

Torts

by **Deron R. Hicks***

I. ANIMAL LIABILITY

In *Coogle v. Jahangard*,¹ the Georgia Court of Appeals addressed the issue of whether the prior owner of a dog may be liable to a party injured by the animal when it is alleged that the prior owner failed to warn the current owner of an alleged dangerous propensity on the part of the animal.² In *Coogle* the plaintiff's eleven-year-old son was attacked and bitten by a golden retriever owned by James Green ("Green"). After the biting incident, Green contacted the defendant, who had given Green the dog, and told the defendant about the biting incident. Allegedly, the defendant told Green that the dog had previously bitten one of the defendant's family members. The plaintiff asserted that this information had not been disclosed to him at the time he accepted ownership of the dog. According to Green, he would not have accepted the dog if he had known of the prior biting incident. The plaintiff brought suit against the defendant and alleged that the defendant, as the prior owner of the animal, had negligently failed to warn Green, the current owner of the animal, about the prior biting incident.³ According to the plaintiff, "a party placing a dog in the 'stream of commerce' has a duty to warn of the dangers associated with the dog, and is liable to the third parties harmed by the dog."⁴ The trial

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1. 271 Ga. App. 235, 609 S.E.2d 151 (2005).
2. *Id.* at 235, 609 S.E.2d at 152.
3. *Id.* at 235-37, 609 S.E.2d at 152-53. The plaintiff's claim was not based upon O.C.G.A. section 51-2-7 nor O.C.G.A. section 51-3-1. *Id.*
4. *Id.* at 235, 609 S.E.2d at 152.

court granted summary judgment on behalf of the defendant, and the plaintiff appealed.⁵ On appeal, the court of appeals affirmed.⁶

The court of appeals noted that to state a claim for negligent failure to warn, a plaintiff must first establish that the prior owner owed a legal duty to the injured party.⁷ In this particular case, the court concluded that there was no contract between the plaintiff and the defendant.⁸ Moreover, the court noted that Georgia law does not specifically require “a dog owner to warn a person to whom he is giving a dog of a prior biting incident.”⁹ Accordingly, because the defendant was no longer in possession or control of the animal at the time of the biting incident, the court held that there was no legal duty owed to the plaintiff and therefore no cause of action in negligence.¹⁰

In addition to the lack of duty owed by the defendant to the plaintiff, the court also noted that the injuries suffered by the plaintiff’s child were “too remote for the law to permit recovery.”¹¹ At the time of the biting incident, a full month had passed between the time of the defendant’s ownership of the animal and the incident itself.¹² Moreover, the court noted the “major change in the dog’s environment” during the period between the defendant’s prior ownership of the animal and the incident at issue.¹³ In light of these factors, the court held that the plaintiff could not prove that the defendant’s alleged failure to warn was the proximate cause of the injury to the plaintiff’s child.¹⁴

In *Taylor v. Howren*,¹⁵ the Georgia Court of Appeals considered the issue of whether an owner of a horse was immune from suit pursuant to the Equine Activities Act¹⁶ when the owner was alleged to have misrepresented the nature or domesticity of the horse.¹⁷ In *Taylor* the plaintiff, after assisting the defendant with dressing the wounds of an injured horse, decided to ride a second horse owned by the defendant. The defendant had recently purchased the second horse and had been

5. *Id.*

6. *Id.* at 239, 609 S.E.2d at 154.

7. *Id.* at 238, 609 S.E.2d at 152.

8. *Id.* at 237, 609 S.E.2d at 153.

9. *Id.*

10. *Id.* at 238, 609 S.E.2d at 153-54.

11. *Id.*, 609 S.E.2d at 154.

12. *Id.*

13. *Id.*

14. *Id.*

15. 270 Ga. App. 226, 606 S.E.2d 74 (2004).

16. O.C.G.A. § 4-12-1 to -5 (1995).

17. *Taylor*, 270 Ga. App. at 226, 229, 606 S.E.2d at 74, 77-78.

instructed at the time of purchase that the horse was “green broke.”¹⁸ The plaintiff, however, contends that the defendant did not inform him that the horse was green broke; rather, the plaintiff contends that the defendant told him the horse was a “good, rideable horse.”¹⁹ As the plaintiff attempted to mount the horse, the horse threw its head backwards and struck the plaintiff in the head.²⁰ The blow from the horse knocked the plaintiff unconscious “and, in the ensuing fall, [the plaintiff] broke his neck, thereby rendering him paralyzed.”²¹ The plaintiff thereafter brought suit against the defendant. In his motion for summary judgment, the defendant alleged that he was immune from the plaintiff’s action pursuant to the Equine Activities Act, and that the plaintiff had assumed the risk of his injuries. The trial court granted the defendant’s motion on both grounds.²² Subsequently, the plaintiff appealed, and the court of appeals reversed.²³

In reversing, the court of appeals first noted that the underlying intent of the Equine Activities Act is to promote equine activities by placing limits on civil liability.²⁴ Nonetheless, the court noted that Official Code of Georgia Annotated (“O.C.G.A.”) section 4-12-3²⁵ specifically excludes from the statute’s limitation on liability a claim against the owner of a horse who “fail[s] to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity . . . and to safely manage *the particular animal* based on the participant’s representations of his or her ability.”²⁶ As noted above, the plaintiff allegedly told the defendant that the horse was good and rideable.²⁷ Although the court noted that several witnesses contradicted the testimony of the plaintiff, the court was constrained to view the facts in a light most favorable to the plaintiff as the nonmovant.²⁸ Accordingly, the court noted that it “cannot be said that one who actively misrepresents the domesticity of a steed has taken prudent efforts to determine whether a proposed rider can safely manage the animal in

18. *Id.* at 226-27, 606 S.E.2d at 74-75. The term “green broke” means that a horse is not fully trained.

19. *Id.* at 227, 606 S.E.2d at 75.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 226, 606 S.E.2d at 74.

24. *Id.* at 227, 606 S.E.2d at 75. *See* O.C.G.A. § 4-12-1 (1995 & Supp. 2005).

25. O.C.G.A. § 4-12-3 (1995 & Supp. 2005).

26. 270 Ga. App. at 228, 606 S.E.2d at 76 (quoting O.C.G.A. § 4-12-3(b)(1)(B) (1995 & Supp. 2005)).

27. *Id.*

28. *Id.* at 226, 228 n.5, 606 S.E.2d at 74, 76 n.5.

question.”²⁹ As such, the court held that the plaintiff was not entitled to immunity under the Equine Activities Act.³⁰ Likewise, the court noted that the defense of assumption of the risk “assumes that the actor, without coercion of circumstances, chooses a course of action with full knowledge of its danger. . . .”³¹ Again, accepting the plaintiff’s version of the facts as true, the plaintiff “was misled regarding the nature of the horse . . . [and therefore] could not be expected to have full knowledge of the likely danger he faced in riding the horse.”³² As such, the plaintiff could not be determined to have assumed the risk of injury as a matter of law.³³

II. PREMISES LIABILITY

In *Collins v. Glover*,³⁴ the plaintiff, a friend and visitor to the defendant’s home, sued the defendant after slipping and falling on a patch of ice in the defendant’s yard. At the time the plaintiff arrived at the defendant’s residence, the temperature was below freezing and it was dark. The plaintiff initially attempted to enter the defendant’s residence through the garage, as the plaintiff had done on prior occasions. However, when the defendant did not respond to the doorbell, the plaintiff started to walk around to the rear of the house. As the plaintiff left the garage, she slipped and fell on a patch of ice that had accumulated in the defendant’s yard. The plaintiff suffered a broken wrist and ankle as a result of her fall.³⁵

The plaintiff brought suit against the defendant for the injuries she sustained as a result of the fall. The trial court denied the defendant’s motion for summary judgment, and the defendant appealed.³⁶ On appeal, the court of appeals affirmed.³⁷ In his motion for summary judgment, the defendant alleged that the plaintiff was a licensee and that, as a result of this status, the plaintiff could not recover absent proof that the defendant had acted willfully or wantonly to injure the plaintiff.³⁸ In connection therewith, the defendant also argued that the plaintiff was aware that there was not a sidewalk leading from the

29. *Id.* at 228, 606 S.E.2d at 76.

30. *Id.*

31. *Id.* (quoting *Beringause v. Fogleman Truck Lines*, 200 Ga. App. 822, 823, 409 S.E.2d 524, 525 (1991)).

32. *Id.*

33. *Id.* at 229, 606 S.E.2d at 76.

34. 273 Ga. App. 352, 615 S.E.2d 194 (2005).

35. *Id.* at 352, 615 S.E.2d at 194-95.

36. *Id.*, 615 S.E.2d at 194.

37. *Id.*

38. *Id.*, 615 S.E.2d at 195.

garage to the backyard, that the plaintiff knew that there was not a light on in the backyard, and that the plaintiff had a means of contacting the defendant via cellular telephone without walking through the backyard.³⁹ The patch of ice that the plaintiff slipped on, however, was apparently caused by a leaky faucet on the defendant's home.⁴⁰ According to the court of appeals decision, the defendant was aware of the leaky faucet and failed to take any action to fix it.⁴¹ The court of appeals further noted that the defendant "also was aware that the temperature outside was below freezing, that [the plaintiff] was coming to his house, and that [the plaintiff] had previously entered through doors in the back of the house."⁴² In light of these factors, the court of appeals agreed with the trial court that the freezing temperatures combined with the broken faucet "created an unreasonable risk of harm to the plaintiff as a social guest," and that the defendant "should have expected that the plaintiff would not realize the danger. . . ."⁴³ The court, therefore, held that it could not conclude as a matter of law that the plaintiff failed to exercise ordinary care for her own safety.⁴⁴

In *Young v. Richard Homes, Inc.*,⁴⁵ the plaintiff brought suit against the defendant homebuilder after the plaintiff fell from a temporary staircase erected on the building site. The defendant, in the course of building a new home, constructed a temporary flight of stairs which consisted of steps made of two-by-four boards. The temporary stairs, which led from the first to the second floor of the house under construction, also lacked a handrail. The plaintiff, who was at the work site at the request of the job-site superintendent for the purpose of preparing a bid for a painting contract, ascended the stairs to the second floor. As the plaintiff descended the temporary stairs, she tripped and fell to the cement floor below. The plaintiff thereafter brought suit against the defendant for injuries sustained as a result of the fall. The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.⁴⁶ On appeal, the court of appeals affirmed.⁴⁷

39. *Id.* at 353, 615 S.E.2d at 195.

40. *Id.* at 352, 615 S.E.2d at 195.

41. *Id.* at 353, 615 S.E.2d at 195.

42. *Id.*, 615 S.E.2d at 195-96. Presumably, however, the plaintiff was also aware of the fact that the temperature outside was below freezing and that it was dark. *Id.* Therefore, it seems that the defendant's knowledge of the specific hazard was deemed by the court to be of greater significance than the plaintiff's knowledge of the general hazard.

43. *Id.* at 353-54, 615 S.E.2d at 196 (quoting *Patterson v. Thomas*, 118 Ga. App. 326, 328, 163 S.E.2d 331, 332 (1968)).

44. *Id.* at 353, 615 S.E.2d at 195.

45. 271 Ga. App. 382, 609 S.E.2d 729 (2005).

46. *Id.* at 382, 609 S.E.2d at 729-30.

The first issue the court of appeals addressed was the plaintiff's status on the premises.⁴⁸ Insofar as the plaintiff had entered the work site at the defendant's request "to serve both [the defendant's] and [the plaintiff's] own business purposes," the court held that the plaintiff was an invitee to whom the defendant owed a duty to exercise ordinary care.⁴⁹ The court of appeals, however, noted that the plaintiff "was also an independent contractor who had more responsibility than other invitees to determine for herself whether the site was safe or unsafe."⁵⁰ As such, the court of appeals noted that the "crux of this case is thus whether [the plaintiff], in her status as both invitee and independent contractor, can recover from [the defendant] on the ground the latter's negligence was the proximate cause of her fall."⁵¹ The court of appeals affirmed the trial court's grant of summary judgment to the defendant on two separate grounds.⁵² First, in accordance with the decision in *Robinson v. Kroger Co.*,⁵³ the court of appeals noted that the plaintiff must first prove not only that the defendant had actual or constructive knowledge of the hazard, but also that the plaintiff lacked knowledge of the hazard by the exercise of ordinary care.⁵⁴ Although the evidence apparently indicated that the stairs had not been constructed in conformance with applicable OSHA regulations,⁵⁵ the record also supported the conclusion that the plaintiff was aware that the steps had been constructed of two-by-four boards and that the stairs lacked handrails.⁵⁶ As such, the court held that the plaintiff had equal knowledge of the defects that allegedly caused her injury.⁵⁷ Moreover, the court of appeals noted that in addition to proving that the defendant had superior knowledge of the defect, a plaintiff in a slip-and-fall case must also prove that it is more likely than not that the defendant's conduct caused the injury.⁵⁸ In this respect, the court of appeals noted

47. *Id.*, 609 S.E.2d at 730.

48. *Id.*

49. *Id.*

50. *Id.* The court's opinion, however, does not clarify this additional responsibility.

51. *Id.*

52. *Id.* at 382-83, 609 S.E.2d at 730.

53. 268 Ga. 735, 493 S.E.2d 403 (1997).

54. *Young*, 271 Ga. App. at 383, 609 S.E.2d at 730 (citing *Robinson*, 268 Ga. at 735, 493 S.E.2d at 403).

55. The plaintiff alluded to 29 C.F.R. § 1926.1052(c) (1992), which requires that treads used for temporary service are to be installed with the full depth and width of the stair and stairways rising thirty or more inches must be equipped with one handrail. 29 C.F.R. § 1926.1052(c) (1992).

56. *Young*, 271 Ga. App. at 383, 609 S.E.2d at 730.

57. *Id.*

58. *Id.*

that the plaintiff could not provide any evidence that the construction of the stairs actually caused her fall.⁵⁹ Thus, the court of appeals affirmed the grant of summary judgment in favor of the defendant.⁶⁰

In *Trulove v. Jones*,⁶¹ the Georgia Court of Appeals addressed the issue of whether the “distraction doctrine” applies to claims by a licensee for injuries suffered as a result of a fall.⁶² In *Trulove* the defendant installed an above-ground pool at her residence and started construction of a deck around the pool. Although the deck was only partially built and did not have handrails, the defendant invited the plaintiff and others over for a swim. While the plaintiff and the defendant were talking, a young boy attempted to push the defendant into the pool. The defendant played along with the boy and began to roll into the pool. As the defendant did so, the plaintiff stepped backwards to get out of the way, falling off the edge of the deck and injuring herself.⁶³ The plaintiff thereafter brought suit against the defendant.⁶⁴ The court of appeals first noted that the plaintiff was a social guest and, thus, a licensee on the defendant’s premises.⁶⁵ As such, the defendant could only be liable to the plaintiff for “willful or wanton injury.”⁶⁶ The court of appeals then held that because the plaintiff clearly had equal knowledge of the dangerous condition—the lack of railing around the pool—“there is no willful or wanton action on the part of the owner and there is no liability to the licensee.”⁶⁷ The plaintiff, however, argued that the distraction doctrine applied to claims by a licensee.⁶⁸ According to the plaintiff, she should still be entitled to recover from the defendant if “her attention was diverted by a sudden occurrence. . . .”⁶⁹ Rejecting the plaintiff’s argument, the court of appeals noted that it could not find any “cases supporting the proposition that the distraction doctrine applies when the plaintiff is a mere licensee.”⁷⁰ Moreover, according to the court of appeals, “the doctrine is one that excuses an invitee from the same degree of caution ordinarily required of invitees

59. *Id.*, 609 S.E.2d at 731.

60. *Id.*

61. 271 Ga. App. 681, 610 S.E.2d 649 (2005).

62. *Id.* at 682, 610 S.E.2d at 652.

63. *Id.* at 681, 610 S.E.2d at 651.

64. *Id.*

65. *Id.*

66. *Id.* See O.C.G.A. § 51-3-2 (2000).

67. *Trulove*, 271 Ga. App. at 682, 610 S.E.2d at 652 (quoting *Evans v. Parker*, 172 Ga. App. 416, 417, 323 S.E.2d 276, 277 (1984)).

68. *Id.*

69. *Id.*

70. *Id.* at 683, 610 S.E.2d at 652.

under the circumstances. It does not affect the standard of care required of property owners to their invitees. . . .”⁷¹ Accordingly, as the conduct of the defendant “was not willful or wanton she cannot be liable regardless of the degree of care that [the plaintiff] took while on the premises.”⁷²

Finally, a survey of premises liability cases cannot be deemed complete without the requisite “slipped-on-a-grape” case. Fortunately, such a decision was issued during the survey period by the Georgia Court of Appeals in *Wallace v. Wal-Mart Stores, Inc.*⁷³ In *Wallace* the plaintiff and her husband visited a Wal-Mart Store in Valdosta to purchase “some frozen okra and butterbeans.”⁷⁴ While walking in the produce department, the plaintiff slipped and broke her hip as a result of the fall. The plaintiff did not notice anything on the floor that might have caused her fall. The facts of the case, however, get significantly more intriguing from this point forward. After the plaintiff fell, her husband was the first to arrive on the scene, followed closely by a produce department employee and the co-manager of the store.⁷⁵ The plaintiff’s husband apparently noticed a “mashed grape” on the floor in the vicinity of his wife’s fall, and the mashed grape was duly photographed by the co-manager of the store.⁷⁶

Unfortunately, matters became increasingly tense in the produce department at Wal-Mart. The plaintiff’s husband, ever alert, noticed a female employee of the defendant walk over and allegedly put her foot over the mashed grape that was on the floor.⁷⁷ The plaintiff’s husband told the unidentified employee to “get her damn foot off that thing.”⁷⁸ The co-manager of the store denied the allegation that any employee had attempted to “cover up the grape.”⁷⁹ Additional controversy arose in the form of an apparent contradiction in the testimony of a produce department employee who testified that she had been stocking produce in the salad section when she heard the plaintiff’s call for help. Another employee, however, testified that the produce department employee had, in fact, been loading the banana tree at the time of the plaintiff’s fall.

71. *Id.*

72. *Id.*

73. 272 Ga. App. 343, 612 S.E.2d 528 (2005).

74. *Id.* at 343, 612 S.E.2d at 529.

75. *Id.*

76. *Id.* at 344, 612 S.E.2d at 529.

77. *Id.*, 612 S.E.2d at 529-30.

78. *Id.*, 612 S.E.2d at 530.

79. *Id.*

The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.⁸⁰

In affirming the trial court, the court of appeals first noted that "[t]o recover for injuries sustained in a slip and fall, [a plaintiff] must prove (1) that Wal-Mart had actual or constructive knowledge of the hazard; and (2) that [the plaintiff] lacked knowledge of the hazard, despite exercising ordinary care, due to actions or conditions within Wal-Mart's control."⁸¹ As noted by the court of appeals, the question in the case was "whether Wal-Mart had actual or constructive knowledge of the hazard."⁸² Because there was no evidence that the defendant had actual knowledge of the hazard, the issue addressed by the court was whether the defendant could be deemed to have constructive knowledge of the hazard.⁸³ The court noted:

Constructive knowledge may be demonstrated in two ways: (1) by showing that a store employee was present in the immediate area and could easily have seen the substance and removed it, or (2) by showing that the substance had been on the floor for such a time that it would have been discovered and removed had the proprietor exercised reasonable care in inspecting the premises.⁸⁴

The court of appeals concluded that there was no evidence that an employee of the defendant had been in the immediate area of the slip and fall and in such a position to have seen the substance and removed it.⁸⁵ The plaintiff, however, further argued that the defendant could be deemed to have constructive knowledge of the hazard "because it failed to employ reasonable inspection procedures."⁸⁶ This argument was also rejected by the court of appeals because "the unrefuted evidence shows that [defendant's employees] had 'been through the area' 15 to 20 minutes before the fall and did not notice a grape on the floor."⁸⁷ As such, "[i]n cases where a proprietor has shown that an inspection occurred within a brief period prior to an invitee's fall, we have held that the inspection procedure was adequate as a matter of law."⁸⁸

80. *Id.* at 343-44, 612 S.E.2d at 529.

81. *Id.* at 345, 612 S.E.2d at 530.

82. *Id.*

83. *Id.*

84. *Id.* (citing *Roberson v. Winn-Dixie Atlanta*, 247 Ga. App. 825, 825-26, 544 S.E.2d 494, 494-95 (2001)).

85. *Id.*, 612 S.E.2d at 530-31.

86. *Id.* at 346, 612 S.E.2d at 531.

87. *Id.* at 346-47, 612 S.E.2d at 531.

88. *Id.* at 347, 612 S.E.2d at 531 (quoting *J.H. Harvey Co. v. Reddich*, 240 Ga. App. 466, 471, 522 S.E.2d 749, 753 (1999)).

III. INVASION OF PRIVACY

In *Johnson v. Allen*,⁸⁹ the Georgia Court of Appeals addressed the issue of whether the alleged improper video surveillance of a bathroom stall could give rise to the tort of invasion of privacy.⁹⁰ In *Johnson* the defendant was the manager of operations of a cold storage facility. The defendant's office at the facility and the restroom attached to his office shared an adjoining wall with the women's restroom at the facility. In 1999 the defendant's employer installed a video surveillance system in the facility in response to rumors that drugs were being sold on the premises. During this period, the defendant told numerous employees that they were constantly being monitored while at the facility. At least one female employee confronted the defendant about whether there was a camera hidden in the women's restroom. The defendant's response was ambiguous. In the fall of 2001, the defendant left the company. In the process of reactivating the previously installed surveillance system, a technician discovered a video camera located above the women's restroom. Subsequent to the discovery of the video camera, numerous female employees, customers, and relatives of employees brought suit against the defendant and the company for, *inter alia*, the tort of invasion of privacy. The defendant filed a motion for summary judgment which was denied by the trial court.⁹¹ On appeal, the court of appeals affirmed the denial of the defendant's motion for summary judgment as to the claim for invasion of privacy.⁹²

Although the concept of invasion of privacy encompasses four distinct torts under Georgia law, the claim in *Johnson* was based on the concept of an intrusion upon the plaintiffs' seclusion.⁹³ The court of appeals noted, "[i]n order to recover for intrusion upon seclusion, it is necessary to show 'a physical intrusion analogous to a trespass.'"⁹⁴ The issue centers on whether the conduct would be offensive or objectionable to a reasonable person.⁹⁵ According to the court, individuals "retain[] a right of privacy regarding their use of a restroom. . . ."⁹⁶ However, the court also noted that the right of privacy is not absolute and that the use

89. 272 Ga. App. 861, 613 S.E.2d 657 (2005).

90. *Id.* at 861, 613 S.E.2d at 657.

91. *Id.* at 862-63, 613 S.E.2d at 659-60.

92. *Id.* at 864-65, 613 S.E.2d at 661.

93. *Id.* at 863-64, 613 S.E.2d at 661.

94. *Id.* at 864, 613 S.E.2d at 661 (quoting *Davis v. Emmis Publ'g Corp.*, 244 Ga. App. 795, 797, 536 S.E.2d 809, 811 (2000)).

95. *Id.*

96. *Id.*

of a “stall in a public restroom is not a private place when it is used for other than its intended purpose.”⁹⁷ As such, the court of appeals appears to suggest in its opinion that the short term surveillance of the bathroom “in response to specific information of illegal activity being performed within a restroom stall” may be acceptable.⁹⁸ However, the court noted that there were only rumors of drug use and sales and that the monitoring of the restroom stall appeared to be continuous.⁹⁹ Thus, the court of appeals held that questions of fact existed that justified denial of the defendant’s motion for summary judgment.¹⁰⁰

IV. DEFAMATION

In *Bollea v. World Championship Wrestling, Inc.*,¹⁰¹ the plaintiff Terry “Hulk Hogan” Bollea brought suit against the defendant, World Championship Wrestling (“WCW”), and one of its management employees for defamation based upon certain statements made by the WCW employee during the course of a pay-per-view wrestling event. Prior to the pay-per-view event, the plaintiff met with the WCW employee, who served as the creative director for WCW, to discuss the script for the wrestling event. The WCW employee also served as an on-air talent and played the role of a member of the wrestling corporation’s management. The storyline leading up to the pay-per-view event centered on a dispute between the WCW employee and the plaintiff’s wrestling character, in which the WCW employee was attempting to replace certain older wrestlers, such as the plaintiff, with younger wrestlers. According to the plaintiff, the wrestling match proceeded in accordance with the script discussed between the plaintiff and the WCW employee. However, subsequent to the match, the WCW employee delivered an on-air speech—known as a “promo”—in which he made numerous derogatory comments about Hulk Hogan. The plaintiff alleged that the derogatory comments were not part of the script and that he suffered damages as a result of the comments. The plaintiff, therefore, brought suit against the defendants for defamation.¹⁰² The trial court granted the defendants’ motion for summary judgment, and the plaintiff appealed.¹⁰³ On appeal, the court of appeals affirmed.¹⁰⁴ The court of appeals first

97. *Id.* (quoting *In re C.P.*, 274 Ga. 599, 600, 555 S.E.2d 426, 427 (2001)).

98. *Id.*

99. *Id.*, 613 S.E.2d at 660-61.

100. *Id.* at 864-65, 613 S.E.2d at 661.

101. 271 Ga. App. 555, 610 S.E.2d 92 (2005).

102. *Id.* at 555-57, 610 S.E.2d at 94-96.

103. *Id.* at 556-57, 610 S.E.2d at 95-96.

104. *Id.* at 555, 610 S.E.2d at 94.

noted that an essential element of a defamation claim is a “false and defamatory statement concerning the plaintiff.”¹⁰⁵ In this respect, the court noted that “[w]restling is a form of entertainment and the characters involved are fictional.”¹⁰⁶ Although the speech made by the corporate employee may not have been in compliance with the script agreed to by the parties, it was consistent with the storyline previously established between the plaintiff and the WCW employee.¹⁰⁷ As such, the court of appeals held that the “speech was made in a fictional context and asserted opinions amounting to hyperbole, which could not be proved false.”¹⁰⁸ Moreover, the court noted the WCW employee never mentioned the plaintiff by his real name, but only his fictional character’s name.¹⁰⁹ As such, the court of appeals held that “the allegedly defamatory speech could not be [reasonably] understood as stating actual facts about [the plaintiff].”¹¹⁰ Accordingly, the court of appeals affirmed the trial court’s grant of summary judgment to the defendant.¹¹¹

V. NEGLIGENCE INFLICTION OF EMOTIONAL DISTRESS

In *Wilson v. Allen*,¹¹² the plaintiff, a school bus driver, was injured in an automobile accident in which the defendant’s vehicle collided with a school bus operated by the plaintiff. Subsequent to the accident, the plaintiff discovered that she had a broken fingernail and a bruise on her right hand. The plaintiff, however, could not recall exactly how the injuries occurred. Though the plaintiff had no other physical injuries, she was taken to the hospital and treated for shock. Thereafter, the plaintiff brought suit against the defendant and alleged that she had suffered emotional distress as a result of the collision. The defendant filed a motion for summary judgment and argued that the plaintiff’s claim was barred by Georgia’s impact rule for claims of negligent infliction of emotional distress. The trial court denied the defendant’s motion for summary judgment, and the defendant appealed.¹¹³ The

105. *Id.* at 557, 610 S.E.2d at 96 (quoting *Mathis v. Cannon*, 276 Ga. 16, 21, 573 S.E.2d 376, 380 (2002)).

106. *Id.* at 558, 610 S.E.2d at 96.

107. *Id.*

108. *Id.* at 557, 610 S.E.2d at 96.

109. *Id.* at 558, 610 S.E.2d at 97.

110. *Id.*

111. *Id.* at 559, 610 S.E.2d at 97.

112. 272 Ga. App. 172, 612 S.E.2d 39 (2005).

113. *Id.* at 172-73, 612 S.E.2d at 40-41.

court of appeals reversed the trial court's holding regarding the issue of the plaintiff's claim for negligent infliction of emotional distress.¹¹⁴

In reversing the trial court, the court of appeals first noted that Georgia's impact rule has three elements: "(1) a physical impact to the plaintiff; (2) the physical impact causes physical injury to the plaintiff; and (3) the physical injury to the plaintiff causes the plaintiff's mental suffering or emotional distress."¹¹⁵ The court determined that the evidence supported the plaintiff's claim of physical impact and of physical injury.¹¹⁶ Although the court's opinion does not specifically state, the court of appeals apparently also concluded that the plaintiff had set forth sufficient evidence that she had suffered some amount of emotional distress. However, the court of appeals reversed the defendant's motion for summary judgment on the basis that the plaintiff did "not claim that these physical injuries caused her mental suffering or emotional distress."¹¹⁷ Having failed to satisfy the causation requirement of the impact rule, the court of appeals held that the trial court erred in denying the defendant's motion for summary judgment as to the plaintiff's emotional distress claim.¹¹⁸

VI. PROFESSIONAL MALPRACTICE

In *Barnes v. Turner*,¹¹⁹ the defendant, an attorney, represented the plaintiff in the sale of the plaintiff's business. In connection with the sale of the business, the plaintiff received an initial down payment and financed the remainder of the purchase price by accepting a promissory note with a term of ten years. The defendant perfected the plaintiff's security interest in the business by the filing of a financing statement under the Uniform Commercial Code.¹²⁰ According to the plaintiff, however, the defendant did not inform him that according to O.C.G.A. section 11-9-515(c),¹²¹ financing statements are only effective for a period of five years and must be renewed at the end of the five-year period.¹²² After five years, the initial financing statements filed by the defendant lapsed and were not renewed. As a result, two additional

114. *Id.* at 174, 612 S.E.2d at 41.

115. *Id.* at 173-74, 612 S.E.2d at 41 (quoting *Conberg v. City of Toccoa*, 255 Ga. App. 890, 891, 567 S.E.2d 21, 23 (2002)).

116. *Id.* at 174, 612 S.E.2d at 42.

117. *Id.*, 612 S.E.2d at 41.

118. *Id.*

119. 278 Ga. 788, 606 S.E.2d 849 (2004).

120. *Id.* at 788, 606 S.E.2d at 850; U.C.C. § 9-402 (1972).

121. O.C.G.A. § 11-9-515(c) (2000).

122. *Barnes*, 278 Ga. at 788, 606 S.E.2d at 850 (citing O.C.G.A. § 11-9-515(c)).

creditors of the purchaser of the plaintiff's business found themselves in a position senior to the plaintiff's secured position. The purchaser subsequently filed bankruptcy. The plaintiff thereafter brought suit against the defendant for legal malpractice. In his suit, the plaintiff alleged that the defendant had violated his duty to the plaintiff by failing to inform the plaintiff of the obligation to renew the financing statements or, in the alternative, by failing to renew the financing statements. The trial court granted the defendant's motion to dismiss.¹²³ The court of appeals affirmed the trial court, however, the Georgia Supreme Court granted certiorari and reversed.¹²⁴

On appeal, the defendant argued that he was not retained to file renewal statements, but simply to close the sale of the business.¹²⁵ The supreme court, however, disagreed, and specifically stated:

In sale of business transactions where the purchase price is to be paid over time and collateralized, it is paramount that the seller's attorney prepare and file UCC financing statements to perfect his client's security interest [I]f the financing statements require renewal before full payment is made to the seller, then the attorney has some duty regarding this renewal. Otherwise the unpaid portion of the purchase price becomes unsecured and the seller did not receive the protection he bargained for.¹²⁶

According to the supreme court:

Where payment is to be made in less than five years, Georgia law does not require renewal of the initial financing statements and thus the lawyer's duty is only to file the initial statements. But where payment is to take longer than five years, the lawyer—being trusted by his client to know how to safeguard his security interest under Georgia law—has some duty regarding renewal of the financing statements.¹²⁷

A stinging dissent to the majority's opinion was filed by Justice Benham and joined by Justices Thompson and Hines.¹²⁸ According to the dissent, "[t]he central question in this legal malpractice case concerns the duty undertaken by [the defendant] when he represented [the plaintiff] and his corporation in the sale of a business."¹²⁹ The

123. *Id.* at 788-89, 606 S.E.2d at 850.

124. *Id.*

125. *Id.* at 789, 606 S.E.2d at 851.

126. *Id.* at 790, 606 S.E.2d at 851.

127. *Id.*

128. *Id.* at 792, 606 S.E.2d at 852-53 (Benham, Thompson & Hines, JJ., dissenting).

129. *Id.*, 606 S.E.2d at 853 (Benham, Thompson & Hines, JJ., dissenting).

dissent noted that the defendant was hired “to perform the services attendant to the closing of the sale of the business. . . .”¹³⁰ According to the dissent, the defendant “breached the duties arising from that employment, or did not, at that time.”¹³¹ Moreover, according to the dissent, the majority’s opinion “imposes as a matter of law duties which were not undertaken by [the defendant] and were not within the scope of his employment to close the sale of the business.”¹³² The additional duties imposed by the majority’s holding raised two significant concerns. First, the majority’s decision “creates new duties that could outlast not only the period of the attorney-client relationship, but even the attorney’s life.”¹³³ As such, “the majority destroys any notion of finality attorneys may hope to have in any aspect of their employment.”¹³⁴ Second, according to the dissent, the majority’s opinion will have an adverse effect on malpractice insurance as “it adds such uncertainty and lack of finality to every transaction that malpractice insurance carriers will be unable to make accurate assessments of their exposure.”¹³⁵ Such uncertainty “will inevitably result in higher premiums, which will necessarily be passed on to clients.”¹³⁶

VII. NEGLIGENCE

In *Sugarloaf Café, Inc. v. Wilbanks*,¹³⁷ the supreme court addressed the issue of whether circumstantial evidence that a restaurant is located in a “remote” location is sufficient evidence under Georgia’s Dram Shop Act¹³⁸ to establish that the defendant restaurant knew that a customer would soon be driving.¹³⁹ In *Sugarloaf Café, Inc.*, the defendant, Jennifer Phillips, left work with several co-workers and went to the defendant’s restaurant. Phillips stayed at the restaurant for approximately five hours and was served approximately ten glasses of wine. When Phillips and her co-workers departed the restaurant, she left with a co-worker who drove her back to her workplace where she drove away in her own vehicle. On her way home, Phillips crossed the centerline of the highway and struck a vehicle operated by the plaintiff. The plaintiff

130. *Id.* at 793, 606 S.E.2d at 853 (Benham, Thompson & Hines, JJ., dissenting).

131. *Id.* (Benham, Thompson & Hines, JJ., dissenting).

132. *Id.* (Benham, Thompson & Hines, JJ., dissenting).

133. *Id.* (Benham, Thompson & Hines, JJ., dissenting).

134. *Id.* (Benham, Thompson & Hines, JJ., dissenting).

135. *Id.* at 794, 606 S.E.2d at 853-54 (Benham, Thompson & Hines, JJ., dissenting).

136. *Id.*, 606 S.E.2d at 854 (Benham, Thompson & Hines, JJ., dissenting).

137. 279 Ga. 255, 612 S.E.2d 279 (2005).

138. O.C.G.A. § 51-1-40 (2000).

139. *Sugarloaf Café, Inc.*, 279 Ga. at 257, 612 S.E.2d at 281.

thereafter brought suit against Phillips and the restaurant that served Phillips the wine.¹⁴⁰ The plaintiff's claim against the defendant restaurant was brought pursuant to Georgia's Dram Shop Act, which provides that a person who "knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication of such . . . person"¹⁴¹ The trial court granted summary judgment to the defendant restaurant and held that the evidence of record was insufficient to prove that the defendant restaurant knew that the defendant Phillips would soon be driving a motor vehicle.¹⁴²

The Georgia Court of Appeals reversed and held that a jury question existed as to the defendant restaurant's knowledge.¹⁴³ In reversing the trial court, the court of appeals relied upon the following testimony offered by the plaintiff's expert:

[The defendant restaurant was] located at an intersection which is not conducive to pedestrian traffic; . . . the residents of a nearby upscale housing development are not accustomed to walking to the shopping area; . . . public transportation does not serve the area; and . . . , therefore, [the restaurant] knew its customers came and left in automobiles.¹⁴⁴

Accordingly, the court of appeals held that the defendant restaurant should have known that either Phillips or someone in her group would soon be driving.¹⁴⁵ The Georgia Supreme Court granted certiorari and posed the following question: "Did the Court of Appeals err in determining that the evidence supported the reasonable inference that the server knew that [defendant] Phillips would be driving shortly after being served alcohol?"¹⁴⁶ The supreme court answered the question in the affirmative and reversed.¹⁴⁷ The supreme court first noted that there was direct evidence in the record "showing that Phillips did not drive to or from [the restaurant]. . . ."¹⁴⁸ Accordingly, the supreme court queried whether the "inferences" raised by the plaintiff's expert were

140. *Id.* at 255-56, 612 S.E.2d at 280.

141. O.C.G.A. § 51-1-40(b) (2000).

142. *Sugarloaf Café, Inc.*, 279 Ga. at 256, 612 S.E.2d at 280.

143. *Id.*, 612 S.E.2d at 280-81.

144. *Id.*, 612 S.E.2d at 281.

145. *Id.*

146. *Id.* at 255, 612 S.E.2d at 280.

147. *Id.*

148. *Id.* at 256, 612 S.E.2d at 281.

sufficient to contradict the direct evidence in the record.¹⁴⁹ The supreme court held that the inferences were not sufficient and that “circumstantial evidence that an alcoholic beverage server does business in a ‘remote’ location and that *most* customers drive to the server’s place of business [is not] sufficient to show that the server knew a customer would soon be driving.”¹⁵⁰

149. *Id.*

150. *Id.* at 256-57, 612 S.E.2d at 281.