Torts

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Torts

by Deron R. Hicks*

I. INTENTIONAL TORTS

A. Battery

In Roberts v. Jones, the Georgia Court of Appeals addressed whether a physician commits battery by performing surgery on a patient to alleviate pain despite the existence of a durable power of attorney forbidding the surgery. In Jones prior to entering the hospital, plaintiff's father executed a durable power of attorney that provided: "I do not want to be operated on or any other treatment that will cause pain and suffering." The durable power of attorney also named plaintiff and plaintiff's sister as the father's agents under a health care agency power. During the course of plaintiff's father's hospitalization, defendant physician performed emergency surgery on plaintiff's father after the father had not urinated for fourteen hours. The father subsequently died due to reasons unrelated to the emergency surgery. Although it was undisputed that the durable power of attorney was contained in the father's medical records, it was also undisputed that the physician had not been notified of the existence of the durable power of attorney. Plaintiff subsequently brought suit against the physician for battery. The trial court granted defendant's motion for summary judgment, and the court of appeals affirmed.
The court of appeals affirmed the trial court's grant of summary judgment on two grounds. First, citing Official Code of Georgia Annotated ("O.C.G.A.") section 31-36-7(1), the court held that it was the responsibility of the agent (the son or the daughter) to notify the physician of the existence of the health care agency. Because it was undisputed that the physician did not have actual notice of the durable power of attorney, the physician could not be held liable for battery or for violating the terms of that document.

Second, O.C.G.A. section 31-36-7(2) provides that a medical care provider must comply with the decision of an agent in accordance with the terms of the health care agency "subject to the provider's right to administer treatment for the patient's comfort or alleviation of pain." Because plaintiff's father had not urinated for fourteen hours, the court had little doubt that the father was in substantial pain. Accordingly, even assuming that the physician knew or should have known of the existence of the durable power of attorney, he was authorized pursuant to O.C.G.A. section 31-36-7(2) to perform the emergency surgery.

6. O.C.G.A. section 31-36-7(1) provides:
Each health care provider and each other person with whom an agent deals under a health care agency shall be subject to the following duties and responsibilities:

(1) It is the responsibility of the agent or patient to notify the health care provider of the existence of the health care agency and any amendment or revocation thereof. A health care provider furnished with a copy of a health care agency shall make it a part of the patient's medical records and shall enter in the records any change in or termination of the health care agency by the principal that becomes known to the provider. Whenever a provider believes a patient is unable to understand the general nature of the health care procedure which the provider deems necessary, the provider shall consult with any available health care agent known to the provider who then has the power to act for the patient under a health care agency.


7. 222 Ga. App. at 549, 475 S.E.2d at 194.
8. Id.
9. O.C.G.A. section 31-36-7(2) provides in part:
Each health care provider and each other person with whom an agent deals under a health care agency shall be subject to the following duties and responsibilities:

(2) A health care decision made by an agent in accordance with the terms of a health care agency shall be complied with by every health care provider to whom the decision is communicated, subject to the provider's right to administer treatment for the patient's comfort or alleviation of pain.


10. Id.
11. 222 Ga. App. at 549, 475 S.E.2d at 195.
12. Id. at 549-50, 475 S.E.2d at 195.
B. False Imprisonment

O.C.G.A. section 51-7-60 provides a limited statutory privilege to shopkeepers regarding the detention of suspected shoplifters. The decision in Brown v. Super Discount Markets, Inc., however, underscores the difficulty in utilizing the statutory privilege as a shield against a civil jury trial. As the court of appeals noted in Brown, a defendant shopkeeper cannot “prevail on motion for summary judgment unless the reasonableness of the initial decision to detain . . . and [the] reasonableness of the manner and length of [the] subsequent detention . . . [are] established as a matter of law.”

In Brown a security employee intercepted plaintiffs while they were attempting to check out at defendant supermarket. The security employee had observed plaintiffs concealing various items in their purses. The security employee escorted plaintiffs to the store office, where, according to defendants, they were briefly interrogated and released. However, according to plaintiffs, the security employee threatened them, used excessive force, and detained plaintiffs for approximately an hour to an hour and a half.

The court of appeals first held that the security employee had reasonable cause to believe that shoplifting was in progress because he had observed plaintiffs concealing various items in their purses. Therefore, the employee was authorized to intercept plaintiffs and to investigate the situation further.

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13. O.C.G.A. section 51-7-60 provides:
Whenever the owner or operator of a mercantile establishment or any agent or employee of the owner or operator detains, arrests, or causes to be detained or arrested any person reasonably thought to be engaged in shoplifting and, as a result of the detention or arrest, the person so detained or arrested brings an action for false arrest or false imprisonment against the owner, operator, agent, or employee, no recovery shall be had by the plaintiff in such action where it is established by competent evidence:

(1) That the plaintiff had so conducted himself or behaved in such a manner as to cause a man of reasonable prudence to believe that the plaintiff, at or immediately prior to the time of the detention or arrest, was committing the offense of shoplifting, as defined by Code Section 16-8-14; or

(2) That the manner of the detention or arrest and the length of time during which such plaintiff was detained was under all the circumstances reasonable.

O.C.G.A. § 51-7-60 (1982).

15. Id. at 175, 477 S.E.2d at 840.
16. Id. at 174-75, 477 S.E.2d at 839-40.
17. Id. at 175, 477 S.E.2d at 840.
18. Id.
The court, however, noted that "the circumstances surrounding the detention are more problematic."19 The court said, "[W]hether the manner and length of detention were reasonable may be determined as a matter of law only in rare cases where the evidence is uncontrov-

20 ered." The court held that based upon the conflict in the evidence, a jury would have to determine whether the manner and length of plaintiffs' detention were reasonable.21

In Ridgeview Institute, Inc. v. Handley,22 the court of appeals addressed whether a claim of false imprisonment can be based upon a hospital's failure to provide the statutory notice required by O.C.G.A. section 37-3-44.23 In Handley plaintiff was involuntarily committed to defendant psychiatric facility after his daughter convinced a psychiatrist that plaintiff was a danger both to himself and his wife. The psychiatrist completed a form 1013 authorizing a police officer to detain plaintiff and bring him to the facility. During the admission process, plaintiff claimed that the admitting nurse failed to notify plaintiff of his right to retain legal counsel and of his right to seek a protective order or habeas corpus relief under O.C.G.A. section 37-3-44. The following day, a psychiatrist evaluated plaintiff and authorized his release after it was determined that he did not need continued hospitalization. Plaintiff subsequently brought suit against the psychiatrist and Ridgeview Institute for false imprisonment. The trial court denied Ridgeview Institute's motion for summary judgment. The court of appeals reversed.25

The court of appeals first noted, "False imprisonment is an intentional tort and not a tort of negligence. Therefore, an essential element of a

19. Id.
20. Id.
21. Id.
23. O.C.G.A. section 37-3-44 provides:
   (a) Immediately upon arrival of a patient at an emergency receiving facility under Code Section 37-3-43, the facility shall give the patient written notice of his right to petition for a writ of habeas corpus or for a protective order under Code Section 37-3-148. This written notice shall also inform the patient that he has a right to legal counsel and that, if the patient is unable to afford counsel, the court will appoint counsel.
   (b) The notice informing the patient's representatives of the patient's hospital-
ization in an emergency receiving facility shall include a clear notification that the representatives may petition for a writ of habeas corpus or for a protective order under Code Section 37-3-148.
24. 224 Ga. App. at 533-35, 481 S.E.2d at 532-34.
25. Id. at 535, 481 S.E.2d at 534.
claim for false imprisonment is an unlawful arrest or detention.”

Citing Williams v. Smith, a 1986 court of appeals decision, the court held that “[w]hen the detention is predicated upon procedurally valid process, false imprisonment is not an available remedy, regardless of the motives upon which the process was secured . . . .” Accordingly, because the form 1013 certificate was “facially valid,” plaintiff’s hospitalization did not constitute an unlawful detention.

Plaintiff, however, argued that although the initial detention may have been lawful, the detention subsequently became unlawful when Ridgeview Institute failed to provide plaintiff with the notice required by O.C.G.A. section 37-3-44. The court of appeals, however, rejected plaintiff’s argument.

The court stated:

If we were to extend the definition of “process” in the manner advanced by Handley and the trial court, then every negligent act or violation of law accompanied by a detention—for example, the failure to read Miranda warnings after a valid arrest—could give rise to a claim for false imprisonment. This would, in effect, eliminate the element of intent from the tort of false imprisonment and create a cause of action for negligent false imprisonment, which is a tort our law does not recognize.

C. Intentional Infliction of Emotional Distress

In Sevecich v. Ingles Markets, Inc., Duane and Kathy Sevecich sued Ingles Markets, Inc. and three employees for “damages allegedly resulting from Ingles wrongfully accusing Mr. Sevecich of shoplifting.” While shopping at defendant grocery store, Mr. Sevecich was accused of shoplifting by three employees of the grocery store. According to Mr. Sevecich, he was taken to a store office “where he was accused of shoplifting, assaulted and battered by an Ingles’ [sic] employee.” Although no store merchandise was found on Mr. Sevecich, he was

26. Id. at 534, 481 S.E.2d at 533 (citations omitted).
29. Id.
30. Id.
31. Id., 481 S.E.2d at 534.
32. Id.
34. Id. at 221, 474 S.E.2d at 6.
35. Id.
36. Id. at 224, 474 S.E.2d at 8.
arrested and placed in the back of a police car. Mr. and Mrs. Sevcech subsequently brought suit against Ingles Market and its three employees for intentional infliction of emotional distress. The trial court, however, granted defendants' motion for summary judgment on plaintiffs' claims of intentional infliction of emotional distress. The court of appeals reversed the trial court's grant of summary judgment on Mr. Sevcech's claim of intentional infliction of emotional distress.

The court of appeals addressed the claims of intentional infliction of emotional distress of Mr. Sevcech and Mrs. Sevcech separately. With respect to Mr. Sevcech's claim, the court of appeals noted that the trial court granted defendants' motion for summary judgment on the basis that there was no evidence that Mr. Sevcech's emotional distress was "severe." In reversing, the court noted the following:

> Four elements must be present to support a claim of intentional infliction of emotional distress: (1) The conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe. . . . The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress. . . . It is for the court to determine whether on the evidence severe emotional distress can be found.

In evaluating the reasonableness of the distress, the court first determined whether defendants' conduct was outrageous or egregious. Based upon Mr. Sevcech's description of the incident, the court of appeals concluded that there was sufficient evidence for a jury to find that defendants' conduct was outrageous. Furthermore, the court concluded that a jury would be authorized to find that Mr. Sevcech's reaction to the incident was not exaggerated. On this basis, the court of appeals concluded that a jury issue existed with respect to Mr. Sevcech's claim of intentional infliction of emotional distress.

37. Id.
38. Id. at 221, 474 S.E.2d at 6.
39. Id.
40. Id. at 223, 474 S.E.2d at 7.
41. Id. at 223-24, 474 S.E.2d at 7-8 (citations omitted).
42. Id. at 224, 474 S.E.2d at 8.
43. Id.
44. Id.
45. Id.
The court of appeals, however, refused to reverse the trial court's grant of summary judgment to defendants on Mrs. Sevcech's claim of intentional infliction of emotional distress.\(^{46}\) The court noted that "[i]mplicit in the requirement that the conduct be intentional is the requirement that it be directed towards the complainant. Where the conduct is directed towards others, not the complainant, he or she cannot establish a necessary element of the claim."\(^{47}\) Because defendants' actions were not directed at Mrs. Sevcech, the court of appeals concluded that Mrs. Sevcech's claim for intentional infliction of emotional distress must fail.\(^{48}\)

In *Southeastern Security Insurance Co. v. Hotle*,\(^{49}\) the court of appeals affirmed a jury verdict on a claim of intentional infliction of emotional distress in a sexual harassment context. The plaintiff in *Hotle* went to work for defendant as a data entry clerk. After three months on the job, codefendant James Alexander, vice president of defendant, became plaintiff's supervisor.\(^{50}\) During meetings with plaintiff, "Alexander would ask [plaintiff] questions such as: 'Did you get laid this weekend?' or 'Did you get stuck this weekend?' or 'Did you have a two-on-one this weekend?'"\(^{51}\) Alexander would also refer to plaintiff and other female employees as his "bitches."\(^{52}\) These comments as well as numerous other actions of the codefendant and other management personnel prompted plaintiff to bring suit against Southeastern Security Insurance Company and James Alexander for intentional infliction of emotional distress.\(^{53}\)

In affirming the judgment, the court of appeals noted the following:

In order to sustain a claim of intentional infliction of emotional harm in a sexual harassment case, a "plaintiff must show 1) that defendant's behavior was wilful and wanton or intentionally directed to harming plaintiff; 2) that the actions of defendant were such as would naturally humiliate, embarrass, frighten, or outrage the plaintiff; 3) that conduct caused mental suffering or wounded feelings or emotional upset or distress to plaintiff."\(^{54}\)

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\(^{46}\) *Id.*

\(^{47}\) *Id.* (citations omitted).

\(^{48}\) *Id.*


\(^{50}\) *Id.* at 162, 473 S.E.2d at 259.

\(^{51}\) *Id.*

\(^{52}\) *Id.*

\(^{53}\) *Id.*

\(^{54}\) *Id.* at 163, 473 S.E.2d at 259-60.
The court held that because some evidence had been presented by plaintiff that would satisfy all three prongs of the test, the jury verdict in favor of plaintiff must be affirmed. In a different employment-related context, however, the court of appeals held that a claim for intentional infliction of emotional distress did not exist. In Bradley v. British Fitting Group, British Fitting Group terminated Bradley's employment contract after his transfer from London to Georgia. Subsequent to the termination, the parties executed a mutual release agreement to settle Bradley's claim that he had been wrongfully terminated. Seeking compensation for the alleged unfair dismissal, Bradley filed a claim against British Fitting Group in the United Kingdom Industrial Tribunal. In response, British Fitting Group brought suit against Bradley in Georgia for breach of contract and fraud for violation of the mutual release agreement. Bradley counterclaimed for intentional infliction of emotional distress.

The trial court granted British Fitting Group's motion for summary judgment on Bradley's claim of intentional infliction of emotional distress, and Bradley appealed. Bradley argued that the actions of British Fitting Group were sufficient to give rise to a claim of intentional infliction of emotional distress. For example, Bradley argued that British Fitting Group intentionally withheld money due Bradley under his employment contract and that his formal written notice of termination, which requested that Bradley collect his personal effects from the office and return company property, "was such as would naturally humiliate and embarrass to an egregious extent someone in [his] position."

The court of appeals, however, rejected Bradley's argument. The court noted that "'[t]he law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it.'" In this regard, the court pointed out that subsequent to Bradley's termination, the parties had engaged in settlement negotiations on the terms of Bradley's severance package, including the amount of compensation due. The court held that even if British Fitting Group's

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55. Id., 473 S.E.2d at 260.
57. Id. at 621, 472 S.E.2d at 149.
58. Id., 472 S.E.2d at 148.
59. Id. at 625, 472 S.E.2d at 151.
60. Id. at 626, 472 S.E.2d at 152.
61. Id. at 625, 472 S.E.2d at 151 (quoting Carroll v. Rock, 220 Ga. App. 260, 262, 469 S.E.2d 391, 394 (1996)).
62. Id. at 626, 472 S.E.2d at 151-52.
“failure to settle at an earlier date was in bad faith, such conduct by itself would be insufficient to support his claim.”  

II. NEGLIGENCE

A. Premises Liability—Slip and Fall

The test for evaluating foreign substance slip and fall cases set forth by the Georgia Supreme Court in 1980 in Alterman Foods, Inc. v. Ligon is simple:

[(In order to state a cause of action in a case where the plaintiff alleges that due to an act of negligence by the defendant he slipped and fell on a foreign substance on the defendant's floor, the plaintiff must show (1) that the defendant had actual or constructive knowledge of the foreign substance and (2) that the plaintiff was without knowledge of the substance or for some reason attributable to the defendant was prevented from discovering the foreign substance.]

How this two-prong test is to be applied, however, has literally divided the Georgia Court of Appeals in the years since the Alterman Foods decision. Two different approaches to applying the test have arisen in the court of appeals. As anyone generally familiar with the area of slip and fall law in Georgia is aware, these approaches to the application of the Alterman Foods test are identified with two judges on the court of appeals: Presiding Judge William McMurray and Judge Gary Andrews. Judge Andrews has adopted a very formalistic approach to the application of the Alterman Foods test, resulting more often than not in the grant of summary judgment to defendants. On the other hand, Judge McMurray views the Alterman Foods test as a flexible tool to guide the trial court and the fact finder's evaluation of the evidence but not as a basis for withdrawing the issues of negligence and knowledge from the fact finder's consideration. Therefore, Judge McMurray's approach to the Alterman Foods test generally results in a determination that a question of fact exists for the jury, thus precluding summary judgment.

Over the course of the last year, there have been a number of slip and fall decisions rendered by the Georgia Court of Appeals in which Judge Andrews either wrote the majority opinion or joined in the majority opinion, and in which the court either affirmed the grant of summary judgment to a defendant or reversed the trial court's denial of such a

63. Id., 472 S.E.2d at 152.
64. 246 Ga. 620, 272 S.E.2d 327 (1980).
65. Id. at 623, 272 S.E.2d at 330.
motion. These decisions include Blake v. Kroger Co., Hornbuckle Wholesale Florist of Macon, Inc. v. Castellaw, Rodriquez v. City of Augusta, and Columbus Doctors Hospital, Inc. v. Thompson. In Blake and Rodriquez, the court of appeals affirmed the grant of summary judgment to defendant proprietors on the basis that defendants did not have actual or constructive knowledge of the alleged foreign substance. In Thompson and Castellaw, the court of appeals reversed the trial courts' denial of defendants' motions for summary judgment because plaintiffs had failed to establish that defendants had actual or constructive knowledge of the dangerous condition.

In Furlong v. Crystal Chandelier, Inc., Arwood v. Tzen, Ingram v. Toccoa Triple Cinema, Inc., Davis v. Piedmont Hospital, Inc., and Service Merchandise, Inc. v. Jackson, the court of appeals held that a question of fact existed with respect to the knowledge of either the proprietor or the plaintiff, thereby precluding judgment as a matter of law in favor of the defendant. In each of the decisions, Judge McMurray either wrote the majority opinion or joined in the court's decision.

The differences separating the two wings of the court cannot be overstated. The disagreement is not simply over the technical application of the Alterman Foods test; rather, the dispute centers in large part around the role of the jury in resolving disputed issues of fact. This division on the court of appeals has at times taken on a personal note. For example, the following is a quote from Judge Blackburn's amended dissent in Blake in which he addresses the current state of slip and fall law as characterized by Judge Andrews's majority approach:

I would implore the Supreme Court of Georgia or the Georgia legislature to restore to victims the right to have their cases tried by

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71. 224 Ga. App. at 684, 482 S.E.2d at 707; 223 Ga. App. at 200, 477 S.E.2d at 351.
their peers and to release the stranglehold this Court has imposed upon victims' rights through judicial activism and an improper usurpation of the authority of Georgia juries.\textsuperscript{78}

It appears that other members of the court of appeals, although sharing in Judge Blackburn and Judge McMurray's view of the court's slip and fall jurisprudence, nonetheless feel constrained to adhere to the formalistic approach mandated in \textit{Alterman Foods} and championed by Judge Andrews. For example, in \textit{Coffey v. Wal-Mart Stores, Inc.},\textsuperscript{79} a three-judge panel, in affirming the grant of summary judgment to defendant, wrote:

\begin{quote}
Our Supreme Court has not yet rejected or revised the \textit{Alterman Foods} standards, and consequently they remain binding on this Court even though we may now believe we have a better concept for allocating the burdens on the parties. Nevertheless, because of recent divergences within this Court in slip and fall cases, perhaps it is time for the Supreme Court to revisit this issue.\textsuperscript{80}
\end{quote}

Apparently, the Georgia Supreme Court now stands ready to meet the challenge. In \textit{Robinson v. Kroger Co.},\textsuperscript{81} the supreme court granted certiorari to review the court of appeals' affirmaance of the trial court's grant of summary judgment in favor of the defendant in a slip and fall case. \textit{Robinson}, argued before the court on April 24, 1997, appears to be the first effort by the supreme court to address the inconsistencies that have developed over the last seventeen years in the application of the \textit{Alterman Foods} test and, perhaps, to revisit the test altogether. As of the date of publication, the court has yet to issue its opinion in \textit{Robinson}.

\section{Imputed and Relational Liability}

\subsection{Corporations}

In \textit{Kissun v. Humana, Inc.},\textsuperscript{82} the Georgia Supreme Court addressed "whether a parent corporation can be held liable for the acts or omissions of a wholly-owned subsidiary corporation under theories of apparent or ostensible agency or joint venturer where the evidence is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{78} 224 Ga. App. at 157, 480 S.E.2d at 211 (Blackburn, J., dissenting).
\item \textsuperscript{79} 224 Ga. App. 824, 482 S.E.2d 720 (1997).
\item \textsuperscript{80} \textit{Id.} at 829, 482 S.E.2d at 724 (citations omitted).
\item \textsuperscript{82} 267 Ga. 419, 479 S.E.2d 751 (1997).
\end{itemize}
\end{footnotesize}
insufficient to pierce the corporate veil. In *Kissun* plaintiffs brought suit for wrongful death and medical malpractice against a hospital and the hospital's parent corporation. The trial court denied the parent corporation's motion for summary judgment, and the parent corporation appealed. The court of appeals reversed and held that because there was insufficient evidence to pierce the corporate veil between the parent corporation and its subsidiary, "there could be no claim against [the parent corporation] under either an apparent agency or a joint venturer theory."

The supreme court granted certiorari and reversed the decision of the court of appeals. The court noted that three separate theories of liability were at issue: alter ego liability, apparent or ostensible agency, and joint venture. The court held that although the three theories "are closely intertwined with one another," the proof necessary to establish liability under each theory is not necessarily interchangeable. The court stated:

[While there may be instances where evidence to pierce the corporate veil also serves to establish an agency relationship between the corporate parties, it cannot be held as a matter of law that evidence insufficient to pierce the corporate veil automatically serves to negate the existence of an agency relationship between the corporations.]

IV. NEGLIGENCE DEFENSES

In *Griffiths v. Schafer*, the court of appeals expanded the defense of assumption of the risk with respect to civil actions filed by veterinary employees as a result of dog bites. Plaintiff in *Griffiths*, a veterinary technician, sued defendant, the owner of an Akita dog, after the dog attacked plaintiff while she was attempting to place a collar on the dog. Defendant appealed the trial court's denial of his motion for summary judgment. The court of appeals reversed and held that plaintiff had assumed the risk of a dog bite.

83. *Id.* at 419, 479 S.E.2d at 752.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 420, 479 S.E.2d at 752.
88. *Id.*, 479 S.E.2d at 753.
90. *Id.* at 560, 478 S.E.2d at 626.
91. *Id.* at 562-63, 478 S.E.2d at 627.
In reaching its decision, the court of appeals relied upon its prior decision in *Lundy v. Stuhr*\(^92\) that a kennel attendant assumed the risk of a dog bite when the attendant had knowledge of the dog's violent propensity and ignored the dog's aggressive behavior while retrieving a water bowl from the dog's cage.\(^93\) However, notwithstanding the apparent contributory negligence of the kennel attendant in *Lundy*, the court of appeals in *Griffiths* stated that the court "affirmed the summary judgment to the dog owner in *Lundy*, on the basis of the general doctrine of assumption of risk by workers in certain professions."\(^94\) According to the court of appeals, "[I]t is not necessary to the assumption of the risk that [plaintiff] acted negligently, as Lundy perhaps did in his sudden movement in the *Lundy* case. Assumption of the risk is a matter of knowledge of the danger and intelligent acquiescence in it."\(^95\)

The court cautioned, however, that its holding did not "establish that there is an immutable, absolute assumption of risk by veterinary employees in handling animals."\(^96\) According to the court, there may be circumstances when the veterinary employee is misled by the dog owner about tendencies of a certain dog or when the violent tendencies of a dog far exceed what would reasonably be expected.\(^97\) Under those circumstances, the veterinary employee would not be deemed to have assumed the risk of injury.\(^98\)

**V. OTHER TORT CAUSES OF ACTION**

**A. Products Liability**

During the past year, a number of very significant decisions were rendered in the area of products liability law. In large part, these decisions have been the result of the 1994 Georgia Supreme Court decision in *Banks v. ICI Americas, Inc.*\(^99\)

For example, in *Doyle v. Volkswagenwerk Aktiengesellschaft*,\(^100\) the Georgia Supreme Court addressed the following certified question from the United States Court of Appeals for the Eleventh Circuit: "When an automobile manufacturer sells an automobile to a Georgia citizen and

\(^93\) Id. at 75, 363 S.E.2d at 346.
\(^94\) 223 Ga. App. at 561, 478 S.E.2d at 626.
\(^95\) Id. at 562, 478 S.E.2d at 627.
\(^96\) Id. at 562-63, 478 S.E.2d at 627.
\(^97\) Id. at 563, 478 S.E.2d at 627.
\(^98\) Id.
\(^100\) 267 Ga. 574, 481 S.E.2d 518 (1997).
the automobile is in compliance with the National Automobile Safety Act, does Georgia law preclude a personal injury product liability claim?" The supreme court said, "The answer to this question is no."102

The court held that "Georgia common law permits a Georgia citizen to sue an automobile manufacturer despite the manufacturer's compliance with the standards established by the National Automobile Safety Act."103 Relying upon the risk-utility test set forth in Banks,104 the court held that "compliance with federal standards or regulations is a factor for the jury to consider in deciding the question of reasonableness, that is, whether the product design selected was a reasonable one from among the feasible choices of which the manufacturer was aware or should have been aware."105 The court expressly overruled the 1988 decision of the Georgia Court of Appeals in Honda Motor Co. v. Kimbrel106 to the extent that it conflicted with the standards set forth in Banks for product liability design defect cases.107

In S K Hand Tool Corp. v. Lowman,108 the Georgia Court of Appeals considered whether, in light of the Banks decision, a professional malpractice affidavit under O.C.G.A. section 9-11-9.1109 is required for a claim of strict liability under O.C.G.A. section 51-1-11.110 In Lowman plaintiff was injured while attempting to reattach a sharpened lawn mower blade to a mower using a ratchet designed and manufactured by

101. Id. at 574, 481 S.E.2d at 519.
102. Id.
103. Id.
104. In Banks the court adopted the risk-utility test for evaluating products liability claims:

To arrive at the appropriate test for reaching the legal conclusion that a product's design specifications were partly or totally defective, this Court has conducted an exhaustive review of foreign jurisdictions and learned treatises. That review has revealed a general consensus regarding the utilization in design defect cases of a balancing test whereby the risks inherent in a product design are weighed against the utility or benefit derived from the product. This risk-utility analysis incorporates the concept of "reasonableness," i.e., whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk.

264 Ga. at 734, 450 S.E.2d at 673 (citations omitted).
105. 267 Ga. at 577, 481 S.E.2d at 521.
110. Id. § 51-1-11; 223 Ga. App. at 712, 479 S.E.2d at 104.
S K Hand Tool Corporation. Plaintiff brought suit against S K Hand Tool Corporation on the basis that the ratchet was defective and not reasonably suited for the purpose for which it was manufactured. Defendant filed a motion to dismiss based on the failure of plaintiff to file an expert affidavit in accordance with O.C.G.A. section 9-11-9.1. The trial court, however, denied the motion to dismiss. The court of appeals affirmed on interlocutory appeal.

On appeal defendant argued that the supreme court's adoption of the risk-utility test in Banks incorporated basic negligence principles into the trier of fact's assessment of defectiveness. In Banks the supreme court "recognize[d] that the determination of whether a product was defective (involving the reasonableness of the manufacturer's design decisions), which is a basic inquiry for strict liability purposes, generally will overlap the determination of whether the manufacturer's conduct was reasonable, which is a basic inquiry for negligence purposes." Based in part on this portion of the Banks decision, defendant argued that because the reasonableness of the manufacturer's conduct could be at issue in the application of the risk-utility test, O.C.G.A. section 9-11-9.1 required the filing of an expert affidavit.

The court of appeals, however, while recognizing that "Banks does seem to blur the distinction Georgia cases have historically made between negligence and strict liability claims," nonetheless held that a distinction still exists between strict liability and negligence theories. The court of appeals stated:

Simply put, a claim for professional malpractice depends upon negligence principles—standards of reasonableness as related to professional services. A claim for strict product liability—whether the problem is manufacture or design—however, depends upon whether a product was defective. While negligence principles may now be utilized in the determination of whether a product was defectively designed, a viable distinction nonetheless remains between claims alleging strict liability and those alleging provision of negligent professional services.

111. 223 Ga. App. at 712, 479 S.E.2d at 104-05.
112. Id.
113. Id. at 714-15, 479 S.E.2d at 106-07.
114. Id. at 715, 479 S.E.2d at 106 (quoting Banks, 264 Ga. at 735 n.3, 450 S.E.2d at 671 n.3).
115. Id. at 714, 479 S.E.2d at 106.
116. Id. at 715, 479 S.E.2d at 106.
117. Id.
118. Id. at 716, 479 S.E.2d at 107.
The court of appeals also struggled with the *Banks* decision in *Sharpnack v. Hoffinger Industries, Inc.*\(^\text{119}\) In *Sharpnack* the court of appeals addressed whether the court in *Banks* abolished the defense of assumption of risk for product liability claims. The plaintiff in *Sharpnack* was rendered a quadriplegic when he dove into an above-ground swimming pool.\(^\text{120}\) During the course of discovery, it was revealed that plaintiff "had used the pool on several occasions the previous summer and was familiar with the pool's uniform three and a half to four foot depth."\(^\text{121}\) Plaintiff also testified that he was "familiar with hazards associated with diving into such shallow water."\(^\text{122}\) The trial court granted the defendant manufacturer's motion for summary judgment on the basis that plaintiff had assumed the risk of serious injury by diving into the pool.\(^\text{123}\) The court of appeals affirmed the trial court's decision.\(^\text{124}\)

According to the majority, the *Banks* risk-utility analysis did not preclude the grant of summary judgment in a situation "in which it is palpably clear that the plaintiff assumed the risk of his injuries and as clear that his own action was the sole proximate cause of his injuries."\(^\text{125}\) In reaching its decision, the court of appeals noted that no appellate court in Georgia had addressed whether the risk-utility analysis precluded summary judgment in products liability cases.\(^\text{126}\) However, the court did note that two federal district courts in Georgia had addressed the issue.\(^\text{127}\) Although the two federal district courts reached different conclusions, both courts concluded that the risk-utility analysis set forth in *Banks* did not preclude summary judgment in products liability cases.\(^\text{128}\)

In at least one of the federal district court decisions cited by the court of appeals, the district court held that based upon the *Banks* decision, the open and obvious danger rule no longer applied in products liability cases.\(^\text{129}\) However, that same court, based upon a review of the law in the jurisdictions cited by the supreme court in *Banks*, concluded that

\(\text{\footnotesize{\text{119. 223 Ga. App. 833, 479 S.E.2d 435 (1996).}}}\)
\(\text{\footnotesize{\text{120. Id. at 833, 479 S.E.2d at 435.}}}\)
\(\text{\footnotesize{\text{121. Id.}}}\)
\(\text{\footnotesize{\text{122. Id., 479 S.E.2d at 435-36.}}}\)
\(\text{\footnotesize{\text{123. Id. at 834, 479 S.E.2d at 436.}}}\)
\(\text{\footnotesize{\text{124. Id. at 836, 479 S.E.2d at 437.}}}\)
\(\text{\footnotesize{\text{125. Id. at 835, 479 S.E.2d at 436.}}}\)
\(\text{\footnotesize{\text{126. Id.}}}\)
\(\text{\footnotesize{\text{128. See Raymond, 925 F. Supp. at 1578; Morris, 904 F. Supp. at 1383;}}}\)
\(\text{\footnotesize{\text{129. Raymond, 925 F. Supp. at 1578.}}}\)
assumption of the risk remained a viable defense under the risk-utility analysis.\textsuperscript{130}

Judge McMurray, however, concluded in his dissent that although plaintiff's knowledge of dangers associated with a particular product may be considered by the jury in applying the risk-utility analysis, that factor alone no longer warranted summary judgment.\textsuperscript{131} Judge McMurray stated:

\begin{quote}
[T]he Supreme Court expressly states in Banks that a user's knowledge of a product and ability to avoid dangers associated with use of the product are merely factors the trier of fact may consider—under a risk-utility analysis—in determining whether the manufacturer breached its duty under O.C.G.A. [section] 51-1-11(b) and thus whether any such defect was a proximate cause of resulting injuries.\textsuperscript{132}
\end{quote}

In \textit{NEC Technologies, Inc. v. Nelson},\textsuperscript{133} the Georgia Supreme Court adopted a new test for defining "unconscionability" in the context of a claim for breach of warranty. Plaintiffs brought suit against Curtis Mathes Corporation to recover for property damage they sustained in a fire allegedly caused by a defect in a television set they had purchased.\textsuperscript{134} The television set came with an express warranty that "Exclude[d] All Incidental and Consequential Damages."\textsuperscript{135} The trial court granted defendant's motion for summary judgment based on the express warranty and held that the exclusion was not unconscionable as a matter of law. The court of appeals reversed the decision of the trial court.\textsuperscript{136} The supreme court, however, granted certiorari and then reversed the decision of the court of appeals.\textsuperscript{137}

The supreme court noted that "Georgia law expressly allows manufacturers of products to limit or exclude consequential damages."\textsuperscript{138} The manufacturer, however, may not limit or exclude damages when the result would be unconscionable.\textsuperscript{139} Although the court recognized that a limitation on consequential property damages in the case of consumer goods is not prima facie unconscionable,\textsuperscript{140} it nonetheless addressed

\begin{flushleft}
130. Id. at 1579.
132. Id.
134. Id. at 390, 478 S.E.2d at 770.
135. Id.
136. Id.
137. Id., 478 S.E.2d at 771.
138. Id.
139. Id.
140. Id. at 391, 478 S.E.2d at 771.
\end{flushleft}
whether, under the particular facts and circumstances of the case at hand, the express warranty was unconscionable.\textsuperscript{141}

The Uniform Commercial Code ("U.C.C.") and the Georgia U.C.C. do not define unconscionability. Accordingly, the court first set forth the basic test for evaluating unconscionability under Georgia law: "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."\textsuperscript{142} Although this general definition provided the court with some guidance on the meaning of unconscionability, the process by which this evaluation is conducted had yet to be developed under Georgia law.\textsuperscript{143} Accordingly, the court found it appropriate to review certain foreign authorities in evaluating how the issue of unconscionability should be resolved.\textsuperscript{144}

The court noted that other jurisdictions have generally divided the relevant factors into procedural and substantive elements:\textsuperscript{145}

Procedural unconscionability addresses the process of making the contract, while substantive unconscionability looks to the contractual terms themselves. A non-inclusive list of some factors courts have considered in determining whether a contract is procedurally unconscionable includes the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice. As to the substantive elements of unconscionability, the courts have focused on matters such as the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risk between the parties, and similar public policy concerns.\textsuperscript{146}

The supreme court adopted this review of the procedural and substantive elements of unconscionability as the appropriate analysis under Georgia law for evaluating unconscionability.\textsuperscript{147} In applying the procedural-substantive analysis to the case before the court, the court concluded that the express warranty at issue was neither procedurally nor substantively unconscionable.\textsuperscript{148} In arriving at this conclusion, the

\textsuperscript{141} Id.
\textsuperscript{142} Id. (quoting U.C.C. § 2-302 cmt. 1 (1977)).
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 392, 478 S.E.2d at 771.
\textsuperscript{146} Id., 478 S.E.2d at 771-72 (citations omitted).
\textsuperscript{147} Id., 478 S.E.2d at 772.
\textsuperscript{148} Id. at 393-94, 478 S.E.2d at 772-73.
court reviewed the specific circumstances of the transaction, the terms of the express warranty, the knowledge of the consumer plaintiff, and the conspicuousness of the warranty.\textsuperscript{149}

The court also appears to suggest in Nelson that the resolution of the procedural unconscionability issue may be determinative of the unconscionability issue as a whole.\textsuperscript{150} On the facts before the court, however, because the express warranty lacked both procedural and substantive unconscionability, the court did not find it necessary to resolve this particular issue.\textsuperscript{151} Between procedural and substantive unconscionability, however, it appears the resolution of the procedural unconscionability issue may be determinative if different conclusions are reached with respect to the two prongs of the test.

B. Defamation

Publication is an essential element of a claim for libel. In Carter v. Hubbard,\textsuperscript{152} the Georgia Court of Appeals affirmed the trial court’s grant of summary judgment to defendant on the basis that there was no publication of the allegedly libelous material.\textsuperscript{153} In Carter after plaintiff, a salesman, resigned his employment with defendant, a lock and safe company, a corporate officer of defendant received information that plaintiff was attempting to solicit a job with a competitor by providing confidential business information that he obtained during the course of his employment with defendant. In response to this information, defendant sent plaintiff a letter in which defendant addressed the unauthorized use of corporate information. The letter indicated that carbon copies were sent to two individuals who were not employed by defendant.\textsuperscript{154}

Plaintiff subsequently brought suit against defendant for libel. According to plaintiff, by forwarding a copy of the allegedly libelous letter to the two individuals who were not employed by defendant, defendant published the material, thus satisfying a necessary element of plaintiff’s prima facie case.\textsuperscript{155} However, in moving for summary judgment, defendant submitted the affidavits of the two individuals to whom the letter was allegedly copied. According to the affidavits, the two individuals never received a copy of the correspondence and had not

\begin{itemize}
\item\textsuperscript{149} Id.
\item\textsuperscript{150} Id. at 394, 478 S.E.2d at 773.
\item\textsuperscript{151} Id.
\item\textsuperscript{152} 224 Ga. App. 375, 480 S.E.2d 382 (1997).
\item\textsuperscript{153} Id. at 377, 480 S.E.2d at 384.
\item\textsuperscript{154} Id. at 376, 480 S.E.2d at 384.
\item\textsuperscript{155} Id., 480 S.E.2d at 383-84.
\end{itemize}
read the allegedly libelous letter. An employee of defendant testified that although he indicated on the letter that it was copied to the two individuals, the letter was in fact sent only to employees of defendant.\footnote{\textit{Id.}, 480 S.E.2d at 384.}

The trial court granted defendant's motion for summary judgment on the basis that there was no evidence that the letter was published to individuals outside defendant's corporate structure.\footnote{\textit{Id.}} The court of appeals affirmed.\footnote{\textit{Id.}} The court of appeals stated:

In this case, even if we assumed the evidence authorized a finding that any of the defendants sent the letter to Williams or Blake, the affidavits and deposition testimony presented by the defendants in support of their motion clearly show that neither of those two individuals received or read the letter. The defendants accordingly have met their burden of showing by the record that the letter was not published to a third party.\footnote{\textit{Id.}}

In \textit{Strange v. Henderson},\footnote{223 Ga. App. 218, 477 S.E.2d 330 (1996).} the court of appeals dealt with the issue of defamation via a radio or television broadcast—often referred to as "defamacast." In \textit{Strange} plaintiff brought suit against defendant for comments that were made by defendant during the course of a radio talk show. Defendant had called into a radio talk show to discuss a fire that had occurred at a building owned by plaintiff. During the course of the broadcast, defendant alleged that plaintiff was the owner of the building, that plaintiff was attempting to secure government funds to rebuild the building, and that plaintiff was delinquent in his property taxes on the property. During the course of discovery, defendant admitted that he had conducted no research to confirm the statements he made during the broadcast; the statements ultimately proved to be false. The jury returned a verdict of twenty-five thousand dollars in favor of plaintiff.\footnote{\textit{Id.}} Defendant appealed, and the court of appeals affirmed the judgment.\footnote{\textit{Id.}}

On appeal defendant argued that the trial court erred in permitting plaintiff to introduce into evidence portions of his appearance on the talk radio show in which he discussed topics that did not involve plaintiff or plaintiff's business. These topics included comments by defendant regarding abortion and religion. Defendant contended that the
statements were immaterial, irrelevant, and prejudicial. The court of appeals, however, held that the jury was entitled to hear all of defendant’s comments on the talk radio show in their proper context. The court of appeals stated:

The court of appeals stated:

The statements regarding abortion and religion, which the appellant wants to exclude, are relevant to the case because they provide a context from which the jury could have inferred that, rather than serving a legitimate public service, appellant instead was acting maliciously to incite the public with a reckless disregard for the truth. . . . To be defamatory, a statement must be both false and malicious; therefore, the jury’s determination regarding Appellant’s motivations in making the statements at issue is material to the case sub judice, and the statements were properly admitted into evidence for the jury’s consideration.

C. Wrongful Death

In the absence of a spouse or children, the right to recover for the wrongful death of a child belongs to the parents of the child. O.C.G.A. section 19-7-1(b)(3), however, provides in part: “Parental power shall be lost by . . . abandonment of the child.” In Uniroyal Goodrich Tire Co. v. Adams, the court of appeals addressed the application of O.C.G.A. section 19-7-1(b)(3) in the context of a claim for wrongful death filed by the mother of the deceased child. In Adams plaintiff brought suit against defendant for the wrongful death of her child after her daughter was killed in a car accident. Defendant moved for the trial court to dismiss the action on the basis that plaintiff had abandoned her child and, therefore, was not a proper party plaintiff. The trial court denied the motion to dismiss, and the court of appeals affirmed.

The court of appeals held that to establish abandonment, there must be clear and convincing evidence of (1) actual desertion of the child and (2) an intent to sever the parental relationship. After plaintiff was divorced from the deceased child’s father, plaintiff had custody of the child. However, plaintiff subsequently gave custody of the child to the

163. Id. at 220, 477 S.E.2d at 332.
164. Id. at 221, 477 S.E.2d at 333.
165. Id. (citations omitted).
167. Id.
169. Id. at 705, 472 S.E.2d at 519.
170. Id. at 706, 472 S.E.2d at 519.
child's father, with whom the child remained for the rest of her life. During the remainder of the child's life, plaintiff allegedly did not provide any financial support for the child. The court of appeals, however, held that the evidence was insufficient to establish abandonment of the child. According to the court, "[t]he mere delivery of custody of a child to another . . . is not sufficient to constitute abandonment." Further, the court recognized that "mere failure of a parent to provide support for a minor child who is in the possession or custody of another person" does not constitute abandonment within the meaning of O.C.G.A. section 19-7-1(b)(3). Therefore, the court held that plaintiff was a proper party to bring the wrongful death action for the death of her child.

D. Torts Arising from Business Relations—Trade Secrets

In Stargate Software International, Inc. v. Rumph, the court of appeals affirmed the trial court's grant of summary judgment to defendants on plaintiff's claim under the Georgia Trade Secrets Act. Plaintiff contracted with a paper producer to develop software to control industrial operations. After experiencing difficulties in performing its contractual obligations, the paper producer instructed plaintiff to seek the assistance of defendant in completing the project. During the course of negotiations with defendant, plaintiff's chief executive officer suggested to plaintiff's employees "that they become [defendant's] employees and continue working on the . . . project at [plaintiff's] offices." The relationship between plaintiff and defendant deteriorated after plaintiff accused defendant of stealing certain records and computers from plaintiff's offices. Plaintiff subsequently brought suit against defendant for misappropriation of trade secrets.

On appeal from the trial court's grant of summary judgment to defendants, plaintiff asserted that "the software and documents it had prepared for the . . . projects were trade secrets and that [defendants] misappropriated them through the work of former [employees of

171. Id.
172. Id., 472 S.E.2d at 520.
173. Id., 472 S.E.2d at 519.
174. Id., 474 S.E.2d at 520 (citations omitted).
175. Id. at 707, 472 S.E.2d at 520.
178. 224 Ga. App. at 874, 482 S.E.2d at 501.
179. Id. at 875, 482 S.E.2d at 501.
180. Id.
plaintiff] and by taking computer software and program documentation.” The court of appeals, however, held that plaintiff had not taken reasonable efforts to protect the confidentiality of its trade secrets.

The evidence established that plaintiff had its employees execute agreements containing confidentiality provisions and had established password protection on its computer network. Although the court of appeals recognized that the agreements may under appropriate circumstances constitute reasonable efforts to protect confidentiality, the agreements and other measures were not sufficient under the particular facts of the case. In reaching its decision, the court wrote:

[Plaintiff] did not simply suggest its employees work for [defendant] and see them go to a competitor, it told them to work for [defendant] on the continuing . . . projects. Transferring the employees with such a charge necessarily gave [defendant] access to trade secrets. When telling its former employees to work for [defendant], [plaintiff] gave no instructions as to confidentiality of documentation on the projects. As a matter of law, given the circumstances, [plaintiff’s] efforts were not reasonable to maintain secrecy of any trade secrets concerning the . . . projects.

VI. DAMAGES

In Russaw v. Martin, the court of appeals was confronted with “an issue of first impression in Georgia as to the scope of permissible damages for mental distress based on a non-sterile needle strike injury.” The plaintiff in Russaw was awaiting treatment for her daughter at defendant’s emergency room. An emergency room nurse, who was attempting to remove keys from her pocket, accidentally dropped a used syringe onto plaintiff’s thigh, striking and puncturing plaintiff’s thigh. The syringe had apparently been used by the nurse to administer medication to an elderly patient. Both plaintiff and the elderly patient subsequently tested negative for hepatitis and HIV. Plaintiff subsequently brought suit against the emergency room nurse and defendant hospital for negligence, battery, reckless conduct, and loss of consortium. The hospital filed a motion for summary judgment on

181. Id. at 876, 482 S.E.2d at 502.
182. Id. at 877, 482 S.E.2d at 502.
183. Id. at 876, 482 S.E.2d at 502.
184. Id.
185. Id. at 877, 482 S.E.2d at 502.
187. Id. at 685, 472 S.E.2d at 511.
plaintiff's claim for mental distress damages arising out of the incident. Although the trial court granted the hospital's motion for summary judgment on plaintiff's mental anguish claim that was based on fear of contracting hepatitis or AIDS in the future, the trial court held that plaintiff had a potentially compensable claim for mental anguish from the time of the physical injury until the negative results of the first HIV test.\footnote{188} The court of appeals affirmed in part and reversed in part.\footnote{189}

According to the court of appeals, "Georgia appellate courts have not yet confronted the issues of 1) whether a Plaintiff can recover damages premised on a fear of developing AIDS; or 2) whether such fear is unreasonable as a matter of law in the absence of proof of actual exposure to HIV."\footnote{190} Because the issues presented by the case were of first impression in Georgia, the court first reviewed how other jurisdictions have dealt with these same issues.\footnote{191}

Two lines of authority have developed in other jurisdictions with respect to whether a plaintiff can recover mental distress damages premised on a fear of developing AIDS. The majority of jurisdictions require actual exposure to disease as a prerequisite to recovery of damages.\footnote{192} This approach is based in part on the fact that "the statistical probability of contracting HIV from a single, needle stick exposure . . . is only approximately 0.3 to 0.5 percent."\footnote{193} The court noted, however, that "[a] few jurisdictions permit recovery under a 'window of anxiety' theory whereby a person possibly exposed to HIV can recover for anxiety and emotional distress up to the point of receiving definitive negative test results."\footnote{194} According to the court of appeals, the trial court apparently adopted the "window of anxiety" theory in ruling upon defendant's motion for summary judgment.\footnote{195} The court of appeals, however, rejected the window of anxiety theory in favor of the majority rule.\footnote{196} The court of appeals stated:

It is axiomatic that for recovery, there must be some reasonable connection between the act or omission of a defendant and the damages which a plaintiff has suffered. Without factual evidence of a causal connection between the alleged breach of duty and the purported damages, the damages must be considered whimsical, fanciful and

\begin{itemize}
  \item \footnote{188} Id. at 683-84, 472 S.E.2d at 509-10.
  \item \footnote{189} Id. at 687, 472 S.E.2d at 512.
  \item \footnote{190} Id. at 685, 472 S.E.2d at 511.
  \item \footnote{191} Id.
  \item \footnote{192} Id.
  \item \footnote{193} Id.
  \item \footnote{194} Id.
  \item \footnote{195} Id. at 686, 472 S.E.2d at 511.
  \item \footnote{196} Id.
\end{itemize}
above all too speculative to form the basis of recovery under O.C.G.A. [section] 51-12-8 . . . . To allow recovery for emotional injuries and mental anguish, without any proof whatsoever that [plaintiff] was actually exposed to HIV or hepatitis is per se unreasonable. 197

In Smith v. Crump, 198 the court of appeals rejected defendant's argument that the trial court erred in denying defendant's motion for remittitur on the ground that the jury verdict was excessive. 199 Plaintiff in Smith was seriously injured when she was in an automobile accident with defendant. Plaintiff brought suit against defendant and obtained a jury verdict in the amount of $1,050,597. Defendant filed a motion for remittitur or, in the alternative, a motion for new trial based in part on his contention that the jury verdict was excessive. Defendant appealed the trial court's denial of his motion. 200

On appeal defendant argued that a jury award of damages for pain and suffering should be based upon a multiple of that plaintiff's special damages. 201 The court, however, rejected defendant's argument and held the following:

Under Georgia law, pain and suffering in the past, present, and future are measured by the enlightened conscience of a fair and impartial jury. There exists no rule or yardstick against which damages for pain and suffering are to be measured, as suggested by the appellant, who would have such damages as some multiple of special damages for medical expenses and lost wages. The reason is simple; if such an objective yardstick is applied, then the young, the old, the sick, the disabled, the rich, the poor, the unemployed, and the underemployed would be treated differently than the fully employed when having such special damage cap would apply. 202

In 1987 the Georgia General Assembly adopted O.C.G.A. section 51-12-5.1 203 in which it established a bifurcated procedure to govern the award of punitive damages in civil actions. 204 Pursuant to section 51-12-5.1, in the first phase of the bifurcated proceeding, the jury must determine, based upon the evidence submitted at trial, whether an award of punitive damages is warranted. 205 If the jury finds that an

197. Id., 472 S.E.2d at 511-12 (citations omitted).
199. Id. at 58, 476 S.E.2d at 822.
200. Id. at 52-53, 476 S.E.2d at 818.
201. Id. at 57, 476 S.E.2d at 821.
202. Id.
204. See id.
205. Id. § 51-12-5.1(d)(1).
award of punitive damages is warranted, then the case proceeds to the second phase of the bifurcated proceeding in which the jury determines the amount of punitive damages to be awarded.\textsuperscript{206}

In \textit{Boyett v. Webster},\textsuperscript{207} the court of appeals addressed the admissibility of evidence of prior DUls of the defendant in the first phase of the bifurcated proceeding. In \textit{Boyett} plaintiff brought suit against defendant as a result of an automobile accident in which plaintiff was injured and in which defendant was charged with driving under the influence. At trial plaintiff attempted to introduce evidence that defendant had previously been convicted of driving under the influence as support for her claim for punitive damages. The trial court, however, excluded the evidence from the first phase of the bifurcated proceeding. The jury subsequently returned a verdict for plaintiff for compensatory damages but declined to assess punitive damages against defendant.\textsuperscript{206}

The court of appeals reversed the decision of the trial court and ordered a new trial on the issue of punitive damages.\textsuperscript{208} The court first noted that O.C.G.A. section 51-12-5.1 requires that the liability for punitive damages be determined separately from the amount of punitive damages to be awarded.\textsuperscript{210} The court noted, however, that "for punitive damages to be authorized, there must be evidence of wilful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences."\textsuperscript{211} The court recognized that as a general rule, evidence of prior acts or omissions of a defendant is not admissible on the issue of liability for punitive damages.\textsuperscript{212} The court, however, stated:

An exception to the general rule regarding excluding evidence of similar acts or omissions allows admission of this evidence when the defendant's driving under the influence in the incident at issue is an aggravating circumstance which would authorize the trier of fact to impose punitive damages. In that circumstance, the extent of the defendant's wilful misconduct, wantonness and entire want of care in driving under the influence cannot be gauged solely by focusing on the single incident in issue and disregarding other incidents of similar conduct. Consequently, evidence that the defendant previously drove

\textsuperscript{206} \textit{Id.} § 51-12-5.1(d)(2).
\textsuperscript{208} \textit{Id.} at 843, 482 S.E.2d at 379.
\textsuperscript{209} \textit{Id.} at 847, 482 S.E.2d at 381-82.
\textsuperscript{210} \textit{Id.} at 844, 482 S.E.2d at 379.
\textsuperscript{211} \textit{Id.}, 482 S.E.2d at 380 (citing Colonial Pipeline Co. v. Brown, 258 Ga. 115, 118, 365 S.E.2d 827, 830 (1988)).
\textsuperscript{212} \textit{Id.} at 845, 482 S.E.2d at 380.
under the influence on another occasion is admissible in the liability phase of a bifurcated trial because such evidence is relevant to the issue of whether punitive damages should be awarded.\(^\text{213}\)

Although the court recognized that a danger of prejudice exists by permitting evidence that the defendant previously drove under the influence to be admitted during the first phase of the trial, the court stated that the “evidence’s relevance on liability for punitive damages outweighs any prejudice if the jury is fully charged that this evidence goes only to liability for punitive damages and not to the issues of liability or damages in the particular incident on trial.”\(^\text{214}\)

The decision in \textit{Boyett} appears to conflict with the prior court of appeals decision in \textit{Holt v. Grinnell}.\(^\text{215}\) In \textit{Holt} the court of appeals held that evidence of prior convictions of driving under the influence “is conduct relevant to the trier of fact’s determination of ‘what amount of [punitive] damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case.’”\(^\text{216}\) Further, in \textit{Holt} the court of appeals specifically noted that by admitting the evidence only in the second phase of the bifurcated trial, “there is no danger that the jury could improperly use it to determine the defendant’s negligence in the incident at issue.”\(^\text{217}\) In reaching its decision in \textit{Boyett}, however, the court of appeals remarkably stated that the decision in \textit{Holt} “did not address directly whether evidence of prior DUIs was admissible in the first phase of a bifurcated trial.”\(^\text{218}\) The supreme court recently granted certiorari in \textit{Boyett}. However, as of the date of publication, the court has yet to issue its opinion.

\section*{VII. BOVINE JURISPRUDENCE}

In \textit{Simmons v. Bearden},\(^\text{219}\) plaintiff’s cow crossed through a broken fence and wandered onto defendant’s property. Plaintiff, who had been feuding with defendant for several years, brought suit against defendant for the return of the cow.\(^\text{220}\) After a bench trial, the trial court ordered the return of plaintiff’s cow; however, the trial court refused to award damages because plaintiff “fail[ed] to identify the cow to [defendant] and

\begin{itemize}
\item \textit{Id.} (citations omitted).
\item \textit{Id.}
\item 212 Ga. App. 520, 441 S.E.2d 874 (1994).
\item \textit{Id.} at 522, 441 S.E.2d at 875 (citations omitted).
\item Id., 441 S.E.2d at 876.
\item 224 Ga. App. at 845, 482 S.E.2d at 380.
\item \textit{Id.} at 430, 474 S.E.2d at 250.
\end{itemize}
request its return prior to trial.\textsuperscript{221} The court of appeals affirmed the trial court's judgment and held that because defendant did not acquire the cow by unlawful means, plaintiff was required to prove conversion of the cow in order to recover damages.\textsuperscript{222} Therefore, plaintiff's failure to prove that he had demanded return of the cow or that defendant had refused to return the cow was fatal to plaintiff's claim for damages.\textsuperscript{223}

VIII. CONCLUSION

It is literally impossible to survey adequately within the necessary editorial confines of this Article the large volume of tort law decisions rendered during the preceding year by the Georgia Supreme Court and the Georgia Court of Appeals. Many of the issues raised in the cases rendered this past year deserve page after page of in-depth discussion and analysis. Next year's tort survey will almost certainly address at length several issues that are currently before the Georgia Supreme Court, including, and perhaps most important, the fate of the Alterman Foods test in slip and fall cases.

\textsuperscript{221} Id. at 431, 474 S.E.2d at 250.

\textsuperscript{222} Id., 474 S.E.2d at 251.

\textsuperscript{223} Id. In the author's review of prior tort surveys, it appears that the prior authors have completely ignored the area of bovine jurisprudence, including such important decisions as Hollingsworth \textit{v.} Thomas, 148 Ga. App. 38, 250 S.E.2d 791 (1978) (holding that ordinary risks of dairy business include cows unexpectedly swishing their tails) and Cone \textit{v.} Shaffer, 146 Ga. App. 472, 246 S.E.2d 714 (1978) (holding that issue as to whether removal of dead calf from uterus of cow should have been accomplished while dead calf was whole or through dissection was jury question precluding summary judgment).