

Torts

by **Deron R. Hicks***

I. PREMISES LIABILITY

In *Music v. Steamco, Inc.*,¹ the Georgia Court of Appeals affirmed the trial court's grant of summary judgment in favor of a restaurant in a slip and fall action.² The action was filed by a patron of the restaurant who suffered injuries when she fell down a set of stairs while exiting the restaurant. Plaintiff, after having lunch with her friends at defendant's restaurant, prepared to leave the restaurant by way of the same stairs she used to enter the restaurant. As she stood at the top of the stairs, plaintiff noticed water on the steps; however, the steps had been dry when plaintiff entered the restaurant. Notwithstanding the presence of the water, plaintiff began to descend the steps, slipped, and fell. During the course of discovery, plaintiff admitted that although it would have been inconvenient, she could have avoided the wet steps altogether.³ In affirming the trial court's grant of summary judgment in favor of defendant, the court of appeals focused on the issue of whether plaintiff had knowledge of the hazardous condition, despite the exercise of ordinary care.⁴

In *Robinson v. Kroger Co.*,⁵ the Georgia Supreme Court held that to recover for injuries sustained in a slip and fall, a plaintiff must satisfy

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1. 265 Ga. App. 185, 593 S.E.2d 370 (2004).
2. *Id.* at 186, 593 S.E.2d at 371.
3. *Id.* at 185, 593 S.E.2d at 371.
4. *Id.* at 186, 593 S.E.2d at 371.
5. 268 Ga. 735, 493 S.E.2d 403 (1997).

a two-prong test.⁶ First, the plaintiff must prove that the owner or occupier of the premises had actual or constructive knowledge of the hazard.⁷ Second, the plaintiff must prove lack of knowledge of the hazard despite the exercise of ordinary care.⁸ According to the court of appeals, “standing water in plain view on the steps was one which ‘any person with ordinary, common sense would recognize as something that might cause a person to trip, slip, or fall.’”⁹ The court of appeals, therefore, held that plaintiff had equal knowledge of the hazard and failed to exercise due care for her own safety.¹⁰

Standing alone, the decision in *Music* is of little significance. The decision, however, should be contrasted with *Mac International-Savannah Hotel, Inc. v. Hallman*,¹¹ a decision issued by the court of appeals one month later.¹² In *Hallman* the court of appeals affirmed the trial court’s denial of summary judgment for a hotel in a slip and fall action.¹³ In *Hallman*, plaintiff was a member of a tour group visiting Savannah. After a bus tour of the city, plaintiff checked into her room at defendant’s hotel and shortly thereafter left the hotel for dinner. Upon returning to the hotel, plaintiff attempted to enter the hotel through a different door, which was located up a short flight of stairs and across a landing. A sign was posted on the door; however, in order to read the sign, plaintiff had to climb the steps and cross the landing. The steps and landing were both dark and the handrails for the steps were overgrown with bushes.¹⁴ Notwithstanding the obvious hazards, plaintiff walked up the stairs to read the sign, which read “Exit only. Do not Enter.”¹⁵ Plaintiff then began to descend the stairs when she fell and broke her ankle. According to an expert retained by plaintiff, the stairs constituted a trip hazard for several reasons, to include the fact that the height of the stair risers varied beyond what was acceptable under the standard building code. Defendant’s motion for summary judgment was denied by the trial court, and defendant appealed.¹⁶

6. *Id.* at 749, 493 S.E.2d at 414.

7. *Id.*

8. *Music*, 265 Ga. App. at 186, 593 S.E.2d at 371.

9. *Id.*

10. *Id.*

11. 265 Ga. App. 727, 595 S.E.2d 577 (2004).

12. *Id.* at 727, 595 S.E.2d at 577.

13. *Id.*, 595 S.E.2d at 578.

14. *Id.*

15. *Id.*

16. *Id.* at 727-28, 595 S.E.2d at 578-79.

On appeal the court of appeals again recited the two-part burden of proof that a plaintiff must satisfy in a slip and fall case.¹⁷ Based on the facts, the court concluded that plaintiff presented evidence that defendant knew or should have known of the hazardous condition of the steps because defendant swept the steps daily and pressure washed the steps quarterly.¹⁸ The court, therefore, held that plaintiff satisfied the first prong of the *Robinson* test.¹⁹ As to the second prong of the *Robinson* test, defendant's argument on appeal was essentially two-fold. First, defendant argued that plaintiff assumed the risk of her fall because she voluntarily entered a darkened area to use stairs that were poorly lit.²⁰ The court of appeals, however, held that defendant was responsible for plaintiff entering the dark area because it failed to properly illuminate the doorway and it failed to post a sign that could be read from the sidewalk.²¹ Second, defendant argued that it was not liable for plaintiff's injuries because plaintiff had equal knowledge of the stairway's condition.²² According to the court of appeals, there was nothing in the evidence to establish that plaintiff knew the stairs were a trip hazard.²³ Accordingly, the court of appeals affirmed the trial court's decision.²⁴

Judge Andrews, in a dissenting opinion, stated that there were certain facts that the majority ignored in reaching its decision.²⁵ One of the facts noted by Judge Andrews was that plaintiff had entered and exited the hotel at the main entrance and, therefore, knew where she was able to enter the hotel.²⁶ Although Judge Andrews never explicitly states so in his opinion, it is clear he questioned the need for plaintiff to enter the darkened area at all. As in *Music*, plaintiff was not required to traverse the dangerous condition and could have avoided it altogether. Moreover, Judge Andrews pointed to the testimony of plaintiff, who previously stated she believed the cause of her fall was the area was not well lit.²⁷ Accordingly, Judge Andrews stated that notwithstanding any testimony on the unevenness of the steps or the inadequacy of the handrail, there was no evidence that these conditions had actually

17. *Id.* at 728, 595 S.E.2d at 579.

18. *Id.* at 728-29, 595 S.E.2d at 579.

19. *Id.*

20. *Id.* at 729, 595 S.E.2d at 579.

21. *Id.* at 729-30, 595 S.E.2d at 579-80.

22. *Id.* at 730, 595 S.E.2d at 580.

23. *Id.*

24. *Id.*

25. *Id.* at 730-31, 595 S.E.2d at 580 (Andrews, J., dissenting).

26. *Id.* at 731, 595 S.E.2d at 580 (Andrews, J., dissenting).

27. *Id.* at 732, 595 S.E.2d at 581 (Andrews, J., dissenting).

resulted in plaintiff's fall.²⁸ Moreover, to the extent that the cause of the fall was the lack of lighting in the area, Judge Andrews noted that plaintiff had clear knowledge that the area was poorly lit.²⁹ As Judge Andrews noted, plaintiff "knew that the lighting was 'dark and shadowy,' but nonetheless chose that doorway to enter, rather than returning to the main entrance from which [she] exited."³⁰

As in *Music*, plaintiff in *Hallman* had a known, safe, and alternative means of traversing the area where the slip and fall occurred. Plaintiff in *Hallman* was not required to ascend the steps and cross the landing to enter the hotel. Likewise, plaintiff in *Music* was not required to traverse the wet area on the steps to leave the restaurant. In fact, a much stronger argument could be made that plaintiff in *Music* was presented with fewer options on how she could exit defendant's restaurant. What is clear, however, is that the plaintiffs in both *Music* and *Hallman* voluntarily elected to take their respective paths. Nonetheless, the court of appeals in *Music* held that plaintiff voluntarily entered a known and dangerous condition; therefore, plaintiff had equal knowledge of the condition.³¹ In contrast, the court of appeals in *Hallman* determined that plaintiff, who attempted to traverse a hazardous condition of her own volition, lacked equal knowledge of the alleged hazard.³² As the court in *Music* noted, "any person with ordinary, common sense would [have] recognize[d] [the standing water] as something that might cause a person to trip, slip, or fall."³³ It is unclear, however, why similar ordinary, common sense was not required in *Hallman*.

II. ANIMAL LIABILITY

In the movie *The Pink Panther Strikes Again*,³⁴ Inspector Clouseau, played by Peter Sellers, engages in the following conversation with an innkeeper:

Inspector Clouseau: "Does yer dewg bite?"

28. *Id.* (Andrews, J., dissenting). It is clear that Judge Andrews is concerned that these alleged static defects were relied upon by the trial court and the majority in denying defendant's motion for summary judgment, even in the absence of any evidence that such defects were causally connected to plaintiff's fall.

29. *Id.* at 733, 595 S.E.2d at 582 (Andrews, J., dissenting).

30. *Id.* (Andrews, J., dissenting).

31. *Music*, 265 Ga. App. at 186, 593 S.E.2d at 371.

32. *Hallman*, 265 Ga. App. at 729, 595 S.E.2d at 579.

33. *Music*, 265 Ga. App. at 186, 593 S.E.2d at 371 (quoting *Means v. Marshalls of MA*, 243 Ga. App. 419, 421, 532 S.E.2d 740, 741 (2000)).

34. *THE PINK PANTHER STRIKES AGAIN* (Anjo Productions 1976).

Innkeeper: "No."

Inspector Clouseau: "Nice doggie" (Clouseau then bends down to pet the dog, which proceeds to bite him) "I thought you said yer dewg did not bite!"

Innkeeper: "Zat . . . iz not my dog."³⁵

This famous scene from Peter Sellers's classic film brings to mind the incident described in the Georgia Court of Appeals decision in *Osowski v. Smith*.³⁶ In *Osowski* plaintiff was a cable TV installer who scheduled an appointment with defendants to install cable television at their residence. When plaintiff arrived at defendants' residence, he saw several dogs roaming around the residence and asked one of the defendants if the dogs would bite him. Defendant assured plaintiff that he would restrain the dogs. Thereafter, defendant left the immediate area; plaintiff, no longer seeing any dogs, left his vehicle and entered the residence. As plaintiff started to leave defendants' residence, he was struck from behind by a dog. Plaintiff claimed that he was injured as a result of being knocked to the ground by the dog. Defendants disputed most of plaintiff's testimony, although they agreed that there were dogs on the property. One of the defendants recalled that there were three dogs on the property that day, two of which were owned by defendants. Similar to Inspector Clouseau's situation, the third dog, which defendants believe knocked plaintiff to the ground, allegedly did not belong to defendants.³⁷

During the course of the civil action, the parties agreed to stipulate to the following facts: plaintiff was an invitee on the property; there was no leash law in effect; and defendants did not have superior knowledge of the dangerous propensity or temperament of the dog that allegedly knocked plaintiff to the ground. Based on these stipulations of fact, and finding neither evidence that plaintiff specifically asked that the offending animal be put inside the house nor evidence that defendants had offered to do so, the trial court entered summary judgment for defendants.³⁸ The court of appeals reversed.³⁹

The court of appeals first noted that in a typical dog bite case, "a plaintiff must produce evidence of the vicious propensity of the dog in order to show that the owner of the premises had superior knowledge of the danger."⁴⁰ In this case, plaintiff conceded that there was no

35. *Id.*

36. 262 Ga. App. 538, 586 S.E.2d 71 (2003).

37. *Id.* at 538-39, 586 S.E.2d at 72-73.

38. *Id.* at 539, 586 S.E.2d at 73.

39. *Id.*

40. *Id.* at 540, 586 S.E.2d at 73.

evidence that the animal at issue had dangerous propensities or that defendants knew about any such propensities.⁴¹ Nevertheless, the court of appeals noted that “a person may be held liable for the negligent performance of a voluntary undertaking.”⁴² In this respect, the court of appeals held that “[w]hen one undertakes an act that he has no duty to perform and another person reasonably relies upon that undertaking, the act must generally be performed with ordinary or reasonable care. The person assuming such responsibility may be held liable for negligently performing the duties so assumed.”⁴³ Viewing the facts in the light most favorable to plaintiff, the court concluded that a question of fact existed on whether defendants had undertaken a duty to ensure that the dogs would not pose a risk to plaintiff.⁴⁴ Specifically, the court noted that there was evidence in the record that plaintiff had discussed the issue of restraining the dogs with one defendant.⁴⁵ Although defendants argued that they had only offered to restrain one dog, the court of appeals held that the conflict in testimony created an issue of fact for the jury.⁴⁶

III. DEFAMATION

Several interesting cases in the area of defamation were issued by the Georgia appellate courts during the survey period. In *Gast v. Brittain*,⁴⁷ the Georgia Supreme Court affirmed the trial court’s grant of summary judgment in a defamation action.⁴⁸ In *Gast* defendant was an eagle scout youth leader in a Boy Scout troop for which plaintiff was an adult leader. Defendant, having apparently become disillusioned with the troop’s leadership, submitted a letter of resignation, a copy of which was sent to certain people involved with the troop and the parents of the Boy Scouts.⁴⁹ The letter set forth the reasons for defendant’s resignation, which included, in part, his allegation that plaintiff was “‘immoral’ and did not live his life according to the ‘ideals of [s]couting.’”⁵⁰ The letter also contained specific allegations of child abuse and other acts of improper conduct against another troupe leader who was not

41. *Id.*

42. *Id.*

43. *Id.* (citations omitted).

44. *Id.* at 540-41, 586 S.E.2d at 74.

45. *Id.* at 540, 586 S.E.2d at 74.

46. *Id.* at 540-41, 586 S.E.2d at 74.

47. 277 Ga. 340, 589 S.E.2d 63 (2003).

48. *Id.* at 340, 589 S.E.2d at 63.

49. *Id.*

50. *Id.*, 589 S.E.2d at 64.

specifically identified. After the letter circulated, plaintiff brought suit against defendant for libel.⁵¹

On motion for summary judgment before the trial court, defendant argued that the statements in the letter, which concerned plaintiff, were only “expressions of non-actionable opinion.”⁵² The trial court agreed and granted defendant’s motion for summary judgment.⁵³ The court of appeals, however, reversed and held that a question of fact existed as to whether the opinions implied “defamatory facts about [plaintiff] that were capable of being proved false.”⁵⁴ The supreme court granted certiorari and reversed.⁵⁵

In reversing the court of appeals, the supreme court first noted that matters of opinion, to which reasonable persons may differ, are not considered libelous.⁵⁶ That is, “[a]n assertion that cannot be proved false cannot be held libelous.”⁵⁷ Accordingly, defendant’s assertions concerning his opinion that plaintiff was “immoral” and did not abide by the “ideals of [s]couting” were “plainly the sorts of opinions that are incapable of being proved false.”⁵⁸ Nonetheless, the supreme court recognized that “[a]n opinion can constitute actionable defamation if the opinion can reasonably be interpreted, according to the context of the entire writing in which the opinion appears, to state or imply defamatory facts about the plaintiff that are capable of being proved false.”⁵⁹ The question faced by the court was whether the allegations regarding the other troop leader, although not directed against plaintiff, could reasonably be interpreted to imply defamatory facts about the plaintiff.⁶⁰ The supreme court held that the letter clearly separated the allegations against the other troop leader from the allegations against plaintiff.⁶¹ Therefore, as the allegations of child abuse could not reasonably be interpreted to apply to plaintiff, the supreme court held that the letter did not constitute actionable defamation.⁶²

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 341, 589 S.E.2d at 64.

57. *Id.* (quoting *Bergen v. Martindale-Hubbell*, 176 Ga. App. 745, 747, 337 S.E.2d 770, 772 (1985)).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 342, 589 S.E.2d at 64.

62. *Id.*, 589 S.E.2d at 64-65.

In *McCandliss v. Cox Enterprises, Inc.*,⁶³ the Georgia Court of Appeals extended the single publication rule in defamation cases to include Internet postings.⁶⁴ McCandliss was the founder of Hipsters, a social club for “persons of size”⁶⁵ The first social gathering held by Hipsters included a lingerie show with plus-size models. Plaintiff, acting under a pseudonym, submitted photographs of one of the plus-size models along with an article about Hipsters to an adult magazine entitled “Plumpers and Big Women.”⁶⁶ The photographs of the model were submitted without the model’s consent.⁶⁷ “The model thereafter sued both McCandliss and the magazine for the unauthorized publication of her pictures”⁶⁸

The *Atlanta Journal-Constitution*⁶⁹ (“AJC”) covered the lawsuit.⁷⁰ The headline for one of the articles in the newspaper read: “The Hipster party in metro Atlanta was noted on the cover [of ‘Plumpers and Big Women’]: ‘5,000 Pounds of Sex-Starved Fatties.’”⁷¹ After publication, the article was placed in an archive located on the newspaper’s Internet website. Approximately two years after the publication of the initial article, McCandliss filed suit against the AJC. The basis of the lawsuit was McCandliss’s contention that the newspaper inappropriately attributed the caption from the cover of the magazine to his organization.⁷² According to the complaint, the “AJC libeled [McCandliss and] placed him in a false light in the public eye.”⁷³ The AJC, relying on section 9-3-33 of the Official Code of Georgia Annotated (“O.C.G.A.”),⁷⁴ subsequently “filed a motion to dismiss [the complaint] arguing that it was barred by the one-year statute of limitation applicable to claims of defamation.”⁷⁵ The trial court dismissed the suit on that basis and McCandliss appealed.⁷⁶ The court of appeals affirmed in part and reversed in part.⁷⁷

63. 265 Ga. App. 377, 593 S.E.2d 856 (2004).

64. *Id.* at 378, 593 S.E.2d at 858.

65. *Id.* at 377, 593 S.E.2d at 377.

66. *Id.*

67. *Id.*

68. *Id.*

69. Tim Galloway, *Model and Lawyer Stand up to Club Racy Magazine*, ATLANTA J. & CONST., Sept. 7, 2000, at JG1.

70. *McCandliss*, 265 Ga. App. at 377-78, 593 S.E.2d at 857.

71. *Id.*

72. *Id.* at 378, 593 S.E.2d at 857.

73. *Id.*

74. O.C.G.A. § 9-3-33 (1982).

75. *McCandliss*, 265 Ga. App. at 378, 593 S.E.2d at 857.

76. *Id.*, 593 S.E.2d at 857-58.

77. *Id.* at 380, 593 S.E.2d at 859.

On appeal McCandliss argued that the single publication rule⁷⁸ should not apply to the Internet posting made by the AJC.⁷⁹ “Under the single publication rule, ‘one publication is only one libel, regardless of the times it was exposed to the view of different people’”⁸⁰ According to the court of appeals,

“[t]he purpose of the single publication rule is to protect newspaper defendants and the courts from a multiplicity of suits and an almost endless tolling of the statute of limitations. Its goals can be accomplished by requiring a plaintiff to collect all of his damages in one action, and establish that the statute of limitations is to run from the date of initial publication.”⁸¹

McCandliss, however, argued that insofar as a website can be altered at any time by its publisher, each separate “hit” on the website should be considered a new publication that renews the statute of limitations.⁸² The court of appeals rejected that argument.⁸³ Instead, the court of appeals noted that the policies underlying the single publication rule took on even greater significance in light of the mass communication provided by the Internet.⁸⁴ According to the court of appeals, “[t]hose policies are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet.”⁸⁵ Based on the extension of the single filing rule to Internet publications, the court of appeals determined that McCandliss’s defamation claim was barred by the one-year statute of limitations.⁸⁶

In *Galardi v. Steele-Inman*,⁸⁷ the Georgia Court of Appeals held that the corporate promoter of the 1997 Miss Nude World International Pageant could not be held liable for slander because there was no evidence that the promoter had expressly directed or authorized an employee to make allegedly slanderous statements about plaintiff, nor

78. *Rives v. Atlanta Newspapers, Inc.*, 220 Ga. 485, 487, 139 S.E.2d 395, 397 (1964).

79. *McCandliss*, 265 Ga. App. at 378, 593 S.E.2d at 858.

80. *Id.* (quoting *Cox Enters. v. Gilreath*, 142 Ga. App. 297, 298, 235 S.E.2d 633, 634 (1997)).

81. *Id.* (quoting *Carroll City/County Hosp. Auth. v. Cox Enters.*, 243 Ga. 760, 760, 256 S.E.2d 443, 444 (1979)).

82. *Id.* at 379, 593 S.E.2d at 858 (citing *Firth v. State of New York*, 775 N.E.2d 463 (N.Y. 2002)).

83. *Id.*

84. *Id.*

85. *Id.* (quoting *Firth*, 775 N.E.2d at 463).

86. *Id.* at 380, 593 S.E.2d at 859.

87. 266 Ga. App. 515, 597 S.E.2d 571 (2004).

had it published the statements about plaintiff.⁸⁸ In *Galardi* plaintiff was a contestant in the 1997 Miss Nude World International Pageant. The pageant was operated by the corporate owner of the Pink Pony, an adult entertainment club. During the course of the six-day pageant, an employee of the corporate promoter accused plaintiff of certain “ballot improprieties.” Plaintiff was also accused of stating that she had “bought” the contest. Plaintiff denied the allegations; nevertheless, she was barred from participating in the remainder of the pageant. Plaintiff alleged that, as a result of the action taken by the corporate promoter, her reputation was badly damaged and her career as an adult entertainer was derailed.⁸⁹

Plaintiff brought suit against the corporate promoter and alleged, *inter alia*, that the corporate promoter had slandered her. A jury returned a verdict on the slander claim in the amount of \$500,000 against the corporate promoter and two individual defendants.⁹⁰ The court of appeals reversed the jury’s verdict.⁹¹

In reversing the jury’s decision, the court of appeals outlined the circumstances in which a corporation may be held liable for the alleged slanderous statements of an agent or employee.⁹² The court of appeals first noted that

[a] corporation is not liable for the slanderous utterances of an agent acting within the scope of his employment, unless it affirmatively appears that the agent was expressly directed or authorized to slander the plaintiff. For liability to attach, the corporation must expressly order and direct the agent to say those very words.⁹³

The only evidence plaintiff offered that showed the corporate defendant had expressly directed or authorized the slander was that the corporate entity had a sole shareholder, who also served as the sole director, president, and chief executive officer of the corporation. According to plaintiff, the employee who allegedly made the slanderous statements acted as the owner’s “personal representative.” Therefore, plaintiff argued that the corporation should be responsible for the statements made by that employee.⁹⁴ The court of appeals rejected this argument.⁹⁵ The court noted that there was no evidence that the corporate

88. *Id.* at 515, 597 S.E.2d at 573.

89. *Id.* at 515, 517, 597 S.E.2d at 573-74.

90. *Id.* at 515, 597 S.E.2d at 573.

91. *Id.*

92. *Id.* at 517, 597 S.E.2d at 574.

93. *Id.*

94. *Id.* at 518, 597 S.E.2d at 575.

95. *Id.* at 518-19, 597 S.E.2d at 575.

entity had actually directed the employee to make the alleged slanderous statements.⁹⁶ Moreover, the court of appeals held that “the doctrine of respondent [sic] superior does not apply in slander cases.”⁹⁷

IV. GEORGIA TORT CLAIMS ACT

The Georgia Tort Claims Act⁹⁸ (the “Act”) provides a limited waiver of sovereign immunity for actions against the State of Georgia for torts committed by state officers or employees acting within the scope of their official duties.⁹⁹ Because the Act operates as a limited waiver of sovereign immunity, it has been strictly construed by Georgia courts.¹⁰⁰ The Act, however, does not operate as a complete waiver of sovereign immunity for torts committed by agents or employees of the state. Rather, the Act sets forth certain specific exceptions to the waiver of sovereign immunity.¹⁰¹ For example, the Act provides that the “state shall have no liability for losses resulting from . . . [a]ssault . . . [and] battery”¹⁰² As made clear in *Oconee Community Service Board v. Holsey*,¹⁰³ the application of this exception to the waiver of sovereign immunity is not limited to those situations in which the person committing the assault and battery is a state employee.¹⁰⁴ The lawsuit in *Holsey* was filed after plaintiff’s daughter—a resident of a community home for persons with developmental disabilities—was stabbed and killed by a house-mate. Plaintiff claimed that the state agency had negligently placed the house-mate in the community home without proper treatment or supervision. Defendant moved to dismiss plaintiff’s complaint on the ground of sovereign immunity. The trial court denied the motion to dismiss.¹⁰⁵ The court of appeals reversed.¹⁰⁶

Plaintiff’s daughter, who was blind, mentally retarded, and suffered from cerebral palsy, was under the care and treatment of the Oconee

96. *Id.* at 518, 597 S.E.2d at 575.

97. *Id.*

98. O.C.G.A. §§ 50-21-20 to -37 (2002).

99. *See* O.C.G.A. § 50-21-23.

100. *See* Bd. of Regents v. Riddle, 229 Ga. App. 15, 493 S.E.2d 208 (1997) (“Although the State has waived its sovereign immunity for negligent acts, the waiver is ‘only to the extent and in the manner provided’ by the Act.”); Dep’t of Human Res. v. Hutchinson, 217 Ga. App. 70, 71, 456 S.E.2d 642, 644 (1995).

101. *See* O.C.G.A. § 50-21-24.

102. *Id.* § 50-21-24(7).

103. 266 Ga. App. 385, 597 S.E.2d 489 (2004).

104. *Id.* at 386, 597 S.E.2d at 491.

105. *Id.* at 385, 597 S.E.2d at 490.

106. *Id.*

Community Service Board (the "Board"). While in the care and treatment of the Board, plaintiff's daughter was placed in a community home. Mary Ann Williams was also residing in the same community home. On February 11, 1999, Williams was admitted to a hospital after she attacked a caseworker at the community house. Williams was released from the hospital five days later and again placed in the community home. Two days after her return, Williams stabbed plaintiff's daughter to death.¹⁰⁷

In reaching its decision, the court of appeals first determined that the Board was a state department or agency for purposes of sovereign immunity.¹⁰⁸ The court of appeals looked to the provisions of the Georgia Tort Claims Act and O.C.G.A. section 50-21-24(7).¹⁰⁹ to determine whether the state had waived its sovereign immunity with respect to plaintiff's claim.¹¹⁰ As set forth above, O.C.G.A. section 50-21-24(7) provides that the state shall have no liability for losses resulting from assault or battery.¹¹¹ However, according to plaintiff, the exception to the waiver of sovereign immunity set forth in section 50-21-24(7) should only apply when the assault and battery is committed by an agent of the State of Georgia, not a third party.¹¹² The court of appeals, however, rejected this argument.¹¹³ According to the court of appeals: "[I]n determining whether the exception . . . applies, . . . the focus is not on the government action taken or the duty allegedly breached by the government, but on the act causing the underlying loss, and it is not necessary that such act have been committed by a state officer or employee."¹¹⁴ Therefore, the focus is on whether the "loss 'results' from such assault and battery, even though there may have been other contributing factors."¹¹⁵ Accordingly, because plaintiff's daughter's "death resulted from the stabbing, which constitutes an assault or battery within the meaning of [O.C.G.A. section] 50-21-24(7), sovereign immunity shields [the Board] from liability."¹¹⁶

107. *Id.*

108. *Id.*

109. O.C.G.A. § 50-21-24(7).

110. *Holsey*, 266 Ga. App. at 386, 597 S.E.2d at 491.

111. O.C.G.A. § 50-21-24(7).

112. *Holsey*, 266 Ga. App. at 386, 597 S.E.2d at 491.

113. *Id.*

114. *Id.* (quoting *Dep't of Human Res. v. Coley*, 247 Ga. App. 392, 394, 544 S.E.2d 165, 168 (2000)).

115. *Id.* (quoting *Coley*, 247 Ga. App. at 397, 544 S.E.2d at 165).

116. See also *Ga. Military Coll. v. Santamorena*, 237 Ga. App. 58, 514 S.E.2d 82 (1999); *Bd. of Regents v. Riddle*, 229 Ga. App. 15, 493 S.E.2d 208 (1997) ("the exception covers all 'losses' that result from an assault or battery, regardless of the identity of the actor

V. NEGLIGENCE

In *McKenna, Long & Aldridge, LLP v. Keller*,¹¹⁷ the Georgia Court of Appeals addressed the question of “whether a party to a legal dispute may bring an action against an adversary’s attorney for negligence.”¹¹⁸ Plaintiff was a former vice-president of First Atlanta Securities, LLC (“First Atlanta”). When plaintiff began working for First Atlanta he signed an employment agreement, which contained certain noncompetition, nonsolicitation, and proprietary information covenants. The agreement also specifically provided that First Atlanta could disclose these covenants to any of plaintiff’s future employers. Subsequently, plaintiff entered into employment negotiations with a competitor of First Atlanta. A letter was sent from First Atlanta to the president of plaintiff’s prospective employer, which included a copy of the employment agreement that referenced the covenants. Thereafter, Long, Aldridge & Norman, LLP (now McKenna, Long & Aldridge), counsel for First Atlanta, sent a similar letter to plaintiff’s prospective employer. The letter from Long, Aldridge & Norman indicated that certain documents, computer disks, and other items were missing and were assumed to be in the possession of either plaintiff or another former employee. The letter also specifically stated that plaintiff was in violation of his employment agreement with First Atlanta.¹¹⁹ Plaintiff brought suit against Long, Aldridge & Norman and alleged that the firm had negligently failed “to investigate adequately its client’s allegations against [plaintiff] before sending the demand letter.”¹²⁰ The trial court

committing the assault or battery”); *Christensen v. State*, 219 Ga. App. 10, 13, 464 S.E.2d 14, 17 (1995); *Dep’t of Human Res. v. Hutchinson*, 217 Ga. App. 70, 456 S.E.2d 642 (1995). In *Department of Human Resources v. Hutchinson*, the court of appeals held that the Georgia Department of Human Resources (“Department”) could not be held liable for an assault by a juvenile under the Department’s custody. 217 Ga. App. 70, 73, 456 S.E.2d 643, 645 (1995). In *Hutchinson* a juvenile with a criminal history was placed by the Department in a foster home operated by plaintiff. After placement in the foster home, the juvenile found a gun owned by plaintiff and shot plaintiff. Plaintiff sued the Department under the Act based on a theory that the Department had been negligently indifferent to plaintiff’s safety by placing the juvenile in plaintiff’s custody without sufficient warning of the juvenile’s alleged violent propensity. The trial court denied the Department’s motion for summary judgment. *Id.* at 71, 456 S.E.2d at 643. The court of appeals reversed. *Id.* at 73, 456 S.E.2d at 645. The court of appeals held that because plaintiff’s claim “resulted from” an assault, liability was precluded. *Id.* at 72, 456 S.E.2d at 644.

117. 267 Ga. App. 171, 598 S.E.2d 892 (2004).

118. *Id.* at 171, 598 S.E.2d at 893.

119. *Id.*

120. *Id.* at 174, 598 S.E.2d at 895.

denied Long, Aldridge & Norman's motion for summary judgment.¹²¹ The court of appeals reversed.¹²²

The court first noted that "[i]t is well established that an action in negligence requires the breach of a duty owed to the claimant. 'The four elements to any tort action are a duty, a breach of that duty, causation and damages.'"¹²³ In this regard, the court of appeals noted that several Georgia cases have discussed "the element of duty in the context of attorneys' relationships with nonclients."¹²⁴ Of particular importance to the court of appeals was the decision in *Tarver v. Wills*,¹²⁵ in which the court of appeals held that a cause of action in negligence was not appropriate because

the overriding public policy guarding free access to the courts and the fact that the attorney's legal duty is to his own client, [demanded a finding] that the attorney owed no legal duty to [an adverse party] to investigate fully the client's claim prior to filing suit . . . or to avoid filing a suit which he knew or should have known was frivolous.¹²⁶

Therefore, the court of appeals held that "if an attorney owes no legal duty sounding in negligence to an adversary to investigate a client's claim prior to filing suit or to avoid filing a potentially frivolous suit, . . . certainly the attorney owed no duty to investigate before merely sending a demand letter on behalf of a client."¹²⁷ Accordingly, as plaintiff's claims arose from Long, Aldridge & Norman's alleged failure to adequately investigate its client's allegations, defendant owed no legal duty to plaintiff giving rise to a claim of negligence.¹²⁸

In *Brown v. All-Tech Investment Group, Inc.*,¹²⁹ the Georgia Court of Appeals affirmed the trial court's grant of summary judgment to two day trading firms.¹³⁰ In *Brown* survivors of a shooting spree at two day trading firms and the families of seven individuals killed in the shooting spree brought an action for damages resulting from the incident.¹³¹ According to the court of appeals:

121. *Id.* at 172, 598 S.E.2d at 893.

122. *Id.* at 174, 598 S.E.2d at 895.

123. *Id.* at 172, 598 S.E.2d at 894 (quoting *Traina Enters. v. RaceTrac Petroleum*, 241 Ga. App. 18, 18, 525 S.E.2d 712, 713 (1999)).

124. *Id.* See *Karpowicz v. Hyles*, 247 Ga. App. 292, 543 S.E.2d 51 (2000).

125. 174 Ga. App. 550, 330 S.E.2d 896 (1985).

126. *Id.* at 551, 330 S.E.2d at 898 (citations omitted).

127. *McKenna*, 267 Ga. App. at 173-74, 598 S.E.2d at 894-95 (citations omitted).

128. *Id.* at 174, 598 S.E.2d at 895.

129. 265 Ga. App. 889, 595 S.E.2d 517 (2004).

130. *Id.* at 900, 595 S.E.2d at 526.

131. *Id.* at 889-90, 595 S.E.2d at 519.

Day trading is a form of financial securities trading in which traders place multiple buy and sell orders for securities and hold the positions for a very short period of time, usually less than one day, seeking profit from the daily fluctuations in stock prices. In exchange for commission on each trade [defendants], as day trading firms, provided their customers access to computer terminals and specialized computer software used in day trading Day trading is highly speculative. A large majority of day traders fail to profit from their trading. . . . Each [day trading firm] had policies to monitor their customers' success and to reevaluate the suitability of customers whose accounts lost a certain percentage in a certain period of time.¹³²

Mark O. Barton began trading at All-Tech Investment Group, Inc., a day trading firm, in April 1998. At the time he opened his account, Barton made certain representations regarding his net worth. The day trading firm, however, never verified Barton's net worth. In little over a year of trading, Barton lost over \$400,000. At that point, All-Tech closed Barton's account. Within a few days, Barton went across the street to Momentum Securities, Inc., another day trading firm, and opened an account. Again, Barton misrepresented his net worth. The second day trading firm also failed to verify his financial information. In little over a month, Barton lost over \$100,000 at the second day trading firm.¹³³

On the day of the shooting, Barton contacted the managers at both day trading firms and informed them he would be bringing in checks to reactivate his accounts. Barton then entered each day trading firm and began randomly firing at people working on the trading floor. Barton killed nine people and injured twelve.¹³⁴

Plaintiffs brought suit against the two trading firms alleging that the trading firms had "violated their duty to determine the suitability of Mark Barton to day trade, that Mark Barton risked and lost substantial amounts of money which were not risk capital, that [the trading firms] facilitated Barton's losses through predatory practices, and that workplace violence is prevalent and recognized."¹³⁵ The trial court granted the motion for summary judgment filed by both day trading firms.¹³⁶ The court of appeals affirmed.¹³⁷

132. *Id.* at 890-91, 595 S.E.2d at 519-20.

133. *Id.* at 892, 595 S.E.2d at 520-21.

134. *Id.* at 892-93, 595 S.E.2d at 521.

135. *Id.* at 895, 595 S.E.2d at 522.

136. *Id.* at 890, 595 S.E.2d at 519.

137. *Id.*

On appeal plaintiffs conceded that Barton's shooting spree constituted an intervening criminal act by a third party, between the trading firms' alleged negligent conduct and plaintiffs' injuries.¹³⁸ As noted by the court of appeals, under Georgia law, an intervening criminal act of a third party is deemed the proximate cause of the injury, breaking the causal connection between the defendant's negligence and the injury, unless three conditions are met.¹³⁹ Those three conditions are as follows: (1) the intervening criminal act of a third party was a reasonably foreseeable consequence of the defendant's conduct; (2) the act was triggered by the defendant's conduct; and (3) the act was sufficient of itself to cause the plaintiff's injury.¹⁴⁰

On appeal plaintiffs argued that although Barton's actions constituted an intervening criminal act, Barton's actions were merely an "intervening consequence" of the trading firms' business practices, rather than an "intervening cause" of plaintiffs' injuries.¹⁴¹ In this respect, plaintiffs alleged that it was "common knowledge that some people will become violent and seek revenge against a party they hold responsible for their financial losses."¹⁴² In support of this contention, plaintiffs presented evidence of certain experts who "discussed generalized concepts of violent reactions to financial disaster and workplace violence."¹⁴³ However, the court of appeals reviewed the experts' testimony and concluded that

[e]ven assuming the . . . events happened as described [by the experts] and the trading firms knew or should have known about them, the experts' testimony illustrates vividly that even arguably similar acts of violence were so unusual, contrary to ordinary experience, and rare that no reasonable jury could find the trading firms should have guarded against them.¹⁴⁴

The court noted in a footnote to its opinion that it "[was] undisputed that before Barton pulled out his weapons, 'no employee [of the day trading firms] had any reason to believe Barton in particular could be dangerous.'¹⁴⁵ Accordingly, the court of appeals held that the issue of proximate cause was "so plain, palpable and indisputable as to demand summary judgment for the defendants."¹⁴⁶

138. *Id.* at 893, 595 S.E.2d at 521.

139. *Id.*

140. *Id.*

141. *Id.* at 894, 595 S.E.2d at 522.

142. *Id.* at 895, 595 S.E.2d at 522.

143. *Id.*, 595 S.E.2d at 523.

144. *Id.* at 895-96, 595 S.E.2d at 523.

145. *Id.* at 896, 595 S.E.2d at 523.

146. *Id.*

VI. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Ever since the Georgia Supreme Court decision in *Lee v. State Farm*,¹⁴⁷ a question has existed on whether Georgia has been drifting towards a more liberal application of the “impact rule”¹⁴⁸ in cases of negligent infliction of emotional distress. In *Shores v. Modern Transportation Services, Inc.*,¹⁴⁹ the Georgia Court of Appeals hinted as to the direction the appellate courts may be leaning.¹⁵⁰ In *Shores* plaintiff was the operator of a train’s lead locomotive. The locomotive, operated by plaintiff, collided with a tractor-trailer owned by defendant and operated by defendant’s employee. Plaintiff was not injured in the accident; however, plaintiff alleged that he subsequently developed post-traumatic stress syndrome and suffered from panic attacks. Plaintiff brought suit against defendant on the basis of negligent infliction of emotional distress. The trial court granted defendant’s motion for summary judgment, and plaintiff appealed.¹⁵¹ The court of appeals affirmed.¹⁵²

The court of appeals recited two well-established circumstances in which a claim for negligent infliction of emotional distress may be stated: First, those circumstances in which the plaintiff has suffered emotional distress as a result of an impact to the plaintiff’s person, resulting in physical injury; second, those situations in which the plaintiff suffers injury to property, resulting in pecuniary loss from mental injury.¹⁵³ The court noted that plaintiff failed to prove either set of circumstances.¹⁵⁴ Nonetheless, plaintiff argued that the court of appeals should “‘relax’ the impact rule to permit a negligent infliction of emotional distress claim where the plaintiff shows presence in the zone of danger.”¹⁵⁵ The court of appeals noted that the Georgia Supreme Court “eased the impact rule” in the decision in *Lee* when it permitted “a mother to pursue a claim for negligent infliction of emotional distress where, although not injured herself, she nonetheless observed injury to her child resulting in the child’s death.”¹⁵⁶ The court of appeals,

147. 272 Ga. 583, 533 S.E.2d 82 (2000).

148. *Id.* at 584, 533 S.E.2d at 84 (quoting *Ryckley v. Callaway*, 261 Ga. 828, 829, 412 S.E.2d 826, 827 (1992)).

149. 262 Ga. App. 293, 585 S.E.2d 664 (2003).

150. *Id.* at 296, 585 S.E.2d at 666.

151. *Id.* at 293-94, 585 S.E.2d at 664-65.

152. *Id.* at 293, 585 S.E.2d at 665.

153. *Id.* at 295, 585 S.E.2d at 665.

154. *Id.*, 585 S.E.2d at 665-66.

155. *Id.* at 296, 585 S.E.2d at 666.

156. *Id.*

however, declined to relax the impact rule to encompass the facts of the case before it.¹⁵⁷ Significantly, the court stated that “[i]t follows that even were we so inclined (*and we are not*), the adoption of a rule broader than that approved in *Lee* is beyond our authority.”¹⁵⁸ Accordingly, although the court notes that a decision to extend the ruling in *Lee* is beyond their authority, the court of appeals also makes it abundantly clear that such an extension is disfavored.¹⁵⁹

157. *Id.*

158. *Id.* (emphasis added).

159. *Id.*