Torts

Deron R. Hicks

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr

Part of the Torts Commons

Recommended Citation
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol50/iss1/13

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.
Torts

by Deron R. Hicks*

I. PREMISES LIABILITY

A. Slip-and-Fall

The 1997 torts survey article addressed the confusing state of slip-and-fall law as it developed since the 1980 decision by the Georgia Supreme Court in *Alterman Foods, Inc. v. Ligon.* The article suggested that although many members of the court of appeals were frustrated by the formalistic approach to slip-and-fall jurisprudence that had developed subsequent to the decision in *Alterman Foods,* the court of appeals apparently felt constrained to adhere to that approach. The following quote from the court of appeals decision in *Coffey v. Wal-Mart Stores, Inc.* was cited as an example of that frustration:

Our Supreme Court has not yet rejected or revised the *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.

The premises liability section of the tort survey article ended with reference to the Georgia Supreme Court's grant of certiorari to review the court of appeals decision in *Robinson v. Kroger Co.* Not long after the publication of the 1997 tort survey article, the Georgia Supreme Court...
Court issued its decision in *Robinson v. Kroger Co.* As anticipated in last year's survey article, the decision in *Robinson* reflects an effort by the supreme court "to address the inconsistencies that have developed over the last seventeen years in the application of the *Alterman Foods* test and . . . to revisit the test altogether."

The facts in *Robinson* are fairly standard fare for a slip-and-fall case. Plaintiff, Henrietta Robinson, injured her knee in one of defendant's supermarkets when she slipped and fell on a foreign substance on the floor of the store. The trial court granted defendant's motion for summary judgment on the basis that the proximate cause of plaintiff's injury "was her failure to exercise ordinary care for her personal safety." On appeal, the court of appeals affirmed the trial court's grant of summary judgment to defendant. The Georgia Supreme Court granted certiorari "to examine 'the proper standard for determining whether the plaintiff in a "slip and fall" premises liability case has exercised ordinary care sufficient to prevail against a motion for summary judgment.'" Reversing the court of appeals, the supreme court held:

> [A]n invitee's failure to exercise ordinary care for personal safety is not established as a matter of law by the invitee's admission that she did not look at the site on which she subsequently placed her foot. Rather, the issue is whether, taking into account all the circumstances existing at the time and place of the fall, the invitee exercised the prudence an ordinarily careful person would use in a like situation.

As in any analysis of slip-and-fall law in Georgia, the supreme court began its decision in *Robinson* with a brief review of the decision in *Alterman Foods*. The court first noted that the decision in *Alterman Foods* represented an effort by the supreme court in 1980 to address the tendency of trial and appellate courts to find a jury issue in every slip-and-fall case. To this end, the court in *Alterman Foods* established a two part test:

> [I]n 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

---

7. 268 Ga. at 735, 493 S.E.2d at 405.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 736, 493 S.E.2d at 405.
13. *Id.*, 493 S.E.2d at 406.
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.

In Robinson the supreme court noted that appellate courts tended to skip over the first prong of the Alterman Foods test and to resolve most cases on the question of whether “the plaintiff had actual knowledge of the hazard equal or superior to that of the defendant or, would have had equal or superior knowledge had the plaintiff exercised ordinary care for personal safety.” Cases that dealt with the second prong of the test established in the Alterman Foods decision fell into two categories. First, the court acknowledged a line of cases in which summary judgment had been granted to the owner/occupier of the premises on the basis that the invitee “had admitted knowledge of the hazardous condition and, with full appreciation of the danger, had chosen a course of conduct which resulted in injury as a result of the hazardous condition.”

A second line of cases, however, dealt with the situation in which the invitee “attempted to explain that he fell due to a hazard of which he was not aware . . . .” In this second line of cases, it was generally the position of the defendant that the plaintiff failed to avoid a hazard of which the plaintiff should have known. The second line of cases culminated in the court of appeals decision in Smith v. Wal-Mart Stores, Inc., in which it was determined that an invitee who did not see the hazard which caused the fall had failed, as a matter of law, to exercise the requisite ordinary care for personal safety when the invitee admitted he/she would have seen the hazard had the invitee been looking at the floor . . . .

In the aftermath of the decision in Smith, the supreme court noted that the “plaintiffs were repeatedly rebuffed based upon their admission that they would have seen the hazard had they been looking at the site where they placed their foot.”

15. 268 Ga. at 736, 493 S.E.2d at 406.
16. Id.
17. Id. at 738, 493 S.E.2d at 407.
19. Id.
20. 268 Ga. at 738, 493 S.E.2d at 407.
21. Id.
The supreme court in Robinson, however, expressed concern that the prior decisions of the court of appeals placed too great an emphasis on the second prong of the Alterman Foods test. The court stated:

By foregoing a resolution of the owner/occupier's knowledge of the hazard in favor of a holding based on the determination that an invitee who did not see a hazard should have seen it in the exercise of ordinary care for personal safety, the courts, in effect, ruled as a matter of law that the invitee had knowledge of the hazard equal to or greater than that of the owner/occupier without knowing the extent of the latter's knowledge, and implicitly held that an invitee's duty to exercise ordinary care in looking where one is going is paramount to an owner/occupier's duty to exercise reasonable care in inspecting and keeping the premises safe for invitees.22

In reaching its decision, the court first noted that issues of negligence, proximate cause, and contributory negligence are generally not issues that can be resolved upon motion for summary judgment.23 The court then turned its focus to the duty owed by the owner/occupier to invitees. As the court noted, the prior decisions of the court of appeals had "relegated to the shadows the duty owed by an owner/occupier to an invitee."24 According to the court,

[b]ly encouraging others to enter the premises to further the owner/occupier's purpose, the owner/occupier makes an implied representation that reasonable care has been exercised to make the place safe for those who come for that purpose, and that representation is the basis of the liability of an owner/occupier for an invitee's injuries sustained in a "slip-and-fall."25

Although the court noted an invitee must exercise ordinary care to discover and avoid injury, the court stated that an invitee "is not bound to avoid hazards not usually present on the premises in which the invitee, exercising ordinary care, did not observe."26 In particular, the court noted that the "invitee is not required, in all circumstances, to look continuously at the floor, without intermission, for defects in the floor."27 In short, "[w]hat constitutes a reasonable lookout depends on all the circumstances at the time and place."28

22. Id. at 739, 493 S.E.2d at 408.
23. Id.
24. Id. at 740, 493 S.E.2d at 408.
25. Id. at 741, 493 S.E.2d at 409.
26. Id., 493 S.E.2d at 409.
27. Id.
28. Id. at 742, 493 S.E.2d at 409.
The court also noted that prior decisions of the court of appeals radically transformed the "plain view" doctrine. This doctrine, as it was originally conceived, stated that a person is under a duty to look where that person is walking and to see large objects "in plain view which are at a location where they are customarily placed and expected to be . . . ." The court noted, however, that the "plain view" doctrine had developed to the point that there were no "reasonable limits" on its application.

According to the court:

The "plain view" doctrine is the equivalent of the "constructive knowledge" aspect of voluntary negligence on the part of the plaintiff. Voluntary negligence is applicable when the invitee knew or should have known of the hazard and proceeded, and the "plain view" doctrine is applied to a hazard in plain view at a location where it is customarily found and can be expected to be, but which the invitee professes not to have seen prior to the fall. Even though the invitee had no actual knowledge of the hazard before being injured, the invitee should have known of the hazard's presence.

In reversing the decision of the court of appeals, the court rejected prior appellate decisions "which hold as a matter of law that an invitee's failure to see before falling the hazard which caused the invitee to fall constitutes a failure to exercise ordinary care." The court stated, demanding as a matter of law that an invitee visually inspect each footfall requires an invitee to look continuously at the floor for defects, a task an invitee is not required to perform since the invitee is entitled to assume that the owner/occupier has exercised reasonable care to make the premises safe for the invitee and continues to exercise such care while the invitee remains on the premises.

The court's inquiry, however, did not end at that point. According to the court, "our examination of slip-and-fall case law revealed other troubling aspects of the judicial treatment of the invitee's exercise of ordinary care for personal safety." Accordingly, the court concluded its decision by addressing two additional issues: (1) the proper application of the
distraction doctrine, and (2) the burdens of proof applicable in a slip-and-fall case.\textsuperscript{36}

The court first noted that "the distraction doctrine holds that 'one is not bound to the same degree of care in discovering or apprehending danger in moments of stress or excitement or when the attention has been necessarily diverted ....'\textsuperscript{37} The application of this doctrine excuses an invitee from exercising the standard of care ordinarily due under the circumstances because the invitee's attention has been distracted.\textsuperscript{38} In Robinson, however, the court expressed concern over the variety of applications of the distraction doctrine as reflected in recent decisions of the court of appeals.\textsuperscript{39} In delineating the appropriate contours of the doctrine, the court stated:

[W]hen an invitee explains that he was not looking at the location of the hazard which caused injury because of something in the control of the owner/occupier, which purported distraction is of such a nature the defendant might have anticipated it would divert an invitee's attention, e.g. the conduct of a store employee, the premises construction or configuration, or merchandise displayed of such a nature that its presence would not have been anticipated by the invitee, the invitee “has presented some evidence of the exercise of reasonable care for [the invitee's] own safety.” It will then be for the fact-finder to determine if the injuries sustained were proximately caused by the defendant's negligence and whether the plaintiff failed to exercise reasonable care for personal safety.\textsuperscript{40}

The court's decision represents an express rejection of the court of appeals decision in Ferguson v. Scadron,\textsuperscript{41} in which the court of appeals held “that the invitee's offer of a specific reason for not looking where he was going, regardless of the involvement of a store employee, created a jury question ....”\textsuperscript{42} According to the court in Robinson, however, the

\begin{itemize}
\item \textsuperscript{36} Id. at 744, 493 S.E.2d at 411.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id. at 744-45, 493 S.E.2d at 411.
\item \textsuperscript{40} 268 Ga. at 746, 493 S.E.2d at 412 (emphasis added) (quoting Barentine v. Kroger Co., 264 Ga. 224, 225, 443 S.E.2d 485 (1994)).
\item \textsuperscript{41} 227 Ga. App. 614, 489 S.E.2d 873 (1997).
\item \textsuperscript{42} 268 Ga. at 746, 493 S.E.2d at 412 (emphasis added).
\end{itemize}
distraction doctrine is only applicable when the plaintiff has been distracted by "something in the control of the owner/occupier . . . ."\textsuperscript{43}

Finally, the court addressed the burdens of proof applicable in a slip-and-fall case. The court first noted that the decisions in \textit{Alterman Foods, Inc. v. Ligon}\textsuperscript{44} and \textit{Lau's Corp. v. Haskins}\textsuperscript{45} "placed upon the plaintiff the onus of proving both the defendant's knowledge and the plaintiff's lack of negligence in order to stay in court."\textsuperscript{46} As the court noted, after the decision in \textit{Lau's Corp.}, the defendant had "only to point to the deficiency in the plaintiff's case and no longer had to affirmatively negate by the presentation of evidence a central element of the plaintiff's case . . . ."\textsuperscript{47} Because the decision in \textit{Lau's Corp.} "modified the practical application of the \textit{Alterman Foods} standard, . . . [the court in \textit{Robinson} decided to] modify \textit{Alterman Foods} somewhat in order to regain balance in the allocation of the burden of proof."\textsuperscript{48} According to the court:

A slip-and-fall plaintiff need not necessarily produce evidence which disproves the plaintiff's negligence to withstand a motion for summary judgment-the burden of coming forward with such evidence arises only after it has been established or assumed the defendant had actual or constructive knowledge of the hazard, and the defendant presents evidence that the plaintiff's injuries were proximately caused either by the plaintiff's voluntary negligence, i.e., plaintiff's intentional and unreasonable exposure of self to a hazard of which plaintiff has knowledge, or by the plaintiff's casual negligence, i.e., the plaintiff's failure to exercise ordinary care for personal safety. In this way, the defendant has the evidentiary burden as to the issue of the plaintiff's negligence after it has been established or assumed for purposes of a motion for summary judgment that the defendant was negligent . . . .

Only after the defendant has produced evidence of the plaintiff's negligence does the plaintiff have the burden of producing rebuttal evidence that the invitee's failure to ascertain the existence of the hazard was due to actions or conditions within the control of the defendant, which actions or conditions are of such a nature that the defendant knew or should have known they would have diverted the invitee's attention from looking where he was going.\textsuperscript{49}

The underlying rationale for the supreme court's decision in \textit{Robinson} appears to be the court's suggestion that summary judgment in slip-and-

\begin{itemize}
\item[43.] \textit{Id.}
\item[44.] 246 Ga. 620, 272 S.E.2d 327 (1980).
\item[46.] 268 Ga. at 746, 493 S.E.2d at 413.
\item[47.] \textit{Id.}
\item[48.] \textit{Id.} at 747, 493 S.E.2d at 413.
\item[49.] \textit{Id.}, 493 S.E.2d at 413-14.
\end{itemize}
fall cases should be granted only in those rare situations when the evidence is "plain, palpable, and undisputed." This conclusion, however, is in direct conflict with the motivation underlying the decision reached by the same court in 1982 in Alterman Foods. In that decision, the court expressed its concern that the standard applicable in slip-and-fall cases resulted in very few cases being disposed of on motion for summary judgment. The Robinson decision, however, is clearly not an attempt by the court to find an acceptable middle ground. Rather, the decision reflects an explicit effort by the court to "swing the pendulum" back to a pre-Alterman Foods climate in which few, if any, slip-and-fall decisions were disposed of on motion for summary judgment. However, by failing to seek an acceptable middle ground (if such even exists), it is almost certain the supreme court will one day again be forced to address this very same issue in an effort, as the court did in Alterman Foods, to provide some basis for summary judgment in slip-and-fall decisions.

Although the supreme court in Robinson repeatedly stated the owner/occupier is not "an insurer of the invitee's safety," the decision in Robinson may ultimately have that very effect. Robinson sends a clear signal to the lower courts that the resolution of slip-and-fall cases on motion for summary judgment is highly disfavored. The practical effect of such a decision is that owners/occupiers and their insurers, faced with the prospect of costly and disruptive litigation, may very well choose to settle marginal cases that may have once been the subject of a motion for summary judgment. In this respect, it is clear the court believed that the owner/occupier of the premises is in a much better position both to prevent injury to invitees and to spread the risk of loss should such an injury occur. Although the court notes the owner/occupier is in a better position to prevent dangerous conditions on its premises, the court is noticeably silent on the practical and economic effects of its decision. Tort law is, if nothing else, a reflection of public policy. This is particularly true in the area of premises liability law. In this respect, the court's decision in Robinson reflects a policy decision that the cost of making the premises safe is worth the increased costs consumers will ultimately pay for such measures as increased staff and insurance, which costs will ultimately be spread among the consumer base as a cost of doing business.

50. Id. at 748, 493 S.E.2d at 414.
51. Id. at 748-49, 493 S.E.2d at 414.
52. 268 Ga. 735, 493 S.E.2d 403 (1997).
53. See id.
54. Id. at 740, 493 S.E.2d at 408.
In preparing a tort survey article, the author is always asked to identify any "trends" evident in the decisions included within the survey period. The decision in Robinson is not evidence of a "trend." Rather, it is a distinct and clear statement that slip-and-fall law as we knew it is no more. In one swift blow, the supreme court completely altered the state of slip-and-fall jurisprudence in Georgia. Although it remains to be seen exactly how the trial courts and the court of appeals will interpret and apply the Robinson decision, it is clear the pendulum has swung swiftly and quickly back in favor of the plaintiff.

B. Criminal Attacks

In March 1997, the Georgia Supreme Court issued its decision in Sturbridge Partners, Ltd. v. Walker. In that decision, the supreme court rejected the proposition that a landlord's knowledge of prior criminal acts against property cannot as a matter of law establish the foreseeability of a crime against a person. According to the court in Sturbridge, "[s]uch a restrictive and inflexible approach does not square with common sense or tort law . . . ." The decision in Sturbridge represented a departure from the line of authority that developed in the aftermath of Lau's Corp. v. Haskins, in which the supreme court held a landlord's knowledge of prior criminal acts against property did not as a matter of law make it foreseeable that a criminal act against a person could or would occur.

In Walker v. St. Paul Apartments, Inc., the Georgia Court of Appeals followed the new standard set forth by the supreme court in Sturbridge and reversed a grant of summary judgment to defendant apartment building and its management following a robbery, assault, and threatened rape of a tenant. Plaintiff in Walker brought suit against her apartment building and its management after a robbery, assault, and threatened rape which occurred on October 2, 1992. The evidence revealed that the defendant apartment building employed full-time security guards. The security guards, however, were not provided a key to the front door of the apartment building, and thus, could not lock the door at night. According to the court of appeals, "the
assailant apparently entered [the apartment building] when the security

 guard left his post to check on a noise outside the building." The
evidence also revealed a significant number of prior purse snatchings as

well as some evidence of prior assaults on the property. The trial
court granted defendants' motion for summary judgment and plaintiff
appealed.65

Relying upon the decision in Sturbridge, the court of appeals reversed
the trial court66 and held "it is improper to distinguish between
criminal attacks involving brutal physical assault and those which did
not, for this incorrectly suggests the landlord could lawfully safeguard
its tenants only from persons who commit criminal acts without
accompanying physical harm."67 The court noted:

[In determining whether previous criminal acts are substantially

similar to the occurrence causing harm (which establishes the foresee-
ability of risk), the court must inquire into the location, nature and
extent of the prior criminal activities and their likeness, proximity or
relation to the crime in question; but, while the prior criminal activity
must be substantially similar to the crime in question, this does not
mean it must be "identical," for what is required is only that the prior
incident be sufficient to attract the landlord's attention to the dangerous
condition which resulted in the litigated incident.68

Based on these factors, the court of appeals determined a jury could
reasonably find "that the particular danger which resulted in the assault
on plaintiff in this case was foreseeable under all the circumstances, and
that appellees were negligent in failing to exercise ordinary care to

guard against it."69

In Doe v. Prudential-Bache/A.G. Spanos Realty Partners, L.P.,70
however, the Supreme Court of Georgia, although acknowledging its
prior decision in Sturbridge, appears to have reverted to its pre-
Sturbridge approach to such cases in practice if not in theory. In
Prudential-Bache plaintiff was raped and robbed after parking her car
in a parking garage underneath an apartment building owned by
defendant.71 The evidence in the case revealed "a number of crimes
against property, such as theft and vandalism, [had been] committed in

---

63. Id.
64. Id.
65. Id. at 298, 489 S.E.2d at 318.
66. Id. at 300, 489 S.E.2d at 318.
67. Id.
68. Id.
69. Id. at 301, 489 S.E.2d at 319.
71. Id. at 604, 492 S.E.2d at 866.
the parking garage."\textsuperscript{72} The trial court granted summary judgment to defendant, and the court of appeals affirmed.\textsuperscript{73} In affirming the trial court's decision, the court of appeals "relied solely on the principle that prior property crimes could not create a factual issue regarding whether a property owner knew or should have known that a crime against a person, sexual or otherwise, might be committed on its premises."\textsuperscript{74} The supreme court, however, noted the very basis for the court of appeals affirmance of the trial court's decision was explicitly rejected by the supreme court in \textit{Sturbridge}.\textsuperscript{75} Nonetheless, the court held that under the circumstances of the case, the court of appeals reached the right decision.\textsuperscript{76}

The court first noted in "determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability or risk, the court must inquire into the location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question."\textsuperscript{77} Based on these factors, the court held the prior property crimes committed on the defendant's premises did not create an issue of fact with respect to whether defendant should have reasonably anticipated that a violent sexual assault might occur on the premises.\textsuperscript{78} In affirming the court of appeals, the court stated:

First, "the very nature" of the theft and acts of vandalism committed in this case do not "suggest that personal injury may occur." Further, because the parking garage where the prior crimes occurred is a common area, used by all the tenants and their guests, there is only the potential for a tenant to confront a thief in an isolated situation, and, even if such an encounter occurs, there is always the possibility that the isolation could be brief . . . . Finally, a tenant generally will have opportunities for escaping an isolated encounter with a thief in a common area, but will not have similar opportunities when encountering a burglar in her apartment.\textsuperscript{79}

According to the court, the facts in the present case were distinguishable from the facts giving rise to the cause of action in \textit{Sturbridge}. The court stated that the "very nature" of the burglaries committed in \textit{Sturbridge}
“suggest[ed] that personal injury may occur” during the unauthorized entry into the dwelling house of another.\textsuperscript{80}

Justice Hunstein wrote a dissent to the majority’s opinion.\textsuperscript{81} In her dissent, Justice Hunstein sharply criticized the majority’s opinion as “inconsistent both legally and factually” with the court’s prior decision in \textit{Sturbridge}.\textsuperscript{82} According to Justice Hunstein:

It little benefits the bench, bar and public for this court to state a rule in one case then inexplicably retreat from that rule the very next time the issue appears. Here, eight months after this court held in \textit{Sturbridge} that a jury, not the appellate courts, should resolve the question of reasonable foreseeability, a majority of this court substitutes itself as the finder of fact to hold that appellees’ knowledge of pervasive property-related criminal activity “cannot establish the foreseeability” of the assault on appellant. In \textit{Sturbridge} we rejected this inflexible approach over Chief Justice Benham’s lament that our holding constituted “an unfortunate jettisoning of precedent.” It appears now that this court’s effort in \textit{Sturbridge} to “square [premises liability cases] with common sense or tort law” was itself nothing more than an aberration and that it is \textit{Sturbridge} that is now being jettisoned by the majority.\textsuperscript{83}

\section{PRODUCTS LIABILITY}

Official Code of Georgia Annotated section 5-1-11 provides, in part:

\begin{quote}
The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to an actual person who may use, consume, or reasonably be affected by the property who suffers injury to his person or property because the property, when sold by the manufacturer, was not merchantable and reasonably suited for the use intended, and its condition when sold was the proximate cause of the injury sustained.\textsuperscript{84}
\end{quote}

This code section, however, does not preclude suit against the distributor of a defective product.\textsuperscript{85} For example, when a distributor has knowledge of a particular danger, the distributor has a duty to warn consumers of that danger. However, what if the manufacturer has already provided a warning of that particular danger? In \textit{Farmer v. Brannan}
Auto Parts, Inc., the Georgia Court of Appeals addressed the duty of a distributor to warn customers and users of a particular danger with a product in situations in which the manufacturer of the product has already warned consumers of that danger.

Plaintiff in Farmer purchased a can of Fix-a-Flat Tire Inflator after one of the tires on his pickup truck went flat. The tire inflator included a warning that informed plaintiff “the substance was flammable; that it should not be used near heat or flame; and that it would remain flammable when transferred from the can into a tire.” During the course of the following three months, the air in plaintiff’s tire continued to leak. As it did, plaintiff filled his tire with air four or five more times. Plaintiff, however, apparently believed that by refilling his tire, he was replacing the inflator gas. Approximately three months after first using the tire inflator, plaintiff discovered a crack in the rim of his wheel and attempted to repair the crack by welding it. Plaintiff, however, did not remove the flat tire from the rim before attempting to weld the rim. When plaintiff’s welding iron touched the rim of the tire, the tire exploded and injured plaintiff.

Plaintiff brought suit against the distributor of the tire inflator to recover for the injuries he suffered as a result of the explosion. The trial court granted defendant’s motion for summary judgment. On appeal, the court of appeals affirmed.

On appeal, plaintiff argued “he did not understand that the substance would remain flammable three-and-a-half months after he placed it in the tire and believed the Fix-a-Flat had dissipated by that time.” According to plaintiff, the distributor had a duty to warn him of that particular danger. Plaintiff pointed to evidence in the record that, prior to the incident, the vice president of defendant was aware that tire inflaters such as Fix-a-Flat formed an explosive gas when the propellant in the tire inflator was mixed with air.

The majority of the court of appeals agreed with plaintiff’s position that “the distributor of a product which, to [its] actual or constructive knowledge, involves danger to users [has] a duty to give warnings of
such danger . . . at the time of sale and delivery.” The court of appeals noted, however, that the case at hand presented a unique situation. This court of appeals recognized that, although the distributor had knowledge of a particular danger, “the manufacturer had already provided written warning to the consumer of the danger.” Even assuming the warning provided by the manufacturer did not address the specific danger at issue, the court held there was no evidence the defendant “knew or should have known the length of time the substance remained flammable or that the distributor knew or should have known consumers would misunderstand the manufacturer’s warning . . . .”

Judge Blackburn wrote a dissent to the majority’s opinion in which Presiding Judge McMurray joined. According to the dissent, because the vice president of defendant had knowledge that tire inflaters could be dangerous, defendant “had a duty to exercise reasonable care to determine whether the tire inflaters [defendant] was selling were dangerous.” As the dissent stated, defendant made a unilateral decision that the warning labels on the tire inflaters were adequate to warn consumers of the danger. According to the dissent, “the reasonableness of this determination should be left to a jury.”

III. TRESPASS

In Bullock v. Jeon, the Georgia Court of Appeals held a jury issue existed on the amount of time reasonably necessary to enable a trespasser “to effect his departure” after the trespasser has been asked to leave premises open to the general public. In Bullock plaintiff and defendant owned competing liquor stores located in close proximity to one another. In October 1994, plaintiff sent one of his employees over to defendant’s store to check out defendant’s prices. Later that same day, defendant went over to plaintiff’s store to confront plaintiff about the price-checking. After defendant started cursing at plaintiff, plaintiff asked defendant to leave the premises. Defendant, however, initially refused. After plaintiff threatened to call the police, defendant exited the store. Plaintiff subsequently brought suit against defendant for

96. Id., 498 S.E.2d at 585 (quoting Beam v. Omark Indus., 143 Ga. App. 142, 237 S.E.2d 607 (1977)).
97. Id.
98. Id. at 355, 498 S.E.2d at 585.
99. Id. at 357, 498 S.E.2d at 586.
100. Id. at 358, 498 S.E.2d at 587.
101. Id.
102. Id.
104. Id. at 876, 487 S.E.2d at 695.
The trial court granted defendant's motion for summary judgment on plaintiff's trespass claim. On appeal, the court of appeals reversed.

On appeal, defendant asserted that plaintiff's "failure to leave the premises immediately upon being asked to leave [gave] rise to a cause of action for trespass." The court of appeals first noted, "[e]vidence that a defendant refused to leave a store after he is asked to leave is sufficient to sustain a conviction for criminal trespass under O.C.G.A. section 16-7-21(b)(3)."

Quoting from the decision in *Hollis v. State*, however, the court noted:

"[e]ven a trespasser, where he is rightfully ordered to leave a building by one having the premises in charge, is entitled to be allowed such a period of time as is necessary to enable him to make his exit from the room or building he is ordered to vacate. The amount of time reasonably necessary to enable such a trespasser to effect his departure may be varied by circumstances, and is a question of fact for determination by the jury."

The court of appeals held a jury issue existed on whether defendant left the premises within a reasonable period of time. The court noted that evidence showing defendant was asked to leave the premises several times and had refused to do so, and that the defendant left the premises only after plaintiff threatened to call the police, was sufficient for a jury to reasonably find that the defendant did not leave within a reasonable period of time. On this basis, the court of appeals reversed the decision of the trial court.

IV. DEFAMATION

In addition to the issue of trespass, the court of appeals in the case of *Bullock v. Jeon* also addressed the issue of under what circumstances "disparaging words" may constitute slander per se pursuant to

---

105. *Id.* at 875, 487 S.E.2d at 694.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 876, 487 S.E.2d at 694.
112. *Id.*
113. *Id.*
114. *Id.*
As noted previously, defendant in Bullock entered plaintiff's liquor store and confronted plaintiff about an incident in which plaintiff sent one of plaintiff's employees into defendant's store to check on defendant's liquor prices. As defendant was leaving plaintiff's premises, defendant turned to plaintiff and called plaintiff a "m-

This confrontation was apparently witnessed by many of plaintiff's employees, customers, and distributors. Plaintiff subsequently brought suit against defendant for slander. The trial court granted defendant's motion for summary judgment on plaintiff's slander claims, and the court of appeals affirmed.

On appeal, plaintiff argued defendant had committed slander per se by referring to plaintiff as a "m-

It was plaintiff's position that the term used by defendant suggested that plaintiff had committed a crime punishable by law, specifically, having sexual intercourse with his mother. According to plaintiff, defendant's actions amounted to slander per se, "thus negating the O.C.G.A. section 51-5-4 requirement of showing special damages."

In affirming the trial court's decision, the court of appeals first noted that "[d]isparaging terms are slanderous per se only if the terms convey 'the impression that the crime in question is being charged, [and also are] couched in such language as might reasonably be expected to convey the meaning to anyone who happened to hear the utterance.' The court noted that if "a statement's meaning is not ambiguous and can reasonably have but one interpretation, the question is one of law for the court." The court of appeals held the words used by defendant did

116. O.C.G.A. § 51-5-4 (Supp. 1998) provides:
(a) Slander or oral defamation consists in: (1) Imputing to another a crime punishable by law; (2) Charging a person with having some contagious disorder or with being guilty of some debasing act which may exclude from society; (3) Making charges against another in reference to his trade, office, or profession, calculated to injure him therein; or (4) Uttering any disparaging words productive of special damage which flows naturally therefrom. (b) In the situation described in paragraph (4) of subsection (a) of this Code section, special damage is essential to support an action; in the situations described in paragraphs (1) through (3) of subsection (a) of this Code section, damage is inferred.

118. Id.
119. Id. at 879, 487 S.E.2d at 694.
120. Id. at 877, 487 S.E.2d at 694.
121. Id.
122. Id. at 876, 487 S.E.2d at 695.
123. Id. at 877, 487 S.E.2d at 694 (quoting Anderson v. Fussell, 75 Ga. App. 866, 869, 44 S.E.2d 694, 697 (1947)).
124. Id., 487 S.E.2d at 695.
not impute a violation of any criminal law by the plaintiff.125 According to the court of appeals, the term “m-f” “generally communicates an obscenity reflecting the speaker’s agitated and angry state of mind.”126 The court noted that although the term certainly constitutes a “degrading insult . . . , it has not been interpreted as an actual accusation that the object of the remark has committed an illegal sexual act.”127 In short, the court concluded that “[n]o reasonable person exposed to [defendant’s] invective, uttered as a parting shot after he had been ordered off the premises and immediately following an argument unrelated to sex, could have concluded that [defendant] was accusing [plaintiff] of having sexual intercourse with his own mother.”128 Accordingly, the court held, in the absence of any showing of special damages, plaintiff could not sustain his cause of action for slander.129

In order to avoid summary judgment, a plaintiff in a defamation action must offer some evidence that the statements at issue were false.130 In Blomberg v. Cox Enterprises, Inc.,131 the senior vice president of a career marketing company brought suit against a former client of the company after the former client was quoted in a newspaper article as stating that the plaintiff vice president was a “silver-tongued devil.”132 As in Bullock, the trial court granted summary judgment in favor of defendant on the basis that defendant’s remark was not subject to a defamatory interpretation.133 The trial court, however, also granted defendant’s motion for summary judgment on the basis that plaintiff failed to prove the statement was false.134 In affirming the trial court’s decision, the court of appeals noted the defendant’s remark “is an assertion that cannot be proved false.”135 “As a statement of wholly subjective opinion not capable of proof, it cannot support an action for defamation against [defendants] for publishing it.”136

125. Id. at 877-78, 487 S.E.2d at 695.
126. Id. at 877, 487 S.E.2d at 695.
127. Id.
128. Id.
129. Id. at 878, 487 S.E.2d at 695.
132. Id. at 179, 491 S.E.2d at 432.
133. Id. at 178, 491 S.E.2d at 431.
134. Id. at 179, 491 S.E.2d at 432.
135. Id. at 180, 491 S.E.2d at 433.
136. Id. at 181, 491 S.E.2d at 433.
V. IMMUNITY

In *Bearden v. Bearden*, the Georgia Court of Appeals addressed the application of the interspousal tort immunity doctrine. Paula Bearden and David Bearden married in 1987 and separated in early 1989. Subsequent to their separation, however, the Beardens frequently spent time together, including overnight trips. On July 11, 1995, the Beardens were returning from an overnight swimming trip when they were in an automobile accident. Mrs. Bearden subsequently brought suit against Mr. Bearden for personal injuries that she allegedly received as a result of his negligent operation of the motor vehicle. Mr. Bearden filed a motion for summary judgment on the basis that Mrs. Bearden's claim was barred by the interspousal tort immunity doctrine. The trial court granted Mr. Bearden's motion for summary judgment. On appeal, the court of appeals reversed.

The court of appeals reversed the trial court's grant of summary judgment to Mr. Bearden on the basis that the traditional policy reasons for application of the interspousal tort immunity doctrine were not present in the case. Citing to the Georgia Supreme Court's 1984 decision in *Harris v. Harris*, the court of appeals stated the traditional policy reasons for interspousal tort immunity are "(1) the belief that abrogation of interspousal tort immunity would foster marital disharmony and disunity and (2) the justifiable fear of collusive or friendly lawsuits between spouses." Relying upon evidence in the record (1) that the Beardens were separated in early 1989, (2) that during separation Mr. Bearden lived with other women, (3) that Mrs. Bearden did not have any hope that the parties would reconcile, and (4) that Mrs. Bearden filed for divorce on the same day she commenced the present action, the court of appeals held the traditional policy reasons did not apply.

Chief Judge Andrews wrote a dissent to the majority opinion. Relying upon the court of appeals decision in *Standfield v. Stand-
field, Judge Andrews stated that the interspousal tort immunity doctrine should be abrogated only in "extreme ... situations." According to Judge Andrews, the evidence in the case clearly revealed that "the parties maintained a substantial ongoing marital relationship by seeing each other frequently and spending the night together." Judge Andrews noted "for purposes of applying the interspousal immunity doctrine, there is a significant difference between . . . a bad marriage and . . . a non-existent marriage." Although the evidence in the case may have indicated the Beardens had a bad marriage, Judge Andrews asserted "this was not a case in which there was clearly no marital harmony to preserve and no reasonable apprehension of collusion between the spouses."

VI. DAMAGES

A. Punitive Damages

In Webster v. Boyett, the Georgia Supreme Court addressed "whether evidence of a defendant's similar acts or omissions is relevant in determining liability for punitive damages and, if so, the proper procedure to be followed in handling the admission of the evidence." In Boyett plaintiff brought suit against defendant after she was injured in an automobile accident in which defendant pled guilty to driving under the influence. The trial court bifurcated the proceedings based on O.C.G.A. section 51-12-5.1. The court also granted defendant's motion in limine and excluded evidence of a prior DUI in the first phase of the bifurcated proceeding. The jury returned a verdict for plaintiff for $7,500 in compensatory damages. However, the jury declined to award

148. 231 Ga. App. at 184, 499 S.E.2d at 362.
149. Id. at 185, 499 S.E.2d at 362.
151. Interestingly, the majority opinion relied upon the fact that Mrs. Bearden filed her divorce action on the same day she commenced the underlying civil action as a basis for finding no evidence of collusion and as a basis for finding there was no marital harmony to be preserved. Neither the majority opinion nor the dissent, however, addressed the fact that this very same evidence could be viewed as evidence of collusion. That is, despite the fact that the parties "separated" in early 1989, Ms. Bearden did not deem it necessary to file for divorce until after she was injured in a motor vehicle accident and even then did not actually file the divorce action until the same day she filed the civil action.
153. Id. at 191, 496 S.E.2d at 460.
154. Id.
punitive damages, and plaintiff appealed. The court of appeals reversed and held that the trial court had abused its discretion by excluding evidence of defendant's prior DUI during the first phase of the bifurcated proceeding and by refusing to trifurcate the proceeding. On appeal, the supreme court reversed.

In reversing the decision of the court of appeals, the supreme court first noted that in the 1985 Moore v. Thompson decision, it held "evidence of the defendant's prior and subsequent guilty pleas to driving under the influence was admissible on the question of punitive damages." As the court explained, the basis for the decision in Moore was "that the extent of the defendant's willful misconduct, wantonness and entire want of care in driving under the influence could not be gauged solely from the incident in issue, but that evidence of other DUI incidents was relevant to the question of punitive damages." The court in Moore, however, recognized that insofar as evidence of prior and subsequent DUIs would have a prejudicial effect on defendant's liability for compensatory damages, trial courts should "try the issue of punitive damages separately in a bifurcated procedure or in a separate trial."

Two years after the decision in Moore v. Thompson, however, the Georgia General Assembly enacted O.C.G.A. section 51-12-5.1. Section 51-12-5.1(d) provides, in part:

(1) An award of punitive damages must be specifically prayed for in a complaint. In any case in which punitive damages are claimed, the trier of facts shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings.

(2) If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case . . . .

155. Id.
156. Id. at 197, 496 S.E.2d at 464.
158. Id. at 236, 336 S.E.2d at 749; 269 Ga. at 192, 496 S.E.2d at 460-61.
159. 269 Ga. at 192, 496 S.E.2d at 461.
160. Id.
The bifurcated procedure required by section 51-12-5.1 effectively put an end to the bifurcated procedure recommended by the supreme court in *Moore*. As the court noted in *Boyett*,

courts must conduct either bifurcated or trifurcated trials under the statute. Under the bifurcated trial, the jury would decide liability, the amount of compensatory damages, and liability for punitive damages in the first phase and the amount of punitive damages in the second phase. Under the trifurcated trial, the jury would determine liability and the amount of compensatory damages in the first phase, liability for punitive damages in the second phase, and the amount of punitive damages in the third phase.\(^{162}\)

The court noted that in the bifurcated procedure mandated by the statute a problem arises when a plaintiff attempts to introduce evidence of the defendant's prior DUIs on the issue of liability for punitive damages.\(^{163}\) Although this evidence is clearly relevant to the issue of punitive damages based on the decision in *Moore*, the evidence is also likely to prejudice the finder-of-fact with respect to the issue of liability for compensatory damages.\(^{164}\)

In reversing the decision of the court of appeals, the supreme court declined to adopt any "bright-line rule."\(^{165}\) According to the court, "the best way to guarantee a fair trial and ensure judicial economy is to continue to give the trial judge discretion on when to admit the evidence of prior and subsequent acts."\(^{166}\) The court first noted the general rule that "trial judges may exercise discretion in excluding relevant evidence if its probative value is substantially outweighed by the risk that its admission will confuse the issue, mislead the jury, or create substantial danger of undue prejudice."\(^{167}\) In reaching its decision, the court suggested trial courts should consider the prejudice to the parties, the complexity of the issues, the potential for jury confusion, and the relative convenience, economy, or delay that may result from the introduction of such evidence.\(^{168}\) Based on these factors, the supreme court held the trial court did not abuse its discretion in refusing to admit evidence of defendant's prior DUI in the liability phase of the bifurcated proceeding.\(^{169}\)

\(^{162}\) 269 Ga. at 193, 496 S.E.2d at 461.

\(^{163}\) *Id.*

\(^{164}\) *Id.* at 195, 496 S.E.2d 463.

\(^{165}\) *Id.*

\(^{166}\) *Id.*

\(^{167}\) *Id.*

\(^{168}\) *Id.*

\(^{169}\) *Id.* at 197, 496 S.E.2d at 464.
In reversing the decision of the trial court, the court of appeals had also held the trial court abused its discretion by refusing to trifurcate the proceeding. In reversing the decision of the court of appeals, the court first noted that recent court of appeals decisions have suggested that the trifurcated proceeding should be the preferred procedure for dealing with the issue of punitive damages. Although the supreme court noted that trifurcation is an option for trial courts to consider, the court disagreed that the trifurcated procedure should be used "in most cases." The court stated:

It is the rare case where, due to the complexity of the issues or evidence, the trial court should divide the trial into three separate phases. First, although not completely devoid of purpose, a third phase expends limited judicial resources by requiring the judge and jury to hear evidence and render a verdict in three separate proceedings. Second, the liability issues, witnesses, and evidence on both compensatory and punitive damages often may not differ substantially, thus eliminating the desire for two separate phases on liability. Third, in routine cases where there is less likelihood of confusion, a limiting instruction may adequately protect the defendant from the prejudicial effect of the similar act evidence. Finally, the trial courts in most tort actions have been able to ensure a fair trial by applying the balancing test, despite their contrary rulings on when the evidence is admissible.

Accordingly, based on these factors, the supreme court held the trial court did not abuse its discretion in refusing to trifurcate the proceeding.

The decision in Boyett, however, is particularly unsatisfying. It is still unclear when and under what circumstances evidence of prior and subsequent DUIs may be admissible in the liability phase of a bifurcated proceeding. As the court noted in reaching its decision,

[t]here is, for example, a difference between a defendant who has been convicted of one prior DUI in which no person was injured, as occurred in this case, and a defendant who has been convicted of two prior DUIs and two subsequent DUIs that involve injuries, as occurred in Moore v. Thompson.

170. Id. at 192, 496 S.E.2d at 460.
171. Id. at 196, 496 S.E.2d at 463.
172. Id.
173. Id. at 196-97, 496 S.E.2d at 463-64.
174. Id. at 197, 496 S.E.2d at 464.
175. Id. at 196, 496 S.E.2d at 463.
The problem, however, is the evidence in *Moore* would appear to have even more of a prejudicial effect on the issue of liability for compensatory damages than the evidence presented in *Boyett*. That is, it appears the more prejudicial the evidence is on the issue of liability, the more relevant it may be to the issue of punitive damages.

Moreover, it appears that the balancing test adopted by the court in *Boyett* may not be limited to the introduction of evidence of prior and subsequent DUls. In reaching its decision in *Boyett*, the court repeatedly spoke in broad terms of “prior similar acts.” As such, it remains to be seen what other “prior similar acts” may be deemed admissible in the first phase of a bifurcated proceeding under section 51-12-5.1.

VII. SPOLIATION OR FRAUDULENT CONCEALMENT OF EVIDENCE

In *Sharpnack v. Hoffinger Industries, Inc.*, the Georgia Court of Appeals suggested that the tort of spoliation of evidence should perhaps be recognized in Georgia as a new cause of action. The decision in *Sharpnack* related to an appeal in a products liability action “based on a tragic incident in which a 15-year-old boy received spinal injuries which rendered him a quadriplegic when he dived from a mini-trampoline into an above-ground swimming pool.” In a prior appeal, the court of appeals affirmed the grant of summary judgment in favor of defendant-manufacturer of the pool with respect to plaintiff’s claims of negligence and strict liability. The prior appeal, however, did not resolve several additional claims also raised in plaintiff’s complaint. Accordingly, upon remand of the case to the trial court, defendant-manufacturer moved for summary judgment on plaintiff’s remaining claims, to include plaintiff’s claim that defendant should be liable in damages for spoliation of evidence. The trial court granted defendant’s motion for summary judgment, and plaintiff appealed.

The court of appeals affirmed the trial court’s decision on the basis that even if the tort of spoliation of evidence existed under Georgia law, the facts of the case before the court did not support such a claim. According to the court, plaintiff could not “establish any causal link between the failure of his underlying claim and the alleged misconduct

---

177. Id. at 830, 499 S.E.2d at 364.
178. Id. at 829, 499 S.E.2d at 364.
179. Id. at 830, 499 S.E.2d at 364.
180. Id.
181. Id.
182. Id.
183. Id. at 831, 499 S.E.2d at 365.
by defendant . . . .”\textsuperscript{184} In reaching its decision, however, the court noted “spoliation of evidence has long been recognized in Georgia as an appropriate basis for appropriate sanctions in the decision of the underlying case.”\textsuperscript{185} Moreover, the court cited to decisions from California, Florida, and Alaska in which courts recognized spoliation of evidence as an independent tort.\textsuperscript{186} The court, however, recognized that the tort of spoliation of evidence had not been expressly approved of in any prior decision in Georgia.\textsuperscript{187} Nonetheless, according to the court, “[r]ecognizing that the spoliation or concealment of evidence is a serious discovery abuse, . . . remedies for that abuse may not be adequate in the absence of recognizing a separate tort . . . .”\textsuperscript{188} The court therefore suggested “a fresh look at the issue of whether Georgia should recognize an independent tort of this type may be appropriate.”\textsuperscript{189} The court, however, as noted above, held the present case did not present “an appropriate case in which to conduct such a re-examination of Georgia law.”\textsuperscript{190}

\textsuperscript{184} Id.
\textsuperscript{185} Id. at 830, 499 S.E.2d at 364.
\textsuperscript{187} 231 Ga. App. at 831, 499 S.E.2d at 364.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id.