Torts

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I. INTENTIONAL TORTS

A. *Malicious Prosecution*

In *Ye v. Kroger Co.*,[1] Mr. Ye visited a Kroger grocery store to shop for a few essential items, including a box of condoms. While partially concealing the condoms in his sleeve, Ye picked up tangerines and contact lens solution. A Kroger employee saw Ye put the box of condoms in his pants pocket. The employee informed the assistant store manager, and both observed Ye proceed through the checkout and exit the store without paying for the condoms. The assistant manager followed Ye out of the store and asked him about the condoms. Ye admitted that he had not paid for the condoms and asked if he could pay for them at that time. The assistant manager did not answer, but took Ye to the manager's office where a shoplifting incident report was completed, and the police were called. Ye was arrested for shoplifting, placed in handcuffs, and transported to jail. After a jury found Mr. Ye not guilty of theft by shoplifting, he sued Kroger for malicious prosecution, false arrest, and false imprisonment.[2]

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1. 252 Ga. App. 712, 556 S.E.2d 879 (2001).
2. *Id.* at 712, 556 S.E.2d at 879.

In affirming the trial court's grant of summary judgment to Kroger, the court of appeals first enumerated the elements of a malicious prosecution action: (1) prosecution for a criminal offense; (2) instigation of the prosecution under a valid warrant, accusation, or summons; (3) termination of the prosecution in favor of the plaintiff; (4) malice; (5) lack of probable cause; and (6) damages to the plaintiff.[3]

While ordinarily a jury decides whether probable cause exists, because Ye admitted he placed the box of condoms in his pocket and failed to pay for it before exiting the store, the existence of probable cause was a proper question for the judge.[4] "Although criminal intent is a material element of shoplifting, a store employee is not required to determine the shopper's subjective intent before seeking an arrest and prosecution for shoplifting."[5] Because Ye's actions would have caused reasonably prudent persons to believe that they had probable cause to prosecute Ye for shoplifting, Ye could not recover for malicious prosecution.[6]

Addressing the third element of a malicious prosecution action, the court of appeals in *Sherrill v. Stockel*[7] found error in the trial court's denial of defendant's motion for summary judgment.[8] The termination of the prosecution was brought about by a compromise and agreement of the parties, and therefore, the prosecution did not terminate in favor of plaintiff, and he could not recover for malicious prosecution.[9]

The court of appeals addressed the second element of a malicious prosecution action in *Erfani v. Bishop*.[10] Bishop swore out an arrest warrant for criminal trespass after Erfani, who leased property from Bishop, vacated the premises prior to the expiration of the lease term, then forcefully re-entered to collect his property after Bishop changed the lock on the door.[11]

While the arrest warrant was valid when sworn out by defendant,[12] the statute of limitations for plaintiff's misdemeanor criminal trespass charge ran before the case was prosecuted. The trial court incorrectly

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3. *Id*. at 712-13, 556 S.E.2d at 880 (quoting Medoc Corp. v. Keel, 166 Ga. App. 615, 615-16, 305 S.E.2d 134, 135-36 (1983)).
4. *Id.* at 713, 556 S.E.2d at 880.
5. *Id*. (citing K-Mart Corp. v. Coker, 261 Ga. 745, 747, 410 S.E.2d 425, 427 (1991)).
6. *Id*.
7. 252 Ga. App. 276, 557 S.E.2d 8 (2001).
8. *Id.* at 276, 557 S.E.2d at 11.
9. *Id.* at 279, 557 S.E.2d at 11-12.
10. 251 Ga. App. 20, 553 S.E.2d 326 (2001).
11. *Id.* at 20-21, 553 S.E.2d at 328-29.
12. The court later explained that because the detention was based upon a procedurally valid process, false imprisonment was not an available remedy to plaintiff. *Id.* at 24, 553 S.E.2d at 330.

ruled that Erfani's malicious prosecution claim was time-barred by the statute of limitations.[13] The court of appeals, however, disagreed, holding that although the issuance of the arrest warrant did not toll the criminal statute of limitations, the civil statute of limitations for malicious prosecution did not commence until "the termination of the criminal prosecution in plaintiff's favor."[14]

Nonetheless, because the trial court's decision was justified for another reason, the court of appeals affirmed the grant of summary judgment.[15] The fact that the magistrate bound the criminal case over to the state court was prima facie evidence of probable cause, though not conclusive of probable cause.[16] Plaintiff became a trespasser when he re-entered Bishop's property after vacating prior to the end of the rental term.[17] The facts that plaintiff admittedly (and forcefully) re-entered the property after he abandoned the premises and that defendant accepted the surrender by installing new locks would lead a reasonable person to believe that plaintiff committed criminal trespass.[18] Therefore, probable cause existed to swear out the warrant and summary judgment was proper.[19]

Plaintiff's defamation claim was barred by the statute of limitations because the complaint was filed more than one year after publication of defendant's statements in an affidavit supporting plaintiff's arrest warrant. Moreover, an absolute privilege protects such statements, and plaintiff's complaint made no allegation that the statements were false or were made with malice.[20]

B. Conversion

In *Walden v. Jones*,[21] Walden operated Capricorn Records out of a building he had owned since 1959. In 1986 he decided to move the recording studio to Nashville and sold the building to Lewis, a high school friend. With Lewis's permission, Walden stored certain music

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13. *Id.* at 21, 553 S.E.2d at 329.
14. *Id.*, 553 S.E.2d at 328-29 (citing O.C.G.A. § 51-7-41 (2000); Daniel v. Ga. R.R. Bank & Trust Co., 255 Ga. 29, 31, 334 S.E.2d 659, 661 (1985); Walters v. Walton, 225 Ga. App. 119, 120, 483 S.E.2d 133, 134-35 (1997)).
15. *Id.* at 21-22, 553 S.E.2d at 329.
16. *Id*. at 23, 553 S.E.2d at 330 (citing Sykes v. S. Side Atlanta Bank, 53 Ga. App. 450, 452, 186 S.E. 464, 466 (1936)).
17. *Id*., 553 S.E.2d at 329.
18. *Id.*, 553 S.E.2d at 330.
19. *Id*. at 23, 553 S.E.2d at 329-30.
20. *Id*. at 24, 553 S.E.2d at 330-31.
21. 252 Ga. App. 692, 556 S.E.2d 566 (2001).

industry memorabilia in the building until he could establish himself in Nashville.[22]

Lewis defaulted on his loan, and the bank foreclosed on the building in September 1991. When Lewis received notice of the foreclosure sale, he contacted Walden's brother and recommended that the memorabilia be removed from the building before the foreclosure occurred. With Walden's permission, Walden's brother and nephew removed much, but not all, of the memorabilia. The building was then sold by the bank to Jones by general warranty deed in April 1992. While the warranty deed conveyed only the building to Jones, the bank quitclaimed the memorabilia to Jones in 1995.[23]

After hearing rumors in December 1996 that Jones loaned selected memorabilia items to the Georgia Music Hall of Fame, Walden wrote Jones demanding return of the memorabilia. Jones subsequently sold the building, without the memorabilia, to Mercer University in March 2000. Walden sought to recover the memorabilia and sought a declaration by the court that the music memorabilia belonged to him. Walden further sought an injunction that would prevent Jones from selling or marketing the memorabilia and asked for damages for conversion.[24]

The court of appeals affirmed the trial court's finding that Walden abandoned the property, explaining that "'abandonment . . . may result from acts of the owner or from failure to bring an action for the recovery of the personalty within four years.'"[25] "An owner may abandon personal property by acts of commission and omission."[26]

The record failed to show any evidence that Walden inventoried the memorabilia left behind when he moved to Nashville in 1986 or when his brother and nephew delivered additional memorabilia to him in 1991. Nor did the record establish that plaintiff was absent when his brother and nephew collected the memorabilia in 1991. Walden's December 1996 letter to Jones was the first communication wherein plaintiff asserted a claim of right to the memorabilia. Under these circumstances, Walden abandoned all the memorabilia that remained in the building

22. *Id.* at 692, 556 S.E.2d at 567.

23. *Id.*

24. *Id.*

25. *Id.* at 694, 556 S.E.2d at 567 (quoting Maslia v. Hall, 121 Ga. App. 740, 743, 175 S.E.2d 48, 51 (1970)) (citing O.C.G.A. § 9-3-32 (2002)).

26. *Id.*, 556 S.E.2d at 568 (citing Ferguson v. Gurley, 105 Ga. App. 575, 579, 125 S.E.2d 218, 222 (1962)).

after he accepted delivery of a portion of the memorabilia delivered to him by his own agents.[27]

Moreover, the court of appeals held that the conversion action failed because the statute of limitations set forth in Official Code of Georgia Annotated ("O.C.G.A.") section 9-3-32[28] expired.[29] The court stated that, "'The true test to determine when a cause of action accrues is to ascertain the time when the plaintiff could first have maintained her action to a successful result.'"[30] Plaintiff's cause of action accrued in 1991, when his agents failed to remove all memorabilia from storage. Because the action was not instituted until 2000, it was time-barred.[31]

Plaintiff in *Taylor v. Powertel, Inc.*[32] sued defendant for conversion after defendant assigned Florida taxes on plaintiff's monthly cellular phone bill.[33] The court of appeals explained that, generally, money is not subject to a conversion action because it is intangible personal property that is fungible.[34] It cannot be differentiated by specific identification absent a specific fund created and set aside from other money.[35] Because plaintiff failed to show that the portion of the total cellular phone bill attributable to the taxes constituted an identifiable fund that belonged to him, and to which he had an immediate right of possession, he failed to show that he sought the kind of personal property subject to suit for conversion.[36] He should have sued for "money had and received."[37]

II. LIBEL/DEFAMATION

In *Swindall v. Cox Enterprises, Inc.,*[38] Swindall sued for libel for statements made in a 1999 editorial published in the *Atlanta Constitution* entitled "Barr's Claims Outrageous, Invalid," which quoted statements made by U.S. Representative Bob Barr during former President Clinton's impeachment trial.[39] When asked if prosecutors

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27. *Id.*
28. O.C.G.A. § 9-3-32 (2002).
29. 252 Ga. App. at 694, 556 S.E.2d at 568.
30. *Id.* (quoting Travis Pruitt & Assoc. v. Bowling, 238 Ga. App. 225, 226, 518 S.E.2d 453, 454 (1999)).
31. *Id.*
32. 250 Ga. App. 356, 551 S.E.2d 765 (2001).
33. *Id.* at 356, 551 S.E.2d at 767.
34. *Id.* at 358-59, 551 S.E.2d at 769.
35. *Id.* at 359, 551 S.E.2d at 769 (citations omitted).
36. *Id.*, 551 S.E.2d at 770.
37. *Id*.
38. 253 Ga. App. 235, 558 S.E.2d 788 (2002).
39. *Id.* at 235, 558 S.E.2d at 789.

would have sought an indictment for an individual who engaged in the perjury of which the President was accused, Barr responded that he had prosecuted such cases, "including a case that probably cost me a primary election in the Republican Party for prosecuting a member of Congress for precisely the activity which brings us here today; that is perjury, misleading a grand jury."[40]

The editorial then commented on Barr's statements as follows: "Barr compares the charges against Pat Swindall, the then-member of Congress he prosecuted and convicted for perjury, to the accusations against Clinton."[41] The editorial made the following references to Swindall's situation: (1) "Swindall was charged with lying about his involvement in a drug-money laundering scheme"; (2) "Swindall's lying about drug-money laundering"; and (3) "Swindall was a man who lied about drug-money laundering."[42] While conceding that the first statement was true, Swindall claimed that the other two statements were false.[43]

Plaintiff had been convicted of nine counts of perjury in the United States District Court for the Northern District of Georgia. The Eleventhth Circuit Court of Appeals affirmed six and reversed three of the convictions.[44] The Eleventh Circuit summarized the nine count indictment as follows: "'Swindall had discussed money laundering transactions with an undercover agent and an intermediary, and then falsely testified to a grand jury to conceal the extent of his involvement in these discussions. Swindall was not charged with any substantive money-laundering offenses.'"[45]

The court stated, "[L]ibel is a false and malicious defamation of another, expressed in print [or] writing . . ., tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule."[46] Therefore, "[t]o be actionable, the statement must be both false *and* malicious . . . ."[47]

The court of appeals rejected Swindall's arguments regarding the falsity of the statements because the statements did not assert that Swindall laundered drug money, but that he *lied* about drug-money

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40. *Id.*
41. *Id.* at 235-36, 558 S.E.2d at 789.
42. *Id.* at 236, 558 S.E.2d at 790.
43. *Id.*
44. *Id.* at 235, 558 S.E.2d at 789.
45. *Id.* (quoting United States v. Swindall, 971 F.2d 1531, 1534 (11th Cir. 1992)).
46. *Id.* at 236, 558 S.E.2d at 790 (second alteration in original) (citing O.C.G.A. § 51-5-1(a) (2000)).
47. *Id.* (citing Jaillett v. Ga. Television Co., 238 Ga. App. 885, 888, 520 S.E.2d 721, 724 (1999)).

laundering.[48] Furthermore, his perjury convictions on nine counts of lying about drug-money laundering gave substantial truth to the editorial statements, even though Swindall did not launder the money. Thus, the trial court did not err in granting summary judgment to Cox because Swindall could not meet his burden of proving the falsity of the editorial. The resolution of the falsity issue mooted the question of whether malice existed.[49]

Mathis v. Cannon[50] involved libelous postings in an internet chat room.[51] The court of appeals upheld the trial court's finding that defendant's statements constituted libel per se.[52] Pursuant to O.C.G.A. section 51-5-4,[53] it is libelous per se to make statements that "'[impute] to another a crime punishable by law . . . [and make] charges against another in reference to his trade, office, or profession, calculated to injure him therein.'"[54] The court found no question that defendant's posting, which called plaintiff a "thief" and suggested he was fired for dishonest behavior, stated and implied defamatory facts about Cannon that could be proved to be false.[55]

Had Cannon become a limited purpose public figure by thrusting himself to the forefront of a public controversy for the purpose of influencing the resolution of issues surrounding that controversy, and if the internet posting were a matter of public concern, Cannon would have to prove that the defendant made the statements with actual malice in order to recover.[56] The court found no evidence that Cannon had thrust himself to the forefront of a public controversy.[57]

Importantly, the court found that O.C.G.A. section 51-5-11(B)(1)(b),[58] which precludes recovery of punitive damages in a libel action when defendant corrects and retracts the allegedly libelous statement in as conspicuous and public a manner as that in which the alleged libelous statement was published, does not apply to internet postings.[59]

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48. *Id.* at 236-37, 558 S.E.2d at 790.
49. *Id*. at 237, 558 S.E.2d at 790-91.
50. 252 Ga. App. 282, 556 S.E.2d 172 (2001).
51. *Id.* at 282, 556 S.E.2d at 174.
52. *Id.*
53. O.C.G.A. § 51-5-4 (2002).
54. 252 Ga. App. at 283, 556 S.E.2d at 174 (quoting O.C.G.A. § 51-5-1(a)(1), (3) (2000)) (alteration in original).
55. *Id*. at 284, 556 S.E.2d at 175.
56. *Id*.
57. *Id.* at 285, 556 S.E.2d at 176.
58. O.C.G.A. § 51-5-11(B)(1)(b) (2002).
59. *Mathis*, 252 Ga. App. at 285, 556 S.E.2d at 176.

Accordingly, plaintiff's claims for punitive damages were not precluded.[60]

III. INFLICTION OF EMOTIONAL DISTRESS

The court of appeals in *Pike Nurseries, Inc. v. Allen*[61] held that the trial court erred in not following the Supreme Court of Georgia's authority, set out in *Lee v. State Farm Mutual Insurance Co.*,[62] which requires that a parent be physically impacted and injured in an accident in order to recover for emotional distress caused by seeing a child injured in the accident.[63]

In *Pike Nurseries*, a concrete display fountain fell on Kenneth and Annette Allen's five-year-old daughter. The Allens alleged that each witnessed the accident or its aftermath and sued Pike for intentional infliction of emotional distress, claiming that Pike's willful and wanton misconduct in negligently maintaining the fountain resulted in the accident. The parents, however, admitted in their depositions that the fountain did not physically impact them. Pike moved for partial summary judgment on the parents' claims of mental and emotional distress. The trial court denied Pike's motion, rejecting the impact requirement set forth in *Lee*, ruling that even without physical impact to the parents, a jury could find in favor of the parents.[64]

The only exception to the impact requirement is "'when the alleged conduct directed toward the plaintiff is malicious, wil[l]ful or wanton.'"[65] Unless the exception to the impact rule applied, the trial court should have granted Pike's motion for partial summary judgment.[66] Neither the court of appeals nor the trial court has the authority to overrule decisions of the Supreme Court of Georgia.[67]

The court of appeals ruled that proof of willfulness or wantonness under this exception required the Allens to show that the conduct was *specifically* directed at them and not at Pike's customers generally.[68]

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60. *Id.* at 286, 550 S.E.2d at 176.
61. 253 Ga. App. 312, 558 S.E.2d 834 (2002).
62. 272 Ga. 583, 533 S.E.2d 82 (2000).
63. 253 Ga. App. at 312, 558 S.E.2d at 835 (citing *Lee*, 272 Ga. at 588, 533 S.E.2d at 86).
64. *Id.*
65. *Id.* at 313, 558 S.E.2d at 836 (quoting *Lee*, 272 Ga. at 584 n.2, 533 S.E.2d at 84).
66. *Id.* at 312-13, 558 S.E.2d at 836.
67. *Id.* at 312, 558 S.E.2d at 836 (citing GA. CONST. art. VI, § 6, para. 4; Parian Lodge v. DeKalb County, 225 Ga. App. 853, 854, 485 S.E.2d 545, 546 (1997)).
68. *Id.* at 313, 558 S.E.2d at 836.

Because Pike's conduct was not specifically directed at plaintiffs, the trial court erred in denying Pike's motion for summary judgment.[69]

In *Mantooth v. American National Red Cross,*[70] Mantooth filed suit against the American Red Cross and others after she was given a blood transfusion in 1998. The blood donor had lived in a region of Africa where a rare, undetectable strain of HIV was known to exist. Later in 1998, the Red Cross notified the hospital that it had supplied blood that did not meet its standards. Neither the donor nor Ms. Mantooth ever tested positive for HIV or the AIDS virus.[71]

Understandably, Mantooth was upset about the possibility that she had been exposed to this undetectable strain of HIV. She claimed she lived in fear that she had the virus and would pass it on to her family members. She never sought medical treatment for her allegedly severe emotional distress nor treatment for any alleged physical damage caused by the transfusion. Furthermore, she conceded that she did not incur any medical expenses as a direct result of the transfusion. Mantooth, however, suffered from many serious medical conditions including anemia, angina, breast cancer, heart disease, lung cancer, asthmatic bronchitis, diabetes, kidney failure, and pneumonia. She died at age seventy-five. Upon her death, Mantooth's executor continued to pursue her claims.[72]

In affirming summary judgment in favor of the Red Cross, the court of appeals held that plaintiff's failure to demonstrate recoverable damage was fatal to her claims of ordinary and professional negligence as well as her claim of intentional infliction of emotional distress.[73] The only alleged damage supported by the record was Mantooth's emotional distress resulting from her fear that she had been exposed to HIV.[74]

Mantooth's executor argued that he "should not have been required to demonstate actual exposure because the 'Group O' HIV strain is undetectable by known tests."[75] The court pointed to the case of *Russaw v. Martin*,[76] which held that a plaintiff *must* prove actual exposure in order to recover for the fear of being exposed to HIV and/or the AIDS virus.[77] Like Mantooth, the plaintiff in *Russaw* was unable to demonstrate actual exposure to HIV, and there was no evidence of a

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69. *Id*., 558 S.E.2d at 836.
70. 253 Ga. App. 587, 569 S.E.2d 242 (2002).
71. *Id.* at 587-88, 569 S.E.2d at 244-45.
72. *Id.*
73. *Id.* at 591, 569 S.E.2d at 247.
74. *Id.* at 592, 569 S.E.2d at 248.
75. *Id.*
76. 221 Ga. App. 683, 472 S.E.2d 508 (1996).
77. *Id.* at 686, 472 S.E.2d at 512.

channel of communication of the disease. Under such circumstances, recovery for fear and mental anguish is unreasonable as a matter of law.[78] Moreover, suppliers of blood are exempt from being held strictly liable under a products liability theory.[79]

To recover for intentional infliction of emotional distress, Mantooth's executor was required to show the following: "(1) the conduct [was] intentional or reckless; (2) it [was] extreme and outrageous; (3) there [was] a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional stress [was] severe."[80] Although plaintiff satisfied the third and fourth elements, there was no evidence that the Red Cross intended to inflict emotional pain on Mantooth or that its conduct was reckless.[81]

In *H.J. Russell & Co. v. Jones*,[82] plaintiff claimed that her employer negligently supervised and retained an employee who allegedly sexually harassed Jones. Evidence showed a history of inappropriate activity by the particular employee toward plaintiff and other female employees. The jury found that the employer negligently retained or supervised the employee and that the negligent retention or supervision was willful, wanton, or malicious, and directed toward plaintiff.[83]

Defendant argued that because plaintiff proved no physical or pecuniary injury, she was only entitled to recover for injury to peace and happiness. Defendant further contended that the evidence presented did not authorize a finding that the employer's actions were willful, wanton, or malicious, and directed toward plaintiff, and, therefore, plaintiff could not recover for injury to peace and happiness.[84]

The court stated, "Damages are generally not available for mental pain, suffering, or emotional distress unless accompanied by physical or pecuniary loss or are the result of malicious, willful, and wanton action directed at the complainant."[85] Because plaintiff did not show physical damage or pecuniary loss, she could recover for damages to her peace

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78. *Id*. at 687, 472 S.E.2d at 512. *See also* McQuaig v. McLaughlin, 211 Ga. App. 723, 727, 440 S.E.2d 499 (1994).

79. McAllister v. Am. Nat'l Red Cross, 240 Ga. 246, 247-48, 240 S.E.2d 247, 249 (1977). *See also* O.C.G.A. § 51-1-28(a) (2002).

80. *Mantooth,* 253 Ga. App. at 593, 569 S.E.2d at 248 (citing Northside Hosp. v. Ruotannen, 246 Ga. App. 433, 435, 541 S.E.2d 66, 68-69 (2000)).

81. *Id.*

82. 250 Ga. App. 28, 550 S.E.2d 450 (2001).

83. *Id*. at 28-31, 550 S.E.2d at 452-53.

84. *Id.* at 30, 550 S.E.2d at 453.

85. *Id*. at 30-31, 550 S.E.2d at 453 (citing OB-GYN Assoc. of Albany v. Littleton, 259 Ga. 663, 665-66, 386 S.E.2d 146, 148-49 (1989); Ryckley v. Callaway, 261 Ga. 828, 829, 412 S.E.2d 826, 827 (1992)).

and happiness only if defendant acted maliciously, willfully, and wantonly toward plaintiff.[86] To show willful and wanton conduct, the plaintiff must establish that the individual acted with an "'entire absence of care [that] would raise the presumption of conscious indifference, or that with reckless indifference, the person acted with actual or imputed knowledge that the inevitable or probable consequences of his conduct would be to inflict injury.'"[87] Defendant's employee was specifically found to have engaged in willful, wanton, or malicious conduct by the jury. Because defendant knew its employee was targeting plaintiff, a wanton failure by defendant to supervise its employee could fairly be seen as a wanton failure on the employer's part to fulfill its duty to plaintiff.[88]

The court rejected defendant's contention that the two year statute of limitations was substantially ignored by the jury when the trial court permitted evidence of incidents that allegedly occurred prior to July 30, 1995, which was two years before plaintiff filed suit.[89] Incidents that occurred before July 30, 1995 were relevant to whether the employer knew or should have known that its employee was a threat to plaintiff.[90] "Acts of sexual harassment occurred after July 30, 1995, and the evidence . . . support[ed] a finding that [the employer] supervised and retained [its employee] after July 30, 1995, under conditions [that] showed a wanton disrespect for the safety of [plaintiff]."[91]

IV. PREMISES LIABILITY

A. *Slip and Fall*

Since the Georgia Supreme Court's decision in *Robinson v. Kroger Co.*,[92] the court of appeals has continued to wrestle with the summary judgment standard in slip and fall cases. The decision in *Robinson* significantly restricted slip and fall defendants' ability to obtain summary judgment. While it is rare that a new slip and fall case fails to cite *Robinson*, the court of appeals in *Barge v. Melvin Carmichael*

86. *Id*. at 31, 550 S.E.2d at 453.
87. *Id.* (quoting Brady v. Glosson, 87 Ga. App. 476, 480, 74 S.E.2d 253, 256 (1953)).
88. *Id.*
89. *Id.* at 31-32, 550 S.E.2d at 454.
90. *Id.* at 32, 550 S.E.2d at 454.
91. *Id*. at 32, 550 S.E.2d at 454.
92. 268 Ga. 735, 493 S.E.2d 403 (1997).

Enterprises, Inc.,[93] reversed the trial court's grant of summary judgment to defendant without referencing *Robinson.*[94]

Barge slipped and fell on ham salad spilled by a customer on the aisle floor at Zack's Discount Food. The evidence showed that Zack's had no actual knowledge of the ham salad on the floor. Plaintiff contended that Zack's had constructive knowledge of the hazard. The trial court granted Zack's motion for summary judgment, finding that Barge failed to show how long the ham salad had been on the floor.[95]

Judge Eldridge, in reversing the trial court, pointed to prior decisions in which it was held that "'in order to withstand a motion for summary judgment, a plaintiff need not show how long a substance has been on the floor unless the defendant has established that reasonable inspection procedures were in place and followed at the time of the incident.'"[96] Without showing that a reasonable inspection procedure was in place and was being carried out, it does not matter how long a foreign substance has been on the floor because the favorable inferences to which the plaintiff/nonmovant is entitled permits the conclusion that the hazardous substance would not have been timely discovered and removed.[97]

Not only did Zack's fail to have "reasonable" inspection procedures, it had virtually no inspection procedures in place at the time of the incident. The individual who purportedly was in charge of inspection procedures was primarily hired to bag groceries and collect shopping carts from the parking lot. He testified that his bagging duties prevented him from inspecting aisles on a regular basis and that he had no idea when any inspection was done on the date of the fall. Additionally, the store owner did not know whether any inspection was performed on the date of the fall or who would have performed such an inspection.[98] Under these circumstances, the court found that Zack's inspection procedures were not "reasonable," and that, therefore, a jury question existed as to defendant's constructive knowledge.[99]

However, patrons who slip and fall at large spectator events are in a more difficult situation. Plaintiff in *Mayhue v. Middle Georgia Coliseum Authority*[100] broke his left wrist when he slipped and fell on a contain-

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93. 252 Ga. App. 725, 556 S.E.2d 906 (2001).
94. *Id.* at 726, 556 S.E.2d at 907.
95. *Id.* at 725-26, 556 S.E.2d at 907.
96. *Id*. at 726-27, 556 S.E.2d at 907 (quoting Straughler v. J.H. Harvey Co., 232 Ga. App. 29, 30, 500 S.E.2d 353, 355 (1998)).
97. *Id.* at 727, 556 S.E.2d at 907.
98. *Id.*, 556 S.E.2d at 907-08.
99. *Id.* at 729, 556 S.E.2d at 909.
100. 253 Ga. App. 471, 559 S.E.2d 488 (2002).

er of nacho cheese while leaving the Macon Coliseum after watching a circus performance. Plaintiff contended that a question of material fact existed on whether the coliseum had constructive knowledge of the hazard, and that therefore, defendant was precluded from summary judgment.[101]

While a plaintiff generally need not show how long a substance has been on the floor unless the defendant establishes that reasonable inspection procedures were in place and carried out at the time of the incident, it would be unduly burdensome, if not impossible, for the proprietor of an event to perform an inspection for trash on the floor while thousands of spectators are exiting a venue.[102] The plaintiff in such a case must prove how long the substance was on the floor before he fell. Because plaintiff failed to meet this burden, summary judgment was appropriate.[103] The court of appeals concluded that it was reasonable for a patron of the Macon Coliseum to encounter food on the ground near the concession stand at the end of a circus performance and that a container of nacho cheese on the floor did not pose an unreasonable risk of harm.[104]

While exiting a restaurant, plaintiff in *Hindmon v. Virgil's Food Mart, Inc.*[105] slipped and fell on a rug that was placed on a covered porch during the time period in which she was dining. Plaintiff admitted that she saw the rug and tried to avoid it, but caught her heel on it.[106] The court of appeals held that plaintiff's admitted knowledge of the rug precluded her recovery.[107]

In *Owens v. DeKalb Medical Center, Inc.*,[108] an elderly plaintiff attended a "senior fair" at DeKalb Medical Center, where she injured herself exiting through a revolving door with her walker.[109] The court of appeals affirmed the trial court's grant of summary judgment to defendant, finding no evidence that the door was defective.[110]

The court further determined that plaintiff was in the best position to judge the danger of using the revolving door with her walker.[111] The

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101. *Id.* at 472-73, 559 S.E.2d at 489-90.
102. *Id*. at 474, 559 S.E.2d at 490-91.
103. *Id.*, 559 S.E.2d at 491 (citing Straughter v. J.H. Harvey Co., 232 Ga. App. 29, 30, 500 S.E.2d 353, 354 (1998)).
104. *Id*.
105. 252 Ga. App. 732, 556 S.E.2d 135 (2001).
106. *Id.* at 733, 556 S.E.2d at 136.
107. *Id.* at 734, 556 S.E.2d at 137.
108. 253 Ga. App. 19, 557 S.E.2d 404 (2001).
109. *Id.* at 19, 557 S.E.2d at 405-06.
110. *Id.* at 20-21, 557 S.E.2d at 406-07.
111. *Id*. at 21, 557 S.E.2d at 406.

court rejected plaintiff's argument that defendant owed a duty to constantly patrol the premises because a revolving door was not a particularly dangerous condition, but rather an apparent and static one.[112] Finally, the court concluded that the senior fair did not constitute special circumstances that would impose a duty on defendant to supervise the revolving door because the center had no reason to foresee a special danger to elderly visitors.[113]

Plaintiff in *Medley v. Home Depot, Inc.*[114] fell on oil deliberately spilled by teenagers who were "clowning around" in a Home Depot store. An employee admitted that he was monitoring the teens' behavior and that the teens had fooled around in the store on prior occasions. Another employee testified that per Home Depot policy, the teens, as nonshoppers, should have been asked to leave.[115]

The court of appeals explained that the true ground of premises liability is the owner's superior knowledge of the hazardous condition and the danger to persons on the property.[116] Because the teens previously spilled substances on the floor at this particular store, a fact issue existed as to whether it was foreseeable that they would again spill substances on the floor that would be hazardous to shoppers.[117]

An intervening criminal act of a third party, without which the injury would not have occurred, does not break the causal connection between the defendant's negligence and the injury if the injury was a foreseeable consequence of the defendant's conduct.[118] Evidence that nonshoppers previously created the danger, combined with evidence that the company failed to follow its own policies, created a jury issue as to whether Home Depot exercised ordinary care in keeping the premises and approaches safe.[119]

Home Depot prevailed in the case of *Langston v. Home Depot United States, Inc.,*[120] in which the court of appeals held that Home Depot had no duty to keep a display safe to support human weight because such use was not invited, intended, or reasonably foreseeable.[121] There

112. *Id*. at 22-23, 557 S.E.2d at 407-08.
113. *Id*. at 22, 557 S.E.2d at 407.
114. 252 Ga. App. 398, 555 S.E.2d 736 (2001).
115. *Id.* at 399, 555 S.E.2d at 737.
116. *Id*. at 401, 555 S.E.2d at 739.
117. *Id.*
118. *Id.* (citing Walker v. Hammock, 246 Ga. App. 640, 642, 541 S.E.2d 439, 441 (2000)).
119. *Id*. at 400-02, 555 S.E.2d at 739.
120. 251 Ga. App. 240, 554 S.E.2d 223 (2001).
121. *Id.* at 241, 554 S.E.2d at 225.

exists no duty to foresee and warn against dangers that are not reasonably expected.[122]

> Thus, when a portion of the premises is put to a use not intended by the owner, the owner is not liable for the resulting injuries unless he knew or should have known that it would be diverted to such use and knew or should have known of the hazard from such.[123]

After defendant produced evidence that it lacked knowledge of the hidden defect in the display panels and that it could not reasonably foresee that any customer would use the shelf as a step or to support weight, the duty shifted to plaintiff to show there was a patent defect and to establish that defendant should have foreseen plaintiff's actions or that defendant had actual or constructive knowledge of the hazard.[124] Because plaintiff's knowledge of the hidden hazard was equal to or greater than the knowledge of defendant, plaintiff could not recover for injuries sustained after she stepped on a lower shelf of a display support that gave way when she reached for merchandise.[125]

Defendant in *Williams v. Truett*[126] was sued by a long-time close friend who slipped and fell on a carpet scrap while visiting defendant's mobile home. As a social guest, plaintiff was a licensee to whom the following duty was owed:

> [O]rdinary care and diligence must be exercised to prevent injuring a licensee after the presence of the licensee is known or reasonably should have been anticipated, making the owner's duty of care in such circumstances the equivalent of the duty of care which would have been owing had the licensee been an invitee.[127]

The true basis for liability to a licensee or invitee is the owner's superior knowledge of the hazard.[128] Because the evidence conflicted as to when the carpet scrap was laid on the landing and whether plaintiff or defendant had previously traversed the carpet scrap prior to the incident, summary judgment was inappropriate.[129]

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122. *Id.*

123. *Id.* (citing Savannah East Side Corp. v. Robinson, 102 Ga. App. 426, 429-30, 116 S.E.2d 613, 616 (1960)).

124. *Id.* at 242, 554 S.E.2d at 226.

125. *Id.* at 242-43, 554 S.E.2d at 226.

126. 251 Ga. App. 46, 553 S.E.2d 350 (2001).

127. *Id*. at 47, 553 S.E.2d at 352 (citing Cooper v. Corporate Property Investors, 220 Ga. App. 889, 891, 470 S.E.2d 689, 691-92 (1996)).

128. *Id.* at 48, 553 S.E.2d at 352.

129. *Id*. at 48-49, 553 S.E.2d at 352-53.

While it was undisputed that the landlord in *Colvin v. Brentwood Manor, Ltd.*[130] was unaware that the light outside his apartment complex was not working on the evening when plaintiff was injured, constructive knowledge of the condition could be established by showing: (1) that an employee was positioned in the immediate vicinity and had a chance to discover and remove the hazard; or (2) that the hazard was present for such a length of time that it would have been discovered upon the exercise of reasonable care and inspection of the premises.[131] Here, the fact that a weekly inspection schedule was in place at the time of the incident was insufficient. The owner failed to demonstrate not only that it had a reasonable procedure, but that the procedure was actually carried out at the time of the incident.[132]

B. Third Party Criminal Acts

In *Wade v. Findlay Management, Inc.,*[133] Wade sued Findlay Management d/b/a McDonald's Restaurant and its manager for failing to protect him from being assaulted as he walked toward the playground and restaurant with small children. Defendants maintained a security guard on their premises on Friday and Saturday nights, particularly when there was a game at the nearby high school. The restaurant manager swore that during her two and a half year tenure at McDonalds, an adult was never threatened or physically attacked by older boys or others anywhere on the property. Contrary evidence showed that approximately two months prior to the incident in question, an adult was attacked on a weekday night after he tried to stop two boys from teasing his son.[134] One of the attackers brandished a gun and yelled, "I'll put a cap up your ass."[135]

The court stated, "'Simply put, without foreseeability that a criminal act will occur, no duty on the part of the proprietor to exercise ordinary care to prevent that act arises.'"[136] If the proprietor has reason to anticipate a criminal act, he has a duty to exercise ordinary care to guard against injury by the dangerous characters:

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130. 251 Ga. App. 477, 554 S.E.2d 604 (2001).

131. *Id*. at 478, 554 S.E.2d at 605-06.

132. *Id*. (citing Avery v. Cleveland Ave. Motel, 239 Ga. App. 644, 646, 521 S.E.2d 668, 670 (1999)).

133. 253 Ga. App. 688, 560 S.E.2d 283 (2002).

134. *Id.* at 688-89, 560 S.E.2d at 284.

135. *Id.* at 689, 560 S.E.2d at 284.

136. *Id.*, 560 S.E.2d at 285 (quoting Days Inns of Am. v. Matt, 265 Ga. 235, 236, 454 S.E.2d 507, 508 (1995)).

> "Accordingly, the incident causing the injury must be substantially similar in type to the previous criminal activities occurring on or near the premises so that a reasonable person would take ordinary precautions to protect his or her customers or tenants against the risk posed by that type of activity. . . . While the prior criminal activity must be substantially similar to the particular crime in question, that does not mean identical. What is required is that the prior incident be sufficient to attract the landlord's attention to the dangerous condition [that] resulted in the litigated incident."[137]

Because plaintiff in *Wade* introduced evidence that contradicted and impeached the manager's testimony regarding prior assaults on adults and produced evidence of a prior similar criminal assault, the grant of summary judgment to defendant was in error.[138]

Plaintiff in *Doe v. HGI Realty, Inc.*[139] was a store employee in an outlet mall that defendant owned and managed. While working at the store, Doe was sexually assaulted by an assailant who took the money from the cash register. According to Doe, defendant provided security in the common areas during business hours, but discontinued the security shortly before the attack. Doe also introduced evidence of one other violent incident in which a store employee was robbed at knife point approximately two years prior to Doe's attack. However, there was no evidence in the record that anyone was ever hurt, injured, or sexually assaulted at the outlet mall.[140]

In affirming the trial court's grant of summary judgment to HGI, the court of appeals held that a landlord's duty to keep common areas safe does not extend to the leased area over which the tenant has exclusive possession and control.[141] There was nothing in the record to show that security guards assumed the responsibility or undertook the duty of providing security within the stores leased from HGI Realty. Furthermore, because Doe knew there was no security during business hours in the common areas, the court determined that HGI's motion for summary judgment was properly granted.[142]

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137. *Id.* (citation omitted) (quoting Sturbridge Partners v. Walker, 267 Ga. 785, 786, 482 S.E.2d 339, 341 (1997)).

138. *Id.* at 690, 560 S.E.2d at 285.

139. 254 Ga. App. 181, 561 S.E.2d 450 (2002).

140. *Id.* at 181, 561 S.E.2d at 451.

141. *Id.* at 182, 561 S.E.2d at 452.

142. *Id.*

V. DOG BITE

In *Johnson v. Warendh,*[143] the court of appeals held Lori Johnson liable for the attack of Mrs. Warendh by two rottweilers when Ms. Johnson owned neither the dogs nor the home where the dogs were kept.[144] Robert Johnson and Michelle Berendt shared the home, and each owned one of the rottweilers. On the day of the attack, neither Mr. Johnson nor Ms. Berendt was home, but Mr. Johnson's sister Lori was there with the dogs. The Warendhs, who had previously lived in the home now occupied by Mr. Johnson and Ms. Berendt, went there to retrieve their mail. After plaintiffs either knocked on the door or rang the doorbell, they saw the dogs barking behind the door. Ms. Johnson tried to slip out, but the dogs pushed the door open and ran out of the house. At least one of the dogs attacked Mrs. Warendh. Plaintiffs filed suit against Lori and her brother, Richard Johnson.[145]

The court of appeals first considered whether plaintiff had to prove that Lori Johnson "kept" the dogs under O.C.G.A. section 51-2-7,[146] which provides as follows:

> "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 that the said animal was at the time of the occurrence not at heel or on a leash."[147]

While Ms. Johnson denied that she "kept" the dogs, she did not argue this point in her motion for summary judgment, nor did she enumerate as error the trial court's implicit finding that an issue of fact existed as to whether she kept the dogs.[148] Therefore, a jury issue existed as to whether she was "keeping" the dogs at the time of the incident.[149]

The court reviewed the history of O.C.G.A. section 51-2-7, explaining that appellate courts have modified the statute by requiring a showing

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143. 252 Ga. App. 674, 556 S.E.2d 867 (2001).
144. *Id.* at 674, 556 S.E.2d at 869.
145. *Id.* at 674-75, 556 S.E.2d at 869.
146. O.C.G.A. § 51-2-7 (2002).
147. *Johnston*, 252 Ga. App. at 675, 556 S.E.2d at 869 (quoting Oertel v. Chi Psi Fraternity, 239 Ga. App. 147, 148-49, 521 S.E.2d 71, 73 (1999)).
148. *Id.*
149. *Id.*

that the animal was vicious or dangerous and that the owner knew of this fact.[150] Moreover, defendant's knowledge of the dangerous propensity had to be greater than any knowledge possessed by plaintiff.[151] In 1985 the General Assembly amended the statute to create liability, regardless of knowledge, for the violation of a local or county ordinance (a leash law). Therefore, cities and counties can afford their citizens a higher degree of protection than allowed at common law.[152]

The incident in question occurred in the City of Roswell, a municipality that enacted a leash law, which required any person having custody of a dog within the city limits to confine the dog on the premises of the owner or someone authorized by the owner. Dogs are not permitted on any streets or other place in the city off the premises of the dog's custodian except on a leash not more than six feet long.[153]

The court of appeals rejected Ms. Johnson's argument that she did not violate the Roswell leash law because the dogs were technically on the premises of the owners at the time plaintiff was injured.[154] The court found evidence that the dogs were not "confine[d] . . . on the premises of the owner . . ." as required by Roswell's leash law.[155] Whether Ms. Johnson violated O.C.G.A. section 51-2-7 was a jury issue and summary judgment was properly denied.[156]

The court refused to consider copies of miscellaneous pieces of information printed from the internet and a newspaper article on a fatal rottweiler attack that appeared in the *Atlanta Journal*, which plaintiffs submitted in an attempt to raise a jury issue as to Ms. Johnson's knowledge of the dogs' vicious propensities.[157] Exhibits attached to briefs on appeal are not part of the record and therefore cannot be considered as evidence.[158] Further, the court noted Georgia's long standing judicial insistence that the breed of a dog is irrelevant because dogs are considered a harmless species of animal regardless of breed.[159] Even if the court were able to consider the exhibits attached

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150. *Id.*, 556 S.E.2d at 869-70 (citing Harvey v. Buchanan, 121 Ga. 384, 385, 49 S.E. 281, 282 (1904)).

151. *Id.* at 676, 556 S.E.2d at 870 (citing Wade v. Am. Nat'l Ins. Co., 246 Ga. App. 458, 461, 540 S.E.2d 671, 673-74 (2000)).

152. *Id*.

153. *Id*.

154. *Id.*

155. *Id.* at 677, 556 S.E.2d at 870 (quoting ROSWELL, GA., CODE § 4-29).

156. *Id.*, 556 S.E.2d at 870-71.

157. *Id.*, 556 S.E.2d at 871.

158. *Id.* (citing SurgiJet, Inc. v. Hicks, 236 Ga. App. 80, 82, 511 S.E.2d 194, 195-96 (1999)).

159. *Id.* at 678, 556 S.E.2d at 871.

to appellee's brief, they would not have been sufficient to support the argument that Ms. Johnson should have known of the dogs' dangerousness.[160]

A jury issue also existed as to whether Mr. Johnson confined his dog as required by the Roswell ordinance. Although he confined the dog inside his home when he left for work, he knew his sister or roommate could come and go in his absence. Nevertheless, he took no steps to prevent his dog from having access to the doors leading outside the house, but rather allowed the dog to roam freely throughout the house.[161]

Evidence also showed that the dog weighed more than Ms. Johnson and that the dog responded primarily to Robert Johnson's command. This evidence presented an issue as to whether Lori Johnson could reasonably be expected to keep the dog confined in her brother's absence.[162] Although Mr. Johnson had no prior knowledge that the dog would try to escape, the court had previously found that if an animal is running at large in violation of a leash law when it bites someone, the owner's knowledge of its propensity to bite is immaterial.[163]

Finally, the court found that a jury should consider whether Lori Johnson could be considered her brother's agent in this instance.[164] Because Mr. Johnson allowed the dog free access to his house, he necessarily relied upon his sister in his absence to keep the dog from getting out. The evidence also showed that Ms. Johnson attempted to stop the dog from getting out while she talked to plaintiff. This raised an issue as to whether Lori Johnson acted as her brother's agent in trying to keep the dogs from escaping.[165] The fact that Robert Johnson did not rely upon his sister to feed, water, or walk the dogs was not determinative of whether Lori Johnson acted as his agent in keeping the dogs confined.[166] The existence of an agency can be shown through

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160. *Id.*; *but see* Sanders v. Bowen, 196 Ga. App. 644, 646, 396 S.E.2d 908, 910 (1990) (holding "habits of aggressiveness and attack [that] common sense says would not be confined to inanimate objects" constituted knowledge of dangerousness despite no prior biting); McBride v. Wasik, 179 Ga. App. 244, 345 S.E.2d 921 (1986) (scienter because animal was trained attack dog).

161. 252 Ga. App. at 679, 556 S.E.2d at 872.

162. *Id.*

163. *Id.* (citing Oertel v. Chi Psi Fraternity, 239 Ga. App. 147, 150, 521 S.E.2d 71, 74 (1999)).

164. *Id.*

165. *Id.* at 680, 556 S.E.2d at 872.

166. *Id.*

circumstances, apparent relations, and the conduct of the parties.[167] The lesson of this case is that if you are watching someone else's dog, you may be liable for its decision to bite someone.

VI. PRODUCT LIABILITY

A. *Guns*

In *Sturm, Ruger & Co. v. City of Atlanta*,[168] the City of Atlanta sued fourteen gun manufacturers and three trade associations, alleging that they negligently designed, manufactured, distributed, marketed, promoted, and sold firearms that were defective and unreasonably dangerous. The City claimed that because of defendants' actions, it was forced to pay large sums of money to provide police and emergency services, police pension benefits, and related expenditures, and that it lost substantial tax revenues due to lost productivity.[169]

Five days after the complaint was filed, the Georgia General Assembly amended O.C.G.A. section 16-11-184[170] so that the statute provided that the lawful design, marketing, manufacture, or sale of firearms to the public is not an unreasonably dangerous activity and does not constitute a nuisance per se. The amendment further provided that, with the exception of breach of contract and warranty claims, the right to recover and file suit against any firearms or ammunition manufacturer, trade association, or dealer by or on behalf of any governmental unit shall be reserved *exclusively* to the State. Both the original Code section and the amendment provided that no county or municipal corporation could regulate in any manner the possession, ownership, purchase, sale, or registration of firearms or firearm components.[171]

The court of appeals, in a lengthy opinion, held that the City's suit was barred by O.C.G.A. section 16-11-184 and that state law preempted the field of gun regulation.[172] The filing of a lawsuit, as opposed to the passing of an ordinance, was no less of a usurpation of state power.[173] A city cannot do indirectly what it cannot do directly.[174]

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167. *Id*. at 679, 556 S.E.2d at 872 (citing Stallings v. Sylvania Ford-Mercury, 242 Ga. App. 731, 732, 533 S.E.2d 731, 732 (2000)).
168. 253 Ga. App. 713, 560 S.E.2d 525 (2002).
169. *Id.* at 713-14, 560 S.E.2d at 527.
170. O.C.G.A. § 16-11-184 (1999).
171. *City of Atlanta*, 253 Ga. App. at 715, 560 S.E.2d at 527.
172. *Id.* at 717, 560 S.E.2d at 529.
173. *Id.*
174. *Id.* at 718, 560 S.E.2d at 530.

The court noted that retroactive application of a statute is only unconstitutional if it affects the vested rights of *citizens*.[175] As creations of the state, municipal corporations are not citizens; therefore, their powers may be limited retrospectively by the General Assembly.[176] The City's claims could not survive because of the legislature's clear directive that municipalities may not attempt to regulate the gun industry except in the limited manner prescribed under the statute.[177]

B. Design Defect

In *Volkswagen of America, Inc. v. Gentry*,[178] the court of appeals affirmed a jury verdict in excess of $11 million in favor of the Gentrys in their wrongful death suit.[179] The plaintiffs' sixteen-year-old daughter was involved in an automobile accident and suffered fatal liver injuries due to Volkswagen's two point passive restraint system, which lacked a lap belt.[180]

In an earlier appeal regarding the same litigation, the court of appeals held that an automobile manufacturer's adherence to federal requirements does not preclude liability in a products liability claim.[181] Nonetheless, plaintiffs' claim that the failure to have a lap belt constituted a design defect would be preempted by federal law.[182] However, a claim for failure to design in a manner that exceeds federal requirements is not preempted.[183] In other words, a claim that Volkswagen's failure to have a lap belt constituted a design defect would be precluded, but plaintiffs' claim that the restraint system was defective, specifically for someone of the plaintiffs daughter's size, was permissible. This claim presented a jury question on the reasonableness of Volkswagen's specific design choice. On that issue, the jury could consider Volkswagen's compliance with federal safety standards to assess the reasonableness of the design choice.[184]

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175. *Id.* at 720, 560 S.E.2d at 531 (citing State Hwy. Dep't v. Bass, 197 Ga. 356, 362, 29 S.E.2d 161, 165 (1944)).

176. *Id.* (citing O.C.G.A. § 36-35-3 (2002); City of Trenton v. New Jersey, 262 U.S. 182 (1923)).

177. *Id.* at 722, 560 S.E.2d at 532 (citing O.C.G.A. § 16-11-184(b)(2), (c), (d), and (e) (1999)).

178. 254 Ga. App. 888, 564 S.E.2d 733 (2002).

179. *Id.* at 889, 564 S.E.2d at 736-37.

180. *Id.* at 888, 564 S.E.2d at 736.

181. Gentry v. Volkswagen of Am., Inc., 238 Ga. App. 785, 786, 521 S.E.2d 13, 16 (1999).

182. *Id.* at 788, 521 S.E.2d at 17.

183. *Id.*

184. *Id.* at 788-90, 521 S.E.2d at 17-18.

Addressing the law regarding recalls, the court of appeals explained that when the manufacturer of a defective product subsequently learns of a dangerous defect, it has a duty to recall the product from the market and to remedy the defect, or in some cases, it must replace the product and give a post-sale warning.[185] It is not enough for the manufacturer to simply send a recall notice that fails to identify the design defect or to inform the user of a method to correct the danger, other than to advise the consumer to stop using the product.[186]

Jones v. NordicTrack, Inc.[187] was an important products liability case wherein the Georgia Supreme Court ruled upon the following certified question from the United States Court of Appeals for the Eleventh Circuit: "[M]ust a product be in use at the time of injury for a defendant to be held liable for defective design under theories of strict liability, negligence, or failure to warn?"[188] The supreme court made two important notations at the outset of the opinion: first, because "use" was not defined in the certified question and because the district court ruled that the product was not in use at the time of the accident, the Georgia Supreme Court's decision is limited to situations when a product is not in use at the time the injury occurs.[189] Second, the court's consideration of liability was limited to liability for failure to warn as a theory of defective design.[190]

On July 3, 1996, Ms. Jones was walking through her recreation room when she fell against her husband's NordicTrack ski exerciser known as an "Achiever." One of the one-inch square front legs that projected straight up from the machine penetrated the rear of Ms. Jones's right thigh and buttock, severing two veins in her thigh and damaging an artery and nerve in her leg. Plaintiffs sued on grounds of strict liability, negligence, and failure to warn. The district court, finding that the equipment was not in use at the time of the accident, granted summary judgment to NordicTrack, concluding that recovery under Georgia law on theories of strict liability, negligence, or failure to warn requires that the injury arise from some use of the product.[191]

The supreme court began its analysis by explaining that the plain language of Georgia's strict liability statute extends manufacturer

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185. Smith v. Ontario Sewing Mach. Co., 249 Ga. App. 364, 368, 548 S.E.2d 89, 95 (2001).

186. *Id.* at 369, 548 S.E.2d at 96.

187. 274 Ga. 115, 550 S.E.2d 101 (2001).

188. *Id.* at 115, 550 S.E.2d at 101-02.

189. *Id.* at 115 n.2, 550 S.E.2d at 102 n.2.

190. *Id.* at 115 n.3, 550 S.E.2d at 102 n.3 (citing Chrysler Corp. v. Batten, 264 Ga. 723, 724, 450 S.E.2d 208, 211 (1994)).

191. *Id.* at 116, 550 S.E.2d at 102.

liability not only to those who may use the product, but also to those persons who "may use . . . consume . . . or reasonably be affected by [the property] . . . ."[192] The statute does not set forth a requirement of product use in order for a manufacturer to be liable when property is "'not merchantable and reasonably suited to the use intended.'"[193]

The supreme court found the facts in *Banks v. ICI Americas*[194] illustrative of the difficultly in defining the term "use" and the fallacy of the need for determining that a product was in use before finding liability.[195] In *Banks* a nine-year-old boy died after ingesting a rodenticide stored in an unmarked container at a club serviced by a pest control company. The court determined that plaintiffs were entitled to a new trial on their claim that the rodenticide was defectively designed, despite the fact that the product was not being used as a rodenticide when the accident occurred.[196] The court also relied on the case of *Rose v. Figgie International,*[197] in which the injured plaintiff was permitted to proceed with a products liability suit against the manufacturer of a fire extinguisher nozzle that spontaneously exploded and separated from the canister while the extinguisher was in storage.[198]

The supreme court explained that there is no significant distinction between negligence and strict liability for purposes of the risk-utility analysis.[199] According to the court, the adoption of the risk-utility analysis "affirms that a product need not be 'in use' for a manufacturer to be held liable in negligence or strict liability . . . ."[200] Because the heart of a design defect case is the reasonableness of adopting the safest feasible alternative product design, the appropriate inquiry does not depend on whether the product was in use, but focuses on a consideration of whether the defendant failed to adopt a reasonable alternative design that would have reduced the foreseeable risks of harm presented by the product.[201]

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192. *Id*. at 117, 550 S.E.2d at 103 (alteration in original); *see also* O.C.G.A. § 51-1-11(b)(1) (2002).

193. 274 Ga. at 117, 550 S.E.2d at 103 (quoting Stiltjes v. Ridco Exterminating Co., 256 Ga. 255, 256, 347 S.E.2d 568, 570 (1986); Ctr. Chem. Co. v. Parzini, 234 Ga. 868, 869, 218 S.E.2d 580, 582 (1975)).

194. 264 Ga. 732, 450 S.E.2d 671 (1994).

195. 274 Ga. App. at 117, 550 S.E.2d at 103.

196. 264 Ga. at 732-33, 450 S.E.2d at 672.

197. 229 Ga. App. 848, 495 S.E.2d 77 (1997).

198. *Id.* at 848, 495 S.E.2d at 79.

199. *Jones*, 274 Ga. at 117 n.5, 550 S.E.2d at 103 n.5 (citing Ogletree v. Navistar Int'l Transp. Corp., 269 Ga. 443, 445, 500 S.E.2d 570, 572 (1998)).

200. *Id.* at 117, 550 S.E.2d at 103 (citing *Banks*, 264 Ga. 732, 450 S.E.2d 671).

201. *Id.*

Justice Fletcher submitted a concurring opinion, stating that the use of a product may still be considered in balancing the risk versus the utility of the alleged defective design and in determining whether a product was merchantable and reasonably suited for its intended use at the time of the sale.[202]

VII. ASSUMPTION OF RISK

In *Bowen v. Cochran*,[203] Bowen and his wife sued Cochran and Classy Cooker Manufacturer's, Inc. for damages after Mr. Bowen sustained severe burns to his hands and forearms when a gas cooking grill manufactured by Cochran exploded. After the jury returned a verdict in favor of defendants, plaintiffs challenged the trial court's denial of their motions for directed verdict on Cochran's affirmative defenses of assumption of the risk and contributory negligence and the trial court's decision to charge the jury on those issues.[204]

Although Cochran did not raise the affirmative defense of assumption of the risk in pleadings or in the pretrial order, the court of appeals held that the defense was raised by the evidence without objection and thereby amended the pleadings.[205] In dissent, Justice Eldridge set forth that the Civil Practice Act[206] mandates that an affirmative defense be raised in the answer, in the pretrial order, or in a motion to provide timely notice of the issues to be tried.[207] Justice Eldridge did not believe the evidence established each and every element of the defense of assumption of risk, and therefore, the evidence admitted at trial did not amend the pleadings to conform to the evidence.[208] Moreover, Justice Eldridge disagreed that plaintiff consented to the issue being tried because plaintiff moved for a directed verdict on the issue.[209]

In keeping with many rulings in similar cases, the court of appeals in *Jekyll Island State Park Authority v. Machurick*[210] affirmed the trial court's grant of summary judgment to defendant amusement park, explaining that a person who uses amusement park rides assumes the

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202. *Id*. at 119, 550 S.E.2d at 104 (Fletcher, J., concurring).
203. 252 Ga. App. 457, 556 S.E.2d 530 (2001).
204. *Id.* at 457, 556 S.E.2d at 531.
205. *Id*. at 459, 556 S.E.2d at 532.
206. O.C.G.A. §§ 9-2-1 to 9-15-15 (1982 & Supp. 2001).
207. *Bowen*, 252 Ga. App. at 461, 556 S.E.2d at 534 (Eldridge, J., dissenting) (citing O.C.G.A. §§ 9-11-8(c), 9-11-16; O'Quinn v. O'Quinn, 237 Ga. 653, 229 S.E.2d 428 (1976)).
208. *Id.* at 462, 556 S.E.2d at 534 (Eldridge, J., dissenting).
209. *Id*. (Eldridge J., dissenting).
210. 250 Ga. App. 700, 552 S.E.2d 94 (2001).

risk of injury arising from the natural and obvious hazards necessary to the purpose of the device.[211] Because plaintiff watched patrons ride the water slide on which she was injured before the accident and even experienced the ride prior to the accident, the hazard was not obscure.[212] She voluntarily boarded the slide and exposed herself to the risks of riding. The danger that she would receive injury was necessary and inherent in the device itself and part of the thrill for which she bargained.[213]

VIII. MEDICAL MALPRACTICE

The court of appeals in *Bowling v. Foster*[214] affirmed the trial court's grant of a directed verdict to defendant on plaintiff's medical malpractice claim because plaintiff failed to present expert testimony at trial to substantiate her allegation that her doctor deviated from the requisite standard of care.[215] However, the trial court erred in directing a verdict on plaintiff's fraud, breach of fiduciary duty, and breach of private duty claims in connection with her doctor's alleged failure to inform her of the results of a foot operation. No expert testimony was necessary to get those claims before a jury because the claims did not require proof of a professional standard of care. Expert testimony is only needed in claims asserting that a professional failed to meet the requisite standards of her profession.[216]

In affirming the decisions below, the supreme court in *Johnson v. Riverdale Anesthesia Associates, P.C.*[217] held that it was proper to prohibit plaintiffs from cross-examining defendants' expert witness about how he would have treated plaintiffs' decedent.[218] Because the standard of care in medical malpractice cases is that which is employed by the medical profession generally and not that which an individual doctor would have done, the manner in which a medical expert would have treated a patient is irrelevant to the issue of whether medical malpractice was committed.[219]

Moreover, the manner in which a testifying medical expert would have personally treated a patient cannot be used to impeach the expert's

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211. *Id.* at 701, 552 S.E.2d at 95-96.
212. *Id.*, 552 S.E.2d at 96.
213. *Id.* at 702, 552 S.E.2d at 96.
214. 254 Ga. App. 374, 562 S.E.2d 776 (2002).
215. *Id.* at 379-80, 562 S.E.2d at 781.
216. *Id.* at 380-81, 562 S.E.2d at 782.
217. 275 Ga. 240, 563 S.E.2d 431 (2002).
218. *Id.* at 243, 563 S.E.2d at 434.
219. *Id.* at 241-42, 563 S.E.2d at 433.

credibility.[220] In dissent, Justice Carley noted that the majority's decision overruled without addressing *Prevost v. Taylor,*[221] which stood for the proposition that while testimony concerning how an expert would have treated a patient is not admissible to show malpractice, it is admissible to impeach the expert's credibility.[222]

Plaintiff in *Johnson* alleged that defendant's failure to pre-oxygenate his wife caused her death. Defendant's expert testified that failure to pre-oxygenate did not deviate from the requisite standard of care. The fact that the expert himself would have pre-oxygenated plaintiff was not admissible to impeach his credibility.[223]

In *Young v. Williams*,[224] the supreme court reversed the decision of the court of appeals and affirmed the trial court's grant of summary judgment to defendants on the ground that plaintiff's medical malpractice claim was time-barred by the statute of limitations.[225] Plaintiff sought treatment with defendant for complaints of foot pain in September 1995. On September 30, 1996, defendant informed plaintiff that her condition was permanent and that she would have to live with the pain.[226]

In early November 1996, plaintiff sought a second opinion from a doctor who X-rayed plaintiff's foot and diagnosed dislocation of her talonavicular joint with subluxation of the calcaneal cuboid joint of the ankle, after which the doctor performed surgery in December 1996. During this entire time, the doctor continued to treat plaintiff for diabetes. One year and fifty-one weeks after the second doctor's diagnosis, plaintiff filed suit against the first doctor, alleging medical malpractice or failure to diagnose.[227]

The supreme court explained that because Georgia's two-year statute of limitations for medical malpractice claims focuses on when the injury or death arising from a negligent or wrongful act or omission occurred, the application of the continuous treatment doctrine was inappropriate.[228] The continuous treatment doctrine commences the statute of limitations on the date when treatment by the doctor for the particular

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220. *Id.* at 243, 563 S.E.2d at 434.

221. 196 Ga. App. 368, 396 S.E.2d 17 (1990), *overruled by Johnson*, 275 Ga. at 242 n.8, 563 S.E.2d at 433 n.8.

222. *Johnson,* 275 Ga. at 243-44, 563 S.E.2d at 434 (Carley, J., dissenting) (citing Prevost v. Taylor, 196 Ga. App. 368, 369-70, 396 S.E.2d 17, 19).

223. *Id*. at 245, 563 S.E.2d at 435.

224. 274 Ga. 845, 560 S.E.2d 690 (2002).

225. *Id.* at 848, 560 S.E.2d at 693.

226. *Id.* at 845, 560 S.E.2d at 691.

227. *Id.* at 845-46, 560 S.E.2d at 691.

228. *Id.* at 847, 560 S.E.2d at 692-93.

disease or condition is terminated unless during treatment the patient learns or should learn of the negligence, in which case the statute runs from the time of discovery.[229] By its very nature, the continuous treatment doctrine is better suited to a statute of limitations "that commences upon the occurrence of the negligent act."[230] Although Georgia had such a medical malpractice statute of limitations from 1976 to 1985, the current statute begins the limitation period with the occurrence of an injury, not the performance of a negligent act.[231] The court noted that "[p]rescribing periods of limitation is a legislative, not a judicial, function."[232]

In the medical malpractice case of *Miller v. Kitchens*,[233] the court of appeals explained that while a movant has the burden of proof regarding the running of the statute of limitations, he need not establish the absence of facts showing a tolling.[234] Because plaintiff's alleged injuries occurred in October 1997 and because he did not file suit until December 1999, his complaint was time-barred.[235] The court rejected plaintiff's argument that his claim for injuries did not expire until December 19, 1999, because he was unconscious from October 2, 1997 through December 19, 1997.[236]

In *Cannon v. Jeffries,*[237] the court of appeals explained that "'[w]hen the expert testimony, alone and unsupported by other evidence, indicates that the causal connection is something less than reasonable medical probability,' this is insufficient to render the physician liable."[238] Accordingly, the court affirmed the trial court's grant of summary judgment to defendant because neither plaintiff's expert nor anyone else could establish to a reasonable degree of medical certainty what caused plaintiff's pre-term labor.[239] Moreover, testimony by plaintiff's expert that it was standard procedure to relay information concerning fetal

229. *Id.*
230. *Id.*, 560 S.E.2d at 692 (citation omitted).
231. *Id.*, 560 S.E.2d at 692-93.
232. *Id*. at 847, 560 S.E.2d at 693 (alteration in original) (quoting Hunter, Maclean, Exley & Dunn v. Frame, 269 Ga. 844, 846, 507 S.E.2d 411, 413 (1998)).
233. 251 Ga. App. 225, 553 S.E.2d 300 (2001).
234. *Id*. at 227, 553 S.E.2d at 302.
235. *Id.* at 229, 553 S.E.2d at 304.
236. *Id.*
237. 250 Ga. App. 371, 551 S.E.2d 777 (2001).
238. *Id.* at 373, 551 S.E.2d at 779 (alteration in original) (quoting Estate of Patterson v. Fulton-DeKalb Hosp. Auth., 233 Ga. App. 706, 709, 505 S.E.2d 232, 235 (1998)).
239. *Id.* at 375-76, 551 S.E.2d at 780-81.

distress to the doctor could not refute the doctor's positive testimony that the information was not provided.[240]

IX. RES IPSA LOQUITUR

In a rare application of the res ipsa loquitur doctrine, the court of appeals in *Persinger v. Step By Step Infant Development Center*[241] reversed the trial court's grant of summary judgment to the defendant daycare center.[242] Defendant alleged that plaintiffs' child broke his leg while running towards a teacher in a carpeted area that was free of toys or other items. Plaintiffs presented an affidavit from the child's treating physician who opined that the fracture of the child's femur resulted from a significant twisting, such as the leg being caught in a crib slat or, at minimum, a fall from a height greater than the height of the child. The doctor also testified that the injury would not have reasonably occurred by the child simply walking or running across the floor absent contact with some external object or the child stepping into a hole. According to the doctor, the child's foot had to have been locked in place in order for his leg to be broken the way it was.[243]

The duty of the childcare provider is "to exercise reasonable care for the safety of the child . . . gauged by the standard of the average reasonable parent."[244] "[A]n injury, without more, does not create the presumption of negligence."[245] Without any evidence of a breach of a duty, summary judgment would have been warranted *unless* the doctrine of res ipsa loquitur applied to these facts.[246]

The court explained that res ipsa loquitur is a rule of circumstantial evidence that allows an inference of negligence to arise from the happening of an event if the following elements exist: (1) an injury of a kind which ordinarily does not occur in the absence of negligence; (2) an injury that was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) an injury that was not due to any voluntary action or contribution on the part of the plaintiff.[247]

In this case, the treating physician's affidavit raised the direct inference that the accident did not happen the way in which defendants

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240. *Id*.
241. 253 Ga. App. 768, 560 S.E.2d 333 (2002).
242. *Id.* at 772, 560 S.E.2d at 338.
243. *Id.* at 768-69, 560 S.E.2d at 335.
244. *Id*. at 769, 560 S.E.2d at 335-36 (internal quotation marks omitted).
245. *Id.*, 560 S.E.2d at 336 (internal quotation marks omitted).
246. *Id.* at 770, 560 S.E.2d at 336.
247. *Id*. (citing Fender v. Colonial Stores, 138 Ga. App. 31, 38, 225 S.E.2d 691, 696 (1976)); Kmart Corp. v. Larsen, 240 Ga. App. 351, 352, 522 S.E.2d 763, 765 (1999)).

contended and provided sufficient evidence to support the conclusion that the injury would not ordinarily occur in the absence of someone's negligence. A significant twisting, such as that which would occur if the child's leg was caught in a crib slat or if the child fell from a height greater than his own, does not ordinarily occur absent the negligence of others.[248] With regard to the second element, the instrumentalities at issue were the daycare workers who had complete authority and responsibility for the child. As to the final element, there was no evidence that the child contributed to the type of injury described by his treating physician.[249]

The court's opinion reminds us that res ipsa loquitur "'should be applied with caution and only in extreme cases.'"[250] Given the expert testimony offered by plaintiffs in this case, the doctrine was properly applicable.[251]

X. MINORS AND PARENTAL LIABILITY

Renaud v. Black[252] was a wrongful death suit brought after a young child drowned in a backyard swimming pool. When the Renauds were unable to find their four-year-old son, Steven, they called the police, who told families in the Renauds' subdivision to search their own property for the missing child. The Black family lived in the same subdivision as the Renauds, but on a different street. The Blacks did not know the Renauds, and young Steven had never been on the Blacks' property. Tragically, the Blacks found Steven's body in their above-ground swimming pool.[253]

The Renauds sued the Blacks for the wrongful death of Steven, claiming that the pool constituted an attractive nuisance, that the Blacks were negligent per se in failing to fully comply with the county ordinance requiring the pool to be fenced, and that the Blacks were negligent in failing to lock their backyard fence gate. The Blacks were granted summary judgment.[254]

Under the attractive nuisance doctrine, one who possesses land with an artificial condition upon it is subject to liability when the condition causes physical harm to a trespassing child if: (1) the possessor knows

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248. *Id.* at 772, 560 S.E.2d at 337.
249. *Id.*
250. *Id.*, 560 S.E.2d at 338 (quoting Williams v. Am. Med. Sys., 248 Ga. App. 682, 684, 548 S.E.2d 371, 374 (2001)).
251. *Id.* at 772, 560 S.E.2d at 338.
252. 254 Ga. App. 31, 561 S.E.2d 183 (2002).
253. *Id.* at 31, 561 S.E.2d at 184.
254. *Id.* at 32, 561 S.E.2d at 184.

or has reason to know that children are likely to trespass where the condition exists; (2) the possessor knows or has reason to know that the condition involved an unreasonable risk of death or serious harm to trespassing children; (3) children, because of their youth, do not discover the condition or realize its risk; (4) the utility of the condition to the possessor, and the burden of eliminating the danger are slight in comparison to the risk to children; and (5) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect children.[255]

The court found no evidence of either the first or fifth elements of an attractive nuisance claim.[256] The Blacks did not know nor have any reason to know that children were likely to trespass in their enclosed backyard. The only children whom the Blacks had ever allowed to use the pool were their own daughters, along with their nieces and nephews. They never allowed other neighborhood children to use the pool. There was no evidence that neighborhood children ever tried to gain access to this swimming pool or that the Blacks had ever known of children coming into the yard without permission. The Blacks did not know Steven Renaud, and Steven had never been to the Blacks' house or in their yard.[257]

The Blacks' backyard and pool were enclosed by a four-foot-high fence free of any defects. The Georgia Supreme Court has held that erecting a fence or other enclosure around a pool is generally all that is required of a landowner to show the exercise of reasonable care.[258] Plaintiffs argued that the fence did not comply with a county ordinance because it had two gates that latched but did not lock. The county ordinance provided that any swimming pool shall be enclosed with a solid or chain-link fence not less than four feet in height. The court of appeals strictly construed the ordinance and refused to extend it beyond its explicit terms, which did not require locks.[259] Because the Blacks were in compliance with the ordinance, the trial court correctly granted summary judgment on plaintiffs' negligence per se claim.[260]

Finally, the Blacks did not breach a duty owed to a trespasser because they did not know Steven was there.[261] The record contained no

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255. *Id*. (citing Gregory v. Johnson, 249 Ga. 151, 154, 289 S.E.2d 232, 234-35 (1982)).
256. *Id.*
257. *Id.*
258. *See Gregory,* 249 Ga. at 153, 289 S.E.2d at 234.
259. *Renaud*, 254 Ga. App. at 33, 561 S.E.2d at 185.
260. *Id.*
261. *Id.*

evidence that the Blacks injured Steven wilfully or recklessly. Therefore, plaintiffs' claim for ordinary negligence also failed.[262]

At issue in *Cole v. Fauk*[263] was the liability of a minor's parents under O.C.G.A. section 51-2-3,[264] which provides that parents may be liable "for the wil[l]ful or malicious acts of [their] minor child[ren]."[265] The parents of Betsy Cole sued Nathan Fauk and his parents after a car driven by Nathan, but owned by plaintiffs, struck a tree, injuring passenger Betsy Cole. Nathan was fifteen years old at the time and had an instruction permit driving license, which allowed him to drive as long as he had a licensed driver of at least twenty-one years of age in the car. Additionally, Nathan's parents had established a rule that Nathan could only drive with his parents, his older sister, or another responsible adult whom the parents knew.[266]

At the time of the accident, Nathan was dating Betsy, who was eighteen and had a valid driver's license. Although Betsy was not supposed to let anyone else drive her Ford Mustang, she let Nathan drive it after school on May 13, 1998. Nathan lost control of the car and struck a tree, and Betsy sustained a brain injury that resulted in memory loss and paralysis.[267] The complaint alleged that the Fauks were liable for negligently failing to control their minor child and for negligently furnishing him with a driver's license when they knew or should have known that he "was incapable of controlling his behavior . . . [and] that he was incapable of driving, controlling and operating a vehicle safely."[268]

The court of appeals explained that, in general, parents are not liable in damages for the torts of their minor children merely because of the parent/child relationship.[269] "'[W]hen liability exists, it is based on a principal-agent or master-servant relationship . . . or it is based on the negligence of the parent in some factual situation such as allowing the child to have unsupervised control of a dangerous instrumentality.'"[270]

In order to impose parental liability under O.C.G.A. section 51-2-3, the Coles had to show that Nathan's parents knew of Nathan's proclivity or propensity for the specific dangerous activity, not simply that he was

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262. *Id.*
263. 253 Ga. App. 892, 560 S.E.2d 772 (2002).
264. O.C.G.A. § 51-2-3 (2000).
265. 253 Ga. App. at 894, 560 S.E.2d at 773 (quoting O.C.G.A. § 51-2-3(a)).
266. *Id.* at 893, 560 S.E.2d at 773.
267. *Id.*
268. *Id.* (alteration in original).
269. *Id.* at 894, 560 S.E.2d at 773-74.
270. *Id.*, 560 S.E.2d at 774 (quoting McNamee v. A.J.W., 238 Ga. App. 534, 535, 519 S.E.2d 298, 301 (1999)).

prone to disobedience.[271] The Fauks's testimony unequivocally showed that Nathan was not allowed to drive with anyone other than a family member, and they had no reason to believe their son would disregard their rules. While Mrs. Cole had a suspicion that Nathan had driven the Mustang on other occasions (based upon the seat position of the car), she was not able to testify with any certainty that Nathan had, in fact, done so. Nor was she able to point to any evidence that Nathan's parents knew of any such incident.[272] Under these circumstances, the trial court correctly granted summary judgment to the Fauks.[273]

Garcia v. Grepling[274] also dealt with the issues of negligent supervision and parental liability. Garcia was severely injured after Charles Grepling and Kevin Lanterman attacked him without provocation at a high school party. Garcia named Grepling's father as a defendant, charging him with liability under a theory of negligent supervision of his minor son.[275] The court of appeals affirmed the trial court's grant of summary judgment to Grepling's father because it was undisputed that he neither provided nor permitted his son access to any dangerous instrumentality with which to commit the assault upon Garcia.[276]

Garcia further argued that Grepling's father knew of two prior incidents resulting in his son's suspension from school and, therefore, was liable because he was on notice of a dangerous proclivity by his son to commit such an assault.[277] The court of appeals found that these two incidents consisted of "rather typical schoolyard altercations" (responding to a challenge to fight another student; pushing and spitting on a student; using foul language and inappropriate gestures) in which no one complained of any injuries.[278] Knowledge of these incidents was insufficient to charge the father with vicarious liability for the tortious conduct of his son.[279]

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271. *Id.*
272. *Id.*
273. *Id.*
274. 254 Ga. App. 219, 561 S.E.2d 868 (2002).
275. *Id.* at 219-20, 561 S.E.2d at 869.
276. *Id.* at 220-21, 561 S.E.2d at 870.
277. *Id.* at 220, 561 S.E.2d at 870.
278. *Id.* at 221, 561 S.E.2d at 870.
279. *Id.*

XI. SOVEREIGN IMMUNITY

A. *Nuisance*

In *Wright v. City of Cochran,*[280] Wright sued the City of Cochran for damages after being shot by co-worker Bullard. On the date of the incident, an altercation began after Bullard saw that Wright had taken up two parking spaces in the parking lot. The argument ended when Bullard shot Wright in the shoulder.[281]

Wright alleged that the City maintained a nuisance by not firing Bullard. Bullard was at least seventy years old and had worked for the City since 1950. In all that time, Bullard was involved in only one other incident. Bullard scared another employee by putting a rubber snake on the time clock. After the employee got angry and hit Bullard, a struggle ensued, and Bullard pulled out a knife and cut the other man.[282]

Affirming the trial court's grant of summary judgment to the City of Cochran, the court of appeals explained the general rule that, "'[w]hile a municipality enjoys sovereign immunity from liability for negligent acts done in the exercise of a governmental function, it may be liable for . . . the creation or maintenance of a nuisance.'"[283] In order to be liable for nuisance, it must be shown that the City knew that it maintained a dangerous condition on a continual or regular basis over a period of time and took no action or inadequate action to correct the condition. Because no previous incident would have put the City on notice that Bullard would shoot a co-worker, the City could not be held liable for maintaining a nuisance.[284]

In the course of considering whether to purchase their house, plaintiffs in *Morris v. Douglas County Board of Health*[285] requested that the Board of Health inspect the house's septic system. Several years prior to that request, the installation of plaintiffs' temporary septic system was approved by the Board because the Douglas County Water and Sewer Authority anticipated building a new sewer line to serve the subdivision within the next two years. However, the Authority abandoned these

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280. 253 Ga. App. 314, 558 S.E.2d 844 (2002).
281. *Id.* at 314-15, 558 S.E.2d at 845.
282. *Id.* at 315, 558 S.E.2d at 845.
283. *Id.* (quoting Gooden v. City of Atlanta, 242 Ga. App. 786, 788, 531 S.E.2d 364, 366 (2000)).
284. *Id.*
285. 274 Ga. 898, 561 S.E.2d 393 (2002).

plans, and the residents who lived in plaintiffs' house before plaintiffs purchased it hid the effects of the ineffective septic tank.[286]

Following its visual inspection of the septic tank, the Board informed plaintiffs that no signs of sewage seepage were seen on the property. The Board expressly disclaimed any guarantee regarding the status of the septic system.[287]

In considering plaintiffs' nuisance claims, the supreme court explained that a county does not incur liability for a nuisance merely by approving a construction project.[288] To be liable for a nuisance, a county must perform a "'continuous or regularly repetitious act, or creat[e] a continuous or regularly repetitious condition' that caused the harm."[289] In order for the Board of Health to be liable, it must be shown that the actions that created a nuisance rose to the level of an inverse condemnation—mere negligence is not enough.[290] Even if the Board was negligent in its inspection, such a single act of negligence would not suffice to hold the board liable for an inverse condemnation and therefore, did not constitute a nuisance.[291]

Unlike the situation in the case of *DeKalb County v. Orwig,*[292] in which plaintiffs' home was connected to a county owned and maintained sewer system, the Morrises' septic system was not owned or maintained by the Board; therefore, the Board was not responsible for the ongoing maintenance of the septic system.[293] Despite the language of section 11-43(g) of the Douglas County Code,[294] which provides that the Douglas County Water Authority "'shall be solely responsible for the ongoing inspection, maintenance and repair of[] on-site septic tank[s],'" the Authority was not liable, either.[295] Because the Authority was created by the General Assembly, Douglas County could not unilaterally impose obligations on the Authority contrary to its enabling legislation.[296] Although the enabling legislation allowed the Authority to enter into agreements regarding septic systems, the Authority did not

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286. *Id.* at 898-99, 561 S.E.2d at 395.
287. *Id.* at 899, 561 S.E.2d at 395.
288. *Id.* at 898, 561 S.E.2d at 395.
289. *Id*. at 899, 561 S.E.2d at 395 (alteration in original) (quoting DeKalb City v. Orwig, 261 Ga. 137, 139, 402 S.E.2d 513, 515 (1991)).
290. *Id*.
291. *Id.*
292. 261 Ga. 137, 402 S.E.2d 513 (1991).
293. *Morris,* 274 Ga. at 900, 561 S.E.2d at 396.
294. DOUGLAS COUNTY, GA., CODE § 11-43(g).
295. 274 Ga. at 900, 561 S.E.2d at 396 (alterations in original) (quoting DOUGLAS COUNTY, GA., CODE § 11-43(g)).
296. *Id.*

enter into any such agreement.[297] No other enforceable agreement obligated the Authority in any way to inspect, maintain, or repair the Morris septic system.[298] Accordingly, the Authority and its executive director were entitled to summary judgment.[299]

Justices Hunstein and Thompson dissented, maintaining that a jury question existed as to whether the Board of Health inversely condemned the Morris property when it (1) issued the building permit to install the septic system, (2) failed to notify plaintiffs that the septic system it inspected was of a temporary nature and was operating past the time allowed, and (3) made no effort to connect the home to the sewer system constructed only a thousand feet away upon learning that the septic system had failed.[300] Even limited instances of negligence can create a continuing nuisance, which is "'anything that works hurt, inconvenience, or damage to another.'"[301] Justice Hunstein interpreted the *Orwig* decision to stand for the proposition that if the county had some hand in creating the nuisance, a jury should consider whether the nuisance rose to a level of taking consistent with inverse condemnation.[302]

B. High Speed Pursuits

In *City of Winder v. McDougald*,[303] the court of appeals gave an interesting twist to the law of high-speed police chases. *McDougald* is the first time the court of appeals allowed a claim for damages to a fleeing suspect to go to a jury.[304] Fourteen-year-old Ashley McDougald snuck out of her home at 3:00 a.m. and took her parents' car without permission. While driving with the headlights off, Ashley passed a police officer who followed her. When Ashley did not turn the vehicle's headlights on, the officer turned on his blue lights and siren. Attempting to flee, Ashley sped through a parking lot, drove on the wrong side of the road, and traveled up to seventy miles per hour while the officer pursued her. Although another officer instructed the pursuing officer to terminate the pursuit, the pursuing officer continued the chase, which

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297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 901-02, 561 S.E.2d at 396-97 (Hunstein, J., concurring in part and dissenting in part).

301. *Id.* at 901, 561 S.E.2d at 397 (Hunstein, J., concurring in part and dissenting in part) (quoting State v. Ball Inv. Co., 191 Ga. 382, 389, 12 S.E.2d 574, 578 (1940)).

302. *Id.* at 901-02, 561 S.E.2d at 396-97 (Hunstein, J., concurring in part and dissenting in part).

303. 254 Ga. App. 537, 562 S.E.2d 826 (2002).

304. *Id.* at 539, 562 S.E.2d at 828.

ended in Ashley's death when she crashed into a utility pole while speeding through a curve in the roadway.[305]

In the wrongful death suit filed by Ashley's parents against the pursuing officer and the City of Winder, the court of appeals noted that to the extent that the City of Winder maintains insurance, it waives governmental immunity and can be sued for damages arising out of the use of a motor vehicle.[306] Pursuant to O.C.G.A. section 40-6-6(d)-(2),[307] a law enforcement officer's pursuit of a fleeing suspect shall *not* be the proximate cause or a contributing proximate cause of injury or death unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in his decision to initiate or continue the pursuit.[308]

Affirming the trial court's denial of Winder's motion for summary judgment, the court of appeals found the evidence that the pursuing officer continued to chase Ashley after a fellow officer instructed him to end the pursuit, combined with expert testimony that the officer's actions violated Winder police chase policies, constituted evidence that the pursuing officer acted with "reckless disregard for proper police procedures."[309] The court has thus established a rule allowing the fleeing perpetrator to sue for death or injuries under the police chase statute.[310]

The dissent written by Judge Andrews argued that the sole and proximate cause of the car crash was the "child's unlawful operation of the car and high speed flight."[311] Judge Andrews maintained that the provisions of O.C.G.A. section 40-6-6, taken as a whole, cannot be construed to create a duty owed by pursuing officers to fleeing violators.[312]

C. *State Tort Claims*

Department of Transportation v. Federal Express Corp.[313] involved the death of Charles Smith who was killed when the vehicle he was driving collided with a Federal Express Corporation vehicle. After settling the wrongful death claim of Smith's widow, Federal Express

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305. *Id.* at 537-38, 562 S.E.2d at 827.

306. *Id*. at 539, 562 S.E.2d at 828 (citing Cameron v. Lang, 274 Ga. 122, 126, 549 S.E.2d 341, 346 (2001); O.C.G.A. § 33-24-51 (2002)).

307. O.C.G.A. § 40-6-6(d)(2) (2002).

308. *McDougald*, 254 Ga. App. at 539-40, 562 S.E.2d at 829.

309. *Id*. at 540, 562 S.E.2d at 828.

310. *Id.*

311. *Id.*, 562 S.E.2d at 828-29 (Andrews, J., dissenting).

312. *Id*. at 542, 562 S.E.2d at 829 (Andrews, J., dissenting).

313. 254 Ga. App. 149, 561 S.E.2d 470 (2002).

sought contribution against the Georgia Department of Transportation ("DOT"), alleging negligence in the construction, operation, and design of the intersection where the collision occurred. DOT appealed the trial court's denial of its motion to dismiss the complaint on the ground of sovereign immunity.[314]

DOT argued that because the loss suffered by Federal Express was not a loss specifically set forth in the Georgia Tort Claims Act,[315] it was not recoverable. The court of appeals disagreed, reasoning that Federal Express sought contribution not for *its* loss, but for the loss suffered in the death of Smith.[316] Contribution is not listed as a "loss" under the statute because it is simply an avenue through which a recoverable loss is pursued against a joint tort feasor.[317]

In *Ridley v. Johns*,[318] plaintiff claimed she was harassed for thirteen months while working for the Heard County Department of Family and Children Services under the supervision of Mr. Ridley.[319] Reversing the court of appeals decision and reinstating the trial court's grant of summary judgment to defendant, the supreme court ruled that state officers and employees cannot be sued personally for an intentional or malicious tort committed in the performance of their official duties.[320]

Although the Georgia Constitution of 1983, article I, section 11, paragraph 9(d)[321] provides that State officers and employees may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions, qualifying language in the same provision provides as follows: "'Except as specifically provided by the General Assembly in a State Tort Claims Act.'"[322] The Georgia Tort Claims Act exempts state officers and employees from liability for torts committed while acting within the scope of their official duties or employment, without any exception for malicious acts.[323] Therefore, the presence of such motivation has no effect on the immunity granted by the statute.[324]

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314. *Id.* at 149, 561 S.E.2d at 470.
315. O.C.G.A. § 50-21-27 (2002).
316. 254 Ga. App. at 149, 561 S.E.2d at 471.
317. *Id*. at 149-50, 561 S.E.2d at 471; *see also* O.C.G.A. § 51-12-32(a) (2002); DOT v. Montgomery Tank Lines, Inc., 253 Ga. App. 143, 145, 558 S.E.2d 723, 725 (2001).
318. 274 Ga. 241, 552 S.E.2d 853 (2001).
319. *Id.* at 241, 552 S.E.2d at 853-54.
320. *Id*. at 243, 552 S.E.2d at 855.
321. GA. CONST. art. I, § 2, para. 9(e).
322. *Ridley*, 274 Ga. at 242, 552 S.E.2d at 854 (quoting GA. CONST. art. I, § 2, para. 9(e)).
323. *Id.*
324. *Id.*

D. Discretionary v. Ministerial Functions

A good illustration of just how confusing the different immunity doctrines can become in application, particularly when dealing with counties and their employees, is the case of *Norris v. Emanuel County*,[325] in which the court of appeals explained that official immunity and sovereign immunity are *not* synonymous.[326] Plaintiff, Norris, was injured when a truck driven by her grandson tipped over due to the collapse of the shoulder of the road. Norris sued Emmanuel County, five county commissioners, the county road superintendent, and a road-crew supervisor.[327] Each defendant was granted summary judgment by the trial court judge, who ruled that the defendants were immune from suit under the doctrine of official immunity because "determining the extent of the work to be performed is a discretionary function requiring the allocation of limited resources."[328]

Plaintiffs appealed, arguing that the trial court erred in granting summary judgment on a basis that was *not* raised on motion for summary judgment—sovereign immunity. Defendants contended that "official immunity," "sovereign immunity" and "public immunity" referred to the same principle and that defendants, therefore, raised the issue of sovereign immunity by raising the issue of official immunity.[329]

The court of appeals disagreed, explaining that sovereign immunity and official immunity are not synonymous, but instead are separate doctrines.[330] Sovereign or governmental immunity is traditionally granted to government entities such as the State or its counties.[331] Official immunity applies to government officials and employees sued in their individual capacities.[332] Of all the defendants, only two were sued in their individual capacity, and, therefore, the doctrine of official immunity related only to them.[333] If the remaining defendants were immune from suit, such immunity stemmed from sovereign immunity, an issue that was not raised by defendants in their motion for summary judgment.[334] By ruling in favor of defendants based upon an argument

325. 254 Ga. App. 114, 561 S.E.2d 240 (2002).
326. *Id.* at 116, 561 S.E.2d at 242.
327. *Id.* at 114, 561 S.E.2d at 241.
328. *Id.* at 116, 561 S.E.2d at 242.
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*

that was not raised in the motion, the trial court deprived plaintiff of her opportunity to respond to the issue.[335]

XII. PRINCIPLE/AGENT

In *Jacobs v. Thomson Oak Flooring*,[336] Greg Lee loaned his company's logging truck to one of his employees, John Howard. Although Lee told Howard to return the truck by Sunday, Howard returned it early Monday morning when the accident with plaintiff's decedent occurred. Plaintiff filed suit against Lee and Howard, and later added Thomson Oak Flooring, who successfully moved for summary judgment on the ground that neither Lee nor Howard were employees or agents of Thomson at the time of the accident.[337]

Although Thomson told Lee what tract of timber to cut and where to haul it, Lee was paid by the ton for timber he cut for Thomson and another company. Thomson did not withhold taxes or contribute to Lee's social security taxes and did not provide benefits for any of Lee's employees.[338] Thomson reserved the right to inspect Lee's work and to insist that Lee's work was done to industry standards. Moreover, Thomson required Lee to carry certain types of insurance and to comply with applicable laws.[339] The court of appeals held that these facts were insufficient to show that Thomson controlled the time, method, and manner of Lee's work, and therefore, did not turn the independent contractor relationship into an employee-employer relationship.[340] Nonetheless, even if Lee was an employee, which he was not, Howard was not acting within the scope of his employment when the accident occurred, and therefore, neither Lee nor Thomson would be responsible under the doctrine of *respondeat superior*.[341]

In *Nulite Industries Co., LLC v. Horne*,[342] defendant appealed the jury's award of general damages and attorney fees to plaintiff in her suit for negligent installation of vinyl siding and windows on her mobile home. The court of appeals explained that implied in every contract by building contractors is an obligation to perform in a fit and workmanlike

335. *Id.* at 117-18, 561 S.E.2d at 243-44.
336. 250 Ga. App. 56, 550 S.E.2d 465 (2001).
337. *Id.* at 56-57, 550 S.E.2d at 467.
338. *Id.* at 58, 550 S.E.2d at 468.
339. *Id.* at 59, 550 S.E.2d at 468.
340. *Id*.
341. *Id.*, 550 S.E.2d at 468-69.
342. 252 Ga. App. 378, 556 S.E.2d 255 (2001).

manner.[343] When the builder fails to exercise the degree of care, skill, and ability ordinarily employed by others in the same profession under similar conditions and like surrounding circumstances, the builder breaches this contractual duty.[344] Because plaintiff produced uncontroverted evidence that defendant failed to perform the work in a fit and workmanlike manner, the court of appeals affirmed the trial court's grant of a directed verdict for plaintiff on the breach of contract claim.[345]

The court rejected defendant's argument that defendant was not liable for the installer's negligence because the installer was an independent contractor.[346] Although generally employers are not responsible for torts committed by independent contractors, an employer cannot escape liability when the wrongful act of the contractor violates a duty imposed by an express contract upon the employer.[347]

Nor did defendant prevail in its argument that the contract's "non-limited one year" warranty for all workmanship reduced the six-year statute of limitations period to one year. While the work was completed in February 1996, plaintiff did not notice problems until October 1998, at which point she immediately notified defendant. The evidence showed that the defects occurred during the warranty period.[348]

Last, defendant argued that a bona fide controversy existed and that therefore, the award of attorney fees was improper. Notwithstanding a bona fide controversy, an allegation by plaintiff of bad faith will support an award for attorney fees.[349] Evidence of bad faith in the transaction supported the trial court's decision to let the jury consider attorney fees.[350]

In *Thompson v. Club Group, Ltd.*,[351] Club Group asked its employee James Gray to perform delivery services on Friday of each week, which was Gray's day off. Because Gray traveled from Savannah to Hilton Head to pick up his paycheck on Friday anyway, Club Group agreed to pay Gray thirty-five dollars to pick up documents from golf courses in Savannah and Hardeeville and to deliver them to Hilton Head each

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343. *Id*. at 379, 556 S.E.2d at 256 (citing Hall v. Harris, 239 Ga. App. 812, 817, 521 S.E.2d 638, 643 (1999)).

344. *Id.*

345. *Id.*, 556 S.E.2d at 256-57.

346. *Id.* at 379-80, 556 S.E.2d at 257.

347. *Id*.

348. *Id*. at 380, 556 S.E.2d at 257.

349. *Id.* at 381, 556 S.E.2d at 258 (citing Home Ins. Co. v. Wynn, 229 Ga. App. 220, 223, 493 S.E.2d 622, 626 (1997)).

350. *Id*.

351. 251 Ga. App. 356, 553 S.E.2d 842 (2001).

Friday. One such Friday, prior to picking up any documents, Gray was speeding and possibly racing when he hit plaintiff, killing himself and severely injuring plaintiff.[352]

The court of appeals affirmed the trial court's decision to consider the affidavit of Mark King, who testified about the relationship between the corporation and Gray.[353] An alleged oral agreement entered into by the deceased is considered a declaration against his interest not made with a view to pending litigation, which is admissible evidence.[354]

However, the court of appeals reversed the trial court's decision that Gray performed no services for Club Group on the date of the accident because the record contained the following evidence that would allow a jury to infer an employment relationship: before Gray took over the delivery responsibilities, the manager of the Savannah golf course handled these responsibilities.[355] Because the thirty-five dollars paid to Gray barely covered the wear and tear on his car, a jury could infer that this courier duty became a part of Gray's responsibilities as an employee of the Club Group.[356] Moreover, Gray was to be paid thirty-five dollars each week even if no deliveries were made. The delivery of the documents was in furtherance of Club Group's business.[357] Furthermore, evidence showed that Club Group controlled Gray in his performance of these services and could have fired him from his position as bellman if he did not perform the services satisfactorily or if he violated traffic laws.[358]

The fact that Gray had not yet picked up the documents did not insulate Club Group from liability.[359] The accident occurred on the road adjacent to the golf course at a time that would allow Gray to pick up the documents, travel to Club Group, and be back to the golf course by the required time of 2:00 p.m.[360]

Plaintiff was not, however, permitted to use as collateral estoppel the administrative decision of the South Carolina Workers' Compensation Commission, which held that Gray was acting within the scope of his employment with Club Group at the time of the accident.[361] The

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352. *Id.* at 356-57, 553 S.E.2d at 843-44.
353. *Id.* at 357, 553 S.E.2d at 844.
354. *Id*.
355. *Id.* at 358, 553 S.E.2d at 844-45.
356. *Id.* at 359, 553 S.E.2d at 845.
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.* at 360-61, 553 S.E.2d at 846.

doctrine of collateral estoppel only applies when the "previous action was between the same parties or their privies."[362]

In the wrongful death suit of *Powell v. Alan Young Homes, Inc.,*[363] the court of appeals affirmed the jury's verdict in favor of defendant.[364] Plaintiff's decedent, a sales manager at Alan Young Homes ("AYH"), was accidentally killed during an after-hours fish fry held at AYH. The decedent's manager asked the decedent to accompany him in a golf cart to get cigarettes. While traveling as a passenger in the golf cart driven by his manager, the decedent was killed when an intoxicated co-worker, who was also at the fish fry, drove her truck into the rear of the golf cart.[365]

The court of appeals disagreed with the trial court's decision that the decedent's discussions with his wife about whether the fish fry was a mandatory company meeting were inadmissible.[366] The court noted that "[a]ny evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant."[367] The testimony was admissible under O.C.G.A. section 24-3-2[368] as original evidence to explain the decedent's motives or conduct in attending the fish fry.[369]

However, excluding the testimony was harmless error because it would not have been sufficient to support a jury verdict in Mrs. Powell's favor.[370] Uncontroverted evidence in the form of testimony of AYH employees showed that AYH did not provide any of the alcohol at the fish fry, regardless of whether the fish fry was in fact connected to a mandatory meeting.[371]

Plaintiff further challenged the trial court's decision to allow the jury to consider evidence and be charged regarding assumption of the risk and contributory and comparative negligence. The trial court initially reserved its ruling on whether such evidence would be introduced at trial, then later allowed the evidence to be presented with no objection from plaintiff.[372] Because she did not raise an objection to evidence at

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362. *Id*. at 361, 553 S.E.2d at 847 (citation omitted).
363. 251 Ga. App. 72, 554 S.E.2d 186 (2001).
364. *Id.* at 72, 554 S.E.2d at 188.
365. *Id.* at 72-73, 554 S.E.2d at 188.
366. *Id.* at 73, 554 S.E.2d at 188.
367. *Id*. at 74, 554 S.E.2d at 188-89.
368. O.C.G.A. § 24-3-2 (2002).
369. 251 Ga. App. at 74, 554 S.E.2d at 189.
370. *Id.* at 75, 554 S.E.2d at 189.
371. *Id*.
372. *Id.*, 554 S.E.2d at 189-90.

the time it was presented, plaintiff forfeited her right to exclude it.[373] According to the court, "no party may complain of the giving or the failure to give an instruction to the jury unless he objects thereto before the jury returns its verdict . . . ."[374]

XIII. APPROPRIATION OF CORPORATE OPPORTUNITIES

In *Bob Davidson & Associates, Inc. v. Norm Webster & Associates, Inc.*,[375] Norman Webster, who represented Frigidaire at Lowe's, hired Davidson as an independent contractor to represent Frigidaire at Home Depot. Webster then incorporated as Norm Webster & Associates, Inc. ("Associates") and issued stock to himself, his three children, and Davidson. Shortly after Webster's death, there was talk of Frigidaire terminating its relationship with Associates. Although Davidson claimed that all the company's shareholders knew the relationship was ending and that the company would cease operating once the 1996-1997 season ended, the Webster children denied agreeing to shut down the business.[376]

Meanwhile, at the end of June 1997, Frigidaire asked Davidson to represent Frigidaire to Home Depot for the 1997-1998 season, and in early July, Davidson accepted the offer. Davidson did not announce the offer to the Webster children because Associates was shutting down, and the offer was made to him personally. Associates sought to share in the proceeds of Davidson's relationship with Home Depot for the 1997-1998 season.[377]

Pursuant to O.C.G.A. section 14-2-831(A)(1)(c),[378] "a corporation may sue an officer or director for 'the appropriation, in violation of his duties, of any business opportunity of the corporation.'"[379] To determine whether liability exists, a court must first determine whether the appropriated opportunity was, in fact, a business opportunity that belonged to the corporation.[380] If it was not, then those who pursued the opportunity are immune from suit.[381] Even if the business opportunity was a corporate opportunity, liability may not be imposed when

373. *Id.*, 554 S.E.2d at 190.
374. *Id.* at 76, 554 S.E.2d at 190 (citing Orr v. CSX Transp., 233 Ga. App. 530, 531, 505 S.E.2d 45, 46 (1998)).
375. 251 Ga. App. 56, 553 S.E.2d 365 (2001).
376. *Id.* at 56-57, 553 S.E.2d at 366-67.
377. *Id.* at 57-58, 553 S.E.2d at 367-68.
378. O.C.G.A. § 14-2-831 (2002).
379. 251 Ga. App. at 61, 553 S.E.2d at 369 (alteration in original) (quoting O.C.G.A. § 14-2-831(A)(1)(c)).
380. *Id.*
381. *Id.*

the acquisition of the opportunity did not violate the official's "'fiduciary duties of loyalty, good faith, and fair dealing toward the corporation.'"[382] The burden of proof with regard to the first prong of the analysis rests upon the plaintiff or the party attacking the acquisition; the burden of proof on questions of good faith, fair dealing and loyalty is on the individual accused of improperly appropriating the opportunity.[383]

"'A business opportunity arises from a . . . legal or equitable interest or an 'expectancy' [that evolves from] a pre-existing right or relationship.'"[384] The opportunity of dealing with certain customers is not a business opportunity.[385] Because evidence existed that the shareholders of Associates expected the corporation to cease operating and because Frigidaire was only interested in reaching an agreement with Davidson personally, issues of fact existed as to whether the business opportunity was a corporate opportunity.[386] Therefore, the trial court erred in granting summary judgment to Associates on its breach of fiduciary duty claim.[387]

XIV. DAMAGES

Upon further consideration of the case on remand from the United States Supreme Court, the court of appeals in *Time Warner Entertainment Co. v. Six Flags Over Georgia, L.L.C.*[388] reinstated its original opinion, reiterating that Georgia courts should apply an abuse of discretion standard in accordance with common law in reviewing punitive damage awards.[389] In doing so, the court reversed its decision in *Kent v. A.O. White, Jr. Consulting Engineer, P.C.,*[390] in which it was held that all punitive damage awards were to be reviewed de novo, in accordance with the U.S. Supreme Court's holding in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[391]

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382. *Id*. (quoting Southeast Consultants v. McCrary Eng'g Corp., 246 Ga. 503, 508, 273 S.E.2d 112, 117 (1980)).

383. *Id.* at 61-62, 553 S.E.2d at 369-70.

384. *Id*. at 62, 553 S.E.2d at 370 (quoting United Seal & Rubber Co. v. Bunting, 248 Ga. 814, 815, 285 S.E.2d 721, 722 (1982)).

385. *Id.*

386. *Id.*

387. *Id*. at 62-63, 553 S.E.2d at 370.

388. 254 Ga. App. 598, 563 S.E.2d 178 (2002).

389. *Id.* at 600, 563 S.E.2d at 181.

390. 253 Ga. App. 492, 559 S.E.2d 731 (2002).

391. *Id.* at 503, 559 S.E.2d at 740 (citing Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001)).

Quoting a scholar who noted that judicial review of excessive punitive damages awards "now comes in both common-law and constitutional flavors,"[392] the court of appeals explained that *Leatherman* applies only to excessive punitive damages claims raised under the Federal Constitution's Due Process Clause—it does not reach excessive claims raised under state and federal common law.[393] Thus, state and federal appellate courts remain free to review common law excessiveness claims under an abuse of discretion standard.[394] Applying this analysis, the court ruled that the jury's $257 million punitive damages award was not excessive.[395]

392. 254 Ga. App. at 600, 563 S.E.2d at 181 (quoting Richard W. Murphy, *Punitive Damages, Explanatory Verdicts And The Hard Look*, 76 WASH. L. REV. 995, 1014 (2001)).

393. *Id.* at 601-02, 563 S.E.2d at 182.

394. *Id.* at 601, 563 S.E.2d at 182.

395. *Id.* at 607, 563 S.E.2d at 186.