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Torts

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I. INTRODUCTION

The Supreme Court of Georgia's decisions from June 1, 2021 to May 31, 2022, ran the gamut in terms of both significance and subjects.[1] Among the major decisions affecting Georgia tort law were the court's decisions addressing apportionment, personal jurisdiction, defamation, products liability, and intellectual property.

II. CASE DISCUSSION

A. Apportionment of Damages and Attorney's Fees

1. Alston & Bird v. Hatcher Management

In *Alston & Bird v. Hatcher Management,*[2] the Supreme Court of Georgia's decision ultimately turned on a fairly simple set of facts that had been developed from a ten-year long complex legal malpractice suit and an earlier appeal to the Georgia Court of Appeals.[3] The plaintiff, Hatcher Management Holdings (HMH), sued the defendant, Alston & Bird (A&B), for legal malpractice.[4] The defendant raised comparative fault as a defense, asserting that HMH was partly responsible for any damages and also raised the fault of a non-party, Maury Hatcher, who had been the managing member of HMH.[5]

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1. For an analysis of last year's tort laws during the prior survey period, *see* Pamela A. Wilkins, *Torts*, *Annual Survey of Georgia Law*, 73 MERCER L. REV. 243 (2021), https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss1/17/ [https://perma.cc/UAY8-G2XM].

2. 312 Ga. 350, 862 S.E.2d 295 (2021) (hereinafter Alston & Bird III).

3. Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC., 336 Ga. App. 527, 785 S.E.2d 541 (2016) (hereinafter Alston & Bird I).

4. *Id.* at 527, 785 S.E.2d at 542.

5. *Id.* at 528, 785 S.E.2d at 542–43.

A jury found A&B liable for legal malpractice but apportioned fault primarily to non-party Hatcher, at 60% at fault, while finding A&B was 30% at fault, and HMH was only 8% at fault.[6] HMH conceded the propriety of reducing damages by its own fault but objected to reducing damages by any fault apportioned to HMH.[7]

HMH based its argument on the statutory text of the apportionment statute.[8] One subsection applied to all suits—suits brought against "one or more" defendants—and allowed for reduction of damages for the plaintiff's fault (that is, what is commonly referred to as "comparative fault" or "comparative negligence," or, less accurately, "contributory negligence").[9] HMH did not object to reducing damages due to its own fault, and so under the Code, the Fulton County Superior Court was authorized to reduce damages by 8%.[10]

Another subsection provides that, where a suit is brought "against one or more" defendants, the jury should apportion fault among those defendants found liable and apportion damages accordingly.[11] HMH argued that this subsection did not apply because the suit was not against more than one defendant, and so nothing authorized reduction of damages for the fault of a non-party, such as Hatcher.[12]

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6. *Alston & Bird III*, 312 Ga. at 352, 862 S.E.2d at 297.

7. *Id.* at 352, 862 S.E.2d at 297–98.

8. *Id.* at 352, 862 S.E.2d at 298; *see* O.C.G.A. § 51-12-33(a) (2020).

9. *Alston & Bird III*, 312 Ga. at 354, 862 S.E.2d at 299. O.C.G.A. § 51-12-33(a) governs procedure when the plaintiff is in some degree responsible for the claimed injury or damages:

> Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

O.C.G.A. § 51-12-33(a).

10. *Alston & Bird III*, 312 Ga. at 355, 862 S.E.2d at 299 n.1.

11. *Id.* at 356, 862 S.E.2d at 300. O.C.G.A. § 51-12-33(b) addresses suits brought against more than one person and apportionment of fault to non-parties who:

> Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the person or persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

O.C.G.A. § 51-12-33(b) (2022).

12. *Alston & Bird III*, 312 Ga. at 358, 862 S.E.2d at 301.

A third subsection, unlike the other two subsections, does not authorize reduction of damages.[13] Instead, it provides: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit."[14]

Thus, HMH argued that nothing, other than the fault of the plaintiff, authorized reduction of damages in a single defendant case.[15] Over HMH's objections, the trial court's judgment ordered A&B to pay 32% of the total compensatory damages award.[16]

The second issue related to apportionment of the attorney's fees award. The jury found that HMH proved that A&B acted in bad faith and awarded damages under section 13-6-11 of the Official Code of Georgia Annotated,[17] which permits an award of damages against the defendant for bad faith in the transaction or conduct that led to litigation, among other things.[18] The jury found that only A&B acted in bad faith.[19]

HMH objected to reducing this award at all.[20] Not only were its objections based upon the same arguments regarding reduction of compensatory damages—no reduction was allowed in a single defendant case for a non-party's fault—but it also argued that no reduction for even HMH's 8% was proper because only A&B was found to have acted in bad faith, so there was no basis to reduce the attorney's fees award at all. Over HMH's objections, the trial court found that the fee award was also subject to apportionment. Accordingly, the trial court entered judgment for the fee award, but also reduced it so that the judgment against A&B was for 32% of the fee award for bad faith litigation.[21]

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13. *Id.* at 355, 862 S.E.2d at 299; *see* O.C.G.A. § 51-12-33(c).

14. O.C.G.A. § 51-12-33(c).

15. *Alston & Bird III*, 312 Ga. at 352, 862 S.E.2d at 298.

16. *Id.* at 352, 862 S.E.2d at 297.

17. O.C.G.A. § 13-6-11 (2022).

18. *Alston & Bird III*, 312 Ga. at 352, 862 S.E.2d at 297. O.C.G.A. § 13-6-11 provides:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

O.C.G.A. § 13-6-11. "O.C.G.A. § 13-6-11 expressly makes its litigation expenses 'part of the damages' to be awarded by the jury." Ga. Dep't of Corr. v. Couch, 295 Ga. 469, 475, 759 S.E.2d 804, 810 (2014).

19. *Alston & Bird III*, 312 Ga. at 352, 862 S.E.2d at 297.

20. *Id.* at 352, 862 S.E.2d at 298.

21. *Id.* at 352, 862 S.E.2d at 297.

Thus the judgment entered by the trial court reduced both compensatory damages and damages for the fee award by the comparative fault of the plaintiff and non-party Hatcher.[22] Both HMH and A&B appealed, with A&B arguing that there was insufficient evidentiary basis to find liability, and HMH asserting that the reduction of each award had been improper.[23]

The court of appeals affirmed the liability verdict, rejecting A&B's argument that there had been insufficient evidence of proximate cause to support the verdict.[24] However, the court reversed the reduction of both compensatory damages and the fee award for the fault of non-party Hatcher.[25]

With respect to the damages award, HMH argued that reduction of damages due to the fault of non-party Hatcher was not authorized by Georgia's apportionment statute because the case had not been brought against "more than one" defendant.[26] The court of appeals agreed and reversed the reduction of damages for fault the jury had apportioned to non-party Hatcher.[27] Specifically, the court of appeals recognized that the subsection of the Code that allowed for reduction of damages due to the fault of a non-party only applied to actions brought against "more than one person," and this suit had been filed against only one defendant.[28] The subsection of the Code that applied to suits against "one or more persons" did not allow for reduction of damages due to the fault of non-parties.[29] Thus, the court of appeals held that the trial court should have reduced the damages award only by 8%—HMH's "comparative fault"—rather than 68%—HMH's fault combined with Hatcher's non-party share of fault.[30]

The court of appeals also agreed with HMH's argument that it was improper to reduce the attorney's fees award for the fault of either HMH or non-party Hatcher.[31] It reasoned that the apportionment statute did not apply because the award was based on bad faith, the apportionment

22. *Id.*

23. *Id.* at 352, 862 S.E.2d at 297–98.

24. *Id.* at 352, 862 S.E.2d at 298.

25. *Id.*

26. Alston & Bird LLP v. Hatcher Mgmt. Holdings, LLC, 355 Ga. App. 525, 532, 843 S.E.2d 613, 619–20 (2020) (hereinafter Alston & Bird II); *see* O.C.G.A. § 51-12-33(b) (2020).

27. *Alston & Bird II*, 355 Ga. App. at 536, 843 S.E.2d at 622.

28. *Id.* at 534, 843 S.E.2d at 620; *see* O.C.G.A. § 51-12-33(b).

29. *Alston & Bird II*, 355 Ga. App. at 534, 843 S.E.2d at 620–21; *see* O.C.G.A. § 51-12-33(a).

30. *Alston & Bird II*, 355 Ga. App. at 536, 843 S.E.2d at 622.

31. *Id.* at 535–36, 843 S.E.2d at 621.

statute did not apply where fault was indivisible, and the jury based the award solely on the bad faith of A&B.[32]

Both HMH and A&B appealed.[33] The supreme court affirmed in part, reversed in part, and remanded.[34] It agreed with the court of appeals' holding with respect to reduction of compensatory damages for non-party Hatcher.[35] In doing so, the court relied on the plain meaning of the text.[36] After quoting the pertinent provisions, the court wrote:

> [W]e see that subsection (b) is the only provision in the statutory apportionment scheme that authorizes apportioning damages based on the fault of persons other than the plaintiff and a single defendant (i.e., additional defendants and nonparties) . . . . But subsection (b) does not apply in this case. By its plain language, the phrase at the outset of subsection (b)—"[w]here an action is brought against more than one person"—limits the application of subsection (b) to an action brought against at least two defendants. The only defendant in this case is A&B.[37]

The court, relying on the proposition that the General Assembly said what it meant and meant what it said, rejected A&B's arguments based upon policy and intentions.[38] It also rejected A&B's arguments that the court had, in cases involving more than one defendant, somehow already construed "more than one" to mean "one or more."[39]

Thus, the supreme court held that, because this was a single-defendant case, nothing authorized reduction of damages for the fault of non-party Hatcher.[40] As a result, the judgment for compensatory damages should have been reduced only by 8%, the fault of the plaintiff.[41]

By contrast, the supreme court reversed the court of appeals' decision that it was improper to reduce the fee award, and remanded.[42] The court first emphasized that damages under O.C.G.A. § 13-6-11 cannot be based upon litigation conduct, but instead must be based on conduct in the underlying transaction.[43] "Put another way, the element of bad faith,

32. *Id.* at 535, 843 S.E.2d at 621.
33. *Alston & Bird III*, 312 Ga. at 352, 862 S.E.2d at 297–98.
34. *Id.* at 351, 862 S.E.2d at 297.
35. *Id.* at 360, 862 S.E.2d at 302.
36. *Id.* at 354, 862 S.E.2d at 298.
37. *Id.* at 356, 862 S.E.2d at 300 (internal citation omitted).
38. *Id.* at 358–59, 862 S.E.2d at 301–02.
39. *Id.* at 351, 862 S.E.2d at 297.
40. *Id.* at 356, 862 S.E.2d at 300.
41. *Id.*
42. *Id.* at 362, 862 S.E.2d at 304.
43. *Id.* at 359, 862 S.E.2d at 302.

stubborn litigiousness, or unnecessary trouble 'must relate to the acts in the transaction itself prior to the litigation, not to the motive with which a party proceeds in the litigation.'"[44] Thus, the support for an award under O.C.G.A. § 13-6-11 "must be found in the 'conduct arising from the transaction underlying the cause of action being litigated, not conduct during the course of the litigation itself.'"[45] The fact that the bad faith had to occur before the suit was filed was underscored by the fact that the finding was against A&B, and not its counsel, in this litigation.[46]

The court then reasoned that because O.C.G.A. § 13-6-11 characterized a fee award as "damages," any award was within the scope of the apportionment statute because it covered "damages," unless the "nature" of the award rendered them "indivisible," meaning it was "legally or factually impossible" to apportion them.[47] The court reasoned that it was not indivisible, at least not in the abstract:

> Here, a claim for expenses of litigation under O.C.G.A. § 13-6-11 is not categorically indivisible as a matter of law. Neither stubborn litigiousness nor causing unnecessary trouble and expense are necessarily limited to just one party. The same is true of bad faith. There may be instances in which a plaintiff is partly at fault for a defendant's bad faith, and we see no reason why a jury cannot make such a factual determination. And, of course, the same may be true of other defendants and nonparties, although our holding in Division 2 makes clear that expenses of litigation may be reduced based on percentages of fault of other defendants or nonparties only in tort actions brought against multiple defendants. It may be that bad faith may be indivisible either legally or factually in some cases, but we cannot say that bad faith is always indivisible as a matter of law.[48]

The court also rejected HMH's argument that there was no basis to apportion the award because the jury had found only A&B had acted in bad faith, noting that the jury had apportioned some fault to HMH and was not instructed to consider whether HMH had acted in bad faith.[49] Because the court of appeals had not considered whether there was

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44. *Id.* (quoting David G. Brown, P.E. v. Kent, 274 Ga. 849, 850, 561 S.E.2d 89, 90 (2002)).

45. *Alston & Bird III*, 312 Ga. at 359, 862 S.E.2d at 302 (quoting *David G. Brown*, 274 Ga. at 850, 561 S.E.2d at 90).

46. *Alston & Bird III*, 312 Ga. at 353, 862 S.E.2d at 298.

47. *Id.* at 359–60, 868 S.E.2d at 302.

48. *Id.* at 361, 862 S.E.2d at 303.

49. *Id.* at 361–62, 862 S.E.2d. at 303–04.

sufficient evidence to apportion fees, it remanded the case for further proceedings.[50]

2. Consequences and Repercussions

In response to the supreme court's decision in *Alston & Bird*, the General Assembly amended section 51-12-33(b) of the Code by replacing "one or more" with "more than one."[51] However, the amendment does not resolve all of the issues in Georgia tort law and creates new ones.[52]

First, the amendment applies only to "cases filed after the effective date" of the act, which was May 13, 2022.[53] Thus, as to any case pending on or before May 13, 2022, there is no statutory basis for a single defendant to receive a reduction of damages for non-party fault. There is no doubt that in the time after the *Alston & Bird* decision and before the May 13, 2022 effective date, many cases were filed to take advantage of the inability of a single defendant to apportion fault to non-parties. Competent plaintiff's lawyers in that timeframe likely examined whether full recovery, or the best recovery, could be obtained against a single defendant, and filed suit only against that defendant. There is no doubt that some plaintiff's counsel filed multiple suits for the same plaintiff, arising out of the same injury, but named only one defendant in each case. As a result, defense counsel representing a defendant in a single defendant case pending on or before May 13, 2022, will need to take appropriate and available procedural steps to try to structure those cases to come within the "more than one" subdivision if that is possible.[54]

In addition, for single-defendant cases pending on or before May 13, 2022, complex issues concerning the ability of the defendant to obtain indemnity or contribution remain and will need to be addressed by

50. *Id.* at 362, 862 S.E.2d at 304.

51. O.C.G.A. § 51-12-33 (2022).

52. *E.g.*, ALR Oglethorpe, LLC v. Fide. Nat'l Title Ins. Co., 361 Ga. App. 776, 863 S.E.2d 568 (2021).

53. *See* Ga. H.R. Bill 961, Reg. Sess., 2022 Ga. Laws 802 § 1 (codified at O.C.G.A. § 51-12-33).

54. *Id.*

Georgia courts.[55] There is some evidence those cases are already percolating through the system.[56]

Second, and perhaps more importantly, the amendment to subsection (b) may not change the result in *Alston & Bird*. Specifically, even as amended, subsection (b) permits reduction of damages in cases against "one or more" defendants, but still only "among the persons who are liable," which the supreme court held, before *Alston & Bird* and reiterated in *Alston & Bird*, meant "only named defendants."[57] No other provision of the apportionment statute permits reduction of damages. Thus, while as amended fault may be allocated even in a single-defendant case, damages may not be reduced except as to named defendants who are found liable. Arguably, even in a single-defendant case, no reduction of damages is available under the plain text of the statute for the fault of non-parties.[58]

Third, in all cases where a fee award is sought under O.C.G.A. § 13-6-11 against a defendant, where slight evidence supports it, defense counsel should request that the jury be instructed to consider the "bad faith" of all parties.[59] As the supreme court advised in *Alston & Bird III*:

> The fault arising from bad faith, stubborn litigiousness, and unnecessary trouble will likely usually be different from the fault for the underlying tort injuries. When that is so, juries should calculate the relevant percentages of fault and the damages attributable to the tort and awarded under O.C.G.A. § 13-6-11 separately and identify them as such on the verdict form.[60]

Finally, the supreme court's decision in *Junior v. Graham*[61] bears mentioning because it addressed an award of damages under O.C.G.A.

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55. In a footnote in *Alston & Bird III,* the supreme court noted:

> Just because O.C.G.A. § 51-12-33(b) does not apply to cases with a single defendant does not mean that a single defendant is without a remedy against its joint tortfeasors. Where apportionment does not apply, joint tortfeasors who both proximately cause a single injury are jointly and severally liable for damages caused by the injury, and a tortfeasor may seek contribution from its joint tortfeasor(s).

Alston & Bird III, 312 Ga. at 356 n.2, 862 S.E.2d at 300.

56. *E.g.*, *ALR Oglethorpe*, 361 Ga. App. 776, 863 S.E.2d 568.

57. *Alston & Bird III*, 312 Ga. at 355, 862 S.E.2d at 299 (citing first Zaldivar v. Prickett, 297 Ga. 589, 600 n.7, 774 S.E.2d 688, 697 (2015); then O.C.G.A. § 51-12-33(f)(1)) ("Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.").

58. *Alston & Bird III*, 312 Ga. at 354, 862 S.E.2d at 298.

59. *Id.* at 360, 862 S.E.2d at 302–03.

60. *Id.* at 362 n.8, 862 S.E.2d at 304.

61. 313 Ga. 420, 870 S.E.2d 378 (2022).

§ 13-6-11.[62] In that case, the court held that an award of damages under O.C.G.A. § 13-6-11 does not preclude an award of attorney's fees under O.C.G.A. § 9-11-68(e)[63] where a jury finds that a party presented a frivolous claim or defense, if the party made a settlement demand as required by that Code section.[64] Significantly, an award of fees under O.C.G.A. § 9-11-68(e) is not characterized as "damages" by the Code, so it would not be subject to apportionment.[65]

B. Personal Jurisdiction

1. Cooper Tire & Rubber Co. v. McCall

In *Cooper Tire & Rubber Co. v. McCall*,[66] a products liability case arose when a tire failed in Florida, causing the driver to lose control and crash the car, suffering injuries.[67] The defendant, a tire company incorporated in Delaware with its principal place of business in Ohio, moved to dismiss the claim for lack of personal jurisdiction.[68] The plaintiff opposed the motion, relying on the fact that the defendant was authorized to do business in Georgia when the accident occurred, and meant under the supreme court's holding in *Allstate Insurance Co. v. Klein*,[69] "any corporation that is authorized to do business in Georgia is subject to the general jurisdiction of Georgia's courts."[70]

The Gwinnett State Court granted the defendant's motion to dismiss, but the court of appeals reversed, relying on *Klein*.[71] The defendant appealed, and the supreme court affirmed.[72]

In doing so, the supreme court recounted seminal cases from the Supreme Court of the United States, noting that the Court had never questioned the holding of *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,[73] which held that a state court may exercise personal jurisdiction over an out-of-state

62. *Id.* at 420, 870 S.E.2d at 379.
63. O.C.G.A. § 9-11-68(e) (2022).
64. *Junior*, 313 Ga. at 426, 870 S.E.2d at 383.
65. *Id.* at 428, 870 S.E.2d at 384.
66. 312 Ga. 422, 863 S.E.2d 81 (2021).
67. *Id.* at 423, 863 S.E.2d at 83.
68. *Id.* at 423, 863 S.E.2d at 83–84.
69. 262 Ga. 599, 422 S.E.2d 863 (1992).
70. *Cooper Tire & Rubber Co.*, 313 Ga. at 431, 870 S.E.2d at 88.
71. *Id.* at 423, 870 S.E.2d at 84.
72. *Id.* at 424, 870 S.E.2d at 84.
73. 243 U.S. 93 (1917).

corporation that consents to being sued in the state.[74] The supreme court then reasoned that, under its long-standing interpretation in *Klein*, by registering to do business in Georgia, the defendant was subject to general personal jurisdiction in Georgia, the interpretation was constitutional under *Pennsylvania Fire*; it was also subject to deference under *stare decisis* as a long-standing interpretation of the statute.[75]

Accordingly, the court affirmed, holding that personal jurisdiction authorized by the Georgia Code is not unconstitutional in light of *Pennsylvania Fire*.[76]

2. Consequences and Repercussions

Cooper Tire expanded the ability of Georgia citizens to seek redress against out-of-state corporations registered to do business in the state. Given the long-standing interpretation of *Klein,* this seems to have been a known risk to corporations. However, the defendant has sought certiorari to the Supreme Court, and its petition remains pending at this time.[77]

C. Defamation

1. American Civil Liberties Union, Inc. v. Zeh

American Civil Liberties Union, Inc. v. Zeh[78] discussed whether an attorney who worked part-time as a misdemeanor public defender, but also represented felony defendants in private practice, was a "public official" for purposes of defamation law and if so required to plead that the allegedly defamatory statements were made with actual malice to be proved by clear and convincing evidence.[79]

The Georgia Supreme Court recognized that state law definitions of who was a "public official" could not control because the issue to be addressed was for the purpose of "a national constitutional protection."[80] It then turned to the test developed by the United States Supreme Court in *Rosenblatt v. Baer*,[81] which held that the "'public official' designation

74. *Cooper Tire & Rubber Co.*, 313 Ga. at 425, 870 S.E.2d at 85 (citing *Penn. Fire*, 243 U.S. at 94).

75. *Cooper Tire & Rubber Co.*, 313 Ga. at 424, 870 S.E.2d at 84.

76. *Id.* at 425, 870 S.E.2d at 85.

77. Petition for a Writ of Certiorari, Cooper Tire & Rubber Co. v. McCall, No. 21-926 (*petition for cert. filed* Dec. 20, 2021).

78. 312 Ga. 647, 864 S.E.2d 422 (2021).

79. *Id.* at 651–52, 864 S.E.2d at 428.

80. *Id.* at 664, 864 S.E.2d at 437.

81. 383 U.S. 75 (1966).

applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[82]

Applying this test, the court held that the plaintiff had been a "public official" when the defamatory statements were made, and the statements related to his conduct, so actual malice was required.[83] In part, the court reasoned:

> [U]nder *Rosenblatt's* test, Zeh—as Glynn County's appointed public defender for all indigent defendants charged with misdemeanor crimes in the County's State Court—had, or at least appeared to the public to have had, substantial responsibility for the conduct of government affairs, namely, the County's misdemeanor public defense system. The facts set forth in the defamation case pleadings and affidavits show that Zeh was appointed to his position to provide public defense services for all misdemeanor cases in State Court, and as a matter of law, he had the responsibility for determining whether or not a defendant in a misdemeanor case was entitled to a public defender because of indigency.
>
> The proper provision of constitutionally required legal representation for indigent criminal defendants in Glynn County's misdemeanor cases is a matter in which the public has an independent interest . . . . Because Zeh was the sole government official responsible for providing those services and determining who was eligible to receive them, his position "ha[d] such apparent importance that the public ha[d] an independent interest in [his] qualifications and performance." Zeh argues in his brief here that he was merely a "part-time" public defender. But the fact that Zeh maintained a private legal practice in addition to his appointed government position does not diminish his substantial responsibility for the misdemeanor public defense system in Glynn County.[84]

Because the defamatory statements related to his position, the plaintiff, as a public official, was required to plead actual malice.[85] The court held that the record at that time was insufficient to support actual

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82. *Id.* at 85.

83. *Zeh*, 312 Ga. at 667, 864 S.E.2d at 438.

84. *Id.* at 665–66, 864 S.E.2d at 437–38 (quoting *Rosenblatt*, 383 U.S. at 86). *See also* O.C.G.A. § 17-12-24(a) (2008) ("The circuit public defender, any other person or entity providing indigent defense services, or the system established pursuant to Code Section 17-12-80 shall determine if a person . . . arrested, detained, or charged in any manner is an indigent person entitled to representation under this chapter.").

85. *Zeh*, 312 Ga. at 667, 864 S.E.2d at 438.

malice, carefully examining the content and the context of the statements.[86]

2. Consequences and Repercussions

The court in *Zeh* gave an extremely expansive definition to "public officials," but is consistent with other Georgia cases, which have reasoned even lower-level employees can be public officials.[87] Thus, the standard set in *Zeh* will protect the public from claims of defamation even by lower-level employees, and so preserves the public interest. On the other hand, it may subject employees who lack a public presence to rebut a false statement from countering widely disseminated false information.[88]

D. Products Liability

1. Maynard v. Snapchat, Inc.

Maynard v. Snapchat, Inc.[89] arose out of the Spalding County State Court's grant of a motion to dismiss in a personal injury case arising out of a car wreck.[90] The plaintiff had been driving a car when he was rear-ended by another driver who at the time was going over 100 miles per hour and using a "speed filter" within a smartphone application known as "Snapchat."[91] The speed filter allowed Snapchat users to record and share this type of video.[92]

The plaintiff sued both the other driver and Snap, Inc. (Snap), the manufacturer of Snapchat and the speed filter.[93] The claim against the driver was for ordinary negligence. The driver, in fact, pled no contest to the criminal charge of causing serious injury by vehicle. The claim against Snap was based upon a design defect.[94]

The allegations the plaintiff made concerning the risks of the speed filter that were known to Snap were summarized as follows:

> [T]he fact that Snap knew that other drivers were using the Speed Filter while speeding at 100 miles per hour or more as part of "a game," purposefully designed its products to encourage such behavior, knew

86. *Id.* at 674, 864 S.E.2d at 443.
87. *Id.* at 652 n.5, 864 S.E.2d at 428.
88. *Id.* at 654–55, 864 S.E.2d at 431.
89. 313 Ga. 533, 870 S.E.2d 739 (2022).
90. *Id.* at 533–34, 870 S.E.2d at 743.
91. *Id.* at 533, 870 S.E.2d at 743.
92. *Id.*
93. *Id.*
94. *Id.* at 535–36, 870 S.E.2d at 744.

> of at least one other instance in which a driver who was using Snapchat while speeding caused a car crash, and warned users not to use the product while driving. The Maynards further alleged that, "[o]nce downloaded, Snapchat's software continues to download and install upgrades, updates, or other new features" from Snap, meaning that the Maynards may be able to introduce evidence showing that Snap continued developing its product and released new versions of the software between the initial launch of the Speed Filter and the date of Wentworth's accident, after obtaining real-world information about how the Speed Filter was in fact being used.[95]

Snap moved to dismiss the plaintiff's claim against it for failing to state a claim, arguing both (1) that Snap did not owe a duty to design its product to prevent drivers from driving dangerously or to control their conduct, and (2) that the driver's criminal conduct had been an intervening cause, cutting off liability for any original defect.[96] The trial court granted that motion, and the plaintiff appealed.[97]

A divided court of appeals affirmed, reasoning that there was no duty because in a design defect case, foreseeable intentional misuse was not considered, and further, foreseeable intentional misuse by a third party was not a consideration.[98] It also reasoned that the allegations of the complaint showed that the driver's third-party criminal act was an intervening cause, and so there was no proximate cause.[99]

The supreme court granted certiorari and reversed.[100] In doing so, the supreme court brought Georgia products liability law even closer to ordinary negligence principles, and in that effort, also clarified that foreseeability in a design defect case is in practice no different than in ordinary negligence and premises liability cases, turning on foreseeability. The court showed the essential overlap between design defect and negligence law in three ways.[101]

After noting that a duty in Georgia product liability law has two sources,[102] the court stated that the duty of a manufacturer was "similar

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95. *Id.* at 540, 870 S.E.2d at 747.

96. *Id.* at 535, 870 S.E.2d at 744.

97. *Id.*

98. *Id.* at 535, 541, 870 S.E.2d at 744, 748.

99. *Id.* at 553, 870 S.E.2d at 756.

100. *Id.* at 534, 870 S.E.2d at 743.

101. *Id.* at 538, 870 S.E.2d at 746.

102. First, the statutory duty under O.C.G.A. § 51-1-11(b) to sell products that are only "merchantable and reasonably suited to the use intended." *See* O.C.G.A. § 51-1-11(b) (2022). Second, the duty under decisional law that "when designing a product, a manufacturer has a duty to exercise reasonable care in 'selecting from among alternative product designs' to 'reduce[] the [reasonably] foreseeable risks of harm presented by [a] product.'" *Maynard*,

in scope to the duty owed by defendants charged with many other types of negligent conduct, which is likewise generally limited to reasonably foreseeable risks of harm."[103] In this regard, the court cited cases in various negligence-based contexts, including premises liability where third-party criminal activity must have been foreseeable for a landowner to owe a duty to protect invitees from criminal attacks.[104] Thus, the court emphasized that the basis for imposing a duty of care—foreseeable risk of harm—was the same in design defect cases as in negligence cases.[105]

Second, with respect to breach, the court noted that "the same test is used" to determine breach under both sources of duty, the "risk-utility" test, which turns on "the reasonableness of choosing from among various alternative product designs."[106] The court emphasized that "negligence principles underl[ie]" the analysis under a design defect theory.[107]

Third, with respect to proximate cause, the court again relied on general negligence principles.[108] For example, the court stated that, as its discussion of duty and breach show, "considerations regarding foreseeability are intertwined with questions of duty, breach, and proximate causation in negligent-design cases."[109]

Against that background, the supreme court reversed the court of appeals' conclusion that Snap owed no duty to the plaintiff.[110] The court reasoned that the allegations of the complaint were sufficient to show that misuse, even misuse that had been intentional or criminal, had been foreseeable, so a duty existed.[111] In this regard, the court emphasized that any foreseeable misuse—whether characterized as accidental, intentional, or even criminal—affect the risk-utility analysis; it did not matter if the misuse had been by a third party rather than the plaintiff.[112]

The court stated that "a manufacturer may owe a design duty to an injured person regardless of who—the injured person or a third party—was using the defectively designed product when the injury occurred."[113]

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313 Ga. at 536, 870 S.E.2d at 745 (quoting Jones v. NordicTrack, Inc., 274 Ga. 115, 118, 550 S.E.2d 101, 103 (2001)).

103. *Maynard*, 313 Ga. at 537 n.3, 870 S.E.2d at 745.

104. *Id.* (citing Martin v. Six Flags Over Ga. II, L.P., 301 Ga. 323, 328, 801 S.E.2d 24, 30 (2017)).

105. *Maynard*, 313 Ga. at 537–38, 870 S.E.2d at 746.

106. *Id.*

107. *Id.* at 538, 870 S.E.2d at 746.

108. *Id.* at 538–39, 870 S.E.2d at 746.

109. *Id.* at 539, 870 S.E.2d at 747.

110. *Id.* at 553, 870 S.E.2d at 756.

111. *Id.* at 534, 870 S.E.2d at 743.

112. *Id.* at 545, 870 S.E.2d at 751.

113. *Id.* at 543, 870 S.E.2d at 749.

This was because the plain meaning of the "statute extends manufacturer liability not only to those who may use the property, but also to those persons who may 'consume' the property or 'reasonably be affected' by it."[114]

The court relied on essentially the same reasoning to conclude that the allegations were sufficient to state proximate cause and that the driver's intentional misuse had not been an intervening act, at least on the pleadings.[115] However, with respect to both proximate cause and duty, the court emphasized "that intentional or tortious third-party misuse may be an important consideration in determining whether a manufacturer owes a decisional-law design duty in a particular case, whether the manufacturer breached that duty, and whether the manufacturer's breach was a proximate cause of the resulting injury."[116]

2. Consequences and Repercussions

The decision in *Maynard* further harmonizes Georgia products liability law with general negligence doctrine, which should simplify its application in future cases.[117] In that regard, by emphasizing that foreseeability of criminal activity is analyzed no differently in this context than in others, it will allow product manufacturers and plaintiff's lawyers to rely on a well-developed body of caselaw, particularly in the premises liability area, examining when third-party criminal activity creates a duty in premises owners or cuts off liability as an intervening cause.[118]

E. Intellectual Property

1. Edible IP, LLC v. Google LLC

In *Edible IP, LLC v. Google, LLC*,[119] the owner of the trade name "Edible Arrangements" sued Google for operating its search engine in a way that, the owner claimed, gave rise—not to claims of trademark infringement—but to claims for civil theft of personal property, conversion, money had and received, and violations of Georgia's RICO Act.[120] In addressing the claims, the supreme court provided rare

114. *Id.*
115. *Id.* at 553, 870 S.E.2d at 756.
116. *Id.* at 545, 870 S.E.2d at 751.
117. *Id.* at 537, 870 S.E.2d at 746 n.3.
118. *Id.*
119. 313 Ga. 305, 869 S.E.2d 481 (2022).
120. *Id.* at 306, 869 S.E.2d at 483–84.

guidance from the high court on the rights of trademark owners under Georgia law.[121]

The case arose on appeal from the dismissal of the plaintiff's complaint.[122] The allegations of the complaint on review were that the plaintiff owned the trademark "Edible Arrangements," which served as a trademark for it and its franchisees, who ran both brick-and-mortar stores and websites.[123] The plaintiff alleged that Google, through its search engine, had auctioned off the right to third parties to use the name "Edible Arrangements," so that when a consumer searched Google for its tradename, the consumer was led to a competing website or somewhere other than to an authorized user of the trademark "Edible Arrangements."[124]

However, and significantly, the plaintiff did not claim that Google was infringing its trademark by causing any confusion among consumers.[125] Instead, the plaintiff's two primary claims were for theft of its trademark and conversion of it. The Gwinnett County Superior Court granted Google's motion to dismiss, and the court of appeals affirmed.[126]

The plaintiff appealed, and the supreme court affirmed.[127] It first turned to the plaintiff's claim for civil theft of personal property.[128] It recognized that section 51-10-6(a)[129] of the Code creates a claim "to recover damages from any person who willfully damages the owner's personal property or who commits a theft as defined in [O.C.G.A. § 16-8-2]."[130] The plaintiff relied on the second subsection of section 16-8-2 of the Code,[131] which provides: "A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated."[132]

The court first reasoned that under the Georgia Code, the plaintiff had a property interest in its trademark, but under the Code the property interest was itself limited to the right to prevent others from using the

121. *Id.* at 312, 869 S.E.2d at 487; *see* McLean v. Fleming, 96 U.S. 245 (1878).
122. *Id.* at 305–06, 869 S.E.2d at 483.
123. *Id.* at 306, 869 S.E.2d at 483.
124. *Id.* at 306, 869 S.E.2d at 483–84.
125. *Id.* at 307–08, 869 S.E.2d at 484.
126. *Id.* at 305, 869 S.E.2d at 483.
127. *Id.*
128. *Id.* at 308, 869 S.E.2d at 484.
129. O.C.G.A. § 51-10-6(a) (2022).
130. *Id.*
131. O.C.G.A. § 16-8-2 (2022).
132. *Id.*

trademark where doing so caused consumer confusion or was done to deceive consumers.[133] Likewise, the court reasoned that under Georgia common law, "a cause of action based on the use of a trademark or trade name has also generally been predicated on either an intent to cause consumer confusion or the likelihood of creating confusion or misunderstanding."[134] It further turned to federal law regarding trademark infringement and noted federal law, too, "recognizes a distinction between the illegitimate misappropriation of a business's goodwill and legitimate comparative advertising and, therefore, permits the use of trade names as long as referencing other brand names does not confuse consumers and is not deceptive."[135]

As a result, because the plaintiff disavowed any consumer confusion in the complaint, the court reasoned that the plaintiff had not established a claim for civil theft of its property, because that property did not consist of the absolute right to use its tradename, but to prevent others from using it in a way that deceived or confused consumers.[136]

The conversion claim fared no better.[137] While the court recognized that Georgia law did provide relief for certain intangible property, it had never been extended to "claims based on the mere use of a trademark or on trade name infringement, and we decline to do so now."[138]

The court addressed dismissal of the plaintiff's other two claims—money had and received and a claim under the Georgia RICO statute—even more succinctly, and affirmed.[139]

2. Consequences and Repercussions

The court's conclusion in *Edible IP*, that the use of a trademark does not violate the property interest, is consistent with the cases from other jurisdictions recited by the court. In that sense, it created no new ground. However, the case represents a rare explication of Georgia trademark law, and so provides a useful summary to Georgia lawyers of the scope of protection that these common law torts, and related statutory claims, afford under Georgia law.

133. *Edible IP*, 313 Ga. at 310, 314 n.9, 869 S.E.2d at 486, 488.
134. *Id.* at 312, 869 S.E.2d at 487.
135. *Id.* at 314, 869 S.E.2d at 488.
136. *Id.* at 318, 869 S.E.2d at 491.
137. *Id.* at 317, 869 S.E.2d at 491.
138. *Id.* at 317, 869 S.E.2d at 490.
139. *Id.* at 317–18, 869 S.E.2d at 491.

III. CONCLUSION

The Supreme Court of Georgia issued several other decisions affecting Georgia tort law, though arguably with less significance than those above. This Article concludes with a brief discussion of some of interest, but perhaps only to narrow audiences.[140]

In *McEntyre v. Sam's East, Inc.*,[141] the court reiterated that strict liability is rarely applied in Georgia cases, and if a statute creates a duty, breach might constitute negligence per se, but without clear statutory text indicating imposition of strict liability, ordinary negligence principles apply.[142]

In *Doe v. St. Joseph's Catholic Church*,[143] the court examined tolling of the statute of limitations under O.C.G.A. § 9-3-96,[144] reiterating that the fraud required to toll limitations must be to conceal the claim so as to have deterred the plaintiff from discovering it at all.[145]

In *Atlantic Specialty Insurance Co. v. City of College Park*,[146] the court considered whether a local government entity that purchased commercial liability insurance above the statutory waiver of $700,000 necessarily waived sovereign immunity to the extent of that additional coverage where the policy endorsement itself stated that the city did not intend to waive sovereign immunity.[147] The court reasoned that under O.C.G.A.

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140. *See*, *e.g.*, RCC Wesley Chapel Crossing, LLC v. Allen, 313 Ga. 69, 867 S.E.2d 108 (2021) (holding that the common law right of a property owner to remove trespassing chattels did not include the right to immobilize trespassing cars); Spann v. Davis, 312 Ga. 843, 866 S.E.2d 371 (2021) (holding that trial courts lack authority to dismiss *sua sponte* based on quasi-judicial immunity and dismiss a suit on that defense); Dep't of Transp. v. Mixon, 312 Ga. 548, 864 S.E.2d 67 (2021) (holding that sovereign immunity under the Georgia Constitutional takings provision waives sovereign immunity for two types of injunctive relief); Roberts v. Unison Behav. Health, 312 Ga. 438, 863 S.E.2d 99 (2021) (holding that the Georgia Torts Claim *ante litem* notice provision requires only a list of the types of losses sustained, not a detailed description of the injuries); Armstrong v. Cuffie, 311 Ga. 791, 860 S.E.2d 504 (2021) (holding that a legal malpractice action based on the failure to protect an underinsured motorist (UIM) claim could be protected by effecting service of the complaint on the UIM carrier); Harvey v. Merchan, 311 Ga. 811, 860 S.E.2d 561 (2021) (analyzing choice of law and conflicts of law in a case arising principally out of sexual abuse in Canada); Gatto v. City of Statesboro, 312 Ga. 164, 860 S.E.2d 713 (2021) (holding that the "nuisance exception" to sovereign immunity did not apply to a claim arising out of an altercation on private property because the city had lacked any degree of dominion or control over that private property).

141. 313 Ga. 429, 870 S.E.2d 385 (2022).

142. *Id.* at 430, 870 S.E.2d at 387.

143. 313 Ga. 558, 870 S.E.2d 365 (2022).

144. O.C.G.A. § 9-3-96 (2022).

145. *Doe*, 313 Ga. at 564, 870 S.E.2d at 373.

146. 313 Ga. 294, 869 S.E.2d 492 (2022).

147. *Id.* at 302–03, 869 S.E.2d at 498.

§ 36-92-2(d)(3),[148] the endorsement was effective to exclude the plaintiff's claim for damages above the $700,000 amount, rejecting the argument that the endorsement was a means to avoid waiver of sovereign immunity but purchase additional aggregate coverage.[149]

148. O.C.G.A. § 36-92-2(d)(3) (2022).

149. *Atl. Specialty Ins.*, 313 Ga. at 303, 869 S.E.2d at 499.