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Hennessey v. Webb: Sovereign Immunity for the Less-Than-Sovereign — How Far Will It Go?

In *Hennessey v. Webb*,¹ the Georgia Supreme Court held that a public school principal was entitled to governmental immunity from tort liability for alleged negligence in allowing a hazardous condition to exist upon school premises.² The court ruled that plaintiff's action was brought against the principal in his official capacity as an agent of the board of education for negligent exercise of his authorized discretion.³

The case was prompted by an incident in which Curtis Webb, a student at Southwest DeKalb High School, was injured⁴ when he fell through a glass door.⁵ The ensuing action sought damage for injuries sustained in the fall and named Kenneth Hennessey, principal of the school, as sole defendant.⁶ Plaintiff alleged that defendant was negligent in allowing a dangerous condition to exist and to continue while he had legal custody and control of the school building.⁷ Specifically, defendant was allegedly negligent in allowing "under his direct supervision and control a rug and mat to be placed at a door in the . . . school."⁸

The trial court granted defendant's motion to dismiss and held that the governmental immunity from tort liability granted to defendant's employer, the DeKalb County Board of Education, extends to its agents and employees,⁹ notwithstanding the fact that defendant's liability insurance¹⁰ would have covered this situation.¹¹ The Georgia Court of Appeals

1. 245 Ga. 329, 264 S.E.2d 878 (1980).

2. *Id.* at 332, 264 S.E.2d at 880.

3. *Id.*

4. The facts are taken, in part, from the opinion of the court of appeals. *Webb v. Hennessey*, 150 Ga. App. 326, 257 S.E.2d 315 (1979).

5. 245 Ga. at 333, 264 S.E.2d at 881 (Nichols, C.J., dissenting).

6. 150 Ga. App. at 326, 257 S.E.2d at 316.

7. 245 Ga. at 331, 332, 264 S.E.2d at 880.

8. *Id.* at 332, 264 S.E.2d at 880.

9. 150 Ga. App. at 326, 257 S.E.2d at 316.

10. *Id.* at 326 n.1, 257 S.E.2d at 316 n.1. GA. CODE ANN. § 32-850 (1976) provides that boards of education of counties, . . . are hereby authorized, in their discretion, to purchase policies of liability insurance or contracts of indemnity insuring or indemnifying . . . principals, . . . against damages arising out of the performance of their duties or in any way connected therewith, . . . based upon negligence. . . . Such boards may expend [public funds] for such purposes.

reversed, holding that plaintiff's complaint was based upon a breach of ministerial¹³ duties, and therefore was not barred by governmental immunity.¹³ The Georgia Supreme Court reversed the court of appeals.¹⁴ Stating that defendant's act or failure to act was discretionary,¹⁵ the court held that, absent an allegation that defendant acted wilfully, wantonly, or outside the scope of his authority, defendant was entitled to governmental or sovereign immunity.¹⁶

The doctrine of sovereign immunity has long been recognized in the United States¹⁷ and in Georgia.¹⁸ Immunity from tort liability in Georgia has also been judicially recognized for political subdivisions of the state,¹⁹ including boards of education.²⁰ Extension of the doctrine of governmental immunity to protect an individual has been somewhat more tenuous. The initial determination in a tort claim against a public official must be whether the suit is brought against the defendant in his individual or his

11. 150 Ga. App. at 326 n.1, 257 S.E.2d at 316 n.1. The DeKalb County Board of Education had purchased a liability policy pursuant to GA. CODE ANN. § 32-850 (1976), but the policy stated that the insurer was not authorized to assert the doctrine of sovereign immunity as a defense. The trial court, after deciding that defendant had immunity, viewed § 32-850 in light of GA. CODE ANN. § 32-851 (1976):

Nothing herein shall be construed as waiving any immunity or privilege now or hereafter enjoyed by the State Board of Education or the board of control of any cooperative educational service agency or by any board of education or by any member of any such board or by any employee of the State Board of Education superintendent, principal, teacher, administrator or other employee, nor of any State or other public body, board, agency or political subdivision.

The trial court remarked that "[i]t appears that the Board of Education of DeKalb County is expending the sum of \$61,403 annually [for premiums] for which it is receiving nothing in return." 150 Ga. App. at 326 n.1, 257 S.E.2d at 316 n.1.

12. Ministerial functions are described as "obedience to orders or the performance of a duty in which the officer is left no choice of his own." W. PROSSER, LAW OF TORTS § 132 at 988-89 (4th ed. 1971). If the ministerial duty is done improperly, there is no immunity from liability. *Id.*

13. 150 Ga. App. at 328, 257 S.E.2d at 317.

14. 245 Ga. at 332, 264 S.E.2d at 881.

15. Discretionary functions are described as those "requiring personal deliberation, decision and judgment." W. PROSSER, *supra* note 12. For performance of discretionary acts, there is immunity. *Id.*

16. 245 Ga. at 332, 264 S.E.2d at 880-81.

17. For a concise explanation of the origins of the doctrine of sovereign immunity from tort liability in the United States, see 1 J. DOOLEY, MODERN TORT LAW § 20.01 (1977).

18. See Comment, *Sovereign Immunity in Georgia*, 27 EMORY L.J. 717, 721 (1978).

19. See, e.g., *Miree v. United States*, 242 Ga. 126, 249 S.E.2d 573 (1978) (counties); *Crowder v. Department of State Parks*, 228 Ga. 436, 185 S.E.2d 908 (1971), *cert. denied*, *Crowder v. Georgia*, 406 U.S. 914 (1972) (Department of State Parks); *Perry v. Regents of Univ. Sys.*, 127 Ga. App. 42, 192 S.E.2d 518 (1972) (State Board of Regents); *Maddox v. City of Atlanta*, 47 Ga. App. 791, 171 S.E. 573 (1933) (municipalities).

20. *Sheley v. Board of Pub. Educ.*, 233 Ga. 487, 212 S.E.2d 627 (1975); *Hale v. Davies*, 86 Ga. App. 126, 70 S.E.2d 923 (1952).

official capacity. When the officer is sued in his official capacity, governmental immunity usually bars the action.²¹ A contrary result is reached, however, when the officer is sued individually because "where State officers or agents are sued personally, the suit is generally maintainable, . . ." ²² This is the general rule in Georgia, but the inquiry goes beyond the manner in which the defendant is named in the suit.

Even though an official is sued individually, Georgia courts may decide that the suit is actually one against the officer in his official capacity, and, thus, against the state. In *Roberts v. Barwick*,²³ plaintiff brought an equitable petition against defendant, individually and as Commissioner of Agriculture, seeking the appointment of a receiver to operate the State Farmers' Market. Plaintiff alleged that defendant's successor in office had breached an agreement to pay one hundred dollars per month to plaintiff for five years in exchange for the assignments of leases plaintiff had obtained for the purpose of operating a farmers' market.²⁴ The court held that the suit was brought against defendant in his official capacity, and since the granting of plaintiff's requested relief would affect the property of the state, the suit must fail due to the sovereign immunity of the state.²⁵ Thus, plaintiff's initial burden is to show that the suit filed against the individual does not seek state funds as damages.

Plaintiff's success in stating a cause of action against a public official further depends upon the court's categorization of "the public officer's harm-causing act."²⁶ By labeling the act as either discretionary or ministerial, courts in Georgia can decide the liability of a public official. Governmental immunity is extended to the public official acting within the scope of his authority if the act is within his discretion,²⁷ that is, if it requires "personal deliberation, decision and judgment."²⁸ However, if the act is found to be ministerial,²⁹ the official is not immune from suit.³⁰

21. *Roberts v. Barwick*, 187 Ga. 691, 1 S.E.2d 713 (1939), but see *infra* notes 33-35 and accompanying text.

22. *Florida State Hosp. for the Insane v. Durham Iron Co.*, 194 Ga. 350, 353, 21 S.E.2d 216, 218 (1942).

23. 187 Ga. 691, 1 S.E.2d 713 (1939).

24. *Id.* at 692, 1 S.E.2d at 714.

25. *Id.* at 695, 1 S.E.2d at 716. The court stated that

[t]he general rule . . . is that any case, regardless of who are named parties thereto, that could result in a judgment or decree that would in any manner affect or control the property or action of the State, . . . is a suit against the State and can not be brought without her consent.

26. *McManis, Personal Liability of State Officials Under State and Federal Law*, 9 GA. L. REV. 821, 825 (1975).

27. INSTITUTE OF GOVERNMENT, UNIVERSITY OF GEORGIA, PERSONAL LIABILITY OF PUBLIC OFFICIALS 34 (1975).

28. See W. PROSSER, *supra* note 12.

29. In *City Council of Augusta v. Owens*, 111 Ga. 464, 36 S.E. 830 (1900), the court

One policy supporting the ministerial/discretionary test and its application to public officials is based upon the theory of separation of powers.³¹ The legislature has vested certain powers and duties in the executive or administrative branch of government. Judicial intrusion, in the form of private action against a public official, into the scheme established by the legislature and executed by the administrative arm is inappropriate.³² Therefore, discretionary or quasi-judicial³³ acts performed by the public official are protected by governmental immunity, with the following exceptions: acts performed outside the official's scope of authority;³⁴ acts performed with malice;³⁵ and acts which violate a statute.³⁶ If the act is

explained the ministerial-judicial dichotomy:

Should the city decide when a street should be opened, closed or repaired, . . . , it is clearly exercising legislative or judicial functions, but when it engages in the work of opening, closing or repairing a street, . . . and is thus engaged in the physical execution of the work, it is evidently in the discharge of duties purely in a ministerial nature.

Id. at 478, 36 S.E. at 835.

30. Vandall, *Tort Liability of Public Officials, Annual Survey of Georgia Law*, 29 *MERCER L. REV.* 303, 308 (1977).

31. Comment, *The Discretionary Function Exception to Government Tort Liability*, 61 *MARQ. L. REV.* 163, 166 (1977).

32. In *Holcombe v. Georgia Milk Producers Confederation*, 188 Ga. 358, 3 S.E.2d 705 (1939), the court explained the public policy behind sovereign immunity:

[I]t is neither becoming nor convenient that a State, exercising sovereign powers, should be summoned as a defendant to answer the complaints of private citizens, or that the course of its public policy or the administration of its public affairs "should be subjected to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests."

Id. at 362, 3 S.E.2d at 708 (citations omitted).

33. See, *McManis*, *supra* note 25, at 826. The term quasi-judicial is used interchangeably with discretionary, and like discretionary, is a reference to the official's power to use judgment in carrying out the duties of his office.

34. *Hodges v. Youmans*, 122 Ga. App. 487, 177 S.E.2d 577 (1970) (Defendant county commissioner conspired to injure plaintiff by a denial of a construction permit); *Varner v. Thompson*, 3 Ga. App. 415, 60 S.E. 216 (1908) (Defendants fraudulently established themselves as officials and then fined and imprisoned plaintiff for default).

35. Georgia courts have used a variety of terms in combination in the establishment of a standard of malice. The court in *Partain v. Maddox*, 131 Ga. App. 778, 206 S.E.2d 618 (1974) has recently stated the standard: "[T]he sound rule seems to be that some words beyond the mere allegations of negligence and failure to perform should be alleged, showing an intent to act wrongfully, wilfully, maliciously, unfaithfully, or in bad faith, . . . showing evil intent. . . ." *Id.* at 782, 206 S.E.2d at 621.

36. *Walker v. Whittle*, 83 Ga. App. 445, 64 S.E.2d 87 (1951) (Sheriff was personally liable when he violated a statute prohibiting unlawful arrest); *Mathis v. Nelson*, 79 Ga. App. 639, 54 S.E.2d 710 (1949) (Warden was personally liable when he had actual knowledge that trucks under his supervision were being operated in violation of a statute); *but see Gormley v. State*, 54 Ga. App. 843, 189 S.E. 288 (1936) (Although statute provided for inspection of banks twice a year, state superintendent of banks was not liable for failing to do so as this

ministerial, that is, without a grant of discretion to the officer, then judicial review of the officer's negligent performance of the act is not an intrusion into the legislative delegation of power.

The court in *Partain v. Maddox*³⁷ applied the discretionary concept to extend governmental immunity to a quasi-judicial official. In *Partain*, defendant Maddox, Chairman of the Board of Pardons and Paroles, followed the instructions of the Governor of Georgia that the locks be changed in the Board's offices so that plaintiff Partain, former Board member, could not gain admittance. The court held that since he acted within his discretion and without wilfulness, corruption, or malice, defendant public official was immune from liability for his acts.³⁸

The opposite result is reached when the act is labeled ministerial, a conclusion achieved by various means. Georgia courts have ruled in favor of personal liability on the basis that the defendant was an employee,³⁹ rather than a public official. Construing the injurious act as effectively ministerial avoids the necessity of finding an exception to the discretionary function test.⁴⁰ *Foster v. Crowder*⁴¹ is illustrative. Foster brought suit against the City of Atlanta and its employee, Crowder, for injuries sustained when Crowder drove a city truck into Foster, striking Foster as he crossed a street in accordance with the traffic signal. The court held that the city was not liable for plaintiff's tort claim by virtue of its municipal immunity, but the employee was personally liable. The court stated that "governmental immunity does not extend to the city employee who negligently operated the vehicle."⁴² Even though the court recognized that officers could be granted immunity for discretionary acts,⁴³ it chose instead to categorize defendant as an employee, thus effectively finding the act of driving the truck to be ministerial.

The court reached the same result as *Foster*, one year earlier, in *Irwin v. Arrendale*,⁴⁴ but the rationale was based upon the duty or standard of care owed by defendant to plaintiff. In *Irwin*, a prisoner brought suit against the prison medical director seeking damages for assault and battery, alleging that he had been subjected to an X-ray without his consent.

was discretionary, and within the scope of his authority).

37. 131 Ga. App. 778, 206 S.E.2d 618 (1974).

38. *Id.* at 785, 206 S.E.2d at 622.

39. See *McManis*, *supra* note 25 at 828-31.

40. See *supra* notes 33-35 and accompanying text.

41. 117 Ga. App. 568, 161 S.E.2d 364 (1968).

42. *Id.* Further, the court in *Foster* explained that the employee in committing the tort has violated his duty to the one injured and so, he is liable.

43. 117 Ga. App. at 569 n.2, 161 S.E.2d at 365 n.2. "Officers in the performance of administrative, legislative or judicial functions can be held only for malicious, corrupt, oppressive or unauthorized action." *Id.* (citations omitted).

44. 117 Ga. App. 1, 159 S.E.2d 719 (1967).

Defendant asserted that the suit was actually one against the state since plaintiff had not alleged that defendant's negligent acts were the proximate cause of plaintiff's injury. The court rejected defendant's argument and held that defendant could be personally liable for his breach of duty to plaintiff, based on the physician-patient relationship.⁴⁶

Construing plaintiff's complaint, the court in *Hennessey* found allegations of agency,⁴⁶ failure to exercise sound judgment,⁴⁷ and negligent exercise of authorized discretion.⁴⁸ In combination, the court used these allegations to interpret the complaint as one asserting that defendant in fact had authorized discretion in maintaining the school building by virtue of his office, and that the negligent exercise of his authorized discretion caused plaintiff's injuries. Applying the *Roberts*⁴⁹ test and using the allegation of agency, the court in *Hennessey* decided that defendant was being sued in his official capacity as principal of the school. This served to strengthen the court's decision that defendant's act was discretionary, and ultimately, to facilitate the extension of governmental immunity. Since there was no allegation that defendant's conduct was wilful, wanton, or outside the scope of his authority, the court held that defendant was protected by governmental immunity; therefore, plaintiff's claim was dismissed.⁵⁰

The court in *Hennessey* relied on *Partain*⁵¹ to explain the immunity which may be extended to quasi-judicial officers for injuries which stem from acts performed in furtherance of their discretionary duties.⁵² Additionally, the court cited three cases as examples of officials' discretionary

45. *Id.* at 5, 159 S.E.2d at 724. The court also found statutory duties imposed upon a jailer or other officer to care for the prisoner. *Id.* at 3-4, 159 S.E.2d at 723.

46. 245 Ga. at 332, 264 S.E.2d at 880. The court reasoned that because the board of education is responsible for the public education and the maintenance of school premises is necessary to that end, the board must grant discretion to some of its agents in fulfilling these responsibilities. Specifically, the court reasoned that the allegations of defendant's legal control and custody over the school building and his supervision and direct control over the allegedly hazardous condition were allegations of agency.

47. *Id.* The court stated that the complaint actually alleged that defendant, in his official capacity, by allowing an allegedly dangerous condition to exist, failed to exercise sound discretion.

48. *Id.* The court surmised that the allegations were actually recitations of defendant's negligent exercise of his authorized discretion as principal and agent of the board, in that the allegations charged that he failed to correct a hazardous situation of which he knew or should have known.

49. 187 Ga. 691, 1 S.E.2d 713.

50. 245 Ga. at 332, 264 S.E.2d at 880.

51. 131 Ga. App. 778, 206 S.E.2d 618 (1974). *See supra* notes 36-37 and accompanying text.

52. 245 Ga. at 330-31, 264 S.E.2d at 879-80.

acts as a release from personal liability. In *Vickers v. Motte*,⁵³ plaintiff claimed that defendant road commissioner refused to stop the work of filling land adjacent to plaintiff's property, even though plaintiff repeatedly warned that continued work would result in flooding plaintiff's land. The court noted that defendant had authorized discretion, but held that plaintiff's allegations of recklessness, negligence, and bad faith were sufficient to show malice and thus allow suit against defendant who could be held personally liable.⁵⁴

The court then cited *Harrell v. Graham*⁵⁵ and *Price v. Owen*⁵⁶ as factual examples of acts performed within the official's discretion and therefore immune from liability. In *Harrell*, a school board and its employee, a bus driver, were sued for injuries sustained when a low-hanging tree branch scratched plaintiff's eye while plaintiff was a passenger on the school bus. Plaintiff charged that the board members were negligent in choosing the bus route. The suit was dismissed against the individual members of the school board due to governmental immunity.⁵⁷ The lower court's denial of the bus driver's demurrer to plaintiff's claim was, however, not appealed.⁵⁸ The plaintiff's claim was allowed to stand against the employee who, though following the instructions of his employer, was the one responsible for driving the bus near enough to the tree branches to cause plaintiff's injury. Thus, it appears from *Foster* that the one whose negligence is the nearest cause of the injury will be personally liable.

In *Price*, the court held that a warden acted within his discretion in allowing convicts to travel outside the prison camp without a guard and so was not liable when the convicts injured a third person.⁵⁹ The court remarked that the convicts' wrongful act would ordinarily be too remote from the warden's misconduct within the prison camp to allow suit against the warden personally by a third party. However, the court stated that this would be changed if the warden had, in any way, been "connected with the perpetration of the tort, or had reasonable grounds for apprehending that it would be committed."⁶⁰

The court's reliance in *Hennessy* upon *Roberts*, *Vickers*, *Harrell*, and *Price* is of questionable foundation. The court purported to apply the

53. 109 Ga. App. 615, 137 S.E.2d 77 (1964).

54. *Id.* at 620, 137 S.E.2d at 81. *Vickers* presented an excellent explanation of the terms malice, bad faith, and wilful.

55. 70 Ga. App. 178, 27 S.E.2d 892 (1943).

56. 67 Ga. App. 58, 19 S.E.2d 529 (1942).

57. 70 Ga. App. at 181, 27 S.E.2d at 894.

58. *Id.* at 180, 27 S.E.2d at 894.

59. 67 Ga. App. 58, 19 S.E.2d 529.

60. *Id.* at 63, 19 S.E.2d at 533.

Roberts test⁶¹ to decide that the suit was being brought against defendant in his official capacity. The facts in *Hennessy*, however, do not support the conclusion reached by the court. Suits which result in a loss of the state's property were the concern of the court in *Roberts*.⁶² In *Hennessy*, there was no showing that a money judgment awarded to plaintiff would be satisfied from state funds.

The court relied on the facts in *Vickers* as an example of a discretionary act.⁶³ *Vickers*, however, can be distinguished from *Hennessy* in that the officer in *Vickers* was granted discretion by statute,⁶⁴ whereas in *Hennessy*, there is no similar statutory grant of discretion to a school principal. In fact, the issue in *Hennessy* was whether the power to control school premises granted to school boards by statute⁶⁵ should be extended to the defendant school principal. Moreover, the case is more often cited for its discussion of malice and its holding that plaintiff's allegations were sufficient to show malice, thus exemplifying this exception to the protection afforded discretionary acts.⁶⁶

The court in *Harrell* was faced with the question of the personal liability of individual school board members.⁶⁷ In *Hennessy*, the issue was not the individual liability of defendant's employer, the DeKalb County Board of Education, since the principal was the sole defendant.⁶⁸ Defendant's situation bears a closer relation to that of the bus driver in *Harrell* since defendant may have had an active part in causing the injury to plaintiff.⁶⁹

The *Price* decision has been severely criticized for its unfair result.⁷⁰ Had *Price* been analyzed under the duty theory discussed in *Irwin*⁷¹ or under the theory of proximate cause as the dicta in *Price*⁷² suggested,

61. 187 Ga. at 695, 1 S.E.2d at 716. See *supra* note 24 and accompanying text.

62. *Id.*

63. 245 Ga. at 331, 264 S.E.2d at 880.

64. 109 Ga. App. at 617, 137 S.E.2d at 79.

65. GA. CODE ANN. § 32-909(a) (Supp. 1979).

66. See, e.g., Vandall, *supra* note 29, at 317.

67. 70 Ga. App. at 178, 27 S.E.2d at 893.

68. 150 Ga. App. at 326, 257 S.E.2d at 316.

69. 245 Ga. at 331, 264 S.E.2d at 880. Plaintiff alleged defendant's negligence in allowing a dangerous condition to exist and continue under his direct supervision and control. Since the court decided this case based upon a construction of the pleadings, no facts were presented regarding defendant's actual role in causing plaintiff's injury.

70. INSTITUTE OF GOVERNMENT, UNIVERSITY OF GEORGIA, PERSONAL LIABILITY OF PUBLIC OFFICIALS 37 (1975). Since the *Price* decision, a statute has been passed which allows municipal corporations and counties to purchase liability insurance for their vehicles, GA. CODE ANN. § 56-2437(1) (1977). In addition, GA. CODE ANN. § 56-2437(2) (1977) expressly waives governmental immunity up to the amount of insurance purchased under § 56-2437(1).

71. 117 Ga. App. 1, 159 S.E.2d 719. See *supra* note 42 and accompanying text.

72. 67 Ga. App. at 63, 19 S.E.2d at 533. See *supra* note 58 and accompanying text.

perhaps a more equitable result would have been reached.

The dissent in *Hennesy* pointed out the unworkable distinction between discretionary and ministerial duties⁷³ as employed by both the court of appeals and the supreme court.⁷⁴ The result in *Hennesy* was reached solely on the basis of the court's interpretation of plaintiff's pleadings.⁷⁵ In order to "open the door" to a holding of immunity, the court first had to find that the acts complained of were done, or not done, in the exercise of defendant's official discretion. The court of appeals in *Webb v. Hennesy*⁷⁶ held that defendant's acts were ministerial, therefore, defendant was liable.⁷⁷ This, in itself, is an excellent example of the case-by-case decision method criticized by the dissent.⁷⁸

The dissent in *Hennesy* recognized that the result of the application of sovereign immunity is unfair to an innocent tort victim and, instead, advocated inquiry into defendant's negligence as the proximate cause of the injury as the basis for determining defendant's liability.⁷⁹ Finally, the dissent suggested "a waiver of immunity up to the limits of . . . insurance coverage"⁸⁰ as an alternative to the strict confines of governmental immunity and its inequitable result.

The better solution in *Hennesy* would have been to view the case in the same manner as the cases which dealt with "employees"⁸¹ in which the actors were held to be personally liable for their negligence. Those decisions were based, primarily, on traditional tort law with little or no discussion of the doctrine of sovereign immunity. The court in *Hennesy* could have thus avoided the troublesome ministerial/discretionary test and decided the case according to traditional concepts of tort law. If this recommendation has been applied by the court in *Hennesy*, plaintiff would have had the opportunity to make out a case and defendant would have had the same opportunity to show that no breach of duty occurred or that any negligence on his part was not the proximate cause of plaintiff's harm. The case would have been tried on the merits, not on the court's construction of the pleadings.

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73. See W. PROSSER, LAW OF TORTS § 132 (4th ed. 1971).

74. 245 Ga. at 333, 264 S.E.2d at 881 (Nichols, C.J., dissenting).

75. 245 Ga. at 332, 264 S.E.2d at 880. See *supra* notes 44-46 and accompanying text.

76. 150 Ga. App. 326, 257 S.E.2d 315 (1979).

77. *Id.* at 328, 257 S.E.2d at 317.

78. 245 Ga. at 333, 264 S.E.2d at 881.

79. *Id.*

80. *Id.* at 334, 264 S.E.2d at 881.

81. See *supra* notes 40-43 and accompanying text.

