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Torts

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I. INTRODUCTION

This Article addresses recent cases decided during the survey period in the area of torts.[1] This survey period is especially remarkable for a couple of cases decided by the Georgia Supreme Court that overruled prior precedents.

II. MEDICAL MALPRACTICE

A jury returned a verdict for over a million dollars but declined to award anything for pain and suffering in *Rockdale Hospital, LLC v. Evans*.[2] This oddity resulted in the plaintiff seeking additur or a new trial on damages on the grounds that the verdict was clearly inadequate and inconsistent with the preponderance of the evidence.[3] The trial court denied the motion and the Georgia Court of Appeals reversed the trial court's denial of that motion and ordered a new trial of the entire case.[4] In reaching its decision, the court of appeals concluded that the verdict was "so clearly inadequate under a preponderance of the evidence as to shock the conscience and necessitate a new trial under OCGA § 51-12-12 (b)."[5]

The Georgia Supreme Court reversed, holding that the court of appeals wrongly applied a preponderance of the evidence standard rather than an abuse of discretion standard to its review of the trial court's

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[1] For an analysis of tort law during the previous survey period, see Jarome E. Gautreaux, *Torts*, *Annual Survey of Georgia Law*, 71 MERCER L. REV. 295 (2019).

[2] 306 Ga. 847, 834 S.E.2d 77 (2019).

[3] *Id.* at 850, 834 S.E.2d at 81.

[4] *Id.*

[5] *Id.* (citing Evans v. Rockdale Hosp., LLC, 345 Ga. App. 511, 516, 813 S.E.2d 601, 606 (2018)).

decision.[6] The court of appeals decision was therefore vacated and the case was remanded.[7]

A trial court granted a directed verdict on the issue of proof of negligence in *Rhoades v. McCormack*.[8] The case involved a facial burn during a dental procedure, apparently from an overheated saw.[9] At trial, the plaintiff's expert could not offer an opinion about the specific measures that the doctor performing the surgery should have undertaken to prevent the burn.[10] Thus, the trial court granted a directed verdict because the plaintiff had failed to prove an act of negligence.[11]

The court of appeals affirmed the trial court, agreeing that there was no showing of any specific act of negligence proved, and thus the expert was simply relying on an inference of negligence because of an unintended result.[12] In reaching this result, the court reiterated the well-established rule that the doctrine of *res ipsa loquitor* does not apply in medical negligence cases.[13]

The Georgia Supreme Court reversed the court of appeals on the issue of a jury instruction on assumption of the risk in *Daly v. Berryhill*.[14] At trial, the evidence showed that a man fainted and fell from a deer stand five days after undergoing heart surgery.[15] The plaintiff alleged that the physician prescribed too much blood pressure medication following the surgery.[16] The trial court instructed the jury on assumption of the risk, and the court of appeals reversed.[17]

The Georgia Supreme Court reversed the court of appeals.[18] The plaintiff argued evidence had to show knowledge of an actual, specific risk, such as knowledge that the plaintiff knew the specific risk of fainting because of his blood pressure medicine.[19] But, based on evidence that the physician instructed the plaintiff not to engage in strenuous activity and not to lift more than ten pounds or bend or stoop over for at least seven days post-surgery, the court found that the assumption of the

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[6] *Id.* at 853, 834 S.E.2d at 82.

[7] *Id.*

[8] 353 Ga. App. 635, 839 S.E.2d 171 (2020).

[9] *Id.* at 636, 839 S.E.2d at 173.

[10] *Id.* at 637, 839 S.E.2d at 174.

[11] *Id.* at 635, 839 S.E.2d at 173.

[12] *Id.* at 638–39, 839 S.E.2d at 175.

[13] *Id.* at 639, 839 S.E.2d at 175 (citing Hawkins v. OB-GYN Assocs*., P.A.*, 290 Ga. App. 892, 894, 660 S.E.2d 835, 838 (2008)).

[14] 303 Ga. 831, 843 S.E.2d 870 (2020).

[15] *Id.* at 831, 843 S.E.2d at 871.

[16] *Id.* at 832, 843 S.E.2d at 872.

[17] *Id.* at 831, 843 S.E.2d at 871.

[18] *Id.* at 831, 843 S.E.2d at 870.

[19] *Id.* at 834, 843 S.E.2d at 873.

risk instruction was properly given by the trial court.[20] Thus, it appears that the supreme court is not requiring specific subjective knowledge of the plaintiff to support a charge on assumption of the risk, and may now be using an objective "reasonable person" standard, or something very akin to it, on this issue.[21]

III. IMMUNITY AND GOVERNMENTAL LIABILITY

The topic of qualified immunity and its evolution into a nearly all-powerful defense to claims against governmental malfeasance is getting much-needed attention these days.[22] As is true in most survey periods, the Georgia courts also continue to address immunity of governmental actors involved in tort actions.

The scope of the parties who must receive an ante litem notice was at issue in *Moats v. Mendez*.[23] The underlying case involved a car wreck between the plaintiff and a deputy sheriff. The ante litem notice was sent to the County Commissioners but not to the Sheriff's Office. The complaint was eventually filed and motions to dismiss were filed based on the failure of the plaintiff to send an ante litem notice to the Sheriff's Office. The trial court denied the motion to dismiss, and interlocutory review was sought and granted.[24]

A majority of the court of appeals reversed the trial court's denial of the motion to dismiss.[25] The majority opinion held that an ante litem notice must be provided to the Sheriff's Office when the claim involves conduct for which the Sheriff can be held vicariously liable.[26] Apparently, the Sheriff is enough "like" a county that it can be treated as a county for ante litem purposes.[27] Thus, despite the plain text of the statute that a claim against a county should be presented to the county, the majority reasons that a county presentment statute morphs into a Sheriff presentment statute, all while the statute never mentions sheriffs at all.[28]

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[20] *Id.*, 843 S.E.2d at 874.

[21] *Id.* 843 S.E.2d at 873–74 (discussing cases on specific knowledge requirement versus the "common sense" standard).

[22] *See* Jamison v. McClendon, No. 3:16-cv-595-CWR-LRA, 2020 U.S. Dist. LEXIS 139327(S.D. Miss. August 4, 2020).

[23] 349 Ga. App. 811, 824 S.E.2d 808 (2019)(cert granted).

[24] *Id.* at 12, 824 S.E.2d at 809–10.

[25] *Id.* at 818, 824 S.E.2d at 814.

[26] *Id.* at 817–18, 824 S.E.2d at 813–14.

[27] *Id.* at 814–15, 824 S.E.2d at 811–12.

[28] *Id.* at 817, 824 S.E.2d at 813.

The dissent rejected the "county-like" theory and noted that the language of O.C.G.A. § 36-11-1[29] does not specifically mention any entities other than counties and the text specifically only applies to "claims against counties."[30] The dissent also concluded that if the claim is treated as a claim against a county, the presentment of the claim to the county should suffice.[31]

Certiorari has been granted, so the Georgia Supreme Court should be issuing an opinion soon that resolves the debate.[32]

City immunity also received appellate scrutiny during the survey period. In *City of Lafayette v. Chandler*,[33] the court of appeals dealt with the recurring issue of how specific the demand for damages must be in an ante litem notice.[34] The case involved a serious motor vehicle wreck between the plaintiff and a city firefighter.[35] The ante litem notice, sent pursuant to O.C.G.A. § 36-33-5(e),[36] advised the city that the injured person was seeking over $100,000 in damages for treatment of several broken bones and corresponding hospitalizations and would seek to recover $1,000,000 at trial.[37]

The City argued that this general statement of the amount of damages was not specific enough to satisfy the statute.[38] The court rejected that argument and held that the statement of the amount of damages was sufficient.[39] In reaching this conclusion, the court noted that the $1,000,000 figure was specific enough to constitute an offer of compromise under the statute.[40] A note of caution, however, is important, as it seems the court also would not find the mere statement that damages "may exceed" a certain amount to be sufficient; it was the $1,000,000 amount that appeared to be an offer of compromise (or close to it) that tipped the scales from an impermissibly unclear amount of damages to a sufficiently definite statement of damages under the statute.[41]

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[29] O.C.G.A. § 36-11-1 (2019).

[30] *Moates*, 349 Ga. App. at 820–21, 824 S.E.2d at 815–16 (Doyle, J., *concurring in part and dissenting in part).*

[31] *Id.* at 821, 824 S.E.2d at 816.

[32] Mendez v. Moats, 2019 Ga. LEXIS 855* (Dec. 23, 2019.)

[33] 354 Ga. App. 259, 840 S.E.2d 638 (2020).

[34] *Id.* at 840, 840 S.E.2d at 639.

[35] *Id.*

[36] O.C.G.A. § 36-33-5(e) (2019).

[37] *City of Lafayette*, 354 Ga. App. at 259, 840 S.E.2d at 639.

[38] *Id.* at 260, 840 S.E.2d at 639.

[39] *Id.* at 261–62, 840 S.E.2d at 640–41.

[40] *Id.* at 262, 840 S.E.2d at 641.

[41] *Id.* at 261, 840 S.E.2d at 640 (discussing cases).

County immunity was at issue in *Gwinnett County v. Ashby*.[42] In *Ashby*, a mom attended her son's football practice, and while there, she stepped or slipped into an uncovered drain, sustaining serious injuries. The County asserted that the claims against it should be dismissed on grounds of sovereign immunity. The trial court denied the motion but granted an interlocutory appeal.[43]

The court of appeals reversed.[44] In so doing, it rejected the injured person's arguments regarding waiver of sovereign immunity.[45] Specifically, the court rejected the plaintiff's arguments that the purchase of liability insurance waived sovereign immunity of the county and that the state Tort Claims Act somehow applied to counties as well.[46] Finally, the court rejected the plaintiff's contention that the Recreational Property Act waived the county's immunity.[47]

IV. PREMISES LIABILITY

Whether a lease provision containing a one-year limitation period for filing a lawsuit is enforceable was at issue in *Langley v. MP Spring Lake, LLC*.[48] In that case, Langley, the tenant, was hurt when she slid on a crumbling curb in a common area of the apartment complex. Both the trial court and the court of appeals enforced the one-year limitation period. The court of appeals noted that the lease provided that the one-year period applied to "any legal action" even though it did not specifically state that it applied to personal injury actions. In so doing, the court of appeals purported to be relying on the plain language of the lease.[49]

The supreme court reversed.[50] The court noted that there were two main interpretations of the scope of the phrase "any legal action": an expansive one based on just the words themselves and a more narrow one based on the words plus the context of the lease.[51] Even textualists normally say that the context of words is important, but it appears that both the court of appeals and the trial court failed to take into account the context of the one-year limitation phrase.[52]

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[42] 354 Ga. App. 863, 842 S.E.2d 70 (2020).

[43] *Id.*, 842 S.E.2d at 71.

[44] *Id.*

[45] *Id.* at 865, 842 S.E.2d at 72.

[46] *Id.* at 865–66, 842 S.E.2d at 73.

[47] *Id.* at 866, 842 S.E.2d at 73.

[48] 307 Ga. 321, 834 S.E.2d 800 (2019).

[49] *Id.* at 321–23, 834 S.E.2d at 802–03.

[50] *Id.* at 329, 834 S.E.2d at 808.

[51] *Id.* at 325, 834 S.E.2d at 805.

[52] *Id.* at 327, 834 S.E2d at 806.

The supreme court also noted that it seemed unlikely, for example, that the limitation provision would apply to such legal matters as a car wreck between the plaintiff and one of the apartment managers, or to a claim involving an intentional attack by an apartment manager.[53] The court left open the possibility that a differently-worded limitation period would be enforceable, but did not specifically address that broader issue.[54]

The knowledge required to sustain a claim for a slip and fall was at issue in *Ermert v. Wildwood at Meadow Gate Homeowners Association*.[55] In that case, the plaintiff stepped in a hole in a grassy common area near a pond on the property and fractured her foot. The plaintiff's son notified the management company and pictures were taken of the area, but no hole was located in the area where the fall was alleged to have occurred.[56]

The trial court granted summary judgment. In its order, the trial court noted that there was no evidence supporting any actual or constructive notice of the hole. One way to prove such notice was to show that the hazard had existed for enough time for a reasonable inspection to have revealed it.[57]

The court of appeals affirmed.[58] The court noted that the plaintiff had failed to show that any more thorough inspection of the area was necessary, in light of no previous falls or injuries in the area.[59] The court reiterated the long-standing rule that the law, in this context, requires only ordinary care, not extraordinary care.[60]

The constitutionality of a portion of the dog-bite statute, O.C.G.A. § 51-2-7,[61] was at issue in *S&S Towing & Recovery, Ltd. v. Charnota*.[62] In *Charnota*, the plaintiff was walking his dog on a leash in front of his home when his dog was attacked and killed by another dog that came from S&S Towing & Recovery's premises nearby. Then the dog continued into the plaintiff's house and attacked the plaintiff.[63]

One of the claims was brought under O.C.G.A. § 51-2-7, which provides in full as follows:

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[53] *Id.*

[54] *Id.* at 379, 834 S.E.2d at 807.

[55] 354 Ga. App. 656, 840 S.E.2d 457 (2020).

[56] *Id.* at 657, 840 S.E.2d at 459.

[57] *Id.* at 657–58, 840 S.E.2d at 459.

[58] *Id.* at 661, 840 S.E.2d at 461.

[59] *Id.* at 660–61, 840 S.E.2d at 461.

[60] *Id.* at 659, 840 S.E.2d at 460.

[61] O.C.G.A. § 51-2-7 (2019).

[62] 844 S.E.2d 730 (2020).

[63] *Id.* at 731–32.

> A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured. In proving vicious propensity, it shall be sufficient to show that the animal was required to be at heel or on a leash by an ordinance of a city, county, or consolidated government, and the said animal was at the time of the occurrence not at heel or on a leash.[64]

The Defendants argued that the presumption of viciousness that is contained in the statute violated due process. The trial court rejected that argument but granted an interlocutory application.[65]

The supreme court analyzed the history of the two sentences of the statute.[66] The court noted that knowledge of the animal's dangerousness was an essential element of the action from the time the statute was first enacted.[67] The defendants argued that the second sentence (which was added later) created a presumption that an animal was dangerous based only on a violation of the leash law, and thus violated due process.[68]

The court determined that the second sentence of O.C.G.A. § 51-2-7 simply created an additional method of proving that an animal was dangerous or vicious.[69] That is, an owner can rebut the presumption of dangerousness by showing that he or she had no knowledge either of the animal's dangerousness or that the animal was unrestrained.[70] This rebuttable presumption, the court held, did not violate due process.[71]

V. APPORTIONMENT

Apportionment in tort cases continues to receive a good deal of appellate attention.

In *Suzuki Motor of America, Inc. v. Johns*,[72] a motorcyclist was injured and brought product liability claims based on allegedly defective brakes. After plaintiff was injured, he received a notice of a recall from Suzuki. Suit was filed.[73]

At trial, defendants contended that the crash was caused not by any defect with the brakes, but rather by the plaintiff's negligent

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[64] O.C.G.A. § 51-2-7 (2019).

[65] *Charnota*, 844 S.E.2d at 732.

[66] *See id.* at 732–36.

[67] *Id.* at 734.

[68] *Id.*

[69] *Id.* at 735.

[70] *Id.*

[71] *Id.*

[72] 351 Ga. App. 186, 830 S.E.2d 549 (2019)(cert. granted).

[73] *Id.* at 186–88, 830 S.E.2d at 552–54.

maintenance, and specifically, his failure to change the brake fluid frequently enough. Plaintiffs contended that there was a defect with the brakes that resulted in the brake failure. The jury found for plaintiff and awarded $10.5 million in compensatory damages. The jury apportioned 49% of the blame to plaintiff and 51% to the defendants collectively.[74] The trial court then apportioned the award pursuant to O.C.G.A. § 51-12-33.[75] Defendants sought a directed verdict and new trial, which were denied.[76]

The court of appeals analyzed the defendants' claim that the brakes were "materially altered" by the plaintiff and concluded that the question of alteration was for the jury.[77] The court relied also on the long-standing rule that questions of proximate cause are generally reserved for the jury.[78]

Regarding the warnings claim, the court of appeals likewise found a jury issue existed.[79] The court also noted that expert testimony on the adequacy of the warnings was not necessary.[80] Also, the court permitted into evidence two other similar incidents.[81]

The more interesting aspect of the case was that the court also concluded that the apportionment of fault to the plaintiff was permitted, despite the common law principle that comparative negligence was not a defense to strict product liability claims.[82] In reaching this conclusion, the court relied on *Couch v. Red Roof Inns,*[83] where the Georgia Supreme Court gave a broad reading to the apportionment statute.[84] The supreme court will likely have to decide how to reconcile these competing rules—no comparative negligence in strict product liability claims versus apportionment.

Several issues, including apportionment, were involved in *Avis Rent A Car System, LLC v. Smith*.[85] In that case, an employee of an Avis car rental business came back to work one night and stole one of the cars

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[74] *Id.* at 189, 830 S.E.2d at 554

[75] O.C.G.A. § 51-12-33.

[76] *Suzuki Motor of America, Inc.,* 351 Ga. App. at 189, 830 S.E.2d at 554.

[77] *Id.* at 191, 830 S.E.2d at 555.

[78] *Id.* at 193, 830 S.E.2d at 556–57.

[79] *Id.* at 194, 830 S.E.2d at 557.

[80] *Id.* at 194–95, 830 S.E.2d at 558.

[81] *Id.* at 196–97, 830 S.E.2d at 559.

[82] *Id.* at 198, 830 S.E.2d at 560.

[83] 291 Ga. 359, 729 S.E.2d 378 (2012).

[84] *Suzuki Motor of America, Inc.,* 351 Ga. App. at 198, 830 S.E2d at 560 (citing Couch v. Red Roof Inns, 291 Ga. 359, 362, 729 S.E.2d 378, 381 (2012)).

[85] 353 Ga. App. 24, 836 S.E.2d 100 (2019).

from the lot. The car was then involved in a police chase and crashed into a wall where the plaintiff was sitting, inflicting serious injuries.[86]

Suit was filed against Avis Rent a Car System and Avis Business Group, and a large verdict was returned. The verdict apportioned damages as well, finding that the two Avis entities were 50% at fault, the operator of the Avis local business was 15% at fault, and the employee who stole the car was 15% at fault.[87] A manager and a security officer were each apportioned 1% fault as well.[88] Avis argued on appeal that it should have had less fault apportioned to it.[89] The trial court apportioned a total of 67% of the fault to Avis, on the grounds that the other defendants were employees of Avis, and thus Avis was liable for their fault as well.[90] Avis argued that 15% of the fault should not have been attributed to it.[91] The main problem with the trial court's decision was that it failed to consider that claims were asserted against Avis that were not based on vicarious liability, and the jury's verdict did not specify the amounts awarded under any particular theory of liability—vicarious or direct.[92]

The local Avis business that operated the lot and its owner argued that they were not liable for claims of negligent hiring or negligent retention because the employee who stole the car, Perry, was not acting under color of employment when he collided with the plaintiff.[93]

This was perhaps a fairly easy call for the court. It takes no special acts of ratiocination to discern that an employee who comes back to the car lot after it has closed and steals a car and then flees the police is not acting under color of employment. But what is the test for this vague phrase—"under color of employment?" The court rejected a broad construction of the phrase that would conclude that an employee acts under color of employment when her actions bear any relationship at all to her employment.[94] Instead, the court concluded that an employee acts under color of employment when "the employer-related conduct that allowed the employee to commit the tort was conduct in the performance of his duties, or conduct permitted by, approved by, or allowed by the employer."[95]

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[86] *Id.* at 25, 836 S.E.2d at 103.

[87] *Id.* at 24–25, 836 S.E.2d at 102–03.

[88] *Id.* at 25, 836 S.E.2d at 103.

[89] *Id.*

[90] *Id.* at 26, 836 S.E.2d at 103–04.

[91] *Id.*, 836 S.E.2d at 104 (apparently Avis did not contest its liability for the 1% fault of the security manager).

[92] *Id.* at 27, 836 S.E.2d at 104.

[93] *Id.* at 28, 836 S.E.2d at 105.

[94] *Id.*

[95] *Id.* at 28–29, 836 S.E.2d at 105 (discussing cases).

VI. MALICIOUS PROSECUTION

One case this survey period seems like it was straight out of a Dickens' novel. A person bought a tomato at WalMart but received a beating and a broken leg from an overzealous officer who apparently thought the tomato was stolen.[96] In *Carnegay v. WalMart Stores, Inc.*, a person bought and paid for a tomato, but then thought he had been overcharged for it so he walked to the produce department to weigh it and then left the store. That was when a security guard and off-duty police officer named Trevor King entered Carnegay's life. King administered a beating to Carnegay as he attempted to leave the store, conduct for which he was eventually indicted and sentenced to 5 years imprisonment.[97]

Carnegay filed suit against WalMart for false imprisonment and other claims. The trial court granted summary judgment to WalMart, finding that King, an off-duty police officer, was not an employee of WalMart but rather was an independent contractor.[98]

The court of appeals reversed the grant of summary judgment on the false imprisonment claim.[99] The court held that there was evidence that King was acting under instructions from Boyd, a WalMart employee and loss prevention officer.[100] This evidence prevented summary judgment.[101]

VII. BAD FAITH/ABUSIVE LITIGATION

The Georgia Supreme Court overruled several cases on punitive damages in the abusive litigation context in *Coen v. Aptean*.[102] In *Aptean*, an employee sought punitive damage on an abusive litigation claim against a former employer.[103] The employee was awarded a large sum for attorney's fees and litigation expenses, based on the litigation tactics employed by the defendants and their attorneys. These tactics included asserting baseless defenses and a strategy of "litigation by attrition."[104]

The trial court granted a motion to dismiss, finding that the plaintiff had not pled any special damages, and instead only asserted injury to "peace, feelings, and happiness" which was not sufficient for the claim for

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[96] Carnegay v. WalMart Stores, Inc., 353 Ga. App. 656, 839 S.E.2d 176 (2020).

[97] *Id.* at 657, 839 S.E.2d at 179.

[98] *Id.* at 658, 839 S.E.2d at 179.

[99] *Id.* at 666, 839 S.E.2d at 184.

[100] *Id.* at 662, 839 S.E.2d at 182.

[101] *Id.* at 664, 839 S.E.2d at 183.

[102] 307 Ga. 826, 838 S.E.2d 860 (2020).

[103] *Id.* at 827, 838 S.E.2d at 861.

[104] *Id.*

abusive litigation.[105] The trial court further found that punitive damages were not permissible in the abusive litigation context.[106]

The court of appeals held that punitive damages are not allowed on abusive litigation claims.[107] The supreme court considered this issue at great length, engaging in an extensive, detailed analysis of prior precedent.[108] The rule finally adopted in the court's opinion is that punitive damages are allowed in abusive litigation claims under O.C.G.A. § 51-12-6,[109] but only when the only injury is not solely to the "peace, happiness and feelings" of the plaintiff.[110]

Confusion over the availability of attorney's fees and litigation expenses on a counterclaim was resolved in *SRM Group, Inc. v. Travelers Property Casualty Co. of America*.[111] The case involved a suit by Travelers to collect unpaid workers compensation premiums from SRM Group. A counterclaim was asserted by SRM, based on an allegation that Travelers had done an audit that misclassified some employees and resulted in a larger premium. SRM recovered at trial on its counterclaim, including attorney's fees.[112]

The court of appeals concluded that a plaintiff-in-counterclaim is precluded from seeking an award of attorney's fees under O.C.G.A. § 13-6-11,[113] unless the counterclaim is permissive as opposed to compulsory.[114] But the supreme court rejected that distinction, engaged in a lengthy and detailed analysis, and held that attorney's fees are permissible for any counterclaims, not just permissive counterclaims.[115]

VIII. CONCLUSION

This survey period included a number of interesting tort cases, drawn from a variety of factual settings. Perhaps most remarkable this survey period is the Georgia Supreme Court's willingness to engage in such lengthy and thoughtful opinions, and to overrule precedent when such overruling is justified.

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[105] *Id.* at 828, 838 S.E.2d at 861–62.

[106] *Id.* at 826–27, 838 S.E.2d at 861.

[107] *Id.* at 828–29, 838 S.E.2d at 862.

[108] *See id.* at 839, 838 S.E.2d at 869.

[109] O.C.G.A. § 51-12-6 (2020).

[110] *Coen,* 307 Ga. at 840, 838 S.E.2d at 869–70.

[111] 308 Ga. 404, 841 S.E.2d 729 (2020).

[112] *Id.* at 404, 841 S.E.2d at 731.

[113] O.C.G.A. § 13-6-11 (2020).

[114] *SRM Group*, 308 Ga. at 405, 841 S.E.2d at 731.

[115] *Id.* at 410–11, 841 S.E.2d at 735.