

Torts

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This Article surveys recent developments in Georgia tort law between June 1, 2009 and May 31, 2010.¹

I. PREMISES LIABILITY

In *American Multi-Cinema, Inc. v. Brown*,² the Georgia Supreme Court affirmed the Georgia Court of Appeals reversal of the grant of summary judgment in favor of a movie theater in a trip and fall case.³ The plaintiff in *Brown* attended a movie at one of the defendant's theaters. Shortly before the movie ended, an employee of the defendant was called upon to clean up a spill that had occurred several feet away from the door of the auditorium. The employee placed a wet-floor sign over the spill. When the movie ended, the plaintiff and her family exited the crowded auditorium. By the time the plaintiff reached the wet-floor sign, it had fallen and was lying on the floor. Because of the crowd, the plaintiff did not see the sign. The plaintiff tripped over the sign, fell, and was injured. The plaintiff thereafter filed suit against the defendant. The Georgia State Court of Clayton County granted the defendant's motion for summary judgment, and the plaintiff appealed.⁴

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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*, 61 MERCER L. REV. 335 (2009).

2. 285 Ga. 442, 679 S.E.2d 25 (2009).

3. *Id.* at 442, 679 S.E.2d at 26.

4. *Id.* at 442-43, 679 S.E.2d at 26-27.

The court of appeals reversed the trial court's ruling and held that a jury could reasonably find that the crowd exiting the auditorium prevented the plaintiff from seeing the floor, thereby "rendering the fallen 'Wet Floor' sign useless as a warning device."⁵ According to the court of appeals, if the jury reached this conclusion, the defendant could be held liable for breaching its duty of care to the public.⁶ The supreme court granted the defendant's petition for writ of certiorari.⁷ Following a review of the record, the supreme court affirmed the court of appeals decision.⁸

The supreme court noted that the plaintiff in a trip and fall case "must plead and prove that: (1) the defendant had actual or constructive knowledge of the hazard; and (2) the plaintiff, despite exercising ordinary care for his or her own personal safety, lacked knowledge of the hazard due to the defendant's actions or to conditions under the defendant's control."⁹ In *Brown* "[o]nly the first prong of the two-part . . . test [was] at issue"—that is, whether the defendant had actual or constructive knowledge of the alleged tripping hazard.¹⁰

The supreme court first addressed the defendant's argument that it lacked actual knowledge of the alleged hazard.¹¹ The defendant argued "that while it knew the *sign* was there, it did not know the sign was a *hazard*, and ipso facto, it had no 'actual knowledge' of the hazard that injured [the plaintiff]."¹² According to the plaintiff, however, the placement of the sign itself created an unreasonable risk of harm, particularly since it was placed in a high-traffic area immediately outside a crowded auditorium. The plaintiff argued that whether any of the defendant's employees actually saw the sign after it fell over was irrelevant—the defendant breached its duty of care simply by placing the sign in that location. In support of this argument, the plaintiffs produced expert testimony that the type of sign used by the defendant constituted a hazard when used in high-traffic areas.¹³

The supreme court rejected the defendant's argument.¹⁴ Citing *Robinson v. Kroger Co.*,¹⁵ the supreme court concluded that "[t]he

5. *Id.* at 443, 679 S.E.2d at 27.

6. *Id.* at 443-44, 679 S.E.2d at 27.

7. *Id.* at 444, 679 S.E.2d at 27.

8. *Id.* at 442, 679 S.E.2d at 26.

9. *Id.* at 444, 679 S.E.2d at 27-28.

10. *Id.* at 445, 679 S.E.2d at 28.

11. *Id.* at 445, 679 S.E.2d at 29.

12. *Id.* at 446, 679 S.E.2d at 29.

13. *Id.*

14. *Id.*

15. 268 Ga. 735, 493 S.E.2d 403 (1997).

decision whether to recognize the [plaintiffs'] theory of recovery as valid under Georgia premises liability law is precisely the type of legal policy judgment we instructed in *Robinson* must be left to a jury to decide in light of all the attendant circumstances.”¹⁶ The court noted that although none of the defendant’s employees actually saw the sign after it fell, it was undisputed that one of the defendant’s employees had put the sign over the spill in accordance with the defendant’s policies.¹⁷ According to the court, the defendant’s policies required the employee to place the sign over the spill “even if that meant putting it on the floor directly in the path of a large, oncoming crowd of pedestrians.”¹⁸ Therefore, the court concluded that summary judgment was not appropriate on the issue of whether the defendant had breached its legal duty.¹⁹

Although the supreme court’s ruling on the issue of “actual knowledge” effectively disposed of the appeal, the court also addressed the defendant’s argument that it lacked “constructive knowledge” of the hazard.²⁰ In a manner consistent with prior trip and fall decisions, the defendant argued that there were no employees of the defendant in the area who could have seen the fallen sign and removed the hazard. The defendant contended that as a result, the plaintiffs had failed to show that the defendant had constructive knowledge of the hazard.²¹ However, the supreme court rejected the defendant’s argument and noted

[T]hat we are not inclined to interpret the concept of “constructive knowledge” in such a way that it would exonerate [the defendant’s] employees for failing to notice and remedy the tripping hazard when their excuse—the inability to see it due to the large mass of people pouring out of the theater—is the same reason [the plaintiff] could not see the hazard and take actions to avoid it.²²

16. *Brown*, 285 Ga. at 446, 679 S.E.2d at 29 (citing *Robinson*, 268 Ga. at 743, 748, 493 S.E.2d at 410-11, 414).

17. *Id.* at 445-46, 679 S.E.2d at 29.

18. *Id.* at 446, 679 S.E.2d at 29.

19. *Id.* at 448, 679 S.E.2d at 30.

20. *Id.* at 446-47, 679 S.E.2d at 29.

21. *Id.* at 446, 679 S.E.2d at 29.

22. *Id.* at 446-47, 679 S.E.2d at 29. The use of the two-part test from *Robinson* seems somewhat at odds with the facts of this case and the theory of liability. The allegation in *Brown* was that the defendant was negligent in allowing the wet-floor sign to be placed in a hallway that the defendant knew would shortly be filled with a large crowd of people. *Id.* at 443, 679 S.E.2d at 27. The issue of knowledge, actual or constructive, is moot. The defendant clearly knew that the sign would be placed in the hallway—in fact, the defendant’s policies actually required it to be placed there. *Id.* at 446, 679 S.E.2d at 29.

Finally, the court addressed the defendant's contention that the court of appeals decision created uncertainty as to when and under what circumstances the use of a wet-floor sign would be appropriate.²³ The court, however, expressed little sympathy for this position and noted that "this problem is an inherent part of our system of trial by jury in civil cases."²⁴ Although the court acknowledged the widespread use of such signs and their value in preventing injuries, the court held that the use of wet-floor signs does not "automatically immunize[] merchants from suits for damages for injuries caused by [the signs]."²⁵

The court of appeals decision in *Kim v. Municipal Market Co.*²⁶—another trip and fall case involving a wet-floor sign—followed the *Brown* decision. The plaintiff in *Kim* operated a salad bar and deli at the Sweet Auburn Curb Market (Curb Market) in Atlanta. Across the aisle from the plaintiff's booth was another business that leased a cooler from Curb Market's landlord, the defendant. This particular cooler leaked frequently, a fact that was known to the plaintiff. On the day of the incident in question, the cooler had leaked, and a yellow wet-floor sign had been placed over the leak. At some point, however, the wet-floor sign fell down. As the plaintiff returned to her booth from parking her car, she tripped and fell over the fallen sign.²⁷ The plaintiff subsequently brought suit against her landlord.²⁸ The trial court granted the

The supreme court's analysis of the knowledge component of the two-part test therefore appears strained. The facts of this particular case seem more appropriately compared to situations in which a plaintiff alleges injury as a result of a substance that was intentionally applied to or placed on the floor. See, e.g., *Alterman Foods, Inc. v. Ligon*, 246 Ga. 620, 272 S.E.2d 327 (1980); *Kolomichuk v. Bruno's, Inc.*, 230 Ga. App. 638, 497 S.E.2d 10 (1998). In such cases, the defendant is presumed to have knowledge of the substance because the defendant actually applied the substance or authorized its application. *Alterman Foods*, 246 Ga. at 624, 272 S.E.2d at 330. Under those circumstances, "the plaintiff must . . . show that the defendant was negligent either in the materials he used in treating the floor or in the application of them." *Id.* at 624, 272 S.E.2d at 331. Similarly, in *Brown* the plaintiff submitted evidence that the type of sign at issue easily collapsed (that is, the defendant was negligent in the material he used) and that the sign should not have been placed immediately outside a crowded theater (that is, the defendant was negligent in the application of the sign). 285 Ga. at 443, 679 S.E.2d at 27.

23. *Brown*, 285 Ga. at 447, 679 S.E.2d at 29-30.

24. *Id.* at 447, 679 S.E.2d at 30.

25. *Id.*

26. 303 Ga. App. 122, 693 S.E.2d 123 (2010).

27. *Id.* at 122-24, 693 S.E.2d at 124-25.

28. See *id.* at 122, 693 S.E.2d at 124.

defendant's motion for summary judgment, and the plaintiff appealed.²⁹ Finding no error, the court of appeals affirmed.³⁰

The defendant argued that because the plaintiff had equal knowledge of the hazard, the defendant was entitled to summary judgment.³¹ As there was little dispute that the plaintiff knew that the leak was a persistent problem, the court of appeals affirmed the trial court's decision.³² However, in contrast to the decision in *Brown*, in which the hazard was the placement of the warning sign,³³ the plaintiff in *Kim* "made no allegation that [the defendant] had actual knowledge that the warning sign had fallen over into the puddle of water or that the placement of the warning sign itself created a hazard."³⁴

In *Imperial Investments Doraville, Inc. v. Childers*,³⁵ the court of appeals reversed a jury verdict in favor of the plaintiff in a trip and fall case.³⁶ The plaintiff was attending a darts tournament held at a hotel owned by the defendant. The hallway outside the room in which the tournament was being held was under renovation. There were rolls of carpet in the hallway, and the existing carpet was bunched up in areas on the floor. The plaintiff, however, had traversed the area on several occasions during the course of the two-day tournament. On the second day of the tournament, the plaintiff followed a friend into the hallway, tripped, and fell through a plate-glass window. An expert testified that the window through which the plaintiff fell should have been safety glass. The defendant, however, had purchased the hotel after its construction and had assumed that the windows met the building code requirements.³⁷ The plaintiff subsequently filed suit against the defendant.³⁸ At trial, the plaintiff admitted that he did not know what, if anything, had caused him to trip and fall.³⁹ Nonetheless, the jury returned a verdict in his favor. The defendant filed a motion for a directed verdict, which was denied by the trial court, and the defendant thereafter appealed.⁴⁰

29. *Id.*

30. *Id.* at 123, 693 S.E.2d at 124.

31. *Id.*

32. *Id.* at 124, 693 S.E.2d at 125.

33. 285 Ga. at 446, 679 S.E.2d at 29.

34. 303 Ga. App. at 124, 693 S.E.2d at 125.

35. 303 Ga. App. 490, 693 S.E.2d 834 (2010).

36. *Id.* at 490, 693 S.E.2d at 835.

37. *Id.* at 490-91, 693 S.E.2d at 835-36.

38. *See id.* at 490, 693 S.E.2d at 835.

39. *Id.* at 490, 492, 693 S.E.2d at 835-36, 837.

40. *Id.* at 490-91, 693 S.E.2d at 835-36.

The court of appeals first considered the issue of causation.⁴¹ According to the court, the problem was that the plaintiff could not identify what had caused him to trip or provide any description of the mechanism that caused him to fall.⁴² In fact, the plaintiff could not even eliminate the possibility that he had tripped over his own feet.⁴³ As the court noted, “A mere possibility of causation is not enough”⁴⁴ The court then turned to the question of whether the defendant should have been on notice that the plate-glass windows constituted a hazard.⁴⁵ The plaintiff, however, failed to present any evidence that the defendant knew (or was ever informed) that the plate-glass windows should have been safety glass or that the defendant knew the windows otherwise constituted a hazard to guests of the hotel.⁴⁶ Accordingly, the court of appeals held that the trial court erred in failing to grant the defendant’s motion for directed verdict.⁴⁷

In *Walker v. Aderhold Properties, Inc.*,⁴⁸ the court of appeals revisited the issue of when and under what circumstances a landowner may be held liable for a third-party criminal attack, ultimately concluding that there were unresolved issues of material fact to address the issue.⁴⁹ Early one morning the plaintiff was confronted in the hallway of her apartment complex by two men. The men forced the plaintiff into her apartment and sexually assaulted her. The plaintiff subsequently filed suit against the management company of her apartment complex and alleged the company had breached its duty to provide adequate security

41. *Id.* at 491, 693 S.E.2d at 836. Unlike the decision in *Brown*, the formal two-pronged test from *Robinson*, see 268 Ga. at 748, 493 S.E.2d at 414, does not form the structure for the court of appeals decision in *Imperial Investments*. Compare 285 Ga. at 444, 679 S.E.2d at 28, with 303 Ga. App. at 491, 693 S.E.2d at 836. Rather, the court of appeals opinion focuses primarily on the issue of causation. *Imperial Invs.*, 303 Ga. App. at 491-93, 693 S.E.2d at 836-37. The issue of causation constitutes a third prong in any trip and fall analysis, although, as Charles R. Adams wisely notes, “[t]his seems to be an issue overlooked in many slip and fall cases.” CHARLES R. ADAMS III, *GEORGIA LAW OF TORTS* § 4-6(e) (2009-2010 ed.).

42. *Imperial Invs.*, 303 Ga. App. at 492, 693 S.E.2d at 837.

43. *Id.* at 493, 693 S.E.2d at 837.

44. *Id.* at 491, 693 S.E.2d at 836 (quoting *Pennington v. WJL, Inc.*, 263 Ga. App. 758, 760, 589 S.E.2d 259, 262 (2003)) (internal quotation marks omitted).

45. See *id.* at 493-94, 693 S.E.2d at 837-38 (“[T]he trial court . . . granted summary judgment on [the plaintiff’s] negligence per se claim, finding no duty on the part of [the defendant] to inspect an existing building and conform it to the latest building code requirements.”).

46. *Id.* at 493, 693 S.E.2d at 837-38.

47. *Id.* at 494, 693 S.E.2d at 838.

48. 303 Ga. App. 710, 694 S.E.2d 119 (2010).

49. See *id.* at 710-11, 694 S.E.2d at 120-21.

and to keep the premises safe.⁵⁰ The plaintiff argued that one of the features that had led her to select the apartment complex was the security measures that were provided; however, many of those security features were not operational at the time of the attack.⁵¹ The defendants filed a motion for summary judgment and argued, *inter alia*, that the plaintiff had “failed to establish that the attack was foreseeable.”⁵² In response, the plaintiff submitted “security company incident reports and police reports” of other criminal acts on the premises.⁵³ However, the trial court excluded the evidence as hearsay and granted the defendants’ motion. The plaintiff appealed.⁵⁴

The court of appeals explained that “landlords . . . have a duty to exercise ordinary care to prevent foreseeable third-party criminal attacks upon tenants.”⁵⁵ Evidence of prior criminal activity on the premises may be used to prove that a landlord—or management company, as the case may be—was on notice that a crime against a person was reasonably foreseeable.⁵⁶ The criminal activity does not have to be identical but “must be substantially similar to the crime in question.”⁵⁷ The defendants argued that the incident reports and police reports submitted by the plaintiff were hearsay and therefore not admissible on the issue of liability.⁵⁸ As the court succinctly noted, “This, however, is not the law.”⁵⁹ According to the court,

[a] landlord need not have actual knowledge of criminal conduct before it may be held liable for failing to keep the premises safe; rather “[a] landowner can be liable for third-party criminal attacks if the landowner has *reasonable grounds* to apprehend that such a criminal act would be committed but fails to take steps to guard against injury.”⁶⁰

50. *Id.* at 711, 694 S.E.2d at 121.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 711-12, 694 S.E.2d at 121.

55. *Id.* at 712, 694 S.E.2d at 121 (quoting *Brookview Holdings, LLC v. Suarez*, 285 Ga. App. 90, 97, 645 S.E.2d 559, 566 (2007)) (internal quotation marks omitted).

56. *Id.*

57. *Id.*

58. *Id.* at 713, 694 S.E.2d at 122.

59. *Id.*

60. *Id.* (alteration in original) (quoting *TGM Ashley Lakes, Inc. v. Jennings*, 264 Ga. App. 456, 462, 590 S.E.2d 807, 816 (2003)).

The court held that incident reports could properly be admitted to prove that the management company had “reasonable grounds” to anticipate the attack at issue.⁶¹

Next, the court of appeals addressed the nature of the prior incidents and whether they were substantially similar to the incident giving rise to the cause of action.⁶² Although the prior crimes were crimes against property—burglaries—and not crimes against people—such as the assault on the plaintiff—the court held that this fact did not resolve the issue in favor of the defendant.⁶³ Citing the decision in *Sturbridge Partners, LTD v. Walker*,⁶⁴ the court noted that “such a rigid approach to determining foreseeability is not in keeping with either common sense or existing law.”⁶⁵ The court concluded that the issue of whether the defendant should have reasonably foreseen the risk of criminal assault against its tenant based on its knowledge of the prior burglaries was a question to be resolved by the jury.⁶⁶ Therefore, the court of appeals reversed the trial court’s grant of summary judgment in favor of the defendant.⁶⁷

In his dissenting opinion, Judge Andrews challenged the court of appeals conclusion that the evidence of the prior burglaries raised a question of fact for the jury.⁶⁸ According to Judge Andrews, two particular facts should have dictated the result of the case: (1) that the initial attack occurred outside the plaintiff’s apartment—that is, in a common area; and (2) that there was no evidence of any prior violent

61. *Id.* The statement in the court’s opinion that “[a] landlord need not have actual knowledge of criminal conduct before it may be held liable for failing to keep the premises safe,” *id.*, appears ripe for misinterpretation and must be read in the context of the opinion as a whole. The court of appeals makes it clear that a plaintiff must still prove that a landlord had reasonable grounds to apprehend that a criminal act would be committed. *Id.* The court’s opinion focuses on the nature of that proof and makes it clear that the security incident reports tendered in this case were properly admissible for this purpose. *Id.* The court of appeals further clarified that “the reports did not constitute hearsay” and noted that “[a]s a fundamental rule, the definition of hearsay does not include out-of-court statements which are not offered as proof of the facts asserted in such statement, but are offered merely as proof that such a statement was made.” *Id.* (quoting *Quicktrip Corp. v. Childs*, 220 Ga. App. 463, 466, 469 S.E.2d 763, 767 (1996)) (internal quotation marks omitted).

62. *See id.*

63. *Id.*

64. 267 Ga. 785, 482 S.E.2d 339 (1997).

65. *Walker*, 303 Ga. App. at 713, 694 S.E.2d at 122 (citing *Sturbridge*, 267 Ga. at 786, 482 S.E.2d at 340).

66. *Id.*

67. *Id.* at 716, 694 S.E.2d at 124.

68. *Id.* (Andrews, J., dissenting).

attacks on the premises.⁶⁹ Citing the decision of the supreme court in *Doe v. Prudential-Bache/A.G. Spanos Realty Partners, L.P.*,⁷⁰ Judge Andrews noted that “property crimes . . . committed in a common area do not put a landlord on notice that a violent assault is likely to occur in that area.”⁷¹ Accordingly, in the absence of any evidence of prior violent attacks, Judge Andrews concluded that summary judgment for the defendant was appropriate.⁷²

II. LIABILITY FOR ANIMAL ATTACKS

In *Kringle v. Elliott*,⁷³ the court of appeals affirmed the grant of a directed verdict in favor of a dog owner under Georgia’s “first bite” rule.⁷⁴ The plaintiff’s seven-year-old son was bitten by the defendant’s golden retriever while playing in the defendant’s backyard. The plaintiff subsequently brought suit against the defendant on behalf of her son. The trial court granted the defendant’s motion for directed verdict, and the plaintiff appealed. On appeal, the plaintiff argued that the trial court erred in excluding evidence that the dog may have attacked other animals.⁷⁵

As noted by the court of appeals, Georgia’s first bite rule “does not literally require a first bite.”⁷⁶ Rather, the plaintiff must prove that the animal had a “propensity to do the particular act (biting) which caused injury” and that the owner of the animal had knowledge of that propensity.⁷⁷ With respect to her efforts to establish the defendant’s knowledge of the dog’s alleged dangerous propensity, the plaintiff contended that the trial court improperly excluded evidence of two incidents. The first incident involved a situation in which the defendant discovered the dog with a dead kitten in its mouth. In the second incident, a neighbor of the defendant found the dog in her backyard with a puppy that eventually died.⁷⁸ The plaintiff argued that these incidents constituted evidence from which a jury could conclude that the

69. *Id.*

70. 268 Ga. 604, 492 S.E.2d 865 (1997).

71. *Walker*, 303 Ga. App. at 716, 694 S.E.2d at 124 (Andrews, J., dissenting) (citing *Prudential-Bache*, 268 Ga. at 606, 492 S.E.2d at 867).

72. *Id.*

73. 301 Ga. App. 1, 686 S.E.2d 665 (2009).

74. *Id.* at 1, 686 S.E.2d at 666.

75. *Id.*

76. *Id.* at 1-2, 686 S.E.2d at 666 (quoting *Phiel v. Boston*, 262 Ga. App. 814, 816, 586 S.E.2d 718, 720 (2003)).

77. *Id.* at 2, 686 S.E.2d at 666 (quoting *Phiel*, 262 Ga. App. at 816, 586 S.E.2d at 720) (internal quotation marks omitted).

78. *Id.* at 2, 686 S.E.2d at 666-67.

dog had a dangerous propensity to attack other animals.⁷⁹ The court of appeals, however, disagreed and noted that the evidence of propensity was speculative.⁸⁰ No one saw the dog attack the kitten or the puppy, and there were no bite marks on either animal.⁸¹ Accordingly, there was simply no way for a jury to conclude “that the harm was caused by a vicious attack rather than the overzealous play of a large dog.”⁸² Therefore, the court of appeals affirmed the trial court’s grant of a directed verdict.⁸³

III. DRAM SHOP ACT

In *Shin v. Estate of Camacho*,⁸⁴ an action filed under Georgia’s Dram Shop Act,⁸⁵ the court of appeals reversed the trial court’s denial of a motion for summary judgment in favor of the defendant.⁸⁶ The defendant hosted a party at his house attended by Seung Park. During the course of the party, Park had several drinks and eventually got into a heated confrontation with another guest. This confrontation effectively ended the party and led the defendant to conclude that Park was intoxicated. Unbeknownst to the defendant, however, Park had at least two more drinks following the fight. The defendant’s wife urged Park to either rest before driving home or allow her to drive him home. The defendant likewise urged Park to forego driving home until he was sober. After resting for an uncertain amount of time at the defendant’s residence—somewhere between forty-five and ninety minutes—Park decided to leave. Once again, the defendant and his wife tried to convince Park not to drive. However, their efforts were unsuccessful. As he was driving home, Park ran a red light and crashed into a car driven by Stacey Camacho.⁸⁷ Camacho died as a result of the injuries sustained in the crash.⁸⁸

Following her death, Camacho’s estate brought suit against the defendant under Georgia’s Dram Shop Act.⁸⁹ The defendant moved for summary judgment on the ground that there was no evidence that he knowingly served alcohol “to Park [while] Park was in a state of

79. *Id.* at 2, 686 S.E.2d at 666.

80. *Id.* at 3, 686 S.E.2d at 667.

81. *Id.* at 2-3, 686 S.E.2d at 666-67.

82. *Id.* at 3, 686 S.E.2d at 667.

83. *Id.* at 4, 686 S.E.2d at 667.

84. 302 Ga. App. 243, 690 S.E.2d 444 (2010).

85. O.C.G.A. § 51-1-40 (2000 & Supp. 2009).

86. *Shin*, 302 Ga. App. at 243, 690 S.E.2d at 445.

87. *Id.* at 243-44, 690 S.E.2d at 445.

88. *Id.* at 243, 690 S.E.2d at 445.

89. *Id.*

noticeable intoxication.”⁹⁰ The trial court denied the defendant’s motion for summary judgment, and an appeal ensued.⁹¹

Under Georgia’s Dram Shop Act, a person who serves alcohol to another “person of lawful drinking age [does] not thereby become liable for injury, death, or damage caused by or resulting from the intoxication of such person.”⁹² However, the Act further provides that a person who serves alcohol to another person who is noticeably intoxicated “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.”⁹³

In reversing the trial court’s denial of summary judgment, the court of appeals noted that there was no evidence that the defendant knowingly served alcohol to Park while Park was in a state of noticeable intoxication.⁹⁴ However, evidence did show that the defendant first discovered Park was intoxicated when the confrontation with the other guest occurred, and the defendant did not serve Park the drinks he consumed after the fight. To the contrary, once the defendant discovered that Park was intoxicated, he made every effort to convince Park not to drive until he was sober.⁹⁵

IV. RESPONDEAT SUPERIOR LIABILITY

In *Hicks v. Heard*,⁹⁶ the plaintiff suffered injuries arising from a car crash with Jessica Heard, an “on-call” employee of the defendant and daughter of one of the co-owners of the defendant company. The plaintiff brought suit against the defendant under a theory of vicarious liability, and the defendant responded by filing a motion for summary judgment. The trial court granted the defendant’s motion. The court of appeals, in turn, affirmed the trial court’s ruling and held that the plaintiff had failed to prove that the on-call employee was acting within the scope of her employment at the time of the car accident.⁹⁷ The supreme court granted certiorari to decide whether, under the supreme court’s decision in *Allen Kane’s Major Dodge, Inc. v. Barnes*,⁹⁸ “the

90. *Id.* at 244, 690 S.E.2d at 445-46.

91. *Id.* at 243, 690 S.E.2d at 445.

92. O.C.G.A. § 51-1-40(b); *Shin*, 302 Ga. App. at 244, 690 S.E.2d at 446 (internal quotation marks omitted).

93. O.C.G.A. § 51-1-40(b); *Shin*, 302 Ga. App. at 245, 690 S.E.2d at 446 (internal quotation marks omitted).

94. *Shin*, 302 Ga. App. at 245, 690 S.E.2d at 446.

95. *Id.* at 246, 690 S.E.2d at 446-47.

96. 286 Ga. 864, 692 S.E.2d 360 (2010).

97. *Id.* at 864, 692 S.E.2d at 361.

98. 243 Ga. 776, 257 S.E.2d 186 (1979).

[c]ourt of [a]ppeals gave proper weight to an employee's 'on-call' status during the final step of the burden shifting framework laid out in . . . [*Allen Kane's Major Dodge*].⁹⁹

Under the burden-shifting framework in *Allen Kane's Major Dodge*, if the operator of a motor vehicle involved in a collision is shown to be employed by the owner of that vehicle, "a presumption arises that the employee was in the scope of his employment at the time of the collision."¹⁰⁰ The burden then shifts to the employer to prove that the employee was not acting within the scope of employment at the time of the accident.¹⁰¹ If the employer satisfies this burden, the burden shifts back to the plaintiff to prove, "in addition to the facts which give rise to the presumption that he was in the course of his employment, some other fact which indicates the employee was acting within the scope of his employment."¹⁰² If the additional evidence submitted by the plaintiff is "direct evidence," then the case proceeds to the jury.¹⁰³ "However, when the 'other fact' is [c]ircumstantial evidence, it must be evidence sufficient to support a verdict in order to withstand the defendant's motion for summary judgment."¹⁰⁴

In *Hicks* the supreme court concluded that the court of appeals had properly applied the *Allen Kane's Major Dodge* test, and thus, the supreme court affirmed.¹⁰⁵ In reaching this conclusion, the court focused on two basic facts.¹⁰⁶ First, at the time of the collision at issue, Jessica Heard was driving home from school in a vehicle owned by the defendant.¹⁰⁷ Second, Jessica Heard was an on-call employee of the defendant.¹⁰⁸ According to the court, these facts gave rise to the initial presumption that Heard was acting within the scope of her employment at the time of the accident.¹⁰⁹ The defendant, however, successfully rebutted this presumption with evidence that Jessica Heard

99. *Hicks*, 286 Ga. at 864, 692 S.E.2d at 361 (citing *Allen Kane's Major Dodge*, 243 Ga. at 777, 257 S.E.2d at 188).

100. *Hicks*, 286 Ga. at 865, 692 S.E.2d at 361 (quoting *Allen Kane's Major Dodge*, 243 Ga. at 777, 257 S.E.2d at 188) (internal quotation marks omitted).

101. *Id.* (quoting *Allen Kane's Major Dodge*, 243 Ga. at 777, 257 S.E.2d at 188).

102. *Id.* at 865-66, 692 S.E.2d at 362 (quoting *Allen Kane's Major Dodge*, 243 Ga. at 780, 257 S.E.2d at 190) (internal quotation marks omitted).

103. *Id.* at 866, 692 S.E.2d at 362 (quoting *Allen Kane's Major Dodge*, 243 Ga. at 780, 257 S.E.2d at 190).

104. *Id.* (quoting *Allen Kane's Major Dodge*, 243 Ga. at 780, 257 S.E.2d at 190) (internal quotation marks omitted).

105. 286 Ga. at 867-68, 692 S.E.2d at 362-63.

106. *See id.* at 867, 692 S.E.2d at 362-63.

107. *Id.* at 866-67, 692 S.E.2d at 362.

108. *Id.* at 867, 692 S.E.2d at 362-63.

109. *Id.* at 867, 692 S.E.2d at 362.

was on a purely personal mission at the time of the accident and therefore was not acting within the scope of her employment.¹¹⁰ Thus, the burden shifted back to the plaintiff to submit some additional fact to prove that Heard was acting within the scope of her employment at the time of the accident.¹¹¹ The plaintiff pointed to the fact that Heard was on-call at the time of the accident.¹¹² The court concluded that the evidence that Heard was an on-call employee constituted only circumstantial evidence, not direct evidence, and that it was not “sufficient to support a verdict.”¹¹³ Consequently, the supreme court affirmed the grant of summary judgment in favor of the defendant.¹¹⁴

V. DEFAMATION

In *Community Newspaper Holdings, Inc. v. King*,¹¹⁵ King, a health-care worker, sued a newspaper and reporter, alleging he had been libeled in two newspaper articles. Viewed in the light most favorable to King, as was required at the stage of a motion to dismiss, the facts showed that King was employed as a healthcare worker at Central State Hospital. During King’s employment, two Baldwin County prisoners

110. *Id.* at 866-67, 692 S.E.2d at 362.

111. *Id.* at 867, 692 S.E.2d at 362-63.

112. *Id.*

113. *Id.*

114. *Id.* at 868, 692 S.E.2d at 363. Interestingly, most of the supreme court’s majority opinion is actually spent addressing Justice Carley’s dissent in this case. *See id.* at 868-70 & n.2, 871 n.2, 873, 875 n.4, 692 S.E.2d at 363-64 n.1, 365 n.2, 366-67, 368 n.4. In his dissent, Justice Carley opines, “[T]o the extent that [c]ourt of [a]ppeals[] opinions have held that an employee’s on-call status, in conjunction with her employer’s ownership of the vehicle, is not sufficient ‘to get the case to the jury,’ they should be overruled.” *Id.* at 878, 692 S.E.2d at 370 (Carley, J., dissenting). The majority opinion expresses the concern that Justice Carley’s approach would effectively establish “24-hour employer liability for on-call employees.” *Id.* at 875, 692 S.E.2d at 367 (majority opinion) (quoting *Thurmon v. Sellers*, 62 S.W.3d 145, 154 (Tenn. Ct. App. 2001)). Justice Carley acknowledged this concern in his dissent and recommended the following to the supreme court:

[A]dopt the following non-exhaustive list of factors . . . to provide guidance in determining whether an on-call employee was acting within the scope of her employment while driving her employer’s vehicle at the time of a collision:

“1. Whether, at the time of the accident, the employee’s use of the vehicle benefitted the employer; 2. Whether the employee was subject to the employer’s control at the time of the accident; 3. Whether the employee’s . . . activities were restricted while on call; 4. Whether the use of the vehicle at the time of the accident was authorized by the employer; and 5. What the employee’s primary reason for using the vehicle was at the time of the injury-producing accident.”

Id. at 879, 692 S.E.2d at 370 (Carley, J., dissenting) (quoting *Thurmon v. Sellers*, 62 S.W.3d 145, 155).

115. 299 Ga. App. 267, 682 S.E.2d 346 (2009).

escaped from the hospital. King was suspected of having assisted the two escapees. Marney, a reporter, wrote two articles about King's alleged assistance in the escape. The articles at issue were published in two separate issues of the newspaper: once on December 22, 2006, and once in the December 23-25, 2006 weekend edition. The first article stated that the warrant had been issued for King's arrest and discussed King's alleged aid in the prisoners' escape. The article quoted the Baldwin County Sheriff, stating "that officers were actively looking for King," and they "consider his assistance to the escapees as a big or bigger crime than the escape itself."¹¹⁶ Subsequent to King's arrest, Marney wrote the second article titled, "Escape [A]ccomplice [A]rrested."¹¹⁷ The article stated in its body that "deputies [had] arrested . . . King . . . for aiding the escape of two Baldwin County prisoners'; . . . King had been charged with 'aiding another to escape from . . . custody'; and King 'could face up to five years in prison if found guilty and convicted.'¹¹⁸ Finally, Marney quoted the sheriff, stating "that King 'allegedly gave [a] key' to one of the prisoners."¹¹⁹

After the charges against King were dismissed for reasons not stated in the case, King filed suit against the newspaper and Marney.¹²⁰ King alleged "that the statements in the articles, [including] the headline of the second article, constituted libel per se."¹²¹ In his lawsuit, King sought compensatory damages, "punitive damages, and damages for emotional distress suffered from having been 'falsely charged with criminal offenses.'¹²² The defendants moved for and were denied summary judgment. The trial court granted a certificate of immediate review.¹²³ The defendants claimed on appeal "that (1) the content of the articles [was] privileged, and (2) the headline of the second article, read in conjunction with the [first] article, [was] not libelous."¹²⁴

The court of appeals first addressed the definition of newspaper libel and the exception to that definition under section 51-5-7(8) of the Official Code of Georgia Annotated (O.C.G.A.),¹²⁵ which provides that "[t]ruthful reports of information received from any arresting officer or police

116. *Id.* at 268, 682 S.E.2d at 347-48.

117. *Id.* at 268, 682 S.E.2d at 348.

118. *Id.*

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

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 268-69, 682 S.E.2d at 348.

124. *Id.* at 269, 682 S.E.2d at 348.

125. O.C.G.A. § 51-5-7(8) (2000).

authorities' are conditionally privileged."¹²⁶ For a statement to be conditionally privileged in a published article, the language in the article must constitute "a fair and honest report of information obtained from police records and police authorities."¹²⁷

The reporter submitted an affidavit with her summary judgment motion that declared "that the statements in both articles were derived from an interview with [the sheriff] and a report issued by hospital police [and] that she had no reason to doubt the accuracy of [that] information."¹²⁸ The report from the hospital police stated "that King had been identified as being the staff member who gave a pass key to one of the escaped inmates and that" as a result of the actions alleged against King, "the [police] investigator had been advised to press charges against King."¹²⁹ The report went on to provide that King's arrest took place on December 22 and that King denied that he gave the key to the inmate. In his deposition, King did not dispute the facts stated in the articles that a warrant had been issued for him or that he had been arrested and posted bond.¹³⁰

The court of appeals noted that

[b]ecause falsity is an essential element of both libel and slander, truth is a perfect defense to a defamation action. Accordingly, where a publication is substantially accurate, and if the article is published by the newspaper in good faith and the same is substantially accurate, the newspaper has a complete defense. As long as facts are not misstated, distorted or arranged so as to convey a false and defamatory meaning, there is no liability for a somewhat less than complete report of the truth, even if the newspaper conveys its own editorial opinions.¹³¹

Based on that standard, the court held "that the newspaper articles fairly, honestly, and with substantial accuracy, reflect[ed] statements in the investigative report [which] identif[ied] King as a suspect in the prison escape" and that the information was supported by the reporter's

126. *Cnty. Newspaper*, 299 Ga. App. at 269, 682 S.E.2d at 348 (quoting O.C.G.A. § 51-5-7(8)). Newspaper libel is defined as "[a]ny 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." *Id.* (alteration in original) (internal quotation marks omitted); O.C.G.A. § 51-5-2(a) (2000).

127. *Cnty. Newspaper*, 299 Ga. App. at 269, 682 S.E.2d at 348 (quoting *Torrance v. Morris Publ'g Grp., LLC*, 281 Ga. App. 563, 571, 636 S.E.2d 740, 746 (2006)) (internal quotation marks omitted).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* (quoting *Lucas v. Cranshaw*, 289 Ga. App. 510, 512, 659 S.E.2d 612, 615 (2008)).

affidavit.¹³² The court noted that privilege is generally a jury issue, yet it declared that when statements are privileged as a matter of law, courts will grant summary judgment.¹³³

The court of appeals next turned to the appellants' contention that the trial court erred in denying summary judgment with regard to the headline of the second article.¹³⁴ King argued that because the charge for aiding the prisoners in the escape was ultimately dismissed, the headline, which implied he was an accomplice, constituted libel.¹³⁵ In response to this argument, the court declared that a headline "must be read in conjunction with the article" and not in isolation.¹³⁶ The court noted that when an allegedly defamatory statement is read in context and "is so unambiguous as to reasonably bear but one interpretation," it is a matter of law whether the statement is defamatory.¹³⁷ The court further stated that an average reader's construction of a writing is paramount to a determination of whether a court should rule that the writing is defamatory.¹³⁸ Ultimately, the court held that "[r]eading the headline in conjunction with the article, . . . the average reader would believe that King had been arrested" and that after the arrest, the charges against him were "aiding another to escape from custody, which was true;" therefore, the statement was not defamatory.¹³⁹ Given this determination, the court of appeals ruled that the headline alone did not constitute an actionable circumstance.¹⁴⁰

The case of *Community Newspaper* creates an interesting situation. The court of appeals held as a matter of law that the headline, which implied King was involved in the crime, was not libelous because the average reader would read the article, which was true at the time the article was published.¹⁴¹ The Authors question whether the average reader reads an entire newspaper article and further question at what stage a reporter crosses the line into defaming someone in a headline. While the headline at issue in this case was not overly derogatory

132. *Id.* at 270, 682 S.E.2d at 348.

133. *Id.* at 270, 682 S.E.2d at 348-49 (quoting *Torrance*, 281 Ga. App. at 571, 636 S.E.2d at 746).

134. *Id.* at 270, 682 S.E.2d at 349.

135. *Id.*

136. *Id.*

137. *Id.* (quoting *Constitution Publ'g Co. v. Andrews*, 50 Ga. App. 116, 117, 177 S.E. 258, 259 (1934)).

138. *Id.* at 271, 682 S.E.2d at 349 (quoting *Cox Enters., Inc. v. Nix*, 274 Ga. 801, 803, 560 S.E.2d 650, 652 (2002)).

139. *Id.*

140. *Id.*

141. *Id.*

towards King, it would be interesting to see whether the court of appeals would hold true to this precedent in the event a headline was more injurious but contained truth in the accompanying article.

VI. MEDICAL MALPRACTICE

On February 16, 2005, Governor Sonny Perdue¹⁴² signed into law Senate Bill 3,¹⁴³ commonly referred to as the Tort Reform Act of 2005. O.C.G.A. § 51-13-1,¹⁴⁴ which established a series of caps on noneconomic damages recoverable in a medical malpractice action,¹⁴⁵ was added by section 13 of the Tort Reform Act.¹⁴⁶

In *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*,¹⁴⁷ the supreme court held that the statutory caps on “noneconomic damages . . . in O.C.G.A. § 51-13-1 violate the right to a jury trial as guaranteed [by] the Georgia Constitution.”¹⁴⁸ The plaintiff brought suit against the defendant after a botched facelift and laser resurfacing procedure left her permanently disfigured. At the conclusion of trial, the jury awarded the plaintiff \$1,265,000, which included \$900,000 in noneconomic damages for the plaintiff’s pain and suffering. The applicable cap under O.C.G.A. § 51-13-1 would have reduced the award of damages to \$350,000. The plaintiff, however, moved to have the statutory caps declared unconstitutional. The trial court granted the motion and awarded the plaintiff the full jury verdict.¹⁴⁹ On appeal, the supreme court affirmed.¹⁵⁰

142. Governor Sonny Perdue was in office from January 2003 until January 2011.

143. Ga. S. Bill 3, Spec. Sess., 2005 Ga. Laws 1 (codified in scattered sections of O.C.G.A. tit. 9, 24, 33, 43 & 51).

144. O.C.G.A. § 51-13-1 (Supp. 2010).

145. *Id.* For example, O.C.G.A. § 51-13-1(b) provides that

[i]n any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against one or more health care providers, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed \$350,000.00, regardless of the number of defendant health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.

Id. O.C.G.A. § 51-13-1 contains four separate provisions that limit the amount of noneconomic damages recoverable in a medical malpractice action. *Id.* § 51-13-1(b) to (e).

146. Ga. S. Bill 3 at § 13, 2005 Ga. Laws at 16-17 (codified at O.C.G.A. § 51-13-1).

147. 286 Ga. 731, 691 S.E.2d 218 (2010).

148. *Id.* at 738, 691 S.E.2d at 224.

149. *Id.* at 731, 691 S.E.2d at 220.

150. *Id.*

Article I of the Georgia Constitution¹⁵¹ provides that “[t]he right to trial by jury shall remain inviolate.”¹⁵² This provision, however, only applies to those categories of actions for which the right to a jury trial existed “at common law or by statute at the time of the adoption of the Georgia Constitution in 1798.”¹⁵³ Citing to the doctrine of “mala praxis”¹⁵⁴ and the recognition of claims of medical neglect in a number of late eighteenth century and early to mid-nineteenth century cases, the supreme court concluded that a right to a jury trial existed at common law for such claims at the time of the adoption of the Georgia Constitution in 1798.¹⁵⁵ Furthermore, the court concluded that this right includes the right to obtain an “award of the full measure of damages, including noneconomic damages, as determined by the jury.”¹⁵⁶ Accordingly, the supreme court concluded that “[t]he very existence of the caps, in any amount, is violative of the right to trial by jury.”¹⁵⁷

The supreme court went on to consider, but ultimately reject, three arguments made by the defendant in support of the statutory caps.¹⁵⁸ First, the defendant argued that the Georgia General Assembly had the authority to modify the common law.¹⁵⁹ The court agreed that the legislature has the general authority to modify the common law but rejected “the notion that this general authority empowers the [l]egislature to abrogate *constitutional* rights that may inhere in common law causes of action.”¹⁶⁰ Second, the defendant suggested that to the extent the legislature can authorize the imposition of double or treble damages, it is likewise reasonable that the legislature would have the inherent authority to cap damages.¹⁶¹ However, the court noted that double or treble damages add to and “affirm the integrity of [the jury’s] award,” unlike statutory caps which limit or “nullify” that award.¹⁶² Finally, the defendant argued that statutory caps should be upheld on

151. GA. CONST. art. I.

152. *Id.* art. I, § 1, para. 11(a).

153. *Nestlehutt*, 286 Ga. at 733, 691 S.E.2d at 221 (quoting *Benton v. Ga. Marble Co.*, 258 Ga. 58, 66, 365 S.E.2d 413, 420 (1988)) (internal quotation marks omitted).

154. The term “mala praxis” is defined as “[m]alpractice; unskillful treatment, esp. by a doctor.” BLACK’S LAW DICTIONARY 1042 (9th ed. 2009); see WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 122 (Univ. of Chicago Press 1979) (1768).

155. *Nestlehutt*, 286 Ga. at 733-35, 691 S.E.2d at 221-23.

156. *Id.*

157. *Id.* at 736, 691 S.E.2d at 223.

158. *Id.* at 736-37, 691 S.E.2d at 223-24.

159. *Id.* at 736, 691 S.E.2d at 223.

160. *Id.*

161. *Id.* at 737, 691 S.E.2d at 224.

162. *Id.*

the basis of their similarity to the trial court's remittitur authority.¹⁶³ The supreme court, however, disposed of this argument by noting that the remittitur authority "is a corollary of the courts' constitutionally derived authority to grant new trials under . . . the Georgia Constitution" and, unlike the statutory caps, "is a carefully circumscribed power" that is applied only in "limited circumstance[s]."¹⁶⁴

VII. EMOTIONAL DISTRESS

The case of *Clarke v. Freeman*¹⁶⁵ arises from the tragic circumstances of Brian Nichols's escape from the Fulton County Courthouse on March 11, 2005. On that day, Nichols entered the Fulton County Courthouse under the custody of the Fulton County Sheriff's Department.¹⁶⁶ Nichols had been charged with burglary, rape, and aggravated assault, and his trial was set to continue that day before Fulton County Superior Court Judge Rowland Barnes. Nichols, however, had other plans. Nichols overpowered a deputy in his holding cell, took her gun, and headed for Judge Rowland's chambers. Along the way he encountered Susan Christy and Gina Clarke, Judge Barnes's case manager and assistant case manager. Nichols ordered the women into the judge's chambers, threatened them, and handcuffed them. He then proceeded into the courtroom, where he shot Judge Barnes and his court reporter.¹⁶⁷

Christy and Clarke subsequently brought suit against the Fulton County Sheriff and numerous employees in the Sheriff's department for damages arising from infliction of emotional distress.¹⁶⁸ The plaintiffs alleged that the defendants failed to follow departmental policies in responding to a threat made by Nichols, in responding to the discovery of a weapon on Nichols, and in the level of security and oversight provided at the courthouse and in the judge's chambers.¹⁶⁹ The defendants filed a motion to dismiss on the ground that the plaintiffs' complaints failed to state a claim upon which relief could be granted. The trial court granted the motion to dismiss, and the plaintiffs appealed.¹⁷⁰

163. *Id.*

164. *Id.*

165. 302 Ga. App. 831, 692 S.E.2d 80 (2010).

166. *Id.* at 834, 692 S.E.2d at 83.

167. *Id.* at 832, 834-35, 692 S.E.2d at 82-84.

168. *Id.* at 835, 692 S.E.2d at 84.

169. *Id.* at 833-35, 692 S.E.2d at 83-84.

170. *Id.* at 835, 692 S.E.2d at 84.

On appeal, the court of appeals first noted that in ruling on the motion to dismiss, the trial court was required to construe the evidence in a light most favorable to the plaintiff.¹⁷¹ Moreover, the motion should not have been “granted unless it appear[ed] to a certainty that the plaintiff[s] would be entitled to no relief under any state of facts which could be proved.”¹⁷² The trial court ruled that the plaintiffs’ claim was barred by Georgia’s “impact rule,” which requires that in order for a plaintiff to recover damages for emotional distress resulting from negligent conduct, the plaintiff must sustain a physical impact that results in physical injury.¹⁷³ The plaintiffs had not suffered any physical injury as a result of a physical impact arising from their confrontation with Nichols.¹⁷⁴ However, an exception to the physical impact requirement arises when a defendant engages in malicious, wilful, or wanton behavior that is directed at the plaintiff.¹⁷⁵ Under those circumstances, no physical impact is required.¹⁷⁶ Nonetheless, the trial court held that although the defendants’ actions may have been malicious, wilful, or wanton, the defendants’ behavior was not directed at the plaintiffs.¹⁷⁷ The court of appeals disagreed.¹⁷⁸

According to the court of appeals, the plaintiffs had alleged facts that, if taken as true, showed that the defendants were aware of a threat directed toward Judge Barnes and his employees, were aware that a weapon had been confiscated from Nichols, and failed to provide proper security to the courtroom and the judge’s chambers.¹⁷⁹ As such, the court concluded the defendants’ behavior could clearly be construed as having been “directed toward the members of Judge Barnes’s chamber (by virtue of the defendants’ alleged knowledge of Nichols’s threat[s] or possession of a weapon).”¹⁸⁰ Accordingly, the court of appeals held that the trial court erred in granting the defendants’ motion to dismiss.¹⁸¹

171. *Id.* at 832, 692 S.E.2d at 82 (quoting *Ford v. Whipple*, 225 Ga. App. 276, 277, 483 S.E.2d 591, 592 (1997)).

172. *Id.* (quoting *Whipple*, 225 Ga. App. at 277, 483 S.E.2d at 592) (internal quotation marks omitted).

173. *Id.* at 836, 692 S.E.2d at 84.

174. *Id.* at 835 n.6, 692 S.E.2d at 84 n.6.

175. *Id.* at 836, 692 S.E.2d at 84.

176. *Id.*

177. *Id.* at 835, 692 S.E.2d at 84.

178. *Id.*

179. *Id.* at 836, 692 S.E.2d at 85.

180. *Id.* at 836-37, 692 S.E.2d at 85.

181. *Id.* at 837, 692 S.E.2d at 85.

VIII. NEGLIGENCE

In *Harper v. Barge Air Conditioning, Inc.*,¹⁸² the court of appeals reversed the grant of a directed verdict in favor of the defendant in a negligence action.¹⁸³ The plaintiff was the manager of an AutoZone store. In May 2005, the store's air conditioning malfunctioned. Representatives from the defendant made several service calls to the store during the month in an effort to fix the problem. On the morning of May 25, one of the defendant's technicians once again attempted to repair one of the store's two heating, ventilating, and air conditioning (HVAC) units. The repair was apparently unsuccessful, as the store continued to get hotter through the day. The plaintiff worked throughout the day in the store and well into the evening along with two other employees. Late in the evening, all three employees became ill. Eventually it was confirmed that the employees had suffered carbon monoxide poisoning. Early the next morning, representatives from the fire department confirmed the presence of a high level of carbon monoxide in the store and took steps to vent the store. However, the carbon monoxide level almost immediately returned to a high level. The HVAC units were examined later that day by the defendant's owner and a service technician. According to the defendant, no problems were detected with the units.¹⁸⁴ Notably, however, the store did not encounter any further problems with the level of carbon monoxide after the units were examined by the defendant.¹⁸⁵

The plaintiff subsequently brought suit against the defendant and alleged that she had been exposed to high levels of carbon monoxide as a result of the negligence of the defendant's service technician. At trial the plaintiff presented evidence that a gas burner in the HVAC units was the only possible source of carbon monoxide on the day in question.¹⁸⁶ An expert hired by the plaintiff testified that the improper replacement of a service panel in the HVAC unit on the day of the plaintiff's injury had caused the unit to emit carbon monoxide.¹⁸⁷ Even

182. 300 Ga. App. 901, 686 S.E.2d 668 (2009).

183. *Id.* at 902, 686 S.E.2d at 669.

184. *Id.* at 902-04, 686 S.E.2d at 669-71.

185. *See id.* at 906, 686 S.E.2d at 672.

186. *Id.* at 901-02, 686 S.E.2d at 669. There was evidence that a propane-powered floor buffer had been used in the store that same evening; however, subsequent testing of the floor buffer indicated that it had been working properly and could not have been the source of the carbon monoxide, particularly since the carbon monoxide level increased even in the absence of the buffer. *Id.* at 903-04, 686 S.E.2d 670-71.

187. *Id.* at 905, 686 S.E.2d at 671.

though “the technician testified he replaced the panel and the owner testified the panel was in place when he inspected it, the expert testified that no other scenario explained how [the plaintiff] became poisoned with carbon monoxide.”¹⁸⁸ The trial court, however, granted the defendant’s motion for directed verdict, and the plaintiff appealed.¹⁸⁹

In reversing the trial court, the court of appeals noted that “[a] court cannot direct a verdict where there is any reasonable inference supported by evidence which would authorize a verdict to the contrary.”¹⁹⁰ In this regard, the court of appeals identified two grounds that supported reversal of the trial court’s decision.¹⁹¹ First, the court held that there was clear circumstantial evidence that the defendant’s negligence had caused the plaintiff’s injuries.¹⁹² As the court noted,

[I]f you find carbon monoxide gas in your store after the technician services your air conditioner, all sources of emission save the HVAC system are eliminated, and the problem never returns after the same company examines your system again, it is reasonable to conclude that the technician caused the carbon monoxide emission.¹⁹³

Second, because the HVAC units were under the exclusive control of the defendant, the facts supported an inference of negligence under a theory of *res ipsa loquitur*.¹⁹⁴ Thus, the court of appeals held that the trial court had erred in directing a verdict in the defendant’s favor.¹⁹⁵

188. *Id.*

189. *Id.* at 901-02, 686 S.E.2d at 669.

190. *Id.* at 906, 686 S.E.2d at 672.

191. *Id.* at 906-07, 686 S.E.2d at 672.

192. *Id.* at 906, 686 S.E.2d at 672.

193. *Id.*

194. *Id.* at 906-07, 686 S.E.2d at 672. The elements of *res ipsa loquitur* include that “(1) the injury ordinarily would not occur in the absence of negligence; (2) the injury was caused by an agent or instrument within the defendant’s exclusive control; and (3) the injury was not due to any voluntary action or contribution on the plaintiff’s part.” *Id.* at 907, 686 S.E.2d at 672.

195. *Id.* at 907, 686 S.E.2d at 673.