

# Torts

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

This Article surveys recent developments in Georgia tort law between June 1, 2008 and May 31, 2009.<sup>1</sup>

## I. DEFAMATION

In *Gettner v. Fitzgerald*,<sup>2</sup> the Georgia Court of Appeals addressed each of the elements of defamation, including the purported “opinion” exception,<sup>3</sup> and addressed whether an individual was a public or private figure for purposes of the standard of liability for a publisher.<sup>4</sup> In 1999 Mark Gettner went to work at Fitzgerald & Company (F&C), an advertising agency, as a group creative director leading one of the company’s creative teams. In 2001 Jim Paddock, then-executive creative director of F&C, retired. Gettner was promoted to Paddock’s previous position, effective April 2001.<sup>5</sup> In July 2002 Gettner decided to leave the executive creative director position because he “did not ‘want to deal with all the nuances that were not part of the creative process,’ such as hiring and managing subordinates.”<sup>6</sup> Gettner claimed that he discussed

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\* General Counsel, Home Builders Association of Georgia. Adjunct Professor, 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). Member, Mercer Law Review (1991-1993); Senior Managing Editor (1992-1993). Member, State Bar of Georgia.

\*\* Partner in the firm of Page, Scramton, 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). Member, Mercer Law Review (2002-2004). Member, State Bars of Georgia and Alabama.

1. For analysis of Georgia tort law during the prior survey period, see Deron R. Hicks & Travis C. Hargrove, *Torts, Annual Survey of Georgia Law*, 60 MERCER L. REV. 375 (2008).

2. 297 Ga. App. 258, 677 S.E.2d 149 (2009).

3. *Id.* at 260–61, 677 S.E.2d at 153–54.

4. *Id.* at 262–63, 677 S.E.2d at 154–55.

5. *Id.* at 259, 677 S.E.2d at 152.

6. *Id.*

this decision with David Fitzgerald, F&C's chief executive officer, and Fitzgerald agreed to allow Gettner to return to his former position.<sup>7</sup>

Fitzgerald claimed that he initiated a meeting with Gettner, telling Gettner he would be demoted because Gettner's subordinates were not producing work of a high enough quality under Gettner's leadership.<sup>8</sup> Fitzgerald proposed that he would allow Gettner to "save face" by allowing the decision to be presented jointly as if it had been Gettner's choice.<sup>9</sup> Gettner's salary was reduced, and a form was submitted to F&C's human resources department which stated that Gettner's salary was being changed because Gettner had "stepped down" to the position of [g]roup [c]reative [d]irector."<sup>10</sup>

In an e-mail sent to all F&C employees in July 2002, Fitzgerald stated that Gettner was returning to his previous position "to be closer to the [creative] work."<sup>11</sup> In August 2002 Fitzgerald e-mailed Alicia Griswold, a reporter for VNU Business Media, Inc.'s advertising trade publication, *AdWeek*, and asked if she "knew of any good executive creative directors because Gettner had 'stepped down.'"<sup>12</sup> Griswold, skeptical that Gettner's demotion was his own choice, asked Fitzgerald for the real story behind the demotion.<sup>13</sup> Fitzgerald told Griswold that Gettner "lacked the qualities an executive director needed" and that Gettner was demoted for "poor performance."<sup>14</sup>

In March 2003, as part of a workforce reduction, F&C terminated Gettner.<sup>15</sup> In April 2003 *AdWeek* released its "Agency Report Cards," an annual rating of the ten largest advertising agencies in the southeast region in numerous categories.<sup>16</sup> *AdWeek* gave F&C an overall grade of "C," and the "Management" section of the rating included a comment that "CEO Dave Fitzgerald demoted [Executive Creative Director] Mark Gettner [in 2002] after poor performance; retired [Executive Creative Director] Jim Paddock started weekly visits "to help" creative."<sup>17</sup> Griswold did not verify this information with Gettner before publishing the article that included this information, claiming that "she did not need to call Gettner to verify Fitzgerald's statement that Gettner had

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7. *Id.*

8. *Id.*

9. *Id.* (internal quotation marks omitted).

10. *Id.*

11. *Id.* (alteration in original).

12. *Id.*

13. *Id.*

14. *Id.* at 259–60, 677 S.E.2d at 152–53.

15. *Id.* at 260, 677 S.E.2d at 153.

16. *Id.*

17. *Id.* (alterations in original).

been demoted for poor performance because she ‘had a fact’ from the head of the agency.”<sup>18</sup> Griswold also claimed that “an advertising consultant told her that he had seen a pitch for an account that Gettner made on behalf of F&C that was ‘weak,’” thus confirming to her that Gettner was performing his job duties in a substandard manner.<sup>19</sup>

After the report was published, Fitzgerald asked Griswold why she printed the information he asked her not to print.<sup>20</sup> Griswold told Fitzgerald “‘don’t ever tell a reporter anything you don’t want to see in print.’”<sup>21</sup> Gettner stated that “he confronted Griswold about the [article] and she admitted that she knew he had actually stepped down voluntarily.”<sup>22</sup>

Gettner sued VNU (Griswold’s employer) for defamation and F&C and Fitzgerald for invasion of privacy based on Fitzgerald’s conversation with Griswold and F&C’s “alleged appropriation of Gettner’s name and likeness.”<sup>23</sup> All defendants moved for summary judgment, and the trial court granted the motions.<sup>24</sup> The court of appeals reversed the trial court’s ruling with respect to the grant of summary judgment to VNU on the defamation claim.<sup>25</sup>

Gettner contended that a jury issue existed with respect to each essential element of his defamation claim against VNU.<sup>26</sup> Gettner’s complaint was premised upon section 51-5-2(a) of the Official Code of Georgia Annotated (O.C.G.A.),<sup>27</sup> and the court evaluated each of the four elements necessary to prove a cause of action under that statute.<sup>28</sup>

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 258, 677 S.E.2d at 152. This Article will focus on the defamation claim, and the invasion of privacy claim will not be addressed herein.

24. *Id.*

25. *Id.*

26. *Id.* at 260, 677 S.E.2d at 153.

27. O.C.G.A. § 51-5-2(a) (2000). The statute states, “Any false and malicious defamation of another in any newspaper, magazine, or periodical, tending to injure the reputation of the person and expose him to public hatred, contempt, or ridicule, shall constitute a newspaper libel.” *Id.*

28. *Gettner*, 297 Ga. App. at 260, 677 S.E.2d at 153. The court noted that the four elements of a claim for defamation are: (1) “the defendant’s publication of a defamatory statement about the plaintiff,” (2) “the falsity of the defamatory statement,” (3) “the defendant’s fault in publishing it,” and (4) “the plaintiff’s actual injury from the statement.” *Id.* (citing *Mathis v. Cannon*, 276 Ga. 16, 20–21, 573 S.E.2d 376, 380 (2002)).

First, the court looked at whether VNU published a defamatory statement about Gettner.<sup>29</sup> While it was not disputed that “VNU published the report about Gettner and that such a report would tend to injure Gettner’s reputation and expose him to public contempt or ridicule,” VNU contended that “whether Gettner’s performance was poor is a matter of opinion and, therefore, that its report about Gettner was not an actionable statement of fact.”<sup>30</sup> The court disagreed, noting that although “a defamation action will lie only for a statement of fact[,]” and not one that “reflects an opinion or subjective assessment, as to which reasonable minds could differ [and which] cannot be proved false,” there is no wholesale exception to defamation for opinions.<sup>31</sup> In fact, “[a]n opinion can constitute actionable defamation if the opinion can reasonably be interpreted, according to the context of the entire writing in which the opinion appears, to state or imply defamatory facts about the plaintiff that are capable of being proved false.”<sup>32</sup> Accordingly, to the extent VNU’s statement could be proven false, it could constitute a defamatory statement.<sup>33</sup> Therefore, the court held that if Gettner could prove that Fitzgerald demoted him for something other than unsatisfactory performance, the statement was capable of being proven false, and VNU could not avoid liability by labeling the statement “opinion.”<sup>34</sup> Therefore, because an issue of fact (whether Gettner was demoted due to poor performance) remained with respect to whether VNU published a defamatory statement about Gettner, summary judgment was improper.<sup>35</sup> The same disputed fact prevented summary judgment on the issue of whether the allegedly defamatory statement was false.<sup>36</sup>

VNU next contended that “Gettner identified no evidence of fault, either under the malice standard that applies to public figures or under the negligence standard that applies to private figures.”<sup>37</sup> Noting that the issue of whether Gettner was a public or private figure was a question of law for the court, the court held that Gettner was not a public figure or a limited-purpose public figure.<sup>38</sup> The court noted that there was no “public controversy” with regard to VNU’s report regarding

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29. *Id.* at 261, 677 S.E.2d at 153.

30. *Id.*

31. *Id.*, 677 S.E.2d at 153–54.

32. *Id.*, 677 S.E.2d at 154 (quoting *Gast v. Brittain*, 277 Ga. 340, 341, 589 S.E.2d 63, 64 (2003)).

33. *Id.* at 261–62, 677 S.E.2d at 154.

34. *Id.*

35. *Id.* at 262, 677 S.E.2d at 154.

36. *Id.*

37. *Id.*

38. *Id.* at 263–64, 677 S.E.2d at 154–55.

Gettner's demotion because there was "no evidence in the record that the issue of the reasons for Gettner's change in employment status could have any substantial ramifications for anyone other than him and his immediate family."<sup>39</sup> Accordingly, Gettner needed only to demonstrate VNU acted with ordinary negligence.<sup>40</sup>

The court next addressed the standard of care owed to Gettner, a private figure, by VNU.<sup>41</sup> The standard of care in such a case

will be defined by reference to the procedures a reasonable publisher in [its] position would have employed prior to publishing [an item] such as [the] one [at issue. A publisher] will be held to the skill and experience normally exercised by members of [its] profession. Custom in the trade is relevant but not controlling.<sup>42</sup>

Under that standard, the court held that a jury issue existed as to whether VNU was negligent in publishing the defamatory statement about Gettner.<sup>43</sup> The court noted that "Griswold had an ample opportunity . . . to conduct a more thorough investigation of the circumstances of Gettner's demotion[,] especially because Fitzgerald's e-mail to the company about Gettner contradicted what he told Griswold about Gettner's demotion and because Fitzgerald had asked Griswold not to publish the information regarding Gettner's demotion."<sup>44</sup> Furthermore, the court held that a jury could have found Griswold breached the applicable standard of care by failing to attempt to verify, through any third-party, the circumstances of Gettner's demotion.<sup>45</sup> Because of all the existing jury issues, the court of appeals reversed the grant of summary judgment on Gettner's defamation claim.<sup>46</sup>

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39. *Id.* at 264, 677 S.E.2d at 155. The fact that a controversy or disagreement of a private nature may become public or that it may attract attention does not make it a public controversy. *See id.* at 263, 677 S.E.2d at 155. Rather, to be a public controversy, it must receive public attention because its ramifications will be felt by persons who are not direct participants. *See id.*

40. *Id.* at 264, 677 S.E.2d at 155.

41. *Id.*

42. *Id.*, 677 S.E.2d at 155–56 (alterations in original) (internal quotation marks omitted) (quoting *Triangle Publ'ns, Inc. v. Chumley*, 253 Ga. 179, 181, 317 S.E.2d 534, 537 (1984)).

43. *Id.* at 265, 677 S.E.2d at 156.

44. *Id.*

45. *Id.*

46. *Id.* at 266, 677 S.E.2d at 157.

## II. EMOTIONAL DISTRESS

In *Blue View Corp. v. Bell*,<sup>47</sup> the Georgia Court of Appeals addressed emotional distress claims in the context of an alleged wrongful foreclosure.<sup>48</sup> Yolanda and Wesley Bell sued Blue View Corporation, claiming intentional infliction of emotional distress after Blue View initiated foreclosure proceedings on the Bells' home. Blue View failed to answer the complaint, and a default judgment was entered against it. A hearing was held on damages, and a judgment was entered against Blue View for \$2 million in compensatory damages and \$5 million in punitive damages.<sup>49</sup> Blue View moved to set aside the default judgment, arguing that "it did not receive notice of the final judgment and did not receive timely notice of the hearing on damages."<sup>50</sup> The trial court found that "Blue View did not receive notice of the final judgment but did receive notice of the hearing"; thus, the motion to set aside was granted.<sup>51</sup> However, the trial court then reentered the same judgment, including the damages award. Blue View appealed on multiple grounds, including that the trial court erred in entering the default judgment.<sup>52</sup>

One year after purchasing real property, in May 2000 the Bells obtained a home equity line of credit and loan in the amount of \$67,000 from Bank One. The Bells fell into arrears on the loan and filed for bankruptcy.<sup>53</sup> At that point, it was alleged that "the Bells 'entered into good faith negotiations with Defendant Bank One to establish a payoff amount of the loan.'"<sup>54</sup> In May 2004 Bank One assigned the loan to Blue View. Six months later, Bank One accepted \$4500 from the Bells as final payment on the loan. In February 2005 Blue View initiated foreclosure proceedings, which were later withdrawn. Blue View then assigned the loan to Stewart Title, which foreclosed on the property and later sold it at auction.<sup>55</sup>

Based on the above averments, the Bells made several claims against Stewart Title and Bank One, including wrongful foreclosure, slander of title, fraud, failure to cancel instrument of record, and conversion. However, the Bells only sued Blue View for intentional infliction of

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47. 298 Ga. App. 277, 679 S.E.2d 739 (2009).

48. *Id.* at 277, 679 S.E.2d at 740.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 277-78, 679 S.E.2d at 740.

54. *Id.* at 278, 679 S.E.2d at 740-41.

55. *Id.*, 679 S.E.2d at 741.

emotional distress. Blue View contended that the trial court erred in granting a default judgment against Blue View because, even admitting the factual allegations of the complaint, as is required in the default judgment context, the facts alleged in the complaint did not state a claim for intentional infliction of emotional distress against Blue View.<sup>56</sup>

To establish a claim for intentional infliction of emotional distress, the court noted a plaintiff must show that “(1) the conduct giving rise to the claim was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress; and (4) the emotional distress was severe.”<sup>57</sup> Furthermore,

[t]he defendant’s conduct must be so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. 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>58</sup>

With respect to the intentional infliction of emotional distress claim against Blue View, the Bells alleged that Blue View “‘recklessly, wantonly and with extreme indifference to the consequences ignore[d] the facts of the case that the debt had been paid,’ that Blue View ‘instituted foreclosure proceeding[s] against the [Bells],’ and that ‘upon information and belief the foreclosure was withdrawn by Blue View.’”<sup>59</sup>

Although noting that “‘an intentional wrongful foreclosure can be the basis for an action for intentional infliction of emotional distress,’”<sup>60</sup> the court observed that the only facts admitted by virtue of Blue View’s default were that it initiated foreclosure proceedings but withdrew the proceedings prior to assigning the loan to Stewart Title.<sup>61</sup> Therefore, any wrongful foreclosure was conducted by Stewart Title and not Blue View.<sup>62</sup> Accordingly, the court held that as a matter of law, based on the conclusory allegations in the complaint, it could not be said that “the acts of Blue View were extreme and outrageous or that the Bells’ emotional distress was ‘so severe that no reasonable man could be

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56. *Id.* at 277–78, 679 S.E.2d at 740–41.

57. *Id.* at 279, 679 S.E.2d at 741 (quoting *Frank v. Fleet Fin., Inc.*, 238 Ga. App. 316, 318, 518 S.E.2d 717, 720 (1999)).

58. *Id.* (internal quotation marks omitted) (quoting *Frank*, 238 Ga. App. at 318, 518 S.E.2d at 720).

59. *Id.*, 679 S.E.2d at 741–42 (alterations in original).

60. *Id.*, 679 S.E.2d at 742 (quoting *Ingram v. JIK Realty Co.*, 199 Ga. App. 335, 337, 404 S.E.2d 802, 805 (1991)).

61. *Id.* at 279–81, 679 S.E.2d at 742.

62. *Id.* at 280, 679 S.E.2d at 742.

expected to endure it.”<sup>63</sup> As the court noted, the fact that the foreclosure was withdrawn before completion differentiated the present case from *DeGolyer v. Green Tree Servicing*,<sup>64</sup> in which a foreclosure proceeded even though the defendant had been told it was foreclosing on the wrong property.<sup>65</sup>

In today’s economic climate and with the number of foreclosures taking place, security interest holders can take some respite from the decision in *Blue View*. If they make an error which could possibly constitute a wrongful foreclosure, but they do not act maliciously in initiating the proceedings and quickly rectify the error, then they can potentially avoid liability for intentional infliction of emotional distress.

In *Abdul-Malik v. AirTran Airways, Inc.*,<sup>66</sup> Mahmoud Abdul-Malik sued his former employer, AirTran Airways, Inc., several AirTran employees with supervisory authority over Abdul-Malik, the manager of System Baggage Service, an individual who worked for All-N-1 Security Services, Inc. (All-N-1), and an Atlanta Police Department detective assigned to the airport station. Abdul-Malik was hired by AirTran on January 16, 2004, to work as a ramp agent at Hartsfield-Jackson International Airport. In August 2005 AirTran began to experience increased complaints regarding theft of checked baggage. As a result of the complaints, AirTran contracted with All-N-1 to investigate the incidents.<sup>67</sup> Charles West, All-N-1’s investigator, deposed that he received a call from an unidentified male on November 11, 2005, who “accused West of ‘messing with’ the caller’s buddies and threatened to blow up West’s house.”<sup>68</sup> The caller identification device indicated the call was made from AirTran’s general number at the airport.<sup>69</sup>

While working as an undercover All-N-1 operative who also worked as an AirTran employee, Charles Carter overheard Abdul-Malik admit to a co-worker that he made the call. Carter reported the information in an e-mail to Chana Rogers, All-N-1’s human resources manager.<sup>70</sup>

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63. *Id.* (quoting *Ingram*, 199 Ga. App. at 337, 404 S.E.2d at 805).

64. 291 Ga. App. 444, 662 S.E.2d 141 (2008).

65. *Blue View*, 298 Ga. App. at 280, 679 S.E.2d at 742 (citing *DeGolyer*, 291 Ga. App. at 449–50, 662 S.E.2d at 148).

66. 297 Ga. App. 852, 678 S.E.2d 555 (2009).

67. *Id.* at 852–53, 678 S.E.2d at 556–57.

68. *Id.* at 853, 678 S.E.2d at 557.

69. *Id.*

70. *Id.* More specifically, the e-mail from Carter stated that while sitting in the office with a number of other employees waiting for a plane to arrive, [he] heard Abdul-Malik say to James Hegarty, another ramp agent, “I am going to find out where Mr. West lives and I am going to blow his house up for what he did to Sixty-Nine.” Hegarty then asked who West was and what he did

According to Abdul-Malik, on November 30, 2005, an AirTran manager came to the place where Abdul-Malik was working and took him to Stanley Whitehead's (a defendant who had overall responsibility for AirTran's operations, employees, and assets in Atlanta) office where Detective Calvin Cole (another defendant) and AirTran employee Michael Brown were also present. Whitehead told Abdul-Malik that AirTran was investigating terroristic threats made to West. Abdul-Malik claimed that Whitehead asked if he was Muslim, and Abdul-Malik stated he was. Whitehead next asked if Abdul-Malik knew West, and Abdul-Malik indicated that he did not. Allegedly, Cole then said that he could see Abdul-Malik's heart beating through his chest and that he was guilty. Cole then allegedly called Abdul-Malik a liar and a terrorist. At that point, Abdul-Malik asked for a lawyer and was not questioned any further. Abdul-Malik was informed he would be suspended with pay until an investigation was completed. Ultimately, Abdul-Malik was terminated for making a false statement during the investigation.<sup>71</sup>

The defendants all moved for summary judgment on Abdul-Malik's claims for intentional infliction of emotional distress, and the motions were granted. Abdul-Malik appealed, alleging that all the defendants were involved in a conspiracy to fabricate the e-mail to Rogers and that the conspiracy caused him emotional distress.<sup>72</sup> The court of appeals dispensed with this argument quickly, noting that Abdul-Malik had not come forward with any evidence to dispute the fact that the e-mail was sent to Rogers by Carter, and the court characterized his fabrication theory as "rampant speculation."<sup>73</sup> Abdul-Malik's remaining allegations centered on the conduct of the defendants during the November 30, 2005 meeting.<sup>74</sup>

The court explained,

To recover on an intentional infliction of emotional distress claim, a plaintiff must show evidence that: (1) [the] defendants' conduct was intentional or reckless; (2) [the] defendants' conduct was extreme and outrageous; (3) a causal connection existed between the wrongful conduct and the emotional distress; and (4) the emotional harm was severe.<sup>75</sup>

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to Sixty-Nine. Abdul-Malik responded that West "tries to get people fired for no reason. . . . I called his ass to scare him but he hung up on me."

*Id.* (ellipses in original).

71. *Id.* at 853-54, 678 S.E.2d at 557.

72. *Id.* at 855, 678 S.E.2d at 558.

73. *Id.* at 857, 678 S.E.2d at 559.

74. *Id.*

75. *Id.* at 855-56, 678 S.E.2d at 558-59.

The court held that the conduct of the defendants at the November 30, 2005 meeting “did not rise to the level of ‘extreme and outrageous.’”<sup>76</sup> The court observed that some of the defendants did not attend the meeting, and of those attending, Brown did not speak.<sup>77</sup> Further, the court noted that “Carter’s e-mail gave Whitehead reasonable grounds to investigate whether Abdul-Malik made a terroristic threat using an AirTran telephone while he was on duty.”<sup>78</sup>

The court acknowledged, according to Abdul-Malik, that Whitehead asked Abdul-Malik if he was a Muslim, and Detective Cole accused Abdul-Malik of being a liar and terrorist.<sup>79</sup> However, Abdul-Malik was not held or detained.<sup>80</sup> Further, the court observed that comments made in the context of one’s employment, including false accusations of dishonesty, are considered “‘common vicissitude[s] of ordinary life’” even if horrifying or traumatizing.<sup>81</sup> Accordingly, the court concluded that the conduct of Whitehead and Cole did not exceed the bounds of what was acceptable within the normal bounds tolerated by society, and such conduct was not extreme and outrageous.<sup>82</sup>

The court also noted that Abdul-Malik failed to produce evidence of the fourth element of intentional infliction of emotional distress—that the harm was “severe.”<sup>83</sup> Noting that this was a question for the court to decide, the court observed that Abdul-Malik alleged he could not sleep after the meeting and eventually gained fifteen pounds but that he did not take medication or seek any professional help.<sup>84</sup> The court held that sleeplessness and weight gain were “not so severe that no reasonable person could be expected to endure them.”<sup>85</sup> Because Abdul-Malik had failed to present evidence of severe emotional distress, the court of appeals concluded that the trial court did not err in granting summary judgment.<sup>86</sup>

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76. *Id.* at 857, 678 S.E.2d at 559.

77. *Id.*

78. *Id.*

79. *Id.*, 678 S.E.2d at 559–60.

80. *Id.*, 678 S.E.2d at 560.

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

82. *Id.*

83. *Id.* at 858, 678 S.E.2d at 560.

84. *Id.*

85. *Id.*

86. *Id.*

## III. MEDICAL MALPRACTICE

In *Moreland v. Austin*,<sup>87</sup> the Georgia Supreme Court addressed the issue of whether, in a medical malpractice case, the Privacy Rule<sup>88</sup> promulgated under the Health Insurance Portability and Accountability Act (HIPAA)<sup>89</sup> precludes a defendant's attorney from informally interviewing a plaintiff's prior treating physicians.<sup>90</sup> The court determined that it does.<sup>91</sup>

The plaintiff, Amanda Moreland, brought a medical malpractice action against Dr. Michael Austin in the State Court of Bibb County after the death of her husband, Jimmy Lee Moreland. The plaintiff produced her husband's medical records, which included documents pertaining to prior physicians who treated her husband.<sup>92</sup> After receipt of these records, the defendant's attorney contacted the previous treating physicians "and asked them to assess Mr. Moreland's 'cardiovascular status and his prognosis.'"<sup>93</sup> The plaintiff objected to these contacts and asserted that the contacts violated HIPAA. The trial court disagreed, and the plaintiff dismissed the state court case and re-filed in superior court.<sup>94</sup> The plaintiff sought, in addition to her medical malpractice claim, an injunction preventing the defense lawyers from "inducing any health-care provider to divulge protected health information concerning [Mr.] Moreland' except in compliance with HIPAA."<sup>95</sup> The injunctive relief was granted, and the trial court ruled that the defense lawyers could not interview Mr. Moreland's prior treating physicians unless they gave the plaintiff notice so that her attorneys could be present during the interviews.<sup>96</sup>

The defendant appealed, and the Georgia Court of Appeals reversed and remanded, holding that "as long as a physician discloses protected health information in compliance with HIPAA and Georgia law, defense counsel can continue to communicate with the physician in an ex parte fashion."<sup>97</sup> The court of appeals remanded the case to the trial court

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87. 284 Ga. 730, 670 S.E.2d 68 (2008).

88. 45 C.F.R. pts. 160, 164 (2008).

89. Pub. L. No. 104-191, 11 Stat. 1936 (1996) (codified in scattered sections of 26, 29, and 42 U.S.C.).

90. *Moreland*, 284 Ga. at 730, 670 S.E.2d at 69.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*, 670 S.E.2d at 69-70 (alteration in original).

96. *Id.*, 670 S.E.2d at 70.

97. *Id.*

“to determine whether [the] plaintiff consented to the disclosure of Mr. Moreland’s protected health information prior to April 14, 2003 (the effective date of the HIPAA privacy provisions),” which would determine whether the meetings with the prior treating physicians could take place.<sup>98</sup>

The Georgia Supreme Court noted that HIPAA was enacted by Congress to protect against the unauthorized disclosure of patients’ medical information.<sup>99</sup> The court observed that one of the regulations promulgated under HIPAA authorizes disclosure of information “in the course of any judicial . . . proceeding’ either in response to an order of a court or in response to a subpoena, a request for discovery, ‘or other lawful process.’”<sup>100</sup> Moreover, another regulation provides that if a patient signs a valid authorization, disclosure is authorized.<sup>101</sup> Without the patient’s consent, the healthcare provider

cannot disclose protected health information unless it receives “satisfactory assurance . . . that reasonable efforts have been made [either] (A) . . . to ensure that the individual who is the subject of the [requested] protected health information . . . has been given notice of the request” and an opportunity to object or “(B) . . . to secure a qualified protective order” prohibiting the litigants from disclosing the information outside of the proceeding and requiring the destruction or return of the information following the termination of the proceeding.<sup>102</sup>

At that point, the healthcare provider can choose to provide the requested information, but it must take reasonable precautions “to ensure that it only discloses the ‘minimum necessary’ to accomplish the intended purpose of the disclosure.”<sup>103</sup>

The court of appeals had held that HIPAA did not preclude *ex parte* communications between defense counsel and prior treating physicians, reasoning that the Georgia Civil Practice Act<sup>104</sup> placed more stringent requirements than HIPAA on requests for documents from a third-party healthcare provider; thus O.C.G.A. § 9-11-34<sup>105</sup> was not preempted by HIPAA.<sup>106</sup> The supreme court disagreed with this analysis, noting

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98. *Id.*

99. *Id.* at 731, 670 S.E.2d at 70.

100. *Id.* (alteration in original) (quoting 45 C.F.R. § 164.512(e)(1) (2008)).

101. *Id.* (citing 45 C.F.R. § 164.508(c) (2008)).

102. *Id.* (alterations in original) (quoting 45 C.F.R. § 164.512(e)(1)(ii)-(v)).

103. *Id.* at 731-32, 670 S.E.2d at 70 (quoting 45 C.F.R. § 164.508 (2008)).

104. O.C.G.A. §§ 9-11-1 to -133 (2006 & Supp. 2009).

105. O.C.G.A. § 9-11-34 (2006).

106. *Moreland*, 284 Ga. at 732, 670 S.E.2d at 71.

that the issue was not whether the evidence was discoverable, but rather the method of discovery.<sup>107</sup>

The supreme court noted that a plaintiff waives his right to privacy regarding medical conditions that are placed in issue in a civil or criminal proceeding<sup>108</sup> and that Georgia law allows a defendant to seek the plaintiff's protected health information by formal discovery or by communicating with the plaintiff's treating physicians.<sup>109</sup> However, the court held that "HIPAA preempts Georgia law with regard to ex parte communications between defense counsel and plaintiff's prior treating physicians."<sup>110</sup> The court reasoned that "HIPAA affords patients more control over their medical records when it comes to informal contacts between litigants and physicians" because HIPAA prevents a medical provider from discussing a patient's medical condition in litigation without a court order, the patient's consent, or through other procedural means.<sup>111</sup>

Although a defense lawyer may not seek medical information, a defense lawyer may still contact a prior treating physician without consent to make inquiries regarding benign topics such as the best methods of serving a subpoena and determining dates for trial testimony or a deposition.<sup>112</sup> Accordingly, if a defense lawyer wants to interview a plaintiff's treating physician, the lawyer must obtain an authorization from the plaintiff or otherwise comply with HIPAA.<sup>113</sup> Consent to contact a physician ex parte shall not be implied by the lack of an objection to a subpoena for production of medical records.<sup>114</sup>

The court noted that the penalty for violations of HIPAA should be determined by the trial court but recommended that an extreme sanction is inappropriate for contacts made prior to its decision in *Moreland* because the applicability of HIPAA to these ex parte communications was uncertain.<sup>115</sup>

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107. *Id.*

108. *Id.* (citing O.C.G.A. § 24-9-40(a) (1995 & Supp. 2009)).

109. *Id.*

110. *Id.* at 733, 670 S.E.2d at 71.

111. *Id.*

112. *Id.* at 733-34, 670 S.E.2d at 72 (citing *Law v. Zuckerman*, 307 F. Supp. 2d 705, 708 (D. Md. 2004)).

113. *Id.* at 734, 670 S.E.2d at 72.

114. *Id.* at 735, 670 S.E.2d at 73.

115. *Id.* at 734, 670 S.E.2d at 72.

## IV. NEGLIGENCE

In *Tims v. Hasselberger*,<sup>116</sup> the mother of sixteen-year-old Greg Wade Murray sued Frances and Michael Tims after Murray died from consuming methadone and alcohol at a party hosted by the Timses' son while the Timses were out of town. The Timses moved for summary judgment, arguing that there was no evidence of negligence, and the trial court denied the motion.<sup>117</sup> The Georgia Court of Appeals granted an application for interlocutory appeal and reversed the denial of summary judgment.<sup>118</sup>

The Timses were out of town for the weekend on May 14–15, 2005. Before they left, Mrs. Tims told Justin Tims, her seventeen-year-old son, not to stay at their house, invite anyone over, or have any parties at the house while his parents were out of town. Justin told his mother that he would stay with either his friend or his employer, and he told his father that he would stay with a friend.<sup>119</sup>

While his parents were out of town, Justin hosted a party at his parents' house, and Greg Murray attended. During the party, another guest, Adam Pennington, sold Murray three methadone pills. Murray died that night after consuming the pills and alcohol that was brought to the house by various party guests.<sup>120</sup>

In response to the motion for summary judgment, the plaintiff submitted an affidavit from Pennington, which stated that on one occasion he had seen Justin take drinks from his father's beer bottle without objection.<sup>121</sup> The affidavit also stated that on May 14, 2005, after Mr. Tims told Justin he was going out of town, Justin replied "Good, now I can throw a party."<sup>122</sup> Mr. Tims responded, "Just don't get too wild or get the police called out here."<sup>123</sup> Another person stated in an affidavit that he saw Justin use marijuana in front of his father. Evidence was also submitted to show that before Murray died, Justin had consumed alcohol, marijuana, and methadone multiple times.<sup>124</sup>

Justin deposed that he consumed methadone, which was provided by Pennington (the same person who provided the methadone to Murray at

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116. 298 Ga. App. 256, 679 S.E.2d 731 (2009).

117. *Id.* at 256, 679 S.E.2d at 732.

118. *Id.*

119. *Id.* at 257, 679 S.E.2d at 732.

120. *Id.*

121. *Id.*

122. *Id.* (internal quotation marks omitted).

123. *Id.* (internal quotation marks omitted).

124. *Id.*

the party), for the first time approximately two weeks prior to the party. Justin testified that he and Murray had consumed methadone on approximately five to ten prior occasions. No evidence was submitted that the Timses knew of Murray's methadone use. Justin also testified that the Timses had to retrieve him from a police station after he and a friend were caught with unopened beer in their vehicle on a prior occasion, that he had been previously arrested and served a week in jail, and that he was on house arrest for six to nine months as a result.<sup>125</sup>

The Timses argued that there was no evidence they could have foreseen that Murray would attend a party at their home while they were not present and that he would voluntarily ingest prescription drugs sold to him by a third-party. Therefore, according to the Timses, they could not be held civilly liable for Murray's death.<sup>126</sup>

Noting that in Georgia, "parents are not liable in damages for the torts of their minor children merely because of the parent-child relationship,"<sup>127</sup> the court stated that "[r]ecovery has been permitted [when] there was some parental negligence in furnishing or permitting a child access to an instrumentality with which the child *likely* would injure a third party."<sup>128</sup> Further, the court stated, "[when], as here 'the parent did not *furnish* the dangerous instrumentality but through negligence allowed access thereto to the child, the standard for imposing liability upon a parent . . . is whether the parent knew of the child's proclivity or propensity for the specific dangerous activity."<sup>129</sup>

The court observed that the evidence in this case showed that the Timses knew Justin had consumed alcohol and marijuana prior to leaving him home alone, that he had been arrested previously for delinquency, and that he had previously been arrested for having an unopened beer in his car.<sup>130</sup> Furthermore, there was evidence Justin told his father that he was going to have a party in his parents' absence.<sup>131</sup> On the other hand, the court noted that the Timses did not supply methadone or alcohol at the party, and no evidence showed that the Timses knew their son had previously consumed methadone.<sup>132</sup> Finally, the court emphasized that the Timses did not have reason to

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125. *Id.* at 257–58, 679 S.E.2d at 732–33.

126. *Id.*, 679 S.E.2d at 733.

127. *Id.* (quoting *McNamee v. A.J.W.*, 238 Ga. App. 534, 535, 519 S.E.2d 298, 301 (1999)).

128. *Id.* (quoting *Saenz v. Andrus*, 195 Ga. App. 431, 433, 393 S.E.2d 724, 726 (1990)).

129. *Id.* at 258–59, 679 S.E.2d at 733 (ellipses in original) (quoting *Saenz*, 195 Ga. App. at 433, 393 S.E.2d at 726).

130. *Id.* at 259, 679 S.E.2d at 734.

131. *Id.*

132. *Id.*

anticipate Justin would host a party at their home where an individual would illegally sell methadone to another person who would ultimately die.<sup>133</sup> Therefore, the Timses had no duty to guard against such a scenario.<sup>134</sup>

The court held that it does not “place a duty on parents to arrange for supervision of their teenagers while . . . away from home”,<sup>135</sup> rather, parental liability is “limited to such instances where the parent has taken some active part in the creation of the danger.”<sup>136</sup> However, failure to supervise does not rise to that level of taking an active part in the creation of the danger.<sup>137</sup> Accordingly, the court of appeals reversed the trial court’s denial of the defendants’ motion for summary judgment.<sup>138</sup>

#### V. PREMISES LIABILITY

In *Jarrell v. JDC & Associates, LLC*,<sup>139</sup> the Georgia Court of Appeals affirmed the grant of summary judgment in favor of a development company after the plaintiff, an employee of BellSouth Communications, was injured on the defendant’s property while in the course of inspecting work performed by a vendor of BellSouth.<sup>140</sup> While inspecting the vendor’s work, the plaintiff fell after stepping into a hole that was allegedly covered by wheat straw. The plaintiff subsequently brought suit against the defendants. During the course of discovery, the plaintiff admitted that he had been on worksites in which wheat straw had been used for erosion control purposes. The defendant filed a motion for summary judgment, arguing that the plaintiff was a licensee, not an invitee, and that the defendant was entitled to judgment as a matter of law because there was no evidence of willful or wanton acts. The trial court granted the motion for summary judgment, and the plaintiff appealed.<sup>141</sup> On appeal, the court of appeals affirmed.<sup>142</sup>

The plaintiff argued on appeal that he was an invitee on the defendant’s premises, not a licensee, and that the defendant therefore had a duty “to exercise ordinary care to keep the premises and approaches

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133. *Id.* at 259–60, 679 S.E.2d at 734.

134. *Id.* at 260, 679 S.E.2d at 734.

135. *Id.* (quoting *McNamee*, 238 Ga. App. at 536, 519 S.E.2d at 301).

136. *Id.* (quoting *Stewart v. Harvard*, 239 Ga. App. 388, 396, 520 S.E.2d 752, 759 (1999)).

137. *Id.*

138. *Id.*

139. 296 Ga. App. 523, 675 S.E.2d 278 (2009).

140. *Id.* at 523, 675 S.E.2d at 279.

141. *Id.* at 523–24, 675 S.E.2d at 279–80.

142. *Id.* at 524, 675 S.E.2d at 280.

safe.”<sup>143</sup> The court of appeals disagreed.<sup>144</sup> The court of appeals distinguished an invitee from a licensee:

The accepted test to determine whether one is an invitee or a licensee is whether the party coming onto the business premises had *present business relations with the owner or occupier which would render his presence of mutual benefit to both*, or whether his presence was for his own convenience, or was for business with one other than the owner or occupier.<sup>145</sup>

The court noted that there was no evidence that the defendant even knew the plaintiff was on the property.<sup>146</sup> Moreover, “the purpose of [the plaintiff’s] visit was connected to BellSouth’s business with its vendors, not business with the landowner, which confers upon [the plaintiff] the status of licensee rather than invitee.”<sup>147</sup> Although a property owner “owes a duty to an invitee to exercise ordinary care to keep the premises and approaches safe,”<sup>148</sup> the “duty to a licensee is not to injure the licensee wantonly or willfully and ‘arises after the owner becomes aware of or should anticipate the presence of the licensee near the peril.’”<sup>149</sup> Further, the court noted that “[t]o the licensee, as to the trespasser, no duty arises of keeping the usual condition of the premises up to any given standard of safety, except that they must not contain pitfalls, man-traps, and things of that character.”<sup>150</sup> Because the record did not contain any evidence that the defendant “wilfully and wantonly injured [the plaintiff] or . . . created a mantrap or pitfall,”<sup>151</sup> the court of appeals affirmed the trial court’s grant of summary judgment.<sup>152</sup>

In *Cocklin v. JC Penney Corp.*,<sup>153</sup> the court of appeals held in a trip-and-fall case that although the plaintiff had traversed the alleged hazard on several occasions prior to her fall, an issue of fact existed about whether the plaintiff was aware of the “specific hazard” that caused her

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143. *Id.* at 524–25, 675 S.E.2d at 280.

144. *Id.* at 524, 675 S.E.2d at 280.

145. *Id.* at 525, 675 S.E.2d at 280 (internal quotation marks omitted) (quoting *Moore-Sapp Investors v. Richards*, 240 Ga. App. 798, 799, 522 S.E.2d 739, 741 (1999)).

146. *Id.*, 675 S.E.2d at 281.

147. *Id.*

148. *Id.*, 675 S.E.2d at 280.

149. *Id.* (quoting *Bartlett v. Mallet*, 247 Ga. App. 749, 750, 545 S.E.2d 329, 331 (2001)).

150. *Id.* at 526, 675 S.E.2d at 281 (quoting *Francis v. Haygood Contracting, Inc.*, 199 Ga. App. 74, 75, 404 S.E.2d 136, 138 (1991)).

151. *Id.*

152. *Id.* at 527, 675 S.E.2d at 282.

153. 296 Ga. App. 179, 674 S.E.2d 48 (2009).

fall, thereby precluding summary judgment in favor of the defendant.<sup>154</sup> The plaintiff fell and was injured as she was entering the hair salon at the JC Penney store in LaGrange, Georgia. The plaintiff brought suit against JC Penney, alleging that the defendant knew or should have known that the offset transition from the JC Penney store into the hair salon constituted a hazard.<sup>155</sup> On motion for summary judgment, however, the defendant argued that “the alleged hazard that caused [the plaintiff’s] fall was a static condition that she had successfully negotiated before and that had caused no prior accidents.”<sup>156</sup> The trial court granted the defendant’s motion.<sup>157</sup> On appeal, the court of appeals reversed.<sup>158</sup>

The record in the case indicated that the plaintiff had been to the hair salon on numerous prior occasions without incident.<sup>159</sup> The court of appeals, however, noted “that the rule imputing knowledge of a danger to a person who has successfully negotiated it before applies only to cases involving a static condition that is ‘readily discernible’ to a person exercising reasonable care for his own safety.”<sup>160</sup> Because the plaintiff had testified that she did not notice the elevated edge of the transition “until conducting a *close, visual and tactile inspection* of the area”<sup>161</sup> the day following her accident, the court held that a material issue of fact existed as to whether the “specific hazard” that allegedly caused the plaintiff to fall “was readily observable to her in the exercise of ordinary care and whether she [could] therefore be presumed to have knowledge of it.”<sup>162</sup>

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154. *Id.* at 182, 674 S.E.2d at 51.

155. *Id.* at 180, 674 S.E.2d at 49–50. The offset transition is described by the court of appeals as follows:

[T]he floor transitions from a lower, horizontal surface composed of vinyl tiles to a higher, horizontal surface composed of ceramic tiles. These two surfaces are separated by a vertical transition piece, or threshold, that arises from the lower surface to the higher surface at a 90 degree angle. Most of the vertical transition piece is covered by a brown strip. But above the brown strip is an exposed edge of ceramic tile about a quarter of an inch in height. This ceramic tile extends slightly beyond the vertical surface of the transition piece leaving a small crevice or lip.

*Id.*

156. *Id.* at 179, 674 S.E.2d at 49.

157. *Id.*

158. *Id.* at 179–80, 674 S.E.2d at 49.

159. *Id.* at 180, 674 S.E.2d at 50.

160. *Id.* at 182, 674 S.E.2d at 51.

161. *Id.* (emphasis added).

162. *Id.*

The decision in *American Multi-Cinema, Inc. v. Brown*<sup>163</sup> raises the intriguing question of under what circumstances a sign designed to warn invitees of a hazardous condition may, in fact, become a hazard itself. In *American Multi-Cinema, Inc.* an employee of the defendant movie theater noticed a drink spilled outside one of the theater's auditoriums.<sup>164</sup> The employee diligently cleaned up the spill and, as an additional precaution and in accordance with the theater's standard procedures, placed "a commonplace, A-frame '[w]et [f]loor' sign . . . [ten] to [twenty] paces outside the auditorium door."<sup>165</sup> The plaintiff, a patron at the theater, exited the auditorium at the conclusion of the movie. The plaintiff did not see the "wet floor" sign because of the crowd and tripped over the sign, which apparently had fallen flat. The plaintiff subsequently brought suit against the defendant. The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.<sup>166</sup> On appeal, the court of appeals reversed and the Georgia Supreme Court affirmed the reversal.<sup>167</sup>

The court of appeals relied on its 2002 decision in *Warberg v. Saint Louis Bread Co.*<sup>168</sup> and its 2006 decision in *Freeman v. Wal-Mart Stores, Inc.*<sup>169</sup> The *Warberg* decision, relied upon by the trial court in granting the defendant's motion for summary judgment, involved a patron at a mall who slipped on a collapsed "wet floor" sign similar to the sign in the present case.<sup>170</sup> The plaintiff in *Freeman* suffered an injury when she fell over a rolled-up mat that had fallen across an aisle in a Wal-Mart store.<sup>171</sup> In adopting the defendant's reading of *War-*

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163. 285 Ga. 442, 679 S.E.2d 25 (2009), *aff'g* 292 Ga. App. 505, 664 S.E.2d 838 (2008).

164. *Id.* at 442, 679 S.E.2d at 26–27.

165. *Id.*

166. *Id.* at 442–43, 679 S.E.2d at 26–27.

167. *Id.* at 443–44, 448, 679 S.E.2d at 27, 30.

168. 255 Ga. App. 352, 565 S.E.2d 561 (2002).

169. 281 Ga. App. 132, 635 S.E.2d 399 (2006); *see American Multi-Cinema, Inc.*, 285 Ga. at 443, 679 S.E.2d at 27.

170. 255 Ga. App. at 352–53, 565 S.E.2d at 562. In *Warberg* the plaintiff went to the defendant's bakery to purchase bagels. As she walked to the bakery counter, the plaintiff "stepped on a plastic 'wet floor' sign that was folded over and lying flat on the floor, rather than in its proper upright position." *Id.* According to the plaintiff in *Warberg*, "the sign 'scooted' out from under [the plaintiff], her foot slid forward with the sign, and she fell on her back." *Id.* at 353, 565 S.E.2d at 562.

171. 281 Ga. App. at 133, 635 S.E.2d at 400. About fifteen minutes before the plaintiff in *Freeman* fell, an employee of the defendant "had inspected the area and had seen the rolled-up mat leaning in a corner against a produce shelf, but did not remove it because he did not consider it to be in anyone's way." The employee did not know that the mat fell across the aisle after his inspection. *Id.* The court of appeals held that there was "some evidence from which a jury could foresee that the rolled-up mat would be knocked over and become a tripping hazard." *Id.* at 136, 635 S.E.2d at 402.

berg and *Freeman*, the trial court agreed with the defendant's arguments that

(1) . . . the sign [was] initially set up correctly; (2) the [plaintiff] produced no evidence that [the defendant] knew the sign had fallen down before [the plaintiff] tripped on it; and (3) the [Georgia] court of appeals held in *Walberg* . . . and *Freeman* . . . that a “[w]et [f]loor” sign is not a tripping hazard as long as it was set up properly even if it is lying flat on the floor by the time the plaintiff reaches it, even if it was placed in a highly trafficked area, and even if the defendant knew that signs of this type frequently end up falling over when they come into contact with moving crowds.<sup>172</sup>

The plaintiff, however, argued that the trial court erred in its application of the *Warberg* and *Freeman* decisions.<sup>173</sup> In affirming the court of appeals decision, the supreme court relied on its decision in *Robinson v. Kroger*.<sup>174</sup> The court noted that after *Robinson*, “to survive a motion for summary judgment, a plaintiff must come forward with evidence that, viewed in the most favorable light, would enable a rational trier of fact to find that the defendant had actual or constructive knowledge of the hazard.”<sup>175</sup> Because the plaintiff presented evidence that the type of sign used by the defendant was prone to collapse when in contact with moving crowds, creating a tripping hazard, the supreme court could not hold as a matter of law that the defendant “fulfilled its legal duty to avoid creating an unreasonable risk of foreseeable harm to the public.”<sup>176</sup>

In *Vega v. La Movida, Inc.*,<sup>177</sup> the plaintiffs filed suit after being shot inside a bar owned by the defendant.<sup>178</sup> The plaintiffs alleged that the defendant “failed to provide adequate security inside the bar.”<sup>179</sup> At trial, however, the jury found in favor of the defendant. An appeal ensued. On appeal, the plaintiffs argued, inter alia, that the trial court had improperly excluded evidence of prior criminal activity near the

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172. *American Multi-Cinema, Inc.*, 285 Ga. at 443, 679 S.E.2d at 27.

173. *See id.*

174. 268 Ga. 735, 493 S.E.2d 403 (1997).

175. *American Multi-Cinema, Inc.*, 285 Ga. at 444–45, 679 S.E.2d at 28.

176. *Id.* at 446, 679 S.E.2d at 29. The court stated that if the plaintiff's theory—that the use of the sign in a heavily trafficked area was itself a risk of foreseeable harm—is viable, then the defendant had actual knowledge of the hazard when the sign was set-up. *Id.*

177. 294 Ga. App. 311, 670 S.E.2d 116 (2008).

178. *Id.* at 311, 670 S.E.2d at 118.

179. *Id.*

bar.<sup>180</sup> The court of appeals, however, rejected the plaintiffs' argument.<sup>181</sup>

The court of appeals noted that as the Georgia Supreme Court held in *Sturbridge Partners, Ltd. v. Walker*,<sup>182</sup>

a proprietor's duty to exercise ordinary care to protect invitees against third-party criminal attacks "extends *only to foreseeable criminal acts*," that is, acts which the proprietor had "reason to anticipate." "Accordingly, the incident causing the injury must be substantially similar in type to the previous criminal activities occurring on or near the premises so that a reasonable person would take ordinary precautions to protect his or her customers . . . against the risk posed by that type of activity."<sup>183</sup>

The plaintiffs alleged that the trial court had improperly excluded evidence of fifteen prior crimes. One of the crimes excluded by the trial judge was a theft that had occurred inside the bar.<sup>184</sup> The remaining fourteen crimes had all occurred outside the bar, "either in the parking lot or in the general neighborhood."<sup>185</sup> The trial court had excluded evidence of these crimes on the basis that they were not substantially similar to the incident giving rise to the plaintiffs' injuries.<sup>186</sup> The court of appeals agreed.<sup>187</sup> With respect to the prior theft inside the bar, the court of appeals held that "this crime against property did not give the proprietor notice sufficient to call his attention to the danger of violent crime inside the bar."<sup>188</sup> With respect to the crimes outside the bar,<sup>189</sup> the court of appeals noted that "evidence of crimes occurring in the parking lot did not show that [the defendant] was on notice that, in

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180. *Id.*

181. *Id.*

182. 267 Ga. 785, 482 S.E.2d 339 (1997).

183. *Vega*, 294 Ga. App. at 312, 670 S.E.2d at 119 (alteration in original) (footnotes omitted) (quoting *Sturbridge*, 267 Ga. at 786, 482 S.E.2d at 340–41).

184. *Id.* at 313, 670 S.E.2d at 119.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. The crimes included

two carjackings; one kidnapping/car theft; one car theft; one stabbing, beating, and aggravated assault with a knife, probably gang-related; one armed robbery at gunpoint; two hit-and-run incidents; one driving under the influence, in which a person was dragged in the parking lot; one person seen brandishing a firearm; and four instances of gunshots fired in or near the parking lot.

*Id.* at 314 n.12, 670 S.E.2d at 120 n.12.

spite of its efforts to put security precautions in place at the entrance to its bar, a dangerous condition existed *inside* the bar.”<sup>190</sup>

In another case arising from an altercation in a bar, the court of appeals in *Mulligan’s Bar & Grill v. Stanfield*<sup>191</sup> affirmed a jury verdict in favor of a patron who was injured “when a beer bottle struck him in the face during a fight between two of [the defendant’s] other patrons.”<sup>192</sup> The evidence established that the two patrons involved in the fight had caused problems throughout the evening, that both of the patrons involved in the fight had previously been banned from the bar for fighting, and that several of the defendant’s employees were “aware of the bottle-throwing patron’s presence at the bar and his demonstrably combative behavior beginning as early as three hours before [the plaintiff] sustained his injury.”<sup>193</sup> In addition, there was evidence that the defendant had received complaints of inadequate security from his own employees prior to the incident but took no action to address the concerns. After a jury verdict in favor of the plaintiff, the defendant appealed.<sup>194</sup> At the heart of the defendant’s appeal was the contention that Georgia’s Dram Shop Act<sup>195</sup> barred the plaintiff’s claims. The defendant argued on appeal that the trial court erred in denying its motion for a directed verdict on this issue.<sup>196</sup>

The court of appeals noted that “[u]nder the Act, ‘the consumption of alcoholic beverages, rather than the sale or furnishing or serving of such beverages, is the proximate cause of any injury . . . inflicted by an intoxicated person upon himself or upon another person.’”<sup>197</sup> The court of appeals, however, rejected the defendant’s “attempt to transform this matter into a ‘liquor liability’ case.”<sup>198</sup> The court noted that it was clear from the plaintiff’s complaint and the other pleadings in the case that the case was “grounded in established Georgia premises liability law.”<sup>199</sup> In this regard, the court noted that the plaintiff had clearly pled and attempted to prove that the defendant had inadequately secured its premises.<sup>200</sup> As the court of appeals noted, “the Georgia Dram Shop Act was never intended to and does not pertain to premises

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190. *Id.* at 314, 670 S.E.2d at 120.

191. 294 Ga. App. 250, 668 S.E.2d 874 (2008).

192. *Id.* at 250, 668 S.E.2d at 874.

193. *Id.* at 250–51, 668 S.E.2d at 875.

194. *Id.*

195. O.C.G.A. § 51-1-40 (2000).

196. *Stanfield*, 294 Ga. App. at 251, 668 S.E.2d at 875.

197. *Id.* (second alteration in original) (quoting O.C.G.A. § 51-1-40(a)).

198. *Id.*

199. *Id.*

200. *Id.* at 251–52, 668 S.E.2d at 875.

liability claims like the one before this Court.<sup>201</sup> The court of appeals, therefore, held that the trial court did not err in denying the defendant's motion for a directed verdict on the basis of the Georgia Dram Shop Act.<sup>202</sup>

#### VI. LIABILITY FOR ANIMAL ATTACKS

In *Custer v. Coward*,<sup>203</sup> the Georgia Court of Appeals affirmed the grant of summary judgment in favor of a defendant in a civil action arising from a dog bite.<sup>204</sup> The plaintiffs' five-year-old daughter was playing on a trampoline at a neighbors' house when she fell off the trampoline and onto the neighbor's dog, Butkus. Butkus responded, perhaps not unexpectedly, by biting the plaintiffs' daughter. The plaintiffs brought suit against their neighbors. The trial court granted the defendants' motion for summary judgment, and the plaintiffs appealed.<sup>205</sup>

On appeal, the plaintiffs argued

that the trial court erred in (1) holding that the dog's prior act of aggression did not place the [defendants] on notice of the likelihood that the dog would bite someone; [and] (2) finding that the [defendants] could not be liable because the dog had not actually bitten someone before the incident in question.<sup>206</sup>

The plaintiffs presented evidence that the dog had previously growled and barked on several prior occasions, although there was no evidence that the dog had actually bitten anyone. In addition, the plaintiffs submitted evidence that the dog suffered from a spinal nerve condition that, according to the plaintiffs, could cause the dog to develop an aggression problem.<sup>207</sup> The court of appeals, however, rejected the plaintiffs' contentions.<sup>208</sup> The court noted that "to prevail on their claim, the [plaintiffs] were required to show that Butkus had the propensity to bite and that the [defendants] had knowledge of that propensity."<sup>209</sup> Further, "the true test of liability is the owner's

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201. *Id.* at 252, 668 S.E.2d at 875.

202. *Id.* at 253, 668 S.E.2d at 876.

203. 293 Ga. App. 316, 667 S.E.2d 135 (2008).

204. *Id.* at 320, 667 S.E.2d at 138.

205. *Id.* at 316-17, 667 S.E.2d at 136.

206. *Id.* at 316, 667 S.E.2d at 136.

207. *Id.* at 317-19, 667 S.E.2d at 137-38.

208. *Id.* at 319, 667 S.E.2d at 138.

209. *Id.* at 318, 667 S.E.2d at 137.

superior knowledge of his dog's temperament."<sup>210</sup> The court rejected the argument that prior occasions on which the dog growled placed the defendants on notice of a propensity for the dog to bite.<sup>211</sup> Moreover, the court held that there was no evidence that the dog's nerve condition "would make it more likely to attack humans."<sup>212</sup>

The plaintiffs further argued on appeal that the trial court erred in rejecting their premises liability claim.<sup>213</sup> The court of appeals, however, noted that

[i]n a typical dog bite case, regardless of whether the cause of action is based on the premises liability statute ([O.C.G.A. § 51-3-1<sup>214</sup>]) or the dangerous animal liability statute ([O.C.G.A. § 51-2-7<sup>215</sup>]) a plaintiff must produce evidence of the vicious propensity of the dog in order to show that the owner of the premises had superior knowledge of the danger.<sup>216</sup>

Because the plaintiffs had failed to do so, the court of appeals affirmed the grant of summary judgment to the defendants.<sup>217</sup>

In another court of appeals case, *Huff v. Dyer*,<sup>218</sup> the defendants had chained their dog in the back of their pickup truck while they enjoyed breakfast at a local restaurant. The plaintiff, who regularly ate at the same restaurant and had seen the defendants' dog on several prior occasions, approached the dog and, apparently believing the dog wanted to lick her face, leaned in toward the dog's face. The dog bit the plaintiff in the face. The plaintiff sued the defendants. The plaintiff submitted evidence that the dog had previously barked at another patron of the restaurant while chained in the back of the defendants' pickup truck. After a jury verdict in favor of the defendants, the plaintiff appealed the denial of her motions for directed verdict.<sup>219</sup> The court of appeals, however, affirmed the trial court's denial of the motions.<sup>220</sup>

On appeal, the plaintiff argued, inter alia, that the trial court erred in denying her motion for directed verdict as to the dog's alleged dangerous

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210. *Id.* at 319, 667 S.E.2d at 137 (quoting *Raith v. Blanchard*, 271 Ga. App. 723, 724, 611 S.E.2d 75, 77 (2005)).

211. *Id.*

212. *Id.*, 667 S.E.2d at 138.

213. *Id.*

214. O.C.G.A. § 51-3-1 (2000).

215. O.C.G.A. § 51-2-7 (2000).

216. *Custer*, 293 Ga. App. at 319, 667 S.E.2d at 138 (quoting *Osowski v. Smith*, 262 Ga. App. 538, 539-40, 586 S.E.2d 71, 73 (2003)).

217. *Id.*

218. 297 Ga. App. 761, 678 S.E.2d 206 (2009).

219. *Id.* at 761-62, 678 S.E.2d at 207-08.

220. *Id.* at 761, 678 S.E.2d at 207.

propensities under O.C.G.A. § 51-2-7.<sup>221</sup> Section 51-2-7 of the O.C.G.A. provides:

A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured. In proving vicious propensity, it shall be sufficient to show that the animal was required to be at heel or on a leash by an ordinance of a city, county, or consolidated government, and the said animal was at the time of the occurrence not at heel or on a leash.<sup>222</sup>

The plaintiff argued that she had “satisfied the second sentence of [O.C.G.A.] § 51-2-7 by producing evidence that the [defendants’] dog was in violation of a Hall County Animal Control Ordinance.”<sup>223</sup> The court of appeals, however, disagreed.<sup>224</sup>

The court held that O.C.G.A. § 51-2-7 “relieves a plaintiff from producing evidence of a dog’s vicious propensity based on evidence of a violation of an ordinance that restricts dogs *from running at large*.”<sup>225</sup> The court of appeals noted that the local ordinance “does not protect people who approach restrained animals, regardless of whether the animal is at heel, on a leash, or restrained in the bed of a truck.”<sup>226</sup> Because the defendants’ dog was restrained in the back of the pickup, the court of appeals held that the trial court did not err in denying the plaintiff’s motion for directed verdict on this issue.<sup>227</sup>

The plaintiff also claimed that the defendants had knowledge of the dog’s vicious propensity.<sup>228</sup> But the plaintiff’s evidence failed on this point as well.<sup>229</sup> The court of appeals noted that “[d]espite evidence that the dog had previously barked when a child was near the truck, barking amounts at most to menacing behavior and does not serve as evidence of a dog’s vicious propensity.”<sup>230</sup>

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221. *Id.* at 763, 678 S.E.2d at 208.

222. O.C.G.A. § 51-2-7.

223. *Huff*, 297 Ga. App. at 763, 678 S.E.2d at 208.

224. *Id.*

225. *Id.* (emphasis added).

226. *Id.* at 764, 678 S.E.2d at 209.

227. *Id.* at 764–65, 678 S.E.2d at 209.

228. *Id.* at 763, 678 S.E.2d at 208.

229. *Id.*

230. *Id.*

## VII. FALSE IMPRISONMENT

In *Shannon v. Office Max North America, Inc.*,<sup>231</sup> the plaintiff was terminated from his employment with the defendant after making copies of pornographic material for his personal use on one of the company's copiers. However, prior to his termination, the plaintiff was questioned for approximately one hour and twenty-five minutes by the store's manager and a loss prevention officer. Subsequent to his termination, the plaintiff brought suit against the defendant for, inter alia, false imprisonment. The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.<sup>232</sup> The Georgia Court of Appeals affirmed.<sup>233</sup>

Section 51-7-20 of the O.C.G.A.<sup>234</sup> provides that "[f]alse imprisonment is the unlawful detention of the person of another, for any length of time, whereby such person is deprived of his personal liberty."<sup>235</sup> As the court of appeals noted, "[t]he restraint used to create the detention must be against the plaintiff's will and be accomplished by either force or fear."<sup>236</sup> There was no evidence in the record that the plaintiff had been physically restrained or threatened with force.<sup>237</sup> Rather, the plaintiff argued "that he was threatened with the loss of his job and with criminal prosecution," which, according to the plaintiff, caused him to be detained against his will.<sup>238</sup> The court of appeals, however, rejected this argument and held that "such threats do not constitute detention for purposes of a false imprisonment claim."<sup>239</sup>

In *Ferrell v. Mikula*,<sup>240</sup> one of the defendants, an assistant manager at a Ruby Tuesday restaurant, was informed by a waitress that two customers had left without paying. The assistant manager exited the restaurant and noticed a vehicle leaving the parking lot. Outside the restaurant was an off-duty police officer hired by the restaurant to provide security. The assistant manager informed the off-duty officer that the people in the car had left without paying. The off-duty police officer followed the vehicle and called the police, who stopped the vehicle.

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231. 291 Ga. App. 834, 662 S.E.2d 885 (2008).

232. *Id.* at 834-35, 662 S.E.2d at 887-88.

233. *Id.* at 837, 662 S.E.2d at 889.

234. O.C.G.A. § 51-7-20 (2000).

235. *Id.*

236. *Shannon*, 291 Ga. App. at 835, 662 S.E.2d at 888 (quoting *Miraliakbari v. Pennicooke*, 254 Ga. App. 156, 160, 561 S.E.2d 483, 488 (2002)).

237. *Id.* at 836, 662 S.E.2d at 888.

238. *Id.*

239. *Id.*

240. 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Eighteen-year-old Racquel Ferrell was driving the vehicle stopped by the police. Her thirteen-year-old sister was a passenger in the car. Both Racquel and her sister were handcuffed by the police and placed in the back of squad cars. Ferrell told the police officers that she had paid her bill. This was true, and shortly thereafter the police learned that the assistant manager had sent the off-duty officer after the wrong vehicle. Ferrell and her little sister were then released. Not surprisingly, Ferrell and her parents took exception to what occurred and brought suit against the restaurant and the assistant manager for, among other claims, false imprisonment. The defendants moved for summary judgment on all counts. The trial court granted the motion for summary judgment, and the plaintiffs appealed.<sup>241</sup> The court of appeals reversed the grant of summary judgment as to the plaintiffs' claim for false imprisonment.<sup>242</sup>

On appeal, the defendants argued that the trial court's order should have been affirmed because (1) the assistant manager "merely stated his good faith belief about the crime to the security guard police officer, who then acted on his own," (2) probable cause existed for the detention, and (3) there was no evidence that the assistant manager acted with malice.<sup>243</sup> The court of appeals, however, rejected the defendants' arguments.<sup>244</sup> As previously noted, false imprisonment is "the unlawful detention of the person of another, for any length of time, whereby such person is deprived of his personal liberty."<sup>245</sup>

The court of appeals observed that there was no dispute over the fact that Ferrell and her little sister had been detained.<sup>246</sup> The court, therefore, turned to the defendants' arguments that the assistant manager did not act with malice and that probable cause existed for the detention.<sup>247</sup> Contrary to the defendants' argument, the court of appeals noted that "malice is not an element of false imprisonment, only of malicious arrest and prosecution under"<sup>248</sup> O.C.G.A. § 51-7-1<sup>249</sup> and O.C.G.A. § 51-7-40.<sup>250</sup> With respect to the defendants' argument that probable cause existed for the detention, the court held that "the mere existence of probable cause standing alone has no real defensive

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241. *Id.* at 326–28, 672 S.E.2d at 9–10.

242. *Id.* at 326, 672 S.E.2d at 9.

243. *Id.* at 329, 672 S.E.2d at 10–11.

244. *Id.* at 329–30, 672 S.E.2d at 11.

245. O.C.G.A. § 51-7-20.

246. *Ferrell*, 295 Ga. App. at 329, 672 S.E.2d at 11.

247. *Id.*

248. *Id.*

249. O.C.G.A. § 51-7-1 (2000).

250. O.C.G.A. § 51-7-40 (2000).

bearing on the issue of liability.”<sup>251</sup> Further, the court stated that “[g]enerally, one ‘who causes or directs the arrest of another by an officer without a warrant may be held liable for false imprisonment, in the absence of justification, and the burden of proving that such imprisonment lies within an exception rests upon the person . . . causing the imprisonment.’”<sup>252</sup> The defendants, however, failed to meet this burden.<sup>253</sup>

The court of appeals next addressed the defendants’ contention that the assistant manager did not cause the arrest because the off-duty police officer acted on his own accord.<sup>254</sup> In this regard, the court of appeals noted that “[w]hether a party is potentially liable for false imprisonment by ‘directly or indirectly urg[ing] a law enforcement official to begin criminal proceedings’ or is not liable because he ‘merely relates facts to an official who then makes an independent decision to arrest’ is a factual question for the jury.”<sup>255</sup> The issue is not whether the defendant actually demanded the arrest; rather, the issue is whether the defendant’s “conduct and acts ‘procured and directed the arrest.’”<sup>256</sup> In the case *sub judice*, the assistant manager

told the officer that the car leaving the parking lot contained people who left without paying for their food, although he did not know or try to ascertain who was in the car. He also knew the officer was going to detain the people in the car and could have tried to stop him, but made no attempt to do so.<sup>257</sup>

The court of appeals, therefore, concluded that the trial court erred in granting summary judgment on the false imprisonment claim.<sup>258</sup>

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251. *Ferrell*, 295 Ga. App. at 329, 672 S.E.2d at 11 (quoting *Collins v. Sadlo*, 167 Ga. App. 317, 318, 306 S.E.2d 390, 391 (1983)).

252. *Id.* at 330, 672 S.E.2d at 11 (ellipses in original) (quoting *Scott Hous. Sys. v. Hickox*, 174 Ga. App. 23, 24, 329 S.E.2d 154, 155 (1985)).

253. *Id.*

254. *Id.*

255. *Id.* (second alteration in original) (quoting *Scott Hous. Sys.*, 174 Ga. App. at 25, 329 S.E.2d at 155).

256. *Id.* (quoting *Webb v. Prince*, 62 Ga. App. 749, 752, 9 S.E.2d 675, 678 (1940)).

257. *Id.* at 331, 672 S.E.2d at 12.

258. *Id.*