Torts

**by Phillip Comer Griffeth*
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This Article surveys recent developments in Georgia tort law between June 1, 2011 and May 31, 2012.[1] Unlike previous years, this Article will not review apportionment of fault under section 51-12-33 of the Official Code of Georgia Annotated (O.C.G.A.) as this issue has garnered such significance so as to require a dedicated article in this edition of the *Mercer Law Review*.[2]

I. NEGLIGENCE

All lawyers know that "[i]n order to have a viable negligence action, a plaintiff must satisfy the elements of the tort, namely, the existence of a duty on the part of the defendant, a breach of that duty, causation

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1. For an analysis of Georgia tort law during the prior survey period, see Phillip Comer Griffeth & Cash V. Morris, *Torts*, *Annual Survey of Georgia Law*, 63 MERCER L. REV. 343 (2011).

2. *See* Thomas A. Eaton, *Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. § 51-12-33*, *Annual Survey of Georgia Law*, 64 MERCER L. REV. 15 (2012). Even pattern jury instructions and verdict forms are subject to the long reach of apportionment. *See* Clark v. Rush, 312 Ga. App. 333, 337, 718 S.E.2d 555, 559 (2011) (holding reversible error includes pattern jury instruction charge on comparative negligence and providing a general verdict form with no space to apportion fault). In a recent jury trial by one author, where the jury deliberated for seven hours and ultimately returned a verdict finding the plaintiff 49% at fault, the jury at one point in its deliberations requested the judge to explain the purpose of the special verdict form, the underlying reasoning behind assigning percentages to the plaintiff and defendant, and the effect the apportionment would have on the damages. Hyun Lee v. Dong Yu & D&J Meats, No. 11EV012840, 2012 WL 3673912 (Ga. State Ct. June 27, 2012).

of the alleged injury, and damages resulting from the alleged breach of the duty."[3] In establishing duties, counsel should be creative and look to statutes,[4] the common law,[5] and industry standards and practices[6] to provide a basis for a client's recovery.[7]

But, "[n]o matter how negligent a party may be, if his act stands in no causal relation to the injury, it is not actionable."[8] As demonstrated by *Wolfe v. Carter*,[9] in all but the clearest cases, plaintiffs have the burden of proof and must use the compulsory discovery period to obtain and

> introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to grant summary judgment for the defendant.[10]

In *Wolfe*, the Georgia Court of Appeals affirmed the grant of summary judgment to the defendant on plaintiff's claims that smoke, reducing visibility on a highway that contributed to a three-car accident, was the result of a prescribed forest burn by the defendant the day before, one-half mile away.[11] Although the plaintiff's search located the only person with a sanctioned burn and showed smoke came from the side of the highway where the burn had occurred, the court rejected this circumstantial evidence as speculative because the plaintiff did not show the location of the burn with respect to the highway; whether the fire was

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3. Jenkins v. Wachovia Bank, N.A., 314 Ga. App. 257, 258, 724 S.E.2d 1, 3 (2012) (quoting Rasnick v. Krishna Hospitality, 289 Ga. 565, 566, 713 S.E.2d 835, 837 (2011)).

4. O.C.G.A. § 51-1-6 specifically provides plaintiffs with a right to recover damages from the breach of a duty established by statute, even when it does not provide a private cause of action. O.C.G.A. § 51-1-6 (2000).

5. *E.g.*, *Rasnick*, 289 Ga. at 566-67, 713 S.E.2d at 837.

6. *See, e.g.*, Griffeth & Morris, *supra* note 1, at 351.

7. *See also Jenkins*, 314 Ga. App. at 258-59, 724 S.E.2d at 3 (agreeing that plaintiff is able to maintain a negligence action against bank for breach of duty established under the Gramm–Leach–Bliley Act, Pub. L. No. 106-102, 113 Stat. 1341 (codified as amended in scattered sections of 12, 15, and 42 U.S.C.)).

8. Whitlock v. Moore, 312 Ga. App. 777, 782, 720 S.E.2d 194, 200 (2011), *cert. denied* (quoting Purvis v. Steve, 284 Ga. App. 116, 119, 643 S.E.2d 380, 383 (2007)) (assuming for argument that even if defendants' pursuit of stolen vehicle was a breach of a duty, no evidence existed that the pursuit caused thief to wreck and injure plaintiff).

9. 314 Ga. App. 854, 726 S.E.2d 122 (2012).

10. *Id.* at 856-57, 726 S.E.2d at 125 (quoting Grinold v. Farist, 284 Ga. App. 120, 121–22, 643 S.E.2d 253, 254 (2007)).

11. *Id.* at 856, 726 S.E.2d at 125.

extinguished, burning, or capable of producing the complained-of smoke; weather conditions; or exclusion of all other sources.[12]

II. INTENTIONAL TORTS

Jones v. Fayette Family Dental Care, Inc.[13] is a continued reminder that intentional infliction of emotional distress claims, no matter how egregious the underlying conduct, require severe emotional distress to be extreme in order to be actionable. In *Jones*, the plaintiff, a former dental assistant (Jones) of the defendant dentist (Verdin), brought suit after she allegedly saw Verdin openly masturbating in a public hallway during work hours.[14] Affirming the trial court's grant of summary judgment, the Georgia Court of Appeals held that the emotional distress, though unpleasant, was not extreme without report of physical ailments or medical treatment.[15]

> Emotional distress includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is *extreme* that liability arises. The law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it.[16]

With the increasing ubiquity of information technology, it is no surprise that our appellate courts are providing guidance in the application of age-old torts to new questions of privacy, trespass, and speech.[17] In *Sitton v. Print Direction, Inc.*,[18] the court of appeals

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12. *Id*. at 857, 726 S.E.2d at 125. For further discussion of proximate cause, see Whiteside v. Decker, Hallman, Barber & Briggs, P.C., 310 Ga. App. 16, 19-20, 712 S.E.2d 87, 90-91 (2011) (stating that expert speculation that attorney's failure to inform client of potential bad faith claim against insurer was the proximate cause of excess judgment).

13. 312 Ga. App. 230, 718 S.E.2d 88 (2011).

14. *Id.* at 230-31, 718 S.E.2d at 89.

15. *Id*. at 233-34, 718 S.E.2d at 91.

16. *Id.* at 233, 718 S.E.2d at 91. *See also* Ghodrati v. Stearnes, 314 Ga. App. 321, 323-24, 723 S.E.2d 721, 723 (2012); Southland Propane, Inc. v. McWhorter, 312 Ga. App. 812, 820, 720 S.E.2d 270, 277 (2011) ("[A]t no point during the lengthy trial did McWhorter testify about any physical, mental, or emotional symptoms he suffered that were related to his distress. Nor did he provide any evidence that defendants' conduct caused him to take medication or seek medical or psychological help."); Williams v. Cobb Cnty. Farm Bureau, Inc., 312 Ga. App. 350, 352, 718 S.E.2d 540, 543 (2011).

17. *See, e.g.*, Barna Log Homes of Ga., Inc. v. Wischmann, 310 Ga. App. 844, 846, 714 S.E.2d 402, 404-05 (2011) (determining that the customer's e-mail and web postings were not libelous). Although not examined in this Article, the Georgia Court of Appeals examined a number of interesting defamation cases during the survey period. *See* Wertz v. Allen, 313 Ga. App. 202, 206, 721 S.E.2d 122, 126 (2011) (stating allegedly defamatory

heard a plaintiff's (Sitton) appeal from a bench trial awarding damages on Sitton's previous employer's (PDI) counterclaims for breach of duty of loyalty for Sitton's work with a competing commercial printing business while an employee at PDI.[19] After the president of PDI (Stanton) learned Sitton was engaged in "outside" work, he entered Sitton's office and moved the mouse on Sitton's personal computer, attached to PDI's network and used for PDI work; in so doing, he discovered e-mails associated with a non-PDI e-mail address that contained evidence Sitton was working for a competitor. After his discharge, Sitton filed suit for invasions of privacy, computer theft, and trespass in violation of O.C.G.A. § 16-9-93[20] and common law invasion of privacy.[21]

Focusing on O.C.G.A. § 16-9-93, the court held that Stanton's actions did not implicate the statute because Stanton did not "take, obtain, or convert Sitton's property (computer theft); delete any computer program or data, obstruct or interfere with a computer program or data, or alter or damage a computer, computer network, or computer program (computer trespass); or examine Sitton's personal data (computer invasion of privacy)."[22] Although Stanton viewed Sitton's personal data, the court provided no explanation why this did not trigger the statute. Regardless, the court concluded that each subsection of the statute required the proscribed activities be taken "with knowledge" and "without authority."[23] This was not the case here because PDI's employee manual computer usage policy allowed Stanton to inspect non-PDI equipment on which PDI e-mail was stored to respond to a legal inquiry or to investigate "indications of unacceptable behavior."[24]

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statements made by college student's mentor were conditionally privileged communications in investigation by college into student's conduct); Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 358, 713 S.E.2d 456, 460-61 (2011) (reversing grant of motion to dismiss natural gas marketer's suit against firm for alleged defamatory press statement released in conjunction with class action against marketer for deceiving and misleading customers). See also *Boston v. Athearn*, No. 12-1-3422-18 (Sup. Ct. Cobb Cnty. filed Apr. 3, 2012), in which a middle school student filed a defamation suit against two classmates and their parents seeking punitive damages, alleging they created a fake Facebook page using her name with a distorted photograph to make her look heavier and stating false claims of sexual activity, drug use, and racial bias.

18. 312 Ga. App. 365, 718 S.E.2d 532 (2011).

19. *Id*. at 366, 718 S.E.2d at 534-35.

20. O.C.G.A. § 16-9-93 (2011).

21. *Sitton*, 312 Ga. App. at 365-66, 718 S.E.2d at 534.

22. *Id.* at 368, 718 S.E.2d at 536.

23. *Id*.; *see also* O.C.G.A. § 16-9-93(c).

24. *Sitton*, 312 Ga. App. at 368-69, 718 S.E.2d at 536 (quoting company's computer usage policy).

Turning to Sitton's claim for common law invasion of privacy based upon an "intrusion upon [his] seclusion or solitude, or into his private affairs,"[25] the court stated that the rule required an "'unreasonable intrusion' . . . involv[ing] a prying or intrusion, which would be offensive or objectionable to a reasonable person, into a person's private concerns"[26] requiring "a physical intrusion which is analogous to a trespass[.]"[27] Clearly, the physicality requirement was not met here, but could be found in a case where "the defendant conducted surveillance on the plaintiff or otherwise monitored [plaintiff's] activities."[28] Returning to the employee manual, the court ruled Stanton's investigation, even if considered surveillance, was "reasonable" under the circumstances and in light of the business interests at stake.[29]

III. PREMISES LIABILITY

A. Trip & Fall Cases

Knowledge—actual versus constructive—on the part of the tortfeasor continues to be fact-specific. In *Landrum v. Enmark Stations, Inc.*,[30] the Georgia Court of Appeals reversed summary judgment for the defendants because material issues of fact remained—whether the owner had constructive knowledge of an uneven crack in the paved surface of its service station parking lot.[31] For an owner to prevail on summary judgment based on the lack of constructive knowledge, the owner must "demonstrate not only that it had a reasonable inspection program in place, but that such program was actually carried out at the time of the incident."[32] Because the owner failed to sufficiently establish procedures in place to inspect the parking lot, it was not entitled to summary

25. *Id.* at 369, 718 S.E.2d at 537 (alteration in original) (quoting Cabaniss v. Hipsley, 114 Ga. App. 367, 370, 151 S.E.2d 496, 500 (1966) (listing four types of invasion of privacy, one of which is intrusion)).

26. *Id.* (quoting Yarbray v. S. Bell Tel. Co., 261 Ga. 703, 705, 409 S.E.2d 835, 837 (1991)).

27. *Id.* (quoting Anderson v. Mergenhagen, 283 Ga. App. 546, 550, 642 S.E.2d 105, 109 (2007)).

28. *Id.* (alteration in original) (quoting *Anderson*, 283 Ga. App. at 550, 642 S.E.2d at 109).

29. *Id*. at 369-70, 718 S.E.2d at 537 (quoting *Anderson*, 283 Ga. App. at 551, 642 S.E.2d at 110).

30. 310 Ga. App. 161, 712 S.E.2d 585 (2011).

31. *Id.* at 161, 712 S.E.2d at 586.

32. *Id.* at 163, 712 S.E.2d at 588 (quoting Shepard v. Winn Dixie Stores, 241 Ga. App. 746, 748, 527 S.E.2d 36, 38 (1999)).

judgment.[33] Likewise, in *Sanderson Farms, Inc. v. Atkins*,[34] the appellate court affirmed the trial court's denial of summary judgment for the owner, holding first that a federal food inspector who slipped and fell on a piece of viscera at the owner's chicken processing plant was an invitee,[35] and, second, that the owner failed to "introduce any evidence to show adherence to [its] inspection and cleaning procedure on the day of [the] fall."[36] Thus, there was sufficient evidence to survive summary judgment on the issue of constructive knowledge.[37]

In *Williams v. GK Mahavir, Inc.*,[38] the court reversed summary judgment for the defendant-hotel on the issue of whether the owner lacked a reasonable inspection procedure.[39] Because employees cleaned the lobby area only if needed, there was no time frame in which an employee was required to walk through–thus no schedule within which the lobby area was inspected–and no particular time that an employee inspected or cleaned the lobby area on the day in question; therefore, the evidence presented a jury question.[40] Similarly, in *Bradley v. Winn-Dixie Stores, Inc.*,[41] the appellate court reversed the trial court's grant of summary judgment to the owner, holding that the trial court erroneously applied the rule of *Prophecy Corp. v. Charles Rossignol,*

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33. *Compare Landrum*, 310 Ga. App. at 163, 712 S.E.2d at 588, *with* Sipple v. Newman, 313 Ga. App. 688, 690-91, 722 S.E.2d 348, 350-51 (2012) (reversing denial of summary judgment on interlocutory appeal when no evidence existed showing defendant had superior knowledge of the condition that caused injuries to plaintiff when the awning from the house gave way). Interestingly, the court in *Sipple* cites *Landings Ass'n v. Williams*, 309 Ga. App. 321, 325, 711 S.E.2d 294, 297 (2011), discussed in last year's survey. *Sipple*, 313 Ga. App. at 690, 722 S.E.2d at 350. *See also* Griffeth & Morris, *supra* note 1, at 349 n.51.

34. 310 Ga. App. 423, 713 S.E.2d 483 (2011).

35. *Id.* at 424, 713 S.E.2d at 486-87. For a discussion of invitee versus licensee, see *infra* notes 67-75.

36. *Sanderson Farms*, 310 Ga. App. at 427, 713 S.E.2d at 488.

37. *Id.* at 426, 713 S.E.2d at 487.

38. 314 Ga. App. 758, 726 S.E.2d 71 (2012).

39. *Id.* at 762, 726 S.E.2d at 75.

40. *Id*. at 761-62, 726 S.E.2d at 75. Interestingly, Judge McFadden concurred fully and specially while Judge Andrews concurred "dubitante." *Id*. at 762, 726 S.E.2d at 76. *See* Griffeth & Morris, *supra* note 1, at 350 n.60. Judge Andrews now joins Judges Blackwell and Dillard in questioning *Straughter v. J.H. Harvey Co.*, 232 Ga. App. 29, 500 S.E.2d 353 (1998), in light of *Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991); although, Judge Blackwell has been elevated to the Georgia Supreme Court by appointment of Governor Nathan Deal on June 25, 2012.

41. 314 Ga. App. 556, 724 S.E.2d 855 (2012). Judge Blackwell writes the opinion for the panel also including Judges Barnes and Adams. See text accompanying *supra* note 40 regarding Judge Blackwell's appointment to the Georgia Supreme Court.

Inc.,[42] and when "no contradiction appear[ed] in the deposition testimony offered by [the plaintiff]," her testimony was sufficient proof of constructive knowledge to overcome a summary judgment.[43]

However, plaintiffs must still carry their burden of proof to show negligence. In *Willingham Loan & Realty Co. v. Washington*,[44] the trial court's denial of summary judgment to the apartment complex owners was reversed when the plaintiff deposed that she "[did not] know what caused [her] to fall" and "adduced no other evidence from which a jury could infer that the owners' alleged negligence in failing to maintain the stairs caused her to fall."[45] A "mere possibility" that a defect in the stairs caused the fall was insufficient.[46] Similarly, in *Paggett v. Kroger Co.*,[47] summary judgment for a gas station was affirmed when the plaintiff showed no evidence of a dangerous condition.[48] Further, the plaintiff was not entitled to a spoliation presumption based on the defendant's inability to produce a surveillance video of the station on the day of the fall (merely completing an incident report not necessarily enough).[49] "[P]roof of a fall, without more, does not give rise to liability . . . ."[50]

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42. 256 Ga. 27, 343 S.E.2d 680 (1986).

43. *Bradley*, 314 Ga. App. at 559, 724 S.E.2d at 859. *But see* Perdue v. Atlanta Bldg. Maint. Co., 311 Ga. App. 81, 83-84, 714 S.E.2d 611, 613-14 (2012) (affirming summary judgment for contractor and subcontractor when plaintiff slipped and fell on recently stripped and waxed school hallway when there was no "express contractual provision that would cast liability," and the subcontractor had warned plaintiff of the operation).

44. 311 Ga. App. 535, 716 S.E.2d 585 (2011).

45. *Id.* at 536, 716 S.E.2d at 586-87.

46. *Id*. at 536, 716 S.E.2d at 587.

47. 311 Ga. App. 690, 716 S.E.2d 792 (2011).

48. *Id.* at 691-92, 716 S.E.2d at 794-95.

49. *Id*. at 692-93, 716 S.E.2d at 795. *See also* Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 227, 715 S.E.2d 728, 732 (2011) (affirming the defense verdict when no reversible error was shown in the trial court's exercise of discretion to charge the jury on the rebuttable presumption arising from spoliation, as opposed to instructing jury that it must accept as true plaintiffs' description of the assault, related to lost security surveillance tape). However, for a case that demonstrates the potential liability to a defendant for violating a spoliation order, see *Walters v. The Kroger Co.*, No. 09-C-14740-S4, 2012 WL 425310, at *1 (Ga. State Ct. 2012) (awarding a jury verdict of $2.3 million to a man hurt slipping in a Kroger store after the judge concluded the company destroyed a video of the accident and acted in bad faith). *See also* Katheryn Hayes Tucker, *Spoliation mars Kroger's defense*, FULTON CNTY. DAILY REP. 1 (Jan. 27, 2012).

50. *Paggett*, 311 Ga. App. at 690, 716 S.E.2d at 794. *See also* Watts & Colwell Builders, Inc. v. Martin, 313 Ga. App. 1, 6, 720 S.E.2d 329, 334 (2011) (reversing summary judgment on interlocutory appeal under O.C.G.A. § 44-7-14 because no facts demonstrated that the owner should have discovered and repaired the hinge on the bathroom stall door before plaintiff's injury).

The plaintiff's own knowledge can also bar recovery as a matter of law. In *Bartlett v. McDonough Bedding Co.*,[51] the appellate court affirmed summary judgment for the owner of a bedding and antiques shop when the plaintiff failed to exercise ordinary care for his own safety, citing the "voluntary departure" rule.[52] Similarly, in *McLemore v. Genuine Parts Co.*,[53] the court also affirmed summary judgment for the owner after the plaintiff's fall from a parking lot curb, "agree[ing] with the trial court that [the plaintiff] had equal knowledge of any hazard presented by the height of the curb" and rejecting the argument that the "distraction theory" precluded summary judgment.[54] Likewise, in another case citing *Robinson v. Kroger*[55] that dealt with the distraction doctrine, the same panel of the court reversed a denial of summary judgment to the property owner.[56] "[W]hether by distraction or emergency, the doctrine addresses a plaintiff's knowledge and appreciation (not avoidance) of the danger, which is the touchstone of premises liability—the 'proprietor may be liable only if he had superior knowledge of a condition that exposed an invitee to an unreasonable risk of harm.'"[57]

B. Dog Bites

"Superior knowledge" remains the basis for liability under Georgia's premises liability statute,[58] even in the context of a dog bite.[59] Thus, in *Stolte v. Hammack*,[60] the court of appeals affirmed summary judgment in favor of a townhouse owner when the plaintiff could not show the owner–and also the roommate–had superior knowledge of the dog's[61] temperament.[62] Similarly, in *Brock v. Harris*,[63] the court

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51. 313 Ga. App. 657, 722 S.E.2d 380 (2012).

52. *Id.* at 658-59, 722 S.E.2d at 382 (citing Gaydos v. Grupe Real Estate Investors, 211 Ga. App. 811, 813, 440 S.E.2d 545, 547-48 (1994); Chamblee v. Grayco, Inc., 266 Ga. App. 154, 156, 596 S.E.2d 683, 685 (2004); Robinson v. Kroger Co., 268 Ga. 735, 748, 493 S.E.2d 403, 414 (1997)).

53. 313 Ga. App. 641, 722 S.E.2d 366 (2012) (Judges Ellington, Doyle, and Miller on the panel).

54. *Id.* at 644-45, 722 S.E.2d at 369.

55. 268 Ga. 735, 493 S.E.2d 403 (1997).

56. Benefield v. Vance, 315 Ga. App. 505, 509, 726 S.E.2d 531, 534 (2012) (Judges Ellington, Doyle, and Miller on the panel).

57. *Id.* at 509, 726 S.E.2d at 533 (quoting Dickerson v. Guest Servs. Co., 282 Ga. 771, 772, 653 S.E.2d 699, 700 (2007)). The plaintiff and his band (The Honky Tonk Rangers) were asked to perform at the owner's annual lakefront Fourth of July party. *Id.* at 505-06, 726 S.E.2d at 531-32.

58. O.C.G.A. § 51–3–1 (2000).

59. *E.g.*, Stolte v. Hammack, 311 Ga. App. 710, 712, 716 S.E.2d 796, 797-98 (2011).

60. 311 Ga. App. 710, 716 S.E.2d 796 (2011).

61. The owner had a pit bull named Cujo. *Id.* at 710, 716 S.E.2d at 797.

reversed the trial court's denial of summary judgment to the premises-owner when a customer to a mower repair shop failed to present evidence that the owner had superior knowledge that his dog had the propensity to behave aggressively.[64] Also, in *Cormier v. Willis*,[65] the court affirmed summary judgment for the defendant, who was not home but on vacation, and who neither owned nor kept the dog–a pit bull named Kain.[66]

C. Status on Property

Consistent with case law from the last survey period, a plaintiff's status on the property can sometimes be a jury question.[67] Thus, while a visitor to a state prison can be an invitee as a matter of law,[68] whether a state prisoner who volunteered to paint the warden's house and severed his urethra after a fall was considered a licensee or an invitee was properly a jury question, and the jury's verdict against the Georgia Department of Corrections was affirmed.[69] Likewise, in *Bethany Group, LLC v. Grobman*,[70] facts presented at summary judgment rendered it impossible to determine the plaintiff's status as a matter of law.[71] Questions of fact remained for a jury to determine whether the plaintiff's husband, shot to death in his taxicab, "was called to the premises by a resident of the [apartment] complex, thereby having a business relationship with an occupier of the land, or whether another individual with no relationship to [the owner] lured him to the com-

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62. *Id.* at 712, 716 S.E.2d at 798 (citing Wade v. Am. Nat'l Ins. Co., 246 Ga. App. 458, 461, 540 S.E.2d 671, 673 (2000)).

63. 312 Ga. App. 493, 718 S.E.2d 851 (2011).

64. *Id.* at 494-95, 718 S.E.2d at 852.

65. 313 Ga. App. 699, 722 S.E.2d 416 (2012).

66. *Id.* at 699-701, 722 S.E.2d at 416-18.

67. *See* Griffeth & Morris, *supra* note 1, at 347 n.38. A plaintiff's classification of status can also determine the extent of a premises owner's liability. *See* Jordan v. Bennett, 312 Ga. App. 838, 841, 720 S.E.2d 301, 302-04 (2011) (reversing the trial court's denial of summary judgment on interlocutory appeal after the plaintiff, a licensee, consumed five beers and two "lemon drop" cocktails, went out onto a balcony to smoke and drink another beer, and fell over the railings of the balcony and onto the sidewalk).

68. Freeman v. Eichholz, 308 Ga. App. 18, 22, 705 S.E.2d 919, 923 (2011), discussed at Griffeth & Morris *supra* note 1, at 347 n.38.

69. Georgia Dep't of Corr. v. Couch, 312 Ga. App. 544, 545-46, 718 S.E.2d 875, 879-80 (2011).

70. 315 Ga. App. 298, 727 S.E.2d 147 (2012) (Judges Ellington, Doyle, and Miller on the panel).

71. *Id*. at 299-300, 727 S.E.2d at 149.

plex."[72] But in *Sands v. Lindsey*,[73] the court concluded that when an emergency medical technician (EMT) slammed into a glass storm door, he was a licensee as a matter of law and affirmed summary judgment for the owner.[74] The court in *Sands* conceded that "Georgia's appellate courts have not directly addressed the status of EMTs, . . ." but, nonetheless, likened their status to that of police officers and firefighters.[75]

IV. DERIVATIVE LIABILITY

In *O'Hara v. Gilmore*,[76] a straight-forward automobile negligence case against a driver (Caitlin) and her parents (O'Haras) under the family purpose doctrine, the Georgia Court of Appeals examined the trial court's denial of the O'Haras' motion for summary judgment—following the court's dismissal of the claim against Caitlin with prejudice—for the plaintiff's failure to perfect service.[77] The plaintiff's inability to obtain a judgment against Caitlin "foreclosed a derivative claim against the [parents] for vicarious liability under the family purpose doctrine."[78] Agreeing and reversing the trial court in favor of the O'Haras, the court relied upon vicarious liability principles to hold that if the action solely stems from the negligence of the servant, and the servant (Caitlin) is dismissed, the derivative claim cannot be maintained against the master (O'Haras):

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72. *Id*. A triable issue also remained as to whether the owner's failure to retain security on the premises or take other precautions was the proximate cause of death. *Id.* at 301, 727 S.E.2d at 150. *But see* Williams v. Capitol Corporate Cleaning, Inc., 313 Ga. App. 61, 62, 720 S.E.2d 228, 230 (2011). In *Williams*, the same panel of judges as in *Bethany* affirmed a jury's defense verdict (noting that Capitol, as independent contractor, did not have independent duty as owner/occupier to inspect the premises for the safety of the employer's invitees and jury charge accurately stated the same). *Id.* at 61, 65-66, 720 S.E.2d at 229, 232.

73. 314 Ga. App. 160, 723 S.E.2d 471 (2012).

74. *Id*. at 161, 164, 723 S.E.2d at 472, 474.

75. *Id*. at 163-64, 723 S.E.2d at 474.

76. 310 Ga. App. 620, 713 S.E.2d 869 (2011). For an interesting discussion and application of family immunity and its exceptions, see *Donegan v. Davis*, 310 Ga. App. 446, 448, 714 S.E.2d 49, 51 (2011) (barring suit against a mother for injuries her child suffered in an automobile accident by parental immunity, despite intoxication at time of collision, because it was not "a malicious or wilful act of such cruelty").

77. *O'Hara*, 310 Ga. App. at 620-21, 713 S.E.2d at 869.

78. *Id.* at 621, 713 S.E.2d at 869. The family purpose doctrine provides that "the owner of an automobile who permits members of his household to drive it for their own pleasure or convenience is regarded as making such a family purpose his business, so that the driver is treated as his servant." *Id*. at 622, 713 S.E.2d at 870 (quoting Medlin v. Church, 157 Ga. App. 876, 878, 278 S.E.2d 747, 749 (1981)).

> "The same principles apply to a master and servant when sued jointly in an action based solely on the negligence of the servant . . . as would apply in cases of joint liability against joint tortfeasors[. Specifically,] the verdict and judgment must be valid against both or it is valid against neither." While the foregoing rule of indivisibility is not absolute in all cases, it is absolute here where, among other things, "some of the tortfeasors . . . are released therefrom for reasons other than on the merits, as shown by . . . evidence . . . such as . . . lack of service . . . ."[79]

It is unclear how this statement squares with the law recently quoted by a different panel of the same court that

> one who is damaged as the result of a tort committed by a corporate agent may sue either the individual agent, seeking to establish the agent's personal liability for the damages, or the corporation, seeking to establish its vicarious liability for the torts of its agent, or both.[80]

On its second trip to the court of appeals,[81] *Georgia Messenger Service, Inc. v. Bradley*,[82] on appeal from an employer's denied motion for summary judgment, provided the court with the opportunity to examine whether the plaintiff presented facts sufficient to impose liability on a master for the intentional torts of its employee.[83] The plaintiff alleged that Georgia Messenger Service, Inc.'s (GMS) courier (Wise) attacked a security guard (Bradley) for placing a boot on Wise's

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79. *Id.* at 622, 713 S.E.2d at 870 (alteration in original) (quoting *Medlin*, 157 Ga. App. at 878, 278 S.E.2d at 749-50).

80. Thorpe v. Sterling Equip. Co., 315 Ga. App. 909, 915, 729 S.E.2d 52, 58 (2012) (quoting Smith v. Hawks, 182 Ga. App. 379, 384, 355 S.E.2d 669, 675 (1987)) (stating the duty to inspect chattel for safety provided in bailor-bailee relationship is not provided under Restatement (Second) of Torts § 388 as adopted in Georgia).

81. In *Georgia Messenger Service, Inc. v. Bradley*, 302 Ga. App. 247, 690 S.E.2d 888 (2010), the court of appeals remanded the case with direction to the trial court to consider untimely filed depositions to determine the courier's employment status with a messenger service. *Id*. at 247, 690 S.E.2d at 889. For further discussion of derivative liability for employers and their agents using vehicles, see *Wood v. B & S Enterprises, Inc.*, 314 Ga. App. 128, 130, 723 S.E.2d 443, 446 (2012) (holding that the trial court did not err in giving special mission doctrine charge) and *Matheson v. Braden*, 310 Ga. App. 585, 585, 713 S.E.2d 723, 724 (2011) (holding that, absent other evidence, a servant using a master's vehicle to drive home for lunch was not acting within the scope of employment at the time of wreck).

82. 311 Ga. App. 148, 715 S.E.2d 699 (2011). *Cf.* Orton v. Masquerade, Inc., 311 Ga. App. 656, 716 S.E.2d 764 (2011); McKee Foods Corp. v. Lawrence, 310 Ga. App. 122, 712 S.E.2d 79 (2011), *cert. denied*.

83. *Ga. Messenger*, 311 Ga. App. at 151-52, 715 S.E.2d at 703.

vehicle after he illegally parked to deliver a package.[84] Under the doctrine of respondeat superior,

> "[t]wo elements must be present to render a master liable for his servant's actions . . .: first, the servant must be in furtherance of the master's business; and, second, he must be acting within the scope of his master's business." If a tort is committed by an employee for reasons unrelated to that employment (for example, "for purely personal reasons disconnected from the authorized business of the master"), the employer is not liable. Summary judgment for the master, then, is appropriate when the evidence "shows that the servant was not engaged in furtherance of his master's business but was on a private enterprise of his own." Finally, the question of whether "the servant at the time of an injury to another was acting in the prosecution of his master's business and in the scope of his employment is for determination by the jury, except in plain and indisputable cases."[85]

Examining the evidence, the court determined that genuine issues of material fact existed—specifically, whether Wise's actions were in furtherance of GMS's business and within the scope of the same because his illegal parking and confrontation with Bradley was for the purpose of timely delivery of the package and a result of the intense pressure placed on him by GMS to deliver more packages than possible in the time allotted.[86]

V. MEDICAL MALPRACTICE

In *O'Brien v. Bruscato*,[87] the Georgia Supreme Court unanimously affirmed the majority opinion of a divided[88] court of appeals' decision discussed in last year's survey.[89] There, the court reversed the trial court's grant of summary judgment to a psychiatrist on a patient's claims surrounding the patient killing his mother during a psychotic episode while in the doctor's care.[90] Victor Bruscato, a severely mentally ill man with a history of violence, sued his psychiatrist, Dr. Derek

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84. *Id*. at 148, 715 S.E.2d at 701.

85. *Id*. at 151, 715 S.E.2d at 703 (alteration in original) (quoting Drury v. Harris Ventures, Inc., 302 Ga. App. 545, 546-47, 691 S.E.2d 356, 358 (2010)) (citations omitted).

86. *Id*. at 152, 715 S.E.2d at 703.

87. 289 Ga. 739, 715 S.E.2d 120 (2011).

88. 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. Bruscato v. O'Brien, 307 Ga. App. 452, 465, 705 S.E.2d 275, 285-86 (2010) (Andrews, J., dissenting), *aff'd*, 289 Ga. 739, 715 S.E.2d 120 (2011).

89. Griffeth & Morris, *supra* note 1, at 357-58.

90. *Bruscato*, 307 Ga. App. at 461-62, 705 S.E.2d at 283.

O'Brien, for negligent withdrawal and monitoring of his medication that he alleged caused him to "decompensate" and brutally kill his mother while in a psychotic state.[91] Determining that the Georgia Court of Appeals had "correctly examined" the public policy issues at hand, the Georgia Supreme Court reaffirmed the public policy bar that "when one knowingly commits a wrongful act, he cannot use this act for personal gain[,]" but, as in the case subjudice, "[t]here may be situations . . . when an individual's psychiatric disorder prevents him from exercising a reasonable degree of care to prevent himself from taking improper and illegal actions[,]"[92] thereby preventing him from "knowingly" committing the act which would otherwise be a bar to recovery.[93] Here, jury issues existed as to whether the patient had the "requisite mental capacity to commit murder."[94] Summary judgment was inappropriate on his claim because it was disputed whether he knowingly committed the act that would function as a public policy bar to his recovery.[95]

In *Peterson v. Reeves*,[96] the court of appeals, in a divided opinion, again affirmed the denial of summary judgment to a psychiatrist on another medical malpractice claim seeking damages that were, in part, the result of the patient's own conduct.[97] The opinion, concurrence, and dissents provide a glimpse into the thoughts of our appellate judges in interpreting statutes and how duties are established.

Since December 2001, plaintiff Mona Reeves had been under psychiatrist Mark Peterson's care for a number of serious mental illnesses including psychotic disorders.[98] In early August 2005, Reeves was admitted to an emergency room twice in two days for evincing psychotic behaviors, the second instance requiring involuntary commitment at Northwest Georgia Regional Hospital for being "at high risk of committing suicide."[99] After a three-day hospital stay, she was transferred to Horizons Crisis Group Home (Horizons), a voluntary treatment facility. Following her Horizons discharge, she was again brought to the emergency room on August 23 and readmitted to Horizons later that evening.[100] Peterson saw Reeves on August 26, 2005 and "diagnosed her with severe major depressive disorder with

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91. *O'Brien*, 289 Ga. at 742, 715 S.E.2d at 123.
92. *Id.*
93. *Id.* at 743, 715 S.E.2d at 123.
94. *Id*. (quoting *Bruscato*, 307 Ga. App. at 459, 705 S.E.2d at 282).
95. *Id.* at 742, 715 S.E.2d at 123.
96. 315 Ga. App. 370, 727 S.E.2d 171 (2012).
97. *Id.* at 370, 727 S.E.2d at 172-73.
98. *Id*. at 371, 727 S.E.2d at 173.
99. *Id.*
100. *Id.* at 371-72, 727 S.E.2d at 173.

psychosis and bipolar disorder with psychosis, and prescribed medication."[101] She was subsequently discharged from Horizons on August 29 without a consult with Peterson. On August 31, she attempted to commit suicide. Reeves and her conservator filed suit alleging numerous breaches by Peterson, including his failure to: a) subject Reeves to a suicide or self-injury risk assessment; b) provide an adequate psychiatric evaluation and consideration for hospitalization; c) stabilize Reeves in a proper medication regimen; and d) remain available for consultation, or have another psychiatrist available, when she was discharged.[102]

In affirming the trial court's denial of the psychiatrist's motion for summary judgment, the court of appeals recognized "that, under some circumstances, the failure to commit may constitute a breach of the well-established duty of care physicians owe patients, and that when a fact question has been created on that issue, it is for the jury."[103] However, the majority[104] made clear "that the trial court did not create, and we are not creating, a new 'duty to commit.'"[105] Although proximate cause played a role, the fundamental disagreement in the opinion is whether the plaintiff has presented a breach of any duty imposed on psychiatrists under the law.

The majority relied primarily on "a psychiatrist's statutory duty to 'bring to the exercise of his profession a reasonable degree of care and skill,'"[106] a breach of which proximately causes injury, established by expert testimony, and heard and decided by the fact-finder.[107] Responding to Judge Andrews's recognition of an exception when a patient commits suicide outside a hospital and Judge Mikell's position that it is the court's duty to state there is no duty to commit the patient, Judge McFadden relied on the general statute and stated: "Appellate judges, although they have the raw power to create exceptions consistent with their policy preferences, have neither the competence nor the legitimate authority to do so, and should therefore exercise self-restraint."[108]

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101. *Id.*
102. *Id.*
103. *Id.* at 378, 727 S.E.2d at 177.
104. Judge McFadden wrote the majority opinion with a concurrence by Judge Phipps, a special concurrence by Judge Dillard, and a concurrence in judgment only by Judge Barnes. Judges Andrews and Mikell–who retired from the court at the end of August 2012–filed separate dissents.
105. *Peterson*, 315 Ga. App. at 378, 727 S.E.2d at 177.
106. *Id.* at 370, 727 S.E.2d at 172; *see also* O.C.G.A. § 51–1–27 (2000); O.C.G.A. § 37-3-4 (2012).
107. *Peterson*, 315 Ga. App. at 375, 727 S.E.2d at 175.
108. *Id.* at 377, 727 S.E.2d at 177.

In his special concurrence, Judge Dillard wrote that while he agreed with the majority's conclusion, he believed the "majority's opinion could be misconstrued as creating an affirmative duty for a mental healthcare professional to involuntarily commit a potentially suicidal patient."[109] Further, summary judgment was properly denied because there was ample evidence of multiple breaches in Peterson's care[110] which, given Reeves's high risk of suicide, could result in the foreseeable harm of her attempting suicide.[111]

In both of their dissents, Judges Andrews and Mikell stated that "[b]ecause the existence of a legal duty . . . is a question of law for the court," not the jury, and when no statute or case law establishes the duty, there was no legal duty requiring the doctor to prevent a suicide when the patient was not in the doctor's control.[112]

Judge Andrews distinguished *Brandvain v. Ridgeview Institute, Inc.*[113] from *Ermutlu v. McCorkle*.[114] He stated that the plaintiff had failed to establish a breach of any supposed duty which proximately caused her injuries, because her experts could not testify whether the plaintiff was a danger to herself when she was discharged, or whether hospitalization would have prevented the suicide attempt five days later.[115] Judge Mikell focused his dissent on the distinction between cause-in-fact and proximate cause[116]: even assuming a breach, while this failure would be a cause-in-fact under the "but for" test, it would fail as too remote a proximate cause—a policy decision—to say it legally caused the injury when the attempt occurred five days after discharge,

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109. *Id.* at 378, 727 S.E.2d at 177 (Dillard, J., concurring specially).

110. *Id*. The plaintiff, by way of her experts, provided multiple theories of negligence on the part of Peterson: a) failure to adequately assess her condition and risk of harm to herself; b) failure to perform a suicide risk assessment prior to discharge; c) her expressed guilt for not caring for her deceased mother; d) voices Reeves heard that told her "she needed to burn in hell"; e) failure to stabilize Reeves with medication; and f) unavailability for consultation on the date of discharge for evaluation or by providing another physician for consultation. *Id*. at 375-76, 379, 727 S.E.2d at 175, 178 (majority opinion).

111. *Id.* at 379, 727 S.E.2d at 177-78 (Dillard, J., concurring specially).

112. *Id*. at 384, 727 S.E.2d at 179 (Andrews, J., dissenting); *id*. at 381-82, 727 S.E.2d at 182 (Mikell, J., dissenting).

113. 188 Ga. App. 106, 372 S.E.2d 265 (1988), *aff'd*, 259 Ga. 376, 382 S.E.2d 597 (1989).

114. 203 Ga. App. 335, 416 S.E.2d 792 (1992).

115. *Peterson*, 315 Ga. App. at 385, 727 S.E.2d at 180 (Andrews, J., dissenting). "(1) [T]he physician must have control over the mental patient; and (2) the physician must have known or reasonably should have known that the patient was likely to cause bodily harm to others." *Id*. at 386, 727 S.E.2d at 181 (quoting *Ermutlu*, 203 Ga. App. at 336, 416 S.E.2d at 794).

116. *See id*. at 382, 727 S.E.2d at 183 (Mikell, J., dissenting).

when the plaintiff was not in the defendant's control, and when the defendant did not know the plaintiff had left Horizons.[117]

VI. DRAM SHOP

In *Flores v. Exprezit! Stores 98-Georgia, LLC*,[118] the Georgia Supreme Court explored whether the liability provisions of the Georgia Dram Shop Act (GDSA)[119] applied to the sale of alcoholic beverages in closed or prepackaged containers by a convenience store for consumption off the store premises.[120] Answering in the affirmative, the court held the GDSA's plain language supplied a basis for convenience store liability:

> a person . . . who knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication of such . . . person when the sale, furnishing, or serving is the proximate cause of such injury or damage . . . .[121]

The court reasoned that the statute was applicable, as a convenience store could: a) "knowingly [sell]" alcoholic beverages to a person who is in a state of noticeable intoxication, b) knowing that such person will soon be driving a motor vehicle.[122]

In construing the statute and limiting it to cases in which alcoholic beverages were served or poured on the vendor's premises, the Georgia Court of Appeals had reasoned that a broader reading, although covered by the statute, would lead to "wholly impractica[l] results"[123] requiring "a jury to speculate about or invent a basis for finding that it was foreseeable to the seller that the sale created an unreasonable risk that the buyer could cause harm by driving while intoxicated"[124] because a convenience store could not know if the purchaser "would drink the beer,

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117. *Id*.

118. 289 Ga. 466, 713 S.E.2d 368 (2011). For a discussion of the court of appeals opinion, see Kate S. Cook et al., *Trial Practice and Procedure, Annual Survey of Georgia*, 63 MERCER L. REV. 359, 370-71 (2011).

119. O.C.G.A. § 51-1-40 (2000).

120. *Flores*, 289 Ga. at 466, 713 S.E.2d at 368. The issue was addressed by the court of appeals in *Flores v. Exprezit! Stores 98-Georgia, LLC,* 304 Ga. App. 333, 333, 696 S.E.2d 125, 125-26 (2010). *See supra* note 118.

121. *Flores*, 289 Ga. at 467, 713 S.E.2d at 369; see also O.C.G.A. § 51-1-40(b).

122. *Flores*, 289 Ga. at 468, 713 S.E.2d at 370.

123. *Id*. at 467, 713 S.E.2d at 370 (quoting *Flores*, 304 Ga. App. at 336, 696 S.E.2d at 127).

124. *Id*.

how much he might drink, when he might do so, or whether he would drive soon after drinking."[125]

On review, the supreme court held that the court of appeals had abandoned fundamental principles of statutory construction requiring courts to "ascertain the purpose and intent [of a statute] . . . [and] when a statute is plain and susceptible of but one natural and reasonable construction, the court has no authority to place a different construction upon it . . . ."[126]

The supreme court dispelled concerns by the court of appeals that this reading and application would lead to speculation by juries and "impractica[l] results" by referring to the statute wherein there is no statutory requirement that the seller know when or how much alcohol the buyer will consume before he gets behind the wheel.[127]

> [B]y focusing in this case on the convenience store's knowledge as to the purchaser's plans to consume the beer, the Court of Appeals missed the mark. The focus should have been solely on the convenience [store's] knowledge as to whether its customer was noticeably intoxicated and would be driving soon. If a convenience store sells alcohol to such a customer, it is foreseeable that the customer will drive while intoxicated and injure an innocent third party. And if the plaintiff can prove that such sale of alcohol was a proximate cause of any injuries, the convenience store will be held liable.[128]

The supreme court stated that a convenience store has an opportunity to see how a patron arrived, will depart, and, in connection with the sale, an opportunity to observe if he is noticeably intoxicated.[129] This opportunity may not be equal to the traditional dram shop, but this is a jury issue and goes to the facts.[130] In addition to statutory construction, although not explicitly stated in the opinion, the underlying current of the opinion is that the supreme court believes the basis on which the court of appeals excluded convenience stores from the statute—namely, the foreseeability of a buyer consuming the supplied alcohol and subsequently driving creating an unreasonable risk that the buyer could cause harm—is an issue of causation, which can be determined by the

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125. *Id*. at 469, 713 S.E.2d at 371 (quoting *Flores*, 304 Ga. App. at 335, 696 S.E.2d at 127).

126. *Id*. at 470, 713 S.E.2d at 371.

127. *Id*. at 467-68, 713 S.E.2d at 370.

128. *Id.* at 470, 713 S.E.2d at 371 (citations omitted).

129. *Id*. at 469, 713 S.E.2d at 370.

130. *Id*.

jury pursuant to the statute, rather than to the exclusion of the statute and its plain language and the duties it imposes on all vendors.[131]

VII. CONCLUSION

If practitioners can glean any practice pointers from a review of this year's tort cases, it would likely be to go "back to the basics" or, as old mentors often say, "start with the statute." Georgia's appellate courts almost always use the statutory language as a starting point in their analysis. Second, counsel should always remember who has the burden of proof. A review of this Article will show that in cases with a well-pleaded complaint and cases in which trial counsel have made a good appellate record showing all relevant facts to support their claims, our appellate courts will, more likely than not, allow the case to proceed to trial.

Looking forward to next year's survey period, personnel changes on both courts will result in fertile ground for analysis, as the new judges chart their courses and hone their judicial philosophies on the appellate bench—some for the first time and others, as in the case with Justice Blackwell, who have already made their mark on Georgia's tort jurisprudence.

131. *Id*. at 470, 713 S.E.2d at 371.