

Torts

by Deron R. Hicks*

I. DEFAMATION

Travis Riddle had achieved a certain degree of notoriety in his hometown of Brunswick, Georgia as a result of his pursuit of a musical career as a rapper.¹ In particular, Riddle's music had been played on the local radio station in Brunswick, WSEG 104.1, by disc jockey Antonio Warrick. Riddle's fame, such as it was, did not appear to extend beyond his hometown. Nonetheless, on August 15, 2002, Warrick, during the course of his show on WSEG 104.1, "began receiving telephone calls from listeners who had heard rumors that Riddle [had] murdered Josephine Howard, a woman who was Riddle's girlfriend and is the mother of his young son."² Exactly what was aired by Warrick was a matter of some dispute. However, several witnesses "recounted hearing one or more reports that Riddle had killed Howard and that the police were looking for her body."³ Riddle's mother recalled hearing a male broadcaster say that Riddle had, in fact, murdered Howard. When Riddle learned of the telephone calls and the information that was being broadcast by Warrick, he called Warrick to complain. Riddle's call was recorded and subsequently aired. Apparently, the rumors regarding Riddle's girlfriend had arisen after she had failed to appear for work, and her mother had filed a missing persons report. The girlfriend, however, was very much alive.⁴

* Partner in the firm of Page, Scrantom, Sprouse, Tucker & Ford, P.C., Columbus, Georgia. Adjunct Professor, Walter F. George School of Law, Mercer University. University of Georgia (B.F.A., 1990); Mercer University, Walter F. George School of Law (J.D., cum laude, 1993). Member, Mercer Law Review (1991-1993); Senior Managing Editor (1992-1993). Member, State Bar of Georgia.

1. Riddle v. Golden Isles Broad., LLC, 275 Ga. App. 701, 701, 621 S.E.2d 822, 824 (2005).

2. *Id.* at 701, 621 S.E.2d at 824.

3. *Id.* at 702, 621 S.E.2d at 824.

4. *Id.* at 701-03, 621 S.E.2d at 823-25.

Thereafter, Riddle brought suit against the owner of WSEG 104.1, Golden Isles Broadcasting, LLC (“Golden Isles”), for defamation. Golden Isles moved for summary judgment on the basis that Riddle was a public figure, and as such, he could not demonstrate that Golden Isles had acted with actual malice.⁵ The superior court granted the motion for summary judgment, and Riddle appealed.⁶ In *Riddle v. Golden Isles Broadcasting, LLC*,⁷ the Georgia Court of Appeals reversed the superior court’s decision and held that the superior court erred in finding that Riddle was a public figure.⁸ As the court of appeals noted in its opinion, the critical “issue in this appeal is whether Riddle is a private or a public figure.”⁹ Nonpublic figures must only prove that a defendant acted with ordinary negligence.¹⁰ On the other hand, public figures must submit proof by clear and convincing evidence of actual malice on the part of the defendant.¹¹ The court of appeals first pointed out that the trial court’s opinion failed to distinguish whether Riddle was considered a general public figure or a limited purpose public figure.¹² Accordingly, the court of appeals was required to determine whether the record supported “a finding that Riddle was a public figure under either analysis.”¹³ The court first turned to the issue of whether Riddle was a general purpose public figure.¹⁴ “A person is a general purpose public figure ‘only if he is a “celebrity[,]” his name a “household word” whose ideas and actions the public in fact follows with great interest.’”¹⁵ As the court of appeals graciously stated, “[T]he evidence of Riddle’s celebrity is far from clear.”¹⁶ It was clear, however, that Riddle “was not a household name.”¹⁷ As such, although “Riddle may have been gaining some popularity in local music circles, the evidence [did] not demonstrate that he had achieved the degree of celebrity and influence typical of a general purpose public figure.”¹⁸

5. *Id.*

6. *Id.* at 701, 621 S.E.2d at 823.

7. 275 Ga. App. 701, 621 S.E.2d 822 (2005).

8. *Id.* at 701, 621 S.E.2d at 823.

9. *Id.* at 703, 621 S.E.2d at 824.

10. *Id.* (citing *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 816-17, 555 S.E.2d 175, 183 (2001)).

11. *Id.*

12. *Id.*, 621 S.E.2d at 825.

13. *Id.*

14. *Id.* at 704, 621 S.E.2d at 825.

15. *Id.* (brackets in original) (quoting *Waldbaum v. Fairchild Publ’ns*, 627 F.2d 1287, 1292 (D.C. Cir. 1980)).

16. *Id.*

17. *Id.*

18. *Id.*, 621 S.E.2d at 826.

The court next turned to the issue of whether Riddle may have been a limited purpose public figure.¹⁹ A limited purpose public figure is “an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”²⁰ Under the applicable analysis, the court must isolate the public controversy at issue, examine the plaintiff’s involvement in the particular controversy, and determine whether the alleged defamation related to the plaintiff’s participation in the controversy.²¹ As noted by the court of appeals, the superior court had “failed to identify a public controversy in this case—the first and most fundamental step in determining whether a person is a limited purpose public figure.”²²

The court of appeals held that the rumors about Riddle’s girlfriend did not rise to the level of a public controversy.²³ Likewise, even the issue of the brief disappearance of Riddle’s girlfriend “had no ramifications for the general public.”²⁴ Accordingly, “[b]ecause there was no public controversy, the record [did] not support a finding that Riddle was a limited purpose public figure.”²⁵ As the record did not support a finding that Riddle was either a general purpose public figure or a limited purpose public figure, the court of appeals held that the superior court had erred in requiring Riddle “to prove that Golden Isles acted with actual malice in broadcasting the alleged[ly] defamatory statements. As a private person, he need only produce evidence from which a jury could infer that Golden Isles acted with ordinary negligence.”²⁶

Shortly after the decision in *Riddle*, the Georgia Court of Appeals issued its decision in *Sewell v. Trib Publications, Inc.*,²⁷ in which the court again addressed the issue of whether a plaintiff in a slander case was a limited purpose public figure. In *Sewell* the plaintiff was an assistant professor at the State University of West Georgia. In April 2003 a student in the plaintiff’s class contacted a reporter for two news publications in Fayette County, Georgia to complain about statements made by the plaintiff during class which concered the Bush administration’s conduct of the war in Iraq. The student also complained that the

19. *Id.* at 705, 621 S.E.2d at 826.

20. *Id.* at 703, 621 S.E.2d at 825 (quoting *Williams v. Trust Co.*, 140 Ga. App. 49, 52-53, 230 S.E.2d 45, 49 (1976)).

21. *Id.* at 705, 621 S.E.2d at 826.

22. *Id.*

23. *See id.* at 705-06, 621 S.E.2d at 826.

24. *Id.* at 706, 621 S.E.2d at 826.

25. *Id.*

26. *Id.*

27. 276 Ga. App. 250, 622 S.E.2d 919 (2005).

plaintiff had refused to allow the student to express any contrary opinions during his class.²⁸

As a result of the student's complaints, two newspaper articles were published which quoted the student "as saying that [the plaintiff] had deviated from his stated lesson plan by discussing the war in Iraq, had accused American troops of murdering people, and had likened President Bush to a fascist."²⁹ The articles also claimed that the plaintiff had refused to allow the student to respond to the plaintiff's statements. The plaintiff subsequently brought an action against the newspaper and the reporter seeking damages for libel and slander. In particular, the plaintiff alleged that the defendants had negligently failed to verify the accuracy of the allegations in the articles.

The defendants moved for summary judgment on the basis that the plaintiff was a limited purpose public figure, and as set forth above, was required to prove actual malice. The trial court granted the defendants' motion for summary judgment. The plaintiff thereafter appealed.³⁰ The court of appeals reversed the trial court's finding that the plaintiff was a limited purpose public figure.³¹

As noted above, in order to determine whether an individual is a limited purpose public figure, the court must first identify the public controversy at issue, examine the plaintiff's involvement in the controversy, and determine whether the alleged defamation is related to the plaintiff's participation in the controversy.³² Applying this test, the trial court had classified the plaintiff as a limited purpose public figure.³³ Specifically, the trial court had determined "that a controversy existed in his classroom regarding American military activities in Iraq, that [the plaintiff] initiated the controversy, and that the newspaper articles that formed the basis for his complaint dealt with the controversy."³⁴ The court of appeals, however, held that the legal analysis supporting the superior court's holding was "flawed."³⁵ The court of appeals acknowledged that the public controversy "indeed, concerned American military activities in Iraq."³⁶ However:

28. *Id.* at 250-51, 622 S.E.2d at 921-22.

29. *Id.* at 251, 622 S.E.2d at 921-22.

30. *Id.* at 250-51, 622 S.E.2d at 921-22.

31. *See id.*

32. *Id.* at 254, 622 S.E.2d at 923 (citing *Jewell*, 251 Ga. App. at 816-17, 555 S.E.2d at 183).

33. *Id.* at 252, 622 S.E.2d at 922.

34. *Id.* at 254-55, 622 S.E.2d at 923.

35. *Id.* at 255, 622 S.E.2d at 923.

36. *Id.*

[B]y discussing the controversy in his classroom, [the plaintiff] in no way thrust himself to the forefront of the controversy in any public forum, so as to have gained access to media outlets generally unavailable to private citizens or to have assumed any risks incident to acceptance of a public role in the matter.³⁷

Moreover, the plaintiff had made no comments to the media concerning the public controversy and was not an actor in the actual events giving rise to the public controversy.³⁸ As such, “prior to [the] publication of the articles, [the plaintiff] was in no way a public figure with respect to the controversy either in [the Fayette County community] or in the global community.”³⁹ Therefore, because the plaintiff was a private figure, the court of appeals held that the negligence standard should apply to the plaintiff’s defamation claims.⁴⁰

In *Austin v. PMG Acquisition, LLC*,⁴¹ the Georgia Court of Appeals analyzed whether statements made in a series of newspaper articles constituted newspaper libel under the Official Code of Georgia Annotated (“O.C.G.A.”) section 51-5-2.⁴² The plaintiff’s daughter was cited for underage drinking. The citation provided to the plaintiff’s daughter indicated that she had a blood alcohol content of 0.21. The plaintiff, an oral surgeon, took his daughter to a hospital for a separate blood alcohol test. According to the plaintiff, the testing machine at the hospital indicated that his daughter had a blood alcohol level of 0.0.⁴³ The plaintiff testified that he “tore the result from the machine, put it in his pocket, and then left with his daughter.”⁴⁴ The following morning, the plaintiff “created a lab report on his computer to mirror the one he tore from the testing machine the night before indicating that his daughter’s blood alcohol level was 0.0.”⁴⁵ The plaintiff subsequently provided a copy of the lab report he created to the police. The police thereafter executed a search warrant at the hospital. At the hospital, the police located a lab report that indicated that the plaintiff’s daughter had a blood alcohol content of 0.17. The plaintiff was subsequently arrested and charged with first degree forgery and making false statements.

37. *Id.*, 622 S.E.2d at 923-24.

38. *Id.*, 622 S.E.2d at 924.

39. *Id.*

40. *Id.*

41. 278 Ga. App. 539, 629 S.E.2d 417 (2006).

42. O.C.G.A. § 51-5-2 (2000 & Supp. 2006).

43. *Austin*, 278 Ga. App. at 540, 629 S.E.2d at 419.

44. *Id.*

45. *Id.*

Over the next year and a half, the defendant, PMG Acquisition, LLC, d/b/a *The Times-Georgian*, ran a series of articles about the plaintiff's arrest and the events that led to the arrest. The plaintiff brought suit against *The Times-Georgian*, claiming that the newspaper had libeled him based on the following four statements in the articles: (1) that Austin had created a fake lab report; (2) that a search warrant executed at the hospital had uncovered a lab report showing the plaintiff's daughter had a blood alcohol content of 0.17; (3) that the plaintiff was trying to protect his daughter; and (4) that the plaintiff had been relieved of his duties as president of Crimestoppers the day he was arrested.⁴⁶ The trial court granted the newspaper's motion for summary judgment, and the plaintiff appealed.⁴⁷ On appeal, the Georgia Court of Appeals affirmed the trial court's ruling.⁴⁸

Pursuant to O.C.G.A. section 51-5-2(a), newspaper libel is "[a]ny false and malicious defamation of another in any newspaper . . . tending to injure the reputation of the person and expose him to public hatred, contempt, or ridicule"⁴⁹ In an action for newspaper libel, a plaintiff must establish that the statement was false and malicious.⁵⁰ However, "in determining whether a statement is false, defamation law overlooks minor inaccuracies and concentrates upon substantial truth. A statement is not considered false unless it would have a different effect on the mind of the viewer from that which the pleaded truth would have produced."⁵¹

In examining the statements at issue, the court of appeals noted that the statements that the plaintiff had created a fake lab report and that the real lab report showed a blood alcohol content of 0.17 were actually attributed to the police and were taken from the contents of the incident report prepared by the police.⁵² As such, the court of appeals held that the "statements were therefore privileged communications and cannot be the basis for a libel action."⁵³ The third statement forming the basis for the plaintiff's complaint was that the plaintiff was trying to protect his daughter.⁵⁴ According to the court of appeals, however, this statement

46. *Id.* at 541, 629 S.E.2d at 419.

47. *Id.* at 539-40, 629 S.E.2d at 419.

48. *Id.* at 540, 629 S.E.2d at 419.

49. O.C.G.A. § 51-5-2(a).

50. *Austin*, 278 Ga. App. at 541, 629 S.E.2d at 420.

51. *Id.* (quoting *Jaillett v. Ga. Television Co.*, 238 Ga. App. 885, 888, 520 S.E.2d 721, 724 (1999)).

52. *Id.*

53. *Id.*

54. *Id.*

represented “merely the opinion of the writer based upon the facts presented in the articles.”⁵⁵

The fourth and final statement at issue was that the plaintiff had been removed from his position as the president of Crimestoppers the day he had been arrested.⁵⁶ The court noted that this statement was not “entirely accurate.”⁵⁷ However, the court did hold that it was “substantially true.”⁵⁸ According to the court of appeals, the plaintiff had been removed as president of Crimestoppers on November 19, 2001, not on November 12, 2001, the day of his arrest.⁵⁹ The court of appeals concluded that this represented a “minor” factual error that did “not go to the substance or gist of [the] story.”⁶⁰ Accordingly, the trial court’s decision was affirmed on appeal.⁶¹

II. INFLICTION OF EMOTIONAL DISTRESS

Mignon Moore Hooper was an employee of Travis Pruitt & Associates, P.C. (“TPA”). Shortly after beginning work with TPA, Hooper became the subject of unwelcome advances by a coworker. Hooper complained about the coworker’s actions to the president of TPA in March 1998. Hooper, however, requested that the coworker not be fired but simply reprimanded. As requested, the president reprimanded the coworker. In addition, the president instructed Hooper and the coworker that they were to have no further contact at work and that any communications necessary for business purposes would need to take place through their supervisor.

Shortly thereafter, Hooper requested the president’s permission to allow direct contact between her and the coworker for business purposes. The president refused the request. The coworker, however, apparently contacted Hooper on several occasions in violation of the president’s order. According to Hooper, she complained to her supervisor about the continued contact, but TPA took no action. Finally, in August 1998, Hooper complained to the president of the company that the coworker continued to contact her. At that point, the coworker’s employment was terminated.⁶² The president, however, also terminated Hooper’s

55. *Id.* at 541-42, 629 S.E.2d at 420.

56. *Id.* at 542, 629 S.E.2d at 420.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Travis Pruitt & Assocs., P.C. v. Hooper*, 277 Ga. App. 1, 1-2, 625 S.E.2d 445, 447-48 (2005).

employment with the company “because she admitted to him that she directly contacted [the coworker] in violation of the communication ban.”⁶³

Hooper subsequently brought suit against TPA in the case of *Travis Pruitt & Associates, P.C. v. Hooper*,⁶⁴ and asserted, inter alia, a claim for emotional distress damages arising from TPA’s alleged negligent failure to protect her from the continued harassment by her coworker.⁶⁵ The trial court denied TPA’s motion for summary judgment, and an appeal ensued.⁶⁶

On appeal, Hooper argued that TPA had “negligently failed to take action to protect her from further harassment by [the coworker].”⁶⁷ The court of appeals first noted that:

“[a] cause of action for negligence against an employer may be stated if the employer, in the exercise of reasonable care, should have known of an employee’s reputation for sexual harassment and that it was foreseeable that the employee would engage in sexual harassment of a fellow employee but he was continued in his employment.”⁶⁸

According to the court of appeals, even assuming that Hooper could produce evidence that TPA had negligently allowed the harassment to continue, TPA “was still entitled to summary judgment on the claim for emotional distress damages resulting from the negligence.”⁶⁹ As noted by the court of appeals, “[a] claim for emotional distress damages caused by negligence must be supported by evidence that the plaintiff suffered an impact resulting in physical injury or pecuniary loss resulting from an injury to the person.”⁷⁰ The record, however, did not contain any evidence of any physical injury or resulting pecuniary loss sufficient to sustain a claim for negligent infliction of emotional distress.⁷¹

The plaintiff, however, argued that even if the record did not support a claim for negligent infliction of emotional distress, the record did support a claim for intentional infliction of emotional distress.⁷² The

63. *Id.* at 2, 625 S.E.2d at 448.

64. 277 Ga. App. 1, 625 S.E.2d 445 (2005).

65. *Id.* at 1, 625 S.E.2d at 447.

66. *Id.*

67. *Id.* at 5, 625 S.E.2d at 450.

68. *Id.* (quoting *Cox v. Brazo*, 165 Ga. App. 888, 889, 303 S.E.2d 71, 73 (1983)).

69. *Id.*

70. *Id.* (citing *OB-GYN Assocs. of Albany v. Littleton*, 259 Ga. 663, 667, 386 S.E.2d 146, 149 (1989)).

71. *Id.* at 6, 625 S.E.2d at 450.

72. *Id.*

court rejected the plaintiff's argument.⁷³ The court of appeals first held that Hooper had failed to set forth a claim for intentional infliction of emotional distress in her pleadings before the trial court.⁷⁴ Nonetheless, the court addressed the issue of whether the record supported such a claim.⁷⁵ As the court noted, "[a] claim for intentional infliction of emotional distress must prove four elements: (1) intentional or reckless conduct (2) that is extreme and outrageous and (3) causes emotional distress (4) that is severe."⁷⁶ The issue of what constitutes extreme and outrageous conduct sufficient to set forth a claim for intentional infliction of emotional distress is generally considered a question of law.⁷⁷ Moreover, the court of appeals noted that for Hooper to recover damages for emotional distress "in the absence of physical injury or pecuniary loss resulting from physical injury, there must be evidence that TPA's conduct directed at Hooper was malicious, willful, and wanton."⁷⁸ Although the court noted that the coworker's actions could support a claim for intentional infliction of emotional distress,⁷⁹ the court of appeals held as a matter of law "that TPA's conduct in response to [the coworker's] alleged harassment was neither extreme or outrageous, nor malicious, willful or wanton."⁸⁰ As such, the court held that there was "no evidence which could support Hooper's claim against TPA for intentional infliction of emotional distress."⁸¹

III. GEORGIA TORT CLAIMS ACT

According to O.C.G.A. section 50-21-35:⁸²

In all civil actions brought against the state under this article, to perfect service of process the plaintiff must both: (1) cause process to be served upon the chief executive officer of the state government entity involved at his or her usual office address; and (2) cause process to be served upon the director of the Risk Management Division of the Department of Administrative Services at his or her usual office address. The time for the state to file an answer shall not begin to run until process has been served upon all required persons. A copy of the

73. *Id.*

74. *Id.*

75. *Id.*, 625 S.E.2d at 451.

76. *Id.* at 8, 625 S.E.2d at 452 (citing *Mears v. Gulfstream Aerospace Corp.*, 225 Ga. App. 636, 638, 484 S.E.2d 659, 663 (1997)).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. O.C.G.A. § 50-21-35 (2006).

complaint, showing the date of filing, shall also be mailed to the Attorney General at his or her usual office address, by certified mail or statutory overnight delivery, return receipt requested and there shall be attached to the complaint a certificate that this requirement has been met.⁸³

In *Department of Human Resources v. Nation*,⁸⁴ the Georgia Court of Appeals, in interpreting section 50-21-35, held: “[The Georgia Tort Claims Act (“The Act”)] specifically requires service upon the Attorney General in order to perfect service and waive sovereign immunity.”⁸⁵ Therefore, because the plaintiff in *Nation* had failed to mail a copy of the complaint to the Attorney General, the plaintiff’s service of process was deemed deficient.⁸⁶

In *Camp v. Coweta County*,⁸⁷ however, the Georgia Supreme Court overruled the holding in *Nation* and held that “mailing a copy of the complaint to the Attorney General is not necessary to perfect service.”⁸⁸ The plaintiff in *Camp*, an inmate incarcerated by the Georgia Department of Corrections, was injured while on a work detail. The plaintiff subsequently brought suit against the Georgia Department of Corrections pursuant to the provisions of the Act.⁸⁹ Although the plaintiff served a copy of his complaint on the chief executive officer of the Department of Corrections and upon the director of the Risk Management Division of the Department of Administrative Services, he did not mail a copy of his complaint to the Attorney General prior to filing his initial complaint and did not certify in his initial complaint that he had done so.⁹⁰

Thereafter, a motion to dismiss was filed by the Department of Corrections on the basis that the plaintiff had failed to properly serve the Attorney General as required by the Act. The plaintiff attempted to cure the service defect by mailing a copy of the complaint to the Attorney General and by filing an amended complaint certifying that a copy had been sent to the Attorney General. The trial court, however, rejected this effort and dismissed the complaint. The Georgia Court of Appeals affirmed the trial court’s decision.⁹¹ The Georgia Supreme Court granted certiorari “to determine whether compliance with [the Attorney

83. *Id.*

84. 265 Ga. App. 434, 594 S.E.2d 383 (2004).

85. *Id.* at 435, 594 S.E.2d at 384.

86. *Id.*, 594 S.E.2d at 384-85.

87. 280 Ga. 199, 625 S.E.2d 759 (2006).

88. *Id.* at 200, 625 S.E.2d at 760.

89. O.C.G.A. §§ 50-21-20 to -37 (2006).

90. *Camp*, 280 Ga. at 201, 625 S.E.2d at 761.

91. *Id.* at 199-200, 625 S.E.2d at 760.

General mailing] requirement is essential to perfecting service and whether an initial failure to comply can be cured by a late mailing and the filing of an amended complaint.”⁹²

According to the supreme court, O.C.G.A. section 50-21-35 establishes two categories of persons.⁹³ “The first category of persons, those upon whom process must be served, [are] covered in the first two sentences [of section 50-21-35].”⁹⁴ “[T]he legislature,” according to the supreme court, “intended to require the plaintiff to serve process only on [the persons covered in the first two sentences].”⁹⁵ The attorney general, on the other hand, falls in the second category and, as such, was only required to receive a copy of the complaint by mail.⁹⁶ According to the supreme court, “the mailing requirement and the service of process requirement are two distinct and independent obligations.”⁹⁷ Accordingly, the supreme court concluded that the mailing requirement is not required to perfect service.⁹⁸

This holding, in turn, led the court to address the issue of whether the failure to comply with the mailing requirement in a timely manner required the dismissal of the plaintiff’s complaint.⁹⁹ The court noted that the Act does not provide any specific time limit for providing notice to the attorney general and does not set forth any penalties for the failure to provide that notice.¹⁰⁰ As a result, the supreme court concluded that:

it is improper for a trial court to rule that the failure to immediately comply with the mailing requirement is necessarily fatal for the complaint in each and every instance. Instead, the courts should examine the consequences of the failure to provide proper notice, and should dismiss the complaint if the court is satisfied that the State has suffered some prejudice by the lack of notice.¹⁰¹

The next question addressed by the court was whether a plaintiff who has failed to comply with the mailing requirement can cure the original omission by mailing a copy of the complaint to the attorney general after the filing of the original complaint and by filing an amended complaint

92. *Id.* at 200, 625 S.E.2d at 760.

93. *Id.*, 625 S.E.2d at 761.

94. *Id.*

95. *Id.* at 201, 625 S.E.2d at 761.

96. *Id.*

97. *Id.*

98. *Id.* at 200, 625 S.E.2d at 760.

99. *Id.* at 202, 625 S.E.2d at 762.

100. *Id.*

101. *Id.*

that complies with the certification requirements of the Act.¹⁰² The court answered this question in the affirmative.¹⁰³ The court noted that “the general rule, applicable to civil actions in the absence of specific statutory authority, is that amendments are generally allowed prior to the entry of a pretrial order.”¹⁰⁴ In the absence of any statutory authority to the contrary, the court held that it is this general rule, “rather than an unwritten general prohibition,” that should apply.¹⁰⁵

In *Welch v. Georgia Department of Transportation*,¹⁰⁶ the plaintiff was injured in an automobile accident with a vehicle owned and operated by the Georgia Department of Transportation (“DOT”). Prior to filing suit under the Georgia Tort Claims Act (the “Act”), a plaintiff is required to provide ante litem notice pursuant to O.C.G.A. section 50-21-26.¹⁰⁷ In *Welch* the plaintiff sent the required ante litem notice to the Commissioner of the Georgia Department of Administrative Services (“DOAS”) and the Commissioner of the DOT. Receipt of this ante litem notice was subsequently acknowledged by the Risk Management Division of the DOAS.

Nonetheless, after the plaintiff filed suit against the DOT, the DOT moved to dismiss the complaint on the ground that the plaintiff had failed to comply with the ante litem notice requirements of the Act. In particular, the DOT alleged that the ante litem notice was sent to the Commissioner of the DOAS, not the Risk Management Division, as required by the Act.¹⁰⁸ The relevant portion of section 50-21-26 of the Act provides that ante litem notice “shall be given in writing and shall be mailed by certified mail or statutory overnight delivery, return receipt requested, or delivered personally to and a receipt obtained from the Risk Management Division of the Department of Administrative Services.”¹⁰⁹ The DOT argued that ante litem notice directed to the Commissioner of the Georgia DOAS does not comply with the requirements of section 50-21-26.¹¹⁰ Therefore, according to the DOT, the complaint should be dismissed for lack of subject matter jurisdiction. The trial court agreed and granted the DOT’s motion to dismiss.¹¹¹

102. *See id.*

103. *Id.* at 203, 625 S.E.2d at 762-63.

104. *Id.*, 625 S.E.2d at 762 (citing O.C.G.A. § 9-11-15(a) (2006)).

105. *Id.*

106. 276 Ga. App. 664, 624 S.E.2d 177 (2005).

107. O.C.G.A. § 50-21-26.

108. *Welch*, 276 Ga. App. at 664, 624 S.E.2d at 178.

109. O.C.G.A. § 50-21-26(a)(2).

110. *Welch*, 276 Ga. App. at 665, 624 S.E.2d at 178.

111. *Id.* at 664, 624 S.E.2d at 178.

On appeal, the plaintiff argued that the notice requirement of section 50-21-26 had been satisfied because the “ante litem notice was eventually received by the proper division of DOAS.”¹¹² The court of appeals, however, disagreed.¹¹³ The court of appeals first noted that the Act, “by its own terms, must be strictly construed. Substantial compliance with the ante litem notice requirement is inadequate under the Act.”¹¹⁴ The Act specifically requires that ante litem notice must be sent to the Risk Management Division of the DOAS.¹¹⁵ The Act does not provide for service of the ante litem notice upon the Commissioner of the DOAS.¹¹⁶ Although the notice was eventually received by the proper division, it had not been sent to that division as required by the Act.¹¹⁷ Accordingly, the decision of the trial court was affirmed.¹¹⁸

IV. PREMISES LIABILITY

In *Rozy Investments, Inc. v. Bristow*,¹¹⁹ the Georgia Court of Appeals affirmed the denial of summary judgment to the defendant in an action arising after a customer tripped over a gasoline pump hose at the defendant’s gas station.¹²⁰ The plaintiff, Louise Bristow, tripped and fell over a gas pump hose lying on the ground next to a pump island at the defendant’s gas station. The plaintiff had finished pumping her own gas and had walked around her car to pay for the gas when she tripped on a coiled portion of a hose from another pump.¹²¹ The hose on which the plaintiff tripped was black, and the concrete on which it was lying was described as either gray or “black looking.”¹²²

At the time of the incident, the defendant had owned and operated the gas station at issue for sixty years. Moreover, according to the record, the plaintiff had been a customer of that particular gas station for over forty years and had purchased gas at the defendant’s gas station approximately once a month. The pumps at which the plaintiff tripped and fell had been installed at the store for at least twenty years prior to

112. *Id.*

113. *Id.*

114. *Id.* at 665, 624 S.E.2d at 178 (quoting *Williams v. Ga. Dep’t of Transp.*, 275 Ga. App. 88, 90, 619 S.E.2d 763, 765 (2005)).

115. O.C.G.A. § 50-21-26(a)(2).

116. *See id.*

117. *See Welch*, 276 Ga. App. at 665, 624 S.E.2d at 178-79.

118. *Id.*, 624 S.E.2d at 179.

119. 276 Ga. App. 278, 623 S.E.2d 171 (2005).

120. *Id.* at 278, 623 S.E.2d at 172.

121. *Id.* at 278-79, 623 S.E.2d at 173.

122. *Id.* at 279, 623 S.E.2d at 173.

the incident and did not have an automatic retrieval system.¹²³ The plaintiff admitted that she was “aware of the presence of the hoses on the pumps, and that they were so long they could lie on the ground beside the pump.”¹²⁴ However, the plaintiff, “as did most customers, placed the excess hose on the pump island and not on the ground when she hung up the hose nozzle.”¹²⁵

In its motion for summary judgment, the defendant argued that the plaintiff had “equal or superior knowledge of the hazard in light of her use of the pumps for over forty years and actual knowledge that a hose was present.”¹²⁶ The defendant also argued that it was entitled to summary judgment on the basis of the “plain view” doctrine.¹²⁷ The trial court denied the defendant’s motion for summary judgment.¹²⁸ On appeal, the court of appeals affirmed.¹²⁹

In its decision, the court of appeals first noted that the defendant was presumed to have knowledge of the length of the hoses at issue and the fact that they did not retract after being used by a customer.¹³⁰ Therefore, according to the court of appeals, “[T]his is not a foreign substance slip and fall case, and Bristow may establish a cause of action by showing an act or omission by [the defendant] which was the proximate cause of her injury and which she could not have avoided through the exercise of ordinary care.”¹³¹ As such, the court of appeals held that the primary issue on appeal was “whether, as a matter of law, Bristow had equal or superior knowledge of the dangerous condition.”¹³² The court of appeals first explored what knowledge the plaintiff had of the hoses prior to the incident in which she fell.¹³³ According to the court of appeals, the plaintiff “knew that the gas pumps had long hoses, and that part of a gas pump hose could lie on the pavement next to the gas pump island after the hose nozzle was reinserted into the gas pump.”¹³⁴

Based on this knowledge, the defendant argued that the only reasonable inference was that the plaintiff was aware of the hazard that

123. *Id.* at 278-79, 623 S.E.2d at 172-73.

124. *Id.* at 278, 623 S.E.2d at 173.

125. *Id.* at 278-79, 623 S.E.2d at 173.

126. *Id.* at 278, 623 S.E.2d at 172.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 279, 623 S.E.2d at 173.

131. *Id.*

132. *Id.* at 280, 623 S.E.2d at 173.

133. *Id.* at 280-81, 623 S.E.2d at 173-74.

134. *Id.* at 280, 623 S.E.2d at 173.

could be created by leaving a portion of the hose on the pavement.¹³⁵ The plaintiff denied seeing the hose prior to tripping and falling over it; she admitted, however, that had she looked, she would have seen the hose.¹³⁶ Relying upon the decision in *Robinson v. Kroger Co.*,¹³⁷ the court of appeals rejected any argument that the plaintiff had an obligation to constantly monitor the ground for hazards.¹³⁸ Significantly, although the court of appeals seemed to acknowledge that the plaintiff may have had some knowledge of the general hazardous condition, the court's holding appears to rest, at least in part, on the lack of any evidence that the plaintiff knew of the specific hazardous condition that caused her slip and fall.¹³⁹ Moreover, the court noted that the plaintiff's knowledge of the general hazardous condition did not excuse the defendant from exercising reasonable care to ensure that the premises were safe.¹⁴⁰

In *Snellgrove v. Hyatt Corp.*,¹⁴¹ the plaintiff, Snellgrove, attended a party hosted by his employer at the defendant's hotel—the Hyatt. Prior to the party, the plaintiff made his employer aware of tensions that existed between the plaintiff and certain other employees, which stemmed from the plaintiff's pending divorce proceedings. The plaintiff was in the process of divorcing his wife, who was also employed by the same company, and the plaintiff had started dating a former employee of that company. Apparently, several other employees and their wives had sided with the plaintiff's wife. Notwithstanding the concerns expressed by the plaintiff, the plaintiff's superiors informed him that he needed to attend the party. The party at the defendant's hotel proceeded without incident.¹⁴²

Subsequent to the party, the plaintiff left the hotel and went to a bar with several friends. The plaintiff returned to the defendant's hotel later that evening, where he intended to spend the night. Upon exiting a cab at the hotel's entrance, the plaintiff encountered several fellow employees. One of those employees—codefendant Rick Nation, who was apparently intoxicated at the time—began shoving the plaintiff, and a fight ensued. Hotel security broke up the fight and called for police assistance. Thereafter, the plaintiff left the hotel's premises and went

135. *Id.* at 281, 623 S.E.2d at 174.

136. *Id.* at 279, 623 S.E.2d at 173.

137. 268 Ga. 735, 493 S.E.2d 403 (1997).

138. *Rozy*, 276 Ga. App. at 281-82, 623 S.E.2d at 174-75 (citing *Robinson*, 268 Ga. at 742, 493 S.E.2d at 409).

139. *See id.* at 281-83, 623 S.E.2d at 174-75.

140. *Id.* at 281, 623 S.E.2d at 174.

141. 277 Ga. App. 119, 625 S.E.2d 517 (2006).

142. *Id.* at 120, 625 S.E.2d at 519.

to a parking lot across the street to wait for the police. While waiting for the police, the plaintiff received a phone call from his estranged wife on his cell phone. During the course of that conversation, defendant Nation got on the phone and challenged the plaintiff to yet another fight. The plaintiff declined. However, the plaintiff did decide to return to the hotel to retrieve his belongings and check out.

The plaintiff did not inform security at the hotel of his intentions. Rather, the plaintiff entered the hotel through a side entrance and took an elevator straight to the floor where his room was located. Unfortunately, after exiting the elevator, the plaintiff encountered the defendant Nation, and another fight ensued. Hotel security again intervened and broke up the fight. However, the plaintiff suffered injuries as a result of the fight. In addition, an investigation by the plaintiff's employer into the situation resulted in the plaintiff's termination from employment. The plaintiff subsequently brought suit against the defendant hotel and alleged that it had breached its duty to provide adequate security to ensure his safety. The defendant hotel filed a motion for summary judgment on the issue of liability, which was denied by the trial court.¹⁴³ The Georgia Court of Appeals reversed.¹⁴⁴

On appeal, the defendant hotel argued that the plaintiff "had equal or superior knowledge of the danger posed by Nation, [his fellow employee], but did not exercise ordinary care to avoid this danger, and thus is precluded from holding [the defendant hotel] liable for his injury."¹⁴⁵ The court of appeals noted that "an owner of land has the duty to exercise ordinary care to keep its premises safe for invitees."¹⁴⁶ Notwithstanding this duty, however, "a property owner is not an insurer of an invitee's safety, and an intervening criminal act by a third party generally insulates a proprietor from liability unless such criminal act was reasonably foreseeable."¹⁴⁷ Moreover, even if the criminal act was foreseeable, "the true ground of liability is the superior knowledge of the proprietor of the existence of a condition that may subject the invitee to an unreasonable risk of harm."¹⁴⁸

According to the court of appeals, the record in the case provided "clear and palpable evidence" that (1) the plaintiff was aware of Nation's intention to cause him harm based on the first fight, (2) the plaintiff was

143. *Id.* at 120-21, 625 S.E.2d at 519-20.

144. *Id.* at 123, 625 S.E.2d at 521.

145. *Id.*

146. *Id.*, 625 S.E.2d at 521-22.

147. *Id.*, 625 S.E.2d at 522.

148. *Id.* at 124, 625 S.E.2d at 522 (quoting *Cook v. Micro Craft*, 262 Ga. App. 434, 438, 585 S.E.2d 628, 631 (2003)).

aware that Nation had offered to continue the fight, and (3) the plaintiff “made the conscious decision to return to the Hyatt without attempting to contact Hyatt security and inform them of Nation’s intention to resume their fight.”¹⁴⁹ In fact, “despite his superior knowledge, Snellgrove made no effort to see to his own safety by either avoiding any chance of another encounter with Nation by not returning to the hotel or by seeking Hyatt security’s protection.”¹⁵⁰ Accordingly, the court of appeals held that the defendant hotel could not be held liable because the plaintiff had equal, if not, superior knowledge of the threat of harm posed by the fellow employee.¹⁵¹

As noted in last year’s tort survey article,¹⁵² a survey of premises liability cases cannot be deemed complete without the requisite “slipped-on-a-grape” case,¹⁵³ which in this particular year’s survey, turns out to be a “slipped-on-a-bean” case. In *Kroger Co. v. Williams*,¹⁵⁴ the plaintiff, Ruby Williams, brought suit against the defendant, Kroger Company, after slipping and falling on a pole bean at the defendant’s grocery store. The trial court denied the grocery store’s motion for summary judgment, and an appeal ensued.¹⁵⁵ The Georgia Court of Appeals reversed the denial of the defendant’s motion for summary judgment.¹⁵⁶

The court of appeals held that the plaintiff could not establish that the defendant had actual or constructive knowledge of the hazardous pole bean.¹⁵⁷ First, the plaintiff had failed to present any evidence that an employee of the defendant “had actual knowledge of the bean on the floor before the incident.”¹⁵⁸ Thus, the question was whether there was any evidence to support an allegation that the defendant had constructive knowledge of the presence of the hazardous bean on the floor.¹⁵⁹ The court of appeals, however, held that the plaintiff had failed to provide any evidence of such constructive knowledge.¹⁶⁰ First, the plaintiff failed to provide any evidence that any employee of the defendant was in the immediate area of the incident and had an

149. *Id.*

150. *Id.* at 124-25, 625 S.E.2d at 522.

151. *Id.* at 125, 625 S.E.2d at 522.

152. See Deron R. Hicks, *Torts*, 57 MERCER L. REV. 363 (2005).

153. *Id.* at 370.

154. 274 Ga. App. 177, 617 S.E.2d 160 (2005).

155. *Id.* at 177, 617 S.E.2d at 161.

156. *Id.*

157. *Id.* at 178, 617 S.E.2d at 161-62.

158. *Id.*, 617 S.E.2d at 161.

159. *Id.*, 617 S.E.2d at 162.

160. *Id.*

opportunity to correct the hazardous bean condition prior to the fall.¹⁶¹ Second, the plaintiff failed to establish that the pole bean had been on the floor for a sufficient period of time that it should have been discovered and removed by the defendant.¹⁶²

V. PROVISION OF ALCOHOL TO MINORS

In *Mowell v. Marks*,¹⁶³ Kirby Mowell, a minor, died in a single-car collision after leaving a party at the house of the defendant Rosanne Marks. The party, which Kirby had attended prior to her death, was hosted by defendant Marks's sixteen-year-old daughter. Alcohol had been provided at the party by two minors who brought two kegs of beer. Marks was aware that the two minors had brought kegs of beer to the party and, in fact, had directed where to place the kegs and provided a tablecloth on which to place the kegs. Marks had left the house shortly after the party began and was not present when Kirby Mowell arrived.

Shortly after leaving the party, Kirby Mowell died in a single-car collision.¹⁶⁴ The plaintiff, the mother of Kirby Mowell, brought suit against Marks and the two minors who had provided the kegs of beer.¹⁶⁵ The plaintiff asserted claims based on negligence, Dram Shop liability,¹⁶⁶ and liability under O.C.G.A. section 51-1-18(a),¹⁶⁷ "which grants a custodial parent a right of action against any person who sells or furnishes alcoholic beverages to the parent's underage child for the child's use without the parent's permission."¹⁶⁸ The plaintiff's claims of negligence and dram shop liability were dismissed by the trial court, which dismissals had previously been affirmed by the court of appeals.¹⁶⁹ Thereafter, the trial court granted summary judgment to the defendants on the plaintiff's claim under O.C.G.A. section 51-1-18(a).¹⁷⁰

161. *Id.* The court noted that a plaintiff would have to prove that an employee of the defendant was in a position "to have easily seen the substance and removed it." *Id.* (quoting *Bolton v. Wal-Mart Stores, Inc.*, 257 Ga. App. 198, 198, 570 S.E.2d 643, 644 (2002)). The court did not, however, address the issue of at what distance a pole bean may be "easily seen," as the resolution of that issue was not required.

162. *Id.* at 179, 617 S.E.2d at 162. Of course, the decision completely failed to address the burning issue of whether a single pole bean could or should ever constitute a "hazardous condition" for purposes of such an analysis. *Id.* at 178, 617 S.E.2d at 162.

163. 277 Ga. App. 524, 627 S.E.2d 141 (2006).

164. *Id.* at 525, 627 S.E.2d at 142-43.

165. *Id.* at 524-25, 627 S.E.2d at 142.

166. *Id.* at 525 n.1, 627 S.E.2d at 142 n.1.

167. O.C.G.A. § 51-1-18(a) (2000).

168. *Mowell*, 277 Ga. App. at 525, 627 S.E.2d at 142.

169. *Id.* at 525 n.1, 627 S.E.2d at 142 n.1.

170. *Id.* at 524-25, 627 S.E.2d at 142; O.C.G.A. § 51-1-18(a) (2000).

The court of appeals reversed the trial court's grant of summary judgment to the defendants.¹⁷¹

On appeal, the minor defendants who had brought the kegs to the party argued that summary judgment was appropriately granted by the trial court because there was no evidence that "they intended to provide any alcohol to Kirby."¹⁷² The court of appeals acknowledged that O.C.G.A. section 51-1-18(a) did in fact establish an intentional tort, which as the court noted, obviously requires intent to commit the act.¹⁷³ The court of appeals held that the requisite intent could be shown because the minor defendants who brought the kegs to the party "made the keg beer available to anyone at the party, they knew that the party-goers were high school students, and they knew that Kirby was at the party."¹⁷⁴ As such, the court of appeals held that the grant of summary judgment to the minor defendants was inappropriate.¹⁷⁵

Defendant Marks, on the other hand, argued that she was entitled to summary judgment "because she was not at home when Kirby drank alcohol, she did not know Kirby was coming to her home, and she did not purchase or serve any alcohol that was consumed by Kirby."¹⁷⁶ The court of appeals, however, noted that Marks had previously pled guilty to a criminal charge of furnishing alcohol to minors, which evidenced her "knowing involvement in furnishing the alcohol."¹⁷⁷ Based on this guilty plea and the evidence that Marks had assisted the codefendants in preparing the kegs for a party that she knew would be attended by minors, "a jury could conclude that Marks intended to furnish alcohol to the minor attendees, which included Kirby."¹⁷⁸ As the court of appeals noted, the fact that Marks "did not know that Kirby in particular would be in attendance at the party does not preclude a jury from concluding that Marks intended to furnish alcohol to Kirby within the meaning of O.C.G.A. [section] 51-1-18(a)."¹⁷⁹

171. *Mowell*, 277 Ga. App. at 525, 627 S.E.2d at 142.

172. *Id.* at 526, 627 S.E.2d at 143.

173. *Id.* (citing *Reeves v. Bridges*, 248 Ga. 600, 603, 284 S.E.2d 416, 419 (1981)).

174. *Id.*

175. *Id.* at 526, 529, 627 S.E.2d at 143, 145.

176. *Id.*, 627 S.E.2d at 143.

177. *Id.* at 527, 627 S.E.2d at 143.

178. *Id.*, 627 S.E.2d at 144.

179. *Id.*, 627 S.E.2d at 143.