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Torts

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

One hundred years ago, on a stultifyingly hot summer morning, Andrew Borden, a wealthy, eccentric miser, and his second wife, Abby, were brutally hacked to death in their tiny home in Fall River, Massachusetts. The peaceful community was shattered by this gruesome event and by the sensational murder trial of Mr. Borden's younger daughter, Elizabeth Andrew Borden. Following her unexpected acquittal, the increasingly reclusive Miss Borden lived on in Fall River, enjoying her inherited wealth, but always a social outcast, taunted by the children chanting just beyond her garden wall:

Lizzie Borden took an ax, Gave her mother forty whacks. When she saw what she had done, She gave her father forty-one!

A century later, burdened with an oppressive number of torts cases and rigidly enforced page limitations, the writers of this survey must plead guilty to a similarly cold-blooded hatchet job. Unlike Lizzie Borden, however, we proceeded with no intention to sever anything vital.

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3. Id. at 16.

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I. INTENTIONAL TORTS

A. Sexual Harassment

Although sexual harassment is a well-recognized cause of action in Georgia, most cases have proceeded under an assault or battery theory. In Fox v. Ravinia Club, Inc., however, the court categorized the work-related sexual harassment of plaintiff as intentional infliction of emotional distress and granted summary judgment against plaintiff's claim on the basis of the statute of limitations applicable to that tort.

Plaintiff fared no better in her companion federal litigation under Title VII. Stating the elements of a cause of action for sexual harassment under federal law, the court concluded that although the "casual atmosphere and loose conversation sometimes had sexual connotations or sexual implications," it did not rise to the level of an abusive environment sufficient to affect the conditions of plaintiff's employment.

B. Trespass

Trespass to Realty. Two "dam" cases during the survey period resulted in defeat of the plaintiffs' claims. The beavers won in Bracey v. King. The beaver's dams on defendant's land backed water up onto plaintiff's property. Applying the rule that "a landowner is not liable for diversion (or obstruction) of surface water unless he diverts (or obstructs) the natural flow of water by "artificial means,"" the court did not hold defendant liable for trespass because a beaver dam is not an artificially

6. Id. at 261-62, 414 S.E.2d at 244-45. Cf. GEORGIA TORTS, supra note 4, at 20 ("It might be possible . . . to predicate a claim [of sexual harassment] on some theory of mental abuse, such as intentional infliction of emotional distress").
10. Plaintiff must prove: (1) she is a member of the protected group, (2) was the subject of unwelcome sexual harassment, (3) the harassment occurred because of her sex, (4) the harassment affected a "term, condition, or privilege" of her employment and (5) the employer knew, or should have known, of the harassment and failed to take remedial action.
Fox, 761 F. Supp. at 800-01.
11. Id. at 801.
12. Id.
14. Id. at 832, 406 S.E.2d at 266 (quoting Kiel v. Johnson, 179 Ga. App. 43, 44, 345 S.E.2d 131, 133 (1986)).
created obstruction. Nor could plaintiff recover in *Davis v. Beard* when an artificial dam on defendant's land caused a flood. Declining to hold that liability for trespass runs with the title, the court found that defendant's predecessor had built the dam and defendant herself had not altered it in any way. Hence, defendant was not liable vicariously for the acts of her predecessor in title.

**Trespass to Chattel.** "Wrongful repossession occurs when a repossession is accompanied by a wrongful act, which [means] an act that 'is in contravention of some legal duty owed to the party from whose possession the vehicle is being taken.'" The court affirmed a wrongful repossession jury verdict for plaintiff in *Purser Truck Sales, Inc. v. Patrick.* Plaintiff bought a car from defendant and made a down payment, but when she drove the car to defendant's business to make her first payment, defendant impounded the car over a disputed repair bill. Defendant later sold the car, but never returned plaintiff's down payment to her. The court agreed that this evidence supported the jury's verdict.

### II. NEGLIGENCE

#### A. In General

"It is virtually impossible to think seriously about torts and not think of negligence; it is virtually impossible to think seriously about negligence and not think of the jury." So begins an extraordinary survey period law review article by one of Georgia's leading torts scholars, Professor Sentell of the University of Georgia. The article collects and analyzes empirical data on judicial views of the role of the jury in negligence cases. It is highly recommended to all trial lawyers and to students of trial practice and of the jury system.

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15. *Id.*
17. *Id.* at 784, 415 S.E.2d at 522.
18. *Id.*, 415 S.E.2d at 523.
21. *Id.* at 120, 410 S.E.2d at 336.
22. *Id.* at 122, 410 S.E.2d at 338.
How and when a negligence case gets to a jury is always the subject of a plethora of appellate decisions, and the current survey period was no exception. Although this is largely the domain of the Georgia Court of Appeals, the supreme court occasionally ventures in, as it did in Lau's Corp. v. Haskins. Overruling some loose language in several earlier decisions of the middle bench, the supreme court held that the evidence must "create a triable issue as to each essential element of the case"; otherwise, summary judgment is appropriate and the case never gets to a jury.

Of course, jury resolution of any negligence claim must be premised on the breach of some legally cognizable duty. Not every legal duty, however, automatically gives rise to a tort claim. In Cechman v. Travis, for example, the court held that Georgia's mandatory child abuse reporting statute did not create a private cause of action in tort, at least under the facts of that case.

One of the thorniest issues in negligence law is when a breach of contract creates a cause of action in tort. In Delancy v. St. Paul Fire & Marine Insurance Co., the Eleventh Circuit Court of Appeals comprehensively discussed this issue in the context of an insurer's tort liability to its insured for failure to settle a claim within policy limits. The court canvassed the Georgia law on this issue and drew the following "assumption":

[W]hen a liability insurer knows or in the exercise of ordinary care should know that a suit against its insured could be settled within the policy limits and that its failure to settle will expose the insured to an unreasonable risk of harm, including emotional distress, the insurer has a duty to effect a settlement within a reasonable time after settlement is possible; if the insurer breaches this duty, it is liable for all damages

26. See Georgia Torts, supra note 4, at 6 ("[T]he great bulk of torts decisions in this State are rendered by the nine judges of the Court of Appeals").
29. 261 Ga. at 495, 405 S.E.2d at 478.
33. 202 Ga. App. at 256, 414 S.E.2d at 284. "There is no allegation or evidence that [defendant] had reasonable cause to believe that the child was a victim of child abuse and that she knowingly and willfully failed to report that suspicion [as required by the statute]."
Id.
34. See generally Georgia Torts, supra note 4, § 3-7.
35. 947 F.2d 1536 (11th Cir. 1991).
proximately caused by its breach, including damages caused by a delay in
settlement.\textsuperscript{36}

Despite this assumption (which, in any event, the court questioned from a
policy standpoint),\textsuperscript{37} the court affirmed summary judgment against plain-
tiffs because (said the court) the facts failed to show defendant had
knowledge of settlement possibilities.\textsuperscript{38} The decision in \textit{Delancy} remains
noteworthy, however, for its thoughtful analysis of the issues presented,
including when a contractual relationship presents an independent legal
duty.\textsuperscript{39}

In \textit{Yow v. Hussey, Gay, Bell & DeYoung International, Inc.},\textsuperscript{40} the
Georgia Court of Appeals determined as a matter of first impression that
an architect or engineer’s liability for construction site safety rests not on
a common law or statutory duty, but on the degree of contractual respon-
sibility for construction site safety resting on the defendant.\textsuperscript{41} “The logic
behind such a rule is that one should not be held responsible for that over
which one does not exercise any control.”\textsuperscript{42} The court examined the con-
tract terms and affirmed summary judgment for defendants on the
grounds that the contract conferred “a total absence of . . . responsibility
for site supervision and safety.”\textsuperscript{43}

\textbf{B. Premises Liability}

\textbf{In General.} The court of appeals applied Georgia’s status-based sys-
tem of determining liability for injury on premises\textsuperscript{44} in \textit{Walker v. Dan-
iers},\textsuperscript{45} which involved the accidental drowning of a student in a swimming
pool at Fort Valley State College. At issue was whether the decedent oc-
cupied the premises as an invitee or a licensee.\textsuperscript{46} The duty of care varies
with the status of the person injured,\textsuperscript{47} so, if the student occupied the
premises as an invitee, defendants would owe him the duty of ordinary

\begin{itemize}
  \item \textsuperscript{36} \textit{Id.} at 1552.
  \item \textsuperscript{37} \textit{Id.} The dissent would have certified the question to the Georgia Supreme Court to
resolve “policy questions which Georgia’s highest court is best equipped to answer.” \textit{Id.} at
1563 (Clark, S.J., dissenting).
  \item \textsuperscript{38} See 947 F.2d at 1553.
  \item \textsuperscript{40} 201 Ga. App. 857, 412 S.E.2d 565 (1991).
  \item \textsuperscript{41} \textit{Id.} at 858, 412 S.E.2d at 566.
  \item \textsuperscript{42} \textit{Id.} at 859, 412 S.E.2d at 567.
  \item \textsuperscript{43} \textit{Id.} at 861, 412 S.E.2d at 568.
  \item \textsuperscript{44} See generally \textit{Georgia Torts}, supra note 4, § 4-1.
  \item \textsuperscript{46} \textit{Id.} at 151, 407 S.E.2d at 71.
  \item \textsuperscript{47} See generally Charles R. Adams III & Cynthia T. Adams, \textit{Torts}, 40 \textit{Mercer L. Rev.}
\end{itemize}
care.48 If, however, he was only a licensee, defendants would owe a lesser duty.49 The court held that even though he was voluntarily attending a recreational swim, because the decedent drowned during the course of an unofficially sanctioned school event,50 he was an invitee.51

The relationship between a college or university and one of its students is one of common interest and mutual advantage. It follows that a student is an invitee and not a mere licensee or social guest.52 [C]ase law thus recognizes a duty on the part of the college or university to exercise ordinary and reasonable care for a student's safety.53 [C]ollege administrators do not stand in loco parentis to adult college students.54

If the injured party's presence on the premises is for a purpose that is or could be beneficial to the owner, an invitation is implied.55 "If, however, [an invitee goes] beyond that part to which he is invited, he becomes a mere licensee."56 In Swanson v. Smith,57 plaintiff approached defendant's residence on a business purpose. When no one came to the door, plaintiff decided to cross defendant's backyard to visit a friend, and injured herself when she stepped into a hole in the backyard.58 The court applied the rule stated above to conclude that plaintiff's status had changed and defendant owed her only the duty to avoid willfully and wantonly injuring her.59

Was plaintiff in Swanson a licensee or a trespasser when she entered the backyard?

A trespasser is a person who enters the premises of another wrongfully and without express or implied permission of the owner, for the trespasser's own benefit or amusement.[60] This may be true even though the

50. Although the college had cancelled the swimming event in question, the Director of Campus Safety testified that "there was a divergence between official policy and practice," which resulted in the building being unlocked for the event anyway. 200 Ga. App. at 151-52, 407 S.E.2d at 72.
51. Id. at 155, 407 S.E.2d at 74.
52. Id. at 154-55, 407 S.E.2d at 74 (citations omitted).
56. Id. at 471, 405 S.E.2d at 302.
57. Id. at 472, 405 S.E.2d at 302.
wrongful entry is peaceable or by mistake; the key to trespass is the wrongful nature of the entry.\[9\]

Thus, even though the court was careful to point out the innocent nature of plaintiff's entry,\[60\] the lack of any evidence of an express or implied invitation rendered her a trespasser, according to the legal principles quoted above.

Practically speaking, the distinction is one without a difference in cases such as Swanson, since "[t]o the licensee, as to the trespasser, no duty arises of keeping the usual condition of the premises up to any given standard of safety, except that they must not contain pitfalls, man-traps, and things of that character."\[61\] Trespassers in two survey period cases argued without success that property owners had set mantraps for them. In Tramell v. Baird,\[62\] plaintiff's decedent drove his motorcycle into a covered cable gate on defendant's land.\[63\] Finding that the decedent clearly had notice his presence was not permitted, the supreme court held that the cable gate was not a mantrap, and its existence did not constitute willful and wanton negligence by defendants.\[64\] Likewise, in Francis v. Haygood Contracting, Inc.,\[65\] the court of appeals rejected plaintiff's contention that defendant's placement of gravel on a private roadway during construction constituted a mantrap.\[66\] The test is whether a deliberate attempt to inflict injury can be inferred from the hazardous condition.\[67\]

**Landlord and Tenant.** Last year's torts survey questioned whether the court of appeals had implicitly rejected the "superior knowledge" test for actions involving a landlord's failure to repair.\[68\] During the survey period, however, the court appeared to return to this traditional legal analysis.

The "superior knowledge" test simply provides that

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60. 199 Ga. App. at 471, 405 S.E.2d at 302.
63. Id. at 124, 413 S.E.2d at 445.
64. Id. at 125-26, 413 S.E.2d at 447.
66. Id. at 75, 404 S.E.2d at 138.
67. Id.
[e]ven though the condition of the premises may be hazardous and the landlord negligent, he may not be liable for injury where the [tenant] had equal or superior knowledge of the alleged defect. If a [tenant] knows of a defect, “[h]e must use all of [his] senses in a reasonable measure amounting to ordinary care in discovering and avoiding those things that might cause hurt to [him].”

Cases in recent years have evidenced a trend away from a strict application of this rule in favor of injured tenants or their guests. In only one survey period case, however, did the court find the existence of a jury question concerning the landlord's superior knowledge. In Demarest v. Moore, plaintiffs sued their landlord after their apartment was burglarized. Plaintiffs contended the lock on the apartment's back door was not sufficient to prevent a break-in. The court focused on whether the landlord had equal knowledge of the lock's inadequacy and an adequate time within which to remedy it. Citing the landlord's statutory “responsibility for damages arising from defective construction or for damages arising from the failure to keep the premises in repair,” the court concluded that the landlord's liability would be for jury determination.

Plaintiffs in other survey period cases did not fare so well. The court turned away allegations that stairs were insufficiently illuminated, a furnace was defective, and there was insufficient traffic control in an apartment complex driveway on the grounds that plaintiffs in each case had or could have had knowledge of the hazard equal to the landowner's. Thus, like Mark Twain's death, reports of the demise of the equal knowledge doctrine in landlord-tenant cases have been “greatly exaggerated.”

**Slip and Fall.** A huge number of appeals each year concern persons who slip, trip, flip, stumble, tumble.

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72. Id. at 91, 410 S.E.2d at 192.


74. 201 Ga. App. at 92, 410 S.E.2d at 193.


78. “‘The reports of my death are greatly exaggerated.' Mark Twain, 1897, cable from London to the Associated Press,” quoted in Hartwell v. Blasingame, 564 So. 2d 543, 545 n.2 (Fla. Dist. Ct. App. 1990).

step,\textsuperscript{64} misstep,\textsuperscript{65} slide,\textsuperscript{66} glide,\textsuperscript{67} skid,\textsuperscript{68} drop,\textsuperscript{69} lurch,\textsuperscript{70} or otherwise\textsuperscript{71} lose their footing and fall on the premises of another. In fact, the exact nature of the plaintiff’s fall sometimes becomes a material issue in the case, as in \textit{Sullenberger v. Grand Union Co.}\textsuperscript{92} In \textit{Sullenberger} plaintiff either tripped over a concrete divider in defendants’ parking lot or slipped in a dark puddle of liquid. The distinction was significant because if a static condition (the divider) created the hazard, Georgia law presents a greater likelihood of liability for the defendant than in the case of a foreign substance (the liquid).\textsuperscript{93} Asked to identify the cause of his fall, plaintiff could only state that “as opposed to a slip or a trip, it seems to me it had to have been a trip because I fell so far forward from where I was.”\textsuperscript{94} Based on that testimony, the court construed this as a “static defect” case. The court nevertheless affirmed summary judgment for defendants, partly because of plaintiff’s contributory negligence,\textsuperscript{95} but also because plaintiff could not definitely state that the curb caused his fall and, in any event, plaintiff failed to produce evidence that better lighting in the parking lot would have prevented the fall.\textsuperscript{96}

Several survey period “slip and fall” cases concerned the application of the “plain view” doctrine:

\begin{enumerate}
\item 201 Ga. App. at 195, 410 S.E.2d at 382.
\item Id. Plaintiff fell while chasing after a shopping cart that he had let go of and allowed to roll off downhill. \textit{Id.} at 194, 410 S.E.2d at 382.
\item Id. at 196, 410 S.E.2d at 383.
\end{enumerate}
"[O]ne is under a duty to look where he is walking and to see large objects in plain view which are at a location where they are customarily placed and expected to be; not performing this duty may amount to a failure to exercise ordinary care for one's safety as would bar a recovery for resulting injuries."

In Wallace v. Pointe Properties, Inc., eight judges of the court of appeals concurred that the evidence presented a jury question concerning whether the hole plaintiff stepped into was in plain view, and whether it was in a place that it reasonably could be expected. Despite the fact that "[p]laintiff was under a duty to use her eyesight for the purpose of discovering any discernible obstruction in her path," the court in Wallace concluded that "there is evidence that the hole was not in plain view, but was obscured by a combination of factors."

By contrast, in Lee v. Peacock, six court of appeals judges combined to deny plaintiff any recovery for the death of her seventy-one year old husband from complications arising out of a fall in defendant's store. Adding that "[w]e are not without sympathy for the plight of appellant; nevertheless, the appellate process affords us no latitude to make adjustments for the . . . heart-rending misfortune of the unlucky," the court applied the plain view doctrine to find that the pallets which plaintiff's decedent tripped over were clearly visible and posed no latent danger. Therefore, despite evidence that the pallets were "sticking out enough to trip you," plaintiff could not recover.

97. Wal-Mart Stores, Inc. v. Hester, 201 Ga. App. 478, 478-79, 411 S.E.2d 507, 508 (1991) (quoting Stenhouse v. Winn Dixie Stores, 147 Ga. App. 473, 474-75, 249 S.E.2d 276, 277-78 (1978)). The courts have stated this doctrine even more graphically: "[T]here should be no duty to warn of the perfectly obvious such as posting a sign on a stairwell that 'These are steps,' or on a brick wall that caution should be exercised as 'This is a brick wall' or a telephone pole saying, 'Beware! This is a telephone pole.'"


99. Id. at 539, 414 S.E.2d at 680.
100. Id., 414 S.E.2d at 679.
101. Id.
103. Id. at 194-95, 404 S.E.2d at 475-76.
104. Id. at 195, 404 S.E.2d at 476 (quoting Harman v. Reames, 188 Ga. App. 812, 814, 374 S.E.2d 539, 543 (1988)).
105. Id. at 194, 404 S.E.2d at 475.
106. Id. at 192, 404 S.E.2d at 474. Three judges, dissenting, found a jury question in this. See id. at 196, 404 S.E.2d at 476-77 (Banke, P.J., dissenting in part).
C. Malpractice

Code section 9-11-9.1 ("section 9.1"),\textsuperscript{107} which requires the filing of an expert witness affidavit along with the complaint in every action alleging professional negligence, continued during the survey period as the epicenter of Georgia tort litigation.\textsuperscript{108} The most significant issue is when the requirements of this section apply. Despite section 9.1’s language mandating an affidavit “[i]n any action for damages alleging professional malpractice,”\textsuperscript{109} the courts have fashioned an exception to the extent the action alleges that the professional defendant’s actions constituted ordinary negligence.\textsuperscript{110} When the plaintiff’s injury resulted from professional negligence, however, section 9.1 strictly mandates the attachment of an affidavit to the complaint.\textsuperscript{111}

During the survey period, the supreme court endeavored, with debatable success, to establish a “bright line” test for determining who is a “professional” within the meaning of section 9.1. In \textit{Gillis v. Goodgame},\textsuperscript{112} the court “conclud[ed] that the legislature intended for the term ‘professional’ as used in O.C.G.A. section 9-11-9.1 to be defined by O.C.G.A. sections 14-7-2(2);\textsuperscript{113} 14-10-2(2);\textsuperscript{114} and 43-1-24.[\textsuperscript{115}]”\textsuperscript{116} The court thus

\begin{table}[h]
\begin{tabular}{|c|c|}
\hline
\textbf{Section} & \textbf{Definition} \\
\hline
9-11-9.1(a) & certified public accountancy, architecture, chiropractic, dentistry, professional engineering, land surveying, law, psychology, medicine and surgery, optometry, osteopathy, podiatry, veterinary medicine, registered professional nursing, or harbor piloting. \\
14-7-2(2) & certified public accountants, chiropractors, dentists, osteopaths, physicians and surgeons, and podiatrists. \\
14-10-2(2) & \\
43-1-24 & \\
\hline
\end{tabular}
\end{table}

\textsuperscript{108} Section 9.1 generates such a volume of appellate decisions each year that legal writers are hard pressed to keep their works current with the law. For the most recent summary of substantive law in this area, see \textit{Georgia Torts}, \textit{supra} note 4, § 5-1. For procedural analysis, the best source is \textit{Hardy Gregory, Georgia Civil Practice} § 3-3 (1990 & Supp. 1992).
\textsuperscript{113} O.C.G.A. § 14-7-2(2) (1989), part of the Georgia Professional Corporation Act, defines “profession” as including “certified public accountancy, architecture, chiropractic, dentistry, professional engineering, land surveying, law, psychology, medicine and surgery, optometry, osteopathy, podiatry, veterinary medicine, registered professional nursing, or harbor piloting.” Id.
\textsuperscript{114} O.C.G.A. § 14-10-2(2) (1989), part of the Georgia Professional Association Act, defines “professional service” as follows:

\begin{quote}
[T]he personal services rendered by attorneys at law and any type of professional service which may be legally performed only pursuant to a license from a state examining board pursuant to Title 43, for example, the personal services rendered by certified public accountants, chiropractors, dentists, osteopaths, physicians and surgeons, and podiatrists (chiropractors).
\end{quote}

\textit{Id.} (emphasis added).
\textsuperscript{115} O.C.G.A. § 43-1-24 (1991) applies to “[a]ny person licensed by a state examining board and who practices a ‘profession,’ as defined in . . . the ‘Georgia Professional Corpora-
adopted as the majority rule Justice Weltner's concurring opinion in *Creel v. Cotton States Mutual Insurance Co.* The rationale in *Gillis* was that these are the only definitions of the term "profession" contained in the Code, so the legislature must have had reference to these definitions when it enacted section 9.1. In *Lamb v. Candler General Hospital, Inc.*, the court applied the test created in *Gillis* to deny section 9.1 protection to a hospital that supplied defective equipment.

Like most judicial attempts to implement a "bright line" test, however, *Gillis* and *Lamb* create as many problems as they purport to solve. The key difficulty lies in the Professional Association Act's blanket definition of "professional service" as including "any type of professional service which may be legally performed only pursuant to a license from a state examining board pursuant to Title 43." Thus, the court has defined all Title 43 occupations as "professions" for purposes of section 9.1. This brings to pass what these writers warned of two years ago—"the absurd result of athletic trainers, barbers, operators of billiard parlors, junk dealers, peddlers, scrap metal processors, and used car dealers, among others, availing themselves of the protections of section 9-11-9.1." Meanwhile, the new rule completely omits an entire learned profession, the clergy, from the protections of section 9.1, just at a time of increasing agitation for a cause of action for "clergy malpractice."

*Gillis* and *Lamb* do not represent a satisfactory resolution of this difficult question. A better approach would be for the court to return to its earlier analysis in *Housing Authority v. Greene* that a section 9.1 affidavit is required when "it is generally necessary to admit expert testi-
mony . . . in order to establish the degree of skill and care ordinarily employed by the profession.”’

“This should encompass the traditional test that expert opinions are required only concerning conclusions that the jury could not ordinarily draw for itself, namely ‘the conclusion is ‘beyond the ken of the average layman,’” and should be limited to ‘learned professions . . . .’” Absent decisive legislative intervention, this area of law is likely to remain unsettled for the foreseeable future.

Those cases that required a section 9.1 affidavit did not lack for controversy either. Competency of the expert witness is always a major concern. In Findley v. Davis, the court extended the well-settled rule that an attorney or physician in a malpractice case may make an affidavit in his own behalf. The court in Findley allowed a section 9.1 affidavit by an attorney who, although not counsel of record for plaintiff, had a financial interest in plaintiff’s case at the time he executed the affidavit. The court rejected defendants’ contention that the purpose of section 9.1, prevention of frivolous lawsuits, is defeated if parties are allowed to rely on the affidavits of experts who lack objectivity because of a personal interest in the litigation. It did so, however, not on the specific merits of that contention, but on the ground that, because the general rule permits a party to a malpractice case, who unquestionably has a financial stake, to testify as an expert, there is a fortiori no inherent prejudice in testimony by another expert with a financial interest. The court in Findley, however, did not purport to change the general rule that “[a] lawyer shall not pay . . . compensation to a witness contingent upon the content of his testimony or the outcome of the case.” Findley should probably be limited to its facts: The section 9.1 affiant, plaintiff’s original lawyer, had referred the case to other counsel prior to executing the affidavit, and he renounced any financial interest in the case prior to the summary judgment hearing.

Not only the witness’ interest in the case, but also his qualifications, are subject to challenge on grounds of competence. In a five-judge majority opinion in Morris v. Chandler Exterminators, the court of appeals

127. Id. at 436, 383 S.E.2d at 868 (emphasis added).
129. Adams & Adams, supra note 123, at 441.
133. Id.
134. See id.
held that a psychologist was qualified to provide an opinion about the organic cause of a mental disorder, and hence was competent to oppose defendant's summary judgment motion in a personal injury action arising from negligent application of chemicals.\textsuperscript{138} Holding that "[m]any health care providers other than medical doctors possess substantial expertise as to medical matters,"\textsuperscript{139} the court determined that "since psychologists are entitled, by statute, to diagnose and treat mental and nervous disorders, it is incongruous to prohibit these same health care providers from testifying concerning the cause of an affliction which lies within the area embraced by their practice."\textsuperscript{140}

The dissent took the position that the causal relationship between inhalation of chemicals and a subsequent physical condition was a medical question. Thus, said the dissent, "[i]f a patient's mental disorder is of organic etiology, because the psychologist's training does not include the medical causes of these physical problems, he should not be allowed to testify thereon."\textsuperscript{141}

\textbf{Medical Malpractice.} Although "[t]he law does not require the use of 'magic words' to constitute a case-saving expert opinion,"\textsuperscript{142} to create an issue of fact in a medical malpractice case, the expert witness "must establish 'the parameters of acceptable professional conduct,' . . . [and] set forth specific facts as the basis for reaching the conclusion that treatment did not meet the standard of care."\textsuperscript{143} This obviously requires that the affiant apply the proper standard of care. When the claim is one alleging inadequacy of hospital services or facilities, courts apply the locality rule. This rule "limits a hospital's duty to its patients to exercising ordinary care in furnishing facilities and equipment reasonably suited to the intended uses and comparable to those in general use in area hospitals . . . ."\textsuperscript{144} \textit{Ross v. Chatham County Hospital Authority},\textsuperscript{145} a case that has been litigated with Dickensian thoroughness,\textsuperscript{146} was back before the court

\begin{footnotes}
\footnotetext[138]{Id. at 818, 409 S.E.2d at 679.}
\footnotetext[139]{Id.}
\footnotetext[140]{Id. at 820, 409 S.E.2d at 680 (Andrews, J., dissenting).}
\footnotetext[141]{Id. at 820, 409 S.E.2d at 680 (Andrews, J., dissenting).}
\footnotetext[144]{GEORGIA TORTS, supra note 4, § 5-2.}
\footnotetext[145]{200 Ga. App. 448, 408 S.E.2d 490 (1991).}
\footnotetext[146]{In Chatham County Hosp. Auth. v. Ross, 184 Ga. App. 660, 362 S.E.2d 390 (1987), rev'd, 258 Ga. 234, 367 S.E.2d 793 (1988), the court of appeals rejected the trial court's conclusion that the hospital was liable for the torts of its operating room personnel, holding that the "borrowed servant" doctrine insulated the hospital from liability. 184 Ga. App. at 661, 362 S.E.2d at 392. In Ross v. Chatham County Hosp., 258 Ga. 234, 367 S.E.2d 793 (1988), the supreme court held that the negligent act in question, failure to count surgical
of appeals during the survey period on the issue of the application of the locality rule. In a full bench opinion, the court ruled that the locality rule is not automatically applicable whenever the alleged negligence involves an administrative or clerical error. The controlling consideration is whether the rationale for the locality rule is present. In this case, said the court, it was not, "inasmuch as the ability of an operating room employee to count the surgical instruments . . . obviously would not be affected by the size or location of the hospital." The court thus adopted for administrative tasks the same rule that applies when professional judgment is involved.

Legal Malpractice. "[A] claim for legal malpractice is sui generis insofar as the plaintiff's proof of damages effectively requires proof that he 'would have prevailed in the original litigation.'" In three separate survey period cases, each panel of the court of appeals had occasion to apply some version of this rule.

In Fine & Block v. Evans, defendants negligently failed to perfect plaintiff's appeal in the original litigation. Applying the logical corollary instruments, was an administrative or clerical act to which the borrowed servant doctrine would not apply. Id. at 236, 367 S.E.2d at 795. The court declined to reach the issue of the local standard of care, remanding it to the trial court. Id. at 236, 367 S.E.2d at 795. "On remand, the trial court entered summary judgment for the hospital as to the entire complaint, thereby implicitly ruling that there were no other alleged acts of negligence 'by its operating room employees which could be considered administrative in nature.'" 200 Ga. App. at 449, 408 S.E.2d at 492. The Delancy case, discussed supra notes 35-39, and accompanying text, also ultimately arose from these facts.

"You are further to reflect, Mr. Woodcourt . . . that on the numerous difficulties, contingencies, masterly fictions, and forms of procedure in this great cause, there has been expended study, ability, eloquence, knowledge, intellect, Mr. Woodcourt, high intellect. For many years the—a—I would say the flower of the Bar, and the—a—I would presume to add, the matured autumnal fruits of the Woolack—have been lavished upon Jarndyce and Jarndyce. If the public have the benefit, and the country have the adornment, of this great Grasp, it must be paid for in money or money's worth, sir."

"Mr. Kenge," said Allan, appearing enlightened all in a moment. "Excuse me, our time presses. Do I understand that the whole estate is found to have been absorbed in costs?"

"Hem! I believe so," returned Mr. Kenge.

CHARLES DICKENS, BLEAK HOUSE Ch. 65 (London 1853).

147. 200 Ga. App. at 451, 408 S.E.2d at 493.
148. Id.
of the rule quoted above, the court held that a determination of whether an appeal would have been successful is crucial to the question of proximate cause in such a case. However, this determination is a pure question of law, according to the court in Evans, which proceeded to adjudicate the merits of the disputed appeal against plaintiff, thus reversing the trial court’s denial of defendant’s motion for summary judgment.

A different panel of the court of appeals reached a sharply contrasting result in Hipple v. Brick. Plaintiff in that case alleged that defendant attorney negligently failed to file an appeal. Defendant moved for summary judgment, contending that the judgment against plaintiff in the original litigation would have been affirmed on appeal in any event. The court of appeals agreed with the trial court’s denial of the motion: “We, no more than can the trial court in this case, ‘address the merits of the hypothetical appeal,’ as this Court was equipped to do in Fine & Block . . . .”

The difficulty with this result is that, if the validity of the “hypothetical appeal” must be addressed as a pure question of law on summary judgment, as the court held in Fine & Block, when should that determination have been made in Hipple? Presumably, if the evidence is in dispute regarding the viability of the appeal, as appeared to be the case in Hipple, the trial court should hear that evidence and make a legal ruling on the issue of liability before sending the case to the jury.

Yet a third appellate panel applied the general rule to a very different type of appeal in Mauldin v. Weinstock. Defendant’s alleged negligence in that case consisted of failure to file a timely appeal for investigation of plaintiff’s discharge to a stated arbitration authority within the time pro-

152. In the context of a legal malpractice case in which the negligence alleged is the failure of an attorney to file or perfect an appeal, proximate cause may be established by showing that the appellate court would have reversed and that upon remand to the lower court the client would have obtained a more favorable result. Id. at 295, 411 S.E.2d at 74 (citing Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989)).

153. The court reached this result, not by constituting itself as a bizzare panel of expert witnesses, but by reviewing the merits of the underlying appeal to determine whether the trial court’s failure to do so was harmful error. Id.

155. Id. at 572, 415 S.E.2d at 183.
156. Id. at 573, 415 S.E.2d at 184 (quoting 201 Ga. App. at 295, 411 S.E.2d at 74).
157. The decision about the proper resolution of a petition or appeal must and can be made by the trial judge as an issue of law, based upon review of the transcript and record of the underlying action, the argument of counsel, and subject to the same rules of review as should have been applied to the . . . appeal.

vided by plaintiff's union contract.\textsuperscript{159} The court of appeals made short work of the resultant malpractice claim, holding that plaintiff had waived his right to pursue such a claim by failing to authorize defendant to take additional steps to secure plaintiff's rights in the original litigation.\textsuperscript{160} In this case, appropriate action would have been to allow defendant to initiate a lawsuit to compel plaintiff's employer to arbitrate the discharge. Because it was undisputed that plaintiff did not authorize defendant to bring such a suit,\textsuperscript{161} "it has never been established . . . that [defendant] has filed a late 'appeal for investigation'; and the trial court correctly concluded that the question of whether [the employer's decision not to arbitrate] was legally correct was never answered."\textsuperscript{162} Because plaintiff had waived his opportunity to have his rights judicially determined in the original litigation, he also forfeited his right to sue for malpractice. "[A]lthough it is an issue of first impression," said the court, "we find that the trial court did not err in thus concluding that 'we cannot now permit Mr. Mauldin to sue his former attorney for failure to timely file an appeal ['for investigation'] when he would not permit his attorney to pursue this course [by litigation] in the first instance.'"\textsuperscript{163}

III. NEGLIGENCE DEFENSES

A. Proximate Cause Defenses

The foreseeability of injury is always a necessary element in determining proximate cause liability.\textsuperscript{164} In \textit{Newsome v. Department of Human Resources},\textsuperscript{165} the court of appeals upheld the grant of summary judgment to defendants on this issue.\textsuperscript{166} Plaintiffs' decedent, a minor child, had been burned to death while residing in the home of his defendant foster parents. Decedent's four-year old sister had started the fire while playing with matches she had obtained from her sleeping foster mother's purse. The record indicated that no foster child had ever been injured while in the care of decedent's foster parents during their more than nine-year tenure as foster parents for the Department of Family and Children's Services and that decedent's sister had never shown any propensity to

\begin{itemize}
  \item \textsuperscript{159} Id. at 515, 411 S.E.2d at 371.
  \item \textsuperscript{160} Id. at 520, 411 S.E.2d at 374.
  \item \textsuperscript{161} Id. at 515-16, 411 S.E.2d at 371.
  \item \textsuperscript{162} Id. at 517-18, 411 S.E.2d at 372-73.
  \item \textsuperscript{163} Id. at 520, 411 S.E.2d at 374.
  \item \textsuperscript{165} 199 Ga. App. 419, 405 S.E.2d 61 (1991).
  \item \textsuperscript{166} Id. at 419, 405 S.E.2d at 62.
\end{itemize}
play with matches, nor had she shown any fascination with fire. In light of this evidence, the court held that it was not reasonably foreseeable that decedent's sister "would obtain a small box of matches from [her foster mother's] handbag and would set the house afire .... Even less was it foreseeable to DHR or [its employees] that placement of the children with these foster parents .... [would cause such an incident to occur]."

A business proprietor must exercise due care to prevent injury to his patrons from reasonably foreseeable criminal acts of others. In Confetti Atlanta, Ltd. v. Gray, plaintiff Gray, a patron of defendant nightclub, was injured when Cooley, another club patron, ran over him with a pickup truck just moments after they had been involved in an altercation in defendant's parking lot. The evidence at trial had shown that prior fights had occurred both inside and outside the nightclub and that there was no security guard on duty outside the club while patrons exiting it remained in the parking lot. Defendant argued that Cooley's running over plaintiff with a truck was not an incident that it could reasonably have foreseen from prior parking lot fights. In rejecting defendant's contentions and affirming the jury's verdict in favor of plaintiff, the court found that Gray

suffered his injuries as the result of an argument which turned into a violent fight .... To focus on the instrumentality which caused [Gray's] injuries rather than the circumstances which set into motion the chain of events leading to the attack on [Gray] would require us to treat Cooley's attack on [Gray] as an isolated criminal attack rather than the extension of an uncontained, uninterrupted fight.
B. Limitation of Actions

In *Miles v. Ashland Chemical Co.*, the Eleventh Circuit Court of Appeals certified to the Supreme Court of Georgia the following question: "Do the Georgia courts follow the discovery rule in applying the statute of limitations to a wrongful death action alleging a failure to warn?" The three decedents in this case all died from cancer after exposure to Methylene Chloride at their place of employment. Plaintiffs did not, however, discover that Methylene Chloride could be a cancer causing agent until substantially more than two years had passed since decedents' deaths. The majority reiterated the established Georgia law that a wrongful death action accrues at death and recited public policy against potentially infinite liability in support of their ruling not to apply the discovery rule to wrongful death claims. In a scathing dissent, Presiding Justice Smith urged the comparison of the discovery rule in this type of situation to Georgia's criminal procedure, which keeps open the prosecution period for any crime when the crime or the criminal is unknown. He further offered a telling glimpse at the nature of tort litigation in the future:

The danger we face today comes in a far more furtive manner through toxins and carcinogens that do not instantly maim or kill, but that destroy life cell-by-cell, slowly, painfully, and as finally as any major physical trauma. The people who commit homicide with these toxins and carcinogens are just as culpable as those who commit homicide with exploding boilers. Our public policy requires that these people be punished and the survivors be compensated. Those goals can only be achieved by tolling the statutes until the causal link and the tortfeasor are discovered.

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182. 261 Ga. at 733-34, 410 S.E.2d at 295 (Smith, P.J., dissenting).
Two other cases decided during this survey period illustrate the difficulties inherent in applying the discovery rule doctrine and present an interesting juxtaposition of the relationship between this doctrine and medical diagnoses. In Thomason v. Gold Kist, Inc., plaintiffs argued that the two-year statute of limitations did not begin to run against defendants until physicians diagnosed plaintiffs as having symptoms consistent with Chlordane poisoning, even though they had experienced physical problems shortly after they had begun using a pesticide containing Chlordane in their home several years earlier. The court did not accept this argument and held that the statute of limitations began to run in this case much earlier when plaintiffs "suspected that Chlordane was the cause of their injuries . . . ."

Likewise, in the case of Deans v. Dain Management, Inc., the court recited "that a medical diagnosis is [not] necessary before the statute of limitation begins to run. . . ." Without determining exactly when the limitations period began to run in this case, however, the court found that plaintiff's complaint had been timely filed, even though plaintiff had been aware for several years that some of her co-workers had experienced problems with formaldehyde exposure in the workplace, and she knew her own symptoms cleared up when she was away from that environment.

Actual fraud that involves moral turpitude and that prevents a plaintiff from bringing a cause of action will toll the statute of limitations until the plaintiff discovers or should have discovered the fraud. The court found that this type of fraud existed in the case of Hahne v. Wylly when defendant's assurances to plaintiff that her swimming pool installation...

186. Id. at 248-49, 407 S.E.2d at 474-75.
187. Id. at 249, 407 S.E.2d at 475.
189. Id. at 470, 411 S.E.2d at 357.
190. Plaintiff filed the complaint on February 29, 1988. Of the dates relevant to this cause of action, it is interesting to note that on February 24, 1986, plaintiff returned to work and began, once again, experiencing physical problems that had subsided while she was absent from her workplace. Within a few days thereafter plaintiff sought medical treatment from an allergist who had treated some of her coworkers and was subsequently diagnosed as having formaldehyde sensitization. Id. at 467, 411 S.E.2d at 355. In spite of its denial thereof, the court seemed to be seeking a medical confirmation of plaintiff's ailment in this instance before deeming that the two-year statute of limitation had begun to run.
191. Id. at 466-67, 411 S.E.2d at 354-55.
tion would have no effect on the operation of her septic tank tolled the limitations period until plaintiff actually began experiencing problems with her septic tank. 194

C. Assumption of the Risk

Once again the court of appeals in Beringause v. Fogleman Truck Lines, Inc. 195 seemingly acted as an "appellate jury" to reverse the trial jury's verdict in favor of a defendant—this time on the grounds of an erroneously given charge on assumption of the risk. 196 In Beringause plaintiff's decedent, a policeman, participated in a convoy consisting of two buses and three campus police cars that travelled "down a two-lane highway, straddling the occasional passing lane so no other vehicles could intervene or pass, sometimes exceeding the speed limit, and using flashing blue lights on the lead and last vehicles . . . . " 197 As observed by vehicles following behind, the convoy prompted some oncoming vehicles to stop, slow down, or pull off the highway. Plaintiff's decedent was killed when an oncoming vehicle suddenly stopped in the highway upon meeting the caravan, causing a tractor-trailer following behind the vehicle to brake and ultimately collide with the decedent's car. 198

Succinctly stated, the doctrine of assumption of the risk includes knowledge of the danger involved, an understanding of the risk associated

194. Id. at 812-13, 406 S.E.2d at 96. In making this decision, the court specifically found that the damage defendant caused was concealed 24 inches below the ground, that defendant had related to plaintiff that only a three-foot segment of drain pipe had been removed when evidence showed much more had been removed, and that other evidence showed that her type of septic tank system could still function for a while after a portion of its drain system was removed. Id., 406 S.E.2d at 95-96. For two other cases decided during this survey period, the court determined that the alleged fraud involved would not cause the applicable statute of limitations to be tolled. Padgett v. Klaus, 201 Ga. App. 399, 411 S.E.2d 126 (1991) (no fraud concerning existence of medical diagnosis when plaintiff sought care of another physician while still under defendant's care); Capra v. Rogers, 200 Ga. App. 131, 407 S.E.2d 101 (1991) (no fraud concerning defendant's whereabouts when defendant had lived at same location all along even though his neighbors told sheriff's deputy that defendant no longer resided at that location.)


198. Id. at 826, 409 S.E.2d at 528.

199. Id. at 826-27, 409 S.E.2d at 528 (Beasley, J., dissenting).
with the danger, and a voluntary exposure to that risk. Without focusing at all upon the question of whether or not participation in a caravan of this nature created an appreciable danger, the majority concluded as a matter of law that the caravan was not a risk-producing danger, and the decedent could not have assumed the risk that another vehicle might swerve across the roadway into his lane of travel. In a well-reasoned dissent, however, Judge Beasley argued that the danger of the caravan was the manner in which other vehicles reacted to it, which in turn could endanger others. As did Judge Birdsong in his dissent to Ellis v. Dalton, she chided: "The question of whether the caravan created a danger is one of fact for the jury to decide, not the appellate court.

Conversely, in two other survey period cases, Wells v. Citizens & Southern Trust Co. and Munger v. Central of Georgia Railroad, the court held as a matter of law that plaintiffs assumed the risks of their actions. The court deemed plaintiff in Wells to have assumed the risk of traversing a darkened stairway outside his apartment, while the court deemed plaintiff in Munger to have assumed the risk of walking upon a train trestle in darkness.

D. Delay in Service

For two factually unusual cases decided during this survey period, the trial courts' dismissals based on delays in service were reversed. In

201. 200 Ga. App. at 826, 409 S.E.2d at 528.
202. Id. (Beasley, J., dissenting).
203. 194 Ga. App. 114, 389 S.E.2d 797 (1989). In that case Judge Birdsong admonished that "[t]here is no place in the [sudden emergency] doctrine for second guessing by this court whether there was in fact an emergency or whether the choice made was reasonable to us." Id. at 119, 384 S.E.2d at 802 (Birdsong, P.J., dissenting).
204. 200 Ga. App. at 827, 409 S.E.2d at 528 (Beasley, J., dissenting). Compare Bergause with the recent decision in Silva v. Smalls, 200 Ga. App. 141, 407 S.E.2d 110 (1991), which, after noting the dangerousness of plaintiff's job as a tractor-trailer inspector, found that the jury was authorized to conclude plaintiff assumed the risk of being run over by such a rig. Id. at 143, 407 S.E.2d at 112-13.
208. 199 Ga. App. at 32, 403 S.E.2d at 828. Plaintiff in this case knew that the overhead light on the stairway he used was out, and he had another stairway exit from his apartment. Id. at 31, 403 S.E.2d at 827.
210. When a defendant is served with a complaint after the applicable statute of limitations has run, the plaintiff must use due diligence in perfecting service so that it will relate
Slater v. Blount, plaintiffs, within the statutory time period, effected what the court later determined to be improper service of process upon defendant. A little more than a month subsequent to that ruling, plaintiffs sought permission to and did serve defendant by publication. By that time, however, approximately a year had passed since the refiling of the complaint and the running of the statute of limitations. In its ruling dismissing the case, the trial court found that plaintiffs had not been diligent in perfecting service since “it did not occur until almost one year after the expiration of the statute of limitations . . . .” The court of appeals held the finding of a lack of due diligence based on the entire lapse of time from when the limitations period expired until the time of service by publication to be improper. Instead, the court of appeals found the relevant time period to be “from the order finding that the prior service was ineffective until the plaintiffs sought approval of their request for service by publication.” Since a ruling had not been made on this basis, the trial court’s judgment was reversed.

In Starr v. Wimbush, defendant received personal service of plaintiff’s complaint approximately seven months after the running of the statute of limitations, which the trial court ruled did not show an exercise of due diligence in perfecting service. Two months prior to the personal service, however, plaintiff had obtained an order for service by publication which expressly found that “defendant could not be found ‘after due diligence.’” The court of appeals determined that the trial court had abused its discretion in dismissing plaintiff’s complaint “[b]ecause due diligence had already been found as of June 30, and the record shows several additional steps were taken to locate defendant between June 30 and the date he was served less than two months later . . . .”


212. Id. at 472, 408 S.E.2d at 435.
213. Id. at 471-72, 408 S.E.2d at 435.
214. Id. at 472, 408 S.E.2d at 435.
215. Id.
216. Id. at 473, 408 S.E.2d at 436.
217. Id.
219. Id. at 280-81, 410 S.E.2d at 777.
220. Id. at 282, 410 S.E.2d at 778. Interestingly, the judge who issued this order was not the same one who eventually dismissed the complaint. Id.
221. Id.
even though plaintiff had defendant's correct address, plaintiff did not perfect service until 206 days after filing the complaint. Plaintiff had a great deal of difficulty locating defendant and was given misinformation by the sheriff's department, but the appellate court found a lack of due diligence in these efforts, stating "[t]he appointment of a special process server and the apparent error of the deputy sheriff did not absolve [plaintiff] of the obligation to obtain the necessary information and serve [defendant] promptly, for she 'cannot excuse her lack of diligence by attempting to place responsibility on others.'" Service was also deemed dilatory in Dunson v. Golden when defendant's address had always been available from his insurer, but plaintiff did not perfect service upon defendant for over six months from the date of filing the complaint.

E. Immunities

The major event in the area of immunities during this survey period was the General Assembly's passage of the Georgia Tort Claims Act. Responding to the ratification of the 1991 amendment to the Georgia Constitution that effectively reinstated sovereign immunity, the 1992 General Assembly set forth the manner and the circumstances under which a tort claim may be brought against the state. Space limitations in this Article permit only a brief overview of this new Act, and the authors caution that a comprehensive reading of its entire text should be undertaken before any lawsuit is filed against the state to avoid any pitfalls for the unwary. The Act waives the state's sovereign immunity "for the torts of state officers and employees while acting within the scope of duties under the laws of the State." 220

223. Id. at 729-30, 405 S.E.2d at 767.
224. Plaintiff had obtained defendant's address from the accident report and filed her complaint in Fulton County. She was informed the following week by the sheriff's department that the address she had provided was not in Fulton County. Ultimately, however, the original address was found to be in Fulton County. Id.
227. Id. at 514, 405 S.E.2d at 333.
230. By specific definition the provisions of this Act apply only to state entities, which do not include "counties, municipalities, school districts, other units of local government, hospital authorities, or housing and other local authorities." O.C.G.A. § 50-21-22(5) (Supp. 1992).
their official duties or employment . . . ."231 There are, however, a number of statutorily imposed exceptions to this liability.232 Individual state officers and employees should no longer be named as parties to a lawsuit against the state,233 and prior to filing a complaint, specific notice of the claim must have been given to the state within twelve months from the date a loss was discovered or should have been discovered.234 The Act’s damages limitation provision caps the maximum recovery at one million dollars for a single occurrence of liability, with aggregate liability per occurrence not to exceed three million dollars.235 In addition, the Act does not permit punitive damages.236

The 1991 sovereign immunity amendment spurred action among state legislators and the supreme court. In Donaldson v. Department of Transportation,237 the court considered the issue of whether the 1991 amendment should be applied retroactively to bar a claim that accrued and was filed prior to January 1, 1991.238 Arguing from Goolsby v. Regents of the University System,239 defendants claimed that a waiver of sovereign immunity was an act of grace from the state and could be withdrawn at any time, thereby divesting the trial court of jurisdiction over plaintiff.240 The supreme court declared that since the amendment itself was silent on the

231. Id. § 50-21-23(a).
232. Id. § 50-21-24. These exceptions include acts or omissions in the execution of statutes, regulations, rules, or ordinances; performance of or failure to perform a discretionary function (it should also be noted that the Act itself defines a “discretionary function or duty,” Id. § 50-21-22(2), which seems to be more narrowly drawn than the traditional case law definitions; see generally Hennessy v. Webb, 245 Ga. 329, 264 S.E.2d 878 (1980)); assessment or collection of any tax or detention of goods by law enforcement officers; legislative, judicial, or prosecutorial action or inaction; administrative action or inaction; civil disturbance or riot or the failure to provide or method of providing law enforcement or fire protection; assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights; inspection powers or functions; licensing powers or functions; highway and other public works designs when prepared in substantial compliance with generally accepted engineering or design standards; financing regulatory activities; and, Georgia National Guard activities. O.C.G.A. § 50-21-24.
236. Id. § 50-21-30.
238. The election ratifying this amendment was held on November 6, 1990, and the amendment became effective on January 1, 1991. Ga. Const. art. X, § 1, para. 6. The complaint in Donaldson had been filed on June 3, 1988. 262 Ga. at 53, 414 S.E.2d at 642.
240. 262 Ga. at 53, 414 S.E.2d at 641.
issue of retroactive application, it should only be applied prospectively.241 The holding went further, however, to conclude that while the state may withdraw a waiver of sovereign immunity at any time, the withdrawal will not be effective against those individuals who have acted in reliance upon the waiver by filing a lawsuit.242 “A waiver of sovereign immunity is binding on the state with respect to any pending action. Goolsby . . . is disapproved to the extent it holds otherwise . . ..”243

The issue of sovereign immunity in relation to hospital authorities also provided a fertile ground for appellate review during this survey period. Relying on the now questionable court of appeals decision in Hospital Authority v. Litterilla,244 the courts in Walker v. Fulton-DeKalb Hospital Authority245 and Culberson v. Fulton-DeKalb Hospital Authority246 found that hospital authorities are entitled to the defense of governmental immunity to the extent that it had not been waived by the existence of liability insurance.247 Additionally, the court in Culberson found that the receipt of county funds by defendant hospital authority for indigent care did not thwart a sovereign immunity defense by divesting the authority’s character as an agency of the county operated primarily for public benefit rather than for revenue generating purposes.248 In reversing the court of appeals decision in Litterilla,249 the supreme court did not deal directly with the general application of sovereign immunity to hospital authorities,250 but held that defendant hospital authority’s Umbrella Lia-
bility Policy together with its self-insurance fund served to act as a waiver of sovereign immunity.\footnote{281}

In \textit{Hiers v. City of Barwick}, the supreme court held unequivocally that "the constitutional provision which waives immunity to the extent of insurance applies to municipalities."\footnote{282} Although the supreme court in making this ruling did not mention the earlier court of appeals decision \textit{Brockman v. Burnette}, the ruling in \textit{Hiers} was, in actuality, an affirmation and clarification of \textit{Brockman}.\footnote{283} The main issue the court dealt with in \textit{Hiers}, however, was whether the City's participation in the Georgia Interlocal Risk Management Agency ("GIRMA") constituted a waiver of sovereign immunity.\footnote{284} Even though certain portions of the legislation that authorizes GIRMA\footnote{285} express an intent not to waive sovereign immunity,\footnote{286} the court found those provisions to be in conflict with the Georgia Constitution and, therefore, void.\footnote{287} "The provision of liability insurance authority's sovereign immunity, assuming that hospital authorities are entitled to such immunity?" \textit{Id.} at 35, 413 S.E.2d at 719.

\textit{Id.} at 36, 413 S.E.2d at 720.


The factual scenario in \textit{Hiers} concerned a high-speed chase of a vehicle by the city's chief of police. The chase ended ultimately in a collision involving plaintiffs' car (262 Ga. at 129, 414 S.E.2d at 648), but the court in \textit{Hiers} did not discuss the implications, if any, that O.C.G.A. § 36-33-3 (1987), might have on the holding discussed above. O.C.G.A. § 36-33-3 states that "[a] municipal corporation shall not be liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law." O.C.G.A. § 36-33-3. \textit{See also} \textit{Peeples v. City of Atlanta}, 189 Ga. App. 888, 377 S.E.2d 889 (1989).

\textit{Id.} at 130, 414 S.E.2d at 648.

under GIRMA constitutes a waiver of sovereign immunity to the extent of available coverage."

The doctrine of family immunity continued its evolution during this survey period with the decision in *Newsome v. Department of Human Resources*, which dealt specifically with the issue of parental immunity. In *Newsome* the natural parents of foster children brought a personal injury and wrongful death action against the children's foster parents. Recognizing that parental immunity has been extended to foster parents, the court noted that at the time the parents filed the instant suit, the children no longer lived with their foster parents. The court reviewed previous decisions concerning when the public policy reasons for the grant of immunity were no longer viable and concluded that the imposition of parental immunity would be determined by the status of the parties' relationship at the time the action is filed, thereby reversing the trial court's grant of summary judgment to the defendant foster parents.

**F. Indemnity**

The court of appeals in two cases decided this year, *Allstate Insurance Co. v. City of Atlanta* and *Moore v. Harry Norman, Inc.*, refused to give effect to indemnity agreements signed by the parties. In *Allstate* 262 Ga. at 132, 414 S.E.2d at 649. When insurance coverage is not present, in order to determine municipal liability it is necessary to ascertain the governmental or ministerial character of the particular conduct at issue. See O.C.G.A. § 36-33-1(b) (1987); *Sinkfield v. Pike*, 201 Ga. App. 652, 411 S.E.2d 889 (1991). During this survey period the following cases were decided concerning the characterization of specific conduct involving municipal corporations: *Banks v. Patton*, 202 Ga. App. 168, 413 S.E.2d 744 (1991) (decision to rush to scene of emergency in police vehicle was discretionary—governmental immunity applied); *Sinkfield v. Pike*, 201 Ga. App. 652, 411 S.E.2d 889 (1991) (operation of fire truck en route to fire is protected by governmental immunity).

260. 262 Ga. at 132, 414 S.E.2d at 649. When insurance coverage is not present, in order to determine municipal liability it is necessary to ascertain the governmental or ministerial character of the particular conduct at issue. See O.C.G.A. § 36-33-1(b) (1987); *Sinkfield v. Pike*, 201 Ga. App. 652, 411 S.E.2d 889 (1991). During this survey period the following cases were decided concerning the characterization of specific conduct involving municipal corporations: *Banks v. Patton*, 202 Ga. App. 168, 413 S.E.2d 744 (1991) (decision to rush to scene of emergency in police vehicle was discretionary—governmental immunity applied); *Sinkfield v. Pike*, 201 Ga. App. 652, 411 S.E.2d 889 (1991) (operation of fire truck en route to fire is protected by governmental immunity).


263. See generally *Georgia Torts*, supra note 4, § 21-4.

264. 199 Ga. App. at 419, 405 S.E.2d at 62.


266. 199 Ga. App. at 421, 405 S.E.2d at 63.


268. 199 Ga. App. at 421-23, 405 S.E.2d at 63-64.


271. id. at 236, 404 S.E.2d at 795.
plaintiff's insurance company (Allstate) had signed an indemnity agreement with the City of Atlanta as a release for subrogation monies received as a result of plaintiff's collision with a City of Atlanta maintenance truck. Giving the necessary strict construction to this agreement as one that attempted to indemnify the indemnitee against its own negligence, the court found that:

[t]he indemnification language is bereft of any express or explicit statement about coverage for the city's own negligence, either direct or vicarious . . . . It should have stated such coverage, if intended, with clarity and specificity for it is insufficient to imply such coverage from the circumstances of the incident giving rise to the agreement.

In Moore plaintiff homeowner in signing a sales listing agreement with defendant realtor had agreed to hold defendant harmless from any claims "which result from any negligent acts of persons who are employees of [defendant], whenever said acts occur during the period of this listing." During the listing period plaintiff's home was burglarized when the lock box containing her house key was also burglarized. Plaintiff brought a negligence action against defendants for failure to disclose the burglary information and failure to prevent unauthorized access to her home and presented evidence that defendant had knowledge of a number of previous lock box burglaries in the area, but had not passed this information on to its employee agents. Defendants claimed insulation from lia-

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274. 202 Ga. App. at 693-94, 415 S.E.2d at 310 (emphasis in original). The reader is referred to the opinion for a full text of the pertinent parts of the indemnity agreement. Id. at 692, 415 S.E.2d at 309.

Another public policy concern in dealing with indemnity agreements that indemnify the indemnitee's own negligence is "to assure that people exercise due care in their activities for fear of liability, rather than act carelessly in the knowledge that indemnity insurance will relieve them." Id. at 693, 415 S.E.2d at 310. In this case, even though the event to be indemnified against had already occurred and the public policy against carelessness was thereby mooted, the court specifically held that the language specificity requirement was still applicable. Id. at 693-94, 415 S.E.2d at 309-10. See supra note 273.

275. 199 Ga. App. at 236, 404 S.E.2d at 795.

276. Id. at 234, 404 S.E.2d at 794.

277. Id. at 234-35, 404 S.E.2d at 794-95. The real estate agent who dealt with plaintiff had no knowledge of the other burglaries and, if fact, had told plaintiff that the only problem she had ever encountered with lock box use in 15 years of selling real estate was a missing ashtray. Id. at 234, 404 S.E.2d at 794.
bility based on the indemnity agreement.\textsuperscript{278} Even though the language in this agreement specifically attempted to indemnify the indemnitee against the negligence of its employees, the court found that since evidence showed that defendant "made a deliberate decision, through its board of directors, to withhold information . . . concerning other 'lock box burglaries' in the metropolitan Atlanta area[,] . . . the corporation's alleged liability is predicated on its own official actions as a corporation rather than on the negligence of individual employees"\textsuperscript{279} and, therefore, refused to uphold the indemnity agreement.\textsuperscript{280}

\textbf{G. Limited Duty}

The court in \textit{Turner v. Walker County}\textsuperscript{281} had to determine the legality of a signed release from liability in the performance of community service work. Plaintiff's decedent was a probationer in Walker County, Georgia, who, prior to beginning his court-imposed community service, had signed a covenant not to sue for any injury received during the course of that work. While performing community service work at the county landfill, plaintiff's decedent was killed when the front-end loader he was operating overturned on him.\textsuperscript{282} The court succinctly held that this release from liability signed by the decedent established a complete defense to plaintiff's wrongful death claim against the county.\textsuperscript{283}

\textbf{IV. OTHER GROUNDS OF TORT LIABILITY}

\textbf{A. Products Liability}

The "open and obvious" rule\textsuperscript{284} and its corollary, the duty to warn,\textsuperscript{285} continue as a primary focus of Georgia product liability litigation. The

\begin{flushleft}
\textsuperscript{278} Id. at 236, 404 S.E.2d at 795.  \\
\textsuperscript{279} Id.  \\
\textsuperscript{280} Id., 404 S.E.2d at 796. In another case decided during this survey period, McPherson v. City of Ft. Oglethorpe, 200 Ga. App. 129, 407 S.E.2d 99 (1991), plaintiffs, alleging negligent operation and maintenance of a traffic signal, argued that they were the direct beneficiaries of an indemnity agreement between defendant city and the Department of Transportation concerning the maintenance of the traffic signal. \textit{Id.} at 130, 407 S.E.2d at 100. The court found no merit to this argument, stating that "[i]t is clear from the record that the City neither agreed to undertake any responsibility regarding the maintenance of the traffic signal nor undertook any such responsibility for which they could hold DOT harmless." \textit{Id.} at 131, 407 S.E.2d at 101.  \\
\textsuperscript{282} Id. at 565, 408 S.E.2d at 819.  \\
\textsuperscript{283} Id.  \\
\textsuperscript{284} For a more complete discussion of the "open and obvious" rule, see Adams & Adams, \textit{supra} note 68, at 422-23.  \\
\textsuperscript{285} For a discussion of the duty to warn, see \textit{GEORGIA TORTS}, \textit{supra} note 4, \S\ 25-3.
\end{flushleft}
parties' status may have a bearing on the duty to warn, as Brown v. Apollo Industries, Inc. illustrates. Plaintiff's decedent in Brown died because of severe electrical burns he received while using in a high voltage area an aerosol cleaning spray manufactured by defendant. "[D]ecedent was an experienced technician and familiar with the procedures to be followed in the job he was performing, having performed similar procedures 25 to 30 times in the past, and he knew or should have known not to use an aerosol spray inside the compartment he was cleaning." Thus, defendant breached no duty to warn plaintiff.

Not only the parties' status, but also their relation to each other, affects the duty to warn, as the court held in Dupree v. Keller Industries, Inc. Plaintiffs in that case were operators of a press their employer had purchased from defendant. When the press injured plaintiffs, they sued defendant on theories that defendant failed to add safeguard devices to conform the press to industry and to OSHA standards, and also that defendant owed them a common-law duty to warn.

The court disposed of the first part of plaintiffs' claim by holding that whatever duties OSHA or industry standards created for defendant, it did not owe those duties to plaintiffs as "remote users" of the product. Regarding the common-law duty to warn, the court recognized Georgia's adoption of sections 388 and 389 of the Restatement (Second) of Torts, but found those provisions inapplicable to the instant case. "[T]here was a complete absence of evidence that [defendant] had reason to believe that [plaintiffs or their employer] would not realize the lack of the safeguard devices." Under those circumstances, defendant had no duty to plaintiffs and could not be liable either for failing to install the safeguard devices or to warn of their absence.

288. Id. at 263, 404 S.E.2d at 450.
290. Id. at 139, 404 S.E.2d at 293.
291. Id. at 142, 404 S.E.2d at 295.
293. Restatement (Second) of Torts § 388 (1965) deals with liability of suppliers of chattels known to be dangerous for intended use. Section 389 deals with liability of suppliers of chattels unlikely to be made safe for use. Id. § 389. See 199 Ga. App. at 143, 404 S.E.2d at 295.
294. 199 Ga. App. at 143, 404 S.E.2d at 295-96.
295. Id., 404 S.E.2d at 296.
296. Id.
B. Nuisance

"While a municipality is not liable for negligence in the exercise of a governmental function, it may be liable for injury resulting from the maintenance of a nuisance regardless of whether it arises from the exercise of a governmental or a ministerial function." For this reason, nuisance is an attractive alternative, and frequently the only alternative, for imposing liability on a local government. In *Denson v. City of Atlanta*, the en banc court of appeals reiterated the three-part test for municipal nuisance liability:

"(1) The defect or degree of misfeasance must . . . exceed the concept of mere negligence. (A single isolated act of negligence is not sufficient . . . ) (2) The act must be of some duration . . . and the maintenance of the act or defect must be continuous or regularly repetitious[.] (3) [T]he municipality [must fail] to act within a reasonable time after knowledge of the defect or dangerous condition."

Plaintiffs in *Denson* lost, however, because the problem with the city's traffic lights that caused their collision had not been in existence long enough to have "placed the city on notice that such operation of the signals constituted a dangerous condition."

The Home of the Braves was not so fortunate in *Grier v. City of Atlanta*. Since 1910, Atlanta had maintained Maddox Park on either side of a railroad track, and children had long played on or near the trains that ran through the park. Plaintiff's minor child lost his leg when, after climbing aboard a train to cross from one side of the park to the other, he attempted to jump from the moving cars. Finding a jury question, the court held that the length of time trains had run through the park and the number of children observed playing on the trains evidenced a "continuous or regularly repetitious" dangerous condition.


300. *Id.* at 327, 414 S.E.2d at 314 (quoting City of Bowman v. Gunnells, 243 Ga. 809, 811, 256 S.E.2d 782, 784 (1979)).

301. *Id.*, 414 S.E.2d at 315.


303. *Id.* at 575-76, 408 S.E.2d at 795-96.

304. *Id.* at 576, 408 S.E.2d at 796.
C. Defamation

Georgia law holds a corporation vicariously liable for libel but not for slander.305 This dichotomy, criticized in last year's torts survey,306 continued during the survey period in Gantt v. Patient Communications Systems.307 In Gantt defendant's employees made verbal and written defamatory statements about plaintiff. Although the employees made all of the statements in the course of their employment, no evidence showed defendant "expressly directed" them to do so.308 Thus, applying the curiously inconsistent rule stated above, plaintiff had a jury claim for libel but not for slander.309

Although expressions of opinion are frequently protected from defamation claims,310 "[t]here is no 'wholesale defamation exemption for anything that might be labeled "opinion."

To say otherwise would ignore the fact that expressions of "opinion" may often imply an assertion of objective fact."311 In Eidson v. Berry,312 defendant wrote a letter to the editor, in which he accused plaintiff, the city attorney, of "knowingly violat[ing] Federal law" by "illegally" tape recording a private conversation between city officials.313 Even conceding that plaintiff was a public figure who could only recover on proof of actual malice,314 the court concluded that defendant's complete lack of evidence to support his accusations "is sufficient to authorize any reasonable jury's finding that defendant . . . acted with reckless disregard for the truth . . ."315

D. Mental Abuse

In General. The tragedy of Lizzie Borden, referred to in the introduction to this article,316 illustrates one remedy people may seek when denied

305. See Adams & Adams, supra note 68, at 427.
306. Id. at 427-28.
308. Id. at 39, 406 S.E.2d at 800.
310. See ADAMS & ADAMS, supra note 4, § 28-6 (Supp. 1992).
313. Id. at 587, 415 S.E.2d at 17.
316. See supra notes 1-2 and accompanying text.
any other outlet for mental abuses inflicted on them.\textsuperscript{317} The law until fairly recently reflected the attitude contained in the following statement from a famous law review article: “Against a large part of the frictions and irritations and clashing of temperaments incidental to participation in a community life, a certain toughening of the mental hide is better protection than the law could ever be.”\textsuperscript{318} Although this approach is not without practical appeal, to the victims of the very real damages visited by mental abuse, it must seem somewhat akin to the argument that Lizzie Borden deserved sympathy because she was an orphan!\textsuperscript{319} Although the law has only recently and grudgingly\textsuperscript{320} come to recognize the genuine damage sustained when a plaintiff’s peace, happiness, or well-being is injured, the cases arising out of such injuries occupy an ever-increasing amount of judicial resources. The survey period was no exception, as the following representative selections indicate.

**Infliction of Emotional Distress.** During the survey period, the courts decided several cases of seminal importance regarding the controversial tort of infliction of emotional distress. In *Yarbray v. Southern Bell*,\textsuperscript{321} the supreme court disagreed with both the trial court and the court of appeals\textsuperscript{322} about the viability of plaintiff’s emotional distress claim. Yarbray testified against Southern Bell in another employee’s discrimination suit.\textsuperscript{323} She claimed Southern Bell “threatened that she would lose her job if she testified against the company, and, after she testified, retaliated by transferring her to an unsatisfactory employment situation.”\textsuperscript{324} The court reiterated that the conduct complained of must have been both “extreme and outrageous” and “severe,”\textsuperscript{325} but held that the determination whether conduct rises to that level is a question of law in the first instance.\textsuperscript{326} The allegations that Southern Bell “deliberately

\textsuperscript{317} U.S. News & World Report, *supra* note 2, suggests that Miss Borden may have been the victim of sexual abuse. This would account for the particularly brutal nature of the murders.


\textsuperscript{320} See W. Page Keeton et al., *PROSSER & KEETON ON THE LAW OF TORTS* § 12, at 54-55 (5th ed. 1984).


\textsuperscript{323} 197 Ga. App. at 847, 399 S.E.2d at 720.

\textsuperscript{324} 261 Ga. at 704, 409 S.E.2d at 836.

\textsuperscript{325} *Id.*, 409 S.E.2d at 837 (citing *RESTATEMENT (SECOND) OF TORTS* § 46(1) (1965)).

\textsuperscript{326} *Id.* at 707, 409 S.E.2d at 838 (citing Gordon v. Frost, 193 Ga. App. 517, 521, 388 S.E.2d 362, 366 (1989)).
set out to retaliate against" plaintiff, "to punish her for ignoring its lawyer's admonitions and testifying against" Southern Bell, and its "subjecting [plaintiff] to abuse by her supervisor and causing her severe emotional pain," if proved, would meet the legal test of outrageousness and present a jury question. 327

An unspoken premise for the holding in Yarbray was the nature of the parties' relationship. The court of appeals made this explicit in the only other two survey period emotional distress cases that resulted in favorable outcomes for the plaintiff. Both of these concerned medical providers. In Williams v. Voljavec, 328 defendant doctor "cussed out" plaintiff, his patient, over an insurance claim form. 329 In Wideman v. DeKalb County, 330 defendant Emergency Medical Technicians' ("EMT's") refused to take plaintiff to her own hospital and doctor when she was having a miscarriage. Defendants instead fabricated an emergency loss of blood to justify taking plaintiff to their hospital. 331 "A defendant's knowledge of a plaintiff's particular susceptibility to injury from emotional distress is often critical in weighing the extreme and outrageous character of [the] conduct," 332 said the court in Williams. "The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know," 333 added the court in Wideman. Thus, in both of these cases, the relationship of trust and dependency that the plaintiffs had in the defendants added to the outrageous nature of defendants' conduct and presented an issue for jury resolution. 334

In a "startling reassessment" 335 of the basis for an infliction of emotional distress claim, the supreme court in the 1989 case of OB-GYN Associates v. Littleton 336 narrowed the long-standing "impact rule" 337 gov-
erning such torts and held that, when the emotional distress claim is premised only on negligent conduct, the plaintiff must suffer either an actual physical injury or a pecuniary loss arising out of a nonphysical personal injury.\footnote{338} Littleton was back in the appellate courts during the survey period on the issue of whether plaintiff, whose baby died allegedly as a result of defendants' negligence,\footnote{338} had suffered an "actionable physical injury"\footnote{340} that would support recovery of damages for emotional distress. Holding that she had, the court emphasized that "any potential award of damages . . . is limited to compensation for any physical injury [plaintiff] suffered as a result of the alleged negligence, and any mental suffering or emotional distress she incurred as a consequence of her physical injuries."\footnote{341}

Invasion of Privacy. In the leading case of Cabaniss v. Hipsley,\footnote{342} the court recognized that "invasion of privacy" consists of four loosely related torts.\footnote{343} In an unusual occurrence, all four were represented in this survey period's cases.

The notorious affair between Donald Trump and Marla Maples\footnote{344} spawned federal litigation in Georgia. Among the issues in Maples v. National Enquirer,\footnote{345} an action by Miss Maples' father arising out of a spurious "interview" of plaintiff in defendant's supermarket tabloid, was whether defendant's report of false information in the form of such an "interview" constituted commercial appropriation of plaintiff's name and likeness.\footnote{346} Defendant argued that Georgia law limited plaintiff's recovery to unauthorized use of his name or likeness in commercial advertisements or product endorsements. The district court, however, "[d]id not agree

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\footnotetext[338]{Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928), overruled by 259 Ga. 663, 386 S.E.2d 146 (1989).}
\footnotetext[341]{199 Ga. App. at 45, 403 S.E.2d at 838.}
\footnotetext[342]{Id. at 46 n.1, 403 S.E.2d at 840 n.1. The supreme court was at pains to point out that this "clearly and correctly states the rule." 261 Ga. at 664, 410 S.E.2d at 122.}
\footnotetext[343]{114 Ga. App. 367, 151 S.E.2d 496 (1966). See generally GEORGIA TORTS, supra note 4, § 29-3.}
\footnotetext[344]{See, e.g., Best Sex I Ever Had!, N.Y. POST, Feb. 16, 1990, at A1.}
\footnotetext[345]{763 F. Supp. 1137 (N.D. Ga. 1990).}
\footnotetext[346]{Id. at 1143.}
that commercial appropriation under Georgia law is so limited.” Because defendant featured plaintiff’s name and story prominently on the cover of its publication, “in a very real sense, Plaintiff’s likeness and story could be considered used by Defendant as publicity or advertising for Defendant’s publication itself.”

Plaintiff also asserted another theory of privacy recovery. Arguing that anyone who knew the true facts of his daughter’s relationship with Trump would consider plaintiff a liar based on the statements defendant attributed to him, plaintiff contended the publication placed him in a false light in the public eye. Applying the rule that the false statement must be “highly offensive to a reasonable person if shown in the same light,” the court concluded that a statement which makes a plaintiff out to be a “self-confessed liar” is actionable as a matter of law under a false light invasion of privacy theory.

Closely related to the false light privacy invasion is the public disclosure of embarrassing or private facts. The supreme court rejected an attempt to use this defensively in Dortch v. Atlanta Journal & Atlanta Constitution, holding that the Georgia Open Records Act required the disclosure of certain telephone numbers called from cellular telephones owned by the City of Atlanta. Like Maples, the court emphasized that “(the matter made public must be offensive and objectionable to a reasonable man of ordinary sensibilities under the circumstances)” and concluded that “such disclosure would [not] be so offensive or objec-

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347. Id.
348. Id.
349. It would too far trespass upon the dignity of the Mercer Law Review to recount these statements here. They are quoted in the district court’s order, and in essence convey that Miss Maples was the “mistress” of Trump, who “dumped” her “like a sack of rotten potatoes,” plunging her into a “black depression” and leaving her “close to suicide.” Id. at 1139. Plaintiff is quoted as being “mad as hell . . . [and] ready to march into Donald’s office and punch him in the nose!” Id. Cf. supra note 344.
350. See generally GEORGIA TORTS, supra note 4, § 29-3, at 344-45.
353. The two theories are chiefly distinguished by the availability of the defense of truth for the former but not the latter. See GEORGIA TORTS, supra note 4, § 29-3, at 343-45.
356. 261 Ga. at 252, 405 S.E.2d at 45.
357. Id. (quoting Cabaniss, 114 Ga. App. 367, 372, 151 S.E.2d 496, 501)).
tionable to a reasonable man as to constitute the tort of invasion of privacy." 356

In Yarbray v. Southern Bell, 359 discussed above, 360 the supreme court rejected plaintiff’s claim that Southern Bell intruded upon her seclusion or solitude and the privacy of her affairs. 361 This theory of invasion of privacy is akin to the public disclosure theory at issue in Dortch, with the omission of the publication element. 362 It does, however, require intrusion in a manner that would be offensive to a reasonable person. 363 "The protection afforded by the law to the right of privacy . . . must be restricted to ‘ordinary sensibilities’ and not to supersensitiveness or agoraphobia." 364 Thus, the court in Yarbray held it was not an unreasonable invasion of plaintiff’s privacy to warn her of the company’s concerns about her testimony. 365

False Imprisonment. The detention necessary to support a claim for false imprisonment “need not consist of physical restraint, but may arise out of ‘words, acts, gestures, or the like, which induce a reasonable apprehension that force will be used if plaintiff does not submit; and it is sufficient if they operate upon the will of the person threatened, and result in reasonable fear of personal difficulty or personal injuries.’” 366 This “reasonable fear of personal difficulty” sustained a claim for false imprisonment in Wideman v. DeKalb County, 367 discussed above. 368 In Wideman plaintiff’s need for immediate medical care, her lack of other means of transportation to the hospital, and the refusal of defendant EMT’s to deliver her to the hospital of her choice, presented a jury issue, albeit a close one, on her fear of personal difficulty. 369

Malicious Prosecution. In a highly questionable four-to-three decision, the supreme court in K-Mart Corp. v. Coker 370 reversed the court of

358. Id.
360. See supra notes 321-27 and accompanying text.
361. See 261 Ga. at 704-05, 409 S.E.2d at 836-37.
362. See GEORGIA TORTS, supra note 4, § 29-3, at 342-44.
363. See 261 Ga. at 705, 409 S.E.2d at 837.
364. GEORGIA TORTS, supra note 4, § 29-3, at 343.
365. 261 Ga. at 705, 409 S.E.2d at 837.
368. See supra notes 330-33 and accompanying text.
369. 200 Ga. App. at 629, 409 S.E.2d at 543.
appeals decision discussed in last year's torts survey and determined that defendant had probable cause for its treatment of plaintiff. The majority held that plaintiff's discarding a lipstick she had not paid for before leaving defendant's store was sufficient evidence of criminal intent to justify her arrest and subsequent prosecution for shoplifting.

The court in Coker, however, in attempting to relieve shopkeepers from the necessity of determining a shopper's subjective intent, went too far by effectively relieving them also from the duty of making a reasonable inquiry about the circumstances. As the dissent pointed out, a line of Georgia appellate decisions dating back to 1887 requires that a reasonable and proper inquiry be made before a criminal prosecution is instituted or maintained. In Coker it was undisputed that defendant's employee never asked plaintiff why she discarded the lipstick before leaving the store; indeed, as the dissent observed, the evidence justified a conclusion that "defendant made no inquiry, much less a 'due and proper inquiry.'" The result in Coker, therefore, seems out of balance with the legal requirement that "[l]ack of probable cause shall be a question for the jury, under the direction of the court." A more balanced treatment of this issue is found in Bi-Lo, Inc. v. McConnell. In that case, defendant prosecuted plaintiff, its employee, for shoplifting a damaged can of soft drink. Plaintiff, seventeen years old and with no criminal record, had seen other employees consume damaged soft drinks and thought such drinks were thrown out. Upon discovering plaintiff with the drink, defendant's manager immediately called the police and refused to allow plaintiff to call his parents.

Sustaining a thirty-thousand dollar jury verdict for plaintiff, the court of appeals focused on the necessity for defendant to make a reasonable inquiry into the circumstances. "[E]ven the most cursory investigation" would have revealed plaintiff's lack of criminal intent, said the court.

372. 261 Ga. at 747, 410 S.E.2d at 427.
373. Id.
375. See 261 Ga. at 750, 410 S.E.2d at 429-30 (Smith, P.J., dissenting).
376. Id. at 754, 410 S.E.2d at 431.
377. Id. at 752, 410 S.E.2d at 430 (quoting Coleman, 79 Ga. at 641, 5 S.E. at 204).
380. Id. at 155, 404 S.E.2d at 328.
381. Id. at 156, 404 S.E.2d at 329.
382. Id.
When "'slight diligence would have brought to [defendant's] attention facts which would have shown conclusively that there could be no conviction, whether or not [defendant] is guilty of malicious prosecution is a question of fact to be determined by a jury.'" McConnell represents a better-reasoned legal view, and it remains to be seen whether the supreme court's decision in Coker represents a shift away from these established jurisprudential principles, or a one-time factual abberation.

Abusive Litigation. The appellate courts have begun to flesh out the provisions of Georgia's abusive litigation statute. Significantly, in Patterson v. Cox Enterprises, Inc., the court limited the reach of this statute to conduct arising out of "civil proceedings" in law or equity. Thus, the statute does not apply to conduct arising out of proceedings under the Workers' Compensation Act, which are administrative in nature. Although "the appeal to the superior court . . . brings the case into the judicial arena . . . [t]he appeal is not a civil proceeding within the scope of the abusive litigation statute but rather a review upon the record made in the administrative agency . . . ." The court based its conclusion on the express terms of the statute. The conclusion is also consonant with the common-law decisions, which hold, for example, that criminal proceedings and nonjudicial foreclosures cannot give rise to abusive litigation claims.

Because the abusive litigation statute is the exclusive remedy for claims filed on and after April 3, 1989, we may expect abusive litigation decisions arising out of the judicially-created abusive litigation tort first

384. See O.C.G.A. §§ 51-7-80 to -85 (Supp. 1992). In Talbert v. Allstate Ins. Co., 200 Ga. App. 312, 408 S.E.2d 125 (1991), the court affirmed dismissal of an abusive litigation claim against Allstate for failure to give the notice required by O.C.G.A. § 51-7-84(a) (Supp. 1992) directly to Allstate instead of to the attorney for its insured in the underlying case. Id. at 314, 408 S.E.2d at 127. The court, however, held the claim against Allstate was not barred by the fact that Allstate was not a party to the original litigation. Id. at 313, 408 S.E.2d at 126. "It took an active part in the continuation of the proceedings and thus could be named as defendant in an abusive litigation claim." Id.
388. 201 Ga. App. at 223, 411 S.E.2d at 86.
389. "Any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another shall be liable for abusive litigation . . . ." O.C.G.A. § 51-7-81 (Supp. 1992) (emphasis added).
enunciated in *Yost v. Torok* gradually to disappear. At the present time, however, they remain important, primarily for the judicial gloss they provide regarding what constitutes abusive litigation. For example, the trial court's denial of a motion for summary judgment generally constitutes a binding determination that the respondent's position was not frivolous or groundless. Of course, courts may decline to apply this rule in unusual cases as when the summary judgment motion was only on procedural matters and not directed at the claim's merits. Likewise, an order denying an interlocutory injunction that does not amount to a consideration of the merits does not preclude a later abusive litigation claim as a matter of law.

E. Fraud

For a tort claim based on fraud, courts will deny relief to one who fails to exercise reasonable diligence to protect himself and who relies upon the representations of others for matters about which he could have informed himself. As pointed out in *Tower Financial Services, Inc. v. Jarrett*, however, "the burden on a fraud claimant to protect himself by investigating the facts before proceeding with a transaction tends to diminish in proportion to the egregiousness of the alleged fraud." The court of appeals ruled that the jury was authorized to conclude that such fraudulent representation had occurred in *Hahne v. Wyllie*. In that case, defendant constructed a swimming pool in plaintiff's backyard and assured plaintiff that the pool construction would pose no problem for the operation of her septic tank. The evidence further indicated that defendant had removed a portion of the septic tank's drainage pipes during the pool construction, but assured plaintiff that the removal would not affect the tank. Plaintiff later experienced major problems with her septic tank that were attributable to the pool's construction and the drainage pipe removal. The court held that from this evidence the jury was author-
ized to find that defendant, who had special knowledge of pool construction, had made fraudulent statements to plaintiff in the course of constructing the pool for her.403 Likewise, in an action for fraud the injured party must have justifiably relied upon the defendant's representations.404 In Jones v. Ward,405 plaintiff claimed reliance upon a Department of Family and Children's Services employee's alleged representation that she would intercede to prevent plaintiff's eviction from his home.406 The court noted that according to the Department's own regulations a case worker could not take any action in an eviction proceeding, but could only process applications for assistance.407 Therefore, the court found that "[e]ven assuming the promises were made . . . [plaintiff] was not entitled to rely on such promises as they were beyond the powers conferred upon [the caseworker] . . ."408 The court in Hardage v. Lewis409 thwarted plaintiffs' fraud action against defendants concerning an allegedly negligent survey410 by a finding of no reliance on the representations of the survey. Plaintiffs, after being informed by the sellers prior to closing that a portion of the backyard property "might be taken by the Department of Transportation . . .,"411 did nothing to ascertain the existence of the Department's recorded easement. The court found that plaintiffs "clearly did not rely [on the survey] to determine the truth or falsity of the sellers' representations"412 and could not, after the fact, seek to blame the survey for their own lack of diligence in determining the Department's easement over their property.413

403. Id. at 813, 406 S.E.2d at 97. In two other cases decided during this survey period the court of appeals determined that plaintiffs failed to use due diligence to discover the alleged fraud. Lester v. Bird, 200 Ga. App. 335, 408 S.E.2d 142 (1991) (plaintiffs' failure to inspect crawl space of house before purchase at auction, which would have revealed termite and other damage, exhibited lack of due diligence and barred recovery); Metmor Fin., Inc. v. Jenkins, 199 Ga. App. 885, 406 S.E.2d 288 (1991) (plaintiff did not use due diligence by failing to inspect the real estate for obvious construction deficiencies before he purchased it).


406. Id. at 758, 412 S.E.2d at 577.

407. Id. at 759, 412 S.E.2d at 578.

408. Id. at 760, 412 S.E.2d at 578.


410. Plaintiffs' lender had hired defendants to prepare a survey of the property. The survey did not show the easement held by the Department of Transportation, but plaintiffs were not aware of the survey until the time of the closing. Id. at 632, 405 S.E.2d at 733.

411. Id.

412. Id. at 634, 405 S.E.2d at 734.

413. Id. "Appellants were damaged by their own reliance upon the sellers' representations and they have no viable claim against [defendants] simply because [defendants'] sur-
Finally, a party may be relieved from the requirement of justifiable reliance when a confidential relationship exists between the parties that, by law, supplies the element of “justification” to the transaction. \(^4\) In the case of *Tigner v. Shearson-Lehman Hutton, Inc.*,\(^4\) defendants allegedly mismanaged plaintiff’s funds, resulting in a loss of over one million dollars to plaintiff. Plaintiff had received his initial funds from a 1982 personal injury damage award. Plaintiff could not read and suffered mental deficiencies as a result of his previous injuries. Defendants were aware of plaintiff’s particular handicaps and agreed to manage his funds. Plaintiff alleged that defendants had failed to inform him that the agreements he had signed with them provided for compulsory arbitration.\(^4\) The trial court granted defendants' motion to compel arbitration,\(^4\) but the court of appeals reversed based on the trial court’s failure to consider the confidential relationship that existed between plaintiff and defendants as a result of plaintiff’s disabilities of which defendants were fully aware.\(^4\)

V. Damages

As in past years, the issue of punitive damages has, again, dominated damages litigation.\(^4\) The supreme court in *Bagley v. Shortt*\(^4\) had to determine the constitutionality of the statutory punitive damages capping provision\(^4\) and how this provision should be applied in a multiparty lawsuit. Succinctly finding this subsection to be constitutional,\(^4\) the court referred to the previously decided case of *Teasley v. Mathis*.\(^4\) In *Teasley* the court held that punitive damages could be statutorily eliminated


\(^4\) Id. at 713-14, 411 S.E.2d at 800-01.

\(^4\) In granting this motion, the trial court specifically found that plaintiff’s mental deficiencies did not excuse his failure to ascertain the contents of the contracts he had signed with defendants. *Id.* Compare *Gardiner v. McDaniel*, 202 Ga. App. 663, 415 S.E.2d 303 (1992) (plaintiff, who was laboring under no disabilities, was bound to exercise ordinary diligence to read and to verify contents of promissory note he signed with defendant).

\(^4\) 201 Ga. App. at 716, 411 S.E.2d at 802.


\(^4\) O.C.G.A. § 51-12-5.1(g) (Supp. 1992). This statute provides that “[f]or any tort action . . . in which the trier of fact has determined that punitive damages are to be awarded, the amount which may be awarded in the case shall be limited to a maximum of $250,000.00.” *Id.*

\(^4\) 261 Ga. at 762, 410 S.E.2d at 739.

entirely; therefore, in the present context no constitutional impediment existed for statutorily circumscribing such damages as set forth in section 51-12-5.1(g). The court then turned to the question of the interpretation of the statutory provision that "the amount which may be awarded in the case shall be limited to a maximum of $250,000.00." After noting that this language was somewhat ambiguous as written, particularly in the context of multiparty litigation, the court held that the $250,000.00 cap:

means that $250,000.00 is the maximum amount of money that the finder of fact may award to any one plaintiff as punitive damages—regardless of the number of defendants and regardless of the number of theories of recovery "arising out of the same transaction, occurrence, or series of transactions or occurrences."

The court in Metropolitan Atlanta Rapid Transit Authority v. Boswell further limited the scope of punitive damages by reversing a judgment from the court of appeals and holding that MARTA was not subject to the imposition of punitive damages. Although the majority held that punitive damage awards against MARTA "would seriously damage the public interest," Presiding Justice Smith, as the sole dissenter and

424. Id. at 564, 255 S.E.2d at 58.
425. 261 Ga. at 762, 410 S.E.2d at 739.
426. O.C.G.A. § 51-12-5.1(g).
427. 261 Ga. at 763 n.3, 410 S.E.2d at 739 n.3.
428. Id. The more prevalent question the courts are asked to determine is whether the evidence of a defendant's conduct in a particular situation is egregious enough to warrant the imposition of punitive damages, and this survey period was not lacking in such cases. See, e.g., Miles Rich Chrysler-Plymouth, Inc. v. Mass, 201 Ga. App. 693, 411 S.E.2d 901 (1991) (evidence of actual fraud and intentional violation of Georgia Fair Business Practices Act could support award of punitive damages); Cullen v. Novak, 201 Ga. App. 459, 411 S.E.2d 331 (1991) (evidence that defendant merely negligently ran red light could not support punitive damages award); Morales v. Webb, 200 Ga. App. 788, 409 S.E.2d 572 (1991) (punitive damage award not supported because lack of evidence showing actual knowledge of shortage of anesthesia); Georgia Kraft Co. v. Faust, 200 Ga. App. 686, 409 S.E.2d 247 (1991) (evidence that defendant's employees exercised little or no care to prevent damage to his trailer in their attempts to retrieve a forklift would support punitive damages award); Day v. Burnett, 199 Ga. App. 494, 405 S.E.2d 316 (1991) (evidence that defendant when involved in automobile collision was under the influence of alcohol, was travelling at an excessive speed, was following too closely, and failed to maintain a proper lookout for other vehicles, could support an award of punitive damages); Moore v. Harry Norman, Inc., 199 Ga. App. 233, 404 S.E.2d 793 (1991) (evidence of defendants' continued use of lock box key security system after knowledge of burglaries could support punitive damages award).
431. 261 Ga. at 427, 405 S.E.2d at 869.
432. Id. See also Ballard v. MARTA, 200 Ga. App. 880, 410 S.E.2d 49 (1991) (which followed this holding in Boswell).
champion of the underdog, characterized the majority’s holding as a “blatant example of judicial legislating,” and urged an application of MARTA’s enabling legislation which makes that entity liable for tortious injury “as any private corporation.” At the other end of the spectrum, the court in Hospital Authority v. Jones concluded that a punitive damage award does not necessarily have to bear a relationship to the general damages award in a particular case. In Jones, even though plaintiff’s injuries were comparatively relatively minor, the potential harm to others through defendant’s conduct was substantial and the punitive damages in that case, therefore, gave effect to the deterrent aspect of such damages. Finally, in Holman v. Burgess, the court of appeals considered the question of the scope of pretrial financial discovery in punitive damages cases. The court first determined that pursuant to section 51-12-5.1, evidence of defendant’s financial condition would be discoverable for punitive damages purposes, but expressed concern about the effects that unlimited discovery could have on an individual’s right to privacy. After reviewing cases from other jurisdictions, the court determined that evidence of personal financial resources would not be discoverable “absent an evidentiary showing (by affidavit, discovery responses, or otherwise) that a factual basis [exists] for [a] punitive damage claim.”

In other areas, the court in Read v. Benedict refused to allow a defense of voluntary payment to a third party to thwart plaintiff’s tort claim against defendant. Plaintiff had brought a malpractice claim against defendant wherein defendant, an attorney, in the process of a real estate closing, had allowed tax liens to attach to plaintiff’s family home. The court ruled that plaintiff’s payments to the Internal Revenue Service

433. 261 Ga. at 430, 405 S.E.2d at 871 (Smith, P.J., dissenting).
436. Id. at 614, 409 S.E.2d at 502-03.
437. Plaintiff was only slightly injured in a severe helicopter crash when defendant attempted to transport him to another hospital after having first brought him to one of its own hospitals, for revenue-producing reasons, instead of using a trauma center more suited for plaintiff’s initial injuries. Id., 409 S.E.2d at 502. See also Hospital Auth. v. Jones, 259 Ga. 759, 386 S.E.2d 120 (1989), for a more detailed accounting of the facts of this case.
441. 199 Ga. App. at 63, 404 S.E.2d at 146-47.
442. Id. at 64, 404 S.E.2d at 147.
444. O.C.G.A. § 13-1-13 (1982) provides that “[p]ayments of claims made . . . where all the facts are known . . . are deemed voluntary and cannot be recovered . . . .” Id.
to remove the liens did "not . . . give rise to a legitimate defense of voluntary payment." 446

Damages in a wrongful death action may be awarded for the full value of the decedent's life. 447 As proof of these damages, the court in Consolidated Freightways Corp. v. Futrell 448 stated that plaintiffs would be allowed to prove the amount of decedent's veteran's benefits as evidence of the economic component of the full value of life and would also be allowed to show church activities as evidence of the intangible component of the full value of life. 449

VI. CONCLUSION

The year 1951 marked the appearance of two significant American institutions: Mercer Law Review published its first Annual Survey of Georgia Law, and the Polka King, Lawrence Welk, 450 first broadcast his Champagne Music on television. 451 During the survey period, one of those landmarks passed from the scene with the death of Maestro Welk on May 17, 1992. 452 Although Champagne Music continues only in reruns, 453 the Georgia Survey bubbles on. That, to serious students of Georgia law, is truly "wunnerful, wunnerful."

446. Id. at 9, 406 S.E.2d at 492.
450. "He was middle America's hero, pop music's voice for the silent majority." Ernie Santosuosso, Welk's Rare Vintage: Good Taste, Professionalism, BOSTON GLOBE, May 19, 1992, at L59. "If the British rock invasion represented one side of the Generation Gap in the '60s, Welk stood way, way on the other side." Hal Boedeker, Welk Was Hallowed Family Ritual, Like Holiday Dinner, MIAMI HERALD, May 24, 1992, at I8.
451. See Lawrence Welk is Dead: From North Dakota Farm to Fame and Fortune, PHILA. DAILY NEWS, May 19, 1992, at 4.
452. "Last Sunday night, in Santa Monica, Calif., so great a distance from Strasburg, N.D., they turned off the bubble machine." Lawrence Devine, Remembering a Simple, Gentle Style: Lawrence Welk's Smile Warmed Lots of Hearts, DETROIT FREE PRESS, May 24, 1992, at G1.
453. "As long as there is videotape and people who like polkas and bubbly fox trots, we may always have Lawrence Welk . . . ." Id.