

Torts

by **Deron R. Hicks***
and **Travis C. Hargrove****

I. NEGLIGENCE HIRING

In *Underberg v. Southern Alarm, Inc.*,¹ the Georgia Court of Appeals reversed a grant of summary judgment in favor of a home security services company and its authorized dealer in a negligent hiring action.² In November 2001 a dealership for a home security services company hired Bert Fields to act as a “promotions representative” for the dealer. As a promotions representative, Fields went door-to-door in residential neighborhoods selling security systems. Prior to hiring Fields, the dealer did not perform a background check. Had a background check been performed, the dealer would have discovered that Fields had been sentenced to life in prison in 1979 for burglary and kidnapping, and paroled in 1995.³

In late 2001, Fields contacted the plaintiff on several occasions at her home concerning the installation of a home security alarm system. In addition to at least three efforts by Fields to contact the plaintiff in person at her home, the dealership’s name and telephone number appeared on the plaintiff’s caller identification system on several occasions. In early February 2002 the plaintiff returned home in the early afternoon, parked her car in the garage, and entered her house through an unlocked door. In the process, she left her garage open. After entering the house, the plaintiff noticed Fields standing in the

* General Counsel, Home Builders Association of Georgia. Adjunct Professor of Law, Mercer University, Walter F. George School of Law. University of Georgia (B.F.A., 1990); Mercer University, Walter F. George School of Law (J.D., cum laude, 1993).

** Associate in the firm of Page, Serantom, Sprouse, Tucker & Ford, P.C., Columbus, Georgia. Auburn University (B.A., magna cum laude, 2001); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 2004).

1. 284 Ga. App. 108, 643 S.E.2d 374 (2007).

2. *Id.* at 108, 643 S.E.2d at 375.

3. *Id.*

doorway. Fields pulled a gun on the plaintiff and asked her whether she recognized him. The plaintiff did not recognize Fields until he identified himself as a salesman for the dealer. Fields bound the plaintiff with duct tape, placed her in a car, and drove her to South Carolina. Fields released the plaintiff after she promised to give him six thousand dollars.⁴

The plaintiff thereafter brought suit against both the security alarm dealership and the security alarm services company. The trial court granted summary judgment in favor of the defendants, and the plaintiff appealed.⁵ On appeal, the plaintiff argued that the defendants had a duty to conduct a background check on Fields, the defendants had breached that duty, and the breach of that duty was the proximate cause of the injuries suffered by the plaintiff.⁶

According to the court of appeals, “The appropriate standard of care in a negligent hiring/retention action is whether the employer knew *or should have known* the employee was not suited for the particular employment.”⁷ The court of appeals further noted that “a jury could find that [the dealer] owed a heightened duty to ascertain whether individuals it hired, even briefly, to enter homes of unsuspecting persons for the purpose of selling security systems were suited for this purpose.”⁸ The court of appeals also noted that whether the dealer owed the plaintiff a duty to perform a background check and whether it breached that duty were questions of fact that must be resolved by a jury.⁹

Notwithstanding the issues of whether the defendants had a duty to perform a background check and whether the defendants breached that duty, the court of appeals still faced the issue of whether a jury could conclude “that the failure to investigate Fields’s background [was] a proximate cause of [the plaintiff’s] abduction.”¹⁰ The defendants argued that proximate cause could not be established because Fields’s act “was not committed within the tortfeasor’s working hours” and “because Fields did not use his association with [the dealer and the alarm services company] as a ruse to gain entry into [the plaintiff’s] home on the date he abducted her.”¹¹

4. *Id.* at 109-10, 643 S.E.2d at 376-77.

5. *Id.* at 108, 643 S.E.2d at 375.

6. *See id.* at 110, 643 S.E.2d at 377.

7. *Id.* (quoting *W. Indus., Inc. v. Poole*, 280 Ga. App. 378, 381-82, 634 S.E.2d 118, 121 (2006)).

8. *Id.* at 111, 643 S.E.2d at 377.

9. *Id.* at 110, 643 S.E.2d at 377.

10. *Id.* at 112-13, 643 S.E.2d at 378.

11. *Id.* at 113, 643 S.E.2d at 379.

The defendants based their argument upon the decision in *TGM Ashley Lakes, Inc. v. Jennings*¹² in which the Georgia Court of Appeals held that “liability does not attach if the employee committed the tort in a setting or under circumstances wholly unrelated to his employment.”¹³ The court of appeals in *Underberg*, however, held that the defendants’ argument constituted “an overly restrictive application of *TGM*.”¹⁴ In reaching this conclusion, the court of appeals was “persuaded by cases from other jurisdictions that neither the termination of the employment relationship nor the passage of time break the causal connection as a matter of law.”¹⁵

The court first addressed the defendants’ argument that Fields had not committed the acts at issue during his working hours.¹⁶ The court rejected this argument on the basis that “[c]ircumstantial evidence exists from which a jury could infer that Fields’s contact with [the plaintiff] was employment-related.”¹⁷ In particular, the court noted that promotions representatives, such as Fields, were encouraged to contact friends and neighbors outside of working hours to sell security systems.¹⁸ The court concluded that because the plaintiff and Fields *resided in the same town*, “the [defendants’] policy empowered him to contact her.”¹⁹

The court of appeals also rejected the argument that because Fields entered the plaintiff’s home through an unlocked garage door, instead of using his position as an employee of the company to gain entry, the abduction was unrelated to his employment.²⁰ The court of appeals rejected this argument on the basis that:

“It remains to be seen in the development of the facts whether the surreptitious entry . . . was the result of the employment of the felon; whether the felon’s background projected the risk; and whether defendant[s] had any knowledge of this background or could have acquired such knowledge. It remains to be determined whether

12. 264 Ga. App. 456, 590 S.E.2d 807 (2003).

13. *Underberg*, 284 Ga. App. at 113, 643 S.E.2d at 379 (quoting *TGM Ashley Lakes, Inc.*, 264 Ga. App. at 459, 590 S.E.2d at 813).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 114-15, 643 S.E.2d at 380.

18. *Id.* at 115, 643 S.E.2d at 380.

19. *Id.*

20. *Id.*

defendant[s] took the precautions . . . reasonable [persons] would be required to take under the circumstances."²¹

The decision in *Underberg* is troubling. On its surface, it would appear that Fields's employment by a dealer of residential security systems is in some manner relevant to the court's determination that a material issue of fact existed that precluded summary judgment. However, a closer examination of the decision draws this conclusion into question. The decision makes it clear that Fields *did not* gain entry into the plaintiff's home by virtue of his position as an employee or independent contractor of the defendants. That is, the plaintiff did not invite Fields into her home in his capacity as a promotions representative. This appears to be the most obvious risk entailed by the defendants' failure to conduct a background check on a person in that position. Fields, however, simply knew who the plaintiff was and where the plaintiff lived. Otherwise, the fact that he sold residential security systems was irrelevant. Fields could have derived the information regarding the plaintiff's identity and address by working in any number of different companies, industries, or capacities.

The decision in *Underberg* raises the issue of whether the duty to conduct background checks of employees has now been expanded to include employees in positions previously unconsidered. That is, does the decision in *Underberg* establish a duty to perform a background check on any employee who may have access to a customer's identity and address?

II. PREMISES LIABILITY

In *McAfee v. ETS Payphones, Inc.*,²² the Georgia Court of Appeals affirmed the grant of summary judgment to the defendant in a premises liability action arising from injuries suffered by the plaintiff as a result of criminal damage to a payphone.²³ The defendant, ETS Payphones, owned approximately 2500 payphones in Georgia. In late 2003 ETS Payphones experienced an increase in incidents of theft from their payphones.²⁴ Apparently, the thieves stole money from the payphones "by drilling out the payphone's locks, which would loosen the phone's casing from its base but would leave the phone fully functioning."²⁵

21. *Id.* (brackets in original) (alterations in original) (quoting *McGuire v. Ariz. Prot. Agency*, 609 P.2d 1080, 1082 (Ariz. 1980)).

22. 283 Ga. App. 756, 642 S.E.2d 422 (2007).

23. *Id.* at 756, 642 S.E.2d at 423.

24. *Id.* at 756-57, 642 S.E.2d at 424.

25. *Id.* at 757, 642 S.E.2d at 424.

Under those circumstances, the only way that ETS Payphones could determine that a phone had been subjected to theft or other tampering was to physically inspect the phone.²⁶

On July 22, 2004, the plaintiff stopped at a gas station to use one of the defendant's payphones.²⁷ Although the payphone was functioning, "the phone's lock had been drilled and its cast-metal casing had been loosened from its base as a result of a theft."²⁸ During the course of making his phone call, the plaintiff knelt on the ground to prevent the wind from blowing away his paperwork. As he did so, the upper casing of the payphone fell on the plaintiff's head.²⁹ The plaintiff filed a negligence action against ETS Payphones and alleged that the defendant failed "to exercise ordinary care to protect him from the hidden danger posed by its theft-damaged payphone."³⁰ ETS Payphones moved for summary judgment, and the trial court granted the motion.³¹ The plaintiff appealed, "arguing that genuine issues of material fact exist[ed] as to whether ETS had superior knowledge of the danger posed by its damaged payphone and as to whether it exercised ordinary care to protect invitees from such danger."³² The court of appeals disagreed and affirmed the trial court's decision.³³

In affirming the trial court's decision, the court of appeals noted that "[t]he true basis of a proprietor's liability for personal injury to an invitee is the *proprietor's superior knowledge of a condition that may expose the invitees to an unreasonable risk of harm.*"³⁴ Moreover, the owner of a premises can only be liable for a third-party criminal act if the crime is foreseeable and the owner fails to take steps to guard against injury.³⁵ The court further held, however, that "[i]n order for the crime at issue to be foreseeable, it must be substantially similar to previous criminal activities occurring on or near the premises such that a reasonable person would take ordinary precautions to protect invitees

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 758, 642 S.E.2d at 424 (emphasis added by court) (quoting *Emory Univ. v. Smith*, 260 Ga. App. 900, 901, 581 S.E.2d 405, 406 (2003)).

35. *Id.*, 642 S.E.2d at 425 (quoting *TGM Ashley Lakes, Inc.*, 264 Ga. App. at 462, 590 S.E.2d at 816).

from the risk posed by the criminal activity.”³⁶ The court of appeals observed that no evidence suggested ETS Payphones had actual knowledge of the danger posed by the specific payphone that injured the plaintiff or the danger posed to other customers because of damage caused during a theft.³⁷

Accordingly, the issue was whether ETS Payphones possessed constructive knowledge of the alleged dangerous condition.³⁸ The plaintiff argued that ETS Payphones

had constructive knowledge based on its being aware of the fact that a recently terminated employee was stealing the money from its payphones and, in the course of such thefts, was damaging the phones in a manner similar to the damage sustained by the phone that caused [the plaintiff’s] injury.³⁹

The court of appeals, however, concluded that ETS Payphones did not have a duty to “foresee dangers which are not reasonably expected.”⁴⁰ On this basis, the court of appeals held that ETS Payphones could not “reasonably foresee that the theft damage of its payphone would cause injury to [the plaintiff] and in particular that [the plaintiff] would be kneeling on the ground and pulling on the phone cord such that the phone would fall on his head.”⁴¹

III. DRAM SHOP ACT

In *Becks v. Pierce*,⁴² the Georgia Court of Appeals reversed the denial of summary judgment to the defendant, the owner of a bar, in an action filed under Georgia’s Dram Shop Act⁴³ because the plaintiff failed to produce any evidence that the defendant or its employees knew that an intoxicated customer would soon be driving.⁴⁴ Jeffery Fleming arrived at the defendant’s bar at some point between 9:30 p.m. and 10:30 p.m. on April 12, 2002. Fleming, who was not a regular patron of the defendant’s bar, stayed at the bar for approximately five to five and a

36. *Id.* (quoting *Agnes Scott Coll., Inc. v. Clark*, 273 Ga. App. 619, 621, 616 S.E.2d 468, 470 (2005)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* (quoting *Yager v. Wal-Mart Stores, Inc.*, 257 Ga. App. 215, 217, 570 S.E.2d 650, 651 (2002)).

41. *Id.* at 759, 642 S.E.2d at 425.

42. 282 Ga. App. 229, 638 S.E.2d 390 (2006).

43. O.C.G.A. § 51-1-40 (2000).

44. *Becks*, 282 Ga. App. at 235, 638 S.E.2d at 394.

half hours.⁴⁵ During that time, Fleming drank two or three mixed drinks and two cups of beer. Fleming left the bar at around 3:30 a.m. When leaving the bar, Fleming walked past a security guard and two police officers employed by the bar. According to Fleming, he did not have a drink for an hour prior to leaving the bar. While driving home, Fleming fell asleep in his vehicle, which crossed the median and struck the plaintiff's oncoming vehicle. The plaintiff thereafter brought suit against the owner of the bar, alleging the owner was liable for her injuries under Georgia's Dram Shop Act.⁴⁶

The trial court denied the owner's motion for summary judgment, ruling that genuine issues of material fact "remained as to whether Fleming was noticeably intoxicated when he was served his last drink [and] whether based on the training given to the Bar's employees, [the owner] should have known that Fleming would soon be driving."⁴⁷ The owner appealed.⁴⁸ On appeal, the Georgia Court of Appeals reversed, holding that summary judgment should have been entered in favor of the defendant.⁴⁹

Under Georgia's Dram Shop Act,

[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 when the sale, furnishing, or serving is the proximate cause of such injury or damage.⁵⁰

On appeal, the defendant argued that the trial court erred in denying his motion for summary judgment because "there was no evidence that the Bar knew that Fleming would soon be driving."⁵¹

According to the court of appeals,

It is a long-standing rule that the [Dram Shop] Act does not require that the person selling, furnishing, or serving alcohol have actual knowledge that the patron was soon to drive. "Rather, if a provider in the exercise of reasonable care should have known *both* that the recipient of the alcohol was noticeably intoxicated *and* that the

45. *Id.* at 229, 638 S.E.2d at 391.

46. *Id.* at 229-30, 638 S.E.2d at 391.

47. *Id.* at 232, 638 S.E.2d at 392.

48. *Id.* at 229, 638 S.E.2d at 390.

49. *Id.* at 235, 638 S.E.2d at 394.

50. O.C.G.A. § 51-1-40(b).

51. *Becks*, 282 Ga. App. at 233, 638 S.E.2d at 393.

recipient would be driving soon, the provider will be deemed to have knowledge of that fact.”⁵²

The court concluded that no evidence in the record established that any employee of the bar knew Fleming would soon be driving when he was served his last drink.⁵³ To the contrary, according to the court, the record showed that “there was no evidence that Fleming displayed his keys at any time or otherwise did anything to indicate that he might be driving. Furthermore, Fleming was not a regular customer of the Bar such that the employees would know that he would be driving.”⁵⁴

The court of appeals rejected the plaintiff’s argument that the defendant’s employees knew or should have known that Fleming intended to drive because he walked by three bar employees when he left the bar.⁵⁵ The court of appeals held that “Fleming’s intention at that time . . . [was] not the relevant inquiry under the statute. Rather, the statute requires that the person serving the last drink know that the patron is soon to drive.”⁵⁶

The court of appeals also rejected the plaintiff’s argument that because most customers drive to the bar, the bar should have known that Fleming would drive after leaving the building.⁵⁷ Based on the supreme court’s decision in *Sugarloaf Café, Inc. v. Willbanks*,⁵⁸ the court of appeals held that evidence that a bar is located in a “‘remote’ location and that most customers drive to the server’s place of business is insufficient to show that the server knew a customer would soon be driving.”⁵⁹

IV. LIABILITY FOR INJURY BY DOMESTICATED ANIMAL

In *Burns v. Leap*,⁶⁰ the Georgia Court of Appeals held that a property owner was not liable for injuries sustained by a visitor who was knocked down by a horse boarded by the owner.⁶¹ In November 2002 the plaintiff approached the defendant property owner about purchasing the

52. *Id.* (footnote omitted) (quoting *Baxley v. Hakiel Indus., Inc.*, 280 Ga. App. 94, 95, 633 S.E.2d 360, 362 (2006)).

53. *Id.* at 234, 638 S.E.2d at 394.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 279 Ga. 255, 612 S.E.2d 279 (2005).

59. *Becks*, 282 Ga. App. at 235, 638 S.E.2d at 394 (quoting *Sugarloaf Café, Inc.*, 279 Ga. at 257, 612 S.E.2d at 281).

60. 285 Ga. App. 307, 645 S.E.2d 751 (2007).

61. *Id.* at 307, 645 S.E.2d at 751.

defendant's property.⁶² The defendant's property included "a seven-acre tract with a main house, a guest house, paddocks, and a barn."⁶³ In addition, the defendant boarded four horses on her property.⁶⁴

On November 29, 2002, the plaintiff and her family toured the defendant's property. The tour included a visit to the pasture where the four horses boarded by the defendant were located. To gain access to the pasture, the defendant and the plaintiff's family first went through a gate near the barn that led to a horse run.⁶⁵ The plaintiff, "who was the last person through the initial gate, failed to close it. After crossing the horse run, the group passed through an open gate that led into the pasture, leaving the gate ajar."⁶⁶ After the plaintiff and her family petted the horses, the defendant asked the plaintiff whether she had closed the initial gate. The plaintiff replied that she had not, but offered to do so. As the plaintiff left to close the first gate, a horse ran toward her and knocked her into a barbed wire fence.⁶⁷

The plaintiff brought suit against the defendant and claimed that the defendant "was negligent in failing to ensure that the gates were closed, asking [the plaintiff] to close the gate, . . . and failing to warn [the plaintiff] of the dangers in the pasture."⁶⁸ The defendant filed a motion for summary judgment and argued, *inter alia*, that the plaintiff "failed to produce evidence of the horse's vicious propensity."⁶⁹ In support of her motion for summary judgment, the defendant submitted an affidavit in which she stated that she had boarded the horse for a number of years and had never observed any vicious propensity on the part of the horse.⁷⁰ The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.⁷¹ On appeal, the court of appeals affirmed the grant of summary judgment.⁷²

According to the court of appeals, "To prevail on a claim for damages for injuries caused by a horse, 'it is necessary to show that the horse was vicious and that the owner had knowledge of that fact.'"⁷³ As no

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 307-08, 645 S.E.2d at 751-52.

66. *Id.* at 308, 645 S.E.2d at 752.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 307, 645 S.E.2d at 751.

72. *Id.*

73. *Id.* at 309, 645 S.E.2d at 752 (quoting *McNish v. Gilbert*, 184 Ga. App. 234, 235, 361 S.E.2d 231, 233 (1987)).

evidence suggested any vicious propensity of the horse, the court of appeals held that the trial court did not err in granting summary judgment to the defendant.⁷⁴

The plaintiff, however, argued that the decision in *Callaway v. Miller*⁷⁵ permitted the plaintiff to “pursue a negligence claim, notwithstanding the lack of any evidence that [the defendant] had knowledge of the horse’s dangerous propensities.”⁷⁶ The court of appeals acknowledged that the decision in *Callaway* did, in fact, hold that Official Code of Georgia Annotated (“O.C.G.A.”) section 51-2-7,⁷⁷ the dangerous animal statute, “does not provide ‘an exclusive basis for recovery when injury is caused by a domestic animal.’”⁷⁸ However, the court of appeals further noted that the decision in *Callaway* “is physical precedent only and therefore not binding.”⁷⁹

V. DEFAMATION

In *Bellemeade, LLC v. Stoker*,⁸⁰ Bellemeade, LLC, Stoker Group, and Jerry Stoker entered into multiple partnerships in connection with the development of several residential properties. At some point, the parties decided to terminate the business relationship and dissolve the partnership; however, they were unable to do so in a mutually agreeable fashion and had to resort to litigation. The suit consisted of multiple claims by Bellemeade and its principals against Stoker Group and its principals for unjust enrichment, breach of oral contract, and breach of fiduciary duties.⁸¹

During the pendency of the litigation, Jerry Stoker amended his complaint against Edward Faircloth (one of the principals of Bellemeade and a party to the litigation) to assert a claim for slander. However, because the amended complaint failed to state Stoker’s special damages

74. *Id.*

75. 118 Ga. App. 309, 163 S.E.2d 336 (1968).

76. *Burns*, 285 Ga. App. at 309, 645 S.E.2d at 752.

77. O.C.G.A. § 51-2-7 (2000).

78. *Burns*, 285 Ga. App. at 309, 645 S.E.2d at 753 (quoting *Callaway*, 118 Ga. App. at 311, 163 S.E.2d at 338).

79. *Id.*

80. 280 Ga. 635, 631 S.E.2d 693 (2006).

81. *Id.* at 635-36, 631 S.E.2d at 694. Certiorari was not granted on these additional claims; rather, the Georgia Supreme Court only granted certiorari with respect to the court of appeals order affirming the denial of summary judgment with respect to the slander claim. *Id.*

with particularity, as required by O.C.G.A. section 9-11-9(g),⁸² the court could only treat the claim as one for slander per se.⁸³

The slander claim against Faircloth arose several months after the parties filed the lawsuit. In that claim, Stoker alleged that Faircloth approached Charles Gross, a friend of Stoker for some time, and purchased numerous real estate lots for development through his connection with Stoker. When Faircloth inquired with Gross about purchasing certain real estate lots from him, Gross told Faircloth that if Gross purchased any lots, it would be through Stoker.⁸⁴ In response, Faircloth allegedly told Gross, “Jerry isn’t going to be selling lots here in Warner Robins much longer. He probably is going back to Valdosta, so if you want to buy these lots, you need to sign a contract with me.”⁸⁵ Faircloth denied making this remark and moved for summary judgment on the basis that even if he made the statement, the plaintiff could not hold him liable for it because it was a statement of opinion regarding a future event.⁸⁶

The trial court denied Faircloth’s motion, and the Georgia Court of Appeals affirmed the denial.⁸⁷ The court of appeals determined that based on Faircloth’s statement, a viable claim of slander per se existed because “the statements at issue could reasonably be interpreted as having the purpose of injuring Stoker’s business by stating or implying that Stoker was going out of the development business in which he was still engaged and leaving the area, and that these assertions are capable of being proved false.”⁸⁸

In affirming the trial court, the court of appeals observed that courts determine whether a statement is slander by looking to “the plain import of the words spoken” without resorting to innuendo.⁸⁹ The court of appeals further explained that the “pivotal questions are whether the statements can reasonably be interpreted as stating or implying defamatory facts about [the] plaintiff and, if so, whether the defamatory assertions are capable of being proved false.”⁹⁰ The

82. O.C.G.A. § 9-11-9(g) (2006).

83. *Bellemeade, LLC*, 280 Ga. at 636, 631 S.E.2d at 694 (citing *McGee v. Gast*, 257 Ga. App. 882, 885, 572 S.E.2d 398, 401 (2002)).

84. *Id.*, 631 S.E.2d at 694-95.

85. *Id.*, 631 S.E.2d at 695.

86. *Id.*

87. *Id.*

88. *Id.* at 637, 631 S.E.2d at 695 (quoting *Stoker v. Bellemeade, LLC*, 272 Ga. App. 817, 827, 615 S.E.2d 1, 11 (2005)).

89. *Id.* at 636, 631 S.E.2d at 695 (quoting *Stoker*, 272 Ga. App. at 827, 615 S.E.2d at 11).

90. *Id.* (quoting *Stoker*, 272 Ga. App. at 827, 615 S.E.2d at 11).

Georgia Supreme Court granted certiorari to determine whether this test was proper for determining whether statements constituted slander per se.⁹¹

The supreme court noted that slander per se consists of “[m]aking charges against another in reference to his trade, office, or profession, calculated to injure him therein”⁹² and that damages need not be proved for such statements because damage is inferred.⁹³ The supreme court reiterated the court of appeals observations about slander and noted that to determine whether a statement constitutes slander per se, a court looks to “the plain import of the words spoken”⁹⁴ that are “injurious on their face—without the aid of extrinsic proof.”⁹⁵ The supreme court further explained that a court is not to “hunt for a strained construction”⁹⁶ and that any “inference a hearer might take from the words does not subject the speaker to liability for slander per se.”⁹⁷ In other words, as the supreme court noted, if the words are defamatory on their face, no innuendo or explanation is required.⁹⁸

The Georgia Supreme Court next addressed the test applied by the court of appeals in determining whether the statements in question constituted slander per se.⁹⁹ The supreme court noted that the “pivotal questions” do not determine whether a statement constitutes slander per se.¹⁰⁰ On the contrary, according to the supreme court, the pivotal questions aid in determining whether a statement constitutes defamation when the speaker claims it is a nonactionable opinion.¹⁰¹ With respect to alleged opinions, no constitutional privilege exists for such statements; rather, a court must determine whether the alleged opinion can be interpreted as reasonably implying defamatory facts about the

91. *Id.* at 637, 631 S.E.2d at 695.

92. *Id.* (quoting O.C.G.A. § 51-5-4(a)(3) (2000)).

93. *Id.* (citing O.C.G.A. § 51-5-4(b)).

94. *Id.* (quoting *Palombi v. Frito-Lay, Inc.*, 241 Ga. App. 154, 156, 526 S.E.2d 375, 378 (1999)).

95. *Id.* (quoting *Macon Tel. Publ'g Co. v. Elliott*, 165 Ga. App. 719, 723, 302 S.E.2d 692, 696 (1983)).

96. *Id.* (quoting *Webster v. Wilkins*, 217 Ga. App. 194, 195, 456 S.E.2d 699, 701 (1995)).

97. *Id.* at 637-38, 631 S.E.2d at 695 (citing *Palombi*, 241 Ga. App. at 156, 526 S.E.2d at 377).

98. *Id.* at 638, 631 S.E.2d 695-96.

99. *Id.*, 631 S.E.2d at 696.

100. *Id.* (citing *Gast v. Brittain*, 277 Ga. 340, 340-41, 589 S.E.2d 63, 64 (2003)).

101. *Id.* (citing *Gast*, 277 Ga. at 340-41, 589 S.E.2d at 64).

plaintiff and, if so, whether the assertions are capable of being proved false.¹⁰²

In reversing the denial of Faircloth's motion for summary judgment, the supreme court concluded that the court of appeals in this case, and in other cases, erred by applying the *Milkovich* factors to determine whether statements constituted slander per se.¹⁰³ Although Faircloth asserted the "opinion defense," the court held that the "employment of the *Milkovich* factors determines only that the alleged opinion is actionable as slander."¹⁰⁴ The supreme court further held that these factors have no bearing on whether the statements constitute slander per se and that the court of appeals erred by including such factors in its determination of whether the statements constituted slander per se.¹⁰⁵ Faircloth's words were not injurious on their face and did not, on their face, "cast aspersions on Stoker's reputation because of the particular demands or qualifications of his profession."¹⁰⁶ Therefore, the court granted summary judgment to Faircloth.¹⁰⁷

The decision in *Bellemeade* establishes that when determining whether a statement constitutes slander per se, a court must solely look at the statement without resorting to any extraneous evidence or innuendo.¹⁰⁸ The decision also establishes the importance of careful drafting of pleadings.¹⁰⁹ Had Stoker alleged special damages as required, his claim would not have been limited to one for slander per se.¹¹⁰ Further, his complaint may not have been susceptible to summary judgment because extrinsic facts may be used to establish the defamatory character of words in a case based on slander rather than slander per se.¹¹¹

VI. EMOTIONAL DISTRESS

In *Metropolitan Atlanta Rapid Transit Authority v. Mosley*,¹¹² the Georgia Court of Appeals considered the potential liability of an

102. *Id.* (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-21 (1990)). These factors are commonly referred to as the "*Milkovich* factors." *Id.*

103. *Id.* (citing *Lippy v. Benson*, 276 Ga. App. 50, 622 S.E.2d 385 (2005); *Holsapple v. Smith*, 267 Ga. App. 17, 599 S.E.2d 28 (2004)).

104. *Id.* at 639, 631 S.E.2d at 696.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 638-39, 631 S.E.2d at 696.

109. *See id.* at 636, 631 S.E.2d at 694.

110. *See id.*

111. *Id.* at 637, 631 S.E.2d at 695.

112. 280 Ga. App. 486, 634 S.E.2d 466 (2006).

employer for the alleged intentional infliction of emotional distress upon an employee by her supervisor.¹¹³ Mosley, the plaintiff, sued the Metropolitan Atlanta Rapid Transit Authority (“MARTA”) based on the alleged conduct of her supervisor, Richards. Richards supervised approximately six hundred bus operators including Mosley. Prior to the incident in question, Mosley had only come into contact with Richards twice. Mosley alleged that as she entered the dispatch office, Richards reached out as if to shake her hand.¹¹⁴ Richards allegedly grabbed her hand and “spun her toward him so that her backside was compressed against the front of his body, rubbed his hand along her side between her waist and underarm, squeezed her waist, moaned and then smiled.”¹¹⁵ The incident lasted approximately two seconds.¹¹⁶

The day after the alleged incident, Mosley filed a complaint with MARTA’s Office of Equal Opportunity Employment on the basis that Richards sexually harassed and assaulted her. MARTA determined that Richards had acted improperly despite his denial of all allegations. Richards only admitted to trying to hug Mosley. Accordingly, MARTA disciplined Richards by requiring or recommending certain corrective actions.¹¹⁷

As a result of the incident, Mosley brought an action against MARTA and Richards for actual and punitive damages based upon the alleged improper touch by Richards. In the complaint, she asserted claims of: (1) battery against Richards; (2) negligent and wrongful retention and failure to provide a safe work environment against MARTA; and (3) intentional infliction of emotional distress against both defendants.¹¹⁸

Both defendants moved for summary judgment on all claims. The trial court denied all the defendants’ motions for summary judgment.¹¹⁹ The court of appeals affirmed the denial of all motions for summary judgment except for the claims of intentional infliction of emotional distress and failure to provide a safe work environment.¹²⁰

In reversing the trial court’s denial of the defendants’ motions for summary judgment regarding the claim for intentional infliction of emotional distress, the court noted the plaintiff’s stringent burden.¹²¹

113. *Id.* at 486-87, 634 S.E.2d at 467.

114. *Id.*, 634 S.E.2d at 467-68.

115. *Id.*

116. *Id.* at 487, 634 S.E.2d at 468.

117. *Id.* Richards complied with all of MARTA’s orders but did not seek counseling through MARTA’s employee assistance program as recommended by MARTA. *Id.*

118. *Id.* at 486-87, 634 S.E.2d at 467.

119. *Id.* at 487, 634 S.E.2d at 467.

120. *Id.*

121. *Id.* at 490, 634 S.E.2d at 470.

To meet the burden, the plaintiff must prove: (1) the conduct complained of was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there is a causal connection between the wrongful conduct and the plaintiff's emotional distress; and (4) the emotional distress is severe.¹²² To satisfy the third element, the conduct must "go beyond all possible bounds of decency, and . . . be regarded as atrocious, and utterly intolerable in a civilized community."¹²³

According to the court, an employer-employee relationship may produce a character of outrageousness that might not otherwise exist.¹²⁴ However, the court further explained that the tort requires "major outrage in the . . . conduct."¹²⁵ In this case, the court did not deem the conduct reprehensible enough to survive summary judgment because "it was an isolated instance that lasted *two seconds*, occurred in public, and was not physically threatening."¹²⁶

Interestingly, the court found persuasive a federal court's holding that a claim similar to Mosley's sexual harassment claim did not survive summary judgment because the conduct was not "*sufficiently severe or pervasive* [enough] to constitute a hostile or abusive work environment."¹²⁷ The court noted that the federal standard for a sexual harassment claim is lower than the "outrageous" conduct standard for intentional infliction of emotional distress.¹²⁸

Mosley is an intriguing case because, construing the facts in the light most favorable to the plaintiff, one could certainly argue that the conduct complained of was indeed reprehensible. Those defending cases involving intentional infliction of emotional distress will find this case useful. Taking the facts stated by the plaintiff as true, the plaintiff was subjected to inappropriate conduct which, although short in duration, most people would likely find appalling.

In *Lockhart v. Marine Manufacturing Corp.*,¹²⁹ the plaintiff brought a claim for intentional infliction of emotional distress against his former

122. *Id.* at 490-91, 634 S.E.2d at 470 (citing *Mangrum v. Republic Indus.*, 260 F. Supp. 2d 1229, 1256 (N.D. Ga. 2003)).

123. *Id.* at 491, 634 S.E.2d at 470 (quoting *Mangrum*, 260 F. Supp. 2d at 1256) (applying Georgia law).

124. *Id.* (citing *Bridges v. Winn-Dixie Atlanta, Inc.*, 176 Ga. App. 227, 230, 335 S.E.2d 445, 448 (1985)).

125. *Id.* (alteration in original) (quoting *Bridges*, 176 Ga. App. at 230, 335 S.E.2d at 448).

126. *Id.*

127. *Id.* at 492 n.7, 634 S.E.2d at 470 n.7 (citing *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982)).

128. *Id.* (citing *Henson*, 682 F.2d at 903-04).

129. 281 Ga. App. 145, 635 S.E.2d 405 (2006).

employer based on four incidents of racist-laden and insulting comments directed at him by other employees, including supervisors. The comments included statements made by Caucasian employees to the plaintiff, an African-American.¹³⁰ First, his supervisor stated that he would “have the [Ku Klux] Klan burn a cross in [the plaintiff’s] yard.”¹³¹ Second, a coworker made the following comment: “[Y]ou can’t pay for that [motor] with food stamps.”¹³² The third comment was made by the plant manager, who was displeased with the speed of the plaintiff’s work: “I ain’t your m___ f___ nigger. I ain’t going to be doing your m___ f___ work for you.”¹³³

As a result of this third comment, the plaintiff quit his job, but later returned after the plant manager visited his home to apologize.¹³⁴ The final comment occurred shortly after the plaintiff returned to work when a supervisor saw the plaintiff with a boat he owned and said the plaintiff was “buying a lot of stuff . . . [and] must be selling drugs.”¹³⁵

The plaintiff brought this action after being terminated from his job for fist fighting with another employee. During his employment, he never complained about the statements to upper management.¹³⁶

The trial court granted the defendant’s motion to dismiss the case, finding that the comments did not amount to extreme and outrageous conduct, a determination that is a question of law.¹³⁷ The court of appeals agreed, applying the principle of law that comments made in the employment context “may be horrifying or traumatizing,” but they are generally considered part of normal life, and plaintiffs are expected to be hardened to certain language.¹³⁸

The court of appeals identified several factors that precluded it from holding that the comments were beyond the bounds of decency or egregious or outrageous enough to justifiably result in severe fright, humiliation, embarrassment, or outrage beyond what any reasonable person is expected to endure.¹³⁹ The court noted that only four comments were made in a fourteen-month employment period, and only

130. *Id.* at 145-46, 635 S.E.2d at 406.

131. *Id.*

132. *Id.* (brackets in original).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 147, 635 S.E.2d at 407.

138. *Id.* (quoting *Jarrard v. United Parcel Serv.*, 242 Ga. App. 58, 59, 529 S.E.2d 144, 147 (2000)).

139. *Id.*

three of these comments related to the plaintiff's job performance.¹⁴⁰ Further, the plaintiff admitted that he never filed a complaint with the management of the company regarding these comments.¹⁴¹ After the most egregious comments, the supervisor apologized, and the plaintiff returned to work.¹⁴² Finally, the court noted that one single person did not make the comments "in a systematic effort to belittle and abuse [the plaintiff]."¹⁴³ Rather, different people made isolated comments over a lengthy period of time.¹⁴⁴

The court of appeals distinguished the case at bar from *Coleman v. Housing Authority of Americus*,¹⁴⁵ in which a supervisor engaged in a concentrated campaign of sexual harassment over a three-year uninterrupted period.¹⁴⁶ In that case, the supervisor proffered pornographic videos and cartoons to the plaintiff, inquired into the plaintiff's marital relations, and barraged her with uninterrupted abusive, obscene, racist, and sexual jokes.¹⁴⁷

Lockhart is an interesting case because, although there was not a campaign of repeated comments, it is indisputable that the third instance of verbal abuse towards the plaintiff was extremely inappropriate. In the employment context, the decision in *Lockhart* will make summary judgment far more likely for a defendant in an intentional infliction of emotional distress case if the verbal abuse is infrequent, followed by an apology from the defendant's employee, or both, even if the verbal abuse is in extremely poor taste, racist-laden, and reprehensible. For plaintiffs, the decision in *Lockhart* will make it difficult to successfully pursue an intentional infliction of emotional distress case against an employer based on a few comments, even if egregious.

VII. MEDICAL MALPRACTICE

In *Allen v. Wright*,¹⁴⁸ Ernestine Wright filed a medical malpractice action against Dr. Thomas Allen.¹⁴⁹ In an attempt to comply with

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 147-48, 281 S.E.2d at 407.

144. *Id.* at 148, 281 S.E.2d at 407.

145. 191 Ga. App. 166, 381 S.E.2d 303 (1989).

146. *Lockhart*, 281 Ga. App. at 148, 635 S.E.2d at 408 (citing *Coleman*, 191 Ga. App. at 166, 381 S.E.2d at 304).

147. *Coleman*, 191 Ga. App. at 168, 381 S.E.2d at 305.

148. 282 Ga. 9, 644 S.E.2d 814 (2007).

149. *Id.* at 9, 644 S.E.2d at 815.

O.C.G.A. section 9-11-9.2,¹⁵⁰ Wright executed an authorization to release her medical records and filed the authorization with her complaint. Allen moved to dismiss the complaint. He alleged that Wright failed to comply with O.C.G.A. section 9-11-9.2 for several reasons, including the medical release's failure to authorize defense attorneys to communicate with Wright's treating physicians without the presence or notification of the plaintiff's lawyer, even though the statute does not require such actions.¹⁵¹

The trial court denied the motion to dismiss, asserting that the Health Insurance Portability and Accountability Act ("HIPAA") of 1996¹⁵² preempted O.C.G.A. section 9-11-9.2. The Georgia Court of Appeals affirmed the trial court's ruling, citing to its decision in *Northlake Medical Center, LLC v. Queen*,¹⁵³ in which the court held that HIPAA preempted O.C.G.A. section 9-11-9.2.¹⁵⁴ The Georgia Supreme Court granted certiorari because the defendants in *Northlake Medical Center* did not seek certiorari and because this was an issue of first impression for the court.¹⁵⁵

The court first noted that O.C.G.A. section 9-11-9.2(a) requires any plaintiff who files a medical malpractice complaint to file a medical

150. O.C.G.A. § 9-11-9.2 (2006). The relevant portion of O.C.G.A. section 9-11-9.2 provides:

(a) In any action for damages alleging medical malpractice . . . , contemporaneously with the filing of the complaint, the plaintiff shall be required to file a medical authorization form. Failure to provide this authorization shall subject the complaint to dismissal.

(b) The authorization shall provide that the attorney representing the defendant is authorized to obtain and disclose protected health information contained in medical records to facilitate the investigation, evaluation, and defense of the claims and allegations set forth in the complaint which pertain to the plaintiff or, where applicable, the plaintiff's decedent whose treatment is at issue in the complaint. This authorization includes the defendant's attorney's right to discuss the care and treatment of the plaintiff or, where applicable, the plaintiff's decedent with all of the plaintiff's or decedent's treating physicians.

(c) The authorization shall provide for the release of all protected health information except information that is considered privileged and shall authorize the release of such information by any physician or health care facility by which health care records of the plaintiff or the plaintiff's decedent would be maintained.

Id.

151. *Allen*, 282 Ga. at 9-10, 644 S.E.2d at 815.

152. Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, 42 U.S.C.).

153. 280 Ga. App. 510, 634 S.E.2d 486 (2006).

154. *Allen*, 282 Ga. at 10, 644 S.E.2d at 815; see *Northlake Med. Ctr.*, 280 Ga. App. at 513, 634 S.E.2d at 490.

155. *Allen*, 282 Ga. at 10, 644 S.E.2d at 815.

authorization contemporaneously with the filing of the complaint.¹⁵⁶ Then the court stated that the Georgia General Assembly could have provided that the authorization must comply with HIPAA, but it did not.¹⁵⁷ Specifically, the court noted that to comply with HIPAA, a patient's authorization to disclose medical information must contain many elements, including the right to revoke the authorization.¹⁵⁸ The court further explained that O.C.G.A. section 9-11-9.2 requires the authorization to contain a notice of revocation provision.¹⁵⁹ The defendant argued that this was immaterial because a plaintiff may always dismiss a complaint and thereby revoke the authorization.¹⁶⁰ The court held that this logic was flawed.¹⁶¹ The court stated that HIPAA "does not recognize that the right to dismiss a lawsuit in which the submission of an authorization is a prerequisite is the functional equivalent of informing [a] patient of his or her right to revoke the authorization."¹⁶² Accordingly, the court held that the statute did not sufficiently comply with HIPAA.¹⁶³

With this in mind, the court addressed whether HIPAA preempted the statute because the statute failed to include a notice of revocation provision.¹⁶⁴ A relevant exception to HIPAA permits a state law to conflict with HIPAA if "the state law relates to the privacy of individually identifiable health information and is 'more stringent' than HIPAA's requirements."¹⁶⁵ The court determined that it was impossible for the statute to be more stringent than HIPAA when it failed to satisfy HIPAA's requirement of notice of the right to revoke.¹⁶⁶ Therefore, the statute was preempted by federal law.¹⁶⁷

The court also held that HIPAA preempted the statute because the statute failed to require a specific and meaningful identification of the information to be disclosed and failed to provide an expiration date or a sufficient expiration condition.¹⁶⁸ Therefore, the court denied the

156. *Id.* at 11, 644 S.E.2d at 816.

157. *Id.*

158. *Id.* (citing *Northlake Med. Ctr.*, 280 Ga. at 512-13, 634 S.E.2d at 489).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 12, 644 S.E.2d at 816.

163. *Id.*

164. *Id.*

165. *Id.* (quoting *Low v. Zuckerman*, 307 F. Supp. 2d 705, 708-09 (D. Md. 2004)).

166. *Id.*, 644 S.E.2d at 816-17.

167. *Id.*, 644 S.E.2d at 817.

168. *Id.* at 13, 644 S.E.2d at 817 (citing *Northlake Med. Ctr.*, 280 Ga. at 514, 634 S.E.2d at 590).

defendant's motion to dismiss and ruled that because HIPAA preempts the statute, the plaintiff did not have to comply with the terms of O.C.G.A. section 9-11-9.2 when she filed a medical malpractice action.¹⁶⁹

Further, despite the principle that statutes are read to be valid whenever possible, the court observed the canon of statutory construction which provides that the express mention of one thing in a statute implies the exclusion of all other things.¹⁷⁰ In this case, the statute included certain things but did not include other items, such as notice of right to revoke and the like, which HIPAA requires.¹⁷¹ Quite simply, the statute did not include the HIPAA requirements, and it is the place of the General Assembly and not the courts to revise the statute so that it complies with HIPAA.¹⁷²

Justice Hunstein concurred in the judgment with respect to the court's holding that HIPAA preempts the provision of the statute that requires a plaintiff to release all of his or her medical information in cases alleging medical malpractice.¹⁷³ However, Justice Hunstein was the lone dissenting justice in disagreeing that HIPAA preempted all of the other provisions of the statute.¹⁷⁴ Justice Hunstein read the statutory language consistently with HIPAA and contended that the mere absence of items in the statute does not prohibit their inclusion.¹⁷⁵ Justice Hunstein noted that an authorization that complies with both the statute and HIPAA could be drafted.¹⁷⁶ Accordingly, Justice Hunstein would hold that HIPAA only preempts subsection (c) of O.C.G.A. section 9-11-9.2, the provision requiring that a plaintiff release all his medical information, because that provision requires disclosure of information in excess of that allowed by HIPAA.¹⁷⁷ Justice Hunstein argued that subsection (c) of the statute should be severed, and the remainder of the statute should remain valid.¹⁷⁸

Given the General Assembly's recent trend toward passing protectionist measures for the medical profession under the general banner of tort

169. *See id.* at 14, 644 S.E.2d at 818.

170. *Id.* at 13-14, 644 S.E.2d at 817 (citing *Alexander Props. Group Inc. v. Doe*, 280 Ga. 306, 309, 626 S.E.2d 497, 500 (2006)).

171. *Id.* at 13, 644 S.E.2d at 817.

172. *Id.* at 14, 644 S.E.2d at 818.

173. *Id.* at 14-15, 644 S.E.2d at 818 (Hunstein, J., concurring in part and dissenting in part).

174. *Id.* at 15, 644 S.E.2d at 818.

175. *Id.* at 16-17, 644 S.E.2d at 819.

176. *Id.* at 16, 644 S.E.2d at 819.

177. *Id.* at 19, 644 S.E.2d at 821.

178. *Id.* at 19-20, 644 S.E.2d at 821.

reform, it is likely that the general assembly will take swift action to bring O.C.G.A. section 9-11-9.2 into compliance with HIPAA. Doing so would require plaintiffs to file a medical record authorization simultaneously with the filing of the complaint. In the interim, defense counsel should be aware that for any cases filed prior to the legislature's further action, defense lawyers must obtain authorizations for medical records through traditional means in existence prior to O.C.G.A. section 9-11-9.2. Thus, counsel should not file motions to dismiss using O.C.G.A. section 9-11-9.2 as the basis.

In *Scott v. Martin*,¹⁷⁹ Martin filed a suit against Scott for medical malpractice but failed to attach an expert affidavit to the complaint.¹⁸⁰ Relying on the former version of O.C.G.A. section 9-11-9.1(b),¹⁸¹ Martin moved for an extension to file the expert affidavit, which the trial court granted. Scott obtained a certificate of immediate review.¹⁸²

Martin filed a lawsuit based on Scott's treatment of fractures Martin received in an accident that occurred on January 26, 2003. Scott performed surgery on Martin on January 30, 2003, to pin one of the injured bones. Martin alleged that Scott negligently performed the surgery and ordered Martin to undergo overly aggressive therapy.¹⁸³

Prior to the expiration of the two-year statute of limitations, the parties entered into settlement negotiations.¹⁸⁴ On January 13, 2005, near the end of the limitations period, Scott wrote a letter to Martin that said he "[gave] permission to extend the statute of limitations . . . for an additional thirty days in order to give us adequate time to resolve this issue."¹⁸⁵ The parties agreed that this letter extended the statute of limitations to March 1, 2005.¹⁸⁶

On February 16, 2005, Governor Perdue signed into law Georgia Laws Act 1 (Senate Bill 3).¹⁸⁷ In relevant part, the Act amended the former O.C.G.A. section 9-11-9.1(b),¹⁸⁸ which allowed plaintiff a forty-five day grace period within which to file an expert affidavit, plus additional extensions for "good cause" shown, when the relevant statute of limitations would expire within ten days of the filing of the com-

179. 280 Ga. App. 311, 633 S.E.2d 665 (2006).

180. *Id.* at 311, 633 S.E.2d at 665.

181. O.C.G.A. § 9-11-9.1(b) (2006).

182. *Scott*, 280 Ga. App. at 311, 633 S.E.2d at 665.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 312, 633 S.E.2d at 665; 2005 Ga. Laws 1.

188. O.C.G.A. § 9-11-9.1(b) (1993 & Supp. 2004) (amended 2005).

plaint.¹⁸⁹ Pursuant to the new legislation, the revisions to O.C.G.A. section 9-11-9.1(b) would become effective upon approval by Governor Perdue.¹⁹⁰

Martin filed the lawsuit on March 1, 2005, after settlement negotiations broke down and after the revisions to O.C.G.A. section 9-11-9.1(b) went into effect. However, Martin did not file an expert affidavit with the complaint because Martin attempted to rely on the former O.C.G.A. section 9-11-9.1(b), which allowed for the forty-five day grace period. Scott pleaded this failure as an affirmative defense.¹⁹¹

On March 21, 2005, Martin again relied on the former O.C.G.A. section 9-11-9.1(b) and filed a motion in the trial court for an additional thirty days to file the expert affidavit. The trial court granted Martin's motion because the court interpreted the tolling agreement executed by Scott to toll not only the statute of limitations but also any changes or revisions to O.C.G.A. section 9-11-9.1.¹⁹²

The court of appeals reversed the trial court's order granting the extension of time to file the expert affidavit.¹⁹³ The court held that the amended statute applied, which requires the plaintiff to file the expert affidavit simultaneously with the complaint, and unless a statutory exception applies, failure to do so subjects the complaint to dismissal for failure to state a claim.¹⁹⁴ According to the court, the revised O.C.G.A. section 9-11-9.1 provides no such exception and clearly revokes both the forty-five day grace period and extensions for good cause.¹⁹⁵ Additionally, the court of appeals held that the tolling agreement, contrary to the trial court's conclusion, did not toll any changes or revisions to O.C.G.A. section 9-11-9.1.¹⁹⁶ The court noted that the agreement did not reference O.C.G.A. section 9-11-9.1 or the filing of the expert affidavit and only stated that it extended the statute of limitations.¹⁹⁷ Thus, the court of appeals determined that "the trial court interpreted the tolling agreement in an overly broad manner."¹⁹⁸ Accordingly, the

189. *Id.*; *Scott*, 280 Ga. App. at 312, 633 S.E.2d at 665-66.

190. *Scott*, 280 Ga. App. at 312, 633 S.E.2d at 666 (citing 2005 Ga. Laws 1, § 15).

191. *Id.*

192. *Id.* at 313, 633 S.E.2d at 666.

193. *Id.*, 633 S.E.2d at 667.

194. *Id.*, 633 S.E.2d at 666 (citing *Smith v. Morris, Manning & Martin, LLP*, 264 Ga. App. 24, 26, 589 S.E.2d 840, 843 (2003)).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

court held that Martin could not have additional time to file his expert affidavit, which effectively resulted in the dismissal of his lawsuit.¹⁹⁹

As a result of the decision in *Scott*, plaintiffs' lawyers should be wary of the strict construction given to O.C.G.A. section 9-11-9.1 with regard to the filing of an expert affidavit. Even in what appeared to be extenuating circumstances, the court of appeals would not vary the requirements or allow any leeway to the plaintiff.²⁰⁰

VIII. NEGLIGENCE

In *Halligan v. Broun*,²⁰¹ Halligan sued Broun for injuries sustained in an accident that resulted from Broun running a red light. Broun died during the pendency of the litigation, and his co-executor was substituted as defendant.²⁰² The trial court granted summary judgment to Broun, concluding that although Broun was negligent per se for running the red light, he did so due to an "act of God."²⁰³

The undisputed facts showed that Broun, who was eighty-five years old, ran a red light and struck Halligan's vehicle.²⁰⁴ Prior to entering the intersection, Broun "passed out or lost consciousness."²⁰⁵ Broun had never lost consciousness in the past and was told by his physician that he had apparently suffered a severe drop in blood pressure; the condition resulted in Broun having a pacemaker implanted.²⁰⁶

Halligan asserted that the trial court erred by granting summary judgment for Broun because Broun was negligent per se in running the light. He argued that requiring an intentional act in a negligence per se situation would give negligence a greater weight than negligence per se.²⁰⁷

In affirming the trial court, the court of appeals noted that negligence per se does not constitute liability per se because negligence in and of itself is only one of the prerequisites to a cause of action.²⁰⁸ If the sole and proximate cause of an automobile accident is an act of God outside

199. *Id.*, 633 S.E.2d at 667.

200. *See id.*

201. 285 Ga. App. 226, 645 S.E.2d 581 (2007).

202. *Id.* at 226, 645 S.E.2d at 582.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* (citing *Herrin v. Peeches Neighborhood Grill & Bar, Inc.*, 235 Ga. App. 528, 533, 509 S.E.2d 103, 107-08 (1998)).

of the defendant's control, a defendant can obtain summary judgment in his or her favor even if he or she was negligent per se.²⁰⁹

The court noted that according to O.C.G.A. section 1-3-3,²¹⁰ "an 'act of God' [is] 'an accident produced by physical causes which are irresistible or inevitable, such as . . . illness.'"²¹¹ Therefore, if a driver suffers an unforeseeable illness that causes him to lose control of his vehicle, "the driver's loss of control is not negligent, and he is not liable for any damages caused by the out-of-control automobile."²¹² A driver must show the "loss of consciousness produced the accident without any contributing negligence on his part."²¹³

In the case at bar, Halligan failed to produce any specific facts to rebut the act of God defense.²¹⁴ Accordingly, Broun was entitled to summary judgment despite the fact that he was negligent per se in running the red light.²¹⁵

Halligan is an interesting case because, not only was the defendant able to assert the act of God defense, but he was also able to actually obtain summary judgment based on the defense.²¹⁶ Broun obtained summary judgment because no evidence refuted the fact that he had no history of passing out.²¹⁷ However, it is generally accepted by practitioners that the act of God defense is rarely successful.

In light of the decision in *Halligan* and in order to survive summary judgment, plaintiff's counsel would be well advised to either (1) scour the defendant's medical records and history, or (2) perhaps obtain an expert witness that can establish the defendant's contributory negligence in driving while aware of the possibility that he may lose consciousness while behind the wheel.²¹⁸

*Hudson v. Swain*²¹⁹ involved a nine-car collision where the defendant was the last car in the line of cars, and the plaintiff was the third car in

209. *Id.*

210. O.C.G.A. § 1-3-3 (2000 & Supp. 2007).

211. *Halligan*, 285 Ga. App. at 226-27, 645 S.E.2d at 582 (emphasis added by court) (quoting O.C.G.A. 1-3-3(3)).

212. *Id.* at 227, 645 S.E.2d at 582 (quoting *Lewis v. Smith*, 238 Ga. App. 6, 7, 517 S.E.2d 538, 540 (1999)).

213. *Id.*

214. *Id.*, 645 S.E.2d at 583.

215. *Id.*

216. *Id.*

217. *Id.*

218. This is not to say that plaintiff's counsel in *Halligan* failed in any way to competently pursue the case.

219. 282 Ga. App. 718, 639 S.E.2d 319 (2006).

the line. When traffic came to a stop, several of the cars collided, but the parties disputed the order of collision.²²⁰

In her motion for summary judgment, Swain contended that no evidence existed in the record to show she caused the complained of injuries. She admitted to hitting the car in front of her, which was five cars behind the plaintiff, but claimed that her collision did not cause any collision with the plaintiff's car which was six cars in front of her.²²¹

The defendant based her motion for summary judgment on deposition testimony from the plaintiff's family. The plaintiff's mother, a passenger in the car, stated that while she knew the car behind her stopped, she did not know about the cars behind that car or the defendant's car. The plaintiff's father, the driver of the vehicle, stated that he did not know how the accident occurred. The plaintiff himself also stated that he did not know who hit whom or when, or whether Swain caused the accident.²²²

In response to Swain's motion for summary judgment, the plaintiff filed an affidavit from his father and relied on affidavits from other drivers involved in the collision (the drivers of the fourth and fifth cars behind the plaintiff who were in the first two cars in front of the defendant), as well as Swain's guilty plea for following too closely. The affidavits from the other drivers did not state that Swain's car pushed the cars in front of it into the plaintiff's car. Further, the plaintiff's father's affidavit, prepared after his deposition, stated that he saw the three vehicles in the back of the line of vehicles skidding toward the rest of the vehicles. The affidavit also stated that the father observed the position of the vehicles after the collision, which made it apparent that the defendant and the drivers of the other two vehicles at the back of the line were responsible for the accident.²²³

Affirming the denial of summary judgment, the court noted that the mere fact of an accident's occurrence affords no basis for recovery absent the plaintiff proving that the negligence of the defendant caused the accident.²²⁴ Assuming Swain's guilty plea for following too closely shows Swain breached the duty of care, in the absence of causation, the

220. *Id.* at 719, 639 S.E.2d at 320.

221. *Id.* The plaintiff initially filed suit against the drivers of the last three cars in the line, but summary judgment was granted for the driver of the eighth car (the plaintiff's car was third). *Id.* at 720 n.1, 639 S.E.2d at 321 n.1. In addition, the plaintiff could not prove who caused the accident, and summary judgment was still pending for the driver of the seventh car. Consequently, the plaintiff dismissed that case and re-filed it against Swain only, who drove the last car in the line, several cars behind the plaintiff. *Id.*

222. *Id.* at 719-20, 639 S.E.2d at 320.

223. *Id.* at 720-21, 639 S.E.2d at 321.

224. *Id.* at 721, 639 S.E.2d at 321.

plaintiff has no basis for recovery.²²⁵ The court noted that the only evidence suggesting Swain's negligence caused the accident was based on the plaintiff's father's affidavit.²²⁶ However, the contradictory testimony rule precluded his affidavit testimony because it directly contradicted his deposition testimony.²²⁷ Therefore, the evidence only showed that a series of collisions occurred and that Swain caused one of the collisions; however, no evidence indicated that Swain's actions caused the plaintiff's injury.²²⁸

225. *Id.*

226. *Id.* at 722, 639 S.E.2d at 322.

227. *Id.*

228. *Id.*, 639 S.E.2d at 322-23.