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Torts

Cynthia Trimboli Adams
Charles R. Adams III

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The renowned composer and dramaturge Richard Wagner assimilated several hundred years of German myth and legend into his epic “music drama” Lohengrin. Elsa, the paradigmatic damsel in distress, is miraculously rescued by the mysterious, sword-bearing Swan Knight, on the sole condition that, as the stranger solemnly enjoins in the passage quoted above, she never ask him his name or his lineage. The climax comes when Elsa, unable to still her doubts, demands to know her hero’s name. He reveals, “I am Lohengrin, knight of the Holy Grail.”
My power lies in my mystery," as he sweeps away and Elsa, overcome with grief, falls dead.  

In contrast to Elsa, our distress in dealing with the "legal Lohengrin" known as torts is not in knowing from whence it came, but rather in attempting to discern where it is going. To assimilate several hundred appellate cases into a coherent survey of Georgia tort law perhaps requires more of the abilities of the thaumaturge than the dramaturge. With the inspiration of the Holy Grail on some Montsalvat regrettably remote from our endeavors, we have had to fall back on Lohengrin's other source of strength: the cutting power of the sword (in this instance replaced by the delete key) to sweep away all but the most epic, or grievous, decisions. Unlike Wagner, however, we hope we have left our subject alive.

I. NEGLIGENCE

A. Premises Liability

In General. As usual, premises liability cases filled up a large portion of the court reports during the current survey period. The court of appeals repeatedly addressed the application of the "superior knowledge" rule in premises cases. "The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner... and not known to the person injured that a recovery is permitted." Although the contemporary formulation of the superior knowledge rule coalesced in the landmark slip and fall case of Alterman Foods, Inc. v. Ligon, the court of appeals during the survey period applied it to many other types of premises-related injuries, denying recovery to plaintiffs who were injured

5. See id. act 3, sc. 3.
8. See infra notes 47-66 and accompanying text.
by alleged construction defects, \(^{10}\) and by alleged premises-based distractions. \(^{11}\) The court also applied the rule to tenants, \(^{12}\) holding in \textit{Rowland v. Tsay} \(^{13}\) that even if the hazardous condition arguably violated applicable building codes, a situation which can sometimes, \(^{14}\) but not always, \(^{15}\) make the landlord guilty of negligence per se, \(^{16}\) the tenant's equal knowledge of a danger (defective flooring), which she had avoided in the past, precluded a recovery from the landlord. \(^{17}\) The court commented that "[t]o say otherwise would be to relieve tenants of any duty of care and impose absolute liability upon landlords . . ." \(^{18}\) a situation the court was loath to countenance. In \textit{Amberley Suite Hotel v. Soto}, \(^{19}\) however, the court declined to equate "knowledge of the defect" in the premises with the legally decisive "knowledge of the danger." \(^{20}\) Plaintiff in \textit{Soto} was injured when a waterlogged piece of sheetrock fell from a ceiling onto his head. He was undisputedly aware of the existence of the defect, and, in fact, was placing a water bucket under the ceiling. \(^{21}\) In view of plaintiff's lack of experience with sheetrock and his inability to examine the extent of the structural weakness, "[t]he conclusion as a matter of law that [he] appreciated the danger of the ceiling falling and injuring him simply because he saw the bulge is unwarranted," \(^{22}\) said the court. \(^{23}\)


17. 213 Ga. App. at 682, 445 S.E.2d at 824.

18. Id. (quoting Hall v. Thompson, 193 Ga. App. 574, 574, 388 S.E.2d 381, 383 (1989)).


20. Id. at 74, 446 S.E.2d at 779.

21. Id. at 73, 446 S.E.2d at 779.

22. Id. at 74-75, 446 S.E.2d at 779-80.
In another application of the superior knowledge rule, the court in *Strickland v. Howard* determined that the defendant employer was not liable for breach of his statutory duty to furnish safe machinery because of the undisputed evidence that plaintiff had equal knowledge of the defect in the equipment that injured him. In that situation, Georgia has actually codified the superior knowledge rule in Official Code section 34-7-23, and the court relied on that section to limit plaintiff’s recovery. Plaintiff succeeded, however, in establishing his safe work place claim. Such a claim is premised upon the rule that “[a]n owner or occupier of land has a duty to exercise ordinary care to keep his premises safe for such persons, including workers who have been hired to work on the premises, as may lawfully come on the premises at the owner’s expressed or implied invitation.” The court in *Strickland* concluded that this rule gave rise to a duty on the part of the employer to inspect the premises for possible hidden dangers, a duty that the defendant employer potentially breached in that case.

In what once would have gone without saying, the en banc court in *Scoggins v. Brown* was constrained to hold that “[w]here parents are watching their child play on someone else’s land and the parents are aware of a dangerous condition, it is the parents’ duty, not that of the landowner, to ensure that the child avoids the danger.” This is a reminder that some premises-related duties are simply nondelegable.

**Licensees.** By statute in Georgia, the owner of a premises owes a lesser duty to one who is on the premises in the status of a licensee. The most typical type of licensee is the social guest. During the survey period, the court held that children jumping on a neighbor’s trampoline and swimming in a neighbor’s pool were licensees, but it

23. Id.
29. Id. at 309-09, 447 S.E.2d at 639.
32. Id. at 308-09, 447 S.E.2d at 639.
34. Id. at 602, 451 S.E.2d at 479.
36. See GEORGIA TORTS, supra note 16, § 4-4.
refused to say as a matter of law that a plaintiff who was visiting defendant, a good friend of his (at least prior to the events giving rise to this lawsuit), and giving him a hand in building a deck, was a licensee as opposed to an invitee.\textsuperscript{39}

One situation in which a social host may be held liable is when he is aware of a dangerous activity going on at his party and fails to stop it.\textsuperscript{40} This rule, however, only applies to "innocent guests"—that is, those who are not participating in the dangerous activity.\textsuperscript{41} Defendant in Driver v. Leicht,\textsuperscript{42} who was hosting a party at which everyone had free access to beer on tap,\textsuperscript{43} escaped liability under this rule when one of his guests carved up the face of plaintiff,\textsuperscript{44} who was also a guest, in a fight plaintiff started over a missed pool shot.\textsuperscript{45} "Even if a social host is negligent," held the court, "he is not liable to an injured guest if that guest is an initiator of or active participant in the sequence of events resulting in his injury."\textsuperscript{46}

\textbf{Slip and Fall.} During almost a decade of surveying torts cases for Mercer Law Review, these writers have empirically observed that only about ten percent of the slip and fall cases in the appellate courts are favorable to the plaintiff.\textsuperscript{47} This led these writers, in last year's torts survey, to ask, "what does the demand reflected by all of these claims indicate about the supply of justice? Are there too many frivolous claims in the area of premises liability, or is the legal standard too high?"\textsuperscript{48} Perhaps the appellate courts are beginning to ask the same question, for even though the current survey period yielded the typical number of slip and fall decisions, about thirty, there was a dramatic increase in the number that resulted in a finding that a jury question existed.\textsuperscript{49} No fewer than ten decisions, one-third of the total, went for the plaintiff, and during the survey period, every appellate judge in Georgia, with the

\begin{thebibliography}{99}
\bibitem{41} \textit{Id.}
\bibitem{43} \textit{See id. at} 696, 452 S.E.2d at 167 (McMurray, P.J., dissenting).
\bibitem{44} \textit{See id.}
\bibitem{45} \textit{Id. at} 694, 452 S.E.2d at 166.
\bibitem{46} \textit{Id. at} 695, 452 S.E.2d at 166.
\bibitem{49} \textit{See infra} note 51.
\end{thebibliography}
lone exception of Judge Andrews,50 cast at least one vote for a slip and fall plaintiff to go to a jury.51

Not every decision, however, was a plaintiff's victory, as illustrated by the analysis in Fitzgerald v. Storer Cable Communications, Inc.52 In that case, plaintiff was injured when he tripped over a television cable defendant had left across his driveway.53 "This is not a typical 'slip and fall' case where liability is premised on ownership or control of the premises," said the court, "[w]e must apply traditional negligence principles to the facts."54 The court held that defendant had an affirmative duty to act to prevent injury from the cable, because "someone might be injured ... by tripping over the cable despite using ordinary care."55 Nevertheless, the court affirmed summary judgment for defendant, reasoning that plaintiff's knowledge of the hazard (the cable had been there for about twenty months) made his own failure to exercise care for his safety the proximate cause of his injuries.56

The supreme court's lone foray into the slip and fall area during the survey period was Barentine v. Kroger Co.57 Reversing the court of appeals decision,58 the high court held that, despite plaintiff's admission that he wasn't looking where he was going, his added explanation that he was looking for defendant's cashier to tell him he was ready to check out was "some evidence that [he] exercised reasonable care for his own safety in approaching the check-out counter."59

53. Id. at 873, 446 S.E.2d at 756.
54. Id.; 446 S.E.2d at 757.
55. Id. at 873-74, 446 S.E.2d at 757.
56. Id. at 874-75, 446 S.E.2d at 758.
59. 264 Ga. at 225, 443 S.E.2d at 486.
The court of appeals' reception of *Barentine* has been decidedly chilly.  

For example, Judge Blackburn, the author of the court of appeals opinion in *Barentine*, wrote, "[h]ow the passive presence of a cashier can constitute ‘the setting up of a distraction, by a sign or conduct, which will so divert the customer’s attention as to be the proximate cause of his injury . . . ’ . . . is not explained." That court rather summarily distinguished *Barentine* in several cases denying recovery. Furthermore, in *Sheriff’s Best Buy, Inc. v. Davis*, the court, speaking again through Judge Blackburn, seemed constrained to find a jury issue against its better judgment because of *Barentine*. In *Davis*, plaintiff fell while responding to a greeting from the store manager. Because of *Barentine*, this made the difference to the court of appeals:

In the subject case, the store employee spoke to Davis, while in *Barentine*, there was no communication generated by the store employee, he was simply the focus of Barentine’s attention. If the facts of *Barentine* establish “some evidence” that Barentine exercised reasonable care for his own safety, then clearly Davis constitutes a much stronger case of such evidence.

**B. Malpractice**

**In General.** For the fourth consecutive year, the expert witness affidavit requirement of Code section 9-11-9.1 consumed a disproportionate amount of judicial resources. These writers’ dismay with the state of the law in this area is well-documented, and, happily, during the last year a majority of the court of appeals appears to have come to

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64. *Id.* at 291, 450 S.E.2d at 320.

65. *Id.* at 290, 450 S.E.2d at 319.

66. *Id.* at 291, 450 S.E.2d at 320.


68. *See, e.g.*, 1993 *Torts*, supra note 47, at 418 (“[S]ection [9.1] is useless, self-defeating mess. It creates far more problems than it solves, and it should be repealed . . . “).
share at least a degree of that dismay. In *Johnson v. Brueckner*, the court of appeals stated the following in a panel decision requiring an expert witness affidavit even when the defendant doctor specifically admitted in the medical records that he was negligent:

> [E]ven though justice may not be served and plaintiff will be denied her day in court, by our application of said statute in this case, [w]e are not empowered to amend the lawful acts of the legislature. Perhaps the legislature should reconsider the appropriateness of O.C.G.A. § 9-11-9.1, in view of its effect on the function of the courts, which is to dispense justice, and the unquestioned ineffectiveness of the statute in reducing litigation. In excess of 100 cases involving O.C.G.A. § 9-11-9.1 have reached the appellate courts of Georgia since its inception in 1987.

Later, in *Sisk v. Patel* a case decided after the close of this survey period, six of the court of appeals' nine judges joined in the following resounding condemnation of the statute:

> The history of O.C.G.A. § 9-11-9.1 in the appellate courts has shown beyond a reasonable doubt that it is only with great difficulty made workable in the practical arena of litigation, and has largely failed to achieve its purpose of reducing frivolous litigation. Rather, it has created an added layer of motions regarding the sufficiency of affidavits preceding the motions for summary judgment on the merits. Rather than continuing to interpret and reconcile subsection after subsection added to the statute by the legislature in attempts to fix what is fundamentally broken, the better approach is to construe pleadings liberally to do substantial justice in accordance with O.C.G.A. § 9-11-8(f).

Perhaps in light of the fact that it has now joined the academic commentators in public criticism of this statute, the court of appeals

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71. Id. at 53-54, 455 S.E.2d at 78.
73. This article surveys cases published in the advance sheets between June 1, 1994 and May 31, 1995.
74. 217 Ga. App. at 159-60, 456 S.E.2d at 720.
during the survey period made several efforts to alleviate some of the grosser injustices occasioned by this loose cannon on the deck of Georgia law. Space does not permit a comprehensive survey of these decisions, but the following are a significant sample.

The most salutary development came in two cases involving Orkin Exterminating Company. In *Moritz v. Orkin Exterminating Co.*, the court held that if the statute of limitations has not expired on a professional malpractice claim, a plaintiff who fails to file a section 9.1 affidavit with the original complaint may cure the defect by dismissing the complaint and refiling it under the renewal statute. The court rejected the argument that this procedure violated section 9.1(e)'s prohibition against curing defective affidavits by amendment, because of the language in subsection 9.1(f) which allows dismissal and refiling within the limitations period.

Subsequently, a different panel of the court of appeals approved the same procedure in *Orkin Exterminating Co. v. Carder.* The court noted that "the Carders' first suit was not void but merely voidable, and their renewal suit was free of the defect complained of by Orkin." Because both *Moritz* and *Carder* involved the complete failure to attach an affidavit, there does not appear to be any principled reason why the rule of those cases would not apply to cure a defective affidavit also.

The Georgia Supreme Court also weighed in on the side of a liberal construction of section 9.1 in *Handson v. HCA Health Services, Inc.* In that case, plaintiffs had used the affidavit of an allopathic physician in a malpractice action against an osteopath involving a pediatric death in an emergency room. Although previous decisions had established that a member of one school of medical practice was competent to testify to the negligence of a member of a different school of practice, provided the methods of treatment were the same, the issue in *Handson* concerned the burden of establishing the requisite professional overlap.

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81. Id. at 259, 450 S.E.2d at 219.
82. 264 Ga. 293, 294, 443 S.E.2d 831, 833 (1994).
83. Id. at 294, 443 S.E.2d at 832.
of expertise.\textsuperscript{85} The court of appeals\textsuperscript{86} had held that the affidavit must contain evidence on this issue, and that the affidavit was insufficient for failing to do so.\textsuperscript{87}

In reversing, the supreme court alluded to the basic public policy reasons underlying section 9.1: "[T]o reduce the number of frivolous malpractice suits being filed, not to force a plaintiff to prove in his pleadings a prima facie case entitling him to a recovery."\textsuperscript{88} The court further affirmed that, "even if an unfavorable construction of the affidavit is possible," it "should be construed most favorably to the plaintiff and all doubts resolved in his favor . . . ."\textsuperscript{89} Following these principles, the court held that the affidavit was sufficient: "There is nothing to suggest that an osteopathic physician who practices emergency room medicine and an allopathic physician who practices in the same field are trained to treat emergency patients [of this type] differently."\textsuperscript{90} The decision in \textit{Handsen}, then, appears to put the burden on a defendant who seeks to invalidate an affidavit to make an affirmative showing that there is no professional overlap of expertise. This would invoke the procedure prescribed in \textit{Hewett v. Kalish},\textsuperscript{91} which allows the plaintiff to present extrinsic evidence of his expert's qualifications if the affidavit is challenged, and allows the trial court then to decide the issue according to ordinary summary judgment principles.\textsuperscript{92}

Almost all of this mighty expenditure of judicial resources could be reduced to bavardage by the simple expedient of allowing amendments to section 9.1 affidavits on terms similar to those under which amendments to pleadings are allowed after the entry of a pretrial order, when the test is "to prevent manifest injustice."\textsuperscript{93} Surely the Legislature has enough faith in the ability of trial judges to police frivolous malpractice suits that it could take this wise step to close down this jurisprudential sideshow.

\begin{itemize}
\item \textsuperscript{85} 264 Ga. App. at 294, 443 S.E.2d at 832-33.
\item \textsuperscript{87} 210 Ga. App. at 501, 436 S.E.2d at 520-21.
\item \textsuperscript{88} 264 Ga. at 294, 443 S.E.2d at 833.
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.} at 295, 443 S.E.2d at 833.
\item \textsuperscript{91} 264 Ga. 183, 442 S.E.2d 233 (1994).
\item \textsuperscript{92} \textit{Id.} at 185, 442 S.E.2d at 235.
\end{itemize}
Medical Malpractice. Whether an action is one for "medical malpractice," as distinguished from ordinary negligence, breach of contract, or some species of intentional wrong was fodder for several survey period decisions. Plaintiff in *Gale v. Obstetrics & Gynecology, P.C.* complained that defendants' failure to advise her that her baby had Down's Syndrome "deprived [her] of the opportunity to make an informed decision concerning the course of [her] pregnancy which would have included the option of a therapeutic abortion." The court of appeals reasoned that "[t]hough couched in terms of breach of contract, breach of confidential relationship, and negligence, the cause of action set forth in [plaintiffs'] complaint is, in reality, one for wrongful birth," a species of medical malpractice action that the Georgia courts have repeatedly declined to authorize.

In the more conventional medical malpractice actions during the survey period, the court of appeals dealt with the applicability of the "hindsight" rule: "[A] medical malpractice defendant cannot be found negligent on the basis of hindsight if the initial assessment was made in accordance with reasonable standards of medical care." The issue in such cases, according to the whole court in *Horton v. Eaton,* is "whether the negligence claim is based on later acquired knowledge or information not known or reasonably available to the defendant.

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94. O.C.G.A. § 9-11-8(a)(1993) defines an "action for medical malpractice" both by the types of treatment provided ("health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care . . .") and by the source of the provider ("any public or private hospital, nursing home, clinic, hospital authority, facility, or institution . . ."). See generally GEORGIA TORTS, supra note 16, § 5-2.


99. *Id.* at 615, 445 S.E.2d at 367.

100. *Id.*


physician at the time the medical care was rendered.\textsuperscript{105} The court seemingly limited the "reasonably available" prong of the hindsight rule in \textit{Stokes v. Candler Hospital, Inc.}\textsuperscript{106} Plaintiff's four-year-old son died after defendant's emergency room physician, Dr. Ng, failed to diagnose acute ischemic necrosis secondary to congenital malformation of the mesentery.\textsuperscript{107} Instead, Dr. Ng merely discharged the child after giving him injections that stopped his vomiting and made him sleep.\textsuperscript{108}

Plaintiff sought to hold the hospital strictly liable under the provisions of the federal Emergency Medical Treatment and Active Labor Act,\textsuperscript{109} commonly referred to as the "Anti-Patient Dumping Act."\textsuperscript{110} Under that Act, a hospital may be strictly liable if it fails to stabilize or otherwise give appropriate treatment to a patient in an emergency medical condition.\textsuperscript{111} The court of appeals in \textit{Stokes} adopted an "actual knowledge" test concerning the existence of the emergency medical condition: "[s]tabilization of an emergency medical condition under the Act refers only to those . . . conditions actually diagnosed . . . [i]t is undisputed that when the child was discharged he had stopped vomiting and was drowsy (albeit delirious) or else 'he was sleeping most of the time,' due to the injections prescribed by Dr. Ng."\textsuperscript{112} Because defendant stabilized the emergency medical condition that the child presented, there was no basis for liability under the Act.\textsuperscript{113}

By adopting the actual knowledge test for cases under the Anti-Dumping Act, the court has thus applied a different standard to those cases than to ordinary medical malpractice actions. Perhaps this can be justified, or at least explained, by the heightened liability standard that applies to cases under the Act.\textsuperscript{114}

The supreme court's only medical malpractice opinion during the survey period dealt with one of those procedural technicalities that this

\begin{footnotesize}
\begin{enumerate}
\item[105.] Id. at 807, 452 S.E.2d at 545 (emphasis added). \textit{Compare} Morse v. Flint River Community Hosp., 215 Ga. App. 224, 227, 450 S.E.2d 253, 257 (1994) (discrepancy between the physician's testimony and the medical records about when he learned of plaintiff's worsening condition supported denial of defendant's summary judgment motion).
\item[107.] Id. at 132, 453 S.E.2d at 504.
\item[108.] Id.
\item[110.] 216 Ga. App. at 133 n.1, 453 S.E.2d at 504 n.1 (citing Baber v. Hospital Corp. of America, 977 F.2d 872, 873 n.1 (4th Cir. 1992)).
\item[111.] 42 U.S.C. § 1395dd(b)(1). \textit{See} Urban v. King, 43 F.2d 523, 525 (10th Cir. 1994).
\item[112.] 216 Ga. App. at 134, 453 S.E.2d at 505.
\item[113.] Id. at 134-35, 453 S.E.2d at 505.
\item[114.] \textit{See} 42 U.S.C. § 1395dd(b)(1); \textit{Urban}, 43 F.2d at 525.
\end{enumerate}
\end{footnotesize}
area of law is so full of. In Paulin v. Okehi, the defendant doctor produced his medical records during discovery and subsequently acknowledged their authenticity during his deposition. When he moved for summary judgment, plaintiffs responded with an expert affidavit based solely on those records. The court of appeals affirmed the trial court's grant of summary judgment based on the general rule that uncertified medical records cannot be used to support a summary judgment affidavit. Holding that "[i]t is the policy of this Court whenever possible to seek 'substantial justice and judicial economy rather than strict compliance with procedural technicalities,'" the supreme court concluded that defendant's own authentication of the records satisfied the summary judgment requirements. "We do not imply," warned the court, "that uncertified or unsworn hospital records alone will satisfy the requirements . . . ."

**Legal Malpractice.** Last year's torts survey discussed the "somewhat sordid" case of Tante v. Herring, in which the supreme court held that Tante, a lawyer who seduced his client after acquiring information about her sex life, and who subsequently infected her with a venereal disease that she passed on to her husband, was liable for breach of fiduciary duty. Although it acknowledged that Tante's conduct breached a canon of the Georgia Code of Professional Responsibility ("CPR"), and subsequently disciplined him for that, the court expressly declined to "decide whether evidence of a violation of the disciplinary rules is relevant in a claim against a lawyer for legal

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115. As one Pennsylvania judge noted about the guilty plea colloquy in criminal cases: "[i]t has become almost symbolic of the worship of technicality over substance, and is, where not ridiculous, tragic." Commonwealth v. Shaffer, 446 A.2d 591, 598 (Pa. 1982) (McDermott, J., concurring).


117. Id. at 605, 449 S.E.2d at 292.

118. Id.


121. Id. at 605 n.1, 449 S.E.2d at 292 n.1.


malpractice or breach of fiduciary duty.” Instead, the court reached that issue with a vengeance in its landmark and potentially landscape altering decision Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C. In Allen, the court for the first time allowed the CPR to be admitted in a legal malpractice action as evidence of the standard of care. Although Presiding Justice Benham’s concurrence ably analyzed the potential adverse consequences of this decision on legal ethics and professionalism, that is beyond the scope of this article, and we must confine ourselves to consideration of the tort law aspects of Allen.

The court adopted what it considered to be the majority rule in the country, that “treats professional ethical standards as evidence of the common law duty of care,” without establishing negligence per se or even a presumption of negligence. Apparently, Allen retains the

127. 264 Ga. at 696 n.5, 453 S.E.2d at 688 n.5.
129. Id. at 376, 453 S.E.2d at 721.
130. See id. at 377-82, 453 S.E.2d at 722-25 (Benham, P.J., concurring).
132. See id. (citing Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses, 107 HARV. L. REV. 1547, 1567 (1994)).
133. The court made the following somewhat curious observation: Most courts do not hold that violation of the ethical guidelines creates a presumption of negligence, although they do permit discussion of such a violation at trial as some evidence of negligence. Expert testimony from an ethics specialist may thus be helpful in establishing the appropriate standard of care. Id. n.4 (quoting Developments, supra note 151, at 1567) (emphasis added). Does this mean that there are some cases in which the court feels it may not be helpful; that introduction of the ethical rule alone would be sufficient to support a jury verdict of negligence? If “ethics is that which is required,” why is introduction of the relevant ethical rule not tantamount to calling the entire State Bar of Georgia as expert witnesses? Compare Francis v. Reynolds, 215 Ga. App. 418, 418, 450 S.E.2d 876, 877 (1994), in which the court of appeals held that the findings of the Georgia Board of Dentistry would not be admissible in a malpractice action arising out of the same facts, because it would relieve plaintiff of her legal burden of proving at trial the applicable standard of care and defendant's deviation from it. The court in Francis concluded with the following statement that appears to be at odds with the rationale of Allen:

Moreover, we do not think this harm could be cured even if the jury was instructed that it was free to reject the findings of the Board on the standard of care issue. At a minimum the jury would give the Board’s findings the same weight as it would that of testimony offered by expert witnesses. This would clearly be prejudicial to defendant, who would have no opportunity to cross-examine the members of the Board as it would other experts testifying at trial. Id. at 419, 450 S.E.2d at 877.
general requirement for proof by expert testimony of the standard of care and the defendant’s deviation therefrom, and the court further limited the sweep of its holding by the requirement that the “Bar Rule [in question] must be intended to protect a person in the plaintiff’s position or be addressed to the particular harm suffered by the plaintiff.”

The Georgia Supreme Court in Allen has taken on an extremely delicate balancing problem. On the one hand, as Justice Benham recognized, the decision presents the risk of treating the legal profession worse than “professions with little or no code of ethics.” “On the other hand, given the court’s acknowledgment that lawyers’ (e)ethical rules . . . ‘can be regarded as a subspecies of legislation—rules that differ from law only in that their enforcement is relatively informal,’ the court has arguably treated negligent attorneys better than other tortfeasors whose conduct violates a statute, ordinance, or regulation and therefore constitutes negligence per se.” It remains to be seen how the court will resolve the legal dilemma it has here created.

II. IMPUTED AND RELATIONAL LIABILITY

A. Alcohol

In Ihesiaba v. Pelletier, the court of appeals affirmed the applicability of Georgia’s statutory “dram shop” scheme to employees in a somewhat offbeat factual setting. Defendant held a company Christmas party at which everyone celebrated rather freely. Defendant hired plaintiff, a limousine operator, to take him and several of the boys from the party to a local pub for further drinks. Unfortunately, things got out of hand and the pub owners found it necessary to throw the boys

135. 265 Ga. at 377, 453 S.E.2d at 721-22.
136. Id. at 381, 453 S.E.2d at 724 (Benham, P.J., concurring).
137. Id. at 377 n. 5, 453 S.E.2d at 721 n.5 (quoting G. HAZARD, ETHICS IN THE PRACTICE OF LAW 2 (1978), reprinted in G. HAZARD & S. KENIAH, THE LAW AND ETHICS OF LAWYERING (1990)).
out. Defendant paid plaintiff to take the boys home, and, at some point on the way, the boys worked plaintiff over, slicing his cornea in two.\(^{142}\)

The court of appeals, holding the statutory scheme of liability\(^{143}\) applicable to employers,\(^{144}\) went on to affirm the trial court's ruling that defendant had discharged his duty by arranging for the employees to be transported home to keep them from driving.\(^{145}\) Defendant owed no duty to plaintiff to control the employees in their conduct outside the scope of their employment, said the court.\(^{146}\) Nor was this third-party criminal attack on plaintiff reasonably foreseeable to defendant, it concluded.\(^{147}\)

### B. Master and Servant—Workers' Compensation Bar

The general statutory bar to an injured employee’s tort recovery against an employer\(^{148}\) seemingly was expanded in *Hennly v. Richardson*.\(^{149}\) Plaintiff in that case sought to recover from her employer for battery and intentional infliction of emotional distress based on her allegations that defendant Hennly, a co-worker, deliberately directed his pipe smoke at her.\(^{150}\) Despite the fact that prior cases had held workers' compensation immunity did not shield either intentional torts\(^{151}\) or nonphysical injuries,\(^{152}\) the supreme court, adopting a broad reading of the compensation bar,\(^{153}\) held that plaintiff's problems were a part of her work environment: "[T]hough Hennley's actions may have been, on occasion, intentional, those actions, when viewed in the context of the complaint and the broad scope of [Code section] 34-9-
1995] Torts 327

III. Torts DEFENSES

A. Proximate Cause Defenses

The supreme court in Mixon v. City of Warner Robins granted certiorari to the court of appeals in that case for the purpose of determining whether a police officer's pursuit of a fleeing criminal suspect can be considered the proximate cause of injuries sustained by a third party from a collision with the fleeing suspect's vehicle. The high court first analyzed this question from the mandates set forth in Code section 40-6-6, which provides that the traffic violation exceptions accorded to the operation of emergency vehicles do not relieve the drivers of such vehicles from "the duty to drive with due regard for the safety of all persons." As a result of this analysis the court concluded that when an officer's act of pursuit is performed without the requisite due regard for the safety of others, he may be found liable for any injuries inflicted upon a third party by the suspect under chase. Thus, in these circumstances the intervening acts of the fleeing criminal did not break the necessary chain of causal events.

The issue of proximate cause most frequently presents itself in relation to the foreseeability of intervening criminal conduct on a particular premises. During this survey period the court deemed the foreseeability issue, which can translate into liability for the premises owner, to be a

154. Id. This whole scenario, of course, should instantly remind every reader of Macbeth's second-guessing his plot to murder King Duncan: "And pity, like a naked new-born babe... shall blow the horrid deed in every eye...." William Shakespeare, Macbeth, act 1, sc. 7 (Signet Classic ed., Signet Books 1963) (1606).


157. 264 Ga. at 385, 444 S.E.2d at 763.

158. O.C.G.A. § 40-6-6 (1994).

159. 264 Ga. at 386-87, 444 S.E.2d at 763-64. See O.C.G.A. § 40-6-6(d) (1994).

160. 264 Ga. at 388, 444 S.E.2d at 764. It should be noted that in response to Mixon, the Georgia General Assembly in 1995 amended O.C.G.A. § 40-6-6 (1994), to provide that when a law enforcement officer is pursuing a fleeing suspect and that suspect causes injury to another person, the "officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit." O.C.G.A. § 40-6-6(d)(2) (Supp. 1995).

161. Id.
jury question in *Days Inn of America, Inc. v. Matt.* In that case, the court held that an armed robbery in the hotel parking lot was substantially similar to numerous other crimes committed in the same area. Likewise, in *Killebrew v. Sun Trust Banks, Inc.*, which involved an attempted armed robbery at an automatic teller location, the court found potential liability for the premises owner where a prior similar incident had occurred.

**B. Limitation of Actions**

The case of *Love v. Whirlpool Corp.* presented the supreme court with a question concerning the constitutionality of Georgia's products liability statute of repose that bars all strict liability and negligence complaints not brought within ten years from the alleged defective product's first sale for use or consumption. The court likened the classifications presented in this statute to those of the medical malpractice statute of repose passed upon during 1993 in *Craven v. Lowndes County Hospital Authority,* and predictably found them to be neither arbitrary nor unreasonable. Concerning this same statute of repose, however, the high court in *Chrysler Corp. v. Batten* held that failure-to-warn causes of action are excluded from the limitations imposed by this statute, "thereby precluding [its] use . . . to relieve manufacturers of their liability for failing to warn of a danger arising from the use of a product whenever that danger becomes known to the manufacturers."

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163. *Id.* at 236, 454 S.E.2d at 508.
165. *Id.* at 160, 453 S.E.2d at 753. In the following survey period cases, the lack of foreseeability of the third party's conduct broke the causal chain of liability: *Ritz Carlton Hotel Co. v. Revel,* 216 Ga. App. 300, 454 S.E.2d 183 (1995) (no previous incidents of violent crime committed against anyone on hotel premises); *J.C. Penny Co. v. Spivey,* 215 Ga. App. 680, 452 S.E.2d 191 (1994) (previous purse snatching in parking lot not substantially similar to theft at mall entrance); *Ihesiaba v. Pelletier,* 214 Ga. App. 721, 448 S.E.2d 920 (1994) (no evidence shown that defendant knew that intoxicated persons had physically attacked anyone or had any ill will toward plaintiff).
168. 264 Ga. at 703, 449 S.E.2d at 605.
169. O.C.G.A. § 9-3-71(b) (Supp. 1995).
173. *Id.* at 727, 450 S.E.2d 213. This holding was predicated upon the following language in O.C.G.A. § 51-1-11(c) (Supp. 1995): “Nothing contained in this subsection shall
As in Wright v. Robinson, in which the supreme court found that the medical malpractice statute of repose discussed above barred a renewal action brought after its expiration, in Love the court similarly found that the products liability statute of repose acts as a bar to any and all such renewal actions. The court of appeals further noted in a case of first impression, Gwinnett Place Associates, L.P. v. Pharr Engineering, Inc., that a statute of ultimate repose will serve to thwart a third-party complaint for indemnification which is brought after the expiration of the applicable period of repose.

Two medical malpractice cases decided during the survey period, Beck v. Dennis and Bynum v. Gregory, found a jury question to exist concerning the well-settled principle that a physician's fraud in dealing with a patient will prevent the applicable statute of repose from insulating the physician from liability. In Beck, defendant doctor admitted that he knew a piece of nasal packing had been left in plaintiff Beck's nose following facial surgery he had performed, but he never informed Beck or any of Beck's other doctors about this condition. Seven years (and many sinus problems) later, another physician discovered and removed the offensive packing. Defendant in Bynum, in response to Bynum's direct questioning, gave Bynum a false diagnosis of spinal meningitis in reference to her infant daughter's condition at birth. Sixteen years later Bynum learned from another physician that her daughter had never had spinal meningitis, but that her problems resulted from a brain injury due to a lack of oxygen at birth. The trial court's grant of summary judgment in favor of defendants was reversed in both of these cases. "The statute of ultimate repose should not [be allowed to] provide an incentive for a doctor or other medical professional to conceal his or her negligence with the

relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer." 264 Ga. at 727, 450 S.E.2d at 213.

177. 264 Ga. at 705-06, 449 S.E.2d at 607.
179. Id. at 55, 449 S.E.2d at 891.
183. 215 Ga. App. at 729, 452 S.E.2d at 206.
184. 215 Ga. App. at 432-33, 450 S.E.2d at 841-42.
assurance that after five years such fraudulent conduct will insulate him or her from liability. The sun never sets on fraud.\textsuperscript{185}

The statutory prerequisite to bringing a claim against a municipality is the giving of written notice of the claim to the governing authority within six months from the date of the accrual of the cause of action.\textsuperscript{186} A problem ensued in \textit{City of Chamblee v. Maxwell}\textsuperscript{187} when plaintiff sought to bring a suit against defendant municipality for a continuing trespass and nuisance that caused property damage more than six months prior to the giving of the required ante litem notice.\textsuperscript{188} Although plaintiff filed his complaint within the applicable four-year limitations period,\textsuperscript{189} the court specifically held that

\begin{quote}

a property owner who incurs damage as a result of a continuing nuisance or trespass maintained by a municipality is entitled, within the four-year period of limitations, to recover only those damages incurred during the six months preceding the giving of [the ante litem] notice. The recovery of any damages incurred prior thereto would be barred, where no timely [ante litem] notice of a claim therefor was given . . . .\textsuperscript{190}
\end{quote}

This case overruled both \textit{Vickers v. City of Fitzgerald}\textsuperscript{191} and \textit{City of Gainesville v. Moss}\textsuperscript{192} to the extent that their rulings were inconsistent with the ruling set forth above.\textsuperscript{193}

Because there is no "discovery rule" in Georgia for property damage claims, the statute of limitations for such causes of action begins to run on the date the wrong is committed regardless of when the injured party discovers the wrongdoing.\textsuperscript{194} The Eleventh Circuit Court of Appeals in \textit{Tucker v. Southern Wood Piedmont Co.}\textsuperscript{195} ruled, however, that for property damage due to toxic substance pollution, federal law mandates a limitations commencement date of the time when a plaintiff knows or reasonably should know that the damages incurred resulted from

\begin{itemize}
\item 187. 264 Ga. 635, 452 S.E.2d 488 (1994).
\item 188. \textit{Id.} at 635, 452 S.E.2d at 489.
\item 189. See O.C.G.A. § 9-3-30 (1982).
\item 190. 264 Ga. at 637, 452 S.E.2d at 491.
\item 193. 264 Ga. at 638, 452 S.E.2d at 491.
\item 195. 28 F.3d 1089 (11th Cir. 1994).
\end{itemize}
contamination by a hazardous substance.\textsuperscript{196} Thus, when determining the applicable statute of limitations for this narrow range of state property damage claims, federal law, in effect, now imposes a discovery rule.

Finally, it should be noted that the 1995 Georgia General Assembly gave some good news to plaintiffs with injuries compensable by both workers' compensation benefits and third party tort claims.\textsuperscript{197} Under the old law such plaintiffs were required to bring their personal injury suits against third parties within a statutorily-shortened one year period or suffer a forced assignment of the claim to their employers.\textsuperscript{198} The amended version gives a plaintiff the full benefit of the applicable limitations period in which to bring his third-party claim, but still allows the employer (with notice to the plaintiff) to bring the claim if the plaintiff has not done so within one year from the injury date.\textsuperscript{199} In addition, the legislature expressly stated that these new provisions would apply to all injuries incurred on or after July 1, 1992.\textsuperscript{200}

C. Assumption of the Risk

The court of appeals in \textit{Turner v. Sumter Self Storage Co.},\textsuperscript{201} reversed the trial court's grant of summary judgment to defendant and determined that a jury question was presented concerning whether plaintiff had assumed the risk of his injuries. Plaintiff was injured at a construction site by a swinging cement chute as he was working behind and with his back to a cement truck.\textsuperscript{202} Relying on the fact that knowledge of the apparent danger is an essential element for assuming the risk of such danger,\textsuperscript{203} the court found that there was no evidence in the record that the cement chute had ever swung while pouring concrete nor was there any evidence that plaintiff knew of any occasion when the chute had slipped and struck someone.\textsuperscript{204}


\textsuperscript{197} O.C.G.A. § 34-9-11.1(c) (Supp. 1995).

\textsuperscript{198} \textit{Id.} § 34-9-11.1(c) (1992). The general statute of limitations period for personal injuries is two years from the accrual of the right of action. \textit{Id.} § 9-3-33.

\textsuperscript{199} \textit{Id.} § 34-9-11.1(c) (Supp. 1995). If the employee brings the third-party suit, the employer retains a limited right of subrogation. \textit{Id.}

\textsuperscript{200} \textit{Id.} § 34-9-11.1(e).

\textsuperscript{201} 215 Ga. App. 92, 449 S.E.2d 618 (1994).

\textsuperscript{202} \textit{Id.} at 92-93, 449 S.E.2d at 619.


\textsuperscript{204} 215 Ga. App. at 95, 449 S.E.2d at 621. In the following survey period cases, however, the court determined as a matter of law that the plaintiffs had assumed the risk of the obvious dangers presented: \textit{Sewell v. Dixie Region Sports Car Club of Am., Inc.}, 215
D. Delay in Service

The supreme court's grant of certiorari in *Hobbs v. Arthur*\(^{205}\) breathed the breath of life back into several earlier decisions which had been overruled by the court of appeals' decision in that case.\(^{206}\) The court of appeals had previously ruled that when a renewal action is filed,\(^{207}\) the question of diligence in perfecting service will relate back to the time of service in the original action regardless of the timeliness of service in the renewed action.\(^{208}\) The supreme court reversed this ruling and held that as long as the original action was valid, diligence in perfecting service in a subsequently dismissed and refiled action "must be measured from the time of filing the renewed suit, [and] any delay in service in a valid first action is not available as an affirmative defense in the renewal action."\(^{209}\)

E. Immunity

The supreme court's review of *Gilbert v. Richardson*\(^{210}\) resulted in a partial affirmance and partial reversal of the court of appeals decision

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\(^{205}\) 264 Ga. 359, 444 S.E.2d 322 (1994).


\(^{209}\) 264 Ga. at 360-61, 444 S.E.2d at 323 (footnote omitted). See also *Urrea v. Flythe*, 215 Ga. App. 212, 450 S.E.2d 266 (1994). Cases decided during the survey period in which it was determined that the respective plaintiffs failed to use due diligence in perfecting service included the following: *Day v. Savage*, 213 Ga. App. 792, 446 S.E.2d 229 (1994) (service not perfected until 166 days after expiration of statute of limitations—plaintiff did nothing to locate defendant until after statute had run and failed to show a lack of periods during which nothing was done to accomplish service); *Devoe v. Callis*, 212 Ga. App. 618, 442 S.E.2d 765 (1994) (service not perfected until 81 days after expiration of statute of limitations—after being placed on notice of a problem with defendant's address a significant time period elapsed before plaintiff initiated investigation activity, also no detailed record presented of what was done to locate defendant).

in that case as it was discussed in last year's survey. In harmony with the court of appeals, the supreme court determined that the 1991 constitutional language extending almost complete sovereign immunity to the state and its departments and agencies was applicable to counties. In addition, the supreme court specifically stated that "[t]he enactment of a state tort claims act was but one of the ways the legislature could constitutionally waive sovereign immunity," thereby affirming the viability of Georgia code section 33-24-51, which allows a waiver of sovereign immunity when a county purchases liability insurance for the negligence of any agent or employee while using a motor vehicle. Unlike the court of appeals, however, the supreme court held that the county's participation in the Georgia Interlocal Risk Management Agency does constitute liability insurance for sovereign immunity waiver purposes, as this court had previously decided in *Hiers v. City of Barwick*. Although most claims against the State must now be brought pursuant to the Georgia Tort Claims Act, a sovereign immunity defense does not protect the State against injunctive relief for acting outside the scope of lawful authority. In *IBM Corp. v. Evans*, plaintiff sought injunctive relief against defendant state agency for the wrongful award of a computer system contract to another company. The court reviewed the sovereign immunity issue in relation to plaintiff's claim that it was not given the correct number of evaluation points it was told it would receive and held that "sovereign immunity does not stand as a bar to [plaintiff's] complaint, and injunctive relief may be granted if [defendant state agency] acted without lawful authority and beyond the scope of its official power in the manner in which it evaluated [plaintiff's] proposal. Concerning the claim notice

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213. GA. CONST. art. I, § 2, para. 9.
215. 264 Ga. at 748, 452 S.E.2d at 480.
221. Id. at 217, 453 S.E.2d at 709.
provision of the Georgia Tort Claims Act, it should be noted that the court in *Hardy v. Candler County* specifically held that the requisite notice must actually be received within the twelve month statutorily-allowed period from the date a loss was or should have been discovered.

During this survey period, the court of appeals in *Landis v. Rockdale County* was, once again, directed to reconsider an earlier decision in that case in light of the special duty/special relationship factors enunciated by the supreme court in *City of Rome v. Jordan*. In *Landis* a deputy sheriff observed, but did not arrest, a noticeably intoxicated driver. Approximately two hours later the drunk driver was involved in a traffic accident in which plaintiff's decedent was fatally injured. The court of appeals, in its reconsideration of this case, found that pursuant to *Jordan* the deputy had no duty to arrest the drunk driver for the protection of the general public. The court further found that there was no special relationship created between the deputy and plaintiff's decedent as a result of the deputy's limited contact with only the drunk driver several hours prior to the accident; nor was there any special relationship created between the deputy and the drunk driver since the deputy had never exercised any control over the driver.

Interesting questions concerning both charitable immunity and Good Samaritan immunity were also addressed during this survey period. The court in *Bagley v. Fulton-DeKalb Hospital Authority* held that institutions which are entitled to assert the defense of charitable immunity may not lawfully, by any agreement or contract, extend

224. Id. at 631, 448 S.E.2d at 490.
227. 263 Ga. 26, 426 S.E.2d 861 (1993). In order for a "special relationship" to exist, the following requirements must be met: (1) an explicit assurance, through promises or actions, that action would be taken on behalf of the injured party; (2) knowledge that inaction could lead to harm; and (3) justifiable and detrimental reliance by the injured party that there would be an affirmative undertaking. Id. at 29, 426 S.E.2d at 863. For a discussion of other cases reconsidered in light of the decision in *City of Rome*, see 1994 Torts, supra note 51, at 498-99.
228. 212 Ga. App. at 700, 445 S.E.2d at 265.
229. Id. at 703, 445 S.E.2d at 266.
230. Id. at 703-04, 445 S.E.2d at 268.
232. For a further discussion of charitable immunity, see GEORGIA TORTS, supra note 16, § 21-10.
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this immunity to cover the tortious acts of their individual employees. In addition, as announced by the court in Johnson v. Gwinnett County, Good Samaritan immunity cannot be waived through the purchase of liability insurance by any persons to whom this immunity otherwise applies.

F. Releases

The Eleventh Circuit Court of Appeals presented the Georgia Supreme Court in U.S. Anchor Manufacturing, Inc. v. Rule Industries, Inc. with certified questions concerning the effects of a general release from liability on certain subsequent, injury-producing acts. The supreme court gave a two-part answer to the Eleventh Circuit. First, a general release from civil liability, according to the supreme court, does not discharge liability for injuries caused by new post-release acts done in the course of a scheme or conspiracy that was ongoing when the release was executed. Second, in order for a general release to discharge liability for unknown prerelease tortious conduct, it must specifically indicate such an intent.

Contracts that seek to release or limit liability on issues of public interest or policy are generally unenforceable. Defendant in Reaugh v. Inner Harbour Hospital, Ltd. entered into a contract with plaintiff's parents to provide medical and educational services to plaintiff, then a minor. In the same contract, defendant also sought to exculpate itself from liability for any harm that resulted to plaintiff in providing or failing to provide such services to her. The court found that in this situation in which parents had entrusted the care, custody,

233. 216 Ga. App. at 540, 455 S.E.2d at 328.
235. See O.C.G.A. § 31-11-8 (1991). This statutory immunity defense provides that any person, including agents and employees, who is licensed to furnish ambulance service and who in good faith renders emergency care to a person who is a victim of an accident or emergency shall not be liable for any civil damages to such victim as a result of any act or omission by such person in rendering such emergency care to such victim.
237. Id. at 296-97, 443 S.E.2d at 834-35.
238. Id. at 297-98, 443 S.E.2d at 835. The release in U.S. Anchor contained liability-discharging language that was construed to apply only to prerelease acts. The subsequent injuries did not result from a continuation of the prerelease acts, but were the effects of new postrelease acts.
239. Id. at 298, 443 S.E.2d at 836.
240. See generally GEORGIA TORTS, supra note 16, § 23-1.
242. Id. at 259, 447 S.E.2d at 618.
and control of their child to defendant, such a liability-limiting contractual provision is contrary to public policy and therefore void.\(^\text{243}\)

Plaintiffs in *Thornton v. Ware County Hospital Authority*\(^\text{244}\) sought to pursue their medical malpractice action against the remaining joint tortfeasor defendants after entering into a covenant not to sue and dismissing the suit against two other joint tortfeasors. The trial court ruled that plaintiffs' claims against the remaining defendants were barred because of the release of the other joint tortfeasors.\(^\text{245}\) Finding that the dismissal served only as an adjudication of nonliability and not as an adjudication of the question of negligence, the court of appeals would have allowed the trial to proceed against the remaining joint tortfeasors.\(^\text{246}\) At the trial of *Hyde v. Fulton County Hospital Authority*\(^\text{247}\) the jury brought back a verdict in favor of one joint tortfeasor defendant and a judgment amount against the other joint tortfeasor defendant. The luckless defendant tendered the full judgment amount to plaintiffs, after which plaintiffs sought to appeal the verdict in favor of the other defendant.\(^\text{248}\) The court of appeals dismissed the appeal and stated that plaintiffs' acceptance of the full judgment amount estopped them from appealing the verdict in favor of the more fortunate defendant.\(^\text{249}\)

**IV. OTHER TORT CAUSES OF ACTION**

**A. Products Liability**

The supreme court's decision in *Banks v. ICI Americas, Inc.*\(^\text{250}\) is surely to be reckoned as the most significant Georgia products liability decision in a generation. *Banks* brought Georgia into line with an

\(^{243}\) Id. at 261, 447 S.E.2d at 619-20.


\(^{245}\) Id. at 276-77, 450 S.E.2d at 261.

\(^{246}\) Id. at 278, 450 S.E.2d at 262. The trial court's decision ultimately was affirmed on the issue of respondeat superior. Id. at 279-80, 450 S.E.2d at 263. If the trial had proceeded against the remaining defendants, they, presumably, could have brought a third-party complaint for contribution against the dismissed defendants for any judgment amount above what had been previously paid to plaintiffs. See O.C.G.A. § 9-11-14 (1993).


\(^{248}\) Id. at 732, 452 S.E.2d at 518.

\(^{249}\) Id. at 732-33, 452 S.E.2d at 518. If plaintiffs wanted to appeal the jury's verdict, they would have been required to do so against both defendants instead of accepting the total money judgment from one and hoping the other would have to ante up later, without a risk to their money already in hand. "Be on your guard against all kinds of greed; a man's life does not consist in the abundance of his possessions." *Luke* 12:15 (New International).

emerging national consensus\textsuperscript{251} by adopting risk-utility analysis in cases involving defective product design.\textsuperscript{252} Recognizing that "the term 'defect' in design defect cases is an expression of the legal conclusion to be reached, rather than a test for reaching that conclusion,"\textsuperscript{253} the court deemed "a balancing test whereby the risks inherent in a product design are weighed against the utility or benefit derived from the product"\textsuperscript{254} to be the appropriate means for arriving at that conclusion. In doing so, the court struck, at least in part, two landmarks from the Georgia products liability scene by disapproving both \textit{Center Chemical Co. v. Parzini}\textsuperscript{255} and \textit{Mann v. Coast Catamaran Corp.}\textsuperscript{256} to the extent they are inconsistent with the new analysis. Both \textit{Parzini} and \textit{Mann} were grounded on a consumer expectations model of products liability, which resulted in the rule that if a product was "properly prepared, manufactured, packaged and accompanied with adequate warnings and instructions,"\textsuperscript{257} and nothing prevented it "from functioning properly in its intended use,"\textsuperscript{258} it was not 'defective' in the contemplation of Georgia's strict products liability statute,\textsuperscript{259} despite evidence of alternative safer designs.

\textit{Banks}, in essence, has added a second story to the products liability "house." By reducing consumer expectations to one of many factors\textsuperscript{260}

\begin{itemize}
    \item \textsuperscript{251} See, e.g. Preliminary Draft No. 1 (Apr. 20, 1993) Restatement (Third) of Torts: Products Liability § 101.
    \item \textsuperscript{252} 264 Ga. at 735, 450 S.E.2d at 674.
    \item \textsuperscript{253} Id. at 734, 450 S.E.2d at 673.
    \item \textsuperscript{254} Id.
    \item \textsuperscript{256} 254 Ga. 201, 326 S.E.2d 436 (1985), overruled in part, 264 Ga. 732, 734, 450 S.E.2d 671, 673 (1994).
    \item \textsuperscript{257} \textit{Parzini}, 234 Ga. at 870, 218 S.E.2d at 582.
    \item \textsuperscript{258} \textit{Mann}, 254 Ga. at 202, 326 S.E.2d at 437.
    \item \textsuperscript{259} See O.C.G.A. § 51-1-11 (1982 & Supp. 1995) ("The manufacturer . . . shall be liable in tort, irrespective of privity, to any natural person . . . who suffers injury . . . because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended . . . ") (emphasis added).
    \item \textsuperscript{260} These factors include: the usefulness of the product; the gravity and severity of the danger posed by the design; the likelihood of that danger; the avoidability of the danger, i.e., the user's knowledge of the product, publicity surrounding the danger, or the efficacy of warnings, as well as common knowledge and the expectation of danger; the user's ability to avoid danger; the state of the art at the time the product is manufactured; the ability to eliminate danger without impairing the usefulness of the product or making it too expensive; and the feasibility of spreading the loss in the setting of the product's price or by purchasing insurance.
\end{itemize}
to be considered by the trier of fact, *Banks* changes consumer expectations from a liability “ceiling”—the maximum degree of protection afforded the consumer—to a “floor.” It may now be said that the legal analysis starts with whether the product functioned properly in its intended use, but beyond that, it is open to an injured plaintiff to prove by a host of other considerations that the defendant manufacturer made an unreasonable design choice.

One of the most tantalizing questions left unanswered by *Banks* is whether it heralds the abolition of the wooden ‘open and obvious’ rule in failure to warn cases. The court of appeals in *Ogletree v. Navistar International Transportation Corp.* had flirted with the abolition of the open and obvious rule and the adoption of a form of risk-benefit analysis, but it speedily reversed itself with the en banc decision in *Weatherby v. Honda Motor Co.* and returned to the standard that there is no duty to warn of an obvious danger, regardless of the availability of safer alternative designs. By reducing “the user’s knowledge of the product, . . . the efficacy of warnings, as well as

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*Banks*, 264 Ga. at 736 n.6, 450 S.E.2d at 675 n.6. This list, of course, is “non-exhaustive.” *Id.* at 736, 450 S.E.2d at 675.

261. *Banks* appears to keep the burden of proving safer alternative design on the plaintiff. *See id.* at 737, 450 S.E.2d at 675 (“the plaintiff’s ability to adduce evidence [of] a feasible alternative design”). This, of course, is inconsistent with one of the classic objectives of strict products liability, which was to relieve injured plaintiffs of onerous proof problems when the defendant manufacturer was in possession of all the relevant information. *See, e.g.,* Barker v. Lull Eng’g Co., 573 P.2d 443, 455 (Cal. 1978); Escola v. Coca-Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

262. “Such diverse matters as competing cost trade-offs, tactical market decisions, product development and research/testing demands, the idiosyncrasies of individual corporate management styles, and federal and other regulatory restrictions can enter into consideration of the reasonableness of a manufacturer’s decision-making process.” *Banks*, 264 Ga. at 736, 450 S.E.2d at 671.

263. *Banks* involved a nine-year old child who died after eating rodenticide manufactured by defendant. Plaintiffs sued both on theories of defective design and failure to warn. The court held that the failure to warn issue was preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-36y (1988), and, hence, did not reach that issue at all. *See Banks*, 264 Ga. at 737, 450 S.E.2d at 676.


266. One focus of *Ogletree’s* inquiry was “whether installation [of a superior safety device] was practical, economically feasible, and technically feasible.” 194 Ga. App. at 46, 390 S.E.2d at 66, which, of course, is the language of risk-utility analysis.


268. *Id.*
common knowledge and the expectation of danger\textsuperscript{269} to but one of the many risk-benefit factors, it would appear that Banks at least sets the stage for plenary reconsideration of the open and obvious rule in an appropriate case.

The court of appeals applied the "learned intermediary" rule\textsuperscript{270} to limit a manufacturer's liability in Lance v. American Edwards Laboratories.\textsuperscript{271} Defendant manufactured a device known as a "gastric bubble," which was surgically implanted in plaintiff's stomach by her physician. Plaintiff, who had a prior incisional hernia, brought suit for her injuries after the device ruptured inside her, alleging that defendant manufacturer breached a duty to warn her directly that the device should not be inserted into a person with an incisional hernia.\textsuperscript{272}

In a very unusual decision involving separate opinions by all three members of the panel,\textsuperscript{273} Lance's only common rationale for denying a recovery against the manufacturer was that "the device and its application at all times were under the control of the prescribing physician . . . .\textsuperscript{[274]} Consequently, [plaintiff's] treating physician had sole responsibility for advising his patient of dangers associated with the use of the gastric bubble."\textsuperscript{275} Because of this intermediary physician-patient relationship, "[t]he conditions do not exist and the manufacturer has no practical means to supply a patient with notice of any risks or side effects associated with the use of its product."\textsuperscript{276}

The basis for disagreement in Lance was the reliance by two members of the panel on Walker v. Jack Eckerd Corp.,\textsuperscript{277} discussed in last year's survey article,\textsuperscript{278} which limited a pharmacist's duty to warn about potential dangers of drugs prescribed by a physician.\textsuperscript{279} Walker, however, did not apply the learned intermediary rule, which places liability on the last person to deal with the plaintiff as an intermediary

\textsuperscript{269} See Banks, 264 Ga. at 736 n.6, 450 S.E.2d at 675 n.6.


\textsuperscript{272} Id. at 714, 452 S.E.2d at 186.

\textsuperscript{273} "[I]f there is a special concurrence without a statement of agreement with all that is said in the opinion. . . , the opinion is a physical precedent only." GA. CT. APP. Rule 33(a) (1995).

\textsuperscript{274} 215 Ga. App. at 717-18, 452 S.E.2d at 188 (Smith, J., concurring).

\textsuperscript{275} Id. at 716, 452 S.E.2d at 187.

\textsuperscript{276} Id. at 717, 452 S.E.2d at 188 (Pope, C.J., concurring).


\textsuperscript{278} 1994 Torts, supra note 48, at 481-82.

\textsuperscript{279} Walker, 209 Ga. App. at 522, 434 S.E.2d at 67-68 (quoting Jones v. Irvin, 602 F. Supp. 399, 402-03 (S.D. Ill. 1985)).
between the plaintiff and the manufacturer. In fact, Walker reversed that rule by moving liability a step back from the last person with an opportunity to warn the plaintiff, and it has been justifiably criticized for doing so.

In a final products liability case of note, the court of appeals in General Motors Corp. v. Moseley reversed the largest punitive damage jury award in Georgia history—$101 million—on the grounds of prejudicial trial conduct by plaintiffs' counsel. Although the lengthy opinion contains a number of interesting holdings on various issues of interest to products liability lawyers, all that should be regarded as obiter dicta in light of the reversal on the stated grounds.

B. Strict Liability

It is well established under Georgia law that a carrier of passengers must use extraordinary diligence to protect the lives and persons of those passengers. In addition, this duty cannot be lessened or absolved by any contract between the passenger and the carrier. Although the owner of a building in which an elevator is operated is not actually a carrier of passengers by strict definition, he too is charged with using extraordinary care in the protection of the passengers for whom the elevator is provided. With these standards in mind, the

283. The precise conduct involved was the repeated introduction into the trial of references to incidents similar to that involving plaintiffs' decedent (side-saddle fuel tank explosions) without making an adequate evidentiary showing of similarity, in violation of the court's order in limine. "Plaintiffs' counsel's repeated breach of that ruling can only be regarded as deliberate," said the court of appeals, "and considering the inflammatory nature of the references to a multitude of other lawsuits and deaths, we are unable to say... that the frequent violation of the trial court's ruling did not influence the jury's verdict." Id. at 878, 447 S.E.2d at 307.
284. For example, the court of appeals stated that evidence of subsequent remedial measures should be admissible in strict liability cases, id. at 882, 447 S.E.2d at 310, thus adopting the minority view on that position.
285. Id. at 878, 447 S.E.2d at 307.
288. See Bullard v. Rolader, 152 Ga. 369, 110 S.E. 16 (1921); Grant v. Allen, 141 Ga. 106, 80 S.E. 279 (1913).
parties in *Gaffney v. EQK Realty Investors* asked the court to determine if this duty owed by an elevator owner can be delegated to a third party who has contracted to make repairs to the elevator. After a brief discussion of the public policies related to this issue, the court succinctly held that “the owner of an office building . . . cannot delegate this duty [of extraordinary care] to an independent contractor engaged to repair the elevator.”

C. Defamation

Of the many interesting defamation cases decided during the survey period, a single representative example must suffice. One can understand the desire of plaintiff in *Cox Enterprises, Inc. v. Thrasher* to sue for injury to her reputation. She agreed to give an interview to the defendant newspaper reporter based on the reporter’s representation that she was investigating “a story on infertility and that plaintiff and her husband would be characterized as a wholesome couple, successful in their quest for a baby.” In fact, the resultant article appeared under a headline reading “A Close Look at a Hidden Danger . . . Often Symptom-Less Chlamydia Threatens the Sexually Active.”

Although the court of appeals reluctantly allowed the plaintiff to go to a jury, the supreme court, on certiorari, flatly repudiated her claim. Focusing on plaintiff’s inability to prove whether the sexually transmitted disease she undisputedly had was chlamydia or not, the court applied the constitutional rule of *Philadelphia Newspapers, Inc. v. Hepps*, which reverses the common-law presumption by putting on the plaintiff the burden of proving the falsity of the statement. “Because the fact finding process will be

290. *Id.* at 653, 445 S.E.2d at 772.
291. *Id.* at 655, 445 S.E.2d at 773-74.
294. *Id.* at 716, 434 S.E.2d at 498.
295. Presiding Judge Beasley concurred in the judgment only, thus robbing the opinion of any precedential value. *See supra* note 273.
297. Plaintiff’s sexually transmitted bacteria was not identified before it was treated with a drug used to cure chlamydia. *Id.* at 237, 442 S.E.2d at 741-42.
300. “[T]he common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.”
unable to resolve conclusively whether the speech at issue was true or false, the burden of proof is dispositive [against plaintiff's] claim that she was defamed by the publication intimating she had contracted chlamydia.\textsuperscript{301}

The problem with the supreme court's decision in \textit{Thrasher} is that it fails to consider further whether plaintiff was defamed by the intimation that she was "sexually active."\textsuperscript{302} After all, one does not have to be sexually active in the sense of promiscuity in order to contract a venereal disease (Mr. Herring got it from his wife\textsuperscript{303}), and since Georgia does not adhere to the doctrine of mitior sensus\textsuperscript{304} in defamation law,\textsuperscript{305} a jury should have determined whether plaintiff, a private figure,\textsuperscript{306} was defamed by the implication that she was promiscuous.\textsuperscript{307}

D. Mental Abuse

\textbf{Infliction of Emotional Distress.} The four elements of the tort of intentional infliction of emotional distress are: "(1) The conduct must be intentional or reckless; (2) The conduct must be extreme and outrageous; (3) There must be a causal connection between the wrongful conduct and the emotional distress; (4) The emotional distress must be severe."\textsuperscript{308} The height of this judicial wall may be measured by the fact that, during the survey period, the court denied recovery to a mother whose stillborn baby was autopsied under confusing circumstances\textsuperscript{309} and to a former

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\textsuperscript{301} Cox, 264 Ga. at 237, 442 S.E.2d at 742.
\textsuperscript{302} See \textit{supra} note 294 and accompanying text.
\textsuperscript{303} See \textit{supra} note 124 and accompanying text.
\textsuperscript{304} Under the ancient mitior sensus rule, if words could be construed as either defamatory or nondefamatory, the court was required to give them the nondefamatory meaning. \textit{See, e.g.}, \textit{Wardlaw v. Peck}, 318 S.E.2d 270, 273 (S.C. App. 1984).
\textsuperscript{305} "A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it." \textit{Fiske v. Stockton}, 171 Ga. App. 601, 602, 320 S.E.2d 590, 593 (1984) (quoting \textit{Ledger-Enquirer Co. v. Brown}, 214 Ga. 422, 423, 105 S.E.2d 229, 231 (1958)).
\textsuperscript{309} \textit{Clark}, 212 Ga. App. at 695, 443 S.E.2d at 278.
television news reporter whose employers made false accusations about him in connection with his employment.\footnote{310}

**Invasion of Privacy.** Plaintiff in *Multimedia WMAZ, Inc. v. Kubach*,\footnote{311} an AIDS patient, won a $500,000 jury verdict on his claim that defendant improperly digitized his face for the first seven seconds of a television interview, thus allowing his identifiable image to be broadcast for that amount of time.\footnote{312} Holding that this was an actionable public disclosure of embarrassing private facts about plaintiff, the court concluded that he had not waived his right to privacy by prior disclosures of his disease to "family, friends, medical personnel and members of his support group."\footnote{313} Presiding Judge Beasley concurred on the grounds that, in this case, the plaintiff had not waived his expectation of privacy: "Telling one hundred members of a confidential support group may retain its private nature for the purposes of this tort, whereas telling one newspaper reporter would give it a decidedly public nature."\footnote{314}

**Malicious Prosecution.** Answering a certified question from the Eleventh Circuit Court of Appeals, the supreme court in *Wal-Mart Stores, Inc. v. Blackford*\footnote{315} held, as a matter of first impression in Georgia, that evidence of the tort plaintiff’s guilt in fact of the underlying criminal act is admissible as a defense to the plaintiff’s damages.\footnote{316} Although this holding attempts to advance the policy that "citizens are encouraged to bring to justice those who are apparently guilty,"\footnote{317} it actually shifts the focus of the malicious prosecution action from the subjective intent of the prosecutor at the time the underlying criminal case was commenced\footnote{318} to an objective, after-the-fact inquiry that will turn every malicious prosecution case into a trial within a trial of the underlying criminal charge. This would appear to have little to do with the public purpose of malicious prosecution actions, which is to protect the criminal processes of this state from being used

\footnote{310}{Phillips, 215 Ga. App. at 517, 451 S.E.2d at 103.}
\footnote{311}{212 Ga. App. 707, 443 S.E.2d 491 (1994) (en banc).}
\footnote{312}{Id. at 707, 443 S.E.2d at 493.}
\footnote{313}{Id. at 709, 443 S.E.2d at 494.}
\footnote{314}{Id. at 718, 443 S.E.2d at 500.}
\footnote{315}{264 Ga. 612, 449 S.E.2d 293 (1994).}
\footnote{316}{Id. at 614, 449 S.E.2d at 295.}
\footnote{317}{Id.}
as a vent for private malice. The ultimate guilt or innocence of the accused may have little or no relevance to the prosecutor’s malice if the prosecutor acted entirely without knowledge of or reference to such guilt or innocence.\(^{319}\)

E. Seduction

Until the supreme court’s decision in *Franklin v. Hill*,\(^ {320}\) parents in Georgia were given a civil cause of action for the seduction of their unmarried daughters.\(^ {321}\) The court’s ruling in that case, however, declared the seduction statute unconstitutional on equal protection grounds since liability under it applied only to men. In addition, the court declined to amend the offensive statute by extending its liability to women.\(^ {322}\)

F. Fraud

There seemed to be more than the usual number of cases during this survey period in which the appellate court determined that the issue of fraud\(^ {323}\) should be decided by a jury rather than upon summary judgment. Three such cases dealt with questions of fact concerning outright misrepresentations made by the defendants\(^ {324}\) or representa-

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319. Another interesting problem *Blackford* creates is the quantum of proof required. Although in the underlying case, of course, the guilt of the accused would have to be established beyond a reasonable doubt, in a civil case, the quantum of proof is only a preponderance of the evidence. *See* RESTATEMENT (SECOND) OF TORTS § 657, cmt. b (1977). Thus, *Blackford* creates the anomalous potential for allowing the malicious prosecution jury to find an accused “guilty” of charges that could not have been proved against him in the underlying criminal case.


322. 264 Ga. at 305, 444 S.E.2d at 781.

323. In general, the elements of fraud specifically include a false representation, knowledge that the representation was false when made, the intent to induce action or inaction by reliance on the representation, justifiable reliance on the representation, and damage as a result of relying on the representation. *See* GEORGIA TORTS, *supra* note 16, § 32-1.

Concerning when disclosures must be made, it should be noted that there is no duty to disclose facts of which the other party already has knowledge. *See* Butts v. Southern Clays, Inc., 215 Ga. 110, 450 S.E.2d 244 (1994).

tions upon which the plaintiffs legally could rely. In both *Rivers v. BMW of North America, Inc.* and *Lister v. Scriver*, the court found that there was ample evidence from which a jury could find that fraudulent misrepresentations were made to the respective plaintiffs. Such evidence in *Rivers* included the fact that the BMW automobile which plaintiff purchased from one of the defendants had been represented to her as new, when, in actuality, it had been damaged by acid rain and repainted. Further, when plaintiff noticed flaws in the paint and questioned them, she was told that the vehicle had not been repainted. Likewise, there was evidence in *Lister* which could establish that defendant represented to plaintiffs individually that they were to be the only other stockholders (besides himself) in a retail clothing establishment and then obtained money from plaintiffs ostensibly to purchase a franchise for the business and incorporate it, when in fact such monies were diverted to other business interests of the defendant.

In *Salmon v. Pearson & Associates*, defendant surveyor was hired to prepare a flood certification necessary for plaintiff's loan closing in conjunction with plaintiff's purchase of certain real estate. Defendant rendered the opinion that the house was not in a flood zone, and four months after the plaintiff moved in the house, it sustained extensive flood water damage. Defendant contended, and the trial court agreed, that the evidence did not indicate anyone would rely on defendant's representations concerning the flood status of the property. The court of appeals reversed and specifically stated that

> [t]his is not a case of blind reliance on the seller's representations regarding a matter of title, which with proper diligence should have

330. 216 Ga. App. at 745, 456 S.E.2d at 86-87. The case of El-Amin v. Nalley Motor Trucks, 215 Ga. App. 509, 451 S.E.2d 61 (1994), decided during the survey period, held that the mileage on a truck plaintiff purchased had not been misrepresented since plaintiff had signed a statement at the time of purchase which indicated that the odometer reading did not represent the actual mileage. *Id.* at 510, 451 S.E.2d at 62.
332. *Id.* at 12, 446 S.E.2d at 764.
been investigated through title survey . . . but rather a case of reliance on professional opinion, regarding flooding, which the buyer was not bound as a matter of law to challenge by independent inquiry.\textsuperscript{333} Generally a fraud claim cannot be predicated upon a misrepresentation concerning a future event unless there is knowledge at the time that the event will not take place.\textsuperscript{334} \textit{Howard v. Hammond}\textsuperscript{335} presented a jury question concerning the exception to this rule. The court found that there was evidence which could support plaintiff's claim that defendant had no intention of including a certain insurance agency contract in a partnership agreement entered into between plaintiff and defendant, since defendant's agency contract stated that it would terminate upon the sale of the business unless certain other conditions were met.\textsuperscript{336} For businesses, the contents of their files and previous documents may provide the scienter element for a claim of fraudulent concealment, as illustrated by the case of \textit{WMI Urban Services, Inc. v. Erwin}.\textsuperscript{337} In that case, defendant issued a termite inspection report on plaintiffs' home which showed past infestation but no evidence of damage. Plaintiffs thereafter discovered a vast amount of termite damage in their newly-purchased home.\textsuperscript{338} The court found that since defendant possessed a previous inspection report showing termite damage four years earlier but nothing indicating the damage had been repaired, a jury could find that defendant submitted a fraudulent report to plaintiffs.\textsuperscript{339}

When a purchaser of personal property elects to affirm a contract that contains disclaimer provisions which eliminate any prior representations made to him not contained in the contract, he is generally thereafter precluded from making any assertions that he relied on any of the

\textsuperscript{333} \textit{Id.} at 14, 446 S.E.2d at 765. Other cases decided during the survey period that dealt with the issue of fraud in which it was determined that there could be no justifiable reliance on the part of the plaintiffs included: Cobb County Sch. Dist. v. MAT Factory, Inc., 215 Ga. App. 697, 452 S.E.2d 140 (1994) (even though disparate test results were available to plaintiff concerning safe fall heights of playground surface material, plaintiff chose not to perform any tests of its own); Smith v. McClung, 215 Ga. App. 786, 452 S.E.2d 229 (1994) (plaintiff did nothing to ascertain actual title status of land before building house); Jung v. Cheoun, 216 Ga. App. 490, 455 S.E.2d 310 (1995) (plaintiff did nothing to inquire about financial status of business before purchasing it).


\textsuperscript{336} \textit{Id.} at 706, 455 S.E.2d at 392.


\textsuperscript{338} \textit{Id.} at 357, 450 S.E.2d at 831.

\textsuperscript{339} \textit{Id.} at 359, 450 S.E.2d at 832.
seller's alleged previous misrepresentations. As illustrated by the decision in Reaugh v. Inner Harbour Hospital, Ltd., this principle is not applicable when plaintiff's claim of fraud is predicated upon the representation that services called for under an agreement would be provided and that plaintiff had been charged for services not rendered. Likewise, in Stricker v. Epstein, the court found that the fraud plaintiffs alleged was involved in the inducement of a stock purchase, while the document containing the disclaimer provision reflected a different aspect of the parties' negotiations. Under these circumstances, plaintiffs were allowed to pursue their fraud claim against defendants. Finally, concerning fraudulent transfers of property, the court in Blankenship v. West Georgia Plumbing Supply, Inc. determined that a husband-to-wife property transfer is not fraudulent when it is done for the purpose of debt payment to the wife, and the property so transferred is in reasonable proportion to the debt owed. In such cases, the husband may prefer such payment to the wife over payment to any other unsecured creditor.

G. Tortious Interference with Business or Contractual Relations

As the heading of this section suggests, there are two separate, but closely related, causes of action in Georgia that involve the nonprivileged interference with a valuable economic relationship. The elements the two torts have in common are as follows: A plaintiff must show the following: "The defendant (1) acted improperly and without privilege, (2) purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) for which the plaintiff suffered..."
some financial injury."\textsuperscript{351} In \textit{Renden, Inc. v. Liberty Real Estate Ltd. Partnership III},\textsuperscript{352} however, the court iterated that there is at least one key difference between the two: "Tortious interference with business relations is a distinct and separate tort from that of tortious interference with contractual relations, although some of the elements of the two torts are similar."\textsuperscript{353} The court stressed that "liability results not only from disruption of the relationship but also from elimination of the injured party’s ability to perform."\textsuperscript{354} Thus, although "proof of a valid and enforceable contract is not required as an element of a cause of action for intentional tortious interference with business relations",\textsuperscript{355} nevertheless, "plaintiff must demonstrate that absent the interference, those relations were reasonably likely to develop in fact."\textsuperscript{356}

V. DAMAGES

The supreme court in \textit{Martin v. Hospital Authority},\textsuperscript{357} granted certiorari to last year’s court of appeals decision in that case\textsuperscript{358} to review the issue of hospital authority liability for punitive damages. Finding the lower appellate court to be correct in its ruling that punitive damages cannot be awarded against a hospital authority, the high court also stated that this decision is unaffected by the existence of any insurance policy under which the authority might be covered.\textsuperscript{359}

During this survey period the court of appeals also dealt with several procedural questions concerning the pursuit of punitive damages. In \textit{Willis v. Lisle},\textsuperscript{360} the trial court determined that the jury’s punitive damage award of $175,000 to plaintiff was excessive and reduced the amount to $90,000, but did not give defendants the opportunity to reject the lowered figure.\textsuperscript{361} The court of appeals found this procedure to be

\begin{itemize}
  \item \textsuperscript{352} 213 Ga. App. 333, 444 S.E.2d 814 (1994).
  \item \textsuperscript{353} Id. at 334, 444 S.E.2d at 817.
  \item \textsuperscript{354} Id.
  \item \textsuperscript{355} Id.
  \item \textsuperscript{356} Id. at 335, 444 S.E.2d at 817.
  \item \textsuperscript{357} 264 Ga. 626, 449 S.E.2d 827 (1994).
  \item \textsuperscript{359} 264 Ga. at 627, 449 S.E.2d at 828-29.
  \item \textsuperscript{360} 215 Ga. App. 191, 450 S.E.2d 826 (1994).
  \item \textsuperscript{361} Id. at 191-92, 450 S.E.2d at 827.
\end{itemize}
incorrect pursuant to Georgia Code section 51-12-12,\textsuperscript{362} which permits a trial judge to raise or lower a clearly inadequate or excessive punitive damages award, but also “envisions that any party may reject the damage award . . . which is substituted for the jury verdict.”\textsuperscript{363} In applicable situations, Georgia law allows the introduction of subsequent guilty pleas to driving under the influence offenses as evidence for punitive damages purposes\textsuperscript{364} and also allows evidence of criminal punishment for such offenses in mitigation of the civil damages award.\textsuperscript{365} The court in Cheevers v. Clark\textsuperscript{366} expanded this rule by allowing the jury to hear evidence of defendant's subsequent incidents of driving under the influence that had not yet been resolved through criminal proceedings, as long as defendant was permitted to plead and prove the statutory penalties associated with the alleged offenses.\textsuperscript{367} An award of punitive damages cannot stand if the evidence is insufficient to support it.\textsuperscript{368} When, however, as in Multimedia WMAZ, Inc.
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v. Kubach, the trial is properly bifurcated in relation to the various damages awards and the jury is properly instructed thereon, a reversal of a general damages award is not required when the evidence is lacking in support of the punitive damages award.

In Knox Enterprises v. Timbermen, Inc., timber growing on plaintiff's land was partially destroyed by wildfires caused by one of defendant's employees. Plaintiff then sought damages in the amount of the present value of the future growth of the damaged trees, which had to be harvested early and sold. The court of appeals found that there was no legal basis for such a recovery and further opined that the proper measure of damages for the timber was the difference between the timber's value before the fire and the state in which the fire left it. Pursuant to Georgia law, when a plaintiff makes a statutory demand to a defendant for the accrual of prejudgment interest, such a demand must be made directly to the person against whom the claim is being made. Notice to a defendant's insurer alone is not deemed sufficient unless defendant's insurer has previously specifically directed plaintiff to direct all correspondence to it as in Hewett v. Carter. Under such circumstances, a defendant is estopped from demanding this strict compliance with the statute.

VI. CONCLUSION

These authors have for several years concluded their articles with a few philosophical words on the art of survey writing in general.

371. 212 Ga. App. at 711, 443 S.E.2d at 495. In such cases the punitive damages award may be written off and the general damages award will stand. Id. at 711-12, 443 S.E.2d at 495.
373. Id. at 390, 450 S.E.2d at 835.
374. Id. at 393, 450 S.E.2d at 837; see also Central R.R. & Banking Co. v. Murray, 93 Ga. 256, 20 S.E. 129 (1894).
378. Id. at 430, 450 S.E.2d at 844.
379. See, e.g., 1994 Torts, supra note 48, at 516 (comparing law survey to Shakespearean drama); 1993 Torts, supra note 47, at 476 (reflecting on necessity for winnowing survey cases); Cynthia T. Adams, et al., Torts 44 MERCER L. REV. 375, 420 (1992) (Georgia Survey compared to Lawrence Welk's Champagne Music ("wunnerful, wunnerful"); see also Charles R. Adams III & Cynthia Trimboli Adams, Torts, 40 MERCER L. REV. 377, 422 (1988) (reflecting on tort law in general as transforming "lamentation into litigation"). Cf. Charles R. Adams III, Domestic Relations, 35 MERCER L. REV. 127, 144-45 (domestic relations law overlays turmoil-ridden fields of human existence; "[f]lar beneath it all, the
Certainly, there are others who are eminently more qualified to comment on these matters than we are, and one of the greatest thinkers in the area of law reviews in general was Professor Karl Llewellyn, whose paean to law review editors was featured in these pages last year. This year, we would like to "show the flag" a little, and conclude with a condign explanation by Llewellyn, from his masterpiece The Bramble Bush, about our editors' unique role in the preservation of "truth, justice, and the American way".

We have in law schools an aristocracy of a peculiar kind. We may almost say it is a perfect aristocracy. One achieves membership exclusively in terms of his performance. Membership carries honor, but the honor that it carries is the duty to work and slave and drive oneself as no other student is expected to. A perfect aristocracy, then, because continued membership is based on higher performance than is demanded of non-members. Now this law review is a scientific publication, on which in good part the reputation of the school depends. Here is a thing American. Here is a thing Americans may well be proud of. There is not so far as I know in the world an academic faculty which pins its reputation before the public upon the work of undergraduate students—there is none, that is, except in the American law reviews. Such an institution it is a privilege to serve. Such an institution it is an honor to belong to. And by virtue of the terms of tenure of office, of this you may be sure: to earn that honor is to earn an education. I hold out before you, then, as the goal of highest achievement in your first year, this chance to enter on real training in your second.

ancient torrents rage").

384. LLEWELLYN, supra note 382, at 105 (emphasis in original).