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Torts

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Torts

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I. PREMISES LIABILITY

A. *Slip-and-Fall*

Notwithstanding the Georgia Supreme Court's attempt to resolve the lingering debate over Georgia's slip-and-fall jurisprudence in its 1997 decision in *Robinson v. Kroger Co.*,[1] the decision, in fact, merely altered the terms of that debate. While the court dealt swiftly with the rigid application of its prior decision in *Alterman Foods v. Ligon*,[2] the decision raised troubling new questions about the proper roles of the court and jury in resolving future cases. The two decisions included in this Article reflect how the Georgia Court of Appeals has struggled to apply *Robinson's* new standard.

In *Laffoday v. Winn Dixie Atlanta, Inc.*,[3] the court of appeals reversed the trial court's grant of summary judgment in favor of defendant in a slip-and-fall action.[4] Plaintiff, who was a representative of a greeting card company, maintained the greeting card section of defendant's grocery store for over a year. Prior to the incident that led to her civil action, plaintiff visited the particular grocery store at issue approximate-

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1. 268 Ga. 735, 493 S.E.2d 403 (1997).
2. 246 Ga. 620, 272 S.E.2d 327 (1980).
3. 235 Ga. App. 832, 510 S.E.2d 598 (1998).
4. *Id.* at 832, 510 S.E.2d at 598.

ly twice a week. Plaintiff's duties required her to walk through the produce preparation area, located behind double doors in the rear of the store, to access a storage area. On the day of the incident, plaintiff fell in the produce preparation area after receiving a page from the store's manager. According to plaintiff's testimony, she was looking at the door at the time she fell.[5] Plaintiff further testified that she knew she had "slipped on water because her clothing was wet after her fall and she saw water on the floor."[6] However, plaintiff admitted that the produce department manager had warned her to be careful about water in the produce area.[7] Plaintiff also testified that "she 'was aware that this area could collect water'" and "that she knew frozen produce was prepped in this area and that water could leak from those items."[8] According to plaintiff, although she knew that there was water in the produce preparation area on the day of the incident, she "denied that before her fall, she was actually aware of the particular water which caused her to slip."[9]

The produce department manager testified that shortly before the accident he was aware of a puddle of water in the general area where plaintiff fell. The department manager instructed employees to clean up the puddle; however, the manager testified that moisture was still evident on the floor after it was dry-mopped, "that it was a 'little bit' wet, and that the linoleum floor was going to be 'a little bit slick' after it had been dry-mopped because the floor could not be completely dried."[10] The trial court granted defendant's motion for summary judgment on the basis that plaintiff "'had equal or greater knowledge of the specific hazard which resulted in her fall.'"[11]

On appeal the court of appeals noted that although the trial court's decision had been rendered prior to the supreme court's decision in *Robinson v. Kroger Co.*,[12] the appellate court was bound to apply *Robinson* to the facts of the case.[13] Quoting from the decision in *Robinson*, the court of appeals noted:

> "[I]n order to recover for injuries sustained in a slip-and-fall action, an invitee must prove (1) that the defendant had actual or constructive

5. *Id.* at 833, 510 S.E.2d at 599.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 833-34, 510 S.E.2d at 599.
11. *Id.* at 832, 510 S.E.2d at 598.
12. 268 Ga. 735, 493 S.E.2d 403 (1997).
13. 235 Ga. App. at 834, 510 S.E.2d at 598-99.

> knowledge of the hazard; and (2) that the plaintiff lacked knowledge of the hazard despite the exercise of ordinary care due to actions or conditions within the control of the owner/occupier." Thus, the true ground of liability in a slip-and-fall action remains the owner/occupier's superior knowledge of the hazard.[14]

The court of appeals reversed the trial court's decision on the basis that defendant had superior knowledge of the particular hazard which gave rise to the dangerous condition.[15] The court noted that "[a]lthough she knew that water was present on the floor of the produce preparation area before her fall, there [was] no evidence that [plaintiff] actually knew about the particular wetness which caused her to fall."[16] In reaching its decision, the court of appeals noted the supreme court's admonition in *Robinson*

> "that an invitee's failure to exercise ordinary care is not established as a matter of law by the invitee's admission that he did not look at the site on which he placed his foot or that he could have seen the hazard had he visually examined the floor before taking the step which lead to his downfall."[17]

The decision in *Laffoday*, however, appears to take this proposition a step further. Significantly, plaintiff in *Laffoday* knew that the produce preparation area was wet, was aware that the area accumulated water, and had been warned prior to her fall to be careful about water in the area.[18] Nonetheless, the court of appeals reversed the trial court's decision because plaintiff lacked knowledge of the specific area of wetness upon which she fell in the produce preparation area.[19] That is, reviewing the facts in a light most favorable to plaintiff, plaintiff's knowledge of the general hazardous condition of the area where she fell did not constitute knowledge equal to that of defendant, who may have had knowledge of the specific hazard in the produce preparation area where plaintiff slipped.[20]

In reaching its decision, the court of appeals also quoted from the portion of the decision in *Robinson* that suggested that a plaintiff may present evidence of the exercise of reasonable care by setting forth evidence that the plaintiff was distracted by "'something in the control

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14. *Id.* at 832, 510 S.E.2d at 598 (quoting *Robinson*, 268 Ga. at 748-49, 493 S.E.2d at 414).
15. *Id.* at 833, 510 S.E.2d at 598.
16. *Id.* at 834, 510 S.E.2d at 599.
17. *Id.*, 510 S.E.2d at 599-600 (quoting *Robinson*, 268 Ga. at 748, 493 S.E.2d at 414).
18. *Id.* at 833, 510 S.E.2d at 599.
19. *Id.* at 834, 510 S.E.2d at 599.
20. *Id.*

of the owner/occupier and of such a nature that the owner/occupier knew or should have known of its distractive qualit[ies].'"[21] In this respect the court appears to suggest that because the page by the grocery store manager "startled" plaintiff, it constituted "some evidence of the exercise of reasonable care" in that the grocery store manager "knew or should have known of its distractive quality."[22] This particular aspect of the court of appeals decision is troubling. There is little doubt that when a person is paged over an intercom system at a grocery store, department store, or other public forum, it is almost certain to be a startling or unexpected event; however, intercom systems often provide a valuable public service. To suggest that the use of an intercom system is of such a distractive quality as to negate the failure of plaintiffs to exercise reasonable care for their own safety is unsettling.

Perhaps more unsettling, however, is the court's holding that summary judgment in favor of a proprietor would not be appropriate even when the invitee has been warned of a generally dangerous condition and has admitted knowledge of that condition.[23] Exactly how far this concept should extend is uncertain. Would a "Caution: Wet Floor" sign have been sufficient to shift the burden to plaintiff to exercise care for her own safety? Perhaps not, particularly in a situation in which the plaintiff has already admitted knowledge of a dangerous condition in the general area. To this end, the court's decision in *Laffoday* suggests an unreasonable burden that few, if any, proprietors could satisfy.

In contrast to the decision in *Laffoday*, the Georgia Court of Appeals in *Lovins v. Kroger Co.*[24] affirmed the grant of summary judgment to defendant grocery store on the basis that plaintiff failed to establish defendant had actual or constructive knowledge of the foreign substance that caused plaintiff to slip and fall.[25] In *Lovins* an employee of the grocery store had placed spinach dip and crackers on a table outside the delicatessen for customers to sample.[26] After setting up the sample display, the employee "inspected the floor in the area, saw that it was clean, and went behind the nearby counter to prepare a cheese basket."[27] Within ten minutes plaintiff slipped on spinach dip and fell. The trial court granted the motion for summary judgment filed by defendant on the basis that there was no evidence that defendant had

21. *Id.*, 510 S.E.2d at 600 (quoting *Robinson*, 268 Ga. at 748, 493 S.E.2d at 414).
22. *Id.*
23. *Id.*
24. 236 Ga. App. 585, 512 S.E.2d 2 (1999).
25. *Id.* at 587, 512 S.E.2d at 5.
26. *Id.* at 585, 512 S.E.2d at 3.
27. *Id.*

actual or constructive knowledge that the foreign substance was on the floor.[28]

In affirming the trial court's grant of summary judgment, the court of appeals held there was no evidence that defendant had actual or constructive knowledge of the foreign substance.[29] As in *Laffoday*, the court first noted that for a plaintiff to recover in a slip-and-fall action, the plaintiff "must prove (1) that the defendant had actual or constructive knowledge of the [foreign substance], and (2) that the plaintiff lacked knowledge of the [foreign substance] despite the exercise of reasonable care."[30] The court held that there was no evidence of any actual knowledge on the part of defendant or its employees of the foreign substance on the floor.[31] Plaintiff, however, suggested that actual knowledge could "be inferred from the employee's testimony that she did not see any customers passing through the area or sampling the dip between the time she set out the dip and the time [plaintiff] fell."[32] Therefore, according to plaintiff, because there was no evidence that other customers had dropped the dip, then the dip must have been dropped by the employee.[33] However, the court of appeals noted that the reason the employee did not see any customers in the area was because, according to her testimony, she had her back turned to the display.[34] Accordingly, because the court determined that the evidence presented as to actual knowledge was "too uncertain or speculative," it refused to infer from such evidence the existence of actual knowledge on the part of defendant.[35]

The court then noted that constructive knowledge could be established in either of the following ways:

> (i) by presenting evidence that an employee of the defendant was in the immediate area of the dangerous condition and could have easily seen the substance and removed the hazard; or (ii) by presenting evidence that the substance was on the floor for such a time that (a) it would have been discovered had the proprietor exercised reasonable care in inspecting the premises and (b) upon being discovered, the substance would have been cleaned up had the proprietor exercised reasonable care in cleaning the premises.[36]

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28. *Id.*
29. *Id.* at 587, 512 S.E.2d at 5.
30. *Id.* at 585, 512 S.E.2d at 3.
31. *Id.* at 586, 512 S.E.2d at 4.
32. *Id.* at 585, 512 S.E.2d at 3-4.
33. *Id.* at 585-86, 512 S.E.2d at 4.
34. *Id.* at 585, 512 S.E.2d at 4.
35. *Id.* at 586, 512 S.E.2d at 4.
36. *Id.*

With respect to the first prong of the constructive knowledge analysis, plaintiff argued that because the employee was in the immediate area where plaintiff fell, the employee could easily have seen the substance and removed it from the floor.[37] Significantly, however, the court rejected this argument and held that evidence "that an employee was merely working in the area of a foreign substance was not enough."[38] Rather, "[t]he employee must have been in a position to have easily seen and removed the substance."[39] Accordingly, based upon (1) the testimony of the employee that she had her back turned to the display at the time of the incident, and (2) the testimony that the display case in the delicatessen would have blocked her view had she been looking, the court declined to find constructive knowledge under the first prong of the constructive knowledge analysis.[40]

As to the second prong of the constructive knowledge analysis, the court noted that the evidence established that the floor had been inspected ten minutes prior to the fall and that no foreign substance had been found.[41] Accordingly, the court held that plaintiff failed to present "evidence establishing that Kroger employees would have discovered the substance and cleaned it up had they exercised reasonable care in inspecting and cleaning the premises."[42]

The court also rejected plaintiff's contention that the decision in *Robinson v. Kroger Co.*[43] required reversal of the trial court's decision.[44] The court noted that the decision in *Robinson* "focused on the issue of a plaintiff's knowledge of the foreign substance, not the defendant's actual or constructive knowledge. *Robinson* did not change the plaintiff's burden concerning the defendant's knowledge."[45]

As the supreme court noted in *Robinson*, the analysis of slip-and-fall cases in the years subsequent to *Alterman Foods v. Ligon*[46] tended to focus on the second prong of the slip-and-fall analysis—whether plaintiffs exercised reasonable care for their own safety.[47] However, it appears from the decision in *Lovins* that at least one panel of the court of appeals is inclined to turn the focus back to the first prong of the slip-

37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 587, 512 S.E.2d at 4.
42. *Id.*
43. 268 Ga. 735, 493 S.E.2d 403 (1997).
44. 236 Ga. App. at 587, 512 S.E.2d at 4.
45. *Id.*
46. 246 Ga. 620, 272 S.E.2d 327 (1980).
47. 268 Ga. at 736-37, 493 S.E.2d at 405-06.

and-fall analysis and thus provide proprietors at least some guidelines for the avoidance of liability. It remains to be seen if the remainder of the court of appeals will follow the approach set forth in *Lovins*.

B. Criminal Attacks

In *Jackson v. Post Properties, Inc.*,[48] the court of appeals reversed the grant of summary judgment to defendant landlord on the basis that a question of fact existed as to whether the landlord had exercised ordinary care to prevent a foreseeable third-party criminal attack upon its tenants.[49] Plaintiff in *Jackson* "was raped by an unknown assailant after moving from an upper level unit to a ground level unit at [defendant's apartment complex]."[50] Plaintiff was a resident of an apartment complex owned by defendant and was originally a resident of an upper level unit in the apartment complex. While plaintiff resided in an upper level unit, another tenant in the apartment complex was raped while residing in a ground floor apartment. The evidence was undisputed that plaintiff knew of the prior rape.[51] In response to the prior rape, the apartment complex "conducted town-hall type meetings with the residents and distributed community newsletters to address the residents' safety concerns."[52] Although it is somewhat unclear from the decision, it appears that defendant either provided additional thumbscrew window locks or provided additional instructions with respect to the proper usage of previously installed thumbscrew window locks. Plaintiff subsequently moved from her upper level apartment to a ground floor unit despite knowledge of the prior rape and knowledge that the assailant had not been apprehended. The trial court apparently granted summary judgment to defendant on the basis that both plaintiff and defendant had equal knowledge of the risk of the third-party criminal attack.[53] On appeal the court of appeals reversed.[54]

The court of appeals first noted the general rule "that a landlord is not an ensurer of his tenant's safety."[55] However, the court noted that "the landlord does have a duty to exercise ordinary care to prevent foreseeable third-party criminal attacks upon tenants."[56] The court further

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48. 236 Ga. App. 701, 513 S.E.2d 259 (1999).
49. *Id.* at 701, 513 S.E.2d at 259.
50. *Id.*, 513 S.E.2d at 261.
51. *Id.* at 702, 513 S.E.2d at 261.
52. *Id.*
53. *Id.* at 701, 513 S.E.2d at 261.
54. *Id.*
55. *Id.*
56. *Id.* (citing Sturbridge Partners v. Walker, 267 Ga. 785, 785-86, 482 S.E.2d 339, 340 (1997)).

noted that a "tenant will be precluded from recovery . . . as a matter of law against the landlord when he or she has equal or superior knowledge of the risk and fails to exercise ordinary care for his or her own safety."[57] In reaching its decision, the court agreed that plaintiff had equal knowledge of the risk of a third-party criminal attack when she moved to the ground floor apartment.[58] However, according to the court, the central issue was whether plaintiff "could have taken any action in the exercise of ordinary care to avoid the consequences of [defendant's] alleged negligence."[59]

The court held that questions of fact, regarding whether defendant was negligent, existed in four respects.[60] First, the court held that a question of fact existed as to whether the thumbscrew window locks provided by defendant to its tenants were properly used.[61] Second, the court held that a question of fact existed as to whether the "rape was the result of the flimsy nature of the windows installed when the . . . apartments were built."[62] Third, the court held that a question of fact existed as to whether a courtesy officer employed by defendant was utilized in a negligent manner.[63] Finally, the court held that a question of fact existed as to whether defendant adequately maintained the property's lighting and landscaping.[64]

To some extent, however, the decision reached by the court of appeals in *Jackson* begs the question. The court did not address the underlying question of whether defendant's knowledge of one prior criminal attack was sufficient to place defendant on notice that a subsequent criminal attack was reasonably foreseeable. It is certainly not unforeseeable in a large metropolitan area that an isolated crime of violence may occur at an apartment complex. However, the direction taken by the court of appeals suggests that a landlord must view each isolated incident of criminal violence as a potential precursor of subsequent acts of a similar nature. The failure of a landlord to take immediate responsive action could constitute grounds for liability. Moreover, as in the decision in *Jackson*, even if the landlord takes some action to protect its tenants, it may not be enough. Accordingly, statements to the contrary notwithstanding, the court's decision in *Jackson* undermines the general proposition that a landlord is not an ensurer of a tenant's safety.

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57. *Id.* at 701-02, 513 S.E.2d at 261.
58. *Id.* at 702, 513 S.E.2d at 261.
59. *Id.*, 513 S.E.2d at 262.
60. *Id.* at 702-04, 513 S.E.2d at 262-63.
61. *Id.* at 702, 513 S.E.2d at 262.
62. *Id.* at 703, 513 S.E.2d at 263.
63. *Id.* at 704, 513 S.E.2d at 263.
64. *Id.*

II. DAMAGES

In *Alternative Health Care Systems, Inc. v. McCown*,[65] the court of appeals held defendant's failure to present a special verdict form or to object to the form of a verdict constituted a waiver of any objection that the jury verdict entered in favor of plaintiff resulted in a double recovery.[66] Plaintiff filed suit against defendant Alternative Health Care Systems and others on the basis that employees of defendant "wrongfully instructed an eye bank to remove [plaintiff's] deceased husband's eyes after she had refused permission, then concealed their actions from her and falsified records pertaining to the eye removal."[67] Plaintiff brought suit "for trespass to and mutilation of her husband's body, intentional infliction of emotional distress, negligence per se [under] O.C.G.A. § 31-22-6, wanton failure on the part of [defendant] to train and supervise its employees, punitive damages, and bad faith penalties."[68]

In a bifurcated proceeding under Official Code of Georgia Annotated ("O.C.G.A.") section 51-12-5.1,[69] the jury entered a verdict after the first portion of the bifurcated proceeding and awarded plaintiff compensatory damages. According to the jury, the conduct of defendant also warranted an award of punitive damages. The jury subsequently returned an award of punitive damages against defendant in the second phase of the bifurcated proceeding.[70]

On appeal defendant contended that the verdict entered by the jury was illegal because it constituted a double recovery for plaintiff.[71] In particular, defendant alleged that the award of punitive damages to plaintiff "was foreclosed by an award for damages to the peace and feelings of [plaintiff] under O.C.G.A. § 51-12-6."[72] Moreover, defendant

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65. 237 Ga. App. 355, 514 S.E.2d 691 (1999).
66. *Id.* at 357, 514 S.E.2d at 695.
67. *Id.* at 355, 514 S.E.2d at 694.
68. *Id.*
69. This statute provides:

> An award of punitive damages must be specifically prayed for in a complaint. In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings.

O.C.G.A. § 51-12-5.1(d)(1) (Supp. 1999).
70. 237 Ga. App. at 355, 514 S.E.2d at 694.
71. *Id.* at 356, 514 S.E.2d at 695.
72. *Id.*, 514 S.E.2d at 694. This statute provides:

contended the jury verdict was improper because plaintiff "was required to make an election before trial between damages under O.C.G.A. § 51-12-6 and special damages."[73] The court of appeals, however, affirmed the jury's verdict.[74]

In reaching its decision, the court first rejected defendant's contention that the award of punitive damages was foreclosed by an award of damages under O.C.G.A. section 51-12-6.[75] Citing the decision in *Southern General Insurance Co. v. Holt*,[76] the court of appeals noted that "a jury may award different measures of damages on multiple claims if the evidence establishes several distinct torts."[77] The court then noted that plaintiff pleaded a number of "distinct tortious acts and causes of action."[78] The court stated, "while the jury's award theoretically *could* have been based entirely on a claim of injury to the peace and feelings of [plaintiff], it is equally possible that the jury awarded compensatory damages and punitive damages on one of [plaintiff's] other claims or on a combination of claims."[79]

Likewise, the court of appeals rejected defendant's contention that plaintiff was required to make an election between damages under O.C.G.A. section 51-12-6 and special damages.[80] Again, the court noted that plaintiff had asserted multiple claims against defendant "based upon different evidence."[81] Despite the fact that defendant was on notice of the several distinct claims asserted by plaintiff, the court noted that "appellants failed to present a special verdict form or object to the form of the verdict on any ground [presented on appeal]."[82] According to the court, "[w]ithout special interrogatories in the verdict form to distinguish between [plaintiff's] various claims and causes of action, any attempt to determine the jury's reasoning in calculating its award is

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> In a tort action in which the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed except the enlightened consciences of impartial jurors. In such an action, punitive damages under Code Section 51-12-5 or Code Section 51-12-5.1 shall not be awarded.

O.C.G.A. § 51-12-6 (Supp. 1999).

73. 237 Ga. App. at 356-57, 514 S.E.2d at 695.
74. *Id.* at 355, 514 S.E.2d at 694.
75. *Id.* at 356, 514 S.E.2d at 695.
76. 200 Ga. App. 759, 768, 409 S.E.2d 852, 860 (1991).
77. 237 Ga. App. at 356, 514 S.E.2d at 695.
78. *Id.*
79. *Id.*
80. *Id.* at 357, 514 S.E.2d at 695.
81. *Id.*
82. *Id.*

futile."[83] In this respect, the court declined to "speculate as to the findings of fact supporting the verdict."[84]

In *Troncalli v. Jones*,[85] the court of appeals applied the guidelines set forth by the supreme court in the 1998 decision in *Webster v. Boyett*[86] to determine whether evidence of prior similar acts would be admissible in the liability phase of a bifurcated procedure under O.C.G.A. section 51-12-5.1.[87] Plaintiff in *Troncalli* sued defendant for stalking, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, and assault and battery after defendant allegedly engaged in a pattern of intimidating and harassing behavior directed at plaintiff. In a bifurcated procedure, the court permitted plaintiff to introduce evidence of a prior pattern of harassment and intimidation by defendant against another female.[88] During the course of the hearing on a motion in limine filed by defendant with respect to the admissibility of the prior acts, the trial court determined that the prior acts "were sufficiently similar to those against [plaintiff] to show a bent of mind or course of conduct."[89] Based on this finding, the trial court permitted plaintiff to introduce evidence of the prior acts. After a jury verdict in favor of plaintiff that included an award of punitive damages, defendant appealed.[90] Although the court of appeals reversed the trial court's decision on other grounds, the court of appeals upheld the trial court's decision to permit plaintiff to introduce evidence of the prior acts.[91]

As noted above, the trial court held that evidence of prior acts was admissible on the basis that such evidence could prove "intent, motive and bent of mind."[92] In affirming the decision of the trial court on this particular ruling, the court of appeals noted that "'[s]imilar acts are admissible in evidence, if committed or proposed at or about the same time, and when the same motive may reasonably be supposed to exist.'"[93]

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83. *Id.*
84. *Id.*
85. 237 Ga. App. 10, 514 S.E.2d 478 (1999).
86. 269 Ga. 191, 496 S.E.2d 459 (1998).
87. 237 Ga. App. at 16-17, 514 S.E.2d at 484.
88. *Id.* at 10-12, 514 S.E.2d at 479-81.
89. *Id.* at 15, 514 S.E.2d at 483.
90. *Id.* at 10-16, 514 S.E.2d at 480-83.
91. *Id.* at 17, 514 S.E.2d at 484.
92. *Id.* at 16, 514 S.E.2d at 484.
93. *Id.*, 514 S.E.2d at 483 (quoting John W. Rooker & Assocs., Inc. v. Wilen Mfg. Co., 211 Ga. App. 519, 520, 439 S.E.2d 740, 741 (1993) (citations and punctuation omitted)).

The court of appeals then turned to the question of whether the evidence of the prior acts "improperly bolstered [plaintiff's] case for punitive damages."[94] The court noted that the "question in *Webster* was whether the evidence of the similar acts was relevant in determining liability for punitive damages and, if so, the proper procedure to be followed in handling the admission of the evidence."[95] The court also noted that although the supreme court recognized the "potentially prejudicial effect that evidence of prior acts could have on a jury during the liability portion of the trial, [it] declined to enunciate a bright-line rule."[96] Rather, the supreme court left such decisions to the discretion of the trial judge.[97] In this respect, the court of appeals noted the "'general rule is that trial judges may exercise discretion in excluding relevant evidence if its probative value is substantially outweighed by the risk that its admission will confuse the issue, mislead the jury, or create substantial danger of undue prejudice.'"[98] In balancing these factors, the court of appeals affirmed the trial court's decision and held that the evidence of the prior acts was "relevant to establish liability for punitive damages in the first phase of the trial."[99]

Although the court of appeals decision fails to provide much guidance as to the exact basis for its decision with respect to the admissibility of the evidence of prior acts in the first phase of the bifurcated proceeding, some conclusions can be drawn from the court's decision. First, unlike the decision in *Webster*, an independent ground existed in *Troncalli* for the admission of evidence of the prior acts as to the issue of liability. In this respect, the prejudicial effect that such evidence would have was obviously negated by the fact that the evidence may have been admissible on other grounds.

Further, the court of appeals noted that plaintiff's case was based on allegations that "[defendant's] acts were *intentional*."[100] Again, unlike the decision in *Webster*, in which the supreme court held that the trial court properly exercised its discretion in excluding evidence of prior acts of *negligence*,[101] the underlying tort in *Troncalli*, as well as the prior acts, was based on allegations that defendant's actions were *intentional*.

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94. *Id.*
95. *Id.* at 17, 514 S.E.2d at 484.
96. *Id.*
97. *Id.*
98. *Id.* (quoting *Webster*, 269 Ga. at 195, 496 S.E.2d at 463).
99. *Id.*
100. *Id.* (emphasis added).
101. 269 Ga. at 197, 496 S.E.2d at 464.

III. STALKING AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In *Troncalli v. Jones*,[102] the court of appeals rejected the argument that the passage of O.C.G.A. section 16-5-90 created a new tort of "stalking."[103] Plaintiff in *Troncalli* sued defendant for negligent infliction of emotional distress, invasion of privacy, and assault and battery. Plaintiff brought suit after defendant touched her breast, verbally threatened her, followed her on numerous occasions, and visited her home without invitation after she advised defendant that his advances were unwelcome. After a jury verdict in favor of plaintiff, defendant appealed.[104] On appeal, the court of appeals reversed the judgment entered by the trial court on the basis that stalking is not recognized as a tort under Georgia law.[105]

O.C.G.A. section 16-5-90(a) provides, in part:

> A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person . . . . For the purposes of this article, the term 'harassing and intimidating' means a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear for such person's safety . . . .[106]

Although the definition of stalking set forth in O.C.G.A. section 16-5-90 further enumerates the offense as a misdemeanor, and possibly a felony if the stalking is repeated or aggravated in some manner, the court of appeals held that the code section did not automatically create the tort of stalking.[107] The court noted it is a well-settled rule of law that "'[t]he violation of a penal statute does not automatically give rise to a civil cause of action on the part of one who is injured thereby.'"[108] Moreover, according to the court, "although O.C.G.A. § 16-5-90 establishes the public policy of the state, nothing in its provisions creates a private cause of action in tort in favor of the victim."[109] The court then

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102. 237 Ga. App. 10, 514 S.E.2d 478 (1999).
103. *Id.* at 12, 514 S.E.2d at 481.
104. *Id.* at 10-11, 514 S.E.2d at 479-80.
105. *Id.* at 13, 514 S.E.2d at 481.
106. O.C.G.A. § 16-5-90(a) (1999).
107. 237 Ga. App. at 12, 514 S.E.2d at 481.
108. *Id.* (quoting Cechman v. Travis, 202 Ga. App. 255, 256, 414 S.E.2d 282 (1991)).
109. *Id.*

held that the jury's verdict could not be sustained because the claim of stalking was an essential part of plaintiff's cause of action.[110]

However, the court of appeals decision is somewhat puzzling in at least one respect. If the conduct of defendant, as alleged by plaintiff, was actionable if classified as intentional infliction of emotional distress, invasion of privacy, or assault and battery (or a combination thereof), then why should the court not recognize stalking as an actionable tort? The practical result of the court of appeals decision will be to require that victims of stalking creatively plead their actions as claims for the above-mentioned torts to bring suit.

IV. PRODUCTS LIABILITY

A. *Risk-Utility Analysis of Strict Liability*

In *Ogletree v. Navistar International Transportation Corp.*,[111] plaintiff brought suit after her husband was fatally injured when a fertilizer-spreader truck backed over him. Plaintiff sued the manufacturer of the cab and chassis of the fertilizer truck and alleged the manufacturer was negligent in not installing an audible back-up alarm mechanism that would signal when the truck was in reverse. On the day of the accident, a customer drove a truck to pick up a load of fertilizer from Colbert's Seed Company. Decedent was an employee of Colbert's Seed Company and rode with the customer to direct the customer to the correct storage area for the fertilizer. The process of loading the fertilizer involved parking the truck in front of a storage trailer called a "Killebrew," which contained a hydraulic motor that would automatically load the fertilizer into the truck. The customer pulled alongside the Killebrew, and plaintiff's husband exited the truck to continue the loading process. As the customer backed the truck alongside the Killebrew, plaintiff's husband, whose back was turned to the truck, was struck and killed.[112]

Plaintiff sued the manufacturer of the cab and chassis, Navistar International Transportation Corp., under a theory of products liability, claiming that the absence of a back-up alarm on a fertilizer truck was a design defect. The trial court initially granted Navistar's motion for summary judgment and held that the lack of an alarm was an open and obvious defect and that a products liability action could not be founded

110. *Id.* at 10, 514 S.E.2d at 480.
111. 236 Ga. App. 89, 511 S.E.2d 204 (1999).
112. *Id.* at 89-90, 511 S.E.2d at 205-06.

on such a defect.[113] In the first *Ogletree* decision ("*Ogletree I*"),[114] the court of appeals reversed the trial court's initial grant of summary judgment and held that Navistar did not establish that decedent subjectively knew or appreciated the danger of a truck without a back-up alarm.[115] The court of appeals overruled *Ogletree I* in *Weatherby v. Honda Motor Co.*,[116] in which the court held "[that] to apply the open and obvious rule the injured party did not need to know subjectively of the danger but only objectively should have known."[117] In *Weatherby* the court of appeals specifically stated that summary judgment should have been granted to Navistar in *Ogletree I*.[118]

However, in the second *Olgetree* decision ("*Ogletree II*"),[119] the court of appeals held that Navistar could not again seek summary judgment, despite the decision in *Weatherby*, because the evidentiary posture of the case had not changed.[120] After a jury verdict in favor of plaintiff and an appeal by defendant, the court of appeals in the third *Ogletree* decision ("*Ogletree III*")[121] remanded the case to the trial court for a ruling on defendants' motion for a new trial, which the trial court denied.[122] In the fourth *Ogletree* decision ("*Ogletree IV*")[123] the court of appeals held that the decision in *Weatherby* controlled at that time, that the evidence submitted at trial was materially different from the evidence on motion for summary judgment, and that judgment should be entered in favor of Navistar.[124] On appeal, the supreme court in the fifth *Ogletree* decision ("*Ogletree V*")[125] overruled the court of appeals decision in *Ogletree IV* on the basis that the decision in *Banks v. ICI Americas*[126] implicitly overruled *Weatherby*.[127] The supreme court in *Ogletree V* held that the openness and obviousness of a defect was not the only determinative factor of a defective design suit and remanded the case to the court of appeals.[128] Although not enumerated this way

113. *Id.* at 90, 511 S.E.2d at 206.
114. 194 Ga. App. 41, 390 S.E.2d 61 (1989).
115. *Id.* at 44-45, 390 S.E.2d at 65.
116. 195 Ga. App. 169, 393 S.E.2d 64 (1990).
117. 236 Ga. App. at 90, 511 S.E.2d at 206.
118. 195 Ga. App. at 172, 393 S.E.2d at 67.
119. Ogletree v. Navistar Int'l Transp. Corp., 199 Ga. App. 699, 405 S.E.2d 884 (1991).
120. *Id.* at 701, 405 S.E.2d at 886.
121. Ogletree v. Navistar Int'l Transp. Corp., 221 Ga. App. 363, 471 S.E.2d 287 (1996).
122. *Id.* at 364, 471 S.E.2d at 288.
123. Ogletree v. Navistar Int'l Transp. Corp., 227 Ga. App. 11, 488 S.E.2d 97 (1997).
124. *Id.* at 15-17, 488 S.E.2d at 101.
125. Ogletree v. Navistar Int'l Transp. Corp., 269 Ga. 443, 500 S.E.2d 570 (1998).
126. 264 Ga. 732, 450 S.E.2d 671 (1994).
127. 269 Ga. at 444, 500 S.E.2d at 571.
128. *Id.* at 445-46, 500 S.E.2d at 571.

in the case, the court of appeals decision on remand can properly be referred to as "*Ogletree VI*."

In *Ogletree VI* the court of appeals applied the risk-utility analysis set forth in *Banks*.[129] Applying *Banks* and its risk-utility analysis, the court of appeals noted that

> "[the] risk-utility analysis incorporates the concept of 'reasonableness,' i.e., whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk."[130]

In *Banks* the supreme court identified a non-exhaustive list of factors that could be examined in applying the risk-utility analysis, including:

> the usefulness of the product; the gravity and severity of the danger posed by the design; the likelihood of that danger; the avoidability of the danger, i.e., the user's knowledge of the product, publicity surrounding the danger, or the efficacy of warnings, as well as common knowledge and the expectation of danger; the user's ability to avoid danger; the state of the art at the time the product is manufactured; the ability to eliminate danger without impairing the usefulness of the product or making it too expensive; and the feasibility of spreading the loss in the setting of the product's price or by purchasing insurance.[131]

Applying these factors, the court of appeals found that the cab and chassis could be used "for a variety of truck vehicles that did not need the alarm[,]" that the decedent was "familiar with the truck's patent lack of an alarm and aware of the dangers[,]" that "the decedent could have avoided the danger by not turning his back on the vehicle[,]" that the state of the art at the time the vehicle was manufactured did not require the installation of an alarm as standard equipment, that "[t]he ability to eliminate the danger without impairing the usefulness of the vehicle was limited[,]" that defendant complied with applicable federal regulations, and that the design could "be used without harm."[132] Based on these conclusions, the court held that application of the factors set forth in *Banks* "negate[s] any possible finding of defective design."[133] Moreover, although the openness and obviousness of the

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129. 236 Ga. App. at 91-92, 511 S.E.2d at 206-07.
130. *Id.* at 92, 511 S.E.2d at 207 (quoting *Banks*, 264 Ga. at 734, 450 S.E.2d at 673).
131. *Banks*, 264 Ga. at 736 n.6, 450 S.E.2d at 675 n.6.
132. 236 Ga. App. at 93-94, 511 S.E.2d at 208.
133. *Id.* at 93, 511 S.E.2d at 208.

defect is no longer the determinative factor, the court of appeals clearly relied upon this factor as a significant consideration in applying the risk-utility analysis.[134]

In the seventh *Ogletree* decision ("*Ogletree VII*"), however, the supreme court reversed the court of appeals on the basis that "there was some evidence that the risk outweighed the utility of the cab and chassis without the alarm."[135] The court noted that "the adoption of the risk-utility analysis in this state has actually increased the burden of a defendant, in seeking a judgment as a matter of law, to show plainly and indisputably an absence of any evidence that a product as designed is defective."[136] Accordingly, because some evidence could reasonably be construed in favor of plaintiff, the court held that defendant was not entitled to judgment as a matter of law.[137]

B. Strict Product Liability and the Definition of Manufacturer

In *Farmex, Inc. v. Wainwright*,[138] the supreme court reversed the decision of the court of appeals and held that a corporation that continues to introduce into the stream of commerce a product manufactured by a predecessor corporation, but that does not itself continue to manufacture that product, is not considered a manufacturer for strict liability purposes.[139] This case arose when a motorist was driving behind a tractor trailer and was hit when the trailer came loose from the tractor. The motorist sued the driver of the tractor trailer and the driver's employer. The driver and his employer brought a third-party complaint against Farmex because the accident occurred as a result of the failure of a hitch pin thought to be manufactured by Farmex. However, the pin was actually designed and distributed by an Ohio corporation known as JA-BIL, Inc. JA-BIL had been part of an asset-purchase agreement under which Farmex purchased all the assets of JA-BIL. Plaintiffs added Farmex as a third-party defendant because Farmex, through its purchase, had introduced the allegedly defective hitch pin into the stream of commerce.[140]

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134. *Id.*

135. Ogletree v. Navistar Int'l Transp. Corp., No. S99G0770, 1999 WL 824428, at *1 (Ga. Oct. 18, 1999).

136. *Id.* at *2.

137. *Id.* at *3.

138. 269 Ga. 548, 501 S.E.2d 802 (1998).

139. *Id.* at 550-51, 501 S.E.2d at 804.

140. Corbin v. Farmex, Inc., 227 Ga. App. 620, 620, 490 S.E.2d 395, 396-97 (1997).

On appeal the court of appeals first noted that only manufacturers of products are subject to liability under a strict liability theory of recovery.[141] However, the court then considered the circumstances under which a corporation that has purchased the assets of another corporation may be held liable for the torts of the predecessor corporation.[142] In reaching its decision, the court cited *Bullington v. Union Tool Corp.*,[143] in which the supreme court held that "generally, a purchasing corporation does not assume the liabilities of the seller unless: (1) there is an agreement to assume liabilities; (2) the transaction is, in fact, a merger; (3) the transaction is a fraudulent attempt to avoid liabilities; or (4) the purchaser is a mere continuation of the predecessor corporation."[144] Plaintiffs argued that the second and fourth exceptions set forth in *Bullington* applied because Farmex merged de facto with JA-BIL and continued the business of JA-BIL, but the court of appeals rejected this argument.[145] First, the court noted that a de facto merger, as defined by the court of appeals in *Howard v. APAC-Georgia, Inc.*,[146] requires "'a continuity of shareholders,'" a factor not present in the transaction in *Farmex*.[147] Second, the court rejected plaintiffs' argument that Farmex was a mere continuation of the predecessor corporation in that there was no identity of ownership between the corporations.[148]

Nevertheless, the court of appeals noted that other courts have expanded successor liability based on public policy considerations.[149] The court outlined the public policy reasons that support strict liability in tort as follows:

> "(1) the manufacturer is better able to protect itself and bear the costs while the consumer is helpless; (2) it is the manufacturer which has launched the product [in question] into the channels of trade; (3) it is the manufacturer which has violated the representation of safety implicit in putting the product into the stream of commerce; and (4) the

141. *Id.* at 621, 490 S.E.2d at 397.
142. *Id.*
143. 254 Ga. 283, 328 S.E.2d 726 (1985).
144. 227 Ga. App. at 621, 490 S.E.2d at 397 (quoting *Bullington*, 254 Ga. at 284, 328 S.E.2d at 727).
145. *Id.* at 622, 490 S.E.2d at 397.
146. 192 Ga. App. 49, 383 S.E.2d 617 (1989).
147. 227 Ga. App. at 622, 490 S.E.2d at 397 (quoting *Howard*, 192 Ga. App. at 50, 383 S.E.2d at 618).
148. *Id.*, 490 S.E.2d at 398.
149. *Id.*

> manufacturer is the instrumentality to look to for improvement of the product's quality."[150]

Based on these factors, the court found that there was evidence presented by plaintiffs that Farmex had continued to manufacture the same product line (although not the same hitch pin) as its predecessor corporation and that Farmex had acquired the hitch pin and introduced it into the stream of commerce.[151] Based on this evidence, the court held that the trial court erred in granting summary judgment to Farmex.[152]

However, the supreme court held that strict liability in tort applies only to manufacturers of new products and does not apply to product sellers unless the successor corporation is merely a continuation of the predecessor manufacturer.[153] The court noted that continuation is found only in those situations in which there is some identity of ownership between the predecessor and successor corporations.[154] The court held that the facts of the case did not support that conclusion because it was "undisputed that Farmex did not continue to design or manufacture any hitch pins of the type that it acquired from JABIL."[155] Instead, Farmex continued only the general business of the corporation by selling the inventory of hitch pins it had purchased.[156] The court concluded that because Farmex did not manufacture the product, it would not be in the position to improve upon the quality of the product, nor would it be in any position to examine the product for any defects.[157] According to the court, Farmex should only be seen as a wholesaler or retailer of the hitch pins and not as a manufacturer.[158] In this respect, the supreme court also noted that "until the General Assembly acts, strict liability is an available remedy only against a 'manufacturer.'"[159] Until such legislative action occurs, *Farmex, Inc. v. Wainwright* should quell any attempts to expand the continuation theory in a strict liability context so as to impose liability on successor corporations that purchase the assets of another corporation but do not continue to manufacture the predecessor's allegedly defective product.

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150. *Id.* (quoting Cyr v. B. Offen & Co., 501 F.2d 1145, 1154 (1st Cir. 1974)).
151. *Id.* at 623, 490 S.E.2d at 398.
152. *Id.*, 490 S.E.2d at 399.
153. 269 Ga. at 549, 501 S.E.2d at 803.
154. *Id.*
155. *Id.*, 501 S.E.2d at 804.
156. *Id.*
157. *Id.* at 550, 501 S.E.2d at 804.
158. *Id.*
159. *Id.*

V. DEFAMATION

A. Defamation and a Request for Investigation by the Georgia Real Estate Commission

In *Skoglund v. Durham*,[160] the court of appeals addressed the question of whether statements made in a request to investigate with the Georgia Real Estate Commission ("GREC"), as dictated by O.C.G.A. section 43-40-27, are governed by the absolute privilege of O.C.G.A. section 51-5-8.[161] This case arose when plaintiff applied for a broker's license with the GREC. Defendants filed a Request for Investigation in which they alleged that plaintiff had been convicted of fraud in a past transaction involving defendants. Plaintiff brought a defamation suit against defendants as a result of the allegations set forth in defendants' Request for Investigation.[162] The trial court ultimately granted summary judgment to defendants on the basis that "public policy warrants the imposition of an absolute privilege for communications made in the filing of a request for investigation with the GREC."[163] Plaintiff appealed the trial court's grant of summary judgment.[164]

On appeal, the court of appeals first noted that "[t]he issue before us is one of first impression."[165] In affirming the decision of the trial court, the court held that a Request for Investigation is privileged because it meets the criteria of O.C.G.A. section 51-5-8 and the public policy rationale of O.C.G.A. section 43-40-27.[166] The court cited O.C.G.A. section 51-5-8 and stated that the privilege enumerated in that section extends to pleadings, but that the definition of pleadings is not limited to the definition of pleadings set forth in O.C.G.A. section 9-11-7(a).[167] In short, the court held that an absolute privilege extends to a number of different pleadings outside the limited definition contained in O.C.G.A. section 9-11-7(a), such as allegations in affidavits, protective orders prepared by counsel, and notices of lis pendens.[168] In its analysis of whether a Request for Investigation falls within the definition of privilege in O.C.G.A. section 51-5-8 but outside the

160. 233 Ga. App. 158, 502 S.E.2d 814 (1998).
161. *Id.* at 158-59, 502 S.E.2d at 815-16.
162. *Id.* at 158, 502 S.E.2d at 815.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 159, 502 S.E.2d at 816.
168. *Id.*

definition of pleadings in O.C.G.A. section 9-11-7(a), the court looked at "the nature of the proceeding and the character of the rights which may be affected by it."[169] Under the provisions of O.C.G.A. section 43-40-27(a), the court held that the Request for Investigation procedures of the GREC satisfy the requirements necessary to constitute an absolute privilege.[170] For example, the court noted that the Request for Investigation process may involve the issuance of subpoenas and other types of discovery, a hearing, and provisional review of the GREC's findings in the superior courts.[171]

The court also found that an absolute privilege existed as to statements made in the GREC's Request for Investigation because of public policy concerns.[172] The court quoted O.C.G.A. section 43-40-27 for the proposition that fraudulent conduct is reason enough for a Request for Investigation.[173] The court further held that the public policy purposes served by these hearings are important and that defamation suits arising out of such statements would possibly have a chilling effect on investigations.[174] Additionally, the court noted that these hearings were governed by confidentiality protections that would safeguard anyone from possible damage if the claims in such an investigation proved to be untrue and malicious.[175]

B. Defamation and Federal Labor Law

In *Douglas v. Maddox*,[176] plaintiff, a corporation, filed suit against the local union and several of its officials because the union distributed fliers during a union organization drive at plaintiff's facilities. Plaintiff specifically complained about three fliers distributed by defendants that, according to plaintiff, falsely claimed plaintiff had been indicted for a sundry list of labor law violations. The evidence established that criminal violations were never filed against plaintiff; however, the National Labor Relations Board had filed a civil suit against plaintiff for certain alleged labor law infractions.[177]

In reversing the trial court's grant of summary judgment to defendants, the court of appeals held that once the issue of labor law became

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169. *Id.*
170. *Id.* at 160, 502 S.E.2d at 816.
171. *Id.* at 159-60, 502 S.E.2d at 816.
172. *Id.* at 160, 502 S.E.2d 816.
173. *Id.*, 502 S.E.2d at 817.
174. *Id.*
175. *Id.* at 161, 502 S.E.2d at 817.
176. 233 Ga. App. 744, 505 S.E.2d 43 (1998).
177. *Id.* at 744, 505 S.E.2d at 43-44.

central to the dispute, plaintiff could not avail itself of "Georgia's libel law, or the remedies thereunder, unless [plaintiff] can show by clear and convincing evidence" that the statements about them were circulated with actual malice.[178] The trial court held that plaintiff failed to present sufficient evidence of actual malice; however, the court of appeals disagreed.[179]

The court of appeals first noted that notwithstanding the heightened "clear and convincing evidence" standard, "proof of actual malice 'does not readily lend itself to summary disposition.'"[180] According to the court, "proof of actual malice brings into question a defendant's state of mind, which can be determined based upon inferences drawn from objective circumstances as well as direct evidence provided by a defendant in a given case."[181] When construed in a light most favorable to the nonmoving party, plaintiff, the facts showed that one defendant was a veteran union organizer who was familiar with National Labor Relations Board proceedings, who "admitted that he knew such proceedings were civil in nature," and who "used the terms 'indicted' and 'indictment' in the fliers even though he knew that they had a criminal meaning."[182] Based on this evidence, the court concluded that a jury could conclude by clear and convincing evidence that defendants "had published the fliers either knowing that the information they contained was false or with a reckless disregard for whether the information the fliers contained was true or false, and thus, that defendants had acted with actual malice."[183]

VI. DOG BITE

In *Supan v. Griffin*,[184] the court of appeals crafted an exception to the "first bite" rule that has traditionally been raised as a defense by dog owners sued as a result of a dog bite.[185] In doing so, the court of appeals has severely undermined the viability of that rule as a defense to liability. Plaintiff in *Supan*, a nine-year-old boy, was attacked by defendant's "Rottweiler and Chow mix" dog while on defendant's premises. Plaintiff and his father were at defendant's home after transporting defendant's son to defendant's residence after the son had

178. *Id.* at 745, 505 S.E.2d at 44.
179. *Id.*
180. *Id.* at 746, 505 S.E.2d at 44 (quoting Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979)).
181. *Id.*
182. *Id.*
183. *Id.*, 505 S.E.2d at 45.
184. 238 Ga. App. 404, 519 S.E.2d 22 (1999).
185. *Id.* at 404-05, 519 S.E.2d at 22.

been involved in an automobile accident. Plaintiff brought suit against defendant for injuries suffered as a result of the attack. Defendant subsequently filed a motion for summary judgment on the basis that defendant had no prior knowledge of the dog's propensity to bite.[186] In support of the motion for summary judgment, defendant submitted an affidavit stating that the attack on plaintiff "was the first knowledge he had of his dog's propensity to bite."[187]

Plaintiff responded to defendant's affidavit by submitting an affidavit from a neighbor of defendant who testified that defendant's dog (along with defendant's four or five other dogs) had come onto the neighbor's front porch, attacked the neighbor's dog, and threatened the neighbor with "'bared fangs, vicious growls and attack behavior.'"[188] The neighbor further testified that defendant had "'acknowledged that the dogs were a problem and told [the neighbor] that if the dogs ever came back on [the neighbor's] property, to do whatever was necessary . . . to keep the dogs from attacking and off of [the neighbor's] property.'"[189] Based on the affidavit from the neighbor, the trial court denied defendant's motion for summary judgment.[190]

On appeal the court of appeals affirmed and held that the affidavit from the neighbor "raises genuine issues of material fact as to [defendant's] prior knowledge of his dogs' tendency to attack humans."[191] The court likened the facts in *Supan* to the facts in *McBride v. Wasik*,[192] in which "defendant pet owner's prior statement concerning a desire for his dog to attack that plaintiff, without proof that the dog had ever bitten anyone, raised genuine issues of material fact as to that defendant's liability for his dog's subsequent attack."[193] On this same basis the court distinguished *Supan* from the 1998 decision in *Hamilton v. Walker*,[194] in which the court of appeals "narrowly held that a dog's aggressive and menacing behavior remains insufficient . . . to show the animal's propensity to bite."[195] The court further noted that "the true test of liability in the case sub judice is [defendant's] superior knowledge

186. *Id.*, 519 S.E.2d at 22-23.
187. *Id.* at 405, 519 S.E.2d at 23.
188. *Id.*
189. *Id.* at 406, 519 S.E.2d at 23.
190. *Id.* at 404, 519 S.E.2d at 22.
191. *Id.* at 406, 519 S.E.2d at 23.
192. 179 Ga. App. 244, 345 S.E.2d 921 (1986).
193. 238 Ga. App. at 406, 519 S.E.2d at 23.
194. 235 Ga. App. 635, 510 S.E.2d 120 (1998).
195. 238 Ga. App. at 406, 519 S.E.2d at 23.

of his dog's temperament."[196] On this basis, the court affirmed the trial court's denial of defendant's motion for summary judgment.[197]

Judge Andrews filed a dissent to the majority's opinion.[198] According to Judge Andrews, the majority's opinion delivers a "coup de grace" to the first bite rule as applied in the Georgia prior to the decision in *Supan*.[199] As Judge Andrews stated, "there is no evidence in the record sufficient to infer that the owner of the dog . . . knew or should have known of the dog's propensity to bite a human being."[200] Moreover, Judge Andrews noted that prior to the decision in *Supan* the court of appeals consistently held "that an owner's knowledge that his dog has previously displayed menacing or aggressive behavior toward human beings is not sufficient to support an inference that the owner knew or should have known that the dog had a propensity to attack, bite, or injure a human being."[201] Because of the court of appeals long-standing reliance on the first bite rule, Judge Andrews rejected the notion that an inference could be drawn that defendant knew or should have known that his dog had a propensity to bite a human being based upon his knowledge of the dog's prior behavior.[202]

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196. *Id.*

197. *Id.*, 519 S.E.2d at 23-24.

198. *See id.* at 407, 519 S.E.2d at 24 (Andrews, J., dissenting).

199. *Id.* at 410, 519 S.E.2d at 26.

200. *Id.* at 407, 519 S.E.2d at 24. According to Judge Andrews:

> There is absolutely no evidence in this case to support an inference that Supan knew or should have known that the dog at issue had a propensity to attack or bite a human being. The dog did not attack or bite [the neighbor] during the incident described by [the neighbor] in his affidavit, nor is there any evidence that the dog had attacked or bitten anyone prior to biting [plaintiff]. Supan's statement to [the neighbor] that the dogs were a problem and that [the neighbor] should do whatever was necessary to keep them from attacking showed nothing more than Supan's acknowledgment of the incident which [the neighbor] had just described to him in which the dogs attacked [the neighbor's] dog and displayed menacing behavior toward [the neighbor] by baring their fangs and growling in what [the neighbor] characterized as "attack behavior."
>
> At most, Supan's statement to [the neighbor] showed that Supan knew the dogs had displayed menacing behavior which [the neighbor] characterized as a threat to attack him and showed Supan knew the dogs had actually attacked [the neighbor's] dog. To interpret Supan's statement as evidence that he had knowledge of the dog's propensity to attack or bite a human being – without any evidence that the dog had previously attacked or bitten anyone – is sheer sophistry. It creates an inference based on pure speculation, conjecture or possibility, which this court has recognized is insufficient to create a genuine issue of fact.

Id. at 408, 519 S.E.2d at 24-25.

201. *Id.* at 409, 519 S.E.2d at 25.

202. *Id.* at 408-09, 519 S.E.2d at 25.

Judge Andrews also rejected the majority's reliance upon the decision in *McBride*.[203] According to the majority opinion, the decision in *McBride* stood for the proposition that prior statements by a dog owner of the animal's propensity to attack human beings may form a basis for a genuine issue of material fact as to the dog owner's liability for the dog's subsequent attack on a human being.[204] Judge Andrews, however, rejected this reading of *McBride*.[205] According to Judge Andrews, although the dog in *McBride* had never previously bitten or attacked a person, the dog was a trained attack dog.[206] Moreover, evidence had been submitted that the dog's owner "had previously commanded the dog to attack the victim's wife . . . and that the dog charged on this command but was called off by the owner before it reached the victim's wife."[207] According to Judge Andrews, the evidence in *McBride* "showed an owner who knew his dog was specifically trained for and had the ability and willingness to attack and injure a human being."[208] In contrast, Judge Andrews noted that the dog in *Supan* "was neither a trained attack or fighting dog, nor had the dog previously grabbed people with its mouth, 'nipped' people, or ripped people's clothes with its teeth."[209]

Finally, Judge Andrews harshly criticized the majority's apparent unwillingness to take into account the public policy underlying the first bite rule.

> The rule under which dog owners are protected from liability for their dog's "first bite" sets a reasonably clear standard by which owners can gauge the risk of second bite liability posed by owning a dog known to have engaged in prior acts of biting or like conduct. The test of liability set forth in the majority opinion creates a vague standard under which first bite liability may be imposed on dog owners whose dogs have never previously engaged in biting or like conduct, but whose dogs had engaged in known conduct which might be subjectively characterized as indicative of a vicious tendency or temperament. Under the majority opinion, every dog owner in the state whose dog has growled and bared his fangs may now be subject to first bite liability based on a claim that the dog has a known vicious tendency or temperament. *This test dramatically increases the risk of liability arising from dog ownership while making it virtually impossible for dog*

203. *Id.* at 409-10, 519 S.E.2d at 26.
204. 238 Ga. App. at 406, 519 S.E.2d at 23.
205. *Id.* at 410, 519 S.E.2d at 26 (Andrews, J., dissenting).
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*

owners to determine when their dog's conduct has placed them at increased risk.[210]

VII. CONCLUSION

The ostensible and primary purpose of the law is to provide rules by which we may judge and guide our behavior. However, as evidenced by the supreme court's 1997 decision in *Robinson v. Kroger Co.*,[211] the increasing trend to thrust all decisions to the jury under the auspices of "questions of fact" threatens this very core purpose. The Georgia Supreme Court and the Georgia Court of Appeals, as evidenced by many of the decisions included in this Article, appear increasingly willing to deconstruct basic standards of conduct that have guided the behavior of businesses and individuals for years. Although the jury plays a significant, central, and fundamental role in resolving disputed issues of fact, the courts should not shy away from establishing firm standards of conduct by which individuals and entities may govern their actions and from applying those standards in cases in which the material facts are not in dispute.

210. *Id.* at 411-12, 519 S.E.2d at 27 (emphasis added).
211. 268 Ga. 735, 493 S.E.2d 403 (1997).