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Torts

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

Who can be wise, amazed, temperate and furious, Loyal and neutral, in a moment? No man.¹

Macbeth may have feigned this plight as he covered up his foul murder of King Duncan, but it precisely describes the survey writer's dilemma. Some of the legal theories advanced in survey period cases were as arcane as the contents of the witches' cauldron.² Some of the holdings were as unsettling as Banquo's ghost at the feast.³ And, as always, the accumulation of cases was as inexorable as Birnam Wood's advance to Dunsinane.⁴ In our endeavor to carve out the decisions of significance, we have perforce wielded a hand as bloody as that of the evil Lady Macbeth herself.⁵ If the result is less than Shakespearean, perhaps the reader will yet find enough drama herein to refrain from according it Macbeth's own grim self-epitaph: "[It is a tale/Told by an idiot, full of sound and fury/Signifying nothing."⁶

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2. Id. act 4, sc. 1.
3. Id. act 3, sc. 4.
4. Id. act 5, sc. 6.
5. Id. act 5, sc. 1.
6. Id. act 5, sc. 5.

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I. INTENTIONAL TORTS

A. Sexual Harassment

In Mathews v. Anderson, a federal district court stated without explanation or citation of authority that "[p]laintiff's assertion that Georgia recognizes the tort of sexual harassment is incorrect." Although no Georgia case has explicitly addressed the viability of such a cause of action, a number of decisions have implicitly allowed it. For example, in Troutman v. B.C.B. Co., the court of appeals denied a punitive damages claim against an employer of a man accused of sexual harassment, but did so in language that "assum[ed] . . . that the [employer] should have known about [the employee's] reputation for sexual harassment . . . ." Also, in Collins v. DOT, the en banc court of appeals recognized that Georgia superior courts have nisi prius jurisdiction over sexual harassment claims brought pursuant to federal law ("Title VII"). The court allowed plaintiff in that case to add the Title VII claim to her original action "seeking damages in tort for sexual harassment."
From the existing authorities, therefore, ample warrant appears for maintaining a common-law tort claim for sexual harassment in Georgia. It would, however, be helpful if the appellate courts would clarify the exact parameters of this tort in an appropriate case.

B. Conversion

Once again, the court of appeals resisted the siren call to expand the tort of conversion,\(^\text{17}\) this time to include intangible property interests. In *Southern Cellular Telecom, Inc. v. Banks*,\(^\text{18}\) plaintiff asked the court to extend the Georgia law of conversion to hold that her minority interest in a corporation was subject to a conversion claim.\(^\text{19}\) "We are not persuaded by [plaintiff's] argument," said the court.\(^\text{20}\) "Conversion is not available as a cause of action with respect to intangible property representing an interest in a business."\(^\text{21}\)

How can *Banks* be reconciled with another recent decision, *Faircloth v. A.L. Williams & Associates, Inc.?*\(^\text{22}\) In that case, which is discussed in last year's survey,\(^\text{23}\) the court of appeals stated that

It would seem that the gist of the tort is an act of hostile dominion or appropriation, and is not merely a matter of whether the property appropriated was tangible or intangible. The line is very fuzzy in modern times. Today, many forms of property may be evidenced only by a notation in a computer, but it is property nevertheless.\(^\text{24}\)

Concluding that the sales commissions at issue in the case were not subject to a conversion claim, the court in *Williams* adhered to "the present rule that conversion involves chattels, not failure to pay money owed under a contract . . . ."\(^\text{25}\) Perhaps the two cases can be reconciled if there is no such thing as an "intangible chattel." Is there?

\(^{17}\) See GEORGIA TORTS, supra note 9, § 2-7, at 16 (Supp. 1994).
\(^{19}\) 208 Ga. App. at 290, 431 S.E.2d at 120.
\(^{20}\) Id.
\(^{21}\) Id.
\(^{24}\) 206 Ga. App. at 767, 426 S.E.2d at 605.
\(^{25}\) Id. at 768, 426 S.E.2d at 605. Accord, Moore v. Barge, 210 Ga. App. 552, 436 S.E.2d 746 (1993) (conversion does not lie for failure to pay money due under a contract, only for specific bills or notes to which plaintiff claims title).
II. NEGLIGENCE

A. Premises Liability

In General. In Lipham v. Federated Department Stores, Inc., the supreme court confirmed the distinction the court of appeals recognized earlier in Wade v. Mitchell between premises liability cases involving a static condition on the premises and cases involving the defendant's active negligence. In Lipham plaintiff went to the parking lot of the mall in which defendant's store was located to take her usual morning constitutional. She was not there as a customer. Plaintiff detoured from her walk to observe a defendant-sponsored competition game that was taking place in a roped-off area of the mall parking lot, and stood directly behind a male employee of defendant who was participating in the event. The employee, unaware of plaintiff's presence, turned around very quickly, and unintentionally knocked plaintiff to the ground. Reversing a divided court of appeals, the supreme court held that plaintiff's status on the property as a licensee or invitee “is irrelevant and does nothing to diminish [defendant's] general duty of care towards [plaintiff]."

Premises liability in some instances is regulated by statute. For example, in the Recreational Property Act ("RPA"), the legislature limited the liability of the owners of recreational property who make the

28. 263 Ga. at 865, 440 S.E.2d at 194.
30. 263 Ga. at 866, 440 S.E.2d at 194.
property available to the public for recreational purposes at no charge.\textsuperscript{33} Such a property is the somewhat tarnished (from overuse) crown jewel of Georgia's Golden Isles, Jekyll Island. The Jekyll Island State Park Authority maintains recreational facilities on Jekyll Island, and charges persons arriving by automobile on the island a “parking fee” upon entry. Plaintiff in \textit{Majeske v. Jekyll Island State Park Authority},\textsuperscript{34} a vacationer on Jekyll Island, was injured when she stepped off a footwalk bridge maintained by the Island Authority.\textsuperscript{35} She contended the one dollar “parking fee” was in reality an admission charge, and the RPA should not apply. The court of appeals disagreed and affirmed summary judgment for defendant.\textsuperscript{36} Because the fee was charged per vehicle, regardless of the number of occupants, and no fee was charged for anyone entering the island by other means, it was not imposed in return for the recreational use of the land, and the RPA's immunity applied.\textsuperscript{37}

Sometimes plaintiffs seek to hold defendants liable seemingly on the strength of nothing more than their mere ownership of premises. Courts typically rebuff such attempts, holding that “[t]he duty imposed [on a landowner] is to exercise reasonable care to prevent foreseeable injury, not to protect against any injury.”\textsuperscript{38} Thus, during the survey period, the courts turned away attempts to impose liability on landowners for an adult drowning\textsuperscript{39} or becoming paralyzed\textsuperscript{40} in a swimming pool, for injuries to a contractor's invitee during surrender of the premises to the contractor,\textsuperscript{41} and for injuries sustained by a falling gutter when the end that fell was attached to another building over which the landowner had no control.\textsuperscript{42}

The question sometimes turns on what duties, if any, the landowner has assumed toward the premises in question. This arises frequently in analyzing the landowner's statutory duty to “keep the premises and

\begin{itemize}
\item \textsuperscript{33} \textit{Id.} § 51-3-20.
\item \textsuperscript{34} 209 Ga. App. 118, 433 S.E.2d 304 (1993).
\item \textsuperscript{35} \textit{Id.} at 119, 433 S.E.2d at 305.
\item \textsuperscript{36} \textit{Id.} at 120, 433 S.E.2d at 306.
\item \textsuperscript{37} \textit{Id. Accord, Spivey v. City of Baxley, 210 Ga. App. 772, 437 S.E.2d 623 (1993) (fee required for participation in church softball league had no relation to permission to enter spectator seating area; RPA applied to injured spectator who was charged nothing to attend the game).}
\item \textsuperscript{39} Belcher, 207 Ga. App. 796, 429 S.E.2d 165 (1993).
\item \textsuperscript{40} Pope v. Workman, 211 Ga. App. 263, 439 S.E.2d 86 (1993).
\end{itemize}
approaches safe." If the owner has not exercised or assumed any rights in the "approach" greater than or different from those exercised by the public at large, he will typically not have any greater duty therein. What constitutes an "approach" occupied a divided supreme court in yet another Jekyll Island case, *Motel Properties, Inc. v. Miller.* Reversing the court of appeals decision discussed in last year's survey, the high court decided four to three that the rip-rap bordering the Jekyll beach did not constitute an "approach" to defendant's Comfort Inn, even though defendant had a sidewalk that extended 200 feet out from its hotel, across state property, and stopped only 27 feet short of the boulders. Plaintiff, a hotel guest who was unfamiliar with the beach at Jekyll Island, decided to go for a night-time stroll on the beach. He walked to the end of defendant's sidewalk, continued on across the sand, and was injured when he fell on the boulders. It was undisputed that defendant provided no illumination or warnings about the presence of the boulders.

The court of appeals, relying on *Todd v. F.W. Woolworth Co.*, found the existence of a jury question based on defendant's right and obligation to illuminate the boulders or at least to post a warning sign. The supreme court stated that "[w]e were not called upon in *Todd* to address the issue present in this case, i.e., what physically constitutes an approach . . . ." The supreme court proceeded to "construe 'approaches' to mean that property directly contiguous, adjacent to, and touching those entryways to premises under the control of an owner or occupier . . . . By ' contiguous, adjacent to, and touching,' we mean that property within the last few steps taken by invitees . . . as they enter or exit the premises." Of course, as the court recognized, the owner can enlarge the approaches "by some positive action on his part, such as constructing a sidewalk, ramp, or other direct approach," but that was

47. 263 Ga. at 484, 436 S.E.2d at 197.
48. *Id.* at 485, 436 S.E.2d at 197.
51. 263 Ga. at 485, 436 S.E.2d at 197-98.
52. *Id.* at 486, 436 S.E.2d at 198.
53. *Id.* (emphasis omitted) (quoting *Elmore, Inc. v. Porcher*, 124 Ga. App. 418, 420; 183 S.E.2d 923, 925 (1971)).
not the case here. Accordingly, said the court, this was "at best . . . an approach to an approach," and defendant, therefore, was not liable.

Presiding Justice Hunt's cogent dissent argued the definition of "approach" should not turn on a "measurement of physical distance," but, as in *Tobd*, on "the nature of the owner's relationship to the approach and rights in that approach; implicit in these considerations is the relationship between the business, the approach and the invitee's reason for using the approach." Part of what defendant's invitees pay for is access to the beach, and defendant provided the walk solely for that purpose. Thus, distance is irrelevant, because "one who leaves the motel on this path can have only one destination . . . ." Appropriately, Judge Cloud Morgan's dissent "express[es] sympathy for the trial judges of this state who may be called upon at some future date to apply th[is] rule . . . ."

Several recent decisions found the existence of a jury issue on the question of the owner's liability. Regardless of the tenant's equal knowledge, when a premises-related danger exists in violation of applicable housing codes, a jury question exists concerning the landlord's liability, such as for the absent stair rail in *Bastien v. Metropolitan Park Lake Associates, L.P.* or the inadequate fire exits in *Windermere, Ltd. v. Bettes.* Furthermore, a proprietor may have a duty to intervene to prevent injury to its invitees, such as the third-party criminal attack sustained by plaintiff in *Good Ol' Days Downtown, Inc. v. Yancey.* Plaintiff had a bad ol' night when he was struck in the face with a pool cue for not acting speedily enough to buy the third party a beer. A jury question existed, in view of plaintiff's assertion that "the employees of [defendant] had sufficient time to react to his attacker's loud and abusive behavior which continued for over five minutes within hearing distance of the waitresses and bartenders."

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54. *Id.* at 487, 436 S.E.2d at 199.
55. 263 Ga. at 487, 436 S.E.2d at 199 (Hunt, J., dissenting).
56. *Id.* at 488, 436 S.E.2d at 200.
57. 263 Ga. at 489, 436 S.E.2d at 200 (Cloud Morgan, J. (sitting by designation), dissenting).
61. *Id.* at 698, 434 S.E.2d at 742. Compare *Yancey* with *Collins v. Shepherd*, 212 Ga. App. 54, 441 S.E.2d 458 (1994) (physical precedent only), in which plaintiff was injured in a brawl at the notorious Whiskey River nightclub in Macon, Georgia. The court held that, although defendant did have a duty to guard its patrons against criminal activity, the security measures it provided were adequate. *Id.* at 56, 441 S.E.2d at 459. See also *Anderson v. Radisson Hotel Corp.*, 834 F. Supp. 1364, 1371-72 (S.D. Ga. 1993) (proprietor that voluntarily undertakes security measures may be held liable if it "acts unreasonably
Slip and Fall. Over the years, the courts have quite deliberately stacked the legal deck against plaintiffs in that specialized branch of premises liability known as ‘slip and fall’ cases. The result is that each year the few meritorious claims get lost in a flood of summary judgments for defendants. For example, during the survey period the courts denied recovery to plaintiffs who took their chances by walking on obviously slick surfaces, clearly uneven pavement, and by deliberately stepping into holes or water puddles.

One theory slip and fall plaintiffs frequently try and fail on is the “distraction” theory, which covers “situations where the plaintiff’s attention is distracted by a natural and usual cause, and this is particularly true where the distraction is placed there by the defendant or where the defendant in the exercise of ordinary care should have anticipated the distraction would occur.” In this regard, plaintiffs frequently contend they were distracted by defendant’s merchandise. However, “a product on store shelves does not in itself constitute a distraction.” To say otherwise would permit customers to barge heedlessly around a store looking at the merchandise, . . . with no care for their own safety and the safety of others. Sometimes it works, though. In Thompson v. Regency Mall Associates, there was evidence plaintiff was distracted by one defendant’s retail display just a few feet away from the defective carpet molding she tripped on. Furthermore, defendants failed to present evidence of regular inspection procedures,

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62. See generally GA. TORTS, supra note 9, § 4-6.
71. Id. at 2, 432 S.E.2d at 232.
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which can be fatal to a motion for summary judgment in this type of case. Likewise, the Georgia Court of Appeals has repeatedly held that "[w]hen a person has successfully negotiated an alleged dangerous condition on a previous occasion, that person is presumed to have knowledge of it and cannot recover for a subsequent injury resulting therefrom." Yet, in a federal case, Evans v. Mathis Funeral Home, Inc., the Eleventh Circuit found a jury question when plaintiff fell down a flight of stairs she had ascended just a couple of hours earlier. That court suggested the rule quoted above applies only when one of three factors is present: (1) The plaintiff traversed the area "only moments before falling"; (2) the plaintiff was repeatedly exposed to the hazardous condition; or (3) the hazardous condition was static. The court found none of these three conditions were present in the instant case, and based its decision also in part on the irregular construction of the stairs as testified to by plaintiff's expert.

Philosophically speaking, 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? Remember that judges are the government; jurors are the free market, and socialism has failed everywhere it has ever been tried.

C. Malpractice

In General. The expert witness affidavit requirement of Official Code of Georgia Annotated ("O.C.G.A.") section 9-11-9.1 continues to

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74. 996 F.2d 266 (11th Cir. 1993).
75. Id. at 270.
76. Id. at 269-70.
overshadow all other events on the malpractice scene. This hypertechnical legal anomaly has been criticized by these writers, and has also begun to draw some judicial fire because of its continuing capacity for confusion. Predictably, the issues presented for appellate resolution under section 9.1 during the survey period ran the gamut from the serious to the absurd. The courts added another chapter to the continually unfolding drama of just who is a "professional" entitled to invoke the protections of section 9.1. Previously, in Gillis v. Goodgame, the supreme court held that because the only statutory definitions of a "professional" are found in Code sections 14-7-2 (part of the Georgia Professional Corporation Act), 14-10-2 (part of the Georgia Professional Association Act); and 43-1-24 which refers to "[a]ny person licensed by a state examining board" and who practices one of the professions covered by those two Acts, section 9.1 protection was limited only to the occupations covered by those Code sections. By extending section 9.1 protection to all occupations "licensed by a state examining board," the court in Gillis expanded the scope of that statute far beyond any legitimate notion of "professional," with the anomalous result that section 9.1 covered many patently nonprofessional occupations—"athletic trainers, barbers, operators of billiard parlors, junk dealers, peddlers, scrap metal processors, and used car dealers, among others,"—but omitted other occupations that clearly were "professions"
but did not appear on one of Gillis' three statutory lists. Among these are the clergy (a "learned profession" at common law), teachers, insurance agents, and, perhaps the most glaring omission for malpractice purposes, pharmacists. In Harrell v. Lusk, the supreme court in a dicta-laden opinion deconstructed at least a portion of the Gillis framework and assayed a different analysis of the definition of "professional" for section 9.1 purposes. The result, like most attempts at judicial legislation, was to make the situation worse than before.

Harrell was a malpractice action against a pharmacist. Defendant argued plaintiff had not attached a proper expert affidavit to her complaint, and section 9.1 consequently barred the action. The court of appeals ruled no affidavit was required, because pharmacists were not among those professions protected by section 9.1 according to Gillis. The supreme court, in a judicial double take, held that "[a]n extensive review of the Official Code of Georgia Annotated reveals that pharmacy, with its education-qualified licensing and state examining board regulation, is the only profession declared to be such by the legislature that is not included in Title 43." Consequently, the court "[found] it necessary to augment the list of professions set forth in Gillis" to include pharmacists. In doing so, the court made a distinction

87. According to BLACK'S LAW DICTIONARY, a "profession" is a vocation or occupation requiring special, usually advanced, education and skill; e.g. law or medical professions. The term originally contemplated only theology, law, and medicine, but as applications of science and learning are extended to other departments of affairs, other vocations also receive the name, which implies professed attainments in special knowledge as distinguished from mere skill.

BLACK'S LAW DICTIONARY 1089-90 (5th ed. 1979). "In all interpretations of statutes, the ordinary signification shall be applied to all words ...." O.C.G.A. § 1-3-1 (1990). Thus, as Justice Carley's concurrence in Harrell v. Lusk, 263 Ga. 895, 898-904, 439 S.E.2d 896, 899-902 (1994), discussed infra note 110 and accompanying text, points out, the whole premise of Gillis is flawed.


92. Id. at 896-97, 439 S.E.2d at 897-98.

93. Id. at 895, 439 S.E.2d at 897.


95. 263 Ga. at 897, 439 S.E.2d at 898 (emphasis in original).

96. Id.
between those occupations included in Title 43 where licensure involves merely registration, e.g., firearm dealers . . . ; operators of motor vehicle racetracks . . . ; peddlers . . . ; and used motor vehicle parts dealers, . . . and those occupations where licensure is conditioned upon the state examining board's determination that the applicant successfully completed the schooling and/or training upon which licensure is statutorily preconditioned.97

In dicta, the court remarked that its nascent section 9.1 analysis would not extend to putative professionals such as teachers, court reporters, and fire fighters.98 Admitting, however, that the state of the law at the time plaintiff filed her complaint was "unclear," the court held it would be "manifestly unfair" to apply this newfound analysis to the instant case.99 Consequently, as it has done before,100 the court made its decision prospective, and affirmed the court of appeals.101

How, in the wake of Harrell, does one determine who is a "professional"? Concerning Title 43 occupations, that case apparently intended to limit the rule to "those occupations where licensure is conditioned upon the state examining board's determination that the applicant successfully completed the schooling and/or training upon which licensure is statutorily preconditioned."102 Space does not permit a comprehensive analysis of all the Title 43 occupations, so one random example will have to suffice. Chapter 10 of Title 43 deals with cosmetologists.103 Accord-

97. Id. at 897 n.2, 439 S.E.2d at 898 n.2.
98. Id. at 897 n.3, 439 S.E.2d at 898 n.3.
99. 263 Ga. at 898, 439 S.E.2d at 899.
101. 263 Ga. at 898, 439 S.E.2d at 899. In Brown v. Nichols, 8 F.3d 770 (11th Cir. 1993), the Eleventh Circuit used the prospective application rule of Harrell, Lutz, and Kneip to sidestep the issue of whether § 9.1 applies in federal diversity actions. Plaintiff in Brown failed to file a § 9.1 affidavit with her complaint, and the district court dismissed her action with prejudice. 8 F.3d at 771. Both the Northern District of Georgia (McGlamery v. Bruttomesso, No. 1:88-CV-787-FCF (N.D. Ga. June 16, 1989)), and the Southern District of Georgia (Boone v. Knight, 131 F.R.D. 609 (S.D. Ga. 1990)), have held that O.C.G.A. § 9-11-9.1 does not apply in federal court. The Eleventh Circuit adverted to Lutz and Kneip to hold that because the applicability of § 9.1 in federal court was unclear, the district court, upon determining that it applied, should have granted plaintiff leave to amend instead of dismissing with prejudice. "We therefore need not reach the question of whether § 9-11-9.1 actually applies in federal court." "Either way, the district court erred." 8 F.3d at 774.

102. 263 Ga. at 897 n.2, 439 S.E.2d at 898 n.2.
ing to statute, a cosmetologist is one who, among other things, cuts or shampoos the hair, or in any way cares for the nails of another person.\(^{104}\) No one can practice cosmetology unless he has obtained a certificate of registration from the State Board of Cosmetology.\(^{106}\) The state board is authorized “to set a course of study for all students of the schools of cosmetology, schools of esthetics, and schools of nail care within this state.”\(^{106}\) Thus, a cosmetologist is a “professional” under \textit{Harrell}, and an action for wrongful manicure or negligent hot wax is elevated to the status of a professional malpractice case.\(^{107}\) This result calls to mind Judge Arthur Gray Powell’s famous observation that “[p]eople would laugh at the law if it required any such thing,”\(^{108}\) but \textit{Harrell} is no laughing matter for litigants on both sides who are still faced with the anomalous result of expert testimony being statutorily required at the pleading stage when, as in the case of a cosmetologist, the common law in all probability would not require it at the evidentiary stage.\(^{109}\)

Justice Carley’s concurrence aptly recognized that the very premise of \textit{Harrell} and \textit{Gillis} is flawed. Rather than “accept[ing] the premise of \textit{Gillis} that the scope of the applicability of [section 9.1] is somehow dependent upon a statutory definition of the term ‘professional,’” Justice Carley contended that “the legislative intent . . . was to create an initial

104.  Id. § 43-10-1(4), (6).
105.  Id. § 43-10-8.
106.  Id. § 43-10-13.
109.  “[E]xpert opinions are required only concerning conclusions that the jury could not draw for itself, that is, a conclusion, that is, beyond the ken of the average layman.” \textit{Georgia Torts}, \textit{supra} note 9, § 5-1, at 46 (Supp. 1994).

pleading requirement, the applicability of which would be as broad as the antecedent common law evidentiary requirement."

This extensive discussion of Harrell perhaps illustrates the enormous range and complexity of the issues generated by section 9.1. Only a few additional highlights can be remarked.

The law of expert witness competency continues to evolve. In their 1989 survey article, these writers contrasted a case which held a nurse was not qualified to refute an attending physician's statements, with another holding a doctor was not a competent expert in the field of nursing. During the current survey period, the court of appeals executed an about-face on both of these issues. In Tye v. Wilson, the court held a doctor who was familiar with the standard of care acceptable to the "medical profession generally" could testify against a nurse. "This court has consistently held that members of the medical profession are competent to render an opinion about the standard of care of other members of the medical profession as long as their opinion concerns a common area of expertise." Predictably, then, in Nowak v. High, the court held a nurse could give an affidavit against a doctor concerning a method of treatment which was the same for both.

A final matter of importance in the area of section 9.1 merits comment. Subsection (b) of that statute provides for an automatic forty-five day extension for filing the affidavit if the statute of limitations will expire within ten days of filing and the plaintiff alleges that, because of time constraints, the affidavit could not be prepared. This seemingly straightforward provision is fraught with perils, however, as several survey period cases proved.

110. 263 Ga. at 902-03, 439 S.E.2d at 901 (Carley, J., concurring) (emphasis in original).
114. 208 Ga. App. 253, 430 S.E.2d 129 (1993). Although Tye was discussed in last year's survey, it is technically a part of this current survey period, which includes cases published in the advance sheets between June 1, 1993 and May 31, 1994. See Cynthia Trimboli Adams, et al., Torts, supra note 23, at 415, 418.
115. 208 Ga. App. at 254, 430 S.E.2d at 130 (emphasis omitted).
116. Id.
118. Id. at 538, 433 S.E.2d at 604.
In *Legum v. Crouch*, the court of appeals held the statute of limitations for plaintiff's medical malpractice claims was tolled during the period her decedent's estate was unrepresented. This aspect of *Legum* is discussed elsewhere in this article, but the court held that because the tolling provisions kept the statute from expiring within ten days of filing, as plaintiff had alleged, subsection (b) did not apply and her affidavit, therefore, was not timely filed.

Plaintiff in *Coleman v. Hicks* also ran afoul of subsection 9.1(b). In her legal malpractice complaint, she alleged defendants wrongfully settled her underlying claim in January 1990. Although plaintiff filed a State Bar complaint against defendants in March 1990, she contended they misled and defrauded her about her case until May 1992 and, consequently, the statute of limitations was tolled until then. Filing the instant action in May 1990, plaintiff attempted to take advantage of subsection 9.1(b), but the court of appeals rebuffed her. "In our view," said the court, "plaintiff's complaint sounds in both tort and contract. After all, she seeks damages for pain and suffering, as well as damages for monetary loss." This put plaintiff in a double bind, explained the

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121. Id. at 188-89, 430 S.E.2d at 364.
122. See infra notes 280-81 and accompanying text.
123. 208 Ga. App. at 189, 430 S.E.2d at 364.
125. Id. at 467-68, 433 S.E.2d at 621-22.
126. Id. at 469, 433 S.E.2d at 623. By suggesting that legal malpractice has a basis in contract, the court in *Coleman* perpetuated a seeming anomaly arising out of such cases as Ballard v. Frey, 179 Ga. App. 455, 459, 346 S.E.2d 893, 896 (1986), and Cheeley v. Henderson, 197 Ga. App. 543, 546-47, 398 S.E.2d 787, 791 (1990), rev'd on other grounds, 261 Ga. 498, 405 S.E.2d 865 (1991), that a malpractice cause of action alleging negligence or unskillfulness can sound in contract or tort. *Coleman*, in fact, seemingly went one step further in suggesting plaintiff's claim for monetary loss sounded in contract, and her claim for personal injuries sounded in tort. All of these cases, however, ultimately rely on the decision in Hamilton v. Powell, Goldstein, Frazer & Murphy, 167 Ga. App. 411, 306 S.E.2d 340 (1983), aff'd, 252 Ga. 149, 311 S.E.2d 818 (1984), which made it clear the duty to exercise the requisite degree of care in the professional's discharge of his services is a duty apart from any express contractual obligation. Therefore, persons of this class performing services pursuant to their contracts with their clients have been held to be liable in tort for their negligence in failing to exercise the required degree of skill, and thus to be liable to a suit *ex delicto* for the negligent performance of the contract.

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167 Ga. App. at 414, 306 S.E.2d at 342 (emphasis added). Thus, *Coleman*, and perhaps the earlier cases as well, probably go too far in implying that a legal malpractice action for monetary loss sounds only in contract. Such a loss, to the extent it is based on negligence, is obviously a tort action, which is "only dependent upon the contract to the extent necessary to raise the duty." Peterson v. First Clayton Bank & Trust Co., 214 Ga. App. 94, 98, 447 S.E.2d 63, 67 (1994) (quoting Mauldin v. Sheffer, 113 Ga. App. 874, 878, 150 S.E.2d
court, because "[t]o the extent [her] claim sounds in tort, it is barred by the applicable two-year statute of limitation."127 Furthermore, added the court, "[t]o the extent [her] claim sounds in contract, it is not time barred."128 Thus, like plaintiff in Legum, Coleman's attempt to avail herself of subsection 9.1(b) was improper.

Since section 9.1 litigation seems to have overtaken slip and fall cases as the tort appeal of choice in Georgia, we terminate the survey of these cases with an apt adaptation of a condign comment conflated by the great Judge Braswell Deen:

Concerning slip and fall [and section 9.1] cases, we have read . . . "until [our] eyes have grown weak with reading and brain fagged out with trying to understand what learned judge after learned judge and learned law writer after learned law writer have said on these subjects. 'But the thought comes to us that one may live in sight of the ocean, may sail upon it, may know its moods in the calm and in the storm, and yet not be able to answer some simple question as to a cup of cold water. He who so oft had studied with most critical and intelligent eyes the profusion of flowers in which England's gardens and fields abound confessed how little he knew of the "all in all" of the single and insignificant flower which he plucked from the crannied wall.'"129

Medical Malpractice. Three essential elements comprise a cause of action for medical malpractice:130 (1) the duty inherent in the doctor-patient relationship;131 (2) the breach of that duty by the failure to apply the requisite degree of skill and care;132 and (3) that failure

150, 154 (1966)). To the extent Coleman, Cheeley, and Ballard were concerned with applying the four-year statute for breaches of oral contract (O.C.G.A. § 9-3-25 (1982)) to plaintiffs' allegations of monetary loss, the same result could have been achieved by recognizing the action was in tort and applying O.C.G.A. § 9-3-31 (1982), the four-year statute of limitations for tortious injury to property.


130. See generally GEORGIA TORTS, supra note 9, § 5-2, at 95.


132. In McQuaig v. McLaughlin, 211 Ga. App. 723, 440 S.E.2d 499 (1994), plaintiffs attempted to ask their expert what action he would have taken had he been caring for plaintiff. Reiterating that "[t]he appropriate standard of care in medical malpractice cases is the standard of care exercised in the medical profession generally, rather than a local standard," the court held evidence concerning what the individual doctor would have done
constituting the proximate cause of injury to the patient. As Georgia Law of Torts points out, however, "[n]ot only physicians, but dentists, chiropractors, psychiatrists, and others are subject to tort liability for medical malpractice." During the survey period, the court of appeals augmented that list with optometrists in Zechmann v. Thigpen. Code section 9-3-70, the medical malpractice statute of limitations, defines such an action in part as "arising out of: (1) health, medical, dental, or surgical service, diagnosis, prescription, treatment, or care rendered by a person authorized by law to perform such service . . . ." Holding that "[this] language plainly encompasses more than the practice of medicine," the court reasoned that because plaintiffs' contentions of injury "arose from the health or medical service, diagnosis and/or care which the optometrist rendered to her," the action was one for medical malpractice and was subject to the limitations period of section 9-3-70.

In a lengthy and thoughtful opinion, a divided court of appeals in Walker v. Jack Eckerd Corp. addressed as a matter of first impression the common-law duty of pharmacists to warn patients about potential adverse consequences of drugs prescribed by a licensed physician. Discussing the two competing lines of authority on this issue, the court adopted the majority view that "a pharmacist has differently was inadmissible. Id. at 727, 440 S.E.2d at 503. Similarly, in Bieling v. Battle, 209 Ga. App. 874, 434 S.E.2d 719 (1993), the court held the standard of care must be based on knowledge available to the general medical community at the time of the alleged negligence. 209 Ga. App. at 878-79, 434 S.E.2d at 722-23. Thus, defendant's failure in 1982 to take measures to prevent plaintiff from contracting AIDS through a blood transfusion was not negligent, because it was undisputed "the general medical community could not have anticipated in 1982 that AIDS was a natural, foreseeable risk associated with a blood transfusion as such connection had not been made at the time and was not a part of general medical knowledge." Id. at 878, 434 S.E.2d at 722-23.


134. GEORGIA TORTS, supra note 9, § 5-2, at 96 (footnotes omitted).


136. Id. at 727, 437 S.E.2d at 477; see O.C.G.A. § 9-3-70 (1982).

137. Id. § 9-3-70(1).


140. The court considered and rejected the "minority view" that a pharmacist does owe a duty to warn. Id. at 521, 434 S.E.2d at 67 (citing Docken v. CIBA-GEIGY, 794 P.2d 45 (Or. App. 1990); Dooley v. Everett, 805 S.W.2d 380 (Tenn. Ct. App. 1990)).
no duty to warn the customer or notify the physician that the drug is being prescribed in dangerous amounts, that the customer is being overmedicated, or that the various drugs in their prescribed quantities could cause adverse reactions to the consumer.\textsuperscript{141} The court based its holding on

the need for preserving, without interference of third parties, a trusted physician-patient relationship, the fact that patients have different reactions to and tolerances for drugs coupled with the fact that the severity of a patient's condition may warrant a different level of risk acceptance, which factors are best monitored and evaluated by doctors, and the public policy of this state for reducing frivolous malpractice actions against professionals . . . .\textsuperscript{142}

The court also noted the limited legislative entry into this field,\textsuperscript{143} and indicated that a different rule may apply to cases arising after January 1, 1993, the effective date of the Georgia State Board of Pharmacy's latest drug review and patient counseling rules.\textsuperscript{144} "Nor will we here decide whether these rules . . . are mandated by federal law or are in conflict with [Code section] 26-3-8(b)," said the court.\textsuperscript{145} Also significantly, the court declined to address the applicability of this rule to "over-the-counter" non-prescription drugs or other products.\textsuperscript{146}

**Legal Malpractice.** One of the most salutary developments in recent years for attorneys concerned with legal malpractice (or the avoidance thereof) was the publication during the survey period of J. Randolph Evans' *Practical Guide to Legal Malpractice Prevention.*\textsuperscript{147} A book of this nature is particularly welcome in light of some unsettling developments during the survey period.

The fiduciary nature of the attorney-client relationship\textsuperscript{148} took center stage in several cases. Notably, in *Tante v. Herring,*\textsuperscript{149} the court

\textsuperscript{141} 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)).
\textsuperscript{142} Id. at 521-22, 434 S.E.2d at 67.
\textsuperscript{144} 209 Ga. App. at 523, 434 S.E.2d at 69 (citing Rules of Ga. State Bd. of Pharmacy § 480-31-.01).
\textsuperscript{145} Id. (citing O.C.G.A. § 26-3-8(b) (1982 & Supp. 1994)).
\textsuperscript{146} Id. at 521, 434 S.E.2d at 67.
\textsuperscript{147} J. RANDOLPH EVANS, PRACTICAL GUIDE TO LEGAL MALPRACTICE PREVENTION (1993). A second edition was issued in 1994. This publication is available from the Georgia Institute of Continuing Legal Education.
\textsuperscript{148} See id. at 94-95.
allowed an action against an attorney by former clients to be based on the attorney's breach of fiduciary duty even though the attorney had been successful in the underlying representation. In this somewhat sordid case, Tante, the attorney, represented Mr. and Mrs. Herring in connection with her Social Security disability claim. "Tante was given medical reports showing [Mrs. Herring] had a severe decrease in her desire for sex . . . . [S]hortly after their first meeting, Tante advised her that she would be less depressed and would feel better if she would enter into a sexual relationship with him." Subsequently, "Tante infected Mrs. Herring with two strains of venereal disease with which she unknowingly infected Mr. Herring."  

Holding that "[a] successful monetary result on a claim does not mean that a lawyer cannot, per se, otherwise breach his professional responsibilities to his clients," the court of appeals thus allowed the Herrings' legal malpractice claim. "[W]hile Tante may have been successful in securing an award from the Social Security Administration, the record establishes that as a result of his actions both of his clients were otherwise severely damaged because of his representation of them."  

As the supreme court subsequently pointed out, however, the true ground of liability was not malpractice, which, after all, is grounded in negligence, but the intentional breach of Tante's fiduciary duties to the Herrings. By his conduct, "Tante assumed an interest antagonistic to his clients and their cause, and contrary to his role as their trusted attorney." Drawing extensively from agency cases, and invoking O.C.G.A. section 51-1-6, Georgia's catchall "no wrong without a remedy" statute for torts, both the court of appeals and the supreme court in Tante not only clarified a new dimension to the liability of

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150. The evidence showed an attorney-client relationship with both Mr. and Mrs. Herring. *Id.* at 323-24, 439 S.E.2d at 8.

151. *Id.* at 326, 439 S.E.2d at 9.

152. *Id.* at 323, 439 S.E.2d at 7.

153. *Id.* at 324, 439 S.E.2d at 8.

154. *Id.* at 327, 439 S.E.2d at 10.


156. "Malpractice is a particular form of negligence that consists of not applying to the exercise of the practice the degree of skill or care which is ordinarily employed by the profession generally under similar conditions and like surrounding circumstances." *Georgia Torts*, supra, note 19, § 5-1, at 93 (emphasis added).


159. O.C.G.A. § 51-1-6 (1982).
lawyers to their clients, but also gave increased definition to the status of breach of fiduciary duty as an independent tort.

Both Tante and Coleman v. Hicks, discussed above, made clear once again that an attorney’s violation of ethical duties imposed by the Code of Professional Responsibility is not enough, standing alone, to state a claim for legal malpractice. "The correct statement of the law is that 'standing alone' a violation of a bar standard will not support a legal malpractice claim." If, however, the unethical conduct proximately results in damage to the client, as it did in Tante, it is actionable on that independent basis.

If Tante stands for the rule that too much communication (at least of the wrong kind) with a client is an actionable breach of fiduciary duty, then Thomas v. White establishes the proposition that not enough communication can have the same result. Plaintiff’s underlying case was dismissed after defendant attorneys failed to file a timely demand for a jury trial as required by local court rules. Plaintiff testified that, instead of telling her this, defendant White initially misrepresented to her that a $30,000 settlement offer was pending, and "after [plaintiff] did not hear from him for almost two months, she repeatedly attempted to contact White over a period of weeks, but he would not speak with her and would not return her calls." Plaintiff further alleged that, when she eventually did speak to White, he continued to represent to her that the case was not lost and he was working on it.

The court held this disputed testimony was sufficient to create a jury issue on the question of punitive damages. "[E]ven without the

160. An attorney’s breach of fiduciary duty liability for intentional misconduct towards clients can perhaps be analogized to a physician’s battery liability for intentional mistreatment of patients. See Georgia Torts, supra note 9, § 2-2.
163. See supra notes 124-28 and accompanying text.
165. 211 Ga. App. at 328, 439 S.E.2d at 11 (emphasis in original).
166. Id.
168. Id. at 141, 438 S.E.2d at 367.
170. 211 Ga. App. at 142, 438 S.E.2d at 368.
171. Id.
172. Id.
evidence of the misstatements of fact because of the attorney-client relationship between these parties, [defendants'] failure to communicate with [plaintiff] about the status of her case, under the circumstances here, could be sufficient to constitute fraud."\textsuperscript{173}

Although \textit{Thomas} illustrates perhaps an extreme example of failure to communicate, this problem in its lesser forms is one of the besetting sins of too many lawyers. As Evans points out, "[e]ven if the case is competently and expeditiously handled, inadequate communication may create the opposite impression."\textsuperscript{174} Now that the deliberate failure to communicate with clients is a ground for punitive damages, the attorney readers of this survey would be well advised to whittle down their stacks of telephone message slips!

In a final case of consequence, the court in \textit{Zepp v. Toporek}\textsuperscript{175} reinforced the admonitory nature of legal malpractice actions by holding the injured client is not required to pursue other available remedies before recovering from the negligent lawyer.\textsuperscript{176} Plaintiff in \textit{Zepp} alleged defendant, who had served as her attorney while she was a minor in settling a personal injury case over twenty years earlier, had knowingly encouraged her guardian to settle for an inadequate amount. Defendant contended plaintiff’s instant claim against him constituted an unauthorized collateral attack on the original judgment, and plaintiff’s remedy was to have the original judgment set aside.\textsuperscript{177} "[I]t is not the law in this state that clients seeking to sue their attorneys for malpractice or misconduct which resulted in an adverse or unacceptable judgment must first set aside that judgment before proceeding against their attorneys," responded the court of appeals.\textsuperscript{178} Assuming the client can prove the attorney acted negligently or otherwise improperly, it certainly seems fair not to require the client to incur additional expense to undo the damage the attorney caused.

\textsuperscript{174} \textit{Evans, supra note 157, at 24.}
\textsuperscript{176} \textit{Id.} at 171, 438 S.E.2d at 639.
\textsuperscript{177} \textit{Id.} at 170, 438 S.E.2d at 639.
III. IMPUTED AND RELATIONAL LIABILITY

A. Liability of Alcohol Providers

Georgia's "dram shop" law, Code section 51-1-40, received significant reinterpretation from the supreme court in Riley v. H&H Operations. That section provides a civil cause of action against any person who provides alcohol to a person not of lawful drinking age "knowing" the minor will "soon" be driving a motor vehicle. Defendants contended the term "soon" was unconstitutionally vague, and the term "knowing" referred only to actual, not constructive, knowledge. The supreme court disagreed on both points. "Although 'soon' does not have a fixed temporal meaning, in the context of the Act it is sufficiently definite and certain in meaning to give proper guidance to those bound by its terms." Thus, the four and one-half hour interval in this case was "soon" enough for the court.

Likewise, the court adopted a broad construction of the term "knowing," holding that "[i]f one in the exercise of reasonable care should have known that the recipient of the alcohol was a minor and would be driving soon, he or she will be deemed to have knowledge of that fact." The court overruled the contrary rule established by the court of appeals, which was criticized in last year's torts survey. Furthermore, in Steedley v. Huntley's Jiffy Stores, Inc., the court of appeals held that a "consumer of alcohol, even an underage consumer, may not recover from the provider of that alcohol for injuries resulting from the consumption of the alcohol." The court explained that "[a]s between provider and consumer, the consumer has the last opportunity

181. O.C.G.A. § 51-1-40(b).
182. 263 Ga. at 653, 436 S.E.2d at 660.
183. Id.
184. 263 Ga. at 654, 436 S.E.2d at 660.
185. Id. at 655, 436 S.E.2d at 661.
189. Id. at 23, 432 S.E.2d at 626.
to avoid the effect of the alcohol, by not drinking or not driving, and thus as between the two, the negligence of the consumer is greater."

B. Master and Servant

Scope of Employment. If a motor vehicle is involved in a collision, and the operator of the vehicle is in the employment of the vehicle's owner, a presumption arises that the employee is in the scope of his employment at the time of the collision. The employer must rebut the presumption by "clear, positive, and uncontradicted evidence," which it did not do in *Bell v. Stroh Brewery Co.* In that case, evidence that the employee's job was such that she needed the company car at all times, and that she had discretion about when and whether to go to the office, created a jury question despite evidence that she was merely on the way to the office from her home at the time of the accident. Once the employer has presented evidence that the employee is not in the scope of employment, however, the burden shifts back to the plaintiff to contradict it with evidence of his own. He cannot simply rely on the presumption in the face of evidence to the contrary, as plaintiff learned in *Carroll v. Americal Corp.*

Negligent Hiring and Retention. In *Diaconescu v. Hettler,* the Diaconescus sued the Hettlers, their neighbors, after Murphy Munsey, the man the Hettlers hired to watch their property while they were out of the country, shot Mrs. Diaconescu with a high powered rifle as she sat in a neighbor's garage. The issue for negligent hiring and retention purposes was whether defendants hired Murphy Munsey (the name alone should have alerted them to something) as a security guard or merely to "watch" their property, since "a security service offering the use of its employees to patrol premises for the purpose of protecting persons and property 'may have been duty bound to exercise a greater amount of care to ascertain [whether] its employees were [fit to perform

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190. *Id.* at 24, 432 S.E.2d at 626.
192. *Id.*
194. *Id.* at 851, 434 S.E.2d at 812-13.
197. *Id.* at 192, 435 S.E.2d at 490.
the security services offered].” Leaving aside the fact that the Hettlers were not a “security service,” the evidence showed Murphy Munsey had been hired only to “watch” the property (i.e. maintain a presence on the premises), not to “protect” the Hettler home. Thus, summary judgment for the Hettlers was proper.

Application of the rule stated in Hettler to the facts of Kemp v. Rouse-Atlanta, Inc., however, yields a somewhat inconsistent result, because the claim against defendants in Kemp was for the negligent hiring and retention of a security officer. Plaintiffs alleged defendant employer was responsible for “inadequate and improper training” of the security officer. Rejecting this claim, however, the supreme court held that “the training [the officer] was required by statute and agency regulations to receive was [not] designed to uncover the trainee’s latent character defects for purposes of placing the employer on notice that the trainee possessed violent or criminal propensities. Thus [defendant’s] failure to provide that training does not avail [plaintiffs].” It would seem that the “greater amount of care” expected of a security service should impose on it a common-law duty to attempt to identify such character defects.

Workers’ Compensation Immunity. The tort immunity conferred on those who are liable for workers’ compensation benefits can be both a sword and a shield. For purposes of tort law, of course, the concern is with its applicability as a shield from tort liability. In Yoho v. Ringier of America, Inc. the supreme court held the way to determine whether the tort immunity applies to a given defendant is first to ascertain whether there is any basis for the defendant to be liable for compensation benefits. “Only an entity who is secondarily liable for workers’ compensation benefits under [O.C.G.A. §] 34-9-8(a) is consequently entitled to tort immunity under [O.C.G.A. §] 34-9-11.” The court concluded that “[a] mere owner to whom the contractual

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199. Id. at 192, 435 S.E.2d at 490.
200. Id. at 194, 435 S.E.2d at 492.
202. Id. at 878, 429 S.E.2d at 267.
206. Id. at 341, 434 S.E.2d at 59.
207. Id.
obligation of performance is owed and from whom no contractual obligation of performance is due is not a ‘principal contractor’ under [O.C.G.A. §] 34-9-8, even if he undertakes a project under his own general supervision. “[T]his would not be the result of his status as an ‘owner,’ but of his lack of status as a ‘contractor.’”

There are a whole range of things the workers’ compensation tort immunity does not shield in any event. Intentional torts and nonphysical injuries during the survey period were held not to be covered by workers’ compensation, and, accordingly, the defendants were not immune from tort liability.

C. Negligent Entrustment

Just as the drunk driver in the section discussed above on alcohol liability could not recover from the alcohol provider for his own injuries, an injured drunk driver cannot recover from the automobile owner under a negligent entrustment theory. With this factual scenario before it, the court of appeals in Ridgeway v. Whisman stated that

[t]he liability of the owner in a negligent entrustment action does not result from imputing the negligence of the incompetent driver to the owner, rather “[n]egligent entrustment of a motor vehicle to an incompetent driver is an independent wrongful act of the vehicle’s owner which is a concurrent, proximate cause of injury when it combines with the negligence of the operator.”

Thus, the court concluded the drunk driver’s parents could not recover for her wrongful death because her own wrongful act of getting drunk was the sole proximate cause of her injuries.

208. Id. at 343, 434 S.E.2d at 60.
212. See supra notes 188-90 and accompanying text.
215. Id. at 170, 435 S.E.2d at 626 (quoting GEORGIA TORTS, supra note 9, at 164).
In *Gafford v. Duncan*,\(^{217}\) defendant's employee used a company-owned vehicle to commit an aggravated assault against his wife.\(^{218}\) Alleging that defendant had negligently entrusted the vehicle to her husband, plaintiff brought suit for her personal injuries. The court held that even though defendant had knowledge its employee had previously abused his wife, it was not foreseeable that he would use the vehicle to commit an assault against her.\(^{219}\) Therefore, since the employee's unforeseeable criminal acts were the proximate cause of plaintiff's injuries, defendant could not be held liable under any theory of negligent entrustment.\(^{220}\)

**D. Family Purpose Doctrine**

The court in *Cox v. Rewis*\(^{221}\) applied the family purpose doctrine\(^{222}\) to hold a noncustodial parent liable for an accident caused by her son, who did not have the general use of her car, but was allowed to use it for specific purposes while visiting with her.\(^{223}\) As *Cox* illustrates, perhaps surprisingly for a doctrine grounded in fiction, the courts tolerate little fiction in its application. The formal legal arrangements regarding the car are typically accorded little weight; instead, the courts look to the facts of each case to determine whether a family purpose is involved. Thus, in *Whitley v. Ditta*,\(^ {224}\) the fact that the father was the named defendant, but the vehicle was titled in the mother, did not prevent application of the doctrine when the evidence showed that "the vehicle was purchased by the father and mother with joint funds, and that it was insured by the father under a family insurance policy . . . ."\(^ {225}\)

Plaintiffs in *Jones v. Walker*\(^ {226}\) sought to hold defendants liable under the family purpose doctrine for injuries their daughter received

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\(^{218}\) Id. at 350, 436 S.E.2d at 78. While in his employer's truck, plaintiff's husband chased his wife's car, repeatedly rammed it with the truck, and forced it off the road into a ditch where it flipped. Id.

\(^{219}\) Id. at 351, 436 S.E.2d at 79.

\(^{220}\) Id.


\(^{222}\) See generally *GEORGIA TORTS*, supra note 9, § 13-1. "When the conditions for application of the family purpose doctrine are present, vicarious liability may be imposed upon a family member (usually the head of household) for the negligence of another family member under a fictitious agency theory." Murch v. Brown, 166 Ga. App. 538, 538, 304 S.E.2d 750, 751 (1983).


\(^{225}\) Id. at 556, 434 S.E.2d at 111.

when the horse she was riding collided with defendants' horse. All animal lovers will be pleased to know that the court concluded there is no such thing as a "family purpose animal," and plaintiffs' reliance on this doctrine was misplaced.

IV. NEGLIGENCE DEFENSES

A. Proximate Cause Defenses

The foreseeability of independent criminal acts in relation to a defendant's liability for a plaintiff's injuries was the subject of several survey period cases. Of particular interest is the supreme court's holding in Southeastern Stages, Inc. v. Stringer, reversing the court of appeals decision, which was discussed in last year's survey. The supreme court specifically disapproved the court of appeals' application of premises liability law to common carriers to find a jury question concerning the foreseeability of one passenger being shot to death by another passenger. Concerning a carrier's duty of passenger protection, the high court stated:

knowledge of conditions which are likely to result in an assault upon a passenger, or which constitute a source of potential danger, imposes the duty of active vigilance on the part of the carrier's agents and the adoption of such steps as are warranted in the light of existing hazards.

Under this standard, the court found that two previous passenger attacks on bus drivers were insufficient to raise a question of fact concerning the foreseeability of the present attack since "there was no evidence that conditions existing on the Augusta-Atlanta route travelled by the decedent were likely to expose passengers to a reasonably

227. Id. at 535, 433 S.E.2d at 728.
228. Id.
229. See GEORGIA TORTS, supra note 9, § 15-1.
233. 263 Ga. at 642, 437 S.E.2d at 318. O.C.G.A. § 46-9-132 (1992) states that "[a] carrier of passengers must exercise extraordinary diligence to protect the lives and persons of his passengers...." Id.
234. 263 Ga. at 642, 437 S.E.2d at 317.
foreseeable danger.\textsuperscript{236} Jury questions were held to exist, however, concerning the foreseeability of criminal activity in two survey period cases. In \textit{Wilks v. Piggly Wiggly Southern, Inc.},\textsuperscript{237} there was a jury question concerning defendant's knowledge of loiterers' assaults upon customers,\textsuperscript{238} and, likewise, in \textit{Collins v. Shepherd},\textsuperscript{239} there was a jury question concerning defendant's knowledge of previous fights at its nightclub.\textsuperscript{240}

In addition to criminal activity, other actions by third parties may intervene in the causal chain of events to insulate a defendant from negligence liability.\textsuperscript{241} Attorneys in Georgia may take some comfort in reading \textit{Meiners v. Fortson \& White}.\textsuperscript{242} In that legal malpractice action, plaintiff's first lawyer was unable to perfect service of plaintiff's original personal injury suit because of the lawyer's negligence in failing to provide a proper service address for the personal injury defendant. Six months before the statute of limitations ran on the personal injury claim, plaintiff fired her first lawyer and hired a new one, who also negligently failed to perfect service of the suit within the required six months.\textsuperscript{243} Plaintiff then brought the instant malpractice action against her first lawyer.\textsuperscript{244} The court of appeals, affirming the trial court's grant of summary judgment to defendant, specifically found:

\begin{quote}
[where, as here, the second attorney is specifically advised by the first attorney that a party needs to be served and the second attorney has more than six months to accomplish that service, it is not reasonably foreseeable that the second attorney will fail to cure the first attorney's error and perfect service as a matter of law.\textsuperscript{245}]
\end{quote}


\textsuperscript{238} \textit{Id.} at 844, 429 S.E.2d at 324.

\textsuperscript{239} 212 Ga. App. 54, 441 S.E.2d 458 (1994).

\textsuperscript{240} \textit{Id.} at 56, 441 S.E.2d at 459.


\textsuperscript{243} \textit{Id.} at 612-13, 436 S.E.2d at 780-81.

\textsuperscript{244} \textit{Id.}

\textsuperscript{245} \textit{Id.} at 613, 436 S.E.2d at 781. \textit{See also Mobley v. Flowers}, 211 Ga. App. 761, 440 S. E.2d 473 (1994) (not foreseeable that plaintiff's truck would malfunction and come into contact with a live electrical wire); \textit{Taylor v. Atlanta Ctr. Ltd.}, 208 Ga. App. 463, 430
The supreme court in *C.W. Matthews Contracting Co. v. Gover* was faced with determining the constitutionality of the portion of O.C.G.A. section 40-8-76.1 that prohibits the introduction of a plaintiff's failure to wear a seat safety belt into evidence. Finding the statute did not violate due process or equal protection standards, the court held it passed constitutional muster.

B. Limitation of Actions

The court of appeals has continued to explore the issue of the date a cause of action for medical malpractice accrues pursuant to O.C.G.A. section 9-3-71. After two recent attempts to reach an agreement, the court in *Bryant v. Crider* seems, at last, to have made the determination that the statute of limitations begins to run for such an action at the time the injury occurs and manifests itself to the plaintiff. The court flatly rejected plaintiff's argument that the limita-

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248. 263 Ga. at 110, 428 S.E.2d at 799.
249. O.C.G.A. § 9-3-71(a) (Supp. 1994). The four recognized points at which such a tort action may accrue are: "(1) When the defendant breaches his duty; (2) when the plaintiff is first injured; (3) when the plaintiff becomes aware of his injury; or (4) when the plaintiff discovers the causal relationship between his injury and the defendant's breach of duty." Lumberman's Mut. Casualty Co. v. Pattillo Constr. Co., 254 Ga. 461, 462, 330 S.E.2d 344, 345 (1985), overruled in part by Corporation of Mercer Univ. v. National Gypsum Co., 258 Ga. 365, 368 S.E.2d 732 (1988). See also Cynthia Trimboli Adams, et al., *Torts, supra* note 23, at 430.
250. Jones v. Lamon, 206 Ga. App. 842, 426 S.E.2d 657 (1992) (four-judge plurality argued for point two; two-judge special concurrence argued for point three; and three-judge dissent argued for point four); Vitner v. Miller, 208 Ga. App. 306, 430 S.E.2d 671 (1993) (four-judge plurality argued for point three; one-judge special concurrence argued for point three and advocated the acceptance of the "continuous treatment" doctrine; two-judge dissent argued for point two; and one judge dissented without opinion).
252. It is particularly interesting to note that Judge Blackburn, who wrote the opinion in *Bryant*, also wrote the dissent in *Vitner*. In *Vitner* he advocated the beginning of the limitations period as the date on which the injury had occurred, which he pinpointed as the date on which plaintiff's abortion had taken place, even though plaintiff was not aware of her injury until a few days later. 208 Ga. App. at 310, 430 S.E.2d at 674. In *Bryant*, however, he seems to have accepted the arguments of his colleagues in the previous opinions and reached the more equitable conclusion that the statute of limitations began to run when plaintiff experienced the symptoms of her abortion-related injury, not at the time of her actual injury, which, following his reasoning in the *Vitner* dissent, would have occurred on the date of her abortion. 209 Ga. App. at 627, 434 S.E.2d at 165.
tions period should not begin to run until she discovered the causal relationship between her injury and defendants' negligence, stating: "A subjective belief that symptoms were due to some other cause unrelated to the alleged negligence does not change the point at which the injury occurred."253

In Craven v. Lowndes County Hospital Authority,254 the general medical malpractice statute of repose255 withstood a claim of unconstitutionality based on equal protection grounds.256 The supreme court found the classification of plaintiffs pursuant to this statute bore a rational relationship to the legislative goal of "providing for the abolition of a cause of action after the passage of the time provided."257 The court applied this statute in Bieling v. Battle258 to put an end to plaintiff's lawsuit filed in 1990 concerning allegedly AIDS-tainted blood she received during an operation in 1982.259 Although the five-year statute of repose did not become effective until 1985, and plaintiff did not know she had contracted AIDS until 1989, the court of appeals had no problem with applying the statute retroactively to the 1982 injury since plaintiff's complaint was filed after the statute's effective date.260

255. O.C.G.A. § 9-3-71(b) (Supp. 1994). This Code section states: "[N]o event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." Id.
256. 263 Ga. at 659, 437 S.E.2d at 309. Plaintiff claimed the statute created an arbitrary classification of plaintiffs in medical malpractice actions. The first claimed classification was victims of medical malpractice who discover their bodily harm within five years of the date of the negligent act or omission and may bring a cause of action. The second classification was for victims who do not discover their injuries until after five years from the date of the negligent act or omission and are thereby forbidden from bringing their causes of action. Id.
257. Id. at 660, 437 S.E.2d at 310. In his dissent, Justice Benham argued for a substantial relation intermediate standard of review. Under this standard, he concluded that given the nature of the injuries at issue and their difficult detectability, the legislature's five year cut-off date was arbitrary and did not bear "a fair and substantial relation to the objective" of minimizing the "long tail" problem. Id. at 663, 437 S.E.2d at 312 (Benham J., dissenting).
259. Id. at 875, 434 S.E.2d at 720.
260. Id. The court based its holding in part upon an earlier supreme court decision, Hunter v. Johnson, 259 Ga. 21, 376 S.E.2d 371 (1989), which found that statutes of limitation were procedural (rather than substantive) in nature thereby creating no impediment for retroactive application. The Eleventh Circuit also reached this same result in Bradway v. American Nat'l Red Cross, 992 F.2d 298 (11th Cir. 1993), in which plaintiff
The reasoning in *Bieling* was also applied in *Zechmann v. Thigpen* to the minor's medical malpractice statute of repose.\(^{261}\) In finding plaintiffs' complaint to be time barred under this statute, the court of appeals recognized the "potential inequity of calculating the time of ultimate repose from the alleged negligent act or omission [when] the injury is subsequent ...."\(^{263}\) There being no present constitutional question, however, the court passed this buck to the legislature.\(^{264}\)

In *Henrickson v. Sammons*,\(^{265}\) the supreme court reversed the court of appeals decision in that case,\(^{266}\) which held the 180-day statute of limitations for O.C.G.A. section 34-6A-6(a) (Georgia Equal Employment for the Handicapped Act)\(^{267}\) was applicable to plaintiff's claim brought pursuant to the Rehabilitation Act of 1973\(^{268}\) for wrongful termination of employment.\(^{269}\) Finding "an overwhelming majority of federal courts have characterized 29 U.S.C. § 794 as providing a cause of action for injuries to the person,"\(^{270}\) the court determined that the most analogous state statute of limitations was the two-year period specified for personal injuries.\(^{271}\) In *Johnson v. Hardwick*,\(^{272}\) the court of appeals also noted that the limitations period for damaged bailed property is four years, the same as for injury to personalty.\(^{273}\)

Although there are a number of events under Georgia law that will toll a statute of limitations, a motion to add additional parties is not one of them.\(^{274}\) Plaintiffs in *Doyle Dickerson Tile Co. v. King*\(^{275}\) filed such

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\(^{261}\) *210 Ga. App. 726, 437 S.E.2d 475 (1993)*.

\(^{262}\) *O.C.G.A. § 9-3-73(c)(2) (Supp. 1994)*.

\(^{263}\) *210 Ga. App. at 730, 437 S.E.2d at 478*.

\(^{264}\) *Id., 437 S.E.2d at 479*.

\(^{265}\) *263 Ga. 331, 434 S.E.2d 51 (1993)*.


\(^{267}\) *O.C.G.A. § 34-6A-6(a) (1992)*.

\(^{268}\) *29 U.S.C. § 794 (1985)*.

\(^{269}\) *263 Ga. at 331, 434 S.E.2d at 51*. Plaintiff claimed that he had been terminated from his job after his employer learned that he was HIV positive. *Id.*, 434 S.E.2d at 52.

\(^{270}\) *Id. at 334, 434 S.E.2d at 53*.

\(^{271}\) *Id. at 332, 434 S.E.2d at 52* (citing O.C.G.A. § 9-3-33 (1982)). *In making this ruling the supreme court recognized that it was creating a "disharmonious result with regard to intrastate uniformity of statutes of limitation for claims of employment discrimination." Id. at 335, 434 S.E.2d at 54*.

\(^{272}\) *212 Ga. App. 44, 441 S.E.2d 450 (1994)*.

\(^{273}\) *Id. at 45, 441 S.E.2d at 451* (citing O.C.G.A. § 9-3-31 (1982)).

\(^{274}\) See GEORGIA TORTS, supra note 9, § 18-6.

\(^{275}\) *210 Ga. App. 326, 436 S.E.2d 63 (1993)*.
a motion in the trial court to add two defendants nineteen days prior to the expiration of the statute of limitations. In ruling that the two added defendants were entitled to summary judgment, the court of appeals found the statute of limitations was not tolled during the pendency of plaintiffs' motion and opined that "[i]t was the duty of counsel to obtain a timely ruling . . . " on the motion. The law in Georgia provides a special limitations tolling provision for unrepresented estates. In Legum v. Crouch, the court determined that this tolling provision is triggered automatically by operation of law for claims belonging to the estate and may not be invoked at the whim of the legal representative of the estate exclusively for his own benefit.

276. Id. at 326, 436 S.E.2d at 64.
277. O.C.G.A. § 9-11-15(c) (1993), states:
An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the foregoing provisions are satisfied, and if within the period provided by law for commencing the action against him the party 'to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

See also Moore v. Baker, 989 F.2d 1129 (11th Cir. 1993).
279. O.C.G.A. § 9-3-92 (1982). “The time between the death of a person and the commencement of representation upon his estate . . . shall not be counted against his estate in calculating any limitation applicable to the bringing of an action, provided that such time shall not exceed five years.” Id. This Code section operates only for claims belonging to a decedent's estate and would not toll the limitations period for any wrongful death claims brought individually by a surviving spouse or child. See O.C.G.A. § 51-4-2 (Supp. 1994); Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484 (1983).
281. Id. at 188-89, 430 S.E.2d at 384. See additional discussion of this case supra at notes 120-23, and accompanying text. Likewise, the court in Hobbs v. Arthur, 209 Ga. App. 855, 434 S.E.2d 748 (1993), rev'd on other grounds, 264 Ga. 359, 444 S.E.2d 322 (1994) found that plaintiff's alleged mental incapacity did not toll the statute of limitations for a claim that had already been filed with the court, but which had been dilatorily served upon defendant. See O.C.G.A. §§ 9-3-90, -91 (Supp. 1994).
C. Assumption of the Risk

The defense of assumption of the risk is applicable in those situations in which a plaintiff proceeds in a course of conduct with full knowledge of the danger and risks associated with it.\(^{282}\) One of the more unusual risks of being involved in a lesbian relationship was brought to light during this survey period in the case of \textit{Taylor v. Schander}.\(^{283}\) The facts of this case showed that one evening, while plaintiff Candace Taylor and defendant Cynthia Schander were involved in a romantic relationship with each other, they retired to defendant's home after spending some time at a local bar. At defendant's house, both parties sat on facing kitchen bar stools and began kissing each other. "Defendant got up and sat in plaintiff's lap and the couple resumed kissing. Because of a certain movement defendant made with her arms, the stool toppled and both women fell to the floor."\(^{284}\) Alleging various injuries, plaintiff later filed her complaint against defendant. Plaintiff admitted she consented to defendant's sitting in her lap, and the court of appeals found as a matter of law that plaintiff had assumed the obvious risk of danger in her activity.\(^{285}\)

D. Delay in Service

When a complaint is served after the applicable statute of limitations has run, the question of the plaintiff's due diligence in perfecting service comes into play.\(^{286}\) The court of appeals in \textit{Deloach v. Hewes}\(^{287}\) determined that plaintiff could not be held responsible for the county marshal's failure to serve defendant.\(^{288}\) Plaintiff filed his complaint,
listing defendant's correct address, before the limitations period expired. The marshal made no attempt to serve the complaint for thirty-nine days (thirty-five days after the statute had run), but was able to accomplish service on the first attempt. The court found that, under these circumstances, plaintiff had acted with due diligence since he had "no authority to require the marshal's office to perform its duties . . . ."

E. Immunity

As a result of its decision in City of Rome v. Jordan, discussed in last year's survey article, the Georgia Supreme Court in Cherokee County v. Feise remanded Cherokee County's appeal for reconsideration in light of the factors outlined in Jordan that comprise the "special relationship" requirement necessary to establish liability. The court of appeals made a very rigid application of the outlined factors and held that since the "law enforcement officials . . . did nothing" after learning of the threats to plaintiff, the assurance of action factor and the justifiable or detrimental reliance factor were not met to create a special relationship between plaintiff and the law enforcement officers. Nor

289. Id., 439 S.E.2d at 94-95.
290. Id. at 322, 439 S.E.2d at 95. Survey period decisions in which the court found a lack of due diligence in perfecting service include: Walker v. Georgia Farm Bureau Mut. Ins. Co., 207 Ga. App. 874, 429 S.E.2d 289 (1993) (plaintiff waited 40 days after statute had run to file motion for service by publication); Gordon v. Coles, 207 Ga. App. 889, 429 S.E.2d 297 (1993) (abuse of discretion to allow service to relate back to filing date when plaintiff attempted improper service by publication and when personal service could have been affected); Traver v. McKnight, 208 Ga. App. 278, 430 S.E.2d 164 (1993) (after initial attempt to locate defendant no further attempts made for almost two years); Buzhardt v. Payton, 210 Ga. App. 67, 435 S.E.2d 280 (1993) (no service upon defendant for over seven months after plaintiff had correct address).
294. 263 Ga. at 30, 426 S.E.2d at 864. 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.
296. 263 Ga. at 30, 426 S.E.2d at 864. In a much more tempered special concurrence, Judge Andrews, although reaching the same result, stated he could not "agree with the majority's rigid application of [the] requirements to the facts at hand." Id. at 735, 434 S.E.2d at 552,(Andrews, J., concurring specially). He then went on to point out while the police did take steps to investigate the threatening telephone calls made to plaintiff, there was no assurance given for her protection since there was no evidence concerning who had
was there a "special relationship" created in *Smail v. Douglas County*297 that would cause the county to be liable for the inaction of its law enforcement officers. In that case plaintiff's decedent was killed when a rock was thrown by third parties from a bridge overpass onto a vehicle in which she was a passenger.298 Although the sheriff's department had received some reports of objects being thrown from the bridge and had increased patrols in that area, the court determined that no special relationship had been established between the county and plaintiff's decedent.299

For all tort claims arising on or after January 1, 1991, the 1991 constitutional amendment's language extending almost complete sovereign immunity to the state and its departments and agencies300 was held to be applicable to counties in *Gilbert v. Richardson*.301 Interestingly, this case also pointed out that "nothing in the 1991 amendment . . . invalidates by implication any pre-existing Act that waived to some extent the immunity for the State and its departments and agencies, including counties."302 Therefore, the unchanged provision of O.C.G.A. section 33-24-51303 that allows a waiver of sovereign immunity when a county purchases liability insurance for the negligence of any agent or employee in the use of a motor vehicle is still viable.304 The court of appeals in *Gilbert* went on to find, however, that a county's participation in the Georgia Interlocal Risk Management Agency ("CIRMA") authorized pursuant to Chapter 85 of Title 36 of the Official Code of Georgia Annotated305 did not constitute liability insurance for sovereign immunity waiver purposes (for post-1991 causes of action) under the terms of O.C.G.A. section 36-85-20.306

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298. Id. at 830, 437 S.E.2d at 824.
299. Id. at 831, 437 S.E.2d at 825. *See also* City of Lawrenceville v. Macko, 211 Ga. App. 312, 439 S.E.2d 95 (1993) (no assurances made to homeowner before the inspection and approval of the building of his home, which later had flooding in a basement area).
300. GA. CONST. art. I, § 2, para. 9.
302. 211 Ga. App. at 796, 440 S.E.2d at 685.

This Code section specifically states that "participation by a municipality or county as a member of an agency authorized by this chapter shall not constitute the obtaining of
After a somewhat tempestuous litigational history, the issue concerning the application of sovereign immunity to hospital authorities was finally laid to rest by the supreme court's decision in *Thomas v. Hospital Authority*. In that case, the court found that a hospital authority does not come within the ambit of the constitutional provision extending sovereign immunity "to the state and all of its departments and agencies," thereby holding this doctrine does not apply to hospital authorities. The court of appeals in *Dyches v. McCorkle* dealt with the application of local government board member immunity to members of the Chatham County Metropolitan Planning Commission. Determining that liability would attach only for actions carried out in bad faith or for willful or wanton misconduct, the court found that the commission members had immunity for the mere negligent performance of their duties.

The sovereign immunity defense is also not available to counties in actions based upon written contracts. Claiming to be the third party beneficiary of a lease and maintenance agreement between DeKalb

liability insurance and no sovereign immunity shall be waived on account of such participation." O.C.G.A. § 36-85-20. In a decision rendered after the close of the survey period, the supreme court on certiorari reversed this portion of the court of appeals opinion and reiterated the ruling in *Hiers v. City of Barwick*, 262 Ga. 129, 414 S.E.2d 647 (1992), that a county's participation in GIRMA waives sovereign immunity to the extent of its liability coverage. Gilbert v. Richardson, 94 F.C.D.R. 3818 (Ga. Nov. 21, 1994).


309. GA. CONST. art. I, § 2, para. 9.

310. 264 Ga. at 41, 440 S.E.2d at 196. The court also reasoned that public policy considerations support the abolition of sovereign immunity for hospital authorities, because individuals who do business with them should not be accorded less protection than those who do business with privately operated hospitals. *Id.* at 43, 440 S.E.2d at 197. See also *Lemonds v. Walton County Hosp. Auth.*, 212 Ga. App. 369, 441 S.E.2d 821 (1994).


312. See O.C.G.A. § 51-2-20 (Supp. 1994). This statute provides that

[a] person serving [on] any local governmental agency, board, authority, or entity shall be immune from civil liability for any act or any omission to act arising out of such service if such person was acting in good faith within the scope of his or her official actions and duties and unless the damage or injury was caused by the willful or wanton misconduct of such person.

*Id.*

313. 212 Ga. App. at 216, 441 S.E.2d at 524.

County and her employer, plaintiff in Burton v. DeKalb County\textsuperscript{315} sought damages for a slip and fall injury she received at her workplace. Plaintiff brought her cause of action against the county as a negligent failure to maintain the building as required under the lease agreement.\textsuperscript{316} Finding the complaint sounded in tort rather than in contract, the court of appeals applied the doctrine of sovereign immunity to bar the action and stated "the fact that plaintiff is an employee of one of the parties to the [lease], without more, does not evince the requisite intent to make plaintiff a beneficiary to the contract."\textsuperscript{317}

For claims against municipalities that arose on or after January 1, 1991, the supreme court in City of Thomaston v. Bridges\textsuperscript{318} determined the constitutional amendment's language\textsuperscript{319} has no effect, thereby establishing the continued viability of O.C.G.A. section 36-33-1(a), which outlines the situations for which insurance coverage may waive a municipality's sovereign immunity.\textsuperscript{320} In reaching this conclusion, the court declined to follow the holding of Hiers v. City of Barwick,\textsuperscript{321} which applied the previous constitutional language to municipalities.\textsuperscript{322} The court in Bridges instead reasoned that the intent behind the enactment of the 1991 amendment was not complete and blanket reinstatement of sovereign immunity which would entirely prevent the public from bringing causes of action against governmental entities.\textsuperscript{323} Therefore, opined the court,

\begin{quote}
although in Hiers we construed the language in former Art. 1, § 2, ¶ 9 to include municipalities, we cannot allow that construction, which effectuated the intent behind the 1983 provision, to bind this Court to a construction which directly conflicts with the obvious intent of the drafters of the 1991 amendment. . . .\textsuperscript{324}
\end{quote}

\begin{itemize}
\item \textsuperscript{315} 209 Ga. App. 638, 434 S.E.2d 82 (1993).
\item \textsuperscript{316} Id. at 638, 434 S.E.2d at 83.
\item \textsuperscript{317} Id. at 639, 434 S.E.2d at 83-84.
\item \textsuperscript{318} 264 Ga. 4, 439 S.E.2d 906 (1994).
\item \textsuperscript{319} GA. CONST. art. I, § 2, para. 9.
\item \textsuperscript{320} 264 Ga. at 7, 439 S.E.2d at 909. O.C.G.A. § 36-33-1 (1993) provides that "[a] municipal corporation shall not waive its immunity by the purchase of liability insurance, except as provided in Code Section 33-24-51, or unless the policy of insurance issued covers an occurrence for which the defense of sovereign immunity is available." O.C.G.A. § 33-24-51 (1990), provides for a waiver of sovereign immunity to the extent of liability insurance coverage for causes of action "arising by reason of ownership, maintenance, operation, or use of any motor vehicle by the municipal corporation . . . ." Id.
\item \textsuperscript{321} 262 Ga. 129, 414 S.E.2d 647 (1992).
\item \textsuperscript{322} 264 Ga. at 6-7, 439 S.E.2d at 909.
\item \textsuperscript{323} Id. at 7, 439 S.E.2d at 909.
\item \textsuperscript{324} Id. at 6, 439 S.E.2d at 909. Rather than distinguishing the Hiers opinion, as did the majority, Justice Carley, concurring specially, would have overruled it to reach the
The tragic facts of *Queen v. Carey* necessitated a comprehensive survey by the court of appeals of the purposes of intrafamily tort immunity in Georgia. Plaintiffs brought suit for the wrongful death of their nineteen-year-old son, who was accidentally run over and killed by his step-grandfather (married to decedent's maternal grandmother). The evidence showed the decedent and his brother had from the time of their birth been supported almost exclusively by defendant (whom they both called "Papa") and his wife. When the complaint was filed in this action, plaintiff mother and her surviving son were living in government-subsidized housing, but by the time of trial they were again living with and being supported by defendant. The trial resulted in a defendant's verdict. On appeal, plaintiffs argued the relationship should be evaluated only as of the time the action is filed. The court disagreed, reiterating that

> [t]he policy reasons behind the rule [of interfamily immunity] are to prevent "(1) disturbance of domestic tranquility, (2) danger of fraud and collusion, (3) depletion of the family exchequer, (4) the possibility of inheritance, by the parent, of the amount recovered in damages by the child, and (5) interference with parental care, discipline, and control."

In order to evaluate the abovegoing factors, the court ruled that the jury was properly allowed to "view a broad span of evidence, stretching from the time of injury to the claim and thereafter."

**F. Release**

In *Darby v. Mathis*, a case of first impression decided during this survey period, plaintiff and his wife brought an action against defendant for injuries plaintiff received in an automobile accident. Plaintiff settled the case with defendant and defendant's liability carrier and sought to proceed against his own uninsured carrier. The court of same result. *Id.* at 8, 439 S.E.2d at 910-11. (Carley, J., concurring specially).

330. Id. at 44, 435 S.E.2d at 266.
332. Id. at 444, 441 S.E.2d at 906. Plaintiff also served his uninsured motorist insurance carrier with a copy of the lawsuit. *Id.*
333. *Id.*
appeals held that since the release signed by plaintiff in favor of defendant impaired the uninsured carrier’s subrogation claim, any further recovery from the uninsured carrier was prohibited.  

Before she filed her personal injury complaint against defendant, plaintiff in *Heffley v. Adkins* executed a release with defendant’s employer which included the stipulation that plaintiff was not entitled to receive workers’ compensation benefits from the employer. Defendant argued plaintiff’s release in favor of his employer prevented her from suing him. The court held, however, that the terms of the release contained only a promise not to sue the employer and did not prohibit suits against its agents or employees. Concerning defendant’s proffered defense of vicarious liability, the court found that while a release of an agent does act as a release of the principal, the converse is not true unless specifically agreed upon in the covenant not to sue.  

V. OTHER TORT CAUSES OF ACTION  

A. *Products Liability*  

The open and obvious rule and its corollary, the duty to warn, dominated Georgia products liability law during the survey period to the virtual exclusion of all other legal issues.  

Under the Georgia “open and obvious rule” or “patent danger rule” it is provided that “a product is not defective [either in its design or manufacture] if the absence of a safety device is open and obvious, and there is no duty to warn of an obvious danger” or one that is “generally known.”  

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334. *Id.* at 445, 441 S.E.2d at 907.  
336. *Id.* at 736, 434 S.E.2d at 538.  
337. *Id.*  
339. *209 Ga. App.* at 737, 434 S.E.2d at 538-39. Defendant argued the release rule concerning unnamed joint tortfeasors should not apply in this case since the employer’s liability, if any, was predicated upon its vicarious liability for the acts of its employee and not upon a joint tortfeasor relationship. *Id.* at 737, 434 S.E.2d at 538.  
Thus, courts during the survey period denied recovery based on the open
and obvious rule in cases alleging failure to warn of the necessity for a
fence around a swimming pool to keep children out,343 failure to install
a “deadman control” on both a lawnmower344 and a rototiller (plaintiff’s
decedent plowed himself under),345 failure to warn that an exposed
cutting blade on a wood shaping machine might cut the operator’s
hand,346 that leaking gas might explode,347 that eating rat poison is
harmful,348 and failure to warn the wearer that a black bicycle helmet
lacked “conspicuity.”349 In Powell v. Harasco Corp.,350 the court of
appeals held as a matter of proximate cause law the manufacturer could
not be liable for failure to warn when it was undisputed the installer of
the defective product failed even to read the installation instruc-
tions.351

Only two open and obvious cases presented a jury question during the
survey period.352 One was the federal diversity litigation in Neal v.
Toyota Motor Corp.353 In that case, plaintiffs were severely injured
when a floor mat shifted on the floor of plaintiff’s Toyota automobile and
“overlapped the gas pedal and brake to such an extent that [plaintiff
driver] could not stop the car before it crashed into the side of, and
partially slid underneath, a semi-tractor trailer.”354 Following jury
verdicts of $1,000,000 to each plaintiff, the district court denied
defendants’ motions for judgment as a matter of law, holding that upon
application of the legally required “objective view” of the product, “the
Court cannot say that the particular danger involved in this case, a floor
mat shifting its position so as to encumber the brakes thereby prevent-
ing [them] from being depressed and stopping the car, was open and

if any, was on the middleman/distributor. Id. at 375, 433 S.E.2d at 353.
The court of appeals found the adequacy of warning issue was preempted by federal law.
Id. at 527, 440 S.E.2d at 42-43.
351. Id. at 350, 433 S.E.2d at 610.
354. Id. at 941.
obvious to a reasonable person . . . "355 As the court noted, "[t]o carry Defendant's theory to its end, the open and obvious doctrine would prevent recovery for any car accident because it is open and obvious that a moving automobile is a dangerous instrument."356 The court, however, remitted plaintiffs' judgments to $250,000 and $750,000, respectively, because it felt the verdict was prejudiced by the improper and unprofessional trial conduct of plaintiffs' counsel.357

In Batten v. Chrysler Corp.,358 the court held there was a jury question on the failure of defendant to warn of the dangers connected with its inertia reel seat belts.359 Indeed, the evidence that defendant concealed the inadequacies of such seat belts and failed to use another available passenger restraint system was "sufficient to authorize a finding that [defendant] acted with willful, reckless, or wanton disregard for life or property . . . ."360

B. Strict Liability

For animal owners in Georgia to be liable for their pets' injuries to others there must be a showing, in the absence of a "leash law,"361 that the owner has reason to know of the animal's propensity to do the type of harm which it inflicts.362 In Torrance v. Brennan,363 such knowledge was shown through evidence that on three prior occasions defendants' dog had jumped up on people and attacked them with its mouth, although no serious injury resulted on those occasions. Plaintiff was severely bitten by the same dog.364 Defendants' claims they did not know their pet had the propensity to be so vicious came to naught as the court of appeals specifically found that

[Although the attack in question was the first time the dog's behavior resulted in serious injury, [plaintiff's] evidence was more than sufficient to allow a jury to find that the dog's established pattern of behavior should have put [defendants] on notice that their animal

355. Id. at 942.
356. Id.
357. Id. at 945.
359. Id. at 175, 438 S.E.2d at 649.
360. Id. at 174, 438 S.E.2d at 649.
364. Id. at 65, 432 S.E.2d at 659.
might cause injury by displaying such behavior towards another at a later date.\textsuperscript{365}

C. Defamation

Victims of media defamation did not fare too well during the survey period. In both \textit{Brewer v. Rogers}\textsuperscript{366} and \textit{Stange v. Cox Enterprises, Inc.},\textsuperscript{367} the subjects of false\textsuperscript{368} media reports were unable to recover because, as "public figures,"\textsuperscript{369} they could not meet the demanding standard of proving defendants' statements were made with "actual malice"—that is, with knowledge that they were false or with reckless disregard for their truth or falsity.\textsuperscript{370} The court of appeals in both cases advanced the standard rationale that "the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies."\textsuperscript{371} Accordingly, "to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones."\textsuperscript{372}

Questions concerning the element of publication were also prominent in defamation cases during the survey period. Although a couple of decisions applied the legal fiction that defamatory statements by one member of an organization to another member having a duty to receive such information are not "published,"\textsuperscript{373} the court of appeals declined

\textsuperscript{365} Id. at 68, 432 S.E.2d at 661.
\textsuperscript{368} In \textit{Brewer}, the court of appeals conceded the falsity of defendant's reports that plaintiff, a high-school football coach, was involved in a widespread gambling operation would be a jury question. Id. at 345, 440 S.E.2d at 80-81. In \textit{Stange}, although the falsity of the reports was somewhat less clear, they were admittedly in error in charging that plaintiff, the acting Housing Commissioner of the City of Atlanta, was party to a suit by a former homeowner. \textit{Id.} at 731-35, 440 S.E.2d at 503-07.
\textsuperscript{369} Plaintiff in \textit{Brewer} was a "public figure," and plaintiff in \textit{Stange} was a "public official." 211 Ga. App. at 347, 439 S.E.2d at 81. 211 Ga. App. at 732, 440 S.E.2d at 505. For purposes of the actual malice standard, however, the two are the same. \textit{See generally} Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).
\textsuperscript{371} \textit{Id.} at 733, 440 S.E.2d at 506 (quoting St. Amant v. Thompson, 390 U.S. 727, 731-32 (1968)).
\textsuperscript{372} \textit{Brewer}, 211 Ga. App. at 348, 439 S.E.2d at 82 (quoting St. Amant, 390 U.S. at 732).
to extend the fiction to include statements by the defendant to the plaintiff's agent. In *Roberts v. Lane*, defendant sent three defamatory mailgrams to plaintiff's attorney. The court of appeals held this to be a publication to a third party. The facts of *Roberts* are not clear on this point, but if the attorney was representing plaintiff in the underlying matter in contention between the parties, this holding probably does not represent the majority rule.

**D. Invasion of Privacy**

In *Macon Telegraph Publishing Co. v. Tatum*, the supreme court held that when plaintiff shot and killed an intruder in her home who was sexually assaulting her, she also put to death her right of privacy concerning the matter. Although Georgia has a "rape victim confidentiality" statute, the court did not analyze Tatum's claim pursuant to that statute, but, rather, viewed her claim as one for "common

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376. Id. at 12, 434 S.E.2d at 229.
377. Id.
378. See, e.g., Mims v. Metropolitan Life Ins. Co., 200 F.2d 800, 802 (5th Cir. 1952) (applying Alabama law). "[I]f the language complained of was uttered only to the complaining party or to his agent representing him in the matter discussed in the communication, it is not such a publication as will support an action for slander." Id.
380. Id. at 680, 436 S.E.2d at 658.
381. See O.C.G.A. § 16-6-23 (1992).
382. 263 Ga. App. at 678, 436 S.E.2d at 656-57. It would have been interesting if the court had done so. Unlike many jurisdictions, see LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE (1989 & Supp. 1994), Appendix H, Georgia does not appear to recognize an implied civil cause of action arising from the breach of a criminal statute. *See* Cechman v. Travis, 202 Ga. App. 255, 256, 414 S.E.2d 282, 284 (1991); Oswald v. American Nat'l Can Co., 194 Ga. App. 882, 883, 392 S.E.2d 26, 27 (1990); Sparks v. Thurmond, 171 Ga. App. 138, 142, 319 S.E.2d 46, 50 (1984). In *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 61-62, 200 S.E.2d 127, 129 (1973), *rev'd on other grounds*, 420 U.S. 469 (1975), the Georgia Supreme Court held that even if a penal statute established the public policy of the state on the subject to which it was addressed, it must expressly create a civil cause of action for one to be available. This rule has never received very thoughtful treatment by the Georgia courts, however, and it should be reexamined. Certainly, in most instances, if a statute creates a standard of care, conduct which falls below that legislatively-created standard may be negligent per se and therefore actionable. *See* GEORGIA TORTS, supra note 9, § 3-6. Thus, if merely negligent conduct that violates a criminal statute is actionable, intentional violations of such statutes should a fortiori be a basis for recovery. Victims, however, may take solace from the fact that in most instances a criminal offense is overlapped by a tort action circumscribing the same conduct: criminal rape equals civil battery; criminal theft equals civil trespass, and so on.
law invasion of privacy." The court adopted a two-part test to evaluate this claim. First, it determined defendant had "legally obtained truthful information about a matter of public significance," because Tatum, the killer of an intruder, was more than just the victim of a sexual assault. Second, balancing Tatum's privacy interests against freedom of the press, the court held the privacy right from its inception has been "limited by the right to speak and print." Because "[a] free press is necessary to permit public scrutiny on the conduct of government and to ensure that government operates openly, fairly, and honestly," the court held the legitimate public interest in this case overrode the victim's right to her privacy.

E. Wrongful Death

Much of the litigation in the area of wrongful death surrounds Georgia's confusing scheme of multiple actions and statutory parties. In Smith v. Memorial Medical Center, Inc., the court of appeals "recognize[d] that an individual's claim for wrongful death and an estate's claim for the decedent's pain and suffering are distinct causes of action. The plaintiff in his individual capacity and in his capacity as administrator are legally different persons." Thus, there was nothing wrong with plaintiff's dismissing his wrongful death claim while leaving his decedent's estate's claim for pain and suffering pending.

Two cases with similar names illustrate the confusion that can arise in a wrongful death case when the parents of a deceased minor child do not comprise a family unit. In Hulsey v. Hulsey, the court of appeals allowed the divorced, noncustodial father of the deceased minor child to intervene in the action being prosecuted by the mother, "[b]ecause [the mother] did not bring the action on behalf of both parents." Likewise, in Holsey v. Davidson, the court of appeals identified the

383. 263 Ga. at 679, 436 S.E.2d at 658.
384. Id. at 678, 436 S.E.2d at 657.
385. Id.
386. Id.
387. Id. at 679, 436 S.E.2d at 658 (quoting Pavesich v. New England Life Ins. Co., 122 Ga. 190, 204, 50 S.E. 68, 73 (1905)).
388. Id. at 679-80, 436 S.E.2d at 658.
389. Id. at 679, 436 S.E.2d at 658.
391. Id. at 27, 430 S.E.2d at 59 (citations omitted).
392. Id.
394. Id. at 269, 441 S.E.2d at 478.
biological father as the proper party to maintain an action for the wrongful death of his illegitimate child, the mother being dead. 396 “[W]here one of the parents of a minor child dies before instituting an action for the child’s wrongful death, the representative of the parent’s estate is not authorized to bring such an action if there is a surviving parent or other [statutory plaintiff] entitled to bring it.” 397

*Emory University v. Dorsey* 398 presented an even more recondite problem. Decedent left behind a husband, who promptly dropped out of the picture, and a minor child (not by the husband), who was subsequently adopted by decedent’s parents, the plaintiffs in the instant case. Defendant moved to dismiss this wrongful death action on the grounds that (1) the child’s adoption terminated his right to the claim and (2) in any event, the surviving spouse was the proper statutory party. 399

Ruling against defendants on both issues, the court of appeals held the child’s rights vested at the time of his mother’s death, and were not terminated by his subsequent adoption by his grandparents. 400 “To hold otherwise would not foster the public policy of encouraging adoptions, particularly in cases such as this one where the child is rendered an orphan.” 401 Furthermore, held the court, recent decisions of the Georgia Supreme Court 402 have established that the statutory order of claimants “do[es] not operate to interfere with a superior court’s exercise of its ‘general equitable powers to supervise litigation pending before it in such a manner as fairly shall protect the substantive and procedural rights of any party at interest.’” 403 Because “[t]here was no blood or legal relationship connecting [the husband] and [the child], and [the husband] left the child with [plaintiffs] without an adequate remedy at law,” 404 this was a proper case to disregard the statutory scheme and allow the action to the child. 405

396. *Id.* at 532, 439 S.E.2d at 745.
397. *Id.* (overruling *Caylor v. Potts*, 183 Ga. App. 133, 358 S.E.2d 291 (1987)).
399. *Id.* at 808-09, 429 S.E.2d at 308.
400. *Id.* at 809, 429 S.E.2d at 308.
401. *Id.*
404. *Id.* at 810, 429 S.E.2d at 309.
405. *Id.*
F. Fraud

In First Union National Bank v. Davies-Elliott, Inc., defendant bank sought to raise the defense of constructive fraud in response to plaintiff customer’s claim the bank had negligently cashed a check on his account after a signatory deletion card had been signed. The bank alleged plaintiff failed to inform it that the person whose signature was to be deleted was no longer the secretary of the corporation, failed to inform it that a signature had been obtained through a power of attorney, and failed to inform it of the urgency of the situation. Citing the proposition that an obligation to communicate may arise from the particular circumstances of a given situation, the court of appeals found a jury question existed over the issue of plaintiff’s constructive fraud. The court of appeals also ruled in LeBrook v. Jefferson there was a proper jury question concerning defendant’s fraudulent representations about its ability to obtain builders and commercial warranties, which induced plaintiffs to purchase their home from defendant’s company.

Traditionally the doctrine of passive concealment has been limited to situations involving residential homeowners and residential builder/sellers. The court of appeals in Condon v. Kunse succinctly

408. 207 Ga. App. at 793, 429 S.E.2d at 163.
410. 207 Ga. App. at 793, 429 S.E.2d at 163.
413. See GEORGIA TORTS, supra note 9, § 32-3. See also Ben Farmer Realty Co. v. Woodard, 212 Ga. App. 74, 441 S.E.2d 421 (1994).
declined to extend the application of this doctrine to the sale of farm land.\textsuperscript{416}

G. Torts Arising from Business Relations

\textbf{Tortious Interference with Business Relations.}

In establishing a cause of action for malicious (or tortious) interference with business relations, \textit{[the plaintiff] must demonstrate that 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{417}

This tort, therefore, does not lie against a party to the contract\textsuperscript{418} or against a third party who merely asserts his own contractual rights.\textsuperscript{419}

\textbf{Misappropriation of Trade Secrets.} The supreme court held in \textit{Avnet, Inc. v. Wyle Laboratories, Inc.}\textsuperscript{420} that “trade secrets,” for the purpose of damages and injunctive relief under Georgia’s Trade Secrets Act,\textsuperscript{421} consist of actual customer lists and other such items that are plaintiff’s property.\textsuperscript{422} It does not, said the court, include knowledge of such matters acquired by defendant during his employment by plaintiff.\textsuperscript{423} If plaintiff wished to protect itself from competition by a former employee based on that employee’s knowledge, plaintiff’s remedy was to obtain an enforceable covenant not to compete.\textsuperscript{424}

\textbf{Defamation of Title.} Georgia recognizes a tort cause of action for defamation or slander of title to land, which consists of defendant’s making some false publication that results in damage to the value of

\begin{itemize}
  \item Id. at 857, 342 S.E.2d at 269.
  \item 263 Ga. 615, 437 S.E.2d 302 (1993).
  \item O.C.G.A. § 10-1-760 (1994).
  \item 263 Ga. at 620, 437 S.E.2d at 305.
  \item Id.
  \item Id.
\end{itemize}
plaintiff's title. In *South River Farms v. Bearden*, defendants filed an action seeking a money judgment against plaintiffs, but recorded in connection therewith a notice of lis pendens against plaintiffs' property. Applying the rule that "[a]t common law and under statutory provisions lis pendens may not be predicated upon an action or suit which seeks merely to recover a money judgment," the court of appeals held plaintiffs' subsequent action for slander of title stated a claim upon which relief could be granted. By contrast, in *Alcovy Properties, Inc. v. MTW Investment Co.*, the court of appeals upheld the general rule that a properly filed lis pendens is privileged against a defamation of title action.

VI. DAMAGES

During this survey period the Georgia Supreme Court was, once again, faced with a constitutional challenge to one of its punitive damage statutes. The issue raised in *Mack Trucks, Inc. v. Conkle* was an equal protection challenge to the requirement that seventy-five percent of a products liability punitive damage award must be rendered to the state. Citing public policy and the unfairness of a windfall to a single plaintiff as necessary reasons for differing treatment of products liability plaintiffs, the majority strained to conclude that the statute

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427. Id. at 157, 435 S.E.2d at 517.
428. Id. at 157-58, 435 S.E.2d at 518 (quoting Watson v. Whatley, 218 Ga. 86, 88, 126 S.E.2d 621, 622 (1962)).
429. Id. at 158, 435 S.E.2d at 518.
431. Id. at 103, 441 S.E.2d at 289.
434. Id. at 539-40, 436 S.E.2d at 637. O.C.G.A. § 51-12-5.1(e) (Supp. 1994) provides in part:

In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission . . . . Seventy-five percent of any amounts awarded under this subsection as punitive damages . . . shall be paid into the treasury of the state . . . .

*Id.* at 543, 436 S.E.2d at 639.
435. For example, in support of their analysis the majority opined:
in question passed constitutional muster. Justice Benham disagreed with this opinion, and, in his well-reasoned dissent, noted in particular that "by removing, or at least crippling, the financial incentive for private citizens to pursue vigorously contested claims for punitive damages, the punishment and deterrence purpose of punitive damages is greatly hindered."

Finding the reasoning in MARTA v. Boswell, to be controlling, the court of appeals in Hospital Authority v. Martin held there can be no award of punitive damages against a hospital authority created as a governmental entity pursuant to the Georgia Hospital Authorities Act. The public policy proclaimed in Boswell, however, was deemed inapplicable to public service corporations. The court of appeals in Oglethorpe Power Corp. v. Sheriff determined that these companies were fair game for all punitive damage claims.

In Sightler v. Transus, Inc., plaintiffs filed suit seeking punitive damages against defendant truck driver and his employer for injuries plaintiffs sustained when defendant driver's truck collided with a service station. Defendant driver died before the case came to trial. Defendant employer then sought to strike the punitive damages claim by urging that since its liability was derivative and punitive damages could not be

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The appellant is correct in its assertion that defendants in various tort actions are treated differently, and the trial court was correct in its finding that the statute treats plaintiffs in various tort actions differently. However, all similarly situated plaintiffs and defendants including those in product liability action, are treated equally by the statute.

Id. (emphasis in original).

437. 263 Ga. at 547, 436 S.E.2d at 642 (Benham, J. dissenting).
438. 261 Ga. 427, 405 S.E.2d 869 (1991). In that case the supreme court found that to allow an award of punitive damages against MARTA, a governmental entity, would place an unwarranted burden upon the public taxpayers. Id. at 428, 405 S.E.2d at 870.

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442. Id. at 301, 436 S.E.2d at 17-18. See also Rossee Oil Co. v. BellSouth Tel., Inc., 212 Ga. App. 235, 441 S.E.2d 464 (1994). Punitive damages may not, however, be assessed in a nuisance action against a business when that business is in compliance with all applicable state and federal environmental and safety regulations. See Stone Man, Inc. v. Green, 263 Ga. 470, 435 S.E.2d 206 (1993).
assessed against the driver's estate, there no longer existed any basis for punitive damages against it. Holding that an award of punitive damages against the employer still would be viable if its agent's conduct so warranted, the court of appeals stated, "immunity from punitive damages of [the driver's] estate, like other immunities agents may enjoy, is a personal defense which depends on something other than the nature of the agent's misconduct and does not insulate the principal from liability for that misconduct." Clear and convincing evidence is the statutory standard for the imposition of punitive damages. When two different standards of proof applied for various issues in a single case, the supreme court in Clarke v. Cotton held it was error for the trial court to fail to charge the definition of "clear and convincing evidence" as it related to the punitive damages issue.

Determining that collateral source evidence may be admissible at trial for limited impeachment purposes, the court of appeals in Patterson v. Lauderback overruled last year's survey period case of Hayes v. Gary

446. Id. at 174, 430 S.E.2d at 81.
447. Id.
448. O.C.G.A. § 51-12-5.1(b) (Supp. 1994).
450. Id. at 862, 440 S.E.2d at 167. See Judge Dawson Jackson's concurring opinion for a proposed charge definition of clear and convincing evidence. Id. at 863, 440 S.E.2d at 168 (K. Dawson Jackson, J., concurring). Other cases decided during this survey period that considered evidentiary support of a punitive damages award included: Coker v. Culter, 208 Ga. App. 651, 431 S.E.2d 443 (1993) (evidence that defendant had been driving 40 m.p.h. in a 35 m.p.h. zone during rainy weather and had a blood alcohol level of .03 did not reach clear and convincing punitive damages standard); Troutman v. B.C.B. Co., 209 Ga. App. 166, 433 S.E.2d 73 (1993) (evidence of ten-year reputation for abusive behavior toward women did not support punitive damages in a negligent hiring and retention action); Smith v. Tommy Roberts Trucking Co., 209 Ga. App. 826, 435 S.E.2d 54 (1993) (evidence that company's payment scheme encouraged fast deliveries and one of its drivers hit plaintiff twice from behind could support award of punitive damages); Rogers v. Carmike Cinemas, Inc., 211 Ga. App. 427, 439 S.E.2d 663 (1993), cert. granted (daily sexual harassment by three of defendant's employees that included sexual conversations, direct confrontations, and offensive touching could support claim for punitive damages); Peters v. Hyatt Legal Servs., 211 Ga. App. 587, 440 S.E.2d 222 (1993) (physical precedent only) (evidence that law firm breached fiduciary duty to client by representing his former wife's interests in divorce action could support punitive damages award).

In addition, the court of appeals in Ross v. Hagler, 209 Ga. App. 201, 433 S.E.2d 124 (1993), held that a lack of evidence in support of a punitive damage judgment does not prohibit an award of attorney fees based on the showing of an intentional tort. Id. at 204, 433 S.E.2d at 127.
Burnett Trucking, Inc., which dealt with that same issue. In Patterson the defense was properly allowed to cross examine decedent's son concerning the availability of insurance coverage for medical bills after the son testified about his mother's inability to pay for necessary medical treatment. Even though Georgia's No-Fault Insurance Act has been repealed, the court of appeals in Walker v. Willis held a defendant is still entitled to have a jury verdict reduced by the amount of no-fault benefits received by the plaintiff.

Damages for fright, shock, and mental pain and suffering are allowable in Georgia if such damages are associated with a physical injury. Defendants in Monk v. Dial claimed plaintiff's decedent could not have experienced such injury since his death was instantaneous at the time of the collision. To the contrary, the court of appeals found there was evidence from which the jury could have extrapolated the decedent was aware of the impending crash and thereby experienced mental suffering. There is, the court opined, "no requirement that the physical injury precede the mental pain and suffering." Additionally, the court of appeals in Windermere, Ltd. v. Bettes determined that when a complaint contains a provision for bad faith attorney fees and there is a prejudgment interest demand letter which offers to settle all damages in a case, the amount of

453. 211 Ga. App. at 892, 440 S.E.2d at 676. See also Moore v. Mellars, 208 Ga. App. 69, 430 S.E.2d 179 (1993). But see Carver v. Kinnett Snow, 209 Ga. App. 577, 434 S.E.2d 136 (1993) (testimony that plaintiff had to go on food stamps as a result of accident did not open door for impeachment by collateral source income since he qualified for food stamps even with the receipt of such income).
454. O.C.G.A. §§ 33-34-1 et seq. (repealed 1991). Former O.C.G.A. § 33-34-9 (repealed 1991) provided that an injured individual who was eligible for economic loss benefits under the Act could not recover tort damages for such injuries to the extent of the available no-fault benefits.
459. Id. at 362, 441 S.E.2d at 859.
460. Id.
461. Id.
prejudgment interest awarded also properly includes interest on the
attorney fees award.465

VII. CONCLUSION

A law survey, like a Shakespearean drama, could not succeed without
the dedicated efforts of many who toil, unseen and unsung, behind the
scenes. In one of his more lighthearted moments, Professor Karl
Llewellyn, author of The Bramble Bush466 and the Uniform Commer-
cial Code,467 among other things, penned the following lines, which
furnish a fitting tribute to the efforts of our editors:

Song of the Law Review

Oh, I was a bright law student,
My grades were good and high,
They said I'd make the Law Review,
And now I'd like to die.

My eyes they burn, my head is dead,
But still I struggle through;
You ain't read half what I have read
To do your work for you.

I have to read advance sheets
And show the faculty
The cases that they ought to read,
The points they ought to see.

Both courts and scholars listen
When I tell them so and thus;
You'll find me cited now as "Notes,"
Now as "Anonymous."

So workers of the Law School world,
While some strength still remains,
Arise, unite, demand a beer,
And slug 'em with your chains.468

465. 211 Ga. App. at 180, 438 S.E.2d at 409.
467. See UNIFORM COMMERCIAL CODE (1952).