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Torts

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

"I asked for ice, but this is ridiculous."

These were purportedly among the last words of the tycoon John Jacob Astor as, clad in formal evening attire, he tenderly placed his wife into a lifeboat and, a gentleman to the last, prepared to meet his watery grave aboard the Titanic after it struck an iceberg in the frosty North Atlantic ocean on April 15, 1912.¹ For the writers of this survey, faced with navigating through a record number of torts cases, this scene is rife with analogies. Obviously, asking for a little and getting a lot is appropriate. As usual, space requirements have forced us to make a rigid triage of which cases shall survive to be surveyed and which shall go down with the ship, so to speak. Guided by no such noble sentiments as "women and children first," it was our mercenary intention to rescue only the first-class passengers. Consequently, we present the surviving cases as the "Astors" of the survey period—and hope we have not left our readers at sea.

¹ These famous words, like so many of the legends that have come to surround the Titanic disaster, are probably apocryphal. See David Sinclair, Dynasty: The Astors and Their Times 207 (1984). For the "classic" Titanic story, see Walter Lord, A Night to Remember (1955). To sort the legends from the truth (somewhat), see Wyn Craig Wade, The Titanic: End of a Dream (1979). For an update following the 1986 discovery of the Titanic's remains, see Charles Pellegrino, Her Name, Titanic (1988).
I. INTENTIONAL TORTS

A. In General

It may seem a bit strange to begin a torts article with a contract case, but in West American Insurance Co. v. Merritt, the court of appeals gave an added dimension to Georgia's definition of an "intentional tort." The insureds in this case were sued after their son shot a friend of his with a BB gun and put out his eye. The insured's son had intended only to hit his friend in the buttocks with the BB in retaliation for a similar act that the friend had perpetrated on him. The homeowner's carrier sought to deny coverage on the grounds that the policy excluded coverage for "bodily injury expected or intended by the insured." The court, recognizing that the policy considerations were somewhat different in this contract case than in a torts case, nevertheless proceeded to hold the exclusion inapplicable. Because the insured's son only intended for his friend to experience pain, not physical injury or harm, the court applied the rule of the Restatement that the basic test is the actor's state of mind about the consequences of his act. Under these circumstances, the court concluded, the insurance company was not entitled to summary judgment.

B. Conversion

The court revisited the definition of the tort of conversion in Katz v. Harris. Conversion constitutes

5. Id. at 823, 456 S.E.2d at 226.
6. Id. at 826, 456 S.E.2d at 226.
7. It is important to remember that the legal issues here rise from contract law. Consequently, policy considerations differ from those in tort and criminal cases. Public policy does not prevent a party from assuming by contract duties more burdensome than those imposed by law because of a party's right to refuse the contract.
8. Id. (quoting State Farm Fire & Cas. Co. v. Morgan, 258 Ga. 276, 276, 368 S.E.2d 509, 510 (1988)).
[any distinct act of dominion wrongfully asserted over another's property in denial of his right, or inconsistent with it . . . . It is unnecessary to show that the defendant applied it to his own use, if he exercised the dominion over it in defiance of the owner's right, or in a manner inconsistent with it . . . . It is immaterial that such dominion was exercised in good faith, for whoever meddles with another's property . . . does so at his peril . . . .

The court in Katz applied this to property having largely sentimental value. Although conversion typically does not include the failure to pay money due under a contract, in Unified Services, Inc. v. Home Insurance Co., the court held that insurance premiums collected by defendant on behalf of plaintiff, which defendant then failed to forward to plaintiff, could be the subject matter of a conversion claim.

II. NEGLIGENCE

A. In General

Every law student knows that different circumstances may call for different degrees of care. A couple of survey-period cases illustrate that point well. In Martin v. Gaither, the court of appeals reviewed the history of the "fireman's rule," which provides that an injured fireman may not recover from the landowner for ordinary negligence directly related to the origin of the fire. The issue in Martin was whether the fireman's rule also applies to police officers injured in the line of duty. The court of appeals reviewed the history of the rule in Georgia, and concluded that it has been

adopted in Georgia, broadly construed to cover tortfeasors other than those whose acts prompted the presence of the fireman at the place of injury, narrowly construed to exclude subsequent or extrinsic acts of negligence other than the initial reason for the fireman's professional

12. Id. at 290, 457 S.E.2d at 242.
15. Id. at 89, 460 S.E.2d at 549.
17. Id. at 647, 466 S.E.2d at 622 (citing Ingram v. Peachtree S., 182 Ga. App. 367, 368, 355 S.E.2d 717, 718 (1987)).
18. Id. at 646, 466 S.E.2d at 622.
presence, and in dicta, broadly construed to apply to "public safety employee[s]" including police officers.\textsuperscript{19}

Therefore, the court concluded that the fireman's rule does govern police officers who are injured in the line of their professional duties.\textsuperscript{20}

In \textit{Clanton v. Gwinnett County School District},\textsuperscript{21} the court of appeals held that the contributory negligence of a child aged five years, ten and one-half months would be a question for the jury.\textsuperscript{22} Georgia has a code section which provides that "[t]he term 'due care,' when used in reference to a child of tender years, is such care as the child's mental and physical capacities enable him to exercise in the actual circumstances of the occasion and situation under investigation."\textsuperscript{23} Although there was some question whether the child's parents had properly preserved the issue for appeal, the court, in a six to three decision, nevertheless held that, while "[i]t is doubtless that at some early stages of infancy the issue of negligence will be a matter of law for the court,"\textsuperscript{24} absent expert opinion on child capacities,

the question is properly left to the jury, which can size up all the particular evidence in the case and bring its collective common knowledge of children's capacities to bear in determining first, whether the child was capable of negligence in the premises and second, whether the child was negligent.\textsuperscript{25}

\textbf{B. Premises Liability}

The Supreme Court of Georgia used its certiorari authority to visit the area of premises liability several times during the survey period. In \textit{City of Winder v. Girone},\textsuperscript{26} it held that plaintiff, who slipped on sewage that had overflown from defendant's system into her basement, failed to exercise ordinary care for her own safety. The court applied "traditional negligence principles" to hold that a defendant who, in trespassing on plaintiff's property, creates a hazardous condition, has a duty either to

\begin{itemize}
  \item \textsuperscript{19} \textit{Id.} at 650, 466 S.E.2d at 624 (quoting Bycom Corp. v. White, 187 Ga. App. 759, 762, 371 S.E.2d 233, 235 (1988)).
  \item \textsuperscript{21} 219 Ga. App. 343, 464 S.E.2d 918 (1995).
  \item \textsuperscript{22} \textit{Id.} at 344, 464 S.E.2d at 918.
  \item \textsuperscript{23} O.C.G.A. § 51-1-5 (1982); see Ashbaugh v. Trotter, 237 Ga. 46, 226 S.E.2d 736 (1976).
  \item \textsuperscript{24} 219 Ga. App. at 346, 464 S.E.2d at 920.
  \item \textsuperscript{25} \textit{Id.} at 344, 464 S.E.2d at 919.
  \item \textsuperscript{26} 265 Ga. 723, 462 S.E.2d 704 (1995).
\end{itemize}
eliminate the danger or to give warning of its presence.\textsuperscript{27} Because the presence of the sewage in this case was open and obvious, the court held that plaintiff assumed the risk when she attempted to traverse the flooded area to lead cleaning personnel to the basement.\textsuperscript{28}

In \textit{Colquitt v. Rowland},\textsuperscript{29} in an even more unlikely factual scenario, the court held that defendant landowner was not liable to plaintiff, a party guest of his tenant, for injuries received after she ingested alcohol and some other mind-altering substances, and subsequently took a nude dive into defendant's shallow pool.\textsuperscript{30} The court, for the first time, clarified that \textit{Official Code of Georgia Annotated} ("O.C.G.A.") section 44-7-13\textsuperscript{31} only imposes contractual liability on a landlord.\textsuperscript{32} The tort liability of a landlord is grounded on O.C.G.A. section 44-7-14.\textsuperscript{33} Because the swimming pool in question had been erected by the tenant after the landlord had parted with possession of the premises, the negligence was that of the tenant, and "[t]o rule otherwise, i.e., to impose liability on a landlord for the negligent acts of his tenant, would yield a harsh and unwanted rule."\textsuperscript{34}

Although the general rule is that a defendant premises owner's knowledge of prior criminal activity on its property is evidence of the

\textsuperscript{27} \textit{Id.} at 723, 462 S.E.2d at 705. In doing so, the court at least indirectly affirmed Soto v. Roswell Townhomes, Inc., 183 Ga. App. 286, 368 S.E.2d 670 (1987), in which the court applied to a trespass the complex set of presumptions that the courts have developed to allocate risk between merchants and their business invitees. These writers have criticized Soto on the grounds that the policy justifications which it assumes are absent in cases involving a trespassing defendant. \textit{See 1989 Torts, supra} note 20, at 390.

\textsuperscript{28} 265 Ga. at 724, 462 S.E.2d at 705-06.

\textsuperscript{29} 265 Ga. 905, 463 S.E.2d 491 (1995).


\textsuperscript{31} O.C.G.A. § 44-7-13 (1991) provides that "[t]he landlord must keep the premises in repair. He shall be liable for all substantial improvements placed upon the premises by his consent."

\textsuperscript{32} 265 Ga. at 907, 463 S.E.2d at 492. \textit{But see} Denise v. Cannon, 219 Ga. App. 765, 466 S.E.2d 885 (1996) (jury question pursuant to § 44-7-13 for landlord's failure to maintain working smoke detector on premises).

\textsuperscript{33} O.C.G.A. § 44-7-14 (1991) provides as follows:

Having fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising from defective construction or for damages arising from failure to keep the premises in repair.

\textsuperscript{34} 265 Ga. at 906, 463 S.E.2d at 492.
foreseeability of a substantially similar attack on a plaintiff, this rule is not without its limits. For example, if the plaintiff's knowledge of the dangerous propensities of a third-party assailant is equal to or greater than that of the defendant premises owner, the plaintiff cannot recover from a premises owner who also had some knowledge thereof.

In Sun Trust Banks, Inc. v. Killebrew, the supreme court held that when the only evidence of prior criminal attacks on defendant's premises was contained in police reports, defendant did not have a duty to investigate them to learn of the criminal activity. This, of course, does not change the rule that actual knowledge of prior violent acts is evidence of a recognizable risk of harm and can subject a defendant premises owner to liability, as the court of appeals held in Shoney's, Inc. v. Hudson.

In a final supreme court decision of note, Keaton v. A.B.C. Drug Co., defendant who placed bleach at a dangerously high level on store shelves was chargeable with knowledge of the danger when the cap came off the bottle and bleach spilled into the customer's eyes.

C. Slip and Fall

Something is fundamentally wrong with the appellate standard of review for slip and fall cases in Georgia. These authors empirically have observed for many years that a hugely disproportionate number of these cases wind up on appeal, and the results are so fact-intensive as to be almost wholly unpredictable. The degree of evidence-weighing that occurs in these cases sometimes reminds one more of Twelve Angry Men than of a judicial opinion. It appears that the reality of this problem has begun to dawn on the court of appeals, beginning with the perceptive Judge Ruffin, who, in a series of concurrences and dissents, has begun to call attention to the growing tension between the inconsistent

35. See Georgia Torts, supra note 11, § 4-5.
38. Id. at 109, 464 S.E.2d at 208.
41. Id. at 387-88, 467 S.E.2d at 561.
principles the court applies to dispose of these cases and the provisions governing summary judgment generally.\textsuperscript{45}

A panel of the court took up this concern in \textit{Service Merchandise, Inc. v. Jackson},\textsuperscript{46} a case that was decided after the close of the current survey period,\textsuperscript{47} but which is included here because of its importance in following Judge Ruffin's trend. Finding a jury question in that slip and fall case, the court noted that "[t]he granting of summary judgment or directed verdict is 'a very, very grave matter,"\textsuperscript{48} because "what is at stake is of constitutional magnitude."\textsuperscript{49} Thus, the court has properly placed the tension in this area as existing between a court's authority to grant summary judgment or directed verdict on one hand, and the parties' constitutional right to trial by jury\textsuperscript{50} on the other.

This is obviously an area that needs to be revisited by the Supreme Court of Georgia. A review of slip and fall decisions, as well as decisions in other areas of tort law over the past several years, indicates that certain members of the court of appeals are giving perhaps an overly expansive reading to the supreme court's decision in \textit{Lau's Corp. v. Haskins},\textsuperscript{51} by interpreting that case to authorize weighing of evidence at the appellate level. The responsibility resting on a court in this situation is not to weigh the evidence, but to "[view] all the facts and reasonable inferences from those facts in a light most favorable to the non-moving party."\textsuperscript{52} Opinions in which the majority decides the propriety of summary judgment on one set of facts, only to be countered by a dissent arguing additional facts,\textsuperscript{53} should give rise to the very concerns addressed in \textit{Jackson}. Perhaps, at long last, the tide is beginning to turn in this very troubled area of law.

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\textsuperscript{47} This article covers cases published in the Georgia advance sheets between June 1, 1995, and May 31, 1996. \textit{Jackson} was decided on June 27, 1996.
\textsuperscript{49} \textit{Id.} at 899, 473 S.E.2d at 211.
\textsuperscript{52} \textit{Id.} at 495, 405 S.E.2d at 478 (emphasis added).
\end{flushright}
D. Malpractice

In General. There are three areas of Georgia tort law that are thoroughly fouled up. The first, slip and fall cases, discussed above, is a plague that the judiciary has brought down on its own house. The second, governmental immunity, discussed below, is a Frankenstein's monster brought to life by a combination of legislative and judicial mad science. The third nightmare, however, is the expert witness affidavit requirement of O.C.G.A. section 9-11-9.1 ("section 9.1"), and it can only be blamed on the legislature. Short of declaring it unconstitutional, the courts have used every other device at their disposal to mitigate the harsh effects of this Georgia legal anomaly. Sisk v. Patel, in which a solid majority of the court of appeals declared this statute to be "fundamentally broken," was decided during the current survey period, but was discussed in last year's torts survey article.

As usual, the following represents only a sampling culled from the plethora of decisions arising under this section.

In Ewers v. Cooper, the court expressly applied the general rule of liberal construction of pleadings to a section 9.1 affidavit. The court declined to apply the rule of Prophecy Corp. v. Charles Rossignol, Inc., that a party's self-contradictory testimony must be construed against him, to statements made by that party's expert in a section 9.1 affidavit. "[W]e allow inconsistencies in pleading, and this rule

54. See supra notes 42-53 and accompanying text.
55. See infra notes 108-22 and accompanying text.
58. Although in Lutz v. Foran, 262 Ga. 819, 427 S.E.2d 248 (1993), the supreme court upheld section 9.1 against a challenge that it violated the provision in the Georgia constitution against bills containing more than one subject matter (see GA. CONST. art. III, § 5, para. 3 (1983)), the supreme court has never addressed the broader constitutional questions of overbreadth, vagueness, or equal protection. See 1993 Torts, supra note 42, at 414.
60. Id. at 160, 456 S.E.2d at 720.
61. See supra note 47.
applies even when an affidavit must be filed to fulfill statutory pleading requirements.\footnote{Id. at 434-35, 457 S.E.2d at 706.}

In Works v. Aupont,\footnote{219 Ga. App. 577, 465 S.E.2d 717 (1995).} a nonprecedential decision,\footnote{If the appeal is decided by the whole Court, a full concurrence by a majority of Judges is a binding precedent, but if the judgment is made only by special concurrences without a statement of agreement with all that is said in the opinion or by concurrence in the judgment only, there being general concurrence by less than a majority of the Judges, it is a physical precedent only. GA. CT. APP. R. 33(a) (1995).} the en banc court ruled that the forty-five day extension granted by subsection 9.1(b)\footnote{O.C.G.A. § 9-11-9.1(b) (1993) provides in part as follows: The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit.} is automatic, and the trial court has no authority to inquire into the merits of plaintiff's allegation that an affidavit could not be obtained because of time constraints.\footnote{219 Ga. App. at 578, 465 S.E.2d at 718-19.} There is some magic to the form of that allegation, however, as plaintiff learned in Keefe v. Northside Hospital, Inc.\footnote{219 Ga. App. 875, 467 S.E.2d 9 (1996).} In that case, the court held that the time constraint exception of subsection 9.1(b) is exhaustive of the circumstances under which a plaintiff is relieved of the contemporaneous filing requirement; consequently, a complaint that fails to allege expressly that the affidavit is not being filed because of time constraints will be dismissed.\footnote{Id. at 876, 467 S.E.2d at 10.}

The courts can do only so much to ameliorate the harsh effects of this statute. As the court of appeals has recognized, "[w]e are not empowered to amend the lawful acts of the legislature."\footnote{Johnson v. Brueckner, 216 Ga. App. 52, 53, 455 S.E.2d 76, 78 (1994).} Thus, the court approved the extension of section 9.1's requirements to suits against athletic trainers,\footnote{Georgia Physical Therapy, Inc. v. McCullough, 219 Ga. App. 744, 466 S.E.2d 635 (1995).} pest control operators,\footnote{Fender v. Adams Exterminators, Inc., 218 Ga. App. 62, 460 S.E.2d 528 (1995) (prospective-only application denied).} and (maybe) "facial estheti-
ticians." In Redmond v. Shook, the court declined to validate a section 9.1 affidavit when the notary had administered the oath over the telephone. "There must be some solemnity, not mere telephone talk," chided the court.

Medical Malpractice. In the area of medical malpractice, there were two interesting decisions. In Gilbert v. R.J. Taylor Memorial Hospital, Inc., defendant hospital lost plaintiff's tissue sample and caused her to undergo unnecessary cancer treatment. The supreme court held a factual issue existed because of plaintiff's expert witness' opinion that it was not possible to determine to a reasonable degree of medical certainty that plaintiff had cancer without the tissue sample.

The other area that continues to be of note is what constitutes an "action for medical malpractice." Does a patient who falls out of bed have a malpractice claim or an ordinary negligence claim? The full court of appeals has answered the question both ways. In Robinson v. Medical Center, the court said it was malpractice, whereas in an earlier case, the court considered it ordinary negligence. It appears that the only way to reconcile these cases is on the basis of whether the act or omission by the defendant (leaving side rails down, etc.) was based on that defendant's exercise of medical judgment or was merely an "administrative act" whose performance requires no professional knowledge, such as carrying out previously received orders.

Legal Malpractice. The area of legal malpractice brought forth one extremely important survey period decision. In Jones, Day, Reavis & Pogue v. American Envirecycle, Inc., the court gave a narrow interpr-

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79. Id. at 477, 462 S.E.2d at 173 (quoting Carnes v. Carnes, 138 Ga. 1, 6, 74 S.E. 765, 788 (1912)).
81. Id. at 582, 458 S.E.2d at 342.
82. O.C.G.A. § 9-3-70(1) (1982) defines an action for medical malpractice as arising out of "[h]ealth, medical, dental, or surgical service, diagnosis, prescription, treatment, or care." Thus, somewhat unsurprisingly, the court held in Crawford v. Spencer, 217 Ga. App. 446, 457 S.E.2d 711 (1995), that a claim for the improper administration of medication and improper monitoring of the patient's progress with it was one for medical malpractice.
86. 217 Ga. App. at 10, 456 S.E.2d at 256.
tation to what kind of attorney conduct constitutes a violation of the standard of care. Defendant law firm’s predecessor had prepared a contract for plaintiff to purchase land from the Emanuel County Development Authority.88 A court had declared the contract ultra vires because it did not include a statement of purpose.89 The court in Jones, Day held that defendant’s predecessor had not deviated from the standard of legal care. “As the legal profession is at best an inexact science, a breach of duty arises only when the relevant . . . principles or procedures are well settled and their application clearly demanded, and the failure to apply them apparent.”90 Following this rule, the court concluded that, because “[t]he state of the law as to the requirement for affirmatively including a statement of purpose within the body of a contract for sale of land by a development authority was not, at the time the contract document was prepared, well settled, clear, and widely recognized,” defendant would not be liable.91 This language is curiously reminiscent of that used to confer official immunity under federal law.92 Although its protection for attorneys is quite broad, the number of legal malpractice cases it will apply to is probably not that large. Most legal malpractice actions turn on more prosaic matters, such as an attorney’s failure to file papers on time.93

III. NEGLIGENCE DEFENSES

A. Workers’ Compensation Bar

A tort claim that arises in the scope of the plaintiff’s employment may be barred by the “exclusive remedy” provisions of the Workers’ Compensation Act.94 In Brown v. Weller,95 the court of appeals held, in a case of first impression, that the exclusion does not preclude third-party claims by the defendant tortfeasor against a co-employee of plaintiff.96 The court reasoned that the third-party defendant had no corresponding liability to pay over compensation benefits to plaintiff.97 Also, in

88. Id. at 80, 456 S.E.2d at 265.
89. Id. at 84, 456 S.E.2d at 267.
90. Id. at 83, 456 S.E.2d at 267.
91. Id. at 84, 456 S.E.2d at 267. The court did not offer any authority for this conclusion.
96. 217 Ga. App. at 68-69, 456 S.E.2d at 603.
97. Id. at 69-70, 456 S.E.2d at 603-04.
Coleman v. Columns Properties, Inc., the supreme court significantly clarified the preclusive effect of prior workers' compensation proceedings on later tort litigation by holding that the issues must be identical before an estoppel arises.

B. Statute of Limitations

Plaintiffs offered several ingenuous (or perhaps disingenuous) excuses in attempts to toll the statute of limitations during the survey period. Lackey v. Crittenden, while certainly presenting a sympathetic case, simply did not fall within the legal provisions for tolling which are extended by the Georgia Code. In that case, plaintiff's counsel had terminal cancer, was undergoing emergency surgery, and attempted to mail the lawsuit to the court for filing within the limitations period. As always seems to be the case with such matters, the complaint was lost in the mail, and plaintiff tried to argue that counsel's medical disability amounted to incompetency within the meaning of O.C.G.A. section 9-3-91, which provides for tolling during periods of incapacity. Holding that the section only applies to parties, and not counsel, the court declined to extend the statute.

There is always considerable controversy about exactly when the two-year statute of limitations starts running in medical malpractice cases. Frequently, these cases are filed on the last day or two before the statute runs, and this issue can become a central focal point in the case. For example, in Henry v. Medical Center, Inc., the relevant dates were as follows: September 6, 1991—Patient admitted to defendant hospital; September 8, 1991—Patient noticed pain and swelling where IV was inserted; September 10, 1991—Patient went to her doctor and learned that something was wrong; September 10,
1993—Patient filed suit.\textsuperscript{107} The court held that the patient's claim was barred by the statute, which started running when the injury occurred and physically manifested itself, not when the patient discovered the medical cause of her injuries.\textsuperscript{108}

In \textit{Crawford v. Spencer},\textsuperscript{109} the court of appeals rejected a continuing tort theory for purposes of statute of limitations tolling in medical malpractice cases. Although plaintiff did not know what was causing his pain, he knew \textit{something} was wrong, and although plaintiff subjectively thought his problem was caused by \textit{something} else, the court re-emphasized that the statute was running against him all the time.\textsuperscript{110}

During 1995 the Georgia Legislature amended the workers' compensation third-party tort statute of limitations to allow plaintiffs a longer time to bring claims against third-party tortfeasors.\textsuperscript{111} The amendment expressly applied to all injuries that occurred on or after July 1, 1992.\textsuperscript{112} After reiterating that one does not have a vested right in the continued existence of a statute of limitations,\textsuperscript{113} the supreme court in \textit{Vaughn v. Vulcan Materials}\textsuperscript{114} gave retroactive application to that amendment.

\textbf{C. Immunity}

Under the present application of sovereign immunity as it exists in Georgia, a plaintiff who is injured by a county has no negligence cause of action unless the injury arose from the use of an automobile,\textsuperscript{115} whereas a plaintiff negligently injured by the State may proceed under the Georgia Tort Claims Act.\textsuperscript{116} Acknowledging that this disparity exists, the supreme court in \textit{Woodard v. Laurens County}\textsuperscript{117} nevertheless found that the scheme passed constitutional muster since the waiver of sovereign immunity is a privilege, not a right.\textsuperscript{118} The court added

\begin{footnotes}
\footnotetext[107]{Id. at 893, 456 S.E.2d at 217-18.}
\footnotetext[108]{Id. at 894, 456 S.E.2d at 218.}
\footnotetext[109]{217 Ga. App. 446, 457 S.E.2d 711 (1995).}
\footnotetext[110]{Id. at 448, 457 S.E.2d at 713.}
\footnotetext[112]{O.C.G.A. § 34-9-11.1(e) (Supp. 1996).}
\footnotetext[113]{See Canton Textile Mills v. Lathem, 253 Ga. 102, 317 S.E.2d 189 (1984).}
\footnotetext[114]{286 Ga. 163, 465 S.E.2d 661 (1996).}
\footnotetext[115]{See Gilbert v. Richardson, 264 Ga. 744, 452 S.E.2d 476 (1994).}
\footnotetext[116]{See O.C.G.A. §§ 50-21-20 et seq. (1994).}
\footnotetext[117]{265 Ga. 404, 456 S.E.2d 581 (1995).}
\footnotetext[118]{See Sikes v. Candler County, 247 Ga. 115, 274 S.E.2d 464 (1981).}
\end{footnotes}
that "[a]ny remedy for this unequal treatment lies with the General Assembly rather than the courts."

County government employees are entitled to official immunity for actions taken in the scope of their employment unless they act "with actual malice or with actual intent to cause injury in the performance of their official duties." In a case of first impression, the supreme court in Merrow v. Hawkins was called upon to define "actual malice." The high court opined that because the constitution used the term actual malice as opposed to implied malice, the phrase was not meant to include reckless disregard for conduct, but assumed only a "deliberate intention to do wrong."

Another case of statutory interpretation, Department of Human Resources v. Hutchinson, involved plaintiff being shot by a foster child who had been placed in her home by the Department of Human Resources. Claims brought against the State must be brought pursuant to the Tort Claims Act, which specifically excludes losses from assault and battery. Plaintiff argued that the exclusion applied only when the assault or battery was committed by a state officer or employee. The court, however, rejected this argument and held that the exclusion included all losses that resulted from intentional acts regardless of who committed the act. Also during this survey period, the court of appeals in Garrett v. Georgia Higher Education Assistance Corp. stated that claims brought against the Georgia Higher Education Assistance Corporation were not subject to the Tort Claims Act.

123. Id. at 391, 467 S.E.2d at 337.
126. Id. § 50-21-24(7).
127. 217 Ga. App. at 72, 458 S.E.2d at 645.
129. Id. at 415, 457 S.E.2d at 678. "[A corporation cannot be a 'state officer or employee,' and (the Georgia Higher Education Assistance Corporation] is not one of the state government entities' specifically mentioned in the Act to which it applies. Id.
IV. OTHER TORT CAUSES OF ACTION

A. Products Liability

Although this survey period did not produce any products liability decisions of the magnitude of Banks v. ICI Americas, Inc., there were, nevertheless, several important matters before the courts. One issue left unresolved by Banks was whether the risk-utility analysis it adopted for design defect cases supersedes the outmoded "open and obvious" rule, which exonerates a manufacturer from liability if the dangerous or defective condition of the product should have been apparent to a reasonable user. In Wilson Foods Corp. v. Turner, the court of appeals applied Banks in the context of a failure-to-warn case. Plaintiff's young son was severely burned when a can of hot shortening manufactured by defendant dissolved in plaintiff's hands as he was carrying it to the trash. He based his claim in part on defendant's failure to put on the container's lid a warning not to pour hot oil into it. Because plaintiff admitted he failed to read the warning that was supplied, the court reversed a jury verdict in his favor on the grounds that some evidence had gone to the jury about the content of the warning. The court went on to hold, however, that, upon retrial, plaintiff could introduce evidence pertaining to the adequacy of defendant's efforts to communicate the warning, including warnings issued by other manufacturers, provided that plaintiff could lay a proper evidentiary foundation. This would relate, said the court, to the Banks factor of whether a safer alternative design was "a marketable reality and technologically feasible." Thus, the Georgia open and obvious rule may not yet be dead, but it is clearly on life support.

Claims based on breach of warranty are an area of products liability litigation that have been somewhat eclipsed in recent years by the rise

130. 264 Ga. 732, 460 S.E.2d 671 (1994), discussed in 1995 Torts, supra note 42, at 336-37 ("Banks . . . is surely to be reckoned as the most significant Georgia products liability decision in a generation."). During this survey period, the supreme court ruled that the risk-utility analysis adopted in Banks could be applied to support an award of punitive damages. Banks v. ICI Americas, Inc., 266 Ga. 607, 611, 469 S.E.2d 171, 175 (1996).

131. See GEORGIA TORTS, supra note 11, § 25-8.


133. Id. at 74, 460 S.E.2d at 533. Plaintiff also claimed that defendant negligently designed the container of a composite material resembling metal. Id.

134. Id. at 75-76, 460 S.E.2d at 534-35.

135. Id. at 77-78, 460 S.E.2d at 535-36.

136. Id. at 78, 460 S.E.2d at 536 (emphasis omitted) (quoting Banks, 264 Ga. at 736, 460 S.E.2d at 675).
of the strict liability theory of recovery. Nevertheless, the breach of warranty theory was of vital significance in several survey period cases. The most common type of warranty claim in products cases is founded on the implied warranty of merchantability. It is somewhat limited in scope by the requirements of notice of breach and privity, although privity attaches the moment the customer takes possession of the product with the intention of purchasing it. Here, too, Georgia courts continue to apply a version of the “open and obvious” rule, holding that the implied warranty of merchantability does not extend to patent defects. In Moore v. Berry, however, the court deemed the defect—a veneered area of filler on a wooden tree stand—to be latent and, hence, within the implied warranty. Furthermore, held the court, defendant’s representations to plaintiff that the tree stand was “probably the safest one on the market” and that there was “no way [plaintiff] could fall in this stand” were sufficient to create an express warranty as well.

Yet another type of warranty in products cases is the implied warranty of fitness for a particular purpose. However, this warranty does not operate unless the seller at the time of sale has reason to know of the particular purpose. In Jones v. Marcus, the court held that plaintiff’s telling defendant that he wanted tires for his pickup truck was not sufficient to invoke this warranty, absent evidence that defendant knew what the truck was to be used for.

137. See generally GEORGIA TORTS, supra note 11, § 25-5.
139. In Buford v. Toys R' Us, Inc., 217 Ga. App. 565, 458 S.E.2d 373 (1995), the court held that no notice to defendant of breach of warranty prior to filing the lawsuit two years after the accident was insufficient as a matter of law to satisfy the requirements of O.C.G.A. § 11-2-607(3)(a).
140. The intricacies of the privity rule in Georgia are discussed in GEORGIA TORTS, supra note 11, § 25-5.
144. Id. at 697, 458 S.E.2d at 880.
145. Id. at 696-99, 458 S.E.2d at 880-81; see O.C.G.A. § 11-2-313 (1994).
147. Id. The statute also requires that the seller have knowledge of the buyer’s reliance on his skill and judgment in furnishing the goods, and these requirements are conjunctive. See Bruce v. Calhoun First Nat'l Bank, 134 Ga. App. 790, 216 S.E.2d 622 (1975).
149. Id. at 374, 457 S.E.2d at 272-73.
B. Defamation

In *Lawton v. Georgia Television Co.*, the court re-applied the "neutral reportage" rule to hold that a report about a national guard investigation of sexual harassment which plaintiff alleged was defamatory of him was privileged pursuant to O.C.G.A. section 51-5-7. The test is whether defendant had engaged in "defamatory editing," so that the resultant report carried a greater "sting" than the original material from which it was drawn. The court in this case, applying the analysis found in the Restatement, held it did not. Nor, held the court, was defendant required to devote equal time to plaintiff's contentions about the report that condemned him.

In another case involving privilege, the court in *Garrett v. Georgia Higher Education Assistance Corp.* ("GHEAC") applied the absolute privilege of O.C.G.A. section 51-5-8 regarding allegations in pleadings. Plaintiff GHEAC sued defendant in a state court to collect a student loan. Defendant, acting pro se, counterclaimed for $5,700,000, arguing that because the complaint involved a federally funded student loan governed by federal law, the Georgia court was not "a court of competent jurisdiction" for purposes of the privilege. Noting that defendant "recognize[d]... that plaintiff's rights as a holder of the note are subject to the Georgia Commercial Code," the court held defendant had failed to show exclusive federal jurisdiction, and, consequently,

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151. *Id.* at 771, 456 S.E.2d at 277. O.C.G.A. § 51-5-7 (1982 & Supp. 1996) provides a conditional privilege for, inter alia, "[f]air and honest reports of the proceedings of... judicial bodies," and "[c]omments upon the acts of public men or public women in their public capacity and with reference thereto." *Id.* § 51-5-7(5), (9). This typically encompasses quasi-judicial administrative hearings such as the one at issue in *Lawton*.
152. 216 Ga. App. at 770-71, 456 S.E.2d at 276-77.
153. *See RESTATEMENT (SECOND) OF TORTS* § 611, cmt.f (1977) (report must only be "substantially accurate" and "fair").
154. 216 Ga. App. at 772, 456 S.E.2d at 278. The court did recognize that "in certain situations the sensationalist 'news' reporting of which [plaintiff] complains may be actionable." *Id.*
156. The difference between an "absolute" and a "conditional" privilege is that the latter is waived by evidence of malice. *See GEORGIA TORTS, supra* note 11, § 28-5.
157. O.C.G.A. § 51-5-8 (1982) privileges "[a]ll charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent to the relief sought, whether legally sufficient to obtain it or not,... however false and malicious such charges, allegations, and averments may be."
159. *Id.* at 416, 457 S.E.2d at 679.
the state court was "presumptively competent" to adjudicate the claim. 160

An essential element of any defamation claim is damages. Depending on the type of defamatory utterance involved, a plaintiff may have to show "special damages" in order to recover. 161 Such a case was Webster v. Wilkins, 162 in which plaintiff sued the professional basketball player Dominique Wilkins, the father of her child, for saying of plaintiff in a newspaper interview that "[s]he's unfit to have a kid." 163 The court held that because Wilkins' statement did not fit into one of the categories of slander per se, 164 plaintiff could not recover because she had not proved any special damages. 165 "The loss of income, of profits, or even of gratuitous entertainment and hospitality will be special damage if the plaintiff can show that it was caused by the defendant's words." 166 Plaintiff had proved none of those, so the trial court properly granted summary judgment against her.

C. Malicious Prosecution

The court reiterated the general public policy against malicious prosecution actions in McGonagil v. Treadwell. 167 This case might well have been styled Hatfield v. McCoy, because the facts involved a lengthy feud between neighboring suburbanites arising out of the playing of a set of electric guitars and drums. Defendant had plaintiff arrested for criminal trespass when plaintiff came over one night to complain about

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160. Id.
161. See generally GEORGIA TORTS, supra note 11, § 28-9.
163. Id. at 194, 456 S.E.2d at 700.
164. According to O.C.G.A. § 51-5-4 (1982), the following categories of slander do not require a showing of special damage: (1) imputation of crime; (2) charges that the plaintiff has some "contagious disorder," or is "guilty of some debasing act"; and (3) charges against the plaintiff's "trade, office, or profession."
165. 217 Ga. App. at 195-96, 456 S.E.2d at 701. The court also held that Wilkins' statement was merely an expression of opinion, and not actionable on that ground, either. Id.
166. Id. at 196, 456 S.E.2d at 701 (quoting Jamison v. First Ga. Bank, 193 Ga. App. 219, 222-23, 387 S.E.2d 375, 378 (1989)).
the drums, and despite its distaste for this type of case, the court found that a jury question existed here.

D. Wrongful Death

In the area of wrongful death, one question that the courts had really never definitively decided was to what extent a recovery by a plaintiff for personal injuries precludes a subsequent wrongful death action by the plaintiff's statutory survivors arising out of the same injuries. In Winding River Village Condominium Ass'n v. Barnett, the court of appeals held that the two actions are separate and the earlier recovery would not preclude a later wrongful death action. The Supreme Court of Georgia followed with its opinion in Waldroup v. Green County Hospital Authority, which held the same and further held that collateral estoppel did not apply in those circumstances.

The Georgia Supreme Court addressed another important wrongful death question in Peters v. Hospital Authority. Answering a certified question from the Eleventh Circuit, the court held that, although the parents have a right to recover for the full value of the child's life, there is no separate wrongful death cause of action on behalf of the stillborn child itself. Said the court, "we are reluctant to accord legal rights to the unborn."

E. Fraud

The Fair Business Practices Act of 1975 received a good bit of attention from the appellate courts during the period surveyed. Answering a certified question from the Eleventh Circuit, the supreme

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168. These actions, said the court, are strictly guarded . . . [and are] never encouraged, except in plain cases; were it otherwise, ill consequences would ensue to the public, for no one would willingly undertake to vindicate a breach of the public law and to discharge his duty to society, with the prospect of an annoying suit staring him in the face. 

Id. at 853, 456 S.E.2d at 263 (quoting Ventress v. Rosser, 73 Ga. 534, 541 (1884)).

169. Id. at 854, 456 S.E.2d at 264.


171. Id. at 36-37, 459 S.E.2d at 571.


173. Id. at 866-86, 463 S.E.2d at 7-8.


175. Id. at 488, 458 S.E.2d at 629 (citing Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955)).

176. Id., 458 S.E.2d at 630.

court held in Friedlander v. PDK Labs, Inc.\textsuperscript{178} that nonconsumers cannot sue competitors under the Act for misrepresentations to the public.\textsuperscript{179} Although the Act does require an element of justifiable reliance similar to common-law fraud claims,\textsuperscript{180} the court found in Baranco, Inc. v. Bradshaw\textsuperscript{181} that there was no justifiable reliance by plaintiff concerning the financing terms of her new vehicle. When plaintiff took possession of the vehicle, she knew that the check she had given had been cashed and that she would be unable to obtain a lease on the vehicle.\textsuperscript{182}

In common-law fraud claims, the court in Armstrong Transfer & Storage Co. v. Mann Construction\textsuperscript{183} declined to extend the passive concealment doctrine, first enunciated in Wilhite v. Mays,\textsuperscript{184} to sales of commercial property. The passive concealment doctrine provides an exception to the general rule of caveat emptor for the sale of residential real estate. It imposes a duty upon a seller to disclose facts not apparent to the buyer of which the seller has special knowledge and which the seller is aware that the buyer would deem important to his purchase decision.\textsuperscript{185}

Fraud actions typically cannot be based upon mere sales talk or “puffery.”\textsuperscript{186} In King v. Codisco, Inc.,\textsuperscript{187} however, the court held that defendant’s statement that it would “give [plaintiff] the lowest price that [defendant] gave to any of its customers” was not puffery but was a statement of fact upon which plaintiff was entitled to rely.\textsuperscript{188}

\textbf{F. Business Torts}

Georgia has a tort action for misappropriation of trade secrets and ideas.\textsuperscript{189} In Leo Publications, Inc. v. Reid,\textsuperscript{190} the supreme court held that plaintiff’s advertising customer list was not a trade secret because

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\textsuperscript{178} 266 Ga. 180, 465 S.E.2d 670 (1996).
\textsuperscript{179} Id. at 180, 465 S.E.2d at 671. According to the court, the Act’s intent was to provide relief to consumers, not business competitors. Id.
\textsuperscript{182} Id. at 172, 456 S.E.2d at 594.
\textsuperscript{184} 239 Ga. 31, 235 S.E.2d 532 (1977).
\textsuperscript{185} See generally GEORGIA TORTS, supra note 11, § 32-3.
\textsuperscript{188} Id. at 705, 458 S.E.2d at 882.
\textsuperscript{189} See generally Adams & Adams, GEORGIA TORTS, supra note 11, § 33-4.
\textsuperscript{190} 265 Ga. 561, 456 S.E.2d 651 (1995).
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“it was readily ascertainable by proper means.” This, of course, is an exception to the general rule that customer lists are the employer’s property and are protected trade secrets. Further, the court held that plaintiff's future business plans were not trade secrets within the contemplation of Georgia law because they were not “novel or original.”

Although plaintiffs seek to redress many types of business wrongs under the general headings of the torts of interference with business or contractual relations, some things simply do not give rise to these torts. For example, in Phillips v. MacDougald, the court of appeals held, in a case of first impression, that an action for tortious interference will not lie based on the defendant’s filing of a lawsuit which allegedly interferes with the plaintiff’s business relations. The court balanced the competing public policies of citizens’ legitimate interest in economic advantage and freedom from undue interference in business against the constitutional right of access to the courts, and concluded that “[t]his state appears to have a compelling governmental interest in encouraging citizens to settle disputes through the court, rather than through self-help which can foster prolonged acrimony and even violence among otherwise peaceable citizens.”

V. DAMAGES

A. In General

Rampell v. Williams dealt with the right of a plaintiff to recover for the increased costs of future insurance resulting from a personal injury. In that case, the court held that plaintiff could not recover such increased costs in the absence of direct evidence that the defendant’s negligence caused that particular economic injury. Further, the court held that to allow plaintiff to recover for future medical expenses, and also for increased insurance premiums related to those same injuries, would be an impermissible double recovery.

191. Id. at 562, 458 S.E.2d at 652.
193. 265 Ga. at 562, 458 S.E.2d at 652.
194. See generally GEORGIA TORTS, supra note 11, §§ 33-2, 33-3.
196. Id. at 156, 464 S.E.2d at 395; see GA. CONST. art. I, § 1, para. 12 (1983).
199. Id. at 294, 457 S.E.2d at 226.
An admittedly negligent lawyer got off “scot-free” because of a questionable damages ruling by the court of appeals in *Crowley v. Trust Co. Bank.* Plaintiff, a bank, required both a first mortgage on real estate and an individual guaranty to secure a loan. Defendant attorney negligently certified title to the real estate, with the result being that the bank did not have a proper lien on it. The bank chose to go after the attorney for legal malpractice, rather than the guarantor, arguing both that it had a right to elect its remedy and that the existence of the guaranty was a collateral source to the legal malpractice claim. The court of appeals turned down both claims, reversing the trial court. It held that the bank was not damaged within the meaning of the law because it had a remedy against the guarantor in lieu of the real estate. A two-judge concurrence, however, apparently left the door open for the guarantor to sue the attorney on some type of negligent misrepresentation or third-party beneficiary claim.

Most animal lovers would disagree with the Georgia Court of Appeals position concerning the emotional value of pets. In *Carroll v. Rock,* plaintiff left her two cats at the veterinarian for neutering. While at the vet’s office, Tigger, a rather vicious feline, managed to fight his way out of the office to freedom, never to return. Plaintiff sued the vet alleging conversion and emotional distress. The court of appeals reversed the sympathetic jury’s award for mental anguish, pain, and suffering because plaintiff’s angst was unaccompanied by physical or pecuniary loss, and there was no evidence that defendant acted maliciously, wilfully, or wantonly.

It should also be noted, as shown in two survey period cases, that concerns about possible future losses will not support a damages award. In *Smith v. Geiger,* plaintiffs’ speculation that tax liens against defendants might place plaintiffs’ leased property in jeopardy lacked

201. Id. at 533, 466 S.E.2d at 26.
202. Id. at 533-34, 466 S.E.2d at 26 (Blackburn, J., concurring specially).
204. Id. at 260, 469 S.E.2d at 392-93.

Concerning plaintiff’s allegations of malicious actions, the court stated:

> We do not agree with [plaintiff’s] argument that [defendant’s] acts of waiting four hours before telling [plaintiff] of the loss, misrepresenting to her how the cat escaped and the efforts undertaken to find it and the nonchalant manner in which she was informed of the loss constituted a willful disregard of her rights or extremely outrageous conduct.

220 Ga. App. at 261, 469 S.E.2d at 393.
sufficient certainty upon which a damages claim could be based. Likewise, plaintiff’s fear of being fired in Department of Human Resources v. Thomas207 was not competent evidence in support of a claim for loss of future earnings.

B. Collateral Source

In an interesting decision, Warren v. Ballard,208 the Georgia Supreme Court held that collateral source evidence is not admissible for impeachment in a case in which the plaintiff testifies to anxiety about payment of medical bills. The court’s rationale was that impeachment by collateral source evidence is only allowed if the false testimony is related to a “material issue” in the case. Because there is no authority that permits a recovery for anxiety, agony, or worry over the payment of medical bills, testimony concerning it does not relate to such a material issue, and, therefore, there can be no impeachment of that testimony. Defendant’s remedy in such a case, said the court, is to object to the false testimony and request curative instructions from the trial court. “In appropriate cases, other sanctions are available, such as rebuke of counsel, contempt of court, or even a mistrial with appropriate costs cast upon the plaintiff.”209 In an interesting dissent, Justices Sears and Fletcher argued that both the testimony about the anxiety over the medical bills and the collateral source information should be admissible and relevant.210

C. Punitive Damages

Many big corporations think they are doing themselves a favor when they reduce everything to writing. Sometimes, however, this may not be the case. In Restaura, Inc. v. Singleton,211 the court of appeals held that defendant’s violation of its own internal policies constituted evidence of conscious indifference to consequences for purposes of a punitive damage claim. Defendant’s employees were admittedly aware of the consequences of their omissions, and, therefore, this was a proper case for punitive damages to be considered.212

209. Id. at 410, 467 S.E.2d at 894.
210. Id. at 410-13, 467 S.E.2d at 894-96 (Sears, J., dissenting in part and specially concurring in part).
212. Id. at 888, 456 S.E.2d at 221.
VI. CONCLUSION

One of the most legendary aspects of the Titanic saga was the heroism of many crew members who toiled on at their posts of duty until the very last; some, like Captain E.J. Smith, choosing to go down with the ship.213 We know from experience that editors of law reviews sometimes feel that they are in the same boat,214 but we believe the great poet Henry Wadsworth Longfellow probably came closer to describing the editors of the Georgia Survey in the following lines:

The heights by great men reached and kept
Were not attained by sudden flight,
But they, while their companions slept,
Were toiling upward in the night.215

213. See, e.g., WADE, supra note 1, at 90-91.
214. See, e.g., 1994 Torts, supra note 42, at 516 (“So workers of the Law School world/While some strength still remains,/Arise, unite, demand a beer,/And slug ‘em with your chains.”) (quoting Karl Llewellyn, “Song of the Law Review” (1952)).