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# Torts

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## I. DEFAMATION

In *Scouten v. Amerisave Mortgage Corp.*,<sup>1</sup> Stephen Scouten, a former employee of Amerisave Mortgage Corporation, filed suit against Amerisave, Information Technology Force, Inc., and several Amerisave employees, asserting claims under the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO Act)<sup>2</sup> and for defamation and intentional infliction of emotional distress. The statements that were the basis for the defamation claims were made solely to the employees of Amerisave and were at no point disseminated outside the corporation. Amerisave moved for dismissal of the complaint based on the fact that there was no allegation in the complaint that any of the allegedly defamatory statements were published to anyone outside the corporation and, therefore, there was no publication of the slander. The Georgia Court of Appeals affirmed the dismissal, holding that Scouten failed to state a claim because he did not allege that the false statements were disseminated outside the corporation.<sup>3</sup>

The Georgia Supreme Court reversed the court of appeals decision, holding that Scouten had indeed stated a claim upon which relief could be granted.<sup>4</sup> The court noted that publication of slander “occurs when

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1. 283 Ga. 72, 656 S.E.2d 820 (2008).
2. O.C.G.A. §§ 16-14-1 to -15 (2007).
3. *Scouten*, 283 Ga. at 72, 656 S.E.2d at 821.
4. *Id.* at 74, 656 S.E.2d at 822.

the slander is communicated to anyone other than the person slandered,<sup>5</sup> but that an exception to that general definition of slander exists “when the communication is intracorporate, or between members of unincorporated groups or associations, and is heard by one who, because of his/her duty or authority has reason to receive the information, there is no publication of the allegedly slanderous material.”<sup>6</sup> The court noted, however, that this exception is not absolute “[a]s subsequent cases have made clear, not all intracorporate statements come within the exception, only those statements received by one who because of his duty or authority has reason to receive the information.”<sup>7</sup>

The court noted that Scouten’s complaint stated that the alleged defamation was “disseminated to employees with no need to have access to his private personnel information.”<sup>8</sup> Because at the motion to dismiss stage a complaint must be construed in the light most favorable to the pleader, the court held that it was possible within the framework of the complaint to introduce evidence that the statements were disseminated to individuals within Amerisave who had no duty or authority giving them reason to receive the information.<sup>9</sup> Therefore, the supreme court reversed and Scouten was allowed to proceed with his case.<sup>10</sup>

*Scouten* provides a few items of note. First, it provides a warning to corporations that they should be careful to distribute information within the corporation only to those who have a duty and authority to have knowledge of a situation. Second, while *Scouten* dealt with a motion to dismiss and not a motion for summary judgment, it will be interesting to see how the court deals with this situation when a motion for summary judgment is filed based on the intracorporate communication defense to publication. Practitioners should carefully craft discovery to deal with this issue should it arise in a defamation case.

The court of appeals dealt with slander per se in *Bullard v. Bouler*.<sup>11</sup> Bullard and Bouler had been involved in a previous trespass dispute that Bullard had won. In the previous dispute, Bullard alleged that Bouler caused a tree on Bullard’s property to be cut down. In the present case, Bullard, according to the facts as construed in her favor,

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5. *Id.* at 73, 656 S.E.2d at 822 (citing *Kurtz v. Williams*, 188 Ga. App. 14, 15, 371 S.E.2d 878, 880 (1988)).

6. *Id.* (quoting *Kurtz*, 188 Ga. App. at 15, 371 S.E.2d at 880).

7. *Id.* (citing *Walter v. Davidson*, 214 Ga. 187, 191-92, 104 S.E.2d 113, 116 (1958); *Atlanta Multispecialty Surgical Assoc. v. DeKalb Med. Ctr.*, 273 Ga. App. 355, 357, 615 S.E.2d 166, 168 (2005)).

8. *Id.*

9. *Id.*

10. *Id.* at 74, 656 S.E.2d at 822.

11. 286 Ga. App. 218, 649 S.E.2d 311 (2007).

took pictures on April 12, 2003 of the trees that had been cut down as evidence for the prior trespass suit. Shortly thereafter, after being contacted by Bouler, Officer R. J. Finley of the Fulton County Police Department came to Bullard's door and explained that Bouler had complained that Bullard was taking pictures of Bouler's wife in Bouler's own backyard. Bullard stated that this was not the case and explained the issue with the trees. Pertinent to this case, Officer Finley told Bullard that Bouler also said Bullard had been posting signs in her window that said, "9-11 F\_\_ You" and that Bouler had other witnesses who had seen these signs.<sup>12</sup>

Bullard felt that Officer Finley reported these allegations "with a look of utter contempt."<sup>13</sup> Bullard vehemently denied the charge to first Finley and again in an affidavit filed in this case.<sup>14</sup> Finley later corroborated Bullard's testimony in a sworn statement and said that Bouler had told him that Bullard had posted signs in a window "of a vulgar nature" that said "9-11 F\_\_ You" and that Bouler had witnesses.<sup>15</sup>

Bullard filed a defamation suit against Bouler and his wife (who was later dismissed), claiming that the allegation regarding the existence of the "9-11 F\_\_ You" sign accused her "of a debasing act that may exclude her from all of American society."<sup>16</sup> This is a claim for slander per se under section 51-5-4(a)(2) of the Official Code of Georgia Annotated (O.C.G.A.)<sup>17</sup> because damage is inferred.<sup>18</sup> The court reviewed the standard for slander per se established in *Bellemead, LLC v. Stoker*,<sup>19</sup> noting that "in order to constitute slander per se the words must be injurious on their face, extrinsic facts may not be considered, and it is inappropriate to rely on innuendo."<sup>20</sup> The court held that a slanderous

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12. *Id.* at 218, 649 S.E.2d at 312.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. O.C.G.A. § 51-5-4(a)(2) (2000).

18. O.C.G.A. § 51-5-4(b) (2000); *see Bellemead, LLC v. Stoker*, 280 Ga. 635, 637, 631 S.E.2d 693, 695 (2006).

19. 280 Ga. 635, 631 S.E.2d 693 (2006).

20. *Bullard*, 286 Ga. App. at 219, 649 S.E.2d at 313. The court continued, quoting *Bellemead*,

[A] court looks to the plain import of the words spoken in order to ascertain whether the words constitute slander per se. To be slander per se, the words are those which are recognized as injurious on their face—without the aid of extrinsic proof. Should extrinsic facts be necessary to establish the defamatory character of the words, the words may constitute slander, but they do not constitute slander per se. Thus, the court may not hunt for a strained construction in order to hold

meaning attributable to the statement that Bullard had displayed a sign stating “9-11 F\_\_ You” is not readily apparent from the plain meaning of that statement.<sup>21</sup> The court held that “[a]t most, Bouler’s words mean that Bullard is the type of person who would say to the public, ‘Nine-eleven, F\_\_ You,’” but that “to know what sort of person is being described, we would need to know the meaning of the sign itself.”<sup>22</sup> According to the court, that meaning is at best ambiguous; however, despite the fact that Bullard contended that Bouler

was asserting that she was the type of person who would disparage America’s loss on September 11, 2001 and that Bouler intended to inflame Officer Finley, a “first responder,” who might have taken offense at that thought . . . Bouler’s words may very well constitute slander, but they do not constitute slander per se because that meaning is not apparent from the plain meaning of the words.<sup>23</sup>

Therefore, summary judgment in favor of Bouler was appropriate.<sup>24</sup>

*Bullard* demonstrates that the standard established in *Bellemead*, which was discussed in the previous survey period,<sup>25</sup> will not be narrowly applied by the court of appeals and that, with respect to slander per se, statements, no matter how derogatory about a person, must clearly be injurious on their face and subject to no interpretation by the hearer.

## II. EMOTIONAL DISTRESS

In *Cook v. Covington Credit of Georgia, Inc.*,<sup>26</sup> “Charlie Cook sued Sharon Gravitt, John Carter, and their employer, Covington Credit of Georgia, Inc. [Covington Credit], alleging that he suffered damages as a result of defendants’ assault, battery, and intentional infliction of emotional distress.”<sup>27</sup> Cook had fallen behind on a loan he had taken from Covington Credit in November 2004. Gravitt and Carter,

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the words used as being defamatory as a matter of law, and the negative inference a hearer might take from the words does not subject the speaker to liability for slander per se. Furthermore, when words are defamatory per se, innuendo—which merely explains ambiguity where the precise meaning of terms used in the allegedly slanderous statement may require elucidation—is not needed.

*Id.* (quoting *Bellemead*, 280 Ga. at 637, 631 S.E.2d at 695).

21. *Id.*

22. *Id.*

23. *Id.* at 219-20, 649 S.E.2d at 313.

24. *Id.* at 220, 649 S.E.2d at 313.

25. Deron R. Hicks & Travis C. Hargrove, *Torts*, 59 MERCER L. REV. 397, 406-09 (2007).

26. 290 Ga. App. 825, 660 S.E.2d 855 (2008).

27. *Id.* at 825, 660 S.E.2d at 856.

employees of Covington Credit, had attempted to reach Cook by phone on numerous occasions but were unable to reach him. On November 22, 2004, Gravitt and Carter, in one last attempt to discuss Cook's default prior to Covington Credit filing a lawsuit, went to the hospital where Cook was employed as a janitor. Gravitt and Carter confronted Cook regarding his default on the loan.<sup>28</sup> When they did, "Cook became upset, asked them both to leave, and also asked them not to bother him at work."<sup>29</sup> Gravitt continued her attempt to discuss the matter with Cook despite Cook's request that Gravitt and Carter leave, at which point Cook pushed Gravitt to the ground. Carter intervened, was pushed by Cook, and the two began fighting. During the fight that ensued, Carter insulted Cook with racial epithets. The fight ended when hospital staff intervened and the police were called.<sup>30</sup>

Because of the incident, Cook's employer suspended Cook from work for three days and required him to undergo financial counseling. In November 2005, Cook filed suit against Gravitt, Carter, and Covington Credit for claims of assault, battery, and intentional infliction of emotional distress.<sup>31</sup> After Cook concluded his presentation of evidence, the "defendants moved for a directed verdict as to Cook's claim of intentional infliction of emotional distress, arguing that Cook had failed to show that defendants' conduct was extreme or outrageous and that he had failed to show that his emotional distress was severe."<sup>32</sup> The trial court granted the defendants' motion, and the jury returned a verdict in favor of the defendants for Cook's other claims.<sup>33</sup>

Cook appealed several issues, including the directed verdict against him on his claim for intentional infliction of emotional distress.<sup>34</sup> Cook claimed that the defendants' conduct was sufficiently extreme or outrageous and that his emotional distress was severe, as required to sustain a claim for intentional infliction of emotional distress.<sup>35</sup> The Georgia Court of Appeals noted that in determining whether conduct is sufficiently extreme and outrageous,

"Actionable conduct does not include insults, threats, indignities, annoyances, petty oppressions, or other vicissitudes of daily living but must go beyond all reasonable bounds of decency so as to be regarded

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28. *Id.* at 826, 660 S.E.2d at 856.

29. *Id.*

30. *Id.*

31. *Id.*, 660 S.E.2d at 856-57.

32. *Id.*, 660 S.E.2d at 857.

33. *Id.*

34. *Id.* at 827, 660 S.E.2d at 857.

35. *Id.*

as atrocious and utterly intolerable in a civilized community.”<sup>36</sup>  
“Whether a claim rises to the requisite level of outrageousness and  
egregiousness to sustain a claim for intentional infliction of emotional  
distress is a question of law.”<sup>37</sup>

Applying these standards, the court concluded that the actions taken by the defendants, including making numerous telephone calls and visiting Cook at work, were not sufficient to constitute outrageous and egregious conduct as a matter of law.<sup>38</sup> “[T]hreatening language in the context of collecting a debt does not go beyond all bounds of decency and cannot be regarded as utterly intolerable in a civilized community.”<sup>39</sup> Regarding the fight, Cook conceded that he initiated the physical altercation; thus, any emotional distress caused by the fight could not be the basis for a claim.<sup>40</sup> The racial statements, although demeaning and degrading, did not constitute egregious or outrageous behavior sufficient to constitute a claim for intentional infliction of emotional distress.<sup>41</sup>

In addition to failing to demonstrate that the conduct of the defendants was sufficiently outrageous, the court held that Cook failed to establish as a matter of law that the emotional distress he suffered as a result of his confrontation with Gravitt and Carter was severe.<sup>42</sup> Cook “testified that he only saw a psychiatrist on one occasion shortly after the incident and that he was deemed to be in no need of anger management counseling.”<sup>43</sup> The mandatory counseling that he attended was to address his financial issues and was not related to his alleged emotional distress.<sup>44</sup> “Cook also acknowledged that he did not lose his job as a result of the incident, and in fact, he received assistance from the hospital in repaying the Covington Credit loan.”<sup>45</sup> Therefore, as a matter of law, Cook failed to state a claim for intentional infliction of emotional distress.<sup>46</sup>

*Cook* is certainly a green light for those in the debt collection industry to take aggressive action, such as visiting a debtor at work in an attempt

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36. *Id.* at 828, 660 S.E.2d at 858 (quoting *Pierce v. Wise*, 282 Ga. App. 709, 713, 639 S.E.2d 348, 351 (2006)).

37. *Id.* (quoting *Lockhart v. Marine Mfg. Corp.*, 281 Ga. App. 145, 147, 635 S.E.2d 405, 407 (2006)).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 828-29, 660 S.E.2d at 858.

45. *Id.* at 829, 660 S.E.2d at 858.

46. *Id.*

to collect a debt, as long as the debt collector complies with the necessary debt collection laws. It is notable that in *Cook*, the physical altercation that ensued was started by the debtor and not by the debt collectors. Certainly, if the physical altercation is started by the debt collector, in addition to battery and assault claims, it is likely that a claim for emotional distress would also survive. Therefore, those in the debt collection business should certainly not read *Cook* as a *carte blanche* with regard to the tactics taken to collect a debt.

### III. MEDICAL MALPRACTICE

In *Monfort v. Colquitt County Hospital Authority*,<sup>47</sup> the Georgia Court of Appeals dealt with the one-year statute of limitations to file suit under O.C.G.A. § 9-3-72<sup>48</sup> when a foreign object is left in a person.<sup>49</sup> The defendants moved for summary judgment, which was granted based on the allegation that the plaintiff did not file the lawsuit within one year of discovering a surgical sponge in her body.<sup>50</sup>

Annette Monfort had an abdominal hysterectomy on October 8, 2001 at the Colquitt Regional Medical Center (CRMC). Due to additional health complications, Monfort had to receive continuing medical care following her discharge from the hospital. On July 1, 2005, Monfort went to see her family practice physician because she was experiencing abdominal pain. Her physician ordered a CAT scan that revealed a large cystic-appearing abdominal mass lesion, which the physician believed was probably cancerous.<sup>51</sup> Monfort sought a second opinion in September 2005, and that physician, after reviewing the CAT scan, believed that the mass was “an abdominal mass with unclear etiology.”<sup>52</sup> A third physician performed an ultrasound in October 2005 and believed the mass to be a possible ovarian cyst. On December 5, 2005, Monfort went to the Atlanta Medical Center complaining of a lack of appetite, increasing abdominal girth, and abdominal pain.<sup>53</sup> The doctors at the Atlanta Medical Center believed that the earlier CAT scan revealed a “large intra-abdominal abscess containing what appeared to be a foreign body consistent with a laparotomy sponge.”<sup>54</sup> An exploratory laparoscopy was performed on December 7, 2005, with the purpose

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47. 288 Ga. App. 202, 653 S.E.2d 535 (2007).

48. O.C.G.A. § 9-3-72 (2007).

49. See *Monfort*, 288 Ga. App. at 204, 653 S.E.2d at 536.

50. *Id.* at 202, 204, 653 S.E.2d at 536, 537.

51. *Id.* at 203, 653 S.E.2d at 536.

52. *Id.*

53. *Id.*

54. *Id.*

of the procedure identified on the informed consent form being “removal of a retained foreign body parenthetically described as an ‘OR sponge.’”<sup>55</sup> The laparoscopy was performed on December 9, 2005, at which time it was confirmed that a surgical sponge caused the mass that was present on the CAT scan. Monfort filed suit on December 11, 2006 against the Colquitt County Hospital Authority and various CRMC medical personnel who assisted with the hysterectomy.<sup>56</sup>

The statute of limitations for medical malpractice is two years under O.C.G.A. § 9-3-71;<sup>57</sup> however, this period does not apply when a foreign object is left in a person’s body.<sup>58</sup> When that occurs, under O.C.G.A. § 9-3-72, an action must be brought within one year of the discovery of the negligent or wrongful act or omission.<sup>59</sup>

The court first examined a previous holding in *Abend v. Klaudt*,<sup>60</sup> when the court held that “the one-year limitation period of OCGA § 9-3-72 did not start to run until [the patient] knew or by the exercise of ordinary care should have learned that a foreign object was in her body which was causing the injury.”<sup>61</sup> The court in *Abend* determined that this question is a mixed question of fact and law for the jury to decide.<sup>62</sup>

In *Monfort* the plaintiff experienced symptoms relating to the sponge left in her body and consulted several physicians about the problem, all of whom provided her with varying diagnoses.<sup>63</sup> The court noted that if it construed the evidence in the plaintiff’s favor, a jury would be authorized to find that when Monfort signed the December 7, 2005 informed consent form for the operation that took place on December 9, 2005, the Atlanta Medical Center could have at most informed her that it had tentatively identified an “OR sponge” in her abdomen and told her that this diagnosis could not be confirmed until the laparoscopy two days later on December 9, 2005.<sup>64</sup> Accordingly, the court left it up to the

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55. *Id.*

56. *Id.*

57. O.C.G.A. § 9-3-71 (2007).

58. *See id.* § 9-3-72.

59. *Id.*

60. 243 Ga. App. 271, 531 S.E.2d 722 (2000).

61. *Monfort*, 288 Ga. App. at 204, 653 S.E.2d at 537 (quoting *Abend*, 243 Ga. App. at 273, 531 S.E.2d at 724). This is referred to as the “discovery rule,” which deals with a situation in which an injury is known but its cause is not and is considered to be a continuing tort. *Id.* at 204 n.5, 653 S.E.2d at 537 n.5 (citing *King v. Seitzingers, Inc.*, 160 Ga. App. 318, 319-20, 287 S.E.2d 252, 254-55 (1981)).

62. *Id.* at 205, 653 S.E.2d at 537 (citing *Abend*, 243 Ga. App. at 273, 531 S.E.2d at 724).

63. *Id.*

64. *Id.* Notably, the suit was filed on a Monday. *Id.* at 203, 653 S.E.2d at 536. The expiration of the statute of limitations had occurred on a Saturday; therefore, plaintiff had

jury to determine whether in the exercise of ordinary care Monfort should have learned on December 7, 2005 that the foreign object had been left in her body during the performance of the 2001 hysterectomy.<sup>65</sup>

In *Hawkins v. OB-GYN Associates, P.A.*,<sup>66</sup> the plaintiff appealed a directed verdict for the defendants in a case alleging mismanagement of an obstetrical complication known as shoulder dystocia. In 1998 Dr. Espy used a vacuum extractor and forceps to aid in the delivery of plaintiff's son, Trenton. Dr. Espy testified that after he delivered Trenton's head, he cradled it in his hands, applied gentle traction, and when he felt resistance, he stopped pulling and diagnosed shoulder dystocia. Shoulder dystocia is an unpredictable and unpreventable condition that occurs when an infant's shoulder becomes lodged behind its mother's pubic bone, thereby preventing delivery of the infant's shoulders and body. Dr. Espy relieved the condition within thirty to forty seconds by using the McRoberts maneuver (pulling the patient's legs up and back toward her abdomen to open up and rotate her pelvic bone) because the condition presented a potential threat to the flow of oxygen to Trenton's brain due to potential compression of the umbilical cord.<sup>67</sup>

After Trenton was born, he was diagnosed as having suffered damage to the nerves in his right shoulder. Surgery was performed on Trenton that partially corrected the condition; however, further corrective surgery would be required. The plaintiff's expert testified that the shoulder injury was caused by the negligent application of excessive downward lateral traction to Trenton's head at the time Dr. Espy diagnosed shoulder dystocia or as he managed it thereafter.<sup>68</sup>

The trial court directed a verdict for the defendant due to a lack of causation evidence.<sup>69</sup> The plaintiff's expert testified as to causation, claiming his opinion was based on a "differential diagnosis," which is 'a patient-specific process of elimination that medical practitioners use to identify the most likely cause of [an injury] from a list of possible causes.'<sup>70</sup> The court noted that O.C.G.A. § 24-9-67.1(f)<sup>71</sup> authorizes

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until December 9, 2006 for the expiration of the one-year period. *See id.* at 205, 653 S.E.2d at 537.

65. *Id.* at 205, 653 S.E.2d at 537.

66. 290 Ga. App. 892, 660 S.E.2d 835 (2008).

67. *Id.* at 892, 660 S.E.2d at 836-37.

68. *Id.* at 893, 660 S.E.2d at 837.

69. *Id.*

70. *Id.* (alteration in original) (quoting *Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 254 (2d Cir. 2005)).

71. O.C.G.A. § 24-9-67.1(f) (Supp. 2008).

Georgia courts in civil cases to consider federal authority to determine the admissibility of expert evidence.<sup>72</sup> “A differential diagnosis satisfies a *Daubert* analysis if the expert uses reliable methods . . . based on scientifically valid decisions as to which potential causes can be “ruled in” or “ruled out,”” making such determinations on a case-by-case basis.<sup>73</sup> The court of appeals noted that if an expert uses differential diagnosis to rule out potential causes of an injury, the expert must also rule in the suspected cause using a scientifically valid methodology.<sup>74</sup>

Following the above framework, the court noted that the plaintiff’s expert ruled out several different possible causes of Trenton’s injuries.<sup>75</sup> However, the expert did not “rule in” excessive traction to Trenton’s head at the time of diagnosis utilizing a methodology that was scientifically valid.<sup>76</sup> In fact, the expert only offered a bare assumption that the theory alleged by the plaintiff was “more probably than not” the cause of the injuries.<sup>77</sup> The plaintiff’s expert’s testimony was in direct contravention to all other evidence in the case, and the expert admitted that his theories of causation as to Trenton’s condition were not submitted to peer review and were contrary to those taught by the American College of Obstetricians and Gynecologists.<sup>78</sup>

The court next noted that Georgia law does not recognize an inference of negligence for an unintended result and also that the doctrine of *res ipsa loquitur* does not apply to medical malpractice cases.<sup>79</sup> In addition to the failure to “rule in” the cause alleged by the plaintiff, the plaintiff’s expert presented no evidence that the standard of care was violated; rather, the expert, relying on circumstantial evidence, inferred negligence merely because of the injury.<sup>80</sup> No evidence existed of excessive traction, yet the expert relied on this assumption in formulating his

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72. *Hawkins*, 290 Ga. App. at 893, 660 S.E.2d at 837 (citing *Mason v. Home Depot U.S.A.*, 283 Ga. 271, 658 S.E.2d 603 (2008)).

73. *Id.* (alteration omitted) (ellipsis in original) (quoting *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2007)).

74. *Id.*, 660 S.E.2d at 837-38 (citing *Ruggiero*, 424 F.3d at 254).

75. *Id.* at 893-94, 660 S.E.2d at 838.

76. *Id.* at 894, 660 S.E.2d at 838.

77. *Id.*

78. *Id.*

79. *Id.* (quoting *Oakes v. Magat*, 263 Ga. App. 165, 168, 587 S.E.2d 150, 152 (2003)). In fact, “It is presumed that medical or surgical services were performed in an ordinarily skillful manner.” *Id.* (quoting *Oakes*, 263 Ga. App. at 168, 587 S.E.2d at 152).

80. *Id.* at 894-95, 660 S.E.2d at 838.

opinion.<sup>81</sup> Therefore, the court affirmed the directed verdict in favor of the defendant.<sup>82</sup>

#### IV. NEGLIGENCE

In *Williams v. Ngo*,<sup>83</sup> Jibade Asim Williams was injured in an automobile accident with Duy Q. Vo, who was alleged to be intoxicated at the time. The vehicle that Vo was driving was rented by First Consulting Group, Inc. for use by its employee, Lam Dac Ngo. Ngo was a passenger when the collision occurred and was sued along with Vo for the injuries Williams suffered; the claim asserted that Ngo was liable under the doctrine of negligent entrustment. Ngo was granted summary judgment, and Williams appealed.<sup>84</sup>

The record showed that Ngo went to a friend's house at 2:00 or 3:00 in the afternoon of December 25, 2004, at which time he had the rental car he was provided by his employer. Between 4:00 p.m. and 5:00 p.m., Ngo and Vo left the party to go to another party where one of Vo's friends lived. Ngo let Vo drive to the second party because Ngo did not know the way there. After 6:00 p.m., Ngo and Vo left the party and drove to a gas station to pick up two friends. At 7:00 p.m., as Vo drove them from the gas station back to the friend's house, the accident occurred. After the collision, all the passengers and Vo got out of the car, and Ngo, who was in the front passenger seat and had suffered a head injury, was unable to identify Vo as the driver. Vo came to the police station several hours later and spoke to a police officer about the accident. Vo was intoxicated at the time.<sup>85</sup>

Ngo testified that he had one beer, he saw Vo have one beer at the first party, and that he did not know if Vo had anything else to drink. He also testified that beer was served at all the parties, that he did not know of Vo's tolerance for alcohol, that he did not recall any alcohol being in the car, that he did not know if Vo was intoxicated when the accident occurred, and that Vo neither smelled of alcohol nor spoke abnormally when Ngo gave him the keys to the car.<sup>86</sup>

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81. *Id.* at 895, 660 S.E.2d at 838.

82. *Id.* at 897, 660 S.E.2d at 840. The court also dealt with an evidentiary issue regarding admission of a videotaped deposition and the exclusion of another expert witness. *See id.* at 895-97, 660 S.E.2d at 839-40. However, this case is addressed herein regarding the causation issues rather than the evidentiary issues, so those issues are not addressed.

83. 289 Ga. App. 44, 656 S.E.2d 193 (2007).

84. *Id.* at 44, 656 S.E.2d at 194.

85. *Id.* at 44-45, 656 S.E.2d at 194-95.

86. *Id.* at 45, 656 S.E.2d at 195.

Summary judgment was granted on the basis that Williams failed to come forward with any affirmative evidence indicating that Ngo had actual knowledge of Vo's incompetence when he allowed Vo to use the rental car.<sup>87</sup> The Georgia Court of Appeals stated that because Williams did not allege that Ngo knew of a habit of recklessness on Vo's part but rather alleged negligent entrustment on the basis of knowledge of intoxication, it was incumbent on Williams to come forward with some affirmative evidence that Ngo had actual knowledge Vo was incompetent to drive.<sup>88</sup> The fact that the police officer at the scene detected the odor of alcohol on Vo and the fact that Vo showed up in an intoxicated state later (after the accident) were not relevant to Ngo's actual knowledge prior to the accident.<sup>89</sup> The court noted that "negligent entrustment does not apply 'merely because the owner, by the exercise of reasonable care and diligence, could have ascertained the fact of the incompetency of the driver'"; rather, actual knowledge must be shown.<sup>90</sup> Although Ngo was a passenger in the car and both were at parties where alcohol was served, no evidence existed that Ngo knew that Vo was currently driving or had a history of driving while under the influence of alcohol.<sup>91</sup> Therefore, summary judgment was appropriate.<sup>92</sup>

In *Matlack v. Cobb Electric Membership Corp.*,<sup>93</sup> Vivian Matlack, as parent and natural guardian of Eric Matlack, sued Cobb Electric Membership Corporation (Cobb Electric), claiming that the negligent maintenance of a "guy wire" caused injury to her son, Eric. Cobb Electric moved for summary judgment and the motion was granted.<sup>94</sup>

The record showed that Eric was visiting a friend's house when he decided to ride a dirt bike onto a "pathway" on the shoulder of the road that was on private property and over which Cobb Electric had an easement. Eric drove a short way and struck a guy wire, or cable, that was maintained by Cobb Electric and that was attached to the top of a utility pole and extended to the ground; he was injured as a result of striking the guy wire. Eric testified that he could not see the guy wire although he could see the pole. The plaintiff alleged that Cobb Electric was negligent by failing to mark the guy wire so that it was more visible. The trial court found that Eric was a trespasser and was not

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87. *Id.*

88. *Id.* at 46, 656 S.E.2d at 195.

89. *Id.*

90. *Id.*, 656 S.E.2d at 196 (quoting *Roebuck v. Payne*, 109 Ga. App. 525, 526, 136 S.E.2d 399, 401 (1964)).

91. *Id.*

92. *Id.* at 46-47, 656 S.E.2d at 196.

93. 289 Ga. App. 632, 658 S.E.2d 137 (2008).

94. *Id.* at 632, 658 S.E.2d at 138.

wantonly or willfully injured by Cobb Electric and that the guy wire was a static condition that was open and obvious, and therefore summary judgment for Cobb Electric was appropriate. The plaintiff contended that the trial court erred in concluding that Eric was a trespasser rather than a licensee or an invitee and further contended that the guy wire was not open and obvious and that the wire was a mantrap.<sup>95</sup>

The court first noted that Eric was, at best, a licensee because there was no suggestion that the owner of the property or Cobb Electric knew Eric was on the property or that either benefited from his presence.<sup>96</sup> Even if Eric was a licensee, Cobb Electric could only be held liable for willful or wanton injury.<sup>97</sup> This has been defined as conduct “so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent to do harm or inflict injury.”<sup>98</sup> This can occur if a landowner fails to prevent injury to a person who is or may be expected to be within the range of a dangerous act or a hidden peril on one’s premises.<sup>99</sup>

The court noted that there was no evidence that Cobb Electric intended to injure Eric and no evidence that the guy wire was a hidden peril or, most importantly, that it had been placed with the intent of doing harm to an anticipated trespasser.<sup>100</sup> While a landowner has a duty to keep property free from mantraps or pitfalls,<sup>101</sup> the theory of a mantrap is premised upon the fact that the owner expects a trespasser or licensee and prepares the premises to do him injury.<sup>102</sup>

The final argument presented by the plaintiff was that Cobb Electric assumed a duty to ensure the safety of those traversing its property by virtue of its inspection procedures.<sup>103</sup> The court noted that even

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95. *Id.* at 633, 658 S.E.2d at 138-39.

96. *Id.* at 634, 658 S.E.2d at 139.

97. *Id.* (citing O.C.G.A. § 51-3-2(b) (2000)).

98. *Id.* (quoting *Trulove v. Jones*, 271 Ga. App. 681, 681, 610 S.E.2d 649, 651 (2005)).

99. *Id.* (quoting *Ellis v. Hadnott*, 282 Ga. App. 584, 585, 639 S.E.2d 559, 560 (2006)).

100. *Id.*, 658 S.E.2d at 139-40.

101. *Id.*, 658 S.E.2d at 140 (citing *Harrison v. Plant Improvement Co.*, 273 Ga. App. 884, 886, 616 S.E.2d 123, 125 (2005)).

102. *Id.* at 634-35, 658 S.E.2d at 140 (quoting *Buce v. Fudge*, 281 Ga. App. 221, 223, 635 S.E.2d 788, 790 (2006)).

103. *Id.* at 635, 658 S.E.2d at 140.

“One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the

assuming for argument's sake that Cobb Electric undertook its safety inspections for the benefit of third parties, there was no evidence that any failure increased the risk of harm to Eric or that Eric relied on the undertaking; thus, the rule of law had no application and summary judgment was appropriate.<sup>104</sup>

#### V. PREMISES LIABILITY

In *Dickerson v. Guest Services Co. of Virginia*,<sup>105</sup> the Georgia Supreme Court reversed the grant of summary judgment to an amusement park in a slip-and-fall action.<sup>106</sup> The plaintiff, a patron at the Six Flags Over Georgia amusement park, was injured when she slipped and fell on a set of stairs leading from a restaurant to a store. Although it had been raining that day, the plaintiff denied seeing any water on the stairs until after she fell. Moreover, the plaintiff's daughter provided an affidavit in which she stated that she had informed an employee of the amusement park about the water on the stairs prior to her mother's fall. The amusement park, in turn, offered evidence of its inspection procedures as well as evidence of the location of the stairs, which were apparently located near the entrance to the restaurant. The trial court granted the defendant's motion for summary judgment. On appeal, the Georgia Court of Appeals affirmed.<sup>107</sup> In affirming the trial court's grant of summary judgment, the court of appeals held that the plaintiff failed to present evidence "that Six Flags exposed her to any unreasonable risk of harm."<sup>108</sup> In particular, the court of appeals held that "an invitee is charged with constructive knowledge that rainy weather can cause interior floors near entrances to become slippery from water tracked in on patrons' feet."<sup>109</sup> The supreme court, however, granted certiorari and reversed the trial court's grant of summary judgment.<sup>110</sup>

As a prelude to its deconstruction of the court of appeals decision, the supreme court harkened back to its 1997 decision in *Robinson v. Kroger Co.*:<sup>111</sup>

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undertaking."

*Id.* (quoting *Huggins v. Aetna Cas. & Sur. Co.*, 245 Ga. 248, 249, 264 S.E.2d 191, 192 (1980)).

104. *Id.*

105. 282 Ga. 771, 653 S.E.2d 699 (2007).

106. *Id.* at 774, 653 S.E.2d at 701.

107. *Id.* at 771, 653 S.E.2d at 700.

108. *Dickerson v. Guest Servs. Co. of Va.*, 281 Ga. App. 387, 390, 636 S.E.2d 44, 47 (2006).

109. *Id.* at 389, 636 S.E.2d at 46.

110. *Dickerson*, 282 Ga. at 771, 774, 653 S.E.2d at 700, 701.

111. 268 Ga. 735, 493 S.E.2d 403 (1997).

Ten years ago in *Robinson* . . . this Court sought to correct an observed tendency to grant summary judgment as a matter of course to defendants in premises liability cases . . . . Our review of the record in this case and the pertinent appellate decisions persuades us that the present case represents the sort of adjudication *Robinson* . . . was intended to prevent.<sup>112</sup>

The supreme court then noted that although the court of appeals briefly touched upon the issue of superior knowledge, it

moved past the issue of relative knowledge of the parties and addressed the issue of unreasonable risk, holding that Six Flags had not exposed [the plaintiff] to an unreasonable risk of harm since “a slippery condition caused solely by rainwater is not a hazard because it presents no unreasonable risk of harm.”<sup>113</sup>

The supreme court, however, noted that this statement by the court of appeals was “overbroad in the context of a fall in the interior of a commercial establishment.”<sup>114</sup> The supreme court acknowledged that although it is “common knowledge that the ground outside gets wet on rainy days,” the same cannot be said for “a portion of an interior space where an invitee has no reason to expect water to accumulate on the floor.”<sup>115</sup> Accordingly, because of factual questions surrounding the location of the stairs relative to the entrance to the premises, the court held that it could not “determine as a matter of law that a reasonable person would have anticipated that the stairs might get wet on a rainy day.”<sup>116</sup> The court therefore held that “the question of relative knowledge of the hazard must be addressed.”<sup>117</sup> Based on the affidavit of the plaintiff’s daughter, the court held that there was some evidence from which a jury could conclude that the amusement park had actual knowledge of the wet stairs.<sup>118</sup> On the other hand, the court noted that “the evidence establishes at most constructive knowledge of the hazard on [the plaintiff’s] part.”<sup>119</sup> Summary judgment was therefore inappropriate because the amusement park “must be deemed for

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112. *Dickerson*, 282 Ga. at 771-72, 653 S.E.2d at 700.

113. *Id.* at 772, 653 S.E.2d at 700 (quoting *Dickerson*, 281 Ga. App. at 389, 636 S.E.2d at 46).

114. *Id.*

115. *Id.*, 653 S.E.2d at 701.

116. *Id.* at 773, 653 S.E.2d at 701.

117. *Id.*

118. *Id.*

119. *Id.*

purposes of summary judgment to have superior knowledge of the hazard.”<sup>120</sup>

In *La Quinta Inns, Inc. v. Leech*,<sup>121</sup> the court of appeals reversed in part and affirmed in part the trial court’s ruling in a wrongful death action arising from a suicide at a hotel.<sup>122</sup> John Leech had been living at a La Quinta Inn Hotel for approximately six months while separated from his wife. On the evening of May 20, 2004, Leech had dinner with his girlfriend, his son James, and one of James’s friends. James and his friend were in town to attend the high school graduation of Leech’s daughter. Later that same evening, Leech returned to the hotel, at which time he booked a room for James’s friend on the seventh floor of the hotel. Shortly after 1:00 a.m. on May 21, 2004, James and his friend went to the hotel and asked the hotel clerk for Leech’s room number. The clerk told James that she could not give out the room number; however, the clerk offered to call Leech to let him know that James and his friend were at the hotel. Leech was not in his room when the clerk called. Rather, the clerk eventually located Leech in the seventh-floor room he had rented for his son’s friend. Leech told the clerk that he would call James on his cell phone, which he proceeded to do.<sup>123</sup>

During the course of the conversation with his father, James became concerned that his father was going to harm himself. At one point, James covered the cell phone and instructed his friend to get help. Apparently, however, the hotel clerk did not respond quickly to the request for assistance. As a result, police officers did not arrive at the hotel until 1:34 a.m. The hotel clerk then told the officers that Leech had rented two rooms, but she did not know which room he was in at the time. The clerk did not mention that Leech had been in the seventh-floor room the last time they had spoken. The officers went to Leech’s regular room, and James went to the seventh-floor room. When James arrived at the seventh-floor room, he heard his father speaking on a phone. James knocked on the door. Leech, however, did not respond. James then kicked in the door only to find the hotel room empty. The window in the room, however, was open. When James looked through the window, he discovered his father’s body on the ground below. No one, however, actually saw Leech jump from the window.<sup>124</sup> Moreover, Leech “had no history of depression or threats of suicide.”<sup>125</sup> With the

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120. *Id.* at 773-74, 653 S.E.2d at 701.

121. 289 Ga. App. 812, 658 S.E.2d 637 (2008).

122. *Id.* at 819, 658 S.E.2d at 642.

123. *Id.* at 813-14, 658 S.E.2d at 638-39.

124. *Id.* at 814, 658 S.E.2d at 639.

125. *Id.*

exception of the brief conversation with his son immediately prior to his death, Leech had not otherwise given any indication that he was contemplating suicide.<sup>126</sup>

Leech's wife subsequently brought suit against the hotel and the clerk, alleging alternate theories of recovery depending on the manner of Leech's death. If Leech accidentally fell through the window, Mrs. Leech alleged that the hotel "negligently maintained hazardous premises, in that the window in Mr. Leech's hotel room lacked window stops, opened to an overly large aperture, opened too low to the ground, and was situated near a tripping hazard."<sup>127</sup> On the other hand, if Leech committed suicide, Mrs. Leech alleged that the hotel clerk, as the hotel's agent, "negligently failed to timely intervene to prevent Mr. Leech from jumping to his death."<sup>128</sup> The trial court granted summary judgment to La Quinta on the plaintiff's first claim on the basis that the evidence of record established that Leech had committed suicide and that his death was not the result of an accident. The trial court, however, denied La Quinta's motion on the second claim.<sup>129</sup> The court of appeals granted La Quinta's application for interlocutory appeal of the trial court's denial of its motion of the plaintiff's second claim.<sup>130</sup> The plaintiff cross-appealed the trial court's "ruling that the evidence of record demand[ed] a finding that Mr. Leech committed suicide."<sup>131</sup>

On her cross-appeal, the plaintiff argued "that, because there is a presumption under Georgia law in favor of accidental death and against suicide, the trial court erred in ruling that the evidence in the record demands a finding that Mr. Leech committed suicide."<sup>132</sup> The court of appeals, however, held that even if Leech's death was accidental, the plaintiff's claim failed as a matter of law.<sup>133</sup> As the court of appeals noted, "[a] premises owner or occupier is not liable for an invitee's injuries caused by a dangerous condition if the invitee had equal or superior knowledge of the danger and voluntarily chose to encounter the hazardous condition or failed to exercise ordinary care to avoid it."<sup>134</sup> In the case sub judice, it was undisputed that the window in the seventh-floor room could be opened wider than Leech's shoulders "and

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126. *Id.* at 815, 658 S.E.2d at 639-40.

127. *Id.*, 658 S.E.2d at 640.

128. *Id.*

129. *Id.*

130. *Id.* at 812, 658 S.E.2d at 638.

131. *Id.*

132. *Id.* at 817-18, 658 S.E.2d at 641.

133. *Id.* at 818, 658 S.E.2d at 641-42.

134. *Id.*, 658 S.E.2d at 642 (citing *Snellgrove v. Hyatt Corp.*, 277 Ga. App. 119, 124, 625 S.E.2d 517, 522 (2006)).

reached from knee-level nearly to the top of Mr. Leech's head."<sup>135</sup> According to the court of appeals, "[i]t is common knowledge that in a multistory building an unguarded opening with such dimensions and vertical placement is dangerous, given that a person walking or standing in a hotel room might stumble or lose his balance and fall."<sup>136</sup> Moreover, the court noted that the "actual risk" was created when Leech opened the window.<sup>137</sup> Therefore, although the court recognized that a "proprietor's actual or constructive knowledge of a design or construction defect is presumed,"<sup>138</sup> there was "no evidence from which a jury could infer that La Quinta's knowledge of the hazard was *superior* to Mr. Leech's knowledge."<sup>139</sup> As such, the court of appeals affirmed the trial court's grant of summary judgment of this claim.<sup>140</sup>

Regarding the plaintiff's second claim, La Quinta argued that the plaintiff failed to produce any evidence that the clerk's acts or omissions were the proximate cause of Leech's suicide.<sup>141</sup> As noted by the court of appeals, "the inquiry is whether the causal connection between the defendant's conduct and the injury is too remote for the law to countenance a recovery."<sup>142</sup> In this respect, the existence of an independent act by someone other than the defendant that "was not foreseeable by [the] defendant, was not triggered by [the] defendant's act, and which was sufficient of itself to cause the injury" operates to break the chain of causation.<sup>143</sup> "Generally, suicide is an unforeseeable intervening cause of death which absolves the tortfeasor of liability."<sup>144</sup> As there was no evidence that any act or omission on the part of the defendant actually triggered the suicide, Leech's act of suicide was the sole proximate cause of his death.<sup>145</sup> The trial court therefore erred in denying the hotel's motion for summary judgment on this claim.<sup>146</sup>

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (citing *Barton v. City of Rome*, 271 Ga. App. 858, 860, 610 S.E.2d 566, 569 (2005)).

139. *Id.*

140. *Id.* at 819, 658 S.E.2d at 642.

141. *Id.* at 815, 658 S.E.2d at 640.

142. *Id.* at 816, 658 S.E.2d at 640 (quoting *Brown v. All-Tech Inv. Group, Inc.*, 265 Ga. App. 889, 893, 595 S.E.2d 517, 521 (2003)).

143. *Id.* (quoting *McQuaig v. McLaughlin*, 211 Ga. App. 723, 726, 440 S.E.2d 449, 503 (1994)).

144. *Id.*, 658 S.E.2d at 641 (quoting *Dry Storage Corp. v. Piscopo*, 249 Ga. App. 898, 900, 550 S.E.2d 419, 420 (2001)).

145. *Id.* at 817, 658 S.E.2d at 641.

146. *Id.*

As with last year's survey article,<sup>147</sup> no survey of premises liability decisions is complete without a slip-and-fall resulting from the greatest danger known to mankind: the grape.<sup>148</sup> This year's winner is the court of appeals decision in *Blocker v. Wal-Mart Stores, Inc.*<sup>149</sup> in which the plaintiff slipped and injured her knee as a result of the callous actions of a lone grape located on the floor near the checkout lane at a Wal-Mart store.<sup>150</sup> The trial court granted Wal-Mart's motion for summary judgment on the basis that "it had neither actual nor constructive knowledge of the grape on which [the plaintiff] slipped."<sup>151</sup> The court of appeals, however, reversed on the basis that "Wal-Mart presented no evidence as to whether or how frequently its inspection procedure was carried out on the day [the plaintiff] fell."<sup>152</sup>

#### VI. DRAM SHOP ACT

Nathan Bowers waited tables and served drinks at Carlito's Mexican Bar and Grill #1. One evening, Bowers invited several friends, including Leilani Raker, to the restaurant for free meals and drinks. Raker arrived at the restaurant that evening with her ten-month old son, Brian. Although the evidence is somewhat contradictory—apparently due to the large amount of alcohol consumed by all the witnesses—it appears that Raker and Bowers became heavily intoxicated over the course of the evening. At about 12:45 a.m., Raker, Raker's infant son, and Bowers left the restaurant in Raker's truck. Raker eventually flipped her truck into a ditch. Raker's son was ejected from the truck during the wreck and suffered severe injuries. Subsequent to the accident, Raker relinquished her parental rights to her mother, who filed suit against the restaurant on behalf of the infant under Georgia's Dram Shop Act.<sup>153</sup> The action sought both compensatory and punitive damages. The restaurant filed a motion to dismiss the punitive damages claim, which was denied by the trial court.<sup>154</sup>

The trial court, however, subsequently granted the restaurant's motion for summary judgment on the basis that "there was no evidence that any

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147. Hicks & Hargrove, *supra* note 25.

148. Lest the Authors be accused of hyperbole, please note that the court of appeals likewise makes specific reference to the "hazard such as a grape" in its decision in *Blocker v. Wal-Mart Stores, Inc.*, 287 Ga. App. 588, 592, 651 S.E.2d 845, 848 (2007).

149. 287 Ga. App. 588, 651 S.E.2d 845 (2007).

150. *Id.* at 589, 651 S.E.2d at 846.

151. *Id.*

152. *Id.* at 591, 651 S.E.2d at 848.

153. O.C.G.A. § 51-1-40 (2000).

154. *Capp v. Carlito's Mexican Bar & Grill #1, Inc.*, 288 Ga. App. 779, 779-81, 655 S.E.2d 232, 234-35 (2007).

Carlito's employee served alcohol to the patron after she was noticeably intoxicated.<sup>155</sup> The plaintiff appealed the trial court's grant of summary judgment, and the restaurant cross-appealed the denial of its motion to dismiss the punitive damages claim.<sup>156</sup> In *Capp v. Carlito's Mexican Bar & Grill #1, Inc.*,<sup>157</sup> the Georgia Court of Appeals reversed the grant of summary judgment to the restaurant and reversed the trial court's denial of the restaurant's motion to dismiss the plaintiff's punitive damages claim.<sup>158</sup>

Georgia's Dram Shop Act provides in pertinent part that

a person who willfully, knowingly, and unlawfully 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.<sup>159</sup>

In reversing the trial court's grant of summary judgment to the restaurant, the court of appeals held that "a trier of fact could conclude that Bowers [as an agent of the restaurant] served Raker after midnight when she was noticeably intoxicated and that she consumed the drink prior to leaving."<sup>160</sup> The fact that Bowers was also intoxicated and could not recall whether Raker was intoxicated was "of no consequence."<sup>161</sup> The court stated,

Under the Georgia Dram Shop Act, a provider of alcohol is deemed to have knowledge if in the exercise of reasonable care, he should have known that the patron was noticeably intoxicated. . . . [I]n light of Bower's own intoxication, a jury could determine that he failed to exercise reasonable care in noting Raker's condition while serving her alcoholic beverages.<sup>162</sup>

The court of appeals likewise reversed the trial court's denial of the restaurant's motion to dismiss the plaintiff's claim for punitive

155. *Id.* at 779, 655 S.E.2d at 234.

156. *Id.*

157. 288 Ga. App. 779, 655 S.E.2d 232 (2007).

158. *Id.* at 784, 655 S.E.2d at 237.

159. O.C.G.A. § 51-1-40(b).

160. *Capp*, 288 Ga. App. at 782, 655 S.E.2d at 236.

161. *Id.* at 782 n.6, 655 S.E.2d at 236 n.6.

162. *Id.* (citation omitted). Interestingly, the court of appeals' opinion does not indicate if the trial court ever addressed the issue of whether Bowers knew that Raker would soon be driving a motor vehicle, an independent requirement of O.C.G.A. § 51-1-40(b).

damages.<sup>163</sup> The court of appeals first noted that subsection (f) of O.C.G.A. § 51-12-5.1<sup>164</sup> governed the plaintiff's claim for punitive damages.<sup>165</sup> That subsection provides in part that "if it is found . . . that the defendant acted or failed to act while under the influence of alcohol . . . to that degree that his or her judgment is substantially impaired, there shall be no limitation regarding the amount which may be awarded as punitive damages against an active tort-feasor."<sup>166</sup> The court noted, however, that the code section further provides that "such damages shall not be the liability of any defendant other than an active tort-feasor."<sup>167</sup> Therefore, according to the court of appeals, "punitive damages against a server of alcohol, such as Carlito's, are not authorized."<sup>168</sup>

#### VII. RESPONDEAT SUPERIOR LIABILITY

Early in the morning of August 2, 2003, Sandy Dowdell and several other patrons from a nearby nightclub entered a Krystal fast-food restaurant. The cashier at the restaurant, overwhelmed by the influx of customers, struggled to fill the orders. Dowdell, who was at the front of the line, grew impatient and asked the cashier when his order would be taken. The cashier responded by cursing at Dowdell. Dowdell responded in turn.<sup>169</sup> The cashier then "reached across the counter and struck Dowdell in the face."<sup>170</sup> A fight ensued between Dowdell and the cashier that was broken up by a couple of off-duty police officers working as security. Both Dowdell and the cashier were arrested. Dowdell subsequently brought suit against numerous defendants, including Krystal, and alleged a dizzying array of claims and theories of liability. Among other claims, Dowdell alleged that Krystal was liable under a theory of respondeat superior. The trial court, however, disagreed with Dowdell's theory of liability and granted Krystal's motion for summary judgment. Dowdell appealed.<sup>171</sup>

The Georgia Court of Appeals affirmed the trial court's ruling.<sup>172</sup> The court noted that "[t]wo elements must be present to render a

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163. *Id.* at 784, 655 S.E.2d at 237.

164. O.C.G.A. § 51-12-5.1(f) (2000).

165. *Capp*, 288 Ga. App. at 783, 655 S.E.2d at 237.

166. O.C.G.A. § 51-12-5.1(f).

167. *Capp*, 288 Ga. App. at 784, 655 S.E.2d at 237 (quoting O.C.G.A. § 51-12-5.1(f)).

168. *Id.*

169. *Dowdell v. The Krystal Co.*, 291 Ga. App. 469, 469, 662 S.E.2d 150, 152 (2008).

170. *Id.*

171. *Id.* at 469-70, 662 S.E.2d at 152-53.

172. *Id.* at 473, 662 S.E.2d at 155.

master liable for his servant's actions under respondeat superior: first, the servant must be in the furtherance of the master's business; and, second, he must be acting within the scope of his master's business."<sup>173</sup> However, in the case at hand, "the acts of striking Dowdell in the face and fighting with him were not connected to or in the furtherance of [the servant's] cashier duties at Krystal, and thus [the servant] abandoned Krystal's business when he engaged in such conduct."<sup>174</sup> Accordingly, because the cashier "chose to engage in a physical altercation with Dowdell for purely personal reasons and not for any purpose beneficial to Krystal," summary judgment in favor of Krystal was appropriate.<sup>175</sup>

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173. *Id.* at 470, 662 S.E.2d at 153 (quoting *Piedmont Hosp., Inc. v. Palladino*, 276 Ga. 612, 613, 580 S.E.2d 215, 217 (2003)).

174. *Id.* at 471, 662 S.E.2d at 153.

175. *Id.*