

Torts

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This Article surveys recent developments in Georgia tort law between June 1, 2010 and May 31, 2011.¹

I. NEGLIGENCE

In motor vehicle collision cases, the Georgia Court of Appeals reminded plaintiffs that they must present positive evidence that the “accident and damages were caused by specific acts of negligence on the part of that defendant”² and cannot rely on inferences of negligence based upon “evidence which is too uncertain or speculative.”³ In *Werner Enterprises v. Lambdin*,⁴ the defendant’s past driving record was inadmissible to prove negligence when the defendant claimed no fault and the plaintiff could not recall the accident.⁵ However, witness

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Thanks to Deron Hicks and Travis Hargrove for passing the baton (at least for this year!) nineteen years after I edited the forty-fourth volume of the Annual Survey of Georgia Law.

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1. For an analysis of Georgia tort law during the prior survey period, see Deron R. Hicks & Travis C. Hargrove, *Torts, Annual Survey of Georgia Law*, 62 MERCER L. REV. 317 (2010).

2. *Hunsucker v. Belford*, 304 Ga. App. 200, 202, 695 S.E.2d 405, 408 (2010) (quoting *Cromer v. Hodges*, 216 Ga. App. 548, 549, 455 S.E.2d 94, 96 (1995)) (internal quotation marks omitted); see also *Turner v. Masters*, 304 Ga. App. 855, 857, 698 S.E.2d 346, 349 (2010) (holding that even if the plaintiff establishes negligence per se of the defendant, it may be inadequate proof).

3. *Werner Enters., Inc. v. Lambdin*, 307 Ga. App. 813, 815, 706 S.E.2d 185, 186 (2011).

4. 307 Ga. App. 813, 706 S.E.2d 185 (2011).

5. *Id.* at 814-15, 706 S.E.2d at 186-87.

testimony regarding the defendant's behavior and driving in the hour before a collision may be admissible as relevant to whether he was speeding at the time of the collision.⁶

In addition to *Shelter Mutual Insurance Co. v. Bryant*⁷ and *Dees v. Logan*,⁸ *Schwartz v. Brancheau*⁹ will likely provide injured plaintiffs with a new citation regarding the use of evidence of an intoxicated defendant when the plaintiff is seeking to recover only compensatory damages.¹⁰ In *Schwartz*, despite a stipulation to negligence by the defendant and dismissal of the plaintiff's punitive damages claim, the court of appeals affirmed the trial court's denial of the defendant's motion in limine to preclude evidence of the defendant's consumption of alcohol.¹¹ The court of appeals rejected the appellant's assertion that it had stipulated to liability, not just negligence, as the record reflected that the defendant was not conceding his negligence was the proximate cause of the plaintiff's injuries.¹² The rule remains when the defendant has admitted negligence but not causation or damages, evidence of a defendant's alcohol consumption that is inextricably linked with the accident and defendant's negligence is admissible even if the plaintiff is not seeking punitive damages.¹³

In *Kesterson v. Jarrett*,¹⁴ the court of appeals analyzed a civil litigant's right to be present at trial and articulated when a trial court may limit a severely injured plaintiff's attendance if their "presence would prejudice the jury and the plaintiff would be unable to assist counsel or comprehend the proceedings" as a result of injuries allegedly caused by the defendant.¹⁵ Finding no case law interpreting the Georgia Constitution or statutes providing a litigant with an absolute right to attend trial, the court determined, citing the United States Court of Appeals for the Sixth Circuit's opinion in *Helminski v. Ayerst Laboratories*,¹⁶ that the right was protected by the constitutional right

6. *Royalston v. Middlebrooks*, 303 Ga. App. 887, 891, 696 S.E.2d 66, 70 (2010).

7. 220 Ga. App. 526, 469 S.E.2d 792 (1996).

8. 281 Ga. App. 837, 637 S.E.2d 424 (2006), *rev'd on other grounds*, 282 Ga. 815, 653 S.E.2d 735 (2007).

9. 306 Ga. App. 463, 702 S.E.2d 737 (2010).

10. *Id.* at 464, 702 S.E.2d at 739. In *Schwartz*, after entering into a limited release with the defendant, the plaintiff's uninsured motorist carrier defended the suit on the defendant's behalf. *Id.*

11. *Id.* at 468, 702 S.E.2d at 741.

12. *Id.* at 466, 702 S.E.2d at 740.

13. *Id.* (quoting *Shelter Mutual*, 220 Ga. App. at 528, 469 S.E.2d at 795).

14. 307 Ga. App. 244, 704 S.E.2d 878 (2010), *cert. granted*.

15. *Id.* at 250, 704 S.E.2d at 883-84.

16. 766 F.2d 208 (6th Cir. 1985).

of due process of law.¹⁷ Reviewing decisions from other jurisdictions and ultimately relying on the reasoning in *Helminski* to balance the litigant's right with the possibility of prejudicing the jury, the court held

that a trial court has the discretion to limit a severely injured plaintiff's presence during the liability phase of a bifurcated trial when, after an evidentiary hearing upon a written motion and after an opportunity to observe the plaintiff, the court makes the following factual findings in a written order: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial likelihood that the plaintiff's presence in the courtroom will cause the jury to be biased toward the plaintiff based on sympathy rather than the evidence such that the jury would be prevented or substantially impaired from performing its duty; (4) the plaintiff is unable to communicate with counsel or to participate in the trial in any meaningful way; and (5) the plaintiff is unable to comprehend the proceedings.¹⁸

In *Cavalier Convenience, Inc. v. Sarvis*,¹⁹ the court of appeals held that the recently amended section 51-12-33 of the Official Code of Georgia Annotated (O.C.G.A.)²⁰ requires a trier of fact to apportion its damage award among multiple liable defendants even when the plaintiff bears no fault.²¹ In *Cavalier*, no defendant alleged the plaintiff was at fault. After entry of the pretrial order, plaintiff sought a ruling from the court that the issue of apportionment among defendants not be presented to the jury since the language of O.C.G.A. § 51-12-33(b)²² only mandates apportionment when the plaintiff was to some degree at fault.²³ Focusing on the clause in subsection (b) beginning "shall after" as establishing a precondition of comparative negligence under

17. *Kesterson*, 307 Ga. App. at 248-49, 704 S.E.2d at 882-83 (citing *Helminski*, 766 F.2d at 213). "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V; see also GA. CONST., art. I, § 1, para. 1.

18. *Kesterson*, 307 Ga. App. at 250, 704 S.E.2d at 884. The court was clear that if the litigant could understand and assist counsel, the party could not be excluded based on prejudice. *Id.*

19. 305 Ga. App. 141, 699 S.E.2d 104 (2010), cert. granted.

20. O.C.G.A. § 51-12-33 (2000 & Supp. 2011).

21. *Cavalier*, 305 Ga. App. at 145, 699 S.E.2d at 107; see also O.C.G.A. § 5-12-33.
22.

Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person.
O.C.G.A. § 51-12-33(b).

23. *Cavalier*, 305 Ga. App. at 141-42, 699 S.E.2d at 105.

subsection (a),²⁴ the trial court granted plaintiff's motion.²⁵ On interlocutory appeal, the court of appeals reversed.²⁶

On de novo review, the court looked to the statute's plain language to give effect to the legislature's intent and found that the trial court's reading of the statute overlooked and disregarded the "if any" clause following the "shall after" clause, incorrectly limiting apportionment to comparative negligence cases.²⁷ Although not expressly stated in *Cavalier*, the "if any" clause only provides that when comparative negligence exists, apportionment should occur after a reduction for plaintiff's negligence. Nonparty allocation under subsection (c)²⁸ was not raised by the parties nor was it addressed by the court. However, in *McReynolds v. Krebs*,²⁹ the court of appeals explained in dicta that "[s]ubsections (c) and (d) explain that apportionment is to be determined based on the fault of all parties liable for the plaintiff's injuries regardless of whether they are parties to the suit, including parties who have settled with the plaintiff."³⁰ Despite this, argument of apportionment to a nonparty was not allowed because the remaining defendant had no evidence of the dismissed nonparty defendant's potential liability to the plaintiff.³¹

II. PREMISES LIABILITY

In *Jones v. Barrow*,³² the court of appeals affirmed summary judgment to a landowner of rural property occasionally used by friends and family to hunt and fish.³³ The court held that the plaintiff, a co-worker of the landowner's nephew's friend, was a licensee on Barrow's property, rather than an invitee, and that Barrow did not breach his duty owed to Jones, who was injured while using a chainsaw to cut into a partially

24. O.C.G.A. § 51-12-33(a).

25. *Cavalier*, 305 Ga. App. at 141-42, 699 S.E.2d at 105; *see also* O.C.G.A. § 51-12-33(b).

26. *Cavalier*, 305 Ga. App. at 141, 699 S.E.2d at 105.

27. *Id.* at 144, 699 S.E.2d at 106; *see also* O.C.G.A. § 51-12-33(b).

28. O.C.G.A. § 51-12-33(c).

29. 307 Ga. App. 330, 705 S.E.2d 214 (2010), *cert. granted*.

30. *Id.* at 333, 705 S.E.2d at 217; *see also* O.C.G.A. § 51-12-33(c)-(d).

31. *McReynolds*, 307 Ga. App. at 334, 705 S.E.2d at 217; *see also* *PN Express, Inc. v. Zegel*, 304 Ga. App. 672, 680, 697 S.E.2d 226, 233 (2010) (holding no apportionment where party's liability is derivative for nonparty employee); *cf.* *Barnett v. Farmer*, 308 Ga. App. 358, 362, 707 S.E.2d 570, 573-74 (2011) (holding apportionment charge required for plaintiff passenger between defendant driver and plaintiff husband driver); *Murray v. Patel*, 304 Ga. App. 253, 254, 696 S.E.2d 97, 99 (2010) (holding that in automobile negligence case, subsection (b) requires apportionment of liability between defendant driver and third-party defendant who was the son and driver of the plaintiffs' vehicle).

32. 304 Ga. App. 337, 696 S.E.2d 363 (2010).

33. *Id.* at 337, 696 S.E.2d at 364-65.

downed tree.³⁴ Jones was not on the property to conduct business with Barrow, but for the convenience of his co-worker; Barrow did not even know they were on the property.³⁵ Further, they were not guests of Barrow's nephew, who was not his uncle's tenant but was, himself, a licensee permitted to go on the property merely for personal interests.³⁶ Also, "the passive or static condition of . . . [the] tree . . . located far from any road and within a densely wooded area . . . was not a mantrap and did not constitute wilful or wanton conduct"³⁷

However, whether a plaintiff is a licensee or invitee is sometimes a jury question.³⁸ If a jury finds the plaintiff visited the property to look at real property being offered for sale and was not on the property merely for his own interest or convenience,³⁹ he could be an invitee rather than a licensee.⁴⁰ Apparently the plaintiff's counsel need not rely upon their own expert in opposing summary judgment, but rather may use the testimony of a defendant's expert to raise an issue of fact.⁴¹

An even lesser duty is owed to a trespasser than to a licensee. In *Craig v. Bailey Bros. Realty, Inc.*,⁴² "[a] ten-year-old girl was injured by a landscape timber spike protruding from a railroad crosstie" and could not recover from an apartment complex because the owner had no duty to protect her from hidden perils.⁴³ The plaintiff tried to argue that his

34. *Id.* at 340, 696 S.E.2d at 366-67.

35. *Id.* at 339, 696 S.E.2d at 366.

36. *Id.*

37. *Id.* at 340, 696 S.E.2d at 366-67.

38. *McGarity v. Hart Elec. Membership Corp.*, 307 Ga. App. 739, 744, 706 S.E.2d 676, 681 (2011). *But see Freeman v. Eichholz*, 308 Ga. App. 18, 705 S.E.2d 919 (2011). In *Freeman*, the court of appeals held as a matter of law that a visitor to a state prison was an invitee. *Id.* at 18, 705 S.E.2d at 921. Though conceding that the issue had not been previously addressed by Georgia's appellate courts, the court limited its holding to the facts of the case. *Id.* at 20-21, 705 S.E.2d at 922.

39. He also apparently had to urinate. *McGarity*, 307 Ga. App. at 740, 706 S.E.2d at 678.

40. *Id.* at 739-40, 706 S.E.2d at 677-78. The plaintiff "made contact with a live electrical wire while visiting real property that was being advertised for sale" and alleged that defendant, "which had installed and maintained the electrical wire (on private property on which it had an easement), . . . negligently maintained and inspected the wire." *Id.* at 739, 706 S.E.2d at 677-78. Interestingly, when moving for summary judgment, the defendant argued that the plaintiff was a trespasser, but abandoned that argument on appeal to argue he was at best a licensee. *Id.* at 742, 706 S.E.2d at 679.

41. *See id.* at 746, 706 S.E.2d at 682.

42. 304 Ga. App. 794, 697 S.E.2d 888 (2010).

43. *Id.* at 794, 798, 697 S.E.2d at 890, 892. The court of appeals also held that the parking lot and the crossties did not constitute an attractive nuisance nor did the owner "fail[] to exercise reasonable care with respect to the foreseeable risks created" *Id.*

daughter was an “anticipated trespasser,” but the owner did not know that the girl or her friends had come onto the property and were playing on the crossties nor did he anticipate the entry.⁴⁴ The children had not previously entered the property or played on the crossties, and “the crossties were not meant for pedestrian traffic”⁴⁵

When a “static, dangerous condition” is alleged,

the basis of the proprietor’s liability is his superior knowledge and if his invitee knows of the condition or hazard there is no duty on the part of the proprietor to warn him and there is no liability for resulting injury because the invitee has as much knowledge as the proprietor does.⁴⁶

However, superior knowledge may be found when a defendant is “on constructive notice of what a reasonable inspection would have revealed” about a condition, such as a curb, including “the curb’s height in relation to the parking lot, the lighting conditions, the view of the curb for someone descending the stairs, and the absence of any paint or warning signs regarding the curb”⁴⁷ For example, in a slip-and-fall case against the Comfort Inn in Valdosta, Georgia, a hotel guest had checked out and was walking along the porch when he stepped off the curb and broke his ankle.⁴⁸ Summary judgment for the hotel was reversed.⁴⁹ An issue of fact remained as to whether the invitee had equal knowledge of the danger.⁵⁰

at 800, 697 S.E.2d at 894.

44. *Id.* at 799, 697 S.E.2d at 893.

45. *Id.*

46. *Perkins v. Val D’Aosta Co.*, 305 Ga. App. 126, 128, 699 S.E.2d 380, 382-83 (2010).

47. *Id.* at 129, 699 S.E.2d at 383.

48. *Id.* at 126, 699 S.E.2d at 381.

49. *Id.* Interestingly, plaintiff relied on a professional engineer who examined the curb and determined it was defective and a fall hazard. *Id.* at 127, 699 S.E.2d at 382.

50. *Id.* at 130, 699 S.E.2d at 383-84 (quoting *Cocklin v. JC Penney Corp.*, 296 Ga. App. 179, 182, 674 S.E.2d 48, 51 (2009)); *see also Lore v. Suwanee Creek Homeowners Ass’n*, 305 Ga. App. 165, 699 S.E.2d 332 (2010). In *Lore*, the court of appeals held that when a homeowner repeatedly notified the homeowner’s association of a sinkhole, the jury should decide if the association “failed in its duty to conduct a reasonable inspection of the sinkhole and the surrounding area to determine whether it posed a danger to invitees and whether it failed to take reasonable steps to protect invitees from those dangers.” 305 Ga. App. at 168, 699 S.E.2d at 336. Judge Andrews dissented on this issue. *Id.* at 173-75, 699 S.E.2d at 339-41 (Andrews, J., concurring in part and dissenting in part). This constitutes a second recent dissent by Judge Andrews, who would have found summary judgment for the landlord. *Id.* at 174, 699 S.E.2d at 340; *see also Walker v. Aderhold Props., Inc.*, 303 Ga. App. 710, 716-18, 694 S.E.2d 119, 124-15 (2010) (Andrews, J., dissenting). For a discussion of the decision in *Walker*, see Hicks & Hargrove, *supra* note 1, at 322-25. Compare *Walker*, 303 Ga. App. at 716, 694 S.E.2d at 124 (holding jury issue remained),

Similarly, in a somewhat unusual case from Chatham County, Georgia, an eighty-three-year-old woman housesitting at a residential community on Skidaway Island was killed by an alligator⁵¹ that bit off her foot, hands, and forearms.⁵² The court of appeals affirmed the trial court's denial in part of the summary judgment motion filed by joint owners of the lagoon on a premises liability theory, holding that the "owners . . . failed to show that an alligator attack upon a person was a danger arising from the arrangement and use of their premises which was not foreseeable as a matter of law, such that the owners had no duty to take reasonable precautions to protect invitees from the danger."⁵³ The court further held that the owners "failed to show that, as a matter of law, [the decedent] equally understood the dangers she might encounter walking near the lagoon and that she nonetheless failed to exercise ordinary care for her own safety."⁵⁴

To establish constructive knowledge in a restaurant setting, a plaintiff must show "either that (1) a[n] . . . employee was in the immediate area of the hazard and could have easily seen the substance or (2) the alleged hazard remained on the floor long enough that ordinary diligence by the . . . employees should have discovered it."⁵⁵ Although the plaintiff in *Brown v. Host/Taco Joint Venture*⁵⁶ relied on his affidavit and deposition testimony, that was not enough to defeat the restaurant's motion for summary judgment, which relied in part on an affidavit from the restaurant manager.⁵⁷ The court in *Brown* cited other cases in which inspections conducted within fifteen minutes prior to a fall were

with *Naraine v. City of Atlanta*, 306 Ga. App. 561, 561, 703 S.E.2d 31, 31-32 (2010) (holding genuine issue of fact existed as to whether city actually or constructively knew of icy condition of sidewalk in area of fall).

51. The alligator "was over eight feet long and weighed 130 pounds." *Landings Ass'n v. Williams*, 309 Ga. App. 321, 322, 711 S.E.2d 294, 296 (2011), *cert. granted*.

52. *Id.* at 322, 711 S.E.2d at 295-96.

53. *Id.* at 326, 711 S.E.2d at 298.

54. *Id.* Judge Andrews, joined by Judge Doyle, filed a dissent, noting that "as a matter of law . . . the owners exercised ordinary care to keep [the decedent] reasonably safe from the risk of a wild alligator attack," and even if they could be found negligent, the decedent "either assumed the risk of encountering a dangerous wild alligator in the dark or failed to exercise ordinary care to avoid it." *Id.* at 336-37, 711 S.E.2d at 305-06 (Andrews, J., concurring in part and dissenting in part). For another dissent filed by Judges Andrews and Doyle in a whole court opinion, see *infra* note 71.

55. *Brown v. Host/Taco Joint Venture*, 305 Ga. App. 248, 250, 699 S.E.2d 439, 442 (2010).

56. 305 Ga. App. 248, 699 S.E.2d 439 (2010).

57. *Id.* at 248-50, 699 S.E.2d at 441-42.

reasonable.⁵⁸ However, in *Benefield v. Tominich*,⁵⁹ the court of appeals reversed summary judgment granted to a gasoline station and a convenience store, declining to find as a matter of law that the store's "inspection procedures were reasonable and that it lacked constructive knowledge of the hazard posed by [a] rubber mat."⁶⁰

If a defect is "open and obvious," of which a plaintiff had equal knowledge or equal means of knowing, no duty is owed by a property owner to correct the alleged defect.⁶¹ Thus, summary judgment was affirmed against the parents of a two-year-old "struck and killed by an automobile while playing in the parking lot behind his parents' apartment."⁶² As a general rule, a landlord has a legal duty to exercise ordinary care in keeping the common areas safe, but the landlord must have "superior knowledge of the perilous condition and the danger therefrom"⁶³ Similarly, "landlords who fully part with possession and the right of possession of the premises are not liable to third parties

58. *Id.* at 252, 699 S.E.2d at 443-44 (citing *Adamchick v. Cracker Barrel Old Country Store*, 281 Ga. App. 677, 678, 637 S.E.2d 44, 46 (2006); *Bolton v. Wal-Mart Stores*, 257 Ga. App. 198, 199, 570 S.E.2d 643, 645 (2002); *Roberson v. Winn-Dixie Atlanta*, 247 Ga. App. 825, 826, 544 S.E.2d 494, 495 (2001); *Daniel v. John Q. Carter Enters.*, 218 Ga. App. 223, 225-26, 460 S.E.2d 838, 839 (1995); *Super Disc. Mkts. v. Clark*, 213 Ga. App. 132, 133-34, 443 S.E.2d 876, 877 (1994); *Moore v. Food Assoc.*, 210 Ga. App. 780, 781, 437 S.E.2d 832, 834 (1993)).

59. 308 Ga. App. 605, 708 S.E.2d 563 (2011).

60. *Id.* at 610, 708 S.E.2d at 568. No store employees were deposed, but the store's manager and the sole employee on duty filed affidavits. *Id.* at 606, 708 S.E.2d at 565. Also of interest to appellate practitioners, two of the court's newest judges, both appointed by Governor Perdue in November 2010, filed a concurrence "dubitante"—"a concurrence that is given doubtfully . . . a full concurrence, albeit one with reservations"—to voice "serious doubts" about the soundness of the principle in *Straughter v. J. H. Harvey Co.*, 232 Ga. App. 29, 500 S.E.2d 353 (1998) that, "in order to withstand a motion for summary judgment, a plaintiff need not show how long a substance has been on the floor unless the defendant has established that reasonable inspection procedures were in place and followed at the time of the incident." *Benefield*, 308 Ga. App. at 611 n.28, 612, 708 S.E.2d at 569 n.28, 569 (quoting *Straughter*, 232 Ga. App. at 30, 500 S.E.2d at 355) (internal quotation marks omitted).

61. *Johnson v. Green Growth 1, LLC*, 305 Ga. App. 134, 138, 699 S.E.2d 109, 112 (2010).

62. *Id.* at 134, 699 S.E.2d at 109-10.

63. *Id.* at 141, 699 S.E.2d at 113 (quoting *Commerce Props. v. Linthicom*, 209 Ga. App. 853, 854, 434 S.E.2d 769, 771 (1993)) (internal quotation marks omitted); *see also Lariscy v. Eschette*, 306 Ga. App. 205, 206-07, 702 S.E.2d 49, 51 (2010) (holding that guest of tenants failed to show superior knowledge by owner when "she had traversed the back stairs many times before her fall, and . . . was well aware of the two defective conditions of which she complained"); *Barnes v. Morganton Baptist Ass'n, Inc.*, 306 Ga. App. 755, 755, 703 S.E.2d 359, 360 (2010) (holding that defendants in wrongful death action "did not have superior knowledge of the danger posed by [a] retaining wall and [a] drop-off therefrom").

for damages arising from the tenant's negligence"⁶⁴ Thus, when an unknown assailant shot a Macon restaurant patron in the parking lot while the latter was trying to break up a fight, summary judgment for the out-of-possession landlord was affirmed because the restaurant owner had exclusive control of the parking lot.⁶⁵

In *Ramcke v. Georgia Power Co.*,⁶⁶ the representative of a decedent struck by machinery while working as an invitee of a Georgia Power Company contractor reached a jury trial,⁶⁷ but the court of appeals affirmed the grant of a directed verdict to all three defendants.⁶⁸ The court was particularly persuaded by the contract between the parties.⁶⁹

Finally, plaintiffs' counsel should remember in premises liability cases that "evidence of noncompliance with OSHA regulations is admissible as evidence of an employer's negligence."⁷⁰ Thus, a jury verdict for CSX Transportation was reversed when the trial court denied a jury charge requested by plaintiff's counsel regarding an Occupational Safety and Health Administration (OSHA) regulation.⁷¹

64. *Lake v. APH Enters., LLC*, 306 Ga. App. 317, 319, 702 S.E.2d 654, 656 (2010).

65. *Id.* at 317-18, 320, 702 S.E.2d at 655, 656; *see also* *Ramcke v. Ga. Power Co.*, 306 Ga. App. 736, 739, 703 S.E.2d 13, 16 (2010) (holding that when a "property owner or occupier surrenders temporary possession and control . . . to an independent contractor to perform work on the property, the owner/occupier is generally not liable . . . for injuries sustained . . . by the contractor's invitees due to unsafe working conditions . . . which the owner/occupier had no right to control"—rather, "the independent contractor has the duty to keep the work premises safe . . .").

66. 306 Ga. App. 736, 703 S.E.2d 13 (2010).

67. The case is unclear as to whether the defendants moved for summary judgment prior to trial.

68. *Ramcke*, 306 Ga. App. at 736, 703 S.E.2d at 14-15.

69. *Id.* at 739-40, 703 S.E.2d at 17. Under the contract, the construction company hired to perform grading and site preparation was to "furnish all labor, materials, and supervision on the project in accordance with the project specifications" and, even though Georgia Power could inspect or stop the work to ensure compliance, the court found that fact alone did "not amount to a right to control the time or manner of the work." *Id.*

70. *Smith v. CSX Transp., Inc.*, 306 Ga. App. 897, 901, 703 S.E.2d 671, 675 (2010), *aff'd*, *CSX Transp., Inc. v. Smith*, No. S11G0556, 2011 WL 490574 (Ga. Oct. 17, 2011); *see also* *Womack v. Oasis Goodtime Emporium I, Inc.*, 307 Ga. App. 323, 328, 705 S.E.2d 199, 203 (2010) (holding that violation of statute or regulation may provide grounds for a negligence per se claim).

71. *CSX Transp., Inc.*, 306 Ga. App. at 903, 703 S.E.2d at 676-77. Of particular interest, Presiding Judge Andrews, joined by Judges Johnson and Doyle, filed a dissent in this whole court opinion. *Id.* at 904, 909, 703 S.E.2d at 677, 680 (Andrews, J., dissenting); *see also supra* note 54 and *infra* notes 82 and 128 for other recent dissents by Judge Andrews.

III. DERIVATIVE LIABILITY

“Under the doctrine of respondeat superior, a master is liable for the tort of its servant only to the extent that the servant committed the tort in connection with his employment by the master, within the scope of his employment, and in furtherance of his master’s business.”⁷² In *BT Two, Inc. v. Bennett*,⁷³ the court of appeals reversed the denial of summary judgment to the defendant BT Two, Inc. (Buffalo’s) on the plaintiff’s claims for injuries sustained in an attack by an employee, King, and another unidentified person without provocation at a party allegedly sponsored by Buffalo’s.⁷⁴ The party was hosted at a private residence to raise money for a Buffalo’s manager moving away.⁷⁵ The event was advertised on flyers at the restaurant stating, “PARTY!!!! HELP BUFFALO’S SAY FAREWELL TO THE BEST DAMN MANAGER EVER, ASK ANYONE FOR DIRECTIONS. \$5.00 COVER ONLY ALL NIGHT!!!!”⁷⁶ Several Buffalo’s employees attended the party, some wearing Buffalo’s uniforms, and a woman wearing a Buffalo’s shirt sold wristbands that entitled the purchaser to unlimited beer.⁷⁷

Assuming, for the sake of argument, that the party was sponsored by Buffalo’s and that King attended the party in connection with his employment, the court of appeals concluded that Buffalo’s was not vicariously liable for King’s attack because there was no evidence that the attack was among his job responsibilities or had furthered any business purpose.⁷⁸ The court also addressed the plaintiff’s negligent sponsorship and inadequate security claims by dismissing the first as barred by the Georgia Dram Shop Act (GDSA)⁷⁹ and the second because there was no evidence that Buffalo’s had superior knowledge of the danger that the plaintiff might be assaulted at the party, despite the service of unlimited alcohol, because this knowledge was imputed to the plaintiff.⁸⁰

72. *BT Two, Inc. v. Bennett*, 307 Ga. App. 649, 652, 706 S.E.2d 87, 90 (2011); *see also* O.C.G.A. § 51-2-2 (2000).

73. 307 Ga. App. 649, 706 S.E.2d 87 (2011).

74. *Id.* at 649-50, 706 S.E.2d at 88-89.

75. *Id.* at 650, 706 S.E.2d at 89.

76. *Id.*

77. *Id.*

78. *Id.* at 652-53, 706 S.E.2d at 90-91.

79. O.C.G.A. § 51-1-40 (2000).

80. *BT Two*, 307 Ga. App. at 654-56, 706 S.E.2d at 91-93. Interestingly, this opinion is only physical precedent due to Judge Barnes filing a special concurrence finding only “circumstantial evidence that Buffalo’s sponsored or participated in giving the party.” *Id.* at 657, 706 S.E.2d at 93 (Barnes, J., concurring specially).

In a consolidated appeal in *Coe v. Carroll & Carroll, Inc.*,⁸¹ a driver's widow filed suit against a tractor-trailer driver, Williams, his employer, Griffin; and the contractor, Carroll, who hired Williams and the truck from Griffin. The plaintiff filed suit after her husband, Coe, suffered serious injury when his automobile struck a tractor-trailer allegedly negligently parked on the side of the road by Williams.⁸² The court provided a clear recitation of derivative liability for employers and contractors under the law of bailments, borrowed servants, and respondeat superior in the trucking context.⁸³

The trial court granted summary judgment to both Carroll and Griffin on the grounds that Williams was not Carroll's borrowed servant, and when the wreck occurred, he had detoured 2.5 miles to pick up lunch on a purely personal mission not within the scope of his employment or to further Griffin's business. Carroll hired Griffin, without a written contract, to supply a tractor, trash trailer, and a driver, at an hourly rate, to haul trash away from Carroll's construction site. Griffin assigned Williams to the job site. Carroll had no authority to terminate Williams, but could tell Griffin to send a new driver in his place. On site, Carroll's foreman directed Williams's hauls including arrival time, when and where to take a load, and when the work day was done. Importantly, Griffin's drivers, including Williams, were not afforded a lunch break but ate on the road or at the job site while on the clock.⁸⁴

Reversing the trial court, the court of appeals determined that Carroll's liability for Williams's negligence was governed by the laws of bailments and whether Williams was a borrowed servant.⁸⁵ Generally, the hirer (Carroll) would not be liable to third parties or the bailor (Griffin) for the acts of the bailor's employee (Williams) during his hire, except for the consequences of the hirer's own direction or gross neglect.⁸⁶ However, when the hirer "had complete control and direction of the [bailor's employee] for the occasion," whereas the bailor had no such control, and (2) if the hirer "had the exclusive right to discharge the [bailor's employee],]"⁸⁷ the bailor's employee is a borrowed servant,

81. 308 Ga. App. 777, 709 S.E.2d 324 (2011).

82. *Id.* at 777, 709 S.E.2d at 327. Judge Andrews dissented, with Judge Doyle, and would have affirmed the grant of summary judgment to Griffin and Carroll. *Id.* at 788, 709 S.E.2d at 335 (Andrews, J., dissenting).

83. *Id.* at 779-80, 782, 709 S.E.2d at 328-29, 331 (majority opinion).

84. *Id.* at 777-79, 709 S.E.2d at 327-28.

85. *Id.* at 781-82, 709 S.E.2d at 330.

86. O.C.G.A. § 44-12-62 (b) (2000).

87. *Coe*, 308 Ga. App. at 780, 709 S.E.2d at 329 (alteration in original) (quoting *Tim's Crane & Rigging, Inc. v. Gibson*, 278 Ga. 796, 797, 604 S.E.2d 763, 765 (2004)).

and the hirer is responsible for his negligence.⁸⁸ While this determination can be made as a matter of law when the borrowed servant doctrine is explicitly determined by a contract between the bailor and hirer, when there is none, the relationship is generally a jury question.⁸⁹

The court of appeals also reversed summary judgment for Griffin on plaintiff's claims under the respondeat superior doctrine.⁹⁰ After reviewing the presumption that an employee is acting in the scope of his employment while driving his employer's vehicle,⁹¹ and the burden shifting back to a plaintiff upon rebuttal,⁹² the court stated the rule that

[i]f a servant steps aside from his master's business to do an act entirely disconnected from it or commits a tortious act for purely personal reasons disconnected from the authorized business of the master, the servant is not acting in the scope of his or her employment and in the furtherance of the master's business.⁹³

One such deviation is taking a lunch break;⁹⁴ however, a jury question lies

if an employee, who is driving to or from a destination while acting within the scope of his employment and in furtherance of the employer's business, detours slightly from the direct or customary route to that destination to get a meal, and if there is evidence that it serves

88. *Id.* (quoting *Montgomery Trucking Co. v. Black*, 231 Ga. 211, 213, 200 S.E.2d 882, 884 (1973)).

89. *Id.* at 780-81, 709 S.E.2d at 329-30.

90. *Id.* at 786-87, 709 S.E.2d at 334.

91.

Where a vehicle is involved in a collision, and it is shown that the [vehicle] is owned by a person, and that the operator of the vehicle is in the employment of that person, a presumption arises that the employee was in the scope of his employment at the time of the collision, and the burden is then on the defendant employer to show otherwise. This must be done by clear, positive and uncontradicted evidence.

Allen Kane's Major Dodge v. Barnes, 243 Ga. 776, 777, 257 S.E.2d 186, 188 (1979) (citations omitted) (quoting *West Point Pepperell, Inc. v. Knowles*, 132 Ga. App. 253, 255, 208 S.E.2d 17, 19 (1974)) (internal quotation marks omitted); *see also Farzaneh v. Merit Constr. Co.*, 309 Ga. App. 637, 640, 710 S.E.2d 839, 843 (2011).

92. *Hicks v. Heard*, 297 Ga. App. 689, 690-91, 678 S.E.2d 145, 147-48 (2009), *aff'd*, *Hicks v. Heard*, 286 Ga. 864, 692 S.E.2d 360 (2010).

93. *Coe*, 308 Ga. App. at 783, 709 S.E.2d at 331 (quoting *Piedmont Hosp. v. Palladino*, 276 Ga. 612, 613-14, 580 S.E.2d 215, 217 (2003)) (internal quotation marks omitted).

94. *Id.* (quoting *Gassaway v. Precon Corp.*, 280 Ga. App. 351, 353, 634 S.E.2d 153, 165 (2006)).

the employer's interests for the employee to make the slight detour for that purpose[.]⁹⁵

such as Williams's speedy return to the job site.⁹⁶

Generally, an employer is not liable for the negligence of an independent contractor;⁹⁷ however, an employer may become liable depending on the nature and result of work performed, the relationship between the employer and the contractor, if the act violates an express contract or statute, or if the employer ratifies the contractor's wrong.⁹⁸ In *Yancey v. Watkins*,⁹⁹ the court of appeals held that the aerial application of chemicals was an inherently dangerous activity, bringing it within the scope of O.C.G.A. § 51-2-5,¹⁰⁰ for which an employer can be held liable for the negligence of an independent contractor hired to perform such work.¹⁰¹

IV. MEDICAL MALPRACTICE

The Georgia Supreme Court considered, in a 4-3 opinion, the following questions in *Cowart v. Widener*,¹⁰² a case alleging negligent or intentional deprivation of necessary medical attention: "(1) whether expert evidence is required to establish causation in a simple negligence case where a medical question is involved; and (2) if so, what constitutes a 'medical question' so as to require such expert testimony."¹⁰³ The court essentially answered yes to the first question, noting that "plaintiffs must come forward with expert evidence to survive a defense motion for summary judgment, where 'medical questions' relating to causation are involved."¹⁰⁴ The court then explained that, when a jury has to know the answers to one or more "medical questions" that "can be answered accurately only by witnesses with specialized expert knowledge," newly termed "specialized medical questions," an expert is required.¹⁰⁵ In

95. *Id.* at 784-85, 709 S.E.2d at 332.

96. *Id.*

97. O.C.G.A. § 51-2-4 (2000).

98. *Id.*; see also *Peachtree-Cain Co. v. McBee*, 170 Ga. App. 38, 39, 316 S.E.2d 9, 11 (1984) (holding that O.C.G.A. § 51-2-4 is inapplicable to intentional torts of independent contractors), *aff'd*, 254 Ga. 91, 327 S.E.2d 188 (1985).

99. 308 Ga. App. 695, 708 S.E.2d 539 (2011).

100. O.C.G.A. § 51-2-5(2) (2000).

101. *Yancey*, 308 Ga. App. at 699-700, 708 S.E.2d at 544; see also *Cmty. Gas Co. v. Williams*, 87 Ga. App. 68, 80, 73 S.E.2d 119, 128-29 (1952) (listing inherently dangerous activities subjecting employer to independent contractor's negligence liability).

102. 287 Ga. 622, 697 S.E.2d 779 (2010).

103. *Id.* at 622, 697 S.E.2d at 781.

104. *Id.* at 627, 697 S.E.2d at 784.

105. *Id.* at 629, 697 S.E.2d at 786 (internal quotation marks omitted).

Cowart, because the evidence in the record was insufficient, summary judgment was properly granted by the trial court and properly affirmed by the court of appeals.¹⁰⁶

Revisiting *ex parte* interviews of treating physicians by defense counsel and its decision in *Moreland v. Austin*,¹⁰⁷ in *Baker v. Wellstar Health System, Inc.*,¹⁰⁸ the Georgia Supreme Court determined that the qualified protective order¹⁰⁹ obtained by the defendant in a medical malpractice action complied with the procedural requirements of the Health Insurance Portability and Accountability Act (HIPAA)¹¹⁰ but violated the plaintiff's substantive constitutional right to medical privacy¹¹¹ because of the breadth of medical information disclosure it allowed.¹¹² Looking to limit the defendant's inquiry to "matters relevant to the medical condition [plaintiff] ha[d] placed at issue,"¹¹³ the court enumerated the dangers of broad protective orders and circumscribed the waiver of the medical privacy right by providing the following list of elements a trial court should state in their qualified protective order with particularity:

- (1) the name(s) of the health care provider(s) who may be interviewed;
- (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and

106. *Id.* at 637, 697 S.E.2d at 790-91. Justice Nahmias authored the opinion. *Id.* at 621, 697 S.E.2d at 781. All the justices concurred, except Justice Thompson, who concurred only in Divisions 1 and 2 and in the judgment, and Chief Justice Hunstein, Presiding Justice Carley, and Justice Benham, who concurred in part and dissented in part, arguing that the majority failed to apply the proper standard of review and improperly construed the evidence, since "genuine issues of material fact remain for a jury to decide." *Id.* at 638, 697 S.E.2d at 791 (Hunstein, C.J., concurring in part and dissenting in part).

107. 284 Ga. 730, 733, 670 S.E.2d 68, 71 (2008) (holding that, despite a plaintiff's statutory waiver of constitutional right to privacy regarding medical records that are relevant to a medical condition the plaintiff placed in issue, HIPPA preempted Georgia law and precluded *ex parte* communications between defense counsel and a plaintiff's prior treating physicians absent plaintiff's consent, court order, or compliance with the procedural provisions of 45 C.F.R. § 164.512(e) (2010)).

108. 288 Ga. 336, 703 S.E.2d 601 (2010).

109. The court order stated that "[p]laintiff's treating physicians and other healthcare providers may discuss [p]laintiff's medical conditions and any past, present, or future care and treatment with [d]efendant's counsel." *Id.* at 338, 703 S.E.2d at 604.

110. 45 C.F.R. § 164.512(e) (2010).

111. *King v. State*, 272 Ga. 788, 790, 535 S.E.2d 492, 495 (2000).

112. *Baker*, 288 Ga. at 338, 703 S.E.2d at 604.

113. *Id.*

(4) the fact that the health care provider's participation in the interview is voluntary.¹¹⁴

The court also advised that in issuing or modifying their order, depending on the facts and evidence, trial courts should consider whether to require defense counsel "to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, requiring the transcription of the interview by a court reporter at the patient-plaintiff's request."¹¹⁵

In *Wilson v. Obstetrics & Gynecology of Atlanta, P.C.*,¹¹⁶ reversing the trial court, the court of appeals found evidence sufficient to create a jury question that the defendants deliberately engaged in fraudulent misrepresentation of blood gas test results at the birth of the plaintiff's child.¹¹⁷ The court also determined that defendants withheld from or failed to disclose information¹¹⁸ to the parents preventing them from realizing that their daughter's oxygen deprivation and resulting brain damage at birth were possibly the result of medical error.¹¹⁹ This created jury questions as to whether the statute of limitations should be tolled¹²⁰ and the defendants estopped from asserting the statute of repose¹²¹ by defendants' alleged fraud.¹²²

In *Brustcato v. O'Brien*,¹²³ a severely mentally-ill man with a history of violence sued his psychiatrist for negligent withdrawal and monitoring of his medication when, a few months after discontinuing two medications, he killed his mother.¹²⁴ The court of appeals reversed the trial

114. *Id.* at 339, 703 S.E.2d at 604-05.

115. *Id.* at 340, 703 S.E.2d at 605.

116. 304 Ga. App. 300, 696 S.E.2d 339 (2010).

117. *Id.* at 300, 696 S.E.2d at 340-41; *see also* *Dove v. Ty Cobb Healthcare Sys.*, 305 Ga. App. 13, 699 S.E.2d 355 (2010); *cf.* *Estate of Shannon v. Ahmed*, 304 Ga. App. 380, 696 S.E.2d 408 (2010).

118.

Defendants' failure to disclose: (i) the fact that no one determined the baby's position before labor-inducing drugs were administered to the mother; (ii) the recorded episodes of Karah's fetal heart rate deceleration in the presence of Northside employees, without prompt action; and (iii) the fact that no fetal heart rate was detected and/or recorded for the 33 minutes prior to Karah's birth.

Wilson, 304 Ga. App. at 306, 696 S.E.2d at 344.

119. *Id.* at 300-01, 696 S.E.2d at 340-41.

120. *See* O.C.G.A. § 9-3-96 (2007).

121. *See* O.C.G.A. § 9-3-71(b) (2007); *see also* *Dove*, 305 Ga. App. at 15, 699 S.E.2d at 357; *Osburn v. Goldman*, 269 Ga. App. 303, 303, 603 S.E.2d 695, 696-97 (2004).

122. *Wilson*, 304 Ga. App. at 300-01, 696 S.E.2d at 340-41.

123. 307 Ga. App. 452, 705 S.E.2d 275 (2010), *aff'd*, *O'Brien v. Brustcato*, 289 Ga. 739, 715 S.E.2d 120 (2011).

124. *Id.* at 452-54, 705 S.E.2d at 277-78.

court's grant of summary judgment to the psychiatrist, which barred the patient's claims for "[m]ental distress and anguish" damages based on the "impact rule" and on public policy grounds preventing a wrongdoer from recovering from his own wrongful act.¹²⁵

On the first issue, the court of appeals reversed the trial court, concluding that "the medical malpractice statute, which provides that 'any injury' resulting from the breach of a physician's duty is a compensable injury, is not limited by the application of the 'impact rule[,]'" in statute or on public policy grounds, or inapplicable to actions sounding in medical malpractice with emotional distress.¹²⁶

On a question that has widespread implication, the court found that because he was presumed innocent¹²⁷ and there had been no adjudication as to his sanity at the time of the homicide, his guilt, or his responsibility for his mother's murder due to his incompetency to stand trial, the patient was not barred by any policy preventing "a wrongdoer who is barred from profiting from his crime[.]" and thus a jury issue existed as to whether he had the "requisite mental capacity to commit murder."¹²⁸

V. CONCLUSION

Although much of the case law is generated from the court of appeals, particularly in slip and fall and auto accident cases, the Georgia Supreme Court demonstrated this survey period that it is not hesitant to weigh in when the opportune time arises on issues of major importance to both the trial and defense bar. While additional legislative action in the name of "tort reform" appears to have stalled, at least during this survey period, the close decisions in both whole court opinions from the court of appeals and cases from the supreme court still give those practitioners interested in this debate plenty to monitor, analyze, and, perhaps, guess about regarding tort reform.

125. *Id.* at 455, 705 S.E.2d at 279 (alteration in original) (internal quotation marks omitted).

126. *Id.* at 456-58, 705 S.E.2d at 279-81.

127. *See* O.C.G.A. § 16-1-5 (2007).

128. *Bruscato*, 307 Ga. App. at 459-60, 705 S.E.2d at 282. Division 2 of Judge Andrews's dissent, joined by Judges Doyle and Johnson, would affirm the trial court's decision and adopt the public policy bar even if the plaintiff did not possess the requisite mens rea to establish culpability for the illegal act. *Id.* at 462, 465, 705 S.E.2d at 284-86 (Andrews, J., dissenting).