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Tort Law

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by Leighton Moore*

During the period covered by this Article, developments in Georgia tort law were mainly attributable to the appellate courts. Full-scale legislative tort reform was not accomplished in the 2003 session, although it is likely to occur next year. The general assembly passed reforms to civil practice that had some impact on tort law, but these did not go into effect until July 2003, and thus fall outside the scope of this Article.[1] In contrast, both the supreme court and the court of appeals rendered important, even controversial, decisions in tort law. By its nature, a survey article cannot probe at length the factual intricacies, historical pedigree, or analytical subtleties of every legal authority that takes effect within the relevant period. This Article presents synopses of selected decisions, with some analysis, grouped by subject for ease of reference.

I. GROUNDS OF LIABILITY

A. Construction—Liability of Builder

The Georgia Supreme Court has defined the accrual date, for the limitations period of O.C.G.A. section 9-30-3(a), for actions against a builder for negligent construction.[2] In *Colormatch Exteriors, Inc. v. Hickey*,[3] the court held that a plaintiff who has purchased new construction from a builder may bring a negligent construction or strict liability

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1. *See* H.B. 792, 149th Gen. Assem., Reg. Sess. (Ga. 2003).

2. Corp. of Mercer Univ. v. Nat'l Gypsum Co., 258 Ga. 365, 366, 368 S.E.2d 732, 733 (1988); O.C.G.A. § 9-3-30(a) (1981 & Supp. 2003) ("All actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues.").

3. 275 Ga. 249, 569 S.E.2d 495 (2002).

action against the builder within four years of the date of original purchase, despite the ordinary rule that a negligent construction action accrues on the date when construction is substantially complete.[4] If the ordinary rule were applied in a case in which the builder still owned the property on the date of substantial completion, the cause of action would accrue before there was any possible plaintiff.[5] The court also held that the limitations period for plaintiffs' products liability action against the manufacturer of allegedly defective building material began to run when construction was substantially complete because the builder-owner would have had a cause of action against the manufacturer at that time.[6] This decision affirms the general principle that a cause of action accrues for statute of limitations purposes when, and only when, someone would be able to sue and recover for the particular injury.[7] *Colormatch* merely concerns a sensible application of that principle to facts relating to a builder-owner.

B. Conversion and Trover

The Georgia Supreme Court clarified the requirements of a trover action when the property, which was allegedly converted by the defendant, is funds on deposit with a bank.[8] In *Decatur Auto Center v. Wachovia Bank, N.A.*,[9] plaintiff (Decatur Auto) had a commercial checking account with the defendant, Wachovia. Plaintiff issued a check to a third party on the understanding that it would not be immediately deposited. Nevertheless, the third party immediately deposited the check at its bank and the depositary bank presented the check to Wachovia for payment. After initially returning the check for insufficient funds, Wachovia paid it upon a second presentment and debited plaintiff's account. By then, however, plaintiff had paid the amount of the check directly to the third party, told the depositary bank's representative that the underlying debt had been paid and that plaintiff was entitled to the return of its check, and ordered Wachovia to stop

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4. *Id.* at 250, 569 S.E.2d at 496; *see, e.g.*, *Nat'l Gypsum Co.*, 258 Ga. at 366, 368 S.E.2d at 733 ("An action under OCGA § 9-3-30 must be brought within four years of substantial completion.").

5. *Colormatch*, 275 Ga. at 251, 569 S.E.2d at 497.

6. *Id.* at 252-53, 569 S.E.2d at 498.

7. *See, e.g.*, Travis Pruitt & Assoc., P.C. v. Bowling, 238 Ga. App. 225, 226, 518 S.E.2d 453, 454 (1999) (holding that the test of accrual is to determine the time at which plaintiff could first have maintained the action "to a successful result").

8. *See* Decatur Auto Ctr. v. Wachovia Bank, N.A., 276 Ga. 817, 583 S.E.2d 6 (2003).

9. 276 Ga. 817, 583 S.E.2d 6 (2003). Although this case was decided by the supreme court in June of 2003, I have included it here, rather than risk confusion by reporting only the June 2002 court of appeals decision without the later reversal by the supreme court.

payment. When Wachovia declined to recredit plaintiff's account, plaintiff sued Wachovia in trover and obtained summary judgment in the trial court.[10]

The court of appeals reversed.[11] In that court's view, plaintiff could not bring trover against a bank for wrongfully paying out his deposited funds.[12] Trover is an action to recover specifically identifiable personal property that a defendant has converted.[13] Funds on deposit with a bank are not specifically identifiable because the bank deposit process is merely the creation of a creditor-debtor relationship.[14] The depositor is not entitled to the return of the same, specific funds he deposited with the bank.[15] Rather he is entitled to have the bank pay to him, or to his order, the amount he deposited according to the terms of his account.[16] Thus the court of appeals held that the specific property could not be identified for purposes of trover.[17] In reaching this conclusion, the court of appeals relied in part on a 104-year-old decision of the supreme court.[18]

The Georgia Supreme Court (Justice Benham alone dissenting) reversed the decision of the court of appeals.[19] The supreme court held that a checking customer may recover in trover for conversion of a check without identifying specific currency in the bank's possession.[20] Among other authorities, the supreme court cited numerous earlier opinions of the court of appeals in which actions were allowed for conversion of checks or amounts deposited.[21] It is important to note that the action here was for conversion of the check itself, not the deposited funds. The case, therefore, does not mean that a plaintiff can sue for conversion of deposited funds whenever a bank pays a check over a stop-payment order. Rather, it stands for the narrow proposition that when the check itself is sufficiently identified, the plaintiff's failure to identify specific

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10. *Id.* at 817-19, 583 S.E.2d at 7.

11. *Id.*; Wachovia Bank, N.A. v. Decatur Auto Ctr., Inc., 255 Ga. App. 666, 666, 566 S.E.2d 337, 337 (2002).

12. *Wachovia Bank*, 255 Ga. App. at 667, 566 S.E.2d at 339.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (citing Cooke v. Bryant, 103 Ga. 727, 731-32, 30 S.E. 435, 435-36 (1898)).

19. *Decatur Auto Center*, 276 Ga. at 821, 583 S.E.2d at 9 (Benham, J., dissenting).

20. *Id.*

21. *Id.* at 819-20, 583 S.E.2d at 8 (citing Farmers Alliance Warehouse & Comm'n Co. v. McElhannon, 98 Ga. 394, 395, 25 S.E. 558, 558 (1896); Harper v. Jeffers, 139 Ga. 756, 78 S.E. 172 (1913)).

currency in the account does not preclude recovery for conversion of the check.[22]

Another noteworthy decision relating to conversion is *Page v. Braddy*.[23] A landowner sued a neighbor for trespass and conversion, alleging that defendant erroneously directed a timber purchaser to cut some trees that stood on plaintiffs' side of the property line. The trial court found that defendant was liable, but that no damages could be awarded because there was insufficient evidence to determine how many trees had been cut at defendant's direction, as opposed to those the purchaser cut on his own initiative.[24] The court of appeals affirmed, noting that there was no claim for nominal damages for trespass, nor for equitable relief.[25] Rather, plaintiffs sought to recover the whole value of the timber taken from their property but provided no principle on which to apportion the damages between defendant and the purchaser.[26]

C. *Dram-Shop Liability*

The Georgia Supreme Court held in *Northside Equities, Inc. v. Hulsey*[27] that scientific evidence of a drunk driver's blood-alcohol content may create a material issue of fact sufficient to defeat summary judgment on the issue of whether the drunk driver was noticeably intoxicated within the meaning of the Dram Shop Act.[28] Plaintiff in *Northside Equities* was the mother of a girl killed in an auto accident by defendant's employee, Greene. Greene had consumed five or six drinks at work. At the time of the accident, two hours after Greene left work, she had a blood-alcohol content of .18 grams percent. Defendant moved for summary judgment, supporting its motion with several affidavits of employees stating that Greene was not noticeably intoxicated at work. Plaintiff countered by introducing the affidavit of an expert on blood-alcohol concentration. Plaintiff's expert opined that a person with the blood-alcohol level that Greene probably had when she left work (about .21 grams percent) would manifest signs of intoxication.[29] The court

22. *Id.* at 821, 583 S.E.2d at 9.
23. 255 Ga. App. 124, 564 S.E.2d 538 (2002).
24. *Id.* at 124-25, 564 S.E.2d at 540.
25. *Id.* at 125, 564 S.E.2d at 540.
26. *Id.* at 128, 564 S.E.2d at 542.
27. 275 Ga. 364, 567 S.E.2d 4 (2002).
28. *Id.* at 365, 567 S.E.2d at 6; *see* O.C.G.A. § 51-1-40(b) (2000) (imposing potential tort liability on defendant "who knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle").
29. 275 Ga. at 364, 567 S.E.2d at 5.

emphasized that the issue was not whether liability should be imposed, but whether plaintiff should have a chance to argue the issue to a jury.[30]

Chief Justice Fletcher, writing for the three dissenting justices, argued that the court was essentially replacing the "noticeably intoxicated" standard with an "actually intoxicated" standard because it did not require the expert's affidavit to conclude how Greene probably appeared the last time Northside served her alcohol.[31] The expert's affidavit stated generally that the average woman might exhibit various signs of intoxication at the blood-alcohol level Greene had, but failed to describe these signs with more particularity and gave no reason to believe that Greene resembled the average woman.[32] In the dissenters' view, the jury would not be authorized to infer from what the average woman would do to what Greene must have done, at least when that conclusion contradicts the testimony of all the witnesses who actually observed Greene at the relevant time.[33] The dissenting justices argued that the rule adopted by the majority expands the dram shop owner's liability beyond the legislature's intent.[34]

D. Identity Theft

In *Blakey v. Victory Equipment Sales, Inc.*,[35] the court of appeals reviewed the sufficiency of various claims made by a victim of identity theft.[36] The court affirmed a grant of summary judgment to the two companies whose unwitting dealings with the impostor resulted in damage to the victim.[37] Blakey's neighbor bought a truck from Victory Equipment Sales, using Blakey's name and credit information. The purchase was financed by Navistar Financial Corporation. Blakey filed a broad complaint against Victory and Navistar, asserting the following claims: conversion, invasion of privacy through false light, invasion of privacy through appropriation, tortious interference with business relations, fraud, violation of Georgia's Racketeer Influenced and Corrupt Organizations (RICO) Act,[38] ratification, mental pain and suffering, and punitive damages.[39] The court of appeals affirmed the trial court's

30. *Id.* at 365, 567 S.E.2d at 5.
31. *Id* at 365-66, 567 S.E.2d at 6 (Fletcher, C.J., dissenting).
32. *Id.* at 366, 567 S.E.2d at 6 (Fletcher, C.J., dissenting).
33. *Id.* at 367, 567 S.E.2d at 7 (Fletcher, C.J., dissenting).
34. *Id.* at 369-70, 567 S.E.2d at 8-9 (Fletcher, C.J., dissenting).
35. 259 Ga. App. 34, 576 S.E.2d 288 (2002).
36. *Id.* at 34-40, 576 S.E.2d at 290-94.
37. *Id.* at 34-35, 576 S.E.2d at 290.
38. O.C.G.A. §§ 16-14-1 to 16-14-15 (2003).
39. 259 Ga. App. at 35, 576 S.E.2d at 290.

grant of summary judgment on all these claims.[40] This case is useful precisely because plaintiff attempted so many theories—quite a natural strategy to use in a relatively undeveloped area of the law. This strategy gave the court of appeals an opportunity to consider and reject various ways a plaintiff might attempt to recover the costs of identity theft from persons other than the perpetrator.

E. Medical Malpractice

In *Breyne v. Potter*,[41] the court of appeals addressed whether a patient's intervening choice breaks the chain of proximate causation between a doctor's negligent medical advice and medical procedures chosen by the patient in reliance on that advice.[42] Defendant, an obstetrician, admittedly misread the results of genetic testing and erroneously told plaintiff her unborn fetus had Down's syndrome. Defendent confirmed this statement several times in response to plaintiff's questioning and advised plaintiff that if she was going to abort the fetus, she should abort sooner rather than later. As a result of this advice, plaintiff aborted the fetus. The next day, defendant told plaintiff that the fetus had a different genetic abnormality.[43] A jury would have been authorized to find that the condition the fetus actually had was typically much less severe than Down's syndrome.[44]

Plaintiff sued for medical malpractice and breach of fiduciary duty. The trial court granted summary judgment to the physician on both counts. On appeal, defendant argued that plaintiff's choice to terminate her pregnancy, not his negligent advice, was the proximate cause of any harm to her.[45] The court of appeals rejected this argument, noting that under defendant's theory, a patient who decided to have a mastectomy in reliance on an erroneous diagnosis of cancer would not have an action against the diagnosing physician.[46] The court's use of this example suggests that the elective nature of abortion did not affect the court's analysis. The court also upheld the mother's action for breach of fiduciary duty.[47] However, summary judgment against the father of the child was affirmed.[48] The father had no action against the doctor

40. *Id.* at 40, 576 S.E.2d at 294.
41. 258 Ga. App. 728, 574 S.E.2d 916 (2002).
42. *Id.* at 729-30, 574 S.E.2d at 918-19.
43. *Id.*, 574 S.E.2d at 918.
44. *Id.* at 732, 574 S.E.2d at 921.
45. *Id.* at 728, 730, 574 S.E.2d at 918, 919.
46. *Id.* at 731, 574 S.E.2d at 920.
47. *Id.* at 733, 574 S.E.2d at 921.
48. *Id.*

for medical malpractice or loss of consortium because he was not the doctor's patient and was not married to the mother.[49]

F. Premises Liability

The court of appeals decided several cases concerning the liability of owners and occupiers of land. In *Lake v. Atlanta Landmarks, Inc.*,[50] the court of appeals held that a theater patron's awareness of dim lighting in a theater stairwell precluded her recovery for injuries sustained when she slipped on the stairs and fell.[51] In *Ray v. Smith*,[52] a landlord was held not responsible for injuries received by tenant's licensee, who fell from a portable skateboard ramp installed by tenant inside the premises.[53] The lease did not impose upon the landlord a duty to inspect, and the tenant was prohibited from modifying the premises without the landlord's consent, which had not been obtained.[54] In *Rainey v. 1600 Peachtree, LLC*,[55] the court of appeals held that an out-of-possession landlord, whose liability was governed by O.C.G.A. section 44-7-14,[56] could assign by contract its duty to repair and maintain the premises.[57] Because the lease assigned such duty to the tenant, the landlord could not be held liable.[58] These cases will likely form the basis for many future summary judgment motions.

G. Products Liability

The court of appeals has held that the ten-year statute of repose governing products liability actions under O.C.G.A. section 51-1-11[59] does not apply to an action against the manufacturer for negligent failure to warn of an alleged defect.[60] *Parks v. Hyundai Motor America, Inc.*[61] concerned a claim by automobile purchasers based on the manufacturer's alleged failure to warn of a known defect in the seatbelt system.[62] The court reasoned that O.C.G.A. section 51-1-11 expressly

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49. *Id.*
50. 257 Ga. App. 195, 570 S.E.2d 638 (2002).
51. *Id.* at 195, 570 S.E.2d at 639.
52. 259 Ga. App. 749, 577 S.E.2d 807 (2003).
53. *Id.* at 751, 577 S.E.2d at 809.
54. *Id.* at 749, 577 S.E.2d at 808.
55. 255 Ga. App. 299, 565 S.E.2d 517 (2002).
56. O.C.G.A. § 44-7-14 (1991).
57. 255 Ga. App. at 300, 565 S.E.2d at 519.
58. *Id.*; O.C.G.A. § 44-7-14 (1991).
59. O.C.G.A. § 51-1-11 (2000).
60. Parks v. Hyundai Motor Am., Inc., 258 Ga. 876, 882, 575 S.E.2d 673, 678 (2002).
61. 258 Ga. App. 876, 575 S.E.2d 673 (2002).
62. *Id.* at 877, 575 S.E.2d at 674.

provides that the statute does not relieve manufacturers of the duty to warn of known risks.[63] Rather, this provision exempts from the repose period claims for negligent failure to warn.[64]

H. Sexual Assault—Respondeat Superior

The Georgia Supreme Court's decision in *Piedmont Hospital, Inc. v. Palladino*[65] will likely bar almost all future attempts to hold an employer vicariously liable for sexual assault by an employee.[66] In *Piedmont* plaintiff alleged that defendant hospital's employee made improper sexual contact with plaintiff's genitals while cleaning plaintiff's groin area during post-surgical treatment. Plaintiff asserted claims against the hospital for negligent hiring, negligent supervision, and vicarious liability. The trial court granted partial summary judgment to the hospital, holding that if plaintiff's allegations were true, then the employee had departed from the scope of his duties, and the employer could not, as a matter of law, be vicariously liable for his tortious act. The court of appeals reversed in relevant part, holding that a jury could have found that the employee's conduct was sufficiently related to his duty to clean the patient.[67]

In a 4-3 split, the supreme court reinstated the summary judgment.[68] The majority stated that an employer is not vicariously liable for the intentional torts of its employee unless the employee's conduct is in furtherance of the employer's objectives and within the scope of the employer's enterprise.[69] The dissent, like the court of appeals, emphasized the scope-of-enterprise side of the issue, pointing out that Piedmont's employee undisputedly had the responsibility of cleaning the patient's groin area.[70] What appears to have been decisive for the majority, however, is that sexual assault could not be said to further any purpose of the employer and thus did not trigger the agency principles that justify respondeat superior.[71] Although an employee who commits ordinary assault or battery may still be acting as the employer's agent,

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63. *Id.* at 882, 575 S.E.2d at 678 (quoting O.C.G.A. § 51-1-11(b)(2), (c) (2000)).
64. *Id.* (quoting Chrysler Corp. v. Batten, 264 Ga. 723, 727, 450 S.E.2d 208, 213 (1994)).
65. 276 Ga. 612, 580 S.E.2d 215 (2003).
66. *Id.* at 617, 580 S.E.2d at 219 (Carley, J., dissenting).
67. *Id.* at 612-13, 580 S.E.2d at 216.
68. *Id.* at 617, 580 S.E.2d at 219.
69. *Id.* at 613, 580 S.E.2d at 217 (quoting O.C.G.A. § 51-2-2 (2002)).
70. *Id.* at 618, 580 S.E.2d at 220 (Carley, J., dissenting).
71. *Id.* at 616, 580 S.E.2d at 219 ("[T]here can be no serious argument that Patterson's alleged manipulation of Palladino's genitals furthered Piedmont Hospital's business. Hence, as a matter of law, Piedmont Hospital cannot be subject to vicarious liability under respondeat superior for Patterson's alleged misconduct.").

sexual acts are rarely performed in a representative capacity. As Justice Carley noted in dissent, the majority's holding would appear to rule out respondeat superior liability for sexual assault in all but the most unusual circumstances.[72] The court's decision did not address liability for negligent hiring or supervision.[73]

I. WRONGFUL DEATH

In *Carringer v. Rodgers*,[74] the United States Court of Appeals for the Eleventh Circuit certified to the Georgia Supreme Court three questions concerning the right of a parent to bring a wrongful death action against the decedent child's surviving spouse who proximately caused the child's death by homicide.[75] The supreme court held that under the circumstances, the fact that the decedent child left a surviving spouse did not prevent the parent from bringing a wrongful death action, notwithstanding the express language of O.C.G.A. section 19-7-1, which gives that action first to the surviving spouse.[76] The general assembly could not have intended that the murdering spouse be treated as a surviving spouse whose right to bring a wrongful death claim would be superior to that of the decedent's surviving parent, or that a killer would be immune from wrongful death liability because he was the only person entitled to bring the claim.[77] In reaching this conclusion, the court ratified the holding of *Belluso v. Tant*,[78] in which the court of appeals held that the trial court could equitably permit prosecution of a wrongful death action by a parent when the decedent's surviving spouse was alleged to have caused the death.[79]

II. DAMAGES

Several recent Georgia Supreme Court decisions have settled important issues concerning damages awards. The exposure of an accounting firm for negligent auditing errors was at issue in *BDO*

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72. *Id.* at 617, 580 S.E.2d at 219 (Carley, J., dissenting). Justice Carley actually put the point somewhat more strongly: "[T]he majority effectively establishes an absolute rule that the doctrine of respondeat superior does not apply to cases involving sexual assault." *Id.*

73. *Id.* at 613 n.2, 580 S.E.2d at 216 n.2.

74. 276 Ga. 359, 578 S.E.2d 841 (2003).

75. *Id.* at 359, 578 S.E.2d at 841.

76. *Id.* at 364, 578 S.E.2d at 844; O.C.G.A. § 19-7-1 (1999 & Supp. 2003).

77. 276 Ga. at 364, 578 S.E.2d at 844.

78. *Id.*; 258 Ga. App. 453, 574 S.E.2d 595 (2002).

79. 258 Ga. App. at 455, 574 S.E.2d at 598.

Seidman, LLP v. Mindis Acquisition Corp.[80] Mindis Acquisition Corporation ("MAC"), which was formed specifically to acquire a scrap metal company, sued BDO Seidman, the acquired company's accountanting firm, for negligently overstating the value of the acquired company's assets in a pre-acquisition audit. A jury awarded $44 million in damages to MAC on an instruction that damages should be measured by a benefit-of-the-bargain standard, i.e., that plaintiff should be put in the position it would have been in if defendant's negligently false representations of value had been true.[81]

The supreme court held that this standard, derived from fraud actions, was incorrect when a defendant's misrepresentations were merely negligent and there was no showing of unjust enrichment.[82] A plaintiff harmed by negligent misrepresentation, like any other party who suffers damage as a result of another's negligence, should be put in the position he would have been in had the negligent act not occurred.[83] Thus, the correct rule in such a case is to permit the plaintiff to recover its out-of-pocket expenses.[84]

The supreme court also resolved an issue relating to vicarious liability for punitive damages.[85] In *May v. Crane Bros.*,[86] the issue was whether an employer, held liable in respondeat superior for an employee's tort, may present as mitigation evidence the fact that the employee received criminal penalties for the tortious conduct.[87] The supreme court held that the employer had no right to present such evidence; thus, the trial court did not err in excluding it.[88]

The court reasoned that the main purpose of punitive damages is to deter a defendant from certain types of conduct.[89] The deterrent impact of punitive damages can be both superfluous and unfair to a defendant who has already received criminal penalties for the same wrongful conduct.[90] Even though the actual tortfeasor is permitted to introduce evidence of criminal sanctions, the vicariously liable employer

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80. 276 Ga. 311, 578 S.E.2d 400 (2003).

81. *Id.* at 311, 578 S.E.2d at 400 (citing McCrary v. Pritchard, 119 Ga. 876, 883, 47 S.E. 341, 344 (1904); Kunzler Enterprises v. Rowe, 211 Ga. App. 4, 5, 438 S.E.2d 365, 365 (1993)).

82. *Id.* at 311-12, 578 S.E.2d at 401.

83. *Id.* at 312, 578 S.E.2d at 401.

84. *Id.*

85. May v. Crane, 276 Ga. 280, 576 S.E.2d 286 (2003).

86. 276 Ga. 280, 576 S.E.2d 286 (2003).

87. *Id.* at 280, 576 S.E.2d at 286.

88. *Id.* at 282, 576 S.E.2d at 287.

89. *Id.* at 281, 576 S.E.2d at 287.

90. *Id.* (quoting Cherry v. McCall, 23 Ga. 193, 199 (1857)).

is in a different position.[91] Criminal sanctions imposed solely upon the employee are unlikely to affect the employer's incentives, nor is the employer in such a case at risk of being punished twice for the same wrong.[92] Thus, the employee's criminal conviction is irrelevant to the question of whether the employer should pay punitive damages.[93] Chief Justice Fletcher alone dissented.[94] In his view, the employer should have been allowed to introduce such evidence because the employer should not be put in a worse position than its wrongdoing employee, who is able to introduce the mitigation evidence.[95]

Several punitive damages cases have come before the court of appeals. *Orkin Exterminating Co. v. Carder*[96] provides precedent on what is necessary to prove conscious indifference to consequences to justify an award of punitive damages.[97] Carder, an employee of a business customer of Orkin's pest-control service, claimed that Orkin's employees negligently misapplied pesticides at his workplace and that Orkin negligently trained and supervised its employees regarding the use of such pesticides. Carder alleged that exposure to the pesticides caused him to develop Sweet's syndrome, a dermatological disorder, as well as other symptoms. The jury awarded $250,000 in compensatory damages and $2.3 million in punitive damages; the latter award was reduced by the judge to $250,000 under O.C.G.A. section 51-12-5.1(g).[98] Among other challenges to the award, on appeal Orkin argued that the jury was not authorized to impose punitive damages because there was not clear and convincing evidence of an entire want of care or conscious indifference to consequences.[99]

The court of appeals held that "[i]n this case, as in most others, a jury question was created whether clear and convincing evidence of such conduct exists."[100] Although the court did not clarify the factual basis for the jury's punitive damage award, the record contained evidence that Orkin's service technicians violated federal law by failing to use the pesticides as directed, that Orkin received previous complaints from

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91. *Id.* at 281-82, 578 S.E.2d at 287.
92. *Id.* at 282, 578 S.E.2d at 287.
93. *Id.*
94. *Id.* (Fletcher, C.J., dissenting).
95. *Id.*, 576 S.E.2d at 287-88 (Fletcher, C.J., dissenting).
96. 258 Ga. App. 796, 575 S.E.2d 664 (2002).
97. *Id.* at 802, 575 S.E.2d at 670 (quoting O.C.G.A. § 81-12-5.1(b) (2000)).
98. *Id.* at 796-97, 575 S.E.2d at 666-67; O.C.G.A. § 51-12-5.1(g) (2000).
99. 258 Ga. App. at 796, 575 S.E.2d at 666.
100. *Id.* at 802, 575 S.E.2d at 670 (citing Thomas v. Atlanta Cas. Co., 253 Ga. App. 199, 206, 558 S.E.2d 432, 440 (2001); Paul v. Destito, 250 Ga. App. 631, 639-40, 550 S.E.2d 739, 748 (2001); Baumann v. Snider, 243 Ga. App. 526, 530, 532 S.E.2d 468, 474 (2000)).

customers regarding its employees' misuse of these pesticides, and that Orkin regularly violated provisions of Georgia law by failing to keep adequate records of the amount of pesticides sprayed.[101]

The same legal issue was presented on different facts in *Gateway Bank & Trust v. Timms*.[102] In that trover action, the court of appeals held that sufficient evidence existed for a jury to form a conviction that defendant bank acted with conscious indifference to the consequences of its repossession of a trailer.[103] Although the bank's debtor's actions made it appear he owned the trailer, the title belonged to plaintiff. The bank made no effort, either before or within a year after the repossession, to identify the rightful owner of the trailer. The bank's agents did not notice the trailer's license tag which showed that it did not belong to the debtor. Moreover, when the rightful owner called the bank's vice president, he told her to speak to the bank's attorney.[104]

The court of appeals resolved two punitive damage questions in *St. Paul Fire & Marine Insurance Co. v. Clark*.[105] The first question dealt with the effect of a partial reversal of liability. When plaintiffs brought both a RICO claim and fraud claims, and judgment on the RICO claim was reversed on appeal, the issue of punitive damages had to be retried because the punitive damages were based on all claims brought by plaintiffs, not just those upheld on appeal.[106] The second issue dealt with jury instructions. On remand, the trial court was not to instruct the jury to consider that plaintiffs would have to pay taxes on their punitive damage award because the sole question relevant to fixing the amount of that award should be what is necessary to punish and deter defendant, not who receives the money or how much plaintiffs get.[107]

III. CONCLUSION

During the period of Georgia tort law covered by this Article, the appellate courts have been faced with several difficult and controversial issues. Of the Georgia Supreme Court decisions canvassed here, most involved at least one dissenting justice. Often the court divided over close policy questions. In the wrongful death and dram shop contexts, divisions of the court concerned a conflict between the language of a statute and the practicalities of its application. Observers must wait

101. *Id.* at 796, 575 S.E.2d at 666.
102. 259 Ga. App. 299, 577 S.E.2d 15 (2003).
103. *Id.* at 301, 577 S.E.2d at 18.
104. *Id.*
105. 255 Ga. App. 14, 566 S.E.2d 2 (2002).
106. *Id.* at 24, 566 S.E.2d at 11.
107. *Id.* at 25, 566 S.E.2d at 12.

and see whether the general assembly addresses any of these substantive issues during next year's anticipated push for tort reform.

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