TITLE 51

TORTS

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Cross references. — Limited liability for pick-your-own farm operations, T. 2, C. 14, A. 7. Abatement of tort actions upon death of either party, § 9-2-41. Time limitations on actions for injuries to the person, § 9-3-33. Forms of complaint for actions based on allegations of negligence, §§ 9-11-109, 9-11-110. Redress by client against attorney for unskillful advice, § 15-19-17. Immunity of municipal corporations from liability for torts of policemen, § 36-33-3. State Tort Claims, § 50-21-20 et seq.

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For note, "Tort Liability in Georgia for the Criminal Acts of Another," see 18 Ga. L. Rev. 361 (1984). For note, "Out With the Old: Georgia Struggles With Its Dated Approach to the Tort of Negligent Infliction of Emotional Distress," see 34 Ga. L. Rev. 349 (1999). For note, "Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s," see 34 Ga. L. Rev. 1049 (2000).

JUDICIAL DECISIONS

Service by publication in tort actions. — Statutes pertaining to torts contain no provision for service by publication in any action for personal judgment for a tort against any person, resident or nonresident. Barnes v. Continental Ins. Co., 231 Ga. 246, 201 S.E.2d 150 (1973); Smith v. Commercial Union Assurance Co., 246 Ga. 50, 268 S.E.2d 632 (1980).

There is no provision in the Nonresident Motorists' Act (see now O.C.G.A. Ch. 12, T. 40), the "long arm" statute (see now O.C.G.A. Art. 4, Ch. 10, T. 9), or in the statutes relative to torts for service on a nonresident defendant by publication, and by its own terms the provision in Ga. L. 1969, p. 487, § 1 (see now O.C.G.A. § 9-11-4(e)(1)) for service by publication is limited in Ga. L. 1969, p. 487, § 1 (see now O.C.G.A. § 9-11-4(i)) by the qualification that the provisions shall apply only in actions or proceedings in which service by publication now or hereafter may be authorized by law. National Sur. Corp. v. Hernandez, 120 Ga. App. 307, 170 S.E.2d 318 (1969).

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Civil liability for insulting or abusive language — modern status, 20 ALR4th 773.

Liability to real-property purchaser for negligent appraisal of property's value, 21 ALR4th 867.

Personal liability of public school teacher in negligence action for personal injury or death of student, 34 ALR4th 228.

Insurer's tort liability for wrongful or negligent issuance of life policy, 37 ALR4th 972.

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Liability of better business bureau or similar organization in tort, 50 ALR4th 745.

Tennis club's liability for tennis player's injuries, 52 ALR4th 1253.

Civil liability for tobacco sales to mi-

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Liability to one struck by golf club, 63 ALR4th 221.

Invasion of privacy by a clergyman, church, or religious group, 67 ALR4th 1086.

Liability of corporate director, officer, or employee for tortious interference with corporation's contract with another, 72 ALR4th 492.

Strict liability, in absence of statute, for injury or damage occurring on the ground caused by ascent, descent, or flight of aircraft, 73 ALR4th 416.

Tort liability for nonmedical radiological harm, 73 ALR4th 582.

Rescue doctrine: liability of one who negligently causes motor vehicle accident for injuries to person subsequently attempting to rescue persons or property, 73 ALR4th 737.

Cause of action for clergy malpractice, 75 ALR4th 750.

Liability in tort for interference with attorney-client relationship, 90 ALR4th 621.

Liability of motorist for injury to child on skateboard, 24 ALR5th 780.

Free exercise of religion clause of first amendment as defense to tort liability, 93 ALR Fed. 754.

Pre-emption, by § 301(a) of Labor-Management Relations Act of 1947 (29 USCS § 185(a)), of employee's state-law action for infliction of emotional distress, 101 ALR Fed. 395.

CHAPTER 1

GENERAL PROVISIONS

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51-1-36. Duty of care of operator of motor vehicle to passengers.
51-1-37. Negligent or improper administration of polygraph examination; measure of damages.
51-1-38. Tort immunity for medical students; exceptions.
51-1-39. Liability for injuries of person committing crime on political subdivision property.
51-1-40. Liability for acts of intoxicated persons.
51-1-41. Liability of sports officials at amateur athletic contests.
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51-1-45. Immunity of persons serving without compensation as athletic team physicians.
51-1-46. "Drug Dealer Liability Act"; purpose; definitions; actions against persons participating in illegal marketing of controlled substances.
51-1-47. Immunity for disconnection of motor vehicle air bags.
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51-1-50. Immunity of broadcasters from liability for Levi's Call: Georgia's Amber Alert Program.
51-1-51. Limitations on liability of liquefied petroleum gas providers.
51-1-52. Federal law payor guidelines and criteria not a legal basis for negligence or standard of care for medical malpractice or product liability.
51-1-53. Recreational joint-use agreements.
51-1-54. Program and Treatment Completion Certificate.
51-1-55. Firearm instructor liability.

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51-1-1. Tort defined.

A tort is the unlawful violation of a private legal right other than a mere breach of contract, express or implied. A tort may also be the violation of a public duty if, as a result of the violation, some special damage accrues to the individual. (Orig. Code 1863, § 2894; Code 1868, § 2900; Code 1873, § 2951; Code 1882, § 2951; Civil Code 1895, § 3807; Civil Code 1910, § 4403; Code 1933, § 105-101.)

History of Code section. — The language of this section is derived in part from the decisions in Western Union Tel. Co. v. Taylor, 84 Ga. 408, 11 S.E. 397 (1890); Louisville & N.R.R. v. Spinks, 104 Ga. 692, 30 S.E. 968 (1898); and Wolff v. Southern Ry., 130 Ga. 251, 60 S.E. 569 (1908).

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JUDICIAL DECISIONS

Analysis

General Consideration
Torts Related to Contract
Pleading and Practice

General Consideration

A tort is the unlawful violation of a private legal right by reason of which some special damage accrues to the individual. Parsons v. Foshee, 80 Ga. App. 127, 55 S.E.2d 386 (1949); First Fed. Sav. Bank v. Fretthold, 195 Ga. App. 482, 394 S.E.2d 128 (1990).

A tort is an injury inflicted otherwise than by mere breach of contract; or, more accurately, a tort is one's disturbance of another in rights which the law has created either in the absence of contract, or in consequence of a relation which a contract has established between the parties. Postal Telegraph-Cable Co. v. Kaler, 65 Ga. App. 641, 16 S.E.2d 77 (1941).

A suit will be treated as a tort action when recovery is based on breach of duty, and not on contract. Bates v. Madison County, 32 Ga. App. 370, 123 S.E. 158 (1924).

In order for tort action to lie, there must be injury to the plaintiff, i.e., some initiating event which is the result of the defendant's negligence and brings that wrongful conduct to light. Cotton States Mut. Ins. Co. v. Crosby, 244 Ga. 456, 260 S.E.2d 860 (1979).

Violation of duty required. — There must be both a breach of duty and damage because of such breach before there can be a recovery upon the official bond of the clerk of the superior court. Georgia Properties Co. v. Nisbet, 42 Ga. App. 338, 156 S.E. 298 (1930).

It is essential to maintain an action in tort that there must be a duty from the defendant to the plaintiff, and a violation of such duty. Knight v. Atlantic Coast Line R.R., 4 F. Supp. 713 (S.D. Ga. 1933), aff'd, 73 F.2d 76 (5th Cir. 1934).

Third-party does not owe a duty to an employer to refrain from injuring the employer's employee. Traina Enters., Inc. v. Racetrac Petro., Inc., 241 Ga. App. 18, 525 S.E.2d 712 (1999).

When an auctioneer sought damages from the auction company the auctioneer worked for and its principal because the auctioneer was arrested in another state for contracting and advertising for an auction without a license, the auction company and principal were entitled to summary judgment because the auctioneer did not show the auction company or principal violated any duty owed to the auctioneer which caused the auctioneer's injury, as the auctioneer knew, when the auctioneer advertised and contracted for the auction in the other state; further, the auction company did not have a license to conduct an auction in that state, so the auctioneer did not establish the elements necessary to recover for the auction company's or principal's alleged tortious conduct under O.C.G.A. § 51-1-1. Morris v. Gavin, Inc., 268 Ga. App. 771, 603 S.E.2d 1 (2004).

Bank's alleged actions in paying a check over a forged endorsement, depositing the funds in new accounts, and failing to observe reasonable commercial standards, were not violations of any legal right of, or duty owed to, the payee of the check who had never received delivery of the check, and the payee had suffered no damages from these actions. Thus, the actions did not give rise to a tort claim under O.C.G.A. §§ 51-1-1, 51-1-6, or 51-1-8. Jenkins v. Wachovia Bank, Nat'l Ass'n, 309 Ga. App. 562, 711 S.E.2d 80 (2011).

City's distribution of federal HUD money. — Since the city's financing activity in distributing federal HUD money did not extend beyond that of a conventional

General Consideration (Cont'd)

construction financing authority, the court did not err in granting summary judgment to the city in an action for damages arising from an incomplete and defective renovation construction to the home under a home improvement grant. White v. City of Atlanta, 248 Ga. App. 75, 545 S.E.2d 625 (2001).

Rightful and proper exercise of lawful power or authority cannot afford basis for action. Louisville & N.R.R. v. Jackson, 139 Ga. 543, 77 S.E. 796 (1913).

Violation of mere moral obligation insufficient. — Law does not yet attempt to guard the peace of mind, or the happiness of every one by giving recovery of damages for mental anguish for a violation produced by a mere moral wrong; thus, if mental pain and anguish results from mere violation of a mere moral obligation, there can be no recovery in tort. Anderson v. Fussell, 75 Ga. App. 866, 44 S.E.2d 694 (1947).

Aiding and abetting breach of fiduciary duty. — Georgia law does not recognize the tort of aiding and abetting a breach of fiduciary duty, and a Georgia court faced with the issue would not be likely to create such a cause of action since the imposition of aider and abettor liability for such breaches essentially extends fiduciary obligations beyond the scope of the confidential or special relationship upon which these duties are based. Munford, Inc. v. Munford, 188 Bankr. 860 (N.D. Ga. 1994), aff'd, 97 F.3d 449 (11th Cir. 1996), 97 F.3d 456 (11th Cir. 1996), aff'd on other grounds, 98 F.3d 604 (11th Cir. 1996).

Georgia law does not recognize spoliation of evidence as a separate tort. Gardner v. Blackston, 185 Ga. App. 754, 365 S.E.2d 545 (1988).

Elements of damage arising from tort. — It is elementary that damage may consist of several items caused by the general wrong or tort. For example, pain and suffering, loss of earning capacity and medical expenses, resulting from and caused by the negligence of a defendant in causing an injury to the person of another. Gloss v. Jacobs, 86 Ga. App. 161, 71 S.E.2d 253 (1952).

Cited in Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 35 Ga. App. 94, 132 S.E. 454 (1926); Wall v. Wall, 176 Ga. 757, 168 S.E. 893 (1933); Sikes v. Foster, 74 Ga. App. 350, 39 S.E.2d 585 (1946); Brigman v. Brenner, 206 Ga. 222, 56 S.E.2d 471 (1949); Dale Elec. Co. v. Thurston, 82 Ga. App. 516, 61 S.E.2d 584 (1950); Hardy v. Leonard, 82 Ga. App. 764, 62 S.E.2d 437 (1950); Freeman v. Busch Jewelry Co., 98 F. Supp. 963 (N.D. Ga. 1951); Aderhold v. Zimmer, 86 Ga. App. 204, 71 S.E.2d 270 (1952); Rhine v. Sanders, 100 Ga. App. 68, 110 S.E.2d 128 (1959); Patillo v. Thompson, 106 Ga. App. 808, 128 S.E.2d 656 (1962); Georgia Elec. Co. v. Smith, 108 Ga. App. 851, 134 S.E.2d 840 (1964); Wittke v. Horne's Enters., Inc., 118 Ga. App. 211, 162 S.E.2d 898 (1968); Railey v. State Farm Mut. Auto. Ins. Co., 129 Ga. App. 875, 201 S.E.2d 628 (1973); Parzini v. Center Chem. Co., 134 Ga. App. 414, 214 S.E.2d 700 (1975); Davis v. Ben O'Callaghan Co., 139 Ga. App. 22, 227 S.E.2d 837 (1976); Aretz v. United States, 604 F.2d 417 (5th Cir. 1979); Young v. Carrollton Fed. Sav. & Loan Ass'n, 159 Ga. App. 836, 285 S.E.2d 264 (1981); Lavine v. General Mills, Inc., 519 F. Supp. 332 (N.D. Ga. 1981); Habersham Mem. Park v. Moore, 164 Ga. App. 676, 297 S.E.2d 315 (1982); Stone Mt. Game Ranch, Inc. v. Hunt, 746 F.2d 761 (11th Cir. 1984); Hodges v. Tomberlin, 170 Ga. App. 842, 319 S.E.2d 11 (1984); Peterson v. First Clayton Bank & Trust Co., 214 Ga. App. 94, 447 S.E.2d 63 (1994); Workman v. McNeal Agency, Inc., 217 Ga. App. 686, 458 S.E.2d 707 (1995); Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc., 133 F.3d 1405 (11th Cir. 1998); Ga. Farm Bureau Mut. Ins. Co. v. Croley, 263 Ga. App. 659, 588 S.E.2d 840 (2003); Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559 (2007).

Torts Related to Contract

This section states that if a duty arises out of a contract, a plaintiff may not convert that action into one sounding in tort. Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co., 519 F. Supp. 60 (S.D. Ga. 1981).

Tort action may arise from misfeasance of duty. — In cases alleging mis-

feasance or the negligent performance of the contract, a cause of action ex delicto may be had. Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966).

There are certain classes of contracts which create a relation from which the law implies duties, a breach of which will constitute a tort, and in such cases an injured party may sue either for breach of the contract or in tort for breach of the implied duty. This rule applies in certain contractual relations between principal and agent, bailor and bailee, attorney and client, physician and patient, carrier and passenger or shipper, master and servant, and similar well-recognized relations; but it is not every contractual relation which involves a public duty, the breach of which will support an action in tort. American Oil Co. v. Roper, 64 Ga. App. 743, 14 S.E.2d 145 (1941).

There is no bar to bringing a tort action for the violation of a duty flowing from relations between the parties which were created by contract. City of Douglas v. Johnson, 157 Ga. App. 618, 278 S.E.2d 160 (1981).

If the result of a contract is to create a relationship between the parties, and there are certain duties which the law attaches to that relationship, the breach of one of those duties may give rise to an action in tort. Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co., 519 F. Supp. 60 (S.D. Ga. 1981).

Duty must be imposed by law. — In order to maintain an action ex delicto because of a breach of duty growing out of a contractual relation, the breach must be shown to have been a breach of a duty imposed by law and not merely the breach of a duty imposed by the contract itself. Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966); Sutker v. Pennsylvania Ins. Co., 115 Ga. App. 648, 155 S.E.2d 694 (1967).

Action in tort may be based on a duty imposed by law in consequence of a contractual relation between the parties. In such a case the action is in no sense based on the contract, especially if none of the expressed provisions are recited, and there is no allegation that any of its expressed provisions were violated, but when the allegation is that the defendant company failed to transmit and deliver the message with the impartiality, good faith, and due diligence required by law. Postal Telegraph-Cable Co. v. Kaler, 65 Ga. App. 641, 16 S.E.2d 77 (1941).

"Duty imposed by law" as used in this context means either a duty imposed by a valid statutory enactment of the General Assembly or a duty imposed by a recognized common-law principle declared in the reported decisions of the appellate courts of the state or jurisdiction involved. Sutker v. Pennsylvania Ins. Co., 115 Ga. App. 648, 155 S.E.2d 694 (1967).

To maintain an action in tort because of a breach of duty growing out of a contractual relation, the breach must be shown to have been a breach of duty imposed by statute or a duty imposed by a recognized common-law principle. Deacon v. Deacon, 122 Ga. App. 513, 177 S.E.2d 719 (1970).

Appellate court rejected an insurer's assertion that its insured's individual tort claims failed because a tort was the unlawful violation of a private legal right other than a mere breach of contract, express or implied, as the duties the insured alleged that the insurer violated did not arise merely from contract but were also imposed by O.C.G.A. § 33-31-9. J.M.I.C. Life Ins. Co. v. Toole, 280 Ga. App. 372, 634 S.E.2d 123 (2006).

Contract applicable only to raise duty. — Tort is dependent on the contract only to the extent necessary to raise the duty, and a suit will be treated as a tort action when the recovery is placed on a breach of duty and not on a contract. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205 (1935); Simmons v. May, 53 Ga. App. 454, 186 S.E. 441 (1936).

Tort claim encompassed by breach of contract claim. — In a case in which a car buyer appealed a district court's entry of summary judgment in favor of the lender because the buyer's theft claim was encompassed by the buyer's breach-of-contract claim, it was unnecessary to address whether the buyer had a cause of action under tort law. O.C.G.A. § 51-1-1 provided that a tort was the unlawful violation of a private legal duty other than a mere breach of contract, express or implied. Goia v. Citifinancial Auto, 499 Fed. Appx. 930 (11th Cir. Dec. 3,

Torts Related to Contract (Cont'd)

2012) (Unpublished).

Breach of contract is not tort. — Breach of an executory contract, into which a railroad company was under no legal duty to enter, is not a tort. Louisville & N.R.R. v. Spinks, 104 Ga. 692, 30 S.E. 968 (1898); Howard v. Central of Ga. Ry., 9 Ga. App. 617, 71 S.E. 1017 (1911).

An action in tort may not be maintained when the neglect of duty complained of, as distinguished from the negligent performance of duty, is specifically provided for by the contract itself. Monroe v. Guess, 41 Ga. App. 697, 154 S.E. 301 (1930).

If there is no liability except that arising out of a breach of the express terms of the contract, the action must be in contract, and an action in tort cannot be maintained. American Oil Co. v. Roper, 64 Ga. App. 743, 14 S.E.2d 145 (1941); Rhine v. Sanders, 100 Ga. App. 68, 110 S.E.2d 128 (1959); Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966).

While it is true that the violation of some private obligation by which damage accrues, which is not the result of a mere neglect of duty expressly or impliedly provided for by the contract itself, can be treated as a tort and affords a right or cause of action, the principle cannot be applied so as to authorize an interpretation that the former suit sounded in tort, for the reason that the wrong complained of was simply the failure of the defendants to comply with their clearly implied duty under the contract to surrender the alleged collateral upon a proper tender of the alleged indebtedness being made. Spence v. Erwin, 200 Ga. 672, 38 S.E.2d 394 (1946).

It is not every breach of contract that gives a cause of action in tort; and so, when the breach complained of is simply the neglect of a duty such as is expressly provided for by the contract itself, the action will be construed and treated as one brought ex contractu. This principle is applicable also when the breach complained of is simply the neglect of a duty provided by the contract by implication, either of law or of fact. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255 (1966).

Mere nonfeasance of duty insufficient. — Nonfeasance or the mere failure to perform a contract at all affords no basis for an action ex delicto, even though the failure to perform may have been characterized as negligent. Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966); Lane v. Corbitt Cypress Co., 215 Ga. App. 388, 450 S.E.2d 855 (1994).

When there is no special relationship beyond the mere contractual one, a failure to perform in accordance with its terms will not constitute a tort as to the other contracting party. Waddey v. Davis, 149 Ga. App. 308, 254 S.E.2d 465 (1979).

Trial court erred in granting the defendants' joint motion for judgment on the pleadings as a chief executive officer (CEO) set forth a breach of fiduciary duty claim because, although a majority owner of an employer could terminate the CEO's contract without cause, the founders of the employer were bound by an employment contract, which purported to establish a confidential relationship. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Absent special relationship, misfeasance/nonfeasance distinction controls in deciding if the harm done to the plaintiff will permit a cause of action in negligence as well as in contract; in the absence of bodily injury or damage to property, only a cause of action in contract is available. Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co., 519 F. Supp. 60 (S.D. Ga. 1981).

Contract status alone insufficient to create tort action. — That a party occupies a status that sometimes gives rise to professional duties, does not transform all contract disagreements into torts based on a professional relationship. Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co., 519 F. Supp. 60 (S.D. Ga. 1981).

When claim lay for breach of contract for failure to pay commissions, no action for conversion of the money owed under that contract was maintainable. Faircloth v. A.L. Williams & Assocs., 206 Ga. App. 764, 426 S.E.2d 601 (1992).

Claim was not for breach of contract, but for intention never to pay. — Fraud claim survived summary judgment because there was sufficient evidence that the corporation promised the plaintiff a substantial sum if a certain manufacturer began to factory fill a line of vehicles with the corporation's synthetic oil, that it was reasonable to rely on that promise, and that it could be inferred that the corporation never had any intention to "work out" the compensation plan. Morrison v. Exxonmobil Corp. Constr. Millwright, Inc., No. 1:03-CV-140(WLS), 2005 U.S. Dist. LEXIS 36117 (M.D. Ga. Sept. 28, 2005).

Claim was not for breach of contract, but for fraud and breach of fiduciary duty. — In a breach of fiduciary duty and fraud action, whether the jury verdict winner, an investment company, was a party to the three contracts that kickbacks were paid under was not relevant to the contract's claims for breach of fiduciary duty and fraud because those claims were in tort, not contract. Wright v. Apt. Inv. & Mgmt. Co., 315 Ga. App. 587, 726 S.E.2d 779 (2012).

Employer's duty to pay servant, contractual duty only. — When a person is employed by a corporation for wages, and after the employee has earned wages under the contract of employment, and the employer refuses to pay the employee the wages earned without legal process and in wanton disregard of the employee's rights and against the employee's will, the only recourse available to the employee is an action for a breach of the contract of employment, as the only duty placed upon the employer arises solely by reason of the contract. Mitchell v. Southern Dairies, Inc., 77 Ga. App. 771, 49 S.E.2d 912 (1948).

Contractor not liable when instructed to delay work. — When the work being undertaken is at the instance of the employer—and particularly when the alleged tortfeasor is working under contract with the employer and must perform the work subject to the employer's requirements as to time and place of performance—and when the employer unilaterally instructs the other party (the contractor) to delay completion of the work until some later time which is convenient for the employer, the contractor cannot be held liable for an injury to an employee which arguably may be a result of the failure to complete the work contracted for. Church v. SMS Enters., 186 Ga. App. 791, 368 S.E.2d 554 (1988).

Tortious interference with contractual relations is applicable only when the interference is done by one who is a stranger to the contract. Jet Air, Inc. v. National Union Fire Ins. Co., 189 Ga. App. 399, 375 S.E.2d 873 (1988).

Unjust enrichment claim not a tort. — Trial court properly granted a judgment on the pleadings for a limited liability company, its founders, and a corporation as a president was attempting to treat an unjust enrichment claim like a tort; a claim for unjust enrichment was not a tort, but an alternative theory of recovery if a contract claim failed, and the parties had a contract and the unjust enrichment claim failed as a matter of law. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Trial court properly entered judgment on the pleadings for a majority owner of an employer on a chief executive officer's tortious interference with an employment contract claim as the owner had a financial interest in the employer, which was a party to the contract. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Trial court properly entered judgment on the pleadings for a majority owner of an employer on a tortious interference with prospective employment claim brought by a chief executive officer (CEO) as there was no evidence that the CEO had an employment offer from a corporation; the claim was predicated on the CEO's termination by the employer and the owner was not a stranger to the employment contract. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Pleading and Practice

Elements of complaint. — All that a plaintiff in tort need allege to withstand the attack of a general demurrer (now motion to dismiss) is the factum of the

Pleading and Practice (Cont'd)

duty, whether by contract or otherwise, a violation of that duty, and damages resulting from that violation. Parsons v. Foshee, 80 Ga. App. 127, 55 S.E.2d 386 (1949); Atlanta Paper Co. v. Sigmon, 82 Ga. App. 730, 62 S.E.2d 363 (1950).

Characterization of action based on contents of pleadings. — Nature of an action is to be determined, not by the designation of the pleader, but by the intrinsic contents of the petition, its recitals of fact, the nature of the wrong sought to be remedied, and the kind of relief sought. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255 (1966).

Sufficiency of pleadings. — Petition alleging that the lessor in a contract of rental had broken several of the contract's terms with the willful and malicious purpose of destroying the business of the lessee, and had thus destroyed the business, did not set forth an actionable tort, the proper remedy of the lessee being an action for breach of contract. Georgia Kaolin Co. v. Walker, 54 Ga. App. 742, 189 S.E. 88 (1936).

Petition sounding in tort which fails to allege an actionable negligence and which fails to allege any physical injury to the person or any pecuniary loss, does not set forth a cause of action, and is subject to dismissal. Anderson v. Fussell, 75 Ga. App. 866, 44 S.E.2d 694 (1947).

When all the damages claimed resulted from the trespass committed, which was a continuing one and which the plaintiff was entitled to plead, the declaration was not subject to special demurrers (now motion to dismiss). Gloss v. Jacobs, 86 Ga. App. 161, 71 S.E.2d 253 (1952).

When duty arose by reason of contract, but it was the violation of the duty, and not the violation of the contract, on which the plaintiff laid the plaintiff's case, the petition set out a cause of action. Frank Graham Co. v. Graham, 90 Ga. App. 840, 84 S.E.2d 579 (1954).

Original petition set out a specific cause of complaint sufficiently to be amendable, since, if the petition was defective in any wise, the petition was only in that the petition omitted to allege sufficiently facts essential to raise the duty or obligation in the cause of action, and the trial court erred in holding that there was not enough in the original petition to amend by. Cannon v. Hood Constr. Co., 91 Ga. App. 20, 84 S.E.2d 604 (1954).

When the plaintiff's petition is based on the defendant's alleged nonfeasance of duty provided by contract and not on the defendant's misfeasance, it does not set forth a cause of action ex delicto. A.A.A. Parking, Inc. v. Bigger, 113 Ga. App. 578, 149 S.E.2d 255 (1966).

Contractor's complaint averring that its expectations arising under the contract between contractor and roofing subcontractor and made applicable to supplier by its agreement with roofing subcontractor were not met, the basis of which was the alleged failure of supplier to deliver roofing material which met the specifications in the contract ("negligent delivery"), not asserting that the roofing material supplied damaged other portions of the building, did not state a claim for damages actionable under a theory of negligence. A.J. Kellos Constr. Co. v. Balboa Ins. Co., 495 F. Supp. 408 (S.D. Ga. 1980).

Denial of summary judgment based on any type of tortious interference with a contract right to exercise an option to purchase was in error since both the original and the amended complaint revealed a lack of compliance with the notice requirement regarding any alleged tortious interference of contract. Bowling v. Gober, 206 Ga. App. 38, 424 S.E.2d 335 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 1 et seq.

C.J.S. — 86 C.J.S., Torts, § 1 et seq.

ALR. — Effect of statute permitting state to be sued upon the question of its liability for negligence or tort, 13 ALR 1276; 169 ALR 105.

Contractual relationship as affecting right of action for death, 115 ALR 1026.

Prima facie tort, 16 ALR3d 1191.

Liability in tort for interference with physician's contract or relationship with hospital, 7 ALR4th 572.

Propriety of allowing person injured in motor vehicle accident to proceed against vehicle owner under theory of negligent entrustment where owner admits liability under another theory of recovery, 30 ALR4th 838.

Liability for injury or damage caused by snowplowing or snow removal operations and equipment, 83 ALR4th 5.

Liability for tortious interference with prospective contractual relations involving sale of business, stock, or real estate, 71 ALR5th 491.

Negligent spoliation of evidence, interfering with prospective civil action, as actionable, 101 ALR5th 61.

51-1-2. Ordinary diligence and ordinary negligence defined.

In general, ordinary diligence is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances. As applied to the preservation of property, the term "ordinary diligence" means that care which every prudent man takes of his own property of a similar nature. The absence of such diligence is termed ordinary negligence. (Orig. Code 1863, § 2034; Code 1868, § 2035; Code 1873, § 2061; Code 1882, § 2061; Civil Code 1895, § 2898; Civil Code 1910, § 3471; Code 1933, § 105-201.)

History of Code section. — The language of this Code section is derived in part from the decision in Southern Ry. v. Hill, 139 Ga. 549, 77 S.E. 803 (1891).

Law reviews. — For article, "The Georgia Jury and Negligence: The View from the Bench," see 26 Ga. L. Rev. 85 (1992).

For case note, "Lynch v. Waters: Tolling Georgia's Statute of Limitations for Medical Malpractice," see 38 Mercer L. Rev. 1493 (1987).

For comment on Austin v. Smith, 96 Ga. App. 659, 101 S.E.2d 169 (1958), concerning gross negligence in relation to gratuitous automobile guest, see 20 Ga. B. J. 552 (1958). For comment on Planter's Elec. Membership Corp. v. Burke, 98 Ga. App. 380, 105 S.E.2d 787 (1958), see 22 Ga. B. J. 249 (1959). For comment on Thomas v. Shaw, 217 Ga. 688, 124 S.E.2d 396 (1962), see 25 Ga. B. J. 221 (1962).

JUDICIAL DECISIONS

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JURY INSTRUCTIONS
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General Consideration

Negligence is defined generally as the absence of the exercise of ordinary diligence. Harden v. United States, 485 F. Supp. 380 (S.D. Ga. 1980), aff'd, 688 F.2d 1025 (5th Cir. 1982).

Actionable negligence involves: first, the existence of a duty; second, the omission to exercise ordinary and reasonable care in connection therewith; and, third, injury resulting in consequence thereof. Patillo v. Thompson, 106 Ga. App. 808, 128 S.E.2d 656 (1962).

Negligence is either an act or omission. — Negligence consists either of the omission to do an act which ought to be done, or the omission to perform properly what one undertakes to do. Womack v. Central Ga. Gas Co., 85 Ga. App. 799, 70 S.E.2d 398 (1952); Mull v. Aetna Cas. & Sur. Co., 226 Ga. 462, 175 S.E.2d 552 (1970).

Negligence, to be actionable, must be part of the proximate cause of the plaintiff's injury. If the injury would have occurred notwithstanding the acts of negligence of the defendant, there can be no recovery. Hollingsworth v. Harris, 112 Ga. App. 290, 145 S.E.2d 52 (1965).

Synonymous terms. — Carelessness and negligence are synonymous terms. Folds v. City Council, 40 Ga. App. 827, 151 S.E. 685 (1930).

Proper care, reasonable care, ordinary care and diligence are synonymous and proper care is the equivalent of ordinary care. Georgia Power Co. v. Whitlock, 48 Ga. App. 809, 174 S.E. 162 (1934).

Due care, ordinary care, and ordinary diligence are interchangeable terms. Criswell Baking Co. v. Milligan, 77 Ga. App. 861, 50 S.E.2d 136 (1948).

Gross negligence distinguishable. — Negligence, including gross negligence, and willful and wanton misconduct are not construed as synonymous terms. Southern Ry. v. Kelley, 52 Ga. App. 137, 182 S.E. 631 (1935).

Negligence relative to particular circumstances. — Standard of ordinary and reasonable care is invariable, such care being that of every prudent man. But the case of a prudent man varies according to circumstances dependent upon the degree of danger. What is the precise legal intent of the term "ordinary care" must, in the nature of things, depend upon the circumstances of each individual case. It is a relative and not an absolute term. Western & A.R.R. v. Young, 81 Ga. 397, 7 S.E. 912 (1880); Central R.R. & Banking Co. v. Ryles, 84 Ga. 420, 11 S.E. 499 (1890).

Ordinary care is that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances. Southern Ry. v. Hill, 139 Ga. 549, 77 S.E. 803 (1913); Goldsmith v. Hazelwood, 93 Ga. App. 466, 92 S.E.2d 48 (1956).

What is ordinary diligence must depend upon the circumstances of each case; it is a relative and not an absolute term; and the care of a prudent man varies according to the circumstances dependent upon the degree of danger. Brown v. Mayor of Athens, 47 Ga. App. 820, 171 S.E. 730 (1933).

Law imposes upon a person the duty to exercise ordinary care to protect oneself against the negligence of another; if there is little reason to apprehend danger, then little care is due to be exercised, and, under such circumstances, little care would be "ordinary care" or "due care," or such care as an ordinarily prudent person would exercise under the same or similar circumstances. Hathcox v. Atlanta Coca-Cola Bottling Co., 50 Ga. App. 410, 178 S.E. 404 (1935).

Ordinary care simply requires the exercise of due care under the circumstances, which involves a degree of caution commensurate with the danger involved. Lunsford v. Childs, 107 Ga. App. 210, 129 S.E.2d 398 (1963).

Due diligence is relative, a question of degree, and to determine due diligence the circumstances of each case must be considered. R.L. Kimsey Cotton Co. v. Pacific Ins. Co., 224 Ga. 249, 161 S.E.2d 315 (1968).

Same standard applies regarding both persons and property. — While

this section has more direct reference to care of property than care to avoid the consequences to the person arising from negligence, yet the underlying idea in both instances is what would every prudent man have done under the same or similar circumstances. Nashville, C. & St. L. Ry. v. Peavler, 134 Ga. 618, 68 S.E. 432 (1910).

Ordinary care not absolute. — One is not liable for injury to another when one's duty is that of ordinary care merely because of a failure to exercise that degree of care which would have absolutely prevented injury. Lunsford v. Childs, 107 Ga. App. 210, 129 S.E.2d 398 (1963).

Plaintiff must not be contributorily negligent. — One who recklessly tests an observed and clearly obvious danger may under the particular facts be held to have failed to exercise "that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances" and is guilty of contributory negligence, which will be deemed the proximate cause of one's resulting injury and in the absence of willful or wanton misconduct by the defendant will preclude one's recovery. Laseter v. Clark, 54 Ga. App. 669, 189 S.E. 265 (1936).

Plaintiff's negligence no bar to recovery unless proximate cause of injury. — Unless a petition construed most strongly against the pleader shows affirmatively that the pleader's negligence was the sole proximate cause of the pleader's injury or that the pleader was guilty of the failure to exercise ordinary care to avoid the defendant's negligence after it was discovered by the pleader and that failure was the proximate cause of the pleader's injury, the pleader will not be barred of a recovery merely because the petition shows that may have been guilty of some act of negligence per se. Purcell v. Hill, 107 Ga. App. 85, 129 S.E.2d 341 (1962).

Affirmative defense of assumption of risk bars the plaintiff from recovering on a negligence claim if it is established that the plaintiff, without coercion of circumstances, chooses a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not; a defendant asserting an assumption of the risk defense must establish that the plaintiff: (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed oneself to those risks. Sones v. Real Estate Dev. Group, Inc., 270 Ga. App. 507, 606 S.E.2d 687 (2004).

Negligence per se. — Negligence per se and negligence as a matter of fact differ only in the mode in which they are proved. In one case the law itself establishes negligence when a certain act or omission is proved and in the other the question of whether a proved fact constitutes negligence is left for a determination of the jury. Purcell v. Hill, 107 Ga. App. 85, 129 S.E.2d 341 (1962).

Cited in Southern Ry. v. Rundle, 37 Ga. App. 272, 139 S.E. 830 (1927); Western & A.R.R. v. Roberson, 44 Ga. App. 736, 162 S.E. 842 (1932); Cain v. State, 55 Ga. App. 376, 190 S.E. 371 (1937); Edwards v. Atlanta, B. & C.R.R., 63 Ga. App. 212, 10 S.E.2d 449 (1940); Eidson v. Felder, 69 Ga. App. 225, 25 S.E.2d 41 (1943); Tinley v. F.W. Woolworth Co., 70 Ga. App. 390, 28 S.E.2d 322 (1943); Ergle v. Davidson, 70 Ga. App. 704, 29 S.E.2d 445 (1944); Bryant v. S.H. Kress & Co., 76 Ga. App. 530, 46 S.E.2d 600 (1948); Irwin v. Torbert, 204 Ga. 111, 49 S.E.2d 70 (1948); Pettit v. Stiles Hotel Co., 97 Ga. App. 137, 102 S.E.2d 693 (1958); Emory Univ. v. Lee, 97 Ga. App. 680, 104 S.E.2d 234 (1958); Hines v. Bell, 104 Ga. App. 76, 120 S.E.2d 892 (1961); Slaughter v. Slaughter, 122 Ga. App. 374, 177 S.E.2d 119 (1970); Blair v. Manderson, 126 Ga. App. 235, 190 S.E.2d 584 (1972); O'Pry v. Goodman, 132 Ga. App. 191, 207 S.E.2d 674 (1974); Fox v. First Nat'l Bank, 145 Ga. App. 1, 243 S.E.2d 291 (1978); Sneider v. Crider, 148 Ga. App. 385, 251 S.E.2d 315 (1978); Walton v. United States, 484 F. Supp. 568 (S.D. Ga. 1980); Johnson v. Landing, 157 Ga. App. 313, 277 S.E.2d 307 (1981); Holmes v. Worthey, 159 Ga. App. 262, 282 S.E.2d 919 (1981); Getz Servs., Inc. v. Perloe, 173 Ga. App. 532, 327 S.E.2d 761 (1985); Ballenger Paving Co. v. Gaines, 231 Ga. App. 565, 499 S.E.2d 722 (1998); Rosenfeld v. Rosenfeld, 286 Ga. App. 61,

General Consideration (Cont'd)

648 S.E.2d 399 (2007).

Applicability to Specific Cases

1. Automobiles

Rate of speed. — Evidence that defendant, driving at 25 m.p.h., turned around briefly when children in the back seat spilled a bottle of milk, causing the car to strike a telegraph pole, did not show that defendant was guilty of gross negligence. Tucker v. Andrews, 51 Ga. App. 841, 181 S.E. 673 (1935).

Reasonable care towards pedestrians. — Pedestrian and a person with an automobile have each the right to use the public highway; but the right of an operator of an automobile upon the highway is not superior to the right of the pedestrian, and it is the duty of each to exercise one's right with due regard to the corresponding rights of the other; the driver of an automobile is bound to use reasonable care, and to anticipate the presence on the streets of other persons having equal rights with the driver to be there; and a pedestrian, when lawfully using the public highways, is not bound to be continually looking and listening to ascertain if cars are approaching, under the penalty that if the pedestrian fails to do so, and is injured, it must be conclusively presumed that the pedestrian was negligent. Eubanks v. Mullis, 51 Ga. App. 728, 181 S.E. 604 (1935).

Owner of an automobile owes a duty to others lawfully riding in it, while it is being operated either by the owner or the owner's authorized agent, to exercise due care and diligence in its maintenance and operation. Ragsdale v. Love, 50 Ga. App. 900, 178 S.E. 755 (1935).

Worn tires. — It is also a question of fact whether a person in operating an automobile is negligent in failing to know that it is equipped with a worn and abused tire, and whether such person who is experienced in the operation of automobiles and who knows the danger attendant upon suddenly applying the brakes to an automobile in an emergency, is, after a tire on the automobile has blown out while the automobile is traveling, guilty of negligence in suddenly applying the brakes and thereby causing the automobile to turn over and injure occupants. Ragsdale v. Love, 50 Ga. App. 900, 178 S.E. 755 (1935).

Avoiding parked cars. — Person traveling along a highway in an automobile who receives injuries from a collision between that person's automobile and one parked on a bridge in the highway, fails to exercise ordinary care to avoid the injuries and is guilty of negligence which proximately causes the injuries, if the driver would have seen the parked automobile in time to bring the driver's own automobile under control and avoid the collision. State Hwy. Dep't v. Stephens, 46 Ga. App. 359, 167 S.E. 788 (1933).

Following too closely. — Summary judgment for driver one was affirmed as even though driver one pled guilty to following too closely, causation was not established since after the self-contradictory portions of an affidavit by a passenger in a car driven by driver two were eliminated, the evidence only showed that there was a series of collisions and that driver one caused one of them because: (1) driver two testified that numerous collisions occurred behind driver two's car before it was struck and driver two did not know who caused the collision; (2) after the contradictory portions of the passenger's affidavit were eliminated, the passenger was also unable to testify about who caused the collision; (3) two other drivers did not testify that driver one's actions caused any injury to the passenger, driver two, or a second passenger in driver two's car; and (4) driver one's testimony that driver one did not cause any car to collide with driver two's car was not contradicted. Hudson v. Swain, 282 Ga. App. 718, 639 S.E.2d 319 (2006).

Failure to display a proper tail light on a motor vehicle parked along a public highway on a dark night is negligence per se, and when it is the proximate cause of any injury, the owner of the vehicle is liable therefor. Adams v. Jackson, 45 Ga. App. 860, 166 S.E. 258 (1932).

Competency of the driver is a proper matter for consideration on

an issue of negligence; and when the driver has failed, by reason of the driver's incompetency or inexperience, to manage the driver's car in a reasonably prudent and careful manner the driver is liable for any resulting injury. Luxenburg v. Aycock, 41 Ga. App. 722, 154 S.E. 460 (1930).

Driver must possess necessary degree of skill. — Ordinary care in the operation of a motor vehicle requires that a driver or operator shall be physically capable of operating it and shall possess skill and experience sufficient to operate it with reasonable safety. Luxenburg v. Aycock, 41 Ga. App. 722, 154 S.E. 460 (1930).

Mere inexperience not equal to negligence. — In the absence of any evidence tending to prove negligence of the driver, the mere fact that the driver was inexperienced is not sufficient to charge the driver with liability for an accident in which the car was involved. Luxenburg v. Aycock, 41 Ga. App. 722, 154 S.E. 460 (1930).

Evidence of prior negligence. — Proof of the allegedly negligent operator's prior driving record, or of the operator's general character for carelessness or recklessness in driving, is impermissible. Thomason v. Harper, 162 Ga. App. 441, 289 S.E.2d 773 (1982).

Negligent entrustment. — Under the theory of negligent entrustment, liability is predicated on a negligent act of the owner in lending the owner's automobile to another to drive, with actual knowledge that the driver is incompetent or habitually reckless, and this negligence must concur, as a part of the proximate cause, with the negligent conduct of the driver on account of the driver's incompetency and recklessness. Thomason v. Harper, 162 Ga. App. 441, 289 S.E.2d 773 (1982).

Under the doctrine of negligent entrustment, the entrustor's negligence must concur with the driver's negligence to proximately cause damage to the plaintiff. Unless the plaintiff can prove the driver of the automobile was negligent, the entrustor's failure to ascertain whether the driver had a valid license is of no consequence. Schofield v. Hertz Corp., 201 Ga. App. 830, 412 S.E.2d 853 (1991), cert. denied, 201 Ga. App. 904, 412 S.E.2d 853 (1992).

Trial court properly entered summary judgment for a mother on an injured party's negligent entrustment claim because: (1) the mother knew about the son's prior collisions and about two arrests for underage drinking, but did not recall the son undergoing any alcohol or drug counseling; (2) the mother knew that the son drank in excess; and (3) there was evidence that the mother knew the son had been caught by the father after drinking and driving. Danforth v. Bulman, 276 Ga. App. 531, 623 S.E.2d 732 (2005).

2. Contractors

Inherently dangerous condition. — Contractor is liable when the work done and turned over by the contractor is so negligently defective as to be imminently dangerous to third persons. Derryberry v. Robinson, 154 Ga. App. 694, 269 S.E.2d 525 (1980).

Nuisance per se. — Contractor is liable when the work is a nuisance per se, or inherently or intrinsically dangerous. Derryberry v. Robinson, 154 Ga. App. 694, 269 S.E.2d 525 (1980).

Contractors were not liable for the negligent design of a ramp as the Georgia Department of Transportation (DOT) had responsibility for the design of the ramp, despite the facts that the DOT gave the contractors no drawings, that the contractors made suggestions for changes to the ramp, and that the contractors implemented the DOT's design; there was no evidence that the DOT relinquished control of the design to the contractors or that the contract specified that the design of the ramp was the contractors' responsibility. Fraker v. C.W. Matthews Contr. Co., 272 Ga. App. 807, 614 S.E.2d 94 (2005), aff'd, 2007 U.S. App. LEXIS 28793 (11th Cir. 2007).

Contractors were not liable for the negligently controlling traffic as the Georgia Department of Transportation (DOT) was required to place and maintain, or cause to be placed and maintained, traffic control devices and the DOT was responsible for approving all traffic control plans before implementation by a contractor; the injured party failed to show that the contractor failed to implement the traffic control devices pursuant to the DOT's direc-

Applicability to Specific Cases (Cont'd)
2. Contractors (Cont'd)

tives, even though the injured party's accident reconstruction expert and drivers involved in the accident found the traffic control measures inadequate or improper. Fraker v. C.W. Matthews Contr. Co., 272 Ga. App. 807, 614 S.E.2d 94 (2005), aff'd, 2007 U.S. App. LEXIS 28793 (11th Cir. 2007).

Work on a public road. — Trial court did not err in sua sponte granting summary judgment to two contractors on an injured party's allegations of negligent inspection of the roadway, negligent maintenance of the roadway, and negligent work performance by the worksite traffic control supervisor; the injured party had an opportunity to respond to the contractors' claims that the contractors could not be held liable for the injuries as the contractors had performed the work in a non-negligent manner, pursuant to the Georgia Department of Transportation's specifications. Fraker v. C.W. Matthews Contr. Co., 272 Ga. App. 807, 614 S.E.2d 94 (2005), aff'd, 2007 U.S. App. LEXIS 28793 (11th Cir. 2007).

Pest control company. — Summary judgment for a pest control company was affirmed as although a guest allegedly bitten by a poisonous spider submitted an expert's affidavit that a pest control company breached its standard of care, the guest failed to show actual causation as the expert's affidavit was based on pure speculation that the guest was bitten by a spider that was in the room when the guest arrived, and the guest acknowledged that the guest and the guest's companion could have been responsible for the spider's entrance into the room. Dew v. Motel Props., Inc., 282 Ga. App. 368, 638 S.E.2d 753 (2006), cert. denied, 2007 Ga. LEXIS 205 (Ga. 2007).

3. Dangerous Instrumentalities

Degree of care proportionate to danger. — One is under a legal duty to use a dangerous instrument with a degree of care in proportion to the danger of the instrument. Harden v. United States, 485 F. Supp. 380 (S.D. Ga. 1980), aff'd, 688 F.2d 1025 (5th Cir. 1982).

Extraordinary care not required. — In the case of dangerous instrumentalities, the defendant's duty is one of ordinary and not extraordinary care. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

When greater caution appropriate. — Ordinary care as to a thing which is subtle, violent, and dangerous may require a greater degree of caution than does an agency which lacks these dangerous propensities. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

Person responsible for a dangerous place or instrumentality must guard, cover, or protect it for the safety of persons rightfully at or near it, and a person's failure to do so is negligence, rendering the person liable to a person who, without fault on the person's part, is injured as a result thereof. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932).

4. Railroads

Railroad liable for lack of due care to person on tracks. — If the presence of a trespasser on the track at the time and place of the injury is brought about by peculiar facts and circumstances which relieve the trespasser from the guilt of a lack of ordinary care in thus exposing oneself, the company might be liable for a mere lack of ordinary care on the company's part in failing to anticipate the trespasser's presence at a time when and a place where it was charged with such duty, and in thereafter failing to take such proper precautions for the trespasser's safety as might seem reasonably necessary. Southern Ry. v. Kelley, 52 Ga. App. 137, 182 S.E. 631 (1935).

Lack of ordinary care not necessarily willful and wanton. — While the mere failure of the employees of a railway company to discover the presence of a trespasser at a place where and a time when it was their duty to anticipate the trespasser's presence might amount to a lack of ordinary care on the part of the company, it would not ordinarily and in and of itself amount to willful and wanton misconduct, so as to render the company

liable when the injured person personally was guilty of a lack of ordinary care. Central of Ga. Ry. v. Stamps, 48 Ga. App. 309, 172 S.E. 806 (1934); Southern Ry. v. Kelley, 52 Ga. App. 137, 182 S.E. 631 (1935).

Plaintiff's presence on track not negligence per se. — It is not per se negligent for one not aware of the approach of the train to attempt to cross the track without stopping, looking, or listening. Hadaway v. Southern Ry., 41 Ga. App. 669, 154 S.E. 296 (1930).

Failure of a person who is unaware of the approach of a train to stop, look, or listen, does not, as a matter of law render such person guilty of a lack of ordinary care such as would prevent a recovery, except for willful and wanton misconduct on the part of the company. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

Plaintiff not negligent if reasonable care exercised. — If the deceased made a reasonable effort to ascertain whether or not the deceased could safely cross the railroad track, a court cannot say, as a matter of law, that the deceased was not in the exercise of due care in undertaking to cross the track under the circumstances alleged. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

Plaintiff's negligence bars recovery if defendant's negligence not wanton. — One who recklessly tests an observed and clearly obvious danger, such as attempting to beat a near and rapidly approaching railroad train or streetcar over a crossing, or to pass an intersecting highway in front of a near and speeding automobile having the right of way, notwithstanding one's own honest but mistaken judgment that one has ample time to get across, may under the particular facts be held to have failed to exercise that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances and may be held to be guilty of contributory negligence, which will be deemed the proximate cause of one's resulting injury, and which will, in the absence of willful or wanton misconduct by the defendant, preclude recovery. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

One who deliberately goes upon a railroad track in front of an approaching train, thinking that one can cross before the train reaches the person, and miscalculating the train's speed because the person is in front of the train, cannot recover for injuries resulting from being run down by the train, although the company's servants may also have been negligent in running at a high rate of speed at that point, and also in failing to check the speed of the train at a public road which crossed the track between the place where the train was when first seen by the plaintiff and the point at which the injury occurred. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

Decedent's negligence bars action by widow. — If a deceased person could not have recovered for injuries personally had the decedent survived the collision, because the decedent was lacking in ordinary care in undertaking to cross the railroad tracks, the decedent's spouse cannot recover for the decedent's death. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

5. Speech

Television broadcast. — Even though the statements concerning sound effects could pose a foreseeable risk of injury to a child who attempted to mimic the segment of the television show, the statements did not pose a clear and present danger of injury as required by the first amendment. Walt Disney Prods., Inc. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981).

6. Utilities

Construction and maintenance of equipment. — Power company is charged with the duty of exercising ordinary care in the construction and maintenance of the company's wires, poles, transformers, and equipment. Collins v. Altamaha Elec. Membership Corp., 151 Ga. App. 491, 260 S.E.2d 540 (1979).

Utility poles in middle of street. — Where, in a city street about 80 feet wide, the city has authorized the erection and maintenance, longitudinally down the middle of the street, of a series of poles

Applicability to Specific Cases (Cont'd)
6. Utilities (Cont'd)

which support electrical wires, and on either side of the poles there remain driveways approximately 40 feet in width each, and the poles cause no substantial interference with the lawful use of the road or danger, the maintenance of the poles in the street does not constitute negligence, either as matter of law or in fact. South Ga. Power Co. v. Smith, 42 Ga. App. 100, 155 S.E. 80 (1930).

Easement rights not defense to negligence. — One may not, in the process of committing a negligent act, simultaneously create "property rights" which will insulate one from liability for the negligent act. A defendant's broadly worded easement may allow it to run power lines in any way or in any place it chooses in relation to the grantee's property, but the easement does not relieve the defendant from the duty to use ordinary care for human safety when it does run the lines. Savannah Elec. & Power Co. v. Holton, 127 Ga. App. 447, 193 S.E.2d 866 (1972).

7. Emergency Situations

"Emergency" defined. — An emergency is a "sudden peril caused by circumstances in which the defendant did not participate and which offered him a choice of conduct without time for thought so that negligence in his choice might be attributed not to lack of care but to lack of time to assess the situation." Lingo v. Brasington, 202 Ga. App. 813, 415 S.E.2d 534 (1992).

Duty measured in light of emergency. — One confronted with a sudden emergency, without sufficient time to determine accurately and with certainty the best thing to be done, is not held to the same standards of judgment as would be required if more time for deliberation existed, and the requirement of the law upon such a person remains as ordinary diligence under all the facts and circumstances of the situation. Central of Ga. Ry. v. Barnes, 46 Ga. App. 158, 167 S.E. 217 (1932); Harden v. United States, 485 F. Supp. 380 (S.D. Ga. 1980), aff'd, 688 F.2d 1025 (5th Cir. 1982).

Culpable negligence will not be attributed to a person who, in dire emergency, endeavors to save the life of another person. Corrie v. Hollaran, 51 Ga. App. 910, 181 S.E. 709 (1935).

8. Miscellaneous

Master's liability to servant. — While a servant is bound to observe open and obvious dangers such as would be disclosed by the exercise of ordinary care, he has the right to assume that his master has performed the duty of furnishing him with a safe place to work and is under no obligation to inspect the same in order to discover latent defects not open to ordinary observation; a danger arising from an unsafe place is not included among the risks assumed by the servant. Nashville, C. & St. L. Ry. v. Hilderbrand, 48 Ga. App. 140, 172 S.E. 87 (1933).

Timber lease. — It cannot be presumed that either of the parties to a timber lease intended waste, and therefore it must have been intended by both of them that the lease would include, with respect to size, only such timber as an ordinarily prudent owner would use or lease. Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783 (1947).

If as applied to a timber lease, there was a custom of business or trade that became by implication a part of the contract, then in case of controversy, such custom would control. But if no such custom existed, it would be permissible to show by other evidence what class of trees as respects dimensions could in ordinary prudence be used, considering present yield and injury, if any, as against future growth and value, along with other factors. Dorsey v. Clements, 202 Ga. 820, 44 S.E.2d 783 (1947).

Forklift. — Summary judgment was properly entered for an individual on an injured party's negligent entrustment claim because: (1) both the individual and the driver believed that the driver was entitled to use the forklift; (2) the individual did not have the right to permit or prohibit the use of the forklift by the driver; (3) there was no evidence that the individual had actual knowledge that the driver was incompetent or had a known habit of recklessness; (4) the individual's

use of the forklift was not evidence of the individual's actual knowledge that the driver intended to use the forklift in an unsafe manner; and (5) the injured party could not argue that the individual should have known that the driver would use the forklift in an unsafe way since it was not sufficient for a plaintiff to show constructive knowledge. Webb v. Day, 273 Ga. App. 491, 615 S.E.2d 570 (2005).

Publication of editorial. — When a magazine editorial reads like a recitation of fact, not a pure opinion, the jury was entitled to find that the editor's failure to verify the assertions contained in it amounted to a failure to exercise that degree of care exercised under the same or similar circumstances by ordinarily prudent persons, and that this negligence was imputable to the publisher of the magazine. Straw v. Chase Revel, Inc., 813 F.2d 356 (11th Cir.), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987).

Duty to fellow pedestrians. — When a victim was injured after colliding with a hotel guest when exiting an elevator, the trial court erred in granting summary judgment to the guest, as the guest had a duty to walk in a reasonably prudent manner so as to avoid colliding with and injuring fellow pedestrians in the hotel. Beard v. Audio Visual Servs., 260 Ga. App. 476, 580 S.E.2d 272 (2003).

Employer not liable for injuries at party. — Employer was not liable for the injuries sustained by a former employee in a fight with a co-worker as the employer quickly took steps to diffuse any tension at a party by having an attendee leave the party almost immediately after the employer learned of the exchange of words with the employee and as the two fights occurred well after the conclusion of the party. Snellgrove v. Hyatt Corp., 277 Ga. App. 119, 625 S.E.2d 517 (2006).

Foreseeability

Injury must be reasonably foreseeable. — Negligence which is the proximate cause of an injury is such an act that a person of ordinary caution and prudence would have foreseen that some injury might likely result therefrom. Teppenpaw v. Blaylock, 126 Ga. App. 576, 191 S.E.2d 466 (1972).

Test of reasonableness. — In determining the existence of negligence, a governing consideration is what should have been reasonably foreseen. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

No need to foresee specific consequences. — In order for a party to be liable as for negligence, it is not necessary that the party should have been able to anticipate the particular consequences which ensued; it is sufficient if in ordinary prudence the party might have foreseen that some injury would result from the party's act or omission, or that consequences of a generally injurious nature might result. Emory Univ. v. Lee, 97 Ga. App. 680, 104 S.E.2d 234 (1958); Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981); Mixon v. Dobbs Houses, Inc., 149 Ga. App. 481, 254 S.E.2d 864 (1979).

Remote possibilities not reasonably foreseeable. — One is not bound to anticipate or foresee and provide against that which is unusual or that which is only remotely and slightly probable. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981); Bettis v. United States, 635 F.2d 1144 (5th Cir. 1981).

Though act by another not necessarily too remote. — Negligence of a joint tort-feasor is not, as a matter of law, too remote if it was reasonably anticipatable that negligence in creating a dangerous condition would, in conjunction with the negligent act of another, cause injury to the plaintiff. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

When the injured parties were rightfully on the property engaging in ordinary farm operations and the negligence of the defendant in failing to properly construct, inspect, and maintain its electrical wires and utility poles was one "cause in fact" of the injuries, the causal connection between an original act of negligence and injury to another is not broken by the "intervening" act if it could reasonably have been anticipated or foreseen by the original wrongdoer. Collins v. Altamaha

Foreseeability (Cont'd)

Elec. Membership Corp., 151 Ga. App. 491, 260 S.E.2d 540 (1979).

Especially acts performed by children. — There are many situations in which the hypothetical reasonable man would be expected to anticipate and guard against the conduct of others. And when children are in the vicinity, much is necessarily to be expected of them which would not be looked for on the part of an adult. Walt Disney Prods., Inc. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981).

Foreseeability is jury question. — Foreseeability of an intervening agency in the causal relationship between the tort-feasor's negligence and the resulting injury is for the jury when reasonable minds might differ. Collins v. Altamaha Elec. Membership Corp., 151 Ga. App. 491, 260 S.E.2d 540 (1979).

Joint Tort-feasors

When there was no concert of action, and the acts result in a single and indivisible injury, the tort is joint. Parks v. Palmer, 151 Ga. App. 468, 260 S.E.2d 493 (1979).

Suit against jointly negligent tort-feasors. — If the alleged negligent acts of two or more tort-feasors result in a single and indivisible injury, such as death, the alleged tort-feasors may be sued jointly. Parks v. Palmer, 151 Ga. App. 468, 260 S.E.2d 493 (1979).

Subsequently negligent tort-feasor. — Original tort-feasor and a subsequently negligent physician can be joint tort-feasors. Parks v. Palmer, 151 Ga. App. 468, 260 S.E.2d 493 (1979).

Special Characteristics of Tort-feasor

Standard of due care generally objective. — Standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor, and it must be, so far as possible, the same for all persons, since the law can have no favorites. McNeeley v. M. & M. Supermarkets, Inc., 154 Ga. App. 675, 269 S.E.2d 483 (1980).

Ordinary care is not what any particular person does under given circumstances, but what the ordinarily prudent person does. Southeastern Air Servs., Inc. v. Edwards, 74 Ga. App. 582, 40 S.E.2d 572 (1946).

Professionals held to professional standard of care. — Law imposed upon persons of professional standing performing medical, architectural, engineering, and those performing other and like skilled services, pursuant to their contracts made with their clients, an obligation to exercise a reasonable degree of care, skill and ability, such as is ordinarily exercised under similar conditions and like circumstances by persons employed in the same or similar professions. This is a duty apart from any express contractual obligation. Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966).

Young children judged by special standard. — Child of tender years may not be under the duty of exercising ordinary care as defined in this section, but the child is charged with the duty of exercising such care as the child's capacity, mental and physical, fits the child for exercising; this capacity is to be judged by the jury from the circumstances surrounding the transaction under investigation, and the child's conduct in reference thereto. Huckabee v. Grace, 48 Ga. App. 621, 173 S.E. 744 (1934).

Jury determines applicable standard. — Question for the jury is whether danger should have been recognized by common experience, or by the special experience of the alleged wrongdoer, or by a person of ordinary prudence and foresight. Mixon v. Dobbs Houses, Inc., 149 Ga. App. 481, 254 S.E.2d 864 (1979).

Statutory Violation as Negligence Per Se

Omission of specific acts of diligence prescribed by statute, or by a valid municipal ordinance, is negligence per se. Sims v. Hoff, 106 Ga. App. 626, 127 S.E.2d 679 (1962).

When train is run at crossing at rate of speed in excess of that limited by ordinance, it is negligence per se, and the railroad company is liable if such speed is the proximate cause of the injury.

Central of Ga. Ry. v. Barnes, 46 Ga. App. 158, 167 S.E. 217 (1932).

Violation of valid municipal ordinance regulating traffic along public street is negligence per se. Griffin v. Browning, 51 Ga. App. 743, 181 S.E. 801 (1935).

Violation of statute must be proximate cause. — When the violation of a penal statute by the defendant is the proximate cause of the injury complained of, the defendant is guilty of negligence per se authorizing recovery. Shermer v. Crowe, 53 Ga. App. 418, 186 S.E. 224 (1936).

Plaintiff must be in class protected by statute. — In order for the violation of some statutory duty to be negligence per se, the person claiming it to be such must be within the class for whose benefit the statute was passed. National Upholstery Co. v. Padgett, 108 Ga. App. 857, 134 S.E.2d 856 (1964).

Violation of statute must also amount to violation of duty owed plaintiff. — Act prohibited by a penal statute, and which might be negligence as a matter of law, is not negligence unless its commission is in violation of some duty owing under the circumstances by the person committing the act to another person and is capable of having a causal connection with the injury inflicted. Sims v. Hoff, 106 Ga. App. 626, 127 S.E.2d 679 (1962).

Pleading and Practice

Particular facts should be pled. — General allegation of negligence is a mere conclusion. The conclusion may be wrong; and, therefore, the particular facts relied upon to support the conclusion should be pled. It is permissible, however, to set forth the facts, and then conclude that these facts amount to negligence. Western & A.R.R. v. Crawford, 47 Ga. App. 591, 170 S.E. 824 (1933).

Pleading alternate forms of negligence. — Plaintiff may rely upon an act or omission as constituting negligence as a matter of fact under the circumstances, or upon the violation of a statute as amounting to negligence per se or as a matter of law; furthermore, the facts may be so pled as to show negligence of both classes in the same action. Reeves v. McHan, 78 Ga. App. 305, 50 S.E.2d 787 (1948).

Proof of ordinary negligence includes the proof of slight negligence, but does not include proof of gross negligence which is the higher degree thereof. Minkovitz v. Fine, 67 Ga. App. 176, 19 S.E.2d 561 (1942).

Fiduciary and tort duty standards are the same. — There is no meaningful difference between the two standards set forth in O.C.G.A. §§ 14-2-842(a)(2) and 51-1-2. Rosenfeld v. Rosenfeld, 286 Ga. App. 61, 648 S.E.2d 399 (2007), cert. denied, 2007 Ga. LEXIS 613 (Ga. 2007).

Gross negligence may encompass ordinary negligence. — When the plaintiff sets forth facts and alleges acts of omission and commission on the part of the defendant which amount to gross negligence; and thereafter sets forth additional facts which would give rise to a duty on the part of the defendant to exercise ordinary care, and alleges that the same acts of omission and commission amount to ordinary neglect, such allegations would not be inconsistent, since any acts of omission or commission which amounted to the want of that care which is characterized as gross negligence would necessarily show an absence of that care which amounts to ordinary neglect. Blanchard v. Ogletree, 41 Ga. App. 4, 152 S.E. 116 (1929).

Effect of res ipsa loquitur. — Res ipsa loquitur is a rule of evidence which allows an inference of negligence to arise from the happening of an event causing an injury to another when it is shown that the defendant owned, operated and maintained, or controlled and was responsible for the management and maintenance of the thing doing the damage, and the accident was of a kind which, in the absence of proof of some external cause, does not ordinarily happen without negligence. Hall v. Chastain, 246 Ga. 782, 273 S.E.2d 12 (1980).

Rule of res ipsa loquitur applies only when the plaintiff does not know what caused the accident and negligence may be presumed from the fact that an accident occurred. Minkovitz v. Fine, 67 Ga. App. 176, 19 S.E.2d 561 (1942).

Pleading and Practice (Cont'd)

Gross negligence not presumed on basis of res ipsa loquitur. — While the rule of evidence expressed in the maxim res ipsa loquitur may make out a prima facie case of ordinary negligence, it is insufficient in itself to make out a prima facie case of gross negligence. Minkovitz v. Fine, 67 Ga. App. 176, 19 S.E.2d 561 (1942).

Defendant's burden when negligence presumed. — If, considering all the surroundings and accompanying circumstances, an event is such as in the ordinary course of things would not have occurred if the defendant had used ordinary care, negligence may be presumed, and this places upon the defendant the burden of explaining the cause of the occurrence. McCann v. Lindsey, 109 Ga. App. 104, 135 S.E.2d 519 (1964).

Jury Instructions

Omission of words "every prudent man" from an instruction applying this section was fatal. Brown Store Co. v. Chattahoochee Lumber Co., 1 Ga. App. 609, 57 S.E. 1043 (1907).

Words "ordinary care" are self-explanatory, and furnish the jury with degree of care required of defendant in case, in the absence of a timely request for a further definition, and the same can also be said to be true of the words "due care." Criswell Baking Co. v. Milligan, 77 Ga. App. 861, 50 S.E.2d 136 (1948).

No jury instruction need be given absent a request. — In the absence of a written request for the court to define to the jury the meaning of "ordinary and reasonable care and diligence," there was no error in the omission to do so. It is doubtful if any specific definition would enlighten the jury, or make any clearer the plain meaning of these simple words. Georgia Power Co. v. Whitlock, 48 Ga. App. 809, 174 S.E. 162 (1934); City of Camilla v. May, 70 Ga. App. 136, 27 S.E.2d 777 (1943).

Instruction based on former Code language not error when new Code language was substantially similar. — There being no substantial difference between the definitions of ordinary care given in the Civil Code of 1910 and in the Code of 1933, in a damage suit based on the negligence of the defendant, it was not prejudicial error requiring the grant of a new trial for the court to give in a charge to the jury the definition as contained in the former Civil Code of 1910, rather than that contained in the Code of 1933. Pollard v. Duffee, 56 Ga. App. 523, 193 S.E. 258 (1937); Pollard v. Boatwright, 57 Ga. App. 565, 196 S.E. 215 (1938).

Standard of ordinary diligence not variable. — Court erred in charging that the standard of ordinary diligence is variable; the standard of ordinary diligence is invariable. Wilson v. Garrett, 92 Ga. App. 820, 90 S.E.2d 74 (1955); Tudor v. Bodeker, 94 Ga. App. 191, 94 S.E.2d 63 (1956).

Trial court erred in charging that the precise legal term "ordinary care" must in the nature of the case depend upon the circumstances of each individual case. Tudor v. Bodeker, 94 Ga. App. 191, 94 S.E.2d 63 (1956).

Care in manufacturing bottled drinks. — Court did not err in the instructions to the jury as to the care and diligence required of one manufacturing bottled drinks for sale, or in charging that "if the defendant was not negligent and did exercise ordinary care, and any foreign substance got into the bottle notwithstanding ordinary care, that would be what the law designates as an unavoidable accident, for the occurrence of which the defendant would not be liable." Hathcox v. Atlanta Coca-Cola Bottling Co., 50 Ga. App. 410, 178 S.E. 404 (1935).

Care in operating automobile. — While it is error to charge the jury that the degree of care exercised must be such as would or could prevent injury to others, it is not error to charge that a defendant in the operation of the defendant's car is required to use ordinary care to prevent injury to others as in such case the requirement that the defendant be in the exercise of ordinary care is, in fact, for the purpose of preventing injury to others. Georgia Power Co. v. Burger, 63 Ga. App. 784, 11 S.E.2d 834 (1940).

Deficient charge on negligence. — Charge which implied that negligence is

the breach of an absolute duty to avoid injuring others rather than a failure to exercise "that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances" was deficient, and the court's failure to give a correct charge on this fundamental principle was reversible error. T.J. Morris Co. v. Dykes, 197 Ga. App. 392, 398 S.E.2d 403 (1990).

No charge required when request was withdrawn. — There was no error in a trial court's failure to give jury instructions regarding ordinary negligence claims under O.C.G.A. § 51-1-2 as a patient's widow's counsel had withdrawn the jury instruction on ordinary negligence in order to allow the matter to proceed to consideration by the jury on just the issues of professional negligence in the widow's action, alleging, inter alia, medical malpractice. Sagon v. Peachtree Cardiovascular & Thoracic Surgs., P.A., 297 Ga. App. 379, 677 S.E.2d 351 (2009).

Negligence as Jury Question

Negligence is jury question except in indisputable cases. — Questions of negligence and diligence and of cause and proximate cause and whose negligence constituted the proximate cause of the plaintiff's injuries are, except in plain, palpable, and indisputable cases, solely for the jury, and the courts will decline to decide such questions unless reasonable minds cannot differ as to the conclusions to be reached. Bohler v. Ownes, 60 Ga. 185 (1878); Atlanta, B. & C.R.R. v. Smith, 43 Ga. App. 457, 159 S.E. 298 (1931); Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932); Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933); Mason v. Frankel, 49 Ga. App. 145, 174 S.E. 546 (1934); Tybee Amusement Co. v. Odum, 51 Ga. App. 1, 179 S.E. 415 (1935); Eubanks v. Mullis, 51 Ga. App. 728, 181 S.E. 604 (1935); Knowles v. La Rue, 102 Ga. App. 350, 116 S.E.2d 248 (1960); Pannell v. Fuqua, 111 Ga. App. 18, 140 S.E.2d 280 (1965); Krystal Co. v. Butler, 149 Ga. App. 696, 256 S.E.2d 96 (1979); Manheim Servs. Corp. v. Connell, 153 Ga. App. 533, 265 S.E.2d 862 (1980); Brooks v. Douglas, 154 Ga. App. 54, 267 S.E.2d 495 (1980); McKeighan v. Long, 154 Ga. App. 171, 268 S.E.2d 674 (1980); Garner v. Driver, 155 Ga. App. 322, 270 S.E.2d 863 (1980); Sugrue v. Flint Elec. Membership Corp., 155 Ga. App. 481, 270 S.E.2d 921 (1980); Shannon v. Walt Disney Prods., Inc., 156 Ga. App. 545, 275 S.E.2d 121 (1980); Herren v. Abba Cab Co., 155 Ga. App. 443, 271 S.E.2d 11 (1981); Lozynsky v. Hutchinson, 159 Ga. App. 715, 285 S.E.2d 70 (1981).

In Georgia, the question of negligence is almost always a question for the jury. Fraley ex rel. Fraley v. Lake Winnepesaukah, Inc., 631 F. Supp. 160 (N.D. Ga. 1986).

Contributory negligence also jury question. — One who recklessly tests an observed and clearly obvious peril is guilty of lack of ordinary care. In plain and palpable cases, it will be so held as a matter of law; otherwise, questions as to such negligence as well as other questions of negligence by the parties, and as to the proximate cause of the injury, present issues for the jury. Central of Ga. Ry. v. Jones, 43 Ga. App. 507, 159 S.E. 613 (1931); Laseter v. Clark, 54 Ga. App. 669, 189 S.E. 265 (1936); Brooks v. Douglas, 154 Ga. App. 54, 267 S.E.2d 495 (1980).

In an action against a railroad company for injuries received by a person lawfully upon a railroad crossing, the question of what such person must or must not do, in order to free oneself of guilt of lack of ordinary care constituting the proximate cause of one's injury, is a question for the jury. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

Questions of willful and wanton negligence. — Exact point when ordinary negligence or the lack of ordinary care passes into and becomes willful and wanton negligence is a question for the jury, under definite instruction from the trial judge that the facts must show that the failure to exercise ordinary care was not only negligence but that it amounted to willful and wanton negligence. Humphries v. Southern Ry., 51 Ga. App. 585, 181 S.E. 135 (1935).

Questions of gross and slight negligence. — Questions of negligence and diligence, even of gross negligence and slight diligence, are matters which should usually be determined by a jury. Pitcher v.

Negligence as Jury Question (Cont'd)

Curtis, 43 Ga. App. 622, 159 S.E. 783 (1931).

Except when a particular act is declared to be negligence, either by statute or by valid municipal ordinance, the question as to what acts do or do not constitute negligence is for determination by the jury. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932).

Condition of utility pole as contributing cause. — When genuine issues of material fact remain in a tort case as to whether the condition of a utility pole was a contributing cause to the injuries sustained, any grant of summary judgment is contrary to law and expressly disavowed. Collins v. Altamaha Elec. Membership Corp., 151 Ga. App. 491, 260 S.E.2d 540 (1979).

Negligence of child guest. — In automobile collision cases, whether a child guest of tender years exercised the measure of due care required by the Code under the actual circumstances of the occasion and situation, is a question peculiarly for a jury, and not a question of law to be decided by the court, except in clear and palpable cases. Eddleman v. Askew, 50 Ga. App. 540, 179 S.E. 247 (1935).

Negligence of pedestrian. — When a pedestrian, after passing between two parked automobiles, looked to the pedestrian's left for traffic, but instantly, and before the pedestrian had time to look to the pedestrian's right, was struck and injured by an automobile being driven on the left side of the street, that is "astraddle" and to the left of the center of that street, and since the pedestrian could have seen the automobile had the pedestrian had time to look to the pedestrian's right, and the driver of the automobile could have seen the pedestrian had the driver been looking, and when the street to the right of the driver of the automobile at this point was clear and could have been used by said automobile at the time of the accident, it was a question for a jury to determine whose negligence was responsible for the injury. Eubanks v. Mullis, 51 Ga. App. 728, 181 S.E. 604 (1935).

Expert opinion not supported by records. — Medical records that provided no information about the patient's second visit to the emergency room, the timing of the discovery of a ruptured appendix, or the exploratory surgery that resulted in an appendectomy were too general to support an expert's conclusion that the doctors' conduct proximately caused the patient's injuries. Jones v. Orris, 274 Ga. App. 52, 616 S.E.2d 820 (2005).

RESEARCH REFERENCES

Am. Jur. 2d. — 57A Am. Jur. 2d, Negligence, §§ 5 et seq., 218 et seq., 226, 239.

Am. Jur. Pleading and Practice Forms. — 17A Am. Jur. Pleading and Practice Forms, Master and Servant, § 475.

C.J.S. — 65 C.J.S., Negligence, § 4 et seq.

ALR. — Failure to stop, look, and listen at railroad crossing as negligence per se, 1 ALR 203; 2 ALR 767; 41 ALR 405.

Presumption of negligence from throwing passenger from seat, 5 ALR 1034.

Carrier's duty to passenger while train is going through tunnel, 9 ALR 96.

Violation of statute or ordinance regulating movement of vehicles as affecting violator's right to recover for negligence, 12 ALR 458.

Contributory negligence in falling on slippery walk, 13 ALR 73.

Driving automobile across track in front of streetcar that has stopped to take on or let off passengers as negligence or contributory negligence, 14 ALR 811.

Negligence in stopping automobile on streetcar track for purpose of taking on or letting off person, 15 ALR 236.

Automobiles: liability of owner or operator for injury to guest, 20 ALR 1014; 26 ALR 1425; 40 ALR 1338; 47 ALR 327; 51 ALR 581; 61 ALR 1252; 65 ALR 952; 61 ALR 1252; 65 ALR 952.

Res ipsa loquitur as affected by circum-

stances tending to negative negligence by defendant, 22 ALR 1471.

Duty to check speed of train upon discovering livestock on or near tracks, 23 ALR 148.

When automobile is under control, 28 ALR 952.

Duty of carrier to guard young children against danger of falling from car, 28 ALR 1035.

Contributory negligence in stepping into roadway where view is obscured by smoke, 28 ALR 1279.

Constitutionality of statute or ordinance denying remedy for personal injury as a result of simple negligence, 36 ALR 1400.

Driving automobile at a speed which prevents stopping within length of vision as negligence, 44 ALR 1403; 58 ALR 1493; 87 ALR 900; 97 ALR 546.

Presence of young child in street unattended as negligence or evidence of negligence, 51 ALR 209.

Attractive nuisances, 53 ALR 1344; 60 ALR 1444.

Restoring electric current after automatic breaking of current as negligence, 57 ALR 1065.

Custom as a standard of care, 68 ALR 1400.

Ownership of automobile as prima facie evidence of responsibility for negligence of person operating it, 74 ALR 951; 96 ALR 634.

Excessive speed of automobile as affecting question whether excavation or other defect in highway is the proximate cause of accident, 82 ALR 294.

Differences with respect to degree or criterion of negligence, between lex loci delicti, and lex fori, as ground for refusal to entertain action for foreign tort, 84 ALR 1268.

Right of way at street or highway intersections as dependent upon, or independent of, care or negligence, 89 ALR 838; 136 ALR 1497.

Duty of federal courts to follow state court decisions as to degree or character of negligence which gives rise to cause of action, 91 ALR 751.

Duty to guard against danger to children by electric wires, 100 ALR 621.

Negligence of third person, other than physician or surgeon, in caring for injured person or in failing to follow instructions in that regard as affecting damages recoverable against person causing injury, 101 ALR 559.

Automobiles: cutting corners as negligence, 115 ALR 1178.

Necessity of proving specific reason for injury or damage to shipment of fruit or vegetables in order to overcome prima facie case against carrier where shipment was received in good condition and delivered in bad condition, 115 ALR 1274.

Negligence or contributory negligence of parent in intrusting child to custody of another child, 123 ALR 147.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 ALR 645.

Conclusiveness, as to negligence or contributory negligence, of judgment in death action, in subsequent action between defendant in the death action and statutory beneficiary of that action, as affected by objection of lack of identity of parties, 125 ALR 908.

Violation of statute or ordinance regarding safety of building or premises as creating or affecting liability for injuries or death, 132 ALR 863.

Duty of sheriff or other officer as to care of property levied upon by him, 138 ALR 710.

Res ipsa loquitur distinguished from characterization of a known condition as negligence, and from the establishment of negligence by specific circumstantial evidence, 141 ALR 1016.

Presumption of due care by person killed in accident as supporting or aiding inference of negligence by defendant, or inference that latter's negligence was proximate cause of accident, 144 ALR 1473.

Res ipsa loquitur as applied to a collision between a moving automobile and a standing automobile or other vehicle, 151 ALR 876.

Foreseeability as an element of negligence and proximate cause, 155 ALR 157; 100 ALR2d 942.

Erosion underneath street or highway as ground of liability of state or municipality for injury, 158 ALR 784.

Ejection of passenger as ground of mo-

torbus carrier's liability for subsequent injury or death, 165 ALR 545.

Negligence of automobile passenger as to lookout or other precaution as affecting question of negligence or contributory negligence of driver, 165 ALR 596.

Custom or practice of drivers of motor vehicles as affecting question of negligence, 172 ALR 1141; 77 ALR2d 1327.

Propriety and effect of pleading different degrees of negligence or wrongdoing in complaint seeking recovery for one injury, 173 ALR 1231.

Res ipsa loquitur as applicable to injury due to coalhole or other opening in street or sidewalk, 174 ALR 607.

Child's violation of statute or ordinance as affecting question of his negligence or contributory negligence, 174 ALR 1170.

Foreseeability as an element of negligence and proximate cause, 100 ALR2d 942.

Custom or practice of drivers of motor vehicles as affecting question of negligence, 77 ALR2d 1327.

Duty and liability of one driving motor vehicle in or along rut, ridge, or the like, in highway, 10 ALR2d 901.

Duty and liability of carrier to intoxicated passenger while en route, 17 ALR2d 1085.

Applicability of res ipsa loquitur to injuries or death sustained by collapse, failure, or falling of scaffold, 22 ALR2d 1176.

Intoxication of person injured or killed as affecting applicability of last clear chance doctrine, 26 ALR2d 308.

Fire as attractive nuisance, 27 ALR2d 1187.

Issue as to negligence as a proper subject of declaratory judgment action, 28 ALR2d 957.

Sudden or unsignaled stop or slowing of motor vehicle as negligence, 29 ALR2d 5.

Rights of injured guest as affected by obscured vision from vehicle in which he was riding, 42 ALR2d 350.

Automobile operator's inexperience or lack of skill as affecting his liability to passenger, 43 ALR2d 1155.

Duty and liability of municipality as regards barriers for protection of adult pedestrians who may unintentionally deviate from street or highway into marginal or external hazards, 44 ALR2d 633.

Attorney's liability for negligence in preparing or conducting litigation, 45 ALR2d 5; 6 ALR4th 342.

Negligence of motorist colliding with vehicle approaching in wrong lane, 47 ALR2d 6.

Negligence of motorist as to injury or damage occasioned in avoiding collision with vehicle approaching in wrong lane, 47 ALR2d 119.

Admissibility in evidence of rules of defendant in action for negligence, 50 ALR2d 16.

Negligence causing automobile accident, or negligence of driver subsequently approaching scene of accident, as proximate cause of injury by or to the approaching car or to its occupants, 58 ALR2d 270.

Duty and liability of vehicle drivers approaching intersection of one-way street with other street, 62 ALR2d 275.

Duty and liability of vehicle drivers within parking lot, 62 ALR2d 288.

Duty and liability of one who voluntarily undertakes to care for injured person, 64 ALR2d 1179.

Construction, application, and effect of legislation making it an offense to permit, or imputing negligence to one who permits, an unauthorized or unlicensed person to operate motor vehicle, 69 ALR2d 978.

Ferry operator's duty and liability as regards motor vehicles and occupants thereof, 69 ALR2d 1008.

Negligence in operation of airplane on take-off, 74 ALR2d 615.

Negligence in operation of airplane in landing, 74 ALR2d 628.

Interference with airplane pilot or controls as negligence or contributory negligence, 75 ALR2d 858.

Applicability of res ipsa loquitur doctrine where motor vehicle turns over on highway, 79 ALR2d 211.

Custom as to loading, unloading, or stowage of cargo as standard of care in action for personal injury or death of seaman or longshoreman, 85 ALR2d 1196.

Failure of signaling device at crossing to operate, as affecting railroad company's liability, 90 ALR2d 350.

Rescue doctrine: negligence and contributory negligence in suit by rescuer against rescued person, 4 ALR3d 558.

Receiver's personal liability for negligence in failing to care for or maintain property in receivership, 20 ALR3d 967.

Violation of regulation governing size or weight of motor vehicles, or combinations of vehicles and loads, on the highway as basis of liability for personal injury, death, or damage to private property, 21 ALR3d 989.

Liability of corporate directors for negligence in permitting mismanagement or defalcations by officers or employees, 25 ALR3d 941.

Right to recover damages in negligence for fear of injury to another, or shock or mental anguish at witnessing such injury, 29 ALR3d 1337.

Duty of one other than carrier or employer to render assistance to one for whose initial injury he is not liable, 33 ALR3d 301.

Effect of violation of safety equipment statute as establishing negligence in automobile accident litigation, 38 ALR3d 530.

Nonmonetary benefits or contributions by rider as affecting his status under automobile guest statute, 39 ALR3d 1083.

Automobile guest statute: status of rider as affected by payment, amount of which is not determined by expenses incurred, 39 ALR3d 1177.

Payments on expense-sharing basis as affecting guest status of automobile passenger, 39 ALR3d 1224.

Weapons: application of adult standard of care to infant handling firearms, 47 ALR3d 620.

Employer's knowledge of employee's past criminal record as affecting liability for employee's tortious conduct, 48 ALR3d 359.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 ALR3d 101.

Lawn mowing by minors as violation of child labor statutes, 56 ALR3d 1166.

Liability or recovery in automobile negligence action as affected by absence on insufficiency of lights on parked or standing motor vehicle, 61 ALR3d 13.

Res ipsa loquitur as applied to accident resulting from wheel or part thereof becoming detached from motor vehicle, 79 ALR3d 346.

Violation of OSHA regulation as affecting tort liability, 79 ALR3d 962.

Amnesiac as entitled to presumption of due care, 88 ALR3d 622.

Standard of care required of trustee representing itself to have expert knowledge or skill, 91 ALR3d 904.

Legal malpractice in connection with attorney's withdrawal as counsel, 6 ALR4th 342.

Standard of care owed to patient by medical specialist as determined by local, "like community," state, national, or other standards, 18 ALR4th 603.

Liability of donor of motor vehicle for injuries resulting from owner's operation, 22 ALR4th 738.

Newspaper's liability to reader-investor for negligent but nondefamatory misstatement of financial news, 56 ALR4th 1162.

Products liability: toxic shock syndrome, 59 ALR4th 50.

Liability for injury incurred in operation of power golf cart, 66 ALR4th 622.

Rescue doctrine: liability of one who negligently causes motor vehicle accident for injuries to person subsequently attempting to rescue persons or property, 73 ALR4th 737.

Legal malpractice: negligence or fault of client as defense, 10 ALR5th 828.

Motorist's liability for signaling other vehicle or pedestrian to proceed, or to pass signaling vehicle, 14 ALR5th 193.

Liability of school or school personnel in connection with suicide of student, 17 ALR5th 179.

Recovery of damages for expense of medical monitoring to detect or prevent future disease or condition, 17 ALR5th 327.

Liability of property owner for damages from spread of accidental fire originating on property, 17 ALR5th 547.

Title insurer's negligent failure to discover and disclose defect as basis for liability in tort, 19 ALR5th 786.

Liability of electric company to one other than employee for injury or death arising from commencement or resumption of service, 46 ALR5th 423.

51-1-3. Extraordinary diligence and slight negligence defined.

In general, extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons exercise under the same or similar circumstances. As applied to the preservation of property, the term "extraordinary diligence" means that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property. The absence of such extraordinary diligence is termed slight negligence. (Orig. Code 1863, § 2035; Code 1868, § 2036; Code 1873, § 2062; Code 1882, § 2062; Civil Code 1895, § 2899; Civil Code 1910, § 3472; Code 1933, § 105-202.)

History of Code section. — The language of this Code section is derived in part from the decision in Alabama M. Ry. v. Guilford, 119 Ga. 523, 46 S.E. 655 (1904).

Law reviews. — For article, "The Georgia Jury and Negligence: The View from the Bench," see 26 Ga. L. Rev. 85 (1992).

For comment on Planter's Elec. Membership Corp. v. Bulse, 98 Ga. App. 380, 105 S.E.2d 787 (1958), see 22 Ga. B. J. 249 (1959).

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This section applies to persons as well as to property. Alabama M. Ry. v. Guilford, 119 Ga. 523, 46 S.E. 655 (1904).

Slight negligence relative to circumstances. — In determining what very prudent and thoughtful persons would do under certain circumstances, the situation and surrounding facts, including the existence of an emergency if there was one, are to be considered. Atlanta & W.P.R.R. v. Jacobs' Pharmacy Co., 135 Ga. 113, 68 S.E. 1039 (1910).

Common carrier of passengers for hire is bound to exercise extraordinary care and diligence in transportation of its passengers. Even slight neglect on the part of the carrier's employee, resulting in personal injury to one lawfully upon one of the carrier's vehicles, may entail liability on the part of the carrier. Georgia Stages, Inc. v. Young, 73 Ga. App. 2, 35 S.E.2d 552 (1945).

Metropolitan Atlanta Rapid Transit Authority, a common carrier, in exercising extraordinary care, did not have to utilize the most approved pattern of an escalator in use up to the time of an injured party's accident. MARTA v. Rouse, 279 Ga. 311, 612 S.E.2d 308 (2005).

Streetcar company is bound to exercise extraordinary care and precaution to prevent injuring the company's passengers, and slight negligence on the company's part, when the company was the proximate cause of the alleged injury, might render the company liable, provided the passenger personally could not have avoided the injury by the exercise of ordinary care. Leslie v. Georgia Power Co., 47 Ga. App. 723, 171 S.E. 395 (1933).

Airport shuttle train or people mover providing free transportation inside the secured area of the airport has the same status of public transportation as escalators and elevators, requiring the exercise of extraordinary diligence in the transportation of passengers. Saltis v. Benz, 243 Ga. App. 603, 533 S.E.2d 772 (2000).

Owner of an office building owes duty of extraordinary diligence to elevator passengers, cannot delegate this duty to an independent contractor engaged in elevator repair, and is liable for slight negligence. Gaffney v. EQK Realty Investors, 213 Ga. App. 653, 445 S.E.2d 771 (1994).

Slight negligence is jury question. — Acts and facts constituting the diligence defined in this section under all the circumstances of the case are questions for determination by the jury. Stiles v.

Atlanta & W.P.R.R., 65 Ga. 370 (1880); Richmond & D.R.R. v. White & Co., 88 Ga. 805, 15 S.E. 802 (1892).

Jury instructions. — Failure to define the term "extraordinary diligence" in an instruction on the law pertaining to the duty a carrier owes to the carrier's passengers was not harmful error because the term is comprised of words of ordinary understanding and is self-explanatory. Adams v. MARTA, 246 Ga. App. 698, 542 S.E.2d 130 (2000).

Questions of negligence and diligence, even of gross negligence and slight negligence, being questions of fact and not of law, are as a rule to be determined by a jury. Frye v. Pyron, 51 Ga. App. 613, 181 S.E. 142 (1935).

Intermediate court erred in overruling Darlington v. Finch, 113 Ga. App. 825 (1966), as a common carrier, in exercising extraordinary care, has to stay informed of safety advances in product design, but is not held to a per se rule that requires the carrier to buy and incorporate those safety advances into previously-purchased, non-defective products; Darlington is reinstated. MARTA v. Rouse, 279 Ga. 311, 612 S.E.2d 308 (2005).

Cited in Peavy v. Peavy, 36 Ga. App. 202, 136 S.E. 96 (1926); Tucker v. Andrews, 51 Ga. App. 841, 181 S.E. 673 (1935); Cain v. State, 55 Ga. App. 376, 190 S.E. 371 (1937); Southern Ry. v. Skinner, 74 Ga. App. 57, 38 S.E.2d 756 (1946); Hines v. Bell, 104 Ga. App. 76, 120 S.E.2d 892 (1961); Atlanta Transit Sys. v. Hines, 138 Ga. App. 746, 227 S.E.2d 489 (1976); Sneider v. Crider, 148 Ga. App. 385, 251 S.E.2d 315 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 57A Am. Jur. 2d, Negligence, §§ 5 et seq., 218 et seq., 239.

C.J.S. — 65 C.J.S., Negligence, § 4 et seq.

ALR. — Duty of carrier to guard young children against danger of falling from car, 28 ALR 1035.

Liability for damages by explosives transported along highway, 31 ALR 725; 44 ALR 124.

Liability of carrier for injury to passenger from car window, 45 ALR 1541.

Liability of hotel, motel, or similar establishment for damage to or loss of guest's automobile left on premises, 52 ALR3d 433.

Liability for injury on or in connection with escalator, 63 ALR 6th 495.

51-1-4. Slight diligence and gross negligence defined.

In general, slight diligence is that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances. As applied to the preservation of property, the term "slight diligence" means that care which every man of common sense, however inattentive he may be, takes of his own property. The absence of such care is termed gross negligence. (Orig. Code 1863, § 2036; Code 1868, § 2037; Code 1873, § 2063; Code 1882, § 2063; Civil Code 1895, § 2900; Civil Code 1910, § 3473; Code 1933, § 105-203.)

History of Code section. — The language of this Code section is derived in part from the decision in Harris v. Reid, 30 Ga. App. 187, 117 S.E. 256 (1923).

Law reviews. — For article, "The Georgia Jury and Negligence: The View from the Bench," see 26 Ga. L. Rev. 85 (1992). For article, "Georgia Law Needs Clarification: Does it Take Willful or Wanton Misconduct to Defeat a Contractual 'Exculpatory' Clause, or Will Gross Negligence Suffice," see 19 Ga. St. B. J. 10 (Feb. 2014).

For comment on Caskey v. Underwood,

89 Ga. App. 418, 79 S.E.2d 558 (1954), finding that the lower court erred in defining gross negligence as the "entire absence of care," see 16 Ga. B. J. 464 (1954). For comment on Austin v. Smith, 96 Ga. App. 659, 101 S.E.2d 169 (1958), concerning gross negligence in relation to gratuitous automobile guest, see 20 Ga. B. J. 552 (1958).

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General Consideration

Basic definitions. — Applied to the preservation of property, slight diligence means that care which every person of common sense, howsoever inattentive the person may be, takes of one's own property. The absence of such care is termed gross negligence. Frye v. Pyron, 51 Ga. App. 613, 181 S.E. 142 (1935); Kimberly v. Reed, 79 Ga. App. 137, 53 S.E.2d 208 (1949).

"Gross negligence," as applicable to particular facts and circumstances is defined as "the want of slight care and diligence," "such care as careless and inattentive persons would usually exercise under the circumstances," "want of that diligence which even careless men are accustomed to exercise," "carelessness manifestly materially greater than want of common prudence." Rider v. Taylor, 166 Ga. App. 474, 304 S.E.2d 557 (1983).

Absence of ordinary diligence is not "gross negligence." Insurance Co. of N. Am. v. Leader, 121 Ga. 260, 48 S.E. 972 (1904); Brown Store Co. v. Chattahoochee Lumber Co., 121 Ga. 809, 49 S.E. 839 (1905).

Applicability to personal injury. — While defined in terms of property, the rule enunciated in this section applies with equal force to diligence to prevent injury to the person. Capers v. Martin, 54 Ga. App. 555, 188 S.E. 465 (1936); Moore v. Shirley, 68 Ga. App. 38, 21 S.E.2d 925 (1942); Carpenter v. Lyons, 78 Ga. App. 214, 50 S.E.2d 850 (1948).

Willful misconduct generally distinguished. — Gross negligence should not be confused with willful and wanton misconduct. Central of Ga. Ry. v. Moore, 5 Ga. App. 562, 63 S.E. 642 (1909); Lanier v. Bugg, 32 Ga. App. 294, 123 S.E. 145 (1924).

Negligence, including gross negligence, and willful and wanton misconduct are not construed as synonymous terms. Southern Ry. v. Kelley, 52 Ga. App. 137, 182 S.E. 631 (1935).

Gross negligence does not amount to willful and wanton disregard for the rights of others, and one may be guilty of gross negligence and still be in the exercise of some degree of care. Hennon v. Hardin, 78 Ga. App. 81, 50 S.E.2d 236 (1948).

Willful or wanton conduct is a different standard than that of gross negligence. Southern Bell Tel. & Tel. Co. v. Coastal Transmission Serv., Inc., 167 Ga. App. 611, 307 S.E.2d 83 (1983).

Equivalency in gross and wanton negligence in certain cases. — Gross negligence is not regarded as the equivalent of willful and wanton negligence in this state, unless the evidence indicates that entire absence of care which would raise the presumption of conscious indifference, or that, with reckless indifference, the person acted with actual or imputed knowledge that the inevitable or probable consequence of one's conduct would be to inflict injury. Blanchard v. Ogletree, 41 Ga. App. 4, 152 S.E. 116 (1929); Frye v. Pyron, 51 Ga. App. 613, 181 S.E. 142 (1935); Dixon v. Merry Bros. Brick & Tile Co., 56 Ga. App. 626, 193 S.E. 599 (1937).

Gross negligence by plaintiff a complete bar to recovery. — If a person knowingly goes into a place of danger, when there is no urgent necessity for the person to do so, the person is guilty of such gross negligence that as a matter of law the person cannot recover any damages for injury the person might sustain under such circumstances. Yarbrough v. Georgia R.R. & Banking Co., 176 Ga. 780, 168 S.E. 873 (1933).

No gross negligence by emergency room physician. — Patient sued an emergency room physician for malpractice for failing to diagnose a leg fracture. As the physician sought no orthopedic consult because a radiologist opined that the x-rays showed no serious fracture, the patient could not prove by clear and convincing evidence that the physician acted with gross negligence, as required under O.C.G.A. § 51-1-29.5(c); thus, the physician was entitled to summary judgment. Pottinger v. Smith, 293 Ga. App. 626, 667 S.E.2d 659 (2008).

No evidence of gross negligence by lessor in selection of vendor to repair roofs. — In an action for claims arising from a commercial property lease agreement, the trial court erred in denying the lessor's motion for partial summary judgment on the lessee's claim of gross negligence in the lessor's selection of a vendor to repair the roofs because the lessee did not identify any evidence that the lessor was indifferent to whether the roofing vendor it selected would do a good job or that it otherwise acted without even slight care when choosing the roofing contractor; and the lessee did not identify any evidence that the lessor acted without even slight care with regard to the quality of work of its chosen contractor. West Asset Mgmt. v. NW Parkway, LLC, 336 Ga. App. 775, 784 S.E.2d 147 (2016).

No evidence from which jury could conclude landowner was grossly negligent in controlled burn. — Landowner was entitled to the protections from liability provided by the Georgia Prescribed Burning Act, O.C.G.A. § 12-6-148, because even assuming there was evidence sufficient to create a jury issue as to whether the landowner was negligent in some way while starting, controlling, or completing a prescribed burn, there was no evidence from which a jury could reasonably conclude that the landowner failed to exercise slight diligence and was, therefore, grossly negligent; according to the chief ranger with the local office of the forestry service, there was nothing actually physically that a landowner could do to stop a prescribed burn from smoldering or to prevent the resulting smoke, and an expert witness's argument that the landowner should have ignored the ranger's recommendations and should not have conducted the burn in order to ensure that the public would be protected from any possibility that smoke would emanate from the landowner's property clearly undermined the express purposes behind the Act, O.C.G.A. § 12-6-145 et seq. Morgan v. Horton, 308 Ga. App. 192, 707 S.E.2d 144 (2011), cert. denied, No. S11C1028, 2011 Ga. LEXIS 533 (Ga. 2011).

Gross negligence not found. — Pursuant to O.C.G.A. § 51-1-4, no reasonable juror could find that gross negligence occurred regarding reporting or preventing a fire because, although the security guard and the defendant homeowners' association may have been "inattentive" in the overseeing and monitoring of the surveillance cameras, their actions did not rise to the level of gross negligence. The primary purpose of monitoring the cameras was to maintain the security of access points and to prevent crime, not to prevent residential fires. Great Northern Ins. Co. v. Ruiz, 688 F. Supp. 2d 1362 (S.D. Ga. 2010).

Cited in Epps v. Parrish, 26 Ga. App. 399, 106 S.E. 297 (1921); Arnold v. Darby, 49 Ga. App. 629, 176 S.E. 914 (1934); Cain v. State, 55 Ga. App. 376, 190 S.E. 371 (1937); White v. Boyd, 58 Ga. App. 219, 198 S.E. 81 (1938); Roberts v. Ethridge, 73 Ga. App. 400, 36 S.E.2d 883 (1946); Cedrone v. Beck, 74 Ga. App. 488, 40 S.E.2d 388 (1946); Barbre v. Scott, 75 Ga. App. 524, 43 S.E.2d 760 (1947); Parker v. Johnson, 97 Ga. App. 261, 102 S.E.2d 917 (1958); Barrow v. Georgia Lightweight Aggregate Co., 103 Ga. App. 704, 120 S.E.2d 636 (1961); Hines v. Bell, 104 Ga. App. 76, 120 S.E.2d 892 (1961); Porter v. Jack's Cookie Co., 106 Ga. App. 497, 127 S.E.2d 313 (1962); James Talcott, Inc. v. Carder,

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300 F.2d 654 (5th Cir. 1962); Meeks v. Johnson, 112 Ga. App. 760, 146 S.E.2d 121 (1965); Ray Wright Enters., Inc. v. Reaves, 128 Ga. App. 745, 197 S.E.2d 856 (1973); Smith v. Southeastern Stages, Inc., 479 F. Supp. 593 (N.D. Ga. 1977); Georgia S. & Fla. Ry. v. Odom, 152 Ga. App. 664, 263 S.E.2d 469 (1979); Levine v. Keene, 178 Ga. App. 832, 344 S.E.2d 684 (1986); Gliemmo v. Cousineau, 287 Ga. 7, 694 S.E.2d 75 (2010).

Applicability to Specific Cases

1. Automobiles

Improper operation of vehicle. — Jury would be authorized to find that a person who failed without cause to observe a dangerous but clearly visible "isle of safety" in a street would be guilty of gross negligence. Smith v. Hodges, 44 Ga. App. 318, 161 S.E. 284 (1931).

Evidence that the defendant, driving at 25 m.p.h., turned around briefly when children in the back seat spilled a bottle of milk, causing the car to strike a telegraph pole, did not show that the defendant was guilty of gross negligence. Tucker v. Andrews, 51 Ga. App. 841, 181 S.E. 673 (1935).

When several witnesses in a suit by a passenger for injuries received in an accident testified that a part of the defendant's car entered the wrong side of the road at a distance of from 100 yards to 15 yards from the point of collision and continued along such path, and when the other driver in the collision testified that "I dimmed my headlights, pulled over farther to the right, and when the approaching car was very near to mine it cut across the road to the left suddenly, striking the left front of my car," the jury was authorized to find that the act of the defendant amounted to gross negligence. Atlantic Ice & Coal Corp. v. Newlin, 56 Ga. App. 428, 192 S.E. 915 (1937).

While there were no allegations and no evidence that the speed at which the defendant was operating an automobile was in violation of the law or of any ordinance, or that the failure to stop before entering the intersection was a violation of any ordinance, nevertheless, the jury was authorized to find that such acts on the part of the defendant, occurring as they did in a thickly populated section on a heavily traveled thoroughfare, together with the defendant's further act of looking to the rear for a period of three to five seconds, long enough to travel 200 to 225 feet, was gross negligence on the defendant's part and was authorized to award the plaintiffs damages on this theory. Chastain v. Lawton, 87 Ga. App. 35, 73 S.E.2d 38 (1952).

Finding is authorized that the defendant is guilty of gross negligence in taking a chance of meeting and passing another automobile on a familiar, narrow, country dirt road when there is barely room to pass, when about 3 feet of the defendant's side of the road are obstructed by limbs of trees, and in turning briefly to the defendant's left to avoid the obstructions with only a guess as to whether the defendant has time to get back on the defendant's side, especially since he knows that another automobile is approaching. Sutherland v. Woodring, 103 Ga. App. 205, 118 S.E.2d 846 (1961).

When evidence disclosed that the driver failed to heed the traffic signal, failed to keep a lookout for traffic, and failed to adhere to the speed limit, such a combination of circumstances would authorize a jury to find gross negligence. McDaniel v. Gysel, 155 Ga. App. 111, 270 S.E.2d 469 (1980).

In order for guest passenger to recover against host driver, the jury must find the host driver grossly negligent. Blanchard v. Ogletree, 41 Ga. App. 4, 152 S.E. 116 (1929); Meddin v. Karsman, 41 Ga. App. 282, 152 S.E. 601 (1930); Atlantic Ice & Coal Corp. v. Newlin, 56 Ga. App. 428, 192 S.E. 915 (1937); Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952); McGowan v. Camp, 87 Ga. App. 671, 75 S.E.2d 350 (1953); McDaniel v. Gysel, 155 Ga. App. 111, 270 S.E.2d 469 (1980).

Grossly negligent conduct by passenger. — When a person who is in an automobile which is being operated by another takes the steering wheel and undertakes to steer the automobile, and while so doing fails to look ahead and

observe the course of the automobile, but gives the passenger's attention to what the operator is doing, and when the automobile while thus being steered collides with a telegraph pole, and as a result of the collision a person on the back seat is thrown forward and sustains a fracture of the collar bone and the shoulder blade and other injuries from the effects of which the person is confined in a hospital for several months, the inference is authorized that the person in taking the steering wheel and steering the automobile, under the circumstances, was guilty of gross negligence. McCord v. Benford, 48 Ga. App. 738, 173 S.E. 208 (1934).

"Guest passenger" rule changed. — It has long been the rule in this state that one riding by invitation and gratuitously in another's automobile cannot recover for injury caused by the other's negligence in driving, unless it amounted to gross negligence. However, effective July 1, 1982, the "guest passenger" rule cited above was changed by O.C.G.A. § 51-1-36, stating: "The operator of a motor vehicle owes to passengers therein the same duty of ordinary care owed by others." Rider v. Taylor, 166 Ga. App. 474, 304 S.E.2d 557 (1983).

No retroactive application of change in "guest passenger" rule. — Trial court did not err in refusing to apply O.C.G.A. § 51-1-36, changing the "guest passenger" rule as to the duty owed by an automobile operator to passengers to ordinary care, to a case involving a January 1981 accident, since, although a statute is "remedial" which affects only the procedure and practice of the courts and thus may be retroactive in application, the "guest passenger" rule established the duty owed by an automobile owner or operator to a nonpaying guest passenger, and there is nothing in the enactment of § 51-1-36 which discloses a legislative intent to apply the terms thereof retroactively. Rider v. Taylor, 166 Ga. App. 474, 304 S.E.2d 557 (1983).

Speed alone not gross negligence. — Although speed coupled with other circumstances may amount to gross negligence, when the record is devoid of any other circumstances which could be coupled with the plaintiffs' allegation that the defendant was driving too fast for conditions, the plaintiffs have failed to make the requisite showing of gross negligence. Rider v. Taylor, 166 Ga. App. 474, 304 S.E.2d 557 (1983).

Pleading and Practice

Gross negligence, such as will authorize recovery by guest in automobile against a host, must be expressly pled, unless the facts alleged in the petition are such as to demand the inference of its existence. Capers v. Martin, 54 Ga. App. 555, 188 S.E. 465 (1936).

Sufficiency of complaint. — Allegations that the defendant was guilty of gross negligence in willfully and deliberately driving the automobile into a ditch at the side of the road, without warning the petitioner of the petitioner's intention to do so, are not subject to a motion to dismiss on the ground that they are a mere conclusion of the pleader without any facts alleged on which to base such charge of gross negligence. Frank v. Horovitz, 52 Ga. App. 651, 183 S.E. 835 (1936).

Conclusory language regarding willful misconduct disregarded. — When the gravamen of the action alleged is gross negligence, the characterization in the petition of the act of negligence as willful and wanton is a mere conclusion of the pleader and may be treated as surplusage if it be regarded as attempting to allege willful and wanton misconduct, and does not affect the sufficiency of a cause of action for gross negligence. Frye v. Pyron, 51 Ga. App. 613, 181 S.E. 142 (1935).

Complaint against joint tort-feasors. — When a petition, in a suit against two defendants, alleges that the plaintiff, while riding in the automobile which was owned by the defendant husband and at the time was being operated by the defendant wife, was injured by the automobile's overturning on the road as a result of the blow-out of a tire and the sudden application of the brakes by the driver while the plaintiff was riding in the car either as a guest or in attendance on business for either the husband or the wife, and that the plaintiff's injuries were proximately caused by the alleged negligence of both defendants, the allegations are sufficient as charging gross negligence

Pleading and Practice (Cont'd)

against both defendants in the maintenance and operation of the automobile under the circumstances indicated and that such negligence was the proximate cause of the plaintiff's injuries. Ragsdale v. Love, 50 Ga. App. 900, 178 S.E. 755 (1935).

Allegation of gross negligence may encompass ordinary negligence. — When the plaintiff sets forth facts and alleges acts of omission and commission on the part of the defendant which amount to gross negligence, and thereafter sets forth additional facts which would give rise to a duty on the part of the defendant to exercise ordinary care, and alleges that the same acts of omission and commission amount to ordinary neglect, such allegations would not be inconsistent, since any acts of omission or commission which amounted to the want of that care which is characterized as gross negligence would necessarily show an absence of that care which amounts to ordinary neglect. Blanchard v. Ogletree, 41 Ga. App. 4, 152 S.E. 116 (1929).

Res ipsa loquitur doctrine not applicable to gross negligence. — While the rule of evidence expressed in the maxim res ipsa loquitur may make out a prima facie case of ordinary negligence, it is insufficient in itself to make out a prima facie case of gross negligence. Minkovitz v. Fine, 67 Ga. App. 176, 19 S.E.2d 561 (1942).

Jury Instructions

Court in undertaking to give definition of this section should not omit the words, "how inattentive soever he may be." Southern Mut. Ins. Co. v. Hudson, 113 Ga. 434, 38 S.E. 964 (1901); Seaboard & R.R. v. Cauthen, 115 Ga. 422, 41 S.E. 653 (1902).

It is error for trial court to use the words "entire absence of care" in defining gross negligence when the use of such expression can be interpreted as meaning that in order to prove gross negligence an entire absence of care must be proved. Caskey v. Underwood, 89 Ga. App. 418, 79 S.E.2d 558 (1953).

Charge improperly enlarges plaintiff's burden of proof. — When a case was based on gross negligence by the pleadings and the evidence, and not on willful and wanton negligence or misconduct, it was error for the court to charge the jury that if it found from the evidence that the driver of the car showed that entire absence of care which would raise the presumption of conscious indifference, or that the driver acted with reckless indifference, or with actual or imputed knowledge that the inevitable or probable consequences of the driver's conduct would be to inflict injury, the jury would be authorized to find that the driver's conduct amounted to gross negligence, as this charge placed too great a burden on the plaintiff. Dixon v. Merry Bros. Brick & Tile Co., 56 Ga. App. 626, 193 S.E. 599 (1937).

Entire absence of care would generally, if not always, result in wanton misconduct; also, charging the entire absence of care as a part of the definition of gross negligence would very likely confuse the jury and cause the jury to assume that before one could be guilty of gross negligence there must be an entire absence of care. Caskey v. Underwood, 89 Ga. App. 418, 79 S.E.2d 558 (1953).

When judge gave elaborate definition of gross negligence and later in charge gave exact definition appearing in this section, the two definitions are in no wise conflicting. Hatcher v. Bray, 88 Ga. App. 344, 77 S.E.2d 64 (1953).

Gross Negligence as Jury Question

When jury question is presented. — Jury question is presented only when reasonable men could disagree as to whether the facts alleged constitute gross negligence. Harris v. National Evaluation Sys., 719 F. Supp. 1081 (N.D. Ga. 1989), aff'd, 900 F.2d 266 (11th Cir. 1990).

When a community service participant was assigned to work for the county sanitation department and was killed after falling from the back of a garbage truck while doing this work, no liability could be assigned for assigning the participant to work for the department, as it was properly authorized to participate in the community service program, but the facts that

the participant was not issued safety shoes issued to department employees and was told to ride on the back of the truck, even though it was going over 10 miles per hour on a busy highway, contrary to department policy, created a fact issue as to the county's gross negligence, under O.C.G.A. § 51-1-4, and willful misconduct; therefore, the county was not entitled to summary judgment, under O.C.G.A. § 42-8-71(d). Currid v. DeKalb State Court Prob. Dep't, 274 Ga. App. 704, 618 S.E.2d 621 (2005).

Services provided by an emergency room physician to a patient who presented with a high pressure puncture wound to one hand were "bona fide emergency services" under O.C.G.A. § 51-1-29.5(a)(5), and the physician was therefore only liable if grossly negligent; evidence that the physician failed to contact a hand surgeon for 7 hours after determining that emergency surgery was necessary was sufficient to go to the jury. Abdel-Samed v. Dailey, 294 Ga. 758, 755 S.E.2d 805 (2014).

Questions of negligence and diligence, even of gross negligence and slight diligence, are as a rule to be determined by the jury, and should not be settled by the court as a matter of law, except in plain and indisputable cases. Frye v. Pyron, 51 Ga. App. 613, 181 S.E. 142 (1935); Frank v. Horovitz, 52 Ga. App. 651, 183 S.E. 835 (1936); Atlantic Ice & Coal Corp. v. Newlin, 56 Ga. App. 428, 192 S.E. 915 (1937); Moore v. Shirley, 68 Ga. App. 38, 21 S.E.2d 925 (1942); Hennon v. Hardin, 78 Ga. App. 81, 50 S.E.2d 236 (1948); Carpenter v. Lyons, 78 Ga. App. 214, 50 S.E.2d 850 (1948); Lawrence v. Hayes, 92 Ga. App. 778, 90 S.E.2d 102 (1955); Pannell v. Fuqua, 111 Ga. App. 18, 140 S.E.2d 280 (1965); McDaniel v. Gysel, 155 Ga. App. 111, 270 S.E.2d 469 (1980).

When one driving an automobile is so inattentive as to look to the side and not keep a constant lookout ahead, when there is an object in the driver's path which is clearly visible that the driver might run into, the question is ordinarily one for the jury as to whether, under all of the proven relevant facts and circumstances of the case, the driver's failure to exercise the precaution of looking along the street ahead of the vehicle is gross negligence. Capers v. Martin, 54 Ga. App. 555, 188 S.E. 465 (1936).

In an action by a gratuitous invited guest against the owner of the automobile in which the guest was riding when injured, the allegations of the petition presented a jury question as to whether the driver was guilty of gross negligence. Hennon v. Hardin, 78 Ga. App. 81, 50 S.E.2d 236 (1948).

While violation of the speed laws alone would not in and of itself constitute gross negligence, and the violation of a state law by the driver of an automobile does not necessarily amount to gross negligence, it cannot be said as a matter of law that one driving an automobile 70 miles per hour around a 45 degree curve, and attempting to pass another automobile on such curve, is not guilty of gross negligence; this would be a question for the jury. Hennon v. Hardin, 78 Ga. App. 81, 50 S.E.2d 236 (1948).

Exact point when ordinary negligence or lack of ordinary care passes into and becomes willful and wanton negligence is jury question, under definite instruction from the trial judge that the facts must show that the failure to exercise ordinary care was not only negligence but that it amounted to willful and wanton negligence. Humphries v. Southern Ry., 51 Ga. App. 585, 181 S.E. 135 (1935).

Failure to refer emergency patient to hand surgeon presented jury question as to gross negligence. — Because a doctor provided care to a patient who had received a high pressure puncture wound to the patient's hand that required emergency surgery, it was clear that the heightened burden of proving gross negligence for emergency services in O.C.G.A. § 51-1-29.5(c) was applicable. The facts were sufficient to go to the jury on the issue of gross negligence. Abdel-Samed v. Dailey, 294 Ga. 758, 755 S.E.2d 805 (2014).

Summary judgment was properly granted in favor of a fitness facility because a decedent who drowned in the facility's pool had signed a valid exculpatory agreement that waived the facility's liability for negligence and the facility's

Gross Negligence as Jury Question (Cont'd)

lifeguards had not acted grossly negligently pursuant to O.C.G.A. § 51-1-4 in turning their attention to a maintenance duty because: (1) there were few swimmers in the pool; (2) the decedent was an experienced swimmer who was in training to be a military rescue swimmer; and (3) upon discovering that the decedent was unconscious for three to five minutes, the lifeguards began immediate rescue and resuscitation efforts; further, the facility's failure to follow Red Cross safety standards did not constitute gross negligence because there was no evidence that the facility was required to follow such standards. Flood v. Young Woman's Christian Ass'n of Brunswick, Ga., Inc., 398 F.3d 1261 (11th Cir. 2005).

RESEARCH REFERENCES

Am. Jur. 2d. — 57A Am. Jur. 2d, Negligence, §§ 5 et seq., 218 et seq., 227 et seq., 239.

C.J.S. — 65 C.J.S., Negligence, § 1 et seq.

ALR. — Automobiles: liability of owner or operator for injury to guest, 20 ALR 1014; 26 ALR 1425; 40 ALR 1338; 47 ALR 327; 51 ALR 581; 61 ALR 1252; 65 ALR 952; 61 ALR 1252; 65 ALR 952.

Duty of carrier to guard young children against danger of falling from car, 28 ALR 1035.

What amounts to gross or wanton negligence in driving an automobile precluding the defense of contributory negligence, 72 ALR 1357; 92 ALR 1367; 119 ALR 654.

What constitutes gross negligence or the like, within statute limiting liability of owner or operator of automobile for injury to guest, 74 ALR 1198; 86 ALR 1145; 96 ALR 1479.

Who is a guest within contemplation of statute regarding liability of owner or operator of motor vehicle for injury to guest, 82 ALR 1365; 95 ALR 1180.

Test or criterion of gross negligence or other misconduct that will support recovery of exemplary damages for bodily injury or death unintentionally inflicted, 98 ALR 267.

Automobiles: gross negligence, recklessness, or the like, within "guest" statute or rule, predicated upon manner of operating car on curve or hill, 136 ALR 1270.

Conduct of operator of automobile at railroad crossing as gross negligence, recklessness, etc., within guest statute, 143 ALR 1144.

Custom or practice of drivers of motor vehicles as affecting question of negligence, 172 ALR 1141; 77 ALR2d 1327.

Custom or practice of drivers of motor vehicles as affecting question of negligence, 77 ALR2d 1327.

Payments or contributions by or on behalf of automobile rider as affecting his status as guest, 10 ALR2d 1351.

Guest's knowledge that automobile driver has been drinking as precluding recovery, under guest statutes or equivalent common-law rule, 15 ALR2d 1165.

Propriety of granting summary judgment in case involving issue of gross or wanton negligence, 50 ALR2d 1309.

Mutual business or commercial objects or benefits as affecting status of rider under automobile guest statute, 59 ALR2d 336.

Applicability of guest statute where motor vehicle accident occurs on private way or property, 64 ALR2d 694.

Intoxication, unconsciousness, or mental incompetency of person as affecting his status as guest within automobile guest statute or similar common-law rule, 66 ALR2d 1319.

Applicability of res ispa loquitur doctrine where motor vehicle turns over on highway, 79 ALR2d 211.

Applicability of guest statute and its requirement of gross negligence, wanton or wilful misconduct, or the like, to owner's liability for injuries to guest in vehicle negligently entrusted to incompetent driver, 91 ALR2d 323.

Liability, under guest statutes, of driver or owner of motor vehicle for running over or hitting person attempting to enter the vehicle, 1 ALR3d 1083.

Speed, alone or in connection with other circumstances, as gross negligence, wantonness, recklessness, or the like, under automobile guest statute, 6 ALR3d 769.

Gross negligence, recklessness, or the like, within "guest" statute, predicated upon conduct in passing cars ahead or position of car on wrong side of the road, 6 ALR3d 832.

Share-the-ride arrangement or car pool as affecting status of automobile rider as guest, 10 ALR3d 1087.

Liability insurance as covering accident, damage, or injury due to wanton or wilful misconduct or gross negligence, 20 ALR3d 320.

Applicability of res ipsa loquitur where plaintiff must prove active or gross negligence, willful misconduct, recklessness, or the like, 23 ALR3d 1083.

Nonmonetary benefits or contributions by rider as affecting his status under automobile guest statute, 39 ALR3d 1083.

Automobile guest statute: status of rider as affected by payment, amount of which is not determined by expenses incurred, 39 ALR3d 1177.

Payments on expense-sharing basis as affecting guest status of automobile passenger, 39 ALR3d 1224.

51-1-5. Meaning of "due care" in reference to child of tender years.

The term "due care," when used in reference to a child of tender years, is such care as the child's mental and physical capacities enable him to exercise in the actual circumstances of the occasion and situation under investigation. (Civil Code 1895, § 2901; Civil Code 1910, § 3474; Code 1933, § 105-204.)

History of Code section. — The language of this Code section is derived in part from the decision in Western & A.R.R. v. Young, 83 Ga. 512, 10 S.E. 197 (1889).

Law reviews. — For article discussing defenses to action for wrongful death in Georgia, see 22 Ga. B. J. 459 (1960).

For comment criticizing Powell v. Hartford Accident & Indem. Co., 217 Tenn. 503, 398 S.W.2d 727 (1966), and advocating subjective determination by jury of minor's capacity to exercise due care on the highway, see 18 Mercer L. Rev. 518 (1967). For comment criticizing Hatch v. O'Neill, 231 Ga. 446, 202 S.E.2d 44 (1973), holding individual under age of criminal responsibility not civilly liable for willful torts, see 26 Mercer L. Rev. 367 (1974).

JUDICIAL DECISIONS

Analysis

General Consideration
Contributory Negligence
Duty of Care Owed to Children
Jury Instructions
Child's Negligence as Jury Question

General Consideration

Conduct of child of tender years is not to be judged by same rule that governs actions of adult. Huckabee v. Grace, 48 Ga. App. 621, 173 S.E. 744 (1934).

No invariable rule. — Care and diligence required of an infant of tender years is not fixed by any invariable rule with reference to the age of the infant or otherwise. It depends upon the capacity of the particular infant, taking into consideration the infant's age as well as other matters. McLarty v. Southern Ry., 127 Ga. 161, 56 S.E. 297 (1906); MacDougald Constr. Co. v. Mewborn, 34 Ga. App. 333, 129 S.E. 917 (1925).

Due care in child of tender years is such care as the child's capacity, mental and physical, fits the child for

General Consideration (Cont'd)

exercising in actual circumstances of the occasion and situation under investigation. Rogers v. McKinley, 48 Ga. App. 262, 172 S.E. 662 (1934); Huckabee v. Grace, 48 Ga. App. 621, 173 S.E. 744 (1934).

Child of tender years may not be under the duty of exercising ordinary care as defined in § 51-1-2, but the child is charged with the duty of exercising such care as the child's capacity, mental and physical, fits the child for exercising, this capacity to be judged by the jury from the circumstances surrounding the transaction under investigation, and the child's conduct in reference thereto. Huckabee v. Grace, 48 Ga. App. 621, 173 S.E. 744 (1934).

Neither average child of child's own age, nor prudent man, is standard by which to measure child's diligence with legal exactness. Clary Maytag Co. v. Rhyne, 41 Ga. App. 72, 151 S.E. 686 (1930); Jackson v. Young, 125 Ga. App. 342, 187 S.E.2d 564 (1972).

Section speaks in terms of particular youthful plaintiff in particularized circumstances. The child, unlike an adult counterpart, does not undergo the metamorphosis into the fictionalized character of the ordinary prudent youth. Williams v. United States, 379 F.2d 719 (5th Cir. 1967).

This section means such care as the capacity of the particular child enables the child to use naturally and reasonably, and not the care ordinarily exercised and which should reasonably be expected from a child of the child's years and experience, under the circumstances in which the child is placed. Ragan v. Goddard, 43 Ga. App. 599, 159 S.E. 743 (1931).

Merely because a petition alleged in effect that a child was intelligent and unusually well developed, the degree of care which the child was required to exercise was still to be measured by the child's own particular capacity, in the light of the actual circumstances of the occasion and situation under investigation. Ragan v. Goddard, 43 Ga. App. 599, 159 S.E. 743 (1931).

For child to be negligent, child must be shown to have appreciation of risk involved, and a general showing that the child was aware of the factual situation is not sufficient. It must be shown that the child was aware of and appreciated the danger of the situation. Williams v. United States, 379 F.2d 719 (5th Cir. 1967).

Due care under age 14. — Infants under 14 years of age are chargeable with contributory negligence resulting from a want of such care as their mental and physical capacity fits them for exercising, and assume the risk of those patent, obvious, and known dangers which they are able to appreciate and avoid. Evans v. Mills, 119 Ga. 448, 46 S.E. 674 (1904); MacDougald Constr. Co. v. Mewborn, 34 Ga. App. 333, 129 S.E. 917 (1925).

Child of tender years, under 14 years of age, is not bound to exercise due care as an adult (exacted of every prudent man) but according to the child's age and capacity. Sturdivant v. Polk, 140 Ga. App. 152, 230 S.E.2d 115 (1976).

Child guest 13 years of age, not being so young as to be as a matter of law incapable of negligence, and not being bound to exercise the same measure of ordinary care which is exacted of every prudent adult, is nevertheless required under the Code to exercise the "due care" of a child of "tender years." Eddleman v. Askew, 50 Ga. App. 540, 179 S.E. 247 (1935).

There is no presumption of law that child between ages of seven and 14 did or did not exercise due care, or does or does not have sufficient capacity to recognize danger or to observe due care. Jackson v. Young, 125 Ga. App. 342, 187 S.E.2d 564 (1972).

Child under four years old. — Child of four years or younger is conclusively presumed to be incapable of contributory negligence. Crawford v. Southern Ry., 106 Ga. 870, 33 S.E. 826 (1899); City of Atlanta v. Whitley, 24 Ga. App. 411, 101 S.E. 2 (1919); Williams v. Jones, 26 Ga. App. 558, 106 S.E. 616 (1921).

Due care over age 14. — If 16 year old plaintiff had desired to avoid the legal presumption that the law treated the plaintiff as an adult, the burden was on the plaintiff to offer proof to rebut the presumption. Sheetz v. Welch, 89 Ga. App. 749, 81 S.E.2d 319 (1954).

Child, 15 years of age, in the absence of any evidence of the want of ordinary capacity in the particular child, should not be treated as a child of "tender years," but as a young person chargeable with such diligence as might fairly be expected of the class and condition to which the child belongs. Laseter v. Clark, 54 Ga. App. 669, 189 S.E. 265 (1936).

Child over 14 years is presumptively chargeable with some degree of diligence as an adult under the same circumstances. Muscogee Mfg. Co. v. Butts, 21 Ga. App. 558, 94 S.E. 821 (1918); Texas Co. v. Hearn, 23 Ga. App. 408, 98 S.E. 419 (1919); Paulk & Fossil v. Lee, 31 Ga. App. 629, 121 S.E. 845 (1924).

Young person of the age of 14 or more is presumed to be capable of realizing danger, and of exercising the necessary forethought and caution to avoid it, and is presumptively chargeable with diligence for the person's own safety, when the peril is palpable and manifest. Laseter v. Clark, 54 Ga. App. 669, 189 S.E. 265 (1936).

Regardless of age, if there is no breach of legal duty on part of defendant toward that person, there can be no legal liability. YMCA v. Bailey, 112 Ga. App. 684, 146 S.E.2d 324 (1965), cert. denied, 385 U.S. 868, 87 S. Ct. 131, 17 L. Ed. 2d 95 (1966).

Cited in McCombs v. Southern Ry., 39 Ga. App. 716, 148 S.E. 407 (1929); Atlantic Ice & Coal Co. v. Harris, 45 Ga. App. 419, 165 S.E. 134 (1932); Southern Ry. v. Perkins, 66 Ga. App. 66, 17 S.E.2d 95 (1941); Eason v. Crews, 88 Ga. App. 602, 77 S.E.2d 245 (1953); Edwards v. United States, 164 F. Supp. 885 (M.D. Ga. 1958); Lanier v. O'Bear, 101 Ga. App. 667, 115 S.E.2d 110 (1960); Henry Grady Hotel Corp. v. Watts, 119 Ga. App. 251, 167 S.E.2d 205 (1969); Perry Bros. Transp. Co. v. Rankin, 120 Ga. App. 798, 172 S.E.2d 154 (1969); Bailey v. Todd, 126 Ga. App. 731, 191 S.E.2d 547 (1972); Anderson v. Happ, 136 Ga. App. 839, 222 S.E.2d 607 (1975); Wallace v. Ener, 521 F.2d 215 (5th Cir. 1975); Lequire v. Youmans, 147 Ga. App. 174, 248 S.E.2d 235 (1978); Walt Disney Prods., Inc. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981); Blackwell v. Cantrell, 169 Ga. App. 795, 315 S.E.2d 29 (1984); Sorrells v. Miller, 218 Ga. App. 641, 462 S.E.2d 793 (1995).

Contributory Negligence

General rules on contributory negligence not necessarily applicable to children. — Although it is the general rule with regard to an adult that to entitle the adult to recover damages for an injury resulting from the negligence of another the adult must be personally in the exercise of ordinary care, this is not the rule with regard to an infant of tender years. Huckabee v. Grace, 48 Ga. App. 621, 173 S.E. 744 (1934).

Assumption of risk not applicable to child's conduct. — If, because of the child's age, a child did not understand the risk involved in the child's conduct, the child's failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence. Hawkins ex rel. Pearson v. Small World Day Care Ctr., Inc., 234 Ga. App. 843, 508 S.E.2d 200 (1998).

Children may be negligent if violating standards applicable to them. — There is no liability if the injured person, by the exercise of that degree of care which the law required of the person, could have avoided the consequences of any negligence of which the defendant may have been guilty. YMCA v. Bailey, 112 Ga. App. 684, 146 S.E.2d 324 (1965), cert. denied, 385 U.S. 868, 87 S. Ct. 131, 17 L. Ed. 2d 95 (1966).

Whether or not a child 15 years of age, who was riding on a truck driven by one whose negligence was not imputable to the child, should be held presumptively liable to the same standard of care as would control an ordinary adult or an ordinarily experienced adult driver, one could not even in that event be held liable as a matter of law for any contributory negligence on the child's part, unless the child's peril was palpable and manifest and the child failed to exercise that care which would have been exercised under similar circumstances by an ordinarily prudent adult. Laseter v. Clark, 54 Ga. App. 669, 189 S.E. 265 (1936).

Question of capacity or lack of capacity to be contributorily negligent in case of children, even very young

Contributory Negligence (Cont'd)

children, is subjective one which necessarily depends in each situation upon the particular child's mental and physical capacity. Brewer v. Gittings, 102 Ga. App. 367, 116 S.E.2d 500 (1960); Jackson v. Young, 125 Ga. App. 342, 187 S.E.2d 564 (1972); Ashbaugh v. Trotter, 237 Ga. 46, 226 S.E.2d 736 (1976).

Proof of child's negligence admissible to prove vicarious liability. — Negligence may be alleged to show the injurious conduct of a child in support of an action against another who bears responsibility on account of the conduct of the child, even if the child cannot be charged with contributory negligence to defeat or diminish recovery in an action in one's behalf, or with negligence to support an action directed against the child. Miles v. Harrison, 115 Ga. App. 143, 154 S.E.2d 377, rev'd on other grounds, 223 Ga. 352, 155 S.E.2d 6 (1967).

Duty of Care Owed to Children

Children of tender years are entitled to degree of care proportioned to their ability to foresee and avoid perils which may be encountered. Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 92 S.E.2d 720 (1956).

Child's ability to appreciate danger generally not presumed. As to a child seven years old, no presumption arises that the child will appreciate danger and will act with the discretion of an adult in going upon a railroad track and in getting out of the way of an approaching train, and persons in charge of such a train are not authorized to act on such a presumption. Simmons v. Atlanta & W.P.R.R., 46 Ga. App. 93, 166 S.E. 666 (1932).

Nor does a child servant necessarily assume risk. — If there are latent defects in machinery or dangers incident to an employment, unknown to the servant, of which the master knows or ought to know, the master must give the servant warning in respect thereto, and this is especially true when the servant is a child of tender years, since, while it is the general rule that a servant assumes the ordinary risks of the servant's employment and is bound to exercise the servant's own skill and diligence to protect oneself, a child of tender years, under the age of 14, assumes only such ordinary risks of the servant's employment as the servant is capable of appreciating and understanding, and a master who, by personally or through an authorized agent, directs such a child to do an act which, if performed according to the means and method provided by the master, would be attended with danger, owes the duty of warning the servant of the dangers incident to its performance, and in doing so must take into consideration the child's incapacity to appreciate and understand danger, and in such a case the duty incumbent upon the child is to exercise due care according to the child's age and the child's own actual capacity, rather than the ordinary care exacted by the general rule of every prudent man. Moore v. Ross, 41 Ga. App. 509, 153 S.E. 575 (1930).

Duty of schoolbus driver. — It is the duty of a schoolbus driver to deposit a passenger in a place of safety and, in the case of an infant, whether or not a place of deposit is a place of safety cannot be determined solely by whether or not one would be safe if the passenger remained on that spot. Davidson v. Horne, 86 Ga. App. 220, 71 S.E.2d 464 (1952).

There was no duty on the part of a schoolbus driver to assist a nine year old child in crossing the highway safely. Davidson v. Horne, 86 Ga. App. 220, 71 S.E.2d 464 (1952).

Jury Instructions

Consistency of instructions. — Immediately after defining negligence in a proper manner and stating that the plaintiff and the defendant were both required to exercise ordinary diligence, the court immediately went on to use the language of this section, construing this portion of the charge as a whole, it was not erroneous and could not have misled the jury. Brewer v. Gittings, 102 Ga. App. 367, 116 S.E.2d 500 (1960).

Explanation of due care unnecessary when plaintiff not negligent as matter of law. — When the court charged the jury that the plaintiff as a matter of law could not be charged with any negligence, it was not error, in the

absence of a special request, for the court to fail to charge more elaborately, as laid down in this section, the rule as to care attributable to a child of tender years, or in failing to charge that the plaintiff, a child of four years, was a child of tender years, and was incapable of being guilty of contributory negligence. Tharpe v. Cudahy Packing Co., 60 Ga. App. 449, 4 S.E.2d 49 (1939).

Instruction on standard of care sufficient as instruction on negligence. — Having instructed the jury as to the standard of care expected of a child, it is unnecessary for the court to repeat such instructions in each instance when referring to the negligence of the child. Shirey v. Woods, 118 Ga. App. 851, 165 S.E.2d 891 (1968).

Tender years instruction improper in accidental shooting case. — In case in which 15-year-old defendant shot plaintiff's 14-year-old son while attempting to unload the defendant's gun during a hunting trip, trial court committed reversible error in giving a child of tender years instruction absent evidence either child lacked the capacity of a person the child's age. Townsend v. Moore, 165 Ga. App. 606, 302 S.E.2d 398 (1983).

Child's Negligence as Jury Question

Question of infant's alleged negligence is one for jury under appropriate instructions from trial court. Canton Cotton Mills v. Edwards, 120 Ga. 447, 47 S.E. 937 (1904); Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 S.E. 998 (1907); Savannah Lighting Co. v. Harrison, 20 Ga. App. 8, 92 S.E. 772 (1917); Western & A.R.R. v. Reed, 35 Ga. App. 538, 134 S.E. 134, cert. denied, 35 Ga. App. 808 (1926); Smith v. Kleinberg, 49 Ga. App. 194, 174 S.E. 731 (1934); Etheridge v. Hooper, 104 Ga. App. 227, 121 S.E.2d 323 (1961); Ashbaugh v. Trotter, 237 Ga. 46, 226 S.E.2d 736 (1976); Davis v. Webb, 149 Ga. App. 144, 253 S.E.2d 820 (1979).

Question of contributory negligence of child of tender years is one especially for jury. Davis v. General Gas Corp., 106 Ga. App. 317, 126 S.E.2d 820 (1962).

Child under six years of age. — Trial court did not err in failing to charge the jury upon request that a child under six years old is presumed incapable of contributory negligence. Clanton v. Gwinnett County Sch. Dist., 219 Ga. App. 343, 464 S.E.2d 918 (1995).

Running into the street. — In determining issues of proximate causation, it was for the jury to decide the issue of due care owed as to a nine-year-old child who ran into the street and was hit by a truck. Atlanta Affordable Hous. Fund L.P. v. Brown, 253 Ga. App. 286, 558 S.E.2d 827 (2002).

Question of an 11-year-old child's contributory negligence is for the jury. Fraley ex rel. Fraley v. Lake Winnepesaukah, Inc., 631 F. Supp. 160 (N.D. Ga. 1986).

Whether child under 14 is capable of negligence, except in plain and unmistakable cases, is question for determination by jury. Williams v. United States, 352 F.2d 477 (5th Cir. 1965), later appeal, 379 F.2d 719 (5th Cir. 1967).

Capacity of child, age seven or above, to appreciate danger and exercise some degree of care, is matter of fact for jury determination. Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 92 S.E.2d 720 (1956); Brewer v. Gittings, 102 Ga. App. 367, 116 S.E.2d 500 (1960); Miles v. Harrison, 115 Ga. App. 143, 154 S.E.2d 377, rev'd on other grounds, 223 Ga. 352, 155 S.E.2d 6 (1967); Shirey v. Woods, 118 Ga. App. 851, 165 S.E.2d 891 (1968).

Jury must find child had requisite capacity. — Since the question of capacity is an individual one in each of the cases involving children between seven and 14 years of age, the jury must first find that the particular child had the capacity required and then must decide whether or not the child exercised it. Brewer v. Gittings, 102 Ga. App. 367, 116 S.E.2d 500 (1960); Jackson v. Young, 125 Ga. App. 342, 187 S.E.2d 564 (1972).

Whether care exercised according to capacity. — Jury is to determine what were the circumstances and facts of the matter under investigation and then determine the child's age and mental and physical capacity at the time of the injury and from this then determine what care the child was capable of exercising and whether or not the child exercised that

Child's Negligence as Jury Question (Cont'd)

particular care which would be the due care expected of the child by law. Clary Maytag Co. v. Rhyne, 41 Ga. App. 72, 151 S.E. 686 (1930); Davis v. Webb, 149 Ga. App. 144, 253 S.E.2d 820 (1979).

Negligence of child guest. — In automobile collision cases, whether a child guest of tender years exercised the measure of due care required by the Code under the actual circumstances of the occasion and situation is a question peculiarly for a jury, and not a question of law to be decided by the court, except in clear and palpable cases. Eddleman v. Askew, 50 Ga. App. 540, 179 S.E. 247 (1935), overruled in part on other grounds, Chadwick v. Miller, 169 Ga. App. 338, 312 S.E.2d 835 (1983).

Jury may apply child's standard to older minors when appropriate. — While the standard of ordinary care of a child of 14 or 15 is presumptively that of an adult, the youth and inexperience of a child of this age are to be considered and the matter ordinarily left as a question of fact for the jury rather than as a matter of law for the court. Lassiter v. Poss, 85 Ga. App. 785, 70 S.E.2d 411 (1952).

RESEARCH REFERENCES

Am. Jur. 2d. — 57A Am. Jur. 2d, Negligence, §§ 180, 189 et seq.

C.J.S. — 65 C.J.S., Negligence, §§ 78, 130 et seq.

ALR. — Automobiles: liability of parent for injury to child's guest by negligent operation of car, 2 ALR 900; 88 ALR 590.

Intervening act of child as affecting question of proximate cause of damage to the person or property of third person by fire or explosion, 8 ALR 1250.

Duty of carrier to guard young children against danger of falling from car, 28 ALR 1035.

Duty to guard against danger to children by electric wires, 49 ALR 1053; 100 ALR 621.

Liability for injury to child guest on one's premises, 60 ALR 108.

Negligence or contributory negligence of parent in intrusting child to custody of another child, 123 ALR 147.

Liability for injury to child by automobile left unattended in street or highway, 140 ALR 538.

Child's violation of statute or ordinance as affecting question of his negligence or contributory negligence, 174 ALR 1170.

Liability for injury by explosive or the like found by, or left accessible to, a child, 10 ALR2d 22.

Railroad's duty to children walking longitudinally along railroad tracks or right of way, 31 ALR2d 789.

Liability to patron of scenic railway, roller coaster, or miniature railway, 66 ALR2d 689.

Standard for judging conduct of minor motorist charged with gross negligence, recklessness, willful or wanton misconduct, or the like, under guest statute or similar common-law rule, 97 ALR2d 861.

Age of minor operator of automobile or other motor-powered vehicle or craft as affecting his primary or contributory negligence, 97 ALR2d 872.

Contributory negligence of child injured while climbing over or through railroad train blocking crossing, 11 ALR3d 1168.

Age and mentality of child as affecting application of attractive nuisance doctrine, 16 ALR3d 25.

Duty of possessor of land to warn child licensees of danger, 26 ALR3d 317.

Railroad's liability for injury to or death of child on moving train other than as paying or proper passenger, 35 ALR3d 9.

Weapons: application of adult standard of care to infant handling firearms, 47 ALR3d 620.

Liability for injury or death in shooting contest or target practice, 49 ALR3d 762.

Excessiveness and adequacy of damages for personal injuries resulting in death of minor, 49 ALR3d 934.

Lawn mowing by minors as violation of child labor statutes, 56 ALR3d 1166.

Infant as guest within automobile guest statutes, 66 ALR3d 601.

Landlord's liability to tenant's child for personal injuries resulting from defects in premises, as affected by tenant's negligence with respect to supervision of child, 82 ALR3d 1079.

Liability of youth camp, its agents or employees, or of scouting leader or organization, for injury to child participant in program, 88 ALR3d 1236.

Liability for injury to or death of child from electric wire encountered while climbing tree, 91 ALR3d 616.

Products liability: toys and games, 95 ALR3d 390.

Modern trends as to tort liability of child of tender years, 27 ALR4th 15.

Modern trends as to contributory negligence of children, 32 ALR4th 56.

Excessiveness and adequacy of damages for personal injuries resulting in death of minor, 49 ALR4th 1076.

51-1-6. Recovery of damages upon breach of legal duty.

When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby. (Orig. Code 1863, § 2896; Code 1868, § 2902; Code 1873, § 2953; Code 1882, § 2953; Civil Code 1895, § 3809; Civil Code 1910, § 4405; Code 1933, § 105-103.)

Cross references. — Liability for acts of intoxicated persons, § 51-1-40.

Law reviews. — For article, "Labor and Employment Law," see 53 Mercer L. Rev. 349 (2001). For annual survey on torts, see 64 Mercer L. Rev. 287 (2012).

For comment on Buttrum v. Buttrum, 98 Ga. App. 226, 105 S.E.2d 510 (1958), holding that an unemancipated minor child may maintain an action in tort against a parent for personal injuries provided that it is a willful and malicious act so cruel as to constitute forfeiture of parental authority, see 21 Ga. B. J. 559 (1959). For comment on Cox v. DeJarnette, 104 Ga. App. 664, 123 S.E.2d 16 (1961), allowing recovery in tort from the liability insurance policy of a charity, see 14 Mercer L. Rev. 463 (1963). For comment on Williams v. Hospital Auth., 119 Ga. App. 626, 168 S.E.2d 336 (1969), see 6 Ga. St. B. J. 209 (1969). For comment on Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605 (1971), see 8 Ga. St. B. J. 244 (1971).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases
1. Duty of Care Imposed
2. Breach of Legal Duty
Pleading and Practice

General Consideration

Section does not create a cause of action; it simply authorizes the recovery of damages for breach of a legal duty and did not apply in an action brought under O.C.G.A. § 36-33-4. City of Buford v. Ward, 212 Ga. App. 752, 443 S.E.2d 279 (1994).

Construction with federal law. — Trial court erred in granting judgment on the pleadings to a bank as to a customer's negligence claim because the allegations of the complaint, taken as true, established the elements of negligence; the Gramm-Leach-Biley Act (GLBA), 15 U.S.C. § 6801(a), imposed a legal duty upon the bank to protect the customer's confidential personal information, and a duty imposed by a federal statute such as the GLBA was a duty imposed by law

General Consideration (Cont'd)

under O.C.G.A. § 51-1-6. Jenkins v. Wachovia Bank, N.A., 314 Ga. App. 257, 724 S.E.2d 1 (2012).

Georgia Court of Appeals erred in holding that a violation of an alleged duty imposed by the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq., gave rise to a cause of action for negligence under O.C.G.A. § 51-1-6 because no duty was imposed against a bank under § 6801(a) to protect a customer's confidential information. Wells Fargo Bank, N.A. v. Jenkins, 293 Ga. 162, 744 S.E.2d 686 (2013).

Statute does not create remedy against grandparents for violation of abandonment statute. — Legislature allowed for contempt, garnishment, and income withholding to enforce child support obligations and did not intend to create additional implied remedies under O.C.G.A. § 51-1-6 for violation of O.C.G.A. § 19-10-1, the child abandonment statute. Therefore, a wife was not entitled to recover damages from her ex-husband's parents for her husband's violation of O.C.G.A. § 19-10-1. Bridges v. Wooten, 305 Ga. App. 682, 700 S.E.2d 678 (2010).

O.C.G.A. § 51-1-6 is designed to provide a cause of action for the breach of a legal duty when one does not otherwise exist as indicated by the plain language of the statute that it operates when "no cause of action is given in express terms." Cruet v. Emory Univ., 85 F. Supp. 2d 1353 (N.D. Ga. 2000).

Failure to specify the law or regulation. — Cable company employee who was injured when a guy wire owned by the cable company came loose and struck the employee while the employee was working on a utility pole owned by a power company failed to establish negligence per se under O.C.G.A. § 51-1-6 because the employee did not specify any statute, ordinance, or regulation that the power company violated. Schaff v. Snapping Shoals Elec. Mbrshp. Corp., 330 Ga. App. 161, 767 S.E.2d 807 (2014).

Right to recover even nominal damages. — When there is fraud or breach of a legal or private duty accompanied by any damage, the law gives a right to recover damages, even only nominal damages, as compensation. Holmes v. Drucker, 201 Ga. App. 687, 411 S.E.2d 728 (1991).

Commission or omission of act by the defendant, and damage to the plaintiff in consequence thereof, must unite to give one good cause of action. No one of these facts by itself is a cause of action against the defendant. Pinholster v. McGinnis, 155 Ga. App. 589, 271 S.E.2d 722 (1980).

Liability in every tort case rests upon breach of duty and resultant injury or damage to one to whom duty is owed. Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958).

Regardless of age or capacity of injured person, if there is no breach of legal duty on the part of the defendant toward such person, there can be no legal liability. Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 92 S.E.2d 720 (1956).

Duty imposed by law means either duty imposed by a valid statutory enactment of the legislature or duty imposed by recognized common-law principle declared in the reported decisions of the appellate courts of the state or jurisdiction involved. Mauldin v. Sheffer, 113 Ga. App. 874, 150 S.E.2d 150 (1966).

Occupational Safety and Health Act regulations by definition constitute a duty under the law and breach of those regulations is a violation of law. The regulations should be admissible not merely as "standards" of performance, but as evidence of legal duty, violation of which may give a cause of action under O.C.G.A. § 51-1-6, though, in this case, the trial court ruled judiciously in excluding evidence of OSHA regulations that was cumulative to the ordinary care evidence that was allowed. Cardin v. Telfair Acres of Lowndes County, Inc., 195 Ga. App. 449, 393 S.E.2d 731 (1990).

OSHA regulations — Occupational Safety and Health Administration (OSHA) regulations are admissible not merely as "standards" of performance, but as evidence of legal duty, violation of which may give a cause of action under O.C.G.A. § 51-1-6; however, applicability in a particular case and relevancy, depend

on the relationship of the parties. Dupree v. Keller Indus., Inc., 199 Ga. App. 138, 404 S.E.2d 291, cert. denied, 199 Ga. App. 905, 404 S.E.2d 291 (1991).

Occupational Safety and Health Administration (OSHA) regulates obligations between an employer and its employees; thus, evidence of a violation of an OSHA regulation by a contractor hired by the city water and sewer department was not pertinent in a negligence action against the contractor by a city employee. Brantley v. Custom Sprinkler Sys., 218 Ga. App. 431, 461 S.E.2d 592 (1995).

OSHA standards as evidence of duty. — OSHA standards for the construction of stairs provided in 29 C.F.R. § 1910.24(f) applied to an office building in which an employee fell. The trial court erred in refusing to charge the jury on these standards because the evidence presented issues for the jury to resolve regarding whether the employer violated the stair safety standards, which were admissible not merely as standards of performance but as evidence of legal duty. Smith v. CSX Transp., Inc., 306 Ga. App. 897, 703 S.E.2d 671 (2010), aff'd 289 Ga. 903, 717 S.E.2d 209 (2011).

No breach of duty found following fire at chicken processing plant. — In a product's liability and negligence action brought following a fire at a chicken processing plant, the trial court erred by denying summary judgment motions by a manufacturer and an insulation services company with regard to the owners' negligence per se claims because the owners failed to establish that a breach of any duty in the Georgia Life Safety Code was the proximate cause of the injury. R & R Insulation Servs. v. Royal Indem. Co., 307 Ga. App. 419, 705 S.E.2d 223 (2010).

Violated statute should have been intended to benefit plaintiff. — This Code section provides a cause of action for violations of statutes that are intended to benefit the party bringing the suit. Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), cert. denied, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130 (1991).

Plaintiff, staff member at defendant's school, was not within class of protected persons contemplated by the child abuse reporting statute (§ 19-7-5), and his claim for damages under this Code section could not survive summary judgment. Odem v. Pace Academy, 235 Ga. App. 648, 510 S.E.2d 326 (1998).

Same duty may arise from different basic obligations imposed by law upon several defendants. Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958).

In determining whether a rule illustrates duty of defendant, its scope will not, by implication, be extended beyond its clear and obvious meaning. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933).

It is never to be presumed that a person will commit a wrongful act or will act negligently or improperly. Porter v. Patterson, 107 Ga. App. 64, 129 S.E.2d 70 (1962).

Performance of duty presumed unless contrary shown. — Negligence or breach of duty is not to be anticipated, but until the contrary is shown it is to be presumed that every man obeys the mandates of the law and performs all of the person's social and official duties. Porter v. Patterson, 107 Ga. App. 64, 129 S.E.2d 70 (1962).

Present action based on future promise good when false representations made at time of promise. — When the petition discloses a promise of something to occur in the future the element of futurity is not fatal to a cause of action when in connection with a promise a false representation has been made. Bishop v. Greene, 62 Ga. App. 126, 8 S.E.2d 448 (1940).

Action may arise from harmful effects though act itself is lawful. — Though an act may be in itself lawful, yet, if in its effects or consequences, it is productive of any injury to another, it subjects the party to this action. Carpenter v. Williams, 41 Ga. App. 685, 154 S.E. 298 (1930).

Liability does not depend upon anticipating particular injury or that a particular person would be injured. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

No duty to warn when knowledge among parties nearly equal. — When

General Consideration (Cont'd)

knowledge among the parties is nearly, if not precisely, equal, and a warning from the defendants would have been met with the response "I know," there arises no duty to warn of a potential danger. McNish v. Gilbert, 184 Ga. App. 234, 361 S.E.2d 231 (1987).

Before negligence can be actionable it must be proximate cause of or part of proximate cause of injury received. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

Proximate cause is not last act or cause or nearest act to the injury; it is negligent act that actively aids in producing the injury as direct and existing cause. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

Acts of third party may break causal link. — General rule is that when there has intervened between the defendant's negligence and the injury an independent, illegal act of a third person producing the injury, and without which the injury would not have occurred, such independent criminal act should be treated as the proximate cause, insulating and excluding the negligence of the defendant. The rule is inapplicable if the original wrongdoer had reasonable grounds for apprehending that such criminal act would be committed. Decker v. Gibson Prods. Co., 505 F. Supp. 34 (M.D. Ga. 1980), rev'd on other grounds, 679 F.2d 212 (11th Cir. 1982).

Causal connection between original negligence and injury not broken by intervening act of third person when same reasonably foreseen by original wrongdoer. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

Proof that the plaintiff's impaired condition was not the proximate result of the defendant's negligence demands a verdict in favor of the defendant. Pinholster v. McGinnis, 155 Ga. App. 589, 271 S.E.2d 722 (1980).

Action based upon negligence is not cognizable under Georgia law when the alleged damages are economic. A.J. Kellos Constr. Co. v. Balboa Ins. Co., 495 F. Supp. 408 (S.D. Ga. 1980).

Violation of O.C.G.A. § 9-2-5(a), prohibiting prosecution of two simultaneous actions for the same cause against the same party, would not give rise to a cause of action for damages, since the statute does not impose upon the plaintiffs a substantive legal duty but rather is simply a procedural matter. Hose v. Jason Property Mgt. Co., 178 Ga. App. 661, 344 S.E.2d 483 (1986).

No damages for breach of oral contract for sale of realty. — Damages for the failure of a party to carry out the purported terms of an oral contract for the sale of realty were not authorized. Zappa v. Basden, 188 Ga. App. 472, 373 S.E.2d 246, cert. denied, 188 Ga. App. 913, 373 S.E.2d 246 (1988).

Duty to follow bylaws. — Hospital has a legal duty to follow the hospital's existing bylaws and any alleged breach of that duty can be asserted as a cause of action under O.C.G.A. § 51-1-6. Rowell v. Phoebe Putney Mem. Hosp., Inc., 338 Ga. App. 603, 791 S.E.2d 183 (2016).

Making of false statements. — No private cause of action lies for false statements made in judicial proceedings. Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), cert. denied, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130 (1991).

Code Section 16-10-20, which prohibits the making of false statements in any matter within the jurisdiction of any department or agency of state government or the government of any political subdivision of the state, was enacted for the protection of the state itself — not private parties, and it does not create a civil cause of action. Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), cert. denied, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130 (1991).

Judgment in favor of a bank customer whose identity was stolen by a bank employee was reversed because the Georgia Court of Appeals erred in holding that a violation of an alleged duty imposed by

the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq., gave rise to a cause of action for negligence under O.C.G.A. § 51-1-6 because no duty was imposed against a bank under § 6801(a) to protect a customer's confidential information. Wells Fargo Bank, N.A. v. Jenkins, 293 Ga. 162, 744 S.E.2d 686 (2013).

Summary judgment properly denied as to proximate cause. — Summary judgment for town and railway was properly denied as to proximate cause as neither eyewitness of a train-truck accident had a continuous, direct view of the area in which the decedent allegedly did not stop the truck. Town of Register v. Fortner, 274 Ga. App. 586, 618 S.E.2d 26 (2005).

Cited in Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937); Donaldson v. Great Atl. & Pac. Tea Co., 186 Ga. 870, 199 S.E. 213 (1938); Sikes v. Foster, 74 Ga. App. 350, 39 S.E.2d 585 (1946); Hamby v. Edmunds Motor Co., 80 Ga. App. 209, 55 S.E.2d 743 (1949); Dale Elec. Co. v. Thurston, 82 Ga. App. 516, 61 S.E.2d 584 (1950); Studdard v. Evans, 108 Ga. App. 819, 135 S.E.2d 60 (1964); Giacalone v. Tuggle, 141 Ga. App. 123, 232 S.E.2d 589 (1977); Oden & Sims Used Cars, Inc. v. Thurman, 250 Ga. App. 709, 301 S.E.2d 673 (1983); Hodges v. Tomberlin, 170 Ga. App. 842, 319 S.E.2d 11 (1984); Sofet v. Roberts, 185 Ga. App. 451, 364 S.E.2d 595 (1987); Marcoux v. Fields, 195 Ga. App. 573, 394 S.E.2d 361 (1990); Jairath v. Dyer, 154 F.3d 1280 (11th Cir. 1998); Sakas v. Settle Down Enters., Inc., 90 F. Supp. 2d 1267 (N.D. Ga. 2000); Project Control Servs., Inc. v. Reynolds, 247 Ga. App. 889, 545 S.E.2d 593 (2001); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006); Ellison v. Southstar Energy Servs., LLC, 298 Ga. App. 170, 679 S.E.2d 750 (2009); Baker v. Harcon, Inc., 303 Ga. App. 749, 694 S.E.2d 673 (2010); Pulte Home Corp. v. Simerly, 322 Ga. App. 699, 746 S.E.2d 173 (2013); Gobran Auto Sales, Inc. v. Bell, 335 Ga. App. 873, 783 S.E.2d 389 (2016).

Applicability to Specific Cases

1. Duty of Care Imposed

Common carrier's duty to inspect. — While a carrier of passengers is not bound to keep up a continuous inspection, or to know at every moment the condition of every part of its cars, yet inspection of the cars should be adequate and sufficient, and should be made with such frequency as the liability to impairment reasonably requires and as is practically possible consistent with the conduct of its business. Leslie v. Georgia Power Co., 47 Ga. App. 723, 171 S.E. 395 (1933).

Common carrier's duty to transport passengers. — It is the legal duty of a common carrier to receive and transport a person who has purchased a ticket over its lines, to the destination called for by the ticket, and should a carrier, in violation of the duty so imposed upon it, illegally expel a passenger from its bus and wrongfully refuse to carry the passenger to the passenger's destination, the carrier would be liable to the passenger for damages proximately resulting therefrom. Daigrepont v. Teche Greyhound Lines, 189 Ga. 601, 7 S.E.2d 174 (1940).

Corporation's duty to public. — Corporation is the creature of the law, and the rights and privileges conferred upon it by the state, in theory at least, were granted not only for its own private benefit, but also for the benefit and good of the public; and in accepting them it impliedly, at least, agreed to carry out the purposes or objects of its creation, and assumed a duty or obligation towards the public which it will, under the law, be required to discharge. Lawrence v. Atlanta Gas Light Co., 49 Ga. App. 444, 176 S.E. 75 (1934).

Defendant's duty to assist person whom defendant's negligence endangers. — When the petitioner was placed in an extremely dangerous situation, from which the petitioner could not extricate oneself, by reason of the negligence of the defendant, the defendant owed the petitioner the duty of exercising ordinary care in extricating the petitioner from the wreckage of the petitioner's automobile. Western & A.R.R. v. Groover, 42 Ga. App. 200, 155 S.E. 500 (1930).

Present lessee owes no duty to prospective lessee. — Lessee in possession who willfully violates the lessee's duty to deliver the premises to the landlord at the end of the lessee's term is not liable in tort to a lessee whose possession was to com-

Applicability to Specific Cases (Cont'd)
1. Duty of Care Imposed (Cont'd)

mence at that time. Kokomo Rubber Co. v. Anderson, 33 Ga. App. 241, 125 S.E. 783 (1924).

Manufacturer who bottles beverage for public consumption is under legal duty not to negligently allow foreign substance which is injurious to the human stomach, such as bits of broken glass, to be present in a bottle of the beverage when the bottle is placed on sale. Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S.E. 152, 110 Am. St. R. 157, 1 L.R.A. (n.s.) 1178 (1905); Beckham v. Jacobs' Pharmacy Co., 25 Ga. App. 592, 103 S.E. 857 (1920).

Seller's duty to buyer upon sale of potentially harmful goods. — In connection with a sale of goods having a potentiality of doing harm by normal, intended, and nonnegligent use, when there is no fiduciary relationship between the seller and the purchaser, and no fraud, it is the duty of the seller to warn the purchaser at the time of sale and delivery, and a breach occurs at this time if there is a failure to warn. Everhart v. Rich's, Inc., 229 Ga. 798, 194 S.E.2d 425 (1972), answer conformed to, 128 Ga. App. 319, 196 S.E.2d 475 (1973).

Servant's duty to third parties. — Defendant, merely because the defendant was working as a section foreman on the railroad, owed no individual duty to the public in the matter of keeping the right of way free from ignitable growth. The defendant did owe a duty to the defendant's master to properly perform the defendant's duties, and if there was embraced in such duties the obligation to keep the right of way free from ignitable growth there would be a liability on the defendant's part to the defendant's master for failure to perform the defendant's agreement. Knight v. Atlantic Coast Line R.R., 4 F. Supp. 713 (S.D. Ga. 1933), aff'd, 73 F.2d 76 (5th Cir. 1934).

Hospital's duty to follow bylaws. — Both public and private hospitals have a legal duty not to abridge or refuse to follow existing bylaws concerning staff privileges; radiologist could assert a cause of action against a hospital for failure to follow existing bylaws with regard to termination of the radiologist staff privileges. St. Mary's Hosp. v. Radiology Professional Corp., 205 Ga. App. 121, 421 S.E.2d 731, cert. denied, 205 Ga. App. 901, 421 S.E.2d 731 (1992).

Summary judgment was granted in favor of a hospital in a doctor's O.C.G.A. § 51-1-6 suit alleging that the hospital breached a legal duty to the doctor because the hospital followed its by-laws in the investigation of the doctor's application for reappointment and the doctor's surgical complications rate. Lee v. Hosp. Auth. of Colquitt County, 353 F. Supp. 2d 1255 (M.D. Ga. 2004).

Doctor was not entitled to recover damages under O.C.G.A. § 51-1-6 because the doctor signed a contract that clearly stated that, at its expiration, the doctor agreed to the removal of the hospital privileges and waived the rights to contest the removal under the hospital's bylaws; the exclusivity contract was not void as against public policy or an illegal restraint of trade because the law allowed the hospital to enforce contracts in order to properly administer the hospital. Whitaker v. Houston County Hosp. Auth., 272 Ga. App. 870, 613 S.E.2d 664 (2005).

Private cause of action recognized for false swearing. — Georgia recognizes a private cause of action under O.C.G.A. § 51-1-6 for a claim of injury due to false swearing. Wilson v. State, 317 Ga. App. 171, 730 S.E.2d 500 (2012).

No duty of care created from Veterans Health Administration handbooks. — Government's motion to dismiss was properly granted in a case brought under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., in which: (1) a podiatrist served a residency program at a Veterans Administration (VA) hospital that lasted two years; (2) then passed a certifying examination, but was denied certification because the second year of residency at the VA hospital had not been accredited by the Council on Podiatric Medical Education; (3) the podiatrist relied on Georgia's negligence per se statute, O.C.G.A. § 51-1-6, to establish the duty element of the podiatrist's negligence; and (4) the podiatrist contended that a Veter-

ans Health Administration Handbook 1122.1 established a legal duty requiring the podiatric residency program director to obtain certification of the VA hospital's podiatric residency program and that the director negligently failed to do so; therefore, they were not the product of procedures which Congress prescribed as necessary prerequisites to giving regulations the binding effect of law. Morris v. United States, No. 1:06-CV-2535-GGB, 2007 U.S. Dist. LEXIS 26708 (N.D. Ga. Apr. 11, 2007).

Duty of officer to assist person injured by drunk driver. — Law enforcement officer owes a tort duty to a member of the general public injured by a drunk driver when the officer allows the noticeably intoxicated driver to continue operating the motor vehicle. Landis v. Rockdale County, 206 Ga. App. 876, 427 S.E.2d 286 (1993).

Injection requested by patient. — Patient did not present any evidence that the dentist had violated any statute, regulation, or ordinance regarding an injection that the dentist provided to the patient, at the patient's request, to numb pain; thus, the trial court did not err in granting partial summary judgment to the dentist, at least regarding the patient's negligence per se claim. Pope v. Davis, 261 Ga. App. 308, 582 S.E.2d 460 (2003).

Builder and architect's duty. — Motion to dismiss a disabled university student's claim against a builder and architect for breach of a legal duty was granted since the only involvement that both the builder and architect had was in the design or construction of the apartment in which the student resided. Barker v. Emory Univ., 2003 U.S. Dist. LEXIS 10976 (N.D. Ga. June 24, 2003).

Code violations capable of having causal connection to injuries. — Trial court erred in granting an adult entertainment club's motion for summary judgment in a dancer's action to recover damages for injuries she sustained when a customer of the club assaulted her in a private room because the dancer fell within the class of persons the DeKalb County, Ga., Code, Art. XII, § 15-402 was intended to protect from exploitation and harm, and the club's code violations were capable of having a causal connection to the dancer's injuries and damage; that was sufficient to constitute negligence per se. Womack v. Oasis Goodtime Emporium I, Inc., 307 Ga. App. 323, 705 S.E.2d 199 (2010).

Bank did not owe duty to payee of check who never had possession of check. — Bank's alleged actions in paying a check over a forged endorsement, depositing the funds in new accounts, and failing to observe reasonable commercial standards, were not violations of any legal right of, or duty owed to, the payee of the check who had never received delivery of the check, and the payee suffered no damages from these actions. Thus, the actions did not give rise to a tort claim under O.C.G.A. § 51-1-1, O.C.G.A. § 51-1-6, or O.C.G.A. § 51-1-8. Jenkins v. Wachovia Bank, Nat'l Ass'n, 309 Ga. App. 562, 711 S.E.2d 80 (2011).

2. Breach of Legal Duty

Failure to insure property. — Recovery has been allowed in this state for failure to keep property insured when the defendant is shown to be plaintiff's agent. Sutker v. Pennsylvania Ins. Co., 115 Ga. App. 648, 155 S.E.2d 694 (1967).

Absent actionable fraud and deceit, it appears settled that there is no liability in tort for failure of the defendant insurance agent or broker to procure or have renewed a policy of insurance when the defendant is the insurance company's agent and not the plaintiff's agent. Sutker v. Pennsylvania Ins. Co., 115 Ga. App. 648, 155 S.E.2d 694 (1967).

Failure to comply with railroad traffic signal zoning ordinance. — An auction company's failure to comply with an ordinance requiring the company to pay for traffic signals at a railroad crossing on the road leading to the company's property gave rise to a claim of negligence per se under O.C.G.A. § 51-1-6; the traffic-related zoning conditions were meant to protect those who were required to negotiate the railroad crossing, and the accident at issue, when a car passing through the crossing was struck by a train, was precisely the type of danger the conditions were intended to guard

Applicability to Specific Cases (Cont'd)
2. Breach of Legal Duty (Cont'd)

against. Combs v. Atlanta Auto Auction, Inc., 287 Ga. App. 9, 650 S.E.2d 709 (2007), cert. denied, 2008 Ga. LEXIS 156 (Ga. 2008).

Hotel owner's failure to inspect and maintain. — When evidence shows that a large number of occupants of a hotel building were injured as a result of a fire therein, and that the hotel was maintained in a condition which was violative of an applicable city ordinance which required various safety precautions against the hazard of fire, the owner, who acquired the hotel while it was under a written lease to others for a number of years, which lease gave to the lessees the exclusive possession except to authorize and require the owner to enter and make repairs required by law, would be guilty of negligence per se and liable for the injuries resulting from such negligence. Irwin v. Willis, 202 Ga. 463, 43 S.E.2d 691 (1947).

Failure to obtain certificate of occupancy was negligence per se as to employee. — Failure of employer to obtain a certificate of occupancy (COO) before opening a facility in which an employee worked was negligence per se as to the employee but not as to the employee's children, as the law requiring a COO was designed to protect those working or otherwise conducting business in the building; furthermore, there was no causal connection between the failure to obtain a COO and an accident when the car in which the children were riding was struck by a train as the car traveled down the road leading to the facility. Combs v. Atlanta Auto Auction, Inc., 287 Ga. App. 9, 650 S.E.2d 709 (2007), cert. denied, 2008 Ga. LEXIS 156 (Ga. 2008).

Insurer's negligent inspection of property. — Reliance by either the employee or the employer on insurance companies' inspections is sufficient to give rise to a cause of action in tort for negligent inspection by the insurance companies. Huggins v. Aetna Cas. & Sur. Co., 245 Ga. 248, 264 S.E.2d 191 (1980).

Service animal. — Innkeepers breached the legal duties imposed by O.C.G.A. §§ 30-4-2 and 43-21-3 when the innkeepers prohibited a vision impaired individual and the individual's service dog from staying at their hotel. Accordingly, the individual's proposed amended complaint alleged all the elements necessary for recovery under the theory of negligence per se and O.C.G.A. § 51-1-6. Amick v. BM & KM, Inc., 275 F. Supp. 2d 1378 (N.D. Ga. 2003).

Invasion of privacy. — Violation of the right of privacy is a direct invasion of a legal right of the individual. It is a tort, and it is not necessary that special damages should have accrued from its violation in order to entitle the aggrieved party to recover. McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939).

When there was no agent or servant of the defendant actually present in the hospital room during the time that it is alleged that the plaintiff was holding intimate, personal, and private conversations, but it is admitted by the defendant that it caused a receiving set to be installed in the plaintiff's room, and what was said and done by the plaintiff was listened to and recorded by the defendant's agent, at its direction, by means of the receiving set and earphones, this conduct was as effectively an intrusion upon or an invasion of the privacy of the plaintiff as if the agent had actually been in the room. McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939).

In the offense of the invasion of the privacy of another, the gravamen or essence of the action is not publication or commercialization of the information obtained. There is nothing in the decided cases of this state, which indicates any such limitation or qualification of the right, and a person's privacy is invaded even though the information obtained be restricted to the immediate transgressor. Publication or commercialization may aggravate, but the individual's right to privacy is invaded and violated nevertheless in the original act of intrusion. McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939).

Malicious injury to business of another will give right of action to the

injured party. Southern Ry. v. Chambers, 126 Ga. 404, 55 S.E. 37, 7 L.R.A. (n.s.) 926 (1906).

This state recognizes a cause of action when one maliciously and wrongfully, and with intent to injure, harms the business of another. The essential thing is the intent to cause the result. If the actor does not have this intent, the actor's conduct does not subject the actor to liability under this rule even if it has the unintended effect of deterring the third person from dealing with the other. Bodge v. Salesworld, Inc., 154 Ga. App. 65, 267 S.E.2d 505 (1980).

Manufacturer's liability. — Manufacturer or someone not in privity with the consumer or user of the manufacturer's product would incur liability if damage is proximately caused by the manufacturer's willful or wrongful acts or omissions. Koppers Co. v. Parks, 120 Ga. App. 551, 171 S.E.2d 639 (1969).

Consumer or user of a product may recover if through a failure to exercise ordinary care on the part of a manufacturer or someone not in privity with the user the product is imperfect, defective, or not as represented when placed on the market, and damage to the consumer or user is proximately caused thereby. Koppers Co. v. Parks, 120 Ga. App. 551, 171 S.E.2d 639 (1969).

Municipal liability for injuries from defect in highway. — Defective structure in a highway which causes injury to a person renders the municipality liable for the damages incurred. City of Greensboro v. McGibbony, 93 Ga. 672, 20 S.E. 37 (1894).

Insurance counselor's duty to be licensed. — Summary judgment was properly entered for a consultant and a consulting firm on a bidding insurer's claim under O.C.G.A. § 51-1-6 after all of the bids for a county contract were rejected because the consultant lacked a license under O.C.G.A. §§ 33-23-1.1 and 33-23-4 as the statutes requiring insurance counselors to be licensed and mandating that licensed individuals meet certain qualifications were designed to protect the insurance counselor's clients and not to protect or benefit providers of insurance; the generic statement that O.C.G.A. § 33-23-5(a) was "for the protection of the people of (Georgia)" did not expand the intent of the statute requiring licensure for counselors to benefit businesses that provided insurance. Benefit Support, Inc. v. Hall County, 281 Ga. App. 825, 637 S.E.2d 763 (2006), cert. denied, No. S07C0306, 2007 Ga. LEXIS 214 (Ga. 2007).

No duty imposed by traffic control device regulation. — Injured motorist failed to prove that highway contractors who built a highway on-ramp were entitled to partial summary judgment as to liability on the motorist's negligence claim because the motorist failed to prove that regulations governing traffic control devices were mandatory and had the force of law, that the motorist was in a protected class, that the harm the motorist suffered was the type of harm the regulations were intended to guard against, and that the alleged negligence per se proximately caused the motorist's injuries. Hubbard v. DOT, 256 Ga. App. 342, 568 S.E.2d 559 (2002).

No civil duty imposed by criminal statute. — Injured party was not able to recover under O.C.G.A. § 51-1-6 for the declarant's alleged violation of the criminal statutes, O.C.G.A. § 16-10-26, prohibiting giving a false report of a crime, and O.C.G.A. § 16-10-24, prohibiting obstructing or hindering the police, as these statutes did not provide for a civil cause of action; furthermore, the legislature had provided statutory civil remedies in the form of false arrest under O.C.G.A. § 51-7-1 and malicious prosecution under O.C.G.A. § 51-7-40. Jastram v. Williams, 276 Ga. App. 475, 623 S.E.2d 686 (2005).

Refusal to furnish public service. — When a gas company operates a franchise, and exercises rights and privileges under the laws of the state, the company is bound to furnish gas to all who apply therefor within the company's territory and agree to the company's reasonable rules and regulations, and that a refusal to do so is a tort. Lawrence v. Atlanta Gas Light Co., 49 Ga. App. 444, 176 S.E. 75 (1934).

Servant, as wrongdoer, is liable individually for tort committed within scope of the master's business. Giles v.

Applicability to Specific Cases (Cont'd)
2. Breach of Legal Duty (Cont'd)

Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

Telegraph company's failure to deliver. — Loss of contract of employment resulting from failure of telegraph company to send message of acceptance gives rise to an action. Baldwin v. Western Union Tel. Co., 93 Ga. 692, 21 S.E. 212 (1894).

Third party beneficiaries. — One who undertakes, gratuitously or for consideration, to render services to another which one should recognize as necessary for the protection of a third person or one's things, is subject to liability to the third person for physical harm resulting from one's failure to exercise reasonable care to protect one's undertaking if (a) one's failure to exercise reasonable care increases the risk of such harm, or (b) one has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking. Huggins v. Aetna Cas. & Sur. Co., 245 Ga. 248, 264 S.E.2d 191 (1980).

Willful violation of law. — Person may not willfully and purposely engage in a violation of the law and then recover damages for injury which might ensue in an attempt by lawful authorities to prevent the person from continuing such a course, when it is not claimed that the person could have been made to desist except by the exercise of force, and it is not alleged that the force used was greater than was necessary to accomplish its object. Kent v. Southern Ry., 52 Ga. App. 731, 184 S.E. 638 (1936).

Wrongful discharge of servant. — Action by a servant for a wrongful discharge from the servant's employment is in contract, and an action in tort will not lie unless the discharge was accompanied by wrongful acts amounting to a trespass. American Oil Co. v. Roper, 64 Ga. App. 743, 14 S.E.2d 145 (1941); Rhine v. Sanders, 100 Ga. App. 68, 110 S.E.2d 128 (1959).

O.C.G.A. § 51-1-6 did not give an employee a cause of action on the basis that the employer dismissed the employee because of the employee's "first offender" conviction in violation of O.C.G.A. § 42-8-63. Mattox v. Yellow Freight Sys., Inc., 243 Ga. App. 894, 534 S.E.2d 561 (2000).

Age discrimination. — At-will employee may not sue in tort under O.C.G.A. § 51-1-6 or O.C.G.A. § 51-1-8 for wrongful discharge based upon age discrimination. Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 528 S.E.2d 238 (2000).

Provisions of O.C.G.A. §§ 51-1-6 and 51-1-8 do not create a civil action for age discrimination for an employee-at-will based upon a violation of either O.C.G.A. § 34-1-2 or the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. Reilly v. Alcan Aluminum Corp., 221 F.3d 1170 (11th Cir. 2000).

Alcohol consumer cannot recover from provider for injuries to third person. — Consumer of alcohol cannot recover damages from the provider of the alcohol for injuries caused by the consumer to a third person. Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985).

Person injured by intoxicated consumer can recover. — Person who encourages a noticeably intoxicated person under the legal drinking age to become further intoxicated and who furnishes to such intoxicated person more alcohol, knowing that such person will soon be driving a vehicle, is liable in tort to a person injured by the negligence of such intoxicated driver. Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985).

In a negligence action, the trial court did not err in charging the jury that one who provides alcoholic beverages to a noticeably intoxicated person, knowing that the person will soon be driving a vehicle, may be liable for a third person's injuries caused by the negligence of the intoxicated driver, if the alcohol was a proximate cause of the injuries. Studebaker's of Savannah, Inc. v. Tibbs, 195 Ga. App. 142, 392 S.E.2d 908 (1990).

Wrongful death action of drunk consumer's widow barred. — Widow's wrongful death action against a bar that served alcohol to her husband for 8 hours, and who then died in a one-vehicle crash,

was barred by the Dram Shop Act, O.C.G.A. § 51-1-40, which barred claims by consumers of alcohol; O.C.G.A. § 51-1-6 did not provide a basis for such a wrongful death action. Dion v. Y.S.G. Enters., 296 Ga. 185, 766 S.E.2d 48 (2014).

Underaged drinking. — Evidence was insufficient to show that any breach of duty by a bowling alley relating to alcohol was the proximate cause of the death of a passenger in a car driven by a minor who had been served beer at the bowling alley, since there was no evidence that any employee had knowledge that the minor was intoxicated or would be driving an automobile. Kalpa v. Perczak, 658 F. Supp. 235 (N.D. Ga. 1987).

O.C.G.A. § 51-1-6 does not establish a cause of action based on the violation of O.C.G.A. § 3-3-23, the underage drinking statute. Lumpkin v. Mellow Mushroom, 256 Ga. App. 83, 567 S.E.2d 728 (2002).

Injury to trade name. — If the right to protection of a trade name exists, the injured party may seek both injunctive relief and damages. Diedrich v. Miller & Meier & Assocs., 254 Ga. 734, 334 S.E.2d 308 (1985).

False swearing in execution of affidavit. — Plaintiff contractor's allegation that the defendant developer knowingly swore falsely in executing affidavits stating that no improvements or repairs had been made to a newly-constructed home, thereby injuring the plaintiff, set forth a cause of action for breach of the legal duty to swear truthfully. Peters v. Imperial Cabinet Co., 189 Ga. App. 337, 375 S.E.2d 635 (1988).

No private civil cause of action for notary's breach. — Bank did not have a viable civil cause of action under the notary statute against an attorney who allegedly falsely attested that guarantee agreements were signed in the attorney's presence as even when combined with the general statutory principles of tort law, notaries had a duty to the public that did not support an actionable claim. Branch Banking & Trust Co. v. Morrisroe, 323 Ga. App. 248, 746 S.E.2d 859 (2013).

Insurer's failure to provide coverage information. — Insurer's breach of O.C.G.A. § 33-3-28, requiring insurers to provide coverage information, did not create a cause of action and the right to seek damages under O.C.G.A. §§ 51-1-6 and 51-1-8. Parris v. State Farm Mut. Auto. Ins. Co., 229 Ga. App. 522, 494 S.E.2d 244 (1997).

Failure to prove any out-of-pocket economic damages. — In a dispute between a franchisor of daycare businesses and its franchisee, the trial court erred by denying the franchisor's motion for directed verdict on the franchisee's claims for negligent misrepresentation and negligence under O.C.G.A. § 51-1-6 because the franchisee failed to prove that the franchisee suffered any out-of-pocket economic damages as a result of the alleged misrepresentations, which was an essential element to such claims. Legacy Academy, Inc. v. Doles-Smith Enters., 337 Ga. App. 575, 789 S.E.2d 194 (2016).

Pleading and Practice

Sufficiency of complaint. — Petition alleging that the defendant company and named agents and servants thereof, falsely and fraudulently impersonated the plaintiff, invaded the plaintiff's right of privacy, the plaintiff's right to the exclusive use of the plaintiff's own name, represented the plaintiff as betraying confidence and giving secret and confidential prices to a competitor of those who gave the prices, caused the plaintiff's time and that of the plaintiff's employees to be consumed, subjected the plaintiff to embarrassment and chagrin, and caused the plaintiff to be held in contempt and ridicule by the plaintiff's business associates, all for the express purpose of advancing the interest of the company set out a cause of action. Goodyear Tire & Rubber Co. v. Vandergriff, 52 Ga. App. 662, 184 S.E. 452 (1936).

When the injuries alleged appear to have resulted entirely from fright or shock, unaccompanied by physical contact, in order to set forth a cause of action it is necessary to show either that the injuries were the natural and proximate result of the fright or shock, that this result was or should have been foreseen with reasonable certainty by the defendant, and that the act was one of such gross carelessness, coupled with a knowledge of the probably physical results as

Pleading and Practice (Cont'd)

amount to willful disregard of the consequences; or that the fright was brought about by the deliberate and malicious intention on the part of the defendant to injure the plaintiff. Towler v. Jackson, 111 Ga. App. 8, 140 S.E.2d 295 (1965).

In a suit challenging a court's electronic filing fee system, the trial court did not err when the court granted the motion to dismiss the plaintiff's claims because none of the statutes or rules cited by the plaintiff provided a private cause of action for damages arising from any violation of the respective statute or rule. Best Jewelry Mfg. Co. v. Reed Elsevier Inc., 334 Ga. App. 826, 780 S.E.2d 689 (2015), cert. denied, 2016 Ga. LEXIS 286 (Ga. 2016).

Amendment of complaint. — Original petition, when measured by the provisions of the principles of law announced in former Code 1933, §§ 105-101, 105-103, and 105-106 (see now O.C.G.A. §§ 51-1-1, 51-1-6, and 51-1-11), set out a plaintiff and a defendant and a specific cause of complaint sufficiently to be amendable, since if the petition was defective in any wise, it was only in that it omitted to allege sufficiently facts essential to raise the duty or obligation in the cause of action, and the trial court erred in holding that there was not enough in the original petition to amend by. Cannon v. Hood Constr. Co., 91 Ga. App. 20, 84 S.E.2d 604 (1954).

Construction with federal law. — Because an express cause of action already existed as part of a remedial scheme set out by the U.S. Congress under the Vocational Rehabilitation Act (VRA), 29 U.S.C. § 794 et seq., and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., the plaintiff may not recover O.C.G.A. § 51-1-6 for any alleged violations of subject legal duties. Cruet v. Emory Univ., 85 F. Supp. 2d 1353 (N.D. Ga. 2000).

Because the breach of legal duty complained of by a title processor against the state vehicle title processing agency employees was under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., the ADA provided a remedial scheme and thus the processor's claim under O.C.G.A. § 51-1-6 was duplicative; O.C.G.A. § 51-1-6 allowed an individual to assert a tort claim for the violation of a legal duty when a cause of action did not otherwise exist. Higdon v. Jackson, 393 F.3d 1211 (11th Cir. 2004).

Removal to federal court appropriate. — Removal to a federal court of an action brought under O.C.G.A. § 51-1-6 was appropriate when the plaintiff's claim ultimately hinged on the interpretation of federal law under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. Jairath v. Dyer, 961 F. Supp. 277 (N.D. Ga. 1996).

Pleading violation of statute as negligence per se. — Plaintiff may rely upon an act or omission as constituting negligence as a matter of fact under the circumstances, or upon the violation of a statute as amounting to negligence per se or as a matter of law; furthermore, the facts may be so pled as to show negligence of both classes in the same action. Criswell Baking Co. v. Milligan, 77 Ga. App. 861, 50 S.E.2d 136 (1948).

O.C.G.A. § 33-24-44 governed the cancellation of insurance policies but did not govern the termination of insurance agents which may have had the ancillary effect of terminating an insurance policy, and the court could not reasonably conclude that the retroactive termination of the financial planner was the harm § 33-24-44 was intended to guard against. Therefore, the financial planner did not allege a viable negligence per se claim and the negligence claims against the insurance company were required to be dismissed. Rosen v. Protective Life Ins. Co., No. 1:09-cv-03620-WSD, 2010 U.S. Dist. LEXIS 50392 (N.D. Ga. May 20, 2010).

Notice requirement. — Denial of summary judgment based on any type of tortious interference with a contractual right to exercise an option to purchase was in error since both the original and the amended complaint revealed a lack of compliance with the notice requirement regarding any alleged tortious interference of contract. Bowling v. Gober, 206 Ga. App. 38, 424 S.E.2d 335 (1992).

Failure to prove out-of-pocket economic damages. — Because franchisees failed to prove out-of-pocket economic

damages as a result of alleged misrepresentations in offering materials regarding the franchise's projected cash flow, the franchisor's motions for directed verdict and j.n.o.v. on claims for negligent misrepresentation and negligence under O.C.G.A. § 51-1-6 should have been granted. Legacy Academy, Inc. v. Doles-Smith Enters., 337 Ga. App. 575, 789 S.E.2d 194 (2016).

Summary judgment erroneously denied. — In a personal injury action alleging violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., a trial court erred by denying summary judgment to a county director of public works because the consumer who tripped and fell was not disabled and, therefore, was not within the class of persons protected by the ADA. Newman v. Johnson, 319 Ga. App. 307, 733 S.E.2d 520 (2012).

Summary judgment properly granted to hospital. — Trial court properly granted summary judgment in favor of the hospital on an anesthesiologist's claim for breach of the hospital's bylaws because the anesthesiologist unilaterally made the decision not to return to work and, therefore, a summary suspension was never imposed and within a day or two of making that decision, the anesthesiologist cancelled malpractice coverage, which disqualified the anesthesiologist from having hospital privileges under the bylaws. Rowell v. Phoebe Putney Mem. Hosp., Inc., 338 Ga. App. 603, 791 S.E.2d 183 (2016).

Failure to exhaust administrative remedies. — Medical group's claim that a health maintenance organization was liable to the group in tort under O.C.G.A. § 51-1-6 based upon the group's breach of a legal duty to comply with Georgia's Any Willing Provider Statute, O.C.G.A. § 33-20-16, was procedurally barred by the failure to exhaust administrative remedies by first submitting the group's dispute to the Georgia Insurance Commissioner pursuant to O.C.G.A. § 33-20-30. Northeast Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc., 297 Ga. App. 28, 676 S.E.2d 428 (2009), cert. denied, No. S09C1241, 2009 Ga. LEXIS 805 (Ga. 2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 10 et seq.

Am. Jur. Proof of Facts. — Intentional Spoliation of Evidence, 18 POF3d 515.

Am. Jur. Trials. — Defense of Claim Brought Under the Americans with Disabilities Act, 49 Am. Jur. Trials 171.

C.J.S. — 86 C.J.S., Torts, § 8 et seq.

ALR. — Liability of street railway company to passenger struck by a vehicle not subject to its control, 1 ALR 953; 12 ALR 1371; 31 ALR 572; 44 ALR 162.

Liability for injury to child playing on or in proximity to automobile, 1 ALR 1385; 44 ALR 434.

Liability of one contracting to make repairs for damages from improper performance of the work, 1 ALR 1654; 44 ALR 824.

Liability for damage to other premises from fire in building where inflammable materials are stored, 5 ALR 1378.

Liability of railroad company for interference with fire department while attempting to extinguish fire, 5 ALR 1651.

Violation of statute or ordinance regulating movement of vehicles as affecting violator's right to recover for negligence, 12 ALR 458.

Violation of statute or ordinance in relation to explosives as ground of action in favor of one injured in person or proper by explosion, 12 ALR 1309.

Liability for death of, or injury to, one seeking to rescue another, 19 ALR 4; 158 ALR 189; 166 ALR 752.

Question of proximate cause as affecting liability for damages for failure to obtain telephone connection, 19 ALR 1419.

Sense of shame, or other disagreeable emotion on part of female, as essential to an aggravated or indecent assault, 27 ALR 859.

Purpose in starting business to injure another as ground of action by latter, 27 ALR 1417.

Liability in damages for inducing the discharge of employee, 29 ALR 532.

Liability of one who makes a certificate or report, to third person who acts in reliance thereon, 34 ALR 67; 68 ALR 375.

Applicability to civil case of provision of penal statute creating a presumption of prima facie case, 43 ALR 959.

Civil rights and liabilities as affected by failure to comply with regulations as to registration of automobile or motorcycle, or licensing of operator, 43 ALR 1153; 54 ALR 374; 58 ALR 532; 61 ALR 1190; 78 ALR 1028; 87 ALR 1469; 111 ALR 1258; 163 ALR 1375.

Liability for damage or injury by contact with structure above the surface of the street or highway, 46 ALR 943; 49 ALR 993.

Duty of public utility to notify patron in advance of temporary suspension of service, 52 ALR 1078.

Liability of one creating dangerous condition in street or highway as affected by removal of the safeguard by a third person, 62 ALR 500.

Liability of carrier for injury to own passenger on its line through negligence of another carrier permitted to use its tracks, 74 ALR 1178.

Marital or parental relation between plaintiff and member of partnership as affecting right to maintain action in tort against partnership or partners, 81 ALR 1106; 101 ALR 1231.

Liability for leaving contract forms accessible to stranger who, by forgery, gives such forms apparent authenticity as completed contracts, 85 ALR 83.

Civil liability of bank officer or director permitting deposit after insolvency of bank, 87 ALR 1402.

Increase in insurance rates or loss of opportunity to obtain insurance in consequence of another's tort as ground of liability, 92 ALR 1205.

Liability of municipality for injury or damage by automobile colliding with temporary obstruction in connection with alteration or repair of street, 100 ALR 1386.

Loss or theft of passenger's ticket or other token of right to transportation as affecting rights and duties of carrier and passenger, 127 ALR 222.

Liability for injury to child by automobile left unattended in street or highway, 140 ALR 538.

Civil and criminal liability of soldiers, sailors, and militiamen, 143 ALR 1530.

Unauthorized prosecution of suit in name of another as ground of action in tort, 146 ALR 1125.

Rights and remedies as between originator of uncopyrighted advertising plan or slogan, or his assignee, and another who uses or infringes the same, 157 ALR 1436.

Liability for injury as affected by interference by outside agency with object, other than automobile, abandoned or temporarily left in public street or park, 158 ALR 880.

Liability of irrigation district for damages, 160 ALR 1165.

Customary or statutory signal from train as measure of railroad's duty as to warning at highway crossing, 5 ALR2d 112.

Breach of assumed duty to inspect property as ground of liability for damage or injury to third person, 6 ALR2d 284.

Liability of publisher for mistake in advertisement, 10 ALR2d 686.

Duty and liability of carrier to intoxicated passenger while en route, 17 ALR2d 1085.

Liability of parent or person in loco parentis for personal tort against minor child, 19 ALR2d 423; 41 ALR3d 904.

Liability for injury to property occasioned by oil, water, or the like flowing from well, 19 ALR2d 1025.

Liability of seller of firearm, explosive, or highly inflammable substance to child, 20 ALR2d 119; 75 ALR3d 825; 95 ALR3d 390; 4 ALR4th 331.

Liability of gas company for injury or damage due to defects in service lines on consumer's premises, 26 ALR2d 136.

Seller's or manufacturer's liability for injuries as affected by buyer's or user's allergy or unusual susceptibility to injury from article, 26 ALR2d 963.

Shipper's liability to consignee or his employee injured while unloading car because of improper loading, 35 ALR2d 609.

Liability of filling station operator, garageman, or the like, in connection with servicing vehicle with lubricants or fuel, 38 ALR2d 1453.

Duty of landowner to erect fence or

other device to deter trespassing children from entering third person's property on which dangerous condition exists, 39 ALR2d 1452.

Liability of architect or engineer for improper issuance of certificate, 43 ALR2d 1227.

Liability for injury or damage resulting from fire started by use of blowtorch, 49 ALR2d 368.

Liability of public accountant, 54 ALR2d 324; 46 ALR3d 979.

Right to damages for exclusion from membership in social or fraternal organization, 59 ALR2d 1290.

Duty and liability of vehicle drivers within parking lot, 62 ALR2d 288.

Liability and suability, in negligence action, of state highway, toll road, or turnpike authority, 62 ALR2d 1222.

Liability of owner or operator to adult trespasser in or on motor vehicle or equipment, 65 ALR2d 798.

Liability of one drawing an invalid will, 65 ALR2d 1363.

Liability to patron of scenic railway, roller coaster, or miniature railway, 66 ALR2d 689.

Liability of person permitting child to have gun, or leaving gun accessible to child, for injury inflicted by the latter, 68 ALR2d 782.

Amusements: liability for injury from slide or chute, 69 ALR2d 1067.

Liability for injury or damage from escaping refrigerant, 74 ALR2d 894.

Air carrier's liability for injury to passenger from changes in air pressure, 75 ALR2d 848.

Liability of taxicab carrier to passenger injured while boarding vehicle, 75 ALR2d 988.

Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting negligence actions, 75 ALR2d 1062.

Liability of manufacturer or seller for injury caused by domestic or industrial soaps, detergents, cleansers, polishes, and the like, 79 ALR2d 482.

Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

Railroad's liability for crossing collision as affected by fact that train or engine was backing or engine was pushing train, 85 ALR2d 267.

Modern status of rule requiring actual knowledge of latent defect in leased premises as prerequisite to landlord's liability to tenant injured thereby, 88 ALR2d 586.

Liability of owner or operator of theater or other place of amusement to patron injured by condition of or defect in lavatory, restroom, or toilet facilities, 88 ALR2d 1090.

Failure of signaling device at crossing to operate, as affecting railroad company's liability, 90 ALR2d 350.

Liability for failure to rescue seaman who has gone overboard, 91 ALR2d 1032.

Duty of proprietor toward visitor upon premises on private business with or errand or work for employee, 94 ALR2d 6.

Tests of causation under Federal Employers' Liability Act or Jones Act, 98 ALR2d 653.

Liability of owner or operator of automobile for injury to one assisting in extricating or starting his stalled or ditched car, 3 ALR3d 780.

Receiver's personal liability for negligence in failing to care for or maintain property in receivership, 20 ALR3d 967.

Liability for injury or death of child social guest, 20 ALR3d 1127.

Invasion of privacy by use of plaintiff's name or likeness in advertising, 23 ALR3d 865.

Employer's misrepresentation as to prospect, or duration, of employment as actionable fraud, 24 ALR3d 1412.

Premises liability: Proceeding in the dark on inside steps or stairs as contributory negligence, 25 ALR3d 446.

Liability in tort for interference with attorney-client or physician-patient relationship, 26 ALR3d 679.

Bailee's duty to insure bailed property, 28 ALR3d 513.

Liability of corporate directors or officers for negligence in permitting conversion of property of third persons by corporation, 29 ALR3d 660.

Right to recover damages in negligence for fear of injury to another, or shock or mental anguish at witnessing such injury, 29 ALR3d 1337.

Application of rule of strict liability in tort to person rendering services, 29 ALR3d 1425; 100 ALR3d 1205.

Liability in connection with fire or ex-

plosion incident to bulk storage, transportation, delivery, loading, or unloading of petroleum products, 32 ALR3d 1169.

Public disclosure of person's indebtedness as invasion of privacy, 33 ALR3d 154.

Duty of one other than carrier or employer to render assistance to one for whose initial injury he is not liable, 33 ALR3d 301.

Landlord's liability for damage to tenant's property caused by water, 35 ALR3d 143.

Modern status of the rule absolving a possessor of land of liability to those coming thereon for harm caused by dangerous physical conditions of which the injured party knew and realized the risk, 35 ALR3d 230.

Surveyor's liability for mistake in, or misrepresentation as to accuracy of, survey of real property, 35 ALR3d 504.

Aviation: helicopter accidents, 35 ALR3d 707.

Tort liability of public schools and institutions of higher learning for accident occurring during school athletic events, 35 ALR3d 725.

Tort liability of public schools and institutions of higher learning for accidents associated with chemistry experiments, shopwork, and manual or vocational training, 35 ALR3d 758.

Liability in connection with fire or explosion of explosives while being stored or transported, 35 ALR3d 1177.

Tort liability of public schools and institutions of higher learning for accidents occurring during use of premises and equipment for other than school purposes, 37 ALR3d 712.

Liability for injury consequent upon spraying or dusting of crop, 37 ALR3d 833.

Liability of product endorser or certifier for product-cause injury, 39 ALR3d 181.

Landowner's right to relief against pollution of his water supply by industrial or commercial waste, 39 ALR3d 910.

Liability for alleged negligence of independent servicer or repairer of aircraft, 41 ALR3d 1320.

Landlord's liability for failure to protect tenant from criminal activities of third persons, 43 ALR5th 207.

Liability of public accountant to third parties, 46 ALR3d 979.

Liability in damages for withholding corpse from relatives, 48 ALR3d 240.

Civil liability of undertaker in connection with embalming or preparation of body for burial, 48 ALR3d 261.

Employer's knowledge of employee's past criminal record as affecting liability for employee's tortious conduct, 48 ALR3d 359.

Liability of hospital for injury caused through assault by a patient, 48 ALR3d 1288.

Liability of oil and gas lessee or operator for injuries to or death of livestock, 51 ALR3d 304.

Liability for damage to highway or bridge caused by size or weight of motor vehicle or load, 53 ALR3d 1035; 31 ALR5th 171.

Unsolicited mailing, distribution, house call, or telephone call as invasion of privacy, 56 ALR3d 457.

Liability of hospital, other than mental institution, for suicide of patient, 60 ALR3d 880.

Tort or statutory liability for failure or refusal of witness to give testimony, 61 ALR3d 1297.

May action for malicious prosecution be predicated on defense or counterclaim in civil suit, 65 ALR3d 901.

Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant, 75 ALR3d 825.

Liability of hospital or similar institution for giving erroneous notification of patient's death, 77 ALR3d 501.

Violation of OSHA regulation as affecting tort liability, 79 ALR3d 962.

Liability of estate for tort of executor, administrator, or trustee, 82 ALR3d 892.

Tort liability for wrongfully causing one to be born, 83 ALR3d 15; 74 ALR4th 798.

Liability of one treating mentally afflicted patient for failure to warn or protect third persons threatened by patient, 83 ALR3d 1201.

Publication of address as well as name of person as invasion of privacy, 84 ALR3d 1159.

Accountant's malpractice liability to client, 92 ALR3d 396.

Products liability: toys and games, 95 ALR3d 390.

Liability for interference with lease, 96 ALR3d 862.

Liability for interference with invalid or unenforceable contracts, 96 ALR3d 1294.

Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another, 97 ALR3d 528; 62 ALR4th 16.

Liability for negligently causing arrest or prosecution of another, 99 ALR3d 1113.

When statute of limitations begins to run as to cause of action for development of latent industrial or occupational disease, 1 ALR4th 117.

Liability of one who sells gun to child for injury to third party, 4 ALR4th 331.

Liability of parent for injury to unemancipated child caused by parent's negligence--modern cases, 6 ALR4th 1066.

Insurer's tort liability for wrongful or negligent issuance of life policy, 37 ALR4th 972.

Liability to adult social guest injured otherwise than by condition of premises, 38 ALR4th 200.

Modern status of intentional infliction of mental distress as independent tort; "outrage", 38 ALR4th 998.

State's liability to one injured by improperly licensed driver, 41 ALR4th 111.

Personal injury or property damage caused by lightning as basis of tort liability, 46 ALR4th 1170.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence, 62 ALR4th 16.

Liability for personal injury or property damage caused by unauthorized use of automobile which had been parked with keys removed from ignition, 70 ALR4th 276.

Intentional spoliation of evidence, interfering with prospective civil action, as actionable, 70 ALR4th 984.

Tort liability for nonmedical radiological harm, 73 ALR4th 582.

Rescue doctrine: liability of one who negligently causes motor vehicle accident for injuries to person subsequently attempting to rescue persons or property, 73 ALR4th 737.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 ALR4th 127.

Violation of governmental regulations as to conditions and facilities of swimming pools as affecting liability in negligence, 79 ALR4th 461.

Liability for interference with physician-patient relationship, 87 ALR4th 845.

Liability in tort for interference with attorney-client relationship, 90 ALR4th 621.

Franchisor's tort liability for injuries allegedly caused by assault or other criminal activity on or near franchise premises, 2 ALR5th 369.

Liability of travel publication, travel agent, or similar party for personal injury or death of traveler, 2 ALR5th 396.

Application of statute of limitations to actions for breach of duty in performing services of public accountant, 7 ALR5th 852.

Breach of assumed duty to inspect property as ground for liability to third party, 13 ALR5th 289.

Motorist's liability for signaling other vehicle or pedestrian to proceed, or to pass signaling vehicle, 14 ALR5th 193.

Financing agency's liability to purchaser of new home or structure for consequences of construction defects, 20 ALR5th 499.

Liability for injury to customer from object projecting into aisle or passageway in store, 40 ALR5th 135.

Liability of independent accountant to investors or shareholders, 48 ALR5th 389.

Social host's liability for death or injuries incurred by person to whom alcohol was served, 54 ALR5th 313.

Recovery for emotional distress based on fear of contracting HIV or AIDS, 59 ALR5th 535.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress — ethnic, racial, or religious harassment or discrimination, 19 ALR6th 1.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress — sexual harassment, sexual discrimination, or accusations concerning sexual conduct or orientation, 20 ALR6th 1.

Invasion of privacy by use of plaintiff's name or likeness in advertising — Consent and waiver, 13 A.L.R.7th 4.

What constitutes "service animal" and accommodation thereof, under Americans with Disabilities Act (ADA), 75 A.L.R. Fed. 2d 49.

51-1-7. When infraction of public duty gives cause of action to individual.

Injury suffered in common with the community, though to a greater extent, will not give a right of action to an individual for the infraction of some public duty. In order for an individual to have such a right of action, there must be some special damage to him, in which the public has not participated. (Orig. Code 1863, § 2895; Code 1868, § 2901; Code 1873, § 2952; Code 1882, § 2952; Civil Code 1895, § 3808; Civil Code 1910, § 4404; Code 1933, § 105-102.)

Law reviews. — For article, "Georgia's Public Duty Doctrine: The Supreme Court Held Hostage," see 51 Mercer L. Rev. 73 (1999).

For comment, "The Officer Has No Robes: A Formalist Solution to the Expansion of Quasi-Judicial Immunity," see 66 Emory L.J. 123 (2016).

JUDICIAL DECISIONS

This section is basis of the distinction between private and public nuisances. Campbell v. Metropolitan S.R.R., 82 Ga. 320, 9 S.E. 1078 (1889).

Elements of action. — Any interference with a landowner's right to the use of a street abutting the landowner's land by an obstruction of the street which inflicts upon the landowner a damage and inconvenience respecting the landowner's lot, which is different in kind from that inflicted upon the community in general, constitutes an injury for which the landowner is entitled to recover damages. Felton v. State Hwy. Bd., 47 Ga. App. 615, 171 S.E. 198 (1933), later appeal, 57 Ga. App. 930, 181 S.E. 506 (1935).

Direct interference with property right not necessary to maintain action. — It is not necessary, to constitute an interference with the abutting landowner's easement in the street, that the obstruction causing the interference should be immediately in front of the landowner's lot or touching upon the land. Felton v. State Hwy. Bd., 47 Ga. App. 615, 171 S.E. 198 (1933), later appeal, 57 Ga. App. 930, 181 S.E. 506 (1935).

Public service corporation owes public duty. — Company which is the holder of a franchise to conduct the business of furnishing water to a city and the city's inhabitants and which has the power of eminent domain is a public service corporation, and owes a public duty to the city's inhabitants. Washington Water & Elec. Co. v. Pope Mfg. Co., 176 Ga. 155, 167 S.E. 286 (1932).

Defendant, merely working as section foreman on railroad, owed no individual duty to the defendant's public in keeping the right of way free from ignitable growth. The defendant did owe a duty to the defendant's master to properly perform the defendant's duties, and if there was embraced in such duties the obligation to keep the right of way free from ignitable growth there would be a liability on the defendant's part to the defendant's master for failure to perform the defendant's agreement. Knight v. Atlantic Coast Line R.R., 4 F. Supp. 713 (S.D. Ga. 1933), aff'd, 73 F.2d 76 (5th Cir. 1934).

Local government duty to house convicts. — If county commissioners failed to perform the public duty resting upon the commissioners to erect suitable quarters for safe-keeping and support of the county convicts under the commissioners' control, the commissioners would be liable, if at all, for only such special damages as the plaintiff sustained by reason of the commissioners infraction of this

public duty. McConnell v. Floyd County, 164 Ga. 177, 137 S.E. 919 (1927).

State may enjoin infliction of common injury such as public nuisance. — State has an interest in the welfare, peace, and good order of the state's citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws. Evans Theatre Corp. v. Slaton, 227 Ga. 377, 180 S.E.2d 712, cert. denied, 404 U.S. 950, 92 S. Ct. 281, 30 L. Ed. 2d 267 (1971).

Court of equity is authorized to enjoin the exhibition of an obscene motion picture to the public. Evans Theatre Corp. v. Slaton, 227 Ga. 377, 180 S.E.2d 712, cert. denied, 404 U.S. 950, 92 S. Ct. 281, 30 L. Ed. 2d 267 (1971).

Cited in Hughes v. Weaver, 39 Ga. App. 597, 148 S.E. 12 (1929).

RESEARCH REFERENCES

Am. Jur. 2d. — 74A Am. Jur. 2d, Torts, § 1 et seq.

C.J.S. — 86 C.J.S., Torts, § 16.

ALR. — Liability of gas company for injury or damage by escaping gas, 29 ALR 1250; 47 ALR 488; 90 ALR 1082; 138 ALR 870.

Liability of county for torts in connection with activities which pertain, or are claimed to pertain, to private or proprietary functions, 101 ALR 1166; 16 ALR2d 1079.

Duty and liability of governmental body responsible for condition of street or highway for injury or damage due to cracking or upheaval of surface, 111 ALR 862.

Liability of irrigation district for damages, 160 ALR 1165.

Liability of county for torts in connection with activities which pertain, or are claimed to pertain, to private or proprietary function, 16 ALR2d 1079.

Duty and liability of municipality as regards barriers for protection of adult pedestrians who may unintentionally deviate from street or highway into marginal or external hazards, 44 ALR2d 633.

Liability of municipality for torts in connection with airport, 66 ALR2d 634.

Liability of gas company for personal injury or property damage caused by gas escaping from mains in street, 96 ALR2d 1007; 34 ALR5th 1.

Liability of water distributor for damage caused by water escaping from main, 20 ALR3d 1294.

Personal liability of policeman, sheriff, or similar peace officer or his bond, for injury suffered as a result of failure to enforce law or arrest lawbreaker, 41 ALR3d 700.

Liability of governmental entity or public officer for personal injury or damages arising out of vehicular accident due to negligent or defective design of a highway, 45 ALR3d 875; 58 ALR4th 559.

Liability of municipality or other governmental unit for failure to provide police protection, 46 ALR3d 1084.

Liability of gas company for damage resulting from failure to inspect or supervise work of contractors digging near gas pipes, 71 ALR3d 1174.

Immunity of public officer from liability for injuries caused by negligently released individual, 5 ALR4th 773.

Governmental liability for failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection, 22 ALR4th 624.

Applicability of judicial immunity to acts of clerk of court under state law, 34 ALR4th 1186.

Personal injury liability of civil engineer for negligence in highway or bridge construction or maintenance, 43 ALR4th 911.

Recoverability from tortfeasor of cost of diagnostic examinations absent proof of actual bodily injury, 46 ALR4th 1151.

Res ipsa loquitor in gas leak cases, 34 ALR5th 1.

51-1-8. Right of action arising from breach of private duty.

Private duties may arise from statute or from relations created by contract, express or implied. The violation of a private duty, accompanied by damage, shall give a right of action. (Orig. Code 1863, § 2897; Code 1868, § 2903; Code 1873, § 2954; Code 1882, § 2954; Civil Code 1895, § 3810; Civil Code 1910, § 4406; Code 1933, § 105-104.)

Law reviews. — For article, "Statutes of Limitation: Counterproductive Complexities," see 37 Mercer L. Rev. 1 (1985). For article, "Labor and Employment Law," see 53 Mercer L. Rev. 349 (2001).

For note discussing landlord liability for crime in apartments, see 5 Ga. L. Rev. 349 (1971). For note discussing tavern keeper liability in Georgia for injury caused by a person to whom an intoxicant was sold, see 9 Ga. L. Rev. 239 (1974).

For comment on Parker v. Vaughn, 124 Ga. App. 300, 183 S.E.2d 605 (1971), see 8 Ga. St. B. J. 244 (1971).

JUDICIAL DECISIONS

Analysis

General Consideration
Private Duty Related to Contract
Applicability to Specific Cases
1. Private Duty Imposed
2. Breach of Private Duty

General Consideration

Elements of an action. — Before a plaintiff can recover, the plaintiff must show that the plaintiff's injury and damage resulted from some negligent act or omission to act in some duty owed to the plaintiff. Knight v. Atlantic Coast Line R.R., 4 F. Supp. 713 (S.D. Ga. 1933), aff'd, 73 F.2d 76 (5th Cir. 1934); Davis v. Johnson, 92 Ga. App. 858, 90 S.E.2d 426 (1955); Carroll v. Griffin, 96 Ga. App. 826, 101 S.E.2d 764 (1958); Black v. New Holland Baptist Church, 122 Ga. App. 606, 178 S.E.2d 571 (1970).

Injury required for action. — Before an action for a tort will lie, there must be an injury accompanying such tort. Clements v. Hendi, 182 Ga. App. 118, 354 S.E.2d 700 (1987).

Right to recover even nominal damages. — When there is fraud or breach of a legal or private duty accompanied by any damage, the law gives a right to recover damages, even only nominal damages, as compensation. Holmes v. Drucker, 201 Ga. App. 687, 411 S.E.2d 728 (1991).

Damages not generally recoverable for nonphysical injury. — Damages for injury to reputation, emotional distress, humiliation, mental and physical strain and the like are generally not recoverable in a legal malpractice case premised on mere negligence when no physical injury is suffered by the plaintiff. Hamilton v. Powell, Goldstein, Frazer & Murphy, 167 Ga. App. 411, 306 S.E.2d 340 (1983), aff'd, 252 Ga. 149, 311 S.E.2d 818 (1984).

"Private duty" evidently means private duty arising either from law or from relation created by contract, express or implied. Ellis v. Taylor, 172 Ga. 830, 159 S.E. 266 (1931).

Nominal damages sufficient. — It is not the special damage or injury resulting from the wrongful act which gives rise to a cause of action, but the fact that nominal damages may be recovered is sufficient to create a cause of action and therefore result in the statute of limitations beginning to run. Jankowski v. Taylor, Bishop & Lee, 246 Ga. 804, 273 S.E.2d 16 (1980).

Instruction in exact language of section not required. — When the trial court fully charged the jury regarding the common-law and statutory duties on which plaintiff based the plaintiff's

claims, it was not error for the court to refuse a request to charge the exact language of O.C.G.A. § 51-1-8. Wadkins v. Smallwood, 243 Ga. App. 134, 530 S.E.2d 498 (2000).

No liability for no breach of private duty. — In a wrongful death action filed by a decedent-lessee's administrator in which the decedent was killed when crossing a public highway that the lessor did not control, the lessor was properly granted summary judgment, as the administrator failed to show that the lessor was negligent per se or that the lessor breached either a common law or private duty owed to the lessee. Walton v. UCC X, Inc., 282 Ga. App. 847, 640 S.E.2d 325 (2006).

No liability when underlying claims fail. — Because O.C.G.A. § 51-1-8 did not confer a separate cause of action in tort and the plaintiff dry cleaners' claims against the defendant natural gas supplier thereunder were contingent on the other claims that failed, the claims under § 51-1-8 failed. Byung Ho Cheoun v. Infinite Energy, Inc., No. 09-13902, 2010 U.S. App. LEXIS 1866 (11th Cir. Jan. 27, 2010) (Unpublished).

Cited in Lea v. Harris, 88 Ga. 236, 14 S.E. 566 (1891); Kutchey Motor Co. v. Hood, 46 Ga. App. 156, 167 S.E. 126 (1932); Wall v. Wall, 176 Ga. 757, 168 S.E. 893 (1933); Bell Fin. Co. v. Johnson, 180 Ga. 567, 179 S.E. 703 (1935); Dale Elec. Co. v. Thurston, 82 Ga. App. 516, 61 S.E.2d 584 (1950); Berger & Co. v. Gray, 97 Ga. App. 230, 102 S.E.2d 925 (1958); Georgia Elec. Co. v. Smith, 108 Ga. App. 851, 134 S.E.2d 840 (1964); Rawls Bros. Co. v. Paul, 115 Ga. App. 731, 155 S.E.2d 819 (1967); Giacalone v. Tuggle, 141 Ga. App. 123, 232 S.E.2d 589 (1977); Aretz v. United States, 604 F.2d 417 (5th Cir. 1979); Tolar Constr. Co. v. GAF Corp., 154 Ga. App. 127, 267 S.E.2d 635 (1980); Sam Finley, Inc. v. Barnes, 156 Ga. App. 802, 275 S.E.2d 380 (1980); Walton v. United States, 484 F. Supp. 568 (S.D. Ga. 1980); Oden & Sims Used Cars, Inc. v. Thurman, 250 Ga. App. 709, 301 S.E.2d 673 (1983); Friedlander v. Nims, 571 F. Supp. 1188 (N.D. Ga. 1983); Blalock Mach. & Equip. Co. v. Iowa Mfg. Co., 576 F. Supp. 774 (N.D. Ga. 1983); Shessel v. Stroup, 253 Ga. 56, 316 S.E.2d 155 (1984); Hodges v. Tomberlin, 170 Ga. App. 842, 319 S.E.2d 11 (1984); Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 595 F. Supp. 1442 (N.D. Ga. 1984); National City Bank v. Busbin, 175 Ga. App. 103, 332 S.E.2d 678 (1985); ITT Terryphone Corp. v. Tri-State Steel Drum, Inc., 178 Ga. App. 694, 344 S.E.2d 686 (1986); Whitehead v. Cuffie, 185 Ga. App. 351, 364 S.E.2d 87 (1987); Bowling v. Gober, 206 Ga. App. 38, 424 S.E.2d 335 (1992); Robinson v. J. Smith Lanier & Co., 220 Ga. App. 737, 470 S.E.2d 272 (1996); Wisdom v. M.A. Hanna Co., 978 F. Supp. 1471 (N.D. Ga. 1997); Vibratech, Inc. v. Frost, 291 Ga. App. 133, 661 S.E.2d 185 (2008); Ellison v. Southstar Energy Servs., LLC, 298 Ga. App. 170, 679 S.E.2d 750 (2009); Estate of Pitts v. City of Atlanta, 323 Ga. App. 70, 746 S.E.2d 698 (2013); Gobran Auto Sales, Inc. v. Bell, 335 Ga. App. 873, 783 S.E.2d 389 (2016); McConnell v. Department of Labor, 337 Ga. App. 457, 787 S.E.2d 794 (2016).

Private Duty Related to Contract

Violation of specific duty. — Action of tort may be maintained for violation of specific duty flowing from relations between the parties, created by contract. Ellis v. Taylor, 172 Ga. 830, 159 S.E. 266 (1931); Frank Graham Co. v. Graham, 90 Ga. App. 840, 84 S.E.2d 579 (1954); Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365 (1957); City of Douglas v. Johnson, 157 Ga. App. 618, 278 S.E.2d 160 (1981).

Tort consists of breach of duty. — If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded upon a contract; in such a case the liability arises out of a breach of duty incident to and created by the contract, but is only dependent upon the contract to the extent necessary to raise the duty. The tort consists in the breach of duty. Wolff ex rel. Salomon Bros. & Co. v. Southern Ry., 130 Ga. 251, 60 S.E. 569 (1908); Ellis v. Taylor, 172 Ga. 830, 159 S.E. 266 (1931); Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205 (1935); Simmons v. May, 53 Ga. App. 454, 186 S.E. 441 (1936); Frank Graham Co. v. Graham, 90 Ga. App. 840, 84 S.E.2d 579 (1954).

Private Duty Related to Contract (Cont'd)

Such duty not always present. — In some contracts duties arise between the parties the violation of which would constitute a tort; however, such duties do not arise in every contract. Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S.E.2d 536 (1953).

Contract unclear and unenforceable. — In a Chapter 11 bankruptcy proceeding, the debtor had a valid objection to an allowance of a claim arising from pending state court litigation; an alleged contract was not sufficiently clear to be enforceable, and there was no independent duty arising from the contract such as would give rise to a negligence claim under O.C.G.A. § 51-1-8. In re LJL Truck Ctr., Inc., 299 B.R. 663 (Bankr. M.D. Ga. 2003).

Contract status alone insufficient to create tort action. — That a party occupies a status that sometimes gives rise to professional duties, does not transform all contract disagreements into torts based on a professional relationship. Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co., 519 F. Supp. 60 (S.D. Ga. 1981).

Mere nonfeasance of contract insufficient. — Mere breach of an ordinary contract does not constitute a tort; and if there is no liability except that arising out of a breach of a purely contractual duty, the action must be in contract, and an action in tort cannot be maintained. Hanson v. Aetna Life & Cas., 625 F.2d 573 (5th Cir. 1980).

When the breach complained of is simply the neglect of a duty such as is expressly provided for by the contract itself, the action will be construed and treated as one brought ex contractu. Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S.E.2d 536 (1953).

While the plaintiff's relationship with the defendant was defined by contract, the mere breach of that contract did not give rise to tort liability. Odem v. Pace Academy, 235 Ga. App. 648, 510 S.E.2d 326 (1998).

Breach of contractual duty to pay money is not tort. Howard v. Central of Ga. Ry., 9 Ga. App. 617, 71 S.E. 1017 (1911).

Breach of security contract established. — Summary judgment was properly denied to a trailer park owner in a premises liability action based upon the murder of a tenant in the park since the owner had a duty to provide security to the park as a result of a contract the owner entered with all residents and failed to inform the residents that security was discontinued. Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559, cert. denied, 285 Ga. App. 90, 645 S.E.2d 559 (2007).

No damages for breach of oral contract for sale of realty. — Damages for the failure of a party to carry out the purported terms of an oral contract for the sale of realty were not authorized. Zappa v. Basden, 188 Ga. App. 472, 373 S.E.2d 246, cert. denied, 188 Ga. App. 913, 373 S.E.2d 246 (1988).

No legal duty to consumer under Franchise Practices Act. — Trial court erred by denying a franchisor's motion for summary judgment with regard to a consumer's negligence claim predicated on the Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., as the Act did not impose a legal duty upon the franchisor to prevent a franchisee from presenting an unreasonable risk of harm to members of the public like the consumer. DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

Applicability to Specific Cases

1. Private Duty Imposed

Common carrier's duty to transport passengers. — It is the legal duty of a common carrier to receive and transport a person who has purchased a ticket over its lines, to the destination called for by the ticket, and should a carrier, in violation of the duty so imposed upon the carrier, illegally expel a passenger from thr carrier's bus and wrongfully refuse to carry the passenger to the passenger's destination, it would be liable to the passenger for damages proximately resulting therefrom. Daigrepont v. Teche Greyhound Lines, 189 Ga. 601, 7 S.E.2d 174 (1940).

Contract of landlord and cropper, when performance has been entered upon, creates status from which reciprocal rights and duties spring; and a tort, as well as a breach of contract, may arise from the violation of one of these duties. Payne v. Watters, 9 Ga. App. 265, 70 S.E. 1114 (1911); Tapley v. Youmans, 95 Ga. App. 161, 97 S.E.2d 365 (1957).

Duty of electric company to insulate wires. — It is the duty of an electric company to keep the wires over the city streets so insulated as to protect persons from injury. Trammell v. Columbus R.R., 9 Ga. App. 98, 70 S.E. 892 (1911).

Duty to carefully perform gratuitous promise once undertaken. — One who, by a gratuitous promise or other conduct which one should realize will cause another reasonably to rely upon the performance of definite acts of service by one as the other's agent, causes the other to refrain from having such acts done by other available means is subject to a duty to use care to perform such service or, while other means are available, to give notice that one will not perform. Mixon v. Dobbs Houses, Inc., 149 Ga. App. 481, 254 S.E.2d 864 (1979).

Duty to deliver message. — Even though the promises made by the defendant to deliver the plaintiff's message to the defendant's spouse may have been gratuitous, once they were undertaken the duty arose to perform under the requisite standard of care. Mixon v. Dobbs Houses, Inc., 149 Ga. App. 481, 254 S.E.2d 864 (1979).

Duty to furnish gas arising from contract. — When the duty of the defendant to furnish the plaintiff with gas arose solely through their contract, the remedy of the plaintiff for a breach of that duty, even though the breach was occasioned by the defendant's negligence, was in contract and not in tort. Atlanta Gas Light Co. v. Newman, 88 Ga. App. 252, 76 S.E.2d 536 (1953).

Duty to repair carefully. — One who undertakes by virtue of a contract to repair a chattel for another owes to such other the duty to use ordinary care in making such repairs so as not to endanger the lives and limbs of others by a negligent performance, the consequences of which may be foreseen by that one. Frank Graham Co. v. Graham, 90 Ga. App. 840, 84 S.E.2d 579 (1954).

Hospital's duty to patients. — Private hospital in which patients are placed for treatment by their physicians, and which undertakes to care for the patients and supervise and look after the patients, is under the duty to exercise such reasonable care in looking after and protecting a patient as the patient's condition, which is known to the hospital through the hospital's agents and servants charged with the duty of looking after and supervising the patient, may require. Emory Univ. v. Shadburn, 47 Ga. App. 643, 171 S.E. 192 (1933), aff'd, 180 Ga. 595, 180 S.E. 137 (1935).

Seller's duty to buyer upon sale of potentially harmful goods. — In connection with a sale of goods having a potentiality of doing harm by normal, intended, and nonnegligent use, when there is no fiduciary relationship between the seller and the purchaser, and no fraud, it is the duty of the seller to warn the purchaser at the time of sale and delivery, and a breach occurs at this time if there is a failure to warn. Everhart v. Rich's, Inc., 229 Ga. 798, 194 S.E.2d 425 (1972), answer conformed to, 128 Ga. App. 319, 196 S.E.2d 475 (1973).

Funeral homes. — Because the named plaintiffs in a purported class action produced evidence that two named plaintiffs were parties to contracts with the funeral homes, the two named plaintiffs had standing to assert claims of negligence on behalf of the class based on the existence of a contract. In re Tri-State Crematory Litig., 215 F.R.D. 660 (N.D. Ga. 2003).

Bank did not owe duty to payee of check who never had possession of check. — Bank's alleged actions in paying a check over a forged endorsement, depositing the funds in new accounts, and failing to observe reasonable commercial standards, were not violations of any legal right of, or duty owed to, the payee of the check who had never received delivery of the check, and the payee had suffered no damages from these actions. Thus, the payee did not have a tort claim under O.C.G.A. § 51-1-1, O.C.G.A. § 51-1-6, or O.C.G.A. § 51-1-8. Jenkins v. Wachovia

Applicability to Specific Cases (Cont'd)
1. Private Duty Imposed (Cont'd)

Bank, Nat'l Ass'n, 309 Ga. App. 562, 711 S.E.2d 80 (2011).

2. Breach of Private Duty

Attorney's action for fee. — Petition by an attorney states a cause of action when the petition alleges that the attorney's cocounsel and the attorney's clients conspired with the intent to deprive petitioner of the petitioner's compensation and the petitioner's right to exercise the petitioner's holding lien. Davidson v. Collier, 104 Ga. App. 546, 122 S.E.2d 465 (1961).

In legal malpractice cases a right of action arises immediately upon the wrongful act having been committed, even though there are no special damages. Ekern v. Westmoreland, 181 Ga. App. 741, 353 S.E.2d 571 (1987).

Bailor's recovery against bailee in tort. — Even when a bailment has been created by special contract, the bailor may recover against the bailee for the bailee's negligence in an action of tort. Warren v. Mitchell Motors, Inc., 52 Ga. App. 58, 182 S.E. 205 (1935).

Driving horse on sidewalk in violation of statute. — When there was proof going to show that the plaintiff, at the time the plaintiff was injured by reason of the horse running over the plaintiff, was standing upon a sidewalk in a city, and one of the acts of negligence charged by the petition was the alleged driving of the horse upon the sidewalk, in violation of a city ordinance, and such ordinance was admitted in evidence without objection, it was not error for the court to charge upon the validity and legal effect of the ordinance, even though the evidence indicated that the driving of the horse on the sidewalk was unintentional on the part of the driver, when the court expressly instructed the jury that, if such act was unintentional, it would constitute no violation of the ordinance. Clackum v. Bagwell, 40 Ga. App. 831, 151 S.E. 689 (1930).

Injury to financial standing of a maker of a note, when the payee sends the note to a bank for collection after the note has been paid, is a tort. State Mut. Life & Annuity Ass'n v. Baldwin, 116 Ga. 855, 43 S.E. 262 (1903).

Negligent repair of automobile. — Negligence of the defendant in failing to repair the brakes to the plaintiff's automobile in such manner that the brakes could be depended upon to function properly, although the defendant represented to the plaintiff that the brakes had been fixed and were in good working condition, constituted a breach of the duty owing to the plaintiff to provide the plaintiff with serviceable and dependable brakes, and this is true although the duty which the defendant owed the plaintiff in this respect was created by the contract, and although the defendant at the time it sold the automobile expressly warranted that the brakes were in good working order. Frank Graham Co. v. Graham, 90 Ga. App. 840, 84 S.E.2d 579 (1954).

Violation of lease as tort against partners. — Landlord who leases in writing a building for the conduct of a particular business, and verbally consents for the lessee to associate with a partner in the business, is liable to the partnership for damages caused to their business by a violation of the terms of the lease. DeFoor v. Stephens & Lastinger, 133 Ga. 617, 66 S.E. 786 (1909).

Insurer's failure to provide coverage information. — Insurer's breach of § 33-3-28, requiring insurers to provide coverage information, did not create a cause of action and the right to seek damages under O.C.G.A. §§ 51-1-6 and 51-1-8. Parris v. State Farm Mut. Auto. Ins. Co., 229 Ga. App. 522, 494 S.E.2d 244 (1997).

Age discrimination. — At-will employee may not sue in tort under O.C.G.A. § 51-1-6 or O.C.G.A. § 51-1-8 for wrongful discharge based upon age discrimination. Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 528 S.E.2d 238 (2000).

Provisions of O.C.G.A. §§ 51-1-6 and 51-1-8 do not create a civil action for age discrimination for an employee-at-will based upon a violation of either O.C.G.A. § 34-1-2 or the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. Reilly v. Alcan Aluminum Corp., 221 F.3d 1170 (11th Cir. 2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 74A Am. Jur. 2d, Torts, § 29 et seq.

Am. Jur. Proof of Facts. — Negligent Operation of Private Swimming Pool, 38 POF2d 1.

Negligent Operation of Pleasure Boat, 43 POF2d 395.

C.J.S. — 86 C.J.S., Torts, § 8 et seq.

ALR. — Violation of statute or ordinance in relation to explosives as ground of action in favor of one injured in person or property by explosion, 12 ALR 1309.

Liability of one undertaking to repair automobile for injury to third person, 52 ALR 857.

Marital or parental relation between plaintiff and member of partnership as affecting right to maintain action in tort against partnership or partners, 81 ALR 1106; 101 ALR 1231.

Contractual relationship as affecting right of action for death, 115 ALR 1026.

Liability of private noncharitable hospital or sanitarium for improper care or treatment of patients, 124 ALR 186.

Loss or theft of passenger's ticket or other token of right to transportation as affecting rights and duties of carrier and passenger, 127 ALR 222.

Breach of lessor's agreement to repair as ground of liability for personal injury to tenant or one in privity with latter, 163 ALR 300; 78 ALR2d 1238.

Implied obligation of employee not to use trade secrets or confidential information for his own benefit or that of third persons after leaving the employment, 165 ALR 1453.

Liability of insurer based upon its act of withdrawal after assumption of defense, 167 ALR 243.

Lockout or removal of place of employment to avoid labor difficulties or punish employees as actionable wrong, 173 ALR 674.

Customary or statutory signal from train as measure of railroad's duty as to warning at highway crossing, 5 ALR2d 112.

Breach of assumed duty to inspect property as ground of liability for damage or injury to third person, 6 ALR2d 284.

Liability of garageman, service or repair station, or filling station operator for destruction or damage of motor vehicle by fire, 16 ALR2d 799.

Recovery by tenant of damages for physical injury or mental anguish occasioned by wrongful eviction, 17 ALR2d 936.

Suspension or expulsion from social club or similar society and the remedies therefor, 20 ALR2d 344.

Suspension or expulsion from professional association and the remedies therefor, 20 ALR2d 531.

General contractor's liability for injuries to employees of other contractors on the project, 20 ALR2d 868.

Liability for procuring breach of contract, 26 ALR2d 1227; 96 ALR3d 1294.

Rights and remedies arising out of delay in passing upon application for insurance, 32 ALR2d 487.

Liability of filling station operator, garageman, or the like, in connection with servicing vehicle with lubricants or fuel, 38 ALR2d 1453.

Liability of motor carrier for injuries to passengers from accident occasioned by blowout or other failure of tire, 44 ALR2d 835.

Liability of public accountant, 54 ALR2d 324; 46 ALR3d 979.

Tort liability for damages for misrepresentations as to area of real property sold or exchanged, 54 ALR2d 660.

Shipper's liability to carrier for damage to vehicle or to other cargo resulting from defects in shipper's containers, 65 ALR2d 770.

Liability of liquor furnisher under civil damage or dramshop act for injury or death of intoxicated person from wrongful act of a third person, 65 ALR2d 923.

Liability of one drawing an invalid will, 65 ALR2d 1363.

Liability of one repairing, installing, or servicing gas-burning appliance, for personal injury, death, or property damage, 72 ALR2d 865.

Liability of taxicab carrier to passenger injured while boarding vehicle, 75 ALR2d 988.

Landlord's liability for personal injury or death of tenant or his privies from

heating system or equipment, 86 ALR2d 791.

Landlord's liability for personal injury or death of tenant or privies from electrical system or equipment, 86 ALR2d 838.

Attorney's liability for negligence in preparing or recording security document, 87 ALR2d 991.

Shipowner's liability for injury caused to seaman or longshoreman by cargo or its stowage, 90 ALR2d 710.

Liability of garageman to one ordering repair of motor vehicle, for defective work, 92 ALR2d 1408; 1 ALR4th 347; 23 ALR4th 274.

Private person's duty and liability for failure to protect another against criminal attack by third person, 10 ALR3d 619.

Tenant's right to damages for landlord's breach of tenant's option to purchase, 17 ALR3d 976.

Duty of vendor of real estate to give purchaser information as to termite infestation, 22 ALR3d 972.

Surveyor's liability for mistake in, or misrepresentation as to accuracy of, survey of real property, 35 ALR3d 504.

Tort liability of public schools and institutions of higher learning for accident occurring during school athletic events, 35 ALR3d 725.

Tort liability of public schools and institutions of higher learning for accidents associated with chemistry experiments, shopwork, and manual or vocational training, 35 ALR3d 758.

Tort liability of private schools and institutions of higher learning for accidents due to condition of buildings, equipment, or outside premises, 35 ALR3d 975.

Tort liability of public schools and institutions of higher learning for accidents occurring during use of premises and equipment for other than school purposes, 37 ALR3d 712.

Tort liability of public schools and institutions of higher learning for injuries due to condition of grounds, walks, and playgrounds, 37 ALR3d 738.

Liability of independent accountant to investors or shareholders, 46 ALR3d 979; 48 ALR5th 389.

Liability of water supplier for damages resulting from furnishing impure water, 54 ALR3d 936.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property, 61 ALR3d 922.

Modern status of landlord's tort liability for injury or death of tenant or third person caused by dangerous condition of premises, 64 ALR3d 339.

Liability of insurance broker or agent to insured for failure to procure insurance, 64 ALR3d 398.

Liability of installer or maintenance company for injury caused by door of automatic passenger elevator, 64 ALR3d 1005.

Liability of insurance agent or broker on ground of inadequacy of liability insurance coverage procured, 72 ALR3d 704.

Liability of insurance agent or broker on ground of inadequacy of life, health, and accident insurance coverage procured, 72 ALR3d 735.

Liability of insurance agent or broker on ground of inadequacy of property insurance coverage procured, 72 ALR3d 747.

Duty of contractor to warn owner of defects in subsurface conditions, 73 ALR3d 1213.

Liability of owner or operator of theatre or other amusement to patron assaulted by another patron, 75 ALR3d 441.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees, 77 ALR3d 6.

Liability of bank in connection with night depository service, 77 ALR3d 597.

Attorney's liability for negligence in cases involving domestic relations, 78 ALR3d 255.

Liability of one who induces termination of employment of another by threatening to end own contractual relationship with employer, 79 ALR3d 672.

Civil liability of prison or jail authorities for self-inflicted injury or death of prisoner, 79 ALR3d 1210.

Liability of swimming facility operator for injury or death allegedly resulting from defects of diving board, slide, or other swimming pool equipment, 85 ALR3d 849.

Liability of youth camp, its agents or employees, or of scouting leader or organization, for injury to child participant in program, 88 ALR3d 1236.

Legal malpractice by permitting statutory time limitation to run against client's claim, 90 ALR3d 293.

Accountant's malpractice liability to client, 92 ALR3d 396.

Liability of manufacturer or seller for injury or death allegedly caused by failure to warn regarding danger in use of vaccine or prescription drug, 94 ALR3d 748.

Liability of telephone company for injury by noise or electric charge transmitted over line, 99 ALR3d 628.

Liability of common carrier for personal injury or death of passenger occasioned by inhalation of gases or fumes from exhaust, 99 ALR3d 751.

Telephone company's liability for disclosure of number or address of subscriber holding unlisted number, 1 ALR4th 218.

Liability of university, college, or other school for failure to protect student from crime, 1 ALR4th 1099.

Tort liability of public schools and institutions of higher learning for educational malpractice, 1 ALR4th 1139.

Liability of wharf owner or operator for personal injuries to invitees or licensees resulting from condition of premises or operation of equipment, 34 ALR4th 572.

Liability of employer with regard to inherently dangerous work for injuries to employees of independent contractor, 34 ALR4th 914.

Insurer's tort liability for wrongful or negligent issuance of life policy, 37 ALR4th 972.

Liability of telephone company for mistakes in or omissions from its directory, 47 ALR4th 882.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 ALR4th 127.

Breach of assumed duty to inspect property as ground for liability to third party, 13 ALR5th 289.

51-1-9. Recovery for torts to self, wife, child, ward, or servant.

Every person may recover for torts committed to himself, his wife, his child, his ward, or his servant. (Orig. Code 1863, § 2903; Code 1868, § 2909; Code 1873, § 2960; Code 1882, § 2960; Civil Code 1895, § 3816; Civil Code 1910, § 4412; Code 1933, § 105-107.)

Law reviews. — For note advocating recognition of interspousal tort actions for personal injuries during coverture, see 14 Mercer L. Rev. 434 (1963). For note, "Torts — Parental Immunity in a Modern Perspective," see 4 Ga. St. B. J. 142 (1967). For note tracing the development in the United States and Australia of recovery for negligently inflicted mental distress arising from peril or injury to another, see 26 Emory L.J. 647 (1977).

For comment criticizing McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299 (1949), and the former common-law rule denying the wife an action for loss of consortium, see 1 Mercer L. Rev. 316 (1950). For comment suggesting grant of right of action to wife for loss of consortium with husband, in light of McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299 (1949), see 12 Ga. B. J. 330 (1950). For comment on Brown v. Georgia Tenn. Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953), allowing wife's recovery for loss of consortium of husband which resulted from personal injuries to him caused by defendant's negligence, see 16 Ga. B. J. 335 (1954). For comment on Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956), recognizing child's right of action for prenatal injuries suffered prior to viability, see 8 Mercer L. Rev. 377 (1957). For comment discussing trend toward allowance of a wrongful death action for death of an unborn child, see 1 Ga. St. B. J. 508 (1968). For comment suggesting reconsideration of Georgia's parental immunity doctrine in light of Gibson v. Gibson, 3 Cal. 3d 909, 92 Cal. Rptr. 288, 479 P.2d 648 (1971), see 22 Mercer L. Rev. 803 (1971).

JUDICIAL DECISIONS

Analysis

General Consideration
Torts to Wife
Torts to Child
Torts to Servant

General Consideration

O.C.G.A. § 51-1-9 is a declaration of the common law. Collins v. Martin, 157 Ga. App. 45, 276 S.E.2d 102 (1981); Ireland Elec. Corp. v. Georgia Hwy. Express, Inc., 166 Ga. App. 150, 303 S.E.2d 497 (1983); McBride v. GMC, 737 F. Supp. 1563 (M.D. Ga. 1990).

Intentional infliction of emotional distress. — To sustain a cause of action for intentional infliction of emotional distress through the use of abusive or obscene language, the defendant's conduct must have been so abrasive or obscene as to naturally humiliate, embarrass, frighten, or outrage the plaintiff, and the alleged emotional distress must be so severe that no reasonable person could be expected to endure it. Williams v. Voljavec, 202 Ga. App. 580, 415 S.E.2d 31 (1992).

There is no right of action in one spouse against another for personal tort not involving any property right, and this is true regardless of the fact that the tort is wantonly and maliciously inflicted. Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952).

Applicable statute of limitation. — Section 9-3-31, providing a four-year limitation for actions based on injury to personalty, applies to actions for loss of services under this section. Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 S.E. 365 (1934), overruled on other grounds, Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605 (1971).

Fetal victim of a tort must be born alive in order to seek recovery from the alleged tortfeasor. Peters v. Hospital Auth., 265 Ga. 487, 458 S.E.2d 628 (1995).

Cited in McDowell v. Georgia R.R., 60 Ga. 320 (1878); City of Atlanta v. Dorsey, 73 Ga. 479 (1884); King v. Southern Ry., 126 Ga. 794, 55 S.E. 965 (1906); Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (1963); Smith v. Tri-State Culvert Mfg. Co., 126 Ga. App. 508, 191 S.E.2d 92 (1972); Bradley v. Tenneco Oil Co., 146 Ga. App. 161, 245 S.E.2d 862 (1978); Coley v. M & M Mars, Inc., 461 F. Supp. 1073 (M.D. Ga. 1978); Chance v. Hanson, 160 Ga. App. 329, 287 S.E.2d 57 (1981).

Torts to Wife

Wife may sue for any injury to her person or reputation. Martin v. Gurley, 201 Ga. 493, 39 S.E.2d 878 (1946).

Husband's suit for injury to wife. — Husband being presumed to be the head of the house and responsible for his wife's necessary expenses, and being also entitled to the services, society, and consortium of his wife, these are the only proper elements of damage for which the plaintiff may sue in his capacity as husband. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

Wife only has claim for certain direct damages. — Wife's physical injuries and attendant pain, suffering, and nervous impairment are no part of her husband's cause of action, nor is her resultant nervousness and impatience, except insofar as it causes a loss of her services to him. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

Wife's only recourse for recovery of medical expenses is through her husband, and the state of her health and her life expectancy must necessarily therefore be considered in determining the award of damages for her benefit. Old Dominion Freight Line v. Martin, 153 Ga. App. 135, 264 S.E.2d 585 (1980).

Joinder of wife in action by husband is permissible. East Tenn., V. & G.R.R. v. Cox, 57 Ga. 252 (1876).

Measure of wife's medical expense damages. — So long as the law vests only in the husband the right to sue for his wife's necessary medical expenses, the

correct measure of such damages must allow for the recovery of what the evidence shows to be the anticipated expenditures for necessary and required care of the wife for the expectancy of her life. Old Dominion Freight Line v. Martin, 153 Ga. App. 135, 264 S.E.2d 585 (1980).

Life expectancy tables permitted to calculate damages over time. — Trial courts may instruct the jury to consider mortality tables as to the wife's life expectancy so as to ascertain what future medical expenses are reasonably certain to accrue as the natural and proximate result of her injuries. Old Dominion Freight Line v. Martin, 153 Ga. App. 135, 264 S.E.2d 585 (1980).

Value of wife's services is a jury question to be estimated in the light of the evidence and their own observation and experience. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

At common law, wife had no cause of action for loss of consortium. McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299 (1949).

Courts now recognize wife's action for consortium. — Wife has an independent cause of action for loss of consortium due to a negligent injury to her husband. Brown v. Georgia-Tennessee Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953); Lemon v. Bank Lines, 411 F. Supp. 677 (S.D. Ga. 1976), aff'd, 562 F.2d 1259 (5th Cir. 1977).

Consortium action derivative in nature. — Right of the wife to recover for loss of consortium on account of alleged injuries inflicted upon her husband cannot arise unless her right to the consortium has been adversely affected under circumstances giving rise to liability and from which liability attaches. One spouse's right of action for the loss of the other's society or consortium is a derivative one, stemming from the right of the other. Armstrong Furn. Co. v. Nickle, 110 Ga. App. 686, 140 S.E.2d 72 (1964).

Torts to Child

Infant may maintain action for damages on account of any tort committed resulting in damages to the infant, whether the tortious act affects the parent or not. Kite v. Brooks, 51 Ga. App. 531, 181 S.E. 107 (1935).

Child may recover for prenatal injury. — If a child born after an injury sustained at any period of the child's prenatal life can prove the effect on the child of a tort, the child has a right to recover. Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956).

Child generally may not sue parent in tort unless emancipated. — While an unemancipated minor cannot sue a father for a tort to himself, such an action is maintainable if the child was emancipated at the time of the tort and the action. Fowlkes v. Ray-O-Vac Co., 52 Ga. App. 338, 183 S.E. 210 (1935).

Except that unemancipated child may sue parent for intentional physical harm. — While an unemancipated minor child has no cause of action against a parent for simple negligence, such child may maintain an action for personal injury against a parent for a willful or malicious act, provided it is such an act of cruelty as to authorize forfeiture of parental authority. Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952).

Unemancipated infant may recover against employer of the infant's parent for injuries the infant sustained due to negligence of the parent while acting in the service of the employer, although the child could not maintain an action against the parent for the tortious act. Stapleton v. Stapleton, 85 Ga. App. 728, 70 S.E.2d 156 (1952).

Adult child may sue parent for negligence, and it follows that a parent may also sue an adult child. Davis v. Cox, 131 Ga. App. 611, 206 S.E.2d 655 (1974).

Statutory right of the parent to sue is merely declaratory of the common law, when such right to recover is, by legal fiction, predicated upon the relation of master and servant, and is limited to the recovery of damages for loss of the child's services. Bell v. Central R.R., 73 Ga. 520 (1884); Frazier v. Georgia R.R. & Banking Co., 101 Ga. 70, 28 S.E. 684 (1897); Kite v. Brooks, 51 Ga. App. 531, 181 S.E. 107 (1935).

Former Code 1933, § 105-108 (see now O.C.G.A. § 51-2-2) was a mere codification of common-law rules, and at common law

Torts to Child (Cont'd)

the liability of a father for the torts of his child was the same as the liability of a master for the torts of his servant. Upon that ground was based the right of action given to a father for a tort committed to his child or ward, set forth in former Code 1933, § 105-107 (see now O.C.G.A. § 51-1-9). Stanford v. Smith, 173 Ga. 165, 159 S.E. 666, answer conformed to, 43 Ga. App. 747, 160 S.E. 93 (1931).

Right to recover damages for loss of services and medical expenses from tortious injury to minor is in the father. Kite v. Brooks, 51 Ga. App. 531, 181 S.E. 107 (1935); City of Dalton v. Webb, 131 Ga. App. 599, 206 S.E.2d 639 (1974).

Action by father. — Father may sue by virtue of this section for injuries to his minor son, as for injuries to a servant, if the son is old enough to render services. Shields v. Yonge, 15 Ga. 349 (1854); Allen v. Atlanta S.R.R., 54 Ga. 503 (1875).

Father must suffer such pecuniary damages to recover. — Father cannot maintain a suit for a wrong done to his minor child, unless he has incurred a direct pecuniary injury therefrom, by reason of loss of service or expenses necessarily consequent thereon. Sorrels v. Matthews, 129 Ga. 319, 58 S.E. 819 (1907); Kite v. Brooks, 51 Ga. App. 531, 181 S.E. 107 (1935).

Mother of fatherless child may recover for loss of services. City of Albany v. Lindsey, 11 Ga. App. 573, 75 S.E. 911 (1912).

There is presumption that infant less than two years old is incapable of performing valuable services. Crenshaw v. Louisville & N.R.R., 15 Ga. App. 182, 82 S.E. 767 (1914).

Recovery not permitted for parent's emotional distress. — Recovery for emotional distress and mental suffering which results from the parent's learning of injuries to his child or seeing the injured child is not allowed. Cotton States Mut. Ins. Co. v. Crosby, 149 Ga. App. 450, 254 S.E.2d 485 (1979), rev'd on other grounds, 244 Ga. 456, 260 S.E.2d 860 (1979).

Parent's right of action generally derivative. — There is no independent right of action available to a parent who is not present at an incident in which his child is injured by the negligence of another. Cotton States Mut. Ins. Co. v. Crosby, 149 Ga. App. 450, 254 S.E.2d 485 (1979), overruled on other grounds, 244 Ga. 456, 260 S.E.2d 860 (1979); Posey v. Medical Center-West, Inc., 184 Ga. App. 404, 361 S.E.2d 505, cert. denied, 184 Ga. App. 910, 361 S.E.2d 505 (1987).

Emancipated child may recover certain damages in own name. — While ordinarily the cause of action for lost earnings and medical expenses expended is in the father of a minor child, a father may emancipate his minor child, and thereby vest in the child the right through his guardian or by next friend to sue for such damages. Brown v. Seaboard Air Line R.R., 91 Ga. App. 35, 84 S.E.2d 707 (1954).

Father loses own right of recovery once vested in child. — While a father may revoke his emancipation of his minor child, once he divests himself of a cause of action for loss of earnings and medical expenses and vests such cause of action in the child by emancipating the child, and the child sues on the cause of action and pursues it to judgment, the father cannot revest the cause of action in himself by revoking his emancipation of the child. Brown v. Seaboard Air Line R.R., 91 Ga. App. 35, 84 S.E.2d 707 (1954).

Death of child will not bar action. Chick v. Southwestern R.R., 57 Ga. 357 (1876).

Pleadings. — Petition which sets forth a good cause of action for loss of services should not be dismissed because of unnecessary allegations. McCarthy v. Gulf Ref. Co., 26 Ga. App. 665, 107 S.E. 92 (1921).

Torts to Servant

Application of common-law action per quod servitium amisit. — Common-law action per quod servitium amisit, which supports the master's recovery against the employer of a tort-feasor for the loss of services of his servant, is applicable to those instances in which the inflicted tort was intentional, with the determination of any liability on behalf of the employer of the tort-feasor who committed the intentional tort being governed

by the applicable rules of the law of agency. Ireland Elec. Corp. v. Georgia Hwy. Express, Inc., 166 Ga. App. 150, 303 S.E.2d 497 (1983).

Employer does not have a cause of action against the employer of an alleged tort-feasor for the loss of his employee's services due to injuries sustained by that employee as a result of the tort-feasor's negligence. Ireland Elec. Corp. v. Georgia Hwy. Express, Inc., 166 Ga. App. 150, 303 S.E.2d 497 (1983); Risdon Enters., Inc. v. Colemill Enters., Inc., 172 Ga. App. 902, 324 S.E.2d 738 (1984).

OPINIONS OF THE ATTORNEY GENERAL

Question of whether child of two years is capable of rendering valuable services to parents is, in the case of doubt, for the jury. 1948-49 Op. Att'y Gen. p. 617.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationships, § 355. 59 Am. Jur. 2d, Parent and Child, § 112 et seq.

C.J.S. — 41 C.J.S., Husband and Wife, § 239 et seq. 67A C.J.S., Parent and Child, § 350 et seq.

ALR. — Liability for misrepresenting age of child to one who, having employed a child below employable age, has incurred liability for injury to him, 1 ALR 302.

Necessity of obtaining the husband's consent to operation on wife, 4 ALR 1531.

Liability of electric light or power company for injuries to employee of patron, 9 ALR 174.

Right of one spouse to enjoin torts of other, 9 ALR 1066.

Avoidance of infant's release of damages for personal tort, 13 ALR 402.

Duty of carrier to guard young children against danger of falling from car, 28 ALR 1035.

What items of damage on account of personal injury to infant belong to him and what to parent, 37 ALR 11; 32 ALR2d 1060.

Liability of person acting under authority of one spouse for injury to other spouse, 57 ALR 755.

Right to recover for death of, or injury to, servant due to his conscious exposure in attempt to save property, 61 ALR 579.

Fiction of loss of services as a condition of action for abduction of child, 72 ALR 847.

Act or omission which would not support an action for damages by person injured as ground of action by parent or spouse for consequential damages, 94 ALR 1211.

Action by one person for consequential damages on account of injury to another as one for bodily or personal injury within statute of limitations, 108 ALR 525.

Authority of next friend or guardian ad litem, or of attorney employed by him, to receive payment or acknowledge satisfaction of judgment in favor of infant, 111 ALR 686.

Husband's right to damages for loss of consortium due to personal injury to wife, 133 ALR 1156.

Damages on account of loss of earnings or impairment of earning capacity due to wife's personal injury as recoverable by her or by her husband, 151 ALR 479.

Liability of parent or person in loco parentis for personal tort against minor child, 19 ALR2d 423; 41 ALR3d 904.

What items of damage on account of personal injury to infant belong to him, and what to parent, 32 ALR2d 1060.

Spouse's cause of action for negligent personal injury as separate or community property, 35 ALR2d 1199.

Right of wife to recover in individual capacity for medical expenses of husband injured by third person's negligence, 42 ALR2d 843.

Employer's right of action against third person tortiously killing or injuring employee, 57 ALR2d 802.

Right of parent or representatives to maintain tort action against minor child, 60 ALR2d 1284; 62 ALR3d 1284.

Truant or attendance officer's liability

for assault and battery or false imprisonment, 62 ALR2d 1328.

Liability of landlord to tenant or member of tenant's family, for injury by animal or insect, 67 ALR2d 1005.

Right of recovery over by means of subrogation or similar theory, against a third-person tort-feasor, of an employer who has paid salary, wages, sick leave pay, medical expenses, or the like, to or for an injured employee, 70 ALR2d 475.

Family relationship other than that of parent and child or husband and wife between tort-feasor and person injured or killed as affecting right to maintain action, 81 ALR2d 1155.

Injured child's subsequent marriage to tort-feasor as barring parent's action for medical expense, loss of service, and the like, 91 ALR2d 910.

Fact that tort-feasor is member of class of beneficiaries as affecting right to maintain action for wrongful death, 95 ALR2d 585.

Conflict of laws as to right of action between husband and wife or parent and child, 96 ALR2d 973.

Judgment in spouses' action for personal injuries as binding, as regards loss of consortium and similar resulting damage, upon other spouse not a party to the action, 12 ALR3d 933.

Medical expenses due to injury to wife as recoverable by her or by husband, 21 ALR3d 1113.

Spouse's or parent's right to recover punitive damages in connection with recovery of damages for medical expenses or loss of services or consortium arising from personal injury to other spouse or to child, 25 ALR3d 1416.

Admissibility of evidence of family circumstances of parties in personal injury actions, 37 ALR3d 1082.

Liability for prenatal injuries, 40 ALR3d 1222.

Conflict of laws as to right of action for loss of consortium, 46 ALR3d 880.

Death action by or in favor of parent against unemancipated child, 62 ALR3d 1299.

Measure and elements of damages in wife's action for loss of consortium, 74 ALR3d 805.

Right of professional corporation to recover damages based on injury or death of attorney or doctor associate, 74 ALR3d 1129.

Carrier's liability for injury or death of infant passenger as affected by fact that child was in custody of parent or other adult, 74 ALR3d 1171.

Action against parent by or on behalf of unemancipated minor child for wrongful death of other parent, 87 ALR3d 849.

Liability for child's personal injuries or death resulting from tort committed against child's mother before child was conceived, 91 ALR3d 316.

Modern status of interspousal tort immunity in personal injury and wrongful death actions, 92 ALR3d 901.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa, 94 ALR3d 676.

Employer's right of action for loss of services or the like against third person tortiously killing or injuring employee, 4 ALR4th 504.

Recovery for loss of consortium for injury occurring prior to marriage, 5 ALR4th 300.

Liability of parent for injury to unemancipated child caused by parent's negligence, 6 ALR4th 1066.

Child's right of action for loss of support, training, parental attention, or the like, against a third person negligently injuring parent, 11 ALR4th 549.

Injured party's release of tort-feasor as barring spouse's action for loss of consortium, 29 ALR4th 1200.

Action for loss of consortium based on nonmarital cohabitation, 40 ALR4th 553.

Sexual child abuser's civil liability to child's parent, 54 ALR4th 93.

Parent's right to recover for loss of consortium in connection with injury to child, 54 ALR4th 112.

When must loss-of-consortium claim be joined with underlying personal injury claim, 60 ALR4th 1174.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse, 61 ALR4th 309.

Recoverability of compensatory damages for mental anguish or emotional distress for tortiously causing another's birth, 74 ALR4th 798.

Right of child to action against mother for infliction of prenatal injuries, 78 ALR4th 1082.

Infliction of emotional distress: toxic exposure, 6 ALR5th 162.

Liability of insurer, or insurance agent or adjuster, for infliction of emotional distress, 6 ALR5th 297.

Prosecution of mother for prenatal substance abuse based on endangerment of or delivery of controlled substance to child, 70 ALR5th 461.

Action by or on behalf of minor child, or presumed minor child, for loss of parental consortium — impact of other legal concepts and theories of recovery, 6 A.L.R.7th 4.

Action by or on behalf of minor child, or presumed minor child, for loss of parental consortium — proof, evidentiary considerations, limits of recovery, parties, 5 A.L.R.7th 4.

Action by or on behalf of minor child, or presumed minor child, for loss of parental consortium — general considerations, 4 A.L.R.7th 1.

51-1-10. Who may bring an action for torts to wife; action by wife living apart from husband for torts to self or children.

If a tort shall be committed upon the person or reputation of the wife, the husband or wife may recover therefor; if the wife shall be living separate from the husband, she may bring an action for such torts and also torts to her children and recover the same to her use. (Orig. Code 1863, § 1703; Code 1868, § 1745; Code 1873, § 1755; Code 1882, § 1755; Civil Code 1895, § 2475; Civil Code 1910, § 2994; Code 1933, § 53-511.)

Law reviews. — For comment criticizing McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299 (1949), and the former common-law rule denying the wife an action for loss of consortium, see 1 Mercer L. Rev. 316 (1950). For comment suggesting grant of right of action to wife for loss of consortium with husband, in light of McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299 (1949), see 12 Ga. B. J. 330 (1950). For comment on Brown v. Georgia Tenn. Coaches, Inc., 88 Ga. App. 519, 77 S.E.2d 24 (1953), allowing wife's recovery for loss of consortium of husband which resulted from personal injuries to him caused by defendant's negligence, see 16 Ga. B. J. 335 (1954).

JUDICIAL DECISIONS

Two distinct causes of action. — When a married woman is injured by the wrongful conduct of another, two different causes of action may arise: the one in her favor for her own pain and suffering, and the other in favor of the husband for the loss of his wife's services and for expenses incurred as a consequence of the injuries to her. Georgia R.R. & Banking Co. v. Tice, 124 Ga. 459, 52 S.E. 916 (1905).

Wife may sue for any injury to her person or reputation. Martin v. Gurley, 201 Ga. 493, 39 S.E.2d 878 (1946).

Wife may sue in own name. — A wife, although living with her husband, may sue and recover in her own name for a tort committed to her person causing physical injury to her. City of Atlanta v. Dorsey, 73 Ga. 479 (1884); Mayor of Athens v. Smith, 111 Ga. 870, 36 S.E. 955 (1900).

Wife may maintain in her own name action for slanderous words alleged to have been used of and concerning herself. Pavlovski v. Thornton, 89 Ga. 829, 15 S.E. 822 (1892).

Husband cannot recover damages for pain and suffering of his wife, that action is in the wife. Collins v. Martin, 157 Ga. App. 45, 276 S.E.2d 102 (1981).

Wife's physical injuries and attendant

pain, suffering and nervous impairment are no part of her husband's cause of action, nor is her resultant nervousness and impatience, except insofar as it causes a loss of her services to him. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

Expenses incurred as consequence of injury to wife. — Married woman cannot recover for expenses incurred by her in consequence of an injury, unless actually paid by her, there being no testimony going to show that she was living separate from her husband, that she was a free trader, that she had any separate property, or that she personally undertook to pay these expenses or in any manner bound herself to do so. The married woman's law does not have the effect of giving her the right to recover for such expenses, without joining her husband in the action. Lewis v. City of Atlanta, 77 Ga. 756 (1886).

Wife's only recourse for recovery of medical expenses is through her husband, and the state of her health and her life expectancy must necessarily therefore be considered in determining the award of damages for her benefit. Old Dominion Freight Line v. Martin, 153 Ga. App. 135, 264 S.E.2d 585 (1980).

In the event of injury to the wife, the right to recover the expenses incurred for medical, hospital and funeral bills is not in her but in the husband, unless there are special circumstances, as when the wife contracts to be personally bound. Old Dominion Freight Line v. Martin, 153 Ga. App. 135, 264 S.E.2d 585 (1980).

Husband may recover loss of wife's services and consortium. — Husband being presumed to be head of the house and responsible for his wife's necessary expenses, and being also entitled to the services, society, and consortium of his wife, these are the only proper elements of damage for which the plaintiff may sue in his capacity as husband. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952); Collins v. Martin, 157 Ga. App. 45, 276 S.E.2d 102 (1981).

Measure of damages for wife's injuries. — So long as the law vests only in the husband the right to sue for his wife's necessary medical expenses, the correct measure of such damages must allow for the recovery of what the evidence shows to be the anticipated expenditures for necessary and required care of the wife for the expectancy of her life. Old Dominion Freight Line v. Martin, 153 Ga. App. 135, 264 S.E.2d 585 (1980).

Injuries suffered before marriage. — When a woman suffers a tortious personal injury, impairing or destroying her earning capacity, the cause of action arising therefrom becomes a "chose in action," and a part of her separate estate, notwithstanding her subsequent marriage, though the damages which under the law she would have been entitled to recover as a result of the tort may include compensation for loss of earning capacity, which the after-acquired husband would have been entitled to enjoy if it had not been previously destroyed by the tort. Wrightsville & Tennille R.R. v. Vaughan, 9 Ga. App. 371, 71 S.E. 691 (1911).

Wife's loss of ability to perform housekeeping duties is recoverable by husband if they are living together. McBowman v. Merry, 104 Ga. App. 454, 122 S.E.2d 136 (1961).

Recovery against husband. — Under the statutory law of Georgia, a wife cannot recover from a husband with whom she is living in lawful wedlock, for a tort resulting from his negligent operation of an automobile in which they were riding at the time of the injury. Heyman v. Heyman, 19 Ga. App. 634, 92 S.E. 25 (1917).

Value of wife's services is a jury question to be estimated in the light of the evidence and their own observation and experience. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

Trial courts may instruct jury to consider mortality tables as to wife's life expectancy so as to ascertain what future medical expenses are reasonably certain to accrue as the natural and proximate result of her injuries, for which her husband is entitled to recover damages. Old Dominion Freight Line v. Martin, 153 Ga. App. 135, 264 S.E.2d 585 (1980).

Fundamental requirement relating to recovery by mother for tortious injury to child is that mother be living apart from her husband. Peppers v. Smith, 151 Ga. App. 680, 261 S.E.2d 427 (1979).

Suit permitted by wife if husband abandons family. — Under this section, a mother has a right of action for a tort which deprives a minor of his ability to render valuable services when the father has abandoned his family and all custody and control of the minor. Amos v. Atlanta Ry., 104 Ga. 809, 31 S.E. 42 (1898).

When a father has lost his parental power, as in the case of abandonment, it is well settled that the mother rather than the father is entitled to bring an action for loss of services and for medical expenses resulting from a tortious injury to the child, but this is not to say that the right of the mother to maintain an action is conditioned upon the loss of parental power by the father. Peppers v. Smith, 151 Ga. App. 680, 261 S.E.2d 427 (1979).

Abandonment not required. — Although abandonment of family by husband may satisfy language of this section, there is no independent requirement of abandonment contained in this section. Peppers v. Smith, 151 Ga. App. 680, 261 S.E.2d 427 (1979).

Cited in Sessions v. Parker, 174 Ga. 296, 162 S.E. 790 (1932); McCallum v. Bryant, 93 Ga. App. 214, 91 S.E.2d 194 (1956); Smith v. Tri-State Culvert Mfg. Co., 126 Ga. App. 508, 191 S.E.2d 92 (1972); McDaniel v. Bliss, 156 Ga. App. 166, 274 S.E.2d 138 (1980); Atlanta Cas. Co. v. Jones, 247 Ga. 238, 275 S.E.2d 328 (1981); Chance v. Hanson, 160 Ga. App. 329, 287 S.E.2d 57 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, § 194 et seq.

C.J.S. — 41 C.J.S., Husband and Wife, § 212 et seq.

ALR. — Consent of husband to rendition of services by wife as prerequisite to her recovery therefor, 9 ALR 1303.

Husband's right to damages for loss of consortium due to personal injury to wife, 21 ALR 1517; 133 ALR 1156.

Right of husband and wife to maintain joint action for wrongs directly affecting both arising from same act, 25 ALR 743.

Judgment in action for damages on account of injury to wife as bar to action for injury to self sustained in same accident and vice versa, 55 ALR 936.

Husband's right to damages for loss of consortium due to personal injury to wife, 133 ALR 1156.

Spouse's cause of action for negligent personal injury as separate or community property, 35 ALR2d 1199.

Right of wife to recover in individual capacity for medical expenses of husband injured by third person's negligence, 42 ALR2d 843.

What law governs the right of a tortiously injured married woman to sue in her own name and the ownership of the cause of action, 97 ALR2d 725.

Judgment in spouse's action for personal injuries as binding, as regards loss of consortium and similar resulting damage, upon other spouse not a party to the action, 12 ALR3d 933.

Medical expenses due to injury to wife as recoverable by her or by husband, 21 ALR3d 1113.

Spouse's or parent's right to recover punitive damages in connection with recovery of damages for medical expenses or loss of services or consortium arising from personal injury to other spouse or to child, 25 ALR3d 1416.

Conflict of laws as to right of action for loss of consortium, 46 ALR3d 880.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa, 66 ALR3d 472.

Measure and elements of damages in wife's action for loss of consortium, 74 ALR3d 805.

Injured party's release of tortfeasor as barring spouse's action for loss of consortium, 29 ALR4th 1200.

51-1-11. When privity required to support action; product liability action and time limitation therefore; industry-wide liability theories rejected.

(a) Except as otherwise provided in this Code section, no privity is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract and except as provided in Code Section 11-2-318.

(b)(1) The manufacturer of any personal property sold as new property directly or through a dealer or any other person shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

(2) No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury.

(3) A manufacturer may not exclude or limit the operation of this subsection.

(c) The limitation of paragraph (2) of subsection (b) of this Code section regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability, except an action seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property. Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer.

(d) Irrespective of privity, a manufacturer shall not be held liable for the manufacture of a product alleged to be defective based on theories of market share or enterprise, or other theories of industry-wide liability.

(e) Irrespective of privity, a manufacturer of a product alleged to be defective shall not be held liable for a public nuisance based on theories

of market share or enterprise, or other theories of industry-wide liability. (Orig. Code 1863, § 2899; Code 1868, § 2905; Code 1873, § 2956; Code 1882, § 2956; Civil Code 1895, § 3812; Civil Code 1910, § 4408; Code 1933, § 105-106; Ga. L. 1968, p. 1166, § 1; Ga. L. 1978, p. 2202, § 1; Ga. L. 1978, p. 2218, § 1; Ga. L. 1978, p. 2267, § 1; Ga. L. 1987, p. 613, § 1; Ga. L. 2009, p. 625, § 1/SB 213.)

Cross references. — Reports of insurers authorized to transact product liability insurance, § 33-3-22.

Editor's notes. — Ga. L. 2009, p. 625, § 2/SB 213, not codified by the General Assembly, provides that subsections (d) and (e) shall apply to causes of action arising on or after May 4, 2009.

Law reviews. — For article, "Georgia's New Statutory Liability for Manufacturers: An Inadequate Legislative Response," see 2 Ga. L. Rev. 538 (1968). For article, "Products Liability Law in Georgia: Is Change Coming?," see 10 Ga. St. B. J. 353 (1974). For article discussing strict liability for defective products in Georgia, see 13 Ga. St. B. J. 142 (1977). For article discussing products liability and plaintiff's fault under the Uniform Comparative Fault Act, see 29 Mercer L. Rev. 373 (1978). For article discussing plaintiff conduct and the emerging doctrine of comparative causation of torts, see 29 Mercer L. Rev. 403 (1978). For article discussing the defenses to strict liability in tort, see 29 Mercer L. Rev. 447 (1978). For article advocating imposition of strict liability for defective products in accordance with reasonable human expectations, see 29 Mercer L. Rev. 465 (1978). For article critically analyzing the distinction in theories of recovery of damages caused by defective products between personal injuries cases and economic losses and suggesting a policy basis for deciding the latter, see 29 Mercer L. Rev. 493 (1978). For article analyzing the roles of court decisions and public regulation in preventing and redressing product defect injuries to children, see 29 Mercer L. Rev. 523 (1978). For article discussing comment K of § 402A Restatement of Torts (Second) pertaining to unavoidably unsafe products of societal benefit specifically in the drug and cosmetic field, see 29 Mercer L. Rev. 545 (1978). For article advocating repudiation of the patent danger rule as a manufacturer's defense to personal injury suits resulting from product defects, see 29 Mercer L. Rev. 583 (1978). For article discussing architect liability for product design and supervision of construction, and the statute of limitations, see 14 Ga. St. B. J. 164 (1978). For article discussing strict liability, see 17 Ga. St. B. J. 56 (1980). For article on the duty to warn users of products of product danger under § 51-1-11, see 18 Ga. St. B. J. 69 (1981). For article surveying torts law, see 34 Mercer L. Rev. 271 (1982). For article, "Statutes of Limitation: Counterproductive Complexities," see 37 Mercer L. Rev. 1 (1985). For article, "Federal Automotive Safety Standards and Georgia Products Liability Law: Conflict or Coexistence?," see 26 Ga. St. B. J. 107 (1990). For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991). For annual survey article on tort law, see 50 Mercer L. Rev. 335 (1998). For annual survey article on tort law, see 52 Mercer L. Rev. 421 (2000). For survey article on tort law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 425 (2003). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For annual survey of product liability law, see 58 Mercer L. Rev. 313 (2006). For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007). For survey article on product liability law, see 60 Mercer L. Rev. 303 (2008). For annual survey on product liability, see 61 Mercer L. Rev. 267 (2009). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009). For annual survey of law on product liability, see 62 Mercer L. Rev. 243 (2010). For annual survey on product liability, see 64 Mercer L. Rev. 231 (2012). For annual survey article on product liability, see 67 Mercer L. Rev. 177 (2015).

For note, "Products Liability in Geor-

gia," see 12 Ga. L. Rev. 83 (1977). For note discussing admissibility of automobile recall letters as proof of defect in products liability case, see 29 Mercer L. Rev. 611 (1978). For note discussing various state legislature's enactments restricting manufacturer's liability for injury resulting from product defects, see 29 Mercer L. Rev. 619 (1978). For note, "Subsequent Remedial Measures in a Product Liability Case: The Fastest Spinning Wheel in Litigation," see 19 Ga. St. B. J. 89 (1982). For note, "Ogletree v. Navistar International Transportation Corp.: The Demise of the 'Open and Obvious Danger' Defense," see 50 Mercer L. Rev. 643 (1999). For note, "Does the National Childhood Vaccine Injury Compensation Act Really Prohibit Design Defect Claims?: Examining Federal Preemption in Light of American Home Products Corp. v. Ferrari," see 26 Ga. St. U.L. Rev. 617 (2010). For note, "The Plaintiffs Keep Getting Richer, the Manufacturers Just Stay Poor: Design Defect Litigation in Georgia Post-Banks," see 49 Ga. L. Rev. 281 (2014).

For comment on Eades v. Spencer-Adams Paint Co., 82 Ga. App. 123, 60 S.E.2d 543 (1950), see 13 Ga. B. J. 343 (1951). For comment criticizing former privity restrictions in product liability suits in light of Revlon, Inc. v. Murdock, 103 Ga. App. 842, 120 S.E.2d 912 (1961), see 13 Mercer L. Rev. 425 (1962) (decided under former Code 1933 § 96-301). For comment on Capital Auto. Co. v. Shinall, 103 Ga. App. 695, 120 S.E.2d 351 (1961), see 14 Mercer L. Rev. 454 (1963). For comment on Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964), as to privity requirement in implied warranty actions, see 17 Mercer L. Rev. 318 (1965). For comment on Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691 (1976), see 28 Mercer L. Rev. 751 (1977). For comment discussing the prohibition of wrongful death suits under Georgia's strict liability in Ford Motor Co. v. Carter, 239 Ga. 657, 238 S.E.2d 361 (1977), see 29 Mercer L. Rev. 649 (1978). For comment, "Strict Liability Actions — Which Statute of Limitations?," see 31 Mercer L. Rev. 773 (1980). For comment, "Proposed Solutions to an 'Obvious' Problem in Georgia Products Liability Law," see 35 Mercer L. Rev. 915 (1984). For comment discussing the applicability of Federal Rule of Evidence 407 to exclude evidence of subsequent remedial measures in products liability actions, see 35 Mercer L. Rev. 1389 (1984). For comment, "Medical Expert Systems and Publisher Liability: A Cross-Contextual Analysis," see 43 Emory L.J. 731 (1994).

JUDICIAL DECISIONS

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General Consideration

Constitutionality. — Ten-year statute of repose barring strict product liability actions and applying to negligent product liability actions is not an unconstitutional denial of equal protection or access to the courts, nor does O.C.G.A. § 51-1-11 violate

the one-subject matter limitation of the state constitution. Love v. Whirlpool Corp., 264 Ga. 701, 449 S.E.2d 602 (1994).

Application of Florida law appropriate. — Florida law was properly applied for a fraud claim brought by a lessee against a lessor's principal because both Georgia under O.C.G.A. § 51-1-11(a) and Florida recognized an exception to the economic loss rule for injuries occurring independently of a contract and, thus, the application of Florida law did not contravene Georgia public policy. Luigino's Int'l, Inc. v. Miller, 2009 U.S. App. LEXIS 2614 (11th Cir. Feb. 11, 2009) (Unpublished).

Former O.C.G.A. § 24-9-67 inapplicable. — Trial court was not required to consider a driver's expert affidavits under former O.C.G.A. § 24-9-67 (see now O.C.G.A. § 24-7-707) in a products liability action because by the statute's terms former O.C.G.A. § 24-9-67 (see now O.C.G.A. § 24-7-707) applied to criminal cases, not civil cases. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

Calculating date. — Date to be used for calculating the beginning of the statute of repose under O.C.G.A. § 51-1-11(b)(2), and the conditions precedent for the imposition of strict liability under O.C.G.A. § 51-1-11(b)(1) are not defined in the same terms because O.C.G.A. § 51-1-11(b)(2) refers to the sale of the finished product to the consumer who is intended to receive the product as new. Campbell v. Altec Indus., 288 Ga. 535, 707 S.E.2d 48 (2011).

Cited in Reddick v. White Consol. Indus., Inc., 295 F. Supp. 243 (S.D. Ga. 1968); Standard v. Meadors, 347 F. Supp. 908 (N.D. Ga. 1972); Stewart v. Gainesville Glass Co., 131 Ga. App. 747, 206 S.E.2d 857 (1974); Long v. Jim Letts Oldsmobile, Inc., 135 Ga. App. 293, 217 S.E.2d 602 (1975); Davis v. Fox Pool Corp., 136 Ga. App. 381, 221 S.E.2d 484 (1975); Fender v. Colonial Stores, 138 Ga. App. 31, 225 S.E.2d 691 (1976); Ford Motor Co. v. Lee, 237 Ga. 554, 229 S.E.2d 379 (1976); Cobb Heating & Air Conditioning Co. v. Hertron Chem. Co., 139 Ga. App. 803, 229 S.E.2d 681 (1976); Dodge Trucks, Inc. v. Wilson, 140 Ga. App. 743, 231 S.E.2d 818 (1976); Lairsey v. Advance Abrasives Co., 542 F.2d 928 (5th Cir. 1976); Beam v. Omark Indus., Inc., 143 Ga. App. 142, 237 S.E.2d 607 (1977); Patent Scaffolding Co. v. Etheridge, 143 Ga. App. 795, 240 S.E.2d 610 (1977); Vance v. Miller-Taylor Shoe Co., 147 Ga. App. 812, 251 S.E.2d 52 (1978); Wansor v. George Hantscho Co., 580 F.2d 726 (5th Cir. 1978); Firestone Tire & Rubber Co. v. Hall, 152 Ga. App. 560, 263 S.E.2d 449 (1979); Tolar Constr. Co. v. GAF Corp., 154 Ga. App. 127, 267 S.E.2d 635 (1980); Daugherty v. Firestone Tire & Rubber Co., 85 F.R.D. 693 (N.D. Ga. 1980); Lang v. Federated Dep't Stores, Inc., 161 Ga. App. 760, 287 S.E.2d 729 (1982); Buchanan v. Georgia Boy Pest Control Co., 161 Ga. App. 301, 287 S.E.2d 752 (1982); Brooks v. Douglas, 163 Ga. App. 224, 292 S.E.2d 911 (1982); Starling v. Seaboard Coast Line R.R., 533 F. Supp. 183 (S.D. Ga. 1982); Beauchamp v. Russell, 547 F. Supp. 1191 (N.D. Ga. 1982); Whirlpool Corp. v. Hurlbut, 166 Ga. App. 95, 303 S.E.2d 284 (1983); Abee v. Stone Mt. Mem. Ass'n, 169 Ga. App. 167, 312 S.E.2d 142 (1983); Lodge v. Champion Home Bldrs. Co., 170 Ga. App. 21, 315 S.E.2d 912 (1984); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984); Lorentzson v. Rowell, 171 Ga. App. 821, 321 S.E.2d 341 (1984); Mann v. Coast Catamaran Corp., 254 Ga. 201, 326 S.E.2d 436 (1985); Folsom v. Sears, Roebuck & Co., 174 Ga. App. 46, 329 S.E.2d 217 (1985); American Living Sys. v. Bonapfel (In re All Am. of Ashburn, Inc.), 56 Bankr. 186 (Bankr. N.D. Ga. 1986); Westinghouse Elec. Corp. v. Williams, 183 Ga. App. 845, 360 S.E.2d 411 (1987); Continental Corp. v. DOT, 185 Ga. App. 792, 366 S.E.2d 160 (1988); Adair v. Baker Bros., 185 Ga. App. 807, 366 S.E.2d 164 (1988); White v. W.G.M. Safety Corp., 707 F. Supp. 544 (S.D. Ga. 1988); Browning v. Maytag Corp., 932 F.2d 1409 (11th Cir. 1991); Samuelson v. Lord, Aeck & Sergeant, Inc., 205 Ga. App. 568, 423 S.E.2d 268 (1992); Wright v. Osmose Wood Preserving, Inc., 206 Ga. App. 685, 426 S.E.2d 214 (1992); United States Fid. & Guar. Co. v. J.I. Case Co., 209 Ga. App. 61, 432 S.E.2d 654 (1993); Lamb ex rel. Shepard v. Sears, Roebuck & Co., 1 F.3d 1184 (11th Cir. 1993); DeLoach v. Rovema Corp., 241

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Ga. App. 802, 527 S.E.2d 882 (2000); Dean v. Toyota Indus. Equip. Mfg., Inc., 246 Ga. App. 255, 540 S.E.2d 233 (2000); Jones v. NordicTrack, Inc., 236 F.3d 658 (11th Cir. 2000); Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559 (2007); Carolina Tobacco Co. v. Baker, 295 Ga. App. 115, 670 S.E.2d 811 (2008); Coosa Valley Tech. College v. West, 299 Ga. App. 171, 682 S.E.2d 187 (2009); Dixie Group, Inc. v. Shaw Indus. Group, 303 Ga. App. 459, 693 S.E.2d 888; Anderson v. Atlanta Gas Light Co., 324 Ga. App. 801, 751 S.E.2d 589 (2013).

Privity as Element of Action

1. In General

Subsection (a) is a codification of the common law. Moody v. Martin Motor Co., 76 Ga. App. 456, 46 S.E.2d 197 (1948).

Subsection (a) allows an action in tort without the necessity of privity. Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969); Lashley v. Ford Motor Co., 359 F. Supp. 363 (M.D. Ga. 1972), aff'd, 480 F.2d 158 (5th Cir.) cert. denied, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973).

Subsection (a) of former Code 1933, § 105-106 (see now O.C.G.A. § 51-1-11) purportedly limited the right of tort action based on the violation of a duty, itself the consequence of a contract, to a party or privy, except in cases when the party would have had a right of action for the injury done, independently of the contract or in cases covered by former Code 1933, § 109A-2--318 (see now O.C.G.A. § 11-2-318) of the Uniform Commercial Code extending the benefit of express or implied warranties to certain natural persons without regard to privity. Koppers Co. v. Parks, 120 Ga. App. 551, 171 S.E.2d 639 (1969); Shell v. Watts, 125 Ga. App. 542, 188 S.E.2d 269, rev'd on other grounds, 229 Ga. 474, 192 S.E.2d 265 (1972).

O.C.G.A. § 51-1-11 states that no privity is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases when the party would have a right of action for the injury done independently of the contract. Levine v. SunTrust Robinson Humphrey, 321 Ga. App. 268, 740 S.E.2d 672 (2013).

Rule of privity in contract actions is made a statutory requirement by subsection (a). — In actions based upon the breach of express or implied warranties, this requirement was subject only to the exception contained in former Code 1933, § 109A-2-318 (see now O.C.G.A. § 11-2-318). Ellis v. Rich's, Inc., 233 Ga. 573, 212 S.E.2d 373 (1975).

Duty of care may be called for by contract and by tort law at same time, and when this is true the plaintiff requires no privity to maintain a tort action. Sims v. American Cas. Co., 131 Ga. App. 461, 206 S.E.2d 121, aff'd sub nom. Providence Wash. Ins. Co. v. Sims, 232 Ga. 787, 209 S.E.2d 61 (1974).

Parties to contract not necessarily confined to contractual remedies. — When the petition was one in tort for a negligent injury committed upon the property of the joint plaintiffs, the right of action was not confined to the parties to the contract, the negligent performance of which resulted in the injury to the plaintiffs' property, since the right of action for the injury done inhered in the owners of the property independently of any obligation imposed by the contract. Monroe v. Guess, 41 Ga. App. 697, 154 S.E. 301 (1930).

Mere fact that the right or privilege of one which has been violated was acquired by virtue of a contract does not confine actions for the violation of the right to parties and privies to the contract. University Apts., Inc. v. Uhler, 84 Ga. App. 720, 67 S.E.2d 201 (1951).

Party to contract may maintain suit in tort with nonparty. — Fact that one of the plaintiffs may have been a party to the contract, the negligent performance of which caused the injury, would not prevent a joint action by both of the owners of the damaged property for the tortious injury to their property independent of the contract, since independently of any duty under the contract, the law imposed upon the defendant the duty not to negligently

and wrongfully injure and damage the property of another. Monroe v. Guess, 41 Ga. App. 697, 154 S.E. 301 (1930).

Action in tort cannot be maintained by third person not privy to the contract for breach of warranty which constitutes a mere contractual obligation between the defendant and the other contracting parties. Hand v. Harrison, 99 Ga. App. 429, 108 S.E.2d 814 (1959).

Since the provisions in an ordinance granting a power company the right to erect its lines along the public streets are contractual between the city and the power company, a breach of them would give rise to a cause of action between them only, unless it appears that the plaintiff injured would have a right of action for the plaintiff's injury independently of the contract. Crosby v. Savannah Elec. & Power Co., 114 Ga. App. 193, 150 S.E.2d 563 (1966).

No rights arise by indirect contract relation. — One person cannot maintain an action against another for an injury to a third person on the ground that the wrong has also indirectly injured the plaintiff by reason of the plaintiff's contractual relations with the third person. Kokomo Rubber Co. v. Anderson, 33 Ga. App. 241, 125 S.E. 783 (1924); East Tenn., V. & Ga. Ry. v. Herrman & Bros., 92 Ga. 384, 17 S.E. 344 (1893); Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 35 Ga. App. 94, 132 S.E. 454 (1926); King Hdwe. Co. v. Ennis, 39 Ga. App. 355, 147 S.E. 119 (1929); Dale Elec. Co. v. Thurston, 82 Ga. App. 516, 61 S.E.2d 584 (1950); Stuart v. Berry, 107 Ga. App. 531, 130 S.E.2d 838 (1963); Hayes v. Century 21 Shows, Inc., 116 Ga. App. 490, 157 S.E.2d 779 (1967); Shellenberger v. Tanner, 138 Ga. App. 399, 227 S.E.2d 266 (1976); Sawyer v. Allison, 151 Ga. App. 334, 259 S.E.2d 721 (1979); Georgia-Carolina Brick & Tile Co. v. Brown, 153 Ga. App. 747, 266 S.E.2d 531 (1980).

Corporations not affected by abolition of privity requirement. — Although the requirement of privity has been abolished for tort actions and actions against manufacturers of defective products brought by "any natural person …", no such change has been effected as to corporations damaged by defective products. Chem Tech Finishers, Inc. v. Paul Mueller Co., 189 Ga. App. 433, 375 S.E.2d 881 (1988).

Buyer corporation may be liable for torts of seller corporation. — When a corporation that has manufactured a product is purchased by another corporation, the purchaser may be held liable for the torts of the seller under certain circumstances. Corbin v. Farmex, Inc., 227 Ga. App. 620, 490 S.E.2d 395 (1997), rev'd on other grounds sub nom. Farmex Inc. v. Wainwright, 269 Ga. 548, 501 S.E.2d 802 (1998), vacated on other grounds, 234 Ga. App. 180, 506 S.E.2d 406 (1998).

Policy considerations may override privity requirements. — Exception to the rigid privity requirement will be implied when policy considerations weigh in favor of liability. Gulf Contracting v. Bibb County, 795 F.2d 980 (11th Cir. 1986).

Third party not in privity cannot rely on professional duty which might give rise to a negligence action had the injured party been in privity. Kaiser Aluminum & Chem. Corp. v. Ingersoll-Rand Co., 519 F. Supp. 60 (S.D. Ga. 1981).

Party not in privity subject to action for procuring breach of contract. — Person not party to contract may procure, without justification, its breach, and be liable therefor in tort; the mere failure of a party to a contract to carry out its terms will not give rise to a cause of action ex delicto in favor of a third person who has contracted with the opposite party to such contract, although in breaching the contract the party so failing may be charged with notice that the opposite party will not be able to perform its contract with such third person. First Mtg. Corp. v. Felker, 158 Ga. App. 14, 279 S.E.2d 451 (1981).

Liability for negligent misrepresentations by persons rendering professional services is limited to a foreseeable person or limited class of persons for whom the information was intended and who can show reasonable reliance on the false information, specifically that the information was given for the purpose of inducing their reliance. Gulf Contracting v. Bibb County, 795 F.2d 980 (11th Cir. 1986).

Privity as Element of Action (Cont'd)
1. In General (Cont'd)

Exception to the privity requirement has been recognized in cases of negligent misrepresentation by a professional, reasonably relied upon by a foreseeable person or class of person. However, no similar exception has been carved out for a professional's alleged negligent failure to supervise a project. Wood Bros. Constr. Co. v. Simons-Eastern Co., 193 Ga. App. 874, 389 S.E.2d 382 (1989).

2. Applicability to Specific Cases

No recovery for economic loss. — If there exists no accident, and no physical damage to other property, and the only loss is a pecuniary one, through loss of the value or use of the thing sold, or the cost of repairing or modifying the property, the court adheres to the rule that purely economic interests are not entitled to protection against mere negligence, and accordingly deny recovery. Bates & Assocs. v. Romei, 207 Ga. App. 81, 426 S.E.2d 919 (1993).

Only parties to contract of shipment may sue upon negligent performance. — When the complaint is grounded upon negligence in performance of the duties imposed by a contract of shipment and, therefore, while not based upon the contract, but in tort, is necessarily founded and grounded upon the obligations assumed under the specific contract by the contracting parties thereto, the maker of the contract is the one to complain of negligence in its performance rather than some other person not a party to the agreement. Black v. Southern Ry., 48 Ga. App. 445, 173 S.E. 199 (1934).

Consignee of goods under bill of lading cannot maintain tort action without an interest in goods consigned. — Consignee who actually is without any special or general property in goods consigned to him, and who therefore incurs no risk from their transportation, cannot maintain against the carrier an action ex delicto for loss or damage to the goods in transit. Black v. Southern Ry., 48 Ga. App. 445, 173 S.E. 199 (1934).

Consignee's ownership interest rebuttably presumed. — Consignee of property delivered by another to a common carrier for shipment is presumed to be the owner, and presumptively a right of action exists in the consignee's favor for any injury or damage to the property in transit. This presumption, however, may be rebutted, and, when successfully done, the consignee cannot maintain an action ex delicto for the loss of or for any damage to the property. Black v. Southern Ry., 48 Ga. App. 445, 173 S.E. 199 (1934).

Consignee with special interest may sue even though not general owner. — Though the consignee may not be the real owner, if the consignee has a special interest in the property shipped, the consignee may maintain action for the loss, or for any damage to such property in transit, and in such action may have a recovery of the full value of the property when lost, or full amount of damages to the property when the property is injured. The ownership may not be extensive, and an agent, factor, broker, bailee, or other person having rights in the property to be protected may maintain an action, and recover both for oneself and the general owner. Black v. Southern Ry., 48 Ga. App. 445, 173 S.E. 199 (1934).

Employees of purchaser do not have privity with manufacturer. Watkins v. Barber-Colman Co., 625 F.2d 714 (5th Cir. 1980).

Independent contractor owes an original duty not to endanger lives and limbs of others by negligent performance of contract, when the consequences of such conduct may be foreseen; the trial court erred in granting a motion to dismiss when the defendant garageman failed to repair brakes on the plaintiff's employer's truck, leading to the plaintiff's injury. Moody v. Martin Motor Co., 76 Ga. App. 456, 46 S.E.2d 197 (1948).

General contractor not in privity with contract between school district and agent. — General contractor's negligence and breach of duty claims against an agent for a school district were barred by the economic loss rule, O.C.G.A. § 51-1-11(a); the contractor was essentially alleging negligent supervision of a school project, and the contractor was not in privity with the contract between the agent and the school district and did not

assert any legal duty owed independently of the contract. J. Kinson Cook of Ga., Inc. v. Heery/Mitchell, 284 Ga. App. 552, 644 S.E.2d 440 (2007).

Independent contractor may be liable to third person after contractor has completed work when completed work product is inherently or intrinsically dangerous or so defective as to be imminently dangerous to third persons. This exception applies as between a designing engineer of a roof and a tenant who was damaged when the roof collapsed. Welding Prods. v. S.D. Mullins Co., 127 Ga. App. 474, 193 S.E.2d 881 (1972).

Landlord's duty not to willfully disturb possession rights not merely contractual duty. — Duty on the part of the landlord not to willfully interfere with the plaintiff's right to occupy the apartment which she had a right to do in the right of her husband and not to interfere with her access to her clothing were not duties arising out of the contract of rental; they were duties owed by all persons to all persons, and the cause of action would have existed if there had been no contract of rental between the parties. University Apts., Inc. v. Uhler, 84 Ga. App. 720, 67 S.E.2d 201 (1951).

Telegraph company liable though privity absent. — Privity of contract is not required when one sues a telegraph company for failure to transmit and deliver a message. Conyers v. Postal Tel. Cable Co., 92 Ga. 619, 19 S.E. 253, 44 Am. St. R. 100 (1893).

Architects and engineers liable for defects in plans relied on by those bidding for contract. — When the defendants negligently failed to disclose the remaining subsurface debris in specifications, plans, drawings, plats, and surveys describing a construction job that the defendants prepared as architects and engineers, those specifications were obviously prepared for a limited class of persons, namely firms bidding for contracts to build all or a portion of the job and reliance on the specifications and other materials by such persons was also reasonable because the information therein was vital to the bidding process, the defendants could be liable to third parties such as the low bidder on the job for the defendants' failure to adequately describe construction requirements through the defendants' specifications and materials. Gulf Contracting v. Bibb County, 795 F.2d 980 (11th Cir. 1986).

Relationship between architectural firm and supplier and installer of materials. — Architectural firm which entered a contract with a store to design a renovation owed no duty of care, as a professional, to the company hired to install the tile, or to the company which supplied the tile, which turned out to be defective, when there was no professional relationship existing between them nor any relationship approaching that of privity. R.H. Macy & Co. v. Williams Tile & Terrazzo Co., 585 F. Supp. 175 (N.D. Ga. 1984).

Surety's recovery from a party not in privity. — As a surety, attempting to recover from a CPM based on a construction company's default, was not in privity with the CPM; did not allege willfulness, physical harm, or property damage; and failed to present exceptions to O.C.G.A. § 51-1-11's strict privity rule other than negligent misrepresentation, personal professional negligence claims failed. Carolina Cas. Ins. Co. v. R.L. Brown & Assocs., No. 1:04-cv-3537-GET, 2006 U.S. Dist. LEXIS 71056 (N.D. Ga. Sept. 29, 2006).

Fall victim not third-party beneficiary of contract between shopping center and independent contractor. — In a couple's slip and fall case, the trial court did not err by granting summary judgment in favor of an independent contractor that had applied a de-icing mixture to the area on the night before the fall when there was no evidence that the injured plaintiffs were third-party beneficiaries of the contract between the shopping center and the independent contractor and when there was no evidence that the independent contractor had been negligent. Davidson v. Meticulously Clean Sweepers, LLC, 329 Ga. App. 640, 765 S.E.2d 783 (2014).

City contractor not in privity with city water customers. — Because the only specific damages alleged by a city's water customers were overpayments to the city for which the customers sought a

Privity as Element of Action (Cont'd)
2. Applicability to Specific Cases (Cont'd)

refund, and because the customers did not seek damages due to injury to the customers' persons or to the customers' real or personal property, the city's contractors did not owe the customers a duty independent of the customers' contracts with the city. City of Atlanta v. Benator, 310 Ga. App. 597, 714 S.E.2d 109 (2011).

Products Liability

1. In General

"Third-party tort-feasor" construed. — Products liability claim pursuant to O.C.G.A. § 51-1-11, against a general contractor in the contractor's capacity as designer and manufacturer of a new paper-making process, as opposed to the contractor's capacity as statutory employer, is not an action against a "third-party tort-feasor" which avoids the immunity provided under O.C.G.A. § 34-9-11. Porter v. Beloit Corp., 194 Ga. App. 591, 391 S.E.2d 430 (1990).

Implied warranty of merchantability distinguished. — Establishment of the implied warranty of merchantability as applied to a seller under O.C.G.A. § 11-2-314 is not the same as the strict liability imposed on a manufacturer under O.C.G.A. § 51-1-11. Buford v. Toys R' Us, Inc., 217 Ga. App. 565, 458 S.E.2d 373 (1995), overruled on other grounds, Wal-Mart Stores, Inc. v. Wheeler, 262 Ga. App. 607, 586 S.E.2d 83 (2003).

Removal to federal court. — In an action against cigarette manufacturers and retail sellers, there was no possibility the plaintiff could recover against the retail defendants who were added to defeat diversity jurisdiction and, thus, the plaintiff's motion to remand after the manufacturers moved the action to federal court should be denied. Crooke v. R.J. Reynolds Tobacco Co., 978 F. Supp. 1482 (N.D. Ga. 1997).

Requirement for an expert affidavit did not apply to a strict products liability action against a manufacturer. SK Hand Tool Corp. v. Lowman, 223 Ga. App. 712, 479 S.E.2d 103 (1996).

Expert affidavit inadequate. — Trial court did not err in determining that the affidavits of a driver's experts were inadequate under former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. § 24-7-702) to defeat summary judgment in favor of a manufacturer in the driver's products liability action because the affidavits did not describe the facts or data upon which the experts' opinions were based, did not explain the principles or methods the experts used to reach the experts' conclusions about the tire, and did not provide support for a conclusion that the experts had applied those principles and methods reliably in the experts' inspections of the tire. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

Subsection (b) imposes strict liability for defective products. — Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975); Mike Bajalia, Inc. v. Amos Constr. Co., 142 Ga. App. 225, 235 S.E.2d 664 (1977); Wansor v. George Hantscho Co., 570 F.2d 1202 (5th Cir.), cert. denied, 439 U.S. 953, 99 S. Ct. 350, 58 L. Ed. 2d 344 (1978).

Subsection (b) does not attach condition that defective product must be "unreasonably dangerous." Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975).

Subsection (b) does not make manufacturer strictly liable for dangerous product absent a defect. Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975).

Strict liability applied only to manufacturers. — These legislative enactments preclude any extension of strict liability by this court to parties other than the manufacturer. Ellis v. Rich's, Inc., 233 Ga. 573, 212 S.E.2d 373 (1975).

Strict liability claim lies only against the manufacturer and not against the mere owner of a product. Williams v. City Ice Co., 190 Ga. App. 744, 380 S.E.2d 341 (1989).

Strict liability through implied warranty of fitness is not applicable to providers of service. — Any imposition of strict liability through an implied warranty of fitness is applicable by statute to the manufacturers of new products,

but is not applicable to the providers of services. Seaboard Coast Line R.R. v. Mobil Chem. Co., 172 Ga. App. 543, 323 S.E.2d 849 (1984).

Subsection (b) imposes tort liability under a breach of contract standard. Higginbotham v. Ford Motor Co., 540 F.2d 762 (5th Cir. 1976).

In contradistinction to law of negligence, law of warranty assigns liability on basis of product's lack of fitness; when machinery "malfunctions," it obviously lacks fitness regardless of the cause of the malfunction. Lashley v. Ford Motor Co., 359 F. Supp. 363 (M.D. Ga. 1972), aff'd, 480 F.2d 158 (5th Cir.), cert. denied, 414 U.S. 1072, 94 S. Ct. 585, 38 L. Ed. 2d 478 (1973).

Subsection (b) is directed to the manufacturer of any personal property sold as new property and not to the distributor. See Ellis v. Rich's, Inc., 132 Ga. App. 430, 208 S.E.2d 331 (1974), aff'd, 233 Ga. 573, 212 S.E.2d 373 (1975); Wansor v. George Hantscho Co., 243 Ga. 91, 252 S.E.2d 623 (1979); Holman Motor Co. v. Evans, 169 Ga. App. 610, 314 S.E.2d 453 (1984); Hatcher v. Allied Prods. Corp., 256 Ga. 100, 344 S.E.2d 418 (1986); English v. Crenshaw Supply Co., 193 Ga. App. 354, 387 S.E.2d 628 (1989); Wheat v. Sofamor, S.N.C., 46 F. Supp. 2d 1351 (N.D. Ga. 1999).

Subsection (b) creates liability only in cases of personal property sold after 1968. Watkins v. Barber-Colman Co., 625 F.2d 714 (5th Cir. 1980).

Subsection (b), by its specified terms, runs to the benefit of natural persons only. American San. Servs. v. EDM of Tex., Inc., 139 Ga. App. 662, 229 S.E.2d 136 (1976); Mike Bajalia, Inc. v. Amos Constr. Co., 142 Ga. App. 225, 235 S.E.2d 664 (1977); A.J. Kellos Constr. Co. v. Balboa Ins. Co., 495 F. Supp. 408 (S.D. Ga. 1980).

Strict liability claims under O.C.G.A. § 51-1-11(b)(1) by plaintiff insured, as subrogee of a contractor, against the defendants, the seller of a school fire protection system and the designer and manufacturer of the system's controller, failed because the insurer and its insured, as corporations, were not "natural persons" within § 51-1-11(b)(1). ACE Fire Underwriters Ins. Co. v. ALC Controls, Inc., 2008 U.S. Dist. LEXIS 41672 (N.D. Ga. May 27, 2008).

Subsection (b) not retroactively applied. — Provisions of subsection (b) created a new cause of action which was in derogation of the common law, and it follows that under former Code 1933, § 102-104 (see now O.C.G.A. § 1-3-5), which forbids the retroactive application of laws, former Code 1933, § 105-106 (see now O.C.G.A. § 51-1-11) may not be given retroactive effect. Wansor v. George Hantscho Co., 243 Ga. 91, 252 S.E.2d 623 (1979).

Subsection (b) should be strictly construed because it is in derogation of common law. Colt Indus. Operating Corp. v. Coleman, 246 Ga. 559, 272 S.E.2d 251 (1980); Stiltjes v. Ridco Exterminating Co., 178 Ga. App. 438, 343 S.E.2d 715, aff'd, 256 Ga. 255, 347 S.E.2d 568 (1986).

Subsection (b) is in derogation of common law and must be strictly construed or limited strictly to the meaning of the language employed and not extended beyond plain and explicit terms. Daniel v. American Optical Corp., 251 Ga. 166, 304 S.E.2d 383 (1983).

Georgia's strict liability doctrine is legislatively enacted, and it will be strictly construed. Robert F. Bullock, Inc. v. Thorpe, 256 Ga. 744, 353 S.E.2d 340 (1987).

Exception to 10 year liability limit. — As a general rule, tort claims against a manufacturer are barred by O.C.G.A. § 51-1-11(b)(2) after 10 years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury; under O.C.G.A. § 51-1-11(c), however, the legislature crafted an exception to the 10-year limit providing that nothing contained in that subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer. Hunter v. Werner Co., 258 Ga. App. 379, 574 S.E.2d 426 (2002).

When a product is sold to a particular group or profession, a manufacturer has no duty to warn against the risks generally known to that group or profession. Argo v. Perfection Prods. Co.,

Products Liability (Cont'd)
1. In General (Cont'd)

730 F. Supp. 1109 (N.D. Ga. 1989), aff'd, 935 F.2d 1295 (11th Cir. 1991).

Failure to warn may constitute defect. — Manufacturer's failure to warn of the dangers in using a product may constitute a defect in the product for purposes of strict liability. Pepper v. Selig Chem. Indus., 161 Ga. App. 548, 288 S.E.2d 693 (1982).

Absence of safety device. — Product is not rendered defective by the patent absence of a specific safety device which would serve to guard against a common danger connected with the limited use of a product, which danger the ultimate user can personally recognize and otherwise guard against. Fortner v. W.C. Cayne & Co., 184 Ga. App. 187, 360 S.E.2d 920 (1987).

Absence of passive restraints or airbags in an automobile could not be considered a defective condition so as to establish a breach of duty on the part of the manufacturer. Honda Motor Co. v. Kimbrel, 189 Ga. App. 414, 376 S.E.2d 379 (1988).

Safety belts rather than airbags in automobiles would not be a defect within the meaning of O.C.G.A. § 51-1-11. Honda Motor Co. v. Kimbrel, 189 Ga. App. 414, 376 S.E.2d 379 (1988).

Doctrine of attractive nuisance by its terms applies only against a possessor of land; and, thus, it would appear to be inherently inapplicable to product liability cases. Greenway v. Peabody Int'l Corp., 163 Ga. App. 698, 294 S.E.2d 541 (1982).

Product defectively designed. — In determining whether a product was defectively designed, the trier of fact may consider evidence establishing that at the time the product was manufactured, an alternative design would have made the product safer than the original design and was a marketable reality and technologically feasible. Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

In a products liability action arising from the death of a nine-year-old child who died after eating rat poison thinking it was candy, a risk-utility analysis should have been applied in determining whether the design of the rodenticide was defective. Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

Plaintiff failed to prove defective product design. — In an action arising from the crash of a helicopter, because the plaintiff failed to show that the crash was proximately caused by a defect in the helicopter and to rebut the manufacturer's argument that the cause was the failure to have an inlet screen in place, the plaintiff's claim failed as a matter of law. Carmical v. Bell Helicopter Textron, Inc., 117 F.3d 490 (11th Cir. 1997).

In an action arising from the electrocution of the plaintiffs' decedent while the decedent was installing a washer/dryer unit in an apartment complex, summary judgment for the seller and manufacturer was proper because there was no evidence that the failure to place a rejection feature in the terminal block to prevent mis-wiring constituted a defective design. Moore v. ECI Mgmt., 246 Ga. App. 601, 542 S.E.2d 115 (2000).

2. Legislative Intent

Public policy on product liability. — Former Code 1933, § 105-106 (see now O.C.G.A. § 51-1-11) as well as former Code 1933, § 109A-2--318 (see now O.C.G.A. § 11-2-318) were recent expressions of the legislature establishing but also limiting the public policy of this state in the area of product liability. Ellis v. Rich's, Inc., 233 Ga. 573, 212 S.E.2d 373 (1975).

Intent to exclude builders of real property from product liability law. — It was the intention of the legislature in using the phrase "personal property" to eliminate from the operation of the statute the sale of buildings by those who might with respect to them be regarded as manufacturers, and thereby to retain with respect to the sale of real property the rules requiring fraud to overcome the normal rule of caveat emptor. Garrett v. Panacon Corp., 130 Ga. App. 641, 204 S.E.2d 354 (1974).

3. Definitions

Loss of bargain not "injury" within subsection (b). — "Injury," within the strict liability context of subsection (b)

does not include damages stemming from loss of the benefit of one's bargain. The history of the doctrine of strict liability in tort indicates that it was designed to govern the distinct problem of physical injuries. Chrysler Corp. v. Taylor, 141 Ga. App. 671, 234 S.E.2d 123 (1977).

Electricity is a "product" within the meaning of subsection (b). Monroe v. Savannah Elec. & Power Co., 267 Ga. 26, 471 S.E.2d 854 (1996).

"Manufacturer" defined. — Entity which assembles component parts and sells them as a single product under its trade name is a "manufacturer". Pierce v. Liberty Furn. Co., 141 Ga. App. 175, 233 S.E.2d 33 (1977).

Corporation which engaged another corporation to construct a prototype of a particular machine, which inspected the machine and offered suggestions for improvements, but which did not actually design or build the machine, did not assemble any component parts into a single product, nor sell or represent the machine as its own product, was not the "manufacturer" of the machine, such as to make it liable when it allowed an employer to use the machine and an employee was injured. Morgan v. Mar-Bel, Inc., 614 F. Supp. 438 (N.D. Ga. 1985).

When an installer did not sell either a vehicle or an auger under its own trade name, the trial court correctly determined as a matter of law that the installer was not a "manufacturer" of the equipment within the meaning of subsection (b)(1) of O.C.G.A. § 51-1-11 and thus could not be held strictly liable for its performance. Yaeger v. Stith Equip. Co., 185 Ga. App. 315, 364 S.E.2d 48, cert. denied, 185 Ga. App. 911, 364 S.E.2d 48 (1987).

Retailer which affixed the retailer's label to a nightgown manufactured by another firm was the ostensible "manufacturer" of the product, and therefore subject to liability under O.C.G.A. § 51-1-11. Morgan v. Sears, Roebuck & Co., 693 F. Supp. 1154 (N.D. Ga. 1988); Morgan v. Sears, Roebuck & Co., 700 F. Supp. 1574 (N.D. Ga. 1988).

Soft drink franchisor, who manufactured and sold syrup to licensed bottling companies who then mixed it with other ingredients, was not liable as a "manufacturer" of the finished beverage product, which was sold by the bottlers for their accounts. Tyler v. Pepsico, Inc., 198 Ga. App. 223, 400 S.E.2d 673 (1990), cert. denied, 198 Ga. App. 899, 400 S.E.2d 673 (1991).

"Not merchantable" defined. — Term "not merchantable and reasonably suited for the use intended," under subsection (b) means that the manufacturer's product when sold by the manufacturer was defective. A defective condition obtains only when the product is, at the time the product leaves the seller's hands, in a condition not contemplated by the ultimate consumer. Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975); Hunt v. Harley-Davidson Motor Co., 147 Ga. App. 44, 248 S.E.2d 15 (1978).

Term "not merchantable and reasonably suited to the use intended" as used in O.C.G.A. § 51-1-11 means "defective." Giordano v. Ford Motor Co., 165 Ga. App. 644, 299 S.E.2d 897 (1983).

"Personal property" defined. — Designation "personal property" as used in subsection (b) includes all items manufactured as personal property regardless of whether such item has been affixed to or incorporated into real property after manufacture. Garrett v. Panacon Corp., 130 Ga. App. 641, 204 S.E.2d 354 (1974).

There is no reason for distinguishing between product itself and container in which it is supplied. Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975).

Stream of commerce — Sale is not an absolute prerequisite to a finding that a product has been placed in the stream of commerce for purposes of subsection (b) of O.C.G.A. § 51-1-11. Monroe v. Savannah Elec. & Power Co., 267 Ga. 26, 471 S.E.2d 854 (1996).

In determining whether electricity had been placed in the stream of commerce for purposes of strict liability, the relinquishment of control over the electricity and/or the marketable condition of that electricity were essential factors. Monroe v. Savannah Elec. & Power Co., 267 Ga. 26, 471 S.E.2d 854 (1996).

Supply of blood by hospital not sale of property within subsection (b). — Hospitals supplying blood to patients do

Products Liability (Cont'd)
3. Definitions (Cont'd)

so as part of the rendering of medical "services," rather than as a "sale" of blood, and thus only negligence and not strict products liability is available to the injured patient. McAllister v. American Nat'l Red Cross, 240 Ga. 246, 240 S.E.2d 247 (1977).

Product. — Engineering company that designed an allegedly defective reinforcing safety net that was installed in the soil above a combined sanitary and storm sewer, and which failed to prevent a hole from developing, could have been found liable under O.C.G.A. § 51-1-11 as the reinforcing safety net could have been considered a product under a theory of products liability. Tensar Earth Techs., Inc. v. City of Atlanta, 267 Ga. App. 45, 598 S.E.2d 815 (2004).

4. Applicability of Subsection (b)

Manufacturer of defective article, which is inherently dangerous, is liable in tort for damages to any person injured by the manufacturer's negligence, though there is no privity of contract. Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S.E. 118, 20 Am. St. R. 324, 5 L.R.A. 612 (1889); Woodward v. Miller, 119 Ga. 618, 46 S.E. 847, 100 Am. St. R. 188, 64 L.R.A. 932 (1904).

Manufacturer is liable if product, when sold, was not merchantable and reasonably suited to use intended and the product's condition when sold is the proximate cause of the injury sustained. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

O.C.G.A. § 51-1-11 does not apply to distributors. Hatcher v. Allied Prods. Corp., 796 F.2d 1427 (11th Cir. 1986).

Electricity is a product or "personal property sold as new property" when it is in the hands of and under the control of the consumer, intended to be available to the customer at a usable voltage. Monroe v. Savannah Elec. & Power Co., 219 Ga. App. 460, 465 S.E.2d 508 (1995), aff'd, 267 Ga. 26, 47 S.E.2d 854 (1996).

After the decedent was killed by electricity that was not transformed or intended to be transformed for use at the customer's facility, there was no basis for a claim against the electric company under paragraph (b)(1) O.C.G.A. § 51-1-11. Monroe v. Savannah Elec. & Power Co., 219 Ga. App. 460, 465 S.E.2d 508 (1995), aff'd, 267 Ga. 26, 47 S.E.2d 854 (1996).

Product seller not a manufacturer. — In an action by an employee for injuries suffered using a paper cutter, when the complaint did not allege any facts showing that the defendant company was a manufacturer under O.C.G.A. § 51-1-11, or that the defendant sold the product as "new property," the defendant could not be strictly liable. Mullins v. M.G.D. Graphics Sys. Group, 867 F. Supp. 1578 (N.D. Ga. 1994).

Corporation which purchased the assets of a manufacturer and sold, but did not manufacture, a product of the design manufactured by its predecessor, was a "product seller" under O.C.G.A. § 51-1-11.1, not a "manufacturer" subject to strict liability under paragraph (b)(1) O.C.G.A. § 51-1-11. Farmex Inc. v. Wainwright, 269 Ga. 548, 501 S.E.2d 802 (1998).

When an alleged injured party asserted product liability claims against several retailers for injuries incurred when a plastic gas container being used near a fire exploded, strict liability claims could not survive; market-share liability had been rejected in Georgia, the retailers were not "manufacturers," and there was no issue regarding the duty to warn. Williamson v. Walmart Stores, Inc., No. (CDL), 2015 U.S. Dist. LEXIS 45657 (M.D. Ga. Apr. 8, 2015).

"First sale" not applicable to person injured. — When a spinal plate was first sold for use or consumption in 1972, O.C.G.A. § 51-1-11 barred a patient's medical product liability claim based on use of the plate in 1988. Pafford v. Biomet, 210 Ga. App. 486, 436 S.E.2d 504 (1993), modified on other grounds, 244 Ga. 540, 448 S.E.2d 347 (1994).

Vehicle not manufactured by defendant. — Defendant used-car dealer could not be held liable under a complaint alleging that the plaintiffs' decedent was killed while driving a used car purchased from the defendant which was defective when manufactured and that the car was cov-

ered by an express warranty of merchantability, issued by the defendant at the time of purchase, when the vehicle in question was not manufactured by the defendant. Ryals v. Billy Poppell, Inc., 192 Ga. App. 787, 386 S.E.2d 513 (1989).

Proof of defect at time of sale or lease. — Failure of the brakes was not evidence that the brakes were defective at the time plaintiff leased the truck because there were several plausible explanations for the brake failure, including negligent brake repair or excessive trailer weight. Jenkins v. GMC, 240 Ga. App. 636, 524 S.E.2d 324 (1999).

Offering for sale or lease, marketing, or placing in stream of commerce, invokes section. — When a manufactured item designed to be sold as new merchandise is initially offered for sale or lease, or otherwise marketed or placed in the stream of commerce, the coverage of O.C.G.A. § 51-1-11 is invoked. Thorpe v. Robert F. Bullock, Inc., 179 Ga. App. 867, 348 S.E.2d 55 (1986), aff'd, 256 Ga. 744, 353 S.E.2d 340 (1987).

Evidence of wilful, reckless, or wanton conduct. — In a negligence action based on the sale of an automobile with an allegedly defectively-designed seat belt retractor mechanism, evidence pertaining to an earlier design was insufficient as a matter of law to establish wilful, reckless, or wanton misconduct since the design had subsequently been modified and there was no evidence to suggest that the modifications were ineffective or failed to correct the earlier problems. Chrysler Corp. v. Batten, 264 Ga. 723, 450 S.E.2d 208 (1994).

In the absence of evidence showing that any defendant acted with a willful, reckless, or wanton disregard for life or property, the willful misconduct exception to the statute of repose was inapplicable in an action based on the claim that the defendants were liable for failing to install an alarm on a truck which would have warned bystanders when the truck was moving backwards. Vickery v. Waste Mgmt. of Ga., Inc., 249 Ga. App. 659, 549 S.E.2d 482 (2001).

Failure to warn. — Claims based on negligent failure to warn of the danger arising from a defectively-designed seat belt were not barred by the statute of repose. Chrysler Corp. v. Batten, 264 Ga. 723, 450 S.E.2d 208 (1994).

Statute of repose does not apply to "failure to warn" claims. Daniels v. Bucyrus-Erie Corp., 237 Ga. App. 828, 516 S.E.2d 848 (1999).

Repairer of machine was not a manufacturer under O.C.G.A. § 51-1-11 because, although the repairer may have assembled component parts, the repairer did not do so for the purpose of having the machine sold as new property under the repairer's own trade name. Barry v. Stevens Equip. Co., 176 Ga. App. 27, 335 S.E.2d 129 (1985).

Product must be defective when sold. — In order to impose strict liability on the manufacturer of a product, the plaintiff must show that the manufacturer's product when sold by the manufacturer was defective. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Test in products liability is whether the product was merchantable and reasonably suited to the use intended as determined at the time the product is sold and when a product is alleged to be "defective" for lack of safety devices, the manufacturer is entitled to have the "defectiveness" of the manufacturer's product considered in the context of the overall original design of the item; this is especially true when the alleged defect in a product is the absence of safety features on a component of the product which would prevent injury in the event another component fails. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Product is not in defective condition when the product is safe for normal handling and consumption. Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975).

Product is not in a defective condition when the product is safe for normal handling. If injury results from abnormal handling, the manufacturer is not liable. Argo v. Perfection Prods. Co., 730 F. Supp. 1109 (N.D. Ga. 1989), aff'd, 935 F.2d 1295 (11th Cir. 1991).

Manufacturer's duty to make product safe. — If a manufacturer does everything necessary to make the machine

Products Liability (Cont'd)
4. Applicability of Subsection (b) (Cont'd)

function properly for the purpose for which the machine is designed, if the machine is without any latent defect, and if the machine's functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demands. Hunt v. Harley-Davidson Motor Co., 147 Ga. App. 44, 248 S.E.2d 15 (1978); Wansor v. George Hantscho Co., 595 F.2d 218 (5th Cir. 1979).

Product must reach consumer without substantial change. — One of the conditions for imposition of strict liability against a manufacturer of "defective" products is that the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Determination of whether a component manufacturer is insulated from liability depends upon the extent to which the product is altered by the assembler before the product reaches the ultimate user. Giordano v. Ford Motor Co., 165 Ga. App. 644, 299 S.E.2d 897 (1983).

Product offered on trial basis. — When a manufacturer in the business of marketing the manufacturer's product to an intended consumer offers the use of the product on a trial basis in order to make a sale, O.C.G.A. § 51-1-11 can be applied in a suit for an alleged injury occurring during the trial use. Robert F. Bullock, Inc. v. Thorpe, 256 Ga. 744, 353 S.E.2d 340 (1987).

Paragraph (b)(2) operates retroactively. — Paragraph (b)(2) O.C.G.A. § 51-1-11 will operate retroactively to bar claim of a plaintiff injured several months after the limitation period went into effect. Weeks v. Remington Arms Co., 733 F.2d 1485 (11th Cir. 1984).

Effects of alteration in product. — When a manufacturer is sued under O.C.G.A. § 51-1-11 for injuries proximately resulting from a defect in the design of the manufacturer's product existing at the time of sale, obviously if the design of that product has been independently altered, eliminated, and replaced by a third party after the sale and injuries then result, those injuries cannot be traced to or be the proximate result of the manufacturer's original design which did not exist at the time of injury; at the time of the tragic accident, the thing being used was not the thing sold. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Manufacturer may show alteration. — When the alleged defect in a product is the absence of safety features, a manufacturer is entitled to demonstrate that this alleged defect is ultimately based upon the failure of an integral part of the overall product, the original design of which component has been independently eliminated and replaced by another and that there is thus no causal connection between any defect in the product existing at the time of sale and the injury. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

As to product-design duty of manufacturer, standard which courts have established is traditional one of reasonable care. A manufacturer or a seller does not have the status of an insurer as respects products design. Hunt v. Harley-Davidson Motor Co., 147 Ga. App. 44, 248 S.E.2d 15 (1978).

In designing a product, a manufacturer's duty is one of reasonable care, under the circumstances. Coast Catamaran Corp. v. Mann, 171 Ga. App. 844, 321 S.E.2d 353 (1984), aff'd, 254 Ga. 201, 326 S.E.2d 436 (1985), overruled on other grounds, Banks v. ICI Ams., Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

Manufacturer is under no duty to guard against injury from patent peril or from source manifestly dangerous, nor is there a duty on the manufacturer or seller to warn of obvious common dangers connected with the use of a product. Hunt v. Harley-Davidson Motor Co., 147 Ga. App. 44, 248 S.E.2d 15 (1978); Wansor v. George Hantscho Co., 595 F.2d 218 (5th Cir. 1979).

Manufacturer is not an insurer. Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975).

Neither a manufacturer nor a seller is

an insurer that their product is, from a design viewpoint, incapable of producing injury. Coast Catamaran Corp. v. Mann, 171 Ga. App. 844, 321 S.E.2d 353 (1984), aff'd, 254 Ga. 201, 326 S.E.2d 436 (1985), overruled on other grounds, Banks v. ICI Ams., Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

Vendor has no general duty to test articles for defects prior to sale. — It is the general rule that a vendor or dealer who is not the manufacturer is under no obligation to test an article purchased and sold by the vendor or dealer for the purpose of discovering latent, or concealed defects, and that when the vendor or dealer purchases and sells an article in common and general use, in the usual course of trade, without knowledge of its dangerous quality, and with nothing tending reasonably to call the vendor's or dealer's attention thereto, the vendor or dealer is not negligent in failing to exercise care to determine whether it is dangerous or not. The vendor or dealer may assume that the manufacturer has done his duty in properly constructing the article and in not placing upon the market a commodity which is defective and likely to inflict injury. Ellis v. Rich's, Inc., 132 Ga. App. 430, 208 S.E.2d 331 (1974), aff'd, 233 Ga. 573, 212 S.E.2d 373 (1975).

If seller has reason to anticipate that danger may result from particular use seller may be required to give adequate warning of the danger, and a product sold without such warning is in a defective condition. Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975); Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Duty to warn extends only as to foreseeable uses of product. — Duty to warn of danger in the use of a product extends only to the use of the product in the manner reasonably contemplated and anticipated by the manufacturer; when the use to which a product was being put at the time of injury is not that originally intended by the manufacturer, the determination of whether strict liability may be asserted as a viable theory of recovery or whether the manufacturer is insulated from liability because the use of the product was "abnormal" and intervening depends, initially, upon the foreseeability that the product would be put to that use. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Duty to warn of danger in use of product extends only to use of product in manner reasonably contemplated and anticipated by manufacturer, and dumpster manufacturer could not be held to reasonably foresee that a small child would be permitted to play in a dumpster. Greenway v. Peabody Int'l Corp., 163 Ga. App. 698, 294 S.E.2d 541 (1982).

No duty to warn as to effects of improper uses of product. — There is no duty to warn that a redesign and replacement of the integral and ultimately injurious component of a product will destroy the original design and may result in an essentially different product with new "dangerous propensities"; the consumer's conscious decision not to use the product as the product was originally manufactured and designed creates a danger readily apparent even without a warning. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

There is no duty to warn of the obvious danger of using a manufacturer's product as the mere foundation from which a redesigned instrumentality will be produced. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Adequacy of warning. — Strict liability is not imposed under subsection (b) of O.C.G.A. § 51-1-11 merely because a product may be dangerous. If products are properly prepared, manufactured, packaged, and accompanied with adequate warnings and instructions, the products cannot be said to be defective. Thornton v. E.I. Du Pont De Nemours & Co., 22 F.3d 284 (11th Cir. 1994).

Since the defendant marketed the defendant's lacquer thinner solely to professionals, and the product carried a warning of the hazards connected with the product's use, which was reasonably calculated to reach the average user and contained clear and simple language, the defendant did not breach the defendant's duty to warn of nonobvious foreseeable dangers from the normal use of the defendant's product. Thornton v. E.I. Du Pont De Nemours & Co., 22 F.3d 284 (11th Cir. 1994).

Products Liability (Cont'd)
4. Applicability of Subsection (b) (Cont'd)

Latent design defect must be shown. — Since the appellant was using a bulldozer manufactured by the appellees for the purpose of clearing felled trees from a construction site, when a tree jumped over the bulldozer blade and struck the appellant in the chest, the appellant's injuries arose not from a latent design defect, but from an obvious one, the lack of a protective metal cage surrounding the driver's seat, and such alleged defect was not actionable. Stodghill v. Fiat-Allis Constr. Mach., Inc., 163 Ga. App. 811, 295 S.E.2d 183 (1982).

Absence of lawn mower safety device not a defect. — Absence of a "deadman device" that would automatically turn a lawn mower motor off once the operator left the driver's seat did not, in and of itself, render a lawn mower "defective" and, therefore, as a matter of law, the manufacturer could not be held strictly liable for the injury suffered by the plaintiff when the plaintiff fell off the mower, which continued to operate, eventually injuring the plaintiff's leg. Pressley v. Sears-Roebuck & Co., 738 F.2d 1222 (11th Cir. 1984).

Failure to install deadman control on rototiller. — Finding that the alleged defect of failing to install a deadman control on the rototiller's forward gear was open and obvious, liability is barred under each of the plaintiff's theories of recovery: strict liability, negligence, and inadequate warning. Smith v. Garden Way, Inc., 821 F. Supp. 1486 (N.D. Ga. 1993), aff'd, 12 F.3d 220 (11th Cir. 1993).

Black bicycle helmet was not defective since the helmets lack of conspicuity was observable from a simple visual inspection. Berkner v. Bell Helmets, Inc., 822 F. Supp. 721 (N.D. Ga. 1993), aff'd, 9 F.3d 121 (11th Cir. 1993).

Firearm is not inherently defective merely because its firing resulted in the death of an innocent bystander. Rhodes v. R.G. Indus., Inc., 173 Ga. App. 51, 325 S.E.2d 465 (1984).

Manufacturer of spermicide. — In a products liability action against a corporation which manufactured and marketed a spermicide, to recover damages arising from multiple birth defects suffered by an infant, the corporation knew or should have known of the potential danger that its product might cause birth defects because various studies suggesting this risk were available well before the infant's mother first obtained the product. This potential danger required a warning, and the absence of such a warning constituted a defect in the product. Wells ex rel. Maihafer v. Ortho Pharmaceutical Corp., 615 F. Supp. 262 (N.D. Ga. 1985), aff'd in part sub nom. Wells v. Ortho Pharmaceutical Corp., 788 F.2d 741 (11th Cir.), cert. denied, 479 U.S. 950, 107 S. Ct. 437, 93 L. Ed. 2d 386 (1986).

Manufacturer of automobile. — Vehicle owner's negligent design claim did not fall within the statute of repose exception under O.C.G.A. § 51-1-11(c) because no reasonable trier of fact could have found that the manufacturer's conduct was willful and wanton; the vehicle performed well on tests that were designed to evaluate rollover propensity. Ivy v. Ford Motor Co., 646 F.3d 769 (11th Cir. 2011).

Manufacturer of vaccine. — Drug manufacturer was not liable for injuries to a child born after the mother had been injected with a measles-mumps-rubella vaccine for which the manufacturer had taken all precautions necessary to warn of any potential injury to an unborn fetus, and the injection was received from a licensed practical nurse who was aware of the risks and had read and understood a circular accompanying the vaccine. Walker v. Merck & Co., 648 F. Supp. 931 (M.D. Ga. 1986), aff'd, 831 F.2d 1069 (11th Cir. 1987).

Motor vehicle striking fallen electric wire. — Strict liability provided for in subsection (b) of O.C.G.A. § 51-1-11 is not applicable to make a power company liable for injuries sustained when a motor vehicle struck a fallen electric wire since the accident did not involve any "personal property sold as new property." Georgia Power Co. v. Collum, 176 Ga. App. 61, 334 S.E.2d 922 (1985).

Doughnut fryer functioned properly for the fryer's intended use and was not defective as a matter of law, since

the danger attendant to its use was patent and a doughnut shop employee's injuries did not result from any malfunction due to product design but instead occurred when another person dislodged the fryer from the fryer's position on a table. Orkin Exterminating Co. v. Dawn Food Prods., 186 Ga. App. 201, 366 S.E.2d 792, cert. denied, 186 Ga. App. 918, 366 S.E.2d 792 (1988).

Propane heater and valve incorporated into the heater as a component part were not defective products when manufactured, and the manufacturers could not have reasonably foreseen that the automatic safety shut-off switch on the valve would be taped down by an industrial user so as to defeat the valve's safety function. Argo v. Perfection Prods. Co., 730 F. Supp. 1109 (N.D. Ga. 1989), aff'd, 935 F.2d 1295 (11th Cir. 1991).

Manufacturer of chemical known as methyl ethyl ketone provided adequate warnings of the product's potential danger, since the label affixed to the outside of its container clearly and graphically advised that the chemical was both flammable and explosive and that it should not be exposed to sparks. Copeland v. Ashland Oil, Inc., 188 Ga. App. 537, 373 S.E.2d 629, cert. denied, 188 Ga. App. 911, 373 S.E.2d 629 (1988).

Fireman's Rule. — Fireman's Rule prevents a fireman injured in the course of his duties from bringing an action for negligence against the manufacturer of a product whose explosion during the fire causes the fireman's injury. White v. Edmond, 971 F.2d 681 (11th Cir. 1992).

Access and egress system on a "skidsteer loader" used to knock down and transport molten glass waste did not constitute a design defect, since the machine included a system which provided for emergency exit in all but the most extraordinary circumstances. Foskey v. Clark Equip. Co., 715 F. Supp. 1088 (M.D. Ga. 1989), aff'd, 914 F.2d 269 (11th Cir. 1990).

O.C.G.A. § 51-1-28 bars a claim for defective blood O.C.G.A. § 51-1-11. Timms v. Verson Allsteel Press Co., 520 F. Supp. 1147 (N.D. Ga. 1981).

Joint tort-feasors. — Theoretical basis of strict liability is in tort, and when a manufacturer is guilty in strict liability and another party is found to be negligent, they are deemed joint tort-feasors. Colt Indus. Operating Corp. v. Coleman, 246 Ga. 559, 272 S.E.2d 251 (1980).

Recovery in strict liability in tort cannot be had solely for property damage to the allegedly defective property itself. Long Mfg., N.C., Inc. v. Grady Tractor Co., 140 Ga. App. 320, 231 S.E.2d 105 (1976); Henderson v. GMC, 152 Ga. App. 63, 262 S.E.2d 238 (1979).

Cause of action in negligence for property damage to defective personal property itself is cognizable. Long Mfg., N.C., Inc. v. Grady Tractor Co., 140 Ga. App. 320, 231 S.E.2d 105 (1976).

Corporations lack standing to bring action. — Georgia courts and the federal district courts have continually disallowed actions in strict liability brought by corporations because under O.C.G.A. § 51-1-11 a corporation has no standing to bring such an action. Baltimore Football Club, Inc. v. Lockheed Corp., 525 F. Supp. 1206 (N.D. Ga. 1981).

Consortium action in connection with products liability. — Wife may maintain an action for loss of consortium in connection with a products liability action for injury to the husband. Timms v. Verson Allsteel Press Co., 520 F. Supp. 1147 (N.D. Ga. 1981).

Wrongful death action based on product liability. — Spouse has the right to recover for the wrongful death of their spouse, in a product liability action. Timms v. Verson Allsteel Press Co., 520 F. Supp. 1147 (N.D. Ga. 1981).

Determining timing of product liability for defective truck lift cylinder. — In order to determine whether product liability claims involving an allegedly defective truck lift cylinder were timely under O.C.G.A. § 51-1-11(b)(2), it was necessary to certify a question to the Georgia Supreme Court as to whether the statute began to run when the lift cylinder was assembled or tested, when the truck was assembled, or when the truck was delivered to the truck's initial purchaser. Campbell v. Altec Indus., 605 F.3d 839 (11th Cir. 2010).

5. Design Defect Cases

Risk-utility analysis. — In product liability design defect cases, a risk-utility

Products Liability (Cont'd)
5. Design Defect Cases (Cont'd)

analysis—a balancing test whereby the risks inherent in a product design are weighed against the utility or benefit derived from the product—is the appropriate test for reaching the legal conclusion that a product's design specifications were partly or totally defective. Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

Risk-utility analysis incorporates the concept of "reasonableness," i.e., whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk. Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

General factors considered in a risk-utility analysis include: the usefulness of the product; the gravity and severity of the danger posed by the design; the likelihood of that danger; the avoidability of the danger, i.e., the user's knowledge of the product, publicity surrounding the danger, or the efficacy of warnings, as well as common knowledge and the expectation of danger; the user's ability to avoid danger; the state of the art at the time the product is manufactured; the ability to eliminate danger without impairing the usefulness of the product or making it too expensive; and the feasibility of spreading the loss in the setting of the product's price or by purchasing insurance. Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

Manufacturer's proof of compliance with industry-wide practices, state of the art, or federal regulations does not eliminate conclusively the manufacturer's liability for the manufacturer's design of allegedly defective products. Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

Alternative safe design factors include: the feasibility of an alternative design; the availability of an effective substitute for the product which meets the same need but is safer; the financial costs of the improved design; and the adverse effects from the alternative. Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

In regard to the benefits aspect of the balancing test, factors that could be considered include the appearance and aesthetic attractiveness of the product; its utility for multiple uses; the convenience and extent of its use, especially in light of the period of time it could be used without harm resulting from the product; and the collateral safety of a feature other than the one that harmed the plaintiff. Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

Parents' wrongful death claim under O.C.G.A. § 19-7-1 pertaining to an unclipped rear seat failed on summary judgment because the unclipped seat did not contribute to their child's fatal skull fracture, and there was thus no evidence showing proximate causation under O.C.G.A. § 51-1-11(b)(1) between the unclipped seat and the child's death; the parents also did not assert a survival action in order to permit recovery for pain and suffering in that such damages were not permitted under O.C.G.A. §§ 19-7-1 and 51-4-1. Davenport v. Ford Motor Co., No. 1:05-cv-3047-WSD, 2007 U.S. Dist. LEXIS 91245 (N.D. Ga. Dec. 11, 2007).

Impossible to determine presence of design defect. — In an action arising from a head on collision at high speed, the design of the fuel and seat systems of one of the vehicles could not be found to be defective in light of the extreme impact, speed, and resulting forces. Timmons v. Ford Motor Co., 982 F. Supp. 1475 (S.D. Ga. 1997), aff'd, 161 F.3d 22 (11th Cir. 1998).

Impossible to determine product liability case. — In this products liability case, summary judgment to the defendants was appropriate since: (1) the opinions of the plaintiff's experts as to the cause of the plaintiff's injuries and the death of the plaintiff's daughter were based on speculation, the opinions would not provide an adequate basis to survive summary judgment even if the opinions were admitted into evidence; and (2) other than the expert testimony proffered by the plaintiff, there was no evidence in the

record that the container on the front porch of the mobile home actually exploded or likely exploded on the day of the accident or, if the container did, that the explosion of the container caused the plaintiff's injuries or the death of the plaintiff's daughter. Walker v. Blitz United States, Inc., 663 F. Supp. 2d 1344 (N.D. Ga. 2009).

Dealer's liability for a failure to warn. — While O.C.G.A. § 51-1-11(b) limited strict liability in tort for product design defects to manufacturers, a dealer could be liable for a failure to warn of a car's stability issue or that the car did not have a stability system that the dealer knew had been developed by the car manufacturer to remedy a design defect. Thayer v. GMC, No. 1:05-cv-1889-WSD, 2005 U.S. Dist. LEXIS 36193 (N.D. Ga. Dec. 14, 2005).

Motorcycle helmet. — In the absence of expert testimony that a design defect cause a motorcycle operator's helmet to fog up and that anti-fogging features used in snowmobile helmets could safely be used in street helmets, the operator had no evidence to show that the fogging, which was a common problem in all helmets, was due to a design defect that the helmet manufacturer could have remedied with a feasible alternative design, and, thus, the operator's O.C.G.A. § 51-1-11 design defect claim failed; the operator's injury was not a sufficient basis, in and of itself, for concluding that the helmet was defective. Mize v. HJC Corp., No. 1:03-CV-2397-JEC, 2006 U.S. Dist. LEXIS 65180 (N.D. Ga. Sept. 13, 2006).

Summary judgment was properly granted in an O.C.G.A. § 51-1-11(b) products liability case as, while identification of a specific defect was not required, it was not sufficiently shown that a boat's gimbal housing deviated from a properly made housing; the existence of a manufacturing defect was not the only plausible explanation for how the housing broke. Graff v. Baja Marine Corp., 310 Fed. Appx. 298 (11th Cir. 2009) (Unpublished).

Hip prosthesis. — Because the district court excluded an expert's testimony due to unreliability under Daubert and Fed. R. Evid. 702, the court properly granted summary judgment to the manufacturer of an allegedly defective hip prosthesis on all claims, including the plaintiffs' strict liability claim. Sumner v. Biomet, Inc., No. 11-10280, 2011 U.S. App. LEXIS 14584 (11th Cir. July 15, 2011) (Unpublished).

Manufacturing defect in medical device. — Because the plaintiff, a surgical patient, did not show that a medical device, a surgical wrap, that was implanted in the plaintiff's stomach did not perform as intended, which required the plaintiff to show how the device was intended to function, the plaintiff did not produce evidence, expert or otherwise, from which a reasonable jury could have concluded that the device contained a manufacturing defect to meet the standard set forth in O.C.G.A. § 51-1-11(b)(1) and, thus, summary judgment was appropriately granted to the defendant, the manufacturer of the product. Williams v. Mast Biosurgery USA, Inc., 644 F.3d 1312 (11th Cir. 2011).

Design defect in drug case. — Plaintiff alleged a prima facie case for design defect against a brand name drug manufacturer because the plaintiff pled that the drug in question at the time the drug was sold was unreasonably dangerous due to the drug's inherent risks, and the decedent suffered from SJS/TEN as a result of the drug, which eventually resulted in the decedent's death. Frazier v. MYLAN Inc., 911 F. Supp. 2d 1285 (N.D. Ga. Dec. 18, 2012).

6. Strict Liability

Negligence not element of strict liability under subsection (b). — Strict liability imposed under subsection (b) is not based on negligence. While negligence on the part of the manufacturer may happen to be involved as a matter of fact in a given situation, it is not necessarily so, and the statute imposes liability irrespective of negligence. Ford Motor Co. v. Carter, 239 Ga. 657, 238 S.E.2d 361 (1977); Colt Indus. Operating Corp. v. Coleman, 246 Ga. 559, 272 S.E.2d 251 (1980); Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Lack of merchantability or suitability. — If a court should construe an action as being a tort action under subsection (b)

Products Liability (Cont'd)
6. Strict Liability (Cont'd)

because of the failure of the product to be merchantable, or not suitable to the use intended, the action, though in tort, would be based not on negligence, but on the ground that the proximate causes of the plaintiff's injuries were the lack of merchantability or the lack of suitability to the use intended of the product purchased, which are identical to the factors of an action on an implied warranty. Evershine Prods., Inc. v. Schmitt, 130 Ga. App. 34, 202 S.E.2d 228 (1973).

Subsection (b) of O.C.G.A. § 51-1-11 does not apply to negligence claims as well as strict liability claims. Hatcher v. Allied Prods. Corp., 256 Ga. 100, 344 S.E.2d 418 (1986) of O.C.G.A. § 51-1-11.

Privity of contract not required for action under subsection (b). — Action is in tort and privity of contract is not necessary nor can the manufacturer avail itself of the usual contract or warranty defenses. Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975); Wansor v. George Hantscho Co., 243 Ga. 91, 252 S.E.2d 623 (1979); Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Manufacturer responsibility for infection following penile implant. — In an action against the manufacturer of a penile implant which had to be surgically removed after an infection developed, the court erred in granting summary judgment to the manufacturer on the plaintiff's claim of strict liability since there was some evidence that the device did not operate as intended and caused the infection which required removal of the implant since the plaintiff's physician's post-operative report noted that there was a disconnection of tubing between the reservoir and cylinder, causing the reservoir fluid to leak into the scrotal compartment, thereby causing infection. Williams v. American Med. Sys., 248 Ga. App. 682, 548 S.E.2d 371 (2001).

"Enhanced injury" caused by seat belt or air bag failure. — Injured party was not required to show the extent of the "enhanced injury" caused by the failure of a seat belt or air bag as the party claimed only that the manufacture of the seat belt and air bag were defective; the injured party did not claim that the design of the seat belt and air bag were defective. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Strict liability is imposed for injuries which are proximate result of product defects, not for the manufacture of defective products; unless the manufacturer's defective product can be shown to be the proximate cause of the injuries, there can be no recovery. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Basis of judgment in strict liability. — Manufacturer has the absolute right to have the manufacturer's strict liability for injuries adjudged on the basis of the design of the manufacturer's own marketed product and not that of someone else. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Failure to identify specific defect was not fatal to claim. — Because the plaintiff patient's expert testified that medical device's wires were cut when it was removed in a third surgery, the resulting failure to identify a specific defect was not fatal to O.C.G.A. § 51-1-11(b)(1) strict liability claim, and the defendant manufacturer's motion for summary judgment was denied. Trickett v. Advanced Neuromodulation Sys., 542 F. Supp. 2d 1338 (S.D. Ga. 2008).

Identity of manufacturer. — Construction worker's O.C.G.A. § 51-1-11(b)(1) strict liability claim against a boom manufacturer failed because there was no evidence that the manufacturer produced the boom that struck the worker, which the worker had been unable to identify, nor was there any evidence that the boom had a defect or that any such defect was the proximate cause of the worker's injuries. McBride v. JLG Indus., No. 7:03-cv-118(HL), 2005 U.S. Dist. LEXIS 21713 (M.D. Ga. Sept. 20, 2005).

Construction worker's O.C.G.A. § 51-1-11(b)(1) strict liability claim against a boom manufacturer failed because there was no evidence that the manufacturer produced the boom that struck the worker, which the worker had

been unable to identify, nor was there any evidence that the boom had a defect or that any such defect was the proximate cause of the worker's injuries. Mosley v. JLG Indus., 2005 U.S. Dist. LEXIS 21782 (M.D. Ga. Sept. 20, 2005).

In a personal injury and products liability action when the seller of an engine had no active participation in the design of an alleged defective wood chipper, and the seller's only input into the design was limited to saying in essence that the particular engine would perform adequately in such a chipper, the trial court properly granted summary judgment to the seller since the seller did not qualify in any manner as a manufacturer of the alleged defective chipper. Davenport v. Cummins Alabama, Inc., 284 Ga. App. 666, 644 S.E.2d 503 (2007).

Strict liability did not attach as defendants did not manufacture chemicals. — Plaintiffs sued the defendants, a chemical plant and a laboratory, alleging the plaintiffs were injured due to chemical fires at the laboratory's facility. As the complaint did not allege that the defendants manufactured the chemicals that caused the harm, the complaint did not state a claim for strict liability under O.C.G.A. § 51-1-11(b)(1), and the defendants were properly granted summary judgment on that claim. Smith v. Chemtura Corp., 297 Ga. App. 287, 676 S.E.2d 756 (2009).

No inadequate warning on mouthwash. — When a consumer alleged that mouthwash caused temporary tooth discoloration and taste impairment, the inadequate warning component of the consumer's strict liability claim failed because the consumer had the opportunity to read the label, but failed to do so. Silverstein v. P&G Mfg. Co., 700 F. Supp. 2d 1312 (S.D. Ga. Oct. 30, 2009).

7. Pleading and Practice

Pleading defect in machinery. — In tort actions based on the malfunctioning of machinery, it is sufficient if the petition alleges that the machine was in such a condition that the machine produced certain definite described results (the injury), which the machine would not have produced had the machine not been defective and had the machine functioned properly. Vickers v. Georgia Power Co., 79 Ga. App. 456, 54 S.E.2d 152 (1949).

Virginia law inapplicable to Georgia action. — When the plaintiff, injured while driving in Virginia, brought an action in Georgia against the car manufacturer under a strict liability theory, Virginia products liability law did not apply since it did not recognize recovery on the basis of strict liability and was contrary to the public policy of Georgia. Alexander v. GMC, 267 Ga. 339, 478 S.E.2d 123 (1996).

Failure to communicate warning label change preempted. — Trial court properly dismissed the plaintiff's claims based on failure to communicate warning label change information to the healthcare community as those claims were preempted by federal law. PLIVA, Inc. v. Dement, 335 Ga. App. 398, 780 S.E.2d 735 (2015), cert. denied, 2016 Ga. LEXIS 234 (Ga. 2016).

Self-destruction as prima-facie evidence of defect. — When a defect cannot be directly observed, that fact does not prevent a plaintiff from establishing a prima-facie case against a manufacturer if the product has a defect which causes its own destruction. Firestone Tire & Rubber Co. v. King, 145 Ga. App. 840, 244 S.E.2d 905 (1978).

Existence of manufacturing defect in products liability case may be inferred from circumstantial evidence. Firestone Tire & Rubber Co. v. King, 145 Ga. App. 840, 244 S.E.2d 905 (1978).

Statute of repose. — "First sale for use or consumption" of a spinal plate did not occur when the manufacturer sold the plate to the hospital but took place when the plate was removed from the hospital's inventory and sold to the patient for its actual intended purpose of placement in the patient's back. Pafford v. Biomet, 264 Ga. 540, 448 S.E.2d 347 (1994).

Liability is not imposed upon a manufacturer by the provisions of paragraph (b)(2) of O.C.G.A. § 51-1-11, but by the provisions of paragraph (b)(1) of § 51-1-11; paragraph (b)(2) merely sets an ultimate limit on which injuries shall be actionable. Thus, if a spinal plate was not defective when the plate was sold to the hospital and subsequently became defective only

Products Liability (Cont'd)
7. Pleading and Practice (Cont'd)

as the result of remaining in the hospital's inventory for more than ten years, the patient would have no viable claim against the manufacturer. Pafford v. Biomet, 264 Ga. 540, 448 S.E.2d 347 (1994).

While the original complaint against the car distributor was filed after the expiration of the 10-year statute of repose, which presented an absolute defense to the plaintiffs' claims of strict liability and negligent manufacture and design, the statute of repose did not provide an absolute bar to the plaintiffs' claims for negligent failure to warn against the car manufacturer as O.C.G.A. § 51-1-11(c) removed the negligent failure to warn claims from the ambit of the statute of repose. Parks v. Hyundai Motor Am., Inc., 258 Ga. App. 876, 575 S.E.2d 673 (2002).

Because the statute of repose in O.C.G.A. § 51-1-11(b)(2) had expired when the parents filed their products liability complaint against an automobile manufacturer, and because the parents failed to make the required foundational showing of substantial similarity, the trial court correctly granted summary judgment in favor of the manufacturer because the exception in § 51-1-11(c) did not apply. Parks v. Hyundai Motor Am., Inc., 294 Ga. App. 112, 668 S.E.2d 554 (2008).

Trial court properly applied the Georgia statute of repose pursuant to O.C.G.A. § 51-1-11 rather than the longer statute in Texas in a product liability action as the statute of repose involved remedial rather than substantive rights and under the Georgia choice of law rules, Georgia's procedural and remedial provisions governed the matter; the matter involved a vehicle accident that occurred in Texas, although the action was brought in Georgia. Bagnell v. Ford Motor Co., 297 Ga. App. 835, 678 S.E.2d 489 (2009).

Because a power company was the intended consumer of an assembled bucket truck and the truck's component parts, an employee's suit had to be filed against any manufacturer under O.C.G.A. § 51-1-11(b) within ten years of the date of the sale of the finished product to the power company; the statute of repose found in O.C.G.A. § 51-1-11(b)(2) begins to run when a finished product is sold as new to the intended consumer who is to receive the product. Campbell v. Altec Indus., 288 Ga. 535, 707 S.E.2d 48 (2011).

Statute of repose bars any lawsuit brought more than 10 years after the sale to the first consumer. Davis v. Brunswick Corp., 854 F. Supp. 1574 (N.D. Ga. 1993).

Phrase "use or consumption" in paragraph (b)(2) of O.C.G.A. § 51-1-11 means that the statute of repose begins to run when the product first enters the stream of commerce. Davis v. Brunswick Corp., 854 F. Supp. 1574 (N.D. Ga. 1993).

Error to dismiss claim — In a products liability action stemming from an automobile accident, because a question of fact existed regarding whether the manufacturer's actions constituted a "willful, reckless, or wanton disregard for property or life," it was error to dismiss the plaintiffs' design defect claim. Watkins v. Ford Motor Co., 190 F.3d 1213 (11th Cir. 1999).

Statute of repose did not apply. — In a products liability action stemming from an automobile accident, the plaintiffs' failure to warn claim was not merely a restatement of the plaintiff's design defect claim and therefore was not subject to the statute of repose. Watkins v. Ford Motor Co., 190 F.3d 1213 (11th Cir. 1999).

Date action filed, not date of injury, determines applicability of statute of limitations. — Subsection (b)(2) of O.C.G.A. § 51-1-11 is a complete bar to strict liability actions filed more than 10 years after the "date of the first sale for use or consumption of" the product regardless of whether the underlying injury occurred within the ten-year period. Hatcher v. Allied Prods. Corp., 256 Ga. 100, 344 S.E.2d 418 (1986).

Since an injury occurred less than ten years after the first sale of the product, but suit was not filed more than ten years after the first sale of the product, O.C.G.A. § 51-1-11 barred a strict liability claims based on an alleged defect in the product causing the injury. Hatcher v. Allied Prods. Corp., 796 F.2d 1427 (11th Cir. 1986).

Applicability of limitation period. — In a case involving a strict liability

claim, since paragraph (b)(2) of O.C.G.A. § 51-1-11 was enacted both before the injury and before the complaint was filed, but after the first sale occurred, the ten-year limitation will be given appropriate application. LFE Corp. v. Edenfield, 187 Ga. App. 785, 371 S.E.2d 435, cert. denied, 187 Ga. App. 908, 371 S.E.2d 435 (1988).

Subsection (c) of O.C.G.A. § 51-1-11 cannot be applied retroactively when both the injury and the filing of the original complaint preceded the effective date of its enactment. LFE Corp. v. Edenfield, 187 Ga. App. 785, 371 S.E.2d 435, cert. denied, 187 Ga. App. 908, 371 S.E.2d 435 (1988).

Homeowners' suit alleging that three corporations, which provided home security and monitoring services, were strictly liable under O.C.G.A. § 51-1-11 for damages to the homeowners' residence that were caused by fire that was not detected by the homeowners' security system was time-barred under a one-year limitations period in the parties' contract; that period was enforceable because it was not unreasonable and had been agreed to by the homeowners when the homeowners entered the contract. Jacobs v. ADT Sec. Servs., No. 4:05-CV-139 (CDL), 2006 U.S. Dist. LEXIS 69103 (M.D. Ga. Sept. 26, 2006).

Paragraph (b)(2) operates retroactively. — Paragraph (b)(2) of O.C.G.A. § 51-1-11 will operate retroactively to bar a claim of a plaintiff injured several months after the limitation period went into effect. Weeks v. Remington Arms Co., 733 F.2d 1485 (11th Cir. 1984).

Time limitation not traditional statute of limitations. — In the 1978 amendment to subsection (b) of O.C.G.A. § 51-1-11, the General Assembly expressly placed time restrictions on the bringing of a cause of action under the subsection, but it was not a traditional statute of limitations, which typically declares that no suit shall be maintained on such causes of action unless brought within a specified period after the right accrued. Daniel v. American Optical Corp., 251 Ga. 166, 304 S.E.2d 383 (1983).

Application of general statute of limitations. — Since subsection (b) of O.C.G.A. § 51-1-11 must be strictly construed, the 1978 amendment thereof was not intended to preclude the application of a general statute of limitations, such as O.C.G.A. § 9-3-33, which would otherwise apply, or to suggest that no general statute of limitations applied to strict products liability actions under subsection (b) prior to the 1978 amendment. Daniel v. American Optical Corp., 251 Ga. 166, 304 S.E.2d 383 (1983).

Two-year statute of limitations provided by O.C.G.A. § 9-3-33 applies to products liability actions. Smith, Miller & Patch v. Lorentzson, 254 Ga. 111, 327 S.E.2d 221 (1985).

Subsection (c) not applied retroactively. — Subsection (c) of O.C.G.A. § 51-1-11 cannot be applied to bar products liability actions based on negligence when the cause of action accrued before the subsection's effective date, July 1, 1987. Browning v. Maytag Corp., 261 Ga. 20, 401 S.E.2d 725 (1991).

Doctrine of res ipsa loquitur does not apply when there is any intervention of an intermediary cause which produces or could produce the sustained injury. Molden v. Atlanta Coca-Cola Bottling Co., 175 Ga. App. 298, 333 S.E.2d 175 (1985).

Plaintiff failed to state claim for strict liability. — Plaintiff's allegations against drug manufacturers failed to state a claim for strict liability under O.C.G.A. § 51-1-11(b) because the plaintiff failed to allege any specific design or manufacturing defect in the products and the court could not draw the reasonable inference that a design or manufacturing defect caused the decedent's injuries. Moore v. Mylan Inc., No. 1:11-CV-03037-MHS, 2012 U.S. Dist. LEXIS 6897 (N.D. Ga. Jan. 5, 2012).

Summary judgment denied. — Operator of airport passenger conveyance was properly denied summary judgment after the operator failed to submit any evidence rebutting the passenger's assertion that the conveyance's lack of seats and its deceleration rate for emergency stops constituted defects in design. Westinghouse Elec. Corp. v. Williams, 173 Ga. App. 118, 325 S.E.2d 460 (1984), aff'd, 183 Ga. App. 845, 360 S.E.2d 411 (1987).

Summary judgment granted. — Defendants were entitled to summary judg-

Products Liability (Cont'd)
7. Pleading and Practice (Cont'd)

ment on the plaintiffs' product liability claims, since plaintiffs failed to show that the rollover accident was caused by a defect in the vehicle's design, and failed to rebut the defendants showing that the accident was caused by the vehicle being driven off the roadway after the driver fell asleep. Jonas v. Isuzu Motors Ltd., 210 F. Supp. 2d 1373 (M.D. Ga. 2002).

Trial court did not err in granting summary judgment to a manufacturer in a driver's products liability action because the manufacturer presented evidence disproving the existence of a defect through the opinion of the manufacturer's expert witness, and the driver failed to point to any competent evidence giving rise to a genuine issue of material fact. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

Loss of product. — Since the plaintiffs' claim against the manufacturer of turnbuckles was based on the unfitness of thousands of turnbuckles for the purpose intended, as opposed to some idiosyncratic defect affecting only a lost turnbuckle, loss of the product did not impair either the plaintiffs' ability to show the defect claimed or the defendant's ability to present a defense to the claim. Chicago Hdwe. & Fixture Co. v. Letterman, 236 Ga. App. 21, 510 S.E.2d 875 (1999).

No exception under subsection (c). — Language of subsection (c) of O.C.G.A. § 51-1-11 provides an exception to the statute of repose for negligence actions claiming failure to warn and disease causation, but does not create an exception for these theories under strict liability claims. Allison v. McGhan Medical Corp., 184 F.3d 1300 (11th Cir. 1999).

Purely economic losses, such as the loss of the use of the property or the cost of repairing the property, are not compensable under O.C.G.A. § 51-1-11 when no personal injury or physical damage has occurred except to the allegedly defective product itself. Busbee v. Chrysler Corp., 240 Ga. App. 664, 524 S.E.2d 539 (1999).

Dentist as expert witness. — In a consumer's suit alleging strict products liability, the consumer's failure to identify a treating dentist as an expert witness under Fed. R. Civ. P. 26(a)(2) was harmless because the defendants had adequate notice that the dentist could be called as a witness and, in fact, already took the dentist's deposition. Silverstein v. P&G Mfg. Co., 700 F. Supp. 2d 1312 (S.D. Ga. Oct. 30, 2009).

Amended complaint properly denied. — Individual's motion for leave to file an amended complaint was denied since the individual's additional allegations failed to demonstrate that a pharmaceutical manufacturer's affiliate was the manufacturer of the drug that allegedly caused the individual's injuries or that the drug included a design or manufacturing defect, and as a result the individual's O.C.G.A. § 51-1-11(b) claim would have been subject to dismissal. Henderson v. Sun Pharms. Indus., No. 4:11-CV-0060-HLM, 2011 U.S. Dist. LEXIS 104999 (N.D. Ga. Aug. 22, 2011).

Lex loci delicti did not apply. — Public policy exception to lex loci delicti applied and Georgia law should have been applied in a design defect products liability case because Georgia recognized strict liability in such cases, pursuant to O.C.G.A. § 51-1-11, whereas Indiana law required a showing that the manufacturer failed to exercise reasonable care under the circumstances. Bailey v. Cottrell, Inc., 313 Ga. App. 371, 721 S.E.2d 571 (2011).

8. Defenses

Discovery of defect by product user. — If the user or consumer discovers the defect and is aware of the danger, but nevertheless proceeds unreasonably to make use of the product, the user or consumer is barred from recovery. Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975); Hunt v. Harley-Davidson Motor Co., 147 Ga. App. 44, 248 S.E.2d 15 (1978).

In most product liability cases, the manufacturer's defense will be that the plaintiff assumed the risk that the defect in the product would produce the injury sustained by using the product with actual knowledge of the defect. Deere & Co. v. Brooks, 250 Ga. 517, 299 S.E.2d 704 (1983).

Injured party's admission that the installation of an x-ray machine was itself the consequence of the contract rendered the nonperformance of a contract obligation, within the ambit of O.C.G.A. § 51-1-11(a), and, consequently, the injured party's negligence claims were barred. Kidd v. Dentsply Int'l, Inc., 278 Ga. App. 346, 629 S.E.2d 58 (2006).

If injury results from abnormal handling, the seller is not liable. Center Chem. Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975).

Manufacturer may demonstrate in defense that the product was in fact merchantable and fit for the purpose intended, or that if there was a deficiency in such regard there was no causal connection between the breach and the damages sued for, or that some other factor was the sole proximate cause of the damage. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Application of bare metal defense. — Summary judgment was warranted in favor of manufacturer of valves on grounds of insufficient evidence of product identification and causation pertaining to the valves because, in applying the bare metal defense, the record did not sufficiently show that the decedent's asbestos exposure stemmed from a product manufactured by the defendant. Thurmon v. A.W. Chesterton, Inc., No. 1:11-CV-01407-CAP, 2014 U.S. Dist. LEXIS 164136 (N.D. Ga. Nov. 21, 2014).

Defense of assumption of risk, although not the defense of contributory negligence, is applicable in a product liability case. Deere & Co. v. Brooks, 250 Ga. 517, 299 S.E.2d 704 (1983).

Assumption of the risk is applicable to product liability cases if the user or consumer discovers the product's defect and is aware of the danger emanating from that defect, but nevertheless proceeds unreasonably to make use of the product. Coast Catamaran Corp. v. Mann, 171 Ga. App. 844, 321 S.E.2d 353 (1984), aff'd, 254 Ga. 201, 326 S.E.2d 436 (1985), overruled on other grounds, Banks v. ICI Ams., Inc., 264 Ga. 732, 450 S.E.2d 671 (1994).

Obvious danger is complete defense. — Open and obvious danger rule is a complete defense to claims based upon negligence, strict liability, and failure to warn. The plaintiff, not the defendant, bears the burden of proof for demonstrating that the peril causing the injury is latent, or not patent. Morris v. Clark Equip. Co., 904 F. Supp. 1379 (M.D. Ga. 1995), aff'd, 129 F.3d 615 (11th Cir. 1997).

Open and obvious danger did not preclude action. — Summary judgment was precluded in an action by a consumer alleging that the manufacturer's lemon-scented bleach was unmerchantable and unsuitable for its intended use, since the Material Safety Data Sheet prepared for the lemon-scent additive warned that the scent was incompatible with strong oxidizing agents and since, while the manufacturer's label identified the bleach as a "strong oxidizer," under a risk utility analysis an open and obvious danger did not preclude an action, because this is but one factor to be considered in determining whether a product is defective. Zeigler v. Clowhite Co., 234 Ga. App. 627, 507 S.E.2d 182 (1998).

Action not untimely. — Plaintiff's 1986 strict liability action for injuries sustained in 1970 when the plaintiff's nightgown caught fire was not untimely, since the gown had been purchased sometime after July, 1968, and the plaintiff did not reach majority age until 1986. Morgan v. Sears, Roebuck & Co., 700 F. Supp. 1574 (N.D. Ga. 1988).

Expert testimony not required. — Whether someone suffers greater injuries in a car wreck when a seat belt does not work to restrain the individual and an air bag does not inflate between the individual and the steering wheel, windshield, and mirror are not issues requiring the expert testimony of a trauma physician or engineer, but are matters not of science but of skill and experience. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Whether a seat belt engaged properly or an air bag deployed are not matters of science and issues requiring the expert testimony of an engineer or a metallurgist, but are matters of skill and experience. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Products Liability (Cont'd)

9. Jury Questions

Whether product is defective is jury question. — Question under the strict liability theory is whether the product was defective in that there was a failure to adequately warn of the product's dangerous propensities. If so, the jury should look to the evidence to see whether the plaintiff knew these facts and nevertheless assumed the risk of the product's use in the manner in which the product was used, so as to bar the plaintiff from recovery. Parzini v. Center Chem. Co., 136 Ga. App. 396, 221 S.E.2d 475 (1975); Stokes v. Peyton's, Inc., 526 F.2d 372 (5th Cir. 1976).

In a strict liability case brought by a driver against a tire manufacturer, the questions for jury resolution were whether there was a defect in the tire and, if so, whether the driver's injuries were the proximate result of that defect or of the driver's own acts in causing the crash; the question was whether the driver's acts were the sole proximate cause of the driver's injuries, not whether the driver's acts which proximately caused the driver's injuries were acts of negligence. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

In some cases it may be a jury question as to whether the product's original design has been merely slightly or somewhat modified; in such cases, the jury must determine whether the original manufacturer's design was defective and, if so, whether the proximate cause of the injuries sustained was the original defective design or the subsequent modification. Talley v. City Tank Corp., 158 Ga. App. 130, 279 S.E.2d 264 (1981).

Injured party presented a triable issue as to a claim that the truck's safety systems were defective and that a manufacturer was strictly liable as a repair technician testified in detail about how the air bags were supposed to deploy, how it worked, and how the sensor failed when the weld attaching it to the frame broke; the technician also testified that the seat belt would not catch, and even demonstrated that fact at a deposition. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Defect held not found. — Evidence that a patron of a self-service gasoline station slipped on a clearly distinguishable oil stain on the driveway and fell was insufficient to show a defect in the manufacture of the concrete used on the driveway. Griffin v. Crown Cent. Petroleum Co., 171 Ga. App. 534, 320 S.E.2d 383 (1984).

Whether injuries compounded. — Injured party presented a triable issue as to whether the party suffered greater injuries in an accident because the seat belt and air bag did not work properly as: (1) a repair technician testified that the rear-view mirror had been knocked off the windshield and had hair stuck to it and that the steering wheel was "folded over"; (2) the injured party's spouse testified that the injured party broke glasses, had a black eye, a knot on the head, and a bruised sternum; (3) the injured party testified that the party hit the mirror, the windshield, and the steering wheel because the seat belt did not catch and the air bag did not deploy; and (4) the treating physician testified that the injured party suffered a nasal fracture that caused pain after the wreck, blocked the tear duct and caused swelling and infection until the break was corrected surgically. Owens v. GMC, 272 Ga. App. 842, 613 S.E.2d 651 (2005).

Jury instruction on failure to recall error. — Legislature showed in O.C.G.A. § 51-1-11 that the legislature knew how to impose a continuing duty to warn on product manufacturers. There was no corresponding continuing duty to recall an allegedly defective vehicle seatback, and a jury instruction allowing a jury to find negligence based on a failure to recall was reversible error. Ford Motor Co. v. Reese, 300 Ga. App. 82, 684 S.E.2d 279 (2009), cert. denied, No. S10C0186, 2010 Ga. LEXIS 161 (Ga. 2010).

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Am. Jur. Proof of Facts. — Defective Mobile Home, 17 POF2d 213.

Formaldehyde Fumes Emitted by Building Materials, 3 POF3d 225.

Defective Design of an All-Terrain Vehicle, 6 POF3d 93.

Defective Design of Golf Cart, 7 POF3d 225.

Defective Forklift Truck, 8 POF3d 615.

Defective Automobile Child Safety Restraint, 21 POF3d 115.

Proof of Automobile Design Defect, 59 POF3d 73.

C.J.S. — 86 C.J.S., Torts, §§ 11, 39.

ALR. — Liability for injuries by breaking or bursting of container in which goods are sold, 4 ALR 1094.

Automobiles: effect of defective brakes on liability for injury, 14 ALR 1339; 63 ALR 398; 170 ALR 611.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer, who purchased from a middleman, 17 ALR 672; 39 ALR 992; 63 ALR 340; 88 ALR 527; 105 ALR 1502; 111 ALR 1239; 140 ALR 191; 142 ALR 1490.

Res ipsa loquitur in case of electric shock from electrical household appliance, 34 ALR 31.

Liability of seller of article not inherently dangerous to third person for injury or death due to dangerous condition of article sold, 42 ALR 1243; 60 ALR 1054.

Liability of one undertaking to repair automobile for injury to third person, 52 ALR 857.

Reliance on dealer's or manufacturer's assurance that article is not dangerous as affecting question of contributory negligence, 55 ALR 1047.

Liability of seller of article not inherently dangerous for personal injuries due to the defective or dangerous condition of the article, 74 ALR 343; 168 ALR 1054.

Duty of manufacturer or seller to warn of latent dangers incident to article as a class, as distinguished from duty with respect to defects in particular article, 86 ALR 947.

Liability for injury or death from refrigerating machinery or apparatus, 117 ALR 1425.

Joinder of manufacturer or packer and retailer or other middleman as defendants in action for injury to person or damaged property of purchaser or consumer of defective article, 119 ALR 1356.

Mistake as to chemical or product furnished or misdescription thereof by label or otherwise as basis of liability for personal injury or death resulting from combination with other chemical, 123 ALR 939.

Implied warranty of reasonable fitness of food for human consumption as breached by substance natural to the original product and not removed in processing, 143 ALR 1421.

Negligence and contributory negligence in respect of delivery of petroleum products, 151 ALR 1261.

Manufacturer's liability for injury or damage as affected by his test, or by his failure to test, for defects, 156 ALR 479.

Intervening purchaser's knowledge of defects in or danger of article, or failure to inspect therefor, as affecting liability of manufacturer or dealer for personal injury or property damage to subsequent purchaser or other third person, 164 ALR 371.

Manufacturer's liability for negligence causing injury to person or damage to property, of ultimate consumer or user, 164 ALR 569.

Liability of person furnishing, installing, or maintaining burglar alarm for loss from burglary, 165 ALR 1254.

Presumption of negligence from foreign substance in food, 171 ALR 1209.

Breach of assumed duty to inspect property as ground of liability for damage or injury to third person, 6 ALR2d 284.

Liability of manufacturer or wholesaler for injury caused by third person's use of explosives or other dangerous article sold to retailer in violation of law, 11 ALR2d 1028.

Seller's or manufacturer's liability for injuries as affected by buyer's or user's allergy or unusual susceptibility to injury from article, 26 ALR2d 963.

Recovery by contractor or artisan, suing

for breach of warranty, of damages for loss of good will occasioned by use in his business of unfit materials, 28 ALR2d 591.

Presumption or prima facie case of negligence based on presence of foreign substance in bottled or canned beverage, 52 ALR2d 117.

Liability of landlord to tenant or member of tenant's family, for injury by animal or insect, 67 ALR2d 1005.

Privity of contract as essential to recovery in negligence action against manufacturer or seller of product alleged to have caused injury, 74 ALR2d 1111.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury, 75 ALR2d 39.

Statements in advertisements as affecting manufacturer's or seller's liability for injury caused by product sold, 75 ALR2d 112.

Manufacturer's or seller's duty to give warning regarding product as affecting his liability for product-caused injury, 76 ALR2d 9; 53 ALR3d 239.

What law governs liability of manufacturer or seller for injury caused by product sold, 76 ALR2d 130.

Liability of manufacturer or seller for injury caused by food or food product sold, 77 ALR2d 7.

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Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, supplies, or equipment, 78 ALR2d 460; 5 ALR4th 483.

Liability of manufacturer or seller for injury caused by industrial, business, or farm machinery, tools, equipment, or materials, 78 ALR2d 594; 8 ALR4th 70.

Liability of manufacturer or seller for injury caused by paint, cement, lumber, building supplies, ladders, small tools, and like products, 78 ALR2d 696.

Liability of manufacturer or seller for injury caused by toys, games, athletic or sports equipment, or like products, 78 ALR2d 738.

Liability of manufacturer or seller for injury caused by drug or medicine sold, 79 ALR2d 301.

Liability of manufacturer or seller for injury caused by medical and health supplies, appliances, and equipment, 79 ALR2d 401.

Liability of manufacturer or seller of hair preparations, cosmetics, soaps and other personal cleansers, and the like, for injury caused by the product, 79 ALR2d 431.

Liability of manufacturer or seller for injury caused by domestic or industrial soaps, detergents, cleansers, polishes, and the like, 79 ALR2d 482.

Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables, 80 ALR2d 488; 94 ALR3d 291; 15 ALR4th 909; 18 ALR4th 206.

Liability of manufacturer or seller for injury caused by household and domestic machinery, appliances, furnishings, and equipment, 80 ALR2d 598.

Liability of manufacturer or seller for injury caused by clothing, shoes, combs, and similar products, 80 ALR2d 702.

Liability of manufacturer or seller of product sold in container or package for injury caused by container or packaging, 81 ALR2d 229; 36 ALR4th 419.

Liability of manufacturer or seller of container (bottle, barrel, drum, tank, etc.) or other packaging material for injury caused thereby, 81 ALR2d 350; 36 ALR4th 419.

Liability for injury from defective condition or improper operation of lift bridge or drawbridge, 90 ALR2d 105.

Products liability: manufacturer and dealer or distributor as joint or concurrent tortfeasors, 97 ALR2d 806.

Products liability: manufacturer's responsibility for defective component supplied by another and incorporated in product, 3 ALR3d 1016.

Contributory negligence or assumption of risk as defense to action for personal injury, death, or property damage resulting from alleged breach of implied warranty, 4 ALR3d 501.

Statute of limitations: when cause of action arises on action against manufacturer or seller of product causing injury or death, 4 ALR3d 821.

Seller's duty to test or inspect as affecting his liability for product-caused injury, 6 ALR3d 12.

Manufacturer's duty to test or inspect as affecting his liability for product-caused injury, 6 ALR3d 91.

Liability of corporation for torts of subsidiary, 7 ALR3d 1343.

Products liability: strict liability in tort, 13 ALR3d 1057; 46 ALR3d 240; 52 ALR3d 121.

Liability for warranties and representations in connection with the sale of air-conditioning equipment, 15 ALR3d 1207.

Privity of contract as essential in action against remote manufacturer or distributor for defects in goods not causing injury to person or to other property, 16 ALR3d 683.

Products liability: in personam jurisdiction over nonresident manufacturer or seller under "long-arm" statutes, 19 ALR3d 13.

Liability of builder-vendor or other vendor of new dwelling for loss, injury, or damage occasioned by defective condition thereof, 25 ALR3d 383.

Products liability: right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa, 28 ALR3d 943.

Application of rule of strict liability in tort to person rendering services, 29 ALR3d 1425; 100 ALR3d 1205.

Products liability: extension of strict liability in tort to permit recovery by a third person who was neither a purchaser nor user of product, 33 ALR3d 415.

Surveyor's liability for mistake in, or misrepresentation as to accuracy of, survey of real property, 35 ALR3d 504.

Aviation: helicopter accidents, 35 ALR3d 707.

Malpractice: attending physician's liability for injury caused by equipment furnished by hospital, 35 ALR3d 1068.

Liability in connection with fire or explosion of explosives while being stored or transported, 35 ALR3d 1177.

Liability for injury caused by spraying or dusting of crops, 37 ALR3d 833.

Right of member of armed forces to recover from manufacturer or seller for injury caused by defective military material, equipment, supplies, or components thereof, 38 ALR3d 1247.

Liability of product endorser or certifier for product-caused injury, 39 ALR3d 181.

Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damage, 41 ALR3d 782.

Liability of manufacturer or seller of power lawn mower for injuries to user, 41 ALR3d 986.

Products liability: alteration of product after it leaves hands of manufacturer or seller as affecting liability for product-caused harm, 41 ALR3d 1251.

Liability of manufacturer, seller, or distributor of motor vehicle for defect which merely enhances injury from accident otherwise caused, 42 ALR3d 560.

Products liability: admissibility of evidence of other accidents to prove hazardous nature of product, 42 ALR3d 780.

Rescue doctrine: applicability to situation created by breach of warranty, 44 ALR3d 473.

Attorney's liability, to one other than his immediate client, for consequences of negligence in carrying out legal duties, 45 ALR3d 1181; 61 ALR4th 464; 61 ALR4th 615.

Products liability: contributory negligence or assumption of risk as defense under doctrine of strict liability in tort, 46 ALR3d 240.

Liability of public accountant to third parties, 46 ALR3d 979.

Liability for injury or death of pallbearer, 48 ALR3d 1280.

Products liability: proof of defect under doctrine of strict liability in tort, 51 ALR3d 8.

Products liability: necessity and sufficiency of identification of defendant as manufacturer or seller of product alleged to have caused injury, 51 ALR3d 1344.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 ALR3d 101.

Failure to warn as basis of liability under doctrine of strict liability in tort, 53 ALR3d 239.

Products liability; strict liability in tort where injury results from allergenic (side-effect) reaction to product, 53 ALR3d 298.

Strict liability in tort: liability of seller of used product, 53 ALR3d 337.

Liability of hospital or medical practitioner under doctrine of strict liability in tort, or breach of warranty, for harm caused by drug, medical instrument, or similar device used in treating patient, 54 ALR3d 258.

Products liability: product as unreasonably dangerous or unsafe under doctrine of strict liability in tort, 54 ALR3d 352.

Liability of water supplier for damages resulting from furnishing impure water, 54 ALR3d 936.

Products liability: proof, under strict tort liability doctrine, that defect was present when product left hands of defendant, 54 ALR3d 1079.

Premises liability insurance: coverage as extending to liability for injuries or damage caused by product sold or rented by the insured and occurring away from the insured premises, 62 ALR3d 889.

Liability of installer or maintenance company for injury caused by failure of automatic elevator to level at floor, 63 ALR3d 996.

Liability for injury caused by fall of person into shaft, or by abrupt drop, sudden movement, or stopping between floors, of automatic passenger elevator, 64 ALR3d 950.

Liability of installer or maintenance company for injury caused by door of automatic passenger elevator, 64 ALR3d 1005.

Tort liability of project architect for economic damages suffered by contractor, 65 ALR3d 249.

Promises or attempts by seller to repair goods as tolling statute of limitations for breach of warranty, 68 ALR3d 1277.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive, 70 ALR3d 315.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases, 74 ALR3d 1001; 38 ALR4th 583.

Statements on container that enclosed toy, game, sports equipment, or the like, is safe as affecting manufacturer's liability for injury caused by product sold, 74 ALR3d 1298.

Products liability: liability for injury or death allegedly caused by defective tire, 81 ALR3d 318.

Products liability: liability for injury or death allegedly caused by defect in snowmobile or other recreational-purpose vehicle, 81 ALR3d 394; 66 ALR4th 622.

Products liability: liability for injury or death allegedly caused by defect in mobile home or trailer, 81 ALR3d 421.

Liability of manufacturer, seller, or installer for personal injury caused by door glass, 84 ALR3d 877.

Products liability: admissibility, against manufacturer, of product recall letter, 84 ALR3d 1220.

Products liability: drain cleaners, 85 ALR3d 727.

Liability of manufacturer or seller for personal injury or property damage caused by television set, 89 ALR3d 210.

Products liability: what statute of limitations governs actions based on strict liability in tort, 91 ALR3d 455.

Products liability insurance coverage as extending only to product-caused injury to person or other property, as distinguished from mere product failure, 91 ALR3d 921.

Statute of limitations: running of statute of limitations on products liability claim against manufacturer as affected by plaintiff's lack of knowledge of defect allegedly causing personal injury or disease, 91 ALR3d 991.

Products liability: stoves, 93 ALR3d 99.

Prospective buyer's release of prospective seller from liability for injuries resulting from trial use or inspection of product for sale, 93 ALR3d 1296.

Liability of manufacturer or seller for injury or death allegedly caused by failure to warn regarding danger in use of vaccine or prescription drug, 94 ALR3d 748.

Promotional efforts directed toward prescribing physician as affecting prescription drug manufacturer's liability for product-caused injury, 94 ALR3d 1080.

Products liability: toys and games, 95 ALR3d 390.

Products liability: defective vehicular gasoline tanks, 96 ALR3d 265.

Products liability: forklift trucks, 95 ALR3d 541.

Products liability: duty of manufacturer to equip product with safety device to protect against patent or obvious danger, 95 ALR3d 1066.

Products liability: modern cases determining whether product is defectively designed, 96 ALR3d 22.

Products liability: defective vehicular gasoline tanks, 96 ALR3d 265.

Liability of packer, foodstore, or restaurant for causing trichinosis, 96 ALR3d 451.

Architect's liability for personal injury or death allegedly caused by improper or defective plans or design, 97 ALR3d 455.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment, 97 ALR3d 627.

Products liability: personal injury or death allegedly caused by defect in motorcycle or its parts, supplies, or equipment, 98 ALR3d 317.

Products liability: personal injury or death allegedly caused by defect in braking system in motor vehicle, 99 ALR3d 179.

Liability of telephone company for injury by noise or electric charge transmitted over line, 99 ALR3d 628.

When is person "engaged in the business" for purposes of doctrine of strict tort liability, 99 ALR3d 671.

Products liability: manufacturer's or seller's obligation to supply or recommend available safety accessories in connection with industrial machinery or equipment, 99 ALR3d 693.

Products liability: personal injury or death allegedly caused by defect in steering system in motor vehicle, 100 ALR3d 158.

Products liability: personal injury or death allegedly caused by defect in drive train system in motor vehicle, 100 ALR3d 471.

Products liability: personal injury or death allegedly caused by defect in suspension system in motor vehicle, 100 ALR3d 912.

Products liability: flammable clothing, 1 ALR4th 251.

Products liability: liability of manufacturer or seller for injury or death caused by defect in boat or its parts, supplies, or equipment, 1 ALR4th 411.

Products liability: defective heating equipment, 1 ALR4th 748.

Products liability in connection with prosthesis or other product designed to be surgically implanted in patient's body, 1 ALR4th 921.

Products liability: industrial accidents involving conveyor belts or systems, 2 ALR4th 262.

Products liability: diethylstibestrol (DES), 2 ALR4th 1091.

Liability of manufacturer or seller of snowthrower for injuries to user, 2 ALR4th 1284.

Products liability: defective vehicular windows, 3 ALR4th 489.

Products liability: farm machinery, 4 ALR4th 13.

Products liability: personal injury or death allegedly caused by defect in electrical system in motor vehicle, 5 ALR4th 662.

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Products liability: glue and other adhesive products, 7 ALR4th 155.

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Products liability: industrial presses, 8 ALR4th 70.

Applicability of comparative negligence doctrine to actions based on strict liability in tort, 9 ALR4th 633.

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Allowance of punitive damages in products liability case, 13 ALR4th 52.

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provisions governing sales (UCC sec. 2-725(1)), 20 ALR4th 915.

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Products liability: mechanical or chain saw or components thereof, 22 ALR4th 206.

Recovery, under strict liability in tort, for injury or damage caused by defects in building or land, 25 ALR4th 351.

Products liability: application of strict liability in tort doctrine to agency merely financing sale or lease-purchase of personal property, 28 ALR4th 326.

Products liability: animal feed or medicines, 29 ALR4th 1045.

Bystander recovery for emotional distress at witnessing another's injury under strict products liability or breach of warranty, 31 ALR4th 162.

Successor products liability: form of business organization of successor or predecessor as affecting successor liability, 32 ALR4th 196.

Validity and construction of "sistership" clause of products liability insurance policy excepting from coverage cost of product recall or withdrawal of product from market, 32 ALR4th 630.

Strict products liability: liability for failure to warn as dependent on defendant's knowledge of danger, 33 ALR4th 368.

Products liability: stud guns, staple guns, or parts thereof, 33 ALR4th 1189.

Products liability: household appliances relating to cleaning, washing, personal care, and water supply, quality and disposal, 34 ALR4th 95.

Products liability: household equipment relating to storage, preparation, cooking, and disposal of food, 35 ALR4th 663, superseding §§ 31, 37, 39 [b, g, i, m] of 80 ALR2d 598.

Products liability: modern status of rule that there is no liability for patent or obvious dangers, 35 ALR4th 861.

Products liability: equipment and devices directly relating to passengers' standing or seating safety in land carriers, 35 ALR4th 1050.

Products liability: home and office furnishings, 36 ALR4th 170.

Products liability: modern cases on explosion or breakage of beverage bottles, 36 ALR4th 419.

Products liability: Admissibility of evidence of postinjury warning measures undertaken by defendant, 38 ALR4th 583.

Products liability: duty of manufacturer or seller of component part incorporated in another product to warn of dangers, 39 ALR4th 6.

Products liability: inhalation of asbestos, 39 ALR4th 399.

Products liability: automobile manufacturer's liability for injuries caused by repairs made under manufacturer's warranty, 40 ALR4th 1218.

Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability, 41 ALR4th 9.

Validity and construction of products liability statute precluding or limiting recovery where product has been altered or modified after leaving hands of manufacturer or seller, 41 ALR4th 47.

Products liability: alcoholic beverages, 42 ALR4th 253.

Products liability: construction materials or insulation containing formaldehyde, 45 ALR4th 751.

Products liability: liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew, 45 ALR4th 777.

Products liability: perfumes, colognes, or deodorants, 46 ALR4th 1185.

Products liability: perfumes, colognes, or deodorants, 46 ALR4th 1197.

Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action, 47 ALR4th 621.

Future disease or condition, or anxiety relating thereto, as element of recovery, 50 ALR4th 13.

Negligence in preparing abstract of title as ground of liability to one other than person ordering abstract, 50 ALR4th 314.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning athletic, exercise, or recreational equipment, 50 ALR4th 1226.

Products liability: admissibility of evidence of absence of other accidents, 51 ALR4th 1186.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning wearing apparel, 52 ALR4th 276.

Attorneys' fees in products liability suits, 53 ALR4th 414.

Products liability: personal soap, 54 ALR4th 574.

Duty and liability of subcontractor to employee of another contractor using equipment or apparatus of former, 55 ALR4th 725.

Products liability: pertussis vaccine manufacturers, 57 ALR4th 911.

Commercial renter's negligence liability for customer's personal injuries, 57 ALR4th 1186.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning food, drugs, and other products intended for ingestion, 58 ALR4th 7.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning cosmetics and other personal care products, 58 ALR4th 40.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning paint, cleaners, or other chemicals, 58 ALR4th 76.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning gas and electric appliances, 58 ALR4th 131.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning bottles, cans, storage tanks, or other containers, 58 ALR4th 160.

Products liability: toxic shock syndrome, 59 ALR4th 50.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning ladders and scaffolds, 59 ALR4th 73.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning weapons and ammunition, 59 ALR4th 102.

Products liability: polyvinyl chloride, 59 ALR4th 129.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning agricultural implements and equipment, 60 ALR4th 678.

Products liability: electricity, 60 ALR4th 732.

Products liability: overhead garage doors and openers, 61 ALR4th 94.

Products liability: building and construction lumber, 61 ALR4th 121.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning building components and materials, 61 ALR4th 156.

Products liability: "fireman's rule" as defense, 62 ALR4th 727.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning automobiles, boats, aircraft, and other vehicles, 63 ALR4th 18.

Products liability: mascara and other eye cosmetics, 63 ALR4th 105.

Live animal as "product" for purposes of strict products liability, 63 ALR4th 127.

Products liability: product misuse defense, 65 ALR4th 263.

Strict products liability: product malfunction or occurrence of accident as evidence of defect, 65 ALR4th 346.

Products liability: sudden or unexpected acceleration of motor vehicle, 66 ALR4th 20.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from its administration, 66 ALR4th 83.

Liability for injury incurred in operation of power golf cart, 66 ALR4th 622.

Products liability: injury caused by product as a result of being tampered with, 67 ALR4th 964.

Products liability: personal jurisdiction over nonresident manufacturer of component incorporated in another product, 69 ALR4th 14.

Products liability: what is an "unavoidably unsafe" product, 70 ALR4th 16.

Strict products liability: recovery for damage to product alone, 72 ALR4th 12.

Products liability: motor vehicle exhaust systems, 72 ALR4th 62.

Products liability: industrial refrigeration equipment, 72 ALR4th 90.

Products liability: scaffolds and scaffolding equipment, 74 ALR4th 904.

Products liability: tractors, 75 ALR4th 312.

Products liability: contributory negligence or assumption of risk as defense in negligence action based on failure to provide safety device for product causing injury, 75 ALR4th 443.

Products liability: contributory negligence or assumption of risk as defense in action for strict liability or breach of warranty based on failure to provide safety device for product causing injury, 75 ALR4th 538.

Forum non conveniens in products liability cases, 76 ALR4th 22.

Products liability: bicycles and accessories, 76 ALR4th 117.

Products liability: exercise and related equipment, 76 ALR4th 145.

Products liability: trampolines and similar devices, 76 ALR4th 171.

Products liability: competitive sports equipment, 76 ALR4th 201.

Products liability: skiing equipment, 76 ALR4th 256.

Products liability: general recreational equipment, 77 ALR4th 1121.

Products liability: mechanical amusement rides and devices, 77 ALR4th 1152.

Burden of proving feasibility of alternative safe design in products liability action based on defective design, 78 ALR4th 154.

Products liability: lubricating products and systems, 80 ALR4th 972.

Products liability: all-terrain vehicles (ATV's), 83 ALR4th 70.

Liability of auctioneer under doctrine of strict products liability, 83 ALR4th 1188.

Products liability: hair straighteners and relaxants, 84 ALR4th 1090.

Products liability: cutting or heating torches, 84 ALR4th 1123.

Liability for injury or death allegedly caused by spoilage or contamination of beverage, 87 ALR4th 804.

Consequential loss of profits from injury to property as element of damages in products liability, 89 ALR4th 11.

Liability for injury or death allegedly caused by foreign substance in beverage, 90 ALR4th 12.

Liability for injury or death allegedly caused by foreign object in food or food product, 1 ALR5th 1.

Products liability of endorser, trade association, certifier, or similar party who expresses approval of product, 1 ALR5th 431.

Liability for injury or death allegedly caused by spoilage, contamination, or other deleterious condition of food or food product, 2 ALR5th 1.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product, 2 ALR5th 189.

Product liability: roofs and roofing materials, 3 ALR5th 851.

Product liability: prefabricated buildings, 4 ALR5th 667.

Products liability: application of strict liability doctrine to seller of used product, 9 ALR5th 1.

Breach of assumed duty to inspect property as ground for liability to third party, 13 ALR5th 289.

Products liability: failure to provide product warning or instruction in foreign language or to use universally accepted pictographs or symbols, 27 ALR5th 697.

Validity and construction of statute terminating right of action for product-caused injury at fixed period after manufacture, sale, or delivery of product, 30 ALR5th 1.

Products liability: cigarettes and other tobacco products, 36 ALR5th 541.

Presumption or inference, in products liability action based on failure to warn, that user of product would have heeded an adequate warning had one been given, 38 ALR5th 683.

Products liability: defective motor vehicle air bag systems, 39 ALR5th 267.

Liability under state law for injuries resulting from defective automobile seatbelt, shoulder harness, or restraint system, 48 ALR5th 1.

Causes of action governed by limitations period in UCC § 2-725, 49 ALR5th 1.

Products liability: recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect, 50 ALR5th 275.

Third-party beneficiaries of warranties under UCC § 2-318, 50 ALR5th 327.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive, 54 ALR5th 1.

Modern status of rules regarding tort liability of building or construction con-

tractor for injury or damage to third person occurring after completion and acceptance of work; "foreseeability" or "modern" rule, 75 ALR5th 413.

Products liability: ladders, 81 ALR5th 245.

Products liability: firearms, ammunition, and chemical weapons, 96 ALR5th 239.

Products liability: Household equipment relating to storage, preparation, cooking, and disposal of food, 122 ALR5th 515.

Federal pre-emption of state common-law products liability claims pertaining to motor vehicles, 97 ALR Fed. 853.

Federal pre-emption of state common-law products liability claims pertaining to tobacco products, 97 ALR Fed. 890.

Federal pre-emption of state common-law products liability claims pertaining to drugs, medical devices, and other health-related items, 98 ALR Fed. 124.

Federal pre-emption of state common-law products liability claims pertaining to pesticides, 101 ALR Fed. 887.

Products liability: personal injury or death allegedly caused by defect in motorcycle or its parts or equipment, 14 A.L.R.7th 7.

Products liability and negligence claims arising from use of stud guns, staple guns, nail guns, or parts thereof, 12 A.L.R.7th 5.

Products liability: clothes dryers, 1 A.L.R.7th 4.

Products liability: exercise, fitness, and related equipment, 76 A.L.R.6th 395.

Products liability: sudden or unexpected acceleration of motor vehicle, 76 A.L.R.6th 465.

51-1-11.1. Liability of product seller as a manufacturer.

(a) As used in this Code section, the term "product seller" means a person who, in the course of a business conducted for the purpose leases or sells and distributes; installs; prepares; blends; packages; labels; markets; or assembles pursuant to a manufacturer's plan, intention, design, specifications, or formulation; or repairs; maintains; or otherwise is involved in placing a product in the stream of commerce. This definition does not include a manufacturer which, because of certain activities, may additionally be included within all or a portion of the definition of a product seller.

(b) For purposes of a product liability action based in whole or in part on the doctrine of strict liability in tort, a product seller is not a manufacturer as provided in Code Section 51-1-11 and is not liable as such.

(c) Nothing contained in this Code section shall be construed to grant a cause of action in strict liability in tort or any other legal theory or to affect the right of any person to seek and obtain indemnity or contribution.

(d) This Code section shall apply to all causes of action accruing on or after July 1, 1987. (Code 1981, § 51-1-11.1, enacted by Ga. L. 1987, p. 1152, § 1.)

Law reviews. — For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For annual survey of product lia-

bility law, see 58 Mercer L. Rev. 313 (2006). For survey article on product liability law, see 60 Mercer L. Rev. 303 (2008).

JUDICIAL DECISIONS

Strict liability confined to actual manufacturers. — O.C.G.A. § 51-1-11.1 confines strict liability to actual manufacturers—those entities that have an active role in the production, design, or assembly of products and place the products in the stream of commerce, such that the category of "ostensible manufacturer" no longer exists in Georgia. Accordingly, a propane gas retailer and propane gas distributor were not manufacturers for purposes of O.C.G.A. § 51-1-11.1. Freeman v. United Cities Propane Gas of Ga., Inc., 807 F. Supp. 1533 (M.D. Ga. 1992).

Product "seller" rather than "manufacturer." — Cause of action for strict liability can be maintained only against the manufacturer of a product. A mere "product seller" is not a manufacturer, and is not liable as a manufacturer on grounds of strict liability. Ream Tool Co. v. Newton, 209 Ga. App. 226, 433 S.E.2d 67 (1993).

An entity which merely affixes its label to a product and sells it under its name is a product seller rather than a manufacturer under O.C.G.A. § 51-1-11.1 and is not liable in a product liability action based on the doctrine of strict liability in tort. Alltrade, Inc. v. McDonald, 213 Ga. App. 758, 445 S.E.2d 856 (1994); Buford v. Toys R' Us, Inc., 217 Ga. App. 565, 458 S.E.2d 373 (1995), overruled on other grounds, Wal-Mart Stores, Inc. v. Wheeler, 262 Ga. App. 607, 586 S.E.2d 83 (2003).

Company which imported and marketed pliers and ordered them by describing the tools it wanted to trading companies which secured them from foreign manufacturers was a product seller, not a manufacturer. Schneider v. Tri Star Int'l, Inc., 223 Ga. App. 85, 476 S.E.2d 846 (1996).

Restaurant selling coffee made in a coffee maker in accordance with the manufacturer's specifications was a "product seller" and could not be held liable to a plaintiff who sustained burns from spilled coffee. Barnett v. Leiserv, Inc., 968 F. Supp. 690 (N.D. Ga. 1997), aff'd, 137 F.3d 1356 (11th Cir. 1998).

Corporation which purchased the assets of a manufacturer and sold, but did not manufacture, a product of the design manufactured by its predecessor, was a "product seller" under O.C.G.A. § 51-1-11.1, not a "manufacturer" subject to strict liability under paragraph (b)(1) of O.C.G.A. § 51-1-11 for any defect in the product. Farmex Inc. v. Wainwright, 269 Ga. 548, 501 S.E.2d 802 (1998).

Distributor of bagels baked by another was not an ostensible manufacturer since there was no evidence that the recipe or formula for the bagels was based on the distributor's own specifications. Thomasson v. Rich Prods. Corp., 232 Ga. App. 424, 502 S.E.2d 289 (1998).

Pharmacist and pharmacy that package and label drugs manufactured by another are product sellers, not manufacturers, within the meaning of strict products liability. Robinson v. Williamson, 245 Ga. App. 17, 537 S.E.2d 159 (2000).

In a personal injury and products liability action when the seller of an engine had no active participation in the design of an alleged defective wood chipper, and the seller's only input into the design was limited to saying in essence that the particular engine would perform adequately in such a chipper, the trial court properly granted summary judgment to the seller since the seller did not qualify in any manner as a manufacturer of the alleged defective chipper. Davenport v. Cummins Alabama, Inc., 284 Ga. App. 666, 644 S.E.2d 503 (2007).

Bicycle helmet importer was not liable under a strict products liability theory because the importer was a product seller under O.C.G.A. § 51-1-11.1, rather than a manufacturer. The importer's actions in providing an instructional booklet and header card was akin to labelling the product; and shipping and distributing a product did not make the company a manufacturer. Williams v. Pac. Cycle, Inc., 661 Fed. Appx. 716 (11th Cir. 2016) (Unpublished).

Cited in Dean v. Toyota Indus. Equip. Mfg., Inc., 246 Ga. App. 255, 540 S.E.2d

233 (2000); Carolina Tobacco Co. v. Baker, 295 Ga. App. 115, 670 S.E.2d 811 (2008); Coosa Valley Tech. College v. West, 299 Ga. App. 171, 682 S.E.2d 187 (2009).

RESEARCH REFERENCES

ALR. — Products liability: seller's right to indemnity from manufacturer, 79 ALR4th 278.

Common-law strict liability in tort of prior landowner or lessee to subsequent owner for contamination of land with hazardous waste resulting from prior owner's or lessee's abnormally dangerous or ultrahazardous activity, 13 ALR5th 600.

Products liability: ladders, 81 ALR5th 245.

Products liability: personal injury or death allegedly caused by defect in motorcycle or its parts or equipment, 14 A.L.R.7th 7.

51-1-12. Liability for ratifying tort.

By ratification of a tort committed for his own benefit, the ratifier becomes as liable as if he had commanded that it be committed. A person ratifying a tort does not become liable, however, if the act was done for the benefit of a third person. (Orig. Code 1863, § 2906; Code 1868, § 2912; Code 1873, § 2963; Code 1882, § 2963; Civil Code 1895, § 3820; Civil Code 1910, § 4416; Code 1933, § 105-109.)

Law reviews. — For annual survey of labor and employment law, see 58 Mercer L. Rev. 211 (2006).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases

General Consideration

There can be no ratification unless the act was done for the master, or at least, purported to be done for the master. Reddy-Waldhauer-Maffett Co. v. Spivey, 53 Ga. App. 117, 185 S.E. 147 (1936); Parry v. Davison-Paxon Co., 87 Ga. App. 51, 73 S.E.2d 59 (1952).

There is no such thing as a master assuming, by ratification, liability for an act of another in which the master had no part. Reddy-Waldhauer-Maffett Co. v. Spivey, 53 Ga. App. 117, 185 S.E. 147 (1936); Parry v. Davison-Paxon Co., 87 Ga. App. 51, 73 S.E.2d 59 (1952).

Ratification requires full knowledge of material facts. — As a general rule, in order that a ratification of an unauthorized act or transaction may be valid and binding, it is essential that the principal have full knowledge, at the time of the ratification, of all material facts and circumstances relative to the unauthorized act or transaction, or that some one authorized to represent the principal, except the agent, have such knowledge, unless the principal is willfully ignorant or purposely refrains from seeking information. Liberty Mut. Ins. Co. v. Lipscomb, 56 Ga. App. 15, 192 S.E. 56 (1937).

Ratification of tort is question of intention, which should be referred to a jury when there is in the petition a clear allegation of facts tending to support that allegation. Estridge v. Hanna, 55 Ga. App. 159, 189 S.E. 364 (1936).

Intention to ratify may often be

General Consideration (Cont'd)

presumed by the law from the conduct of the principal, and that presumption may be conclusive, even against the actual intention of the principal, when the principal's conduct has been such that it would be inequitable to others to permit the principal to assert that the principal has not ratified the unauthorized act of the principal's agent. Liberty Mut. Ins. Co. v. Lipscomb, 56 Ga. App. 15, 192 S.E. 56 (1937).

Retention of servant after commission of tort may be implied ratification. Gasway v. Atlanta & W.P.R.R., 58 Ga. 216 (1877).

Retention if servant acted exclusively for themselves. — Since the employee was acting exclusively for the employee and was not acting at all for the master, and did not profess to be acting for the employer, the mere retaining of the servant after knowledge of the servant's tort would not constitute ratification binding the master. Reddy-Waldhauer-Maffett Co. v. Spivey, 53 Ga. App. 117, 185 S.E. 147 (1936); Parry v. Davison-Paxon Co., 87 Ga. App. 51, 73 S.E.2d 59 (1952).

Cited in Harrison v. Kiser, 79 Ga. 588, 4 S.E. 320 (1887); Crockett Bros. v. Sibley, 3 Ga. App. 554, 60 S.E. 326 (1908); Smith v. Colonial Stores, Inc., 72 Ga. App. 186, 33 S.E.2d 360 (1945); Wren Mobile Homes, Inc. v. Midland-Guardian Co., 117 Ga. App. 22, 159 S.E.2d 734 (1967).

Applicability to Specific Cases

Conduct beyond scope of employment. — When the conduct of the chauffeur took the chauffeur outside the scope of the chauffeur's employment and when the chauffeur's conduct was a complete departure, instead of a deviation or detour incidental to the chauffeur's employment, the mere retention of the employee, after knowledge of all the facts, would not constitute ratification on the part of the employer. Reddy-Waldhauer-Maffett Co. v. Spivey, 53 Ga. App. 117, 185 S.E. 147 (1936).

Because a co-employee who sexually harassed an employee was acting exclusively for self interest and was not acting at all for the employer, although the actions occurred in the course of the employment, the actions did not arise out of the employment, and the employer could not be held liable under a vicarious liability theory of either respondeat superior or ratification for the co-employee's actions pursuant to common law and O.C.G.A. § 51-1-12; accordingly, the employer should have been granted summary judgment on the employee's claim to that effect. Travis Pruitt & Assocs., P.C. v. Hooper, 277 Ga. App. 1, 625 S.E.2d 445 (2005).

Payment for services rendered. — When the doctor to whom a heart was taken for the purpose of dissection was either specially or generally employed by the defendant insurance company to dissect the heart of the deceased spouse of the plaintiff, and that the doctor did dissect and mutilate the heart, all without the knowledge or consent of the plaintiff, and thereafter reported to the insurance company that the doctor had done so, and the insurance company paid the doctor for the doctor's services in the matter, a cause of action against the defendant insurance company existed. Liberty Mut. Ins. Co. v. Lipscomb, 56 Ga. App. 15, 192 S.E. 56 (1937).

Payment alone insufficient if made without knowledge of acts. — When the designated examiner of the defendant insurance company directed defendant A to employ defendant B, a doctor, to remove the heart of the deceased spouse of the plaintiff and deliver the heart to another doctor for the purpose of dissection, without the knowledge or consent of the plaintiff, and that the second doctor did dissect the said heart, and that the insurance company ratified the acts of A and B by paying the two doctors for their services, but the insurance company did not have any knowledge of the act of A or B, or received or retained any benefit therefrom, and when defendant A is joined with defendant B and the insurance company as joint tort-feasors in an action for damages on account of the alleged unauthorized removal, and mutilation of the heart, a cause of action as to the acts of A and B, against the defendant insurance company under any theory of agency or of ratification of an unauthorized act did not exist. Liberty Mut. Ins. Co. v. Lipscomb, 56 Ga.

App. 15, 192 S.E. 56 (1937).

Separate business scheme by servants. — Petition set forth no cause of action against the defendant employer on the grounds of condonation and ratification of the acts of its employees, since the two employees had departed from the prosecution of the master's business and begun a separate scheme of their own, from which no benefit could possibly inure to the master. Parry v. Davison-Paxon Co., 87 Ga. App. 51, 73 S.E.2d 59 (1952).

Statement that insurer would pay. — Mere statement of the defendant that the defendant's insurance company would pay for the damages to the automobile would not in itself authorize a finding that the defendant ratified the acts of the nephew of the cropper who worked the defendant's farm and would not in itself authorize a finding that the defendant had admitted liability. Cox v. Estes, 96 Ga. App. 649, 101 S.E.2d 107 (1957).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 64 et seq.

C.J.S. — 86 C.J.S., Torts, § 33.

ALR. — Liability of wife for husband's torts, 12 ALR 1459.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 ALR 1066.

Liability of hospital or sanitarium for negligence of physician or surgeon, 69 ALR2d 305.

Parents' liability for injury or damage intentionally inflicted by minor child, 54 ALR3d 974.

Liability of estate for tort of executor, administrator, or trustee, 82 ALR3d 892.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Liability of hospital or sanitarium for negligence of physician or surgeon, 51 ALR4th 235.

51-1-13. Cause of action for physical injury; intention considered in assessing damages.

A physical injury done to another shall give a right of action to the injured party, whatever may be the intention of the person causing the injury, unless he is justified under some rule of law. However, intention shall be considered in the assessment of damages. (Orig. Code 1863, § 2910; Code 1868, § 2917; Code 1873, § 2968; Code 1882, § 2968; Civil Code 1895, § 3826; Civil Code 1910, § 4422; Code 1933, § 105-601.)

Cross references. — Settlement offers and agreement for personal injury, bodily injury, and death from motor vehicle, § 9-11-67.1.

Law reviews. — For comment on Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S.E.2d 909 (1951), holding child may maintain action for prenatal injury caused by negligence of another, see 14 Ga. B. J. 249 (1951). For comment on Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952), see 15 Ga. B. J. 83 (1952). For comment on Plantation Pipe Line Co. v. Hornbuckle, 212 Ga. 504, 93 S.E.2d 727 (1956), holding that if a child born after an injury occurring at any period in its prenatal life can prove a tortious effect it will be allowed the right to recover, see 19 Ga. B. J. 87 (1956). For comment on Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956), recognizing child's right of action for prenatal injuries suffered prior to viability, see 8 Mercer L. Rev. 377 (1957). For comment on Mims v. Boland, 110 Ga. App. 477, 138 S.E.2d 902 (1964), see 2 Ga. St. B. J. 133 (1965). For comment, "'Am I My Brother's Keeper?': Reforming Criminal

Hazing Laws Based on Assumption of Care," see 63 Emory L.J. 925 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration
Jury Instructions

General Consideration

Cause of action for personal injury. — Actions ex delicto both by the common law and the law of Georgia unquestionably include actions for injuries to the person. Goebel v. Hodges, 83 Ga. App. 574, 64 S.E.2d 207 (1951).

Cause of action for prenatal injury. — If a child born after an injury sustained at any period of the child's prenatal life can prove the effect on the child of a tort, the child has a right to recover. Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956).

Lack of consent for medical treatment. — Cause of action for battery exists when objected-to treatment is performed without the consent of, or after withdrawal of consent by, the patient; there is no authority for holding that a medical consent form signed for one operation or treatment is valid for another operation later and elsewhere. Joiner v. Lee, 197 Ga. App. 754, 399 S.E.2d 516 (1990).

Cause not barred merely because arising only due to special condition of plaintiff. — When a married woman in a state of pregnancy suffers physical injuries which are caused by another's negligence, but which may not have resulted except for her delicate condition, she is not to be debarred from recovering damages from the person guilty of the negligence for the injuries which are the legal and natural result of the act done. Saul Klenberg Co. v. Mrozinski, 78 Ga. App. 59, 50 S.E.2d 247 (1948).

Trespasser's action for injury good only if harm maliciously inflicted. — When a plaintiff seeks to hold the wife liable in damages for a wrong inflicted by the husband, and alleges no more to establish his legal status at the time of the alleged injury than inferences that he was a trespasser upon lands of the defendants, the plaintiff must clearly show that the alleged injuries were maliciously inflicted at the command or counsel of the wife or that she aided and abetted in the injuries received, in order to state a cause of action against her. Brigman v. Brenner, 206 Ga. 222, 56 S.E.2d 471 (1949).

Filing of suit for personal injury gives defendant right to reasonably investigate claim. — When one elects to sue another for injuries one receives, it has been recognized for a limited purpose that the plaintiff may waive the plaintiff's right to privacy and the defendant has the right to conduct a reasonable investigation of the plaintiff in order to ascertain the validity of the plaintiff's claim. Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), later appeal, 130 Ga. App. 254, 202 S.E.2d 701 (1973).

Plaintiff impliedly waives right of privacy against such investigation. — Right of privacy may be implicitly waived and the right is waived by one who files an action for damages resulting from a tort to the extent of the defendant's intervening right to investigate and ascertain for oneself the true state of injury. The reasonableness of the investigation under the circumstances is a question for the jury. Ellenberg v. Pinkerton's Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), later appeal, 130 Ga. App. 254, 202 S.E.2d 701 (1973).

Use of opprobrious words as justification. — Opprobrious words or abusive language are to be left to the jury, in an action for assault and battery, to determine whether the battery was justifiable. Thompson v. Shelverton, 131 Ga. 714, 63 S.E. 220 (1908).

Injury caused by mental patient. — When the course of treatment of a mental patient involves an exercise of control by a physician who knows or should know that the patient is likely to cause bodily harm

to others, an independent duty arises from that relationship and falls upon the physician to exercise that control with such reasonable care as to prevent harm to others at the hands of the patient. Bradley Center, Inc. v. Wessner, 161 Ga. App. 576, 287 S.E.2d 716, aff'd, 250 Ga. 199, 296 S.E.2d 693 (1982).

Intent of agressor not a factor. — Four refugees showed that the former Bosnian-Serb soldier committed extensive physical injuries against all of them, without their consent, and in a harmful and offensive manner. Therefore, the soldier was liable to the refugees under Georgia law for assault and battery, regardless of the soldier's intent. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

Remedies for Fourth Amendment violation by police officers. — See Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984), aff'd in part and rev'd and vacated in part en banc, 774 F.2d 1495 (11th Cir. 1985), cert. denied, 476 U.S. 1115, 106 S. Ct. 1970, 90 L. Ed. 2d 654 (1986).

Injury caused by a federal officer. — Inmate's battery claim against the United States, which was based on injuries the inmate sustained when a federal agent, who was attempting to arrest the inmate pursuant to a warrant, moved the agent's vehicle to block the inmate's escape, failed under the federal Tort Claims Act, 28 U.S.C. § 2680(h), because under applicable state law regarding a battery claim, O.C.G.A. § 51-1-13, the agent was justified in using force reasonably necessary to effectuate the arrest, and under the totality of the circumstances, the agent did not use more force than was reasonably necessary. Williams v. United States, 314 Fed. Appx. 253 (11th Cir. 2009) (Unpublished).

Summary judgment inappropriate. — When a merchant's employee detained three suspected shoplifters, and the detainees brought claims of assault and battery, summary judgment in favor of the merchant was inappropriate after the plaintiffs testified that the employee detained the plaintiffs an unreasonable amount of time and was physically and verbally abusive. Brown v. Super Disc. Mkts., Inc., 223 Ga. App. 174, 477 S.E.2d 839 (1996).

Grant of summary judgment in favor of the employee on the employee's claim of battery was reversed since there were factual issues regarding whether the co-worker's conduct constituted an offensive touching and whether it was intentional. Vasquez v. Smith, 259 Ga. App. 79, 576 S.E.2d 59 (2003).

Trial court properly denied summary judgment to a former supervisor in a former employee's action arising from an improper touching that the supervisor allegedly committed to the employee while pretending to reach out to shake the employee's hand, as there was a relatively low threshold required to prove the claimed battery, and the court was required to view all evidence in the light most favorable to the employee as the non-movant. MARTA v. Mosley, 280 Ga. App. 486, 634 S.E.2d 466 (2006).

Viewing the evidence in the light most favorable to an arrestee who was shot in the face by an officer during a traffic stop, the officer's use of force was not justified because the arrestee's car was stopped and not moving at the time the officer shot the arrestee. Therefore, the officer was not entitled to qualified immunity and summary judgment on the arrestee's claims. Porter v. Massarelli, 303 Ga. App. 91, 692 S.E.2d 722 (2010).

Cited in Western & A.R.R. v. Sawtell, 65 Ga. 235 (1880); Berkner v. Dannenberg, 116 Ga. 954, 43 S.E. 463, 60 L.R.A. 559 (1903); Dodd v. Slater, 101 Ga. App. 362, 114 S.E.2d 170 (1960); Bowling v. Janmar, Inc., 142 Ga. App. 53, 234 S.E.2d 849 (1977); Bendiburg v. Dempsey, 707 F. Supp. 1318 (N.D. Ga. 1989); Telfair v. Gilberg, 868 F. Supp. 1396 (S.D. Ga. 1994); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006).

Jury Instructions

Jury instruction on mitigating circumstances as possible justification appropriate. — Court erred in failing to charge the jury upon written request, in an action for damages on account of an assault and battery, that the defendant could give in evidence any opprobrious words or abusive language used by the plaintiff to the plaintiff's servant or agent, in order to justify the servant or agent's

Jury Instructions (Cont'd)

conduct or mitigate the damages, and it was for the jury to determine whether such language amounted to a justification or only to a mitigation of damages recoverable. Exposition Cotton Mills v. Crawford, 67 Ga. App. 135, 19 S.E.2d 835 (1942).

Jury instruction on relative strength of parties appropriate. — In an action for damages for assault and battery the court erred in failing to charge the jury, upon written request, that, in considering the question as to whether or not the battery was proportioned to the provocation, it could take into consideration the relative strength of the plaintiff and defendant's employee, where the plaintiff was an able-bodied man of 34 years, while the employee was 69 years old, and afflicted at the time with cancer. Exposition Cotton Mills v. Crawford, 67 Ga. App. 135, 19 S.E.2d 835 (1942).

Jury instruction based on this section erroneous in simple negligence case. — In a suit for personal injuries based on simple negligence in which compensatory damages only were sued for, it was error for the court to give in charge to the jury the provisions of this section. Georgia Ry. & Power Co. v. Bryans, 35 Ga. App. 713, 134 S.E. 787 (1926); Hirsch v. Plowden, 35 Ga. App. 763, 134 S.E. 833 (1926); Rozier v. Folsom, 53 Ga. App. 53, 185 S.E. 140 (1936); Collins v. Porterfield, 102 Ga. App. 294, 116 S.E.2d 105 (1960).

Vice of charging this section in a negligence case lies in the fact that it allows the jury to consider the defendant's intentions in the assessment of damages, when no damages based on willfulness or malice are sought. Collins v. Porterfield, 102 Ga. App. 294, 116 S.E.2d 105 (1960).

Jury instruction based on this section erroneous without intent. — Charge based upon this section should not have been given when there was no allegation and no evidence that the injury was intentional. Rozier v. Folsom, 53 Ga. App. 53, 185 S.E. 140 (1936).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, §§ 2, 6, 8.

C.J.S. — 86 C.J.S., Torts, §§ 23, 90.

ALR. — Liability for property lost or stolen at the time of a personal injury, 1 ALR 737.

Liability of electric light or power company for injuries to employee of patron, 9 ALR 174.

Liability of master for injury inflicted by servant with firearms, 10 ALR 1087; 75 ALR 1176.

Liability of one maintaining electric wire over or near highway for injury due to breaking of wire by fall of tree or limb, 19 ALR 801.

Liability for injury due to condition of trees in or overhanging highway, 19 ALR 1021; 49 ALR 840.

Injury to one while coasting in the street, 20 ALR 1433; 109 ALR 941.

Competency of hospital physician or attendant to testify as to condition of patient, 22 ALR 1217.

Liability for injury to window washer, 28 ALR 622.

Liability for injury to one in street by object falling from window, 29 ALR 77; 53 ALR 462.

Liability of one starting bonfire for burning of child, 36 ALR 297.

Constitutionality of statute or ordinance denying remedy for personal injury as a result of simple negligence, 36 ALR 1400.

Liability of one whose acts cause collection of, or disorder in, crowd for injuries incident thereto, 38 ALR 1531.

Release by, or judgment in favor of, person injured as barring action for his death, 39 ALR 579.

Recovery for physical consequences of fright resulting in a physical injury, 40 ALR 983; 76 ALR 681; 98 ALR 402.

Measure of damages in action for personal injuries commenced by the deceased in his lifetime and revived by his personal representative, 42 ALR 187.

Liability of carrier for injury to passenger due to construction of floor of car or vessel on different levels, 48 ALR 1424.

Liability for unintentionally shooting person while hunting, 53 ALR 1205.

Civil liability for death or injury in prize fights, 71 ALR 189.

Liability for damage to person or property by fall of tree, 72 ALR 615.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal-injury or death action carries liability insurance, 74 ALR 849.

Recovery for physical consequences of fright resulting in physical injury, 76 ALR 681; 98 ALR 402.

Liability for injury to one riding on running board of automobile or other place outside body of car, 80 ALR 553; 104 ALR 312; 44 ALR2d 238.

Reliance on particular kind of treatment in case of injury as affecting amount of recovery against one causing injury, 82 ALR 491.

Gas company's liability for injury or damage by escaping gas, 90 ALR 1082; 138 ALR 870.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal-injury or death action carries liability insurance, 95 ALR 388; 105 ALR 1319; 4 ALR 2d 761.

What amounts to claim for personal injury within statute or ordinance requiring notice as condition of municipal liability, 97 ALR 118.

Liability of county for torts in connection with activities which pertain, or are claimed to pertain, to private or proprietary functions, 101 ALR 1166; 16 ALR2d 1079.

Release or compromise by parent of cause of action for injuries to child as affecting right of child, 103 ALR 500.

Judgment in action for personal injuries to or death of one person as res judicata or conclusive of matters there litigated subsequent action for personal injury to or death of another person in the same accident, 104 ALR 1476.

Sufficiency of complaint in action against railroad for killing or injuring person or livestock as regards time, and direction and identification of train, 115 ALR 1074.

Liability of owner or operator of public gasoline filling station for injury to person or damage to property, 116 ALR 1205.

Liability of churches or other religious societies for torts causing personal injury or death, 124 ALR 814.

What amounts to a personal injury within venue statute, 134 ALR 751.

Liability for injury to person or damage to property as result of "blackout,", 136 ALR 1327; 147 ALR 1442; 148 ALR 1401; 150 ALR 1448; 153 ALR 1433; 154 ALR 1459; 155 ALR 1458; 158 ALR 1463.

Liability for death or injury on or near golf course, 138 ALR 541; 82 ALR2d 1183.

Damages on account of loss of earnings or impairment of earning capacity due to wife's personal injury as recoverable by her or by her husband, 151 ALR 479.

Liability for death of, or injury to, one seeking to rescue another, 158 ALR 189.

Liability of adjoining property owner for injury to one deviating from highway or frequented path, 159 ALR 136.

Right of one to recover from personal injury to himself and for death of another killed in the same accident as giving rise a single cause of action or to separate causes of action, 161 ALR 208.

Breach of lessor's agreement to repair as ground of liability for personal injury to tenant or one in privity with latter, 163 ALR 300; 78 ALR2d 1238.

Liability for injury to or death of participant in game or contest, 7 ALR2d 704.

Liability of manufacturer or wholesaler for injury caused by third person's use of explosives or other dangerous article sold to retailer in violation of law, 11 ALR2d 1028.

Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death, 15 ALR2d 418.

Liability for injury resulting from swinging door, 16 ALR2d 1161.

Liability of owner or operator of park or other premises on which baseball or other game is played, for injuries by ball to person on nearby street, sidewalk, or premises, 16 ALR2d 1458.

Liability of municipality for injury or damage from explosion or burning of substance stored by third person under municipal permit, 17 ALR2d 683.

Recovery by tenant of damages for physical injury or mental anguish occasioned by wrongful eviction, 17 ALR2d 936.

Liability of one servicing, repairing, or adjusting an oil-burning furnace or other oil-burning heating appliance, for personal injury, death, or property damage, 18 ALR2d 1326.

Liability of seller of firearm, explosive, or highly inflammable substance to child, 20 ALR2d 119; 75 ALR3d 825; 95 ALR3d 390; 4 ALR4th 331.

Danger of apparent danger of great bodily harm or death as condition of self-defense in civil action for assault and battery, personal injury, or death, 25 ALR2d 1215.

Liability of landowner for injury to or death of child caused by cave-in or landslide, 28 ALR2d 195.

Liability of landowner for injury to or death of child resulting from piled or stacked lumber or other building materials, 28 ALR2d 218.

Liability for injury or damage growing out of pulling out of parked motor vehicle, 29 ALR2d 107.

Violation of zoning ordinance or regulation as affecting or creating liability for injuries or death, 31 ALR2d 1469.

Liability for injury to hand in vehicle door, 34 ALR2d 1172.

Shipper's liability to consignee or his employee injured while unloading car because of improper loading, 35 ALR2d 609.

Joinder of cause of action for pain and suffering of decedent with cause of action for wrongful death, 35 ALR2d 1377.

Municipal liability for injuries from snow and ice on sidewalk, 39 ALR2d 782.

Liability for injury or death of adult from electric wires passing through or near trees, 40 ALR2d 1299.

Liability of one negligently causing fire for personal injuries sustained in attempt to control fire or to save life or property, 42 ALR2d 494.

Liability for injury to or death of child from burns caused by hot ashes, cinders, or other hot waste material, 42 ALR2d 930.

Liability of motor carrier for injury to passenger's hand in vehicle door, 42 ALR2d 1190.

Overcrowding motor vehicle or riding in unusual position thereon as affecting liability for injury or damage, 44 ALR2d 238.

Liability of landowner for injury or death of adult falling down unhoused well, cistern, mine shaft, or the like, 46 ALR2d 1069.

Liability of carrier to passenger injured by hurling of object through window by a third person, 46 ALR2d 1098.

Res ipsa loquitur doctrine with respect to firearms accident, 46 ALR2d 1216.

Right of defendant in action for personal injury, property damage, or death, to bring in new parties as cross defendants to his counterclaim or the like, 46 ALR2d 1253.

Liability for injury or damage resulting from fire started by use of blowtorch, 49 ALR2d 368.

Liability for injury or death from electrification of guy wire, 55 ALR2d 129.

Liability for injury or death from collision with guy wire, 55 ALR2d 178.

Liability for injury or damage from stone or other object on surface of highway thrown by passing vehicle, 56 ALR2d 1392.

Prejudicial effect of admission, in personal injury action, of evidence as to financial or domestic circumstances of plaintiff, 59 ALR2d 371.

Liability of air carrier to passenger injured while boarding or alighting, 61 ALR2d 1113.

Liability for injuries received in fishing accidents resulting from use of tackle, 61 ALR2d 1262.

Liability of liquor furnisher under civil damage or dramshop act for injury or death of intoxicated person from wrongful act of a third person, 65 ALR2d 923.

Liability for personal injury to one colliding with or falling over scale or other machine dispensing merchandise or services on public sidewalk, 65 ALR2d 965.

Liability for accident from "jackknifing" of trailers or the like, 68 ALR2d 353.

Liability of electric power company for injury or death resulting from contact of crane, derrick, or other movable machine with electric line, 69 ALR2d 93.

Liability of owner or occupant of premises for injury or death resulting from contact of crane, derrick, or other movable machine with electric line, 69 ALR2d 160; 14 ALR4th 913.

Hospital's liability for injury to patient from heat lamp or pad or hot-water bottle, 72 ALR2d 408.

Liability of one repairing, installing, or servicing gas-burning appliance, for personal injury, death, or property damage, 72 ALR2d 865.

Liability of operators or sponsors of soapbox derby for personal injury, 72 ALR2d 1137.

Liability for injury or damage from taxiing aircraft, 74 ALR2d 654.

Municipal liability for injury or death from collision with rope or clothesline across sidewalk or street, 75 ALR2d 565.

Liability for injury to one on or near merry-go-round, 75 ALR2d 792.

Air carrier's liability for injury to passenger from changes in air pressure, 75 ALR2d 848.

Liability for personal injury or death based on overloading aircraft, 75 ALR2d 868.

Liability of taxicab carrier to passenger injured while boarding vehicle, 75 ALR2d 988.

Liability for injury to one servicing airplane, 76 ALR2d 1070.

Shipowner's liability to longshoreman for injuries due to aspects of unseaworthiness brought about by acts of stevedore company or latter's servants, 77 ALR2d 829.

Participation in gambling activities as bar to action for personal injury or death, 77 ALR2d 961.

Liability for injury or damage caused by negligent operation of crane, derrick, or the like, 81 ALR2d 473.

Liability for injury or damage caused by operation of power machine in snow removal, 81 ALR2d 519.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in an action for personal injury or death, 81 ALR2d 733.

Liability for injury to person in street by glass falling from window, door, or wall, 81 ALR2d 897.

Liability for injury or damages resulting from operation of vehicle in funeral procession or in procession which is claimed to have such legal status, 85 ALR2d 692.

Liability of owner of horse to person injured or killed when kicked, bitten, knocked down, and the like, 85 ALR2d 1161.

Custom as to loading, unloading, or stowage of cargo as standard of care in action for personal injury or death of seaman or longshoreman, 85 ALR2d 1196.

Liability for injury or death of child in refrigerator, 86 ALR2d 709.

Liability for injury or damage caused by bees, 86 ALR2d 791.

Liability of consignee for personal injury or death of one other than his employee in connection with carrier unloading operations, 86 ALR2d 1399.

Liability of pedestrian to another pedestrian injured as result of collision between them on sidewalk, 88 ALR2d 1143.

Liability of doctor or dentist using force to restrain or discipline patient, 89 ALR2d 983.

Liability for injury from defective condition or improper operation of lift bridge or drawbridge, 90 ALR2d 105.

Shipowner's liability for injury caused to seaman or longshoreman by cargo or its stowage, 90 ALR2d 710.

Liability of operator of skiing, tobogganing, or bobsledding facilities for injury to patron or participant, 94 ALR2d 1431; 95 ALR3d 203.

Products liability: toys and games, 95 ALR3d 390.

Liability of gas company for personal injury or property damage caused by gas escaping from mains in street, 96 ALR2d 1007; 34 ALR5th 1.

Civil liability of one causing personal injury for consequences of negligence, mistake, or lack of skill of physician or surgeon, 100 ALR2d 808.

Liability for injury to or death of passenger in connection with a fire drill or abandonment-of-ship drill aboard a vessel, 8 ALR3d 650.

Validity, enforceability, and effect of provision in seamen's employment contract stipulating the maximum recovery for scheduled personal injuries, 9 ALR3d 417.

Master's liability to agricultural worker injured other than by farm machinery, 9 ALR3d 1061.

Liability for injury to or death of umpire, referee, or judge of game or contest, 10 ALR3d 446.

Propriety and prejudicial effect of reference by plaintiff's counsel, in jury trial of personal injuries or death action, to

amount of damages claimed or expected by his client, 14 ALR3d 541.

Water distributor's liability for injuries due to condition of service lines, meters, and the like, which serve individual consumer, 20 ALR3d 1363.

Liability under Jones Act or seaworthiness doctrine for injuries caused by assault, 22 ALR3d 624.

Skier's liability for injuries to or death of another person, 24 ALR3d 1447.

Contributory negligence or assumption of risk of one injured by firearm or air gun discharged by another, 25 ALR3d 518.

Liability of owner or operator of power lawnmower for injuries resulting to third person from its operation, 25 ALR3d 1314.

Spouse's or parent's right to recover punitive damages in connection with recovery of damages for medical expenses or loss of services or consortium arising from personal injury to other spouse or to child, 25 ALR3d 1416.

Hunter's civil liability for unintentionally shooting another person, 26 ALR3d 561.

Municipal liability for personal injury or death under mob violence or antilynching statutes, 26 ALR3d 1142.

Liability for injury or damage caused by rocket testing or firing, 29 ALR3d 556.

Liability, because of improper loading, of railroad consignee or his employee injured while unloading car, 29 ALR3d 1039.

Railroad's liability for injury to or death of child on moving train other than as paying or proper passenger, 35 ALR3d 9.

Liability in connection with fire or explosion of explosives while being stored or transported, 35 ALR3d 1177.

Tort liability of public schools and institutions of higher learning for accidents occurring during use of premises and equipment for other than school purposes, 37 ALR3d 712.

Tort liability of public schools and institutions of higher learning for injuries due to condition of grounds, walks, and play grounds, 37 ALR3d 738.

Liability for injury caused by spraying or dusting of crops, 37 ALR3d 833.

Liability of landlord for injury or death occasioned by swimming pool maintained for tenants, 39 ALR3d 824.

Liability for injury to guest in airplane, 40 ALR3d 1117.

Liability for prenatal injuries, 40 ALR3d 1222.

Anti-hitchhiking laws: Their construction and effect in action for injury to hitchhiker, 46 ALR3d 964.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises, 48 ALR3d 1027.

Liability for injury or death of pallbearer, 48 ALR3d 1280.

Liability of hospital for injury caused through assault by a patient, 48 ALR3d 1288.

Liability for injury or death in shooting contest or target practice, 49 ALR3d 762.

Master and servant: employer's liability for injury caused by food or drink purchased by employee in plant facilities, 50 ALR3d 505.

Liability of owner or operator of store or similar place of business for injury to child climbing or playing on furniture, fixtures, displays, or the like, 50 ALR3d 1227.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 ALR3d 669.

Liability for injuries or death resulting from physical therapy, 53 ALR3d 1250.

Absolute liability for blasting operations as extending to injury or damage not directly caused by debris or concussion from explosion, 56 ALR3d 1017.

Liability of installer or maintenance company for injury caused by failure of automatic elevator to level at floor, 63 ALR3d 996.

Liability for injury caused by fall of person into shaft, or by abrupt drop, sudden movement, or stopping between floors, of automatic passenger elevator, 64 ALR3d 950.

Liability of installer or maintenance company for injury caused by door of automatic passenger elevator, 64 ALR3d 1005.

Liability of owner or operator for injury caused by failure of automatic elevator to level at floor, 64 ALR3d 1020.

Liability for injury or death of minor or other incompetent inflicted upon himself by gun made available by defendant, 75 ALR3d 825.

Liability of one causing physical inju-

ries as a result of which injured party attempts or commits suicide, 77 ALR3d 311.

Civil liability of prison or jail authorities for self-inflicted injury or death of prisoner, 79 ALR3d 1210.

Liability of power company for injury or death resulting from contact of radio or television antenna with electrical line, 82 ALR3d 113.

Peace officer's civil liability for death or personal injuries caused by intentional force in arresting misdemeanant, 83 ALR3d 238.

Liability of swimming facility operator for injury or death allegedly resulting from condition of deck, bathhouse, or other area in vicinity of water, 86 ALR3d 388.

Liability of swimming facility operator for injury to or death of swimmer allegedly resulting from hazardous condition in water, 86 ALR3d 1021.

Liability of youth camp, its agents or employees, or of scouting leader or organization, for injury to child participant in program, 88 ALR3d 1236.

Liability of one negligently causing fire for injuries sustained by person other than firefighter in attempt to control fire or to save life or property, 91 ALR3d 1202.

Liability for injuries in connection with revolving door on nonresidential premises, 93 ALR3d 132.

Liability of owner or operator of boat livery for injury to patron, 94 ALR3d 876.

Liability of private owner or occupant of land abutting highway for injuries or damages resulting from tree or limb falling onto highway, 94 ALR3d 1160.

Liability for injury or death form ski lift, ski tow, or similar device, 95 ALR3d 203.

Liability for civilian skydiver's or parachutist's injury or death, 95 ALR3d 1280.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from ice or snow on surface of highway or street, 97 ALR3d 11.

Architect's liability for personal injury or death allegedly caused by improper or defective plans or design, 97 ALR3d 455.

Liability of taxicab carrier to passenger injured while alighting from taxi, 98 ALR3d 822.

Liability of persons furnishing intoxicating liquor for injury to or death of consumer, outside coverage of civil damage acts, 98 ALR3d 1230.

Liability of telephone company for injury by noise or electric charge transmitted over line, 99 ALR3d 628.

Liability of governmental unit or private owner or occupant of land abutting highway for injuries or damage sustained when motorist strikes tree or stump on abutting land, 100 ALR3d 510.

When statute of limitations begins to run as to cause of action for development of latent industrial or occupational disease, 1 ALR4th 117.

Liability for injury on, or in connection with, escalator, 1 ALR4th 144.

Motor carrier's liability for personal injury or death of passenger caused by debris, litter, or other foreign object on floor or seat of vehicle, 1 ALR4th 1249.

Highway construction contractor's liability for injuries to third persons by materials or debris on highway during course of construction or repair, 3 ALR4th 770.

Liability of one who sells gun to child for injury to third party, 4 ALR4th 331.

Liability of owner of dog for dog's biting veterinarian or veterinarian's employee, 4 ALR4th 349.

Liability of governmental unit or its officers for injury to innocent occupant of moving vehicle, or for damage to such vehicle, as result of police chase, 4 ALR4th 865.

Actual notice or knowledge by governmental body or officer of injury or incident resulting in injury as constituting required claim or notice of claim for injury — modern status, 7 ALR4th 1063.

Excessiveness or adequacy of damages awarded for injuries to head or brain, or for mental or nervous disorders, 14 ALR4th 328.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, circulatory, digestive, and glandular systems, 14 ALR4th 539.

Excessiveness or adequacy of damages awarded for injuries causing particular diseases or conditions, 16 ALR4th 736.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sensory or speech organs and systems, 16 ALR4th 1127.

Applicability of doctrine of strict liability in tort to injury resulting from X-ray radiation, 16 ALR4th 1300.

Liability of theater owner or operator for injury to or death of patron resulting from lighting conditions on premises, 19 ALR4th 1110.

Liability of hospital, physician, or other individual medical practitioner for injury or death resulting from blood transfusion, 20 ALR4th 136.

Liability for personal injury or death allegedly resulting from television or radio broadcast, 20 ALR4th 327.

Modern status of rules as to admissibility of evidence of prior accidents or injuries at same place, 21 ALR4th 472.

Liability of blood supplier or donor for injury or death resulting from blood transfusion, 24 ALR4th 508.

Width or design of lateral space between passenger loading platform and car entrance as affecting carrier's liability to passenger for injuries incurred from falling into space, 28 ALR4th 748.

Exterminator's tort liability for personal injury or death directly resulting from operations, 29 ALR4th 987.

Liability for injury or death resulting when object is manually brought into contact with, or close proximity to, electric line, 33 ALR4th 809.

Liability of land carrier to passenger who becomes victim of third party's assault on or about carrier's vehicle or premises, 34 ALR4th 1054.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 35 ALR4th 441.

Tort action for personal injury or property damage by partner against another partner or the partnership, 39 ALR4th 139.

Liability of attorney for suicide of client based on attorney's professional act or omission, 41 ALR4th 351.

Liability of employment agency for personal injury or property damage suffered by employer from acts of referred employee, or by employee from acts of referred employer, 41 ALR4th 531.

Liability of land carrier to passenger who becomes victim of another passenger's assault, 43 ALR4th 189.

Liability for injury to martial arts participant, 47 ALR4th 403.

Excessiveness or adequacy of damages awarded for injuries to trunk or torso, or internal injuries, 48 ALR5th 129.

Liability for personal injury or death caused by trespassing or intruding livestock, 49 ALR4th 710.

Liability to one struck by golf ball, 53 ALR4th 282.

Tortious maintenance or removal of life supports, 58 ALR4th 222.

Tort liability of private nursery school or daycare center, or employee thereof, for injury to child while attending facility, 58 ALR4th 240.

Products liability: toxic shock syndrome, 59 ALR4th 50.

Condominium association's liability to unit owner for injuries caused by third person's criminal conduct, 59 ALR4th 489.

Primary liability of private chain franchisor for injury or death caused by franchise premises or equipment, 59 ALR4th 1142.

Liability for injury to customer or other invitee of retail store by falling of displayed, stored, or piled objects, 61 ALR4th 27.

Liability to one struck by golf club, 63 ALR4th 221.

Liability for injury incurred in operation of power golf cart, 66 ALR4th 622.

Tort liability of college, university, fraternity, or sorority for injury or death of member or prospective member by hazing or initiation activity, 68 ALR4th 228.

Liability for injuries caused by cat, 68 ALR4th 823.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 ALR4th 131.

Tort liability for window washer's injury or death, 69 ALR4th 207.

Liability for personal injury or property damage caused by unauthorized use of automobile which had been parked with keys removed from ignition, 70 ALR4th 276.

Right of child to action against mother for infliction of prenatal injuries, 78 ALR4th 1082.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 ALR4th 127.

Liability of cosmetology school for injury to patron, 81 ALR4th 444.

Permissibility of in-court demonstration to show effect of injury in action for bodily injury, 82 ALR4th 980.

Liability for injury or damage caused by snowplowing or snow removal operations and equipment, 83 ALR4th 5.

Application of "discovery rule" to postpone running of limitations against action for damages from assault, 88 ALR4th 1063.

Refusal of medical treatment on religious grounds as affecting right to recover for personal injury or death, 3 ALR5th 721.

Liability for injury or death from collision with guy wire, 8 ALR5th 177.

Prospective juror's connection with defendant's insurance company as ground for challenge for cause, 9 ALR5th 102.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 ALR5th 195.

Products liability: lighters and lighter fluid, 14 ALR5th 47.

Air carrier's liability for injury from condition of airport premises, 14 ALR5th 662.

Liability of adult assailant's family to third party for physical assault, 25 ALR5th 1.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party, 31 ALR5th 550.

Res ipsa loquitor in gas leak cases, 34 ALR5th 1.

Liability for injuries to, or death of water skiers, 34 ALR5th 77.

Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person, 40 ALR5th 1.

Propriety of, and liability related to, issuance or enforcement of do not resuscitate orders, 46 ALR5th 793.

Excessiveness of adequacy of damages awarded for injuries to trunk or torso, or internal injuries, 48 ALR5th 129.

Excessiveness or adequacy of damages awarded for injuries to head or brain, 50 ALR5th 1.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system, 51 ALR5th 467.

Liability of participant in team athletic competition for injury to or death of another participant, 55 ALR5th 529.

Liability of vendor for food or beverage spilled on customer, 64 ALR5th 205.

Liability for donee's contraction of Acquired Immune Deficiency Syndrome (AIDS) from blood transfusion, 64 ALR5th 333.

Prosecution of mother for prenatal substance abuse based on endangerment of or delivery of controlled substance to child, 70 ALR5th 461.

Liability of owner, operator, or other parties, for personal injuries allegedly resulting from snow or ice on premises of parking lot, 74 ALR5th 49.

Skier's liability for injuries to or death of another person, 75 ALR5th 583.

Comparative negligence, contributory negligence, and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow, 83 ALR5th 589.

Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed. 541.

Limitation of liability of air carrier for personal injury or death, 91 ALR Fed. 547.

First amendment guaranty of freedom of speech or press as defense to liability stemming from speech allegedly causing bodily injury, 94 ALR Fed. 26.

Construction and application of contact sports exception to negligence, 75 A.L.R.6th 109.

51-1-14. Violent injury or attempt to commit injury.

Any violent injury or illegal attempt to commit a physical injury upon a person is a tort for which damages may be recovered. (Orig. Code 1863, § 2911; Code 1868, § 2918; Code 1873, § 2969; Code 1882,

§ 2969; Civil Code 1895, § 3827; Civil Code 1910, § 4423; Code 1933, § 105-602.)

Cross references. — Assault and battery generally, T. 16, C. 5, Art. 2. Rape, § 16-6-1.

Law reviews. — For comment on Mims v. Boland, 110 Ga. App. 477, 138 S.E.2d 902 (1964), see 2 Ga. St. B. J. 133 (1965).

JUDICIAL DECISIONS

Cause of action for personal injury. — Actions ex delicto both by the common law and the law of Georgia unquestionably include actions for injuries to the person. Goebel v. Hodges, 83 Ga. App. 574, 64 S.E.2d 207 (1951).

Unlawful touching constitutes physical injury. — Any unlawful touching of a person's body, even though no actual physical hurt may ensue therefrom, since it violates a personal right, constitutes a physical injury to that person. Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937).

Unlawful touching need not be direct, but may be indirect, as by the precipitation upon the body of a person of any material substance. Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937).

Mere striking of silver coin thrown by defendant against plaintiff's body amounted in law to physical injury. Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937).

Actual touching of victim not required. — Evidence supported an award of damages for the tort of assault and intentional infliction of emotional distress when the parent of a child in daycare harassed the daycare provider by tailgating the provider, cutting the provider off, and running the provider off the road. Edwards v. Sabat, 263 Ga. App. 852, 589 S.E.2d 618 (2003).

Summary judgment inappropriate. — When a merchant's employee detained three suspected shoplifters, and the detainees brought claims of assault and battery, summary judgment in favor of the merchant was inappropriate since the plaintiffs testified that the employee detained the plaintiff's an unreasonable amount of time and was physically and verbally abusive. Brown v. Super Disc. Mkts., Inc., 223 Ga. App. 174, 477 S.E.2d 839 (1996).

Summary judgment was improperly granted to the defendant after the plaintiff basketball referee testified that the defendant coach intentionally slammed the coach's body into the plaintiff and bumped the plaintiff backwards and that the coach's conduct was highly offensive. Darnell v. Houston County Bd. of Educ., 234 Ga. App. 488, 506 S.E.2d 385 (1998).

Jury instructions. — The court having properly instructed the jury as to the relative rights of the parties under the pleadings and the evidence, it was not error to fail to give in charge the definition of a tort as contained in this section. Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680, overruled on other grounds, Ob-Gyn Assocs. v. Littleton, 259 Ga. 663, 386 S.E.2d 146 (1989), overruled on other grounds, Lee v. State Farm Mut. Ins. Co., 272 Ga. 583, 533 S.E.2d 82 (2000), overruled on other grounds, Shores v. Modern Transp. Servs., 262 Ga. App. 293, 585 S.E.2d 664 (2003).

Remedies for Fourth Amendment violation by police officers. — See Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984), aff'd in part and rev'd and vacated in part en banc, 774 F.2d 1495 (11th Cir. 1985), cert. denied, 476 U.S. 1115, 106 S. Ct. 1970, 90 L. Ed. 2d 654 (1986).

Cited in Dodd v. Slater, 101 Ga. App. 362, 114 S.E.2d 170 (1960); Roberts v. Harrell, 230 Ga. 454, 197 S.E.2d 704 (1973); Bowling v. Janmar, Inc., 142 Ga. App. 53, 234 S.E.2d 849 (1977); Capitol T.V. Serv., Inc. v. Derrick, 163 Ga. App. 65, 293 S.E.2d 724 (1982); Luckie v. Piggly-Wiggly S., Inc., 173 Ga. App. 177,

325 S.E.2d 844 (1984); Gardner v. Rogers, 224 Ga. App. 165, 480 S.E.2d 217 (1996); Sam's Wholesale Club v. Riley, 241 Ga. App. 693, 527 S.E.2d 293 (1999); Wallace v. Stringer, 250 Ga. App. 850, 553 S.E.2d 166 (2001); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 17 et seq.

C.J.S. — 6A C.J.S., Assault, § 4 et seq.

ALR. — Civil action for assault upon female person, 6 ALR 985.

Civil liability growing out of mutual combat, 30 ALR 199; 47 ALR 1092.

Recovery for physical consequences of fright resulting in physical injury, 76 ALR 681; 98 ALR 402.

Punitive or exemplary damages for assault, 123 ALR 1115.

Proof to establish or negative self-defense in civil action for death from intentional act, 17 ALR2d 597.

Civil liability of insane or other mentally disordered person for assault or battery, 77 ALR2d 625.

Liability under Jones Act or seaworthiness doctrine for injuries caused by assault, 22 ALR3d 624.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 ALR3d 718.

Assault: criminal liability as barring or mitigating recovery of punitive damages, 98 ALR3d 870.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 ALR3d 569.

Employee's act or threat of physical violence as bar to unemployment compensation, 20 ALR4th 637.

Liability for injury to martial arts participant, 47 ALR4th 403.

Workers' compensation law as precluding employee's suit against employer for third person's criminal attack, 49 ALR4th 926.

Parking facility proprietor's liability for criminal attack on patron, 49 ALR4th 1257.

Permissibility of in-court demonstration to show effect of injury in action for bodily injury, 82 ALR4th 980.

51-1-15. Right of action for abduction or harboring of wife.

A husband shall have a right of action against another for abducting or harboring his wife. Furnishing shelter and food to a wife driven from her home by cruel treatment is an act of humanity and shall give no right of action to the husband. (Orig. Code 1863, § 2949; Code 1868, § 2956; Code 1873, § 3007; Code 1882, § 3007; Civil Code 1895, § 3868; Civil Code 1910, § 4464; Code 1933, § 105-1202.)

JUDICIAL DECISIONS

Action based on loss of consortium. — Gist of an action for harboring the plaintiff's wife is the loss of "consortium," which is a property right growing out of the marriage relationship, and includes the exclusive right to the services of the spouse and to the society, companionship, and conjugal affection of each other. Hobbs v. Holliman, 74 Ga. App. 735, 41 S.E.2d 332 (1947).

Action for loss of consortium must be brought within a two-year period from the date of injury. Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 108 Ga. App. 159, 132 S.E.2d 119 (1963).

Cause of action accrues when con-

sortium lost. — Cause of action accrues when or immediately after the society, affection, assistance, and conjugal fellowship, usually expressed by the term "consortium," is lost without reference to words or acts which allegedly caused the loss. Hobbs v. Holliman, 74 Ga. App. 735, 41 S.E.2d 332 (1947).

Pleadings. — Facts of harboring the wife being pled as inducement or explanatory of the gist of the cause of action for loss of consortium, such acts are not required to be set forth with the same certainty as that required in setting forth the gist or the essential elements of the cause of action. Hobbs v. Holliman, 74 Ga. App. 735, 41 S.E.2d 332 (1947).

Cited in Edwards v. Monroe, 54 Ga. App. 791, 189 S.E. 419 (1936); Hosford v. Hosford, 58 Ga. App. 188, 198 S.E. 289 (1938); Wright v. Lester, 105 Ga. App. 107, 123 S.E.2d 672 (1961).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, §§ 2, 3.

C.J.S. — 41 C.J.S., Husband and Wife, § 239 et seq.

51-1-16. Right of action for seduction of daughter; exemplary damages.

The seduction of a daughter, unmarried and living with her parent, whether followed by pregnancy or not, shall give a right of action to the father or to the mother if the father is dead, or absent permanently, or refuses to bring an action. No loss of services need be alleged or proved. The seduction is the gist of the action, and in well-defined cases exemplary damages shall be granted. (Orig. Code 1863, § 2951; Code 1868, § 2958; Code 1873, § 3009; Code 1882, § 3009; Civil Code 1895, § 3870; Civil Code 1910, § 4466; Code 1933, § 105-1204.)

Cross references. — Sexual offenses generally, T. 16, C. 6.

Law reviews. — For note, "Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions," see 23 Ga. L. Rev. 1085 (1989).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 51-1-16 is a gender-based classification that violates the equal protection clause of the Georgia Constitution because only men may be civilly liable for seduction under the statute. Franklin v. Hill, 264 Ga. 302, 444 S.E.2d 778 (1994).

This section is not of common-law origin, but, on the contrary, supplants and is a substitute for the common law, which required proof of loss of service. Mosley v. Lynn, 172 Ga. 193, 157 S.E. 450 (1931).

Seduction is the act of a man inducing a woman to commit unlawful intercourse with him; and it is not essential, in order to maintain an action, that there should be a promise of marriage. Mosley v. Lynn, 172 Ga. 193, 157 S.E. 450 (1931).

No requirement of "false or fraudulent" means. — Tort of seduction as codified in O.C.G.A. § 51-1-16 does not include a requirement that the seduction of the daughter be accomplished through "false or fraudulent" means. Franklin v. Hill, 203 Ga. App. 724, 417 S.E.2d 721, cert. denied, 203 Ga. App. 906, 417 S.E.2d 721 (1992).

"Seduction" further construed. — Properly construed, the word "seduction," as used in this section has reference to any and all cases in which a child is led astray and her morals destroyed, uprooted, and extirpated, her social standing damaged, and she is thereby rendered an

unfit associate for other children in the family, and a debased member of society; the word may include adultery or fornication; and there may be recovery by a parent of damages for such conduct as has debauched his daughter, though the seducer be known by the infant to be a married man, if by the employment of any means the seducer leads the child into sexual immorality and vice. Mosley v. Lynn, 172 Ga. 193, 157 S.E. 450 (1931).

Only parent has requisite standing. — Statute, on its face, provides that only a parent of a seduced daughter has the requisite standing to bring an action for seduction, therefore the alleged victim of seduction, cannot bring a valid cause of action under O.C.G.A. § 51-1-16 in her own name through mother "as next friend". Franklin v. Hill, 203 Ga. App. 724, 417 S.E.2d 721, cert. denied, 203 Ga. App. 906, 417 S.E.2d 721 (1992); Brayman v. Deloach, 211 Ga. App. 489, 439 S.E.2d 709 (1993).

Actionable injury is against parent. — As a civil injury, the term "seduction" denominates an injury to the parent which arises out of any unlawful sexual intercourse in which the child is induced to participate by the acts or wiles of the seducer. Mosley v. Lynn, 172 Ga. 193, 157 S.E. 450 (1931).

Either parent may bring action. — This section effected another change from common law, in that at common law the mother, not being entitled to the services of the child, was not entitled to recover for loss or deprivation of such services. Mosley v. Lynn, 172 Ga. 193, 157 S.E. 450 (1931).

Joint tort-feasors. — One who aids and abets or assists another in the debauchery of a female child, and especially if he stand guard during such continuous seduction, to prevent detection of the participants in the act of fornication and adultery, is a joint tort-feasor, and as such is liable with the principal in the act. Mosley v. Lynn, 172 Ga. 193, 157 S.E. 450 (1931).

Action arises on completion of seduction. — Father's cause of action for the seduction of his daughter arises when the act of seduction is complete, and not when he discovers that his daughter has been seduced. Davis v. Boyett, 120 Ga. 649, 48 S.E. 185, 102 Am. St. R. 118, 66 L.R.A. 258, 1 Ann. Cas. 386 (1904).

Not necessary to plead particular facts and circumstances. — In order to charge seduction, it is not necessary that the manner of accomplishing the act or the circumstances attending the act should be set out. Mosley v. Lynn, 172 Ga. 193, 157 S.E. 450 (1931).

Not necessary to allege victim's virtue. — In an action brought for the recovery of damages under this section, it is not necessary to allege or prove that a daughter alleged to have been seduced was virtuous. Mosley v. Lynn, 172 Ga. 193, 157 S.E. 450 (1931).

Elements of the tort of seduction do not include a requirement that the seduced female be "virtuous," only that the seduced daughter be unmarried and living with her parent. Furthermore, the statute makes it clear that "the seduction is the gist of the action," thus placing the emphasis on the conduct of the tortfeasor, rather than on the behavior of the alleged victim. Franklin v. Hill, 203 Ga. App. 724, 417 S.E.2d 721, cert. denied, 203 Ga. App. 906, 417 S.E.2d 721 (1992).

Fact that in her deposition the alleged victim admitted that she had sexual relations with her boyfriend prior to the alleged acts of sexual intercourse with the seducer would not preclude her mother from bringing an action under O.C.G.A. § 51-1-16. Franklin v. Hill, 203 Ga. App. 724, 417 S.E.2d 721, cert. denied, 203 Ga. App. 906, 417 S.E.2d 721 (1992).

It is not important whether the word "debauching" or "seduction" is used in the pleadings. Mosley v. Lynn, 172 Ga. 193, 157 S.E. 450 (1931).

Cited in Edwards v. Monroe, 54 Ga. App. 791, 189 S.E. 419 (1936); Hosford v. Hosford, 58 Ga. App. 188, 198 S.E. 289 (1938); Wages v. Amisub of Ga., 235 Ga. App. 156, 508 S.E.2d 783 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 70 Am. Jur. 2d, Seduction, § 30 et seq.

C.J.S. — 86 C.J.S., Torts, §§ 88, 89.

ALR. — Exhibition of child in criminal prosecution, or civil action, for seduction, 1 ALR 622.

When statute of limitations commences to run against civil action for seduction, 3 ALR 155.

Promise of marriage as condition of civil action for seduction, 21 ALR 303.

Presumption and burden of proof as to chastity of prosecutrix in a prosecution for seduction, 64 ALR 265.

Right of seduced female to maintain action for seduction, 121 ALR 1487.

Excessiveness or inadequacy of damages for alienation of affections, criminal conversation, or seduction, 36 ALR2d 548.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 ALR3d 569.

51-1-17. Rights of action for adultery, alienation of affections, and criminal conversation abolished.

Adultery, alienation of affections, or criminal conversation with a wife or husband shall not give a right of action to the person's spouse. Rights of action for adultery, alienation of affections, or criminal conversation are abolished. (Orig. Code 1863, § 2950; Code 1868, § 2957; Code 1873, § 3008; Code 1882, § 3008; Civil Code 1895, § 3869; Civil Code 1910, § 4465; Code 1933, § 105-1203; Ga. L. 1979, p. 466, § 46.)

Cross references. — Criminal penalty for adultery, § 16-6-19. Divorce, § 19-5-1 et seq.

Law reviews. — For article surveying legislative and judicial developments in Georgia's divorce, alimony and child custody laws for 1978-79, see 31 Mercer L. Rev. 75 (1979).

JUDICIAL DECISIONS

Retrospective repeal of former section unconstitutional. — Portion of the Family and Domestic Relations Law which made the repeal of the cause of action for alienation of affections retrospective as to pending actions is unconstitutional. Enger v. Erwin, 245 Ga. 753, 267 S.E.2d 25 (1980).

Interference with marital contract or relations. — O.C.G.A. § 51-1-17, by implication, bars actions based on alleged intentional interference with marital contract and marital relations. Arnac v. Wright, 163 Ga. App. 33, 292 S.E.2d 440 (1982).

Professional liability claims. — Patient could not bring a medical malpractice claim for damages against a family doctor for interference with the patient's marriage, loss of affection, or depression and anxiety that resulted from the doctor having an affair with the patient's wife because O.C.G.A. § 51-1-17 abolished torts claims for adultery and alienation of affections. The patient's claim of breach of fiduciary duty/confidential relationship was nothing more than a renamed claim of the torts banned by O.C.G.A. § 51-1-17. Witcher v. McGauley, 316 Ga. App. 574, 730 S.E.2d 56 (2012).

Cited in Cook v. Wood, 30 Ga. 891 (1860); Wood v. State, 62 Ga. 406 (1879); Sikes v. Tippins, 85 Ga. 231, 11 S.E. 662 (1890); Sellers v. Page, 127 Ga. 633, 56 S.E. 1011 (1907); Drawdy v. Hesters, 130 Ga. 161, 60 S.E. 451 (1908); Wilson v. Brock, 134 Ga. 782, 68 S.E. 497 (1910); Miller v. State, 9 Ga. App. 827, 72 S.E. 279 (1911); Davis v. Cochran, 42 Ga. App. 215, 155 S.E. 379 (1930); Barney v. Barney, 43 Ga. App. 545, 159 S.E. 595 (1931); Sessions v. Parker, 45 Ga. App. 101, 163 S.E.

297 (1932); Roberts v. Turner, 49 Ga. App. 516, 176 S.E. 91 (1934); Edwards v. Monroe, 54 Ga. App. 791, 189 S.E. 419 (1936); Hosford v. Hosford, 58 Ga. App. 188, 198 S.E. 289 (1938); Sanders v. Chandler, 71 Ga. App. 337, 30 S.E.2d 813 (1944); Kidd v. Holtzendorf, 88 Ga. App. 360, 76 S.E.2d 656 (1953); Posner v. Koplin, 94 Ga. App. 306, 94 S.E.2d 434 (1956); Wright v. Lester, 105 Ga. App. 107, 123 S.E.2d 672 (1961); Emerson v. Fleming, 127 Ga. App. 296, 193 S.E.2d 249 (1972); Brown v. Hauser, 249 Ga. 513, 292 S.E.2d 1 (1982); Hyman v. Moldovan, 166 Ga. App. 891, 305 S.E.2d 648 (1983); Brewer v. Paulk, 296 Ga. App. 26, 673 S.E.2d 545 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, § 220 et seq.

Am. Jur. Proof of Facts. — Proof of Alienation of Affections, 54 POF3d 135.

C.J.S. — 41 C.J.S., Husband and Wife, § 251 et seq.

ALR. — Action for intentional infliction of emotional distress against paramours, 99 ALR5th 445.

Intentional infliction of distress in marital context, 110 ALR5th 371.

51-1-18. Furnishing alcoholic beverages to minor children; gambling with minor children.

(a) The custodial parent or parents shall have a right of action against any person who shall sell or furnish alcoholic beverages to that parent's underage child for the child's use without the permission of the child's parent.

(b) A parent shall have a right of action against any person who shall play and bet at any game of chance with his minor child for money or any other thing of value without the parent's permission. (Orig. Code 1863, §§ 2952, 2953; Code 1868, §§ 2959, 2960; Code 1873, §§ 3010, 3011; Code 1882, §§ 3010, 3011; Civil Code 1895, §§ 3871, 3872; Civil Code 1910, §§ 4467, 4468; Code 1933, §§ 105-1205, 105-1206; Ga. L. 1988, p. 365, § 1.)

Cross references. — Constitutional provisions on alcohol, U.S. Const., amend 21. Prohibition of sale of alcoholic beverages by or to underage persons generally, § 3-3-23 et seq. Sale of alcoholic beverages to minors generally, § 3-3-24. Gambling and related offenses, § 16-12-20 et seq.

Editor's notes. — Section 2 of Ga. L. 1988, p. 365, not codified by the General Assembly, provided that nothing in that Act shall be construed to create any new or additional cause of action.

Law reviews. — For annual survey of tort law, see 58 Mercer L. Rev. 385 (2006).

For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B. J. 124 (1970). For note discussing tavern keeper liability in Georgia for injury caused by a person to whom an intoxicant was sold, see 9 Ga. L. Rev. 239 (1974).

JUDICIAL DECISIONS

Constitutionality of subsection (a) prior to 1988 amendment. — Subsection (a) of O.C.G.A. § 51-1-18 as it existed prior to the 1988 amendment created a

gender classification which did not rest upon "some ground of difference having a fair and substantial relation to the object of the legislation," and therefore violated equal protection of the laws. Stepperson, Inc. v. Long, 256 Ga. 838, 353 S.E.2d 461 (1987).

Strict liability for injury resulting from liquor sales is constitutional on the basis that the state enjoys a particularly broad police power as a result of the U.S. Const., amend. 21, repealing prohibition. Reeves v. Bridges, 248 Ga. 600, 284 S.E.2d 416 (1981).

Legislature did not intend to impose strict liability in enacting O.C.G.A. § 51-1-18. Reeves v. Bridges, 248 Ga. 600, 284 S.E.2d 416 (1981).

Cause of action. — Parent is provided a right of action against any party who furnishes spiritous liquors to one's child without the parent's permission. Dodd v. Slater, 101 Ga. App. 362, 114 S.E.2d 170 (1960).

Cause of action under subsection (a) vested in parent. — Subsection (b) of O.C.G.A. § 51-1-18 was amended to place the cause of action in "a parent" when the legislature enacted the Code of 1981, effective November 1, 1982, and the failure to amend subsection (a) in a similar manner was a mere oversight. Thus, although subsection (a) as it existed until the 1988 amendment was unconstitutional as written, the entire statute should not fall on account of the defect in a relatively unimportant part, and the action against one who furnished alcoholic beverages to an underage child for the child's use without the permission of the child's parent was vested in a parent, to be brought by either of them or jointly by both of them. Stepperson, Inc. v. Long, 256 Ga. 838, 353 S.E.2d 461 (1987).

Parent's participation in sting operation. — When parents willingly participated in a sting operation in which the parents anticipated that a provider would attempt to serve alcohol to the parents' underage children, the parents could not recover damages against the provider under O.C.G.A. § 51-1-18(a). Allowing the parents to recover in such a circumstance would be unreasonable and would not serve the purpose of the statute, which was to prevent the furnishing of alcoholic beverages to underage children in the absence of parental consent. Abreu v. Rainey, 293 Ga. App. 597, 667 S.E.2d 434 (2008).

Serving alcohol to teenager over age of majority. — Trial court erroneously denied a motion to dismiss a personal injury action filed by two parents against two social hosts, arising out of the death of the parents' 20-year-old daughter, which alleged that the social hosts served the daughter alcohol, and the daughter died when the daughter drunkenly drove into a tree after leaving the social hosts' home, as the action was barred due to the fact that the daughter had already reached the age of majority at the time of the accident. Penny v. McBride, 282 Ga. App. 590, 639 S.E.2d 561 (2006), cert. denied, 2007 Ga. LEXIS 223 (Ga. 2007).

Consent of the minor to drink alcohol was of no consequence since the cause of action lay with the minor's parents. McNamee v. A.J.W., 238 Ga. App. 534, 519 S.E.2d 298 (1999).

O.C.G.A. § 51-1-40, which precludes recovery by a consumer against provider, did not apply in an action by parents for damages under O.C.G.A. § 51-1-18. Eldridge v. Aronson, 221 Ga. App. 662, 472 S.E.2d 497 (1996).

"Custodial parent" construed. — Parent with custody of a minor pursuant to a court order is the "custodial parent." Leach v. Braswell, 804 F. Supp. 1551 (S.D. Ga. 1992), aff'd, 8 F.3d 37 (11th Cir. 1993).

Summary judgment for lessor of store which sold beer to minor. — Defendant oil company was entitled to summary judgment, since, although beer was sold to the plaintiff's minor son at a filling station/convenience store leased by the defendant, defendant had no control over the time, manner, and method of operating the store. Leach v. Brilad Oil Co., 753 F. Supp. 366 (S.D. Ga. 1991).

Summary judgment improperly granted to property owner and party guests. — Trial court erred in granting summary judgment to a property owner and the party guests, as to a mother's claims that they provided alcohol to a minor, who later was killed in an auto

accident, in violation of O.C.G.A. § 51-1-18(a), as there was a triable issue of fact where the evidence indicated that the owner allowed the guests to bring kegs of beer to the party, at which most of the other guests were minors, and that the guests knowingly allowed the deceased minor to drink beer from the kegs; the mother was not precluded from recovering damages under O.C.G.A. § 51-12-6, as there was a triable issue of fact as to whether these acts were intentional. Mowell v. Marks, 277 Ga. App. 524, 627 S.E.2d 141 (2006).

Fact that the defendant did not personally attend the party at which alcoholic beverages were provided to the plaintiffs' underage son did not settle the question of whether the defendant "furnished" beverages within the meaning of O.C.G.A. § 51-1-18. Eldridge v. Aronson, 221 Ga. App. 662, 472 S.E.2d 497 (1996).

Damages recoverable. — In a suit brought upon a right of action under this section, the plaintiff may recover both general and special damages. Wright v. Smith, 128 Ga. 432, 57 S.E. 684 (1907).

Damages recoverable under O.C.G.A. § 51-1-18 by a parent may be limited to general and special damages suffered directly by the parent, as opposed to damages the parent may have to pay to a third person. Sutter v. Hutchings, 254 Ga. 194, 327 S.E.2d 716 (1985).

Damages under subsection (a) of O.C.G.A. § 51-1-18 are limited to vindictive damages authorized by O.C.G.A. § 51-12-6 because the legislature has declared, in O.C.G.A. § 51-1-40 (a), that the consumption of alcohol, rather than the furnishing of alcohol, is the proximate cause of any self-inflicted injury to an intoxicated minor. Leach v. Braswell, 804 F. Supp. 1551 (S.D. Ga. 1992), aff'd, 8 F.3d 37 (11th Cir. 1993).

Liability for injuries to consumer of alcohol. — Provider of alcohol cannot be held liable to a consumer of alcohol for injuries sustained as a result of such consumption. Steedley v. Huntley's Jiffy Stores, Inc., 209 Ga. App. 23, 432 S.E.2d 625 (1993).

Legal and medical expenses. — Parent of 19 year old son who lived with the parent had no right of action under subsection (a) of O.C.G.A. § 51-1-18 to recover the legal, medical, and other expenses which the parent incurred on the son's behalf. Burch v. Uokuni Int'l, Inc., 192 Ga. App. 861, 386 S.E.2d 889 (1989).

Discovery of defendant's worldly circumstances. — In an action under subsection (a) O.C.G.A. § 51-1-18 by a parent for furnishing alcoholic beverages to the parent's underage child without the parent's consent, when the parent has prayed for general, special, O.C.G.A. § 51-12-5, and O.C.G.A. § 51-12-6 damages, and the parent has not yet made an election to forego all other damages in favor of § 51-12-6 damages, the trial court is correct in denying the parent's motion to compel discovery of defendant's worldly circumstances. If, however, the parent timely amends the parent's complaint to abandon all claims except one for § 51-12-6 damages, the parent will be entitled to discover the defendant's worldly circumstances. Stepperson, Inc. v. Long, 256 Ga. 838, 353 S.E.2d 461 (1987).

Cited in Edwards v. Monroe, 54 Ga. App. 791, 189 S.E. 419 (1936); Hosford v. Hosford, 58 Ga. App. 188, 198 S.E. 289 (1938); Dodd v. Slater, 101 Ga. App. 358, 114 S.E.2d 167 (1960); Keaton v. Kroger Co., 143 Ga. App. 23, 237 S.E.2d 443 (1977); Riverside Enters., Inc. v. Rahn, 171 Ga. App. 674, 320 S.E.2d 595 (1984); Spivey v. Sellers, 185 Ga. App. 241, 363 S.E.2d 856 (1987); Hansen v. Etheridge, 232 Ga. App. 408, 501 S.E.2d 517 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 45 Am. Jur. 2d, Intoxicating Liquors, § 220 et seq.

C.J.S. — 48 C.J.S., Intoxicating Liquors, §§ 488 et seq., 840, 841.

ALR. — Liability, under dramshop acts, of one who sells or furnishes liquor otherwise than in operation of regularly established liquor business, 8 ALR3d 1412.

Criminal offense of selling liquor to a minor or permitting him to stay on li-

censed premises as affected by ignorance or mistake regarding his age, 12 ALR3d 991.

Contributory negligence allegedly contributing to cause of injury as defense in Civil Damage Act proceeding, 64 ALR3d 849.

Proof of causation of intoxication as a prerequisite to recovery under Civil Damage Act, 64 ALR3d 882.

Civil Damage Act: liability of one who furnishes liquor to another for consumption by third parties, for injury caused by consumer, 64 ALR3d 922.

Liability of state or municipality in tort action for damages arising out of sale of intoxicating liquor by state or municipally operated liquor store or establishment, 95 ALR3d 1243.

Common-law right of action for damage sustained by plaintiff in consequence of sale or gift of intoxicating liquor or habit-forming drug to another, 97 ALR3d 528; 62 ALR4th 16.

Intoxicating liquors: employer's liability for furnishing or permitting liquor on social occasion, 51 ALR4th 1048.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence, 62 ALR4th 16.

Liability of independent accountant to investors or shareholders, 48 ALR5th 389.

Social host's liability for death or injuries incurred by person to whom alcohol was served, 54 ALR5th 313.

51-1-19. Negligence by person given trust or confidence for consideration.

When trust or confidence is reposed in a person in consideration of the payment or promise of a reward to him, negligence in the person trusted which results in injury to the other person shall give the injured party a right of action. (Orig. Code 1863, § 2948; Code 1868, § 2955; Code 1873, § 3006; Code 1882, § 3006; Civil Code 1895, § 3867; Civil Code 1910, § 4463; Code 1933, § 105-1201.)

JUDICIAL DECISIONS

Standing to bring suit. — In a class action brought by a beneficiary of a trust holding a participating unit in the common trust fund of a bank, alleging that the bank made imprudent investments which resulted in losses, the class members, i.e., beneficiaries of other participating trusts, had standing, having possibly suffered injury. The bank, which had an adverse interest in the litigation, was not required to bring suit against itself. Meyer v. Citizens & S. Nat'l Bank, 106 F.R.D. 356 (M.D. Ga. 1985).

Trust holding title to utility property. — The statutory provisions of former § 53-13-51, imposing a general duty to exercise ordinary care in the preservation and protection of trust property in the possession of the trustee, and of O.C.G.A. § 51-1-19, imposing general liability upon a compensated trustee for the trustee's negligence, were inapplicable since the underlying purpose of the trust to hold title to certain utility property was neither to transfer to the uncompensated trustee immediate possession of the utility corporation's property nor to impose any immediate duty on the trustee to undertake the operation and maintenance of the corporation's water system. Smith v. Hawks, 182 Ga. App. 379, 355 S.E.2d 669 (1987).

Cited in Mobley v. Phinizy, 42 Ga. App. 33, 155 S.E. 73 (1930); Citizens & S. Nat'l Bank v. Haskins, 254 Ga. 131, 327 S.E.2d 192 (1985); Benson v. McMillan, 261 Ga. App. 78, 581 S.E.2d 707 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 76 Am. Jur. 2d, Trusts, § 368 et seq.

C.J.S. — 90A C.J.S., Trusts, §§ 326-334.

ALR. — Individual liability of trustee or other fiduciary for injury to person or property of third person due to negligence, violation of statute or ordinance, in management of trust estate, 123 ALR 458.

Employer's liability for action of trustees or similar body administering employer's pension plan, 54 ALR3d 189.

Liability of insurance agent or broker on ground of inadequacy of liability insurance coverage procured, 72 ALR3d 704.

Liability of insurance agent or broker on ground of inadequacy of life, health, and accident insurance coverage procured, 72 ALR3d 735.

Liability of insurance agent or broker on ground of inadequacy of property insurance coverage procured, 72 ALR3d 747.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees, 77 ALR3d 6.

Liability of estate for tort of executor, administrator, or trustee, 82 ALR3d 892.

Liability of insurance agent or broker for placing insurance with insolvent carrier, 42 ALR5th 199.

51-1-20. Liability of persons serving charitable organizations and public entities while acting in good faith.

(a) A person serving with or without compensation as a member, director, or trustee, or as an officer of the board without compensation, of any nonprofit hospital or association or of any nonprofit, charitable, or eleemosynary institution or organization or of any local governmental agency, board, authority, or entity shall be immune from civil liability for any act or any omission to act arising out of such service if such person was acting in good faith within the scope of his or her official actions and duties and unless the damage or injury was caused by the willful or wanton misconduct of such person.

(b) As used in this Code section, the term "compensation" shall not include reimbursement for reasonable expenses related to said services.

(c) This Code section shall not affect any immunity of any person arising from any source, whether or not such person may additionally be subject to and possess an immunity provided by this Code section. The immunity provided by this Code section shall be supplemental to any such existing immunity. (Ga. L. 1969, p. 709, § 1; Ga. L. 1987, p. 915, § 2; Ga. L. 1987, p. 986, § 1.)

Law reviews. — For article, "The Tort Liability of a Charitable Institution," see 5 Ga. B. J. 25 (1942). For article, "Hospital Liability for Negligent Care in Georgia," see 17 Ga. B. J. 18 (1954). For article analyzing doctrine of immunity from tort liability enjoyed by charitable institutions, see 24 Ga. B. J. 201 (1961).

For note on the status of the charitable immunity doctrine, see 10 Mercer L. Rev. 323 (1959). For note advocating uniformity in doctrine of charitable immunity, see 23 Ga. B. J. 398 (1961).

For comment on Cox v. DeJarnette, 104 Ga. App. 664, 123 S.E.2d 16 (1961), see 24 Ga. B. J. 536 (1962). For comment on Williams v. Hospital Auth., 119 Ga. App. 626, 168 S.E.2d 336 (1969), see 6 Ga. St.

B. J. 209 (1969). For comment advocating abolition of the doctrine of charitable immunity in light of Abernathy v. Sisters of St. Mary's, 446 S.W.2d 599 (Mo. 1969), see 21 Mercer L. Rev. 521 (1970).

JUDICIAL DECISIONS

Scope of immunity. — Immunity of O.C.G.A. § 51-1-20 extends to public, charitable, or nonprofit institutions or organizations generally and is not limited to hospitals and other health care institutions and organizations. Bunkley v. Hendrix, 164 Ga. App. 401, 296 S.E.2d 223 (1982).

Actions in violation of Open Meetings Act. — Actions taken by members of county airport authority which may have violated the Open Meetings Act, O.C.G.A. Ch. 14, T. 50, did not lose their character as actions taken within the scope of the members' official duties for purposes of immunity. Atlanta Airmotive, Inc. v. Royal, 214 Ga. App. 760, 449 S.E.2d 315 (1994).

Mere negligence. — County planning commission members could not be held personally liable based upon the mere negligent performance of the members' duties. Dyches v. McCorkle, 212 Ga. App. 209, 441 S.E.2d 518 (1994).

Immunity upheld. — Record was devoid of conduct that would lift the county planning commission members' shield of immunity. Dyches v. McCorkle, 212 Ga. App. 209, 441 S.E.2d 518 (1994).

Pursuant to O.C.G.A. § 51-1-20(a), the defendant president, as an uncompensated officer of a non-profit farm bureau, was immune from civil liability in the employee's tortious interference with an employment contract action for the president's good faith performance of official duties as president of the farm bureau in communicating to the employee's employer a request to transfer the employee. Culpepper v. Thompson, 254 Ga. App. 569, 562 S.E.2d 837 (2002).

Immunity not upheld. — Although it was undisputed that the defendant was a member of the association which sponsored the seminar for which the defendant was a speaker, there was no evidence that the defendant's participation in the seminar was within the scope of any official actions and duties owed to the association; therefore, the defendant was not entitled to immunity for any liability regarding seminar material the defendant distributed. Zarach v. Atlanta Claims Ass'n., 231 Ga. App. 685, 500 S.E.2d 1 (1998).

Members of county airport authority were entitled to immunity from personal liability when the members complained of actions were taken in good faith within the scope of the members' official duties with the authority and the complained of damage was not caused by any wilful or wanton misconduct. Atlanta Airmotive, Inc. v. Royal, 214 Ga. App. 760, 449 S.E.2d 315 (1994).

Owner or proprietor of private hospital or sanitarium which is operated for profit and not for charity is liable for injuries to patients due to negligence of nurses or other employees. A private hospital operated for pecuniary profit owes to the patient the duty to use reasonable care for the patient's safety, and reasonable skill and diligence in nursing and caring for the patient. Porter v. Patterson, 107 Ga. App. 64, 129 S.E.2d 70 (1962).

Cited in Golf Club Co. v. Rothstein, 97 Ga. App. 128, 102 S.E.2d 654 (1958); Johnson v. Metropolitan Atlanta Rapid Transit Auth., 207 Ga. App. 869, 429 S.E.2d 285 (1993); Stephens v. Conyers Apostolic Church, 243 Ga. App. 170, 532 S.E.2d 728 (2000); Abdel-Samed v. Dailey, 294 Ga. 758, 755 S.E.2d 805 (2014).

OPINIONS OF THE ATTORNEY GENERAL

Private Industry Councils, created by the federal Job Training Partnership Act, 29 U.S.C. § 1501 et seq., are non-profit organizations and charitable institutions within the class of organizations specified in O.C.G.A. § 51-1-20; however, while the general nature of a council brings it within the parameters of that

section, each immunity issue must be decided on a case-by-case basis. 1988 Op. Att'y Gen. No. 88-6.

RESEARCH REFERENCES

Am. Jur. 2d. — 40A Am. Jur. 2d, Hospitals and Asylums, §§ 25 et seq., 36.

C.J.S. — 41 C.J.S., Hospitals, §§ 43, 44.

ALR. — Liability of private, noncharitable hospital or sanitarium for improper care or treatment of patients, 22 ALR 341; 39 ALR 1431; 124 ALR 186.

Personal liability of member of voluntary association not organized for personal profit on contract with third person, 41 ALR 754.

Immunity of charitable institution from liability for personal injuries as affecting right to recover for and defense available in action by it for services, 100 ALR 1335.

Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital, 25 ALR2d 203.

Liability of hospital to patient injured through defective wheelchair or similar furniture or appliance, 31 ALR2d 1118.

Hospital's liability for injury or death in obstetrical cases, 37 ALR2d 1284.

Hospital's liability as to diagnosis and care of patients brought to emergency ward, 72 ALR2d 396.

Hospital's liability for injury to patient from heat lamp or pad or hot-water bottle, 72 ALR2d 408.

Liability for injury or death due to physical condition of church premises, 80 ALR2d 806.

Hospital's liability for exposing patient to extraneous infection or contagion, 96 ALR2d 1205.

Res ipsa loquitur in action against hospital for injury to patient, 9 ALR3d 1315; 49 ALR4th 63.

Hospital's liability to patient for injury sustained from defective equipment furnished by hospital for use in diagnosis or treatment of patient, 14 ALR3d 1254.

Malpractice: liability of physician or hospital where patient suffers heart attack or the like while undergoing unrelated medical procedure, 17 ALR3d 796.

Hospital's liability for injuries sustained by patient as a result of restraints imposed on movement, 25 ALR3d 1450.

Hospital's liability for injury or death to patient resulting from or connected with administration of anesthetic, 31 ALR3d 1114.

Liability of hospital for refusal to admit or treat patient, 35 ALR3d 841.

Immunity of private schools and institutions of higher learning from liability in tort, 38 ALR3d 480.

Tort liability of public schools and institutions of higher learning for injuries resulting from lack or insufficiency of supervision, 38 ALR3d 830.

Tort liability of private schools and institutions of higher learning for negligence of, or lack of supervision by, teachers and other employees or agents, 38 ALR3d 908.

Hospital's liability for injury allegedly caused by improper diet or feeding of patient, 42 ALR3d 736.

Liability of governmental entity or public officer for personal injury or damages arising out of vehicular accident due to negligent or defective design of a highway, 45 ALR3d 875; 58 ALR4th 559.

Liability of hospital for injury caused through assault by a patient, 48 ALR3d 1288.

Hospital's liability to patient for injury allegedly sustained from absence of particular equipment intended for use in diagnosis or treatment of patient, 50 ALR3d 1141.

Hospital's liability for negligence in selection or appointment of staff physician or surgeon, 51 ALR3d 981.

Liability of hospital, other than mental institution, for suicide of patient, 60 ALR3d 880.

Liability of member of unincorporated association for tortious acts of association's nonmember agent or employee, 62 ALR3d 1165.

Coverage and exclusions under hospital professional liability or indemnity policy, 65 ALR3d 969.

Liability of charitable organization under respondeat superior doctrine for tort of unpaid volunteer, 82 ALR3d 1213.

Patient tort liability of rest, convalescent, or nursing homes, 83 ALR3d 871.

Damage liability of state or local public employees' union officials for unlawful work stoppage, 84 ALR3d 336.

Hospital's liability for patient's injury or death as result of fall from bed, 9 ALR4th 149.

Hospital's liability for negligence in failing to review or supervise treatment given by doctor, or to require consultation, 12 ALR4th 57.

Liability for wrongful autopsy, 18 ALR4th 858.

Tort immunity of nongovernmental charities — modern status, 25 ALR4th 517.

Hospital's liability for patient's injury or death resulting from escape or attempted escape, 37 ALR4th 200.

Liability of hospital or clinic for sexual relationships with patients by staff physicians, psychologists, and other healers, 45 ALR4th 289.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper administration of, or failure to administer, anesthesia or tranquilizers, or similar drugs, during labor and delivery, 1 ALR5th 269.

Hospital's liability for injury resulting from failure to have sufficient number of nurses on duty, 2 ALR5th 286.

Liability of hospital, physician, or other medical personnel for death or injury to child caused by improper postdelivery diagnosis, care, and representations, 2 ALR5th 811.

Liability of physician, nurse, or hospital for failure to contact physician or keep physician sufficiently informed concerning status of mother during pregnancy, labor, and childbirth, 3 ALR5th 123.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper procedures during vaginal delivery, 4 ALR5th 210.

Liability of hospital, physician, or other medical personnel for death or injury to mother caused by improper postdelivery diagnosis, care, and representations, 6 ALR5th 534.

Liability for personal injury or death allegedly caused by defect in church premises, 8 ALR5th 1.

Right of one governmental subdivision to sue another such subdivision for damages, 11 ALR5th 630.

51-1-20.1. Liability of volunteers, employees, or officers of nonprofit association conducting or sponsoring sports or safety program; liability of association.

(a) As used in this Code section, the term:

(1) "Compensation" does not mean or include any gift, any reimbursement for any reasonable expense incurred for the benefit of a nonprofit athletic program, or, in the case of an umpire or referee, a modest honorarium.

(2) "Nonprofit association" means any entity which is organized as a nonprofit corporation or a nonprofit unincorporated association under the laws of this state, including, but not limited to, youth or sports associations, volunteer fire associations, or religious, charitable, fraternal, veterans, civic, county fair, or agricultural associations, or any separately chartered auxiliary of the foregoing, if organized and operated on a nonprofit basis.

(3) "Safety program" means a program designed for education and training with respect to safety and accident prevention as related to

the home, vehicle maintenance and operation, boating, hunting, firearms, self-protection, fire hazards, or other activity which may involve exposures to personal injury or property damage.

(4) "Sports program" means any program or organized activity:

(A) Which conducts any competitive sport which is formally recognized as a sport, on the date on which any cause of action arises to which this Code section is applicable, by the United States Olympic Committee as specified by and under the jurisdiction of the Amateur Sports Act of 1978, Public Law 95-606, 36 U.S.C. Section 371, et seq., the Amateur Athletic Union, or the National Collegiate Athletic Association; and

(B) Which is organized for recreational purposes and related training and education and the activities of which are substantially for such purpose.

(5) "Volunteer" means any person rendering services as a manager, coach, instructor, umpire, or referee, or assistant to such person, who performs such services without compensation.

(b) Except as provided in subsection (c) of this Code section, no person who is a volunteer for a sports program or safety program of a nonprofit association, or any employee or officer of such nonprofit association conducting or sponsoring such sports or safety program, shall be liable to any person as a result of any acts or omissions in rendering such services or in conducting or sponsoring such sports or safety programs if such person was acting in good faith within the scope of his or her assigned duties and unless the conduct of such person amounts to willful and wanton misconduct or gross negligence; provided, however, the defense of immunity is waived as to those actions for the recovery of damages against such persons for which liability insurance protection for such claims has been provided, but such waiver shall only apply to the extent of any liability insurance so provided.

(c) Nothing in this Code section shall be construed as affecting or modifying the liability of such volunteers, employees, officers, or a nonprofit association for acts or omissions relating to the transportation of participants in a sports program or safety program to or from a game, training session, event, or practice, or relating to the care and maintenance of real estate unrelated to the practice, training, or playing areas which such volunteers, employees, officers, or a nonprofit association owns, possesses, or controls.

(d) This Code section shall apply to any cause of action arising on or after July 1, 1988. (Code 1981, § 51-1-20.1, enacted by Ga. L. 1988, p. 383, § 1.)

Cross references. — Required hunter education courses, § 27-2-5. Limited Liability of Owners and Operators of Sport Fishing Locations, T. 27, C. 4, Art. 7.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1989, "owns, possesses, or controls" was substituted for "own, possess, or control" at the end of subsection (c).

Pursuant to Code Section 28-9-5, in 1996, a comma was inserted following "36 U.S.C. Section 371" in subparagraph (a)(4)(A).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — School's Failure to Maintain Children's Play Area Properly, 9 POF2d 729.

Sport Injury — Negligence, 15 POF2d 1.

Playground Accidents — Human Impact Tolerance, 21 POF2d 701.

Negligent Operation or Public Swimming Pool, 34 POF2d 63.

Inadequate Protection of Spectator at Sporting Event, 45 POF2d 407.

Liability for Trampoline Injury, 45 POF2d 469.

Assumption of Risk Defense in Sports or Recreation Injury Cases, 30 POF3d 161.

Liability for Errant Golf Ball Shots, 31 POF3d 87.

Negligent Operation of Gymnasium, Health Club, or Similar Facility, 40 POF3d 111.

51-1-20.2. Liability of child passenger safety technicians.

(a) As used in this Code section, the term:

(1) "Child passenger safety technician" means a person who holds a current certification as a child passenger safety technician or technician instructor by the National Highway Traffic Safety Administration of the United States Department of Transportation, the American Automobile Association, or other entity designated by the National Highway Traffic Safety Administration but specifically does not include any person who is an employee or agent of a manufacturer of child safety seats.

(2) "Child safety seat" means a seat as defined in paragraph (1) of subsection (b) of Code Section 40-8-76.

(3) "Sponsoring organization" means a person or organization other than a manufacturer of or an employee or agent of a manufacturer of child safety seats that:

(A) Offers or arranges for the public a nonprofit child safety seat educational program, checkup event, or fitting station program utilizing child passenger safety technicians; or

(B) Owns property upon which a nonprofit child safety seat educational program, checkup event, or fitting station program for the public occurs utilizing child passenger safety technicians.

(b) A child passenger safety technician or sponsoring organization shall not be liable to any person as a result of any act or omission that occurs solely in the inspection, installation or adjustment of a child

safety seat, or in providing education regarding the installation or adjustment of a child safety seat if the child passenger safety technician or sponsoring organization provides the services without a fee and acts in good faith within the scope of training for which the technician is currently certified and unless the act or omission constitutes willful and wanton misconduct or gross negligence.

(c) Nothing in this Code section shall be construed as affecting, modifying, or eliminating the liability of a manufacturer of a child safety seat or its employees or agents under any legal claim, including but not limited to product liability claims.

(d) This Code section shall apply to any cause of action arising on or after July 1, 2002. (Code 1981, § 51-1-20.2, enacted by Ga. L. 2002, p. 1140, § 1.)

Cross references. — Safety restraints for children six years of age or younger, § 40-8-76.

Law reviews. — For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 339 (2002).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Defective Automobile Child Safety Restraint, 21 POF3d 115.

Proof of Injury Resulting from Defects in Child Safety Seat, 77 POF3d 85.

51-1-21. Liability of owner of watercraft for torts generally.

(a) As used in this Code section, the term:

(1) "Owner" means a person other than a secured party who has title to personal property or who has the use and possession of personal property subject to a security interest.

(2) "Watercraft" means any boat, vessel, or craft, other than a seaplane, used as a means of transportation on water.

(b) The owner of a watercraft shall be liable for any tort caused by the operation of the watercraft, in the same manner and to the same degree as the owner of an automobile is liable for torts caused by its operation. (Code 1933, § 105-108.1, enacted by Ga. L. 1968, p. 1416, § 1.)

Cross references. — Operation of watercraft generally, T. 52, C. 7.

Law reviews. — For article, "Motorboat Collisions and the Family Purpose Doctrine," see 2 Ga. St. B. J. 473 (1966).

JUDICIAL DECISIONS

Family purpose doctrine applies not only to driving of automobiles, but to operation of motorboats as well. Quattlebaum v. Wallace, 156 Ga. App. 519, 275 S.E.2d 104 (1980).

Section is narrowly construed. — Although the family purpose doctrine was extended to a boat by this section, it will not be judicially extended to riding lawnmowers. Maddox v. Queen, 150 Ga. App. 408, 257 S.E.2d 918 (1979).

Application of family purpose doctrine. — There are four requirements for the application of the family purpose doctrine: (1) the owner must have given permission to a family member to drive the vehicle; (2) the owner must have relinquished control of the vehicle to the family member; (3) the family member must be in the vehicle; and (4) the vehicle must be engaged in a family purpose. Quattlebaum v. Wallace, 156 Ga. App. 519, 275 S.E.2d 104 (1980).

Not applicable when control of vehicle assumed without authority. — Trial court erred in finding the family purpose doctrine applicable when the uncontroverted evidence indicates that only the appellant was authorized to operate the motorboat, and the appellant's stepson had in the past only been permitted to drive the boat with the appellant present and presumably in control, when never before the date of the accident had the appellant ever permitted another person to control the operation of the boat, and when the appellant had neither given the appellant's stepson permission to drive the boat on the day in question nor to allow anyone else other than whom the appellant designated to drive the boat. Quattlebaum v. Wallace, 156 Ga. App. 519, 275 S.E.2d 104 (1980).

Cited in Stephens v. Stewart, 118 Ga. App. 811, 165 S.E.2d 572 (1968); Kimbell v. DuBose, 139 Ga. App. 224, 228 S.E.2d 205 (1976); Wallace v. Lessard, 248 Ga. 575, 285 S.E.2d 14 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Admiralty, § 65 et seq.

C.J.S. — 2 C.J.S., Admiralty, § 58 et seq.

ALR. — Action for death caused by maritime tort within a state's territorial waters, 71 ALR2d 1296.

Shipowner's liability to longshoreman for injuries due to aspects of unseaworthiness brought about by acts of stevedore company or latter's servants, 77 ALR2d 829.

Res ipsa loquitur with respect to personal injuries or death on or about ship, 1 ALR3d 642.

Liability for injury to or death of passenger in connection with a fire drill or abandonment-of-ship drill aboard a vessel, 8 ALR3d 650.

Validity, enforceability, and effect of provision in seamen's employment contract stipulating the maximum recovery for scheduled personal injuries, 9 ALR3d 417.

Liability of owner of powerboat for injury or death allegedly caused by one permitted to operate boat by owner, 71 ALR3d 1018.

Liability of owner or operator of boat livery for injury to patron, 94 ALR3d 876.

Liability of owner or operator of powered pleasure boat for injuries to swimmer or bather struck by boat, 98 ALR3d 1127.

Liability of owner or operator of pleasure boat for injury or death of guest passenger, 35 ALR4th 104.

Liability for injuries to, or death of water skiers, 34 ALR5th 77.

51-1-22. Owner's liability for negligent operation of vessel; express or implied consent prerequisite.

The owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of the vessel, whether the

negligence consists of a violation of the statutes of this state or of neglecting to observe such ordinary care in such operation as the rules of common law require. The owner shall not be liable, however, unless the vessel is being used with his or her express or implied consent. It shall be presumed that the vessel is being operated with the knowledge and consent of the owner if, at the time of the injury or damage, the vessel is under the control of his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the owner's family. Nothing contained in this Code section shall be construed to relieve any other person from any liability which he would otherwise have nor shall anything contained in this Code section be construed to authorize or permit any recovery in excess of injury or damage actually incurred. (Ga. L. 1968, p. 487, § 10; Ga. L. 1973, p. 1427, § 20.)

Cross references. — Operation of watercraft generally, T. 52, C. 7.

Law reviews. — For article, "Motorboat Collisions and the Family Purpose Doctrine," see 2 Ga. St. B. J. 473 (1966).

JUDICIAL DECISIONS

Constitutionality. — In the absence of any cases addressing the constitutionality of owner-consent statutes with regard to boats, the reasoning of owner-consent automobile cases which have been held constitutional has equal application to boats. Therefore, O.C.G.A. § 51-1-22 is constitutional. Gunn v. Booker, 259 Ga. 343, 381 S.E.2d 286 (1989).

Statutory presumption does not codify family purpose doctrine. — Presumption of O.C.G.A. § 51-1-22 that a vessel is being operated with the owner's consent if it is under the control of an immediate family member is not a codification of the family purpose doctrine but is merely an evidentiary tool to aid a plaintiff in proving consent. The presumption cannot be confined solely to the members of an owner's household. Gunn v. Booker, 259 Ga. 343, 381 S.E.2d 286 (1989).

O.C.G.A. § 51-1-22 has two prongs. It first provides that the owner of a vessel shall be liable for any injury or damage occasioned by the negligent operation of such vessel while such vessel is being used with the owner's consent, either express or implied, and to this extent that section is broader than the family purpose doctrine. The section goes on to provide that it shall be presumed that the vessel is being operated with the owner's consent if it is under the control of an immediate family member. This presumption is akin to the family purpose doctrine. Wallace v. Lessard, 248 Ga. 575, 285 S.E.2d 14 (1981).

Presumption referred to in O.C.G.A. § 51-1-22 obtains only when the boat is under the control on an immediate member of the owner's family. Wallace v. Lessard, 158 Ga. App. 772, 282 S.E.2d 153, aff'd, 248 Ga. 575, 285 S.E.2d 14 (1981).

No liability if no negligence or misfeasance. — Regardless of state law characterization, the federal Tort Claims Act, 28 U.S.C. § 2671 et seq., itself precludes the imposition of liability if there has been no negligence or other form of misfeasance and nonfeasance on the part of the government. Craine v. United States, 722 F.2d 1523 (11th Cir. 1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Admiralty, § 62 et seq.

C.J.S. — 2 C.J.S., Admiralty, § 58 et seq.

ALR. — Law of general average as affected by fact that necessity for sacrifice or expenditure was due to negligent navigation, 25 ALR 154.

Liability of owner or operator of motorboat for injury or damage, 63 ALR2d 343; 71 ALR3d 1018; 98 ALR3d 1018.

Liability for marine collision as affected by failure to provide or use radar on vessel, 82 ALR2d 764.

Shipowner's liability for injury caused to seaman or longshoreman by cargo or its stowage, 90 ALR2d 710.

Res ipsa loquitur with respect to personal injuries or death on or about ship, 1 ALR3d 642.

Liability for injury to or death of passenger in connection with a fire drill or abandonment-of-ship drill aboard a vessel, 8 ALR3d 650.

Liability of owner of powerboat for injury or death allegedly caused by one permitted to operate boat by owner, 71 ALR3d 1018.

Liability of owner or operator of boat livery for injury to patron, 94 ALR3d 876.

Liability of owner or operator of powered pleasure boat for injuries to swimmer or bather struck by boat, 98 ALR3d 1127.

51-1-23. Sale of unwholesome provisions.

Any person who knowingly or negligently sells unwholesome provisions of any kind to another person, the defect being unknown to the purchaser, by the use of which damage results to the purchaser or to his family, shall be liable in damages for such injury. (Orig. Code 1863, § 2945; Code 1868, § 2952; Code 1873, § 3003; Code 1882, § 3003; Civil Code 1895, § 3864; Civil Code 1910, § 4460; Code 1933, § 105-1101.)

Cross references. — Warranties relating to sales of goods, § 11-2-312 et seq. Adulterated food, § 26-2-26.

Law reviews. — For comment on Davis v. Williams, 58 Ga. App. 274, 198 S.E. 357 (1938), see 1 Ga. B. J. 41 (1939).

JUDICIAL DECISIONS

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General Consideration
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General Consideration

This section is applicable to principals and not agents. Crosby v. Calaway, 65 Ga. App. 266, 16 S.E.2d 155 (1941).

Liability of vendor is not that of insurer. Rowe v. Louisville & N.R.R., 29 Ga. App. 151, 113 S.E. 823 (1922).

Emotional distress. — Summary judgment pursuant to O.C.G.A. § 9-11-56(c) to a restaurant was properly granted by a trial court in an action by a restaurant patron, alleging that the patron suffered emotional distress when the patron discovered two blood spots on the french fry container, as the patron feared contracting HIV or hepatitis, because the patron failed to provide evidence of more than the patron's "fear" that the patron had been exposed to the diseases; accordingly, the patron's claims for negligence, negligence per se, and breach of the implied warranty of merchantability, under O.C.G.A. §§ 11-2-314 and 51-1-23, failed due to the patron's failure to meet the damages requirement. Wilson v. J & L Melton, Inc., 270 Ga. App. 1, 606 S.E.2d 47 (2004).

Knowledge of defect or negligence by supplier essential to action. — With respect to the sale of specified articles intended for human consumption or use, either knowledge of the defect or negli-

gence by the seller is an essential element. Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967).

Actual knowledge not necessary if defendant ought to have known food was bad. — It is not necessary that it appear that the defendant had actual knowledge that food sold was unwholesome or spoiled and contaminated, but it is sufficient if it appears that the defendant ought to have known of the bad condition of the food. Dupee v. Great Atl. & Pac. Tea Co., 69 Ga. App. 144, 24 S.E.2d 858 (1943).

Plaintiff must establish negligence either in law or fact. — In a suit for damages against a seller of unwholesome food the plaintiff may establish negligence as a matter of fact, or the plaintiff may show negligence as a matter of law by establishing a breach of a statutory duty imposed by the provisions of the pure food and drug laws, or the plaintiff may rely on both classes of negligence. Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949).

Persons who engage in business of furnishing food for human consumption are bound to exercise due care and diligence respecting the food's fitness and those persons may be held liable in damages, if, by reason of any negligence on their part, contaminated and spoiled or unwholesome food is sold and persons are made ill and suffer damages as the result of eating such food. Dupee v. Great Atl. & Pac. Tea Co., 69 Ga. App. 144, 24 S.E.2d 858 (1943).

Ordinary care is proper degree of care. — Degree of care required of the defendant baking company, in preparing a pie which allegedly made the plaintiffs ill, was ordinary care. Criswell Baking Co. v. Milligan, 77 Ga. App. 861, 50 S.E.2d 136 (1948).

Violation not negligence per se. — Liability described by this section is simply the common law liability for injury to another through negligence, as a matter of fact, and a violation of this section, which refers to private rights and based on common law principles, is not negligence per se. Burns v. Colonial Stores, Inc., 90 Ga. App. 492, 83 S.E.2d 259 (1954).

Violation of other regulatory statutes may constitute negligence per se. — Evidence authorized the jury to find that the defendant, in selling fish to the plaintiff, violated the former version of the pure-food statute and therefore was guilty of negligence as a matter of law. Southern Grocery Stores, Inc. v. Donehoo, 59 Ga. App. 212, 200 S.E. 335 (1938).

General allegations of negligence sufficient in pleadings. — Petition charging the defendant with negligence in selling impure food resulting in injury need not set out specific acts of negligence on the part of the defendant, in order to withstand the test of a motion to dismiss; but such general allegations as that the defendant was negligent in selling such food when the defendant knew or by the exercise of ordinary care could have known that this would result in injury are to be deemed sufficient in law. Howard v. Phillips, 44 Ga. App. 233, 161 S.E. 163 (1931).

Description of the substance contained in the pie, by the use of language "that defendant was negligent in permitting said putrid, tainted, impure, deleterious, unwholesome, and poisonous substance to become an ingredient of said product" and similar language, was sufficient to put the defendant on notice of the nature and what caused the illness of and damage to the plaintiffs. Criswell Baking Co. v. Milligan, 77 Ga. App. 861, 50 S.E.2d 136 (1948).

Not necessary to allege knowledge by defendant. — It is not necessary to aver that the defendant knew of the injurious quality of the food. It is sufficient if it appears that the defendant ought to have known of it and was negligent in furnishing unwholesome food, by reason whereof the plaintiff was injured. McPherson v. Capuano & Co., 31 Ga. App. 82, 121 S.E. 580 (1923).

Plaintiff should allege plantiff's own lack of fault. — When, in a suit against the seller of allegedly poison bootleg whisky, the petition was silent as to whether or not the defect was unknown to the purchaser and whether the purchaser was without negligence on the purchaser's own part in exercising the degree of diligence required by law, this was a fatal

General Consideration (Cont'd)

defect in the petition. Rivers v. Weems, 208 Ga. 783, 69 S.E.2d 756 (1952).

Plaintiff's prima facie case. — When the plaintiff established the unwholesome quality of the food, with injury from the food's consumption, these facts in themselves would sufficiently speak of the defendant's negligence to make a prima facie case; and until the defendant is exonerated, the jury would be authorized to apply the maxim res ipsa loquitur, and to find such issue in favor of the plaintiff. Criswell Baking Co. v. Milligan, 77 Ga. App. 861, 50 S.E.2d 136 (1948).

Proof of merely becoming sick after eating food insufficient. — Proof by one claiming to have been injured by eating food furnished to one at a public restaurant or delicatessen, merely that one ate the food and in consequence became sick, would not establish the averment that the food was unwholesome. McPherson v. Capuano & Co., 31 Ga. App. 82, 121 S.E. 580 (1923).

To establish a claim under O.C.G.A. § 51-1-23 there must be evidence that the food was unwholesome. A mere showing that a person became sick subsequent to eating food is insufficient. Stevenson v. Winn-Dixie Atlanta, Inc., 211 Ga. App. 572, 440 S.E.2d 465 (1993).

Jury instruction on defendant's burden to rebut prima facie case. — Charge of the court that when the plaintiffs might establish the unwholesome quality of food and establish injury from the food's consumption, and establish that the food as consumed by them was in the same condition as when it left the custody, possession, and control of the defendant, these facts in themselves would sufficiently set forth the defendant's negligence and make out a prima facie case, and the burden would be upon the defendant to show that the defendant used due care in the premises was not error against the defendant. Criswell Baking Co. v. Milligan, 77 Ga. App. 861, 50 S.E.2d 136 (1948).

Cited in Smith v. Williams, 117 Ga. 782, 45 S.E. 394, 97 Am. St. R. 220 (1903); Fleetwood v. Swift & Co., 27 Ga. App. 502, 108 S.E. 909 (1921); Maddox Coffee Co. v. Collins, 46 Ga. App. 220, 167 S.E. 306 (1932); Davis v. Williams, 58 Ga. App. 274, 198 S.E. 357 (1938); Donaldson v. Great Atl. & Pac. Tea Co., 186 Ga. 870, 199 S.E. 213 (1938); H.J. Heinz Co. v. Fortson, 62 Ga. App. 130, 8 S.E.2d 443 (1940); Armour & Co. v. Roberts, 63 Ga. App. 846, 12 S.E.2d 376 (1940); Yeo v. Pig & Whistle Sandwich Shops, Inc., 83 Ga. App. 91, 62 S.E.2d 668 (1950); Bailey v. F.W. Woolworth, Inc., 106 Ga. App. 264, 126 S.E.2d 686 (1962); Chambley v. Apple Restaurants, Inc., 233 Ga. App. 498, 504 S.E.2d 551 (1998).

Applicability to Specific Cases

Bagel distributor. — Even though bagels were not packaged or wrapped when sold at retail, a distributor was not liable for injuries caused by a staple baked into a bagel, since the distributor could not be expected to open for inspection individual bagels baked by another. Thomasson v. Rich Prods. Corp., 232 Ga. App. 424, 502 S.E.2d 289 (1998).

Beverage bottler. — Manufacturer who makes and bottles for public consumption a beverage represented to be harmless and refreshing is under a legal duty not to negligently allow a foreign substance which is injurious to the human stomach, such as bits of broken glass, to be present in a bottle of the beverage when it is placed on sale; and one who, relying on this obligation and without negligence on one's own part, swallows several pieces of glass while drinking the beverage from a bottle, may recover from the manufacturer for injuries sustained in consequence. Atlanta Coca-Cola Bottling Co. v. Shipp, 41 Ga. App. 705, 154 S.E. 385 (1930).

It cannot be said as a matter of law that the plaintiff, in drinking from the bottle of Coca-Cola which had previously been unopened, without first making an examination of its contents, was, as a matter of law, guilty of such a failure to exercise ordinary care for the plaintiff's own safety as would bar a recovery, or that the jury was not authorized, despite the evidence on behalf of the defendant as to the manner and method and degree of care exercised by it in conducting its business of bottling beverages, to apply the doctrine

of res ipsa loquitur and find against the defendant upon the issue as to its negligence. Cordell v. Macon Coca-Cola Bottling Co., 56 Ga. App. 117, 192 S.E. 228 (1937).

Whether the defendant bottlers and vendors exercised due care and diligence in performing the defendants' admitted duty not to sell a bottle of Coca-Cola with flies in it, and whether the plaintiff, by the exercise of ordinary care, could have avoided the alleged injury to the plaintiff resulting from the alleged negligence of the defendants, were questions of fact for a jury. Cordell v. Macon Coca-Cola Bottling Co., 56 Ga. App. 117, 192 S.E. 228 (1937).

Case brought against the bottling company by an individual who purchased and drank a portion of a soft drink containing a dead roach was one which under the evidence should have been submitted to a jury on the question of negligence, and it was error to grant a nonsuit. Whited v. Atlantic Coca-Cola Bottling Co., 88 Ga. App. 241, 76 S.E.2d 408 (1953).

Ice cream retail dealer. — Retail dealer who dispenses ice cream to the dealer's customers by removing the ice cream in small quantities from the container in which the ice cream was furnished to the dealer by the manufacturer, and the servant of the dealer who actually serves and dispenses the ice cream by removing the ice cream from the container to be delivered to the customer, owe a duty to the customer to exercise ordinary care to see that the ice cream so furnished is free from harmful and deleterious foreign matter, notwithstanding the ice cream, when furnished by the dealer to the customer, contained therein glass as a result of the negligence of the manufacturer. Crowley v. Lane Drug Stores, Inc., 54 Ga. App. 859, 189 S.E. 380 (1937).

In a suit by the customer against the manufacturer of ice cream, the dealer, and the servant of the dealer, to recover damages for injuries alleged to have been received by the plaintiff when consuming ice cream with glass in the ice cream which had been served to the plaintiff as a customer of the dealer, since the evidence indicated that the glass was in the ice cream when delivered from the manufacturer to the dealer, a verdict for the plaintiff against the defendants would have been authorized. Crowley v. Lane Drug Stores, Inc., 54 Ga. App. 859, 189 S.E. 380 (1936).

Vehicle manufacturer. — Because Georgia law prohibited recovery for wrongful death under a theory of breach of warranty pursuant to O.C.G.A. § 51-1-23, a warranty claim brought by parents based on the death of their daughter in an auto accident failed on summary judgment. Davenport v. Ford Motor Co., No. 1:05-cv-3047-WSD, 2007 U.S. Dist. LEXIS 91245 (N.D. Ga. Dec. 11, 2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 63 Am. Jur. 2d, Products Liability § 1 et seq.

Am. Jur. Proof of Facts. — Foreign Substance in Food or Beverage, 30 POF2d 1.

Food Poisoning, 31 POF2d 31.

Cigarette Manufacturer's Liability for Mesothelioma Caused by Asbestos Fibers in Cigarette Filters, 39 POF3d 181.

C.J.S. — 72A C.J.S. Supp., Products Liability, § 1 et seq.

ALR. — Presumption of negligence from foreign substance in food, 4 ALR 1559; 47 ALR 148; 105 ALR 1039; 171 ALR 1209.

Seller's duty to ascertain at his peril that articles of food conform to food regulations, 28 ALR 1385.

Illness after partaking of food or drink as evidence of negligence on part of one who prepared or sold it, 49 ALR 592.

Statutory provisions relating to purity of food products as applicable to foreign substances which get into product as result of accident or negligence, and not by purpose or design, 98 ALR 1496.

Knowledge or actual negligence on part of seller which is not an element of criminal offense under penal statute relating sale of unfit food or other commodity, as condition of civil action in tort in which violation of the statute is relied upon as

negligence per se or evidence of negligence, 128 ALR 464.

Infected or tainted condition of milk or other food, or contamination in water, and its causation of the sickness of the consumer, as inferable from such sickness, 130 ALR 616.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, 140 ALR 191; 142 ALR 1490.

Implied warranty of reasonable fitness of food for human consumption as breached by substance natural to the original product and not removed in processing, 143 ALR 1421.

Implied warranty of fitness by one serving food, 7 ALR2d 1027; 87 ALR4th 804; 90 ALR4th 12.

Recovery for loss of business resulting from resale of unwholesome food or beverages furnished by another, 17 ALR2d 1379.

Liability of manufacturer or seller for injury caused by food or food product sold, 77 ALR2d 7.

Liability of manufacturer or seller for injury caused by beverage sold, 77 ALR2d 215.

Master and servant: employer's liability for injury caused by food or drink purchased by employee in plant facilities, 50 ALR3d 505.

Products liability: necessity and sufficiency of identification of defendant as manufacturer or seller of product alleged to have caused injury, 51 ALR3d 1344.

Liability of water supplier for damages resulting from furnishing impure water, 54 ALR3d 936.

Liability of packer, foodstore, or restaurant for causing trichinosis, 96 ALR3d 451.

Liability for injury or death allegedly caused by spoilage or contamination of beverage, 87 ALR4th 804.

Liability for injury or death allegedly caused by foreign substance in beverage, 90 ALR4th 12.

Liability for injury or death allegedly caused by foreign object in food or food product, 1 ALR5th 1.

Liability for injury or death allegedly caused by spoilage, contamination, or other deleterious condition of food or food product, 2 ALR5th 1.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product, 2 ALR5th 189.

51-1-24. Sale of adulterated drugs or alcoholic beverages.

Any person who knowingly or negligently, by himself or his agent, sells adulterated drugs or alcoholic beverages to another person, by the use of which damage accrues to the purchaser, his patients, his family, or his property, shall be liable in damages for the injury done. (Orig. Code 1863, § 2946; Code 1868, § 2953; Code 1873, § 3004; Code 1882, § 3004; Civil Code 1895, § 3865; Civil Code 1910, § 4461; Code 1933, § 105-1102.)

Cross references. — Warranties relating to sales of goods generally, § 11-2-312 et seq. Pharmacists and pharmacies generally, § 26-4-1 et seq.

Law reviews. — For note, "Does the National Childhood Vaccine Injury Compensation Act Really Prohibit Design Defect Claims?: Examining Federal Preemption in Light of American Home Products Corp. v. Ferrari," see 26 Ga. St. U.L. Rev. 617 (2010).

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Knowledge of defect or negligence by supplier essential to action. — With respect to the sale of specified articles intended for human consumption or use,

either knowledge of the defect or negligence by the seller is an essential element. Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967).

Druggist not liable when druggist had no knowledge of adulterated condition. — Druggist who sold to customer an original unbroken package of proprietary medicine which was called for by the customer was not guilty of negligence because the contents of such package were "old, aged, stale, worm-eaten, deleterious, and unfit" for human consumption, when it did not appear that the druggist knew of such condition. Howard v. Jacobs' Pharmacy Co., 55 Ga. App. 163, 189 S.E. 373 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 63 Am. Jur. 2d, Products Liability, § 570 et seq. 63A Am. Jur. 2d, Products Liability, §§ 1067, 1133, 1138. 63B Am. Jur. 2d, Products Liability, §§ 1919, 1920.

Am. Jur. Pleading and Practice Forms. — 8C Am. Jur. Pleading and Practice Forms, Drugs, Narcotics, and Poisons, § 13 et seq.

Am. Jur. Proof of Facts. — Injuries from Drugs, 7 POF3d 1.

C.J.S. — 28 C.J.S. Drugs and Narcotics, §§ 14, 36 et seq.

ALR. — Liability of manufacturer or seller for injury caused by beverage sold, 77 ALR2d 215.

Liability of manufacturer or seller for injury caused by drug or medicine sold, 79 ALR2d 301.

Liability, under dramshop acts, of one who sells or furnishes liquor otherwise than in operation of regularly established liquor business, 8 ALR3d 1412.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive, 70 ALR3d 315.

Liability of manufacturer or seller for injury or death allegedly caused by failure to warn regarding danger in use of vaccine or prescription drug, 94 ALR3d 748.

Liability of manufacturer of oral live polio (Sabin) vaccine for injury or death from its administration, 66 ALR4th 83.

Liability for injury or death allegedly caused by spoilage or contamination of beverage, 87 ALR4th 804.

Liability for injury or death allegedly caused by foreign substance in beverage, 90 ALR4th 12.

Malpractice: physician's liability for injury or death resulting from side effects of drugs intentionally administered to or prescribed for patient, 47 ALR5th 433.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive, 54 ALR5th 1.

51-1-25. Furnishing of wrong article or medicine by vender of drugs and medicines.

If a vender of drugs and medicines, by himself or his agent, either knowingly or negligently furnishes the wrong article or medicine and damage accrues to the purchaser, his patients, his family, or his property from the use of the drug or medicine furnished, the vender shall be liable for the injury done. (Orig. Code 1863, § 2947; Code 1868, § 2954; Code 1873, § 3005; Code 1882, § 3005; Civil Code 1895, § 3866; Civil Code 1910, § 4462; Code 1933, § 105-1103.)

Cross references. — Pharmacists and pharmacies generally, § 26-4-1 et seq.

Law reviews. — For note, "Does the National Childhood Vaccine Injury Compensation Act Really Prohibit Design Defect Claims?: Examining Federal Preemption in Light of American Home Products Corp. v. Ferrari," see 26 Ga. St. U.L. Rev. 617 (2010).

JUDICIAL DECISIONS

Codification of common-law duty. — O.C.G.A. § 51-1-25 does nothing more than codify, with respect to vendors of drugs and medicines, the general common-law duty of all persons to exercise reasonable care and diligence to avoid injuring others. Sparks v. Kroger Co., 200 Ga. App. 135, 407 S.E.2d 105 (1991).

Druggist impliedly warrants that article druggist sells is article called for, and is liable for breach of such warranty for injury resulting in giving the purchaser the wrong article. Watkins v. Jacobs Pharmacy Co., 48 Ga. App. 38, 171 S.E. 830 (1933).

Legal doctrine caveat emptor should in cases of vendors of drugs be caveat vendor. Watkins v. Jacobs Pharmacy Co., 48 Ga. App. 38, 171 S.E. 830 (1933).

Knowledge of defect or negligence by supplier essential to action. — With respect to the sale of specified articles intended for human consumption or use, either knowledge of the defect or negligence by the seller is an essential element. Lovett v. Emory Univ., Inc., 116 Ga. App. 277, 156 S.E.2d 923 (1967).

Professional malpractice. — When a vendor of drugs or medicines is a licensed pharmacist and is sued on the basis of allegations that the pharmacist negligently dispensed the wrong drug in filling a medical prescription, the claim against the pharmacist clearly is for professional malpractice. Sparks v. Kroger Co., 200 Ga. App. 135, 407 S.E.2d 105 (1991).

There is nothing in O.C.G.A. § 51-1-25 which would obviate the need for compliance with O.C.G.A. § 9-11-9.1, which requires an affidavit to accompany a charge of professional malpractice. Sparks v. Kroger Co., 200 Ga. App. 135, 407 S.E.2d 105 (1991).

Cited in Lewis v. Brannen, 6 Ga. App. 419, 65 S.E. 189 (1909); Jacobs Pharmacy Co. v. Gipson, 116 Ga. App. 760, 159 S.E.2d 171 (1967).

RESEARCH REFERENCES

Am. Jur. 2d. — 63 Am. Jur. 2d, Products Liability, § 570 et seq. 63A Am. Jur. 2d, Products Liability, §§ 1067, 1133, 1138. 63B Am. Jur. 2d, Products Liability, §§ 1919, 1920.

C.J.S. — 28 C.J.S., Drugs and Narcotics, § 40 et seq.

ALR. — Liability of druggist for injury in consequence of mistake, 31 ALR 1336; 44 ALR 1482.

Liability of druggist for punitive damages, 31 ALR 1362.

Civil liability of pharmacist who fills accurately an improper prescription or one calling for an unusual dose, 80 ALR 452.

Liability of manufacturer or seller for injury caused by drug or medicine sold, 79 ALR2d 301.

Hospital's liability for negligence in connection with preparation, storage, or dispensing of drug or medicine, 9 ALR3d 579.

Malpractice: doctor's liability for mistakenly administering drug, 23 ALR3d 1334.

Druggist's civil liability for suicide consummated with drugs furnished by him, 58 ALR3d 828.

Liability of manufacturer or seller for injury or death allegedly caused by failure to warn regarding danger in use of vaccine or prescription drug, 94 ALR3d 748.

Promotional efforts directed toward prescribing physician as affecting prescription drug manufacturer's liability for product-caused injury, 94 ALR3d 1080.

Druggist's civil liability for injuries sustained as result of negligence in incorrectly filling drug prescriptions, 3 ALR4th 270.

Liability of pharmacist who accurately fills prescription for harm resulting to user, 44 ALR5th 393.

51-1-26. Survivability of actions under Code Sections 51-1-23 through 51-1-25.

If death ensues as a result of any injury or damage in any case arising under Code Section 51-1-23, 51-1-24, or 51-1-25, the right of action for such death shall survive as provided in Chapter 4 of this title. (Orig. Code 1863, § 2947; Code 1868, § 2954; Code 1873, § 3005; Code 1882, § 3005; Civil Code 1895, § 3866; Civil Code 1910, § 4462; Code 1933, § 105-1104.)

RESEARCH REFERENCES

Am. Jur. 2d. — 22A Am. Jur. 2d, Death, §§ 72 et seq., 103 et seq.

C.J.S. — 25A C.J.S., Death, §§ 23, 124 et seq.

ALR. — Validity of exception for specific kind of tort action in survival statute, 77 ALR3d 1349.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged, 30 ALR4th 707.

51-1-27. Recovery for medical malpractice authorized.

A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which a recovery may be had. (Orig. Code 1863, § 2915; Code 1868, § 2922; Code 1873, § 2973; Code 1882, § 2973; Civil Code 1895, § 3831; Civil Code 1910, § 4427; Code 1933, § 84-924.)

Cross references. — Time limitations for bringing of actions for medical malpractice, § 9-3-70 et seq. Giving of consent for surgical or medical treatment, T. 31, C. 9. Observance of provisions of "living wills" by physicians and other health-care professionals, § 31-32-7. Recovery in tort for malpractice of chiropractor, § 43-9-16. Regulation of practice of physicians generally, § 43-34-20 et seq. Suspension of license to practice medicine and other disciplining of physicians, § 43-34-37.

Law reviews. — For article, "No-Fault Insurance for Injuries Arising From Medical Treatment: A Proposal for Elective Coverage," see 24 Emory L.J. 21 (1975). For article analyzing the trend in this country toward no-fault liability, see 25 Emory L.J. 163 (1976). For article, "Baby Doe Cases: Compromise and Moral Dilemma," see 34 Emory L.J. 545 (1985). For annual survey of law of torts, see 38 Mercer L. Rev. 351 (1986). For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

For note, "Summary Judgment in Medical Malpractice Actions," see 7 Ga. St. B. J. 470 (1971). For note, "Informed Consent: The Illusion of Patient Choice," see 23 Emory L.J. 503 (1974).

For comment on Specht v. Gaines, 65 Ga. App. 782, 16 S.E.2d 507 (1941), see 4 Ga. B. J. 49 (1942). For comment on Saffold v. Scarborough, 91 Ga. App. 628, 86 S.E.2d 649 (1955), holding that the running of the statute of limitations for medical malpractice was properly postponed due to allegations of fraud, and suit for alleged malpractice instituted within two years after the discovery of such fraud was not barred, see 18 Ga. B. J. 79 (1955). For comment on Carroll v. Griffin, 96 Ga. App. 826, 101 S.E.2d 764 (1958), affirming a verdict for defendant-doctor when pa-

tient failed to prove he had been abandoned by the physician, see 21 Ga. B. J. 105 (1958). For comment on Hayes v. Brown, 108 Ga. App. 360, 133 S.E.2d 102 (1963), see 26 Ga. B. J. 456 (1964). For comment on Gian-Cursio v. State, Epstein v. State, 180 So.2d 396 (Fla. 1965), as to the appropriate school of practice for expert witnesses testifying in chiropractor malpractice cases, see 18 Mercer L. Rev. 292 (1966). For comment, "Legislative Limitations on Medical Malpractice Damages: The Chances of Survival," see 37 Mercer L. Rev. 1583 (1986). For comment, "Medical Expert Systems and Publisher Liability: A Cross-Contextual Analysis," see 43 Emory L.J. 731 (1994).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Special Cases
1. Dentists
2. Hospitals
3. Unlicensed Practitioners
4. Surgeons
Pleading and Practice

General Consideration

Basis for a malpractice action is provided in this section. Hayes v. Brown, 108 Ga. App. 360, 133 S.E.2d 102 (1963).

Malpractice defined. — Malpractice is a particular form of negligence which consists in not applying to the exercise of the practice of medicine that degree of care and skill which is ordinarily employed by the profession generally under similar conditions and like surrounding circumstances. Johnson v. Myers, 118 Ga. App. 773, 165 S.E.2d 739 (1968).

Cause of action for malpractice brought either in tort or in contract. — Under Georgia law, malpractice actions may be brought either in tort or in contract and when a physician undertakes to treat a patient, even when there is no express agreement, an implied contract arises and the doctor impliedly warrants that the doctor possesses the requisite skill to perform the treatment undertaken and that the doctor will exercise ordinary skill and care. Scott v. Simpson, 46 Ga. App. 479, 167 S.E. 920 (1933); Wolfe v. Virusky, 306 F. Supp. 519 (S.D. Ga. 1969), rev'd on other grounds, 470 F.2d 831 (5th Cir. 1972).

Elements of liability. — There are three essential elements imposing liability upon which recovery is bottomed: (1) the duty inherent in the doctor-patient relationship; (2) the breach of that duty by failing to exercise the requisite degree of skill and care; and (3) that this failure be the proximate cause of the injury sustained. Negligence alone is insufficient to sustain recovery. It must be proven that the injury complained of proximately resulted from such want of care or skill. A bare possibility of such result is not sufficient. Goggin v. Goldman, 209 Ga. App. 251, 433 S.E.2d 85 (1993).

In a medical malpractice case, the trial court erred in denying the doctor's motion for summary judgment because, even though the medical records listed the doctor as the child's pediatrician and the coding summary indicated that the doctor provided certain treatments to the child, the director of medical records for the medical center stated in an affidavit that, because the parent had not selected a pediatrician, the pediatrician who was on call at the time of the baby's birth was assigned automatically as the admitting and attending physician in the child's chart; the doctor presented evidence that the doctor did not treat the mother or the child; and the mother failed to establish the existence of a doctor-patient relationship. Tomeh v. Bohannon, 329 Ga. App. 596, 765 S.E.2d 743 (2014).

There are three essential elements imposing liability upon which recovery

is bottomed: (1) the duty inherent in the doctor-patient relationship; (2) the breach of that duty by failing to exercise the requisite degree of skill and care; and (3) that this failure is the proximate cause of the injury sustained. Hawkins v. Greenberg, 166 Ga. App. 574, 304 S.E.2d 922 (1983).

Sexual relationship with a patient. — Patient could not bring a medical malpractice claim under O.C.G.A. § 51-1-27 against a family doctor for interference with the patient's marriage, loss of affection, or depression and anxiety that resulted from the doctor having an affair with the patient's wife because O.C.G.A. § 51-1-17 abolished torts claims for adultery and alienation of affections. The patient failed to allege an error of professional skill or judgment with regard to the doctor's care. Witcher v. McGauley, 316 Ga. App. 574, 730 S.E.2d 56 (2012).

Physician's implied contract. — Whenever a physician undertakes to treat a patient, an implied contract arises that the physician possesses the necessary ordinary skill and experience possessed by those who practice the profession, and that the physician will use such ordinary care and skill in treating the patient, and likewise an implied promise or obligation arises that such patient will compensate the physician in a reasonable sum for such services. Scott v. Simpson, 46 Ga. App. 479, 167 S.E. 920 (1933).

This section is applicable to physician who specializes in administering X-ray treatment. Kuttner v. Swanson, 59 Ga. App. 818, 2 S.E.2d 230 (1939); Mason v. Hall, 72 Ga. App. 867, 35 S.E.2d 478 (1945).

Provisions of this section apply also to a licensed dentist in the practice of the dentist's profession. Bryan v. Grace, 63 Ga. App. 373, 11 S.E.2d 241 (1940); Specht v. Gaines, 65 Ga. App. 782, 16 S.E.2d 507 (1941).

This section is applicable to chiropractor who performs acts usually done by surgeon, and the giving of this section in charge is not error even if the chiropractor had done no act of surgery or administering medicine. Mims v. Ragland, 59 Ga. App. 703, 2 S.E.2d 174 (1939); Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366 (1969).

Impact rule does not apply to medical malpractice actions. — Trial court should not have granted a psychiatrist summary judgment in a patient's medical malpractice action because the court erred in applying the impact rule; the medical malpractice statute, O.C.G.A. § 51-1-27, 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," and there is no rational basis for applying the rule to causes of action sounding in medical malpractice. Bruscato v. O'Brien, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

Policy concerns traditionally given for having the impact rule and denying recovery for emotional distress unrelated to physical injuries are not present in medical malpractice cases because such cases require a physician-patient relationship between the defendant and the plaintiff; consequently, there is no question to be resolved regarding the emotional impact of the defendant's alleged negligence on third parties or bystanders, nor is there concern about a "flood of litigation" arising from such negligence, and the concern about avoiding fraudulent or frivolous lawsuits is already addressed by the strict pleading requirements of O.C.G.A. § 9-11-9.1, the purpose of which is to reduce the number of frivolous malpractice suits being filed. Bruscato v. O'Brien, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

Requisite standard of care and skill is that employed by profession generally. — Standard of care and skill fixed by the statute, when applied to the facts and circumstances of any particular case, must be taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by the profession generally. Radcliffe v. Maddox, 45 Ga. App. 676, 165 S.E. 841 (1932); Kuttner v. Swanson, 59 Ga. App. 818, 2 S.E.2d 230 (1939); Lord v. Claxton, 62 Ga. App. 526, 8 S.E.2d 657 (1940); Bryan v. Grace, 63 Ga. App. 373, 11 S.E.2d 241 (1940); Specht v. Gaines, 65 Ga. App. 782, 16 S.E.2d 507 (1941); Mason v. Hall, 72 Ga. App. 867, 35 S.E.2d 478 (1945); Webb v. Sandoz Chem. Works, Inc., 85 Ga. App. 405, 69 S.E.2d 689 (1952); Hayes v.

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Brown, 108 Ga. App. 360, 133 S.E.2d 102 (1963); Rahn v. United States, 222 F. Supp. 775 (S.D. Ga. 1963); Mull v. Emory Univ., Inc., 114 Ga. App. 63, 150 S.E.2d 276 (1966); Starr v. Fregosi, 370 F.2d 15 (5th Cir. 1966); Williams v. Ricks, 152 Ga. App. 555, 263 S.E.2d 457 (1979); Fain v. Moore, 155 Ga. App. 209, 270 S.E.2d 375 (1980); Robertson v. Emory Univ. Hosp., 611 F.2d 604 (5th Cir. 1980); Wagner v. Timms, 158 Ga. App. 538, 281 S.E.2d 295 (1981); Blount v. Moore, 159 Ga. App. 80, 282 S.E.2d 720 (1981); Hawkins v. Greenberg, 159 Ga. App. 302, 283 S.E.2d 301 (1981), aff'd, 166 Ga. App. 574, 304 S.E.2d 922 (1983); but see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Reasonable belief standard. — Standard determining whether a procedure was "therapeutically necessary" is whether the doctor exercised that degree of care, skill, and diligence which any other surgeon in the community would be required to employ in reaching a decision under the same or similar circumstances, in other words, the reasonable belief standard. Davidson v. Shirley, 616 F.2d 224 (5th Cir. 1980).

Standard not limited to local practices. — This section, which provides the "reasonable degree of care and skill" standard in the practice of medicine, does not further circumscribe the requirement by limiting it to locality. Murphy v. Little, 112 Ga. App. 517, 145 S.E.2d 760 (1965); Williams v. Ricks, 152 Ga. App. 555, 263 S.E.2d 457 (1979).

Georgia law requires evidence of compliance with the standards of the medical profession generally and not compliance with local standards. Summerour v. Saint Joseph's Infirmary, Inc., 160 Ga. App. 187, 286 S.E.2d 508 (1981).

Jury may consider general practices in locality in determining care under the circumstances. — Skill prescribed by this section is not such as is ordinarily employed by the profession in the particular locality or community; but the jury may, in determining what is reasonable care and skill under the circumstances, consider the degree of care and skill practiced by the profession generally in the locality or community. Kuttner v. Swanson, 59 Ga. App. 818, 2 S.E.2d 230 (1939); Mason v. Hall, 72 Ga. App. 867, 35 S.E.2d 478 (1945); Mull v. Emory Univ., Inc., 114 Ga. App. 63, 150 S.E.2d 276 (1966); but see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Plaintiff need not allege failure to follow local practices. — While the jury may consider the accepted medical practice in the local community in determining whether or not the failure to use or follow the alleged practices was an act of negligence, it is not necessary to so allege. Mull v. Emory Univ., Inc., 114 Ga. App. 63, 150 S.E.2d 276 (1966); but see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Careful performance of authorized acts not defense to negligent performance of unauthorized acts. — When a surgeon enters into an agreement with a person merely to perform a certain operation, and the surgeon, in violation of the contract, goes farther, without an emergency, and performs another operation which is unauthorized by the agreement, or by an emergency necessitating the additional operation, and injury results to the patient, the surgeon cannot relieve oneself from liability by showing skill and care in the other operation. Lord v. Claxton, 62 Ga. App. 526, 8 S.E.2d 657 (1940).

Duty of care in making diagnosis. — Relative to a diagnosis by a doctor for discovering the nature of an ailment, the general rule of law is that a patient is entitled to a thorough and careful examination such as the condition of the patient and the attending circumstances will permit, with such diligence and method of diagnosis for discovering the nature of the ailment as are usually approved and practiced under similar circumstances by members of the doctor's profession in good standing. Pilgrim v. Landham, 63 Ga. App. 451, 11 S.E.2d 420 (1940).

Same degree of care and skill is required in making diagnosis as is required in treatment. Mull v. Emory Univ., Inc., 114 Ga. App. 63, 150 S.E.2d 276 (1966); but see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Failure to diagnose. — Trial court erred in denying a radiologist's motion for

summary judgment on a patient's claim that the radiologist should have ordered an MRI with intravenous contrast, allowing earlier diagnosis of an epidural abscess, because the radiologist was unaware that the patient was a diabetic and showed signs of an infection, and there was no evidence that, lacking this knowledge, the radiologist deviated from the standard of care. Meli v. Hicks, 300 Ga. App. 894, 686 S.E.2d 489 (2009), cert. denied, No. S10C0504, 2010 Ga. LEXIS 254 (Ga. 2010).

Trial court erred by granting the attending physician summary judgment because the expert testimony presented a genuine issue of material fact as to whether the patient's death could have been avoided if the attending physician had prior diagnosed the patient's condition in the emergency room in compliance with the applicable standard of care. The experts testified that the attending physician deviated from the standard of care when the physician failed to obtain a CT scan imaging of the patient's aorta to make the diagnosis of an aortic dissection, and if the diagnosis had been made timely, it could have been successfully repaired. Knight v. Roberts, 316 Ga. App. 599, 730 S.E.2d 78 (2012).

Improper diagnosis is not actionable per se, the issue being whether the physician has used reasonable care and diligence as a professional man. Hogan v. Almand, 131 Ga. App. 225, 205 S.E.2d 440 (1974).

One physician may generally rely on diagnosis of another. — When a family physician has diagnosed the case and given it as the physician's opinion that the patient is suffering from a tumor and desires an operation or treatment by an expert, the expert has the right to rely on the diagnosis of the family physician, and, in the absence of anything warranting a contrary conclusion, to perform the operation or give the treatment. Pilgrim v. Landham, 63 Ga. App. 451, 11 S.E.2d 420 (1940).

Duty to consult other physicians. — Doctor with knowledge that a patient needs treatment the doctor is unable to provide has a duty to consult with a doctor more experienced in that particular field. Garbaccio v. Oglesby, 675 F. Supp. 1342 (M.D. Ga. 1987).

Standard for nurses. — There is no law prohibiting nurses from giving intravenous injections; therefore, when such services are performed, the standard of care which should be imposed is the same as in regard to other authorized nursing activities. Deese v. Carroll City County Hosp., 203 Ga. App. 148, 416 S.E.2d 127 (1992).

Informed consent doctrine is not a viable principle of law in this state; therefore, the trial court did not err in precluding the plaintiff from presenting evidence on the issue of whether the plaintiff's consent to the surgical procedure was informed consent. Reece v. Selmonosky, 179 Ga. App. 718, 347 S.E.2d 649 (1986).

Failure of physician to remove sponge. — Physician is liable, when the physician negligently left a sponge in the body of a person after the operation was completed. Akridge v. Noble, 114 Ga. 949, 41 S.E. 78 (1902).

Improper placement of hand board beneath patient. — When placement of hand board which allegedly caused back injury to the plaintiff was that of the nurses and was completed before the surgeon entered the operating room, and the surgeon did not supervise its placement, these acts preceded the surgeon's appearance and were not made under the surgeon's immediate personal supervision so as to make any negligence of the nurses attributable to the surgeon. McClure v. Clayton County Hosp. Auth., 176 Ga. App. 414, 336 S.E.2d 268 (1985).

Transfer to another hospital. — Plaintiff failed to present any evidence of proximate causation, i.e., evidence within a reasonable degree of medical certainty that the decedent would have survived but for the defendant's alleged negligence, based on the physician's decision to transfer the decedent to another hospital. Anthony v. Chambless, 231 Ga. App. 657, 500 S.E.2d 402 (1998).

It is not mere possession of requisite professional skill, but its exercise, which is required. Chapman v. Radcliffe, 44 Ga. App. 49, 162 S.E. 651 (1932); Kuttner v. Swanson, 59 Ga. App.

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818, 2 S.E.2d 230 (1939); Lord v. Claxton, 62 Ga. App. 526, 8 S.E.2d 657 (1940); Bryan v. Grace, 63 Ga. App. 373, 11 S.E.2d 241 (1940); Mull v. Emory Univ., Inc., 114 Ga. App. 63, 150 S.E.2d 276 (1966); but see Felix v. State, 271 Ga. 534, 523 S.E.2d 1 (1999).

Failure to exercise care and skill may be accomplished by failure to exercise care only, or by failure to exercise skill only, or by failure to do both. — See Richards v. Harpe, 42 Ga. App. 123, 155 S.E. 85 (1930).

Trial court erred by refusing to give requested jury instructions that because a physician must bring to the exercise of that profession the requisite degree of care and skill, the physician may be held liable for failure to exercise either the required care or the required skill. Brown v. Macheers, 249 Ga. App. 418, 547 S.E.2d 759 (2001).

In action for malpractice, law presumes that medical or surgical services were performed in ordinarily skillful manner, and burden of proof is on the plaintiff to show a want of due care, skill, and diligence on the part of the defendant. Yeates v. Boyd, 50 Ga. App. 331, 177 S.E. 921 (1935); Hayes v. Brown, 108 Ga. App. 360, 133 S.E.2d 102 (1963); Washington v. City of Columbus, 136 Ga. App. 682, 222 S.E.2d 583 (1975); Gunthorpe v. Daniels, 150 Ga. App. 113, 257 S.E.2d 199 (1979); Evans v. DeKalb County Hosp. Auth., 154 Ga. App. 17, 267 S.E.2d 319 (1980); Porubiansky v. Emory Univ., 156 Ga. App. 602, 275 S.E.2d 163 (1980); Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653 (1981); Blount v. Moore, 159 Ga. App. 80, 282 S.E.2d 720 (1981); Hawkins v. Greenberg, 166 Ga. App. 574, 304 S.E.2d 922 (1983); Killingsworth v. Poon, 167 Ga. App. 653, 307 S.E.2d 123 (1983).

Plaintiff's expert affidavit. — Once the defendant in a malpractice suit has carried the defendant's burden on motion for summary judgment, the plaintiff must respond with an expert's affidavit which must state the particulars in which the treatment was negligent, including an articulation of the minimum standard of acceptable professional conduct, and how and in what way the defendant deviated therefrom. Sanders v. Ramo, 203 Ga. App. 43, 416 S.E.2d 333 (1992).

Expert opinion. — It was error to reverse a jury verdict for a surgeon and the surgeon's medical corporation in a medical malpractice case because the trial court's charge that the patient's expert's opinion had to be based on reasonable medical certainty and based on more than speculation was sufficient under Georgia law. Zwiren v. Thompson, 276 Ga. 498, 578 S.E.2d 862 (2003).

Doctor is not insurer and unintended result does not raise even an inference of negligence. A physician cannot always effect a cure. Hayes v. Brown, 108 Ga. App. 360, 133 S.E.2d 102 (1963); Blount v. Moore, 159 Ga. App. 80, 282 S.E.2d 720 (1981).

Physician not liable for unintended result if requisite care exercised. — When a doctor or physician possesses the skill and learning ordinarily, under similar circumstances, possessed by the members of the doctor's profession, and uses ordinary and reasonable care and diligence and the doctor's best judgment in the application of the doctor's skill to the case, the doctor is not liable because the doctor's efforts to assist nature in effecting a cure did not bring about the desired result. Howell v. Jackson, 65 Ga. App. 422, 16 S.E.2d 45 (1941).

Prescribing drugs. — Physician does not have a legal duty upon each occasion of prescribing a potentially dangerous drug to inquire of any known allergies of the patient, but has the duty to determine the proper medication for each patient, weighing the medication's benefits against the medication's potential dangers. Hawkins v. Greenberg, 166 Ga. App. 574, 304 S.E.2d 922 (1983).

Physician who has been retained by third party, such as the Department of Human Resources, to undertake a medical examination of an individual cannot be held liable to that individual for malpractice as a result of that examination, when the physician neither offered nor intended to treat, care for, or otherwise benefit the individual and did not injure

the individual during the course of the examination, even though the physician failed to advise the individual of the results of the examination or to diagnose cancer based thereon. Peace v. Weisman, 186 Ga. App. 697, 368 S.E.2d 319, cert. denied, 186 Ga. App. 918, 368 S.E.2d 319 (1988).

"Wrongful birth" actions shall not be recognized in Georgia absent a clear mandate of such recognition by the legislature. Atlanta Obstetrics & Gynecology Group v. Abelson, 260 Ga. 711, 398 S.E.2d 557 (1990).

Holding in Atlanta Obstetrics & Gynecology Group v. Abelson, 260 Ga. 711, 398 S.E.2d 557 (1990), which forecloses wrongful birth claims under Georgia law, was not infirm for depriving women of a remedy for the unconstitutional deprivation of their right to make a free and informed choice concerning termination of a pregnancy since there is no evidence that this remedy was ever contemplated by the Georgia legislature. Campbell v. United States, 795 F. Supp. 1127 (N.D. Ga. 1991), aff'd, 962 F.2d 1579 (11th Cir. 1992), cert. denied, 507 U.S. 909, 113 S. Ct. 1254, 122 L. Ed. 2d 653 (1993).

Georgia Supreme Court's holding in Atlanta Obstetrics & Gynecology Group v. Abelson, 260 Ga. 711, 398 S.E.2d 557 (1990) does not turn on questions of gender or other arbitrary classifications. Campbell v. United States, 795 F. Supp. 1127 (N.D. Ga. 1991), aff'd, 962 F.2d 1579 (11th Cir. 1992), cert. denied, 507 U.S. 909, 113 S. Ct. 1254, 122 L. Ed. 2d 653 (1993).

Aborted pregnancy based on physician's misrepresentation. — After a mother terminated her pregnancy based on a doctor's misrepresentation of the results of pre-natal testing, the mother, but not the father, was entitled to damages for medical malpractice and breach of fiduciary duty. Breyne v. Potter, 258 Ga. App. 728, 574 S.E.2d 916 (2002).

Suicide. — Fact that the patient's suicide was volitional did not make it a rational act, nor did that alone relieve the hospital and physician of their duty to the patient. Brandvain v. Ridgeview Inst., Inc., 188 Ga. App. 106, 372 S.E.2d 265 (1988), aff'd, 259 Ga. 376, 382 S.E.2d 597 (1989).

Doctrine of res ipsa loquitur does not apply in malpractice suit. An unintended result does not raise an inference of negligence. It is presumed that medical or surgical services were performed in an ordinarily skillful manner. Hayes v. Brown, 108 Ga. App. 360, 133 S.E.2d 102 (1963); Washington v. City of Columbus, 136 Ga. App. 682, 222 S.E.2d 583 (1975).

Plaintiff must show defendant's negligence was proximate cause. — To prevail, the plaintiff must show not only that the defendant was negligent but also that the plaintiff's injury was proximately caused by the defendant's lack of care or skill. Robertson v. Emory Univ. Hosp., 611 F.2d 604 (5th Cir. 1980).

Cannot recover without proximate cause. — Plaintiff cannot recover for malpractice when there is not sufficient evidence that such physician's alleged failure to use the requisite degree of skill and diligence in treatment either proximately caused or contributed to cause the plaintiff additional suffering. Parrott v. Chatham County Hosp. Auth., 145 Ga. App. 113, 243 S.E.2d 269 (1978).

Causation is jury question. — When measured by the method shown by medical witnesses to be negligence and the evidence, a bad result is shown, it is the province of the jury to say whether the result was caused by the negligence. Pilgrim v. Landham, 63 Ga. App. 451, 11 S.E.2d 420 (1940).

Summary judgment was improperly granted to the doctor as the plaintiffs raised a genuine issue of material fact as to whether the doctor breached the applicable standard of care because the plaintiffs' expert witness testified at a deposition that the doctor breached the standard of care by failing to implement a proper wound care plan, and failing to take part in the aggressive program to, inter alia, prevent pressure ulcers on the decedent's body; and the plaintiffs raised a genuine issue of material fact as to causation that should be determined by a jury as the chief medical examiner opined that the sepsis resulting from ulcers that developed under the doctor's care caused the decedent's death. Fields v. Taylor, No. A16A1754, 2017 Ga. App. LEXIS 10 (Jan. 18, 2017).

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Effect of plaintiff's contributory negligence. — When from the allegations of the plaintiff's petition it is palpably clear that the injuries complained of were not caused from the failure of the physician to use reasonable care and skill but from the act of the plaintiff, the question of whether the physician has used such skill should be decided as a matter of law when a timely motion to dismiss has been filed. Robinson v. Campbell, 95 Ga. App. 240, 97 S.E.2d 544 (1957).

Cited in Smith v. Overby, 30 Ga. 241 (1860); Edwards v. Roberts, 12 Ga. App. 140, 76 S.E. 1054 (1913); Sweat v. Foster, 28 Ga. App. 360, 111 S.E. 66 (1922); Johnson v. Mitchell, 45 Ga. App. 414, 165 S.E. 140 (1932); Slack v. Crawford, 131 F.2d 101 (5th Cir. 1942); Wall v. Brim, 138 F.2d 478 (5th Cir. 1943); Norton v. Hamilton, 92 Ga. App. 727, 89 S.E.2d 809 (1955); Word v. Henderson, 110 Ga. App. 780, 140 S.E.2d 92 (1964); Word v. Henderson, 220 Ga. 846, 142 S.E.2d 244 (1965); Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972); Bell v. Sigal, 129 Ga. App. 249, 199 S.E.2d 355 (1973); Kenney v. Piedmont Hosp., 136 Ga. App. 660, 222 S.E.2d 162 (1975); Hogan v. City-County Hosp., 138 Ga. App. 906, 227 S.E.2d 796 (1976); North Am. Co. for Life & Health Ins. v. Berger, 648 F.2d 305 (5th Cir. 1981); Sullivan v. Henry, 160 Ga. App. 791, 287 S.E.2d 652 (1982); Bradley Center, Inc. v. Wessner, 161 Ga. App. 576, 287 S.E.2d 716 (1982); Sandford v. Howard, 161 Ga. App. 495, 288 S.E.2d 739 (1982); Grindstaff v. Coleman, 681 F.2d 740 (11th Cir. 1982); Dobbs v. Cobb E.N.T. Assocs., 165 Ga. App. 238, 299 S.E.2d 141 (1983); Skinner v. Coleman-Nincic Urology Clinic, P.A., 165 Ga. App. 280, 300 S.E.2d 319 (1983); Overstreet v. Nickelsen, 170 Ga. App. 539, 317 S.E.2d 583 (1984); Lorentzson v. Rowell, 171 Ga. App. 821, 321 S.E.2d 341 (1984); Central Anesthesia Assocs. P.C. v. Worthy, 173 Ga. App. 150, 325 S.E.2d 819 (1984); Verre v. Allen, 175 Ga. App. 749, 334 S.E.2d 350 (1985); Thomas v. Newnan Hosp., 185 Ga. App. 764, 365 S.E.2d 859 (1988); Cutts v. Fulton-DeKalb Hosp. Auth., 192 Ga. App. 517, 385 S.E.2d 436 (1989); Doctors Hosp. v. Bonner, 195 Ga. App. 152, 392 S.E.2d 897 (1990); Williams v. Memorial Medical Ctr., Inc., 218 Ga. App. 107, 460 S.E.2d 558 (1995); Roseberry v. Brooks, 218 Ga. App. 202, 461 S.E.2d 262 (1995); Cannon v. Jeffries, 250 Ga. App. 371, 551 S.E.2d 777 (2001).

Applicability to Special Cases

1. Dentists

Dentists under same duty of care as physicians. — Duties and responsibilities of a dentist to the dentist's patient are controlled by the same rules of law as control the duties and responsibilities of a physician and surgeon. Gunthorpe v. Daniels, 150 Ga. App. 113, 257 S.E.2d 199 (1979); Porubiansky v. Emory Univ., 156 Ga. App. 602, 275 S.E.2d 163 (1980); Tumlin v. Daniels, 166 Ga. App. 635, 305 S.E.2d 145 (1983).

Dentist's duty of care defined. — Dentist in practicing the dentist's profession is under the duty, not only to use the requisite care and skill in a particular operation, but also to give such after treatment to the patient as the necessity of the case demands, in the absence of any special agreement to the contrary. Specht v. Gaines, 65 Ga. App. 782, 16 S.E.2d 507 (1941).

Duty of one engaged in the practice of dentistry and medicine to "bring to the exercise of his profession a reasonable degree of care and skill" is an affirmative statutory duty imposed upon those who engage in professional practice. The obligation to practice under this standard must be viewed as a condition to the licensure of the state to engage in the practice of medicine and dentistry. Emory Univ. v. Porubiansky, 248 Ga. 391, 282 S.E.2d 903 (1981).

Duty not relieved by contract. — It is against the public policy of this state to allow one who procures a license to practice dentistry to relieve oneself by contract of the duty to exercise reasonable care. Emory Univ. v. Porubiansky, 248 Ga. 391, 282 S.E.2d 903 (1981).

Dentist is not an insurer or warrantor that the exercise of the dentist's professional judgment will effect a cure of the patient, nor is the dentist obliged to bring

to the exercise of the dentist's profession the utmost skill. Bryan v. Grace, 63 Ga. App. 373, 11 S.E.2d 241 (1940); Specht v. Gaines, 65 Ga. App. 782, 16 S.E.2d 507 (1941); Kent v. Henson, 174 Ga. App. 400, 330 S.E.2d 126 (1985).

Dentist not liable if requisite degree of care exercised. — If a dentist measures up to the qualifications and applies the reasonable care and skill legally required of the dentist, then the dentist is not responsible for a mistake of judgment; if, however, an error of judgment is so gross as to be inconsistent with that degree of care and skill which a dentist should possess and exercise, liability may result when an injury is produced. Bryan v. Grace, 63 Ga. App. 373, 11 S.E.2d 241 (1940); Specht v. Gaines, 65 Ga. App. 782, 16 S.E.2d 507 (1941).

Presumption of due care. — Law presumes that a dentist performs the dentist's services with the proper degree of skill and care, and, except in extreme circumstances, the plaintiff can overcome this presumption only through expert testimony. Tumlin v. Daniels, 166 Ga. App. 635, 305 S.E.2d 145 (1983).

Conclusory allegations of dentist's misjudgment insufficient as pleadings. — Allegation that, in effect, it was an error of judgment on the part of the defendant in failing to extract the plaintiff's teeth amounted only to a conclusion or opinion of the pleader, and without supporting facts which would have made a jury question as to whether or not such conduct was equivalent to a lack of the legally required professional care and skill was not good against a motion to dismiss. Byran v. Grace, 63 Ga. App. 373, 11 S.E.2d 241 (1940).

2. Hospitals

Section applicable to hospitals. — While in the strict technical sense a hospital corporation cannot be considered "a person professing to practice surgery or the administering of medicine", it is common knowledge that hospitals do in fact administer medical treatment. Richmond County Hosp. Auth. v. Haynes, 121 Ga. App. 537, 174 S.E.2d 364 (1970).

Hospital's duty of care analogous to that of physician. — Rule applicable against physicians in malpractice cases, that requires physicians to bring to the exercise of the physicians profession a reasonable degree of care and skill applies equally to an action brought against a hospital when technical questions are involved and expert testimony by medical witnesses is offered. Goodman v. St. Joseph's Infirmary, Inc., 144 Ga. App. 614, 241 S.E.2d 487 (1978).

Private hospital in which patients are placed for treatment by their physicians, and which undertakes to care for the patients and supervise and look after them, is under the duty to exercise such reasonable care in looking after and protecting a patient as the patient's condition, which is known to the hospital through the hospital's agents and servants charged with the duty of looking after and supervising the patient, may require. Of course, the duties do not end until the relation of patient and physician and patient and hospital has ceased. Lord v. Claxton, 62 Ga. App. 526, 8 S.E.2d 657 (1940).

Elements for establishing liability. — There are three elements a plaintiff must establish to show a hospital's malpractice liability: (1) the duty of the hospital; (2) the breach of that duty by failing to exercise the requisite degree of skill and care; and (3) that the failure of the hospital to exercise such requisite skill and care was the proximate cause of the injury sustained. McClure v. Clayton County Hosp. Auth., 176 Ga. App. 414, 336 S.E.2d 268 (1985).

Patient-health care provider relationship was established between a hospital and parents who took their baby to the emergency room for any medical assistance needed and, on the strength of reassurances by a nurse that the baby was fine, left the hospital. South Fulton Medical Ctr. Inc. v. Poe, 224 Ga. App. 107, 480 S.E.2d 40 (1996).

Air Force hospital liable. — Air Force hospital's failure to diagnose the plaintiff's hypercholesterolemia and heart disease, the failure of the supervising physician to properly supervise physician's assistants and the failure to provide thrombolytic therapy, breached the required standard of care and proximately

Applicability to Special Cases (Cont'd)
2. Hospitals (Cont'd)

caused the plaintiff's myocardial infarction and the damage as a result thereof. The United States Air Force had a duty to conform to a standard of conduct raised by Georgia law for the protection of the plaintiff. MacDonald v. United States, 853 F. Supp. 1430 (M.D. Ga. 1994).

Veteran's hospital not liable when veteran failed to follow treatment plan. — There is a presumption in a medical malpractice case that the physician performed in an ordinarily skillful manner so that the burden is upon the plaintiff to show a want of care or skill; a veteran whose leg was amputated after the veteran failed to comply with a Veterans Administration (VA) treatment plan for the veteran's diabetes and related foot ulcer failed to show that VA personnel breached the standard of care set out in O.C.G.A. § 51-1-27 and that the amputation would have been unnecessary if another treatment plan had been used. Moreover, the evidence plainly established that the veteran's negligence in failing to comply with the veteran's treatment plan exceeded the negligence, if any, by VA personnel, so the veteran could not recover under O.C.G.A. § 51-11-7. Kimbrough v. United States Gov't, No. 1:07-CV-1517-RWS, 2008 U.S. Dist. LEXIS 77793 (N.D. Ga. Oct. 2, 2008).

Hospital not negligent for acts of independent physician absent showing of negligence in permitting physician to practice in hospital. — When the attending physician was an independent contractor rather than an employee of the hospital, and it is not alleged that the hospital was negligent in having the physician on the hospital's staff or that the hospital undertook to direct the physician in the physician's treatment of the patient, the hospital cannot be held liable for the physician's alleged negligence. Moore v. Carrington, 155 Ga. App. 12, 270 S.E.2d 222 (1980).

Hospital is not liable for negligence of physician when the negligence relates to a matter of professional judgment on the part of the physician when the hospital does not exercise and has no right to exercise control in the diagnosis or treatment of illness or injury. Stewart v. Midani, 525 F. Supp. 843 (N.D. Ga. 1981).

Hospital is liable for lack of due care in selection of unskilled physician or surgeon as employee or member of staff, or directing the physician in a negligent manner as to the treatment of a hospital patient. Goodman v. St. Joseph's Infirmary, Inc., 144 Ga. App. 614, 241 S.E.2d 487 (1978).

Administrative or clerical duties — Noncharitable hospital is liable for negligence of the hospital's nurses, orderlies, and other employees, in the performance of mere administrative or clerical duties, which, though constituting a part of the patient's prescribed medical treatment, do not require the application of specialized technique or the understanding of a skilled physician or surgeon and which duties are not performed under the direct supervision of the attending physician. Goodman v. St. Joseph's Infirmary, Inc., 144 Ga. App. 614, 241 S.E.2d 487 (1978); Moore v. Carrington, 155 Ga. App. 12, 270 S.E.2d 222 (1980).

Negligent acts of employees. — Hospital may be liable for the negligent acts of the hospital's servants and employees in carrying out a physician's instructions in performing administrative or clerical acts requiring no medical judgment. Swindell v. St. Joseph's Hosp., 161 Ga. App. 290, 291 S.E.2d 1 (1982).

Actions of nurses. — Trial court did not err by denying the hospital's motion for summary judgment because experts testified that the hospital's nurses failed to properly triage the patient and did not immediately carry out the attending physician's orders for the patient's medications and treatment until almost an hour after the orders were given. Knight v. Roberts, 316 Ga. App. 599, 730 S.E.2d 78 (2012).

Doctor practicing in a city-owned and operated hospital is not protected by the sovereign immunity doctrine and is therefore liable for the doctor's negligent actions. Jackson v. Miller, 176 Ga. App. 220, 335 S.E.2d 438 (1985).

Telephone instructions from consultant. — Evidence did not support alle-

gations that emergency room physician was negligent in failing to make certain that the ER physician understood the consulting physician's telephone instructions regarding drugs prescribed for a kidney patient since the consultant's preoccupation with the consultant's work during the conversation was the more likely source of the error in communication. Garbaccio v. Oglesby, 675 F. Supp. 1342 (M.D. Ga. 1987).

3. Unlicensed Practitioners

Mere failure to have license to practice medicine or surgery will not authorize inference of negligence when one attempts to treat or operate on another and injures that person. Andrews v. Lofton, 80 Ga. App. 723, 57 S.E.2d 338 (1950); Irwin v. Arrendale, 117 Ga. App. 1, 159 S.E.2d 719 (1967).

No cause will lie against unlicensed person absent causal link between defendant's actions and plaintiff's injury. — Allegations that the duties and inhibitions imposed upon the defendant by the statutes as to the necessity of having a license to practice medicine or surgery were due to the plaintiff and the plaintiff's child personally, and as members of the public seeking medical and surgical care, and that the death of the child was a natural and probable consequence of the violation of such statutes by the defendant were subject to a motion to dismiss for failure to show anything having a causal relation to the death of the child. Andrews v. Lofton, 80 Ga. App. 723, 57 S.E.2d 338 (1950).

Fact defendant is unlicensed may be pertinent on other issues. — Allegations made as to the defendant falsely holding oneself out as a physician and surgeon in violation of stated sections of the Code of Georgia, and that the defendant did not possess the qualifications necessary for the possession of a license are pertinent by way of history or inducement as to why the plaintiff engaged the services of the defendant and for that reason should not be stricken on motion, though irrelevant on the question of the defendant's negligence. Andrews v. Lofton, 80 Ga. App. 723, 57 S.E.2d 338 (1950).

Fact that nurse failed board exam was irrelevant. — In a medical malpractice action filed by the court's plaintiff parents against a pediatrician, a nurse, and others, the trial court did not abuse the court's discretion by prohibiting the parents from showing that the nurse failed to pass the nursing board examination as such evidence was irrelevant, and even if it could be said that the evidence had any probative value, the evidence was substantially outweighed by the danger of undue prejudice. Snider v. Basilio, 281 Ga. 261, 637 S.E.2d 40 (2006).

4. Surgeons

Negligence of operating room personnel. — When a hospital yields control of the hospital's employees to a surgeon in the operating room and the surgeon exercises immediate personal supervision over these employees, then the surgeon becomes their master and their negligence during the course of the master-servant relationship will be imputed to the surgeon. Swindell v. St. Joseph's Hosp., 161 Ga. App. 290, 291 S.E.2d 1 (1982).

Expert opinion not supported by records. — Medical records that provided no information about the patient's second visit to the emergency room, the timing of the discovery of a ruptured appendix, or the exploratory surgery that resulted in an appendectomy were too general to support an expert's conclusion that the doctors' conduct proximately caused the patient's injuries. Jones v. Orris, 274 Ga. App. 52, 616 S.E.2d 820 (2005).

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Privity required. — Action against a medical professional can be maintained only by one within the physician-patient relationship. Bradley Center, Inc. v. Wessner, 161 Ga. App. 576, 287 S.E.2d 716, aff'd, 250 Ga. 199, 296 S.E.2d 693 (1982).

Sufficiency of pleadings. — Petition which shows such conduct on the part of the defendant as would authorize a jury to find that the defendant had not exercised the requisite care and skill in treating and operating upon the plaintiff's daughter, and that such negligence was the proxi-

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mate cause of the death of the child stated a cause of action for the child. Andrews v. Lofton, 80 Ga. App. 723, 57 S.E.2d 338 (1950).

Allegation that the defendant "knew or should have known" was a sufficient allegation as to knowledge since the defendant's duty arose from the legal relation of physician and patient. Frazier v. Davis, 94 Ga. App. 173, 94 S.E.2d 51 (1956).

In a federal Tort Claims Act, 28 U.S.C. § 2671 et seq., case, a district court's entry of summary judgment in favor of the government was affirmed because the inmate did not present evidence to raise a genuine issue of material fact as to the penitentiary medical staff's negligence in response to the government's motion for summary judgment; in fact, the inmate produced no evidence indicating that the medical staff failed to exercise the requisite care in treating and diagnosing the inmate and failed to establish medical malpractice under O.C.G.A. § 51-1-27. Duque v. United States, 216 Fed. Appx. 830 (11th Cir. 2007) (Unpublished).

Plaintiff must prove defendant's negligence through expert medical testimony in order to prevail at trial. Starr v. Fregosi, 370 F.2d 15 (5th Cir. 1966); Self v. Executive Comm. of Ga. Baptist Convention of Ga., Inc., 245 Ga. 548, 266 S.E.2d 168 (1980); Parker v. Knight, 245 Ga. 782, 267 S.E.2d 222 (1980); Larson v. Friedman & Snyder, 154 Ga. App. 702, 269 S.E.2d 532 (1980).

To establish professional medical negligence the evidence presented by the patient must show a violation of the degree of care and skill required of a physician. Hawkins v. Greenberg, 159 Ga. App. 302, 283 S.E.2d 301 (1981).

Question of compliance with the required standards of O.C.G.A. § 51-1-27 must be presented through expert testimony. Wagner v. Timms, 158 Ga. App. 538, 281 S.E.2d 295 (1981).

Plaintiff asserting medical malpractice must present expert medical testimony to overcome the presumption of a physician's care, skill, and diligence. Jones v. Wike, 654 F.2d 1129 (5th Cir. 1981).

Physician can be his or her own expert witness. Moore v. Candler Gen. Hosp., 185 Ga. App. 280, 363 S.E.2d 793 (1987).

To avoid the grant of summary judgment in a medical malpractice suit, the plaintiff must counter a defendant's expert affidavit with a contrary expert opinion. Moore v. Candler Gen. Hosp., 185 Ga. App. 280, 363 S.E.2d 793 (1987).

Expert testimony must establish requisite degree of care and skill. — Proper standard of measurement in determining whether a doctor exercised a reasonable degree of care and skill is to be established by testimony of physicians; for it is a medical question. Pilgrim v. Landham, 63 Ga. App. 451, 11 S.E.2d 420 (1940); Self v. Executive Comm. of Ga. Baptist Convention of Ga., Inc., 245 Ga. 548, 266 S.E.2d 168 (1980); Robertson v. Emory Univ. Hosp., 611 F.2d 604 (5th Cir. 1980); Blount v. Moore, 159 Ga. App. 80, 282 S.E.2d 720 (1981).

In malpractice actions, expert testimony is necessary to establish the parameters of acceptable professional conduct, a significant deviation from which would constitute malpractice. Franklin v. Elmer, 174 Ga. App. 839, 332 S.E.2d 314 (1985).

Trial court did not err in denying a psychiatrist's motion for summary judgment in a patient's medical malpractice action because whether the psychiatrist breached duties arising from the psychiatrist-patient relationship was an issue of fact; pursuant to O.C.G.A. § 9-11-9.1, the patient presented expert testimony that the psychiatrist's breaches of the duty of care directly resulted in the foreseeable harm of the patient's attempting suicide. Peterson v. Reeves, 315 Ga. App. 370, 727 S.E.2d 171 (2012).

Required proof by plaintiff. — To overcome the presumption of due care and to show negligence in a medical malpractice case, it is usually required that the patient offer expert medical testimony to the effect that the defendant-doctor failed to exercise that degree of care and skill which would ordinarily have been employed by the medical profession generally under the circumstances. Killingsworth v. Poon, 167 Ga. App. 653, 307 S.E.2d 123 (1983).

Need for contrary expert opinion not obviated. — Improper placement of a

hand board underneath a patient is not such an obvious act of negligence, and is not so gross or clear and palpable act of negligence, to obviate the necessity for expert testimony to refute a defendant doctor's expert opinion that the defendant was not negligent. McClure v. Clayton County Hosp. Auth., 176 Ga. App. 414, 336 S.E.2d 268 (1985).

When contrary expert opinion not required. — Evidentiary burden on plaintiff-patients to produce such expert medical testimony as will overcome the presumption of the physician's exercise of due care is not applicable in those cases when the asserted actionable negligence would appear to be so clear from the evidence then of record that expert testimony would, at that point, otherwise be unnecessary to establish a prima facie case of malpractice. Killingsworth v. Poon, 167 Ga. App. 653, 307 S.E.2d 123 (1983).

Failure of a medical expert to use "magic words" in accusing a colleague of negligence in a medical malpractice case will not deprive the expert's opinion of all efficacy when it is clear that the witness is of the opinion that the colleague failed to exercise due care in treating the patient. Tysinger v. Smisson, 176 Ga. App. 604, 337 S.E.2d 49 (1985).

"Pronounced results" exception to the general evidentiary rule requiring the plaintiff to produce expert testimony encompasses only those exceedingly rare cases wherein the medical questions presented concern matters which a jury can be credited with knowing by reason of common knowledge or wherein the possibility of actionable medical negligence appears so clearly from the record that the plaintiff-patient need not produce expert medical testimony concerning the applicable standard of care to avoid summary judgment for a defendant in a medical malpractice action who has produced expert medical testimony as to the defendant's own lack of negligence. Cherokee County Hosp. Auth. v. Beaver, 179 Ga. App. 200, 345 S.E.2d 904 (1986).

Trial court erred in ruling that evidence merely that the plaintiff experienced pain and an unexplained weakness in the plaintiff's leg at the time the plaintiff received an injection was sufficient to warrant application of the narrow "pronounced results" exception. Cherokee County Hosp. Auth. v. Beaver, 179 Ga. App. 200, 345 S.E.2d 904 (1986).

Nonexpert testimony allowed as to readily apparent medical conditions. — Results of diagnosis and treatment, if so pronounced as to become apparent, as when a leg or limb which has been broken is shorter than the other after diagnosis and treatment, may be testified to by anyone. Pilgrim v. Landham, 63 Ga. App. 451, 11 S.E.2d 420 (1940).

Conflicting evidence on standard of care. — Conflicting evidence was presented as to whether the psychiatrist complied with the applicable standards of care, the trial court did not err in denying the patient's motion for new trial based on sufficiency of evidence supporting the patient's claim for medical malpractice. Harris v. Leader, 231 Ga. App. 709, 499 S.E.2d 374 (1998).

Conflicting testimony insufficient to support malpractice action when both views are customary and accepted. — Testimony showing a mere difference in views or individual practices among doctors, however, is insufficient to support a malpractice action when it is shown that each view or practice is acceptable and customary. Hayes v. Brown, 108 Ga. App. 360, 133 S.E.2d 102 (1963); Robertson v. Emory Univ. Hosp., 611 F.2d 604 (5th Cir. 1980).

Result of medical treatment is not consideration in the determination of whether the treatment was performed negligently. Blount v. Moore, 159 Ga. App. 80, 282 S.E.2d 720 (1981).

Fact that treatment resulted unfavorably does not raise presumption of want of proper care, skill, or diligence. Blount v. Moore, 159 Ga. App. 80, 282 S.E.2d 720 (1981).

Admission of error by defendant. — Admission by a surgeon that the surgeon made a mistake during surgery would not raise a question of negligence for the jury in the absence of positive evidence of the usual and customary practices and procedures followed by the medical profession generally. Williams v. Ricks, 152 Ga. App. 555, 263 S.E.2d 457 (1979).

Photograph of wound as evidence. — In an action for malpractice, a photo-

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graph of the wound alleged to have been caused by the malpractice is admissible in evidence to show the extent of the injury. Pace v. Cochran, 144 Ga. 261, 86 S.E. 934 (1915).

Summary judgment in favor of psychiatrist improper. — Because a patient had not been convicted of murder, no court had entered a judgment finding the patient mentally competent at the time of the crime, and the evidence did not establish, as a matter of law, that the patient was mentally competent when the patient killed the patient's mother, the patient was presumed innocent under O.C.G.A. § 16-1-5 and was not a "wrongdoer" whose status as such would be a bar to any of the patient's medical malpractice claims against a psychiatrist and, consequently, summary judgment on that issue or any issue relating to the patient's contributory negligence for causing the patient's mother's death was not authorized by the evidence since a jury issue existed as to whether the patient had the requisite mental capacity to commit murder. Bruscato v. O'Brien, 307 Ga. App. 452, 705 S.E.2d 275 (2010).

Plaintiff must produce expert testimony when defendant has done so. — In those cases when the plaintiff must produce an expert's opinion in order to prevail at trial, when the defendant produces an expert's opinion in the defendant's favor on motion for summary judgment and the plaintiff fails to produce a contrary expert opinion in opposition to that motion, then there is no genuine issue to be tried by the jury and it is not error to grant summary judgment to the defendant. Pilgrim v. Landham, 63 Ga. App. 451, 11 S.E.2d 420 (1940); Golden v. Payne, 152 Ga. App. 800, 264 S.E.2d 292 (1979), rev'd on other grounds, 245 Ga. 784, 267 S.E.2d 211 (1980); Parker v. Knight, 245 Ga. 782, 267 S.E.2d 222 (1980); Lawrence v. Gardner, 154 Ga. App. 722, 270 S.E.2d 9 (1980).

Summary judgment properly based on defendant's own expert allegations if plaintiff fails to produce expert testimony. — When a plaintiff must produce an expert's opinion that the defendant was negligent in order to avoid the grant of a directed verdict in favor of the defendant, that the plaintiff must also produce that opinion in order to avoid the grant of summary judgment in favor of the defendant when the defendant moves for summary judgment solely on the basis of the defendant's own affidavit, submitted in the defendant's capacity as an expert, that the defendant was not negligent. Payne v. Golden, 245 Ga. 784, 267 S.E.2d 211 (1980).

Defendant not entitled to summary judgment when defendant's expert's testimony may also support plaintiff's claim. — Simply because the defendant is initially responsible for the production of certain witnesses, the defendant is not entitled to summary judgment when the experts relied upon by the defendant also offer expert testimony which a jury could find supports the plaintiff's allegations of medical negligence. Lawrence v. Gardner, 154 Ga. App. 722, 270 S.E.2d 9 (1980).

Burden of proof. — In a suit for damages alleged to have been caused by the malpractice of a surgeon, the burden is on the plaintiff to show a want of due care, skill, or diligence as required by this section, and also that the injury resulted from the want of such care, skill, or diligence. Georgia N. Ry. v. Ingram, 114 Ga. 639, 40 S.E. 708 (1901).

Under O.C.G.A. § 51-1-27, the burden is on the plaintiff to show failure to exercise due care and skill. Hawkins v. Greenberg, 159 Ga. App. 302, 283 S.E.2d 301 (1981), aff'd, 166 Ga. App. 574, 304 S.E.2d 922 (1983).

To satisfy the burden of proof in a malpractice action brought by the patient it was not necessary for another physician to testify that the defendant-physician was guilty of malpractice or professional negligence. Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653 (1981).

Plaintiff in a wrongful death action established medical malpractice because evidence, including expert testimony, showed that medical professionals did little, if anything, to monitor the patient and improve the patient's respiratory function after the patient received the patient's

final dosage of Dilaudid. There was a medical probability that the pain medication proximately caused the patient's death. Mixon v. United States, No. (WLS), 2014 U.S. Dist. LEXIS 137871 (M.D. Ga. Sept. 30, 2014).

Whether the requisite degree of care and skill has been exercised is question of fact for determination by jury. Radcliffe v. Maddox, 45 Ga. App. 676, 165 S.E. 841 (1932); Robinson v. Campbell, 95 Ga. App. 240, 97 S.E.2d 544 (1957); Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366 (1969); Rogers v. Black, 121 Ga. App. 299, 173 S.E.2d 431 (1970).

Questions of negligence, diligence, contributory negligence, proximate cause, and the exercise of ordinary care for one's protection, ordinarily are to be decided by a jury. Stephen W. Brown Radiology Assocs. v. Gowers, 157 Ga. App. 770, 278 S.E.2d 653 (1981).

Trial court did not err in denying a psychiatrist's motion for summary judgment in a patient's medical malpractice action because whether the psychiatrist breached duties arising from the psychiatrist-patient relationship was an issue of fact; under O.C.G.A. §§ 37-3-4 and 51-1-27, the psychiatrist could be held liable if the treatment of the patient fell below the requisite standard of care, and that failure proximately caused the patient's injury. Peterson v. Reeves, 315 Ga. App. 370, 727 S.E.2d 171 (2012).

Failure to commit patient. — Under some circumstances, the failure to commit may constitute a breach of the well-established duty of care physicians owe patients, and when a fact question has been created on that issue, it is for the jury. Peterson v. Reeves, 315 Ga. App. 370, 727 S.E.2d 171 (2012).

Neither court nor jury may substitute its own standard for that established by expert testimony. — Court and the jury must have a standard measure which they are to use in measuring the acts of the doctor in determining whether the doctor exercised a reasonable degree of care and skill, and are not permitted to set up and use any arbitrary or artificial standard of measurement that a jury may wish to apply. Pilgrim v. Landham, 63 Ga. App. 451, 11 S.E.2d 420 (1940); Hayes v. Brown, 108 Ga. App. 360, 133 S.E.2d 102 (1963).

Jury may be limited to expert testimony in determining negligence. — Jury, in determining the question of negligence in an action brought under this section, may be limited to the testimony of physicians and surgeons when determining this question when other facts and circumstances are absent. Fincher v. Davis, 27 Ga. App. 494, 108 S.E. 905 (1921).

Jury charge as to physician care and skill requirements. — Trial court did not err in denying the patient's requested charge on the exercise of the requisite skill and care required of a physician, as the charge given by the court gave full and correct statement of law regarding the care and skill required of a physician and proof required to support a medical malpractice claim; moreover, no abuse resulted from the trial court's refusal to strike challenged defense expert's testimony as a question of fact existed as to whether the physician applied the appropriate standard, and it was up to the jury to weigh this testimony and determine if it met the standard under the court's charge. West v. Breast Care Specialists, LLC, 290 Ga. App. 521, 659 S.E.2d 895 (2008).

Location of the external site of the injection was merely a question of fact, not a "medical question" such as required expert medical testimony. Cherokee County Hosp. Auth. v. Beaver, 179 Ga. App. 200, 345 S.E.2d 904 (1986).

It was not error to charge the substance of former Code 1933, §§ 84-907, 84-924, and 84-1207 (see now O.C.G.A. §§ 43-34-26 and 51-1-27) in connection with an action against a hospital administrator who is alleged to have mixed and administered drugs for the relief of his discomfort to a patient at the hospital as a result of which the patient suffered a bromide poisoning. Fulton Hosp. v. McDonald, 106 Ga. App. 783, 128 S.E.2d 539 (1962).

Use of phrase "acceptable customary medical approach" in charging the jury on the proper standard of negligence did not impermissibly allow a "custom" defense. Davis v. Coastal Emergency

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Servs., Inc., 868 F.2d 1223 (11th Cir. 1989).

"Hindsight" instruction. — First sentence of the suggested pattern "hindsight" charge states that, "In a medical malpractice action, a defendant cannot be found negligent on the basis of an assessment of a patient's condition that only later, in hindsight, proves to be incorrect as long as the initial assessment was made in accordance with reasonable standards of medical care." This portion of the instruction is appropriate in any case when the negligence claim is based in whole or in part on the assertion that the physician made an incorrect assessment of a patient's condition. Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009).

Second and third sentences of the suggested pattern "hindsight" charge state that, "In other words, the concept of negligence does not include hindsight. Negligence consists of not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely and slightly possible." As the third sentence is not a correct statement of the law, and the second is duplicative of the first sentence, they are disapproved, as are cases in which they were upheld, e.g., Steele v. Atlanta Maternal-Fetal Medicine, 610 S.E.2d 546 (Ga. App. 2005); Betha v. Ebanks, 589 S.E.2d 831 (Ga. App. 2003); Cherry v. Schwindt, 584 S.E.2d 673 (Ga. App. 2003); Brannen v. Prince, 421 S.E.2d 76 (Ga. App. 1992); Gillis v. City of Waycross, 543 S.E.2d 423 (Ga. App. 2000); and Haynes v. Hoffman, 296 S.E.2d 216 (Ga. App. 1982). Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009).

"Later acquired knowledge" standard for evaluating the giving of the "hindsight" instruction in medical malpractice cases is disapproved. Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 61 Am. Jur. 2d, Physicians, Surgeons, and Other Healers, § 183 et seq.

Am. Jur. Proof of Facts. — Proof of Failure to Diagnose Diabetes or Complications of Diabetes, 51 POF3d 1.

Medical Malpractice in Tonsillectomies, 57 POF3d 381.

Proof of Injury Resulting from Prescription Medication Rezulin, 74 POF3d 141.

Proof of Injury Resulting from Liposuction Surgery, 82 POF3d 1.

C.J.S. — 70 C.J.S., Physicians and Surgeons, § 62 et seq.

ALR. — Liability of physician for permitting exposure to infectious or contagious disease, 13 ALR 1465; 5 ALR 926.

Liability of private noncharitable hospital or sanitarium for improper care of treatment of patient, 39 ALR 1431; 124 ALR 186.

Liability for medical or surgical services rendered inmates of public institutions, 44 ALR 1285.

Liability to patient for results of medical or surgical treatment by one not licensed as required by law, 44 ALR 1418; 57 ALR 978.

Liability for committing, or aiding commitment, to contagious disease hospital of one not suffering from contagious disease, 54 ALR 656.

Physicians and surgeons: standard of skill and care required of specialist, 59 ALR 1071.

When statute of limitations commences to run against actions against physicians, surgeons, or dentists for malpractice, 74 ALR 1317; 80 ALR2d 368; 70 ALR3d 7.

Grounds for revocation of valid license of physician, surgeon, or dentist, 82 ALR 1184.

Liability as for malpractice as affected by failure to take or advise the taking of an X-ray picture after operation, or to resort to other means of determining advisability of a supplementary operation or special treatment, 115 ALR 298.

Electrical treatment as practice of medicine or surgery within statute, 115 ALR 957.

Necessary allegations in a declaration or complaint in action against physician or surgeon based on wrong diagnosis, 134 ALR 683.

Necessity of expert evidence to support

an action for malpractice against a physician or surgeon, 141 ALR 5; 81 ALR2d 597.

Physicians and surgeons: presumption or inference of negligence in malpractice cases; res ipsa loquitur, 162 ALR 1265; 174 ALR 960; 82 ALR2d 1262.

Proximate cause in malpractice cases, 13 ALR2d 11.

Malpractice: diagnosis and treatment of brain injuries, diseases, or conditions, 29 ALR2d 501.

Hospital's liability for injury or death in obstetrical cases, 37 ALR2d 1284.

Liability for injury by X-ray, 41 ALR2d 329.

Contributory negligence or assumption of risk as defense in action against physician or surgeon for malpractice, 50 ALR2d 1043.

Medical malpractice action as abating upon death of either party, 50 ALR2d 1445.

Nurse's liability for her own negligence or malpractice, 51 ALR2d 970.

Malpractice: treatment of fractures or dislocations, 54 ALR2d 200.

Malpractice: diagnosis of fractures or dislocations, 54 ALR2d 273.

Malpractice in the diagnosis or treatment of cancer, 55 ALR2d 461; 79 ALR2d 890.

Liability of physician or surgeon for extending operation or treatment beyond that expressly authorized, 56 ALR2d 695.

Liability of physician for lack of diligence in attending patient, 57 ALR2d 379.

Liability of physician who abandons case, 57 ALR2d 432.

Malpractice in nose and throat treatment and surgery, 58 ALR2d 216.

Malpractice in administering medicine to which patient is unusually susceptible or allergic, 64 ALR2d 1281.

Hospital's liability for injury to patient from heat lamp or pad or hot-water bottle, 72 ALR2d 408.

Malpractice: propriety and effect of instruction or argument directing attention to injury to defendant's professional reputation or standing, 74 ALR2d 662.

Malpractice in diagnosis or treatment of tuberculosis, 75 ALR2d 814.

Malpractice in treatment and surgery of the ear, 76 ALR2d 783.

Malpractice: physician's duty to inform patient of nature and hazards of disease or treatment, 79 ALR2d 1028.

Statute of limitations applicable to malpractice action against physician, surgeon, dentist, or similar practitioner, 80 ALR2d 320; 70 ALR4th 535.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner, 80 ALR2d 368; 70 ALR3d 7.

Liability of chiropodist for malpractice, 80 ALR2d 1278.

Physicians and surgeons: res ipsa loquitur, or presumption or inference of negligence, in malpractice cases, 82 ALR2d 1262.

Liability of dentist to patient, 83 ALR2d 7; 11 ALR4th 748.

Liability of one physician or surgeon for malpractice of another, 85 ALR2d 889.

Competency of physician or surgeon of school of practice other than that to which defendant belongs to testify in malpractice case, 85 ALR2d 1022.

Liability of physician for injury to esophagus or other internal organs occurring in course of gastroscopic examination, 88 ALR2d 297.

Liability of doctor or dentist using force to restrain or discipline patient, 89 ALR2d 983.

Malpractice in appendicitis treatment and surgery, 94 ALR2d 1006.

Hospital's liability for exposing patient to extraneous infection or contagion, 96 ALR2d 1205.

Malpractice in connection with care and treatment of burn patients, 97 ALR2d 473.

Malpractice liability with respect to diagnosis and treatment of mental disease, 99 ALR2d 599; 94 ALR3d 317; 8 ALR4th 464.

Physician's or surgeon's liability for injury to mother in pregnancy and childbirth cases, 99 ALR2d 1336; 76 ALR4th 1112; 1 ALR5th 269; 2 ALR5th 769; 3 ALR5th 146; 4 ALR5th 148; 4 ALR5th 210; 6 ALR5th 534; 7 ALR5th 1.

Liability of physician or surgeon for injury to child in pregnancy and childbirth cases, 99 ALR2d 1398.

Hospital's liability for personal injury or death of doctor, nurse, or attendant, 1 ALR3d 1036.

Physician's or surgeon's malpractice in connection with care and treatment of hemophiliac or diagnosis of hemophilia, 1 ALR3d 1107.

Physician's or surgeon's malpractice in connection with diagnosis or treatment of rectal or anal disease, 5 ALR3d 916.

Malpractice in connection with intravenous or other forced or involuntary feeding of patient, 6 ALR3d 668.

Validity and construction of contract exempting hospital or doctor from liability for negligence to patient, 6 ALR3d 704.

Applicability, in action against nurse in her professional capacity, of statute of limitations applicable to malpractice, 8 ALR3d 1336.

Hospital's liability for negligence in connection with preparation, storage, or dispensing of drug or medicine, 9 ALR3d 579.

Res ipsa loquitur in action against hospital for injury to patient, 9 ALR3d 1315; 49 ALR4th 63.

Malpractice: liability of physician, surgeon, anesthetist, or dentist for injury resulting from foreign object left in patient, 10 ALR3d 9.

Physician's duties and liabilities to person examined pursuant to physician's contract with such person's prospective or actual employer or insurer, 10 ALR3d 1071.

Malpractice: liability in connection with insertion of prosthetic or other corrective devices in patient's body, 14 ALR3d 967.

Hospital's liability to patient for injury sustained from defective equipment furnished by hospital for use in diagnosis or treatment of patient, 14 ALR3d 1254.

Scope of defendant's duty of pretrial discovery in medical malpractice action, 15 ALR3d 1446.

Employer's liability to employee for malpractice of physician supplied by employer, 16 ALR3d 564.

Malpractice: liability of physician or hospital where patient suffers heart attack or the like while undergoing unrelated medical procedure, 17 ALR3d 796.

Malpractice in diagnosis and treatment of diseases or conditions of the heart or vascular system, 19 ALR3d 825.

Malpractice: doctor's liability for mistakenly administering drug, 23 ALR3d 1334.

Hospital's liability for injuries sustained by patient as a result of restraints imposed on movement, 25 ALR3d 1450.

Medical malpractice, and measure and element damages, in connection with sterilization or birth control procedures, 27 ALR3d 906.

Right to maintain malpractice suit against injured employee's attending physician notwithstanding receipt of workmen's compensation award, 28 ALR3d 1066.

Malpractice in diagnosis and treatment of tetanus, 28 ALR3d 1364.

Malpractice in connection with diagnosis and treatment of epilepsy, 30 ALR3d 988.

Hospital's liability for injury or death to patient resulting from or connected with administration of anesthetic, 31 ALR3d 1114.

Malpractice: admissibility of evidence that defendant physician has previously performed unnecessary operations, 33 ALR3d 1056.

Malpractice: physician's failure to advise patient to consult specialist or one qualified in a method of treatment which physician is not qualified to give, 35 ALR3d 349.

Liability of hospital for refusal to admit or treat patient, 35 ALR3d 841.

Malpractice: attending physician's liability for injury caused by equipment furnished by hospital, 35 ALR3d 1068.

Right of action for injury to or death of woman who consented to abortion, 36 ALR3d 630.

Liability for negligence in diagnosing or treating aspirin poisoning, 36 ALR3d 1358.

Malpractice: surgeon's liability for inadvertently injuring organ other than that intended to be operated on, 37 ALR3d 464.

Release of one responsible for injury as affecting liability of physician or surgeon for negligent treatment of injury, 39 ALR3d 260.

Duty of physician or nurse to assist patient while dressing or undressing, 41 ALR3d 1351.

Recovery against physician on basis of breach of contract to achieve particular result or cure, 43 ALR3d 1221.

Medical malpractice: liability for injury

allegedly resulting from negligence in making hypodermic injection, 45 ALR3d 731.

Malpractice: failure of physician to notify patient of unfavorable diagnosis or test, 49 ALR3d 501.

Hospital's liability to patient for injury allegedly sustained from absence of particular equipment intended for use in diagnosis or treatment of patient, 50 ALR3d 1141.

Liability of optometrist or optician for malpractice, 51 ALR3d 1273.

Necessity and sufficiency of expert evidence to establish existence and extent of physician's duty to inform patient of risks of proposed treatment, 52 ALR3d 1084.

Liability of hospital or medical practitioner under doctrine of strict liability in tort, or breach of warranty, for harm caused by drug, medical instrument, or similar device used in treating patient, 54 ALR3d 258; 65 ALR5th 357.

Liability of physician or hospital in the performance of cosmetic surgery upon the face, 54 ALR3d 1255.

Chiropractor's liability for failure to refer patient to medical practitioner, 58 ALR3d 590.

Druggist's civil liability for suicide consummated with drugs furnished by him, 58 ALR3d 828.

Duty of physician or surgeon to warn or instruct nurse or attendant, 63 ALR3d 1020.

Malpractice: physician's duty to inform patient of nature and hazards of radiation or x-ray treatments under the doctrine of informed consent, 69 ALR3d 1223.

When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body, 70 ALR3d 7.

Medical malpractice: amendment purporting to change the nature of the action or theory of recovery, made after statute of limitations has run, as relating back to filing of original complaint, 70 ALR3d 82.

Acupuncture as illegal practice of medicine, 72 ALR3d 1257.

Discovery, in medical malpractice action, of names of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 74 ALR3d 1055.

Tort liability of physician or hospital in connection with organ or tissue transplant procedures, 76 ALR3d 890.

Malpractice in connection with diagnosis of cancer, 79 ALR3d 915.

Tort liability for wrongfully causing one to be born, 83 ALR3d 15; 74 ALR4th 798.

Patient tort liability of rest, convalescent, or nursing homes, 83 ALR3d 871.

Modern status of views as to general measure of physician's duty to inform patient of risks of proposed treatment, 88 ALR3d 1008.

Malpractice: questions of consent in connection with treatment of genital or urinary organs, 89 ALR3d 32.

Malpractice: liability of anesthetist for injuries from spinal anesthetics, 90 ALR3d 775.

When statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedures, 93 ALR3d 218.

Malpractice in connection with electroshock treatment, 94 ALR3d 317.

Medical malpractice: instruction as to exercise or use of injured member, 99 ALR3d 901.

Modern status of "locality rule" in malpractice action against physician who is not a specialist, 99 ALR3d 1133.

Medical malpractice: patient's failure to return, as directed, for examination or treatment as contributory negligence, 100 ALR3d 723.

Application of rule of strict liability in tort to person or entity rendering medical services, 100 ALR3d 1205.

Medical malpractice: administering or prescribing drugs for weight control, 1 ALR4th 236.

Civil liability for physical measures undertaken in connection with treatment of mentally disordered patient, 8 ALR4th 464.

Hospital's liability for patient's injury or death as result of fall from bed, 9 ALR4th 149.

Medical malpractice: administering or prescribing birth control pills or devices, 9 ALR4th 372.

Propriety, in medical malpractice case, of admitting testimony regarding physician's usual custom or habit in order to establish nonliability, 10 ALR4th 1243.

Duty of medical practitioner to warn patient of subsequently discovered danger from treatment previously given, 12 ALR4th 41.

Hospital's liability for negligence in failing to review or supervise treatment given by doctor, or to require consultation, 12 ALR4th 57.

What constitutes physician-patient relationship for malpractice purposes, 17 ALR4th 132.

Standard of care owed to patient by medical specialist as determined by local, "like community," state, national, or other standards, 18 ALR4th 603.

Liability of hospital, physician, or other individual medical practitioner for injury or death resulting from blood transfusion, 20 ALR4th 136.

Medical malpractice: instrument breaking in course of surgery or treatment, 20 ALR4th 1179.

Malpractice liability based on prior treatment of mental disorder alleged to relate to patient's conviction of crime, 28 ALR4th 712.

Patient's failure to reveal medical history to physician as contributory negligence or assumption of risk in defense of malpractice action, 33 ALR4th 790.

Recovery for emotional distress resulting from statement of medical practitioner or official, allegedly constituting outrageous conduct, 34 ALR4th 688.

Validity of state statute providing for periodic payment of future damages in medical malpractice action, 41 ALR4th 275.

Medical malpractice: liability based on misrepresentation of the nature and hazards of treatment, 42 ALR4th 543.

Physician's liability to third person for prescribing drug to known drug addict, 42 ALR4th 586.

Liability of physician, for injury to or death of third party, due to failure to disclose driving-related impediment, 43 ALR4th 153.

Liability of hospital or clinic for sexual relationships with patients by staff physicians, psychologists, and other healers, 45 ALR4th 289.

Physician's tort liability for unauthorized disclosure of confidential information about patient, 48 ALR4th 668.

Future disease or condition, or anxiety relating thereto, as element of recovery, 50 ALR4th 13.

Liability of hospital or sanitarium for negligence of physician or surgeon, 51 ALR4th 235.

Medical malpractice: "loss of chance" causality, 54 ALR4th 10.

Tortious maintenance or removal of life supports, 58 ALR4th 222.

Medical malpractice: hospital's liability for injury allegedly caused by failure to have properly qualified staff, 62 ALR4th 692.

Liability for injury or death allegedly caused by activities of hospital "rescue team", 64 ALR4th 1200.

Recovery in death action for failure to diagnose incurable disease which caused death, 64 ALR4th 1232.

Medical practitioner's liability for treatment given child without parent's consent, 67 ALR4th 511.

Applicability of res ipsa loquitur in case of multiple medical defendants — modern status, 67 ALR4th 544.

Medical malpractice in performance of legal abortion, 69 ALR4th 875.

Medical malpractice: presumption or inference from failure of hospital or doctor to produce relevant medical records, 69 ALR4th 906.

Veterinarian's liability for malpractice, 71 ALR4th 811.

Propriety and prejudicial effect of trial counsel's reference or suggestion in medical malpractice case that defendant is insured, 71 ALR4th 1025.

Liability of osteopath for medical malpractice, 73 ALR4th 24.

"Dual capacity doctrine" as basis for employee's recovery for medical malpractice from company medical personnel, 73 ALR4th 115.

Liability for medical malpractice in connection with performance of circumcision, 75 ALR4th 710.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper procedures during caesarean delivery, 76 ALR4th 1112.

Liability for dental malpractice in provision or fitting of dentures, 77 ALR4th 222.

Liability of chiropractors and other drugless practitioners for medical malpractice, 77 ALR4th 273.

Medical malpractice: measure and elements of damages in actions based on loss of chance, 81 ALR4th 485.

Liability of orthodontist for malpractice, 81 ALR4th 632.

Medical malpractice: drug manufacturer's package insert recommendations as evidence of standard of care, 82 ALR4th 166.

Malpractice involving hysterectomies and oophorectomies, 86 ALR4th 18.

Gynecological malpractice not involving hysterectomies or oophorectomies, 86 ALR4th 125.

Recoverability of cost of raising normal, healthy child born as result of physician's negligence or breach of contract or warranty, 89 ALR4th 632.

Malpractice: physician's duty, under informed consent doctrine, to obtain patient's consent to treatment in pregnancy or childbirth cases, 89 ALR4th 799.

What patient claims against doctor, hospital, or similar health care provider are not subject to statutes specifically governing actions and damages for medical malpractice, 89 ALR4th 887.

Application of "firemen's rule" to bar recovery by emergency medical personnel injured in responding to, or at scene of, emergency, 89 ALR4th 1079.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper administration of, or failure to administer, anesthesia or tranquilizers, or similar drugs, during labor and delivery, 1 ALR5th 269.

Liability for incorrectly diagnosing existence or nature of pregnancy, 2 ALR5th 769.

Liability of hospital, physician, or other medical personnel for death or injury to child caused by improper postdelivery diagnosis, care, and representations, 2 ALR5th 811.

Liability of physician, nurse, or hospital for failure to contact physician or to keep physician sufficiently informed concerning status of mother during pregnancy, labor, and childbirth, 3 ALR5th 123.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by inadequate attendance or monitoring of patient during and after pregnancy, labor, and delivery, 3 ALR5th 146.

Liability of doctor or other health practitioner to third party contracting contagious disease from doctor's patient, 3 ALR5th 370.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper choice between, or timing of, vaginal or cesarean delivery, 4 ALR5th 148.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper procedures during vaginal delivery, 4 ALR5th 210.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper treatment during labor, 6 ALR5th 490.

Liability of hospital, physician, or other medical personnel for death or injury to mother caused by improper postdelivery diagnosis, care, and representations, 6 ALR5th 534.

Liability of hospital, physician, or other medical personnel for death or injury to mother or child caused by improper diagnosis and treatment of mother relating to and during pregnancy, 7 ALR5th 1.

Joint and several liability of physicians whose independent negligence in treatment of patient causes indivisible injury, 9 ALR5th 746.

Medical malpractice: who are "health care providers," or the like, whose actions fall within statutes specifically governing actions and damages for medical malpractice, 12 ALR5th 1.

Validity, construction, and application of state statutory provisions limiting amount of recovery in medical malpractice claims, 26 ALR5th 245.

Ophthalmological malpractice, 30 ALR5th 571.

Allowance of punitive damages in medical malpractice action, 35 ALR5th 145.

Medical malpractice in connection with diagnosis, care, or treatment of diabetes, 43 ALR5th 87.

Propriety of, and liability related to, issuance or enforcement of do not resuscitate orders, 46 ALR5th 793.

Malpractice: physician's liability for injury or death resulting from side effects of drugs intentionally administered to or prescribed for patient, 47 ALR5th 433.

Malpractice in diagnosis and treatment of male urinary tract and related organs, 48 ALR5th 575.

Liability of health maintenance organizations (HMOs) for negligence of member physicians, 51 ALR5th 271.

Malpractice in diagnosis or treatment of meningitis, 51 ALR5th 301.

Liability for donee's contraction of Acquired Immune Deficiency Syndrome (AIDS) from blood transfusion, 64 ALR5th 333.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff, 66 ALR5th 591.

Physical injury requirement for emotional distress claim based on false positive conclusion on medical test diagnosing disease, 69 ALR5th 411.

Contributory negligence or comparative negligence based on failure of patient to follow instructions as defense in action against physician or surgeon for medical malpractice, 84 ALR5th 619.

Medical negligence in extraction of tooth, established through expert testimony, 18 ALR6th 325.

Medical malpractice in diagnosis and treatment of cancer of male reproductive system, 96 A.L.R.6th 503.

Medical malpractice in diagnosis and treatment of colorectal cancer, 95 A.L.R.6th 541.

Medical malpractice in diagnosis and treatment of lung cancer, 94 A.L.R.6th 431.

Medical malpractice in diagnosis and treatment of cancer of female reproductive system, 93 A.L.R.6th 123.

Medical malpractice in diagnosis and treatment of breast cancer, 92 A.L.R.6th 379.

51-1-28. Transfusions, transplants, and transfers of human blood, tissue, organs; negligence prerequisite to recovery for damages.

(a) The injection, transfusion, or other transfer of human whole blood, blood plasma, blood products, or blood derivatives and the transplanting or other transfer of any tissue, bones, or organs into or onto the human body shall not be considered a sale of any commodity, goods, property, or product subject to sale or barter but, instead, shall be considered as the rendition of medical services. No implied warranties of any kind or description shall be applicable thereto and no person, firm, or corporation participating in such services shall be liable for damages unless negligence is proven.

(b) Code Section 51-1-27 shall not be affected by subsection (a) of this Code section. (Code 1933, § 105-1105, enacted by Ga. L. 1971, p. 457, § 1.)

Cross references. — Inapplicability of implied warranties to injection, transfusion, or other transfer of blood, blood plasma, etc., or transplanting of tissue, bones, or organs, § 11-2-316.

Law reviews. — For article, "Federal Automotive Safety Standards and Georgia Products Liability Law: Conflict or Coexistence?," see 26 Ga. St. B. J. 107 (1990).

For comment on tort liability of hospitals based on use of defective blood in blood transfusions, see 5 Ga. L. Rev. 371 (1971).

JUDICIAL DECISIONS

This section is not contrary to the privileges and immunities clause of U.S. Const., amend. 14. McAllister v. American Nat'l Red Cross, 240 Ga. 246, 240 S.E.2d 247 (1977).

Section not special legislation. — The reasoning behind this section is free from the arbitrariness which would render the exemption of blood suppliers special legislation contrary to the Georgia Constitution. McAllister v. American Nat'l Red Cross, 240 Ga. 246, 240 S.E.2d 247 (1977).

Clear import of this section is to include not only hospitals, but entities like the American National Red Cross engaged in providing blood for human use. McAllister v. American Nat'l Red Cross, 240 Ga. 246, 240 S.E.2d 247 (1977).

Hospitals supplying blood to patients do so as part of rendering medical "services," rather than as a "sale" of blood, and thus only negligence and not strict products liability is available to the injured patient. McAllister v. American Nat'l Red Cross, 240 Ga. 246, 240 S.E.2d 247 (1977).

O.C.G.A. § 51-1-28 bars claim under O.C.G.A. § 51-1-11 for defective blood. Timms v. Verson Allsteel Press Co., 520 F. Supp. 1147 (N.D. Ga. 1981).

AIDS claim against commercial laboratory barred. — Georgia's "blood shield" statute applied to a commercial laboratory, so as to bar a hemophiliac's strict liability and breach of warranty claims against the laboratory for a defective blood-clotting agent which allegedly exposed the hemophiliac to the virus associated with acquired immune deficiency syndrome (AIDS). Jones v. Miles Labs., Inc., 705 F. Supp. 561 (N.D. Ga. 1987), aff'd, 887 F.2d 1576 (11th Cir. 1989).

Cited in Parr v. Palmyra Park Hosp., 139 Ga. App. 457, 228 S.E.2d 596 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 63A Am. Jur. 2d, Products Liability, §§ 842, 1189.

C.J.S. — 72A C.J.S. Supp., Product Liability, §§ 5, 23, 54.

ALR. — Hospital's liability for exposing patient to extraneous infection or contagion, 96 ALR2d 1205.

Tort liability or physician or hospital in connection with organ or tissue transplant procedures, 76 ALR3d 890.

Liability of hospital, physician, or other individual medical practitioner for injury or death resulting from blood transfusion, 20 ALR4th 136.

Liability of blood supplier or donor for injury or death resulting from blood transfusion, 24 ALR4th 508.

Liability for donee's contraction of Acquired Immune Deficiency Syndrome (AIDS) from blood transfusion, 64 ALR5th 333.

Validity, construction, and application of blood shield statutes, 75 ALR5th 229.

Federal preemption of state common-law products liability claims pertaining to medical devices, implants, and other health-related items, 74 A.L.R. Fed. 2d 1.

Products liability: pain pumps, 90 A.L.R.6th 75.

Liability of manufacturer or distributor for injuries arising from allegedly defective artificial knee devices or prostheses, 89 A.L.R.6th 337.

Products liability: hip prostheses, 96 A.L.R.6th 1.

51-1-29. Liability of persons rendering emergency care.

(a) Any person, including any person licensed to practice medicine and surgery pursuant to Article 2 of Chapter 34 of Title 43 and any person licensed to render services ancillary thereto, who in good faith renders emergency care at the scene of an accident or emergency to the victims thereof without making any charge therefor shall not be liable

for any civil damages as a result of any act or omission by such person in rendering emergency care or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the injured person.

(b) As used in this Code section, the term "emergency care" shall include, but shall not be limited to, the rescue or attempted rescue of an incapacitated or endangered individual from a locked motor vehicle. (Ga. L. 1962, p. 534, § 1; Ga. L. 2015, p. 598, § 2-1/HB 72.)

The 2015 amendment, effective July 1, 2015, designated the previously existing provisions of this Code section as subsection (a), and in such subsection, deleted "including" following "Title 43 and" near the beginning, and deleted "victim or" preceding "victims thereof" near the middle; and added subsection (b).

Cross references. — Emergency assistance to persons choking, § 26-2-374. Implied consent to surgical or medical treatment in emergency situations, § 31-9-3. Liability of persons licensed to furnish ambulance service who render emergency care to victims of accident or emergency, § 31-11-8. Liability of law enforcement officers for actions taken while performing duties at scene of emergency, § 35-1-7. Limitation of liability for death or injury relating to operation of "911" emergency telephone system, § 46-5-131. Limitation of liability for persons rendering assistance at scene of boating collision, accident, or other casualty, § 52-7-14.

Law reviews. — For article, "The Good Samaritan Laws: A Reappraisal," see 16 J. Pub. L. 128 (1967). For article, "Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism," see 44 Ga. L. Rev. 607 (2010). For article on the 2015 amendment of this Code section, see 32 Ga. St. U.L. Rev. 63 (2015). For annual survey of tort laws, see 67 Mercer L. Rev. 237 (2015).

For note, "Good Samaritan Laws — Good or Bad?," see 15 Mercer L. Rev. 477 (1964).

For comment, "Good Samaritan Laws — Legal Disarray: An Update," see 38 Mercer L. Rev. 1439 (1987).

JUDICIAL DECISIONS

Scope of section. — While medical practitioners are included in this section, it is manifest that "any person" who in good faith renders emergency care at the scene of an accident or emergency to the victims thereof "without making any charge therefor," although not a licensed medical practitioner, is exempt from civil liability as a "good Samaritan." Wallace v. Hall, 145 Ga. App. 610, 244 S.E.2d 129 (1978).

Good Samaritan Statute, O.C.G.A. § 51-1-29, applied when a truck driver witnessed an accident on a highway in which two vehicles veered off the road into a ravine and the truck driver stopped in an emergency lane to run into the ravine to provide assistance; summary judgment in favor of the driver, the driver's employer, and the driver's insurer in a suit brought by passengers in a car which collided with the driver's truck within minutes was proper. Reid v. Midwest Transp., 270 Ga. App. 557, 607 S.E.2d 170 (2004).

Emergencies in which doctors are protected. — Doctors who by chance are called upon to render emergency care are protected by O.C.G.A. § 51-1-29; however, occurrence of an "emergency" will not invoke the immunity afforded by § 51-1-29; if it was the doctor's duty to respond to the emergency. Clayton v. Kelly, 183 Ga. App. 45, 357 S.E.2d 865 (1987).

Trial court properly granted summary judgment to a doctor in a medical malpractice action by a patient, based on the application of the "Good Samaritan" exemption from liability, as the patient was treated at the scene of an emergency as a result of tornado injuries, the patient received emergency care due to the unfore-

seen circumstance that called for immediate action, and the fact that the patient was not in a critical or life-threatening condition was not a dispositive fact because the physician did not have a contractual duty to render treatment, as the physician was not scheduled to be in the emergency room at that time, and the physician was not compensated for the services. Willingham v. Hudson, 274 Ga. App. 200, 617 S.E.2d 192 (2005).

Doctor present in hospital when emergency arises. — Physician is not deprived of immunity by the fact alone that the physician works at the hospital, or is present at the hospital, or is called to the hospital when the emergency arises. If there was no prior duty to respond and there was no prior doctor-patient relationship, one is not created by the event of the emergency. Clayton v. Kelly, 183 Ga. App. 45, 357 S.E.2d 865 (1987).

Physician's skill does not create duty. — Fact that a physician is skilled in the subject matter in question or that the exigency lies within the physician's expertise does not create a duty when none existed before; in fact such persons are particularly encouraged by the Good Samaritan statute to volunteer their aid. Clayton v. Kelly, 183 Ga. App. 45, 357 S.E.2d 865 (1987).

Rule of sudden emergency is that one who in a sudden emergency acts according to one's best judgment or, because of want of time in which to form judgment, acts in the most judicious manner, is not chargeable with negligence. Webb v. Perry, 158 Ga. App. 409, 280 S.E.2d 423 (1981).

Trial court did not err in entering summary judgment in favor of an arts center in a widow's wrongful death action because the center owed no duty to provide emergency medical services to the husband; the widow pointed to no statutory enactment that would impose a duty on the center to provide emergency medical services to the patrons of the center's concerts, and no common law principle imposed such a duty. Boller v. Robert W. Woodruff Arts Ctr., Inc., 311 Ga. App. 693, 716 S.E.2d 713 (2011).

Burden of proof is on the physician to establish a prima facie case in support of a Good Samaritan liability defense, and when genuine issues of material fact exist as to whether the physician was a volunteer not under some preexisting duty to render medical care, summary judgment is precluded. Henry v. Barfield, 186 Ga. App. 423, 367 S.E.2d 289 (1988).

Summary judgment proper. — In a negligence action filed by the parents on behalf of their injured child, because jury questions remained as to whether a doctor had to provide immediate "emergency care at the scene of an accident or emergency" to the child within the meaning of the Good Samaritan statute, O.C.G.A. § 51-1-29, as well as the employer-hospital's immunity from any vicarious liability, summary judgment was erroneously entered against the parents and in favor of both the doctor and the hospital. Gilley v. Hudson, 283 Ga. App. 878, 642 S.E.2d 898 (2007).

In a tree trimmer's negligence suit against a friend and the property owners (the defendants) of certain land upon which the tree trimmer was cutting limbs off of trees and fell from a ladder, the trial court properly granted the defendants summary judgment as there were no genuine issues of material fact existing to establish that the defendants' actions in delaying medical care and allegedly improperly moving the tree trimmer after the fall caused any of the injuries that were incurred. Henderson v. Sargent, 297 Ga. App. 504, 677 S.E.2d 709 (2009), cert. denied, No. S09C1399, 2009 Ga. LEXIS 790 (Ga. 2009).

Summary judgment improper on doctor's motion for directed verdict. — Testimony of one of the patient's experts in a medical malpractice case, which described the patient's situation as an orthopedic emergency that had to be treated within six hours, was not evidence that warranted the grant of a directed verdict on the doctor's Good Samaritan defense under O.C.G.A. § 51-1-29; a jury question existed as to whether the doctor provided the patient with emergency care upon circumstances requiring immediate action. The trial court properly charged the jury regarding the defense, and did not err in denying the doctor's motion for a directed verdict or post-trial motions on

the Good Samaritan defense. Gilley v. Hudson, 299 Ga. App. 306, 682 S.E.2d 627 (2009), cert. denied, No. S09C1986, 2010 Ga. LEXIS 8 (Ga. 2010); cert. denied, No. S09C1987, 2010 Ga. LEXIS 24 (Ga. 2010).

Cited in Gordon v. Athens Convalescent Ctr., Inc., 146 Ga. App. 134, 245 S.E.2d 484 (1978); Gragg v. Neurological Assocs., 152 Ga. App. 586, 263 S.E.2d 496 (1979); Emory Univ. v. Porubiansky, 248 Ga. 391, 282 S.E.2d 903 (1981); Gragg v. Spenser, 159 Ga. App. 525, 284 S.E.2d 40 (1981); Abdel-Samed v. Dailey, 294 Ga. 758, 755 S.E.2d 805 (2014).

OPINIONS OF THE ATTORNEY GENERAL

Certain persons rendering aid to accident victims protected by section. — Ga. L. 1962, p. 534, § 1 (see now O.C.G.A. § 51-1-29) appears to relieve one not at fault but involved in an automobile accident from liability because one is required under the provisions of Ga. L. 1953, Nov.-Dec. Sess., p. 556, §§ 40, 41 (see now O.C.G.A. §§ 40-6-270) to render aid and provide transportation to a hospital, even though one believes that one is not competent to undertake such responsibility. 1967 Op. Att'y Gen. No. 67-333.

Certain persons required by law to render aid not volunteers within scope of section. — Good Samaritan Law exempts volunteers aiding victims from liability for their negligence as long as the assistance is rendered in good faith; when, however, the victim is employed by an industry, which must comply with 29 C.F.R. § 1910, requiring the employer to maintain certain first-aid facilities, the employer and persons employed by the employer in a first-aid capacity are not volunteers, but are under a legal duty to assist; they are not protected by the Good Samaritan Law, and the employer and the employer's first-aid employees are responsible to exercise reasonable care. 1972 Op. Att'y Gen. No. U72-62.

RESEARCH REFERENCES

Am. Jur. 2d. — 61 Am. Jur. 2d, Physicians, Surgeons, and Other Healers, §§ 163 et seq.

C.J.S. — 70 C.J.S., Physicians and Surgeons, § 51.

ALR. — Liability for medical or surgical services rendered inmates of public institutions, 44 ALR 1285.

Negligence of third person, other than physician or surgeon, in caring for injured person or in failing to follow instructions in that regard as affecting damages recoverable against person causing injury, 101 ALR 559.

Hospital's liability as to diagnosis and care of patients brought to emergency ward, 72 ALR2d 396.

Construction and application of "Good Samaritan" statutes, 68 ALR4th 294.

Rescue doctrine: liability of one who negligently causes motor vehicle accident for injuries to person subsequently attempting to rescue persons or property, 73 ALR4th 737.

Modern status of sudden emergency doctrine, 10 ALR5th 680.

51-1-29.1. Liability of voluntary health care provider and sponsoring organization.

(a) Without waiving or affecting and cumulative of any existing immunity from any source, unless it is established that injuries or death were caused by gross negligence or willful or wanton misconduct:

(1) No health care provider licensed under Chapter 9, 11, 26, 30, 33, or 34 of Title 43 who voluntarily and without the expectation or receipt of compensation provides professional services, within the

scope of such health care provider's licensure, for and at the request of a hospital, public school, nonprofit organization, or an agency of the state or one of its political subdivisions or provides such professional services to a person at the request of such an organization, which organization does not expect or receive compensation with respect to such services from the recipient of such services; or

(2) No licensed hospital, public school, or nonprofit organization which requests, sponsors, or participates in the providing of the services under the circumstances provided in paragraph (1) of this subsection

shall be liable for damages or injuries alleged to have been sustained by the person nor for damages for the injury or death of the person when the injuries or death are alleged to have occurred by reason of an act or omission in the rendering of such services.

(b) Nothing in this Code section shall be construed to change the scope of practice of any health care provider granted immunity in this Code section.

(c) This Code section shall apply only to causes of action arising on or after July 1, 1987. (Code 1981, § 51-1-29.1, enacted by Ga. L. 1987, p. 887, § 4; Ga. L. 1987, p. 986, § 2; Ga. L. 1998, p. 859, § 1; Ga. L. 1999, p. 81, § 51; Ga. L. 2007, p. 47, § 51/SB 103.)

Code Commission notes. — The enactment of this Code section by Ga. L. 1987, p. 887, § 4, irreconcilably conflicted with and was treated as superseded by Ga. L. 1987, p. 986, § 2. See County of Butts v. Strahan, 151 Ga. 417 (1921).

Law reviews. — For article, "Torts," see 53 Mercer L. Rev. 441 (2001).

JUDICIAL DECISIONS

Prima facie case of immunity under O.C.G.A. § 51-1-29.1 was established by a physician's affidavit that neither the physician's nor the physician's professional corporation expected or received any public or private source payment for the physician's on-call services. Washington v. Clark, 250 Ga. App. 242, 550 S.E.2d 671 (2001).

In a medical malpractice action, as affidavits from a decedent's mother and girlfriend created a fact issue regarding a doctor's expectation of payment which required resolution by a jury, the trial court erred in granting the doctor's summary judgment motion pursuant to O.C.G.A. § 51-1-29.1. Travick v. Lee, 278 Ga. App. 823, 630 S.E.2d 99 (2006).

Summary judgment in favor of a doctor and a clinic for the post-op treatment of a patient was upheld on appeal, as: (1) both remained immune from suit under O.C.G.A. § 51-1-29.1; (2) the doctor's treatment of the decedent's complications immediately following the decedent's surgery did not change the voluntary nature of the treatment as a whole; (3) it was reasonable to expect that a physician would continue to treat a patient following surgery; and (4) the appeals court viewed the doctor's voluntary treatment of the decedent as a whole, not divided into categories of preoperative, operative, and post-operative; moreover, because no evidence was presented that either the doctor or the clinic was a "charitable institution," and O.C.G.A. § 51-1-29.1 provided no such exception, waiver of any common-law charitable immunity through the doctor's procurement of liabil-

ity insurance did not apply. Wells v. Rogers, 281 Ga. App. 473, 636 S.E.2d 171 (2006), cert. denied, 2007 Ga. LEXIS 101 (Ga. 2007).

Cited in Walker v. Fulton-DeKalb Hosp. Auth., 200 Ga. App. 750, 409 S.E.2d 529 (1991); Porquez v. Washington, 268 Ga. 649, 492 S.E.2d 665 (1997); Washington v. Georgia Baptist Medical Ctr., 230 Ga. App. 654, 501 S.E.2d 1 (1998).

RESEARCH REFERENCES

C.J.S. — 65 C.J.S., Negligence, § 40. 65A C.J.S., Negligence, § 342.

51-1-29.2. Liability of persons or entities acting to prevent, minimize, and repair injury and damage resulting from catastrophic acts of nature.

Any natural person and any association, fraternal organization, private for profit entity, not for profit entity, religious organization, or charitable organization and the officers, directors, employees, and agents of such associations, organizations, and entities, when such persons, associations, organizations, or entities are working in coordination and under the direction of an appropriate state agency, who voluntarily and without the expectation or receipt of compensation provides services or goods in preparation for, anticipation of, or during a time of emergency and in a place of emergency as declared by the Governor for the benefit of any natural person or his or her property to prevent or minimize harm to such natural person or to prevent, minimize, and repair injury and damage to such person's property resulting from biological, chemical, or nuclear agents; terrorism; pandemics or epidemics of infectious disease; or catastrophic acts of nature, including, but not limited to, fire, flood, earthquake, wind, storm, or wave action, or any other occurrence which warrants the declaration of a state of emergency or disaster by the Governor pursuant to Code Section 38-3-51 or by a federal agency shall not be civilly liable to any natural person receiving such assistance as a result of any act or omission in rendering such service if such natural person, association, organization, or entity was acting in good faith and unless the damage or injury was caused by the willful or wanton negligence or misconduct of such natural person, association, organization, or entity. Nothing in this Code section shall be construed to amend, repeal, alter, or affect in any manner any other provision of law granting immunity or limiting liability. Nothing in this Code section shall be construed to abrogate the sovereign immunity of this state as to all actions executed by any party under this Code section. (Code 1981, § 51-1-29.2, enacted by Ga. L. 1995, p. 954, § 1; Ga. L. 2008, p. 1199, § 8/HB 89.)

Cross references. — Sovereign immunity granted those who allow premises to be used for emergency purposes, § 38-3-32. Immunity granted those who

provide equipment in emergencies, § 38-3-33. Immunity of state and political subdivision, § 38-3-35.

Editor's notes. — Ga. L. 2008, p. 1199, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Business Security and Employee Privacy Act.'"

Law reviews. — For article, "Georgia's 'Bring Your Gun to Work' Law May Not Have the Firepower to Trouble Georgia Employers After All," see 14 (No. 7) Ga. State Bar J. 12 (2009).

For note on the 1995 enactment of this Code section, see 12 Ga. St. U.L. Rev. 368 (1995).

51-1-29.3. Immunity for operators of external defibrillators.

(a) The persons described in this Code section shall be immune from civil liability for any act or omission to act related to the provision of emergency care or treatment by the use of or provision of an automated external defibrillator, as described in Code Sections 31-11-53.1 and 31-11-53.2, except that such immunity shall not apply to an act of willful or wanton misconduct and shall not apply to a person acting within the scope of a licensed profession if such person acts with gross negligence. The immunity provided for in this Code section shall extend to:

(1) Any person who gratuitously and in good faith renders emergency care or treatment by the use of or provision of an automated external defibrillator without objection of the person to whom care or treatment is rendered;

(2) The owner or operator of any premises or conveyance who installs or provides automated external defibrillator equipment in or on such premises or conveyance;

(3) Any physician or other medical professional who authorizes, directs, or supervises the installation or provision of automated external defibrillator equipment in or on any premises or conveyance other than any medical facility as defined in paragraph (5) of Code Section 31-7-1; and

(4) Any person who provides training in the use of automated external defibrillator equipment as required by subparagraph (b)(1)(A) of Code Section 31-11-53.2, whether compensated or not. This Code section is not applicable to any training or instructions provided by the manufacturer of the automated external defibrillator or to any claim for failure to warn on the part of the manufacturer.

(b) Nothing in this Code section shall be construed so as to provide immunity to the manufacturer of any automated external defibrillator or off-premises automated external defibrillator maintenance or service providers, nor shall it relieve the manufacturer from any claim for product liability or failure to warn. (Code 1981, § 51-1-29.3, enacted by Ga. L. 2001, p. 776, § 2; Ga. L. 2002, p. 415, § 51; Ga. L. 2008, p. 12, § 2-37/SB 433.)

Cross references. — Automated external defibrillator required in schools, § 20-2-775.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2001, the subsection designations were added.

Law reviews. — For note on the 2001 enactment of this Code section, see 18 Ga. St. U.L. Rev. 146 (2001).

RESEARCH REFERENCES

ALR. — Liability arising out of availability or use of automated external defibrillator or other defibrillator device, 2 A.L.R.7th 5.

51-1-29.4. Liability of voluntary health care providers and sponsoring organizations; cumulative immunity; application.

(a) As used in this Code section, the term:

(1) "Free health clinic" means a nonprofit, charitable, or eleemosynary institution or organization which voluntarily and without expectation or receipt of payment or other compensation or financial benefit provides health care services to persons who do not qualify for medicare or Medicaid, have no private health insurance, and cannot afford to see a medical care professional.

(2) "Medical care professional" means a professional who is licensed under Chapter 4 of Title 26 or Chapter 9, 11, 11A, 26, 30, 33, 34, or 44 of Title 43.

(b)(1) A free health clinic and its agents, employees, and volunteers when acting within the scope of that relationship shall not be liable to a patient for ordinary negligence which proximately causes injury to or the death of that patient if the services provided to that patient were free of any charge and the free health clinic and the medical care professional whose services are at issue neither received nor expected to receive any payment or other compensation or financial benefit for providing care to that patient.

(2) A licensed hospital, public school, or nonprofit organization which requests, sponsors, or participates in providing the services of a free health clinic shall not be liable to a patient for ordinary negligence which proximately causes injury to or the death of that patient if the services requested, sponsored, or provided to that patient were free of any charge and the free health clinic, the medical care professional whose services are at issue, the licensed hospital, the public school, or the nonprofit organization did not receive or expect to receive any payment or other compensation or financial benefit for providing care to that patient.

(3) The immunity granted under this Code section shall not waive or affect and is cumulative of any existing immunity from any other source.

(c) This Code section shall apply only to causes of action arising on or after July 1, 2004. (Code 1981, § 51-1-29.4, enacted by Ga. L. 2004, p. 446, § 1; Ga. L. 2005, p. 60, § 51/HB 95.)

Cross references. — Care and protection of indigent and elderly patients, T. 31, C. 8. "Health Share" volunteers in medicine, T. 31, C. 8, A. 8.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2004, this Code Section enacted as Code Section 51-1-29.15 was redesignated as Code Section 51-1-29.4.

51-1-29.5. Definitions; limitation on health care liability claim to gross negligence in emergency medical care; factors for jury consideration.

(a) As used in this Code section, the term:

(1) "Affiliate" means a person who, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with a specified person, including any direct or indirect parent or subsidiary.

(2) "Claimant" means a person, including a decedent's estate, who seeks or has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

(3) "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the person, whether through ownership of equity or securities, by contract, or otherwise.

(4) "Court" means any federal or state court.

(5) "Emergency medical care" means bona fide emergency services provided after the onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or care that is unrelated to the original medical emergency.

(6) "Emergency medical services provider" means any person providing emergency medical care.

(7) "Health care" means any act or treatment performed or furnished, or that should have been performed or furnished, by any

health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(8) "Health care institution" means:

(A) An ambulatory surgical center;

(B) A personal care home licensed under Chapter 7 of Title 31;

(B.1) An assisted living community licensed under Chapter 7 of Title 31;

(C) An institution providing emergency medical services;

(D) A hospice;

(E) A hospital;

(F) A hospital system;

(G) An intermediate care facility for the intellectually or developmentally disabled; or

(H) A nursing home.

(9) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care, which departure from standards proximately results in injury to or death of a claimant.

(10) "Health care provider" means:

(A) Any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Georgia to provide health care, including but not limited to:

(i) A registered nurse;

(ii) A dentist;

(iii) A podiatrist;

(iv) A pharmacist;

(v) A chiropractor;

(vi) An optometrist; or

(vii) A health care institution; and

(B) Any person who is:

(i) An officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; or

(ii) An employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.

(11) "Hospice" means a facility licensed as such under the "Georgia Hospice Law," Article 9 of Chapter 7 of Title 31.

(12) "Hospital" means a facility licensed as such under Chapter 7 of Title 31.

(13) "Hospital system" means a system of hospitals located in this state that are under the common governance or control of a corporate parent.

(14) "Medical care" means any act defined as the practice of medicine under Code Section 43-34-21.

(15) "Nursing home" means a facility licensed as such under Chapter 7 of Title 31.

(16) "Pharmacist" means a person licensed as such under Chapter 4 of Title 26.

(17) "Physician" means an individual licensed to practice medicine in this state, a professional association organized by an individual physician or group of physicians, or a partnership or limited liability partnership formed by a group of physicians.

(18) "Professional or administrative services" means those duties or services that a physician or health care provider is required to provide as a condition of maintaining the physician's or health care provider's license, accreditation status, or certification to participate in state or federal health care programs.

(b) Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law.

(c) In an action involving a health care liability claim arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, no physician or health care provider shall be held liable unless it is proven by clear and convincing evidence that the physician or health care provider's actions showed gross negligence.

(d) In an action involving a health liability claim arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the court shall instruct the jury to consider, together with all other relevant matters:

(1) Whether the person providing care did or did not have the patient's medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications;

(2) The presence or lack of a preexisting physician-patient relationship or health care provider-patient relationship;

(3) The circumstances constituting the emergency; and

(4) The circumstances surrounding the delivery of the emergency medical care. (Code 1981, § 51-1-29.5, enacted by Ga. L. 2005, p. 1, § 10/SB 3; Ga. L. 2009, p. 859, § 16/HB 509; Ga. L. 2011, p. 227, § 29/SB 178; Ga. L. 2015, p. 385, § 4-14/HB 252.)

The 2015 amendment, effective July 1, 2015, substituted "intellectually or developmentally disabled" for "mentally retarded" in subparagraph (a)(8)(G).

Editor's notes. — Ga. L. 2005, p. 1, § 1/SB 3, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2005, p. 1, § 14/SB 3, not codified by the General Assembly, provides for severability.

Ga. L. 2005, p. 1, § 15(b)/SB 3, not codified by the General Assembly, provides that this Code section shall apply only with respect to causes of action arising on or after February 16, 2005, and any prior causes of action shall continue to be governed by prior law.

Ga. L. 2015, p. 385, § 1-1/HB 252, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'J. Calvin Hill, Jr., Act.'"

Law reviews. — For article on the 2005 enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010). For annual survey on torts, see 65 Mercer L. Rev. 265 (2013). For annual survey on torts law, see 66 Mercer L. Rev. 189 (2014). For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014). For annual survey of tort law, see 68 Mercer L. Rev. 279 (2016).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 51-1-29.5(c) does not violate the uniformity provision of the Georgia Constitution, Ga. Const. 1983, Art. III, Sec. VI, Para. IV(a), because it is a general law; it operates uniformly upon all health care

liability claims arising from emergency medical care, and classification of the designated class is neither arbitrary nor unreasonable. Gliemmo v. Cousineau, 287 Ga. 7, 694 S.E.2d 75 (2010).

Because the legislative purpose of O.C.G.A. § 51-1-29.5(c) is legitimate, and the classification drawn has some reasonable relation to furthering that purpose, the classification passes constitutional muster, and, although § 51-1-29.5(c) raises the burden of proof in certain cases, it does not deprive one of the right to a jury trial or any other fundamental right. Promoting affordable liability insurance for health care providers and hospitals, and thereby promoting the availability of quality health care services, are legitimate legislative purposes, and it is entirely logical to assume that emergency medical care provided in hospital emergency rooms is different from medical care provided in other settings and that establishing a standard of care and a burden of proof that reduces the potential liability of the providers of such care will help achieve those legitimate legislative goals. Gliemmo v. Cousineau, 287 Ga. 7, 694 S.E.2d 75 (2010).

O.C.G.A. § 51-1-29.5(c) satisfies due process requirements because it is not so vague and indefinite in its meaning that persons of ordinary intelligence must necessarily guess at the subsection's meaning and differ as to the subsection's application. Gliemmo v. Cousineau, 287 Ga. 7, 694 S.E.2d 75 (2010).

Phrase "in a hospital emergency department." — Georgia General Assembly's use of the phrase "in a hospital emergency department" in O.C.G.A. § 51-1-29.5 to mean the physical location in which a patient is treated is reflected by its inclusion in the statute of two other locations within which a patient may be treated for an emergency. Nisbet v. Davis, 327 Ga. App. 559, 760 S.E.2d 179 (2014).

Medical care is an objective, rather than subjective, test. Nguyen v. Southwestern Emergency Physicians, P.C., 298 Ga. 75, 779 S.E.2d 334 (2015).

Question of fact remained whether statute applied. — In a malpractice suit alleging that emergency department physicians failed to diagnose and treat an infant's skull fracture, the trial court erred by granting summary judgment to the medical defendants because the record showed a genuine issue of material fact as to whether the heightened proof standards set forth in O.C.G.A. § 51-1-29.5(c) applied in the case. Nguyen v. Southwestern Emergency Physicians, P.C., 298 Ga. 75, 779 S.E.2d 334 (2015).

Application when husband remained symptomatic. — Trial court properly determined that O.C.G.A. § 51-1-29.5(c) applied to a couple's negligence claims because the services rendered by the defendants constituted emergency medical care defined by § 51-1-29.5(a)(5) as the husband remained symptomatic throughout the entire time of being treated in the emergency room and the couple did not show that the husband was ever capable of receiving medical treatment as a nonemergency patient. Quinney v. Phoebe Putney Mem. Hosp., 325 Ga. App. 112, 751 S.E.2d 874 (2013).

Question as to whether delay in treatment constituted emergency medical care. — In a medical malpractice action, the trial court's grant of the defendants' motion for summary judgment was erroneous because, although the evidence reflected that the patient presented to the emergency room with an emergency condition, a question of fact existed as to whether the defendants' actions in delaying necessary treatment constituted emergency medical care under O.C.G.A. § 51-1-29.5(c). Dailey v. Abdul-Samed, 319 Ga. App. 380, 736 S.E.2d 142 (2012).

Trial court did not err in allowing the jury to interpret O.C.G.A. § 51-1-29.5 when the court allowed the jury to determine whether the medical care provided to the patient arose out of the provision of "emergency medical care," as the jury had to determine whether the patient's claims rose out of the provision of the emergency medical care and the trial court charged the jury on the definition of "emergency medical care," which was not beyond the ken of the average juror. Howland v. Wadsworth, 324 Ga. App. 175, 749 S.E.2d 762 (2013).

Question of fact remained whether patient was provided emergency

medical care. — In the plaintiffs' negligence action against the defendants for the treatment of the plaintiffs' child, the plaintiffs' partial summary judgment motion was improperly granted because a question of fact remained as to whether the child was provided emergency medical care since nothing in the record suggested that the physician assistant who evaluated the child in the emergency room (ER) was not acting in good faith when the physician assistant diagnosed the child as suffering from a mere contusion; and the circumstances of the child's admission, readmission, and permanent injuries required a jury to consider whether, when the child presented at the ER with a large red-purple lump on the head, the child was suffering from an actual emergency. Southwestern Emergency Physicians, P.C. v. Nguyen, 330 Ga. App. 156, 767 S.E.2d 818 (2014), aff'd, 298 Ga. 75, 779 S.E.2d 334 (2015).

Factual questions existed as to whether an emergency room doctor provided a patient with emergency medical care, O.C.G.A. § 51-1-29.5(a)(5), and whether the patient's act in jumping out of a car and being killed on the interstate was a reasonably foreseeable consequence of the doctor's failure two days earlier to diagnose and treat the patient's psychosis. Everson v. Phoebe Sumter Medical Center, Inc., No. A16A1710, 2017 Ga. App. LEXIS 165 (Mar. 14, 2017).

No evidence emergency room physician acted with gross negligence. — Patient sued an emergency room physician for malpractice for failing to diagnose a leg fracture. As the physician sought no orthopedic consult because a radiologist opined that the x-rays showed no serious fracture, the patient could not prove by clear and convincing evidence that the physician acted with gross negligence, as required under O.C.G.A. § 51-1-29.5(c); thus, the physician was entitled to summary judgment. Pottinger v. Smith, 293 Ga. App. 626, 667 S.E.2d 659 (2008).

Even assuming there was evidence sufficient to create a jury issue as to whether the doctor's actions were negligent, there was no evidence, and certainly no clear and convincing evidence, by which a jury could reasonably conclude that the doctor failed to exercise even slight care and was therefore grossly negligent. Johnson v. Omondi, 318 Ga. App. 787, 736 S.E.2d 129 (2012).

Evidence of emergency room doctor's gross negligence was sufficient for jury. — Services provided by an emergency room physician to a patient who presented with a high pressure puncture wound to one hand were "bona fide emergency services" under O.C.G.A. § 51-1-29.5(a)(5), and the physician was therefore only liable if grossly negligent; evidence that the physician failed to contact a hand surgeon for seven hours after determining that emergency surgery was necessary was sufficient to go to the jury. Abdel-Samed v. Dailey, 294 Ga. 758, 755 S.E.2d 805 (2014).

Application of non-emergency exception. — Whether a patient, who originally needed emergency services, had stabilized and was capable of receiving medical treatment as a nonemergency patient was a question for the trier of fact and, thus, the trial court erred by granting the doctor summary judgment on the issue of whether the exception for non-emergency care applied. Bonds v. Nesbitt, 322 Ga. App. 852, 747 S.E.2d 40 (2013).

Trial court erred in determining that the emergency medical care statute, O.C.G.A. § 51-1-29.5, did not apply since the doctor gave care in the actual emergency room of a hospital, but properly denied the defendant's summary judgment because a question of fact existed as to whether the plaintiff demonstrated by clear and convincing evidence that the doctor was grossly negligent. Nisbet v. Davis, 327 Ga. App. 559, 760 S.E.2d 179 (2014).

Genuine issues of fact as to gross negligence. — Trial court erred by granting the medical defendants' motion for summary judgment because the appellate court found that the court could not say as a matter of law that a reasonable jury would be unable to find by clear and convincing evidence that the defendants were not grossly negligent based on the plaintiffs' expert evidence and because the emergency room doctor, at the time a radiologist's report was relied upon, had

facts that called into question the reliability of the CT scan results. Quinney v. Phoebe Putney Mem. Hosp., 325 Ga. App. 112, 751 S.E.2d 874 (2013).

Need for emergency medical care created heightened burden of proving gross negligence. — Because a doctor provided care to a patient who had received a high pressure puncture wound to the patient's hand that required emergency surgery, it was clear that the heightened burden of proving gross negligence for emergency services in O.C.G.A. § 51-1-29.5(c) was applicable. The facts were sufficient to go to the jury on the issue of gross negligence. Abdel-Samed v. Dailey, 294 Ga. 758, 755 S.E.2d 805 (2014).

Evidence of gross negligence sufficient to withstand summary judgment. — In a medical malpractice claim, because the emergency department doctor's actions did not meet the standard of care in the medical profession as the diagnostic measures the doctor took did nothing to prove or disprove the presence of pulmonary embolism in the patient, and the proper standard of care required the doctor to administer a CT scan, or a lung scan, which the doctor did not do, a reasonable jury could find that the doctor acted with gross negligence, and summary judgment was improperly granted in favor of the doctor. Johnson v. Omondi, 294 Ga. 74, 751 S.E.2d 288 (2013).

51-1-29.6. Liability of health care institutions and providers regarding THC oil.

(a) As used in this Code section, the term:

(1) "Caregiver" shall have the same meaning as set forth in Code Section 31-2A-18.

(2) "Health care institution" shall have the same meaning as set forth in Code Section 51-1-29.5.

(3) "Health care provider" means any person licensed, certified, or registered under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43 or Chapter 4 of Title 26.

(4) "Low THC oil" shall have the same meaning as set forth in Code Section 16-12-190.

(b) A health care institution shall not be subject to any civil liability, penalty, licensing sanction, or other detrimental action and a health care provider shall not be subject to any civil liability, penalty, denial of a right or privilege, disciplinary action by a professional licensing board, or other detrimental action for allowing an individual or caregiver to possess, administer, or use low THC oil on the premises of a health care institution or offices of a health care provider, provided that the possession of such substance is in accordance with the laws of this state. (Code 1981, § 51-1-29.6, enacted by Ga. L. 2015, p. 49, § 5-1/HB 1; Ga. L. 2016, p. 864, § 51/HB 737.)

Effective date. — This Code section became effective April 16, 2015.

The 2016 amendment, effective May 3, 2016, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (b).

Editor's notes. — Ga. L. 2015, p. 49, § 1-1/HB 1, not codified by the General

Assembly, provides that: "This Act shall be known and may be cited as the 'Haleigh's Hope Act.'"

Law reviews. — For article on the 2015 enactment of this Code section, see 32 Ga. St. U.L. Rev. 153 (2015).

51-1-30. Liability of officers and agents for acts performed while fighting fires or performing duties at the scene of emergencies.

(a) As used in this Code section, the term "fire department" includes volunteer fire departments established pursuant to local act, ordinance, or resolution or established as nonprofit corporations pursuant to private subscription and any fire department established as a department, bureau, or agency of a municipality, county, fire district, or authority of this state.

(b) The officers, members, agents, or employees of any fire department established by any county, municipality, fire district, or authority shall not be liable at law for any act or acts done while actually fighting a fire or performing duties at the scene of an emergency, except for willful negligence or malfeasance.

(c) This Code section shall not affect the right of any party to recover damages for an act which occurred before July 1, 1980. (Code 1933, § 3-1004.1, enacted by Ga. L. 1980, p. 1173, §§ 1, 2; Ga. L. 1982, p. 1150, §§ 1, 2; Ga. L. 1985, p. 149, § 51.)

Cross references. — Immunity of counties, municipalities for damages resulting from inspections or other actions taken or not taken pursuant to fire protection laws, § 25-2-38.1. Powers of fire departments in emergencies generally, § 25-3-2. Firefighters, T. 25, C. 4. Liability of law enforcement officers for actions taken while performing duties at scene of emergency, § 35-1-7. Liability of counties only as authorized by statute, § 36-1-4. Liability of municipal corporations for acts or omissions of officers generally, T. 36, C. 33. Immunity of state and political subdivisions and emergency management workers for actions taken during emergencies and disasters, § 38-3-35. Liability of persons rendering assistance at scene of boat collision, accident, or other casualty, § 52-7-14.

Code Commission notes. — This Code section, enacted by Ga. L. 1980, p. 1173, §§ 1 and 2, was designated § 3-1004.1 of the Code of 1933 by the 1980 Act. However, Ga. L. 1976, p. 1363, § 3, previously enacted a section with that same number for the Code of 1933. See Code Section 9-3-34.

Law reviews. — For comment, "Good Samaritan Laws — Legal Disarray: An Update," see 38 Mercer L. Rev. 1439 (1987).

JUDICIAL DECISIONS

Firefighters' immunity. — Trial court properly granted summary judgment to three firefighters on the widow's wrongful death action against the firefighters for the death of the decedent while the decedent tried to rescue a fisherman whose canoe capsized at a lake, which was an incident the firemen were called to, as the lack of evidence of the three firefighters' wilful negligence and malfeasance meant the firefighters were entitled to immunity under O.C.G.A. § 51-1-30(b). Robinson v. DeKalb County, 261 Ga. App. 163, 582 S.E.2d 156 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 57 Am. Jur. 2d, Municipal, County, School, and State Tort Liability, §§ 429 et seq.

C.J.S. — 63 C.J.S., Municipal Corporations, §§ 912, 913.

ALR. — Products liability: firefighting equipment, 19 ALR4th 326.

51-1-30.1. Exemption from tort liability of drivers and operators of fire apparatus in certain municipalities.

(a) As used in this Code section, the term "fire apparatus" means salvage and first-aid cars, chiefs' cars, hose wagons, pumpers, aerial trucks, water towers, service trucks, supply trucks, or other publicly owned and operated automotive equipment used in fire fighting.

(b) A driver or operator of fire apparatus publicly owned and operated by any member of a fire department in municipalities having a population of more than 300,000 according to the United States decennial census of 1940 or any future such census shall be exempted from any tort liability by reason of injuries sustained to the person or property of anyone where such damage or injury is caused by the driving of such apparatus in responding to a fire alarm or while returning to a fire station under emergency orders of a chief or assistant chief to put equipment back into service for another call.

(c) Nothing in this Code section shall affect in any manner the liability of such municipalities owning such fire apparatus for the torts of its employees under the general laws of this state. (Ga. L. 1941, p. 442, § 1; Code 1981, § 51-1-30.1, enacted by Ga. L. 1982, p. 2107, § 52; Ga. L. 1985, p. 149, § 51.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1983, Code Section 51-1-30.1, as enacted by Ga. L. 1982, p. 2495, § 1, was redesignated as Code Section 51-1-30.2.

51-1-30.2. Immunity of teachers and school personnel from liability for communicating information concerning drug abuse.

Teachers and other school personnel shall be immune from any civil liability for communicating information in good faith concerning drug abuse by any child to that child's parents, to law enforcement officials, or to health care providers. (Code 1981, § 51-1-30.1, enacted by Ga. L. 1982, p. 2495, § 1; Code 1981, § 51-1-30.2, as redesignated by Ga. L. 1983, p. 3, § 40.)

Cross references. — Reporting of juvenile drug use, § 19-7-6. Mandatory instruction concerning alcohol and drug use, § 20-2-144.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1983, Code Section 51-1-30.1, as enacted by Ga. L. 1982, p. 2495, § 1, was redesignated as Code Section 51-1-30.2.

JUDICIAL DECISIONS

Cited in Abdel-Samed v. Dailey, 294 Ga. 758, 755 S.E.2d 805 (2014).

51-1-30.3. Immunity from liability for persons providing certain services upon public or private school property and for public or private schools requesting such services.

(a) Unless it is established that injuries or death were caused by gross negligence or willful or wanton misconduct:

(1) No natural person who voluntarily and without the expectation or receipt of compensation provides services for and at the request and sanction of a public school or private school and who does not expect or receive compensation with respect to such services from the recipient of such services; or

(2) No public school or private school which requests, sponsors, or participates in the providing of the services under the circumstances provided in paragraph (1) of this subsection

shall be liable for damages or injuries alleged to have been sustained by another person or damages for the injury or death of the other person when the injuries or death are alleged to have occurred by reason of an act or omission occurring on school property in the rendering of such services if such services are provided upon school property or at a school sponsored function.

(b) This Code section shall not apply to any incident or incidents arising out of the operation of a motor vehicle or motor vehicles. This Code section also shall not apply to any public or private school to the extent that any such public or private school has insurance in effect which covers any damages or injury or death described in paragraph (a) above.

(c) This Code section shall not apply to persons who are performing tasks associated with their normal or ordinary course of business or their trade or profession.

(d) This Code section shall apply only to causes of action arising on or after July 1, 1994.

(e) Nothing in this Code section shall be construed to alter, affect, or repeal any other provision of law granting immunity from liability or to alter or affect any other immunity provision from whatever source and

shall be cumulative of any existing immunity from any source. (Code 1981, § 51-1-30.3, enacted by Ga. L. 1994, p. 1055, § 1.)

Law reviews. — For annual survey on local government law, see 68 Mercer L. Rev. 199 (2016).

For note on the 1994 enactment of this Code section, see 11 Ga. St. U.L. Rev. 267 (1994).

RESEARCH REFERENCES

C.J.S. — 98A C.J.S., Schools and School Districts, § 452 et seq.

51-1-30.4. Immunity from liability for officers providing security at nuclear facilities.

Notwithstanding any other provision of law, an authorized security officer as provided for in Code Section 16-11-124 acting within the scope of his or her official duties on the premises of a federally licensed nuclear power facility or the properties adjacent to the facility pursuant to a written agreement entered into with the local law enforcement agency having jurisdiction over the facility shall be entitled to immunity as provided in Code Section 51-11-9. Such officer and the officer's employer or the owner, operator, or licensee of the facility where the officer is providing security services shall also be immune from liability for the officer's good faith performance of his or her duties at such facility in accordance with a nuclear security plan approved by the United States Nuclear Regulatory Commission or other authorized federal agency. (Code 1981, § 51-1-30.4, enacted by Ga. L. 2006, p. 812, § 5/SB 532.)

Editor's notes. — Ga. L. 2006, p. 812, § 5/SB 532, not codified by the General Assembly, provides that: "this Act shall apply only with respect to causes of action arising on or after the effective date of this Act." This Act became effective May 3, 2006.

51-1-31. Liability from donation of canned or perishable food to charitable or nonprofit organizations for use or distribution.

(a) As used in this Code section, the term:

(1) "Canned food" means any food which has been commercially processed and prepared for human consumption and which has been commercially packaged in such a manner as to remain nonperishable without refrigeration for a reasonable length of time.

(2) "Donor" includes, but is not limited to, a farmer, processor, distributor, commercial food service operator, wholesaler, or retailer of food.

(3) "Gleaner" means a person who harvests for use or distribution an agricultural crop that has been donated by the owner.

(4) "Perishable food" means any food that may spoil or otherwise become unfit for human consumption because of its nature, type, or physical condition. "Perishable food" includes, but is not limited to, table-ready food, cooked foods, fresh or processed meats, poultry, seafood, dairy products, bakery products, eggs, fresh fruits or vegetables, and foods that have been noncommercially or commercially packaged or that have been frozen or otherwise require temperature control to remain nonperishable for a reasonable length of time.

(b) A good faith donor or gleaner of any canned or perishable food apparently fit for human consumption who donates such food to a bona fide charitable or nonprofit organization for use or distribution shall not be subject to criminal penalty or civil damages arising from the condition of the food, unless an injury is caused by the recklessness or intentional misconduct of the donor or gleaner.

(c) A bona fide charitable or nonprofit organization which accepts any canned or perishable food apparently fit for human consumption from a good faith donor or gleaner for use or distribution shall not be subject to criminal penalty or civil damages arising from the condition of the food, unless an injury is caused by the recklessness or intentional misconduct of the charitable or nonprofit organization.

(d) The provisions of this Code section apply to the good faith donation of canned or perishable food not readily marketable due to appearance, freshness, grade, surplus, or other such considerations.

(e) The provisions of this Code section shall not be construed to restrict the authority of any lawful agency otherwise to regulate or ban the use of food for human consumption. (Code 1933, § 105-1106, enacted by Ga. L. 1980, p. 69, § 1; Ga. L. 1987, p. 832, § 1; Ga. L. 1990, p. 44, § 1.)

Cross references. — Inspection and handling of food items donated to nonprofit organizations, § 26-1-1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, "good faith" was substituted for "good-faith" in subsections (b), (c), and (d).

RESEARCH REFERENCES

ALR. — Tort immunity of nongovernmental charities — modern status, 25 ALR4th 517.

51-1-32. Separate causes of action for personal injury and property damage caused by motor vehicle.

In cases arising from the wrongful or negligent operation of a motor vehicle in which the single wrongful or negligent act causes or results in both physical injuries to a person and injuries to the property of such person, the injured person shall have a separate and distinct cause of action against the person whose wrongful or negligent act caused such injury for the physical injury to his person and a separate and distinct cause of action for the injuries to his property. The injured party shall have the right, in his sole discretion, to prosecute each cause of action separately or to combine the two causes of action in one single action. (Code 1933, § 105-1301A, enacted by Ga. L. 1973, p. 295, § 1.)

Cross references. — Settlement offers and agreement for personal injury, bodily injury, and death from motor vehicle, § 9-11-67.1. Criminal penalties for homicide by vehicle and serious injury by vehicle, §§ 40-6-393, 40-6-394.

Law reviews. — For article advocating moderate reform of auto accident compensation system prior to Georgia's adoption of the Georgia Motor Vehicle Accident Reparations Act, see 5 Ga. St. B. J. 321 (1969).

For note discussing the family purpose car doctrine as an extension of the principle of respondeat superior, see 3 Ga. St. B. J. 112 (1966).

JUDICIAL DECISIONS

Constitutionality of guest passenger rule. — Guest passenger rule, by creating a distinction between paying and nonpaying passengers, does not violate the equal protection clause of U.S. Const., amend. 14. Corey v. Jones, 650 F.2d 803 (5th Cir. 1981).

Guest passenger rule is reasonably related to two legitimate purposes of the rule: fostering hospitality among vehicle operator and passengers and discouraging collusive lawsuits. Corey v. Jones, 650 F.2d 803 (5th Cir. 1981).

Automobile guest passenger rule precludes nonpaying guest passenger from recovering damages for personal injuries sustained by the ordinary negligence of the owner or operator. Corey v. Jones, 650 F.2d 803 (5th Cir. 1981).

Doctrines of res judicata and estoppel by judgment are inapplicable to cases arising from motor vehicle collisions in which personal injury claims and property damage claims are dealt with in separate actions. Childers v. F.A.F. Motor Cars, Inc., 171 Ga. App. 232, 319 S.E.2d 90 (1984).

Rule prohibiting assignment of personal injury actions unaffected. — O.C.G.A. § 51-1-32 is consistent with O.C.G.A. § 44-12-24 in distinguishing between property damage and personal injury claims, and in no way addresses or alters the rule prohibiting assignment of personal injury causes of action. GEICO v. Hirsh, 211 Ga. App. 374, 439 S.E.2d 59 (1993).

Applicability. — When an insured brought a counterclaim for property damage against a tortfeasor but later withdrew it, the insurer could not seek to reassert that claim under O.C.G.A. § 51-1-32, allowing the splitting of personal injury and property damage claims, in a subsequent action, because the insured's only claim was for property damage. Allstate Ins. Co. v. Welch, 259 Ga. App. 71, 576 S.E.2d 57 (2003).

Cited in Coaxum v. Graham, 151 Ga. App. 75, 258 S.E.2d 740 (1979); American States Ins. Co. v. Walker, 223 Ga. App. 194, 477 S.E.2d 360 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 64 et seq.

C.J.S. — 1A C.J.S., Actions, §§ 122, 123.

ALR. — Injury by road vehicle to person on sidewalk, 1 ALR 840; 75 ALR 559.

Liability for injury to child playing on or in proximity to automobile, 1 ALR 1385; 44 ALR 434.

Liability for damages by vehicle trailers, 3 ALR 618.

Measure of damages for destruction of or injury to commercial vehicle, 4 ALR 1350; 169 ALR 1074.

Liability of person transporting or conducting on highway an object which frightens horse, 5 ALR 940.

Duty and liability to persons struck by automobile while crossing street at unusual place, or diagonally, 14 ALR 1176; 67 ALR 313.

Automobiles; effect of defective brakes on liability for injury, 14 ALR 1339; 63 ALR 398; 170 ALR 611.

Liability of guest for injury to third person due primarily to negligence of driver, 18 ALR 365.

Automobiles: liability of owner or operator for injury to guest, 20 ALR 1014; 26 ALR 1425; 40 ALR 1338; 47 ALR 327; 51 ALR 581; 61 ALR 1252; 65 ALR 952.

Personal care required of one riding in an automobile driven by another as affecting his right to recover against third persons, 22 ALR 1294; 41 ALR 767; 47 ALR 293; 63 ALR 1432; 90 ALR 984.

Liability of street railway company for injury to person in "safety zone", 41 ALR 376.

Liability of carrier for injury to passenger from car window, 45 ALR 1541.

Liability for personal injuries by tractor, 48 ALR 939.

Liability for injury to pedestrian struck by automobile as affected by his blindness, deafness, or other physical disability, 62 ALR 578.

Liability of owner for negligence of one to whom car is loaned or hired, 68 ALR 1008; 100 ALR 920; 168 ALR 1364.

Liability for injury to one riding on running board of automobile or other place outside body of car, 80 ALR 553; 104 ALR 312; 44 ALR2d 238.

Size or weight of automobile or load involved in accident as factor in determining responsibility, 85 ALR 1173.

Violation of traffic regulation requiring one intending to turn left at intersection to approach in traffic lane nearest to center of street or highway, 87 ALR 1165.

What conduct in driving automobile amounts to wantonness, wilfulness, or the like, precluding defense of contributory negligence, 92 ALR 1367; 119 ALR 654.

Liability for injury to pedestrian struck by automobile while traveling along street or highway, 93 ALR 551.

Overcrowding motor vehicle or riding in unusual position thereon as affecting liability for injury or damage, 104 ALR 312; 44 ALR2d 238.

Liability of joint owners of automobile for injury or damage resulting from its operation, 109 ALR 124.

Liability for damage or injury by skidding motor vehicle, 113 ALR 1002.

Right or duty to turn in violation of law of road to avoid traveler or obstacle, 113 ALR 1328.

Liability for injury to person or damage to property from stone or other object on surface of highway thrown by or from passing vehicle, 115 ALR 1498.

Collision between automobiles on bridge or approach thereto, 118 ALR 1196.

Liability of owner or one in charge of automobile for injury due to its condition, to one, other than his employee or bailee use, engaged in some service or operation in connection with it, 122 ALR 1023.

Admissibility and weight of evidence as to condition of automobile or parts thereof after accident, on issue as to responsibility for accident, 129 ALR 438.

Necessity and sufficiency, in complaint or declaration in action for injury or damage due to dangerous condition of automobile or other machine, of allegations as to particular defects, 129 ALR 1274.

Stopping vehicle on traveled portion of highway as affecting responsibility for collision between vehicles, 131 ALR 562.

Injury to guest of operator as within statutory or nonstatutory rule which makes owner of automobile liable for negligence of another operating the car with his consent, 131 ALR 891.

Liability for injury or damages resulting from traffic accident on highway involving vehicle in military service, 133 ALR 1298; 147 ALR 1431.

Liability for injury to bicyclist while holding on to moving motor vehicle, 138 ALR 1127.

Insurer's right of subrogation against tort-feasor as affecting application of rule against splitting cause of action, 140 ALR 1241; 166 ALR 870.

Damages on account of loss of earnings or impairment on earning capacity due to wife's personal injury as recoverable by her or by her husband, 151 ALR 479.

Res ipsa loquitur as applied to a collision between a moving automobile and a standing automobile or other vehicle, 151 ALR 876.

Note: imputation of driver's negligence to passenger, 163 ALR 697.

Civil rights and liabilities as affected by failure to comply with regulations as to registration of automobile or motorcycle or licensing of operation, 163 ALR 1375.

Automobile owner's common-law liability for negligence in entrusting car to known incompetent, reckless, or inexperienced person as affected by statute limiting owner's liability to use within terms of consent, 163 ALR 1418.

Negligence causing automobile accident as proximate cause of injury or death resulting from acts done or attempted with reference to person or property involved, 166 ALR 752.

Rights and remedies incident to subrogation to one but not both elements of a single cause of action for injury to person and damage to property, 166 ALR 870.

Common-law liability based on entrusting automobile to incompetent, reckless, or unlicensed driver, 168 ALR 1364.

Effect of defective brakes on liability for injury, 170 ALR 611.

Reciprocal duties of driver of automobile and bicyclist or motorcyclist, 172 ALR 736.

Custom or practice of drivers of motor vehicles as affecting question of negligence, 172 ALR 1141; 77 ALR2d 1327.

Duty as regards barriers for protection of automobile travel, 173 ALR 626.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 ALR2d 196.

Proof of title to motor vehicle requisite to recovery for injury thereof, 7 ALR2d 1347.

Liability to automobile guest injured by falling from or through door of moving automobile, 9 ALR2d 1337.

Liability of driver of private automobile for injury to occupant struck by another vehicle after alighting, 20 ALR2d 789.

Liability for killing or injuring, by motor vehicle, of livestock or fowl on highway, 20 ALR2d 1053.

Liability of owner or operator of motor vehicle for accident resulting from alleged breaking of or defect in steering mechanism, 23 ALR2d 539.

Admissibility, in vehicle accident case, of evidence of opposing party's intoxication where litigant's pleading failed to allege such fact, 26 ALR2d 359.

Liability for failure to provide motor vehicle with adequate rearview mirror, 27 ALR2d 1040.

Physical defect, illness, drowsiness, or falling asleep of motor vehicle operator as affecting liability for injury, 28 ALR2d 12; 93 ALR3d 326.

Physical defect, illness, drowsiness, or falling asleep of motor vehicle operator as affecting liability for injury, 28 ALR2d 12; 93 ALR3d 326; 1 ALR4th 556.

Liability for injury or damage growing out of pulling out of parked motor vehicle, 29 ALR2d 107.

Liability for injury incident to towing automobile, 30 ALR2d 1019.

Liability for motor vehicle accident where vision of driver is obscured by smoke, dust, atmospheric condition, or unclean windshield, 42 ALR2d 13.

Rights of injured guest as affected by obscured vision from vehicle in which he was riding, 42 ALR2d 350.

Liability for injury occurring when clothing of one outside motor vehicle is caught as vehicle is put in motion, 43 ALR2d 1282.

Overcrowding motor vehicle or riding in unusual position thereon as affecting liability for injury or damage, 44 ALR2d 238.

Right of defendant in action for personal injury, property damage, or death, to

bring in new parties as cross defendants to his counterclaim or the like, 46 ALR2d 1253.

Liability of vehicle driver or owner for running over or hitting former passenger or guest who has alighted, 50 ALR2d 974.

Recovery under automobile property damage policy expressly including or excluding collision damage, where vehicle is struck by object falling thereon other than as a result of storm or the like, 54 ALR2d 381.

Liability of motor vehicle owner or operator for personal injury or death of passenger or guest occasioned by inhalation of gases or fumes from exhaust, 56 ALR2d 1099.

Liability as between participants for accident arising from private automobile or other vehicle racing on public street or highway, 59 ALR2d 481.

Liability of state, municipality, or public agency for vehicle accident occurring because of accumulation of water on street or highway, 61 ALR2d 425.

Duty and liability of vehicle drivers approaching intersection of one-way street with other street, 62 ALR2d 275.

Duty and liability of vehicle drivers within parking lot, 62 ALR2d 288.

Right to punitive or exemplary damages in action for personal injury or death caused by operation of automobile, 62 ALR2d 813.

Liability for injury occasioned by backing of motor vehicle in public street or highway, 63 ALR2d 5.

Liability for injury occasioned by backing of motor vehicle from private premises into public street or highway, 63 ALR2d 108.

Liability for injury or damage occasioned by backing of motor vehicle within private premises, 63 ALR2d 184.

Instructions on unavoidable accident, or the like, in motor vehicle cases, 65 ALR2d 12.

Liability of owner or operator to adult trespasser in or on motor vehicle or equipment, 65 ALR2d 798.

Liability for accident from "jackknifing" of trailers or the like, 68 ALR2d 353.

Liability for injury or damage from motor vehicle accident assertedly caused by insect, 73 ALR2d 1214.

Custom or practice of drivers of motor vehicles as affecting question of negligence, 77 ALR2d 1327.

Instructions on sudden emergency in motor vehicle cases, 80 ALR2d 5; 102 ALR 781; 118 ALR 982.

Violation of statute requiring one involved in an accident to stop and render aid as affecting civil liability, 80 ALR2d 299.

Liability for injury or damage caused by operation of bulldozer, earth grader, or similar earth-moving equipment, 81 ALR2d 456.

Liability of owner or driver of double-parked motor vehicle for ensuing injury, death, or damage, 82 ALR2d 726.

Negligence in connection with the pushing of one motor vehicle by another, 82 ALR2d 918.

Liability arising from accidents involving police vehicles, 83 ALR2d 383.

Liability of governmental unit or its officer for injury or damage from operation of vehicle pursued by police, 83 ALR2d 452.

Liability for injury or damages resulting from operation of vehicle in funeral procession or in procession which is claimed to have such legal status, 85 ALR2d 692.

Criminal responsibility for injury or death in operation of mechanically defective motor vehicle, 88 ALR2d 1165.

Liability for accident arising from fall of motor vehicle load upon, or into path of, another motor vehicle, 91 ALR2d 897.

Liability for injury or damage caused in collision with, or avoiding collision with, open door of parked automobile, 92 ALR2d 1037.

Improper use of automobile license plates as affecting liability or right to recover for injuries, death, or damages in consequence of automobile accident, 99 ALR2d 904.

Liability for automobile accident, other than direct collision with pedestrian, as affected by reliance upon or disregard of stop-and-go signal, 2 ALR3d 12.

Liability for collision of automobile with pedestrian at intersection as affected by reliance upon or disregard of stop-and-go signal, 2 ALR3d 155.

Liability for automobile accident at in-

tersection as affected by reliance upon or disregard of "yield" sign or signal, 2 ALR3d 275.

Liability for automobile accident at intersection as affected by reliance upon or disregard of unchanging stop signal or sign, 3 ALR3d 180.

Liability for automobile accident at intersection as affected by reliance upon or disregard of unchanging caution, slow, danger, or like sign or signal, 3 ALR3d 507.

Liability for collision of automobile with pedestrian at intersection as affected by reliance upon or disregard of traffic sign or signal other than stop-and-go signal, 3 ALR3d 557.

Parking illegally at or near street corner or intersection as affecting liability for motor vehicle accident, 4 ALR3d 324.

Owning, leasing, or otherwise engaging in business or furnishing services for taxicabs as basis of tort liability for acts of taxi driver under respondeat superior doctrine, 8 ALR3d 818.

Liability for accident occurring in motor transportation of house or similar structure on public streets or highways, 9 ALR3d 1436.

What amounts to negligence within meaning of statutes penalizing negligent homicide by operation of a motor vehicle, 20 ALR3d 473.

Automobiles: duty and liability with respect to giving audible signal upon approaching pedestrian, 24 ALR3d 183.

Burden of pleading and proving guest status, or absence thereof, under automobile guest statute, 24 ALR3d 1400.

Liability of motorist colliding with person engaged about stalled or disabled vehicle on or near highway, 27 ALR3d 12.

Admissibility of evidence of habit, customary behavior, or reputation as to care of pedestrian on question of his care at time of collision with motor vehicle giving rise to his injury or death, 28 ALR3d 1293.

Automobiles: liability of motorist for collision as affected by attempts to avoid dog or other small animal in road, 41 ALR3d 1124.

Automobiles: liability for accident arising from escape of trailer, 43 ALR3d 725.

Anti-hitchhiking laws: their construction and effect in action for injury to hitchhiker, 46 ALR3d 964.

Liability of owner or operator of motor vehicle or aircraft for injury or death allegedly resulting from failure to furnish or require use of seat belt, 49 ALR3d 295.

Automobiles: liability of one fleeing police for injury resulting from collision of police vehicle with another vehicle, person or object, 51 ALR3d 1226.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 ALR3d 669.

Liability or recovery in automobile negligence action as affected by absence on insufficiency of lights on parked or standing motor vehicle, 61 ALR3d 13.

Liability or recovery in automobile negligence action arising out of collision or upset as affected by operation of vehicle without front lights, or with improper front lights, 62 ALR3d 560.

Liability or recovery of automobile negligence action arising out of collision or upset as affected by operation of vehicle without or with improper taillights or rear reflectors, 62 ALR3d 771.

Liability or recovery in automobile negligence action arising out of collision or upset as affected by operation of vehicle without, or with improper, clearance, load, or similar auxiliary lights, 62 ALR3d 844.

Liability or recovery in automobile negligence action as affected by driver's being blinded by lights of motor vehicle, 64 ALR3d 551.

Liability or recovery in automobile negligence action as affected by driver's being blinded by lights other than those of a motor vehicle, 64 ALR3d 760.

No-fault: right of insurer to reimbursement out of recovery against tortfeasor, 69 ALR3d 830.

Automobile occupant's failure to use seat belt as contributory negligence, 92 ALR3d 9.

Liability for automobile accident allegedly caused by driver's blackout, sudden unconsciousness, or the like, 93 ALR3d 326.

Nonuse of seatbelt as reducing amount of damages recoverable, 95 ALR3d 239; 62 ALR5th 537.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from ice or snow on surface of highway or street, 97 ALR3d 11.

Products liability: personal injury or death allegedly caused by defect in braking system in motor vehicle, 99 ALR3d 179.

Liability of common carrier for personal injury or death of passenger occasioned by inhalation of gases or fumes from exhaust, 99 ALR3d 751.

Products liability: personal injury or death allegedly caused by defect in drive train system in motor vehicle, 100 ALR3d 471.

Liability of governmental unit or its officers for injury to innocent pedestrian or occupant of parked vehicle, or for damage to such vehicle, as result of police chase, 100 ALR3d 815.

Products liability: personal injury or death allegedly caused by defect in suspension system in motor vehicle, 100 ALR3d 912.

Motor vehicle passenger's contributory negligence or assumption of risk where accident resulted from driver's drowsiness, physical defect, or illness, 1 ALR4th 556.

Motor carrier's liability for personal injury or death of passenger caused by debris, litter, or other foreign object on floor or seat of vehicle, 1 ALR4th 1249.

Liability for negligent operation of dune buggy, 2 ALR4th 795.

Liability of governmental unit or its officers for injury to innocent occupant of moving vehicle, or for damage to such vehicle, as result of police chase, 4 ALR4th 865.

Products liability: personal injury or death allegedly caused by defect in electrical system in motor vehicle, 5 ALR4th 662.

Immediacy of observation of injury as affecting right to recover damages for shock or mental anguish from witnessing injury to another, 5 ALR4th 833.

Liability of governmental unit for injuries caused by driver of third vehicle to person whose vehicle had been stopped by police car, 17 ALR4th 897.

Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 132.

Liability of owner or operator of vehicle for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 159.

Fact that passenger in vehicle is owner as affecting right to recover from driver for injuries to, or death of, passenger incurred in consequence of driver's negligence, 21 ALR4th 459.

Simultaneous injury to person and property as giving rise to single cause of action — modern cases, 24 ALR4th 646.

Motor vehicle operator's liability for accident occurring while driving with vision obscured by smoke or steam, 32 ALR4th 933.

Liability of highway user for injuries resulting from failure to remove or protect against material spilled from vehicle onto public street or highway, 34 ALR4th 520.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 35 ALR4th 441.

Fact that passenger in negligently operated motor vehicle is owner as affecting passenger's liability to or rights against third person—modern cases, 37 ALR4th 565.

Motorist's liability for striking person lying in road, 41 ALR4th 303.

Construction and application of statute imposing liability expressly upon motor vehicle lessor for damage caused by operation of vehicle, 41 ALR4th 993.

Liability for personal injury or property damage caused by unauthorized use of automobile which had been parked with keys removed from ignition, 70 ALR4th 276.

Rescue doctrine: liability of one who negligently causes motor vehicle accident for injuries to person subsequently attempting to rescue persons or property, 73 ALR4th 737.

Modern status of rule imputing motor vehicle driver's negligence to passenger on joint venture theory, 3 ALR5th 1.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 ALR5th 195.

Motorist's liability for signaling other vehicle or pedestrian to proceed, or to pass signaling vehicle, 14 ALR5th 193.

Instructions on "unavoidable accident,"

"mere accident," or the like, in motor vehicle case — modern cases, 21 ALR5th 82.

Failure to use or misuse of automobile child safety seat or restraint system as affecting recovery for personal injury or death, 46 ALR5th 557.

Liability under state law for injuries resulting from defective automobile seatbelt, shoulder harness, or restraint system, 48 ALR5th 1.

Comparative negligence of driver as defense to enhanced injury, crashworthiness, or second collision claim, 69 ALR5th 625.

51-1-33. Settlement of single action under Code Section 51-1-32 — Evidence in separate action.

If the two causes of action specified in Code Section 51-1-32 are tried separately, the fact that a settlement has been made or that a judgment has been rendered in the action for property damage shall not be admissible in evidence in the action for physical injuries to the person. The fact that a settlement has been made or a judgment rendered in the action for the physical injuries to the person shall not be admissible in evidence in the action for property damage. (Code 1933, § 105-1302A, enacted by Ga. L. 1973, p. 295, § 1.)

Law reviews. — For article surveying torts law, see 34 Mercer L. Rev. 271 (1982).

JUDICIAL DECISIONS

Doctrines of res judicata and estoppel by judgment are inapplicable to cases arising from motor vehicle collisions in which personal injury claims and property damage claims are dealt with in separate actions. Childers v. F.A.F. Motor Cars, Inc., 171 Ga. App. 232, 319 S.E.2d 90 (1984).

Cited in Chance v. Hanson, 160 Ga. App. 329, 287 S.E.2d 57 (1981); American States Ins. Co. v. Walker, 223 Ga. App. 194, 477 S.E.2d 360 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 64 et seq.

51-1-34. Settlement of single action under Code Section 51-1-32 — Effect in separate action.

The settlement of a claim or cause of action arising from a motor vehicle collision for property damage shall not bar or otherwise affect the prosecution of the claim or cause of action for physical injury to the person. The settlement of a claim or cause of action arising from a motor vehicle collision for physical injury to the person shall not bar or otherwise affect the prosecution of the claim or cause of action for property damage. (Code 1933, § 105-1303A, enacted by Ga. L. 1973, p. 295, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 64 et seq.

C.J.S. — 50 C.J.S., Judgments, § 926 et seq.

ALR. — Avoidance of release of claim for personal injuries on ground of mistake or fraud respecting the nature of the claim covered, 164 ALR 402.

Recovery under automobile property damage policy expressly including or excluding collision damage, where vehicle is struck by object falling thereon other than as a result of storm or the like, 54 ALR2d 381.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 ALR2d 801.

51-1-35. When negotiating or obtaining statement from injured adverse party prohibited; effect of prohibited settlement in court action.

(a) No person whose interest is or may become adverse to an injured person who is confined to a hospital or health care center as a patient shall, within 15 days from the date of the occurrence causing the person's injury:

(1) Negotiate or attempt to negotiate a settlement with the injured patient;

(2) Obtain or attempt to obtain a general release of liability from the injured patient; or

(3) Obtain or attempt to obtain any statement, either written or oral from the injured patient, for use in negotiating a settlement or obtaining a release.

(b) Any settlement agreement entered into or any general release of liability made by any person who is confined in a hospital or health care center after he incurs a personal injury which is obtained contrary to the provisions of subsection (a) of this Code section shall not be admitted as evidence in any court action relating to the injury and shall not be utilized for any purpose in any legal action in connection therewith.

(c) Nothing in this Code section is intended to preclude an interested party from visiting an injured party while confined as a patient to a hospital or health care center for purposes of expressing concern for the injured or determining the extent of injuries incurred. (Ga. L. 1976, p. 202, § 1.)

JUDICIAL DECISIONS

Claims adjuster violated this section. — A claims adjuster, even absent a fiduciary relationship, may not induce a claimant by trick, artifice, or misrepresentation to sign a general release while the claimant is under a disability which deprives the claimant of the capacity to read, reason, or investigate for oneself. Cravey

v. Johnson, 229 Ga. App. 130, 493 S.E.2d 536 (1997).

Cited in Hardigree v. McMichael, 181 Ga. App. 583, 353 S.E.2d 78 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 43 Am. Jur. 2d, Insurance, §§ 1642 et seq., 1791 et seq.

C.J.S. — 46A C.J.S., Insurance, § 1872 et seq.

ALR. — Judgment against or settlement by person responsible for a personal injury as affecting his liability on account of improper medical or surgical treatment of injured person, 29 ALR 1313.

Release by, or judgment in favor of, person injured as barring action for his death, 39 ALR 579.

Avoidance of release of claims for personal injuries on ground of mistake or fraud relative to the extent or nature of injuries, 48 ALR 1462; 71 ALR2d 82.

Retention of consideration paid under release in settlement of claim as ratification, 76 ALR 344.

Representation by insurer's agent as to nonliability as fraud avoiding release, 96 ALR 1001.

Release by insured after accident or disability which ultimately results in his death as affecting right of beneficiary in respect of indemnity under accident policy or life policy with accident or disability feature, 115 ALR 425.

Avoidance of release of claim for personal injuries on ground of mistake or fraud respecting the nature of the claim covered, 164 ALR 402.

Avoidance of release of claim for personal injuries on ground of misrepresentation as to matters of law by tortfeasor of his representative insurer, 21 ALR2d 272.

Constitutionality, construction, and effect of legislation forbidding or limiting the use, as evidence, of statement secured from an injured person, 22 ALR2d 1269.

Admissibility of evidence of unperformed compromise agreement, 26 ALR2d 858.

Collision insurance: insured's release of tort-feasor before settlement by insurer as releasing insurer from liability, 38 ALR2d 1095.

Right to jury trial on issue of validity of release, 43 ALR2d 786.

Avoidance of release of personal injury claims on ground of fraud or mistake as to the extent or nature of injuries, 71 ALR2d 82.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 ALR2d 801.

Settlement with or release of person directly liable for injury or death as releasing liability under civil damage act, 78 ALR2d 998.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 ALR2d 533.

Validity of release from civil liability where release is executed by person while incarcerated, 86 ALR3d 1230.

Validity of release of prospective right to wrongful death action, 92 ALR3d 1232.

Modern status of rules as to avoidance of release of personal injury claim on ground of mistake as to nature and extent of injuries, 13 ALR4th 686.

Release of, or covenant not to sue, one primarily liable for tort, but expressly reserving rights against one secondarily liable, as bar to recovery against latter, 24 ALR4th 547.

51-1-36. Duty of care of operator of motor vehicle to passengers.

The operator of a motor vehicle owes to passengers therein the same duty of ordinary care owed to others. (Code 1933, § 105-104.1, enacted by Ga. L. 1982, p. 1283, § 1; Code 1981, § 51-1-36, enacted by Ga. L. 1982, p. 1283, § 2.)

Cross references. — Settlement offers and agreement for personal injury, bodily injury, and death from motor vehicle, § 9-11-67.1.

Law reviews. — For article criticizing Georgia's traditional rules for determining choice of law questions and discussing available alternatives, see 34 Mercer L. Rev. 787 (1983).

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Slight degree of care no longer sufficient. — Prior to the enactment of O.C.G.A. § 51-1-36, a host driver owed only a duty to exercise a slight degree of care in regard to passengers in the driver's motor vehicle. Bostwick v. Flanders, 171 Ga. App. 93, 318 S.E.2d 801 (1984).

No retroactive application of change in "guest passenger" rule. — Trial court did not err in refusing to apply O.C.G.A. § 51-1-36, changing the "guest passenger" rule as to the duty owed by an automobile operator to passengers to ordinary care, to a case involving a January 1981 accident, since, although a statute is "remedial" which affects only the procedure and practice of the courts and thus may be retroactive in application, the "guest passenger" rule established the duty owed by an automobile owner or operator to a nonpaying guest passenger, and there is nothing in the enactment of that section which discloses a legislative intent to apply the terms thereof retroactively. Rider v. Taylor, 166 Ga. App. 474, 304 S.E.2d 557 (1983).

Cited in Powell v. Clanton, 173 Ga. App. 363, 326 S.E.2d 495 (1985).

RESEARCH REFERENCES

ALR. — Modern status of choice of law in application of automobile guest statutes, 63 ALR4th 167.

51-1-37. Negligent or improper administration of polygraph examination; measure of damages.

(a) Any person who is given a polygraph examination and who suffers damages as a result of such polygraph examination having been administered in a negligent manner shall have a cause of action against the polygraph examiner.

(b) The measure of damages shall be the actual damages sustained by such person, together with reasonable attorneys' fees, filing fees, and reasonable costs of the action. Reasonable costs of the action may include, but shall not be limited to, the expenses of discovery and document reproduction. Damages may include, but shall not be limited to, back pay for the period during which such person did not work or was denied a job as a result of such examination. (Code 1981, § 51-1-37, enacted by Ga. L. 1985, p. 1008, § 2; Ga. L. 2001, p. 1035, § 1.)

Cross references. — Victim's right to refuse request for polygraph examinations or other truth-telling devices, § 17-5-73.

Editor's notes. — Ga. L. 1985, p. 1008, § 3, not codified by the General Assembly, provided as follows: "Nothing contained in this Act shall be construed so as to authorize the results of any polygraph examination to be introduced in evidence in any judicial or administrative proceeding in this state; provided, however, that such an

examination given with respect to employment may be admitted in an administrative proceeding dealing solely with action taken with respect to the employment; nor shall this Act be construed as a legislative determination that such examinations are reliable to demonstrate any fact or that they have any probative value."

Law reviews. — For note on the 2001 amendment to this Code section, see 18 Ga. St. U.L. Rev. 331 (2001).

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Refusal to take polygraph examination. — Dismissal of public employees from employment upon refusal to take a polygraph examination is permissible if the employee is informed: (1) that the questions will relate specifically and narrowly to the performance of official duties; (2) that the answer cannot be used against the employee in any subsequent criminal prosecution; and (3) that the penalty for refusal is dismissal. Moss v. Central State Hosp., 179 Ga. App. 359, 346 S.E.2d 580 (1986).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Reliability of Polygraph Examination, 14 POF2d 1.

Am. Jur. Trials. — Uses, Techniques, and Reliability of Polygraph Testing, 42 Am. Jur. Trials 313.

ALR. — Employee's action in tort against party administering polygraph, drug, or similar test at request of actual or prospective employer, 89 ALR4th 527.

Construction and application of Employee Polygraph Protection Act of 1988 (29 USCA § 2001 et seq.), 154 ALR Fed. 315.

51-1-38. Tort immunity for medical students; exceptions.

(a) No student who participates in the provision of medical care or medical treatment under the supervision of a medical facility, academic institution, or doctor of medicine, as a part of an academic curriculum leading to the award of a medical degree, shall be liable for any civil damages as a result of any act or omission in such participation, except for willful or wanton misconduct.

(b) Subsection (a) of this Code section shall not be construed to affect or limit the liability of a medical facility, academic institution, or doctor of medicine. (Code 1981, § 51-1-38, enacted by Ga. L. 1987, p. 363, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, Code Section 51-1-38, as enacted by Ga. L. 1987, p. 433, § 1, was redesignated as Code Section 51-1-39.

51-1-39. Liability for injuries of person committing crime on political subdivision property.

A person who engages in a criminal act on property owned or leased by a political subdivision of this state and who suffers an injury as a result of said criminal act which is not inflicted by an officer, employee, or agent of such political subdivision shall not have a cause of action

against such political subdivision for any injury sustained. The provisions of this Code section shall not have the effect of waiving the sovereign immunity of any political subdivision. (Code 1981, § 51-1-39, enacted by Ga. L. 1987, p. 433, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1987, Code Section 51-1-38, as enacted by Ga. L. 1987, p. 433, § 1, was redesignated as this Code section.

51-1-40. Liability for acts of intoxicated persons.

(a) The General Assembly finds and declares that the consumption of alcoholic beverages, rather than the sale or furnishing or serving of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person, except as otherwise provided in subsection (b) of this Code section.

(b) A person who sells, furnishes, or serves alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury, death, or damage caused by or resulting from the intoxication of such person, including injury or death to other persons; provided, however, a person who willfully, knowingly, and unlawfully sells, furnishes, or serves alcoholic beverages to a person who is not of lawful drinking age, knowing that such person will soon be driving a motor vehicle, or 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 minor or person when the sale, furnishing, or serving is the proximate cause of such injury or damage. Nothing contained in this Code section shall authorize the consumer of any alcoholic beverage to recover from the provider of such alcoholic beverage for injuries or damages suffered by the consumer.

(c) In determining whether the sale, furnishing, or serving of alcoholic beverages to a person not of legal drinking age is done willfully, knowingly, and unlawfully as provided in subsection (b) of this Code section, evidence that the person selling, furnishing, or serving alcoholic beverages had been furnished with and acted in reliance on identification as defined in subsection (d) of Code Section 3-3-23 showing that the person to whom the alcoholic beverages were sold, furnished, or served was 21 years of age or older shall constitute rebuttable proof that the alcoholic beverages were not sold, furnished, or served willfully, knowingly, and unlawfully.

(d) No person who owns, leases, or otherwise lawfully occupies a premises, except a premises licensed for the sale of alcoholic beverages,

shall be liable to any person who consumes alcoholic beverages on the premises in the absence of and without the consent of the owner, lessee, or lawful occupant or to any other person, or to the estate or survivors of either, for any injury or death suffered on or off the premises, including damage to property, caused by the intoxication of the person who consumed the alcoholic beverages. (Code 1981, § 51-1-40, enacted by Ga. L. 1988, p. 1692, § 1.)

Cross references. — Sale of alcoholic beverages to intoxicated persons, § 3-3-22. Sale of alcoholic beverages to underage persons, § 3-3-23.

Editor's notes. — Ga. L. 1988, p. 1692, § 2, as amended by Ga. L. 1989, p. 301, § 1, not codified by the General Assembly, provides: "This Act shall apply only to causes of action which arise under Code Section 51-1-40 on or after the effective date of this Act [April 12, 1988]."

Law reviews. — For survey article on tort law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 425 (2003). For annual survey of tort law, see 57 Mercer L. Rev. 363 (2005). For survey article on tort law, see 60 Mercer L. Rev. 375 (2008). For annual survey of law on torts, see 62 Mercer L. Rev. 317 (2010).

JUDICIAL DECISIONS

Analysis

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General Consideration

Constitutionality. — Word "soon" in subsection (b) is sufficiently definite and certain in meaning to give notice to a seller that the seller could be held liable for injuries occurring four and one-half hours after the sale of alcohol to a minor; the dictates of due process do not demand that the word be construed as having so narrow a time frame as to exclude such an interval from the ambit of that section. Riley v. H & H Operations, Inc., 263 Ga. 652, 436 S.E.2d 659 (1993).

Construction with O.C.G.A. § 51-1-18(a). — Trial court erroneously denied a motion to dismiss a personal injury action filed by two parents against two social hosts, arising out the death of the parents' 20-year-old daughter, which alleged that the social hosts served the daughter alcohol, and the daughter died when the daughter drunkenly drove into a tree after leaving the social hosts' home, as the action was barred due to the fact that the daughter had already reached the age of majority at the time of the accident; moreover, because the daughter could not recover from the social hosts, neither could the parents recover under a wrongful death theory. Penny v. McBride, 282 Ga. App. 590, 639 S.E.2d 561 (2006), cert. denied, 2007 Ga. LEXIS 223 (Ga. 2007).

Construction with O.C.G.A. § 51-12-5.1. — Punitive damages are not authorized against a server of alcohol under O.C.G.A. § 51-12-5.1(f). O.C.G.A. § 51-12-5.1(f) provides that if the defendant acted or failed to act while under the influence of alcohol, there shall be no limitation regarding the amount which may be awarded as punitive damages against such an active tortfeasor; however, such damages shall not be the liability of any defendant other than an active tortfeasor, that is, the defendant acting under the influence of alcohol. Capp v. Carlito's Mexican Bar & Grill #1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007), cert. denied, 2008 Ga. LEXIS 317 (Ga. 2008).

Term "consumer" as used in subsection (b) of O.C.G.A. § 51-1-40 means one who purchases and consumes alcohol, then injures oneself; it does not refer to one who purchases and consumes alcohol, then is injured by another. Griffin Motel Co. v. Strickland, 223 Ga. App. 812, 479 S.E.2d 401 (1996).

Exclusive remedy for claims based on furnishing alcohol. — Provider of alcohol is insulated from liability to third parties except as provided in subsection (b) of O.C.G.A. § 51-1-40; thus, in a wrongful death action against a fraternity arising from an accident caused by an intoxicated driver who consumed alcohol at a party sponsored by the fraternity, the trial court erred in denying the fraternity's motion for summary judgment on the plaintiff's general negligence claims. Kappa Sigma Int'l Fraternity v. Tootle, 221 Ga. App. 890, 473 S.E.2d 213 (1996).

Because O.C.G.A. § 51-1-40(b) afforded the plaintiff an exclusive remedy against the defendant tavern for damages arising from an accident caused by an employee of the defendant, the trial court correctly granted summary judgment to the defendant on the claim based on common law general negligence principles. Hulsey v. Northside Equities, Inc., 249 Ga. App. 474, 548 S.E.2d 41 (2001).

No liability for furnishing premises. — Subsection (b) of O.C.G.A. § 51-1-40 does not impose liability upon one who merely furnishes the premises upon which alcohol is consumed. Viau v. Fred Dean, Inc., 203 Ga. App. 801, 418 S.E.2d 604, cert. denied, 203 Ga. App. 905, 418 S.E.2d 604 (1992).

In a wrongful death action against a fraternity arising from an accident caused by an intoxicated driver, although the fraternity sponsored the party at which the driver consumed alcohol, that was insufficient to impose liability upon the fraternity since the fraternity did not furnish the alcohol consumed by the driver. Kappa Sigma Int'l Fraternity v. Tootle, 221 Ga. App. 890, 473 S.E.2d 213 (1996).

Neither the resident's allowance of underage drinking at the apartment nor the landlord's failure to call the police when drinking was detected was the proximate cause of death of a guest who was stabbed while attempting to break up a fight at the party. Hansen v. Etheridge, 232 Ga. App. 408, 501 S.E.2d 517 (1998).

No individual liability for negligent supervision on part of sole shareholder of tavern. — Trial court properly granted summary judgment to a tavern's sole shareholder for individual liability on plaintiff's claims for negligent training and supervision because the general rule that an officer of a corporation who takes part in a tort is personally liable was inapplicable to claims against officers involving negligent training as a corporate officer's failure to properly train does not constitute sufficiently direct participation in a tort leading to a plaintiff's injuries. Barnes v. Smith, 339 Ga. App. 607, 794 S.E.2d 262 (2016).

Duty imposed on alcohol providers to protect third parties by not serving intoxicated patrons could not likewise be imposed on doctors treating patients and, thus, the doctor did not owe a duty to the decedent based on the doctor's provision of a medical certificate to the truck driver that the truck driver was physically fit to drive a commercial vehicle, when the truck driver died of preexisting coronary disease three months after receiving the certificate while driving a truck and the truck then struck the decedent's vehicle and killed the decedent. The doctor did not have any legal authority to restrain the truck driver for the benefit of the public, and, therefore, owed no duty to the decedent to not have provided the certificate to the truck driver. Houston v. Bedgood, 263 Ga. App. 139, 588 S.E.2d 437 (2003).

Effect on action for sale to minor. — O.C.G.A. § 51-1-40 does not preclude a cause of action pursuant to O.C.G.A. § 51-1-18 so long as the damages sought are only those contemplated by the provisions of O.C.G.A. § 51-12-6. Leach v. Braswell, 804 F. Supp. 1551 (S.D. Ga. 1992), aff'd, 8 F.3d 37 (11th Cir. 1993).

Health care providers. — Physician who administered medication to a patient who later was involved in an automobile accident was not under a duty similar to that imposed on providers of alcohol under O.C.G.A. §§ 3-3-22 and 51-1-40, as requiring health care providers to con-

sider the risk of harm to third persons before prescribing medication would have been inconsistent with the physician-patient relationship. Shortnacy v. N. Atlanta Internal Med., P.C., 252 Ga. App. 321, 556 S.E.2d 209 (2001).

Restraint of intoxicated person not required. — Nothing in O.C.G.A. § 51-1-40 or any other provision of Georgia law mandates that a provider of alcoholic beverages must prevent an intoxicated person from driving. Armstrong v. State, 244 Ga. App. 871, 537 S.E.2d 147 (2000).

Assumption of risk defense authorized. — In an action alleging that the defendant willfully and knowingly sold beer to a third party who negligently caused the death of the plaintiff's decedent, the defendant properly asserted as a defense that the deceased assumed the risk of riding with the obviously intoxicated third party. Taylor v. RaceTrac Petroleum, Inc., 238 Ga. App. 761, 519 S.E.2d 282 (1999).

Liability properly established despite default judgment. — In a wrongful death action, the trial court did not err by entering a judgment against the defendant as to liability even though it was in default because the facts as alleged in the complaint, together with the fair inferences and conclusions of fact to be drawn from those allegations, supported a claim against the defendant under the Dram Shop Act, O.C.G.A. § 51-1-40. Freese II, Inc. v. Mitchell, 318 Ga. App. 662, 734 S.E.2d 491 (2012).

Evidence. — Circumstantial evidence provided by a deputy sheriff that the deputy found a motorist in an intoxicated condition four hours after the motorist left the host's party was insufficient to contradict the host's direct and positive evidence that the motorist was not noticeably intoxicated when the motorist was furnished alcoholic beverages at the party. McElroy v. Cody, 210 Ga. App. 201, 435 S.E.2d 618 (1993).

Evidence showing only that the defendant unlawfully sold beer to underaged purchasers, which later in the day was consumed by another underaged person who, while intoxicated, drove a motor vehicle, which was involved in a fatal accident, is not sufficient to establish liability O.C.G.A. § 51-1-40. Taylor v. N.I.L., Inc., 221 Ga. App. 99, 470 S.E.2d 491 (1996).

Employer was entitled to summary judgment when uncontroverted evidence demonstrated that the employer's employee, who was involved in an automobile collision, did not appear to be in a state of noticeable intoxication while at the employer's annual holiday luncheon prior to the accident. Birnbrey, Minsk & Minsk, L.L.C. v. Yirga, 244 Ga. App. 726, 535 S.E.2d 792 (2000).

Trial court erred in granting summary judgment against the plaintiff's claim under O.C.G.A. § 51-1-40(b) because scientific evidence of the driver's blood alcohol level created a genuine issue of material fact on the crucial issue of whether the driver was noticeably intoxicated at the time the driver was served a last drink by defendant tavern. Hulsey v. Northside Equities, Inc., 249 Ga. App. 474, 548 S.E.2d 41 (2001).

Summary judgment was properly granted dismissing motorists' suit against a restaurant under the Dram Shop Act, O.C.G.A. § 51-1-40(b), for injuries sustained in a collision with one of the restaurant's patrons because the evidence did not present a question of fact as to whether the restaurant knew that the patron would be driving soon after leaving the premises. Sugarloaf Cafe, Inc. v. Willbanks, 279 Ga. 255, 612 S.E.2d 279 (2005).

Spoliation of evidence. — Given proof of spoliation under former O.C.G.A. § 24-2-22, in an action filed against a tavern pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40(b), the trial court erred in granting summary judgment to an injured party's guardian as the tavern's manager was aware of the potential for litigation and failed to preserve whatever videotaped evidence might have been captured as to whether one of the tavern's intoxicated patron's would soon be driving; hence, a rebuttable presumption arose against the tavern that the evidence destroyed would have been harmful to the tavern, rendering summary judgment inappropriate. Baxley v. Hakiel Indus., 282 Ga. 312, 647 S.E.2d 29 (2007).

Adoptive parent's ability to recover medical expenses of child. — In a suit

brought by an adoptive parent of a child pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40, the adoptive parent was not entitled to recover for medical expenses incurred prior to the time that the child was adopted as the action to recover for a child's medical expenses does not become vested in the adopting parent until after the adoption becomes final. That a Medicaid lien may have been imposed upon any recovery that was obtained by the child did not alter the decision. Capp v. Carlito's Mexican Bar & Grill #1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007), cert. denied, 2008 Ga. LEXIS 317 (Ga. 2008).

Commercial Environments

Statute applies to convenience stores. — Because O.C.G.A. § 51-1-40 uses the terms "sells, furnishes, or serves" alcohol in the disjunctive, it is clear that the statute was intended to encompass the sale of an alcoholic beverage at places other than the proverbial dram shop; the statutory requirements of the Dram Shop Act, § 51-1-40, are straightforward and under the plain language of the statute are equally applicable to convenience stores and traditional dram shops. Flores v. Exprezit! Stores 98-Georgia, LLC, 289 Ga. 466, 713 S.E.2d 368 (2011).

When a convenience store sells alcoholic beverages to a customer the store will often have an opportunity to observe how the customer arrived and, conversely, the manner in which he or she will depart and, thus, a convenience store may very well know if a customer will soon be driving a motor vehicle and does have an opportunity to observe the customer to determine if he or she appears to be noticeably intoxicated; if a plaintiff cannot demonstrate the convenience store knowingly sold alcoholic beverages to a noticeably intoxicated person who would soon be driving a motor vehicle, the convenience store would be entitled to summary judgment, and this is not to say that the Dram Shop Act, O.C.G.A. § 51-1-40, cannot be applied to sales made by convenience stores as a matter of law, but each case must rise or fall on the case's own facts. Flores v. Exprezit! Stores 98-Georgia, LLC, 289 Ga. 466, 713 S.E.2d 368 (2011).

Knowledge of a convenience store. — Dram Shop Act, O.C.G.A. § 51-1-40, does not require the seller of alcoholic beverages to know when or how much alcohol a purchaser will consume before the purchaser gets behind the wheel; the focus should be solely on a convenience store's knowledge as to whether the store's customer was noticeably intoxicated and would be driving soon because 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 under O.C.G.A. § 51-1-40(b). Flores v. Exprezit! Stores 98-Georgia, LLC, 289 Ga. 466, 713 S.E.2d 368 (2011).

Knowledge of store clerk is essential element. — The store clerk must have had actual or constructive knowledge of the elements of O.C.G.A. § 51-1-40 in order to be held liable. Jaques v. Kendrick, 43 F.3d 628 (11th Cir. 1995).

Actual knowledge that a customer would be driving soon was not required since there was evidence that the defendant, a tavern, should have known that the customer would be driving. Griffin Motel Co. v. Strickland, 223 Ga. App. 812, 479 S.E.2d 401 (1996).

Actual knowledge that the buyer is a minor and will be driving soon is not required; if one in the exercise of reasonable care should have known that the recipient of the alcohol was a minor and would be driving soon, he or she will be deemed to have knowledge of that fact. Riley v. H & H Operations, Inc., 263 Ga. 652, 436 S.E.2d 659 (1993).

Exclusion in comprehensive business liability insurance policy applying to sale of intoxicated beverages to a minor or to an intoxicated person excluded coverage for claims based on violations of statute on sales of alcohol to minors and drams shop law and was not void as against public policy. Hartford Ins. Co. v. Franklin, 206 Ga. App. 193, 424 S.E.2d 803 (1992); Kirby v. Northwestern Nat'l Cas. Co., 213 Ga. App. 673, 445 S.E.2d 791 (1994).

No liability for departing passengers. — The trial court erred by denying a

motion for summary judgment when the uncontroverted evidence established that the defendant, a minor hosting an unattended party at the minor's parents' residence, watched as the minor's friend departed as a passenger in a vehicle which the minor understood would conduct the minor's friend home. Manuel v. Koonce, 206 Ga. App. 582, 425 S.E.2d 921 (1992), overruled on other grounds, Riley v. H & H Operations, Inc., 263 Ga. 652, 436 S.E.2d 659 (1993).

Intermediate court erred in reinstating an injured party's Georgia Dram Shop Act, O.C.G.A. § 51-1-40, claim against an airline as the Georgia General Assembly intended to abrogate the common law principle that the negligent driver was the sole proximate cause of injuries resulting from an inebriated condition only in the limited case of a traditional land-based supplier of the alcohol. Delta Airlines, Inc. v. Townsend, 279 Ga. 511, 614 S.E.2d 745 (2005).

Employer could not be held liable for injuries caused by the employer's employees to the plaintiff, a limousine service driver, on the ground that the employer provided alcoholic beverages to the employees because the employer arranged for the employees be transported home to prevent the employees from driving; the case did not fall within any exception delineated in subsection (b) of O.C.G.A. § 51-1-40. Ihesiaba v. Pelletier, 214 Ga. App. 721, 448 S.E.2d 920 (1994).

Employer not liable. — Former employer was not liable to a former employee for injuries from an attack by the employee's former love interest, who was the employer's sole owner, after the former love interest became intoxicated at a company party, because the injuries were not the result of a vehicular accident caused by the employer's serving alcohol to a noticeably intoxicated person. Solley v. Mullins Trucking Co., 301 Ga. App. 565, 687 S.E.2d 924 (2009).

Trial court erred in denying an employer's motion for summary judgment in a guest's action to recover damages for injuries the guest sustained when an employee and an unidentified person assaulted the guest at a private party because O.C.G.A. § 51-1-40 foreclosed the guest's theory that the employer was negligent on the ground that the employer sponsored a party at which unlimited alcohol was served and that the service of alcohol to partygoers was a proximate cause of the guest's injuries; to the extent that the guest's assailants were intoxicated at the time of the assault and that the intoxication contributed to the assault, it was the assailants' consumption of alcohol, not the service of alcohol to the assailants', that could have been the proximate cause of the guest's injuries. B-T Two, Inc. v. Bennett, 307 Ga. App. 649, 706 S.E.2d 87 (2011).

Constructive knowledge insufficient. — Constructive knowledge is insufficient for liability under O.C.G.A. § 51-1-40 and when there was no evidence that the cashier knew of the other minor's presence, the cashier could not be said to have "willingly or knowingly" furnished the group with alcohol or to have known of the group's imminent driving. Jaques v. Lever, 831 F. Supp. 881 (S.D. Ga. 1993), aff'd, 43 F.3d 628 (11th Cir. 1995).

No liability for intoxication of minor other than buyer. — Seller, furnisher, or supplier of alcoholic beverages to a minor cannot be held liable for the negligent acts of a second minor intoxicated by such beverages when the seller is not alleged to have had actual knowledge of the second minor's presence and affiliation with the first. Perryman v. Lufran, Inc., 209 Ga. App. 654, 434 S.E.2d 112 (1993), overruled on other grounds, Riley v. H & H Operations, Inc., 263 Ga. 652, 436 S.E.2d 659 (1993).

Requirement of noticeable intoxication. — A defendant will not be liable for serving alcohol unless the consumer of the alcohol is noticeably intoxicated when served. Thus, the plaintiff's evidence regarding the employee's level of intoxication, taken together with expert testimony that such a level of intoxication would produce manifestations of intoxication, was sufficient to create a question of fact as to whether the employee was noticeably intoxicated at work where the drinking was occurring and, thereby, to avoid summary judgment. Northside Equities, Inc. v. Hulsey, 275 Ga. 364, 567 S.E.2d 4 (2002).

Commercial Environments (Cont'd)

Summary judgment for a country club in an injured driver's suit under the Georgia Dram Shop Act, O.C.G.A. § 51-1-40, was affirmed when: (1) the admission of an additional statement, which the driver contended was not inadmissible hearsay, would not have changed the result; (2) the unrebutted evidence was that the country club did not serve alcoholic beverages to the tortfeasor while the tortfeasor was noticeably intoxicated or knew that the tortfeasor would be driving soon; and (3) the driver did not present any expert testimony to supplement the evidence of the tortfeasor's post-death blood alcohol level or to explain the liquid found in the tortfeasor's alimentary tract. Wright v. Pine Hills Country Club, 261 Ga. App. 748, 583 S.E.2d 569 (2003).

Trial court erred by granting summary judgment in favor of a restaurant in a negligence suit brought against the restaurant pursuant to Georgia's Dram Shop Act, O.C.G.A. § 51-1-40(b), wherein an adoptive parent brought suit to recover damages for personal injuries to a child who was injured in a motor vehicle accident in a vehicle driven by the intoxicated biological parent of the child, as the record revealed conflicting evidence on the issue as to whether the driving parent was noticeably intoxicated at the time of last service at the restaurant. As a result, the conflicting evidence was sufficient to have created a question of fact for a jury to determine, thereby making summary disposition of the matter inappropriate. Capp v. Carlito's Mexican Bar & Grill #1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007), cert. denied, 2008 Ga. LEXIS 317 (Ga. 2008).

Circumstantial evidence sufficient to create issue of fact regarding purchase of alcoholic beverages in store. — Grant of summary judgment was reversed because direct evidence that the driver entered the store and shortly thereafter exited the store carrying packaged beer was circumstantial evidence that the driver purchased the beer in the store, and that circumstantial evidence pointed more strongly to a conclusion opposite to the direct testimony from the store employee that there was no sale of beer. Flores v. Exprezit! Stores 98-Georgia, LLC, 314 Ga. App. 570, 724 S.E.2d 870 (2012), overruled in part Phillips v. Harmon, 297 Ga. 386, 774 S.E.2d 596, 2015 Ga. LEXIS 485 (2015).

Knowledge of driving required. — Trial court should have granted summary judgment in favor of the bar in the passenger's Georgia Dram Shop Act, O.C.G.A. § 51-1-40, case; there was no evidence that the bar's employees should have known that the bar patron would be driving soon, there was no evidence that the patron had displayed the patron's keys or that the employees were familiar enough with the patron to know that the patron would be driving, and the fact that most patrons drove to the bar was insufficient to show that the server knew the patron would soon be driving. Becks v. Pierce, 282 Ga. App. 229, 638 S.E.2d 390 (2006), cert. denied, 2007 Ga. LEXIS 154 (2007).

Wrongful death action of consumer's widow barred. — Widow's wrongful death action against a bar that served alcohol to her husband for 8 hours, and who then died in a one-vehicle crash, was barred by the Dram Shop Act, O.C.G.A. § 51-1-40, which barred claims by consumers of alcohol; § 51-1-40 did not violate the separation of powers clause, Ga. Const. 1983, Art. I, Sec. II, Para. III, because the legislature had the authority to enact legislation codifying the common law. Dion v. Y.S.G. Enters., 296 Ga. 185, 766 S.E.2d 48 (2014).

Domestic Environments

No parental liability for unattended minor son's gathering. — The trial court erred by denying a motion for summary judgment when the uncontroverted evidence established that parents of a minor neither knew nor should have known their son had a propensity for making alcohol available to underage guests at their home during their absence, the parents left no alcohol in the home upon their departure and had strictly prohibited the use of alcohol during their absence. Manuel v. Koonce, 206 Ga. App. 582, 425 S.E.2d 921 (1992), overruled on other grounds, Riley v. H & H

Operations, Inc., 263 Ga. 652, 436 S.E.2d 659 (1993).

O.C.G.A. § 51-1-40 did not apply in an action by parents under O.C.G.A. § 51-1-18, based on allegations that the defendants furnished alcoholic beverages to their son without their permission. Eldridge v. Aronson, 221 Ga. App. 662, 472 S.E.2d 497 (1996).

When evidence showed that the deceased was not driving when the deceased fell out of the Jeep, the statutory exception to the common law rule did not apply. Lumpkin v. Mellow Mushroom, 256 Ga. App. 83, 567 S.E.2d 728 (2002).

Knowledge cannot be imputed to hosts. — Trial court properly granted the hosts' motion for summary judgment in an injured party's action under the Georgia Dram Shop Act, O.C.G.A. § 51-1-40(b), since: (1) the intoxicated driver's brother testified that the driver was not noticeably intoxicated at the party; (2) at the request of the driver's brother, the driver agreed to stay with the hosts after the party because the driver had been drinking; and (3) because there was direct evidence that the driver agreed not to drive soon, contrary knowledge could not be imputed to the hosts. Hodges v. Erickson, 264 Ga. App. 516, 591 S.E.2d 360 (2003).

Knowingly furnishing alcohol. — Trial court erred in denying a homeowner's motion for summary judgment in a dram shop action filed by a decedent's estate because the homeowner showed that: (1) there was no evidence in the record that, when a guest was in a state of noticeable intoxication, the homeowner knowingly furnished alcoholic beverages to the guest; and (2) after the guest's intoxication became apparent, the homeowner expressed concern that the guest not drive until the guest became sober, urged the guest to stay and rest as long as necessary, and offered to drive the guest home if the guest could not wait; because there was no evidence that the homeowner knew or should have known that the guest consumed additional alcoholic beverages after the guest became noticeably intoxicated, there was no record evidence that the homeowner knowingly furnished or served alcoholic beverages to a noticeably intoxicated guest. Shin v. Estate of Camacho, 302 Ga. App. 243, 690 S.E.2d 444, cert. denied, No. S10C0965, 2010 Ga. LEXIS 528 (Ga. 2010).

No liability based solely upon tortfeasor's subsequent guilty plea. — Tortfeasor's guilty plea to driving under the influence did not, by itself, make the homeowners, who had a party where the tortfeasor was not an invited guest, liable for the injuries sustained in the subsequent car accident. Erickson v. Hodges, 257 Ga. App. 144, 570 S.E.2d 420 (2002).

Cited in Steedley v. Huntley's Jiffy Stores, Inc., 209 Ga. App. 23, 432 S.E.2d 625 (1993); Pass v. Bouwsma, 239 Ga. App. 902, 522 S.E.2d 484 (1999); La Cosecha, Inc. v. Hall, 246 Ga. App. 441, 540 S.E.2d 659 (2000); Powell v. Alan Young Homes, Inc., 251 Ga. App. 72, 554 S.E.2d 186 (2001); Whitfield v. Tequila Mexican Rest. No. 1, Inc., 323 Ga. App. 801, 748 S.E.2d 281 (2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 45 Am. Jur. 2d, Intoxicating Liquors, § 452 et seq.

Am. Jur. Proof of Facts. — Negligent Failure to Detain Intoxicated Motorist, 1 POF3d 545.

Liability of Social Host for Negligent Driving of Intoxicated Adult Guest, 3 POF3d 697.

Am. Jur. Trials. — Dram Shop Litigation, 12 Am. Jur. Trials 729.

Liquor Provider Liability, 43 Am. Jur. Trials 527.

C.J.S. — 48A C.J.S., Intoxicating Liquors, § 824 et seq.

ALR. — Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence, 62 ALR4th 16.

Tort liability of college or university for injury suffered by student as a result of own or fellow student's intoxication, 62 ALR4th 81.

Passenger's liability to vehicular accident victim for harm caused by intoxi-

cated motor vehicle driver, 64 ALR4th 272.

Validity, construction, and effect of statute limiting amount recoverable in dram shop action, 78 ALR4th 542.

Social host's liability for death or injuries incurred by person to whom alcohol was served, 54 ALR5th 313.

51-1-41. Liability of sports officials at amateur athletic contests.

(a) Sports officials who officiate amateur athletic contests at any level of competition in this state shall not be liable to any person or entity in any civil action for injuries or damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties within the confines of the athletic facility at which the athletic contest is played.

(b) For the purposes of this Code section, the term "sports officials" means:

(1) Those individuals who serve as referees, umpires, linesmen, and those who serve in similar capacities but may be known by other titles and are duly registered with or are members of a local, state, regional, or national organization which is engaged in part in providing education and training to sports officials; and

(2) Those individuals who render service without compensation as a manager, coach, instructor, or assistant manager, coach, or instructor in any system of supervised recreation established pursuant to Chapter 64 of Title 36.

(c) Nothing in this Code section shall be deemed to grant the protection set forth in subsection (a) of this Code section to sports officials who cause injury or damage to a person or entity by actions or inactions which are intentional, willful, wanton, reckless, malicious, or grossly negligent. (Code 1981, § 51-1-41, enacted by Ga. L. 1989, p. 1603, § 1.)

Cross references. — Liability of volunteers, employees, or officers of nonprofit associations conducting or sponsoring sports or safety program; liability of association, § 51-1-20.1.

Editor's notes. — Ga. L. 1989, p. 1603, § 1, provides that this Act shall apply to causes of action filed on or after the effective date of the Act, including those causes of action which allege actions or inactions of sports officials which occurred prior to the effective date of the Act. This Act became effective April 19, 1989.

Law reviews. — For article, "Appellate Practice and Procedure," see 63 Mercer L. Rev. 67 (2011).

JUDICIAL DECISIONS

City track coach not grossly negligent. — Volunteer track and field coach was immune from liability under O.C.G.A. § 51-1-41(a) for alleged negligence in placing a barrier at the end of a long jump runway for children in a city recreational program to jump over. The coach's actions did not rise to the level of

gross negligence under § 51-1-41(c) as a matter of law. Heard v. City of Villa Rica, 306 Ga. App. 291, 701 S.E.2d 915 (2010).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — School's Failure to Maintain Children's Play Area Properly, 9 POF2d 729.

Sport Injury — Negligence, 15 POF2d 1.

Playground Accidents — Human Impact Tolerance, 21 POF2d 701.

Negligent Operation or Public Swimming Pool, 34 POF2d 63.

Inadequate Protection of Spectator at Sporting Event, 45 POF2d 407.

Liability for Trampoline Injury, 45 POF2d 469.

Assumption of Risk Defense in Sports or Recreation Injury Cases, 30 POF3d 161.

Liability for Errant Golf Ball Shots, 31 POF3d 87.

Negligent Operation of Gymnasium, Health Club, or Similar Facility, 40 POF3d 111.

ALR. — Construction and application of contact sports exception to negligence, 75 A.L.R.6th 109.

51-1-42. Limitation of liability for transportation of senior citizens by volunteer.

(a) As used in this Code section, the term:

(1) "Charitable organization" means any charitable unit of a religious or civic group, including those supported wholly or partially by private donations.

(2) "Human service agency" means any human service unit, clinic, senior citizens program, congregate meal center, or day-care center for the elderly, whether supported wholly or partially from public funds.

(3) "Volunteer transportation" means motor vehicle transportation provided by an individual under the direction, sponsorship, or supervision of a human service agency or a charitable organization. A volunteer may receive reimbursement for actual expenses or an allowance to defray expenses of operating the vehicle used to provide transportation services but shall not receive compensation for his or her time.

(b) Any person who provides volunteer transportation for senior citizens shall not be liable for any civil damages for any injury to such senior citizens arising out of or resulting from such transportation if such person was acting in good faith within the scope of his or her official actions and duties and unless the conduct of such person amounts to willful and wanton misconduct. (Code 1981, § 51-1-42, enacted by Ga. L. 1991, p. 1585, § 1.)

51-1-43. "Roller Skating Safety Act of 1993."

(a) This Code section shall be known and may be cited as the "Roller Skating Safety Act of 1993."

(b) As used in this Code section, the term:

(1) "Operator" means a person or entity who owns or controls or who has operational responsibility for a roller skating center.

(2) "Roller skater" means a person wearing roller skates while that person is in a roller skating center for the purpose of roller skating.

(3) "Roller skating center" means a building, facility, or premises which provides an area specifically designed to be used for roller skating by the public.

(4) "Spectator" means a person who is present in a roller skating center only for the purpose of observing skating activity, whether recreational or competitive.

(c) Each operator of a roller skating center shall be required to:

(1) Post the duties of roller skaters and spectators as prescribed in this Code section in conspicuous places;

(2) Comply with the safety standards ordinarily accepted in the roller skating rink industry;

(3) Maintain roller skating equipment and roller skating surfaces according to the safety standards cited in paragraph (2) of this subsection; and

(4) Maintain the stability and legibility of all required signs, symbols, and posted notices.

(d) While in a roller skating center, each roller skater shall do all of the following:

(1) Maintain reasonable control of his or her speed and course at all times;

(2) Read all posted signs and warnings;

(3) Maintain a proper lookout to avoid other roller skaters and objects;

(4) Accept the responsibility for knowing the range of his or her own ability to negotiate the intended direction of travel while on roller skates and to skate within the limits of that ability; and

(5) Refrain from acting in a manner which may cause injury to others.

(e) Each person who participates in roller skating in a roller skating center accepts the risks that are inherent in that activity insofar as the risks are obvious and necessary.

(f) A roller skater, spectator, or operator who violates the provisions of this Code section shall be liable in a civil action for damages for that portion of the loss or damage resulting from the violation.

(g) Nothing in this Code section shall be construed to relieve an operator from exercising ordinary diligence in his or her operational responsibility. (Code 1981, § 51-1-43, enacted by Ga. L. 1993, p. 719, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1993, Code Section 51-1-43, as enacted by Ga. L. 1993, p. 1051, § 1, was redesignated as Code Section 51-1-44 and Code Section 51-1-43, as enacted by Ga. L. 1993, p. 1278, § 1, was redesignated as Code Section 51-1-45.

JUDICIAL DECISIONS

Owners of skating rink entitled to summary judgment. — Because a skating rink patron failed to present sufficient evidence showing that the rink owners breached a duty by failing to have identifiable floor guards on duty at the time of the patron's fall, and that the breach proximately caused the patron's injuries, but instead, the unequivocal evidence showed that a floor guard was on duty at the time of the fall, the trial court properly granted summary judgment to the owners as to the issue of their liability. Moreover, testimony from other management personnel, who were not at the rink at the time of the fall, did not contradict the assistant manager's positive assertions or written report and did not create a material issue of fact. Evans v. Sparkles Mgmt., LLC, 290 Ga. App. 458, 659 S.E.2d 860 (2008).

RESEARCH REFERENCES

C.J.S. — 65A C.J.S., Negligence, § 133 et seq.

51-1-44. Limitation of liability for dental students.

(a) No dental student who participates in the provision of dental care or dental treatment under the supervision of a medical facility, academic institution, or dentist, as a part of an academic curriculum leading to the award of a dental degree, shall be liable for any civil damages to the patient as a result of any act or omission in such participation, except for willful or wanton misconduct.

(b) Subsection (a) of this Code section shall not be construed to affect or limit the liability of a medical facility, academic institution, or dentist. (Code 1981, § 51-1-44, enacted by Ga. L. 1993, p. 1051, § 1.)

Cross references. — Dentists, T. 43, C. 11.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1993, Code

Section 51-1-43, as enacted by Ga. L. 1993, p. 1051, § 1, was redesignated as Code Section 51-1-44.

Law reviews. — For note on 1993 enactment of this Code section, see 10 Ga. St. U.L. Rev. 228 (1993).

51-1-45. Immunity of persons serving without compensation as athletic team physicians.

Any person licensed to practice medicine and surgery pursuant to Article 2 of Chapter 34 of Title 43 and including any person licensed to render services ancillary thereto who in good faith renders voluntary service without compensation as an athletic team physician, either as the team doctor during or in conjunction with athletic practice activities or athletic contests or in conducting preseason physicals for athletes, shall not be liable for any civil damages as a result of any act or omission by such person in rendering such voluntary service or in conducting such physicals or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the amateur or nonprofessional athlete. Liability for civil damages shall attach to any willful or wanton act or omission by such person committed in rendering such voluntary service or in conducting such physicals or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the athlete. (Code 1981, § 51-1-45, enacted by Ga. L. 1993, p. 1278, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1993, Code Section 51-1-43, as enacted by Ga. L. 1993, p. 1278, § 1, was redesignated as Code Section 51-1-45.

Law reviews. — For note on 1993 enactment of this Code section, see 10 Ga. St. U.L. Rev. 230 (1993).

RESEARCH REFERENCES

ALR. — Liability of school or school personnel for injury to student resulting from cheerleader activities, 25 ALR5th 784.

51-1-46. "Drug Dealer Liability Act"; purpose; definitions; actions against persons participating in illegal marketing of controlled substances.

(a) This Code section shall be known and may be cited as the "Drug Dealer Liability Act."

(b) The General Assembly finds and declares that every community in Georgia is impacted by the marketing and distribution of illegal drugs. The purpose of this Code section is to provide a civil remedy for damages to persons in a community injured as a result of illegal drug use. Those persons include parents, employers, insurers, governmental entities, and others who pay for drug treatments, as well as infants injured as a result of exposure to drugs in utero. This Code section will

enable them to recover from those persons in the community who have joined the illegal drug market. A further purpose of this Code section is to shift, to the extent possible, the cost of the damage caused by the existence of the illegal drug market in a community to those who illegally profit from that market. Another purpose of this Code section is to establish the prospect of substantial monetary loss as a deterrent to those who have not yet entered into the illegal drug distribution market.

(c) As used in this Code section, the term:

(1) "Controlled substance" means that term as defined by paragraph (4) of Code Section 16-13-21. For the purpose of this Code section, the term "controlled substance" shall include marijuana as defined by paragraph (16) of Code Section 16-13-21.

(2) "Individual drug abuser" means an individual who uses a controlled substance that is not obtained directly from or pursuant to a valid prescription or order of a practitioner who is acting in the course of the practitioner's professional practice or which use is not otherwise authorized by state law.

(3) "Level one participation" means participating in illegal marketing of less than 50 grams of a mixture containing a specified controlled substance or of one or more pounds or 25 or more plants, but less than four pounds or 50 plants, of marijuana.

(4) "Level two participation" means participating in illegal marketing of 50 or more grams, but less than 225 grams, of a mixture containing a specified controlled substance or of four or more pounds or 50 or more plants, but less than eight pounds or 75 plants, of marijuana.

(5) "Level three participation" means participating in illegal marketing of 225 or more grams, but less than 650 grams, of a mixture containing a specified controlled substance or of eight or more pounds or 75 or more plants, but less than 16 pounds or 100 plants, of marijuana.

(6) "Level four participation" means participating in illegal marketing of 650 or more grams of a mixture containing a specified controlled substance or of 16 or more pounds or 100 or more plants of marijuana.

(7) "Market area" means the area in which a person is presumed to have participated in illegal marketing of a market area controlled substance.

(8) "Market area controlled substance" means a specified controlled substance or marijuana.

(9) "Participate in illegal marketing" means doing any of the following in violation of state or federal law:

(A) Manufacturing, distributing, or delivering or attempting or conspiring to manufacture, distribute, or deliver, a controlled substance; or

(B) Possessing or attempting or conspiring to possess a controlled substance with the intent to manufacture, distribute, or deliver a controlled substance.

This definition shall not include any licensed practitioner who is acting in the course of the practitioner's professional practice.

(10) "Person" means an individual, governmental entity, sole proprietorship, corporation, limited liability company, firm, trust, partnership, or incorporated or unincorporated association existing under or authorized by the laws of this state, another state, or a foreign country.

(11) "Practitioner" means that term as defined in paragraph (23) of Code Section 16-13-21.

(d)(1) A person injured by an individual drug abuser may bring an action under this Code section for damages against a person who participated in illegal marketing of the controlled substance used by the individual abuser. In an action brought under this Code section, participation in illegal marketing shall be proven by clear and convincing evidence.

(2) If a plaintiff in an action under this Code section proves that the defendant participated in illegal marketing of a market area controlled substance actually used by the individual abuser who injured the plaintiff, the defendant is presumed to have injured the plaintiff and to have acted willfully and wantonly if the plaintiff is one of the following:

(A) A parent, legal guardian, child, spouse, or sibling of the individual abuser;

(B) A child whose mother was an individual abuser while the child was in utero;

(C) The individual abuser's employer; or

(D) A medical facility, insurer, governmental entity, or other legal entity that financially supports a drug treatment or other assistance program for, or that otherwise expends money or provides unreimbursed service on behalf of, the individual abuser.

(e)(1) A plaintiff under paragraph (2) of subsection (d) of this Code section may prove that a defendant participated in illegal marketing

of the market area controlled substance used by the individual abuser who injured the plaintiff by proving both of the following:

(A) The defendant was participating in the illegal marketing of the market area controlled substance at the time the individual abuser obtained or used that market area controlled substance; and

(B) The individual abuser obtained or used the market area controlled substance, or caused the injury, within the defendant's market area.

(2) If a person participated in illegal marketing of a market area controlled substance, the person's market area for that controlled substance is the following:

(A) For level one participation, each county in which the person participated in illegal marketing;

(B) For level two participation, each market area described in subparagraph (A) of this paragraph plus all counties with a border contiguous to each of those market areas;

(C) For level three participation, each market area described in subparagraph (B) of this paragraph plus all counties with a border contiguous to each of those market areas; and

(D) For level four participation, the state.

(f)(1) If a defendant under this Code section has a criminal conviction under state or federal law for an act that constitutes participation in illegal marketing of a controlled substance under this Code section, that person is conclusively presumed to have participated in illegal marketing of a controlled substance for the purposes of this Code section.

(2) If a defendant is proved or presumed to have participated in illegal marketing of a controlled substance, that defendant is presumed to have participated during the two years before and the two years after the date of the participation or conviction, unless the defendant proves otherwise by clear and convincing evidence.

(3) In addition to each county in which a defendant is proved to have actually participated in illegal marketing of a controlled substance, the defendant is presumed to have participated in each county in which the defendant resides, attends school, is employed, or does business during the period of participation. In addition to the counties in which the individual abuser is presumed to have obtained or used the controlled substance, the individual abuser is presumed to have obtained or used the controlled substance in each county in which the individual abuser resides, attends school, or is employed

during the period of the individual's abuse of that controlled substance, unless the defendant proves otherwise by clear and convincing evidence.

(g)(1) A person who is entitled to a recovery under this Code section may recover economic, noneconomic, and exemplary damages and reasonable attorneys' fees and costs, including, but not limited to, reasonable expenses for expert testimony.

(2) A third party shall not pay damages awarded under this Code section or provide a defense or money for a defense on behalf of an insured under a contract of insurance or indemnification.

(h) A cause of action accrues under this Code section when a person who may recover has reason to know of the harm from use of an illegally marketed controlled substance that is the basis for the cause of action and has reason to know that the controlled substance used is the cause of the harm.

(i)(1) A prosecuting attorney may represent the state or a political subdivision of the state in an action brought under this Code section.

(2) On motion by a governmental agency involved in a controlled substance investigation or prosecution, an action brought under this Code section shall be stayed until the completion of the investigation or prosecution that gave rise to the motion for a stay of the action.

(3) An action shall not be brought under this Code section against a law enforcement officer or agency or a person acting in good faith at the direction of a law enforcement officer or agency for participation in illegal marketing of a controlled substance if that participation is in furtherance of an official investigation.

(j)(1) Two or more persons may join in one action under this Code section as plaintiffs if their respective actions have at least one market area of illegal marketing activity in common.

(2) Two or more persons may be joined in one action under this chapter as defendants if those persons are liable to at least one plaintiff.

(3) A plaintiff need not be interested in obtaining and a defendant need not be interested in defending against all the relief demanded. Judgment may be given for one or more plaintiffs according to their respective rights to relief and against one or more defendants according to their respective liabilities. (Code 1981, § 51-1-46, enacted by Ga. L. 1997, p. 387, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1997, "deterrent" was substituted for "deterrant" in the last sentence of subsection (b) and a semicolon was substituted for a period at the end of subparagraph (e)(2)(B).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state drug dealer liability acts, 12 A.L.R.7th 2.

51-1-47. Immunity for disconnection of motor vehicle air bags.

The manufacturers, distributors, dealers, and sellers of a motor vehicle and those who, on authorization and direction of the owner or lessee, lawfully install in a prudent and workmanlike manner a switch to turn off the air bag shall be immune from civil liability for any injuries caused by the failure of an air bag to deploy when the air bag has been disconnected, turned off, or otherwise disabled by the owner, lessee, or operator of the motor vehicle or an agent of the owner or lessee of the motor vehicle. (Code 1981, § 51-1-47, enacted by Ga. L. 1998, p. 1108, § 1.)

51-1-48. Diligence required in reviewing claims; nonwaivable liability is not created; definitions.

(a) Any claim administrator, health care advisor, private review agent, or other person or entity which administers benefits or reviews or adjusts claims under a managed care plan shall exercise ordinary diligence to do so in a timely and appropriate manner in accordance with the practices and standards of the profession of the health care provider generally. Notwithstanding any other provision of law to the contrary, any injury or death to an enrollee resulting from a want of such ordinary diligence shall be a tort for which a recovery may be had against the managed care entity offering such plan, but no recovery shall be had for punitive damages for such tort.

(b) The provisions of this Code section may not be waived, shifted, or modified by contract or agreement and responsibility therefor shall be a duty which shall not be delegated. Any effort to waive, modify, delegate, or shift liability for a breach of the duty provided by this Code section, through a contract for indemnification or otherwise, shall be invalid.

(c) This Code section shall not create any liability on the part of an employer of an enrollee or that employer's employees, unless the employer is the enrollee's managed care entity. This Code section shall not create any liability on the part of an employee organization, a voluntary employee beneficiary organization, or a similar organization, unless such organization is the enrollee's managed care entity and makes coverage determinations under a managed care plan.

(d) As used in this Code section and in Code Section 51-1-49, the terms "claim administrator," "enrollee," "health care advisor," and

"private review agent" shall be defined as set forth in Chapter 46 of Title 33 except that "enrollee" shall include the enrollee's eligible dependents; "managed care entity" and "managed care plan" shall be defined as set forth in Code Section 33-20A-3; and "independent review" means a review pursuant to Article 2 of Chapter 20A of Title 33, the "Patient's Right to Independent Review Act." (Code 1981, § 51-1-48, enacted by Ga. L. 1999, p. 350, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, punctuation was revised in subsection (d).

Editor's notes. — Ga. L. 1999, p. 350, § 4, not codified by the General Assembly, provides: "For purposes of certifying independent review organizations by the Health Planning Agency, or its successor agency, this Act shall become effective upon its approval by the Governor (April 20, 1999) or upon its becoming law without such approval. For all other purposes, this Act shall become effective on July 1, 1999, and shall be applicable to any contract, policy, or other agreement of a managed care plan or health maintenance organization if such contract, policy, or agreement provides for health care services or reimbursement therefor and is issued, issued for delivery, delivered, or renewed on or after July 1, 1999."

Law reviews. — For annual survey article discussing developments in insurance law, see 51 Mercer L. Rev. 313 (1999).

For note on 1999 enactment of this Code section, see 16 Ga. St. U.L. Rev. 151 (1999).

51-1-49. Requirements for maintaining cause of action against managed care entity; notice; independent review.

(a) No person may maintain a cause of action pursuant to Code Section 51-1-48 unless the affected enrollee or the enrollee's representative:

(1) Has exhausted the grievance procedure provided for under Code Section 33-20A-5 and before instituting the action:

(A) Gives written notice of intent to file suit to the managed care entity; and

(B) Agrees to submit the claim to independent review if required under subsection (c) of this Code section; or

(2) Has filed a pleading alleging in substance that:

(A) Harm to the enrollee has already occurred for which the managed care entity may be liable; and

(B) The grievance procedure or independent review is not timely or otherwise available or would not make the enrollee whole,

in which case the court, upon motion by the managed care entity, shall stay the action and order such grievance procedure or independent review to be conducted and exhausted.

(b) The notice required by paragraph (1) of subsection (a) of this Code section must be delivered or mailed to the managed care entity not fewer than 30 days before the action is filed.

(c) The managed care entity receiving notice of intent to file suit may obtain independent review of the claim, if notice of a request for review is mailed or delivered to the Health Planning Agency, or its successor agency, and the affected enrollee within ten days of receipt of the notice of intent to file suit. (Code 1981, § 51-1-49, enacted by Ga. L. 1999, p. 350, § 1.)

Editor's notes. — Ga. L. 1999, p. 350, § 4, not codified by the General Assembly, provides: "For purposes of certifying independent review organizations by the Health Planning Agency, or its successor agency, this Act shall become effective upon its approval by the Governor (April 20, 1999) or upon its becoming law without such approval. For all other purposes, this Act shall become effective on July 1, 1999, and shall be applicable to any contract, policy, or other agreement of a managed care plan or health maintenance organization if such contract, policy, or agreement provides for health care services or reimbursement therefor and is issued, issued for delivery, delivered, or renewed on or after July 1, 1999."

Law reviews. — For note on 1999 enactment of this Code section, see 16 Ga. St. U.L. Rev. 151 (1999).

51-1-50. Immunity of broadcasters from liability for Levi's Call: Georgia's Amber Alert Program.

(a) As used in this Code section, the term:

(1) "Broadcast" means the transmission of video or audio programming by an electronic or other signal conducted by radiowaves or microwaves, by wires, lines, coaxial cables, wave guides or fiber optics, by satellite transmissions directly or indirectly to viewers or listeners, or by any other means of communication.

(2) "Broadcaster" means any corporation or other entity that is engaged in the business of broadcasting video or audio programming, whether through the public airwaves, by cable, by direct or indirect satellite transmission, or by any other means of communication.

(3) "Levi's Call: Georgia's Amber Alert Program" means the voluntary program entered into by the Georgia Bureau of Investigation, the Georgia Emergency Management and Homeland Security Agency, the Georgia Association of Broadcasters, and certain broadcasters licensed to serve in the State of Georgia, which program provides that if the Georgia Bureau of Investigation verifies that a child has been abducted and is in danger, an alert containing known details of the abduction is transmitted to the Georgia Emergency Management and Homeland Security Agency, which is then transmitted by the Georgia Emergency Management and Homeland Security Agency to broadcasters in Georgia; and those broadcasters participating in the program then broadcast or otherwise disseminate the alert to listeners, viewers, or subscribers.

(b) Any broadcaster participating in Levi's Call: Georgia's Amber Alert Program shall not be liable for any civil damages arising from the

broadcast or other dissemination of any alert generated pursuant to the Levi's Call: Georgia's Amber Alert Program. The immunity provided for in this Code section shall apply to any broadcast or dissemination of information that is substantially consistent with the information transmitted by the Georgia Emergency Management and Homeland Security Agency and that takes place during an alert requested by the Georgia Emergency Management and Homeland Security Agency and for a period of two hours after such alert has ended or the Georgia Emergency Management and Homeland Security Agency informs the participating broadcasters that the alert has changed in content.

(c) Nothing in this Code section shall be construed to limit or restrict in any way any legal protection a broadcaster may have under any other law for broadcasting or otherwise disseminating any information. (Code 1981, § 51-1-50, enacted by Ga. L. 2004, p. 56, § 1; Ga. L. 2005, p. 60, § 51/HB 95; Ga. L. 2016, p. 91, § 23/SB 416.)

The 2016 amendment, effective July 1, 2016, inserted "and Homeland Security" following "Georgia Emergency Management" throughtout this Code section.

Cross references. — Kidnapping, § 16-5-40. Interference with custody, § 16-5-45.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2004, "Georgia," was substituted for "Georgia;" and "the" was inserted preceding "Georgia Emergency Management Agency" in two places in paragraph (a)(3).

Law reviews. — For annual survey of law of torts, see 56 Mercer L. Rev. 415 (2004). For annual survey of law of torts, see 56 Mercer L. Rev. 433 (2004).

51-1-51. Limitations on liability of liquefied petroleum gas providers.

(a) As used in this Code section, the term:

(1) "Liquefied petroleum gas equipment" means a liquefied petroleum gas appliance or liquefied petroleum gas equipment.

(2) "Liquefied petroleum gas provider" means any person or entity engaged in the business of supplying, handling, transporting, or selling at retail liquefied petroleum gas in this state.

(b) A liquefied petroleum gas provider shall be immune from civil liability if the proximate cause of the injury or damages was:

(1) An alteration, modification, or repair of liquefied petroleum gas equipment that could not have been discovered by the liquefied petroleum gas provider in the exercise of reasonable care; or

(2) The use of liquefied petroleum gas equipment in a manner or for a purpose other than that for which the liquefied petroleum gas equipment was intended to be used or for which could reasonably have been foreseen, provided that the liquefied petroleum gas provider or the manufacturer of the liquefied petroleum gas equipment

has taken reasonable steps to warn the ultimate consumer of the hazards associated with foreseeable misuses of the liquefied petroleum gas equipment.

(c) Nothing in this Code section shall be construed as affecting, modifying, or eliminating the liability of a manufacturer of liquefied petroleum gas equipment or its employees or agents under any legal claim, including but not limited to product liability claims.

(d) This Code section shall apply to any cause of action arising on or after July 1, 2005. (Code 1981, § 51-1-51, enacted by Ga. L. 2005, p. 1177, § 1/SB 139.)

51-1-52. Federal law payor guidelines and criteria not a legal basis for negligence or standard of care for medical malpractice or product liability.

(a) As used in this Code section, the term:

(1) "Criteria" means criteria relating to administrative procedures and shall not include criteria relating to medical treatment, quality of care, or best practices.

(2) "Guideline" means a guideline relating to administrative procedures and shall not include guidelines relating to medical treatment, quality of care, or best practices.

(3) "Payor" means any insurer, health maintenance organization, self-insurance plan, or other person or entity which provides, offers to provide, or administers hospital, outpatient, medical, or other health care benefits to persons treated by a health care provider in this state pursuant to any policy, plan, or contract of accident and sickness insurance as defined in Code Section 33-7-2.

(4) "Standard" means a standard relating to administrative procedures and shall not include standards relating to medical treatment, quality of care, or best practices.

(b) The development, recognition, or implementation of any guideline by any public or private payor or the establishment of any payment standard or reimbursement criteria under any federal laws or regulations related to health care shall not be construed, without competent expert testimony establishing the appropriate standard of care, to establish a legal basis for negligence or the standard of care or duty of care owed by a health care provider to a patient in any civil action for medical malpractice or product liability. Nor shall compliance with such a guideline, standard, or criteria establish a health care provider's compliance with the standard of care or duty of care owed by a health care provider to a patient in any civil action for medical malpractice or

medical product liability without competent expert testimony establishing the appropriate standard of care. (Code 1981, § 51-1-52, enacted by Ga. L. 2013, p. 627, § 1/HB 499.)

Cross references. — Expert opinion testimony in civil cases, § 24-7-702.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, Code Section 51-1-52, as enacted by Ga. L. 2008, p. 702, § 4/SB 239, was redesignated as Code Section 51-3-30.

Pursuant to Code Section 28-9-5, in 2013, Code Section 51-1-52, as enacted by Ga. L. 2013, p. 870, § 1/HB 382, was redesignated as Code Section 51-1-53.

51-1-53. Recreational joint-use agreements.

(a) As used in this Code section, the term:

(1) "Facilities" means a school's buildings, fixtures, and equipment, including, but not limited to, classrooms, libraries, rooms and space for physical education, space for fine arts, restrooms, specialized laboratories, cafeterias, media centers, building equipment, building fixtures, furnishings, gardens, tracks, stadiums, and other facilities or portions of facilities used primarily for athletic competition.

(2) "Recreational joint-use agreement" means a written agreement between the governing authority of a school and a private entity authorizing such entity to access the facilities of a school under the governing authority's jurisdiction for the purposes of conducting or engaging in recreational, physical, or performing arts activity.

(3) "School" means any public pre-kindergarten, elementary school, or secondary school.

(b) A recreational joint-use agreement shall:

(1) Set forth the terms and conditions of the use of a facility;

(2) Include a hold harmless provision in favor of the governing authority;

(3) Be revocable at any time by the governing authority of the school;

(4) Require the private entity to maintain and provide proof of a minimum of $1 million in liability insurance coverage applicable to the use of the facilities and effective for the duration of such agreement; and

(5) Provide a citation that such agreement shall be governed by this Code section.

(c) The governing authority of a school that enters into a recreational joint-use agreement which complies with subsection (b) of this Code

section shall not be deemed to have waived its sovereign immunity as to damages to persons or property arising out of or resulting from such recreational joint-use agreement.

(d) Code Section 51-12-33 shall not apply to claims for civil damages arising from the use of a school's facilities pursuant to a recreational joint-use agreement.

(e) This Code section shall apply to causes of action arising on or after July 1, 2013. (Code 1981, § 51-1-53, enacted by Ga. L. 2013, p. 870, § 1/HB 382.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2013, Code Section 51-1-52, as enacted by Ga. L. 2013, p. 870, § 1/HB 382, was redesignated as Code Section 51-1-53.

51-1-54. Program and Treatment Completion Certificate.

(a) As used in this Code section, the term "Program and Treatment Completion Certificate" means the certificate issued pursuant to Code Section 42-2-5.2 or Code Section 42-3-2.

(b) Issuance of a Program and Treatment Completion Certificate by the Board of Corrections or the Board of Community Supervision or the granting of a pardon from the State Board of Pardons and Paroles as provided in the Constitution and Code Section 42-9-42 shall create a presumption of due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise engaging in activity with the individual to whom the Program and Treatment Completion Certificate was issued or the pardon was granted. Such presumption may be rebutted by relevant evidence which extends beyond the scope of the Program and Treatment Completion Certificate or pardon and which was known or should have been known by the person against whom negligence is asserted.

(c) Nothing in this Code section shall be construed to constitute a waiver of the sovereign immunity of the state, and no action shall be maintained against the state or any agency or department thereof for issuance of or failure to issue any Program and Treatment Completion Certificate or issuance of or failure to grant a pardon. (Code 1981, § 51-1-54, enacted by Ga. L. 2014, p. 34, § 1-7/SB 365; Ga. L. 2017, p. 585, § 2-17/SB 174.)

The 2017 amendment, effective July 1, 2017, added "or Code Section 42-3-2" immediately following "Code Section 42-2-5.2" in subsection (a); and substituted "Board of Corrections or the Board of Community Supervision" for "Department of Corrections" near the beginning of the first sentence of subsection (b).

Law reviews. — For article on the 2014 enactment of this Code section, see 31 Ga. St. U.L. Rev. 25 (2014).

51-1-55. Firearm instructor liability.

(a) As used in this Code section, the term:

(1) "Dangerous weapon" shall have the same meaning as provided for under Code Section 16-11-121.

(2) "Firearm" means any handgun, rifle, shotgun, or other weapon which will or can be converted to expel a projectile by the action of an explosive or electrical charge and which is not a dangerous weapon.

(b) Any instructor who lawfully instructs, educates, or trains a person in the safe, proper, or technical use of a firearm shall be immune from civil liability for any injuries caused by the failure of such person to use such firearm properly or lawfully. (Code 1981, § 51-1-55, enacted by Ga. L. 2017, p. 555, § 9/HB 292.)

Effective date. — This Code section became effective May 8, 2017.

Cross references. — Right to bear arms, U.S. Const., amend 2. Arms, right to keep and bear, Ga. Const. 1983, Art. I, Sec. I, Para. VIII. Carrying and possession of firearms, § 16-11-125.1.

Editor's notes. — Ga. L. 2017, p. 555, § 1/HB 292, not codified by the General Assembly, provides: "The General Assembly finds that:

"(1) The ownership of firearms is a clear and explicit right protected by the United States Constitution and the Constitution of this state;

"(2) Access to financial services provides for the functioning of a firearms industry and, thus, the constitutionally protected right of firearm ownership; and

"(3) The provisions of this Act are intended to implement the constitutional protections provided for under the law."

CHAPTER 2

IMPUTABLE NEGLIGENCE

Sec.		Sec.	
51-2-1.	Basis for imputation of negligence; fault of parents or custodians not imputable to child.		and health care provider prerequisite to liability; notice regarding independent contractor status; factors for consideration in determining status.
51-2-2.	Liability for torts of spouse, child, or servant in certain instances.	51-2-6.	Liability of owner or keeper of dog for damage done to livestock while off his or her premises.
51-2-3.	Liability for malicious acts of minor child.	51-2-7.	Liability of owner or keeper of vicious or dangerous animal for injuries caused by animal.
51-2-4.	Liability for torts of independent employee.		
51-2-5.	Liability for negligence of contractor.		
51-2-5.1.	Relationship between hospital		

RESEARCH REFERENCES

ALR. — State or local governmental unit's liability for injury to private highway construction worker based on its own negligence, 29 ALR4th 1188.

Liability of hospital or sanitarium for negligence of physician or surgeon, 51 ALR4th 235.

51-2-1. Basis for imputation of negligence; fault of parents or custodians not imputable to child.

(a) For the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation or privity to the negligent person as to create the relation of principal and agent.

(b) In an action by an infant, the fault of the parent or of custodians selected by the parents is not imputable to the child. (Civil Code 1895, § 2902; Civil Code 1910, § 3475; Code 1933, § 105-205.)

History of Code section. — The language of this Code section is derived in part from the decisions in East Tenn., Va. & Ga. Ry. v. Markens, 88 Ga. 60, 13 S.E. 855 (1891); Atlanta & C. Air-Line Ry. v. Gravitt, 93 Ga. 369, 20 S.E. 550 (1894).

Cross references. — Agency generally, T. 10, C. 6.

Law reviews. — For comment on Southern Ry. v. Garland, 75 Ga. App. 98, 41 S.E.2d 925 (1947), see 10 Ga. B. J. 102 (1947).

JUDICIAL DECISIONS

Analysis

General Consideration
Parent's Negligence Not Imputed to Child

General Consideration

Principal is responsible for torts of agent when agent is acting on behalf of principal. DeDaviess v. U-Haul Co., 154 Ga. App. 124, 267 S.E.2d 633 (1980).

Agent personally must be liable for negligence to be imputed to principal. — One charged with negligence solely on the ground of respondeat superior will be held liable only if, and to the extent that, the agent who committed the tortious act is personally liable. Redd v. Peters, 100 Ga. App. 316, 111 S.E.2d 132 (1959).

Ratification doctrine inapplicable to action of unidentified patron. — Doctrine of ratification was inapplicable in an action for injuries at the defendant's nightclub from actions of a patron, when the evidence showed that the unidentified patron acted in an individual capacity and not as one holding oneself out as acting in the name of or under the authority of defendant. Ginn v. Renaldo, Inc., 183 Ga. App. 618, 359 S.E.2d 390 (1987).

Mother's negligence not bar to father's recovery for wrongful death of child. — In a suit brought by parents against the mother's employer for the wrongful death of twin infant girls, allegations of contributory negligence or assumption of the risk by the mother would not defeat recovery for the father. Fulford v. ITT Rayonier, Inc., 676 F. Supp. 252 (S.D. Ga. 1987).

When negligence of driver imputable to passenger. — Negligence by the driver of a private vehicle, contributing to the injury of a person riding therein by invitation, is not imputable to the injured person, unless it is made to appear that the injured person owned the vehicle, or had some agency or concern in the vehicle's operation, such as that the driver was the injured person's servant or agent, or that the two were at the time engaged in a joint enterprise for their common benefit, or unless the injured person otherwise had some right, or was under some duty, to control or influence the driver's conduct, such as might arise from the obvious or known incompetency of the driver, resulting from drunkenness or other cause. Metropolitan St. R.R. v. Powell, 89 Ga. 601, 16 S.E. 118 (1892); Roach v. Western & A.R.R., 93 Ga. 785, 21 S.E. 67 (1894); Southern Ry. v. King, 128 Ga. 383, 57 S.E. 687 (1907); Adamson v. McEwen, 12 Ga. App. 508, 77 S.E. 591 (1913); Seaboard Air-Line Ry. v. Barrow, 18 Ga. App. 261, 89 S.E. 283 (1916); Wilkinson v. Bray, 27 Ga. App. 277, 108 S.E. 133 (1921); Mayor of Savannah v. Waters, 27 Ga. App. 813, 109 S.E. 918 (1921).

When a husband, not acting as an agent of his wife, operates an automobile not belonging to the wife, but under her command, his negligence is not imputable to the wife. Holloway v. Mayor of Milledgeville, 35 Ga. App. 87, 132 S.E. 106 (1926).

When a wife is merely accompanying her husband as a guest in an automobile driven by him, and a collision occurs, which might in part be attributable to the negligence of the husband as driver of the automobile, any such negligence on his part is not imputable to the wife. Randall Bros. v. Duckett, 53 Ga. App. 250, 185 S.E. 394 (1936).

In Georgia, the negligence of a host driver of a motor vehicle cannot be imputed to the driver's guest passenger unless the passenger stands in such a relation of privity to the negligent host driver as to create the relation of principal and agent. Jones v. Petroleum Carrier Corp., 483 F.2d 1369 (5th Cir. 1973).

Passenger not liable for driver's conduct absent same right to direct and control. — In order for the occupants of a conveyance to be engaged in a joint enterprise, under the rules of law pertaining to negligence, there must be not only a joint interest in the objects and purposes of the undertaking, but also an equal right, express or implied, to direct and control the conduct of each other in the operation of the conveyance. Holland v. Boyett, 212 Ga. 458, 93 S.E.2d 662 (1956).

Liability of transferee of corporate stock. — O.C.G.A. § 51-2-1 does not, either by the statute's terms or by implication, create a direct cause of action in tort against the transferee of corporate stock for the transferor corporation's negligence in a completely separate transaction. Brown Transp. Corp. v. Street, 194 Ga. App. 717, 391 S.E.2d 699 (1990).

Liability for identity theft. — Trial court properly granted summary judgment to auto dealer, mortgage broker, and lender. Even if it was assumed that the auto dealer and the mortgage broker were negligent in reviewing the credit application of another individual who was using the accused person's identity to obtain financing for a truck purchase, there was no evidence showing that either the auto dealer or the mortgage broker was acting as the lender's agent, and such a showing was necessary to sustain a recovery under a ratification theory. Blakey v. Victory Equip. Sales, Inc., 259 Ga. App. 34, 576 S.E.2d 38 (2002).

Individual not liable for negligent acts of a corporation's employee. — Summary judgment for a neighbor in a negligence suit by landowners arising out of fire damage was proper because a corporation, not the neighbor, owned the land on which the fire was set, and the person performing the burn was employed by the corporation, not the neighbor. There was no showing of agency under O.C.G.A. § 10-6-1 or O.C.G.A. § 51-2-1(a) between the neighbor and the employee. Barrs v. Acree, 302 Ga. App. 521, 691 S.E.2d 575 (2010).

Jury instructions. — Instruction giving this general legal rule will not be accounted erroneous merely on the ground that the jury is not also informed as to what facts and circumstances would constitute the principal-agent relation. Jones Mercantile Co. v. Copeland, 54 Ga. App. 647, 188 S.E. 586 (1936).

Cited in Watson v. Loughran, 112 Ga. 837, 38 S.E. 82 (1901); English v. Georgia Power Co., 66 Ga. App. 363, 17 S.E.2d 891 (1941); Wilson v. Harrell, 87 Ga. App. 793, 75 S.E.2d 436 (1953); Charles v. Raine, 99 Ga. App. 1, 107 S.E.2d 566 (1959); Saunders v. Vikers, 116 Ga. App. 733, 158 S.E.2d 324 (1967); Shirley v. Woods, 118 Ga. App. 851, 165 S.E.2d 891 (1968); Hartz v. United States, 415 F.2d 259 (5th Cir. 1969); Whittle v. Johnston, 124 Ga. App. 785, 186 S.E.2d 129 (1971); Brock v. Patterson, 128 Ga. App. 257, 196 S.E.2d 351 (1973); Allstate Ins. Co. v. Harris, 133 Ga. App. 567, 211 S.E.2d 783 (1974); Garmon v. Delta Air Lines, 139 Ga. App. 152, 227 S.E.2d 821 (1976); Strickland v. ITT Rayonier, Inc., 162 Ga. App. 317, 291 S.E.2d 396 (1982); Adams v. Wright, 162 Ga. App. 550, 293 S.E.2d 446 (1982); Davis v. Stone Mt. Mem. Ass'n, 179 Ga. App. 486, 347 S.E.2d 317 (1986); Commerce Properties, Inc. v. Linthicum, 209 Ga. App. 853, 434 S.E.2d 769 (1993); Housing Auth. of Atlanta v. Jefferson, 225 Ga. App. 60, 476 S.E.2d 831 (1996); Old Republic Union Ins. Co. v. Floyd Beasley & Sons, Inc., 250 Ga. App. 673, 551 S.E.2d 388 (2001); Hicks v. Walker, 262 Ga. App. 216, 585 S.E.2d 83 (2003); Dockens v. Runkle Consulting, Inc., 285 Ga. App. 896, 648 S.E.2d 80 (2007).

Parent's Negligence Not Imputed to Child

When negligence of parent or custodian not imputable to child. — Negligence of a parent or of a custodian selected by a parent is not imputable to a child when the child is itself the plaintiff. Ferguson v. Columbus & Rome Ry., 77 Ga. 102 (1886); Herrington v. Mayor of Macon, 125 Ga. 58, 54 S.E. 71 (1906); Crook v. Foster, 142 Ga. 715, 83 S.E. 670 (1914); Williams v. Jones, 26 Ga. App. 558, 106 S.E. 616 (1921).

Negligence of parent in driving automobile in which child is riding cannot be imputed to child. Fallaw v. Hobbs, 113 Ga. App. 181, 147 S.E.2d 517 (1966).

Any contributory negligence by the husband driver of the automobile, not being imputable to the mother as a "guest," she having no right of control or direction over the movements of the car, was not imputable to the plaintiff children since their right of action arose from her death and did not come through the husband. Pollard v. Gorman, 52 Ga. App. 127, 182 S.E. 678 (1935).

Since the plaintiff was a six-year old child, riding as a guest in the automobile which collided with the defendant's railroad car at the crossing, and was under no duty, and had no right, to control or influence the conduct of the driver of the automobile, any negligence of the driver that contributed to causing the collision was not imputable to the child. Atlanta, B. & C. Ry. v. Loftin, 67 Ga. App. 601, 21 S.E.2d 290 (1942).

Parent's Negligence Not Imputed to Child (Cont'd)

Mother's negligence in failing to keep child off dangerous sidewalk not imputed. — In an action by a child, suing by the child's next friend, for a personal injury alleged to have arisen from the negligence of a municipal corporation in leaving one of its sidewalks in a dangerous condition, any negligence on the part of the child's mother in failing to keep the child from danger could not be imputed to the plaintiff personally. Wallace v. Adams, 47 Ga. App. 144, 169 S.E. 852 (1933).

Parent's knowledge of defective condition of premises is not imputable to child. — Knowledge of the tenant of the defective condition of the premises is not imputable to the child of the tenant and such child may recover for injury caused by the defective condition of the premises, if the child personally is in the exercise of ordinary care at the time of the injury. Wallace v. Adams, 47 Ga. App. 144, 169 S.E. 852 (1933).

Recovery is barred when negligence of parent proximately caused child's injury. — Negligence of the parent, not imputable to the child, cannot be used as a bar or defense to the defendant's causative negligence. However, when the negligence of the parent is the sole proximate cause of the injury to the child, the child cannot recover from the defendant. Stroud v. Willingham, 126 Ga. App. 156, 190 S.E.2d 143 (1972).

No recovery if defendant's negligence is not proximate cause. — When the sole proximate cause of an injury to the plaintiff is the negligence of someone other than the defendant, there can be no recovery against the defendant, although such negligence may not be imputable to the plaintiff and the defendant may have been guilty of negligence. Teppenpaw v. Blaylock, 126 Ga. App. 576, 191 S.E.2d 466 (1972).

No need to plead affirmative care by parent. — Overruling of the defendant's motion to dismiss, which contended that the petition brought by the five-year old by one's next friend to recover damages for personal injuries was defective in that it failed to show that either parent of the plaintiff exercised any care or control over the minor child, was not error. Fulcher v. Rowe, 78 Ga. App. 254, 50 S.E.2d 378 (1948).

Death of child in motel swimming pool. — In a wrongful death action arising out of the death of the plaintiffs' three-year-old son in a motel swimming pool, the child was incapable of contributory negligence, while any negligence on the part of the parents was not imputable to the child. Therefore, if the parents were barred from recovery, the parents were barred by the parents' own negligence or assumption of risk. English v. 1st Augusta Ltd., 614 F. Supp. 1406 (S.D. Ga. 1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 57B Am. Jur. 2d, Negligence, §§ 1096 et seq., 1130 et seq., 1147 et seq.

C.J.S. — 65A C.J.S., Negligence, §§ 297, 301.

ALR. — Automobiles: liability of parent for injury to child's guest by negligent operation of car, 2 ALR 900; 88 ALR 590.

Imputability to rescuer of antecedent negligence of rescued person, 5 ALR 206.

Liability for negligence of chauffeur furnished with a car hired for an extended period, 8 ALR 484.

Imputing negligence of parent or custodian to child in action by or on behalf of child for personal injury, 15 ALR 414.

Liability of husband for independent tort of wife, 20 ALR 528; 27 ALR 1218; 59 ALR 1468.

Liability of employer for injuries by automobile while being driven by or for salesman or collector, 54 ALR 627; 107 ALR 419.

Liability of owner for negligence of one permitted by former's servant or member of his family to drive automobile, 54 ALR 851; 98 ALR 1043; 134 ALR 974.

Liability of person acting under author-

ity of one spouse for injury to other spouse, 57 ALR 755.

Negligence of driver of automobile as imputed to member of joint enterprise, 62 ALR 440; 85 ALR 630.

When occupants of automobile deemed to be engaged in joint enterprise so that negligence of one is imputable to other, 80 ALR 312; 95 ALR 857.

Doctrine of ratification invoked to charge one person with responsibility for the negligence of another not authorized to act for him, 85 ALR 915.

Negligence of driver of automobile as imputable to passenger, 90 ALR 630; 123 ALR 1171.

Liability of bank for losses incurred on loans or investments made on recommendation of its officers or employees, 113 ALR 246.

Negligence or contributory negligence of parent in intrusting child to custody of another child, 123 ALR 147.

Liability of owner under family purpose doctrine for injuries by automobile while being used by member of his family, 132 ALR 981.

Right to bring separate actions against master and servant, or principal and agent, to recover for negligence of servant or agent, where master's or principal's only responsibility is derivative, 135 ALR 271.

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51-2-2. Liability for torts of spouse, child, or servant in certain instances.

Every person shall be liable for torts committed by his wife, his child, or his servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily. (Orig. Code 1863, § 2904; Code 1868, § 2910; Code 1873, § 2961; Code 1882, § 2961; Civil Code 1895, § 3817; Civil Code 1910, § 4413; Code 1933, § 105-108.)

History of Code section. — The language of this Code section is derived in part from the decisions in Curtis v. Ashworth, 165 Ga. 782, 142 S.E. 111 (1928); Dodgen v. DeBorde, 43 Ga. App. 131, 158 S.E. 64 (1931).

Law reviews. — For article, "Motorboat Collisions and the Family Purpose Doctrine," see 2 Ga. St. B. J. 473 (1966). For article analyzing the trend in this country toward no-fault liability, see 25 Emory L.J. 163 (1976). For article, "Sexual Harassment Claims Under Georgia Law," see 6 Ga. St. B. J. 16 (2000).

For note, "Effect of Verdict for Employee in Joint Action Against Employer and Employee," see 3 Mercer L. Rev. 298 (1952). For note discussing the doctrine of respondeat superior, see 2 Ga. St. B. J. 478 (1966). For note discussing the family purpose car doctrine as an extension of the principle of respondeat superior, see 3 Ga. St. B. J. 112 (1966). For note discussing governmental immunity from tort liability in Georgia, see 5 Ga. St. B. J. 494 (1969). For note, "Tort Liability in Georgia for the Criminal Acts of Another," see 18 Ga. L. Rev. 361 (1984).

For comment on Durden v. Maddox, 73 Ga. App. 491, 37 S.E.2d 219 (1946), see 9 Ga. B. J. 98 (1946). For comment on Cohen v. Whiteman, 75 Ga. App. 286, 43 S.E.2d 184 (1947), see 10 Ga. B. J. 222 (1947). For comment on Woolf v. Colonial Stores, Inc., 76 Ga. App. 565, 46 S.E.2d 620 (1948), see 11 Ga. B. J. 70 (1948). For comment regarding joinder of master and servant as parties defendant, in light of Southern Ry. v. Garland, 76 Ga. App. 729, 47 S.E.2d 93 (1948), see 11 Ga. B. J. 226 (1948). For comment on Colonial Stores, Inc. v. Sasser, 79 Ga. App. 604, 54 S.E.2d 719 (1949), see 12 Ga. B. J. 215 (1949). For comment on Davidson v. Harris, Inc., 81 Ga. App. 665, 59 S.E.2d 551 (1950), see 13 Ga. B. J. 229 (1950). For comment on Radio Cabs, Ltd. v. Tolbert, 86 Ga. App. 181, 70 S.E.2d 260 (1952), see 15 Ga. B. J. 226 (1952). For comment on Henson v. Garnto, 88 Ga. App. 320, 76 S.E.2d 636 (1953), regarding recovery by wife under doctrine of respondeat superior for injuries caused by husband, see 5 Mercer L. Rev. 209 (1953). For comment discussing liability of husband to wife for tort caused by their minor child, in light of Silverman v. Silverman, 145 Conn. 663, 145 A.2d 826 (1958), see 10 Mercer L. Rev. 339 (1959). For comment on Myrick v. Alexander, 101 Ga. App. 1, 112 S.E.2d 697 (1960), see 22 Ga. B. J. 570 (1960). For comment on Marques v. Ross, 105 Ga. 133, 123 S.E.2d 412 (1961), and application of the family purpose doctrine, see 14 Mercer L. Rev. 297 (1962). For comment on Ferguson v. Gurley, 105 Ga. App. 575, 125 S.E.2d 218 (1962), see 25 Ga. B. J. 209 (1962). For comment on Emory Univ. v. Porter, 103 Ga. App. 752, 121 S.E.2d 668 (1961), as to hospital's liability for the negligence of a physician, see 14 Mercer L. Rev. 467 (1963). For comment on Porter v. Patterson, 107 Ga. App. 64, 129 S.E.2d 70 (1962), see 26 Ga. B. J. 184 (1963). For comment on Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), holding employer defendant may not use independent contractor defense to invasion of privacy suit resulting from actions of investigator working in his behalf, see 9 Ga. St. B. J. 519 (1973).

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Torts of Spouse

Husband is not liable for torts of his wife merely because of the relationship. Durden v. Maddox, 73 Ga. App. 491, 37 S.E.2d 219 (1946).

Tort must be based on spouse's direction. — In this state a husband now is liable for the torts of his wife only when they are committed by her in the capacity of agent; and when it is sought to hold the husband liable for some wrong committed by her within the scope of her agency, a suit may be maintained against the husband without joining the wife as a party defendant. Miller v. Straus, 38 Ga. App. 781, 145 S.E. 501 (1928).

In Georgia, a husband is not liable for the torts of his wife, except as such liability may arise by reason of the commission of the act "by his command or in the prosecution and within the scope of his business." Farrar v. Farrar, 41 Ga. App. 120, 152 S.E. 278 (1930).

Facts must show agency relationship. — Marital relationship alone will not, in view of the modification of the common-law rule of liability in this state, support an action against a husband for the tort of his wife in the absence of facts showing an agency relationship. Shelton v. Doster, 99 Ga. App. 863, 109 S.E.2d 862 (1959).

Husband not liable for independent tort of wife. — A husband, under this

section, and existing statutes enlarging the rights and functions of married women, is not liable for an independent tort committed by the wife in the operation of an automobile not furnished by him to the wife, and not used in the husband's business, but operated without his consent, command, or participation in any way. Shelton v. Doster, 99 Ga. App. 863, 109 S.E.2d 862 (1959).

Not necessary to join husband as defendant. — In a suit against a married woman for a tort, whether the husband would or would not be liable, under the doctrine of respondeat superior, it is not necessary that the husband be joined as a defendant in the action. Farrar v. Farrar, 41 Ga. App. 120, 152 S.E. 278 (1930).

Torts of Child

Causes of action against parents of minor tort-feasors are rooted in common law and are predicated on something more than mere parent-child relationship. Scarboro v. Lauk, 133 Ga. App. 359, 210 S.E.2d 848 (1974); Muse v. Ozment, 152 Ga. App. 896, 264 S.E.2d 328 (1980).

Liability of parent for injury committed by child is governed by ordinary principles of liability of principal for the acts of one's agent, or a master for the master's servant. Stanford v. Smith, 173 Ga. 165, 159 S.E. 666, answer conformed to, 43 Ga. App. 747, 160 S.E. 93 (1931); Hubert v. Harpe, 181 Ga. 168, 182 S.E. 167, answer conformed to, 52 Ga. App. 262, 183 S.E. 98 (1935); Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971); Scarboro v. Lauk, 133 Ga. App. 359, 210 S.E.2d 848 (1974); Muse v. Ozment, 152 Ga. App. 896, 264 S.E.2d 328 (1980).

Parents are not liable in damages for the torts of their minor children merely because of the parent-child relationship; when liability exists it is based on a principal-agent or a master-servant relationship when the negligence of the child is imputed to the parent, or it is based on the negligence of the parent in some factual situation such as allowing the child to have unsupervised control of a dangerous instrumentality. Hill v. Morrison, 160 Ga. App. 151, 286 S.E.2d 467 (1981).

Father not liable for tort of his minor child, with which he was in no way connected, which he did not ratify, and from which he did not derive any benefit. Chastain v. Johns, 120 Ga. 977, 48 S.E. 343, 66 L.R.A. 958 (1904); Schumer v. Register, 12 Ga. App. 743, 78 S.E. 731 (1913).

So far as the liability of a father is concerned, the tort must have been committed by the child by his command or in the prosecution and within the scope of his business. The father is liable for the child's torts only upon the idea that the child was his servant, and to the extent that he would be liable for the torts of any other servant. The rule, being taken from the common law, is to be liberally construed. Stanford v. Smith, 173 Ga. 165, 159 S.E. 666, answer conformed to, 43 Ga. App. 747, 160 S.E. 93 (1931); Stephens v. Stewart, 118 Ga. App. 811, 165 S.E.2d 572 (1968), aff'd in part and rev'd in part, 225 Ga. 185, 166 S.E.2d 890 (1969).

Father is not liable for tort of minor child, with which he was in no way connected, which he did not ratify, and from which he did not derive any benefit, merely because of the relation of parent and child. Stanford v. Smith, 173 Ga. 165, 159 S.E. 666, answer conformed to, 43 Ga. App. 747, 160 S.E. 93 (1931); Hulsey v. Hightower, 44 Ga. App. 455, 161 S.E. 664 (1931); Hubert v. Harpe, 181 Ga. 168, 182 S.E. 167, answer conformed to, 52 Ga. App. 262, 183 S.E. 98 (1935); Herrin v. Lamar, 106 Ga. App. 91, 126 S.E.2d 454 (1962); Wittke v. Horne's Enters., Inc., 118 Ga. App. 211, 162 S.E.2d 898 (1968); Stephens v. Stewart, 118 Ga. App. 811, 165 S.E.2d 572 (1968), aff'd in part and rev'd in part, 225 Ga. 185, 166 S.E.2d 890 (1969).

Son as father's agent. — Under evidence which shows that a son assisted in doing little things around the home, making minor repairs, and that a stairway fell when the son was using it, and he repaired it with some nails, there was some direct evidence that the son was the father's agent. Butler v. Moore, 125 Ga. App. 435, 188 S.E.2d 142 (1972).

Section applicable only to vicarious liability and not to parent's own negligence. — Principles of this section are

Torts of Child (Cont'd)

applicable to cases when it is sought to hold a father liable for an injury by his child, independently of any fault on the part of the father, but are not applicable when a liability is claimed against the father for a negligent or wrongful act which is personal to himself, although the act of his child may be the immediate cause of the injury. Hulsey v. Hightower, 44 Ga. App. 455, 161 S.E. 664 (1931).

Parent may be liable for own negligence when it makes child's act possible. — Parent may be held liable for an injury caused directly by his minor child when the parent's own original negligence or contributing negligence has made the child's act possible. Stephens v. Stewart, 118 Ga. App. 811, 165 S.E.2d 572 (1968), aff'd in part and rev'd in part, 225 Ga. 185, 166 S.E.2d 890 (1969).

If the act of a child is legally traceable to the negligence of its father, the latter may be held responsible for injury and damage occasioned thereby; but in such a case the cause of action is founded upon the negligence of the father, and not upon the negligence of the child plus the paternal relation. Hulsey v. Hightower, 44 Ga. App. 455, 161 S.E. 664 (1931).

If a parent knows the parent's child is irresponsible, incompetent or unqualified regarding certain activities, and knowingly permits the child to engage in such activities, this may constitute such negligence on the part of the parent as will support a recovery. Stephens v. Stewart, 118 Ga. App. 811, 165 S.E.2d 572 (1968), aff'd in part and rev'd in part, 225 Ga. 185, 166 S.E.2d 890 (1969).

Recovery is permitted when there was some parental negligence in furnishing or permitting a child access to an instrumentality with which the child likely would injure a third party. Muse v. Ozment, 152 Ga. App. 896, 264 S.E.2d 328 (1980).

Injury must be reasonably foreseeable. — In cases predicated on the parent's negligence, the ordinary element of all negligence cases must be shown including, of course, the requirement that the parent should have foreseen or anticipated that some injury would likely result from the negligence. Stephens v. Stewart, 118 Ga. App. 811, 165 S.E.2d 572 (1968), aff'd in part and rev'd in part, 225 Ga. 185, 166 S.E.2d 890 (1969).

Parent's negligence based on breach of duty to supervise child. — True test for determining whether a parent is liable for the negligence of a child is not the fact of escape, but is whether: (a) a duty was raised against the parent by the facts of the case of anticipating that in the absence of the parent's supervision a particular type of injury to another will result; and (b) whether the parent then exercised reasonable care to control and supervise the infant to prevent such result. Assurance Co. of Am. v. Bell, 108 Ga. App. 766, 134 S.E.2d 540 (1963).

True test of parental negligence vel non is whether in the exercise of ordinary care the parent should have anticipated that harm would result from the unsupervised activities of the child and whether, if so, the parent exercised the proper degree of care to guard against this result. Hill v. Morrison, 160 Ga. App. 151, 286 S.E.2d 467 (1981).

Parent not negligent absent knowledge of circumstances requiring special care. — Failure to keep an "unremitting watch and restraint" over children in their own yard in the absence of knowledge of facts and circumstances requiring such action is not negligence. Scarboro v. Lauk, 133 Ga. App. 359, 210 S.E.2d 848 (1974).

When a parent has no special reason to anticipate that a child, either through known dangerous proclivities or because of possession of dangerous instrumentalities, may inflict harm on the person or property of others, mere failure to supervise the child's play activities is not a failure to exercise ordinary care on the part of the parent so as to subject the parent to liability. Muse v. Ozment, 152 Ga. App. 896, 264 S.E.2d 328 (1980).

Although recovery is permitted when through parental negligence a child is permitted access to an instrumentality which, if not properly used, is foreseeably likely to cause injury to a third person, this does not make the parent liable for an injury negligently inflicted by a child when there is no dangerous proclivity known to the former and no reason to

anticipate the injury which in fact occurred. Hill v. Morrison, 160 Ga. App. 151, 286 S.E.2d 467 (1981).

Allowing a child unsupervised access to a golf club, without more, would not provide the evidence of parental negligence necessary for a recovery, as was the case when the instrument was a pistol, a shotgun, or a rotary lawnmower. Mayer v. Self, 178 Ga. App. 94, 341 S.E.2d 924 (1986).

Jury questions. — Whether or not such precaution taken is sufficient to relieve the parents of responsibility for the death of a neighbor's child is not for the court to decide as a matter of law, but more properly for the jury as a matter of fact. Hill v. Morrison, 160 Ga. App. 151, 286 S.E.2d 467 (1981).

When the instrumentality of harm used by the child is a firearm or other explosive, liability is frequently imposed upon an offending parent, or at the least a jury question as to such liability arises. Hill v. Morrison, 160 Ga. App. 151, 286 S.E.2d 467 (1981).

When there was evidence that the defendants were aware of a previous incident in which the defendants' son had hurt someone with a golf club, a jury issue was presented as to whether the defendants should have anticipated injury to another through their child's use of a golf club. Mayer v. Self, 178 Ga. App. 94, 341 S.E.2d 924 (1986).

Vicarious Liability

Owner of automobile is not liable for negligence of its driver merely because one is the owner of the vehicle. Graham v. Cleveland, 58 Ga. App. 810, 200 S.E. 184 (1938); Holland v. Cooper, 192 F.2d 214 (5th Cir. 1951).

Owner is not liable for negligence of operator of automobile merely because owner consented, expressly or impliedly, to operation by such person. Graham v. Cleveland, 58 Ga. App. 810, 200 S.E. 184 (1938).

Owner of automobile who is present in vehicle is liable for negligence of driver. American Cas. Co. v. Windham, 26 F. Supp. 261 (M.D. Ga.), aff'd, 107 F.2d 88 (5th Cir. 1939), cert. denied, 309 U.S. 674, 60 S. Ct. 714, 84 L. Ed. 1019 (1940).

Owner liable if driver is acting as servant at time of wrongful act. — In order to hold the owner liable under the doctrine of respondeat superior for the acts of the driver of a motor vehicle, the driver must be the agent or servant of the owner at the time of the wrongful act; and, in order to create such relationship, the essential and sufficient element is the owner's right to control and direct the driver's conduct. Powell v. Kitchens, 84 Ga. App. 701, 67 S.E.2d 203 (1951).

Effect of joint ownership of automobile. — In the case of joint ownership of a motor vehicle, when there is no express statute on the subject, such ownership does not render one of such persons liable when the machine is operated by the other in one's personal affairs. Raley v. Hatcher, 61 Ga. App. 846, 7 S.E.2d 777 (1940).

Preemption. — Immunity provision of the charter of the Macon Water Authority Act that exempted the Authority from vicarious liability was not preempted by O.C.G.A. § 51-2-2 and, therefore, did not offend Ga. Const. 1983, Art. III, Sec. VI, Par. IV (a). Matthews v. Macon Water Auth., 273 Ga. 436, 542 S.E.2d 106 (2001).

Family Purpose Doctrine

1. General Principles

Liability under family purpose doctrine rests upon same principles of law as that governing master and servant or principal and agent. Johnson v. Brant, 93 Ga. App. 44, 90 S.E.2d 587 (1955); Temple v. Chastain, 99 Ga. App. 719, 109 S.E.2d 897 (1959).

Family purpose doctrine is based on principles of agency. McCray v. Hunter, 157 Ga. App. 509, 277 S.E.2d 795 (1981).

Under the family purpose doctrine, the owner of an automobile who permits members of one's household to drive the automobile for their own pleasure or convenience is regarded as making such a family purpose one's business, so that the driver is treated as one's servant. Medlin v. Church, 157 Ga. App. 876, 278 S.E.2d 747 (1981).

Liability under the family purpose doctrine rests upon a fictional agency theory.

Family Purpose Doctrine (Cont'd)
1. General Principles (Cont'd)

Shank v. Phillips, 193 Ga. App. 393, 388 S.E.2d 5 (1989).

Agency must be shown either in relationship of master and servant or under family car doctrine. Grahl v. McMath, 59 Ga. App. 247, 200 S.E. 342 (1938).

Agency may exist when owner keeps automobile as "family car," for convenience and use of family members, and owner may in such case be liable for member's negligence, who is thus considered as driving the car "upon the business of the owner." Samples v. Shaw, 47 Ga. App. 337, 170 S.E. 389 (1933).

When one furnishes an automobile to members of one's family for pleasure or convenience, etc., one is liable for injuries inflicted by the machine while the machine is being negligently operated by a member of the family for a purpose for which the machine was furnished, on the theory that the furnishing and using of the car for such purposes is the business of the husband and the one operating the car is the agent or servant of the owner in the course of the owner's business. Durden v. Maddox, 73 Ga. App. 491, 37 S.E.2d 219 (1946).

Liability attaches to the owner of an automobile who furnishes the automobile for the pleasure, comfort, or convenience of the members of the owner's family, when one of the latter while driving the automobile commits a tort upon another, on the theory that, when the owner makes it the owner's business so to do, a member of the family operating the vehicle is doing so within the scope of the owner's business, under the law of principal and agent and of master and servant. Studdard v. Turner, 91 Ga. App. 318, 85 S.E.2d 537 (1954).

Under family purpose doctrine, agency must be proved as in other cases, except when law presumes agency. Durden v. Maddox, 73 Ga. App. 491, 37 S.E.2d 219 (1946).

Family car. — There is no presumption of law that a man with a family furnishes an automobile to his family for pleasure and convenience merely because he owns one. Durden v. Maddox, 73 Ga. App. 491, 37 S.E.2d 219 (1946).

Family car rule states that the head of a family who keeps and maintains an automobile for the use, comfort, pleasure and convenience of the family is liable for an injury resulting from the negligence of a member of the family while operating the automobile with the knowledge and consent of the owner, for the comfort or pleasure of the family, and thus in pursuance of the purpose for which the automobile was kept and maintained by the parent. Whitlock v. Michael, 79 Ga. App. 316, 53 S.E.2d 587 (1949).

When it is first established, at least prima facie, that a car is a family purpose car, then the agency of the family member driving is prima facie established, but the premise that a car is a family purpose car may not be shown by assuming that proof of ownership plus a family member's driving is family purpose. Durden v. Maddox, 73 Ga. App. 491, 37 S.E.2d 219 (1946).

"Family car doctrine" as applied in Georgia holds that when one furnishes an automobile to members of one's family for pleasure or convenience one is liable for injuries inflicted by the machine while the machine is being negligently operated by a member of the family for a purpose for which the machine was furnished, on the theory that the furnishing and using of the car for such purposes is the business of the one so furnishing the machine and the one operating the machine is the agent or servant of the one so furnishing the machine in the course of the business. Temple v. Chastain, 99 Ga. App. 719, 109 S.E.2d 897 (1959).

Basic elements of family purpose doctrine. — There are four requirements for the application of the family purpose doctrine: (1) the owner must have given permission to a family member to drive the vehicle; (2) the owner must have relinquished control of the vehicle to the family member; (3) the family member must be in the vehicle; and (4) the vehicle must be engaged in a family purpose. Quattlebaum v. Wallace, 156 Ga. App. 519, 275 S.E.2d 104 (1980).

Pleasure, comfort and convenience. — Member of a family who injures another while using the car for one's own

purposes within the scope of the business for which the car is maintained — that is, the pleasure, comfort and convenience of a member of the family — renders the head of the family who furnishes such automobile liable under the doctrine of respondeat superior. Johnson v. Brant, 93 Ga. App. 44, 90 S.E.2d 587 (1955).

Supervision and control. — Supervision and control required to bring the car's use under the family purpose doctrine is the owner's (or provider's) furnishing of such supervision, control and use of the vehicle for the comfort, pleasure, and convenience of the owner's family, i.e., within the owner's business of family purpose; the ultimate supervision and control an owner exercises as an incident of ownership does not of itself qualify to bring the doctrine into play. McCray v. Hunter, 157 Ga. App. 509, 277 S.E.2d 795 (1981).

In insureds' suit seeking to recover damages in connection with an accident in which a daughter struck the insureds' vehicle while driving a car that was titled in her father's name, there existed genuine issues of material fact with regard to the father's liability in connection with the accident under Georgia's Family Purpose Doctrine, O.C.G.A. § 51-2-2, since the evidence showed that the father exercised authority and control over the car when the father took out the loan to buy the car, the title was in the father's name, the father contributed to the car's operating expenses, and the daughter was not listed as an insured on the policy that covered the car. Harris v. Houston, No. 4:04-cv-159 (HL), 2006 U.S. Dist. LEXIS 69099 (M.D. Ga. Sept. 26, 2006).

Relationship is a precondition. — Appellee's unrefuted evidence shows the absence of a necessary precondition, in that the negligent operator of the vehicle was not a member of the owner's immediate household; this renders the family purpose doctrine inapplicable to impose vicarious liability on the owner of the vehicle. Wingard v. Brinson, 212 Ga. App. 640, 442 S.E.2d 485 (1994).

Family purpose doctrine does not apply. See Willis v. Allen, 188 Ga. App. 390, 373 S.E.2d 79 (1988).

Doctrine applicable although family member uses car for own pleasure. — Family purpose doctrine imposes liability on the head of the family who supplies the automobile notwithstanding the fact that the automobile is being used at the time of the injury by the member of the family exclusively for the owner's own individual use or pleasure. Clayton v. Long, 147 Ga. App. 645, 249 S.E.2d 622 (1978).

When an unmarried man, who is the head of a family consisting of himself, a widowed mother, and two sisters, one of whom is unmarried, furnishes and maintains an automobile for the use of the members of the family for their pleasure and comfort, and when, while on a particular occasion with the specific authority and consent of the brother, the automobile is being run and operated by the unmarried sister for the comfort and pleasure of herself and her friends, another person is injured and damaged as the proximate result of the negligence of the sister in operating the automobile, the unmarried brother is liable for such injuries. Levy v. Rubin, 181 Ga. 187, 182 S.E. 176, answer conformed to, 52 Ga. App. 212, 183 S.E. 98 (1935).

Car need not be available to all family members. — If the head of a family makes it his business to furnish a particular automobile for the pleasure and convenience of less than all of the members of his family to the exclusion of others, his liability for the negligent acts of such a favored member while operating the automobile so furnished is not affected by the failure to so furnish this automobile to other members of the family circle. Temple v. Chastain, 99 Ga. App. 719, 109 S.E.2d 897 (1959).

Family purpose doctrine applies equally as well to boats. Stewart v. Stephens, 225 Ga. 185, 166 S.E.2d 890 (1969).

Family purpose doctrine applies not only to driving of automobiles, but to operation of motorboats as well. Quattlebaum v. Wallace, 156 Ga. App. 519, 275 S.E.2d 104 (1980).

Family Purpose Doctrine (Cont'd)
1. General Principles (Cont'd)

Principles of family purpose doctrine have been applied to cases involving aircraft. Kimbell v. DuBose, 139 Ga. App. 224, 228 S.E.2d 205 (1976).

Doctrine not applicable to use of bicycle furnished to minor by parent. — Father is not liable to a third person for injuries unlawfully and negligently inflicted by his minor son in the use of a bicycle furnished by the father to the son for the purpose of going to and from school. Calhoun v. Pair, 71 Ga. App. 211, 30 S.E.2d 776 (1944).

2. Use by Spouse

Independent actions of spouse. — Husband is not liable for an independent tort committed by the wife in the operation of an automobile not furnished by him to the wife, and not used in the husband's business, but operated without his consent, command, or participation in any way. Curtis v. Ashworth, 165 Ga. 782, 142 S.E. 111, 59 A.L.R. 1457 (1928).

Authorized use by wife imputable to husband. — When a person maintained an automobile for use by his family, including his wife, and the wife, with the husband's consent, used the automobile for the purpose of going on a trip, the wife, in taking and operating the car while on the trip, did so as the authorized agent of the husband, and any negligence on her part in the operation of the automobile pursuant to the purpose for which she is using it was imputable to the husband. Petway v. McLeod, 47 Ga. App. 647, 171 S.E. 225 (1933).

Husband responsible for wife's negligence. — Husband is liable for the negligence of his wife in driving an automobile which is kept and controlled by him and which he furnished her for family purposes or for her pleasure, comfort, and convenience, if she was so using it at the time when the injury sued for occurred. Hexter v. Burgess, 52 Ga. App. 819, 184 S.E. 769 (1936).

Carpooling. — Under the family purpose car doctrine, when the owner of an automobile furnishes a car to members of the owner's family, for the convenience of the family, the owner is liable for an injury caused by the negligent operation of the automobile by the owner's wife in carrying their child to and from school and the fact that the wife was transporting in the car other children to and from this school building would not of itself render this doctrine inapplicable. Doss v. Miller, 87 Ga. App. 230, 73 S.E.2d 349 (1952).

3. Use by Child

Automobile for pleasure and comfort. — Whne a father provides an automobile for the purpose of furnishing his family with pleasure and comfort, and a member of his family uses such automobile for that purpose, the use of the automobile therefore is within the scope of the father's business. Wolfson v. Rainey, 51 Ga. App. 493, 180 S.E. 913 (1935).

When an automobile is placed in the hands of the automobile's family by a father, for the family's pleasure, comfort, and entertainment, justice requires that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained. Hubert v. Harpe, 181 Ga. 168, 182 S.E. 167, answer conformed to, 52 Ga. App. 262, 183 S.E. 98 (1935).

Mother, the owner, is liable for minor son's negligent operation of an automobile maintained for the comfort and pleasure of the family, when the minor son resides with the family and drives the automobile for his own pleasure with the expressed or implied permission of the mother. Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936), aff'd, 184 Ga. 203, 190 S.E. 582 (1937).

Authorized use. — If a father or mother, owning an automobile, and keeping it to be used for the comfort and pleasure of the family, should authorize a son to drive the automobile for the comfort or pleasure of the family, this would make the owner liable for the negligence of the son operating the machine for such purpose. Grahl v. McMath, 59 Ga. App. 247, 200 S.E. 342 (1938).

Controlling test under this section is not whether the child is operating an automobile or a boat, but whether the child is using the car or boat for a purpose for which the parent provided it, with the

permission of the parent, express or implied. Stewart v. Stephens, 225 Ga. 185, 166 S.E.2d 890 (1969).

Basic principle. — Family car doctrine is based squarely on the relation of master and servant or principal and agent, and holds that a child may occupy the position of a servant or agent of the child's parent, and for the child's acts, and as such, the parent may be liable under the general principles governing the relation of master and servant, or principal and agent. Whitlock v. Michael, 79 Ga. App. 316, 53 S.E.2d 587 (1949).

Father not obligated to provide automobile. — Father is under no legal obligation to furnish an automobile for the comfort and pleasure of his child, whether minor or adult; and if he does so, it is a voluntary act on his part, and in every such case the question in determining liability under the family car doctrine is whether the father, or other parent has expressly or impliedly made the furnishing of an automobile for such purpose a part of his business, so that one operating the vehicle for that purpose with his consent, express or implied, may be considered as his agent or servant. Whitlock v. Michael, 79 Ga. App. 316, 53 S.E.2d 587 (1949).

Authority and control created agency. — When the parents had the right to exercise authority and control over the son's use of a family van, an agency relationship existed rendering the parents vicariously liable for the son's negligence; thus, partial summary judgment was properly granted. Gaither v. Sanders, 259 Ga. App. 810, 578 S.E.2d 512 (2003).

Relationship does not make agency. — When the mother lent her car to her son as she might to another who was not a member of her family, and not as a vehicle which she had provided in her business of extending pleasure and comfort to her family, in his use of the car, the son was not the mother's agent in pursuit of her family purpose business; the mere fact that she owned the car does not create an agency in her son's use of it, nor does her mere consent to him to use the car, nor, moreover, does such consent plus the fact that he was a member of her family create such an agency for family purpose and business. McCray v. Hunter, 157 Ga. App. 509, 277 S.E.2d 795 (1981).

Requirements for family purpose met. — When the mother purchased the car with a check drawn on her account and retained title in her name, when the car was insured as belonging to her on a policy covering two cars, when the money to pay for the car was deposited to her checking account from her son's savings account and he reimbursed her for his share of the insurance premiums, when she had never driven or ridden in the car and contributed no money for its upkeep, and when she had deprived her son of use of the car as an incentive to do better in school, granting of summary judgment on the basis that the car was not being used as a family purpose vehicle was in error. Tolbert v. Murrell, 253 Ga. 566, 322 S.E.2d 487 (1984).

Trial court erred in granting summary judgment for a mother on an injured party's claim under the family purpose doctrine as: (1) the mother was the owner of the car and provided it to the son for his pleasure; (2) the son was in the car at the time of the collision; (3) the fact that the son was on his way to a friend's house at the time and was an adult did not preclude application of the family purpose doctrine; and (4) the evidence was in conflict as to the mother's right to exercise authority and control over the car as the son was under her general supervision and was expected to follow her rules while living at home and the son testified that his mother would have restricted his use of the car if she had known he was drinking or using drugs prior to the collision. Danforth v. Bulman, 276 Ga. App. 531, 623 S.E.2d 732 (2005).

Mother was not vicariously liable under the family purpose doctrine for an incident involving her minor son's car; although insurance was in the names of the mother and the son's stepfather and title was in the stepfather's name, the son purchased the car with his own funds and paid for its upkeep, maintenance, and insurance, and even if the stepfather were liable because he facilitated the purchase by holding title, the stepfather's liability would not be imputed to the mother.

Family Purpose Doctrine (Cont'd)
3. Use by Child (Cont'd)

Dashtpeyma v. Wade, 285 Ga. App. 361, 646 S.E.2d 335 (2007).

Requirements for family purpose not met. — When the evidence conclusively establishes that a vehicle was owned and operated by an individual acting in the individual's own capacity as the donee of an absolute gift, without any necessity for the consent of the individual's father, expressed or implied, and without the exercise of any authority or control by the father, these facts fail to disclose that the use was intended for a family purpose in any way or any basis for an action against the father under the family-purpose doctrine for damages and injuries arising from its negligent operation. Keith v. Carter, 172 Ga. App. 588, 323 S.E.2d 886 (1984).

Doctrine applies when authority exists although family member exceeds authority. — Son living with his mother as a member of the family, having general authority to drive the family car for pleasure and convenience, is acting within the scope of his authority in so doing, though he violates the conditions of that grant of authority. Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936), aff'd, 184 Ga. 203, 190 S.E. 582 (1937).

When an automobile is furnished by a father as a family purpose automobile, the mere fact that one of the children used the automobile for such purpose contrary to express instructions from the father not to use the automobile in his absence does not necessarily destroy the relationship between the parties which is that of master and servant, and does not necessarily render the act of the son in operating the automobile for the family purpose, although contrary to the express orders of the father, an act of the son alone and not his act as a servant of the father. Battle v. Kilcrease, 54 Ga. App. 808, 189 S.E. 573 (1936).

Doctrine not applicable when family member not authorized to use vehicle. — Stepdaughter who does not live in the home of and is not a member of the family or household of her stepfather, but who lives with her own father, should not be considered as a member of her stepfather's family, to the extent of holding him liable when he keeps and maintains an automobile for the comfort, pleasure, and business of his family, and his stepdaughter, while not living with him, without his knowledge or consent, takes the automobile and uses it for her exclusive comfort and pleasure, and not connected in any way with the business or pleasure of the family of her stepfather, and while so using it has a wreck, inflicting certain injuries upon another. Wolfson v. Rainey, 51 Ga. App. 493, 180 S.E. 913 (1935).

When the undisputed evidence showed that the father had expressly denied to his 15-year-old son any use of his car on the occasion in question, the law will not presume or assume an implied assent, especially when it was also denied that such car was ever so used as to make applicable to it the family car doctrine. Grahl v. McMath, 59 Ga. App. 247, 200 S.E. 342 (1938).

Owner cannot be found liable on the basis of the family purpose doctrine when the minor with permission to use the car was not driving or riding in the car and was not authorized by the owner to permit others to drive the car. Rucker v. Frye, 151 Ga. App. 415, 260 S.E.2d 373 (1979).

Trial court erred in finding the family purpose doctrine applicable when the uncontroverted evidence indicates that only the appellant was authorized to operate the motorboat, and his stepson had in the past only been permitted to drive the boat with the appellant present and presumably in control, when never before the date of the accident had the appellant ever permitted another person to control the operation of the boat, and when appellant had neither given his stepson permission to drive the boat on the day in question nor to allow anyone else other than whom he designated to drive the boat. Quattlebaum v. Wallace, 156 Ga. App. 519, 275 S.E.2d 104 (1980).

Denial of authorized use must be explicit and consistent. — If an automobile is available and no positive steps have been taken to prohibit the use of the automobile by the family member, then the owner is liable even though on one occasion the child has been instructed

that the child may not use the automobile. Clayton v. Long, 147 Ga. App. 645, 249 S.E.2d 622 (1978).

Not applicable to mere "loan" of vehicle to nondependent adult child. — If the father was the sole owner of the car and the son was over 21 years of age and was not a member of the family within the meaning of the family car doctrine, a mere loan of the car by the father to the son was in principle the same as if he had loaned it to a friend to go on a mission solely for the benefit of the friend and would in fact make the son a mere bailee and if the son's chauffeur or driver injured someone on the trip, the father would not be liable. Raley v. Hatcher, 61 Ga. App. 846, 7 S.E.2d 777 (1940).

"Loan" to minor child. — It is essential to a "family purpose rule" case, that it be established that the vehicle furnished for the members of the family to use and is being so used at the time, for a mere lending of an automobile to a minor child to use for the child's own purposes is not sufficient. Studdard v. Turner, 91 Ga. App. 318, 85 S.E.2d 537 (1954).

Doctrine inapplicable to child acting as agent for another entity. — Family purpose doctrine does not extend to hold a parent liable for the acts of a child performed in the child's capacity as agent or employee for another person or entity. Shank v. Phillips, 193 Ga. App. 393, 388 S.E.2d 5 (1989).

4. Use by Other

Doctrine not inapplicable merely because car also used in business. — Fact that automobile may have been kept and maintained primarily for business use by the owner does not remove the automobile from the operation of the "family car doctrine" when the automobile is also regularly furnished to members of the owner's family for their pleasure and convenience. Temple v. Chastain, 99 Ga. App. 719, 109 S.E.2d 897 (1959).

Corporation holding title to vehicle. — When the president of a corporation had the custody of an automobile which was used exclusively by the president and the president's spouse, the fact that the title to the car was in the corporation would not absolve the president from liability for the spouse's negligence under the family car doctrine. Hexter v. Burgess, 52 Ga. App. 819, 184 S.E. 769 (1936).

Corporate title holder not liable under family purpose doctrine. — When a wholly owned family corporation furnishes a vehicle owned by the corporation to the corporation's president for the president's personal and business use, and he permits the unrestricted use of the vehicle by members of his family with the knowledge and consent of corporate officers and stockholders, and, while the vehicle is so used, a third person is injured because of negligence, the corporation is not negligent under the family-purpose car doctrine. McIntosh v. Neal-Blun Co., 123 Ga. App. 836, 182 S.E.2d 696 (1971).

Use of vehicle by nondependent adult child. — Under the "family purpose doctrine," a parent is liable for damages caused by an adult child living with the parent when such child causes the damages through the negligent operation of the family automobile. Kennedy v. Manis, 46 Ga. App. 808, 169 S.E. 319 (1933).

When a father keeps and maintains an automobile to be used for the comfort and pleasure of his family, including his wife and minor children, and when he permits a nondependent, self-supporting adult son to reside in his home without charge, whom he also as a matter of custom voluntarily permits to use and drive the automobile for the comfort and pleasure of the son upon the same footing as the father's wife and minor children, the father can be held liable for a personal injury to a third person proximately caused by the negligent operation of the automobile by such son, when at the time of the injury the son was driving the vehicle for his own recreation and pleasure by the express or implied permission of the father. Hubert v. Harpe, 181 Ga. 168, 182 S.E. 167, answer conformed to, 52 Ga. App. 262, 183 S.E. 98 (1935); Belch v. Sprayberry, 97 Ga. App. 47, 101 S.E.2d 870 (1958).

Family car rule has been extended to liability for damages caused by an adult son or daughter living with the parent as a member of the family, and to a

Family Purpose Doctrine (Cont'd)
4. Use by Other (Cont'd)

"nondependent, self-supporting adult son" who resided in the home without charge and by custom was voluntarily permitted to drive the car for his own comfort and pleasure upon the same footing as the father's wife and minor children. Whitlock v. Michael, 79 Ga. App. 316, 53 S.E.2d 587 (1949).

Since a child, whether a minor or an adult, may occupy the position of a servant or agent of his parent, for his negligent acts as such the parent may be liable under the family car doctrine thus whether the child is an adult or a minor is immaterial, except as a circumstance to be considered in determining whether the relation of master and servant really existed, and by the same process of reasoning it is likewise immaterial, to the same extent, whether an adult child living in the house with the parent was single or married. Whitlock v. Michael, 79 Ga. App. 316, 53 S.E.2d 587 (1949).

If the driver of an automobile involved in an accident is a member of the owner's family and otherwise within the purview of the "family purpose rule" it does not matter that he is a nondependent, self-supporting son, or that the son lives a part of the time away from home. Studdard v. Turner, 91 Ga. App. 318, 85 S.E.2d 537 (1954).

Owner may be liable when third party operates vehicle as agent of family member. — When a married woman owns as her separate property an automobile which she keeps for the comfort, pleasure, and convenience of the members of her family including her husband, who had general authority from the wife not only to ride in but to direct the operation of the car by others for his own pleasure, and when, without the knowledge or the express consent of the wife, she not being present, the husband procures an adult person, not a member of her family, to drive the car under the direction, control, and supervision of the husband, the wife, under the "family purpose doctrine," is liable in damages for personal injuries to a third person caused by the negligence of the driver in operating the car on a public highway. Golden v. Medford, 189 Ga. 614, 7 S.E.2d 236 (1940).

Member of a family for whose pleasure, comfort, and convenience an automobile is furnished may use such automobile for his pleasure and convenience, and may under certain circumstances, in so using it, obtain the services of another person to operate it for him, he being present and the car being under his direction or control and the use to which it is put being the accomplishment of a mission of his own, and the owner who furnishes such automobile may still be liable under the doctrine of respondeat superior. Johnson v. Brant, 93 Ga. App. 44, 90 S.E.2d 587 (1955).

No liability if family member "lends" car. — Fact that the son had a right to use car belonging to his father as he pleased for his own purposes was not sufficient to make his father, the owner, liable, since the son lent the car to another under circumstances which, had the father himself lent the car to such other he would not be liable. Johnson v. Brant, 93 Ga. App. 44, 90 S.E.2d 587 (1955).

No liability if third party had no authority from owner or family member. — When no negligence is alleged against the owner, or a member of the owner's family, and when the operator of the vehicle is not a servant or agent of the owner nor a servant or agent of a member of the owner's family who would have a right, under the family car doctrine, to employ the services of another to drive him while he was using the car for the purpose for which such family car was maintained, the owner is not liable. Johnson v. Brant, 93 Ga. App. 44, 90 S.E.2d 587 (1955).

5. Procedure

Whether doctrine applicable is question of fact. — Genuine issues of material fact, precluding summary judgment, existed as to whether the family purpose doctrine was applicable when, despite multiple residences and a subsequent divorce, there was evidence that, at the time of the accident, the owner's family continued to function as a cohesive social entity, and that one had the right to exercise, and did in fact exercise, author-

ity and control over the use of the automobile. Smith v. Sherman, 197 Ga. App. 183, 397 S.E.2d 617 (1990).

Negligence must be determined. — Family car doctrine renders a parent or guardian who keeps an automobile for the comfort and pleasure of one's family liable for the negligence of any member of the family driving the vehicle with the parent's consent, either express or implied, as the agent of the owner. However, the jury must first determine the family members' negligence before applying the family car doctrine. Clayton v. Long, 147 Ga. App. 645, 249 S.E.2d 622 (1978).

No need to join family member as party defendant. — Under Georgia law when the head of the family is sought to be held liable for some wrong committed by a member of one's family within the scope of the family purpose doctrine, that member of the family need not necessarily be joined as a party defendant. Medlin v. Church, 157 Ga. App. 876, 278 S.E.2d 747 (1981).

Jury instructions. — Trial judge erred in charging the jury in substance that the defendant would be liable if the negligence of the defendant's child caused injury or damage, without in this same connection instructing them that it must appear from the evidence that the defendant furnished the automobile for the use, pleasure, comfort, and convenience of the defendant's family, and that it was, at the time of the collision, being operated by the defendant's child within the scope of the purpose for which it was furnished. Studdard v. Turner, 91 Ga. App. 318, 85 S.E.2d 537 (1954).

It was question for jury to say whether car kept by mother was a family purpose car, within meaning of "family car rule," so as to subject her to liability for damages from its negligent operation by her self-supporting, adult married daughter living in the home with her. Whitlock v. Michael, 79 Ga. App. 316, 53 S.E.2d 587 (1949).

Use of car one time by wife and husband's leaving key at home is insufficient evidence to establish fact that car was a family purpose car. Durden v. Maddox, 73 Ga. App. 491, 37 S.E.2d 219 (1946).

If evidence fails to show that automobile was furnished by husband as "family purpose" car, verdict against husband is unauthorized. Durden v. Maddox, 73 Ga. App. 491, 37 S.E.2d 219 (1946).

Torts of Servant

1. Definitions and General Scope

Common law applies. — Common law rule as to liability or nonliability of the master for acts of a substitute employee engaged without authority of the master has been followed: every person is liable for torts committed by that person's servant, by that person's command or in the prosecution and within the scope of that person's business, whether the same be by negligence or voluntary. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784 (1953).

Former Code 1933, §§ 4-312 and 105-108 (see now O.C.G.A. §§ 10-6-61 and 51-2-2), being in pari materia, must be construed together. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671 (1935); King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

While the word "business" in this section is commonly employed in connection with an occupation for livelihood or profit, it is not limited to such pursuits. Butler v. Moore, 125 Ga. App. 435, 188 S.E.2d 142 (1972).

Corporation is a "person" in the meaning of this section. Louisville & N.R.R. v. Hudson, 10 Ga. App. 169, 73 S.E. 30 (1911).

This section applies as well when the master is a corporation as when the master is a private individual. Southern Grocery Stores, Inc. v. Herring, 63 Ga. App. 267, 11 S.E.2d 57 (1940).

A corporation, under the law, is a "person," and the terms of this section apply to corporations as well as to natural persons. Digsby v. Carroll Baking Co., 76 Ga. App. 656, 47 S.E.2d 203 (1948).

Word "servant" means an employee as well as a domestic servant. Toole Furn. Co. v. Ellis, 5 Ga. App. 271, 63 S.E. 55 (1908); Andrews v. Norvell, 65 Ga. App. 241, 15 S.E.2d 808 (1941); Du Pree v. Babcock, 100 Ga. App. 767, 112 S.E.2d 415 (1959).

Torts of Servant (Cont'd)
1. Definitions and General Scope (Cont'd)

Word "voluntary" in this section will cover any or all motives or purposes of the wrongdoer, acting in the scope of the wrongdoer's employment, which are not covered by acts of negligence. Frazier v. Southern Ry., 200 Ga. 590, 37 S.E.2d 774 (1946); Pope v. Seaboard Air Line R.R., 88 Ga. App. 557, 77 S.E.2d 55 (1953); McCranie v. Langdale Ford Co., 176 Ga. App. 281, 335 S.E.2d 667 (1985).

2. Basis of Master's Liability

Master liable for torts of servant committed within scope of business. — If a tort is committed by a servant in the prosecution of the master's business, that is, if the servant is at the time engaged in serving the master, the latter will be liable. Savannah Elec. Co. v. Wheeler, 128 Ga. 550, 58 S.E. 38 (1907); Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933).

When a servant does an act in the execution of a lawful authority given the servant by the servant's master and for the purpose of performing what the master has directed, the master will be liable for an injury thereby inflicted on another, whether the wrong be occasioned by negligence or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner. Personal Fin. Co. v. Whiting, 48 Ga. App. 154, 172 S.E. 111 (1933); Gomez v. Great Atl. & Pac. Tea Co., 48 Ga. App. 398, 172 S.E. 750 (1934).

It is not essential to the liability of a master for the willful and intentional tort of a servant that the servant shall have acted at the command of the master or with the master's consent; the master is liable if a tort is committed by the servant in the course of the servant's employment while the servant is acting within the scope of the servant's authority and in the prosecution of the master's business. Ford v. Mitchell, 50 Ga. App. 617, 179 S.E. 215 (1935).

Test of the master's responsibility for the acts of the master's servant is, not whether such act is done in accordance with the instruction of the master to the servant, but whether it is done in the prosecution and in the scope of the master's business. Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936), aff'd, 184 Ga. 203, 190 S.E. 582 (1937); Crane Auto Parts, Stewart Ave. Branch, Inc. v. Patterson, 90 Ga. App. 257, 82 S.E.2d 666 (1954).

Master is responsible for the tortious acts of the master's servant, done in the master's business and within the scope of the servant's employment, although the master does not authorize or know of the particular act, or even if the master disapproves or forbids. Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936), aff'd, 184 Ga. 203, 190 S.E. 582 (1937); Crane Auto Parts, Stewart Ave. Branch, Inc. v. Patterson, 90 Ga. App. 257, 82 S.E.2d 666 (1954).

Rule is that for all acts done by a servant in obedience to the express orders or directions of a master, or in the execution of the master's business, within the scope of the servant's employment, and for acts in any sense warranted by the express or implied authority conferred upon the servant considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible. Dawson Motor Co. v. Petty, 53 Ga. App. 746, 186 S.E. 877 (1936).

Test is not that the act of the servant was done during the existence of the employment, that is to say, during the time covered by the employment, but whether it was done in the prosecution of the master's business; whether the servant was at that time engaged in serving the servant's master. Jump v. Anderson, 58 Ga. App. 126, 197 S.E. 644 (1938); Cooley v. Tate, 87 Ga. App. 1, 73 S.E.2d 72 (1952); Watkins v. United States, 462 F. Supp. 980 (S.D. Ga. 1977), aff'd, 587 F.2d 279 (5th Cir. 1979).

Master is liable for a tort committed by the master's servant in the prosecution and within the master's business, whether by negligence or willfully. Brown v. Union Bus Co., 61 Ga. App. 496, 6 S.E.2d 388 (1939).

In order for the master to be liable for torts committed by the master's servant

the tort-feasor must have either acted by command of the master or the tortious act must have been perpetrated in the prosecution of and within the scope of the master's business. There is no liability on the part of the master arising from the mere relationship of master and servant. Falls v. Jacobs Pharmacy Co., 71 Ga. App. 547, 31 S.E.2d 426 (1944); Taff v. Life Ins. Co., 77 Ga. App. 836, 50 S.E.2d 154 (1948); Parry v. Davison-Paxon Co., 87 Ga. App. 51, 73 S.E.2d 59 (1952); Jones v. Reserve Ins. Co., 149 Ga. App. 176, 253 S.E.2d 849 (1979).

To render a master liable for the servant's tort, the servant must be acting both in the prosecution and within the scope of the master's business. Ruff v. Gazaway, 82 Ga. App. 151, 60 S.E.2d 467 (1950).

For injuries caused by the negligence of an employee not directed or ratified by the employer, the employee is liable because the employee committed the act which caused the injury, while the employer is liable, not as if the act was done by oneself, but because of the doctrine of respondeat superior, the rule of law which holds the master responsible for the negligent act of the master's servant committed while the servant is acting within the general scope of the servant's employment and engaged in the master's business. Stapleton v. Stapleton, 85 Ga. App. 728, 70 S.E.2d 156 (1952).

In order for the master to be liable for torts committed by the servant, the tort-feasor must either have acted by command of the master or the tortious act must have been perpetrated in the prosecution of and within the scope of the master's business. Parry v. Davison-Paxon Co., 87 Ga. App. 51, 73 S.E.2d 59 (1952); McCranie v. Langdale Ford Co., 176 Ga. App. 281, 335 S.E.2d 667 (1985).

In order for the master to be liable the tortious conduct of the servant must have been by the command of the master or in the prosecution and within the scope of the master's business; it must appear that the negligence of the defendant's servant arose in a transaction in the doing of which the servant was actually engaged in the performance of the master's business. Cooley v. Tate, 87 Ga. App. 1, 73 S.E.2d 72 (1952).

In determining the liability of the master for the negligent or willful acts of a servant, the test of liability is, not whether the act was done during the existence of the employment, but whether the act was done within the scope of the actual transaction of the master's business for accomplishing the ends of the servant's employment. Jones v. Reserve Ins. Co., 149 Ga. App. 176, 253 S.E.2d 849 (1979); Sexton Bros. Tire Co. v. Southern Burglar Alarm Co., 153 Ga. App. 413, 265 S.E.2d 335 (1980).

Master will be liable for injury to third persons caused by a servant's negligent act done in furtherance of the master's business. Harden v. United States, 485 F. Supp. 380 (S.D. Ga. 1980), aff'd, 688 F.2d 1025 (5th Cir. 1982).

To hold a master liable for a tort committed by the servant, it must appear that at the time of the injury the servant was engaged in the master's business and not upon some private and personal matter of the servant's own; that is, the injury must have been inflicted in the course of the servant's employment. May v. Phillips, 157 Ga. App. 630, 278 S.E.2d 172 (1981).

Master acquiesces in action of servant. — To neglect to exercise authority to forbid a thing is, in legal contemplation, to permit it. Gorman v. Campbell, 14 Ga. 137 (1853).

When a master (principal) has knowledge that the servant (agent) pursues a given course of conduct and the master takes no steps to prevent such conduct, the master is liable for the consequences. Allen & Bean, Inc. v. American Bankers Ins. Co., 153 Ga. App. 617, 266 S.E.2d 295 (1980).

True test of liability is not whether the tort was committed by reason of anger, malice, or ill will, but whether or not the tort was committed in the prosecution and within the scope of the master's business. Parry v. Davison-Paxon Co., 87 Ga. App. 51, 73 S.E.2d 59 (1952); Pope v. Seaboard Air Line R.R., 88 Ga. App. 557, 77 S.E.2d 55 (1953); McCranie v. Langdale Ford Co., 176 Ga. App. 281, 335 S.E.2d 667 (1985).

True test of vicarious liability is whether or not the tort is committed in

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the prosecution and within the scope of the master's business. Fountain v. World Fin. Corp., 144 Ga. App. 10, 240 S.E.2d 558 (1977).

Relationship required. — To impose liability under respondeat superior, some relationship must exist between the principal and agent or employer and employee, and when the unrebutted evidence showed that the defendant-landowner had no such relationship with injured employee and did not authorize the employee to act on his behalf, the necessary element for the imposition of liability was absent. Gaskins v. Gaona, 209 Ga. App. 322, 433 S.E.2d 408 (1993).

Master not liable if servant not liable. — When a lawsuit is brought against a master and a servant based upon a cause of action attributable to the master under the doctrine of respondeat superior, a verdict finding only against the master and releasing the servant may be set aside when the pleadings and the evidence fail to allege or show any independent tort of the master which could have supported the verdict. Colonial Stores, Inc. v. Fishel, 160 Ga. App. 739, 288 S.E.2d 21 (1981).

Mere fact that servant's negligent act is expressly forbidden by master does not absolve master of vicarious liability, the test being whether the servant's negligent act is within the class of acts that the servant is authorized to perform, and if the act is within the class, the master is bound, although the servant is forbidden to perform the particular act. Harden v. United States, 485 F. Supp. 380 (S.D. Ga. 1980), aff'd, 688 F.2d 1025 (5th Cir. 1982).

Servant forbidden to perform act. — When an employee is acting within the class of service the employee has authority to perform, the master is bound even though the servant is forbidden to perform the particular act. Southern Airways Co. v. Sears, Roebuck & Co., 106 Ga. App. 615, 127 S.E.2d 708 (1962).

Anger or malice in commission of tort by servant is not defense for master. Frazier v. Southern Ry., 200 Ga. 590, 37 S.E.2d 774 (1946).

Allowing a master to defend an action for the servant's tort by showing that at the time of the commission of the tort, when the servant was within the course of employment, the servant acted through anger, malice, or ill will, would defeat the purpose of this section, which makes the master liable for voluntary torts. Frazier v. Southern Ry., 200 Ga. 590, 37 S.E.2d 774 (1946).

Employer is not liable for misconduct of employee without the scope of employment. Great Atl. & Pac. Tea Co. v. Cox, 51 Ga. App. 880, 181 S.E. 788 (1935).

Employer is not liable for acts of his employee in no way connected with or in furtherance of employer's business. Lewis v. Millwood, 112 Ga. App. 459, 145 S.E.2d 602 (1965).

When a servant acts not in the prosecution of the master's business or within the scope of such business, the master cannot be held liable, no matter how wanton or willful the conduct of the servant so that if the servant, wholly for a purpose of the servant's own, disregarding the object for which the servant is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. Gomez v. Great Atl. & Pac. Tea Co., 48 Ga. App. 398, 172 S.E. 750 (1934).

When there is no showing that the servant was acting within the scope of the employment or in the prosecution of the employer's business, or that the nature of the employee's service was such that the employee's authority to perform the act on behalf of the employer could be legitimately inferred, there is no liability on the part of the employer for the conduct of the employee. Rivers v. Mathews, 96 Ga. App. 546, 100 S.E.2d 637 (1957).

Benefit to master not required. — Liability of an employer for the negligence of the servant is predicated on the basis that the servant, while in the course and scope of the employment, causes the injury, regardless of whether the master benefited from the act or not. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784 (1953).

Master is not liable when act of servant is done purely from personal spite or malice and has no connection with the business about which the servant

is employed. Estridge v. Hanna, 55 Ga. App. 159, 189 S.E. 364 (1936).

Master not liable when servant steps aside from master's business. — If a servant steps aside from the master's business for however short a time to do an act entirely disconnected from the master's business, and injury results to another from such independent voluntary act, the servant may be liable, but the master is not. Friedman v. Martin, 43 Ga. App. 677, 160 S.E. 126 (1931); Selman v. Wallace, 45 Ga. App. 688, 165 S.E. 851 (1932); Dawson Chevrolet Co. v. Ford, 47 Ga. App. 312, 170 S.E. 306 (1933); Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933); Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937); Jump v. Anderson, 58 Ga. App. 126, 197 S.E. 644 (1938); Mulkey v. Griffen Constr. Co., 58 Ga. App. 808, 200 S.E. 163 (1938); Broome v. Primrose Tapestry Mills, 59 Ga. App. 70, 200 S.E. 506 (1938); Southern Grocery Stores, Inc. v. Herring, 63 Ga. App. 267, 11 S.E.2d 57 (1940); Falls v. Jacobs Pharmacy Co., 71 Ga. App. 547, 31 S.E.2d 426 (1944); Frazier v. Southern Ry., 200 Ga. 590, 37 S.E.2d 774 (1946); Parry v. Davison-Paxon Co., 87 Ga. App. 51, 73 S.E.2d 59 (1952); Jones v. Reserve Ins. Co., 149 Ga. App. 176, 253 S.E.2d 849 (1979).

For a tort committed by the servant entirely disconnected from the service or business of the master, the latter is not responsible under the doctrine of respondeat superior, although it may occur during the general term of the servant's employment. American Sec. Co. v. Cook, 49 Ga. App. 723, 176 S.E. 798 (1934); Southern Grocery Stores, Inc. v. Herring, 63 Ga. App. 267, 11 S.E.2d 57 (1940); May v. Phillips, 157 Ga. App. 630, 278 S.E.2d 172 (1981).

Servant's deviation for personal business slight. — If a servant, while engaged in the business of the master, makes a slight deviation for ends of the servant's own, the master remains liable when the act was so closely connected with the master's affairs that, though the servant may derive some benefit from it, it may nevertheless fairly be regarded as within the course of the servant's employment. Selman v. Wallace, 45 Ga. App. 688, 165 S.E. 851 (1932); Jump v. Anderson, 58 Ga. App. 126, 197 S.E. 644 (1938).

Servant's personal motive merely additional to master's business. — When there has been a mingling of personal motive or purpose of the servant with the doing of the servant's work for the servant's employer, the presence of such a motive or purpose in the servant's mind does not affect the master's liability since that which the servant does is in the line of the servant's duty and in the prosecution of the master's work. Jump v. Anderson, 58 Ga. App. 126, 197 S.E. 644 (1938).

When a servant makes a deviation which results in injury to person or property, the master is liable unless the deviation was for purposes entirely personal to the servant. When the latter is engaged in the business of the employer it is immaterial that the servant join with this some private purposes of the servant's own. Johnson v. Franklin, 312 F. Supp. 310 (S.D. Ga. 1970).

Master's liability reattaches when servant resumes duties. — Although a servant may have made a temporary departure from the service of the master, and in so doing may for the time have severed the relationship of master and servant, yet, when the object of the servant's departure has been accomplished and the servant has resumed the discharge of the servant's duties to the master, the responsibility of the master for the acts of the servant reattaches. Atlanta Laundries, Inc. v. Goldberg, 71 Ga. App. 130, 30 S.E.2d 349 (1944).

Employer's liability for the employee's torts is suspended during the employee's "deviation" from the employee's duties; upon the employee's resumption of the employee's work, the employer's liability reattaches. Bridger v. IBM Corp., 480 F.2d 566 (5th Cir. 1973).

Suit by servant's wife against master for servant's negligence not barred. — Wife who sustains personal injuries as the result of the negligence of the defendant's agent acting within the scope of his employment may sue the employer directly under the doctrine of respondeat superior, regardless of the fact that the defendant's agent who committed

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the tortious act is her husband, against whom she would be precluded from recovery by virtue of the marital relationship. Garnto v. Henson, 88 Ga. App. 320, 76 S.E.2d 636 (1953).

If, when the tortious act of the servant is the act of the master, the master is liable proximately even though the wife may not recover from the husband, the servant. She is merely denied a remedy; this does not destroy the right of action against the master. Bradley v. Tenneco Oil Co., 146 Ga. App. 161, 245 S.E.2d 862 (1978).

Master may remain liable for negligent selection or retention of servant. — When a servant departs from the prosecution of the servant's business and commits a tort while acting without the scope of the servant's authority, the person employing the servant may still be liable if the person failed to exercise due care in the selection of the servant; the same principle would be applicable if the employer retains the servant after knowledge that the servant is of such temper and disposition that the servant is likely to injure others who are rightfully on the premises. Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937); Pope v. Seaboard Air Line R.R., 88 Ga. App. 557, 77 S.E.2d 55 (1953).

Employer's liability for negligent hiring or retention of an employee requires proof that the employer knew or should have known of the employee's violent and criminal propensities. Odom v. Hubeny, Inc., 179 Ga. App. 250, 345 S.E.2d 886 (1986).

Master's liability to injured party's employer. — O.C.G.A. § 51-2-2 accords an injured party a cause of action against the employer of a third-party tortfeasor, but does not extend that right to the injured party's employer. Unique Paint Co. v. Wm. F. Newman Co., 201 Ga. App. 463, 411 S.E.2d 352 (1991).

3. Scope of Employment

Determining scope of employment. — Expressions "in the scope of his business" or "in the scope of his employment," or similar words, have sometimes been given too narrow a meaning. A master rarely commands a servant to be negligent, or employs the servant with the expectation that the servant will commit a negligent or willful tort: but if the act is done in the prosecution of the master's business — that is, if the servant is at the time engaged in serving the master — the latter will be liable. American Sec. Co. v. Cook, 49 Ga. App. 723, 176 S.E. 798 (1934); Jump v. Anderson, 58 Ga. App. 126, 197 S.E. 644 (1938); Brown v. Union Bus Co., 61 Ga. App. 496, 6 S.E.2d 388 (1939); Southern Grocery Stores, Inc. v. Herring, 63 Ga. App. 267, 11 S.E.2d 57 (1940).

If the act done by the employee is done in the prosecution of the business of the employer, that is, if the employee is at the time of the commission of the wrongful act engaged in serving the employer, the wrongful act is done "in the prosecution and within the scope of" the employer's business. Andrews v. Norvell, 65 Ga. App. 241, 15 S.E.2d 808 (1941); DuPree v. Babcock, 100 Ga. App. 767, 112 S.E.2d 415 (1959).

If a fellow servant, in committing an act which resulted in injury to the plaintiff, was seeking to further the master's business, such an act would be within the scope of employment if it was not an extreme deviation from the employee's normal conduct. Such deviation from the normal course of conduct is not the same as deviation from the scope of employment and it must occur within the scope of employment. Atlantic Coast Line R.R. v. Heyward, 82 Ga. App. 337, 60 S.E.2d 641 (1950).

True test as to the scope of employment is whether the purpose of the fellow servant in performing the act is to further the master's business, rather than whether or not it deviated in some degree from the servant's normal conduct. Atlantic Coast Line R.R. v. Heyward, 82 Ga. App. 337, 60 S.E.2d 641 (1950).

Employee sufficiently rebutted a certification by the U.S. Attorney General under 28 U.S.C. § 2679(d)(1) that an assistant director (AD) acted within the scope of employment when the AD made an allegedly defamatory statement against the

employee. Thus, the AD remained a party defendant in the employee's action under O.C.G.A. § 51-2-2. Schiefer v. United States, No. 07-14370, 2008 U.S. App. LEXIS 11678 (11th Cir. May 29, 2008) (Unpublished).

Misconduct outside scope of employment. — Boarding school's adult staff member's alleged misconduct of participating in a consensual sexual relationship with a 13-year-old student was held to be considered personal in nature and unrelated to the performance of the staff member's employment duties. Doe v. Village of St. Joseph, Inc., 202 Ga. App. 614, 415 S.E.2d 56 (1992).

Because it was absolutely undisputed that a city police officer was off duty, intoxicated, and not in any way engaged in the officer's law enforcement duties at the time the officer attacked an innocent driver, summary judgment in favor of the city was proper on the driver's claim against the city for respondeat superior. Graham v. City of Duluth, 328 Ga. App. 496, 759 S.E.2d 645 (2014).

If tort of employee is wholly personal to the employee, it is not within scope of the employee's employment, and the employee's employer is not required to anticipate the improbable, nor to take measures to prevent a happening which no reasonable person would have expected. Community Theatres Co. v. Bentley, 88 Ga. App. 303, 76 S.E.2d 632 (1953).

Appellate court erred in reversing the trial court's grant of summary judgment for the hospital after the patient sued the hospital on a respondeat superior theory for the acts of the hospital's employee in rubbing the patient's genitals after surgery when the employee was only authorized to check the groin area for surgical complications, as the hospital could not be liable as a matter of law because the patient could not show one requirement for finding the hospital liable, namely that the employee's purely personal act did anything to further the hospital's business. Piedmont Hosp., Inc. v. Palladino, 276 Ga. 612, 580 S.E.2d 215 (2003).

Disclosure of tax information. — Defendants were found to be acting within the scope of the defendants' employment when the defendants allegedly disclosed confidential tax returns to third parties in their attempt to collect the plaintiffs' taxes or to collect information for tax related purposes. Retirement Care Assocs. v. U.S./I.R.S., 1 F. Supp. 2d 1472 (N.D. Ga. 1998).

Horseplay with employees to keep employees energized. — When automobile salesperson was injured while "finger-wrestling" with his supervisor, testimony that the supervisor believed that engaging in occasional horseplay with employees to keep the employees "pumped up" constituted a part of the supervisor's supervisory responsibilities, created a material factual conflict, precluding summary judgment for the employer, on the issue of whether the supervisor's alleged misconduct occurred within the scope of the supervisor's employment. Gaylor v. Jay & Gene's Chrysler-Plymouth-Dodge, Inc., 183 Ga. App. 255, 358 S.E.2d 655 (1987).

Hugging of patron by a bar waitress was done for purely personal motives and her employer was not liable for injuries caused to the patron when the patron fell as the result of the waitress's action. Morrison v. Anderson, 221 Ga. App. 396, 471 S.E.2d 329 (1996).

Employee forging signature on contract. — Employer was not liable when the act of an employee forging a signature of a purported customer to a company contract was not within the scope of the servant's employment. Wittig v. Spa Lady, Inc., 182 Ga. App. 689, 356 S.E.2d 665 (1987).

Manager was acting within the scope of employment when wrong person arrested. — Since the undisputed evidence showed that the manager swore out the affidavit for arrest against the defendant for the sole reason that the manager thought the manager was instructed to do so by the manager's employer, the manager was acting within the scope and course of the manager's employment even though the manager had the wrong person arrested. Rent to Own, Inc. v. Bragg, 248 Ga. App. 130, 546 S.E.2d 9 (2001).

Servant leaving work held to be in scope of employment. — See Fred A.

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York, Inc. v. Moss, 176 Ga. App. 350, 335 S.E.2d 618 (1985).

Drunk while driving company car. — Employee was not acting within the scope of the employee's employment when the employee fell asleep at the wheel and ran over two pedestrians, while driving home inebriated in a company car after meeting five other employees at a restaurant/bar to celebrate the impending marriage of another employee. Divecchio v. Mead Corp., 184 Ga. App. 447, 361 S.E.2d 850 (1987).

Parking a tractor-trailer as furtherance of employer's business. — Trial court erred in granting an employer's motion for summary judgment in a widow's action to recover for the damages a driver sustained when the driver's car crashed into a tractor-trailer an employee had parked on the side of the road because the question of whether the employee's deviation from the employer's business was so slight and so closely connected with the employer's affairs that the employer could be held vicariously liable for the employee's alleged negligence had to be resolved by a jury; there was evidence that the employee's act of driving the tractor-trailer from a landfill to a contractor's job site furthered the employer's business pursuant to O.C.G.A. § 51-2-2. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

Sexual advances by counselor as part of counseling "technique". — Because the defendant hospital had not granted a drug abuse counselor any authority to make the sexual advances and the counselor abused the counselor's authority to pursue the counselor's own sexual agenda in sexually harassing plaintiff patients, the counselor's conduct was outside the scope of the counselor's employment under O.C.G.A. § 51-2-2; the counselor's attempt to explain that the counselor's misconduct was part of the counselor's counseling "technique" was irrelevant. Doe v. Fulton-DeKalb Hosp. Auth., 628 F.3d 1325 (11th Cir. 2010).

4. Servant's Intentional Torts

Master liable even though servant's tort is willful. — Principal may be liable for the willful tort of the principal's agent, done in the prosecution and within the scope of the principal's business, although it is not expressly shown that the principal either commanded the commission of the willful act or assented to the act. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671 (1935); Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432 (1964).

Master is liable for the willful torts of a servant, committed in the course of the servant's employment, just as though the master had personally commanded them. Gomez v. Great Atl. & Pac. Tea Co., 48 Ga. App. 398, 172 S.E. 750 (1934); Brown v. Union Bus Co., 61 Ga. App. 496, 6 S.E.2d 388 (1939); Frazier v. Southern Ry., 200 Ga. 590, 37 S.E.2d 774 (1946).

Though a tort committed by a servant upon another be willful, entirely unjustified, and done in great anger, the master is nevertheless liable in damages therefore if the tort be committed by the master's command or in the prosecution and within the scope of the master's business. Southern Grocery Stores, Inc. v. Herring, 63 Ga. App. 267, 11 S.E.2d 57 (1940).

Employer is liable for the willful or malicious acts of the employer's servants done in the course of his employment and within its scope although the acts are not done by the express direction of the employer or with the employer's assent. Andrews v. Norvell, 65 Ga. App. 241, 15 S.E.2d 808 (1941).

Master is liable for the willful torts of the master's servant acting in the prosecution and within the scope of the master's business, and this is true even though the servant, at the time of the commission of such tort, may evidence anger, malice, or ill will. Frazier v. Southern Ry., 200 Ga. 590, 37 S.E.2d 774 (1946); Gaylor v. Jay & Gene's Chrysler-Plymouth-Dodge, Inc., 183 Ga. App. 255, 358 S.E.2d 655 (1987).

Master may be liable for even the willful and malicious torts of the master's servant, but to sustain liability it must ap-

pear that the tort was committed within the scope of the master's business. Community Theatres Co. v. Bentley, 88 Ga. App. 303, 76 S.E.2d 632 (1953).

Master is liable for the tort of the master's servant committed in the performance of the master's business, even when the tort is a willful one. Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668 (1954).

Fact that the alleged tort was intentional rather than negligent does not, in and of itself, preclude the doctrine of respondeat superior from being considered applicable. Sparlin Chiropractic Clinic v. Tops Personnel Servs., Inc., 193 Ga. App. 181, 387 S.E.2d 411 (1989).

Master is liable for the torts of the master's servants although torts may amount to a crime. Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668 (1954).

Fact that an act itself may be criminal does not relieve the employer of civil liability for damages caused thereby, when the act is done by the employees at the employer's command or within the scope of the employees' employment. Coleman v. Nail, 49 Ga. App. 51, 174 S.E. 178 (1934).

If the criminal act of the servant was done within the range of the servant's employment and for the purpose of accomplishing the authorized business of the master, the latter is liable. Pope v. Seaboard Air Line R.R., 88 Ga. App. 557, 77 S.E.2d 55 (1953).

Mere fact that a tortious act of an employee amounts to a crime does not, per se, relieve the employer from liability. Sexton Bros. Tire Co. v. Southern Burglar Alarm Co., 153 Ga. App. 413, 265 S.E.2d 335 (1980).

Master not responsible for servant's sexual misconduct. — In an action in which an employee filed suit against an employer and a supervisor, alleging a claim of sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the court found that the employee could not succeed on the employee's claims against the corporate defendants based on respondeat superior; assuming, arguendo, the supervisor committed any one of the state law torts the employee alleged, the supervisor did not commit those torts in the prosecution and within the scope of the corporate defendants' business because they involved sexual misconduct. Mangrum v. Republic Indus., 260 F. Supp. 2d 1229 (N.D. Ga. 2003).

Master may be held responsible for assault and battery committed by the servant acting within the scope of employment. Greenfield v. Colonial Stores, Inc., 110 Ga. App. 572, 139 S.E.2d 403 (1964).

Assault by servant. — When a willful and unjustified assault is committed by a servant within the scope of the servant's employment, the master is liable for the injury thus inflicted under the doctrine of respondeat superior. Broome v. Primrose Tapestry Mills, 59 Ga. App. 70, 200 S.E. 506 (1938).

When an act of a servant in committing an assault is committed in the prosecution of the master's business or the said act is within the scope of the servant's employment, the master is liable in tort. Frazier v. Southern Ry., 200 Ga. 590, 37 S.E.2d 774 (1946).

Theory that one may be an employee one minute and the very next minute become enraged, commit an assault and battery and in that act be not an employee is too fine spun a distinction. Gilbert v. Progressive Life Ins. Co., 79 Ga. App. 219, 53 S.E.2d 494 (1949).

Company not liable for agent's assault motivated by personal reasons. — Company is not liable for damages resulting from an assault and battery inflicted by the company's agent upon a third person, when it appears that the difficulty which gave rise to the beating arose out of a personal quarrel, and that the agent, so far as related to the agent's participation therein, was acting upon the agent's individual responsibility and not within the scope of the business of the agency as an employee of the company. Jones v. Reserve Ins. Co., 149 Ga. App. 176, 253 S.E.2d 849 (1979).

Mere fact that an assault occurs during a time of ostensible employment is not dispositive of the question of scope of employment. When an assault is unrelated to the employee's task and is completely personal in nature, no genuine

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issue of material fact remains as to a claim based upon a theory of respondeat superior, and an employer is entitled to judgment on this issue as a matter of law. Southern Bell Tel. & Tel. Co. v. Sharara, 167 Ga. App. 665, 307 S.E.2d 129 (1983).

5. Principal—Agent Liability

Principal is liable for tort of agent within scope of principal's business. American Cas. Co. v. Windham, 26 F. Supp. 261 (M.D. Ga.), aff'd, 107 F.2d 88 (5th Cir. 1939), cert. denied, 309 U.S. 674, 60 S. Ct. 714, 84 L. Ed. 1019 (1940); DeDaviess v. U-Haul Co., 154 Ga. App. 124, 267 S.E.2d 633 (1980).

Agent not liable for negligence of principal. — This section provides for the liability of the principal for the acts of the agent by the principal's command or in the prosecution and within the scope of the principal's business, whether the same shall be by negligence or voluntary, but it does not conversely provide that the agent is liable for the neglect or default of the principal. Crosby v. Calaway, 65 Ga. App. 266, 16 S.E.2d 155 (1941).

Agent is not liable for failure of principal to discharge affirmative duties which principal may owe, but principal is liable for carelessness of agent. Crosby v. Calaway, 65 Ga. App. 266, 16 S.E.2d 155 (1941); Verddier v. Neal Blun Co., 128 Ga. App. 321, 196 S.E.2d 469 (1973).

Acts for agent's personal benefit. — Employer was not vicariously liable for a broker's acts in fraudulently inducing plaintiffs to invest in a nonexistent fund which the broker falsely represented as a fund of the employer, since the acts were committed for the broker's personal benefit, involved no participation by the employer, and were of no benefit to the employer. Hobbs v. Principal Fin. Group, Inc., 230 Ga. App. 410, 497 S.E.2d 243 (1998).

Trial court did not err in granting summary judgment to an insurance agency on the plaintiff's fraud claim because the acts of the agency's manager in accepting the plaintiff's premiums without obtaining insurance were personal acts for the manager's own benefit, involved no participation by the agency, and were of no benefit to the agency. GFA Bus. Solutions, Inc. v. Greenway Ins. Agency, Inc., 243 Ga. App. 35, 531 S.E.2d 134 (2000).

There should be no distinction between the relationships of principal and agent and that of master and servant, so as to make different rules of liability apply, according to the nature of the relationship. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671 (1935).

Whether the tort-feasor was an agent or a servant makes no difference in applying the doctrine of respondeat superior; if the tort-feasor's wrongful acts were in the prosecution of the defendant's business and within the scope of the employment, then the defendant is liable for such tortious conduct of the defendant's servant or agent, as the case may be. Prince v. Brickell, 87 Ga. App. 697, 75 S.E.2d 288 (1953).

Contrast to federal law. — Under Georgia law, in a true principal/agent relationship, the principal is automatically liable for the negligence of an agent acting within the scope of the agency. The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., in contrast, contemplates that a response action contractor will be independently liable for negligence or other tortious behavior and that the United States may assume the liability in certain circumstances. Amtreco, Inc. v. O.H. Materials, Inc., 802 F. Supp. 443 (M.D. Ga. 1992).

Former Code 1933, § 105-108 (see now O.C.G.A. § 51-2-2) was not contrary to former Code 1933, § 4-312 (see now O.C.G.A. § 10-6-61) because the latter properly construed does not mean the principal is not liable for the willful trespass of the principal's agent unless done by the principal's express command or assent, but the principal may be liable if the trespass was committed by the principal's implied command or implied assent, and if committed within the scope of the agency, the implication will arise as a matter of law. Planters Cotton Oil Co. v. Baker, 181 Ga. 161, 181 S.E. 671 (1935).

Principal's consent generally implied. — Since the determinative ques-

tion in a case of a principal's liability is whether the act of the agent is done in the prosecution and within the scope of the principal's business, either command or assent can be implied. Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432 (1964).

If a willful trespass is committed by an agent within the scope of the agency, the assent of the principal will be implied as a matter of law, and in such case it is unnecessary to make proof of an express command or assent, and the principal may be liable for the willful tort of the agent, done in the prosecution and within the scope of the principal's business. International Bhd. of Boilermakers v. Newman, 116 Ga. App. 590, 158 S.E.2d 298 (1967).

Principal may be liable if the trespass was committed by the principal's implied command or implied assent; and if committed within the scope of the agency, the implication will arise as a matter of law. Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

Ordinarily, agent is not liable to third persons for acts of nonfeasance. Crosby v. Calaway, 65 Ga. App. 266, 16 S.E.2d 155 (1941).

Subagents hired by agents. — Unless a primary agent, expressly or impliedly authorized by the principal as owner of an automobile to drive it on the business of the owner, is expressly or impliedly authorized to appoint a subagent for that purpose, the owner will not be liable for the negligence of the agent. Samples v. Shaw, 47 Ga. App. 337, 170 S.E. 389 (1933).

Principal may employ an agent and permit the employment by the agent of subagents or servants to aid him in carrying on the business, without becoming liable for the acts of the subagents or servants. Sinclair Ref. Co. v. Veal, 51 Ga. App. 755, 181 S.E. 705 (1935).

If a servant, who is employed to do certain work for the servant's master, employs another person to assist the servant, the master is liable for the negligence of the assistant only when the servant had authority, express or implied, to employ the assistant, or when the act of employment is ratified by the master. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784 (1953).

6. Independent Contractors

Employer not liable for torts of independent contractor. — Principle of law that a master or employer is liable for a tort committed by the servant or employee about the master's business or within the course of the employee's employment is not applicable in a case where the relation between the parties is that of principal or employer and independent contractor. Whitehall Chevrolet Co. v. Anderson, 53 Ga. App. 406, 186 S.E. 135 (1936).

Absent evidence of a master-servant relationship or that the alleged master controlled the time, manner, means, or method by which the servant completed work, these independent parties were entitled to summary judgment as to the basis of liability in a wrongful death action filed against them. Gateway Atlanta Apts., Inc. v. Harris, 290 Ga. App. 772, 660 S.E.2d 750 (2008).

Entertainer was not liable for a security guard's alleged assault of a person attending a promotional event because there was no evidence that the guard was an employee, rather than an independent contractor, since there was no evidence that the entertainer controlled the manner and method of the guard's performance of the guard's security functions. Herring v. Harvey, 300 Ga. App. 560, 685 S.E.2d 460 (2009), cert. denied, No. S10C0389, 2010 Ga. LEXIS 305 (Ga. 2010).

Distinguishing independent contractor from servant. — Real test by which to determine whether a person was acting as the servant of another at the time of the infliction of an injury by the servant is to ascertain whether at the particular time when the injury was inflicted the servant was subject to the other person's orders and control, and was liable to be discharged from the particular employment for disobedience of orders or misconduct. Bibb Mfg. Co. v. Souther, 52 Ga. App. 722, 184 S.E. 421 (1936); Graham v. Cleveland, 58 Ga. App. 810, 200 S.E. 184 (1938).

Test to be applied in determining whether the relation is that of a servant or independent contractor lies in whether

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6. Independent Contractors (Cont'd)

the contract of employment gives the employer the right to control the time and manner of executing the work, or the employer interferes and assumes such control, as distinguished from the right merely to require results in conformity to the contract. Whitehall Chevrolet Co. v. Anderson, 53 Ga. App. 406, 186 S.E. 135 (1936); Morris v. Constitution Publishing Co., 84 Ga. App. 816, 67 S.E.2d 407 (1951); Hotel Storage, Inc. v. Fesler, 120 Ga. App. 672, 172 S.E.2d 174 (1969); Buchanan v. Canada Dry Corp., 138 Ga. App. 588, 226 S.E.2d 613 (1976); Sloan v. Hobbs Sporting Goods Shop, 145 Ga. App. 255, 243 S.E.2d 673 (1978).

Test in determining whether one is a servant or independent contractor is whether the employer had the right, under the employment, taking into consideration the circumstances and situation of the parties, and the work, to so control and direct the work. Sparlin Chiropractic Clinic v. Tops Personnel Servs., Inc., 193 Ga. App. 181, 387 S.E.2d 411 (1989).

Workers' compensation. — O.C.G.A. § 34-9-11 of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., expressly abrogated the vicarious liability provisions of , O.C.G.A. § 34-9-1 et seq., § 51-2-5 which would have otherwise permitted the parents of an employee of an independent subcontractor to bring a tort action against the general contractor/statutory employer. McCorkle v. United States, 737 F.2d 957 (11th Cir. 1984).

7. Borrowed Servants

Servant loaned for particular purpose becomes servant of borrower. — When one lends one's servant to another for a particular employment, the servant will be dealt with as a servant of the person to whom one is lent although one remains the general servant of the person who lent the servant. Hotel Storage, Inc. v. Fesler, 120 Ga. App. 672, 172 S.E.2d 174 (1969).

Special master is alone liable to third persons for injuries caused by such wrongful acts as special servant may commit in course of his employment. Bibb Mfg. Co. v. Souther, 52 Ga. App. 722, 184 S.E. 421 (1936).

Determining status as borrowed servant. — Test to be applied in ascertaining if one is a loaned servant is: (1) that the special master must have complete control and direction of the servant for the occasion; (2) that the general master must have no such control; (3) that the special master must have the exclusive right to discharge the servant, to put another in one's place or to put one to other work. Control is the determinative factor. Hotel Storage, Inc. v. Fesler, 120 Ga. App. 672, 172 S.E.2d 174 (1969).

Because an employer, as bailor, sent the employer's own employee with the thing bailed, a tractor with an attached trash trailer, under O.C.G.A. § 44-12-62(b), a contractor, as the hirer, was liable only for the consequences of the employer's own directions or for the employer's gross negligence; the trial court erred in concluding that the contractor was entitled to summary judgment on the basis that the employee was not the contractor's borrowed servant because the evidence presented at least a factual issue regarding whether the employee was the contractor's borrowed servant since there was evidence that the contractor alone supervised the employee's work hauling debris, that the contractor controlled the employee's schedule for each day, and that the contractor dictated which landfill would receive the debris and when a load was ready. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

Mere performance of work beneficial to third person insufficient. — Mere fact that a servant is, at the time of an injury, performing work beneficial to a third person, does not render one the servant of such third person and make such third person responsible for the servant's negligent acts. Graham v. Cleveland, 58 Ga. App. 810, 200 S.E. 184 (1938).

Change of relationship must be clear. — To show that the general employee or agent of one person has become the employee of another, with the effect of ending the general employer's responsibility for the acts of the agent, the new relationship of the parties must clearly appear. Fleming v. E.I. Du Pont De

Nemours & Co., 89 Ga. App. 837, 81 S.E.2d 529 (1954).

8. Joint and Several Liability

Servant, as wrongdoer, is liable individually for tort committed within scope of master's business. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

When a servant assumes to act for the servant's master, the servant's duty to third persons, so far as it relates to the proper performance of the obligations assumed for and in behalf of the master is, to the extent of such assumption of duty, the same as that of the master, and one's failure to perform makes one liable as the master, provided, of course, one's failure to perform can be said to be the proximate cause of the injury. Atlantic Coast Line R.R. v. Knight, 48 Ga. App. 53, 171 S.E. 919 (1933), aff'd, 73 F.2d 76 (5th Cir. 1934).

Master and his servant may be jointly sued for damages resulting solely from negligence of servant, in which case the liability of the master and of the servant is joint and several. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

Master not derivatively liable unless servant liable. — When the liability, if any, of the master to a third person is purely derivative and dependent entirely upon the principle of respondeat superior, and although not technically a joint tort-feasor, the master may be sued alone or jointly with the servant but a judgment in favor of the servant on the merits (and by analogy, a release of the servant from liability) will bar an action against the master, when injury and damage are the same. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

When, under the doctrine of respondeat superior, an action for damages against a master and servant as codefendants is based solely on the negligence of the servant, a verdict absolving the servant, but holding the master liable is contradictory and is therefore a nullity. Moffett v. McCurry, 84 Ga. App. 853, 67 S.E.2d 807 (1951).

When no actionable tort is committed such that the plaintiff might recover from the speaker, the plaintiff cannot recover against the employer. Brown v. Colonial Stores, Inc., 110 Ga. App. 154, 138 S.E.2d 62 (1964).

When the jury returned a verdict in favor of the individuals upon whose acts corporate liability depended, there was no basis for a verdict against the corporations. ESAB Distribs. S.E., Inc. v. Flamex Indus., Inc., 243 Ga. 355, 254 S.E.2d 328 (1979).

Settlement with servant releases master. — When in an action for damages growing out of a collision between the truck of the plaintiffs, driven by their servant, and the truck of the defendants, driven by their servant, which resulted in certain property damage to the plaintiffs' truck and certain personal injuries to the defendants' servant, the plaintiffs and the defendants' servant enter into an agreement, whereby the defendants' servant for and in consideration of the payment of a certain sum by the plaintiffs, releases the plaintiffs from all claims, anticipated and unanticipated, growing out of the collision, the release constitutes a settlement of the plaintiffs' claims against the servant, and a settlement of the plaintiffs' claims against the servant necessarily constitutes a release of the defendants as there can be only one satisfaction of the same injuries. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

Master may be independently liable for own negligence. — Rule that, when an action for damages against a master and servant as codefendants is based solely on the negligence of the servant, holding the master liable is contradictory and is therefore a nullity, has no application when there is any evidence authorizing the jury to find that the master was negligent independently of the servant-codefendants. Moffett v. McCurry, 84 Ga. App. 853, 67 S.E.2d 807 (1951).

Nature of judgment when master and servant jointly sued. — 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 tort-feasors; the verdict and judgment must be valid against both or it is valid against neither. Medlin v. Church,

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157 Ga. App. 876, 278 S.E.2d 747 (1981).

9. Pleading and Practice

Basic elements of pleading. — Principal or master being responsible for the negligent acts of one's agent or servant only when done by command or within the scope of the employment, it is necessary, in an action seeking to charge one for the acts of another upon the theory that the latter was agent for the former, that the petition should disclose, either expressly or by necessary implication, not only the existence of the agency, but also the connection of the act with the employment. Bates v. Southern Ry., 52 Ga. App. 576, 183 S.E. 819 (1936).

General averment that act is within scope of employment sufficient for pleading purposes. — General averment in effect that the act of the employee was committed in the prosecution of the employer's business and within the scope of the employee's authority states traversable facts rather than a mere conclusion of the law. Gilbert v. Progressive Life Ins. Co., 79 Ga. App. 219, 53 S.E.2d 494 (1949).

When the plaintiff alleges by a simple direct statement the fact that the wrongful act was the act of the defendant's servant and was committed in the prosecution of the principal's business and within the scope of the employee's authority, the plaintiff's petition is not subject to general or special demurrer (now motion to dismiss). Candace, Inc. v. Newton, 91 Ga. App. 357, 85 S.E.2d 616 (1955).

Pleading agency. — One of the ways of pleading that agency existed so as to make alleged principal responsible for the wrongful acts of the agent is to allege by a simple direct statement that the defendant principal by its agent committed the wrongful act, and this as against a general or special demurrer (now motion to dismiss) would be sufficient. Garver v. Smith, 90 Ga. App. 892, 84 S.E.2d 693 (1954).

One way of alleging agency so as to bind the principal for the acts of the agent is to allege that the act was committed by the agent as agent for the principal and within the scope of his employment. Greenfield v. Colonial Stores, Inc., 110 Ga. App. 572, 139 S.E.2d 403 (1964).

General allegation of agency will yield to specific allegations of fact which in themselves negative agency, or negative agency for the purpose and particular set of facts under which it is sought to hold the master on the doctrine of respondeat superior. Community Theatres Co. v. Bentley, 88 Ga. App. 303, 76 S.E.2d 632 (1953).

While it is true that, when a general averment that a tort was committed within the scope of an employee's authority is amplified by specific allegations which plainly and distinctly negative the general allegation that the act or acts complained of were in the prosecution of the employer's business and within the scope of the employee's authority, the specific allegations will prevail. Gilbert v. Progressive Life Ins. Co., 79 Ga. App. 219, 53 S.E.2d 494 (1949).

True test for imputing liability is agency. — In a passenger's personal injury action against an owner of another vehicle that had been negligently driven by another, causing it to collide with the car in which the passenger was riding, summary judgment was properly granted to the owner under O.C.G.A. § 9-11-56 since the passenger did not offer evidence to support the passenger's claim for imputing liability on the owner, pursuant to O.C.G.A. § 51-2-2, beyond the passenger showing that the individual owned and insured the vehicle. The true test of liability for imputing liability was not the title or ownership but rather the agency. Collins v. Hamilton, 259 Ga. App. 52, 576 S.E.2d 42 (2002).

Petition against master fatally defective if no allegation made that servant acted within scope of employment. — Petition which seeks to charge the defendant with liability for the act of an agent is fatally defective when the petition contains no allegation that the servant was acting within the scope of the servant's employment or in the prosecution of the agent's employer's business, and did not show that the nature of the agent's service was such that the agent's authority to perform the act on behalf of the principal could be legitimately in-

ferred. Sherwin-Williams Co. v. St. Paul-Mercury Indem. Co., 97 Ga. App. 298, 102 S.E.2d 919 (1958).

No need to prove command or assent by master. — If the tort of the agent is committed in the prosecution and within the scope of the principal's business, it is done with the implied command or assent of the principal, and in such case it is unnecessary to make proof of an express command or assent. Planters Cotton Oil Co. v. Baker, 181 Ga. App. 161, 181 S.E. 671 (1935).

10. Jury Instructions

Charge to jury. — When the charge limited the accountability of the master the servant's for the negligence of the servant to the servant's acts when done "as the servant or agent of the defendant," this should be taken as the equivalent of a statement that the acts must have been done within the scope of the master's business. Fielder v. Davison, 139 Ga. 509, 77 S.E. 618 (1913); Collier v. Schoenberg, 26 Ga. App. 496, 106 S.E. 581 (1921).

Negligence of the defendant's servant, if any, being imputable to the defendant under the undisputed pleadings and evidence, there was no error in a reference by the court in the court's charge to the "negligence of the defendant", rather than "negligence of the driver of defendant's vehicle." Chancey v. Shirah, 96 Ga. App. 91, 99 S.E.2d 365 (1957).

11. Jury Questions

Whether servant acted within scope of employment is jury question. — Question of whether a servant by whose act another is injured was acting within the scope of his employment is ordinarily one to be determined by the jury. Century Bldg. Co. v. Lewkowitz, 1 Ga. App. 636, 57 S.E. 1036 (1907); Friedman v. Martin, 43 Ga. App. 677, 160 S.E. 126 (1931).

Whether or not the servant was at the time acting within the scope of employment is generally a question of fact for the jury. Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933).

Whether the agent was acting within the scope of employment when the agent committed a tortious act is a question of fact for the jury. Personal Fin. Co. v. Whiting, 48 Ga. App. 154, 172 S.E. 111 (1933); Digsby v. Carroll Baking Co., 76 Ga. App. 656, 47 S.E.2d 203 (1948).

Question of whether or not the servant at the time of an injury to another was acting in the prosecution of the master's business and in the scope of the servant's employment is for determination by the jury except in plain and indisputable cases. Jump v. Anderson, 58 Ga. App. 126, 197 S.E. 644 (1938).

Except in plain and palpable cases, it is for the jury to decide the question whether the servant was acting within the scope of and in furtherance of the servant's employment when the servant committed the tortious act in question. Southern Grocery Stores, Inc. v. Herring, 63 Ga. App. 267, 11 S.E.2d 57 (1940).

Whether or not an employee at the time of an assault and battery on the plaintiff, was acting in the scope of his employment and in the prosecution of the employers' business is a question for the jury. Gilbert v. Progressive Life Ins. Co., 79 Ga. App. 219, 53 S.E.2d 494 (1949).

When there is a deviation the question should ordinarily be submitted to the jury as to whether or not the deviation from the master's business was so slight as not to affect the master's responsibility for the negligent act. Cooley v. Tate, 87 Ga. App. 1, 73 S.E.2d 72 (1952).

Scope of employment may be matter of law in plain cases. — While it is true that the question of whether a servant was acting within the scope of the servant's employment at the time of an alleged assault is generally for the jury, yet when it is plain and palpable that at the time of the assault the servant was not so acting, the appellate court may so determine, as a matter of law. Broome v. Primrose Tapestry Mills, 59 Ga. App. 70, 200 S.E. 506 (1938).

Knowledge of sexual harassment and rape. — Disputed issues of material fact precluded the grant of summary judgment on the plaintiff's claim of intentional infliction of emotional distress under the doctrine of respondeat superior when the employer was possessed of knowledge of the accusation of sexual harassment and

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11. Jury Questions (Cont'd)

rape of the plaintiff by her co-employee, and the employer failed to report or correct the conduct, therefore essentially ratifying the co-employee's actions. Simon v. Morehouse Sch. of Medicine, 908 F. Supp. 959 (N.D. Ga. 1995).

Torts of Servant — Specific Cases

1. Automobiles

General rules of respondeat superior applicable to suits based on servant's operation of motor vehicle. — If an owner of an automobile is sued for damages on account of an injury caused by the negligent operation of the automobile by the owner's chauffeur, the rules of law touching master and servant will ordinarily be applied for the determination of the liability of the former for the act of the latter. Cooley v. Tate, 87 Ga. App. 1, 73 S.E.2d 72 (1952).

Owner of vehicle also liable for negligently permitting unqualified person to use it. — Aside from the relation of master and servant, the owner of an automobile may be rendered liable for injuries inflicted by its operation by one whom the owner has permitted to drive the automobile on the ground that such person, by reason of one's age or want of experience, or one's physical or mental condition, or one's known habit of recklessness, is incompetent to safely operate the machine. Graham v. Cleveland, 58 Ga. App. 810, 200 S.E. 184 (1938).

Master not liable when servant uses vehicle for personal reasons not within scope of employment. — When an employee, instead of returning "immediately" to the employer's place of business, as it was the employee's duty to do, proceeded in the opposite direction from the place of business of the employer on what the employee termed a "joy ride," the enterprise was purely the private affair of the employee, and one which bore no relation whatever to the prosecution of the employer's business. Dawson Chevrolet Co. v. Ford, 47 Ga. App. 312, 170 S.E. 306 (1933).

Since the servant is not permitted to use the car for the servant's own benefit during the interval before the servant is required to act for the owner, and the servant uses the car of employer for the servant's own personal business during this interval, the employer is not liable. Reddy-Waldhauer-Maffett Co. v. Spivey, 53 Ga. App. 117, 185 S.E. 147 (1936).

Owner of an automobile is not liable for injuries caused by the chauffeur's negligent operation of the car at a time when the conduct of the chauffeur took the chauffeur outside the scope of the chauffeur's employment and when his conduct was a complete departure instead of a "deviation" or "detour" incidental to employment. Reddy-Waldhauer-Maffett Co. v. Spivey, 53 Ga. App. 117, 185 S.E. 147 (1936).

Fact that the defect in the car was that it did not have a rear red light attached, even if known to the owner, would not in this case create a liability on the part of the owner, since the owner on the night in question did not know the employee would use the car. Reddy-Waldhauer-Maffett Co. v. Spivey, 53 Ga. App. 117, 185 S.E. 147 (1936).

Owner of an automobile is not liable for an injury from negligent driving thereof by an employee who was using the car for a private purpose entirely disconnected from the owner's business. Holland v. Cooper, 192 F.2d 214 (5th Cir. 1951).

When a servant, while not engaged in the performance of the master's business, and during a time when the servant is free to engage in the servant's own pursuits, uses the master's automobile for the servant's own purposes (although the servant does so with the knowledge and consent of the master), and, while so using it, negligently injures another by its operation, the master is not liable. Cooley v. Tate, 87 Ga. App. 1, 73 S.E.2d 72 (1952); May v. Phillips, 157 Ga. App. 630, 278 S.E.2d 172 (1981).

If, while a servant is not engaged in the performance of the master's business, and during a time when the servant is free to engage in the servant's own pursuits, the master lends the servant an automobile, and while the servant is using it for the servant's own pleasure, disconnected from any business of the master, the servant

negligently injures another by its operation, the servant will stand in the same position as would another borrower; and the master will not be liable for the servant's acts on the doctrine of respondeat superior. Cooley v. Tate, 87 Ga. App. 1, 73 S.E.2d 72 (1952).

When a servant is permitted by the master to use a vehicle for the servant's own pleasure or business, wholly disconnected from that of the master, and a third party is injured by the servant's negligent operation of the vehicle while on the servant's own mission, the master cannot be held liable under the doctrine of respondeat superior. Harper v. Brown, 122 Ga. App. 316, 176 S.E.2d 621 (1970).

There was no evidence that the attempt of an employee of a law firm to deliver a check was in furtherance of the employer's business based on the fact that the employee was asked by a fellow employee to deliver the check which was issued by an entity other than the employer for initiation of phone service for an entity other than the employer. Chorey, Taylor & Feil, P.C. v. Clark, 273 Ga. 143, 539 S.E.2d 139 (2000).

Servant acting outside the scope of employment because acting under direction of another. — Defendant owner of truck was not liable for injury suffered by the plaintiff repairman who was injured while repairing the truck's motor when the employee of the defendant started the motor, thereby causing the injury, as the employee was not at the time acting as a servant or agent of the defendant, but was acting under the direction of the plaintiff and was the plaintiff's agent or servant to manipulate the truck under the direction so as to facilitate the plaintiff's work in making the repairs on the truck. Carstarphen v. Ivey, 66 Ga. App. 865, 19 S.E.2d 341 (1942), criticized, Griffin v. Hardware Mut. Ins. Co., 93 Ga. App. 801, 92 S.E.2d 871 (1956).

Servant engaging substitute driver without permission. — When one who is employed to drive a motor vehicle, without the consent of and against specific instructions of the master engages a substitute driver, the master is not liable for the negligence of the substitute driver unless the act of the servant employing the substitute driver be ratified by the master. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784 (1953).

Unless a primary agent, expressly or impliedly authorized by the principal as owner of an automobile to drive the automobile on the business of the owner, is personally expressly or impliedly authorized to appoint a subagent for that purpose, the owner will not be liable for the negligence of the latter. Carter v. Bishop, 209 Ga. 919, 76 S.E.2d 784 (1953).

Driver not servant to owner. — When the owner of an automobile delivers the owner's car to the agent of another, who is engaged in the operation of a parking lot for automobiles for hire, for the purpose of parking the car in that lot a short distance away, such agent does not become the servant of both the owner of the car and the owner and operator of such parking lot so as to make them jointly liable for the negligent operation of the car, nor does the petition set out a joint cause of action against such defendants by reason of an allegation that both of the defendants "knew or could have known" that the agent was a reckless and incompetent driver, but nevertheless permitted and directed the agent to operate the car. Graham v. Cleveland, 58 Ga. App. 810, 200 S.E. 184 (1938).

Under the facts the person who was operating the automobile at the time of the collision was the servant and employee of the manager of the service station, and was not the servant, employee, or agent of the defendant owner of the car, to whom the car was being delivered following its washing at the service station, and the defendant owner was therefore not liable for damages caused by the collision. Simmons v. Beatty, 61 Ga. App. 759, 7 S.E.2d 613 (1940).

Employee acting as independent contractor. — Automobile salesperson employed on a commission basis, who operates the salesperson's own automobile to aid the salesperson's in carrying on the salesperson's employment, and whose movements are not controlled by the salesperson's employer, is, with respect to the operation of the salesperson's automobile, an independent contractor, and the employer is not liable in damages for an

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1. Automobiles (Cont'd)

injury to a person who was riding in the car with the employee and to whom the salesperson was trying to sell an automobile of the employer at the time, although the injury was caused by the negligence of the employee in the operation of the salesperson's automobile. Whitehall Chevrolet Co. v. Anderson, 53 Ga. App. 406, 186 S.E. 135 (1936).

When defendant company did not have any right to direct the manner, method, or means of performance of the work of operating and driving of the truck, owned by another, the driver of the truck was not the defendant's servant, but was the servant of the owner, an independent contractor, and the defendant was not liable for the negligence of the driver of the truck in the truck's operation along a public highway, resulting in injury to the plaintiff. Brown v. Georgia Kaolin Co., 60 Ga. App. 347, 4 S.E.2d 100 (1939).

Owner of automobile is not liable for act of servant who exceeds his authority by permitting third person to ride with servant. Greeson v. Bailey, 167 Ga. 638, 146 S.E. 490 (1929).

Driver of a motor vehicle, in the absence of express or implied authority from the owner to permit third persons to ride therein, is ordinarily held to be acting outside the scope of his employment in permitting them to do so. Braselton v. Brazell, 49 Ga. App. 269, 175 S.E. 254 (1934).

Evidence that the plaintiff's son was riding on the running board of the defendant's car, which was being driven at the time by one not an employee at the request of defendant's spouse for a mission of the spouse's own, in violation of the positive order of the defendant never to permit anyone to ride on the running board, demanded a verdict in defendant's favor as the driver's act was beyond the scope of the driver's authority and created no liability as between the rider on the running board and the defendant. Summers v. Barron, 59 Ga. App. 202, 200 S.E. 228 (1938).

When agent, servant, or employee of the defendant, while driving an automobile in and about the defendant's business and in performance of the services for which one was hired or which one contracted to perform for one's principal or master, invites a third person to ride as a guest, and such third person is injured by reason of the negligence of the driver, no right of action arises in favor of such third person against the owner of the automobile for a tort committed by the driver as the driver's agent, servant, or employee. Beard v. Oliver, 52 Ga. App. 229, 182 S.E. 921 (1935).

Although the driver was the agent, servant, or employee of the defendant, and was driving the automobile in and about the defendant's business and in performance of the services for which the agent was hired, if while so engaged the agent invited a third person to ride with the agent as a guest, and thereupon such guest was killed by reason of the negligence of the driver, which negligence may have amounted to gross negligence, no right of action arose against the owner of the automobile and in favor of such person who may be entitled to sue on account of the wrongful death, unless it should also appear that the guest was in the automobile with the authority, knowledge, or consent of the owner. Carpenter v. Lyons, 78 Ga. App. 214, 50 S.E.2d 850 (1948).

Driver employed by the owner of an automobile who invites another as the driver's guest to ride in the automobile without the knowledge, authority, or consent of the owner is acting outside the scope of his employment, and the owner is not liable on account of the guest's death caused by negligence of the driver. Carpenter v. Lyons, 78 Ga. App. 214, 50 S.E.2d 850 (1948).

Owner not liable when loan of vehicle is mere bailment. — If the furnishing of an automobile is within what may be said to be a "business" of the owner, one to whom the car is entrusted for such purpose is not a bailee, as in a case of lending, but is a servant or agent; if on the other hand, the car is furnished by the owner merely as an accommodation to the other, with no interest or concern in the purpose for which the other will use it, then its use, whether for recreation or

otherwise, is not within the business of the owner, and the transaction is a mere bailment. Hubert v. Harpe, 181 Ga. 168, 182 S.E. 167, answer conformed to, 52 Ga. App. 262, 183 S.E. 98 (1935).

Relationship between dealer in automobiles and prospective purchaser was that of bailor and bailee, not principal and agent or master and servant, and the dealer was not liable for injuries accruing to third person by reason of the negligent operation of the automobile by the prospective purchaser while trying the vehicle out. Harris v. Whitehall Chevrolet Co., 55 Ga. App. 130, 189 S.E. 392 (1936).

Servant a mere bailee when using vehicle for personal reasons with master's permission. — Operation of the master's vehicle by a servant with the master's knowledge, consent, and permission, but on a mission purely personal to the servant, places the servant in the same position as that of any borrower of a vehicle, and as to the use of the vehicle on the personal mission the relationship is that of bailor and bailee only. Harper v. Brown, 122 Ga. App. 316, 176 S.E.2d 621 (1970).

No employer liability. — Although the driver of a company vehicle was negligent per se, the driver was not acting within the scope of the driver's job and the driver's corporate employer was not liable for the accident. Torres v. Tandy Corp., 264 Ga. App. 686, 592 S.E.2d 111 (2003).

County was not liable for its employee's collision with another driver under O.C.G.A. § 51-2-2 or respondeat superior, because although the employee was on call for the county, the employee was driving the employee's personal vehicle on the employee's way to work for another employer, and there was no evidence that the employee was acting at the county's direction at the time of the collision. Williams v. Baker County, 300 Ga. App. 149, 684 S.E.2d 321 (2009).

Business purpose need not be sole reason for servant's use of vehicle. — Sole purpose of the use of a vehicle by a servant does not have to be furtherance of the employer's business. As long as one of the purposes is such, it makes no difference that the vehicle is "also being used in part for the accommodation of the driver." Johnson v. Franklin, 312 F. Supp. 310 (S.D. Ga. 1970).

Compensation to servant not required. — It is not essential that the relationship between the owner and driver such as to make the owner liable for the acts of the driver should be a business one or that the service be a remunerative service; an agency or servant relationship does not depend on an express appointment but may be implied from the circumstances of the case and, thus, one driving the owner's car at the owner's request and for the owner's purposes is the owner's servant or agent. Powell v. Kitchens, 84 Ga. App. 701, 67 S.E.2d 203 (1951).

Servant may resume duties after detour in which case master's liability reattaches. — When a servant whose duty in the employment of the master, is to drive a truck and to make delivery of an article of merchandise at a designated place, and then return with the truck to the garage where the truck is to be placed for the night, and when the servant, after having proceeded to the place for delivery of the merchandise, instead of proceeding to return the truck to the garage, makes a temporary departure from the service of the master on a devious course from that necessary to return the truck to the garage on a mission of the servant's own, and when, after attending to this mission, the servant proceeds to return the truck to the garage as the servant's duties to the master require the servant, the servant has then resumed the servant's duties to the master, and in the operation of the truck for the purpose of returning the truck to the garage the servant is acting within the scope of the servant's authority and is in the discharge of the servant's duty to the master; when in returning the truck to the garage, the servant negligently runs the truck against and injures an automobile belonging to another person, the servant's negligence is the negligence of the master. Atlanta Furn. Co. v. Walker, 51 Ga. App. 781, 181 S.E. 498 (1935).

Slight detour to get a meal. — If an employee, who is driving to or from a destination while acting within the scope of his or her employment and in furtherance of the employer's business, detours

Torts of Servant — Specific Cases (Cont'd)
1. Automobiles (Cont'd)

slightly from the direct or customary route to that destination to get a meal, and if there is evidence that it serves the employer's interests for the employee to make the slight detour for that purpose, a jury issue exists regarding whether the employee is acting within the scope of the employee's employment during the brief detour. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

As general rule, servant in going to and from the servant's work in automobile acts only for the servant's own purposes and not for those of the servant's employer, and consequently the employer is not to be held liable for an injury occasioned while the servant is en route to or from the servant's work. McGuire v. Gem City Motors, Inc., 296 F. Supp. 541 (N.D. Ga. 1969); Johnston v. United States, 310 F. Supp. 1 (N.D. Ga. 1969).

Vicarious liability of joint owners of vehicle. — When two persons jointly own an automobile and employ a chauffeur and practically have an equal right to the use of the machine and the services of such chauffeur, both of such joint owners are liable for the negligence of the chauffeur although at the time of the accident only one of the owners is enjoying the use of the machine, but if one of the owners singly employs a chauffeur and has the sole control of the chauffeur's conduct at the time of an accident, the co-owner is not charged with liability. Raley v. Hatcher, 61 Ga. App. 846, 7 S.E.2d 777 (1940).

Sufficiency of pleadings. — Petition alleging that defendant's servant, engaged in hauling freight in interstate commerce, playfully and negligently drove truck towards the plaintiff, and misjudging the distance and speed, struck the plaintiff, inflicting certain injuries, set out a cause of action against the defendant. Jump v. Anderson, 58 Ga. App. 126, 197 S.E. 644 (1938).

When it was alleged that at the defendant's special request an individual was using the defendant's vehicle for the purpose of looking after the needs of the defendant's aged parents and sister, two of whom were ill, that the individual had been spending several nights at their home and carrying them groceries and medicines, and that the individual was at the time proceeding toward their home to attend to their needs during the night, that all of these acts were at the defendant's request and for the defendant's benefit, and this was the purpose for which the car had been entrusted to the individual, which purpose the individual was actually attempting to effectuate at the time of collision, it could not be said as a matter of law that the petition failed on the petition's face to show an agency relationship. Powell v. Kitchens, 84 Ga. App. 701, 67 S.E.2d 203 (1951).

Two delivery truck drivers of the defendant, who unlawfully and criminally forced their way into the plaintiff's home for the purpose of committing an unlawful act, were not acting in furtherance of their master's business, but were acting outside of the scope of their employment, and the petition brought against the employer did not set forth a cause of action under the doctrine of respondeat superior. Parry v. Davison-Paxon Co., 87 Ga. App. 51, 73 S.E.2d 59 (1952).

Allegation that the defendant was at the time of the automobile accident an agent and employee of the owner of the vehicle acting within the course and scope of the agent's employment, with the express permission and consent and for the benefit of the latter is a sufficient allegation of agency to bind the owner for the tortious misconduct of the defendant. Belch v. Sprayberry, 97 Ga. App. 47, 101 S.E.2d 870 (1958).

Prima facie case of master's liability. — When, in a suit to recover damages against the master for injury because of the negligence of a servant in operating a motor vehicle which was negligently driven against the automobile of a third person causing injury, the evidence establishes: (a) that the motor vehicle belonged to the master; (b) that the servant was an employee of such master; and (c) that at the time of the collision the servant was in control of and operating the motor vehicle of the master, a prima facie case is made

for the plaintiff, and the burden of proof shifts to the master to prove, by testimony, if the master can, that at the time of the collision the servant was not acting for the master and within the scope of the employment of the servant. Atlanta Laundries, Inc. v. Goldberg, 71 Ga. App. 130, 30 S.E.2d 349 (1944).

When, the evidence for the plaintiff established the plaintiff's (a) the truck which was driven into the rear of the driver's car belonged to the defendant corporation; (b) the operator of the truck was an employee of the defendant; and (c) the employee was at the time of the collision in exclusive control of and negligently operating the truck, causing damage, a presumption arose that the employee was at the time engaged in the master's business, within the scope of the employment and that the defendant was liable for the defendant's negligent conduct; this presumption could be overcome by testimony, it generally being a jury question under all the facts and circumstances as developed by the whole evidence as to whether such presumption was rebutted by the evidence. Atlanta Laundries, Inc. v. Goldberg, 71 Ga. App. 130, 30 S.E.2d 349 (1944).

Sufficiency of evidence. — When there was nothing in the evidence declarations of alleged agent and alleged statements of the defendant over the telephone to support the contention of the plaintiff that the automobile belonged to the defendant, or that at the time of the collision it was being used for the defendant, and in and about the defendant's business, the evidence was not sufficient to support the verdict against the defendant. Greble v. Morgan, 69 Ga. App. 641, 26 S.E.2d 494 (1943).

Although the evidence established the fact that the employee temporarily (after making delivery of laundry) turned aside from the scope of the employee's duty to engage in beer drinking, which was personal to the employee, and of no concern to the employee's master, and was outside the scope of the employee's employment, under the facts the jury were authorized to find that at the time of the collision the employee had finished the personal deviation and had returned to his duties within the scope of the employee's employment, and had at the time resumed the employee's master's business. Atlanta Laundries, Inc. v. Goldberg, 71 Ga. App. 130, 30 S.E.2d 349 (1944).

In an action to recover damages on account of personal injuries sustained by being struck by an automobile truck of the defendant corporation, when the evidence not only failed to show that the driver of the truck was employed by the defendant company at the time of the accident, but there is no evidence at all that driving a truck was within the scope of the driver's employment or that the driver had ever been seen doing so, the evidence was such that a verdict for the plaintiff would have been unauthorized and contrary to law, and it was proper for the court to direct a verdict for the defendant. Johnson v. Webb-Crawford Co., 89 Ga. App. 524, 80 S.E.2d 63 (1954).

2. Corporations

Corporation is responsible for acts of its agents in the business of their employment, just as individual is liable. Personal Fin. Co. v. Whiting, 48 Ga. App. 154, 172 S.E. 111 (1933); Digsby v. Carroll Baking Co., 76 Ga. App. 656, 47 S.E.2d 203 (1948).

Corporation is liable for the tort of its watchman who arrests a person under a mistaken idea that the latter is intoxicated. Exposition Cotton Mills v. Sanders, 143 Ga. 593, 85 S.E. 747 (1915).

When a manufacturing company employs and pays a public officer to keep order on its premises, protect its property, and make arrests of persons violating the state laws, if such servant in the prosecution of the servant's duties as such servant and within the scope of the master's business commits a tortious act, the master is liable for the servant's tort. Massachusetts Cotton Mills v. Hawkins, 164 Ga. 594, 139 S.E. 52 (1927).

When under the allegations of the petition, the managing officer of the defendant corporation was the alter ego of the corporation, the officer's command, in directing the servant of the corporation to use a truck of the corporation in transporting the plaintiff's son who was killed when the truck overturned, was that of the

Torts of Servant — Specific Cases (Cont'd)
2. Corporations (Cont'd)

corporation itself. Sumter Milling & Peanut Co. v. Singletary, 79 Ga. App. 111, 53 S.E.2d 181 (1949).

Corporation not liable when servant acts from personal motivation or outside scope of business. — Mere averment in a petition that the slanderous utterance was made by the "manager" of the defendant's store, "in charge of the business of the defendant and so acting at the time complained of," was insufficient to authorize a recovery upon the theory of slander, since the utterance was not made by one who prima facie was the alter ego of the corporation, and presumably was authorized to speak for the corporation, and, since there was no allegation of any express direction or authority from the corporation to speak the words in question. Sims v. Miller's, Inc., 50 Ga. App. 640, 179 S.E. 423 (1935).

Petition failed to set out a cause of action against the beer distributing company for the wrongful death of the plaintiff's son, an innocent bystander killed when the company's sole stockholder and an accomplice were attempting to murder another in revenge for that person's alleged theft from the company. Heath v. Atlanta Beer Distrib. Co., 56 Ga. App. 494, 193 S.E. 73 (1937).

When a servant, at the time having no dealings with the plaintiff with reference to the business of the servant's employer, took offense at what the servant thought was an abusive and disrespectful remark cast at the servant by the plaintiff, and immediately assaulted the plaintiff therefor, the master is not responsible for such servant's conduct, even though at the time of the assault the plaintiff was trespassing on the master's property, contrary to instructions theretofore given the by such servant, who had authority to evict the trespassers from property of the master, and even though in making such assault the servant may have incidentally evicted the plaintiff from the premises, and by the assault rendered it less probable that the plaintiff would be guilty of any future trespass. Broome v. Primrose Tapestry Mills, 59 Ga. App. 70, 200 S.E. 506 (1938).

Corporation not responsible if alleged tort-feasor not its servant. — Corporation is not liable for the acts of city police chief, while acting as such, in preventing the commission of a crime by the plaintiff and others about the property of the corporation, even though the corporation's agent may have commanded the police chief to do the act which caused injury to the plaintiff. Kent v. Southern Ry., 52 Ga. App. 731, 184 S.E. 638 (1936).

Corporation is not chargeable with acts of agent done solely for the agent's own benefit and from which no benefit accrues to the corporation. Atlanta Hub Co. v. Bussey, 93 Ga. App. 171, 91 S.E.2d 66 (1956).

Company is not chargeable with acts committed by its president in the president's individual capacity and for the president's personal benefit only. Harper v. Brown, 122 Ga. App. 316, 176 S.E.2d 621 (1970).

When one who is agent of corporation commits tort at places other than place of agency, the company is not liable for the tort, unless it appears that it authorized the act or ratified it after its commission. Greenfield v. Colonial Stores, Inc., 110 Ga. App. 572, 139 S.E.2d 403 (1964).

Mere fact that one who commits tort is director and officer of corporation does not, without more, render corporation liable. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

Corporation is not liable for malicious acts of its agent or officer unless the acts are authorized, or were within scope of the agent's duties, or were in themselves a violation of a duty owed by the corporation to the party injured, or such acts were ratified by the corporation. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

Banking corporation is not liable for damages resulting from a false statement maliciously and willfully made by its executive vice-president, thereby inducing another to institute without probable cause and maliciously a criminal prosecution against another, even when in making such false statement the officer of the corporation was acting in the officer's ca-

pacity as such officer and for the corporation, and within the scope of the agency with the corporation, unless it affirmatively appears that such officer had authority from the corporation to make such false statement. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

Bank is not liable for a malicious prosecution in which its vice-president participated, encouraged, and aided, and purported to act for the corporation, when it does not affirmatively appear that the bank authorized the vice-president to engage in such prosecution or aid and abet therein or that the bank assented thereto or ratified the same. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

In order for a bank to be held liable for a malicious prosecution instigated by a false statement made by its agent or its executive vice-president, it must appear that the bank authorized such malicious prosecution, and that the same was done by the officer and agent, acting within the scope of his employment or at the discretion or command of the bank. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

Corporation may, in proper case, be liable for malicious prosecution when the prosecution is conducted by an agent or servant in furtherance of the business of the former, and within the scope of the latter's authority. Atlanta Hub Co. v. Bussey, 93 Ga. App. 171, 91 S.E.2d 66 (1956).

Corporation may only be liable for slander expressly ordered or directed, and in slander situations only for those words spoken by the corporation's command. Church of God, Inc. v. Shaw, 194 Ga. App. 694, 391 S.E.2d 666 (1990).

Even though tort-feasor is owner and sole stockholder, corporation is not liable unless tort-feasor is acting within scope of the tort-feasor's employment or in the line of business of the corporation at the time. Harper v. Brown, 122 Ga. App. 316, 176 S.E.2d 621 (1970).

3. Railroads

Railroad liable for torts committed by servants in course of employment. — Even though the act of a trainman in beckoning and signaling to plaintiff to proceed was without the express or implied assent of the railroads as the railroads had limited the trainman's duties to attending the train, and at crossings, the trainman's duty did not extend beyond seeing that the train did not injure anyone at the crossing, the defendant railroads would be responsible for the wrongful act of the trainman, if committed in the prosecution of the trainman's business with the railroads, and if, as a result thereof, the plaintiff was injured. Louisville & N.R.R. v. Ellis, 54 Ga. App. 783, 189 S.E. 559 (1936).

When an employee, acting in the scope of employment, with the use of a lantern or other instrumentality, knocks a fellow employee from a railroad engine by the tracks, and to one's death, the master is liable for the employee's voluntary act. Frazier v. Southern Ry., 200 Ga. 590, 37 S.E.2d 774 (1946).

Railroad not liable when servant acts for personal reasons outside scope of employment. — When it appeared that the real purpose of the person assaulted in approaching the agent of a railroad company at the agent's place of business was solely to renew a mere personal quarrel between the plaintiff and the agent, the plaintiff being under notice that the agent was acting according to the agent's instructions, the railroad company had no concern in what passed between them, and the trial judge did not err in granting a nonsuit. Dugger v. Central of Ga. Ry., 36 Ga. App. 782, 138 S.E. 266 (1927).

Neither a carrier nor one who furnishes to a carrier terminal facilities for taking on passengers, owing a duty to one who is a passenger, violates that duty through any act of a servant towards a passenger, when a servant committing the act has not been entrusted with the performance of any duty owing by a master to the passenger, and when the master is not negligent in failing to anticipate, or to prevent, the performance of the act of the servant. Massengale v. Atlanta, B. & C.R.R., 46 Ga. App. 484, 168 S.E. 111 (1933).

Railroad company is not liable in damages for a homicide committed by a servant, when the homicide was not commit-

Torts of Servant — Specific Cases (Cont'd)
3. Railroads (Cont'd)

ted in the prosecution of the master's business and within the scope of the servant's employment, but was the servant's personal act in resenting a real or fancied insult. Frazier v. Southern Ry., 200 Ga. 590, 37 S.E.2d 774 (1946).

Alleged tort-feasor not a servant. — When employee of the Southern Railway solicited the aid of the city police chief in removing striking employees of a mill engaged in criminal trespass of railroad tracks, and told that officer to fire upon the strikers after requests and threats had failed, and the police officer did so fire, police officer was acting in the officer's official capacity and not as an agent of the railroad, and the injured party had no cause of action against the railroad. Kent v. Southern Ry., 52 Ga. App. 731, 184 S.E. 638 (1936).

4. Retail Sales

Retail sales employer liable for torts of servant committed within scope of employment. — Customer lawfully on the premises of a mercantile establishment for the purpose of transacting the business for which the establishment is operated is there by invitation of the proprietor of the establishment, and if, while thus lawfully on the premises, the customer is unlawfully assaulted and beaten by an employee of the proprietor while acting within the scope of the employment, the proprietor is liable therefor. J.M. High Co. v. Holler, 42 Ga. App. 657, 157 S.E. 209 (1931).

Master who puts a servant in a place of trust or responsibility, or commits to the servant the management of the master's business, or the care of the master's property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion of protecting the master's property, goes beyond the line of his strict duty or authority, and inflicts unjustifiable injury upon another. A company must take the risk of infirmity of temper, maliciousness, and misconduct (committed in the course of the servant's employment) of the employees whom the company has placed in charge of the company's business. Great Atl. & Pac. Tea Co. v. Dowling, 43 Ga. App. 549, 159 S.E. 609 (1931).

When the defendant had not instructed or authorized its collector to pursue an improper course in the collection of bills due it, or to commit a tort, this did not necessarily prevent a recovery from the defendant. Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933).

Petition which alleged that the plaintiff, while present in the defendant's store as a customer, desiring to make a purchase from the defendant, was in a loud and angry tone, which could be heard by other customers present, falsely and unjustly accused by one of the defendant's clerks of having in a handbag a certain article belonging to the defendant, which charge humiliated and embarrassed the plaintiff, set out a cause of action for a willful and intentional tort, that is, the failure to protect the plaintiff as a customer, lawfully upon the defendant's premises, from injury caused by the misconduct of the defendant's employees. Sims v. Miller's, Inc., 50 Ga. App. 640, 179 S.E. 423 (1935).

If the conduct of employees outside of the scope of their employment, or of third persons or customers, is such as to cause any reasonable apprehension of danger to other customers or invitees because of such conduct, it is the duty of the proprietor to interfere to prevent probable injury; and a failure so to interfere, and consequent damage, will subject such proprietor to an action for damages for such negligent failure to prevent the injury; but this duty of interference on the proprietor's part does not begin until the danger is apparent, or the circumstances are such as would put an ordinarily prudent man on notice of the probability of danger. Great Atl. & Pac. Tea Co. v. Cox, 51 Ga. App. 880, 181 S.E. 788 (1935).

If there is any reasonable apprehension of danger to a customer from the unlawful conduct of other customers or third persons, or if a personal injury from the misconduct of other customers or third persons could have been prevented by the proprietor by the exercise of ordinary care

and diligence, the proprietor may be guilty of negligence for the proprietor's failure to use it, and consequently responsible in damages. Great Atl. & Pac. Tea Co. v. Cox, 51 Ga. App. 880, 181 S.E. 788 (1935).

When the plaintiff was engaged in picketing a grocery store, and the store manager threw pepper on the sidewalk and swept the pepper into the plaintiff's face, and also poured ammonia on the sidewalk, in an effort to deter the plaintiff from picketing the store, the petition was not subject to demurrer (now motion to dismiss) on the grounds that the manager was not acting within the scope of the employment. Southern Grocery Stores, Inc. v. Herring, 63 Ga. App. 267, 11 S.E.2d 57 (1940).

If a company by its agent gives instructions for the use of its explosive products, it is liable for its negligence in giving such instructions in connection with the sale of its products. Fleming v. E.I. Du Pont De Nemours & Co., 89 Ga. App. 837, 81 S.E.2d 529 (1954).

When there was evidence that the defendant's explosives sales agent, in advising and instructing a county engineer as to the method of detonation and the quantities of explosives necessary to blast rock from the county's quarry, was acting in the scope of employment and in the prosecution of the defendant's business, and was not subject to the county's control in the performance of the agent's duties connected with the sales of explosives, and that, as a result of the negligence of the defendant's agent in instructing the county engineer to use a large quantity of explosives, to be detonated in a short time, a blast was performed in the county's quarry according to the instructions given, thereby causing the damage to the plaintiffs' house as alleged, the court erred in refusing to vacate a judgment on nonsuit and reinstate the plaintiffs' case. Fleming v. E.I. Du Pont De Nemours & Co., 89 Ga. App. 837, 81 S.E.2d 529 (1954).

In consideration of the problem of whether insults by employees are actionable against employers, both the public interest with which the defendant is invested and the willful character of the act committed against the plaintiff must be considered. Brown v. Colonial Stores, Inc., 110 Ga. App. 154, 138 S.E.2d 62 (1964).

Invitee on the premises of an invitor/employer for the purpose of transacting business has a cause of action against the invitor when one is made the brunt of opprobrious, insulting, and abusive words by a clerk employed to deal with the invitee and which tend to humiliate, mortify, and wound the feelings of the invitee. Greenfield v. Colonial Stores, Inc., 110 Ga. 572, 139 S.E.2d 403 (1964).

When the plaintiff was struck by an unidentified individual running down the aisle of a grocery store owned by the defendant, the court erred in granting summary judgment to the defendant when it appeared from the attire of the unidentified individual that the individual was a store employee and there was evidence from which it could be inferred that the individual was either running to clock in or running to the back of the store to do some aspect of the individual's job. Beverly v. J.H. Harvey Co., 237 Ga. App. 21, 515 S.E.2d 404 (1999).

Restaurant employee acted within scope of employment based on evidence that the employee was cooking while using offensive language against the plaintiff customers, identified as a restaurant employee when the employee called the police and told the responding officer that the employee was in charge, and based on the employee's testimony that the employee believed the employee was doing the employee's job when the employee called the police stating that the employee had to handle the situation because no manager was present. Middlebrooks v. Hillcrest Foods Inc., 256 F.3d 1241 (11th Cir. 2001).

It is duty of one who invites members of general public to come to his place of business to protect such customers or invitees from injury caused by misconduct of one's own employees, in the conduct and scope of one's business, and from the misconduct of other persons who come upon the premises. Great Atl. & Pac. Tea Co. v. Cox, 51 Ga. App. 880, 181 S.E. 788 (1935).

Owner of an establishment operated for the purpose of selling beer to the public owes a duty to a customer, who is lawfully

Torts of Servant — Specific Cases (Cont'd)
4. Retail Sales (Cont'd)

in the owner's place of business by the owner's implied invitation for the purpose of purchasing beer, to protect the customer against a willful and intentional tort committed by one employed by the owner to operate such establishment. Andrews v. Norvell, 65 Ga. App. 241, 15 S.E.2d 808 (1941).

Proprietor of a saloon is bound to exercise ordinary care and diligence to see that one who enters the propietor's saloon as a customer and patron is protected from willful misconduct and practical jokes which cause bodily harm to the patron and customer, perpetrated by one employed by the proprietor to operate such saloon. Andrews v. Norvell, 65 Ga. App. 241, 15 S.E.2d 808 (1941).

In a customer's suit for assault, the true test is whether the assault is so related to, and so integrally a part of the transaction of a company's business as to logically and inescapably grow out of it. On the premises or off, a business establishment which invites customers to come in and trade owes to them the duty of not sending its employees out after them to commit unlawful assaults upon them while acting within the scope of employment. Colonial Stores, Inc. v. Sasser, 79 Ga. App. 604, 54 S.E.2d 719 (1949).

No liability when employee pursuing own interests. — Gasoline station operators were not liable under the doctrine of respondeat superior to a customer who was assaulted by a station employee, when the employee was pursuing the employee's own, and not the master's, interest when the employee grabbed the customer and asked the customer to "party." Slaton v. B & B Gulf Serv. Center, 178 Ga. App. 701, 344 S.E.2d 512 (1986).

When salesperson acts as independent contractor. — If the manner in which the details of the work of selling defendant's automobiles are to be done is left to the salesperson, and the defendant company is interested only in the result of the salesperson's work, the salesperson is an independent contractor. Whitehall Chevrolet Co. v. Anderson, 53 Ga. App. 406, 186 S.E. 135 (1936).

Employer not responsible for acts of subagent. — Principal who has put goods for sale into the hands of an agent, the agent having no power to delegate the agent's authority, and it being perhaps a wrongful act on the part of the agent to entrust them to any one else, and a wrongful act on the part of the latter to exercise any control over them, may be willing that the agent may employ a subagent so far that the entrusting of the goods by the agent to the subagent, or the exercise of control over them by the latter, or the latter's sale of them upon the terms prescribed to the agent, may all be acts done with the principal's consent, and yet not done by a person who stands in any contractual relations to the principal, or who can look to the principal for compensation, or for whose promises or conduct the principal would be responsible to third persons. Sinclair Ref. Co. v. Veal, 51 Ga. App. 755, 181 S.E. 705 (1935).

When an oil refining company made a written contract with another as its agent to sell its products within a certain territory, and provided that the agent should pay all necessary expenses in draying the company's products and equipment and in making sales, deliveries, and collections, and the company merely furnished the products to be sold, notwithstanding it may have had rules and regulations binding upon its agent as to the character of the subagent and as to the conduct of the business for the sale of its product, and when a truck driver was employed by the agent to drive the truck furnished by the agent to transport, sell, and deliver the company's products to customers, and was hired and paid by the agent out of the agent's own funds, and the agent had control and direction of the operation of the truck and gave orders and directions to the driver as to what to do, and had control of the driver and the driver's activities, and control of the time, manner, means, and methods of the driver in the execution of the work, the truck driver, in selling the products of the company by delivery from the truck while in the performance of the work for which one was employed, was the servant of the agent, and not the servant of the company; the

company therefore was not liable for a mistake of the driver in delivering gasoline instead of kerosene to a purchaser. Sinclair Ref. Co. v. Veal, 51 Ga. App. 755, 181 S.E. 705 (1935).

Jury to determine whether employee acted within scope of business. — Under the allegations of the petition the plaintiff, at the time of the plaintiff's injury, was an invitee of the defendant cotton mill, and it was a question for the jury whether or not the act of the defendant's store manager, in striking and injuring the plaintiff, was so closely connected with the employer's business as to render the defendant liable for the willful assault of its servant. Crawford v. Exposition Cotton Mills, 63 Ga. App. 458, 11 S.E.2d 234 (1940).

5. Miscellaneous

Game warden. — When petition alleged that a willful tort (the fatal shooting of plaintiff's husband) by a servant (game warden on plantation) was committed in the prosecution and within the scope of the servan't business and employment, and stated facts in support thereof, which, in connection with legitimate inferences, might establish the truth of the allegation, the question of the master's liability was one of fact. Estridge v. Hanna, 55 Ga. App. 159, 189 S.E. 364 (1936).

Grounds keeper. — When the servant, while engaged in the duties of the employment (to keep trespassers off the defendant's land), shot the plaintiff, and when it did not appear from the allegations in the petition that the servant at the time when the plaintiff was shot was engaged in keeping the plaintiff off the lands of the defendant, the petition did not show that the servant was acting in the course of the servant's employment and in the prosecution of the master's business, and thus did not set out a cause of action. Ford v. Mitchell, 50 Ga. App. 617, 179 S.E. 215 (1935).

Hospitals and then Hospitals are liable for the liable for the negligence of its nurses in performing mere administrative or clerical acts, which acts, though constituting a part of a patient's prescribed medical treatment, do not require the application of the specialized technique or the understanding of a skilled physician or surgeon. Porter v. Patterson, 107 Ga. App. 64, 129 S.E.2d 70 (1962).

Hospital has a responsibility for the exercise of due care by a nurse (as well as by other hospital employees) while she is performing acts of a character which, though constituting a part of the patient's treatment as prescribed by the attending physician, do not require either the application or the understanding of the specialized technique possessed by a skilled physician or surgeon. Porter v. Patterson, 107 Ga. App. 64, 129 S.E.2d 70 (1962).

Whether an act is merely administrative, so that negligence in its performance is imputed to the hospital, or nonadministrative depends on the nature or character of the act. Porter v. Patterson, 107 Ga. App. 64, 129 S.E.2d 70 (1962).

Hospital was not liable for nurse's conduct in injecting certain patients with lethal doses of potassium chloride in order to "put them out of their misery," when, although the nurse may have been advancing the hospital's interests in giving authorized injections of potassium chloride, the nurse clearly abandoned the hospital's interest and pursued only the nurses's own when she gave lethal, unauthorized injections. Lucas v. Hospital Auth., 193 Ga. App. 595, 388 S.E.2d 871 (1989).

Hotels. — Proprietor of a hotel is liable for an assault and battery committed by the proprietor's manager on a guest. Hooks v. Sanford, 29 Ga. App. 640, 116 S.E. 221 (1923).

Like other masters, a hotel proprietor or innkeeper is liable for the torts of his servant committed in the performance of the duties the servant is employed to discharge and that could be reasonably expected of him in the prosecution of the proprietor's business. Newton v. Candace, 94 Ga. App. 385, 94 S.E.2d 739 (1956).

When although there was a conflict in the evidence, there was some evidence supporting the contention of the plaintiff patron, that, when the plaintiff politely requested of the defendant hotel proprietor's clerk that the clerk arrange credit for the plaintiff's spouse at another hotel, the clerk without provocation committed a violent assault upon the plaintiff, thereby

Torts of Servant — Specific Cases (Cont'd)
5. Miscellaneous (Cont'd)

personally injuring and humiliating the plaintiff, it was error to grant a nonsuit on the assumption that the clerk when making the attack was not acting within the scope of the clerk's employment or in the prosecution of the hotel proprietor's business. Newton v. Candace, 94 Ga. App. 385, 94 S.E.2d 739 (1956).

It is within the scope of a hotel clerk's employment, when representing the proprietor of the establishment, to courteously reply to polite requests of the patron for accommodations of a lawful and moral nature irrespective of whether the clerk or the hostelry is under any duty or can reasonably be expected to grant such requests. Newton v. Candace, 94 Ga. App. 385, 94 S.E.2d 739 (1956).

Industrial manufacturer. — When the defendant loaned two of the defendant's employees to the injured person to help with the person's contract to repair blowpipes for the defendant, and it became necessary for employees to help injured prepare a piece of railroad iron to use in repairing the blowpipes, and employees' negligence caused the iron to slip and crush the injured person's hand, the injured person could recover from the defendant because the injured person had the right to put special servants at any task properly converted into the job. Bibb Mfg. Co. v. Souther, 52 Ga. App. 722, 184 S.E. 421 (1936).

Insurance companies. — When the designated examiner of the defendant insurance company directed defendant A to employ defendant B, a doctor, to remove the heart of the deceased husband of the plaintiff and deliver it to another doctor for the purpose of dissection, without the knowledge or consent of the plaintiff, and that the second doctor did dissect the said heart, and that the insurance company ratified the acts of A and B by paying the two doctors for their services, but the insurance company did not have any knowledge of the act of A or B, or received or retained any benefit therefrom, and since defendant A is joined with defendant B and the insurance company as joint tort-feasors in an action for damages on account of the alleged unauthorized removal and mutilation of the heart, a cause of action as to the acts of A and B, against the defendant insurance company under any theory of agency or of ratification of an unauthorized act did not exist. Liberty Mut. Ins. Co. v. Lipscomb, 56 Ga. App. 15, 192 S.E. 56 (1937).

Function of a designated examiner for an insurance company is to examine living persons, and such examiner has no authority, merely by virtue of such agency, to dissect or cause to be dissected a dead body; and its act is directing another to employ a doctor for that purpose, without specific instructions from the principal, will not be binding on the principal. Liberty Mut. Ins. Co. v. Lipscomb, 56 Ga. App. 15, 192 S.E. 56 (1937).

Land clearing business. — When the record shows without substantial dispute that the defendant was not in the land clearing business but was having the defendant's own land cleared; that the defendant was to pay a lump sum calculated at the rate of $125 per acre for each acre cleared; that the profits or losses belonged solely to the third party and that the third party furnished the party's own equipment and tools; that the defendant did not share in any of the expenses for supplies or repairs; nor did the defendant pay any employees, the third party was an independent contractor and not a servant of the defendant. Pippin v. Bryan, 149 Ga. App. 193, 253 S.E.2d 855 (1979).

Lifeguard. — Jury could have found that the efforts, allegedly negligent, of the lifeguard to revive the injured person were within the general scope of the lifeguard's employment, and thus would bind the employer under the principles embodied in this section. Knowles v. La Rue, 102 Ga. App. 350, 116 S.E.2d 248 (1960).

Newspaper carrier. — Evidence demanded the finding that the newscarrier whose act was alleged to have been the cause of the plaintiff's injuries was an independent contractor, and the trial court did not err in directing a verdict for defendant company. Morris v. Constitution Publishing Co., 84 Ga. App. 816, 67 S.E.2d 407 (1951).

Parking attendant. — Parking attendant's altercation with the plaintiff and

her boyfriend appeared to have been purely personal and not for any purpose beneficial to the attendant's employer. Worstell Parking, Inc. v. Aisida, 212 Ga. App. 605, 442 S.E.2d 469 (1994).

Property management. — Petition alleging that the plaintiff was maliciously shot and injured by the janitor of an apartment house while the plaintiff was present in the house as a guest of a tenant, the janitor, within the knowledge of the defendants, (security deed holder and managing agents) being a man of vicious and dangerous character, having a propensity to assault and injure others without cause, and that the defendants were negligent in retaining the janitor as such employee after knowledge of this trait, is sufficient to state a cause of action against the defendants. Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937).

Telegraph company. — When an agent of a telegraph company is a party to a fraudulent scheme, by sending over the wires of the company false, fraudulent, and fictitious messages, which are intended to and do deceive the addressee, to the addressee's damage, the telegraph company is liable therefor. Jenkins v. Cobb, 47 Ga. App. 456, 170 S.E. 698 (1933).

When, to facilitate discharge of duties of servant employed by telegraph company to collect telegraphic messages and bring them to the company, it is essential that the servant ride a bicycle, and when the servant, in order to have the bicycle repaired, is authorized by the employer to go to a repair shop for that purpose, injury to a pedestrian occasioned on the return trip, when the servant negligently runs into a pedestrian on the street is proximately caused by the negligence of the telegraph company through its servant and agent. Marsh v. Postal Telegraph-Cable Co., 55 Ga. App. 57, 189 S.E. 550 (1936).

Telephone company. — When the employee raped victim while reestablishing her telephone service the alleged rape was not related to the defendant's employment and did not further the employer's business. It was a purely personal act for which the employer cannot be deemed vicariously liable. Mountain v. Southern Bell Tel. & Tel. Co., 205 Ga. App. 119, 421 S.E.2d 284 (1992).

Theaters. — Petition alleging that the manager of the theater was guilty of willful and malicious conduct (commission of acts of sodomy) resulting in injury to the minor plaintiff, failed to state a cause of action against the defendant theater company because it appeared from the allegations thereof that the manager's acts were perpetrated solely for the manager's personal gratification, and no facts were alleged such as would constitute actual notice to the master sufficient to raise a duty as to it to protect its invitees from such acts, to put it on notice or inquiry as to the criminal propensities of its employee, or to put the employer on notice so that its retention of the employee in its service would constitute negligence. Community Theatres Co. v. Bentley, 88 Ga. App. 303, 76 S.E.2d 632 (1953).

OPINIONS OF THE ATTORNEY GENERAL

"Servant" means employee as well as domestic servant. 1958-59 Op. Att'y Gen. p. 390.

Master not liable when servant steps aside from master's business. — If a servant steps aside from the master's business, for however short a time, to do an act entirely disconnected from it, and injury results to another from such independent voluntary act, the servant may be liable, but the master is not liable; the test is not that the act of the servant was done during the existence of the employment, that is to say, during the time covered by the employment, but whether it was done in the prosecution of the master's business. 1958-59 Op. Att'y Gen. p. 390.

Distinguishing independent contractor from servant. — True test whether a person employed is a servant or an independent contractor is whether the employer, under the contract, whether oral or written, has the right to direct the time, the manner, the methods, and the means of the execution of the work, as contradistinguished from the right to insist upon the contractor producing results according to the contract, or whether the

contractor in the performance of the work contracted for is free from any control by the employer of the time, manner, and method in the performance of the work. 1958-59 Op. Att'y Gen. p. 390.

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, § 192 et seq. 59 Am. Jur. 2d, Parent and Child, § 88 et seq. 74 Am. Jur. 2d, Torts, § 55 et seq.

Am. Jur. Proof of Facts. — Parent's Failure to Supervise Children, 11 POF2d 541.

Parental Failure to Control Child, 45 POF2d 549.

Complicity Rule in Motor Vehicle Accident Cases: Employer's Authorization or Ratification of Driver's Conduct, 19 POF3d 437.

C.J.S. — 67A C.J.S., Parent and Child, § 329 et seq.

ALR. — Automobiles: liability of parent for injury to child's guest by negligent operation of car, 2 ALR 900; 88 ALR 590.

Liability of employer for acts of janitor, 8 ALR 1458.

Liability of parent for injury inflicted by minor child with dangerous instrumentality left accessible to him, 12 ALR 812.

Liability of wife for husband's torts, 12 ALR 1459.

Liability of master for damage to person or property due to servant's smoking, 13 ALR 997; 31 ALR 294.

Liability of master for injury to one whom servant, in violation of instructions, permits to ride on vehicle, 14 ALR 145; 62 ALR 1167; 74 ALR 163.

Statutory liability of stockholder for tort of corporation, 14 ALR 267.

Liability of employer for injuries inflicted by automobile while being driven by or for salesman or collector, 17 ALR 621; 29 ALR 470; 54 ALR 627; 107 ALR 419.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Liability of husband for independent tort of wife, 20 ALR 528; 27 ALR 1218; 59 ALR 1468.

Judgment for or against master in action for servant's tort as bar to action against servant, 31 ALR 194.

Liability of master for damages to third person from wanton or willful act of servant directed against master, 40 ALR 207.

Liability of contractee and contractor inter se with respect to injuries sustained while the stipulated work is in course of performance, 44 ALR 891.

Liability of owner for negligence of one permitted by the former's servant, or member of his family, to drive automobile, 44 ALR 1382; 54 ALR 851; 98 ALR 1043; 134 ALR 974.

Owner's liability for injury by automobile while being used by a servant for his own pleasure or business, 45 ALR 477.

Liability for injury to or by one operating motor vehicle while under the age prescribed by law, 46 ALR 1067.

Liability of principal for amount of fraudulent excess collection by agent, 46 ALR 1212.

Liability of bank in respect to funds of third persons misappropriated by bank officer or employee and used to cover his own overdraft or defalcation, 48 ALR 464.

Responsibility of mail contractor to third person for negligence or other misconduct of an employee, 51 ALR 198.

Liability of private employer of police officer for latter's negligence or other misconduct, 55 ALR 1197.

Liability for negligence of intoxicated partner or servant, 55 ALR 1225.

Negligence of one spouse as imputable to other because of the marital relationship itself, 59 ALR 153; 110 ALR 1099.

Liability for injury caused by window washer, 61 ALR 356.

Liability of one who leaves building materials accessible to children for injury to third person by child's act, 62 ALR 833.

Liability of bank to holder of certificate of deposit fraudulently issued by a bank officer or employee in its name, 63 ALR 991.

Liability of owner under "family-purpose" doctrine, for injuries by automobile while being used by member of his family, 64 ALR 844; 88 ALR 601; 100 ALR 1021; 132 ALR 981.

Liability of infant in tort for inducing contract by misrepresenting his age, 67 ALR 1264.

Ownership of automobile as prima facie evidence of responsibility for negligence of person operating it, 74 ALR 951; 96 ALR 634.

Liability of master for injury inflicted by servant with firearms, 75 ALR 1176.

Necessity of verdict against servant or agent as condition of verdict against master or principal for tort of servant or agent, 78 ALR 365.

Family purpose doctrine as applicable to instrumentality other than automobile, 79 ALR 1161.

What amounts to gross negligence, recklessness, or the like, within statute limiting liability of owner or operator of automobile for injury to guest, 86 ALR 1145.

Liability of telegraph company for punitive damages for wrongful or negligent acts of employees as regards messages, 89 ALR 356.

Necessity of pleading family purpose doctrine and sufficiency and effect of pleading in that regard, 93 ALR 991.

Right to join master and servant as defendants in action based on wrongful or negligent act of servant, where master's liability rests on doctrine of respondeat superior, 98 ALR 1057; 59 ALR2d 1066.

Liability of owner for negligence of one to whom car is loaned or hired, 100 ALR 920; 168 ALR 1364.

One in general employment of carrier as servant temporarily of shipper or consignee while aiding in loading or unloading or moving cars, as regards responsibility for his negligence, and vice versa, 102 ALR 514.

Liability of infant for torts of his employee or agent, 103 ALR 487.

Liability of bank for losses incurred on loans or investments made on recommendation of its officers or employees, 113 ALR 246.

Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 116 ALR 457; 83 ALR2d 1282.

Prima facie case or presumption from registration of automobile in name of, or from proof of ownership by, defendant, as applicable to questions other than the master-servant relationship at time of accident, 122 ALR 228.

Right to bring separate actions against master and servant, or principal and agent, to recover for negligence of servant or agent, where master's or principal's only responsibility is derivative, 135 ALR 271.

Identity of master, as regards rule of respondeat superior, of one loaned or hired out by general employer in connection with WPA or other similar governmental project, 136 ALR 525.

Criminal responsibility of one authorized generally to sell intoxicating liquors for particular illegal sale thereof by employee or agent, 139 ALR 306.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 ALR 1066.

Variance between allegation and proof as regards identity of servant or agent for whose acts defendant is sought to be held responsible, 139 ALR 1152.

Rule respondeat superior as applicable to negligent act of employee done within scope of the employment, where injury was the result of a personal collision or accident of a similar nature, 141 ALR 683.

Amount of recovery in tort action against servant or other person who was the active tort-feasor as limit of amount recoverable against one responsible only derivatively, 141 ALR 1168.

Homework by employee as affecting employer's responsibility for injury to third person due to employee's negligence while on way to or from home, 146 ALR 1193.

Scope and application of exceptions as regards carrying passengers in policies of automobile insurance, 147 ALR 632.

Owner's statutory liability for negligent operation of automobile where he has consented to use by another and car is being driven by a third person, 147 ALR 875.

Owner's presence in automobile operated by another as affecting former's right or liability, 147 ALR 960.

Liability for injury or damages resulting from traffic accident on highway involving vehicle in military service, 147 ALR 1431.

Liability of master or principal for servant's or agent's libel or slander of one other than servant or agent or former servant or agent, 150 ALR 1338.

Liability of owner of automobile for negligence while it is being operated by another with his consent as affected by immunity of the operator (or his employer) from liability or action, 152 ALR 1058.

Liability for injury to person or damage to property as result of "blackout," 155 ALR 1458; 158 ALR 1463.

Master's liability for injury of one servant by another in enforcing discipline, 156 ALR 640.

Automobile owner's common-law liability for negligence in entrusting car to known incompetent, reckless, or inexperienced person as affected by statute limiting owner's liability to use within terms of consent, 163 ALR 1418.

Master's liability for injuries to nonemployee caused by servant's negligence in use of instrumentality different from that authorized, 166 ALR 877.

Liability of one spouse for tort of other in maintenance of household, 168 ALR 937.

Employer's liability for assault by truck driver or chauffeur, 172 ALR 532.

Liability of infant for injuries inflicted at play, 173 ALR 890.

Necessity of pleading that tort was committed by servant, in action against master, 4 ALR2d 292.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 ALR2d 196.

Defenses of fellow servant and assumption of risk in actions involving injury or death of member of airplane crew, ground crew, or mechanic, 13 ALR2d 1137.

Tort liability of master for theft by servant, 15 ALR2d 829; 39 ALR4th 543.

Liability under respondeat superior doctrine for acts of operator furnished with leased machine or motor vehicle, 17 ALR2d 1388.

Acts of employee, in procuring warrant or aiding prosecution, as within scope of employment so as to render employer liable for malicious prosecution, 18 ALR2d 402.

Liability of employer for injury resulting from games or other recreational or social activities, 18 ALR2d 1372.

Liability for assault by employee in collecting debt, 22 ALR2d 1227.

Employer's liability for negligence of an assistant procured or permitted by his employee without authority, 25 ALR2d 984.

Construction and effect of statutes which make parent, custodian, or other person signing minor's application for vehicle operator's license liable for licensee's negligence or willful misconduct, 26 ALR2d 1320.

Liability of employer, other than carrier, for a personal assault upon customer, patron, or other invitee, 34 ALR2d 372.

Liability for injury to hand in vehicle door, 34 ALR2d 1172.

Liability of insurance company for negligent operation of automobile by insurance agent or broker, 36 ALR2d 261.

Employer's liability for negligence of employee in piloting his own airplane in employer's business, 46 ALR2d 1050.

Liability for injury or damage resulting from fire started by use of blowtorch, 49 ALR2d 368.

Owner's presence in motor vehicle operated by another as affecting owner's rights or liability, 50 ALR2d 1281.

Employer's liability for employee's negligence in operating employer's car in going to or from work or meals, 52 ALR2d 350.

Route driver or salesman as independent contractor or employee of merchandise producer or processor, for purposes of respondeat superior doctrine, 53 ALR2d 183.

Liability of employer for negligent operation of motor vehicle by automobile salesman, 53 ALR2d 631.

Employer's liability for assault by taxicab or motorbus driver, 53 ALR2d 720.

Liability of insurance company for libel or slander by its agents or employees, 55 ALR2d 828.

Right to join master and servant as defendants in tort action based on respondeat superior, 59 ALR2d 1066.

Sleeping-car company's liability for employee's assault upon passenger, 60 ALR2d 1115.

Liability of proprietor of store, office, or

similar business premises for injury from fall due to presence of obstacle placed or dropped on floor, 61 ALR2d 110.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of litter or debris on stairway, 61 ALR2d 174.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of obstacle placed or dropped on steps, 61 ALR2d 205.

Liability of municipality for torts in connection with airport, 66 ALR2d 634.

Liability of person permitting child to have gun, or leaving gun accessible to child, for injury inflicted by the latter, 68 ALR2d 782.

Liability of hospital or sanitarium for negligence of physician or surgeon, 69 ALR2d 305.

Hospital's liability as to diagnosis and care of patients brought to emergency ward, 72 ALR2d 396.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

House-to-house salesman or canvasser as independent contractor or employee, for purposes of respondeat superior, 98 ALR2d 335.

Liability of employer for injury to wife or child of employee through latter's negligence, 1 ALR3d 677.

Right of employer sued for tort of employee to implead the latter, 5 ALR3d 871.

Validity and construction of statutes making parents liable for torts committed by their minor children, 8 ALR3d 612.

Owning, leasing, or otherwise engaging in business of furnishing services for taxicabs as basis of tort liability for acts of taxi driver under respondeat superior doctrine, 8 ALR3d 818.

Modern status of family purpose doctrine with respect to motor vehicles, 8 ALR3d 1191.

Liability of operating surgeon for negligence of nurse, assisting him, 12 ALR3d 1017.

Employer's liability to employee for malpractice of physician supplied by employer, 16 ALR3d 564.

Master's liability for injury to or death of person, or damage to property, resulting from fire allegedly caused by servant's smoking, 20 ALR3d 893.

Liability of owner or operator of power lawnmower for injuries resulting to third person from its operation, 25 ALR3d 1314.

Admissibility and probative value of admissions of fault by agent on issue of principal's secondary liability, where both are sued, 27 ALR3d 966.

Liability of hospital for negligence of nurse assisting operating surgeon, 29 ALR3d 1065.

Intoxicating liquors: right of one liable under civil damage act to contribution or indemnity from intoxicated person, or vice versa, 31 ALR3d 438.

Liability of labor union or its membership for torts committed by officers, members, pickets, or others, in connection with lawful primary labor activities, 36 ALR3d 405.

Liability of one contracting for private police security service for acts of personnel supplied, 38 ALR3d 1332.

Insurer's tort liability for acts of adjuster seeking to obtain settlement or release, 39 ALR3d 739.

Liability for negligence of doorman or similar attendant in parking patron's automobile, 41 ALR3d 1055.

Subrogation of employer's liability insurer to employer's right of indemnity against negligent employee, 53 ALR3d 631.

Liability for injury to or death of passenger from accident due to physical condition of carrier's employee, 53 ALR3d 669.

Employer's liability for action of trustees or similar body administering employer's pension plan, 54 ALR3d 189.

Parents' liability for injury or damage intentionally inflicted by minor child, 54 ALR3d 974.

Newspaper boy or other news carrier as independent contractor or employee for purposes of respondeat superior, 55 ALR3d 1216.

Liability of hospital, other than mental institution, for suicide of patient, 60 ALR3d 880.

Liability of parent for injury caused by child riding a bicycle, 70 ALR3d 611.

Liability of one hiring private investigator or detective for tortious acts committed in course of investigation, 73 ALR3d 1175.

When is employer chargeable with negligence in hiring careless, reckless, or incompetent independent contractor, 78 ALR3d 910.

Vicarious liability of private franchisor, 81 ALR3d 764.

Student-driver's negligence as imputable to teacher-passenger, 90 ALR3d 1329.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Liability of one who sells gun to child for injury to third party, 4 ALR4th 331.

Liability of governmental unit or its officers for injury to innocent occupant of moving vehicle, or for damage to such vehicle, as result of police chase, 4 ALR4th 865.

Criminal responsibility of parent for act of child, 12 ALR4th 673.

Fact that passenger in vehicle is owner as affecting right to recover from driver for injuries to, or death of, passenger incurred in consequence of driver's negligence, 21 ALR4th 459.

Liability of donor of motor vehicle for injuries resulting from owner's operation, 22 ALR4th 738.

Release of, or covenant not to sue, one primarily liable for tort, but expressly reserving rights against one secondarily liable, as bar to recovery against latter, 24 ALR4th 547.

Modern trends as to tort liability of child of tender years, 27 ALR4th 15.

Fact that passenger in negligently operated motor vehicle is owner as affecting passenger's liability to or rights against third person--modern cases, 37 ALR4th 565.

Insurer's tort liability for wrongful or negligent issuance of life policy, 37 ALR4th 972.

Liability of bank or safe-deposit company for its employee's theft or misappropriation of contents of safe-deposit box, 39 ALR4th 543.

Construction and effect of statutes which make parent, custodian, or other person signing minor's application for vehicle operator's license liable for licensee's negligence or willful misconduct, 45 ALR4th 87.

Liability of hospital or sanitarium for negligence of physician or surgeon, 51 ALR4th 235.

Liability, under statute, of labor union or its membership for torts committed in connection with primary labor activities--state cases, 85 ALR4th 979.

Liability of church or religious society for sexual misconduct of clergy, 5 ALR5th 530.

Employer's liability for assault, theft, or similar intentional wrong committed by employee at home or business of customer, 13 ALR5th 217.

Liability of municipal corporation for negligent performance of building inspector's duties, 24 ALR5th 200.

Employer's liability for negligence of employee in driving his or her own automobile, 27 ALR5th 174.

Recovery for emotional distress based on fear of contracting HIV or AIDS, 59 ALR5th 535.

51-2-3. Liability for malicious acts of minor child.

(a) Every parent or guardian having the custody and control over a minor child or children under the age of 18 shall be liable in an amount not to exceed $10,000.00 plus court costs for the willful or malicious acts of the minor child or children resulting in reasonable medical expenses to another, damage to the property of another, or both reasonable medical expenses and damage to property.

(b) This Code section shall be cumulative and shall not be restrictive of any remedies now available to any person, firm, or corporation for injuries or damages arising out of the acts, torts, or negligence of a minor child under the "family-purpose car doctrine," any statute, or common law in force and effect in this state.

(c) The intent of the General Assembly in passing this Code section is to provide for the public welfare and aid in the control of juvenile delinquency, not to provide restorative compensation to victims of injurious or tortious conduct by children. (Ga. L. 1956, p. 699, § 1; Ga. L. 1966, p. 424, § 1; Ga. L. 1976, p. 511, § 2; Ga. L. 1982, p. 849, §§ 1, 2; Ga. L. 1987, p. 3, § 51; Ga. L. 1997, p. 532, § 1.)

History of Code section. — Georgia Laws 1976, p. 511, § 2 entirely superseded the former section which was held unconstitutional in Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971), insofar as it made parents liable without limits for willful torts of their children which resulted in personal injury.

Cross references. — Juvenile proceedings, parental rights, mental incompetency and dependency for juveniles, T. 15, C. 11. Interstate compact for juveniles, T. 49, C. 4B.

Editor's notes. — Ga. L. 1997, p. 532, § 2, not codified by the General Assembly, provides that the 1997 amendment to this Code section shall be applicable to willful and malicious acts occurring on or after July 1, 1997.

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B. J. 189 (1969). For article surveying constitutional law, see 34 Mercer L. Rev. 53 (1982). For article surveying recent developments in Georgia juvenile law, see 34 Mercer L. Rev. 395 (1982).

For note discussing the family purpose car doctrine as an extension of the principle of respondeat superior, see 3 Ga. St. B. J. 112 (1966). For note, "Tort Liability in Georgia for the Criminal Acts of Another," see 18 Ga. L. Rev. 361 (1984).

For comment on Landers v. Medford, 108 Ga. App. 525, 133 S.E.2d 403 (1963), see 1 Ga. St. B. J. 229 (1964). For comment criticizing Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 776 (1971), as to constitutionality of this section prior to 1976 amendment, see 23 Mercer L. Rev. 681 (1972). For comment on Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971), holding parental liability statute which formerly provided for unlimited liability of parents for willful torts of minor children on the basis of parent-child relationship violative of due process, see 9 Ga. St. B. J. 129 (1972).

JUDICIAL DECISIONS

Analysis

General Consideration
Decisions Under Prior Law

General Consideration

Section not unreasonable. — O.C.G.A. § 51-2-3, intended to aid in reducing juvenile delinquency by imposing liability upon parents who control minors, is neither unreasonable, arbitrary, nor capricious. Hayward v. Ramick, 248 Ga. 841, 285 S.E.2d 697 (1982).

State has legitimate interest in subject of O.C.G.A. § 51-2-3. (controlling juvenile delinquency), and that there is a rational relationship between the means used (imposing of liability upon parents of children who willfully or maliciously damage property) and this object. Hayward v. Ramick, 248 Ga. 841, 285 S.E.2d 697 (1982).

No liability when child's acts were not reckless. — Parent, whose child stole the parent's car keys and was driving the parent's car when the car collided with a bicyclist, was not liable for damages, although the parent was aware that the parent's son was not a licensed driver and that the child had a juvenile record, when there was no evidence that the parent knew of any proclivity or propensity on the part of the parent's son for the specific dangerous activity alleged, and there was no evidence that the parent's child's acts

General Consideration (Cont'd)

were reckless. Jackson v. Moore, 190 Ga. App. 329, 378 S.E.2d 726 (1989).

Teenaged driver's negligence could not be imputed to his parents after he drove the girlfriend's car and injured her. The parents had not allowed their son to drive his girlfriend's car nor even known about it until after the accident, and there was no proof that their son's actions were willful or malicious. Cole v. Fauk, 253 Ga. App. 892, 560 S.E.2d 772 (2002).

Owner of an automobile whose child let an unlicensed 16-year-old drive has an action against the 16-year-old and the child's parents for willful or malicious acts and the 16-year-old is not protected by the principles of the family car doctrine. Cabral v. White, 181 Ga. App. 816, 354 S.E.2d 162 (1987).

Cited in Herrin v. Lamar, 106 Ga. App. 91, 126 S.E.2d 454 (1962); Vort v. Westbrook, 221 Ga. 39, 142 S.E.2d 813 (1965); Wittke v. Horne's Enters., Inc., 118 Ga. App. 211, 162 S.E.2d 898 (1968); Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971); Reeves v. Bridges, 248 Ga. 600, 284 S.E.2d 416 (1981).

Decisions Under Prior Law

Liability does not arise out of mere relationship of parent and child. Bell v. Adams, 111 Ga. App. 819, 143 S.E.2d 413 (1965) (decided under former Ga. L. 1956, p. 699, § 1).

"Willful and wanton act" is one done intentionally or with reckless disregard for consequences. Landers v. Medford, 108 Ga. App. 525, 133 S.E.2d 403 (1963) (decided under former Ga. L. 1956, p. 699, § 1).

Willful and wanton act in the damaging or destruction of property is one so reckless as to evince an entire want of care on the part of the defendants so as to raise a presumption of a conscious indifference to the consequences. Mere negligence can never amount to such aggravating circumstances. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Hill, 113 Ga. App. 283, 148 S.E.2d 83 (1966) (decided under former Ga. L. 1956, p. 699, § 1).

Vandalism is willful or malicious destruction of property. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Hill, 113 Ga. App. 283, 148 S.E.2d 83 (1966) (decided under former Ga. L. 1956, p. 699, § 1).

Vandalism does not encompass within its meaning acts directed only against persons. Bell v. Adams, 111 Ga. App. 819, 143 S.E.2d 413 (1965) (decided under former Ga. L. 1956, p. 699, § 1).

Section generally not applicable to personal injuries. — This section does not apply to the willful torts of a minor under 18 which are directed against the persons of others and not directed against property. Browder v. Sloan, 111 Ga. App. 693, 143 S.E.2d 13 (1965).

Liability of a parent for the tort of the parent's child applies only to acts of the child directed to the damaging of property and to injuries to the person resulting naturally and proximately from those acts. Browder v. Sloan, 111 Ga. App. 693, 143 S.E.2d 13 (1965); Bell v. Adams, 111 Ga. App. 819, 143 S.E.2d 413 (1965) (decided under former Ga. L. 1956, p. 699, § 1).

Liability of a parent for the tort of the parent's child in directly inflicting injury on the person of another is governed by the ordinary principles of liability of a principal for the acts of the principal's agent or a master for the principal's servant. Bell v. Adams, 111 Ga. App. 819, 143 S.E.2d 413 (1965) (decided under former Ga. L. 1956, p. 699, § 1).

Section modified common law. — Former statute modified the general rule that liability of a parent for an injury committed by the parent's child was governed by the ordinary principles of liability of a principal for the acts of the principal's agent, or a master for the servant, and that a father is not liable for the tort of a minor child, with which he was in no way connected, which he did not ratify, and from which he did not derive any benefit, merely because of the relationship of parent and child. Sagnibene v. State Wholesalers, Inc., 117 Ga. App. 239, 160 S.E.2d 274 (1968) (decided under former Ga. L. 1966, p. 424, § 1).

Former statute was not applicable when child, being only four years old,

was not capable of committing willful and wanton act. Sagnibene v. State Wholesalers, Inc., 117 Ga. App. 239, 160 S.E.2d 274 (1968) (decided under former Ga. L. 1966, p. 424, § 1).

Section held unconstitutional. — Former statute contravenes the due process clauses of the state and federal Constitutions and is void. Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971) (decided under former Ga. L. 1966, p. 424, § 1).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Parent and Child, § 88 et seq.

C.J.S. — 67A C.J.S., Parent and Child, § 329 et seq.

ALR. — Liability of parent for injury inflicted by minor child with dangerous instrumentality left accessible to him, 12 ALR 812.

Liability of owner under "family-purpose" doctrine, for injuries by automobile while being used by member of his family, 64 ALR 844; 88 ALR 601; 100 ALR 1021; 132 ALR 981.

Infant's liability in tort for own act, or right to recover for another's tort, as affected by its connection with infant's contract, 127 ALR 1441.

Automobile owner's common-law liability for negligence in entrusting car to known incompetent, reckless, or inexperienced person as affected by statute limiting owner's liability to use within terms of consent, 163 ALR 1418.

Construction and effect of statutes which make parent, custodian, or other person signing minor's application for vehicle operator's license liable for licensee's negligence or willful misconduct, 26 ALR2d 1320.

Liability of person permitting child to have gun, or leaving gun accessible to child, for injury inflicted by the latter, 68 ALR2d 782.

Validity and construction of statutes making parents liable for torts committed by their minor children, 8 ALR3d 612.

Modern status of family purpose doctrine with respect to motor vehicles, 8 ALR3d 1191.

Parents' liability for injury or damage intentionally inflicted by minor child, 54 ALR3d 974.

Liability of parent for injury caused by child riding a bicycle, 70 ALR3d 611.

Liability of owner of powerboat for injury or death allegedly caused by one permitted to operate boat by owner, 71 ALR3d 1018.

Liability of one who sells gun to child for injury to third party, 4 ALR4th 331.

Criminal responsibility of parent for act of child, 12 ALR4th 673.

Modern trends as to tort liability of child of tender years, 27 ALR4th 15.

Construction and effect of statutes which make parent, custodian, or other person signing minor's application for vehicle operator's license liable for licensee's negligence or willful misconduct, 45 ALR4th 87.

Jurisdiction or power of juvenile court to order parent of juvenile to make restitution for juvenile's offense, 66 ALR4th 985.

51-2-4. Liability for torts of independent employee.

An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate direction and control of the employer. (Orig. Code 1863, § 2905; Code 1868, § 2911; Code 1873, § 2962; Code 1882, § 2962; Civil Code 1895, § 3818; Civil Code 1910, § 4414; Code 1933, § 105-501.)

Cross references. — Liability of employers for injuries to employees generally, § 34-7-20 et seq.

Law reviews. — For article surveying torts law, see 34 Mercer L. Rev. 271 (1982).

For note discussing the doctrine of respondeat superior, see 2 Ga. St. B. J. 478 (1966).

For comment on Nichols v. G.L. High Motor Co., 65 Ga. App. 397, 15 S.E.2d 805 (1941), and Andrews v. Norvell, 65 Ga. App. 241, 15 S.E.2d 808 (1941), see 4 Ga. B. J. 46 (1941). For comment on Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), holding employer defendant may not use independent contractor defense to invasion of privacy suit resulting from actions of investigator working in his behalf, see 9 Ga. St. B. J. 519 (1973).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases

General Consideration

Applicability. — O.C.G.A. § 51-2-4 pertains to an employer's liability for the negligence of an independent contractor and thus is inapplicable to cases which involve intentional torts. Peachtree-Cain Co. v. McBee, 170 Ga. App. 38, 316 S.E.2d 9 (1984), aff'd, 254 Ga. 91, 327 S.E.2d 188 (1985).

O.C.G.A. §§ 51-2-4 and 51-2-5 limit an employer's vicarious liability only and do not apply to a claim arising from the employer's own conduct. England v. Beers Constr. Co., 224 Ga. App. 44, 479 S.E.2d 420 (1996).

In a premises liability action filed by the plaintiff repairman arising from injuries suffered while repairing a roof, because the trial court properly found that an out-of-possession landlord and its tenants who surrendered control of the owned premises did not ratify the repairman's employer's actions in not providing safety equipment, and did not have superior knowledge of the dangers involved, the out-of-possession landlord and its tenants were properly granted summary judgment in the repairman's premises liability action; further, an exception under O.C.G.A. § 51-2-4 did not apply, as the vicarious liability of a landowner who undertook to provide security for the actions of its security agent was not equivalent to the liability of a landowner who hired a contractor to repair its roof. Saunders v. Indus. Metals & Surplus, Inc., 285 Ga. App. 415, 646 S.E.2d 294 (2007), cert. denied, 2007 Ga. LEXIS 624 (Ga. 2007).

Independent contractor is person employed to perform work on terms that the contractor is to be free from the control of the employer as respects the manner in which the details of the work are to be executed. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

Absent evidence of a master-servant relationship or that the alleged master controlled the time, manner, means, or method by which the servant completed work, these independent parties were entitled to summary judgment as to the basis of liability in a wrongful death action filed against them. Gateway Atlanta Apts., Inc. v. Harris, 290 Ga. App. 772, 660 S.E.2d 750 (2008).

Term "independent business," as used in this section, must necessarily be taken to mean a business or employment separate and independent from the business of the employer. Yearwood v. Peabody, 45 Ga. App. 451, 164 S.E. 901 (1932); Buchanan v. Canada Dry Corp., 138 Ga. App. 588, 226 S.E.2d 613 (1976).

Employer is not liable for torts committed by an independent contractor, unless the work is in itself unlawful or attended with danger to others, or the wrongful act consists in the violation of a duty imposed by the employer, or is in violation of a duty imposed by statute, or the employer interferes and assumes control so as to create the relation of master and servant, or ratifies the unauthorized wrong of the independent contractor. Massee & Felton Lumber Co. v. Macon

Cooperage Co., 44 Ga. App. 590, 162 S.E. 396 (1932).

When a corporation contracts with an individual, exercising an independent employment, for the individual to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods and not subject to the employer's control or orders, except as to results to be obtained, the employer is not liable for the wrongful or negligent acts of such independent contractor or of the servants. Quinan v. Standard Fuel Supply Co., 25 Ga. App. 47, 102 S.E. 543 (1920); Zurich Gen. Accident & Liab. Ins. Co. v. Lee, 36 Ga. App. 248, 136 S.E. 173 (1926); Massee & Felton Lumber Co. v. Macon Cooperage Co., 44 Ga. App. 590, 162 S.E. 396 (1932).

Employer of an independent contractor is not responsible for the contractor's negligent acts. United States v. Aretz, 248 Ga. 19, 280 S.E.2d 345 (1981).

When the work is not inherently dangerous except as a result of the negligence of the contractor respondeat superior does not apply. St. Paul Cos. v. Capitol Office Supply Co., 158 Ga. App. 748, 282 S.E.2d 205 (1981).

Seller of home assumed responsibility of contractor. — Trial court erred in granting summary judgment to a home seller in an action filed by the buyers against the seller alleging negligence and a breach of contract; notwithstanding the general rule outlined in O.C.G.A. § 51-2-4, the seller could not escape liability for the alleged negligence by two of the seller's contractors in grading the property and installing the home because the seller assumed that responsibility under the sales contract. French v. Sinclair-Oconee Homes of Milledgeville, LLC, 289 Ga. App. 696, 658 S.E.2d 226 (2008).

Exceptions to general rule provided by statute. — Employer was not liable for acts of the employer's independent contractor unless the facts and circumstances bring the case under the exceptions to such rule, plainly and unmistakably stated in former Code 1933, §§ 105-501 and 105-502 (see now O.C.G.A. §§ 51-2-4 and 51-2-5). Robbins Home Imp. Co. v. Guthrie, 213 Ga. 138, 97 S.E.2d 153 (1957).

Rule in employer-independent contractor situations was one of no liability on the part of the employer, unless some of the rule's recognized exceptions as set out in former Code 1933, § 105-502 (see now O.C.G.A. § 51-2-5) were met. Moore v. J.C. Penney Co., 107 Ga. App. 254, 129 S.E.2d 538 (1963).

Georgia law imposes liability on an employer for the torts of an independent contractor only when a duty imposed by statute, and not under common law, has been violated. Uniroyal, Inc. v. Hood, 588 F.2d 454 (5th Cir. 1979).

Landowners who surrender a portion of their premises to independent contractors are relieved of their duties with regard to that portion of the premises they no longer control. PYA/Monarch, Inc. v. Higley, 219 Ga. App. 199, 464 S.E.2d 630 (1995).

O.C.G.A. § 51-2-5 does not represent an exclusive list of exceptions to the limitation of liability contained in O.C.G.A. § 51-2-4. Peachtree-Cain Co. v. McBee, 254 Ga. 91, 327 S.E.2d 188 (1985).

Test to determine status as independent contractor. — Test to be applied in determining the relationship of the parties under the contract lies in whether the contract gives, or the employer assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract. Zurich Gen. Accident & Liab. Ins. Co. v. Lee, 36 Ga. App. 248, 136 S.E. 173 (1926); Massee & Felton Lumber Co. v. Macon Cooperage Co., 44 Ga. App. 590, 162 S.E. 396 (1932); Yearwood v. Peabody, 45 Ga. App. 451, 164 S.E. 901 (1932); Cooper v. Dixie Constr. Co., 45 Ga. App. 420, 165 S.E. 152 (1932); Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934); Whitehall Chevrolet Co. v. Anderson, 53 Ga. App. 406, 186 S.E. 135 (1936); Fidelity & Cas. Co. v. Clements, 53 Ga. App. 622, 186 S.E. 764 (1936); De Bord v. Procter & Gamble Distrib. Co., 58 F. Supp. 157 (N.D. Ga. 1943), aff'd, 146 F.2d 54 (5th Cir. 1944); Morris v. Constitution Publishing Co., 84 Ga. App. 816, 67 S.E.2d 407 (1951); Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott, 88 Ga. App. 266, 76 S.E.2d 568 (1953); Weiss v. Kling, 96 Ga. App.

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618, 101 S.E.2d 178 (1957); Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432 (1964); Savannah Elec. & Power Co. v. Edenfield, 118 Ga. App. 531, 164 S.E.2d 366 (1968); Hotel Storage, Inc. v. Fesler, 120 Ga. App. 672, 172 S.E.2d 174 (1969); Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972); Farmers Mut. Exch. of Commerce, Inc. v. Sisk, 131 Ga. App. 206, 205 S.E.2d 438 (1974); Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974); Buchanan v. Canada Dry Corp., 138 Ga. App. 588, 226 S.E.2d 613 (1976); Jones v. International Inventors, Inc. E., 429 F. Supp. 119 (N.D. Ga. 1976); Hodges v. Doctors Hosp., 141 Ga. App. 649, 234 S.E.2d 116 (1977); Sloan v. Hobbs Sporting Goods Shop, 145 Ga. App. 255, 243 S.E.2d 673 (1978); Walton v. United States, 484 F. Supp. 568 (S.D. Ga. 1980); Bowman v. C.L. McCord Land & Pulpwood Dealer, Inc., 174 Ga. App. 914, 331 S.E.2d 882 (1985).

Fact that an employee might not be generally engaged in the particular business or occupation carried on by the employee under the employee's special contract with the employer would not prevent the relation between them from being that of an employer and independent contractor, if the work undertaken was not under a contract whereby the relationship of master and servant arose. Yearwood v. Peabody, 45 Ga. App. 451, 164 S.E. 901 (1932).

When one contracts with an individual exercising an independent employment, for the individual to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to results to be obtained, the employer is not liable for the wrongful or negligent acts of such independent contractor or the contractor's servants. This rule is applicable under the provisions of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

Undoubtedly one cannot shield oneself under the doctrine of independent contractors by simply employing another person, and giving that person a general authority to procure others to assist in work which requires no care or skill or experience, but which is merely such as might be done by any person with sufficient physical strength. Swift & Co. v. Alston, 48 Ga. App. 649, 173 S.E. 741 (1934).

One who carries on an independent business and who contracts with another to perform services for that independent business, being answerable only for the result and not being under the control of the employer as to the time, manner, or method of doing the work, is an independent contractor for whose torts the other contracting party is not liable except in a few stated exceptions. St. Paul Cos. v. Capitol Office Supply Co., 158 Ga. App. 748, 282 S.E.2d 205 (1981).

When the contract of employment clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control. Ross v. Ninety-Two W., Ltd., 201 Ga. App. 887, 412 S.E.2d 876 (1991).

Respondeat superior principles were used to analyze a coverage question under a Georgia Interlocal Risk Management Agency agreement as the statutory language and coverage language was similar to that used by Georgia courts in applying the theory of respondeat superior. Ga. Interlocal Risk Mgmt. Agency v. Godfrey, 273 Ga. App. 77, 614 S.E.2d 201 (2005).

Instructions such as giving a deadline for performance or requiring that work be completed at night or before the opening of business each day do not amount to control over the time of the work because the instructions do not purport to control specifically when any particular duties were to be performed. Adcox v. Atlanta Bldg. Maint. Co., 301 Ga. App. 74, 687 S.E.2d 137 (2009).

Evidence created a genuine dispute as to whether the realtor was an independent contractor of the corporation because the Federal National Mortgage Association's (Fannie Mae) contract was with the corporation, not the realtor, and Fannie Mae's master listing agreement with the corporation required the corporation to exercise considerable control over the time, manner, and method of the realtor's

work, mandated that the corporation and its subcontractors comply with the requirements of Fannie Mae's sales guide, and held the corporation responsible for its subcontractors and personnel. Mwangi v. Fannie Mae, 164 F. Supp. 3d 1403 (N.D. Ga. 2016).

Controlling question is not whether employer actually did assume control of manner of doing work, but whether the employer had the right to do so under contract. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934); Savannah Elec. & Power Co. v. Edenfield, 118 Ga. App. 531, 164 S.E.2d 366 (1968); Hodges v. Doctors Hosp., 141 Ga. App. 649, 234 S.E.2d 116 (1977).

Independence of contract. — Fact that a contractor employs, controls, and assumes entire charge over the contractor's workers and that the employer neither has nor exercises any control, has, by many courts, including our own, been held practically decisive of the question of the independence of the contract. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

Employer's right to control inferred in certain cases. — When one is employed generally to perform certain services for another, and there is no specific contract to do a certain piece of work according to specifications for a stipulated sum, it is inferable that the employer has retained the right to control the manner, method, and means of the performance of the contract, and that the employee is not an independent contractor. Swift & Co. v. Alston, 48 Ga. App. 649, 173 S.E. 741 (1934).

Ground upon which some decisions may have been said to have proceeded was that, in view of the humble industrial status of the persons employed and the simple character of the work to be done, the only admissible inference was that the employers intended to retain the right to give direction in regard to details of the work. Swift & Co. v. Alston, 48 Ga. App. 649, 173 S.E. 741 (1934).

Limited control by employer not equivalent to master-servant relationship. — There is in all agreements to do specific work for another the necessary and implied power in the person for whom the work is to be done to supervise the work, to see that the desired results are attained, and to reject all products that do not come up to specifications, but this control would not change the relation of employer and independent contractor into that of master and servant. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

Right of the employer to exercise a certain control over the work, when the control reserved does not apply to the manner of doing the details of the work, and does not thereby take the work out of the hands of the contractor, but goes merely to a general supervision to ensure that the ends prescribed by the contract shall be substantially met, does not destroy the independence of the relation. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

If relationship of employer and independent contractor is established, merely taking steps to see that the contractor carries out the contractor's agreement, by supervision of the intermediate results obtained, or reserving the right of dismissal on grounds of incompetence, is not such interference and assumption of control as will render the employer liable for the torts of the contractor. American Sec. Life Ins. Co. v. Gray, 89 Ga. App. 672, 80 S.E.2d 832 (1954).

Supervision of independent contractor. — Employer is not bound to supervise progress of contract work for purpose of preventing the commission of a collateral tort by independent contractor. The employer has the right to presume that the independent contractor will do the work in a prudent and proper manner. Dekle v. Southern Bell Tel. & Tel. Co., 208 Ga. 254, 66 S.E.2d 218 (1951), overruled on other grounds, Peachtree-Cain Co. v. McBee, 254 Ga. 91, 327 S.E.2d 188 (1985).

Employer liable when work inherently dangerous regardless of independent status. — When the work done is inherently dangerous, or involves peculiar risk of bodily harm to others unless special precautions are taken, this duty is nondelegable and the employer is liable for negligence of the contractor which produces a result falling short of what it was the employer's duty to attain. Community

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Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

When the work to be done is dangerous only because of the absence of proper care, the doctrine of nonresponsibility for the negligence of the independent contractor may apply, but if the work is dangerous in itself unless reasonable care is taken to render it harmless, this doctrine does not apply. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

Employer under no general duty to contractor's employees. — General rule is that the independent contractor's employer is under no duty to take affirmative steps to guard or protect the contractor's employees against the consequences of the contractor's negligence or to provide for their safety. United States v. Aretz, 248 Ga. 19, 280 S.E.2d 345 (1981).

In a wrongful death action premised on both negligence and negligence per se filed on behalf of a mother's deceased minor son, a premises owner was properly granted summary judgment, as the independent contractor that hired the decedent, and not the premises owner, had sole control over its personnel, and the son's hazardous occupation on the owner's premises for a third party did not in and of itself demonstrate that the owner was in violation of Georgia's child labor laws; thus, the appeals court declined to reach the issue of whether an owner who knew or had reason to know that its independent contractor was employing a minor under the age of 16 to perform a dangerous occupation on the owner's premises was in violation of O.C.G.A. § 39-2-2. Benson-Jones v. Sysco Food Servs. of Atlanta, LLC, 287 Ga. App. 579, 651 S.E.2d 839 (2007).

Compliance with requirements of automobile and disability insurance and safety rules. — When the employer has no contract right to and had not assumed control of the time, the manner and the method of performance of the employee, a requirement that the employer purchase auto insurance and workers' compensation and comply with safety rules and regulations for the employee's benefit did not bring the employer with the doctrine of respondeat superior. Slater v. Canal Wood Corp., 178 Ga. App. 877, 345 S.E.2d 71 (1986).

Proof of independent contractor status. — When there is testimony uncontradicted that the employer did or did not assume and under the oral contract either did have or did not have the right to any control over the manner of doing the details of the work to be performed, such testimony prevails against any antagonistic evidence that may be introduced. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

Relationship between parties is for jury as the trier of fact to determine. Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

Cited in Harrison v. Kiser, 79 Ga. 588, 4 S.E. 320 (1887); Atlanta & F.R.R. v. Kimberly, 87 Ga. 161, 13 S.E. 277 (1891); Louisville & N.R.R. v. Hughes, 134 Ga. 75, 67 S.E. 542 (1910); Lamb v. Fulton Bag & Cotton Mills, 26 Ga. App. 572, 106 S.E. 607 (1921); Central of Ga. Ry. v. Lawley, 33 Ga. App. 375, 126 S.E. 273 (1925); Hughes v. Weekley Elevator Co., 37 Ga. App. 130, 138 S.E. 633 (1927); Poss Bros. Lumber Co. v. Haynie, 37 Ga. App. 60, 139 S.E. 127 (1927); Calvert v. Atlanta Hub Co., 37 Ga. App. 295, 139 S.E. 917 (1927); Davis v. Starrett Bros., 39 Ga. App. 422, 147 S.E. 530 (1929); Lovelace v. Ivey, 41 Ga. App. 204, 152 S.E. 266 (1930); Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937); Goldman v. Clisby, 62 Ga. App. 516, 8 S.E.2d 701 (1940); Gulf Life Ins. Co. v. McDaniel, 75 Ga. App. 549, 43 S.E.2d 784 (1947); Rodgers v. Styles, 100 Ga. App. 124, 110 S.E.2d 582 (1959); City of Villa Rica v. Couch, 281 F.2d 284 (5th Cir. 1960); Newsome v. Dunn, 103 Ga. App. 656, 120 S.E.2d 205 (1961); Webb v. Wright, 103 Ga. App. 776, 120 S.E.2d 806 (1961); Townsend & Ghegan Enters. v. W.R. Bean & Son, 117 Ga. App. 109, 159 S.E.2d 776 (1968); Moore v. Oglethorpe Sanitarium, Inc., 129 Ga. App. 310, 199 S.E.2d 615 (1973); Neda Constr. Co. v. Jenkins, 137 Ga. App. 344, 223 S.E.2d 732 (1976); Johnson v. Lanier, 140 Ga. App. 522, 231 S.E.2d 428 (1976); Allen v. Cooper, 145 Ga. App. 555, 244 S.E.2d 98 (1978); Ballard v. Turner, 147 Ga. App. 584, 249 S.E.2d 637 (1978); Fields v. B & B

Pipeline Co., 147 Ga. App. 875, 250 S.E.2d 582 (1978); Horn v. C.L. Osborn Contracting Co., 591 F.2d 318 (5th Cir. 1979); Harrison & Ellis, Inc. v. Nashville Milling Co., 156 Ga. App. 697, 275 S.E.2d 374 (1980); American Cyanamid Co. v. Ring, 158 Ga. App. 525, 281 S.E.2d 247 (1981); Bayliner Marine Corp. v. Prance, 159 Ga. App. 456, 283 S.E.2d 676 (1981); Paul v. Jones, 160 Ga. App. 671, 288 S.E.2d 13 (1981); Brewer v. Williams, 167 Ga. App. 151, 305 S.E.2d 891 (1983); Bryant v. Village Ctrs., Inc., 167 Ga. App. 220, 305 S.E.2d 907 (1983); Wilmock, Inc. v. French, 185 Ga. App. 259, 363 S.E.2d 789 (1987); Baughcum v. Cecil Key Paving, Inc., 190 Ga. App. 21, 378 S.E.2d 151 (1989); Ledbetter v. Delight Whsle. Co., 191 Ga. App. 64, 380 S.E.2d 736 (1989); Scott v. McDonald, 218 Ga. App. 810, 463 S.E.2d 379 (1995); Fortune v. Principal Fin. Group, Inc., 219 Ga. App. 367, 465 S.E.2d 698 (1995); Williams v. Georgia Dep't of Cors., 224 Ga. App. 571, 481 S.E.2d 272 (1997); Johnson v. Kimberly Clark, 233 Ga. App. 508, 504 S.E.2d 536 (1998); Atkins v. MRP Park Lake, L. P., 301 Ga. App. 275, 687 S.E.2d 215 (2009); Scapa Dryer Fabrics, Inc. v. Knight, 332 Ga. App. 82, 770 S.E.2d 334 (2015).

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Amusement parks. — One who, by contract or otherwise, controls the operation of a fair and of the premises, invites the public to attend, and receives a percentage of the profits cannot avoid liability for a patron's injury resulting from defective amusement apparatus or devices on the grounds that the concessionaire in control of those devices is an independent contractor. Hayes v. Century 21 Shows, Inc., 116 Ga. App. 490, 157 S.E.2d 779 (1967).

Automobiles and motor vehicles. — When the owner of an automobile delivered it to A for the purpose of being sold by A to any purchaser whom A may procure, and the entire control of the car was surrendered to A, A was not the servant of the owner, but an independent contractor. Simril v. Davis, 42 Ga. App. 277, 155 S.E. 790 (1930).

When A, acting as an independent contractor for the owner, and while operating the car in a demonstration drive for a prospective buyer who was riding in the car, negligently injured another, the owner was not liable in an action for damages for the injury; even though the owner knew that A intended to operate the car on a demonstration drive for the purpose of securing, if possible, a purchaser for the car, and that he (the owner) furnished the gasoline for the demonstration. Simril v. Davis, 42 Ga. App. 277, 155 S.E. 790 (1930).

When defendant company did not have any right to direct the manner, method, or means of performance of the work of operating and driving of a truck, owned by another, the driver of the truck was not the defendant's servant, but was the servant of the owner, an independent contractor, and the defendant was not liable for the negligence of the driver of the truck in its operation along a public highway, resulting in injury to the plaintiff. Brown v. Georgia Kaolin Co., 60 Ga. App. 347, 4 S.E.2d 100 (1939).

Automobile salesperson employed on a commission basis, who operates the salesperson's own automobile to aid the salesperson in carrying on the salesperson's employment, and whose movements are not controlled by the employer, is, with respect to the operation of the salesperson's automobile, an independent contractor, and the employer is not liable in damages for an injury to a person who was riding in the car with the employee and to whom the salesperson was trying to sell an automobile of the employer at the time, although the injury was caused by the negligence of the employee in the operation of the automobile. Whitehall Chevrolet Co. v. Anderson, 53 Ga. App. 406, 186 S.E. 135 (1936).

When an owner contracts with another as an independent contractor to cause the owner's car to be driven or transported to a specified place, to be there redelivered to the owner, and, pursuant to the contract, delivers the car to the representative of the contractor, from that time on until the car is redelivered to the owner, the car is not in the owner's custody or control, and the owner is not liable for injuries caused by the servants or agents of the contractor while in control of or operating it. De Bord

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v. Proctor & Gamble Distrib. Co., 146 F.2d 54 (5th Cir. 1944).

In a wrongful death action, evidence that the car dealership who hired a driver to transport one of its vehicles retained the right to control the time, method, and manner of the driver's work, raised questions of fact as to whether the driver was an employee or an independent contractor, and the dealership's summary judgment motion disclaiming liability under O.C.G.A. § 51-2-4 was denied; evidence included the fact that the dealership owned the vehicle that the driver was transporting, that the dealership did not check the driver's license or require separate insurance, and that the dealership retained the right to dictate the time that the driver was to depart with the vehicle and arrive at the destination. Richardson v. Dickerson, No. CV204-166, 2005 U.S. Dist. LEXIS 34948 (S.D. Ga. Nov. 28, 2005).

Taxicab company could not be held liable for a driver's negligence under the theory that the driver was the company's employee as the evidence did not show that the company assumed control over the time, manner, or method of the driver's work. The driver was free to work when the driver wanted, was not required to accept fares from the company, could obtain the driver's own fares, and could work anywhere the taxi could legally be operated; moreover, the car the driver was using was not owned by the company, but by another taxi driver. Lopez v. El Palmar Taxi, Inc., 297 Ga. App. 121, 676 S.E.2d 460 (2009).

Auto accidents. — Trial court erred in granting employers summary judgment in a driver's action to recover damages for injuries the driver sustained in a vehicle collision with an employee because there was a genuine issue of material fact as to whether the degree of control exercised by the employers over the employee's work was such that the employers could be held liable for the employee's alleged negligence against the driver; a genuine issue of material fact remained as to whether, at the time of the collision with the driver, the employee was acting in furtherance of the employers' business and within the scope of the business. Broadnax v. Daniel Custom Constr., LLC, 315 Ga. App. 291, 726 S.E.2d 770 (2012).

Motorcycle accident. — Trial court erred by granting summary judgment to the defendant on the plaintiffs' respondeat superior claim because the record revealed genuine issues of disputed facts about whether the driver who hit their motorcycle was the defendant's temporary employee or an independent contractor as, while the defendant did not pay the driver directly or choose break times, there was also evidence to support the conclusion that the defendant maintained sufficient control over the driver, such as instructing the driver on the time, method, and manner of the daily drive. Boatner v. Show Media, LLC, 331 Ga. App. 332, 771 S.E.2d 40 (2015).

Automotive repairs. — Owner of an automobile is not liable for injuries caused by the negligence of a garage man, to whom the car was surrendered for repairs. Wooley v. Doby, 19 Ga. App. 797, 92 S.E. 295 (1917).

When owner of truck, through the owner's agent and driver, delivers the truck to a mechanic for the purpose of repair, and surrenders the entire control of the truck to the mechanic, the mechanic is not the servant of the owner, but an independent contractor, and when the mechanic, under such circumstances, negligently injures another while testing the truck, the owner is not liable in an action for damages for the injury; and fact test was being made with consent of agent of owner does not change the rule, it not appearing that the agent was riding in the truck or exercising any control over the mechanic's operation of the truck during the test. Ousley Co. v. Ledbetter, 44 Ga. App. 375, 161 S.E. 634 (1931).

Person undertaking repairs to another's automobile may not be a mechanic by trade, and may not be generally engaged in the business of repairing automobiles, but may be a domestic servant of a third person, since the labor undertaken under the contract is independent of the employer, and is thus an "independent business" within the meaning of this section so

far as the parties are concerned. Yearwood v. Peabody, 45 Ga. App. 451, 164 S.E. 901 (1932).

When the owner of an automobile delivers the automobile to another person, toward whom one does not stand in the relationship of master to servant, for the purpose of repair, and surrenders the entire control of the automobile to that person, and neither reserves by the contract, nor assumes, the right to control the time, manner, or method in which the work is done, the person undertaking the labor being responsible to the owner only for results, the relation between the parties is not that of master and servant, but that of employer and independent contractor. This is true even though the person undertaking such repairs may not be a mechanic by trade, and may not be generally engaged in the business of repairing automobiles, but may be a domestic servant of a third person, since the labor undertaken under the contract is independent of the employer, and is thus an "independent business" within the meaning of this section so far as the parties are concerned. When such mechanic, while testing the automobile during the process of the work undertaken thereon, negligently injures a third person, the owner of the automobile is not liable in damages on account of such injury. De Loach v. Hicks, 50 Ga. App. 239, 177 S.E. 822 (1934).

Automobile repossession. — Repossession of automobiles constitutes function which must be regarded as a regular part of Ford Motor Credit Company's business activities. McGuire v. Ford Motor Credit Co., 162 Ga. App. 312, 290 S.E.2d 487 (1982).

Trial court erred in granting summary judgment in favor of a creditor as to whether the creditor could be held vicariously liable for an independent contractor's acts in attempting to repossess a debtor's car because the creditor had a non-delegable statutory duty under O.C.G.A. § 11-9-609 to not breach the peace in repossessing the car, and if the contractor's attempt to repossess the car was in violation of the statute, the creditor would be chargeable with that conduct since it was done in violation of a duty imposed upon it by statute; the creditor's duty was personal and non-delegable, and a recovery based upon a breach of that duty would not constitute imposition of liability without fault. Lewis v. Nicholas Fin., Inc., 300 Ga. App. 888, 686 S.E.2d 468 (2009).

Banks. — When a tortfeasor stated that the tortfeasor was an independent contractor with relation to the bank and unequivocally denied the existence of an employer-employee relationship, and the victim introduced no direct proof to contradict that testimony, the bare possibility that the bank might have retained some control (raised only by the circumstances) was not sufficient to prevent summary judgment for the bank. Deitrich v. Trust Co. Bank, 179 Ga. App. 330, 346 S.E.2d 107 (1986).

Carriers. — When A and B are the joint owners of lumber and sell the lumber to be delivered at another place, and B owns a truck and employs and pays C by the day to drive the truck, and B agrees with A to transport and deliver the lumber for which A is to pay B a stipulated amount per thousand feet for hauling A's part of the lumber, B is an independent contractor in the transportation of such lumber, and A cannot be held liable for an alleged tort committed by C, the driver of the truck in the transportation of such lumber. Wallace v. Price, 55 Ga. App. 783, 190 S.E. 273 (1937).

When an injured party sued a taxicab company, alleging that the party was injured by a taxicab owned by the company which was negligently operated by its driver, who was the company's employee, the evidence at trial showed that the driver leased the taxicab from the company for a certain daily amount and that the company had no control over the manner in which the driver performed the work, so the driver was an independent contractor, and the company could not be held liable for the negligence under the doctrine of respondeat superior. Metro Taxi, Inc. v. Brackett, 273 Ga. App. 122, 614 S.E.2d 232 (2005).

In a wrongful death and personal injury suit, the trial court properly granted summary judgment in favor of a trucking company as the evidence of the trucking company's limited involvement in direct-

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ing how its goods were shipped was insufficient as a matter of law to impose vicarious liability on it for a tractor-trailer driver's negligence. Further, because the driver was not an employee of the trucking company, the trucking company could not have negligently hired the driver as a matter of law. McLaine v. McLeod, 291 Ga. App. 335, 661 S.E.2d 695 (2008).

Motor carrier was not vicariously liable under O.C.G.A. § 51-2-4 for a freight company's negligent hiring of a partially blind, unlicensed trucker as the contract between the carrier and company provided that the company was an independent contractor with full control and direction of its employees, and there was no evidence that the carrier knew the company hired the trucker or that the carrier exercised control over the company's day-to-day operations. Clarendon Nat'l Ins. Co. v. Johnson, 293 Ga. App. 103, 666 S.E.2d 567 (2008), cert. denied, No. S08C2066, 2008 Ga. LEXIS 1004 (Ga. 2008); cert. denied, 556 U.S. 1229, 129 S. Ct. 2166, 173 L.Ed.2d 1169 (2009).

Courier. — Trial court did not err in denying a messenger service company's motion for summary judgment in a security guard's action alleging that the company was liable for a courier's conduct because although the employment contract between the courier and company designated the courier as an independent contractor, there was a genuine issue of material fact as to whether the degree of control the company exercised over the courier's delivery services was such that the company could be held liable for the courier's allegedly tortious actions against the security guard; the courier's claim that the courier was only permitted to work for the company was substantiated by the same contract, which prohibited the courier from allowing the courier's vehicle to be used by anyone other than the company. Ga. Messenger Serv. v. Bradley, 311 Ga. App. 148, 715 S.E.2d 699 (2011), cert. denied, 2012 Ga. LEXIS 56 (Ga. 2012).

Construction contractors and subcontractors. — Person who is employed under a contract whereby the person agrees to drill a well and furnish the casing therefor for $4.00 a foot, when it does not appear that the employer has the right to direct the work or to control the manner of the work's performance, is employed to bring about a result, and is therefore an "independent contractor." Edmondson v. Town of Morven, 41 Ga. App. 209, 152 S.E. 280 (1930).

When a general contractor is in control of the premises, such contractor obtains the status of occupier so that it has a responsibility to invitees and others entering the premises which is equivalent to that duty owed by the owner of the premises. Reed v. Batson-Cook Co., 122 Ga. App. 803, 178 S.E.2d 728 (1970).

If there was any negligence on the part of a subcontractor in installing a septic tank, it was not imputable to the builder. Hall v. Richardson Homes, Inc., 168 Ga. App. 593, 309 S.E.2d 825 (1983).

Contract to build a house, with its attendant obligations, is between the buyer and builder, not the buyer and any independent contractor. Hudgins v. Bacon, 171 Ga. App. 856, 321 S.E.2d 359 (1984).

When, under a construction contract, the duty of providing safe working conditions was squarely upon the independent contractor and not the owner, and there was compliance with the clear terms of the contract, the owner was not liable for the contractor's wrongful or negligent breach of this duty, and since the owner did not owe an employee of an independent subcontractor any duty to provide safe working conditions, the owner had no liability to the employee. Modlin v. Swift Textiles, Inc., 180 Ga. App. 726, 350 S.E.2d 273 (1986).

When an insurance company did not retain or exercise any right of control over the time, manner, or method of performance of a repair contractor's work, the insurance company could not be held vicariously liable for the contractor's alleged negligence under the doctrine of respondeat superior. Carter v. Allstate Ins. Co., 197 Ga. App. 738, 399 S.E.2d 500 (1990).

Trial court correctly determined that general contractor, and not subcontractor, was responsible to homeowners for the

proper erection of a garage pursuant to the written agreement which provided that the scope of the work to be performed by the general contractor included the part that later proved defective. Crispens Enter. Inc. v. Halstead, 209 Ga. App. 133, 433 S.E.2d 353 (1993).

Even though a contract between a telephone company and contractor for installation of a utility pole and underground cable denominated the contractor as independent, it also gave the company a significant amount of control over the time, method, and manner of executing the work, and the trial court did not err in finding that the installer was not an independent contractor. BellSouth Telecommunications, Inc. v. Helton, 215 Ga. App. 435, 451 S.E.2d 76 (1994).

When an independent subcontractor sued a retailer for injuries occurring while the subcontractor was doing work on the retailer's premises, the retailer was entitled to a directed verdict in its favor as the retailer exercised no control over the subcontractor's work, and any control over that work was contractually ceded to the subcontractor and to the contractor who hired the subcontractor. Neiman-Marcus Group, Inc. v. Dufour, 268 Ga. App. 104, 601 S.E.2d 375 (2004).

Utility provider to installer. — In a personal injury action against a utility and its independent contractor, the trial court properly granted summary judgment against a cable installer, finding that: (1) the utility was not vicariously liable to the installer for the allegedly negligent acts of its contractor; (2) the utility's right to inspect the work did not render it liable for its contractor's negligence as the right was intended for the limited purpose of making sure the contractor competently carried out the terms of the contract; (3) the utility was not liable for its failure to flag a power line trench in which the installer fell and was injured, as surface markings showing the path of the trench would not have informed the installer of the danger, and the installer was not injured as a result of excavating or blasting; and (4) the High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., did not apply to afford the installer a remedy. Perry v. Georgia Power Co., 278 Ga. App. 759, 629 S.E.2d 588 (2006).

Debt collector. — One operating a collection agency whereby one undertakes the collection of debts on a commission, and whose services are in no wise subject to the employer's control or orders as to the time, manner, or method of their execution, does not occupy the status of a servant, but must be taken as exercising an independent business. When one contracts with an individual thus exercising an independent business to do a work not in itself unlawful or attended with danger to others, the employer is not liable for the wrongful or negligent acts of the independent contractor or the contractor's servants. Calvert v. Atlanta Hub Co., 37 Ga. App. 295, 139 S.E. 917 (1927).

Eminent domain. — Whether the statute embodied in former Code 1933, §§ 105-501 and 105-502 (see now O.C.G.A. §§ 51-2-4 and 51-2-5) was exhaustive as to exceptions to the rule of nonliability of an employer for the acts of an independent contractor, it must yield to and cannot control the constitutional duty imposed upon a condemnor to pay compensation for the taking or damaging of private property for public purposes whether or not such taking or damaging was done by an independent contractor hired by the condemnor. Fulton County v. Woodside, 223 Ga. 316, 155 S.E.2d 404 (1967); Georgia Power Co. v. Jones, 122 Ga. App. 614, 178 S.E.2d 265 (1970).

Factory. — Factory was not liable for independent contractor's unauthorized, unsupervised use of a forklift to raise the defendant to the contractor's truck for repairing a factory fan. Murphy v. Blue Bird Body Co., 207 Ga. App. 853, 429 S.E.2d 530 (1993).

Floor cleaning service. — When the agreement between the defendant grocery store and floor cleaning service gave the store only the general right to order the work stopped or resumed, to inspect its process or to receive reports, to make suggestions or recommendations and to prescribe alterations and deviations, it was not shown that the store controlled work methods, and it was not error to grant summary judgment to the store on the issue that the service was an indepen-

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dent contractor. Feggans v. Kroger Co., 223 Ga. App. 47, 476 S.E.2d 822 (1996).

Franchises. — Because the need for controls over the use of a trade name, in a franchise agreement authorizing such use, has generally been recognized, a franchise contract under which one operates a type of business on a royalty basis does not create an agency relationship. Buchanan v. Canada Dry Corp., 138 Ga. App. 588, 226 S.E.2d 613 (1976).

Hair salon. — In an action by a patron against a hair salon for injuries allegedly caused by the negligence of an apprentice facial esthetician, because of the relationship between the salon and the apprentice imposed by O.C.G.A. § 51-2-4 and the evidence of the degree of control actually asserted by the salon, summary judgment that the salon was not liable under respondeat superior for any negligent acts of the apprentice and/or employee was not authorized. Brown v. Who's Three, Inc., 217 Ga. App. 131, 457 S.E.2d 186 (1995).

Hospitals. — Noncharitable hospital is liable for the negligence of its nurses, orderlies, and other employees, in the performance of mere administrative or clerical duties which, though constituting a part of the patient's prescribed medical treatment, do not require the application of a specialized technique or the understanding of a skilled physician or surgeon and which duties are not performed under the direct supervision of the attending physician. Moore v. Carrington, 155 Ga. App. 12, 270 S.E.2d 222 (1980).

Home repairs. — Homeowner who hired a third party who negligently repaired the owner's air conditioner was not liable for the negligence of that party in the absence of evidence that the owner exercised any control over the work. Clemmons v. Griffin, 230 Ga. App. 721, 498 S.E.2d 99 (1998).

Hotel franchisor. — After reviewing the franchise agreement and operating manual in their entirety, the trial court properly ruled that no franchise agreement existed between the hotel franchisor and franchisee to hold the former liable for the latter's alleged infliction of the patron's injuries upon the patron's ejection from the hotel lounge. McGuire v. Radisson Hotels Int'l, Inc., 209 Ga. App. 740, 435 S.E.2d 51 (1993).

Insurance companies. — While contract between solicitor of insurance and insurance company indicated a relationship of independent contractor and employer, when evidence discloses that insurance company's state manager, by whom the contractor was employed and under whose supervision the contractor worked, allotted certain territory to the contractor, and required regular attendance at morning staff meetings, and that the insurance company paid for the salesperson's license, furnished the salesperson all literature and selling aids, required the salesperson to own an automobile as a condition of employment; and that at the time of the collision salesperson was on the salesperson's way to interview a prospective customer whose name had been given the salesperson at the office, evidence authorizes finding that the master-servant relationship existed. American Sec. Life Ins. Co. v. Gray, 89 Ga. App. 672, 80 S.E.2d 832 (1954).

Janitorial service. — Trial court did not err in granting a janitorial services contractor summary judgment in an employee's suit to recover damages for injuries sustained when the employee slipped and fell on ice in the employer's parking lot because, under O.C.G.A. § 51-2-5(5), the contractor's indication to a subcontractor that mop water could be discarded in back of the building was insufficient to constitute an assumption of control by the contractor so as to create the relation of master and servant or so that an injury resulted that was traceable to its interference but was no more than a general indication that the mop water could be discarded in back of the building, and the contractor's willingness to supply materials to the subcontractor did not intrude into the subcontractor's ability to control the daily operations of its business; the agreement between the contractor and subcontractor provided for an independent contractor relationship because the subcontractor had full authority and responsibility over its employees, including hiring and firing, and under the agree-

ment, the contractor had delivered full and complete possession of the premises to the subcontractor, which gave the specific instructions about where to discard the water. Adcox v. Atlanta Bldg. Maint. Co., 301 Ga. App. 74, 687 S.E.2d 137 (2009).

Brushing land. — Summary judgment was properly entered for a realtor and a developer as to a landowner's claim that the realtor and the developer were liable under O.C.G.A. §§ 51-2-4 and 51-2-5 for failing to ascertain and communicate to an independent contractor hired by the developer to brush the realtor's lot the location of the boundary between the realtor's lot and the landowner's lot; the developer testified that the developer used a creek and a transformer as landmarks for the boundary line in instructing the contractor, and the landowner did not challenge the use of the landmarks. Sorrow v. Hadaway, 269 Ga. App. 446, 604 S.E.2d 197 (2004).

Logger who did work for more than one company, owned the logger's own equipment, was paid by the ton for the timber the logger cut, and negotiated the price before the loger began cutting was an independent contractor. Jacobs v. Thomson Oak Flooring, 250 Ga. App. 56, 550 S.E.2d 465 (2001).

Crop duster was independent contractor. — Crop duster was an independent contractor to a cotton farm owner. The farmer hired the crop duster on a one-time basis to apply the chemicals, the farmer did not control precisely when and how the crop duster flew during the crop dusting, and the farmer asked the crop duster to perform the defoliation based on the recommendation from a cotton scout that the farmer's crop was ready. Yancey v. Watkins, 308 Ga. App. 695, 708 S.E.2d 539 (2011).

Lessor not liable to servant of lessee. — Lessor is not liable to a servant of the lessee arising from the negligence of the latter. Crusselle v. Pugh, 67 Ga. 430, 44 Am. R. 724 (1881).

Physicians. — Trial court properly granted summary judgment to professional corporation on the patient's medical malpractice action against it as the patient alleged that the doctor who allegedly caused the medical malpractice did so while acting as an agent or employee of the professional corporation, but the evidence actually showed the doctor was working for the second professional corporation with an office in another county, and that the doctor could not have been acting as an agent or employee of the professional corporation because the professional corporation was not active, the doctor had closed the doctor's office, and the patient at all times was seen by the doctor at the second professional corporation which the doctor incorporated after the professional corporation ceased to do business. Dix v. Shadeed, 261 Ga. App. 145, 581 S.E.2d 747 (2003).

Medical care provided to prisoners. — When prisoner's doctor was an independent contractor, not an employee of the sheriff, the doctor was not an employee within the meaning of subsection (b) of O.C.G.A. § 51-2-4 and did not have official immunity; therefore, any negligence of the doctor could not be imputed to sheriff. Cantrell v. Thurman, 231 Ga. App. 510, 499 S.E.2d 416 (1998).

Nightclub performer. — When a nightclub patron was injured by the alleged negligence of a performer at a nightclub, neither the nightclub nor the nightclub's employee could be held liable because the performer was an independent contractor, and not an employee of the nightclub as: (1) the nightclub's oral agreement with the performer only set when the performer would perform and how much the performer would be paid, but did not dictate the manner or method of the performer's routine; (2) the nightclub's ability to stop the show, policy forbidding weapons, and determination of the schedule for performers' performances did not create a fact issue as to whether the nightclub controlled the time, manner, and method of the performance; and (3) while not dispositive, it was highly relevant that the performer did not perform the performer's services on a regular basis or for a fixed period of time. Orton v. Masquerade, Inc., 311 Ga. App. 656, 716 S.E.2d 764 (2011).

Newspaper carrier. — Evidence demanded the finding that the newscarrier whose act was alleged to have been the

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cause of the plaintiff's injuries was an independent contractor, and the trial court did not err in directing the verdict for the defendant company. Morris v. Constitution Publishing Co., 84 Ga. App. 816, 67 S.E.2d 407 (1951).

Employee making deliveries on day off. — In a personal injury case when an employee was involved in a collision during the employee's day off, but when the employee regularly made deliveries on that day between the employee's employer and affiliated companies, summary judgment for the affiliates was proper because the employee was acting, at most, as an independent contractor with respect to the affiliates in making the deliveries. Thompson v. Club Group, Ltd., 251 Ga. App. 356, 553 S.E.2d 842 (2001).

Private security agencies. — Even though hirers of an independent security or protective agency have generally been held not liable for negligent torts of agency personnel, when the hirer did not exercise control over them, the hirers have been held liable for the intentional torts of the agency's personnel committed, in the scope of the agency's employment, against the hirer's invitees. United States Shoe Corp. v. Jones, 149 Ga. App. 595, 255 S.E.2d 73 (1979).

Employer of a private detective agency was held liable to a third person for an invasion of privacy committed during the course of an investigation by the agency's personnel, despite the fact that the agency was employed as an independent contractor. United States Shoe Corp. v. Jones, 149 Ga. App. 595, 255 S.E.2d 73 (1979).

Rule that a property owner is liable for the intentional torts of an employee of a private security agency hired to guard the property is applicable when the agency is hired by the manager of the property rather than by the owner personally. Peachtree-Cain Co. v. McBee, 254 Ga. 91, 327 S.E.2d 188 (1985).

Procuring investments. — Employer was not vicariously liable for a broker's acts in fraudulently inducing the plaintiffs to invest in a nonexistent fund which the broker falsely represented as a fund of the employer since the acts were committed for the broker's personal benefit, involved no participation by the employer, and were of no benefit to the employer. Hobbs v. Principal Fin. Group, Inc., 230 Ga. App. 410, 497 S.E.2d 243 (1998).

Retail sales. — If the manner in which the details of the work of selling the defendant's automobiles are to be done is left to the salesperson, and the defendant company is interested only in the result of the salesperson's work, the salesperson is an independent contractor. Whitehall Chevrolet Co. v. Anderson, 53 Ga. App. 406, 186 S.E. 135 (1936).

Servant of stevedore. — Employer of a stevedore is not liable for injuries received by one of the employees. Rankin v. Merchants Miners' Transp. Co., 73 Ga. 229 (1884).

Tree felling. — In civil action for damages caused by felling of a tree under the doctrine of respondeat superior, the trial court erroneously denied the homeowner's motion for summary judgment as an independent contractor was hired to fell the tree and homeowner had no control over the contractor's actions, and the act of felling the tree was not wrongful in itself; moreover, the homeowner's single suggestion or comment that the contractor could proceed with felling the tree as an entire unit did not necessarily have to be followed and did not create liability on the homeowner's part, but was simply confirming the freedom of the contractor to fell the tree as that contractor deemed appropriate. Whatley v. Sharma, 291 Ga. App. 228, 661 S.E.2d 590 (2008).

Tree trimming and vegetation removal for power company. — Power company was not liable for a construction company's actions relating to the trimming of trees and removal of vegetation in the right-of-way because the construction company was an independent contractor that was responsible for the time, manner, and method of doing the work. Wilann Props. I, LLC v. Ga. Power Co., 321 Ga. App. 297, 740 S.E.2d 386 (2013).

Workers' compensation. — O.C.G.A. § 34-9-11 of the Workers' Compensation Act, O.C.G.A.§ 34-9-1 et seq., expressly abrogated the vicarious liability provisions of O.C.G.A. §§ 51-2-2 and 51-2-4

which would have otherwise permitted the parents of an employee of an independent subcontractor to bring a tort action against the general contractor/statutory employer. McCorkle v. United States, 737 F.2d 957 (11th Cir. 1984).

When home buyers sued an engineering firm for professional negligence for an allegedly negligent inspection of the home, the firm's alleged professional negligence could not be imputed to the sellers or the sellers' agent, as the sellers and agent were not negligent in making the firm's representations themselves or inducing the firm to make a negligent inspection of the home. Smiley v. S & J Inves., Inc., 260 Ga. App. 493, 580 S.E.2d 283 (2003).

Lack of evidence supporting the contention that the worker was an employee. — When the terms of a lease clearly denominated the worker as an independent contractor, the law presumed that the worker was in fact an independent contractor unless the evidence suggested otherwise and it did not in the instant case. The lack of evidence supporting the contention that the worker was an employee was fatal to the vicarious liability claim brought under O.C.G.A. § 51-2-4 against the corporations. Clark v. Roberson Mgmt. Corp., No. 5:03CV274 (DF), 2005 U.S. Dist. LEXIS 46972 (M.D. Ga. Jan. 11, 2005).

OPINIONS OF THE ATTORNEY GENERAL

Test to determine status as independent contractor. — True test whether a person employed is a servant or an independent contractor is whether the employer, under the contract, whether oral or written, has the right to direct the time, the manner, the methods, and the means of the execution of the work, as contradistinguished from the right to insist upon the contractor producing results according to the contract, or whether the contractor in the performance of the work contracted for is free from any control by the employer of the time, manner and method in the performance of the work. 1958-59 Op. Att'y Gen. p. 390.

RESEARCH REFERENCES

Am. Jur. 2d. — 27 Am. Jur. 2d, Employment Relationship, § 356 et seq.

Am. Jur. Proof of Facts. — "Fraudulent or Dishonest Act" by Employee Covered by Fidelity Bond, 13 POF3d 559.

Complicity Rule in Motor Vehicle Accident Cases: Employer's Authorization or Ratification of Driver's Conduct, 19 POF3d 437.

C.J.S. — 30 C.J.S., Employer-Employee, § 237 et seq.

ALR. — Employment of incompetent, inexperienced, or negligent employee as independent ground of negligence toward one other than an employee, 8 ALR 574.

Liability of master for injury inflicted by servant with firearms, 10 ALR 1087; 75 ALR 1176.

Liability of master for damage to person or property due to servant's smoking, 13 ALR 997; 31 ALR 294.

Duty of an employer with respect to the timbering of a mine, under the common law and general statutes, 15 ALR 1380.

Liability for misconduct or negligence of messenger not directly related to the service, 18 ALR 1416.

General discussion of the nature of the relationship of employer and independent contractor, 19 ALR 226.

Circumstances under which the existence of the relationship of employer and independent contractor is predictable, 19 ALR 1168.

Liability of employer growing out of unauthorized act of employee in taking charge of property as accommodation, 23 ALR 131.

Contributory negligence or assumption of risk in disobeying rules or directions of master under counter directions by superior, 23 ALR 315.

Liability of employer as predicated on the ground of his being subject to a

nondelegable duty in regard to the injured person, 23 ALR 984.

Nondelegable duty of employer in respect of work which will in the natural course of events produce injury, unless certain precautions are taken, 23 ALR 1016.

Nondelegable duty of employer with respect to work which is inherently or intrinsically dangerous, 23 ALR 1084.

Independent contractor: remedial rights in respect of injuries caused by breaches of positive duties correlative to corporate franchises, 28 ALR 122.

Liability of employer for injuries inflicted by automobile while being driven by or for salesman or collector, 29 ALR 470; 54 ALR 627; 107 ALR 419.

Liability of employer for acts or omissions of independent contractor in respect of positive duties or former arising from or incidental to contractual relationships, 29 ALR 736.

Independent contractor: liability of employer as predicated on the ground of his personal fault, 30 ALR 1502.

Judgment for or against master in action for servant's tort as bar to action against servant, 31 ALR 194.

Independent contractor: extent of the employer's liability after he has assumed control of the subject-matter of the stipulated work, 31 ALR 1029.

Liability of contractee and contractor inter se with respect to injuries sustained while the stipulated work is in course of performance, 44 ALR 891.

Liability of the contractee for injuries sustained by the contractor's servants in the course of the stipulated work, 44 ALR 932.

Owner's liability for injury by automobile while being used by a servant for his own pleasure or business, 45 ALR 477.

Personal liability of agent to third person for injuries or damages due to condition of principal's premises, 49 ALR 521.

Liability of one undertaking to repair automobile for injury to third person, 52 ALR 857.

Liability for injuries resulting from failure of independent contractor to guard opening in sidewalk while delivering merchandise, etc., 53 ALR 932.

Salesman employed on a percentage or commission basis as a servant or an independent contractor, 61 ALR 223.

Necessity of verdict against servant or agent as condition of verdict against master or principal for tort of servant or agent, 78 ALR 365.

Negligence of driver of automobile as imputed to members of joint enterprise, 85 ALR 630.

Independent contractor rule as applied to injuries resulting from conditions created by independent contractors in streets, 115 ALR 965.

Prima facie case or presumption from registration of automobile in name of, or from proof of ownership by, defendant, as applicable to questions other than the master-servant relationship at time of accident, 122 ALR 228.

One soliciting subscriptions for newspaper, magazine, or book, on commission basis as an independent contractor or employee, 126 ALR 1120.

Criminal responsibility of one authorized generally to sell intoxicating liquors for particular illegal sale thereof by employee or agent, 139 ALR 306.

Variance between allegation and proof as regards identity of servant or agent for whose acts defendant is sought to be held responsible, 139 ALR 1152.

Homework by employee as affecting employer's responsibility for injury to third person due to employee's negligence while on way to or from home, 146 ALR 1193.

Automobile owner's common law liability for negligence in entrusting car to known incompetent, reckless, or inexperienced person as affected by statute limiting owner's liability to use within terms of consent, 163 ALR 1418.

Employer's liability for assault by truck driver or chauffeur, 172 ALR 532.

Loaned servant doctrine under Federal Employers' Liability or Safety Appliance Act, 1 ALR2d 302.

Doctrine of apparent authority as applicable where relationship is that of master and servant, 2 ALR2d 406.

Liability under respondeat superior doctrine for acts of operator furnished with leased machine or motor vehicle, 17 ALR2d 1388.

Employer's liability for negligence of employee in piloting his own airplane in employer's business, 46 ALR2d 1050.

Deviation from employment in use of employer's car during regular hours of work, 51 ALR2d 8; 65 ALR4th 346.

Employee's operation of employer's vehicle outside regular working hours as within scope of employment, 51 ALR2d 120.

Route driver or salesman as independent contractor or employee of merchandise producer or processor, for purposes of respondeat superior doctrine, 53 ALR2d 183.

Liability of employer for negligent operation of motor vehicle by automobile salesman, 53 ALR2d 631.

Employer's liability for assault by taxicab or motorbus driver, 53 ALR2d 720.

Liability of hospital or sanitarium for negligence of physician or surgeon, 69 ALR2d 305.

Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 83 ALR2d 1282.

Liability insurance of garages, motor vehicle repair shops and sales agencies, and the like, 93 ALR2d 1047.

Respondeat superior: deviation from scope of employment in flying employer's airplane, 100 ALR2d 1346.

Right of employer sued for tort of employee to implead the latter, 5 ALR3d 871.

Liability of corporation for torts of subsidiary, 7 ALR3d 1343.

Owning, leasing, or otherwise engaging in business of furnishing services for taxicabs as basis of tort liability for acts of taxi driver under respondeat superior doctrine, 8 ALR3d 818.

Liability of police officer or his bond for injuries or death of third persons resulting from operation of motor vehicle by subordinate, 15 ALR3d 1189.

Master's liability for injury to or death of person, or damage to property, resulting from fire allegedly caused by servant's smoking, 20 ALR3d 893.

Liability of one contracting for private police security service for acts of personnel supplied, 38 ALR3d 1332.

Liability to one injured in course of construction, based upon architect's alleged failure to carry out supervisory responsibilities, 59 ALR3d 869.

Liability of hospital, other than mental institution, for suicide of patient, 60 ALR3d 880.

Liability for member of unincorporated association for tortious acts of association's nonmember agent or employee, 62 ALR3d 1165.

When is employer chargeable with negligence in hiring careless, reckless, or incompetent independent contractor, 78 ALR3d 910.

Vicarious liability of private franchisor, 81 ALR3d 764.

Patient tort liability of rest, convalescent, or nursing homes, 83 ALR3d 871.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Storekeeper's liability for personal injury to customer caused by independent contractor's negligence in performing alterations or repair work, 96 ALR3d 1213.

Liability of hospital or sanitarium for negligence of physician or surgeon, 51 ALR4th 235.

Modern status of rule imputing motor vehicle driver's negligence to passenger on joint venture theory, 3 ALR5th 1.

51-2-5. Liability for negligence of contractor.

An employer is liable for the negligence of a contractor:

(1) When the work is wrongful in itself or, if done in the ordinary manner, would result in a nuisance;

(2) If, according to the employer's previous knowledge and experience, the work to be done is in its nature dangerous to others however carefully performed;

(3) If the wrongful act is the violation of a duty imposed by express contract upon the employer;

(4) If the wrongful act is the violation of a duty imposed by statute;

(5) If the employer retains the right to direct or control the time and manner of executing the work or interferes and assumes control so as to create the relation of master and servant or so that an injury results which is traceable to his interference; or

(6) If the employer ratifies the unauthorized wrong of the independent contractor. (Civil Code 1895, § 3819; Civil Code 1910, § 4415; Code 1933, § 105-502.)

History of Code section. — The language of this Code section is derived in part from the decision in Atlanta & F.R.R. v. Kimberly, 87 Ga. 161, 13 S.E. 277 (1891).

Cross references. — Liability of principal contractor or subcontractor for injuries suffered by employees engaged in working upon subject matter of contract, § 34-9-8.

Law reviews. — For article surveying torts law, see 34 Mercer L. Rev. 271 (1982). For annual survey of administrative law, see 56 Mercer L. Rev. 31 (2004). For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005). For annual survey of law on labor and employment law, see 62 Mercer L. Rev. 181 (2010).

For comment criticizing Dekle v. Southern Bell Tel. & Tel. Co., 208 Ga. 254, 66 S.E.2d 218 (1951), holding defendant not liable for negligence of independent contractor since excavating public street is not inherently dangerous as a matter of law, see 14 Ga. B. J. 228 (1951). For comment on Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), holding employer defendant may not use independent contractor defense to invasion of privacy suit resulting from actions of investigator working in his behalf, see 9 Ga. St. B. J. 519 (1973). For comment on Aretz v. United States, 604 F.2d 417 (5th Cir. 1979), discussing federal government's duty of care to employees of an independent contractor, see 31 Mercer L. Rev. 1095 (1980).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Other Specific Cases
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General Consideration

Applicability. — O.C.G.A. §§ 51-2-4 and 51-2-5 limit an employer's vicarious liability only and do not apply to a claim arising from the employer's own conduct. England v. Beers Constr. Co., 224 Ga. App. 44, 479 S.E.2d 420 (1996).

"Independent contractor" defined. — Independent contractor is person employed to perform work on terms that the contractor is to be free from the control of the employer as respects the manner in which the details of the work are to be executed. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

Employer is not liable for torts committed by an independent contractor, unless the work is in itself unlawful or attended with danger to others, or the wrongful act consists in the violation of a duty imposed by the employer, or is in violation of a duty imposed by statute, or the employer interferes and assumes control so as to create the relation of master and servant, or ratifies the unauthorized wrong of the independent contractor.

Massee & Felton Lumber Co. v. Macon Cooperage Co., 44 Ga. App. 590, 162 S.E. 396 (1932).

When an individual or corporation contracts with another individual or corporation, exercising an independent employment, for the latter to do a work not in itself unlawful or attended with danger to others, such work to be done and according to the contractor's own methods, and not subject to the employer's control or orders, except as to results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or the contractor's servants. Georgia Power Co. v. Gillespie, 49 Ga. App. 788, 176 S.E. 786 (1934).

Person employing another to do a lawful act is presumed, in the absence of evidence to the contrary, to have employed one to do it in a lawful and reasonable manner; and, therefore, unless the parties stand in the relation of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the work is done. Georgia Power Co. v. Gillespie, 49 Ga. App. 788, 176 S.E. 786 (1934).

Absent an express contractual duty, a general contractor cannot be held liable for damage caused by the collateral torts of independent contractors. Faubion v. Piedmont Eng'g & Constr. Corp., 178 Ga. App. 256, 342 S.E.2d 718 (1986).

When a nonprofit corporation which encourages industrial and business development retained the right to approve a soils testing firm and to direct a general contractor when to begin construction, the retained rights did not constitute such control as to render the corporation liable. Toys 'R' Us, Inc. v. Atlanta Economic Dev. Corp., 195 Ga. App. 195, 393 S.E.2d 44 (1990).

Trial court did not err in finding that a power company was not liable to an injured employee of a contractor hired by the power company under the theory that cutting timber by hand was inherently dangerous as the employee did not establish that the contractor's negligence led to the employee's injury pursuant to O.C.G.A. § 51-2-5; while the employee's experts testified that the contractor's safety program was lacking, the record did not show that any inadequacy in the safety program caused the employee's injury. Rayburn v. Ga. Power Co., 284 Ga. App. 131, 643 S.E.2d 385 (2007), cert. denied, 2007 Ga. LEXIS 507 (Ga. 2007).

In a wrongful death action premised on both negligence and negligence per se filed on behalf of a mother's deceased minor son, a premises owner was properly granted summary judgment as the independent contractor that hired the decedent, and not the premises owner, had sole control over its personnel, and the son's hazardous occupation on the owner's premises for a third party did not in and of itself demonstrate that the owner was in violation of Georgia's child labor laws; thus, the appeals court declined to reach the issue of whether an owner who knew or had reason to know that its independent contractor was employing a minor under the age of 16 to perform a dangerous occupation on the owner's premises was in violation of O.C.G.A. § 39-2-2. Benson-Jones v. Sysco Food Servs. of Atlanta, LLC, 287 Ga. App. 579, 651 S.E.2d 839 (2007).

Trial court erred in granting summary judgment to a home seller in an action filed by the buyers against the seller alleging negligence and a breach of contract; notwithstanding the general rule outlined in O.C.G.A. § 51-2-4, the seller could not escape liability for the alleged negligence by two of the seller's contractors in grading the property and installing the home because the seller assumed that responsibility under the sales contract. French v. Sinclair-Oconee Homes of Milledgeville, LLC, 289 Ga. App. 696, 658 S.E.2d 226 (2008).

Liability when contractor employed to serve third party. — One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by the employer's servants is subject to liability for physical harm caused by the negligence of the contractor in supplying such services to the same extent as though the employer were supplying them personally or by the employer's servants. Stewart v. Midani, 525 F. Supp. 843 (N.D. Ga. 1981).

General Consideration (Cont'd)

Principal may employ an agent and permit employment by the agent of subagents or servants to aid the agent in carrying on the business, without becoming liable for the acts of the subagents or servants. Sinclair Ref. Co. v. Veal, 51 Ga. App. 755, 181 S.E. 705 (1935).

Employer of independent contractor may be liable to employees of independent contractor for own wrongful acts. Aretz v. United States, 604 F.2d 417 (5th Cir. 1979).

Employer is not bound to supervise progress of contract work for purpose of preventing commission of collateral tort by independent contractor. — Employer has the right to presume that the independent contractor will do the work in a prudent and proper manner. Dekle v. Southern Bell Tel. & Tel. Co., 208 Ga. 254, 66 S.E.2d 218 (1951).

Employer has right to rely on presumption that contractor will discharge the contractor's legal duties owing to the contractor's employees and third persons. Georgia Power Co. v. Gillespie, 49 Ga. App. 788, 176 S.E. 786 (1934).

Employer's liability for contractor's torts limited by statute. — Georgia law imposes liability on an employer for the torts of an independent contractor only when a duty imposed by statute, and not under common law, has been violated. Uniroyal, Inc. v. Hood, 588 F.2d 454 (5th Cir. 1979).

Exceptions to the rule that only the master of a servant could be held liable for the servant's negligence are set forth in this section providing that in certain cases the employer of a contractor may be held liable for the negligence of the contractor, or the contractor's employees. Peabody Mfg. Co. v. Smith, 94 Ga. App. 240, 94 S.E.2d 156 (1956).

General rule, absent any of the exceptions embodied in this section, is that an employer of an independent contractor is not liable for the contractor's negligence. McEntyre v. Clack, 104 Ga. App. 646, 122 S.E.2d 595 (1961).

Rule in employer-independent contractor situations is one of no liability on the part of the employer, unless some of the rule's recognized exceptions as set out in this section are met. Moore v. J.C. Penney Co., 107 Ga. App. 254, 129 S.E.2d 538 (1963).

Exceptions not exclusive. — O.C.G.A. § 51-2-5 does not represent an exclusive list of exceptions to the limitation of liability contained in O.C.G.A § 51-2-4. Peachtree-Cain Co. v. McBee, 254 Ga. 91, 327 S.E.2d 188 (1985).

Contractor's liability for subcontractor. — Responsibility of a general contractor is not unlimited, but the contractor is liable for the negligence of the subcontractor under any one of the alternative circumstances set forth in this section. Harrison & Ellis, Inc. v. Nashville Milling Co., 156 Ga. App. 697, 275 S.E.2d 374 (1980).

Liability of independent contractor generally. — One who carries on an independent business and who contracts with another to perform services, being answerable only for the result and not being under the control of the employer as to the time, manner, or method of doing the work, is an independent contractor for whose torts the other contracting party is not liable except in a few stated exceptions, such as those involving a nondelegable duty ensuing from work which according to previous knowledge and experience is by its nature dangerous to others, however carefully performed. St. Paul Cos. v. Capitol Office Supply Co., 158 Ga. App. 748, 282 S.E.2d 205 (1981).

Although exculpatory clauses signed by a pilot and a safety pilot who flew an aircraft company's plane and engaged in simulated aerial combat were not against public policy under O.C.G.A. § 1-3-7, the clauses were not enforceable if the company was found to have been grossly negligent or to have engaged in willful misconduct, which was an issue to be resolved by the jury; additionally, a jury issue remained as to whether one of the pilots was an independent contractor for purposes of the company's liability under O.C.G.A. § 51-2-5(5) and, accordingly, a grant of summary judgment pursuant to O.C.G.A. § 9-11-56 to the company was error. McFann v. Sky Warriors, Inc., 268 Ga. App. 750, 603 S.E.2d 7 (2004).

Test to determine status as independent contractor. — Test to be applied in determining the relationship of the parties under the contract lies in whether the contract gives, or the employer assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract. Massee & Felton Lumber Co. v. Macon Cooperage Co., 44 Ga. App. 590, 162 S.E. 396 (1932); Yearwood v. Peabody, 45 Ga. App. 451, 164 S.E. 901 (1932); Cooper v. Dixie Constr. Co., 45 Ga. App. 420, 165 S.E. 152 (1932); Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934); Whitehall Chevrolet Co. v. Anderson, 53 Ga. App. 406, 186 S.E. 135 (1936); Fidelity & Cas. Co. v. Clements, 53 Ga. App. 622, 186 S.E. 764 (1936); De Bord v. Procter & Gamble Distrib. Co., 58 F. Supp. 157 (N.D. Ga. 1943), aff'd, 146 F.2d 54 (5th Cir. 1944); Morris v. Constitution Publishing Co., 84 Ga. App. 816, 67 S.E.2d 407 (1951); Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott, 88 Ga. App. 266, 76 S.E.2d 568 (1953); Weiss v. Kling, 96 Ga. App. 618, 101 S.E.2d 178 (1957); Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432 (1964); Savannah Elec. & Power Co. v. Edenfield, 118 Ga. App. 531, 164 S.E.2d 366 (1968); Hotel Storage, Inc. v. Fesler, 120 Ga. App. 672, 172 S.E.2d 174 (1969); Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972); Farmers Mut. Exch. of Commerce, Inc. v. Sisk, 131 Ga. App. 206, 205 S.E.2d 438 (1974); Warner v. Arnold, 133 Ga. App. 174, 210 S.E.2d 350 (1974); Buchanan v. Canada Dry Corp., 138 Ga. App. 588, 226 S.E.2d 613 (1976); Jones v. International Inventors, Inc. E., 429 F. Supp. 119 (N.D. Ga. 1976); Hodges v. Doctors Hosp., 141 Ga. App. 649, 234 S.E.2d 116 (1977); Sloan v. Hobbs Sporting Goods Shop, 145 Ga. App. 255, 243 S.E.2d 673 (1978); Walton v. United States, 484 F. Supp. 568 (S.D. Ga. 1980); Dennis v. Malt, 196 Ga. App. 263, 395 S.E.2d 894 (1990).

One who caused work to be done is liable for the acts of employees of an independent contractor since the resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work if reasonable case was omitted in the course of the performance. Georgia Power Co. v. Gillespie, 49 Ga. App. 788, 176 S.E. 786 (1934).

When one contracts with an individual exercising an independent employment, for one to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to results to be obtained, the employer is not liable for the wrongful or negligent acts of such independent contractor or the contractor's servants. This rule is applicable under the provisions of the Workmen's Compensation Act. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

Undoubtedly one cannot shield oneself under the doctrine of independent contractors by simply employing another person, and giving that person a general authority to procure others to assist in work which requires no care or skill or experience, but which is merely such as might be done by any person with sufficient physical strength. Swift & Co. v. Alston, 48 Ga. App. 649, 173 S.E. 741 (1934).

If the act or negligence which produces the injury is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or the contractor's workers the rule is that the employer is not liable. Georgia Power Co. v. Gillespie, 49 Ga. App. 788, 176 S.E. 786 (1934).

Instructions such as giving a deadline for performance or requiring that work be completed at night or before the opening of business each day do not amount to control over the time of the work because the instructions do not purport to control specifically when any particular duties were to be performed. Adcox v. Atlanta Bldg. Maint. Co., 301 Ga. App. 74, 687 S.E.2d 137 (2009).

Evidence created a genuine dispute as to whether the realtor was an independent contractor of the corporation because the Federal National Mortgage Association's (Fannie Mae) contract was with the corporation, not the realtor, and Fannie Mae's master listing agreement with the

General Consideration (Cont'd)

corporation required the corporation to exercise considerable control over the time, manner, and method of the realtor's work, mandated that the corporation and its subcontractors comply with the requirements of Fannie Mae's sales guide, and held the corporation responsible for its subcontractors and personnel. Mwangi v. Fannie Mae, 164 F. Supp. 3d 1403 (N.D. Ga. 2016).

Controlling question is not whether employer actually did assume control of manner of doing work, but whether one had right to do so under contract. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934); Savannah Elec. & Power Co. v. Edenfield, 118 Ga. App. 531, 164 S.E.2d 366 (1968); Hodges v. Doctors Hosp., 141 Ga. App. 649, 234 S.E.2d 116 (1977).

Fact that a contractor employs, controls, and assumes entire charge over the contractor's workers and that the employer neither has nor exercises any control, has, by many courts, including the courts of this state, been held practically decisive of the question of the independence of the contract. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

Main consideration in the definition of master and servant is the right of the employer to control the activities of the employee in the employment duties. Griffin v. Hardware Mut. Ins. Co., 93 Ga. App. 801, 92 S.E.2d 871 (1956).

Specialization alone is not infallible test in determining whether one is servant or independent contractor. Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott, 88 Ga. App. 266, 76 S.E.2d 568 (1953).

Employer is not liable when nuisance was created, when right to inspect work before acceptance was provided for. Louisville & N.R.R. v. Hughes, 134 Ga. 75, 67 S.E. 542 (1910).

Test under paragraph (1) of this section is would a nuisance result if work is done in the ordinary manner. Test is not would a nuisance result if the work is done in a careless and negligent manner. The nonliability of the employer would be abrogated if the law were to place an absolute duty on the employer to guard against injuries which might result from the negligence of the independent contractor in the performance of the stipulated work. Dekle v. Southern Bell Tel. & Tel. Co., 208 Ga. 254, 66 S.E.2d 218 (1951), overruled on other grounds, Peachtree-Cain Co. v. McBee, 254 Ga. 91, 327 S.E.2d 188 (1985).

Paragraph (2) of this section holds employer liable only when work to be done is inherently dangerous however carefully done, not merely because of the absence of proper care. Pressley v. Wilson, 116 Ga. App. 206, 156 S.E.2d 399 (1967).

Work involving inherently dangerous or peculiar risk of bodily harm. — When the work done is inherently dangerous, or involves peculiar risk of bodily harm to others unless special precautions are taken, this duty is nondelegable and the employer is liable for negligence of the contractor which produces a result falling short of what it was the employer's duty to attain. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

When the employer of an independent contractor procures the latter to perform an act which, according to previous knowledge and experience, is in its nature dangerous to others, however carefully performed, the negligence of the independent contractor proximately resulting in the injuries and occurring in the course of the prosecution of the execution of the act which one was employed to perform is imputable to the contractor; the duty on the part of such contractor to exercise ordinary care to prevent injury to others is nondelegable when according to previous knowledge and experience the work to be done is in its nature dangerous to others however carefully performed. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

Proprietor, landlord, owner, employer, or contractor, in dealing with an independent contractor or subcontractor, has certain duties relating to the exercise of reasonable care in work which from one's knowledge and experience is known to be intrinsically dangerous, which duties are nondelegable. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952); Georgia Indus. Realty Co. v.

Maddox, 91 Ga. App. 565, 86 S.E.2d 628 (1955).

One who employs an independent contractor to do work which the employer should recognize as likely to create, during its progress, a peculiar unreasonable risk of physical harm to others unless special precautions are taken is subject to liability for physical harm caused to them by the absence of such precautions if the employer: (a) fails to provide in the contract that the contractor shall take such precautions; or (b) fails to exercise reasonable care to provide in some other manner for the taking of such precautions. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

No liability when no inherent danger. — When the work to be done is dangerous only because of the absence of proper care, the doctrine of nonresponsibility for the negligence of the independent contractor may apply, but if the work is dangerous in itself unless reasonable care is taken to render it harmless, this doctrine does not apply. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

When the work is not inherently dangerous except as a result of the negligence of the contractor, the employer is not liable. Mason v. Gracey, 189 Ga. App. 150, 375 S.E.2d 283 (1988).

Work is not "dangerous to others however carefully performed" if danger results from doing work in unsafe manner and there is safe way of doing work. Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969), aff'd, 424 F.2d 545 (5th Cir. 1970); Horn v. C.L. Osborn Contracting Co., 591 F.2d 318 (5th Cir. 1979).

When it is undisputed that there are several safe ways of doing the work, it is not inherently dangerous, and is not "in its nature dangerous to others, however carefully performed" within the meaning of this section so as to charge an employer with the duty of providing a subcontractor's employee a safe place to work. Horn v. C.L. Osborn Contracting Co., 591 F.2d 318 (5th Cir. 1979).

Past knowledge and experience is gauge by which to measure dangerous nature of work to be done. Dekle v. Southern Bell Tel. & Tel. Co., 208 Ga. 254, 66 S.E.2d 218 (1951), overruled on other grounds, Peachtree-Cain Co. v. McBee, 254 Ga. 91, 327 S.E.2d 188 (1985).

Purpose of inherently dangerous work doctrine is to allow a plaintiff to bring employer in as another defendant, not to take the independent contractor out of the case by relieving it of various liability. Berry v. Cordell, 120 Ga. App. 844, 172 S.E.2d 848 (1969).

Paragraph (3) of this section renders employer liable for negligence of contractor when wrongful act is violation of duty imposed by express contract upon the employer. However, unless the parties stand in the relation of master and servant, the employer is not responsible for the damages occasioned by the negligent mode in which work is done. Fields v. B & B Pipeline Co., 147 Ga. App. 875, 250 S.E.2d 582 (1978); PYA/Monarch, Inc. v. Higley, 219 Ga. App. 199, 464 S.E.2d 630 (1995).

When a contract between an employer and an independent contractor incorporates federal safety regulations promulgated under the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., the employer is liable under paragraph (3) of this section for any violation of such regulations proximately causing an injury to an employee of the independent contractor. Horn v. C.L. Osborn Contracting Co., 591 F.2d 318 (5th Cir. 1979).

Paragraph (3) of this section allows injured individual to ground the individual's argument on contract provision contained in a contract between the owner and the general contractor even when the actual breach of the provision is caused by the subcontractor not a party to the contract. Horn v. C.L. Osborn Contracting Co., 591 F.2d 318 (5th Cir. 1979).

Legal duty owed to all not sufficient. — It is not sufficient, in order to bring case within exception set forth in paragraph (3), to merely allege facts which show violation of legal duty common to all people. Rodgers v. Styles, 100 Ga. App. 124, 110 S.E.2d 582 (1959).

One charged by law with performance of absolute duties cannot, by delegating performance to independent contractor, escape liability for non-

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performance. Southern Ry. v. Brooks, 112 Ga. App. 324, 145 S.E.2d 76 (1965).

In determining whether person is independent contractor or employee, courts have applied standard laid down in paragraph (5) of this section. Griffin v. Hardware Mut. Ins. Co., 93 Ga. App. 801, 92 S.E.2d 871 (1956).

Employer liable under paragraph (5) of this section when employer interferes with or assumes control of contractor. — This section provides for liability of the employer of an independent contractor for the negligence of the contractor, and apparently for the employer's own negligence also, if the employer interferes and assumes control so that an injury results which is traceable to the employer's interference. Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969), aff'd, 424 F.2d 545 (5th Cir. 1970).

Owner does not assume control of the work when the contract stipulates that the work is subject to the supervision of an architect. Lampton v. Cedartown Co., 6 Ga. App. 147, 64 S.E. 495 (1909); Malin v. City Council, 29 Ga. App. 393, 115 S.E. 504 (1923).

Terms of this section require both interference with and assumption of control of some aspect of operation to which injury is traceable. The interference and assumption of control need not be of a degree great enough to create the relation of master and servant so long as the injury is traceable to the interference. Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969), aff'd, 424 F.2d 545 (5th Cir. 1970).

Employer's right to control inferred in certain cases. — When one is employed generally to perform certain services for another, and there is no specific contract to do a certain piece of work according to specifications for a stipulated sum, it is inferable that the employer has retained the right to control the manner, method, and means of the performance of the contract, and that the employee is not an independent contractor. Swift & Co. v. Alston, 48 Ga. App. 649, 173 S.E. 741 (1934).

Ground upon which some decisions may have been said to have proceeded was that, in view of the humble industrial status of the person employed and the simple charter of the work to be done, the only admissible inference was that the employers intended to retain the right to give direction in regard to details of the work. Swift & Co. v. Alston, 48 Ga. App. 649, 173 S.E. 741 (1934).

Independent status also inferable. — If there is a specific contract to do a certain piece of work according to specifications for a stipulated sum, it is inferable that the employer has not retained the right to control the manner, method, and means of the performance of the contract, and that the employee is an independent contractor. Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

Limited control by employer not interference. — Act of the employer in identifying the work, or pointing out to the contractor where the work is to be performed, is not an interference with, or direction of or control of, the manner of the work's execution. Edmondson v. Town of Morven, 41 Ga. App. 209, 152 S.E. 280 (1930); Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952); DeLoach v. Thelen, 233 Ga. 350, 211 S.E.2d 304 (1974).

When a corporation contracts with another to do work under a contract whereby the work is to be done according to the contractor's own methods, and not subject to the employers' control or orders except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of such independent contractor or of the contractor's servants, and the mere fact that the employer may have had an agent to supervise the work for the purpose of seeing that it was done in accordance with the contract, without interfering with the methods or means of executing the work, would not amount to such control or direction of the work as would render the employer responsible. Mount v. Southern Ry., 42 Ga. App. 546, 156 S.E. 701 (1931).

Right of the employer to exercise a certain control over the work, where the control reserved does not apply to the manner of doing the details of the work, and does not thereby take the work out of

the hands of the contractor, but goes merely to a general supervision to ensure that the ends prescribed by the contract shall be substantially met, does not destroy the independence of the relation. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

There is in all agreements to do specific work for another the necessary and implied power in the person for whom the work is to be done to supervise the work, to see that the desired results are attained, and to reject all products that do not come up to specifications, but this control would not charge the relation of employer and independent contractor into that of master and servant. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

If relationship of employer and independent contractor is established, merely taking steps to see that the contractor carries out the contractor's agreement, by supervision of the intermediate results obtained, or reserving the right of dismissal on grounds of incompetence, is not such interference and assumption of control as will render the employer liable for the torts of the contractor. American Sec. Life Ins. Co. v. Gray, 89 Ga. App. 672, 80 S.E.2d 832 (1954).

When there exists only the right under the contract to superintend the work to the end that the desired results contracted for are obtained and there is no right nor assumption of the right to control the manner in which it is done the relationship is that of an independent contractor. Helms v. Young, 130 Ga. App. 344, 203 S.E.2d 253 (1973).

Contract that gave the building owner the right to ensure that the general contractor's work conformed to the contract drawings and specifications and the general right to order the work stopped or resumed, inspect its progress, or prescribe alterations and deviations, and also allowed the owner to dismiss any person who was unfit or unskilled and restricted the contractor's right to terminate the job-site supervisor without the owner's consent did not give the owner control over the work of the general contractor or subcontractors. Kraft Gen. Foods, Inc. v. Maxwell, 219 Ga. App. 211, 464 S.E.2d 639 (1995).

When injury results directly from acts which contractor agrees to and is authorized to do, person who employs contractor is equally liable to the injured party. Georgia Power Co. v. Gillespie, 49 Ga. App. 788, 176 S.E. 786 (1934).

It is true that ordinarily the principal or employer is not liable for the negligence of an independent contractor but the rule is entirely different when the principal employs an independent contractor to perform a job which is itself wrongful or ratifies the unauthorized wrong of the independent contractor. Azar v. GMAC, 134 Ga. App. 176, 213 S.E.2d 500 (1975).

Ordinarily, in order to ratify act, one must have knowledge of act. Southern Mills, Inc. v. Newton, 91 Ga. App. 738, 87 S.E.2d 109 (1955).

Mere completion not ratification. — Mere proof of the completion of the job, without any other facts in evidence, will not amount to a ratification. Hickman v. Toole, 31 Ga. App. 230, 120 S.E. 438 (1923).

Ratification of wrongful act may result from acceptance of work on the theory that acceptance shifts the responsibility for maintaining the work in the work's defective condition to the employer. Southern Mills, Inc. v. Newton, 91 Ga. App. 738, 87 S.E.2d 109 (1955); Wilmock, Inc. v. French, 185 Ga. App. 259, 363 S.E.2d 789, cert. denied, 185 Ga. App. 911, 363 S.E.2d 789 (1987); Jenkins v. Georgia Power Co., 849 F.2d 507 (11th Cir. 1988), cert. denied, 488 U.S. 1007, 109 S. Ct. 789, 102 L. Ed. 2d 780 (1989).

Acceptance of benefits will not ratify independent collateral tort committed in procuring the benefit as the ratification must be, not of the contract, but of the unauthorized wrong. Southern Mills, Inc. v. Newton, 91 Ga. App. 738, 87 S.E.2d 109 (1955).

Issues of fact over ratification. — Trial court erred in granting summary judgment when issues of fact existed over the company's and general contractor's knowledge of the condition left by independent contractor and over their acceptance of that condition. Considering their duty to maintain or leave the premises in a safe condition for invitees, along with the fact that the defective condition was

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allowed to exist for nine months, it could be argued that the evidence left little room for concluding anything other than a ratification of the independent contractor's work. Bodenheimer v. Southern Bell Tel. & Tel. Co., 209 Ga. App. 248, 433 S.E.2d 75 (1993).

Contractor discharged by acceptance of work. — Independent contractor is not liable for injuries to a third person, occurring after the owner has accepted the work, though the injury results from the contractor's failure to properly carry out the contractor's contract. Young v. Smith & Kelly Co., 124 Ga. 475, 52 S.E. 765, 110 Am. St. R. 186, 4 Ann. Cas. 226 (1905).

If the work performed by the contractor is not shown to come within one of the exceptions to the general rule, when the work is finished by the contractor and accepted by the contractor's employer, the liability of the former generally ceases and the employer becomes answerable for damages which may thereafter accrue from the defective conditions of the work. Derryberry v. Robinson, 154 Ga. App. 694, 269 S.E.2d 525 (1980).

General rule is that the contractor is not liable to third persons for damages or injuries subsequently suffered by reason of the condition of the work, even though the contractor was negligent in carrying out the contract, at least, if the defect is not hidden but readily observable on reasonable inspection. Derryberry v. Robinson, 154 Ga. App. 694, 269 S.E.2d 525 (1980).

Apparent agency. — Although a hospital may contract with emergency room physicians, characterizing the physicians as independent contractors, if the hospital cloaks the physicians with the vestments of agents and patients rely upon such apparent agency, the physicians may be held liable as employees. Stewart v. Midani, 525 F. Supp. 843 (N.D. Ga. 1981).

Providing auto and workers' compensation insurance and complying with safety rules insufficient to impose liability. — When the employer has no contract right to and had not assumed control of the time, the manner, and the method of performance of the employee, a requirement that the employer purchase auto insurance and workers' compensation and comply with safety rules and regulations for the benefit of the employee did not bring the employer within the doctrine of respondeat superior. Slater v. Canal Wood Corp., 178 Ga. App. 877, 345 S.E.2d 71 (1986).

Proof of independent contractor status. — When there is uncontradicted testimony that the employer did or did not have the right to any control over the manner of doing the details of the work to be performed, such testimony prevails against any antagonistic evidence that may be introduced. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

Jury instructions. — Trial court erred in charging the jury in the following language: "I charge you members of the jury, that a general contractor is responsible for whatever his subcontractor might do." Harrison & Ellis, Inc. v. Nashville Milling Co., 156 Ga. App. 697, 275 S.E.2d 374 (1980).

Control presents jury question. — It is a question for the jury to determine whether the defendant retained, or interfered and assumed control of the work. Quinan v. Standard Fuel Supply Co., 25 Ga. App. 47, 102 S.E. 543 (1920).

Cited in Louisville & N.R.R. v. Hughes, 143 Ga. 206, 84 S.E. 451 (1915); International Agric. Corp. v. Suber, 24 Ga. App. 445, 101 S.E. 300 (1919); Buffalo Forge Co. v. Southern Ry., 43 Ga. App. 445, 159 S.E. 301 (1931); De Bord v. Procter & Gamble Distrib. Co., 58 F. Supp. 157 (N.D. Ga. 1943); Gulf Life Ins. Co. v. McDaniel, 75 Ga. App. 549, 43 S.E.2d 784 (1947); Southern Mills, Inc. v. Newton, 91 Ga. App. 738, 87 S.E.2d 109 (1955); City of Villa Rica v. Couch, 281 F.2d 284 (5th Cir. 1960); Newsome v. Dunn, 103 Ga. App. 656, 120 S.E.2d 205 (1961); Webb v. Wright, 103 Ga. App. 776, 120 S.E.2d 806 (1961); Noxon Rug Mills, Inc. v. Smith, 220 Ga. 291, 138 S.E.2d 569 (1964); Brunswick Pulp & Paper Co. v. Dowling, 111 Ga. App. 123, 140 S.E.2d 912 (1965); Townsend & Ghegan Enters. v. W.R. Bean & Son, 117 Ga. App. 109, 159 S.E.2d 776 (1968); Millard v. AAA Electrical Contractors & Eng'rs, 119 Ga. App. 548, 167

S.E.2d 679 (1969); Scarboro Enters., Inc. v. Hirsh, 119 Ga. App. 866, 169 S.E.2d 182 (1969); Herndon v. Aultman-Beasley, Inc., 127 Ga. App. 743, 195 S.E.2d 250 (1972); Neda Constr. Co. v. Jenkins, 137 Ga. App. 344, 223 S.E.2d 732 (1976); Allen v. Cooper, 145 Ga. App. 555, 244 S.E.2d 98 (1978); Blackwell v. Taylor, 497 F. Supp. 351 (M.D. Ga. 1980); Johnson v. Fowler Elec. Co., 157 Ga. App. 319, 277 S.E.2d 312 (1981); Poppell v. Georgia Power Co., 157 Ga. App. 488, 277 S.E.2d 777 (1981); United States v. Aretz, 248 Ga. 19, 280 S.E.2d 345 (1981); American Cyanamid Co. v. Ring, 158 Ga. App. 525, 281 S.E.2d 247 (1981); Paul v. Jones, 160 Ga. App. 671, 288 S.E.2d 13 (1981); McGuire v. Ford Motor Credit Co., 162 Ga. App. 312, 290 S.E.2d 487 (1982); Financial Bldg. Consultants, Inc. v. Guillebeau, Britt & Waldrop, 163 Ga. App. 607, 295 S.E.2d 355 (1982); Brewer v. Williams, 167 Ga. App. 151, 305 S.E.2d 891 (1983); Deitrich v. Trust Co. Bank, 179 Ga. App. 330, 346 S.E.2d 107 (1986); Caruso v. Aetna Cas. & Sur. Co., 181 Ga. App. 829, 354 S.E.2d 18 (1987); Spell v. Port City Adhesives, Inc., 183 Ga. App. 816, 360 S.E.2d 63 (1987); Jenkins v. Georgia Power Co., 668 F. Supp. 1574 (N.D. Ga. 1987); BellSouth Telecommunications, Inc. v. Helton, 215 Ga. App. 435, 451 S.E.2d 76 (1994); Rice v. Delta Air Lines, 217 Ga. App. 452, 458 S.E.2d 359 (1995); Owens v. Barclays American/Mortgage Corp., 218 Ga. App. 160, 460 S.E.2d 835 (1995); Finley v. Lehman, 218 Ga. App. 789, 463 S.E.2d 709 (1995); Stanley v. Fiber Transp., Inc., 221 Ga. App. 171, 470 S.E.2d 767 (1996); Lane v. Montgomery Elevator Co., 225 Ga. App. 523, 484 S.E.2d 249 (1997); Allen v. King Plow Co., 227 Ga. App. 795, 490 S.E.2d 457 (1997); Bell S. Telecommunications, Inc. v. Widner, 229 Ga. App. 634, 495 S.E.2d 52 (1998); Johnson v. Kimberly Clark, 233 Ga. App. 508, 504 S.E.2d 536 (1998); Grey v. Milliken & Co., 245 Ga. App. 804, 539 S.E.2d 186 (2000); Mitchell v. Jones, 247 Ga. App. 113, 541 S.E.2d 103 (2000); Enviromediation Servs., L.L.C. v. Boatwright, 256 Ga. App. 200, 568 S.E.2d 117 (2002); McLaine v. McLeod, 291 Ga. App. 335, 661 S.E.2d 695 (2008); O'Dell v. Mahoney, 324 Ga. App. 360, 750 S.E.2d 689 (2013); Scapa Dryer Fabrics, Inc. v. Knight, 332 Ga. App. 82, 770 S.E.2d 334 (2015).

Applicability to Other Specific Cases

Automobiles. — It is nowhere held that the negligence of a driver is ipso facto imputable to the owner simply because the owner may be a passenger at the time of the collision. At most there is only a presumption, or inference, in the absence of evidence to the contrary, that the owner has the right to control the driver as the owner's agent or servant and is therefore liable for the driver's negligence under the doctrine of respondeat superior, or is therefore chargeable with the driver's negligence in the owner's action against a third party. Floyd v. Colonial Stores, Inc., 121 Ga. App. 852, 176 S.E.2d 111 (1970).

When uncontradicted and unimpeached evidence is produced as to the real facts, the inference that the owner of a car controls the driver simply because the owner is a passenger in the car disappears and does not create a conflict in the evidence so as to require submission to a jury. Floyd v. Colonial Stores, Inc., 121 Ga. App. 852, 176 S.E.2d 111 (1970).

Joint interest with another in the object and purpose of an automobile trip is not enough to render one liable for the negligent acts of the other in the operation of the automobile. Floyd v. Colonial Stores, Inc., 121 Ga. App. 852, 176 S.E.2d 111 (1970).

Auto accidents. — Trial court erred in granting the employers' summary judgment in a driver's action to recover damages for injuries the driver sustained in a vehicle collision with an employee because there was a genuine issue of material fact as to whether the degree of control exercised by the employers over the employee's work was such that the employers could be held liable for the employee's alleged negligence against the driver; a genuine issue of material fact remained as to whether, at the time of the collision with the driver, the employee was acting in furtherance of the employers' business and within the scope of the business. Broadnax v. Daniel Custom Constr., LLC, 315 Ga. App. 291, 726 S.E.2d 770 (2012).

Motorcycle accident. — Trial court erred by granting summary judgment to

Applicability to Other Specific Cases (Cont'd)

the defendant on the plaintiffs' respondeat superior claim because the record revealed genuine issues of disputed facts about whether the driver who hit their motorcycle was the defendant's temporary employee or an independent contractor as, while the defendant did not pay the driver directly or choose break times, there was also evidence to support the conclusion that the defendant maintained sufficient control over the driver, such as instructing the driver on the time, method, and manner of the daily drive. Boatner v. Show Media, LLC, 331 Ga. App. 332, 771 S.E.2d 40 (2015).

Automotive repairs. — There was no evidence that the car owner retained the right to direct or control the time and manner of executing the work to be done upon the owner's truck, or that the owner interfered and assumed control of any part of the work, when although the evidence showed that the owner told the garage owner to fix the carburetor and to put the truck on the street when the garage got through with it, these were instructions as to the end results desired, and not as to the means or manner of accomplishing these results. Strickland v. Baker, 91 Ga. App. 97, 84 S.E.2d 851 (1954).

Operation of a taxicab on public streets by a mechanic for the purpose of testing it in connection with maintenance required by a municipal ordinance was not a violation of any duty of the owner-operator arising from public ordinances, such as would subject the owner to liability for injuries caused by the wrongful act of the mechanic, under the provisions of this section. Pressley v. Wilson, 116 Ga. App. 226, 156 S.E.2d 398 (1967).

Automobile repossession. — Automobile repossession business and its owner were not liable for injuries arising from the repossession of a van by an independent contractor since there was no control over the time or manner of the repossession and there was no ratification of the wrongful act leading to the accident. Clayton v. Edwards, 225 Ga. App. 141, 483 S.E.2d 111 (1997).

Trial court erred in granting summary judgment in favor of a creditor as to whether it could be held vicariously liable for an independent contractor's acts in attempting to repossess a debtor's car because the creditor had a non-delegable statutory duty under O.C.G.A. § 11-9-609 to not breach the peace in repossessing the car, and if the contractor's attempt to repossess the car was in violation of the statute, the creditor would be chargeable with that conduct since it was done in violation of a duty imposed upon it by statute; the creditor's duty was personal and non-delegable, and a recovery based upon a breach of that duty would not constitute imposition of liability without fault. Lewis v. Nicholas Fin., Inc., 300 Ga. App. 888, 686 S.E.2d 468 (2009).

Bulldozing for property owner. — Bulldozer operator was not a borrowed servant but more like an independent contractor, when although a property owner had asked the operator to do $200 worth of bulldozing for which the owner would pay the operator's employer, the operator was not subject to the owner's orders and control and was not liable to be discharged by the owner for misconduct or disobedience to orders. Wilson v. McCullough, 180 Ga. App. 579, 349 S.E.2d 751 (1986).

Trespasser who employed two workers to cut and remove trees from the trespasser's property was jointly liable for the two workers wrongfully removing timber from the property owners' land as the trespasser erroneously pointed out the property line to the two workers, permitted the two workers to cut trees on the property owners' land when the trespasser knew the two workers should not be doing so, and ratified the two workers' misconduct by accepting and retaining payment for the wrongfully cut timber. Jones v. Ceniza, 257 Ga. App. 806, 572 S.E.2d 362 (2002).

Excavation. — If the excavation for a building is so negligently done as to injure a structure on adjoining premises, the owner will not be liable provided the plans and specifications furnished to the contractor were sufficient to secure a safe construction of the building, and provided the erection of the building was not, in its nature, dangerous to the adjacent prop-

erty. Georgia Power Co. v. Gillespie, 49 Ga. App. 788, 176 S.E. 786 (1934).

Utility provider to installer. — In a personal injury action against a utility and the utility's independent contractor, the trial court properly granted summary judgment against a cable installer, finding that: (1) the utility was not vicariously liable to the installer for the allegedly negligent acts of the contractor; (2) the utility's right to inspect the work did not render the utility liable for the utility's contractor's negligence, as that right was intended for the limited purpose of making sure the contractor competently carried out the terms of the contract; (3) the utility was not liable for the utility's failure to flag a power line trench in which the installer fell and was injured as surface markings showing the path of the trench would not have informed the installer of the danger, and the installer was not injured as a result of excavating or blasting; and (4) the High-voltage Safety Act, O.C.G.A. § 46-3-30 et seq., did not apply to afford the installer a remedy. Perry v. Georgia Power Co., 278 Ga. App. 759, 629 S.E.2d 588 (2006).

Applicability to Construction

Brushing land. — Summary judgment was properly entered for a realtor and a developer as to a landowner's claim that the realtor and the developer were liable under O.C.G.A. §§ 51-2-4 and 51-2-5 for failing to ascertain and communicate to an independent contractor hired by the developer to brush the realtor's lot the location of the boundary between the realtor's lot and the landowner's lot; the developer testified that the developer used a creek and a transformer as landmarks for the boundary line in instructing the contractor, and the landowner did not challenge the use of the landmarks. Sorrow v. Hadaway, 269 Ga. App. 446, 604 S.E.2d 197 (2004).

Crop dusting. — Aerial application of chemicals to open land involved sufficient inherent danger that it fell within the scope of O.C.G.A. § 51-2-5(2) such that an employer could be liable for the negligence of an independent contractor the employer hired to perform crop dusting work when chemicals drifted onto a neighboring crop, damaging the crop. Yancey v. Watkins, 308 Ga. App. 695, 708 S.E.2d 539 (2011).

Carriers. — When a contract was on the contract's face one between a brick manufacturer and an independent contractor engaged in an independent and separate trucking business, the evidence did not authorize an inference that the truck driver was an agent or employee of the brick company since there was no evidence to show that the company retained the right to direct or control the time and manner of executing the work or that it interfered and assumed control. Jocie Motor Lines v. Burns Brick Co., 98 Ga. App. 404, 105 S.E.2d 780 (1958).

Mill owner not liable for contractor's negligence. — General contractor's worker was injured in a crane accident at a mill. The mill owner was not liable for the contractor's negligence under O.C.G.A. § 51-2-5(4) based on a violation of statutes as the contractor, not the owner, was the worker's "employer" for purposes of 29 C.F.R. §§ 1910.179(n)(3)(x) and 1926.550(a)(19), which obliged an "employer" to require a crane operator not to lift loads over employees. Furthermore, the mill owner was not liable under paragraph (2) based on the inherently dangerous nature of the work since there was no evidence the mill owner knew the activity was inherently dangerous based on the owner's prior knowledge and experience. Boyd v. Packaging Corp. of Am., 292 Ga. App. 281, 664 S.E.2d 277 (2008).

Pollution of watercourse during construction. — Owner of premises is not liable when a contractor polluted a watercourse while engaged in making bricks. Sharp & Co. v. Parker, 108 Ga. 805, 34 S.E. 135 (1899).

Latent or concealed hazards. — Owner of premises who retains control thereof will be held liable to the workers of a contractor when the hazard is latent or concealed. Huey v. City of Atlanta, 8 Ga. App. 597, 70 S.E. 71 (1911); Central of Ga. Ry. v. Lawley, 33 Ga. App. 375, 126 S.E. 273, cert. denied, 33 Ga. App. 828 (1925).

Failure to seek bond. — When the employer was a municipal corporation which had employed an independent contractor, the fact that no legally enforceable contract existed between the employer

Applicability to Construction (Cont'd)

and the contractor by reason of failure of the contractor to give bond for the faithful performance of the contract did not operate to alter the status of the relationship between the parties as respects the nature and character of the work performed or the character and conduct of the employer with reference to the operation of the work, and the city therefore was not, by reason of the failure of the contractor to execute the required bond, liable for any damage resulting from negligence in the performance of the work. Edmondson v. Town of Morven, 41 Ga. App. 209, 152 S.E. 280 (1930).

Negligence in machine operation. — When the digging of a well, with the use of an engine apparatus, is in close proximity to an inflammable frame building, the employer of the independent contractor is not liable for damages sustained as a result of the ignition of the building from sparks emitted as the result of the negligence of the defendant in operating the engine. Edmondson v. Town of Morven, 41 Ga. App. 209, 152 S.E. 280 (1930).

The digging of a well which requires the use of apparatus consisting of a steam engine in which fire is used to generate steam is not work which "according to previous knowledge and experience … is in its nature dangerous" as an instrumentality likely to set fire to the neighboring buildings "however carefully" the work is performed, when, by the use of an engine properly equipped and properly operated, the danger from the spread of fire from the operation of the engine can be eliminated. Edmondson v. Town of Morven, 41 Ga. App. 209, 152 S.E. 280 (1930).

Duty to safeguard during construction. — If the owner of adjacent property merely hires an independent contractor to make excavations adjacent to the wall of the owner's neighbor's building without providing in any way for safeguarding such walls, and such contractor carries out the directions of the contractor's employer, such employer will be liable for any injury resulting from the work carried out in the manner directed by the employer. On the other hand, if the plans and specifications provided that proper and necessary precautions be taken to prevent injury and such independent contractor failed to obey such instructions, the employer would not be liable. Georgia Power Co. v. Gillespie, 49 Ga. App. 788, 176 S.E. 786 (1934).

Erection of scaffolding. — In the construction of a tall office building the owner would not be liable for the failure of the independent contractor to erect safe scaffolding in the construction of such building, although both the owner and the independent contractor knew that the failure so to do was necessarily dangerous to employees working thereon. Georgia Power Co. v. Gillespie, 49 Ga. App. 788, 176 S.E. 786 (1934).

Contracting by power company for installation of power lines. — Electricity is a substance so inherently dangerous that a power company may not contract for the building of power lines with an independent contractor and absolve itself from liability for an injury which occurs solely because of the negligence of such independent contractor in the doing of the work. Georgia Power Co. v. Gillespie, 49 Ga. App. 788, 176 S.E. 786 (1934).

Removal of obstruction not within contracted work. — When an independent contractor in doing repair work for an owner causes an obstruction on the sidewalk or in the street adjoining the property being repaired, the owner by accepting the work done on the owner's own property does not thereby assume liability for the failure of the independent contractor in failing to remove in a reasonable time such obstruction, it appearing that such obstruction is not connected with nor does it form any part of the work accepted by the owner on the owner's own property. Goldman v. Clisby, 62 Ga. App. 516, 8 S.E.2d 701 (1940).

Modifications to elevator. — Theory that the plaintiff was an invitee of the elevator company, employed to make alterations on the elevator because the plaintiff was an employee and invitee of the lessee would not be sustainable since if the elevator company had exclusive control of the elevators, the plaintiff as an employee of the lessee would not have occupied the status of invitee as to the

elevator either as to the elevator company or the lessee, in the absence of allegations showing an authorized invitation otherwise. Callaham v. Carlson, 85 Ga. App. 4, 67 S.E.2d 726 (1951).

Propane tanks. — The mere fact that an individual was present and directed where the propane tank was to be put would not make the individual liable for the tank's dropping and resultant explosion as an employer of the independent contractor under the fifth exception in this section on the theory that the individual interfered and assumed control, for an employer has the right to supervise the work to the extent of seeing that the results are in conformity with the specifications. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

Role of contractor in selecting subcontractors. — When the contractor had no initial or final control over the selection of subcontractors, so that both the contractor and subcontractor occupied the relationship of contractors to the landowner, only the subcontractor-employer of the welder who caused the fire could be held liable for negligence even though the contract between the landowner and the contractor stated that the contractor would have full directing authority over the execution of the contract. Peabody Mfg. Co. v. Smith, 94 Ga. App. 240, 94 S.E.2d 156 (1956).

Building of bridge. — When a prime contractor who is charged with constructing a bridge and a portion of a highway employs another company to build the bridge, although it may in general direct and supervise the work in accordance with the terms of its contract, the relationship insofar as building the bridge is concerned is not solely that of master and servant, and the subcontractor who is actually engaged in erecting the bridge must be considered to be in control of the construction to the extent of exercising ordinary care to avoid injuring others thereby; the prime contractor had a general duty respecting the entire project to warn the traveling public of dangers incident thereto and the subcontractor also had a duty to avoid injuring others in the construction work actually undertaken by the subcontractor. Holland v. Phillips, 94 Ga. App. 361, 94 S.E.2d 503 (1956).

Construction of public highways. — When one company enters into a contract with the State Highway Department (now Department of Transportation) to do construction work on the public highways of this state and lets out a part of the contract to another company, the work to be under the direction and supervision of the former, the relation of contractor and subcontractor exists between the two and they may be jointly liable for injury resulting from negligence. Holland v. Phillips, 94 Ga. App. 361, 94 S.E.2d 503 (1956).

Construction of building. — When the owner of premises employs a general contractor to construct a dwelling house upon the premises, and places the general contractor in possession and control of the premises, a subcontractor whom the general contractor employs to do certain work connected with the construction of the building is an invitee of the general contractor to whom the latter owes the duty of ordinary care. Braun v. Wright, 100 Ga. App. 295, 111 S.E.2d 100 (1959).

Builder-sellers have a right and a duty to direct and control the work of those employed by them to the extent that an ordinarily prudent builder would exercise such direction and control to build a fit and workmanlike structure. Even assuming the buyers, in the exercise of ordinary care, would not have known of the latent construction defect, the issue to be determined is whether such defects either were known to the builder-seller or in the exercise of ordinary care would have been discovered by the builder-seller. Seely v. Loyd H. Johnson Constr. Co., 220 Ga. App. 719, 470 S.E.2d 283 (1996).

Independent contractors. — Cases which have construed this section have emphasized the word "express" and the necessity that as between an independent contractor and subcontractors, the contractual obligations should be placed upon the particular employer as opposed to any independent contractor since the contractual duty could be discharged in any effective manner, and the act of a subcontractor in negligently damaging the property would be a collateral tort for which the prime contractor would not be liable because this would not be a violation of an

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express contract obligation falling within the exception provided in this section. Fields v. B & B Pipeline Co., 147 Ga. App. 875, 250 S.E.2d 582 (1978).

Construction of public highways. — Petition for wrongful death of the plaintiff's wife and mother, who were riding in an automobile that was struck by road machinery operated by the subcontractor's employee, which alleged that the subcontractor had surrendered to the contractor the right to direct and control the manner in which the machinery was to be operated by the subcontractor's employee, failed to state a cause of action against the subcontractor due to this lack of control. Ed Smith & Sons v. Mathis, 217 Ga. 354, 122 S.E.2d 97 (1961).

Insurance company exercising control over repairs. — Since an insurance company did not retain or exercise any right of control over the time, manner or method of performance of a repair contractor's work, the insurance company could not be held vicariously liable for the contractor's alleged negligence under the doctrine of respondeat superior. Carter v. Allstate Ins. Co., 197 Ga. App. 738, 399 S.E.2d 500 (1990).

Duty owed to contractor and subcontractor. — Under Georgia law, the United States owed the contractor's employee a duty to exercise ordinary care in carrying out the contractor's safety responsibilities for the construction project at an Air Force base, even though a subcontractor created the dangerous scaffold situation. Phillips v. United States, 956 F.2d 1071 (11th Cir. 1992).

Assumption of duty of safety. — Property owner was not liable for injuries sustained by the subcontractor's employee since the independent contractor alone had assumed the duty of providing for the safety of the contractor's workers. Englehart v. Oki Am., Inc., 209 Ga. App. 151, 433 S.E.2d 331 (1993).

Regulatory compliance as meeting standard. — Since the employer's contract mandated compliance with regulations of OSHA and safety standards of Associated General Contractors, and there was evidence that the employer was aware that the contractor was in violation of such regulations and standards, a material issue of fact existed as to whether the employer ratified the conduct of the contractor and grant of summary judgment was error. Styles v. Mobil Oil Corp., 218 Ga. App. 48, 459 S.E.2d 578 (1995).

Trench dug across public road. — After the plaintiff's car fell into a trench that had been dug across a public road to lay a telephone cable, the defendant construction contractor could not be held liable for the negligence of an independent contractor based on an implied duty to restore the road to the road's original condition after the utility work was completed or based on a ratification of the wrong of the independent contractor. Widner v. Brookins, Inc., 236 Ga. App. 563, 512 S.E.2d 405 (1999).

Retailer had no control over subcontractor. — When an independent subcontractor sued a retailer for injuries occurring while the subcontractor was doing work on the retailer's premises, the retailer was entitled to a directed verdict in its favor as the retailer exercised no control over the subcontractor's work, and any control over that work was contractually ceded to the subcontractor and to the contractor who hired the subcontractor. Neiman-Marcus Group, Inc. v. Dufour, 268 Ga. App. 104, 601 S.E.2d 375 (2004).

Realtor and developer. — Summary judgment was properly entered for a realtor and a developer as to a landowner's claim under O.C.G.A. § 51-2-5(1) that the developer hired an independent contractor to undertake activities that were wrongful in that the contractor had no right to enter the landowner's land; the realtor did not hire the contractor, and the developer hired the contractor to brush the realtor's property, which was not wrongful in itself. Sorrow v. Hadaway, 269 Ga. App. 446, 604 S.E.2d 197 (2004).

Repairs to roof. — In a premises liability action filed by a repairman arising from injuries suffered while repairing a roof, because the trial court properly found that an out-of-possession landlord and its tenants who surrendered control of the owned premises did not ratify the repairman's employer's actions in not providing safety equipment, and did not have

superior knowledge of the dangers involved, the out-of-possession landlord and its tenants were properly granted summary judgment in the repairman's premises liability action. Saunders v. Indus. Metals & Surplus, Inc., 285 Ga. App. 415, 646 S.E.2d 294 (2007), cert. denied, 2007 Ga. LEXIS 624 (Ga. 2007).

Work for utility. — The Department of Transportation's Utility Accommodation Policy and Standards did not impose the nondelegable duties of an applicant for an utility encroachment permit upon contractors doing work for the applicant; thus, in a personal injury suit, a contractor and a subcontractor doing work for a utility were not liable under O.C.G.A. § 51-2-5(4) for the actions of an independent contractor that was trimming trees for the subcontractor. Watkins v. First South Util. Constr., Inc., 284 Ga. App. 547, 644 S.E.2d 449 (2007).

Regulatory compliance as meeting standard. — Subcontractor's agreement to comply with "OSHA, state and local" safety regulations did not expressly impose a duty upon the subcontractor to ensure that safety devices were in place, as was required for it to be held liable under O.C.G.A. § 51-2-5(3) for the negligence of an independent contractor doing work for the subcontractor. Watkins v. First South Util. Constr., Inc., 284 Ga. App. 547, 644 S.E.2d 449 (2007).

Damages from carbon monoxide poisoning. — Trial court erred in granting an apartment owner and a manager summary judgment in a tenant's action to recover damages for the personal injuries the tenant sustained from carbon-monoxide poisoning because the owner and manager could be liable for the actions of a construction company's workers even if the company, which was orally hired to assist in the clean up of the owner's apartments, was an independent contractor; the evidence showed that a temporary tarp repair the workers performed was completed so negligently that a defect in the premises was created, and some evidence showed that the company and its workers were not independent contractors. In placing a temporary tarp on the roof of the tenant's apartment, the company was performing the duty of the owner and manager to repair the premises by stopping a leak until a more permanent repair could be effected, and no written or oral contract outlined the company's precise responsibilities, setting forth specifications as to the work to be performed, nor did any contract identify a stipulated sum. Atkins v. MRP Park Lake, L. P., 301 Ga. App. 275, 687 S.E.2d 215 (2009).

Control of work. — Because an employer, as bailor, sent the employer's own employee with the thing bailed, a tractor with attached trash trailer, under O.C.G.A. § 44-12-62(b), a contractor, as the hirer, was liable only for the consequences of its own directions or for its gross negligence; the trial court erred in concluding that the contractor was entitled to summary judgment on the basis that the employee was not its borrowed servant because the evidence presented at least a factual issue regarding whether the employee was the contractor's borrowed servant since there was evidence that the contractor alone supervised the employee's work hauling debris, that the contractor controlled the employee's schedule for each day, and that the contractor dictated which landfill would receive the debris and when a load was ready. Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 709 S.E.2d 324 (2011).

Impact of stranger to contract. — In a construction site delivery driver's claims against a general contractor and a subcontractor arising out of injuries that occurred when the driver was struck by the subcontractor's concrete-filled hose on the construction site, the contractor was not liable for the subcontractor's negligence because, although the contractor's contract with the owner made it responsible for the subcontractors' work, the driver was a stranger to the contract and could not enforce the contract. Card v. Dublin Constr. Co., 337 Ga. App. 804, 788 S.E.2d 845 (2016), cert. denied, 2017 Ga. LEXIS 151 (Ga. 2017); cert. denied, 2017 Ga. LEXIS 140 (Ga. 2017).

Installation services by an independent contractor. — Even if privity of contract existed, an injured party's claims failed, because the party neglected to point out an express contractual provision

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that would cast liability on either the supplier or distributor of an x-ray machine which allegedly caused the injuries due to poor installation by an installer, who was an independent contractor of the distributor. Kidd v. Dentsply Int'l, Inc., 278 Ga. App. 346, 629 S.E.2d 58 (2006).

In a case in which an individual sought to impose vicarious liability on a company for the installation of the company's cable line by a subcontractor, the individual's nuisance allegations, as they appeared in the individual's proposed amendment focused on the improper installation of the cable line, rather than on whether the cable line, if installed correctly, would pose a nuisance, the nuisance allegations did not fit within the exception to O.C.G.A. § 51-2-5(1), and the individual could not amend the complaint to add that claim against a company; that part of the proposed amendment would be futile. Whitley v. Comcast of Georgia, No. 3:05-cv-82 (CAR), 2007 U.S. Dist. LEXIS 26071 (M.D. Ga. Apr. 9, 2007).

Welding. — No Georgia authority existed finding that welding was an inherently dangerous activity; therefore, there was no error in the trial court's grant of summary judgment to the home center company on the homeowners' negligence claim that welding was an inherently dangerous activity for which the company remained responsible under the exception of O.C.G.A. § 51-2-5(2). Luther v. Wayne Frier Home Ctr. of Tifton, Inc., 264 Ga. App. 827, 592 S.E.2d 470 (2003).

Slip and fall. — Defendant was not entitled to immunity in a slip and fall case, notwithstanding its assertion that the fall was caused by the actions of an independent contractor, as the duty imposed on owner/occupiers to exercise ordinary care in keeping the premises and approaches safe is statutory; therefore, the defendant was liable for the acts and omissions of its independent contractor. Kroger Co. v. Strickland, 248 Ga. App. 613, 548 S.E.2d 375 (2001).

Injury at store. — Because no evidence was presented that a hardware store had actual knowledge that a hazard existed, summary judgment for the hardware store was proper in a claim for damages arising from an incident when a box fell on a customer at the hardware store. Green v. Home Depot U.S.A., Inc., 277 Ga. App. 779, 627 S.E.2d 836 (2006).

State contractors. — Department of Veterans Services does not have a non-delegable duty to care for its veterans and it properly contracted with an independent contractor to run the State War Veterans' Home; thus, in an action based on negligent acts of the contractor resulting in the death of a veteran at the Home, the trial court erred in concluding that the Department could not avail itself of the independent contractor defense. Department of Veterans Servs. v. Robinson, 244 Ga. App. 878, 536 S.E.2d 617 (2000).

Trial court, in a wrongful death suit, erred by denying the motions of the Georgia Department of Human Resources and the Georgia Department of Juvenile Justice to dismiss and for a directed verdict, following the death of a juvenile the agencies placed in a corporate child care institution as the two agencies were immune from suit under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., and there was no waiver of sovereign immunity by the state. Ga. Dep't of Human Res. v. Johnson, 264 Ga. App. 730, 592 S.E.2d 124 (2003).

Plaintiff did not have grounds for holding the Georgia Department of Human Resources and the Department of Juvenile Justice liable for the electrocution death of the plaintiff's child, which was caused by an employee for an independent contractor for the state, in part, because O.C.G.A. § 51-2-5 did not provide grounds for waiver of the state agencies' sovereign immunity. Johnson v. Ga. Dep't of Human Res., 278 Ga. 714, 606 S.E.2d 270 (2004).

Dismantling of elevator was not inherently dangerous since evidence showed that the elevator could have been safely dismantled with the use of additional cranes and structural bracing. Brooks v. Oil-Dri Corp., 205 Ga. App. 214, 422 S.E.2d 22, cert. denied, 205 Ga. App. 899, 422 S.E.2d 22 (1992).

Eminent domain. — Whether the statute embodied in former Code 1933, §§ 105-501 and 105-502 (see now O.C.G.A. §§ 51-2-4 and 51-2-5) was exhaustive as to

exceptions to the rule of nonliability of an employer for the acts of an independent contractor, it must yield to and cannot control the constitutional duty imposed upon a condemnor to pay compensation for the taking or damaging of private property for public purposes whether or not such taking or damaging was done by an independent contractor hired by the condemnor. Fulton County v. Woodside, 223 Ga. 316, 155 S.E.2d 404 (1967); Georgia Power Co. v. Jones, 122 Ga. App. 614, 178 S.E.2d 265 (1970).

Equipment leasing. — In a suit for damages to a crane leased to defendant corporation's wholly owned subsidiary, the complaint alleging that the subsidiary was employed by the defendant corporation as servant and agent at the time the crane was damaged was good against a general demurrer (now motion to dismiss). Condenser Serv. & Eng'r Co. v. Brunswick Port Auth., 87 Ga. App. 469, 74 S.E.2d 398 (1953).

Factory. — Factory was not liable for the independent contractor's unauthorized, unsupervised use of a forklift to raise the defendant to a higher level for the purpose of repairing the factory fan, resulting in the employee's falling from the forklift and sustaining injury. Murphy v. Blue Bird Body Co., 207 Ga. App. 853, 429 S.E.2d 530 (1993).

Worker's claim under O.C.G.A. § 51-2-5(4) against a tire manufacturing plant, for which the worker did independent contractor work pursuant to an agreement between the plant and the worker's employer, failed because the plant had no statutory or contractual duty to maintain a forklift or to ensure that the employer properly maintained it and, accordingly, the trial court should have granted the plant's motion for judgment notwithstanding the verdict, pursuant to O.C.G.A. § 9-11-50; the forklift jumped backwards and due to a malfunctioning emergency brake, the transformer that it was carrying dropped and crushed the worker's arm, and it was noted that the forklift was purchased by the employer but was delivered directly to the plant and remained on those premises. Cooper Tire & Rubber Co. v. Merritt, 271 Ga. App. 16, 608 S.E.2d 714 (2004).

Floor cleaning service. — Even though a floor cleaning service was an independent contractor of defendant grocery store, because the store was open for business with employees present during the time the service worked on the floor, material issues of fact existed as to whether the store had turned full possession and control of the floor over to the service and whether warning signs were posted. Feggans v. Kroger Co., 223 Ga. App. 47, 476 S.E.2d 822 (1996).

Janitorial service. — Trial court did not err in granting a janitorial services contractor summary judgment in an employee's suit to recover damages for injuries sustained when the employee slipped and fell on ice in the employer's parking lot because, under O.C.G.A. § 51-2-5(5), the contractor's indication to a subcontractor that mop water could be discarded in back of the building was insufficient to constitute an assumption of control by the contractor so as to create the relation of master and servant or so that an injury resulted that was traceable to its interference but was no more than a general indication that the mop water could be discarded in back of the building, and the contractor's willingness to supply materials to the subcontractor did not intrude into the subcontractor's ability to control the daily operations of its business; the agreement between the contractor and subcontractor provided for an independent contractor relationship because the subcontractor had full authority and responsibility over its employees, including hiring and firing, and under the agreement, the contractor had delivered full and complete possession of the premises to the subcontractor, which gave the specific instructions about where to discard the water. Adcox v. Atlanta Bldg. Maint. Co., 301 Ga. App. 74, 687 S.E.2d 137 (2009).

Gas station. — Company that leased property and sold gas to a gas station was not the employer of the operator of the station and could not be held vicariously liable under O.C.G.A. § 51-2-5 for the operator's negligence. Wells v. Vi-Mac, Inc., 226 Ga. App. 261, 486 S.E.2d 400 (1997).

Materials recovery facility was responsible for ensuring transportation of

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the facility's waste in compliance with regulations promulgated pursuant to the Georgia Comprehensive Solid Waste Management Act, O.C.G.A. § 12-8-20 et seq., and could be responsible for an injury caused by a contractor's violation of the regulations. Perry v. Soil Remediation, Inc., 221 Ga. App. 386, 471 S.E.2d 320 (1996).

Hazardous waste. — Manufacturer that hired a contractor to galvanize nails could not be held liable under O.C.G.A. § 51-2-5 for the contractor's negligence with respect to treatment or disposal of hazardous wastes. Briggs & Stratton Corp. v. Concrete Sales & Serv., Inc., 971 F. Supp. 566 (M.D. Ga. 1997).

Hauling logging equipment was not shown to be inherently dangerous. Jacobs v. Thomson Oak Flooring, 250 Ga. App. 56, 550 S.E.2d 465 (2001).

Hospitals. — Physician on the staff of a hospital is not automatically an employee of the hospital and when a physician is an independent contractor the hospital is not liable for the physician's negligent performance of professional services unless it negligently selected the physician or undertook to direct the physician in the manner and method of treating the patient. Hollingsworth v. Georgia Osteopathic Hosp., 145 Ga. App. 870, 245 S.E.2d 60, aff'd, 242 Ga. 522, 250 S.E.2d 433 (1978).

Department of Human Resources cannot be held liable for the negligence of an independent contractor. Georgia General Assembly has spoken by removing from the pool of state employees covered by the Georgia Tort Claims Act, O.C.G.A. § 50-21-20 et seq., independent contractors and corporations, and by failing to include in O.C.G.A. § 51-2-5 a waiver of sovereign immunity. Thus, the plaintiff's claim of negligence, based on a failure to notify of the child's sickle cell anemia, against the department was barred by sovereign immunity. In re Carter, 288 Ga. App. 276, 653 S.E.2d 860 (2007).

When the attending physician was an independent contractor rather than an employee of the hospital, and it is not alleged that the hospital was negligent in having the physician on the hospital's staff or that the hospital undertook to direct the physician in the physician's treatment of the patient, the hospital cannot be held liable for the physician's alleged negligence. Moore v. Carrington, 155 Ga. App. 12, 270 S.E.2d 222 (1980).

In a medical malpractice action, the court correctly charged that if the hospital were found to be providing professional services through its actual or apparent agent, the hospital's actions in providing those services should be judged by the standard of such profession. Doctors Hosp. v. Bonner, 195 Ga. App. 152, 392 S.E.2d 897 (1990).

Insurance companies. — While contract between solicitor of insurance and insurance company indicated relationship of independent contractor and employer, when evidence discloses that insurance company's state manager, by whom the contractor was employed and under whose supervision the contractor worked, allotted certain territory to the contractor, and required regular attendance at morning staff meetings, and that the insurance company paid for the contractor's (salesperson's) license, furnished the contractor all literature and selling aids, required the contractor to own an automobile as a condition of employment, and that at the time of the collision the contractor was on the contractor's way to interview a prospective customer whose name had been given the contractor at the office, evidence authorizes finding that the master-servant relationship existed. American Sec. Life Ins. Co. v. Gray, 89 Ga. App. 672, 80 S.E.2d 832 (1954).

Newspaper delivery. — Publisher could not be held liable for negligent driving of distributor's delivery vehicle on the ground that the driver was not licensed since there was no duty on the part of the newspaper publisher to inquire and ascertain if the distributor was properly licensed. Tanner v. USA Today, 179 Ga. App. 722, 347 S.E.2d 690 (1986).

Newspaper publisher was not vicariously liable to the owner of a newspaper distribution service since the newspaper truck involved in a collision was owned, maintained, and insured by the distribu-

tor and the publisher had no right to control the route used by the truck, the choice of driver, or the way in which the truck was driven. Tanner v. USA Today, 179 Ga. App. 722, 347 S.E.2d 690 (1986).

Private security agencies. — Defendant-employer has the right to invade the injured plaintiffs-employee's privacy, but only in a reasonable and proper manner and only in furtherance of the employer's interest with regard to the suit for personal injuries against the employer. The employer cannot delegate the employer's duty of conducting a proper investigation to a third party so as to insulate itself from suit if the third party failed to conduct a reasonable surveillance. That being true, the independent contractor rationale is not applicable in a case of this kind. Ellenberg v. Pinkerton's, Inc., 125 Ga. App. 648, 188 S.E.2d 911 (1972), later appeal, 130 Ga. App. 254, 202 S.E.2d 701 (1973).

Employer of a private detective agency was held liable to a third person for an invasion of privacy committed during the course of an investigation by the agency's personnel, despite the fact that the agency was employed as an independent contractor. United States Shoe Corp. v. Jones, 149 Ga. App. 595, 255 S.E.2d 73 (1979).

Even though hirers of an independent security or protective agency have generally been held not liable for negligent torts of agency personnel, when the hirer did not exercise control over the agency, the hirers have been held liable for the intentional torts of the agency's personnel committed in the scope of the agency's employment against the hirer's invitees. United States Shoe Corp. v. Jones, 149 Ga. App. 595, 255 S.E.2d 73 (1979).

Rule that a property owner is liable for the intentional torts of an employee of a private security agency hired to guard the property is applicable when the agency is hired by the manager of the property rather than by the owner personally. Peachtree-Cain Co. v. McBee, 254 Ga. 91, 327 S.E.2d 188 (1985).

After the night watchman was hired by Contractor A, who directed the watchman in all of the watchman's duties and activities and gave the watchman a paycheck, the fact that Contractor B had agreed (unknown to the watchman) with Contractor A to pay half of the watchman's costs to guard Contractor B's equipment did not create a master-and-servant relationship between Contractor B and the watchman under the terms of paragraph (5) of O.C.G.A. § 51-2-5. Gilleland & Son v. Misener Marine Constr., Inc., 173 Ga. App. 713, 327 S.E.2d 829 (1985).

Landlord had vicarious liability for any negligent act or omission of its independent contractor/security guard, separate from its own liability under O.C.G.A. § 51-3-1. FPI Atlanta, L.P. v. Seaton, 240 Ga. App. 880, 524 S.E.2d 524 (1999).

Retail sales. — When an oil refining company made a written contract with another as its agent to sell its products within a certain territory, and provided that agent should pay all necessary expenses in draying the company's products and equipment and in making sales, deliveries, and collections, and the company merely furnished the products to be sold, notwithstanding it may have had rules and regulations binding upon its agent as to the character of the subagent and as to the conduct of the business for the sale of its product, and when a truck driver was employed by the agent to drive the truck furnished by the agent to transport, sell, and deliver the company's products to customers, and was hired and paid by the agent out of the agent's own funds, and the agent had control and direction of the operation of the truck and gave orders and directions to the driver as to what to do, and had control of the driver and the driver's activities, and control of the time, manner, means, and methods of the driver in the execution of the work, the truck driver, in selling the products of the company by delivery from the truck while in the performance of the work for which the driver was employed, was the servant of the agent, and not the servant of the company; the company, therefore, was not liable for a mistake of the driver in delivering gasoline instead of kerosene to a purchaser. Sinclair Ref. Co. v. Veal, 51 Ga. App. 755, 181 S.E. 705 (1935).

Taxicab company. — Taxicab company was not liable for the negligence of its independent contractor driver based on the driver's violation of the statute prohib-

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iting leaving the scene of an accident; the statutory duty was imposed on the driver, not on the company, so the exception pertaining to violation of a duty imposed by statute does not apply. Loudermilk Enters., Inc. v. Hurtig, 214 Ga. App. 746, 449 S.E.2d 141 (1994).

Tree felling. — In civil action for damages caused by felling of a tree under doctrine of respondeat superior, the trial court erroneously denied the homeowner's motion for summary judgment as an independent contractor was hired to fell the tree and the homeowner had no control over the contractor's actions, and the act of felling the tree was not wrongful in itself; moreover, the homeowner's single suggestion or comment that the contractor could proceed with felling the tree as an entire unit did not necessarily have to be followed and did not create liability on the homeowner's part, but was simply confirming the freedom of the contractor to fell the tree as that contractor deemed appropriate. Whatley v. Sharma, 291 Ga. App. 228, 661 S.E.2d 590 (2008).

Workers' compensation. — In order for one to recover compensation under the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., it must be shown that the relation of master and servant existed between the servant and the person from whom the servant claims compensation. Bentley v. Jones, 48 Ga. App. 587, 173 S.E. 737 (1934).

Wrongful eviction and trespass. — Trial court correctly granted limited liability companies (LLC) summary judgment on the mortgagors' wrongful eviction and trespass claims given the absence of an independent legal duty imposed upon the companies; because a mortgagee was the legal title holder of foreclosed property, the duty to comply with the statutory dispossessory procedures provided in O.C.G.A. § 44-7-50 et seq. was imposed upon the mortgagee and could not be delegated to a third party, and since there was no evidence that the mortgagee ever sought to accomplish the mortgagee's statutory duties through an agent by contracting with either company to file a dispossessory action against the mortgagors on the mortgagee's behalf. The independent contractors had no separate legal duty to file a dispossessory action and then comply with the statutory procedures. Ikomoni v. Exec. Asset Mgmt., LLC, 309 Ga. App. 81, 709 S.E.2d 282 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Independent Contractors, § 43 et seq.

Am. Jur. Proof of Facts. — Complicity Rule in Motor Vehicle Accident Cases: Employer's Authorization or Ratification of Driver's Conduct, 19 POF3d 437.

Am. Jur. Trials. — Structural Damage to Residential Buildings, 51 Am. Jur. Trials 493.

C.J.S. — 30 C.J.S., Employer-Employee, § 246 et seq.

ALR. — Liability for injuries resulting from failure of independent contractor to guard opening in sidewalk while delivering merchandise, etc., 11 ALR 571; 53 ALR 932.

Duty of an employer with respect to the timbering of a mine, under the common law and general statutes, 15 ALR 1380.

Nonliability of an employer in respect of injuries caused by the torts of an independent contractor, 18 ALR 801.

General discussion of the nature of the relationship of employer and independent contractor, 19 ALR 226.

Elements bearing directly upon the quality of a contract as affecting the character of one as independent contractor, 20 ALR 684.

Liability of the employer for torts of independent contractor as predicated on the ground that the injury complained of was a direct and necessary result of the stipulated work, 21 ALR 1229.

Liability of employer as predicated on the ground of his being subject to a nondelegable duty in regard to the injured person, 23 ALR 984.

Nondelegable duty of employer in respect of work which will in the natural course of events produce injury, unless certain precautions are taken, 23 ALR 1016.

Nondelegable duty of employer with re-

spect to work which is inherently or intrinsically dangerous, 23 ALR 1084.

Liability of municipal corporations and their licensees for the torts of independent contractors, 25 ALR 426; 52 ALR 1012.

Independent contractor remedial rights in respect of injuries caused by breaches of positive duties correlative to corporate franchises, 28 ALR 122.

Liability of employer for acts or omissions of independent contractor in respect of positive duties or former arising from or incidental to contractual relationships, 29 ALR 736.

Independent contractor liability of employer as predicated on the ground of his personal fault, 30 ALR 1502.

Independent contractor extent of the employer's liability after he has assumed control of the subject-matter of the stipulated work, 31 ALR 1029.

Liability of independent contractors for injuries to third persons by defects in completed work, 41 ALR 8; 123 ALR 1197.

Liability of contractee and contractor inter se with respect to injuries sustained while the stipulated work is in course of performance, 44 ALR 891.

Liability of the contractee for injuries sustained by the contractor's servants in the course of the stipulated work, 44 ALR 932.

Liability of one undertaking to repair automobile for injury to third person, 52 ALR 857.

Independent contractor non-delegable duties with respect to intrinsically dangerous or unlawful work, 76 ALR 1257.

Liability of company which maintains poles for acts or omissions of other companies using the poles under lease or license rendering them unsafe to persons working thereon, 81 ALR 415.

Negligence of driver of automobile as imputed to members of joint enterprise, 85 ALR 630.

Employment of independent contractor as affecting landlord's liability for personal injury to tenant or to one in like case with tenant, 90 ALR 50; 162 ALR 1111.

Independent contractor rule as applied to injuries resulting from conditions created by independent contractors in streets, 115 ALR 965.

Owner's liability for injury by automobile while being used for servant's own pleasure or business, 122 ALR 858; 51 ALR2d 8; 51 ALR2d 120; 52 ALR2d 350.

Homework by employee as affecting employer's responsibility for injury to third person due to employee's negligence while on way to or from home, 146 ALR 1193.

Loaned servant doctrine under Federal Employers' Liability or Safety Appliance Act, 1 ALR2d 302.

Liability of freight motor carrier possessing certificate from Interstate Commerce Commission and employing noncertified independent contractor under "one-way" lease of latter's vehicle for negligence of latter's employee on return trip, 16 ALR2d 960.

Liability in damages for injury or death of window washer, 17 ALR2d 637.

Liability under respondeat superior doctrine for acts of operator furnished with leased machine or motor vehicle, 17 ALR2d 1388.

Duty of owner of premises to furnish independent contractor or his employee a safe place of work, where contract is for repairs, 31 ALR2d 1375.

Independent contractor rule as applicable to injury or death of third person as result of excavation and refill work, 33 ALR2d 7.

Independent contractor rule as applicable to injury or death of third person as result of demolition work, 33 ALR2d 89.

Liability of employer for injury to adjoining realty resulting from excavation work by independent contractor on his premises, 33 ALR2d 111.

Liability of lessor motor carrier for lessee's torts or nonperformance of franchise duties, 34 ALR2d 1121.

Deviation from employment in use of employer's car during regular hours of work, 51 ALR2d 8; 51 ALR2d 120; 52 ALR2d 350.

Route driver or salesman as independent contractor or employee of merchandise producer or processor, for purposes of respondeat superior doctrine, 53 ALR2d 183.

Liability of employer for negligent operation of motor vehicle by automobile salesman, 53 ALR2d 631.

Right to join master and servant as defendants in tort action based on respondeat superior, 59 ALR2d 1066.

Independent contractor's or subcontractor's liability for injury or death of third person occurring during excavation work not in street or highway, 62 ALR2d 1052.

Liability of abutting owner or occupant for condition of sidewalk, 88 ALR2d 331.

Right of contractor with federal, state, or local public body to latter's immunity from tort liability, 9 ALR3d 382.

Master's liability for injury to or death of person, or damage to property, resulting from fire allegedly caused by servant's smoking, 20 ALR3d 893.

Liability of builder-vendor or other vendor of new dwelling for loss, injury, or damage occasioned by defective condition thereof, 25 ALR3d 383.

Liability of one contracting for private police security service for acts of personnel supplied, 38 ALR3d 1332.

Liability to one injured in course of construction, based upon architect's alleged failure to carry out supervisory responsibilities, 59 ALR3d 869.

Liability of builder or subcontractor for insufficiency of building resulting from latent defects in materials used, 61 ALR3d 792.

Liability of subcontractor upon bond or other agreement indemnifying general contractor against liability for damage to person or property, 68 ALR3d 7.

When is employer chargeable with negligence in hiring careless, reckless, or incompetent independent contractor, 78 ALR3d 910.

Storekeeper's liability for personal injury to customer caused by independent contractor's negligence in performing alterations or repair work, 96 ALR3d 1213.

Tort liability for window washer's injury or death, 69 ALR4th 207.

Modern status of rule imputing motor vehicle driver's negligence to passenger on joint venture theory, 3 ALR5th 1.

The government-contractor defense to state products-liability cases, 53 ALR5th 535.

Modern status of rules regarding tort liability of building or construction contractor for injury or damage to third person occurring after completion and acceptance of work; "foreseeability" or "modern" rule, 75 ALR5th 413.

51-2-5.1. Relationship between hospital and health care provider prerequisite to liability; notice regarding independent contractor status; factors for consideration in determining status.

(a) As used in this Code section, the term:

(1) "Health care professional" means a professional licensed as an audiologist, chiropractor, clinical social worker, dentist, dietitian, medical doctor, marriage and family therapist, registered professional or licensed practical nurse, occupational therapist, optometrist, osteopathic physician, pharmacist, physical therapist, physician assistant, professional counselor, podiatrist, psychologist, radiological technician, respiratory therapist, or speech-language pathologist.

(2) "Hospital" means a facility that has a valid permit or provisional permit issued by the Department of Community Health under Chapter 7 of Title 31.

(b) Notwithstanding the provisions of Code Section 51-2-5, no hospital which complies with the notice provisions of either subsection (c) or subsection (d) of this Code section shall be liable in a tort action for the

acts or omissions of a health care professional unless there exists an actual agency or employment relationship between the hospital and the health care professional.

(c) The hospital shall post a notice in the form and manner described herein. Such notice shall:

(1) Be posted conspicuously in the hospital lobby or a public area of the hospital;

(2) Contain print at least one inch high; and

(3) Provide language substantially similar to the following:

"Some or all of the health care professionals performing services in this hospital are independent contractors and are not hospital agents or employees. Independent contractors are responsible for their own actions and the hospital shall not be liable for the acts or omissions of any such independent contractors."

(d) The hospital shall have the patient or the patient's personal representative sign a written acknowledgment that contains language substantially similar to that set forth in paragraph (3) of subsection (c) of this Code section.

(e) The notice required in this Code section shall be sufficient if it meets the requirements of either subsection (c) or subsection (d) of this Code section even if the patient or the patient's personal representative did not see or read such notice for any reason, including but not limited to medical condition or language proficiency.

(f) Whether a health care professional is an actual agent, an employee, or an independent contractor shall be determined by the language of the contract between the health care professional and the hospital. In the absence of such a contract, or if the contract is unclear or ambiguous, a health care professional shall only be considered the hospital's employee or actual agent if it can be shown by a preponderance of the evidence that the hospital reserves the right to control the time, manner, or method in which the health care professional performs the services for which licensed, as distinguished from the right to merely require certain definite results.

(g) If the court finds that there is no contract or that the contract is unclear or ambiguous as to the relationship between the hospital and health care professional, the court shall apply the following:

(1) Factors that may be considered as evidence the hospital exercises a right of control over the time, manner, or method of the health care professional's services include: the parties believed they were creating an actual agency or employment relationship; the health care professional receives substantially all the employee benefits

received by actual employees of the hospital; the hospital directs the details of the health care professional's work step-by-step; the health care professional's services are terminable at the will of the hospital without cause and without notice; the hospital withholds, or is required to withhold, federal and state taxes from the remuneration paid to the health care professional for services to the patients of the hospital; and factors not specifically excluded in paragraph (2) of this subsection; and

(2) Factors that shall not be considered as evidence a hospital exercises a right of control over the time, manner, or method of the health care professional's services include: a requirement by the hospital that such health care professional treat all patients or that any health care professional or group is obligated to staff a hospital department continuously or from time to time; the hospital's payment to the health care professional on an hourly basis; the provision of facilities or equipment by the hospital; the fact a health care professional does not maintain a separate practice outside the hospital; the source of the payment for the professional liability insurance premium for that health care professional; the fact that the professional fees for services are billed by the hospital; or any requirement by the hospital that such health care professional engage in conduct required to satisfy any state or federal statute or regulation, any standard of care, any standard or guideline set by an association of hospitals or health care professionals, or any accreditation standard adopted by a national accreditation organization. (Code 1981, § 51-2-5.1, enacted by Ga. L. 2005, p. 1, § 11/SB 3; Ga. L. 2008, p. 12, § 2-38/SB 433; Ga. L. 2009, p. 859, § 3/HB 509.)

Editor's notes. — Ga. L. 2005, p. 1/SB 3, § 1, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2005, p. 1, § 14/SB 3, not codified by the General Assembly, provides for severability.

Ga. L. 2005, p. 1, § 15(b)/SB 3, not codified by the General Assembly, provides that this Code section shall apply only with respect to causes of action arising on or after February 16, 2005, and any prior causes of action shall continue to be governed by prior law.

Law reviews. — For article on 2005 enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For article, "State

of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

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Posting of notice by hospital sufficient. — Summary judgment was properly granted to a hospital in a medical malpractice action based on vicarious liability as the widow of a deceased patient failed to present any evidence to counter the testimony provided by the hospital that the notice was posted conspicuously in a public area of the hospital, as statutorily required, regarding the independent status of certain health care professionals. Hunter v. Emory-Adventist, Inc., 323 Ga. App. 537, 746 S.E.2d 734 (2013).

Impact of doctors as independent contractors to hospital. — In a complaint alleging professional negligence against two doctors, as well as imputed liability against the medical center, the trial court erred in granting summary judgment to the medical center based on the court's finding that the two doctors were independent contractors because the contractual relationships between the doctors' physician groups who had contracts with the medical center did not fall under O.C.G.A. § 51-2-5.1; furthermore, the trial court did not conduct an analysis on whether an agency relationship existed between the medical center and the doctors. Thomas v. Tenet Healthsystem GB, Inc., 340 Ga. App. 78, 796 S.E.2d 307 (2017).

Cited in Graham v. HHC St. Simons, Inc., 322 Ga. App. 693, 746 S.E.2d 157 (2013).

51-2-6. Liability of owner or keeper of dog for damage done to livestock while off his or her premises.

If any dog, while not on the premises of its owner or the person having charge of it, kills or injures any livestock, the owner or person having charge of the dog shall be liable for damages sustained by the killing or maiming of the livestock and for the full costs of action. (Ga. L. 1865-66, p. 76, § 1; Code 1868, § 2914; Code 1873, § 2965; Code 1882, § 2965; Civil Code 1895, § 3822; Civil Code 1910, § 4418; Code 1933, § 105-111.)

Cross references. — Liability of owner of dog which kills or injures livestock or poultry, § 4-8-4.

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Owner is liable for certain acts of the owner's dog; thus, recognizing that the dog is property. Graham v. Smith, 100 Ga. 434, 28 S.E. 225, 62 Am. St. R. 323, 40 L.R.A. 503 (1897); Columbus R.R. v. Woolfolk, 128 Ga. 631, 58 S.E. 152, 119 Am. St. R. 404, 10 L.R.A. (n.s.) 1136 (1907).

Cited in Clinkscales v. Hammons, 159 Ga. App. 114, 282 S.E.2d 738 (1981); Mintz v. Frazier, 160 Ga. App. 668, 288 S.E.2d 24 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, §§ 67, et seq., 75 et seq.

Am. Jur. Pleading and Practice Forms. — 1D Am. Jur. Pleading and Practice Forms, Animals, § 118.

C.J.S. — 3B C.J.S., Animals, § 354 et seq.

ALR. — Validity, construction, and effect of statute eliminating scienter as condition of liability for injury by dog or other animal, 1 ALR 1113; 142 ALR 436.

Character and extent of claims for which lien on animal damage feasant attaches, 26 ALR 1047.

Owner or keeper of trespassing dog as subject to injunction or damages, 107 ALR 1323.

Contributory negligence, assumption of risk, or intentional provocation as defense to action for injury by dog, 66 ALR2d 916.

Liability for injury inflicted by horse, dog, or other domestic animal exhibited at show, 80 ALR2d 886.

Who "harbors" or "keeps" dog under animal liability statute, 64 ALR4th 963.

Intentional provocation, contributory or comparative negligence, or assumption of risk as defense to action for injury by dog, 11 ALR5th 127.

51-2-7. Liability of owner or keeper of vicious or dangerous animal for injuries caused by animal.

A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured. In proving vicious propensity, it shall be sufficient to show that the animal was required to be at heel or on a leash by an ordinance of a city, county, or consolidated government, and the said animal was at the time of the occurrence not at heel or on a leash. The foregoing sentence shall not apply to domesticated fowl including roosters with spurs. The foregoing sentence shall not apply to domesticated livestock. (Orig. Code 1863, § 2907; Code 1868, § 2913; Code 1873, § 2964; Code 1882, § 2964; Civil Code 1895, § 3821; Civil Code 1910, § 4417; Code 1933, § 105-110; Ga. L. 1985, p. 1033, § 1.)

History of Code section. — The language of this Code section is derived in part from the decision in Conway v. Grant, 88 Ga. 40, 13 S.E. 803 (1891).

Cross references. — Vicious dogs, T. 4, C. 8, Art. 3. Care and confinement of wild animals, T. 27, C. 5.

Law reviews. — For annual survey article on tort law, see 52 Mercer L. Rev. 421 (2000). For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007). For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009). For annual survey of tort law, see 68 Mercer L. Rev. 279 (2016).

For note, "Is There (and Should There Be) Any 'Bite' Left in Georgia's 'First Bite' Rule?," see 34 Ga. L. Rev. 1343 (2000).

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General Consideration

This section is but a restatement of common law. Rodriguez v. Newby, 131 Ga. App. 651, 206 S.E.2d 585 (1974).

The 1985 amendment of O.C.G.A. § 51-2-7,, substituting "may" for "shall" in the first sentence, brought the amount of statutory liability more in line with the liability imposed by the common law since the amendment did not purport to change the "first bite" rule, but rather supported the limited protection of the rule for pet owners by removing an inflexible strict liability standard. Hamilton v. Walker, 235 Ga. App. 635, 510 S.E.2d 120 (1998), overruled on other grounds by Steagald v. Eason, 2017 Ga. LEXIS 169 (Ga. 2017).

Reasonable measures required in control of animals. — O.C.G.A. § 51-2-7 merely recognizes a duty to exercise ordinary care in the management and restraint of a vicious or dangerous animal for the protection of the public; ordinary care to restrain an animal requires the taking of reasonable measures to keep the animal restrained, and that, in turn, necessarily requires personal deliberation and judgment. What should be done always will depend to some extent on the circumstances and, for purposes of official immunity, that means that the duty cannot — when applied to a public officer — be characterized properly as a ministerial one; thus, the public officer is entitled to official immunity. Eshleman v. Key, 297 Ga. 364, 774 S.E.2d 96 (2015), overruled on other grounds, Rivera v. Washington, 2016 Ga. LEXIS 248 (Ga. 2016).

Section is not an exclusive basis for recovery when injury is caused by domestic animal. Callaway v. Miller, 118 Ga. App. 309, 163 S.E.2d 336 (1968).

Cause of action for attack by animal. — The owner of a vicious or dangerous animal, who allows the animal to go at liberty, is liable to one who sustains injury as a result of the vicious or dangerous tendency of the animal only in the event that the owner knows of the animal's vicious or dangerous character. Flowers v. Flowers, 118 Ga. App. 85, 162 S.E.2d 818 (1968); Sutton v. Sutton, 145 Ga. App. 22, 243 S.E.2d 310 (1978).

Under this section, which is but a restatement of the common law, to support an action for damages for injuries sustained by being bitten by a dog, it is necessary to show that the dog was vicious, and that the owner had knowledge of this fact. Hays v. Anchors, 71 Ga. App. 280, 30 S.E.2d 646 (1944); McCree v. Burks, 129 Ga. App. 678, 200 S.E.2d 491 (1973).

An owner of a domestic animal who allows it to go at liberty is liable under this section to one who sustains injury as a result of the vicious or dangerous tendency of the animal only in the event the owner knows of vicious or dangerous character. Starling v. Davis, 121 Ga. App. 428, 174 S.E.2d 214 (1970).

In order for a party to recover, it must appear that the animal had a propensity to do the act which caused the injury and that the defendant knew of it. McCree v. Burks, 129 Ga. App. 678, 200 S.E.2d 491 (1973); Pearce v. Shanks, 153 Ga. App. 693, 266 S.E.2d 353 (1980).

Cat and dog bite cases treated same. — There is no authority for the assertion that cat bite cases should be treated differently than dog bite cases. Fellers v. Carson, 182 Ga. App. 658, 356 S.E.2d 658, cert. denied, 182 Ga. App. 910, 356 S.E.2d 658 (1987).

Official immunity following bite by police dog. — When a police dog attacked the plaintiff's son, the officer's motion for summary judgment on the ground of official immunity was improperly denied because the officer, who was a dog handler for the police department, did not act with malice or an intent to injure anyone when the officer failed to secure the police dog outside the officer's home; and the duties that the officer was alleged to have violated were not ministerial ones, for which the officer would not have been entitled to immunity, because, although the duties reflected in O.C.G.A. § 51-2-7 and a county ordinance might be definite, they required an exercise of personal deliberation and judgment about what was reasonable regarding the restraint of the police dog. Eshleman v. Key, 297 Ga. 364, 774 S.E.2d 96 (2015), overruled on other grounds, Rivera v. Washington, 2016 Ga. LEXIS 248 (Ga. 2016).

Cited in Phillips v. Cleveland, 31 Ga. App. 206, 120 S.E. 639 (1923); Sinclair v.

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Friedlander, 197 Ga. 797, 30 S.E.2d 398 (1944); Rutherford v. Underwood, 84 Ga. App. 624, 66 S.E.2d 768 (1951); Thomas v. Richardson, 129 Ga. App. 834, 201 S.E.2d 653 (1973); Gordon v. Dawson, 146 Ga. App. 784, 247 S.E.2d 596 (1978); Rines v. Harris, 18 Bankr. 666 (Bankr. M.D. Ga. 1982); Smith v. Culver, 172 Ga. App. 183, 322 S.E.2d 294 (1984); McBride v. Wasik, 179 Ga. App. 244, 345 S.E.2d 921 (1986); Goodman v. Kahn, 182 Ga. App. 724, 356 S.E.2d 757 (1987); Gilbert v. Hudspeth, 182 Ga. App. 898, 357 S.E.2d 601 (1987); Pickard v. Cook, 223 Ga. App. 595, 478 S.E.2d 432 (1996); Bakhtiarnejad v. Cox Enters., 247 Ga. App. 205, 541 S.E.2d 33 (2000).

Knowledge

Dog's dangerous character and owner's knowledge thereof. — Under O.C.G.A. § 51-2-7, the dog's dangerous character is at issue totally apart from the issue of the owner's knowledge of the dog's dangerous character; therefore, while the expert's report concluding that the dog was dangerous or potentially dangerous could not be relevant to the issue of knowledge because it was issued after the attack on the plaintiff, the fact that the dog was declared dangerous or potentially dangerous three weeks after the attack were relevant to whether the dog had dangerous propensities at the time of the attack. Torrance v. Brennan, 209 Ga. App. 65, 432 S.E.2d 658 (1993).

Lack of knowledge of vicious and dangerous character. — If owner does not know of vicious and dangerous character of the owner's animal, the owner will not be liable for injury which is not usual and natural consequence to be anticipated from allowing an ordinary animal of that kind to go at large. Flowers v. Flowers, 118 Ga. App. 85, 162 S.E.2d 818 (1968).

In a wrongful death action based on the death of an infant caused by a dog, the dog owner was entitled to summary judgment on the parent's claim under O.C.G.A. § 51-2-7 because there was no evidence that the animal had ever attacked or bitten a human; the owner's rule that the dog stay outside unless accompanied by a person was a result of the dog's destruction of property, not due to any threat the dog posed to animals or humans. Harper v. Robinson, 263 Ga. App. 727, 589 S.E.2d 295 (2003).

In a personal injury suit brought by a visitor seeking damages for injuries incurred after being kicked by a horse, the owner of the real property was properly granted summary judgment since there was no evidence whatsoever that the owner was aware of any vicious propensity on the part of the horse; the owner filed an affidavit, stating that the owner boarded the horses for many years and never observed the horse who injured the visitor exhibit the propensity to run directly at any person or exhibit any violent, vicious, or dangerous behavior. Burns v. Leap, 285 Ga. App. 307, 645 S.E.2d 751 (2007).

Dog-bite victim sued the dog's owners, alleging the owners failed to warn the victim of the dog's vicious tendencies. As there was no evidence the dog had ever previously bitten or attacked anyone, and an owner's alleged statement that children would not "have to worry about getting bit" if the children stayed away from the owner's truck, where the dog was chained in the truck bed, was insufficient to establish the owners' knowledge of the dog's vicious propensity; thus, the owners were properly granted a directed verdict on this claim. Huff v. Dyer, 297 Ga. App. 761, 678 S.E.2d 206 (2009).

Unforeseen and unforeseeable acts of dog. — Owner of dog may not be found liable for unforeseen and unforeseeable act of dog simply because dog was not under owner's direct control at the time the act took place. Fitzpatrick v. Henley, 154 Ga. App. 555, 269 S.E.2d 60 (1980).

Proof of scienter required. — Under this section, it is still necessary, as at common law, to show not only that the animal is vicious or dangerous, but also that the owner or keeper knows of this fact. Harvey v. Buchanan, 121 Ga. 384, 49 S.E. 281 (1904).

Scienter is a necessary and a material fact which must be shown before there can be any finding of liability under this section. Chandler v. Gately, 119 Ga. App. 513, 167 S.E.2d 697 (1969); McCree v. Burks,

129 Ga. App. 678, 200 S.E.2d 491 (1973); Banks v. Adair, 148 Ga. App. 254, 251 S.E.2d 88 (1978).

Proof of scienter is essential to a suit under this section. Johnson v. Hurt, 120 Ga. App. 761, 172 S.E.2d 201 (1969).

Proof that the owner of a dog either knew or should have known of the dog's propensity to do the particular act which caused injury to the complaining party is indispensable to recovery against the owner. Fitzpatrick v. Henley, 154 Ga. App. 555, 269 S.E.2d 60 (1980); Stanger v. Cato, 182 Ga. App. 498, 356 S.E.2d 97 (1987).

The size of a dog, its breed, and the fact that its owner keeps it restrained, does not establish any inference that the owner knows the dog to be dangerous. Freeman v. Farr, 184 Ga. App. 830, 363 S.E.2d 48 (1987).

Scienter requirement is not satisfied by dog owner's use of a restraining chain, or posting of "beware of dog" sign. Banks v. Adair, 148 Ga. App. 254, 251 S.E.2d 88 (1978).

Chain restraint may not be sufficient. — The simple fact that a dog is restrained on a chain may not be sufficient to establish the owner is free from liability for "careless management" under O.C.G.A. § 51-2-7. Freeman v. Farr, 184 Ga. App. 830, 363 S.E.2d 48 (1987).

Owner is not responsible for acts of dog if there is lack of scienter. Banks v. Adair, 148 Ga. App. 254, 251 S.E.2d 88 (1978).

In a typical dog bite case, regardless of whether the cause of action is based on the premises liability statute of O.C.G.A. § 51-3-1, or the dangerous animal liability statute of O.C.G.A. § 51-2-7, a plaintiff must produce evidence of the vicious propensity of the dog in order to show that the owner of the premises had superior knowledge of the danger. Custer v. Coward, 293 Ga. App. 316, 667 S.E.2d 135 (2008).

When there is a lack of scienter, even the breach of a leash law is not sufficient to hold the owner responsible for the acts of the dog. Turner v. Irvin, 146 Ga. App. 218, 246 S.E.2d 127 (1978); Fitzpatrick v. Henley, 154 Ga. App. 555, 269 S.E.2d 60 (1980).

Dog owners entitled to summary judgment when no propensity to bite. — In a parent's personal injury action seeking to hold the dog owners liable for injury to the parent's son, the dog owners were entitled to summary judgment because there was no evidence that the dog ever displayed vicious behavior or evinced a propensity to bite anyone prior to biting the child as required for such an action. Swanson v. Tackling, 335 Ga. App. 810, 783 S.E.2d 167 (2016).

Knowledge of propensity to particular harm required. — It is not enough for liability under this section that the possessor of the animal know of a propensity to do harm in one or more specific ways; it is necessary that the possessor have reason to know of its propensity to do harm of the type which it inflicts, Carter v. Ide, 125 Ga. App. 557, 188 S.E.2d 275 (1972); Penick v. Grimsley, 130 Ga. App. 722, 204 S.E.2d 510 (1974); Banks v. Adair, 148 Ga. App. 254, 251 S.E.2d 88 (1978); Rowlette v. Paul, 219 Ga. App. 597, 466 S.E.2d 37 (1995); Clark v. Joiner, 242 Ga. App. 421, 530 S.E.2d 45 (2000).

Knowledge may be actual or constructive. — To support a recovery a plaintiff must show either actual or constructive knowledge by the defendant of the animal's danger to others. Flowers v. Flowers, 118 Ga. App. 85, 162 S.E.2d 818 (1968); Starling v. Davis, 121 Ga. App. 428, 174 S.E.2d 214 (1970).

Knowledge presumed in certain dangerous animals cases. — While this section does not set out how knowledge of the vicious nature of the animal may be acquired, under the common law this knowledge is presumed to exist when the animal involved belongs to a certain class of animals ferae naturae, such as lions, tigers, bears, wolves, baboons, apes, and monkeys. Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935).

When a person is injured by an attack of an animal ferae naturae, the negligence of the owner or keeper thereof is presumed because of the dangerous and ferocious propensities of a wild beast, such as a lion, tiger, leopard, bear, ape, baboon, and such wild beasts, and the law recognizes that safety lies only in keeping such animals perfectly secure. Candler v. Smith, 50 Ga.

Knowledge (Cont'd)

App. 667, 179 S.E. 395 (1935).

Knowledge of instinct to bite of dogs. — A propensity on the part of a dog to bite people is not one of the instincts common to the species of which every owner must be presumed to have notice. Starling v. Davis, 121 Ga. App. 428, 174 S.E.2d 214 (1970).

What constitutes knowledge of animal's dangerous nature. — In order to constitute notice to an owner or keeper of an animal's vicious or dangerous nature, there should be an incident or incidents which would put a prudent man on notice to anticipate the event which occurred. A single incident may not adequately place a person on notice. The test should be whether the one incident was of such nature as to cause a reasonably prudent person to believe that the animal was sufficiently dangerous as to be likely to cause an injury at a later time. Sutton v. Sutton, 145 Ga. App. 22, 243 S.E.2d 310 (1978).

If a dog has "friendly" intentions but has habits which because of its size or other characteristics make the dog dangerous, then it seems that such behavior should be controlled. However, it is necessary that the owner, as previously pointed out, have knowledge of the pattern of the animal's dangerous behavior before the owner can be held for failure to control the animal. Flowers v. Flowers, 118 Ga. App. 85, 162 S.E.2d 818 (1968).

Sufficient evidence of dog's vicious propensity. — By presenting evidence that the defendant's animal was required to be on a leash by an ordinance of the applicable governmental body and that the animal was not on a leash at the time of the occurrence, the plaintiff presented sufficient evidence to prove the vicious propensity of the defendant's dog under O.C.G.A. § 51-2-7 section. The trial court erred by granting summary judgment in the defendant's favor based upon uncontroverted evidence that the defendant had no knowledge of the dog's vicious propensity. Fields v. Thompson, 190 Ga. App. 177, 378 S.E.2d 390 (1989).

Defendant pet-owner's statement to another, about three months before the defendant's dog bit the plaintiff, asking that person "to do whatever was necessary . . . to keep the dogs from attacking. . ." raises genuine issues of material fact as to the defendant's prior knowledge of the dogs' tendency to attack humans. Supan v. Griffin, 238 Ga. App. 404, 519 S.E.2d 22 (1999).

Insufficient knowledge of dog's vicious propensities. — When the worker who was knocked down, allegedly by the dog owners' dog, was unable to show that the dog had any dangerous propensities or that the dog owner knew about such propensities, the worker could not recover either under the dangerous animal liability statute, O.C.G.A. § 51-2-7, or the premises liability statute, O.C.G.A. § 51-3-1; however, the trial court erred in granting summary judgment to the dog owners as a genuine issue of material fact still existed regarding whether the one dog owner voluntarily undertook a duty to restrain the dogs on the owner's premises and, if so, whether that voluntary undertaking was negligently performed. Osowski v. Smith, 262 Ga. App. 538, 586 S.E.2d 71 (2003).

Trial court did not err in granting a dog owner summary judgment in a nurse's action under the dangerous animal liability statute, O.C.G.A. § 51-2-7, to recover for injuries the nurse sustained when the dog bit the nurse while the nurse was at the owner's home because there was no genuine issue of material fact that the dog was required to be at heel or on a leash or that the owner had knowledge that the dog had the propensity to bite a human; section 10-11(a)(1) of the Cobb County, Ga., animal control ordinance did not require the dog to be at heel or on a leash at the time of the incident. Stennette v. Miller, 316 Ga. App. 425, 729 S.E.2d 559 (2012).

Knowledge or notice that dog will behave ferociously toward other animals is not necessarily notice that it will attack human beings. Carter v. Ide, 125 Ga. App. 557, 188 S.E.2d 275 (1972); Banks v. Adair, 148 Ga. App. 254, 251 S.E.2d 88 (1978).

Knowledge of attacks on other animals, combined with the confinement by the defendant of the defendant's dog, is not

sufficient to show the defendant's knowledge of the dog's vicious tendencies and therefore to create liability. Carter v. Ide, 125 Ga. App. 557, 188 S.E.2d 275 (1972).

Dog's menacing behavior alone is sufficient to apprise owner of animal's vicious propensities. Banks v. Adair, 148 Ga. App. 254, 251 S.E.2d 88 (1978).

Menacing behavior does not establish vicious propensity. — A dog's barking and growling amount, at most, to menacing behavior, and menacing behavior does not establish vicious propensity under O.C.G.A. § 51-2-7.. Durham v. Mooney, 234 Ga. App. 772, 507 S.E.2d 877 (1998).

Knowledge of frolicsome affection directed solely to owners. — An owner's knowledge of a dog's frolicsome affection which is directed solely towards the owners is not such knowledge of a pattern of dangerous behavior as to put a reasonably prudent person on notice that the animal may cause injury by displaying such behavior towards another at a later date. Marshall v. Person, 176 Ga. App. 542, 336 S.E.2d 380 (1985).

Fact that dog owner invited or allowed neighbor to pet the owner's dog did not make the owner liable for the neighbor's subsequent dog bite injuries, since the owner had no prior knowledge, either actual or constructive, that the dog would bite the neighbor. Durham v. Mooney, 234 Ga. App. 772, 507 S.E.2d 877 (1998).

Adequacy of owner's management and control. — A new trial was authorized when material fact issues existed as to the adequacy of an owner's management and control of the owner's dog. Evans-Watson v. Reese, 188 Ga. App. 292, 372 S.E.2d 675 (1988).

Even if the defendant's dog were vicious or dangerous, genuine issues of material fact existed as to whether the defendant was careless in the defendant's management of the dog and whether the plaintiff exercised reasonable care for the plaintiff's own safety since the dog was chained in an area accessible only by stepping over a 28″ high guardrail and which was not an area where people would normally pass. Hackett v. Dayton Hudson Corp., 191 Ga. App. 442, 382 S.E.2d 180 (1989).

Guard dogs. — The scienter requirement applies in the case of a dog specifically purchased and used for guarding commercial property. Wade v. American Nat'l Ins. Co., 246 Ga. App. 458, 540 S.E.2d 671 (2000).

Victim's knowledge of dog's aggressive tendencies. — Trial court properly granted summary judgment to dog owners in dog bite case in light of the evidence of the victim's equal or superior knowledge of the dog's aggressive tendencies and assumption of the risk in petting the dog. Durham v. Mason, 256 Ga. App. 467, 568 S.E.2d 530 (2002).

Trial court did not err in granting a dog owner summary judgment in a roommate's action under the vicious animal statute, O.C.G.A. § 51-2-7, and the premises liability statute, O.C.G.A. § 51-3-1, to recover damages for injuries the roommate sustained when the owner's dog attacked the roommate inside the owner's townhouse because the roommate had knowledge of the dog's vicious propensity equal to that of the owner's; the roommate's own testimony was that the roommate was aware of the dog's previous unprovoked attack and was nervous when around the dog, presumably because the roommate was afraid that the dog could attack again. Stolte v. Hammack, 311 Ga. App. 710, 716 S.E.2d 796 (2011).

Violation of Ordinances

Violation of municipal ordinance not necessarily scienter. — The fact that a mad dog is at large in violation of the municipal ordinance imposing a penalty upon its owner does not alter the rule that scienter must be shown. Langford v. Eskedor, 30 Ga. App. 799, 119 S.E. 431 (1923).

Violation of local ordinance. — By presenting evidence that the defendant's dog was required by ordinance to be on a leash and that the dog was not on a leash at the time of the occurrence, the plaintiff presented sufficient evidence to prove the vicious propensity of the dog under O.C.G.A. § 51-2-7. Oertel v. Chi Psi Fraternity, 239 Ga. App. 147, 521 S.E.2d 71 (1999).

Violation of Ordinances (Cont'd)

Violation of leash law was irrelevant under former provisions. — In the absence of any evidence showing that the owners of a dog had knowledge, prior to a mauling incident, that their dog had ever bitten another human being, the owners of the dog were not liable to the victim even though the dog's presence on the premises where the incident occurred was in violation of the county leash law. Brown v. Pierce, 176 Ga. App. 787, 338 S.E.2d 39 (1985).

Dog not confined as required by ordinance. — Defendants' dog was not "confined within the property limits of his owner or custodian," as required by a county ordinance, since, although the animal may have been physically within the boundaries of the defendants' property at the time the dog bit the plaintiffs' son, it had broken loose from its chain. Tutak v. Fairley, 198 Ga. App. 307, 401 S.E.2d 73 (1991).

When a dog's owner allowed the dog to run free inside the owner's house, including having access to doors leading outside the house, a genuine fact issue was present as to whether the dog was allowed to roam free in violation of a local ordinance. Johnston v. Warendh, 252 Ga. App. 674, 556 S.E.2d 867 (2001).

No evidence that ordinance was violated. — Dog-bite victim sued the dog's owners, asserting a claim of negligence per se. As the dog had not been running at large, and the applicable ordinance did not protect people such as the victim who approached a dog that was restrained in the bed of a truck, the victim's motion for a directed verdict on this claim was properly denied. Huff v. Dyer, 297 Ga. App. 761, 678 S.E.2d 206 (2009).

Trial court erred in denying an animal care clinic's motion for summary judgment in a guest's action to recover damages for injuries the guest sustained when a dog bit the guest because the guest could not establish a vicious propensity pursuant to O.C.G.A. § 51-2-7 through a violation of the county animal ordinances; the dog was not running at large in violation of Cherokee County, Ga., Ordinance Sec. 10-29(a) at the time of the guest's injury. Abundant Animal Care, LLC v. Gray, 316 Ga. App. 193, 728 S.E.2d 822 (2012).

Domesticated Livestock

Bulls, stallions, and rams. — The law does not regard bulls, stallions, and rams as being abnormally dangerous animals, but rather as animals routinely kept for stud purposes, so that the particular danger involved in their dangerous tendencies has become a normal incident of civilized life. Taft v. Taft, 209 Ga. App. 499, 433 S.E.2d 667 (1993).

Roosters. — Sitter failed to present any evidence supporting the sitter's claim that the pet owners violated O.C.G.A. § 51-2-7 as there was no evidence that the owners engaged in careless management of the rooster by asking a professional pet sitter to take care of the rooster, which was kept in a coop, and warning the sitter that the rooster "will attack!" and that a garbage can lid could be useful in dealing with the rooster. Gilreath v. Smith, 340 Ga. App. 265, 797 S.E.2d 177 (2017).

Injuries by runaway horse. — The owner of a runaway horse is generally liable for injuries caused by the horse. Phillips v. Dewald, 79 Ga. 732, 7 S.E. 151, 11 Am. St. R. 458 (1887).

Knowledge that horse has thrown rider does not show propensity to kick. Carter v. Ide, 125 Ga. App. 557, 188 S.E.2d 275 (1972).

Procedure

Sufficiency of pleadings. — It is not sufficient to allege that the defendant knew or should have known that the defendant's dog was vicious, but facts showing knowledge, either actual or constructive, must be alleged. Hays v. Anchors, 71 Ga. App. 280, 30 S.E.2d 646 (1944).

When the plaintiff did not allege that the dog had ever made an attack on anyone prior to the time the dog injured the plaintiff, or had ever given the defendant cause to suspect that the dog might be vicious, except that the dog belonged to the breed of dogs known as German police dogs, and did not allege that the defendant was the owner of the dog, or that the defendant ever had the dog under the defendant's personal supervision or con-

trol, the petition did not set out a cause of action for damages sustained by the plaintiff when bitten by the dog. Hays v. Anchors, 71 Ga. App. 280, 30 S.E.2d 646 (1944).

Petition alleged that the plaintiff was employed by the defendant, and that the plaintiff was bitten by the dog on entering the premises, and that the defendant did not furnish the plaintiff with a safe place to work, in that keeping the dog endangered the plaintiff's life and safety while the plaintiff was in the performance of duties incident to the plaintiff's employment. When no facts were alleged to show that the defendant had knowledge that the dog was vicious, or that it would be unsafe for the plaintiff to work in the house with the dog present, the petition failed to set out a cause of action because of failure to allege facts showing the defendant knew, or should have known of the danger. Hays v. Anchors, 71 Ga. App. 280, 30 S.E.2d 646 (1944).

When in an action for damages it is alleged that the plaintiff was bitten and injured by a dog kept by the defendant, that the dog was vicious and accustomed to bite which was known to the defendant, the allegations are sufficient as against a general demurrer (now motion to dismiss). Greene v. Orr, 75 Ga. App. 673, 44 S.E.2d 273 (1947).

When a petition alleges that the defendant wrongfully and injuriously did keep a certain dog which the defendant knew was used and accustomed to attack and bite, and that the defendant negligently and carelessly managed the dog in that the defendant permitted the dog to go at liberty knowing the character of the dog and that the dog was vicious and that the defendant knew that the dog was vicious, the ferocious character of the dog and knowledge of the owner were sufficiently alleged as against a demurrer (now motion to dismiss). Greene v. Orr, 75 Ga. App. 673, 44 S.E.2d 273 (1947).

Knowledge can defeat summary judgment. — Affidavit by the parent of a dog-bite victim that the dog's owner told the parent that "she knew something like this would happen" was admissible, and was evidence sufficient to preclude summary judgment for the defendants. Johnson v. Kvasny, 230 Ga. App. 162, 495 S.E.2d 651 (1998).

Summary judgment in favor of homeowner proper because dog belonged to homeowner's visiting child. — Homeowner was not the owner or keeper of a dog who attacked a home health care provider in the homeowner's driveway; the provider admitted in the complaint and in a deposition that the dog was owned by the homeowner's child, who was visiting from another city. Therefore, the homeowner was not liable to the provider for the dog's attack under O.C.G.A. § 51-2-7. Cormier v. Willis, 313 Ga. App. 699, 722 S.E.2d 416 (2012).

Summary judgment on issue of negligence was improper. — Trial court erred by granting partial summary judgment to an injured pedestrian as to negligence because, even if the dog owners violated the local ordinance, there was still a genuine issue of fact as to whether the owners were careless in the management of the owners' dog under O.C.G.A. § 51-2-7, so it could not be said that the owners were negligent as a matter of law. Askew v. Rogers, 326 Ga. App. 24, 755 S.E.2d 836 (2014).

After the plaintiffs' children were bitten by the defendants' dog, the trial court erred by removing the question of whether the defendants carelessly managed their dog from the jury's consideration as the trial court's order granting partial summary judgment found only that the dog was not properly restrained and made no ruling as to whether the dog was carelessly managed; and the trial court's instruction that the defendants were negligent based solely on the fact that the defendants did not properly restrain the dog was a misstatement of the law, which could not be considered harmless as the jury did not have an opportunity to consider the primary issue of whether the defendants carelessly managed the defendants' dog. Cowan v. Carillo, 331 Ga. App. 387, 771 S.E.2d 86 (2015).

Jury instructions. — When there was proof going to show that the plaintiff, at the time the plaintiff was injured by reason of the horse running over the plaintiff, was standing upon a sidewalk in a city, and one of the acts of negligence charged

Procedure (Cont'd)

by the petition was the alleged driving of the horse upon the sidewalk, in violation of a city ordinance, and such ordinance was admitted in evidence without objection, it was not error for the court to charge upon the validity and legal effect of the ordinance, even though the evidence indicated that the driving of the horse on the sidewalk was unintentional on the part of the driver, since the court expressly instructed the jury that, if such act was unintentional, it would constitute no violation of the ordinance. Clackum v. Bagwell, 40 Ga. App. 831, 151 S.E. 689 (1930).

Jury question. — In an action for injuries to the plaintiff by a bull of the defendant, the questions of the viciousness of the bull, and the negligence of the defendant are questions for the jury. Van Harlengen v. Bearse, 26 Ga. App. 473, 106 S.E. 306 (1921).

When a private zoo owner opens a private zoo for viewing without any charge to the public, it is a question for the jury whether the act of the defendant's employee in removing a chimpanzee from the chimpanzee's cage complied with that degree of care required by this section. Palmer Chem. & Equip. Co. v. Gantt, 123 Ga. App. 703, 182 S.E.2d 492 (1971).

While a previous attack would not necessarily be required to say there is a jury issue on the question of knowledge that a dog had a propensity to attack human beings, at least some form of menacing behavior would be. Carter v. Ide, 125 Ga. App. 557, 188 S.E.2d 275 (1972).

Evidence that the dog's owner knew that the dog had tried to attack another person and had scolded the dog for this behavior was behavior evidence such that the jury should have been allowed to determine whether the owner should have anticipated the subsequent successful attack on the plaintiff. Thurmond v. Saffo, 238 Ga. App. 687, 520 S.E.2d 43 (1999).

OPINIONS OF THE ATTORNEY GENERAL

Scope of section. — This section relates to a civil action for damages for injury caused by a vicious or dangerous animal kept by its owner when the owner with knowledge of the viciousness of the animal negligently allows the animal to go at liberty. 1945-47 Op. Att'y Gen. p. 652.

Basis of liability. — If injury occurs to another by reason of the exercise of the vicious propensity of an animal, the owner will be held liable therefor, if the owner knew of the vicious character and negligently allowed such an animal to run at large. 1945-47 Op. Att'y Gen. p. 652.

Presumption of negligence. — When a person is injured by an attack of an animal which by nature is vicious, the negligence of the owner is presumed because the law recognizes that safety lies only in keeping such animals perfectly secure. 1945-47 Op. Att'y Gen. p. 652.

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Animals, § 62 et seq.

Am. Jur. Proof of Facts. — Plaintiff's Negligence, Provocation, or Assumption of Risk as Defense in Dogbite Cases, 39 POF3d 133.

Am. Jur. Pleading and Practice Forms. — 1D Am. Jur. Pleading and Practice Forms, Animals, § 98.

C.J.S. — 3B C.J.S., Animals, § 319 et seq., 340 et seq., 365 et seq.

ALR. — Duty and liability of master to servant injured by horse belonging to master, 26 ALR 871; 42 ALR 226; 60 ALR 468.

Character and extent of claims for which lien on animal damage feasant attaches, 26 ALR 1047.

Constitutionality of "dog laws", 49 ALR 847.

Liability of owner or occupant of premises for injury to person thereon by dog not owned or harbored by former, 92 ALR 732.

Liability of owner of male animal who

furnishes its service for breeding purposes, for damage inflicted during such services, 106 ALR 1418.

Owner or keeper of trespassing dog as subject to injunction or damages, 107 ALR 1323.

Owner's liability, under legislation forbidding domestic animals to run at large on highways, as dependent on negligence, 34 ALR2d 1285.

Statutory liability for physical injuries inflicted by animal as surviving defendant's death, 40 ALR2d 543.

Liability for injury to property inflicted by wild animal, 57 ALR2d 242.

Contributory negligence, assumption of risk, or intentional provocation as defense to action for injury by dog, 66 ALR2d 916.

Liability of landlord to tenant or member of tenant's family, for injury by animal or insect, 67 ALR2d 1005.

Law as to cats, 73 ALR2d 1032; 8 ALR4th 1287.

Liability for injury inflicted by horse, dog, or other domestic animal exhibited at show, 80 ALR2d 886.

Liability of owner of horse to person injured or killed when kicked, bitten, knocked down, and the like, 85 ALR2d 1161.

Liability for injury or damage caused by bees, 86 ALR2d 791.

Master's liability to agricultural worker injured other than by farm machinery, 9 ALR3d 1061.

Liability for injury or death of child social guest, 20 ALR3d 1127.

Owner's or keeper's liability for personal injury or death inflicted by wild animal, 21 ALR3d 603; 92 ALR3d 832; 66 ALR Fed. 305.

Liability of owner of dog known by him to be vicious for injuries to trespasser, 64 ALR3d 1039.

Animals as attractive nuisance, 64 ALR3d 1069.

Keeping bees as nuisance, 88 ALR3d 992.

Governmental liability from operation of zoo, 92 ALR3d 832.

Personal injuries inflicted by animal as within homeowner's or personal liability policy, 96 ALR3d 891.

Liability of owner of dog for dog's biting veterinarian or veterinarian's employee, 4 ALR4th 349.

Liability of owner or bailor of horse for injuries by horse to hirer or bailee thereof, 6 ALR4th 358.

Measure, elements, and amount of damages for killing or injuring cat, 8 ALR4th 1287.

Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 132.

Liability of owner or operator of vehicle for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 ALR4th 159.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 29 ALR4th 431.

Liability to adult social guest injured otherwise than by condition of premises, 38 ALR4th 200.

Liability for personal injury or death caused by trespassing or intruding livestock, 49 ALR4th 710.

Modern status of rule of absolute or strict liability for dogbite, 51 ALR4th 446.

Cat as subject of larceny, 55 ALR4th 1080.

Who "harbors" or "keeps" dog under animal liability statute, 64 ALR4th 963.

Liability of owner or operator of business premises for injury to patron by dog or cat, 67 ALR4th 976.

Liability for injuries caused by cat, 68 ALR4th 823.

Landlord's liability to third person for injury resulting from attack on leased premises by dangerous or vicious animal kept by tenant, 87 ALR4th 1004.

Landlord's liability to third person for injury resulting from attack off leased premises by dangerous or vicious animal kept by tenant, 89 ALR4th 374.

Intentional provocation, contributory or comparative negligence, or assumption of risk as defense to action for injury by dog, 11 ALR5th 127.

Liability for injury inflicted by horse, dog, or other domestic animal exhibited at show, 68 ALR5th 599.

Liability of United States, under Fed-

eral Tort Claims Act (28 USCS secs. 1346, 2671 et seq.), for death or injury sustained by visitor to national park or national forest, 66 ALR Fed. 305.

CHAPTER 3

LIABILITY OF OWNERS AND OCCUPIERS OF LAND

Article 1

General Provisions

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51-3-1. Duty of owner or occupier of land to invitee.
51-3-2. Duty of owner of premises to licensee.
51-3-3. Lawful possessor of land owes no duty of care to trespasser.

Article 2

Owners of Property Used for Recreational Purposes

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Article 3

Owners of Property Used for Other Purposes

51-3-30. Liability of landowner or hunter for injury caused by wildlife crossing public roadway.
51-3-31. Agritourism defined; immunity for civil liability; warnings.

Article 4

Liability of Space Flight Entities

51-3-41. Definitions.
51-3-42. Civil or criminal liability for injuries during space flight.
51-3-43. Required warning and agreement for space flight; requirements for enforceability.
51-3-44. Governing law.

Law reviews. — For annual survey article discussing local government law, see 51 Mercer L. Rev. 397 (1999).

RESEARCH REFERENCES

ALR. — Tort liability for window washer's injury or death, 69 ALR4th 207.

ARTICLE 1

GENERAL PROVISIONS

51-3-1. Duty of owner or occupier of land to invitee.

Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and

approaches safe. (Civil Code 1895, § 3824; Civil Code 1910, § 4420; Code 1933, § 105-401.)

History of Code section. — The language of this Code section is derived in part from the decision in Atlanta Cotton-Seed Oil Mills v. Coffey, 80 Ga. 145, 4 S.E. 759 (1887).

Law reviews. — For article discussing property owner liability in "slip and fall" cases, see 14 Ga. St. B. J. 131 (1978). For article surveying torts law, see 34 Mercer L. Rev. 271 (1982). For annual survey of torts law, see 35 Mercer L. Rev. 291 (1983). For article, "Changes in Liability Standards for Owners and Occupiers," see 20 Ga. St. B. J. 41 (1983). For article, "Construction Law," see 53 Mercer L. Rev. 173 (2001). For article, "Premises Liability for Criminal Attacks: Same Crimes, New Law," see 5 Ga. St. B. J. 54 (1999). For survey article on construction law, see 60 Mercer L. Rev. 59 (2008). For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009). For annual survey on torts, see 64 Mercer L. Rev. 287 (2012). For annual survey of tort law, see 68 Mercer L. Rev. 279 (2016).

For note contrasting attractive nuisance doctrine in Georgia with that in California, see 22 Ga. B. J. 563 (1960). For note discussing Georgia's approach to social guests injured on the land of another, and advocating elevation of the expressly invited social guest to the status of invitee, see 6 Ga. St. B. J. 130 (1969). For note discussing landlord liability for crime in apartments, see 5 Ga. L. Rev. 349 (1971). For note, "Tort Liability in Georgia for the Criminal Acts of Another," see 18 Ga. L. Rev. 361 (1984). For note, "Robinson v. Kroger: A Leveling of the Field or Fatal Fall for Summary Judgment?," see 50 Mercer L. Rev. 655 (1999). For note, "Between Bystander and Insurer: Locating the Duty of the Georgia Landowner to Safeguard Against Third-Party Criminal Attacks on the Premises," see 15 Ga. St. U.L. Rev. 1099 (1999).

For comment on Macon Tel. Publishing Co. v. Graden, 79 Ga. App. 230, 53 S.E.2d 371 (1949), see 1 Mercer L. Rev. 130 (1949). For comment criticizing Plante v. Lorraine Mfg. Co., 78 R.I. 505, 82 A.2d 893 (1951), holding no implied invitation to youths despite defendant's excavation and exposed sand bank, see 14 Ga. B. J. 248 (1951). For comment on Stanolind Oil & Gas Co. v. Franklin, 193 F.2d 561 (5th Cir. 1951), see 14 Ga. B. J. 498 (1952). For comment on Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957) wherein child accompanying customer parent into store had status of invitee, see 9 Mercer L. Rev. 375 (1958). For comment on Austin v. Smith, 96 Ga. App. 659, 101 S.E.2d 169 (1958), concerning gross negligence in relation to gratuitous automobile guest, see 20 Ga. B. J. 552 (1958). For comment on Baynes v. McElrath, 106 Ga. App. 805, 128 S.E.2d 348 (1962), finding passenger under car-pool arrangement as an invitee and not a guest, to whom driver owed ordinary care, see 14 Mercer L. Rev. 477 (1963). For comment on Findley v. Lipsitz, 106 Ga. App. 24, 126 S.E.2d 299 (1962), see 25 Ga. B. J. 457 (1963). For comment on Kriess v. Allatoona Landing, Inc., 108 Ga. App. 427, 133 S.E.2d 602 (1963), see 26 Ga. B. J. 450 (1964). For comment discussing motel owner's duty of care to infants, in light of Waught v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966), see 18 Mercer L. Rev. 480 (1967). For comment on Hanson v. Town & Country Shopping Center, 259 Iowa 542, 144 N.W.2d 870 (1966), as to business owners' duty to anticipate injury to customer due to ice on parking lot, see 1 Ga. L. Rev. 548 (1967). For comment on Cargill, Inc. v. Zimmer, 374 F.2d 924 (8th Cir. 1967), highlighting Georgia's narrow application of the "attractive nuisance" doctrine, see 19 Mercer L. Rev. 472 (1968). For comment on Nesmith v. Starr, 115 Ga. App. 473, 155 S.E.2d 24 (1967), see 4 Ga. St. B. J. 518 (1968). For comment on Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rep. 97, 443 P.2d 561, 32 A.L.R.3d 496 (Sup. Ct. 1968), applying a reasonable man test to the host in a personal injury suit brought by a social guest, rather than classifying plaintiff's status, see 20 Mercer L. Rev. 338 (1969). For comment on Ryckeley v. Georgia Power Co., 122 Ga. App. 107, 176 S.E.2d 493 (1970), see 23 Mercer L. Rev. 431 (1972). For comment, "A New Begin-

ning for the Attractive Nuisance Doctrine in Georgia," see 34 Mercer L. Rev. 433 (1982).

JUDICIAL DECISIONS

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General Consideration

1. In General

Liability depends on injured person's status. — The liability of the owner of business premises depends upon whether the decedent, at the time the decedent suffered the fatal injury, was a trespasser, a licensee or an invitee (express or implied). Under O.C.G.A. § 51-3-2, the owner or proprietor of the premises is liable only for willful or wanton injury to a licensee, whereas under O.C.G.A. § 51-3-3, the landowner or occupier owes an invitee the duty to exercise ordinary care in keeping the premises safe. The duty owed to a trespasser is not to willfully and wantonly injure the trespasser. Atkins v. Tri-Cities Steel, Inc., 166 Ga. App. 349, 304 S.E.2d 409 (1983).

Distinction between business invitees and licensees is permissible classification under equal protection guarantees of the state and federal Constitutions. Delk v. Sellers, 149 Ga. App. 439, 254 S.E.2d 446 (1979).

A business invitor owes a nondelegable duty to protect the business's invitees from injury. Moon v. Homeowners' Ass'n, 202 Ga. App. 821, 415 S.E.2d 654, cert. denied, 202 Ga. App. 906, 415 S.E.2d 654 (1992).

Court of Appeals does not have jurisdiction to hold this section unconstitutional in order to abolish the common-law categories of invitee, licensee and trespasser and substitute the standard of reasonable care on the part of the occupier of premises in view of the probability of harm to entrants. Meyberg v. Dodson, 136 Ga. App. 324, 221 S.E.2d 200 (1975).

Intent of section. — The object and purpose of this section is to require the owner or occupier of the premises to exercise ordinary care in keeping the premises safe for an invitee. Irwin v. Torbert, 204 Ga. 111, 49 S.E.2d 70 (1948).

Knowledge and appreciation of risk bars recovery. — Tort liability under either O.C.G.A. § 51-1-2 or O.C.G.A. § 51-3-1 is barred when the plaintiff, with actual knowledge and subjective appreciation of the risk, undertakes an obvious danger from the employee's negligence. Sones v. Real Estate Dev. Group, Inc., 270 Ga. App. 507, 606 S.E.2d 687 (2004).

Distraction doctrine did not allow a homeowner to be held liable for an invitee's "trip and fall" injury suffered at the homeowner's home due to hazardous

General Consideration (Cont'd)
1. In General (Cont'd)

steps because: (1) the invitee saw and appreciated any hazard posed by the steps; and (2) under such circumstances, a mere distraction could not overcome summary judgment when the invitee had actual, prior knowledge of the hazard, so, even if the homeowner knew of the alleged hazard, the invitee could not recover due to the invitee's equal knowledge of the hazard. Benefield v. Vance, 315 Ga. App. 505, 726 S.E.2d 531 (2012).

Plaintiff knew there was a pothole in the area where the plaintiff parked and that the plaintiff could have seen the plaintiff was placing the plaintiff's foot in the pothole if the plaintiff had looked. Because the plaintiff's knowledge of the hazard that caused the plaintiff's fall and resulting injuries was at least equal to that of the landowner, the plaintiff could not recover. LeCroy v. Bragg, 319 Ga. App. 884, 739 S.E.2d 1 (2013).

In a premises liability action based on the injuries the plaintiff sustained in a four-wheeler accident caused by a chain installed between two trees on the defendant's property, the trial court did not err in granting summary judgment in favor of the defendant as the plaintiff had equal or superior knowledge of the hazard of a chain; the plaintiff could see the chain well enough from a distance to observe whether the chain was up or down; and the plaintiff failed to exercise ordinary care for the plaintiff's personal safety because, while the plaintiff did not see the chain at the time of the collision, that was the result of the plaintiff's own conduct, including the speed and the angle at which the plaintiff entered the lane. Seago v. Estate of Earle, 331 Ga. App. 699, 771 S.E.2d 397 (2015), cert. denied, 2015 Ga. LEXIS 512 (Ga. 2015).

Knowledge of unreasonable risk of criminal attack in dormitory prerequisite to recovery. — In an action by college students who were sexually assaulted while living in a dormitory, knowledge that the dormitory subjected the students to the unreasonable risk of criminal attack is a prerequisite to recovery under O.C.G.A. § 51-3-1, and may be demonstrated by evidence of the occurrence of prior substantially similar incidents. However, in light of the dearth of evidence of the occurrence of prior substantially similar incidents, the college was entitled to summary judgment. Savannah College of Art & Design, Inc. v. Roe, 261 Ga. 764, 409 S.E.2d 848 (1991).

Defective construction. — Liability under this section may arise from defective construction. Ross v. Jackson, 123 Ga. 657, 51 S.E. 578 (1905); Wynne v. Southern Bell Tel. & Tel. Co., 159 Ga. 623, 126 S.E. 388 (1925).

Application of this section cannot be restricted to purely physical defects in real property or personal property located thereon. It must be interpreted to include risks upon the premises in the nature of vicious animal or ill tempered individuals likely to inflict harm upon invitees visiting upon the premises. Georgia Bowling Enters., Inc. v. Robbins, 103 Ga. App. 286, 119 S.E.2d 52 (1961); Sutton v. Sutton, 145 Ga. App. 22, 243 S.E.2d 310 (1978); Beard v. Fender, 179 Ga. App. 465, 346 S.E.2d 901 (1986).

The presence of a mischievous human being on premises may constitute the danger against which the law requires of the occupant reasonable care to protect the invitee. Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937).

Generally, law does not require owner or possessor to anticipate presence of animals ferae naturae. Williams v. Gibbs, 123 Ga. App. 677, 182 S.E.2d 164 (1971).

This section refers to premises under control of owner or occupier, not to premises over which a person has a mere easement of passage, and which belong to another. Spindel v. Gulf Oil Corp., 100 Ga. App. 323, 111 S.E.2d 160 (1959).

Elements of action. — As between owner and customer, one who sustains injuries upon the property of the other, in order to recover, must show that two elements at least exist, fault on the part of the owner, and ignorance of danger on the part of the invitee. Barber v. Rich's, Inc., 92 Ga. App. 880, 90 S.E.2d 666 (1955).

Prudence of the ordinarily careful person. — In a "slip and fall" premises

case, an invitee's failure to exercise ordinary care for personal safety is not established as a matter of law by the invitee's admission that the invitee did not look at the site on which the invitee placed the invitee's foot or that the invitee could have seen the hazard had the invitee visually examined the floor before taking the step which led to the invitee's downfall; rather, the issue is whether, taking into account all the circumstances existing at the time and place of the fall, the invitee exercised the prudence the ordinarily careful person would use in a like situation. Robinson v. Kroger Co., 268 Ga. 735, 493 S.E.2d 403 (1997); Christensen v. Overseas Partners Capital, Inc., 249 Ga. App. 827, 549 S.E.2d 784 (2001).

Liability for injuries to invitees on premises of others depends on its own peculiar facts. This is more or less true as to all negligence cases and is especially applicable to actions based on this section. Lowe v. Atlanta Masonic Temple Co., 79 Ga. App. 575, 54 S.E.2d 677 (1949).

A guest of a tenant is an invitee upon the premises of the landlord when the guest is invited by the tenant and visits the tenant in such premises; the applicable standard of care is that prescribed by O.C.G.A. § 51-3-1. Winchester v. Sun Valley-Atlanta Assocs., 206 Ga. App. 140, 424 S.E.2d 85 (1992).

Known licensee. — After the presence of a licensee is known, exactly the same acts of caution may be required of the owner to satisfy the legal duty as would be necessary if the licensee were invited. Cooper v. Corporate Property Investors, 220 Ga. App. 889, 470 S.E.2d 689 (1996).

The "equal knowledge rule" is the practical application of a rule that a knowledgeable plaintiff cannot recover damages if by ordinary care the plaintiff could have avoided the consequences of the defendant's negligence. Clark v. Carla Gay Dress Co., 178 Ga. App. 157, 342 S.E.2d 468 (1986).

Plaintiff's "equal knowledge" was not dispositive, since although the plaintiff knew as much if not more than the plaintiff's factory supervisor about the plaintiff's estranged spouse's propensities, it was equally clear that the plaintiff did not anticipate that the spouse would enter the factory and shoot the plaintiff in the head, and it was not clear whether the plaintiff could have avoided it in any case. Clark v. Carla Gay Dress Co., 178 Ga. App. 157, 342 S.E.2d 468 (1986).

In a negligence action by a parent against a child for injuries sustained when the child's store was robbed and the parent was shot, the evidence showed that both people knew about a previous robbery at that store that involved no shooting, but that only the child knew about a prior robbery and shooting at the store. The equal knowledge rule is not applicable in this case because liability under O.C.G.A. § 51-3-1 is founded upon the foreseeability of harm; the proprietor's liability is based on the proprietor's failure to exercise ordinary care to keep the premises safe for invitees. Lee v. Lee, 194 Ga. App. 606, 391 S.E.2d 654 (1990).

The "equal knowledge" rule did not apply when the plaintiff was injured by an employee who had earlier been fired for assaulting the plaintiff and who, without the plaintiff's knowledge, was permitted by the employer to return to the premises. Crapp v. Elberta Crate & Box Co., 223 Ga. App. 902, 479 S.E.2d 101 (1996).

Victim's negligence claim for personal injuries suffered while traversing the owner's gas station parking lot was properly dismissed as the victim had actual knowledge of the allegedly hazardous condition, it was equal to the owner's knowledge, and therefore the distraction doctrine did not apply. Delk v. Quiktrip Corp., 258 Ga. App. 140, 572 S.E.2d 676 (2002).

When customer's knowledge of hazard is equal to owner's, customer's claim fails. Helms v. Wal-Mart Stores, Inc., 806 F. Supp. 969 (N.D. Ga. 1992), aff'd, 998 F.2d 1023 (11th Cir. 1993) (also finding that owner had exercised reasonable care).

The superior/equal knowledge rule is applicable in those cases when the proprietor allows a dangerous condition to exist, including cases when the alleged dangerous condition is one created by the activities of third persons, so long as the condition is one which the invitee can expect equally with the host, or come to know of, and therefore must anticipate the danger.

General Consideration (Cont'd)
1. In General (Cont'd)

In other words, the condition even if created by third parties must be such that the invitee can indeed have equal knowledge and either assumes the risk or can avoid the danger with ordinary care. Clark v. Carla Gay Dress Co., 178 Ga. App. 157, 342 S.E.2d 468 (1986).

Store owner had no duty to warn the store's customer of an icy condition in a parking lot, since the customer had knowledge at least equal to that of the store employees, and the customer had traversed ice and snow when going from the customer's van into the store. Favour v. Food Lion, Inc., 193 Ga. App. 750, 389 S.E.2d 22 (1989).

Department store manager not liable. — Department store manager, who was neither an owner or occupier of the store, could not be held liable for injuries to a customer who fell in the store. Adams v. Sears, Roebuck & Co., 227 Ga. App. 695, 490 S.E.2d 150 (1997).

Knowledge of defective electrical wiring. — Because a painter failed to show that a homeowner's knowledge of an electrical wiring defect was superior to that of the painter, the homeowner was entitled to summary judgment as to the issue of the homeowner's liability. Schuessler v. Bennett, 287 Ga. App. 880, 652 S.E.2d 884 (2007), cert. denied, 2008 Ga. LEXIS 230 (Ga. 2008).

Evidence sufficient to preclude summary judgment. — When evidence showed the injured defendant took care to inspect the work area for possible hazards before starting to remove a roof, asked workers for the property owner to stay away from the area where the defendant was working and generally tried to keep the area safe, the defendant's claim should have survived summary judgment. Greenforest Baptist Church, Inc. v. Shropshire, 221 Ga. App. 465, 471 S.E.2d 547 (1996).

When a delivery person slipped and fell on loose telephone books at a hospital loading dock, the hospital was properly denied summary judgment; there was an issue of fact as to whether the hospital had constructive knowledge of the condition, the hospital did not show that the delivery person's knowledge of the hazard was equal or superior to its own, the voluntary departure rule did not apply because there was evidence that the route taken by the delivery person was an authorized one and was routinely used, and whether the delivery person was negligent in not watching where the delivery person stepped was for the jury to resolve. Kennestone Hosp., Inc. v. Harris, 285 Ga. App. 393, 646 S.E.2d 490 (2007).

Constructive knowledge of water on floor. — Trial court properly denied a store's motion for a directed verdict in a slip and fall case because the plaintiff presented evidence from which the jury could infer the store's constructive knowledge of the hazard based on water on the floor in the floral area being a recurrent problem and mats on the floor to catch the water were not in place on the day the plaintiff fell. The Kroger Co. v. Schoenhoff, 324 Ga. App. 619, 751 S.E.2d 438 (2013).

No liability found. — When the worker who was knocked down, allegedly by the dog owners' dog, was unable to show that the dog had any dangerous propensities or that the dog owner knew about such propensities, the worker could not recover either under the dangerous animal liability statute, O.C.G.A. § 51-2-7, or the premises liability statute, O.C.G.A. § 51-3-1; however, the trial court erred in granting summary judgment to the dog owners as a genuine issue of material fact still existed regarding whether the one dog owner voluntarily undertook a duty to restrain the dogs on the owner's premises and, if so, whether that voluntary undertaking was negligently performed. Osowski v. Smith, 262 Ga. App. 538, 586 S.E.2d 71 (2003).

Because: (1) the undisputed evidence presented to the trial court was that a retailer had no knowledge of a hazard posed by a previously loaded BB gun placed on an open display shelf and accessible to children; and (2) a parent failed to show that it was reasonably foreseeable that the parent's child would take the gun and shoot the child's sibling, the trial court did not err in granting the retailer summary judgment as to the issue of its liability. Roberts v. Wal-Mart Stores, Inc., 287 Ga. App. 316, 651 S.E.2d 464 (2007).

Cited in Pacetti v. Central of Ga. Ry., 6 Ga. App. 97, 64 S.E. 302 (1909); Mattox v. Lambright, 31 Ga. App. 441, 120 S.E. 685 (1923); Bussell v. Dannenberg Co., 34 Ga. App. 792, 132 S.E. 230 (1925); Hickman v. Toole, 35 Ga. App. 697, 134 S.E. 635 (1926); Walker v. Central of Ga. Ry., 47 Ga. App. 240, 170 S.E. 258 (1933); Wardlaw v. Executive Comm. of Baptist Convention, 47 Ga. App. 595, 170 S.E. 830 (1933); Rogers v. McKinley, 48 Ga. App. 262, 172 S.E. 662 (1934); Atlanta & W. Point R.R. v. Wise, 190 Ga. 254, 9 S.E.2d 63 (1940); Swope v. Farrar, 66 Ga. App. 52, 17 S.E.2d 92 (1941); Bryant v. S.H. Kress & Co., 76 Ga. App. 530, 46 S.E.2d 600 (1948); Kelley v. Black, 203 Ga. 589, 47 S.E.2d 802 (1948); Nabors v. Atlanta Biltmore Corp., 77 Ga. App. 730, 49 S.E.2d 688 (1948); Ludwig v. J.J. Newberry Co., 78 Ga. App. 871, 52 S.E.2d 485 (1949); Brigman v. Brenner, 206 Ga. 222, 56 S.E.2d 471 (1949); McCarthy v. Hiers, 81 Ga. App. 365, 59 S.E.2d 22 (1950); Hogg v. First Nat'l Bank, 82 Ga. App. 861, 62 S.E.2d 634 (1950); Peggy Ann of Ga., Inc. v. Scoggins, 86 Ga. App. 109, 71 S.E.2d 89 (1952); Howerdd v. Whitaker, 87 Ga. App. 850, 75 S.E.2d 572 (1953); Sheraton Whitehall Corp. v. McConnell, 88 Ga. App. 725, 77 S.E.2d 752 (1953); Dantos v. Community Theatres Co., 90 Ga. App. 195, 82 S.E.2d 260 (1954); United States v. Adams, 212 F.2d 912 (5th Cir. 1954); Wicker v. Roberts, 91 Ga. App. 490, 86 S.E.2d 350 (1955); Greyhound Corp. v. Stokes, 91 Ga. App. 674, 86 S.E.2d 804 (1955); Nunnally v. Shockley, 91 Ga. App. 767, 87 S.E.2d 115 (1955); Dawley v. Sheridan-Punaro Co., 93 Ga. App. 696, 92 S.E.2d 613 (1956); Shockley v. Nunnally, 95 Ga. App. 342, 98 S.E.2d 47 (1957); Golf Club Co. v. Rothstein, 97 Ga. App. 128, 102 S.E.2d 654 (1958); Pettit v. Stiles Hotel Co., 97 Ga. App. 137, 102 S.E.2d 693 (1958); Midland Properties Co. v. Farmer, 100 Ga. App. 8, 110 S.E.2d 100 (1959); Netherland v. Pacific Employers Ins. Co., 101 Ga. App. 837, 115 S.E.2d 122 (1960); Robinson's Tropical Gardens, Inc. v. Sawyer, 105 Ga. App. 468, 125 S.E.2d 131 (1962); Home Fed. Sav. & Loan Ass'n v. Hulsey, 106 Ga. App. 171, 126 S.E.2d 541 (1962); National Distrib. Co. v. Georgia Indus. Realty Co., 106 Ga. App. 475, 127 S.E.2d 303 (1962); YMCA of Metro. Atlanta, Inc. v. Bailey, 107 Ga. App. 417, 130 S.E.2d 242 (1963); 670 New Street, Inc. v. Smith, 107 Ga. App. 539, 130 S.E.2d 773 (1963); Campbell v. Eubanks, 107 Ga. App. 527, 130 S.E.2d 832 (1963); Pulliam v. Walgreen Drug Stores, Inc., 108 Ga. App. 90, 131 S.E.2d 801 (1963); Atlanta Funtown, Inc. v. Crouch, 114 Ga. App. 702, 152 S.E.2d 583 (1966); Somers v. Tribble, 115 Ga. App. 282, 154 S.E.2d 620 (1967); Christian v. Vargas, 116 Ga. App. 359, 157 S.E.2d 308 (1967); Horton v. Nicholas, 117 Ga. App. 748, 162 S.E.2d 208 (1968); Murray Biscuit Co. v. Hutto, 119 Ga. App. 377, 167 S.E.2d 182 (1969); Millard v. AAA Electrical Contractors & Eng'rs, 119 Ga. App. 548, 167 S.E.2d 679 (1969); Washington v. Trend Mills, Inc., 121 Ga. App. 659, 175 S.E.2d 111 (1970); Nathan v. Oakland Park Supermarket, Inc., 126 Ga. App. 538, 191 S.E.2d 327 (1972); Gray v. Delta Air Lines, 127 Ga. App. 45, 192 S.E.2d 521 (1972); Rodriguez v. Newby, 131 Ga. App. 651, 206 S.E.2d 585 (1974); Burger Barn, Inc. v. Young, 131 Ga. App. 828, 207 S.E.2d 234 (1974); Chatmon v. Church's Fried Chicken, Inc., 133 Ga. App. 326, 211 S.E.2d 2 (1974); City of Macon v. Powell, 133 Ga. App. 907, 213 S.E.2d 63 (1975); Anderson v. Atlanta Univ., Inc., 134 Ga. App. 365, 214 S.E.2d 394 (1975); Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691 (1976); Keister v. Creative Arts Guild, Inc., 139 Ga. App. 67, 227 S.E.2d 880 (1976); Piggly-Wiggly S., Inc. v. Tucker, 139 Ga. App. 873, 229 S.E.2d 804 (1976); Guthrie v. Monumental Properties, Inc., 141 Ga. App. 21, 232 S.E.2d 369 (1977); Thompson-Weinman & Co. v. Brock, 144 Ga. App. 346, 241 S.E.2d 279 (1977); Hatcher v. City of Albany, 147 Ga. App. 843, 250 S.E.2d 537 (1978); Krystal Co. v. Bulter, 149 Ga. App. 696, 256 S.E.2d 96 (1979); Cuevas v. State, 151 Ga. App. 605, 260 S.E.2d 737 (1979); Blackwell v. Taylor, 497 F. Supp. 351 (M.D. Ga. 1980); Powell v. United Oil Corp., 160 Ga. App. 810, 287 S.E.2d 667 (1982); Strickland v. ITT Rayonier, Inc., 162 Ga. App. 317, 291 S.E.2d 396 (1982); Vizzini v. Blonder, 165 Ga. App. 840, 303 S.E.2d 38 (1983); Wagner v. Casey, 169 Ga. App. 500, 313 S.E.2d 756 (1984); Tolbert v. Captain Joe's Seafood, Inc., 170 Ga. App. 26, 316 S.E.2d 11

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1. In General (Cont'd)

(1984); Stouffer Corp. v. Henkel, 170 Ga. App. 383, 317 S.E.2d 222 (1984); Robinson v. Western Int'l Hotels Co., 170 Ga. App. 812, 318 S.E.2d 235 (1984); Gregory v. Trupp, 171 Ga. App. 299, 319 S.E.2d 122 (1984); Pitts v. Ivester, 171 Ga. App. 312, 320 S.E.2d 226 (1984); Brownlow v. Six Flags Over Ga., Inc., 171 Ga. App. 519, 322 S.E.2d 548 (1984); Begin v. Georgia Championship Wrestling, Inc., 172 Ga. App. 293, 322 S.E.2d 737 (1984); Bowman v. Richardson, 176 Ga. App. 864, 338 S.E.2d 297 (1985); Beard v. Fender, 179 Ga. App. 465, 346 S.E.2d 901 (1986); Willis v. Neal, 179 Ga. App. 732, 347 S.E.2d 700 (1986); Bishop v. Fair Lanes Ga. Bowling, Inc., 803 F.2d 1548 (11th Cir. 1986); Stanger v. Cato, 182 Ga. App. 498, 356 S.E.2d 97 (1987); Burnsed v. City of Albany, 184 Ga. App. 297, 361 S.E.2d 275 (1987); Phillips v. Lindsey, 184 Ga. App. 728, 362 S.E.2d 491 (1987); Fulton-DeKalb County Hosp. Auth. v. Estes, 187 Ga. App. 120, 369 S.E.2d 262 (1988); Pennington v. Cecil N. Brown Co., 187 Ga. App. 621, 371 S.E.2d 106 (1988); D.J. Powers Co. v. Hendry, 190 Ga. App. 297, 379 S.E.2d 1 (1989); Fowler v. Campbell, 191 Ga. App. 872, 383 S.E.2d 163 (1989); Reed v. Ed Taylor Constr. Co., 198 Ga. App. 595, 402 S.E.2d 346 (1991); Swanson v. Smith, 199 Ga. App. 471, 405 S.E.2d 301 (1991); Wallace v. Pointe Properties, Inc., 202 Ga. App. 537, 414 S.E.2d 678 (1992); Hobson v. Kroger Co., 204 Ga. App. 417, 419 S.E.2d 492 (1992); Ashley v. Balcor Property Mgt., Inc., 205 Ga. App. 590, 423 S.E.2d 14 (1992); Barlow v. Brant, 206 Ga. App. 313, 425 S.E.2d 309 (1992); Collins v. Shepherd, 212 Ga. App. 54, 441 S.E.2d 458 (1994); Smith v. Housing Auth., 212 Ga. App. 503, 441 S.E.2d 847 (1994); Lowe v. Macerich Real Estate Co., II, 213 Ga. App. 299, 444 S.E.2d 389 (1994); Days Inn of Am., Inc. v. Matt, 265 Ga. 235, 454 S.E.2d 507 (1995); Heffernan v. Home Depot U.S.A., Inc., 226 Ga. App. 167, 486 S.E.2d 51 (1997); Bible v. Jack Eckerd Corp., 227 Ga. App. 882, 490 S.E.2d 553 (1997); Gill v. Cooper Tire & Rubber Co., 231 Ga. App. 482, 499 S.E.2d 85 (1998); Johnson v. Loy, 231 Ga. App. 431, 499 S.E.2d 140 (1998); Freyer v. Silver, 234 Ga. App. 243, 507 S.E.2d 7 (1998); Lowery's Tavern, Inc. v. Dudukovich, 234 Ga. App. 687, 507 S.E.2d 851 (1998); Lee v. Food Lion, 243 Ga. App. 819, 534 S.E.2d 507 (2000); Medley v. Home Depot, Inc., 252 Ga. App. 398, 555 S.E.2d 736 (2001); Doe v. HGI Realty, Inc., 254 Ga. App. 181, 561 S.E.2d 450 (2002); Gilbert v. Auto. Purchasing Serv., 254 Ga. App. 770, 563 S.E.2d 906 (2002); Odister v. Leach, 257 Ga. App. 106, 570 S.E.2d 391 (2002); Barnes v. St. Stephen's Missionary Baptist Church, 260 Ga. App. 765, 580 S.E.2d 587 (2003); Thomas v. Exec. Comm. of the Baptist Convention, 262 Ga. App. 315, 585 S.E.2d 217 (2003); Am. Multi-Cinema, Inc. v. Walker, 270 Ga. App. 314, 605 S.E.2d 850 (2004); Norman v. Jones Lang LaSalle Ams., Inc., 277 Ga. App. 621, 627 S.E.2d 382 (2006).

2. Determining Invitee Status

"Invitee" defined. — When one enters the premises of another for purposes connected with the owner's business conducted on such premises such person is an invitee, and the owner is liable in damages to the invitee for failure to exercise ordinary care in keeping the premises safe. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932); United Theatre Enters., Inc. v. Carpenter, 68 Ga. App. 438, 23 S.E.2d 189 (1942); Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952); Jones v. West End Theatre Co., 94 Ga. App. 299, 94 S.E.2d 135 (1956); Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958); Abney v. London Iron & Metal Co., 152 Ga. App. 238, 262 S.E.2d 505 (1979), aff'd, 245 Ga. 759, 267 S.E.2d 214 (1980).

When a person induces or leads another to come upon the person's premises for any lawful purpose, the person is liable in damages to such person for a failure to exercise ordinary care in keeping the premises and approaches safe. Flint River Cotton Mills v. Colley, 71 Ga. App. 288, 30 S.E.2d 426 (1944).

A person is an invitee when at the time of the injury the person had present business relations with the owner of the premises which would render that person's

presence of mutual aid to both. Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975).

When one is on the premises of another at the latter's request and for the sole benefit of the latter, one is an invitee to whom the latter owes the duty of extraordinary care to avoid injury to that person. Abney v. London Iron & Metal Co., 152 Ga. App. 238, 262 S.E.2d 505 (1979), aff'd, 245 Ga. 759, 267 S.E.2d 214 (1980).

Licensee found. — Injured party was a licensee when the injured party entered into the lobby of a radio station just to be with the injured party's child, who was being interviewed, and had no other business at the station; the station did not obtain a benefit by virtue of the injured party's visit and did not impliedly invite the public at large into the station's lobby. Howard v. Gram Corp., 268 Ga. App. 466, 602 S.E.2d 241 (2004).

Child entering business to use bathroom. — Summary judgment should have been granted in favor of a store and employees on a tortious misconduct claim in a parent's action arising out of the employees' claim that the parent's child stole from the store because the child did not meet the legal definition of an invitee under O.C.G.A. § 51-3-1; the child had to be regarded as a licensee under O.C.G.A. § 51-3-2(a)(3) because the child entered the store only to use bathroom and had no intention of shopping there. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Distinction between licensee and invitee. — Mere permission to enter the premises creates the relation of licensee, but an invitee is one who comes upon the premises by an express or implied invitation. An owner is not liable to a licensee, unless the owner wilfully causes the licensee to be harmed. Mandeville Mills v. Dale, 2 Ga. App. 607, 58 S.E. 1060 (1907).

The general test as to whether a person is an invitee or licensee is whether the injured person at the time of the injury had present business relations with the owner of the premises which would render the person's presence of mutual aid to both, or whether the person's presence on the premises was for the person's own convenience, or on business with others than the owner of the premises. Cobb v. First Nat'l Bank, 58 Ga. App. 160, 198 S.E. 111 (1938); Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939); Pries v. Atlanta Enters., Inc., 66 Ga. App. 464, 17 S.E.2d 902 (1941); Brown v. Hall, 81 Ga. App. 874, 60 S.E.2d 414 (1950); Atkins v. Tri-Cities Steel, Inc., 166 Ga. App. 349, 304 S.E.2d 409 (1983); Burkhead v. American Legion, Post Number 51, Inc., 175 Ga. App. 56, 332 S.E.2d 311 (1985); Lee v. Myers, 189 Ga. App. 87, 374 S.E.2d 797 (1988), cert. denied, 189 Ga. App. 912, 374 S.E.2d 797 (1989).

The determining question as to whether a visitor is an invitee by implication or a licensee is whether or not the owner or occupant of the premises will receive some benefit, real or supposed, or has some interest in the purpose of the visit. Anderson v. Cooper, 214 Ga. 164, 104 S.E.2d 90 (1958); Dawson v. American Heritage Life Ins. Co., 121 Ga. App. 266, 173 S.E.2d 424 (1970).

Implied permission is not the same as business invitation. — When the plaintiff was injured while swimming in a lake on the defendant's property, neither implied permission nor recreational use enhanced the defendant's duties owed to the plaintiff beyond those owed to a plaintiff beyond those owed to a licensee. Nye v. Union Camp Corp., 677 F. Supp. 1220 (S.D. Ga. 1987), aff'd, 849 F.2d 1479 (11th Cir. 1988).

Business invitees. — When an owner of property leases the property to be used in the conduct of a business, those coming upon the premises in connection with the conduct of the business are invitees of the owner and proprietor alike. N.L. Indus., Inc. v. Madison, 176 Ga. App. 451, 336 S.E.2d 574 (1985).

Mutuality of interest does not mean that there must be commercial business transaction between the parties, but merely that each party is moved by a lawful purpose or interest in the object and subject matter of the invitation; the enterprise must be mutual to the extent that each party is lawfully interested therein, or that there is a common interest

General Consideration (Cont'd)
2. Determining Invitee Status (Cont'd)

or mutual advantage involved. Flint River Cotton Mills v. Colley, 71 Ga. App. 288, 30 S.E.2d 426 (1944).

While there must be at least some mutuality of interest in the subject matter to which the visitor's business relates, it is not necessary that the particular subject of the visit be for the benefit or profit of the occupant. Davis v. Garden Servs., Inc., 155 Ga. App. 34, 270 S.E.2d 228 (1980).

Business guests of tenant invitee enjoy invitee status. — The guests of invitee tenants, those coming on the leased premises for business purposes beneficial to the tenant, and those doing business with the tenant are there by the tenant's invitation and stand in the tenant's shoes insofar as they suffer injury due to the negligence of the owner or occupier of the premises. Davis v. Garden Servs., Inc., 155 Ga. App. 34, 270 S.E.2d 228 (1980).

One invited to premises of another as personal favor to the invitee, does not become an "invitee" of owner of the premises. Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975).

Delivery driver could be invitee of contractor on construction project. — In a construction site delivery driver's claims against a general contractor and a subcontractor arising out of injuries that occurred when the driver was struck by a concrete-filled hose on the construction site, as to the subcontractor, the driver was a licensee because there was no evidence that the driver's presence was for their mutual benefit, but as to the general contractor, the question of whether the driver was a licensee or invitee was for the jury. Card v. Dublin Constr. Co., 337 Ga. App. 804, 788 S.E.2d 845 (2016), cert. denied, 2017 Ga. LEXIS 151 (Ga. 2017); cert. denied, 2017 Ga. LEXIS 140 (Ga. 2017).

Independent contractor as invitee. — In action against property owner by independent contractor hired to do carpentry work for injuries sustained when beam upon which the contractor was standing fell to the ground, when the plaintiff was found to be a business invitee obviously hired for the plaintiff's expertise in carpentry and when the beam upon which the contractor was standing was ornamental and never intended for such use, the defendant property owner was not liable for injuries occasioned thereby unless the defendant had actual knowledge that such instrumentality was defective or unsuited for that purpose and knew or should have anticipated it would be diverted to such use. Amear v. Hall, 164 Ga. App. 163, 296 S.E.2d 611 (1982).

Determination that a widow's husband was an independent contractor on the owners' property while the husband was trimming the owners' tree limbs as part of a fundraising activity did not preclude a determination that the husband was also an invitee. Glenn v. Gibbs, 323 Ga. App. 18, 746 S.E.2d 658 (2013).

College students. — The relationship between a college or university and one of its students is one of common interest and mutual advantage. It follows that a student is an invitee and not a mere licensee or social guest. Unless the college or university is immune from tort liability, it has a duty to exercise ordinary and reasonable care for a student's safety. Walker v. Daniels, 200 Ga. App. 150, 407 S.E.2d 70 (1991).

Guest of university student on campus was licensee. — Board of Regents was not liable to a university campus visitor who was injured when the visitor tripped on a landscaping pipe in an unlit area off a walkway; the visitor was a licensee because there was no mutually beneficial interest in the visitor's being on campus in the middle of the night. Although the visitor was a guest of a university student, the visitor was in an area of campus that the visitor was not required to travel to reach the student's dorm. Scully v. Bd. of Regents of the Univ. Sys. of Ga., 332 Ga. App. 873, 775 S.E.2d 230 (2015), cert. denied, 2015 Ga. LEXIS 741 (Ga. 2015).

This section has no application in regard to mere social guest. Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975).

Mother and child were social guests; thus, not invitees, in the defendant's res-

idence, even though they were planning a joint family social trip with the defendants for their mutual personal benefit. Riley v. Brasunas, 210 Ga. App. 865, 438 S.E.2d 113 (1993).

Social guest is not an invitee but is a licensee. Barry v. Cantrell, 150 Ga. App. 439, 258 S.E.2d 61 (1979).

Relative as social guest. — When there was no evidence that the homeowner derived any benefit from the homeowner's half-brother's presence in the home, the half-brother was a mere social guest or licensee and the voluntary act of cutting the lawn for the homeowner did not change this status, nor the homeowner's duty of care to the guest. Robinson v. Turner, 164 Ga. App. 515, 297 S.E.2d 522 (1982).

Country club member's invited social guests were invitees to whom the club owed a duty of ordinary care, where members were required to pay guest privileges of $2 per guest for use of the club's swimming pool. Haliburton v. Cole, 193 Ga. App. 795, 389 S.E.2d 13 (1989).

Security guard at shopping mall was invitee of owner of fast food restaurant in the mall and was not required to show that owner had been willfully or wantonly negligent. T & M Invs., Inc. v. Jackson, 206 Ga. App. 218, 425 S.E.2d 300 (1992).

Neighbor as invitee. — Neighbor who entered defendant's property by express invitation for the purpose of caring for their plants and shrubs was an invitee. Anderson v. Reynolds, 232 Ga. App. 868, 502 S.E.2d 782 (1998).

Court properly granted summary judgment to defendants after a neighbor slipped and fell on their lawn while bringing in their newspaper, since the defendants had no knowledge that the sprinkler system had caused the ground to become soggy. Hansen v. Cooper, 253 Ga. App. 533, 559 S.E.2d 740 (2002).

Prison visitors. — Trial court erred in determining that a prison visitor was a licensee because the visitor's status was that of an invitee since both the visitor and the state and Department of Corrections received benefits from prison visitation; the prison at issue held itself open to visitors, maintaining regular visitation hours, and the state and Department supported inmate visitation. Freeman v. Eichholz, 308 Ga. App. 18, 705 S.E.2d 919 (2011).

Duty to keep premises safe for invitees extends to all portions of premises which are included within invitation and which it is necessary or convenient for the invitee to visit or use in the course of the business for which the invitation was extended, and at which his presence should therefor reasonably be anticipated, or to which he is allowed to go. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932); Georgia Power Co. v. Sheats, 58 Ga. App. 730, 199 S.E. 582 (1938); Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939); Freeman v. Levy, 60 Ga. App. 861, 5 S.E.2d 61 (1942); Sheffield Co. v. Phillips, 69 Ga. App. 41, 24 S.E.2d 834 (1943); Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952); Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958).

The duty to keep premises safe for invitees extends to any part thereof which one is specifically invited to enter, even though the place so entered is not designed for the use of, or ordinary use of, persons coming to the premises on business. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932).

Owner liable so long as invitee stays within area to which invitation extends. — If the invitee does not go beyond that part of the premises to which, as the situation reasonably appears to the invitee, the invitation extends, the invitee cannot be held to have become a mere licensee because, as a matter of fact, the purposes of the invitation could have been fulfilled without going on such part of the premises. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932); Georgia Power Co. v. Sheats, 58 Ga. App. 730, 199 S.E. 582 (1938); Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939); Freeman v. Levy, 60 Ga. App. 861, 5 S.E.2d 61 (1939).

Invitee who goes beyond invited area becomes mere licensee. — An owner's invitation, and the protection due an invitee thereunder, extend to those portions of the premises necessary for

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2. Determining Invitee Status (Cont'd)

ingress and egress and on parts necessary or incidental to the mutual business or purposes of the invitation; but an invitee who leaves such places for others on the premises not included in the invitation and disconnected with the objects of the invitation is, as to such parts of the premises, a mere licensee. Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 92 S.E.2d 720 (1956).

Invitee may rely upon discharge of duty resting upon occupier of land under this section by the person occupying the land and in control thereof, and is not necessarily, and as a matter of law, guilty of negligence in failing to discover the existence of a patent defect in the premises which renders the premises unsafe for persons coming upon the premises. Rogers v. Sears, Roebuck & Co., 45 Ga. App. 772, 166 S.E. 64 (1932); Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952); Jones v. Hunter, 94 Ga. App. 316, 94 S.E.2d 384 (1956); Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958); Marshall v. Pig'n Whistle, Inc., 102 Ga. App. 526, 116 S.E.2d 671 (1960); Winn-Dixie Stores, Inc. v. Hardy, 138 Ga. App. 342, 226 S.E.2d 142 (1976).

When the owner or occupier of premises fails to exercise ordinary care in keeping reasonably safe such premises for the use of those who go upon the premises as invitees, and when such an invitee is injured by a patent defect in such premises of which the injured party has no actual knowledge, it cannot be held as a matter of law that such injured party was lacking in ordinary care in failing to observe the defect in time to avoid the injury. Parsons v. Sears, Roebuck & Co., 69 Ga. App. 11, 24 S.E.2d 717 (1943).

If a defect, though patent, is not of such a nature and character as to be necessarily seen, in the exercise of ordinary care by a person coming upon the premises and who has a right to rely upon the duty of the owner or occupier of the premises to keep them safe, an invitee coming upon the premises is not, as a matter of law, guilty of negligence in not observing this defect. Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952); Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958).

Invitee, who is as fully aware of dangers and defects of premises as proprietor, assumes the risk and cannot recover from the defendant for dangers resulting in injuries by reason of such dangers and defects. Rogers v. Atlanta Enters., Inc., 89 Ga. App. 903, 81 S.E.2d 721 (1954).

Invitee is not obligated to inspect premises to discover latent defects nor even to observe all patent defects. Herrington v. Stone Mt. Mem. Ass'n, 119 Ga. App. 658, 168 S.E.2d 633, rev'd on other grounds, 225 Ga. 746, 171 S.E.2d 521 (1969).

Invitee need not choose safest way across owner's or proprietor's property but may travel any way customarily used and reasonably safe. Herrington v. Stone Mt. Mem. Ass'n, 119 Ga. App. 658, 168 S.E.2d 633, rev'd on other grounds, 225 Ga. 746, 171 S.E.2d 521 (1969).

Plain view doctrine of plaintiff's contributory negligence. — The plain view doctrine puts a duty upon a person to look where the person is walking and to see large objects in plain view which are at a location where the objects are customarily placed and expected to be; not performing this duty may amount to a failure to exercise ordinary care for one's safety as would bar a recovery for resulting injuries. Stenhouse v. Winn Dixie Stores, Inc., 147 Ga. App. 473, 249 S.E.2d 276 (1978).

Distraction doctrine may limit plaintiff's contributory negligence in certain cases. — Under the distraction doctrine, a plaintiff may be excused from the otherwise required degree of care because of circumstances creating an emergency situation of peril. This doctrine covers situations where the plaintiff's attention is distracted by a natural and usual cause, and this is particularly true when the distraction is placed there by the defendant or when the defendant in the exercise of ordinary care should have anticipated that the distraction would occur.

Stenhouse v. Winn Dixie Stores, Inc., 147 Ga. App. 473, 249 S.E.2d 276 (1978).

One valid line of distinction existing under the distraction doctrine concerns the cause of the distraction. When the distraction is self-induced, the plaintiff can no more take the benefit of it to excuse the plaintiff's lack of care for the plaintiff's own safety than who creates an emergency can excuse oneself because of its existence. When the distraction comes from without, and is of such nature as naturally to divert the plaintiff, and also of such nature that the defendant might naturally have anticipated it, the result is different. Stenhouse v. Winn Dixie Stores, Inc., 147 Ga. App. 473, 249 S.E.2d 276 (1978).

Invitation, express or implied, is necessary to create more responsible relation and consequent higher duty upon owner or proprietor. Atlanta & W.P.R.R. v. Hyde, 45 Ga. App. 548, 165 S.E. 466 (1932), later appeal, 47 Ga. App. 139, 169 S.E. 854 (1933).

Express invitation. — Victim was invitee; victim was invited by paving company's subcontractor to project site to observe saw blades and both had an interest in the effectiveness of the saw blades being used. Ballenger Paving Co. v. Gaines, 231 Ga. App. 565, 499 S.E.2d 722 (1998).

Implied invitation. — An implied invitation is one which is held to be extended by reason of the owner doing something or permitting something to be done which fairly indicates to the person entering that one's entry and use of the property is consistent with the intents and purposes of the owner. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932); Georgia Power Co. v. Sheats, 58 Ga. App. 730, 199 S.E. 582 (1938); Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939); Freeman v. Levy, 60 Ga. App. 861, 5 S.E.2d 61 (1939).

Invitation is implied when entry on premises is for purpose which is, or is supposed to be, beneficial to owner. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932).

An invitation of the owner or occupant of premises is implied by law when the person goes on the premises for the benefit, real or supposed, of the owner or occupant, or in a matter of mutual interest, or in the usual course of business, or for the performance of some duty. McCall v. McCallie, 48 Ga. App. 99, 171 S.E. 843 (1933); Flint River Cotton Mills v. Colley, 71 Ga. App. 288, 30 S.E.2d 426 (1944).

An invitation is inferred when there is a common interest or mutual advantage, while a license is inferred when the object is the mere pleasure or benefit of the person using it. Hall v. Capps, 52 Ga. App. 150, 182 S.E. 625 (1935); Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975).

Federal food inspector was an invitee under O.C.G.A. § 51-3-1, not a licensee under O.C.G.A. § 51-3-2, because the inspector was not present at an owner's chicken processing plant merely for the inspector's own pleasure or convenience but rather pursuant to United States Department of Agriculture (USDA) responsibilities; the owner could not have legally conducted business without the presence of USDA inspectors, which indicated that the owner received an advantage from the inspector's presence on the property and, thus, was easy to infer that the owner invited the inspector onto the premises in order to ensure compliance with federal regulations so that the owner could operate the plant. Sanderson Farms, Inc. v. Atkins, 310 Ga. App. 423, 713 S.E.2d 483 (2011).

In order for visitor to occupy status of implied invitee, as distinguished from mere licensee, one must come for purpose connected with the business in which the occupant is engaged, or which the occupant permits to be carried on there; there must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant. Hall v. Capps, 52 Ga. App. 150, 182 S.E. 625 (1935); Morse v. Sinclair Auto. Serv. Corp., 86 F.2d 298 (5th Cir. 1936); Georgia Power Co. v. Sheats, 58 Ga. App. 730, 199 S.E. 582 (1938).

Principle on which courts distinguish case of implied license from one of implied invitation, in the technical

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sense, seems to be this: speaking generally, when the privilege of the user exists for the common interest or mutual advantage of both parties it will be held to be a case of invitation; but if it exists for the mere pleasure and benefit of the party exercising the privilege, it will be held to be a case of license. Atlantic Steel Co. v. Cleaton, 52 Ga. App. 502, 183 S.E. 827 (1936).

In case of implied invitation, gist of liability consists in fact that person injured did not act merely for the person's own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that the person entered the premises because the person was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. Georgia Power Co. v. Sheats, 58 Ga. App. 730, 199 S.E. 582 (1938).

Invitation may be implied by dedication or may arise from known and customary use of portions of certain premises and it may be inferred from conduct, if notorious or actually known to the owner or the owner's authorized agent, or from any state of facts in which such invitation naturally and necessarily arises. Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952).

Invitation to use premises exists when person enters public place to trade. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932).

Invitee becomes mere licensee if visit is disconnected with business. — When a visit is made on express invitation, but the purpose of the visit is wholly disconnected with the business in which the occupant is engaged, such an invitee occupies the status of a mere licensee. Hall v. Capps, 52 Ga. App. 150, 182 S.E. 625 (1935); Morse v. Sinclair Auto. Serv. Corp., 86 F.2d 298 (5th Cir. 1936).

Express permission constitutes invitation only if circumstances imply assurance that premises have been prepared and made safe for particular visit. London Iron & Metal Co. v. Abney, 245 Ga. 759, 267 S.E.2d 214 (1980).

Owner of place of business is not insurer of safety of customers. Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 92 S.E.2d 720 (1956); Hammonds v. Jackson, 132 Ga. App. 528, 208 S.E.2d 366 (1974).

While owner or person in charge of property is not insurer of safety of the invitee thereon, one owes to invitee duty of exercising reasonable or ordinary care for one's safety and is liable for injury resulting from a breach of such duty. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932).

Summary judgment inappropriate when status unclear. — Summary judgment is unavailable to a landowner against a person who sustains injury on real property when questions of fact exist as the injured person's status while on the property as to any duty of the landowner arising therefrom with particular reference to the law as to the liability of owners of recreational areas. North v. Toco Hills, Inc., 160 Ga. App. 116, 286 S.E.2d 346 (1981).

When the plaintiff was manager of a restaurant adjacent to, and leased from, a motel, and when the plaintiff was in the motel lobby at the request of the desk clerk and was shot during a robbery of the motel, the plaintiff's status as an invitee or licensee was an issue of disputed material fact making denial of summary judgment motions by both parties appropriate. Bishop v. Mangal Bhai Enters., Inc., 194 Ga. App. 874, 392 S.E.2d 535 (1990).

For one person to be an invitee of another there must be some mutuality of interest. Atlanta & W. Point R.R. v. Hyde, 45 Ga. App. 548, 165 S.E. 466 (1932), later appeal, 47 Ga. App. 139, 169 S.E. 854 (1933).

In order for injured party to have occupied the position of an invitee on the defendant's premises at the time the injured party received the alleged injuries,

there must have been some mutuality of interest in the subject to which the injured party's business related, although the particular thing which was the subject of the visit may not have been for the benefit of the defendant. American Legion v. Simonton, 94 Ga. App. 184, 94 S.E.2d 66 (1956).

A privity of interest is necessary in order to raise an express invitee above the legal status of a licensee. Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975).

Whether a person is an invitee or a licensee depends upon the nature of one's relation or contact with the owner of the premises. If the relationship is one of mutual interest to the parties, the injured party is an invitee of the owner. Frankel v. Antman, 157 Ga. App. 26, 276 S.E.2d 87 (1981).

When an accident victim and the victim's companions returned to a restaurant's parking lot, the victim's entry thereon after closing hours was evidence from which the jury could find the victim was a mere licensee, and the owners and occupiers of the premises owed the victim only the duty not to wilfully or wantonly injure the victim. Savage v. Flagler Co., 258 Ga. 335, 368 S.E.2d 504 (1988).

3. Duty Owed to Invitee by Owner/Occupier or Proprietor

Liability of owner of property is dependent on whether the owner had any duty which might arise from control of the property or title thereto or a superior right to possession of property which is in possession or control of another. Williams v. Nico Indus., Inc., 157 Ga. App. 814, 278 S.E.2d 677 (1981), overruled on other grounds, 250 Ga. 568, 300 S.E.2d 145 (1983), superceded by statute as stated in Williams v. Mitchell County Elec. Mbrshp. Corp., 279 Ga. 759, 582 S.E.2d 107 (2003). But see Preston v. Georgia Power Co., 227 Ga. App. 449, 489 S.E.2d 573 (1997), cert. denied, 525 U.S. 869, 119 S. Ct. 163, 142 L. Ed. 2d 134 (1998); Santana v. Georgia Power Co., 269 Ga. 127, 498 S.E.2d 521 (1998).

Landowner is not insurer of invitee's safety. Pound v. Augusta Nat'l, Inc., 158 Ga. App. 166, 279 S.E.2d 342 (1981).

Major tenant of an office building was the "owner or occupier" for purposes of liability under O.C.G.A. § 51-3-1 since, although it was not the title owner of the building, it occupied most of the space in the building. Georgia Bldg. Servs., Inc. v. Perry, 193 Ga. App. 288, 387 S.E.2d 898 (1989).

Owners or operators of nonresidential swimming facilities owe an affirmative duty to exercise ordinary and reasonable care for the safety and protection of invitees swimming in the pool. Walker v. Daniels, 200 Ga. App. 150, 407 S.E.2d 70 (1991).

Hotel proprietors. — Under O.C.G.A. § 51-3-1, a hotel proprietor owes only a duty of "ordinary care" to guests of the hotel; however, ordinary care may vary according to location, exposure, and other factors specific to the hotel, and is ultimately a question to be answered by a jury. McNeal v. Days Inn of Am., 230 Ga. App. 786, 498 S.E.2d 294 (1998).

Plaintiff's claim for negligent failure to maintain the premises in a reasonably safe manner under O.C.G.A. § 51-3-1 failed because the plaintiff did not present competent evidence that the criminal act committed against the plaintiff on the defendant hotel's property by the unidentified third parties was reasonably foreseeable, the hotel did not have superior knowledge of the harm, and the plaintiff assumed the risk of harm. Gordon v. Starwood Hotels & Resorts Worldwide, Inc., No. 1:09-CV-3493-CC, 2011 U.S. Dist. LEXIS 109644 (N.D. Ga. Sept. 26, 2011).

Gas station sign. — Summary judgment for a gas station on a customer's claim for injuries arising from an incident when the customer tripped over sign legs and fell was proper; the sign posed no inherent danger, testimony indicated that the sign had always been there since the gas station opened, and there was no basis for liability under O.C.G.A. § 51-3-1. Rowland v. Murphy Oil USA, Inc., 280 Ga. App. 530, 634 S.E.2d 477 (2006).

Gasoline tanker driver did not voluntarily assume risk. — Corporation's unique requirement that tanker drivers

General Consideration (Cont'd)
3. Duty Owed to Invitee by Owner/ Occupier or Proprietor (Cont'd)

delivering gasoline manually stick the gas tanks and the placement of the tank access in the gas station's active parking area were conditions created by the corporation and were not conditions inherent in the work of delivering gasoline; thus, the exception regarding whether the work changed the character for safety of the workplace did not apply. Rather, it was simply another way of asserting that the tanker driver's claims should be barred because the tanker driver assumed the risk of any alleged danger arising from the conditions the corporation imposed by continuing to work under such conditions, but factual issues remained on that issue barring summary judgment. Travis v. Quiktrip Corporation, 339 Ga. App. 551, 794 S.E.2d 195 (2016).

Summary judgment was improperly granted to the corporation that owned the gas station and the gas station manager because the tanker driver, the corporation, and the manager all knew that the placement of the tanks at the gas station presented a potential hazard because, while sticking the tanks, it put tanker drivers into the flow of traffic pulling in and out of the parking area where the tanks were located; the tanker driver had voiced displeasure that the corporation's policy of sticking the tanks subjected the tanker driver to risk; and the tanker driver did not voluntarily assume the risk of the traffic flow as the tanker driver was presented with the untenable choice of risking the traffic flow or risk losing the tanker driver's job. Travis v. Quiktrip Corporation, 339 Ga. App. 551, 794 S.E.2d 195 (2016).

Proprietor is not an insurer of customer's safety. Cook v. Arrington, 183 Ga. App. 384, 358 S.E.2d 869, cert. denied, 183 Ga. App. 905, 358 S.E.2d 869 (1987).

The proprietor is not the insurer of the invitee's safety, but is bound to exercise ordinary care to protect the invitee from unreasonable risks of which he or she has superior knowledge. Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991).

Ownership alone, in absence of negligence, imposes no liability for injury sustained on premises. Jones v. Interstate N. Assocs., 145 Ga. App. 366, 243 S.E.2d 737 (1978).

Liability to invitees is not imposed merely because of ownership, but because of the invitation. If the invitation includes a representation of ownership or control, justice and reason require that the invitor may be taken at the invitor's word in that aspect of the case as well as in others. Davis v. City of Atlanta, 84 Ga. App. 572, 66 S.E.2d 188 (1951).

There is no liability from ownership alone; it must appear that injury resulted from breach of some duty owed by the defendant to the injured party. Slaughter v. Slaughter, 122 Ga. App. 374, 177 S.E.2d 119 (1970); Daniel v. Georgia Power Co., 146 Ga. App. 596, 247 S.E.2d 139 (1978).

This section imposes duty on owner of reasonable inspection of premises for protection of invited persons. Brown v. Rome Mach. & Foundry Co., 5 Ga. App. 142, 62 S.E. 720 (1908); Fulton Ice & Coal Co. v. Pece, 29 Ga. App. 507, 116 S.E. 57 (1923).

The owner has a duty to exercise ordinary care in keeping the premises safe, this includes a duty to inspect the premises to discover possible dangerous conditions of which the owner does not know and to take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement and use of the premises. Barksdale v. Nuwar, 203 Ga. App. 184, 416 S.E.2d 546 (1992).

When danger is not apparent, possessor of land has duty to exercise ordinary care to make condition reasonably safe or to give a warning adequate to enable the invitee upon the premises to avoid harm. Knowles v. La Rue, 102 Ga. App. 350, 116 S.E.2d 248 (1960).

Owner or occupier of land is under duty to invitees to discover and either keep premises safe from or warn of hidden dangers or defects not observable to such invitees in the exercise of ordinary care. Georgia Farmers' Mkt. Auth. v. Dabbs, 150 Ga. App. 15, 256 S.E.2d 613 (1979).

Owner of land owes duty to invitee to exercise ordinary care to protect

the invitee against injury, and the invitee must exercise ordinary care to keep the premises free from pitfalls and mantraps. Harvill v. Swift & Co., 102 Ga. App. 543, 117 S.E.2d 202 (1960).

Duty of owner or occupier of premises to invitee is to exercise ordinary care in keeping the premises and approaches safe. Pilgreen v. Hanson, 89 Ga. App. 703, 81 S.E.2d 18 (1954); Tatum v. Clemones, 105 Ga. App. 221, 124 S.E.2d 425 (1962); Simpson v. Dotson, 133 Ga. App. 120, 210 S.E.2d 240 (1974).

As to invitees on the premises of another, it is the duty of the owner to keep the premises, not in a reasonably safe condition, but in a safe condition. Pound v. Augusta Nat'l, Inc., 158 Ga. App. 166, 279 S.E.2d 342 (1981).

A storekeeper is not liable as an insurer of the safety of persons whom the storekeeper has invited to enter the storekeeper's premises. The storekeeper owes a duty of ordinary care, to have the storekeeper's premises in a reasonably safe condition, not to lead them into a dangerous trap or to expose them to unreasonable risk, but to give them adequate and timely notice and warning of latent or concealed perils. Young v. Wal-Mart Stores, Inc., 209 Ga. App. 199, 433 S.E.2d 121 (1993).

An owner or occupier of land is liable in damages to invitees who come upon the land for injuries occasioned by the failure to exercise ordinary care in keeping the premises safe. Lake v. Atlanta Landmarks, Inc., 257 Ga. App. 195, 570 S.E.2d 638 (2002).

Trial court erred in granting summary judgment to a food service corporation in a bench user's personal injury action, which arose when the user sat on a bench at a university and the bench collapsed, causing the user to fall and suffer injuries, as it was unclear from the contractual language between the corporation and the university whether the corporation had assumed control over the bench where the incident occurred; pursuant to O.C.G.A. § 51-3-1, the owner or occupier of the land had a duty to exercise ordinary care for invitees, but it was unclear whether the corporation was an occupier of the premises, which were owned by the university. Nair v. Aramark Food Serv. Corp., 276 Ga. App. 793, 625 S.E.2d 78 (2005).

A business entity and the entity's owners did not breach their duty of care under O.C.G.A. § 51-3-1 to an invitee because the alleged defect in a transition area between dark, rubberized mat flooring around a playground and a green, astroturf-type surface was static and the invitee had successfully negotiated the transition area once to get into the playground; no other customers fell in the transition area in the three years that the business had been open. Sherrod v. Triple Play Cafe, LLC, 285 Ga. App. 689, 647 S.E.2d 376 (2007).

Summary judgment was properly granted to owners and managers of a shopping center in a store employee's trip and fall action, which occurred as the employee stepped on a grassy median between a sidewalk and the center's parking lot, as the owners and managers exercised ordinary care by conducting inspections of the premises which were reasonable under the circumstances pursuant to O.C.G.A. § 51-3-1. Berni v. Cousins Props. Inc., 316 Ga. App. 502, 729 S.E.2d 617 (2012).

Duty of occupier when not physically present. — In order for there to be a duty arising from control of land at a time when one is not physically on the premises, there must be the grant of authority, dominion, or a continuing exclusive right to control the premises in question. In short, one must have the status of an occupier, such as a contractor who comes upon another's land for the purpose of constructing a house or building. Housing Auth. v. Famble, 170 Ga. App. 509, 317 S.E.2d 853 (1984).

Duty to keep premises safe (not reasonably safe) exists as to all persons who for any lawful purpose come upon premises at express or implied invitation of owner. Mitchell v. Gay, 111 Ga. App. 867, 143 S.E.2d 568 (1965).

Duty to keep premises safe for invitees applies to defects or conditions which are in nature of hidden dangers, traps, and the like, in that they are not known to the invitee and would not be observed by the invitee in the exercise of ordinary care. Coffer v.

General Consideration (Cont'd)
3. Duty Owed to Invitee by Owner/ Occupier or Proprietor (Cont'd)

Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932).

The duty to keep the premises safe applies to hidden dangers and defects and the owner or occupier must use ordinary care to guard, cover or protect the dangerous or defective portion of the premises for the safety of persons rightfully thereon which might include timely warning of such dangerous or defective condition. Sheffield Co. v. Phillips, 69 Ga. App. 41, 24 S.E.2d 834 (1943); Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952).

Owner is liable to invitees for failure to keep premises safe. — Owner or occupier of the land is liable in damages to those expressly or impliedly invited upon the premises for such damage as is occasioned by the owner's or occupier's failure to exercise ordinary care to keep the premises and approaches safe. Goldsmith v. Hazelwood, 93 Ga. App. 466, 92 S.E.2d 48 (1956); Knowles v. La Rue, 102 Ga. App. 350, 116 S.E.2d 248 (1960); Winn-Dixie Stores, Inc. v. Hardy, 138 Ga. App. 342, 226 S.E.2d 142 (1976).

The duty is imposed by law upon an owner as to an invitee to keep the premises and approaches safe and if the owner fails to exercise the care required of a reasonably prudent man in keeping such premises safe, the owner is liable to the invitee for an injury sustained thereon as a result of the unsafe condition of the premises. The owner must exercise ordinary care to keep the premises safe, not to keep the premises reasonably safe. Massey v. Georgia Power Co., 85 Ga. App. 593, 69 S.E.2d 824 (1952).

The owner of premises is liable for injuries resulting from dangerous conditions existing on the premises as the result of the owner's failure to exercise ordinary care. Harvill v. Swift & Co., 102 Ga. App. 543, 117 S.E.2d 202 (1960).

Duty to keep premises reasonably safe and suitable. — The owner or person in charge of the premises owes to invitees thereon the duty of keeping the premises in a reasonably safe and suitable condition, so that those invited to enter thereon shall not be unnecessarily or unreasonably exposed to danger, and is therefore liable for injuries received by invitees as a result of a dangerous condition of the premises. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932).

Daughter was social guest, not invitee. — In a slip and fall action between a daughter and the daughter's mother, because the evidence showed that the daughter was a mere social guest or licensee in the mother's home at the time of the daughter's injury, and not an invitee, present only in the home for the daughter's convenience, and the mother did not act with any intent to harm the daughter, the mother was properly granted summary judgment on the issue of liability for the daughter's personal injuries resulting from a slip and fall. Behforouz v. Vakil, 281 Ga. App. 603, 636 S.E.2d 674 (2006).

Voluntarily undertaking additional or greater duty. — Even though there was no duty to warn those entering the store on a rainy day that there may be accumulations of water on the floor, when the proprietor voluntarily sought to mop every five minutes, to put out a safety mat, and to warn of the wet floor, there was a duty to perform the assumed measures with ordinary care. Sutton v. Winn Dixie Stores, Inc., 233 Ga. App. 424, 504 S.E.2d 245 (1998).

True ground of liability is the proprietor's superior knowledge of the perilous instrumentality. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. Ramsey v. Mercer, 142 Ga. App. 827, 237 S.E.2d 450 (1977); Jones v. Interstate N. Assocs., 145 Ga. App. 366, 243 S.E.2d 737 (1978).

True ground of liability of owner or occupant of property to invitee is superior knowledge of proprietor of a condition that may subject the invitee to an unreasonable risk of harm. Sutton v. Sutton, 145 Ga. App. 22, 243 S.E.2d 310 (1978); Pound v. Augusta Nat'l, Inc., 158 Ga. App. 166, 279 S.E.2d 342 (1981); Hackett v. Dayton Hudson Corp., 191 Ga. App. 442, 382 S.E.2d 180 (1989).

In a patron's slip and fall action filed

against a home seller, the trial court properly found that the seller was entitled to summary judgment as a matter of law because the patron could not show that the seller's knowledge of the condition which allegedly caused the patron's fall, specifically, loose gravel on the ground immediately adjacent to unbuffered metal trailer tongues, was superior to the patrons. Whitley v. H & S Homes, LLC, 279 Ga. App. 877, 632 S.E.2d 728 (2006).

Premises owner was properly granted summary judgment in an occupant's personal injury action filed against it as the uneven and unstable brick-paved walkway where the occupant fell was an open and obvious static condition which the occupant was presumed to have knowledge of, given that the occupant had successfully traversed the area before; moreover, while the occupant might have disagreed with the trial court's application of the law to the facts presented, that disagreement did not warrant reversal. Nemeth v. RREEF Am., LLC, 283 Ga. App. 795, 643 S.E.2d 283 (2007).

In a premises liability suit, the trial court properly granted the store summary judgment because, although the candle holder's globe picked up by the customer was made of glass, the customer knew of the dangers in handling a glass object and that people can be cut by glass; thus, the store did not possess superior knowledge of that danger. Aubain-Gray v. Hobby Lobby Stores, Inc., 323 Ga. App. 672, 747 S.E.2d 684 (2013).

Knowledge of owner compared to inspector. — Trial court did not err in denying the owner of a chicken processing plant summary judgment in a federal food inspector's action to recover damages for injuries the inspector sustained when the inspector slipped and fell on a piece of viscera at the plant because the owner failed to carry the owner's burden on summary judgment to establish that the owner did not have constructive knowledge of the substance on the floor; the owner established that the owner had a customary inspection and cleaning procedure, but the owner failed to introduce any evidence to show adherence to the owner's inspection and cleaning procedure on the day of the inspector's fall. Sanderson Farms, Inc. v. Atkins, 310 Ga. App. 423, 713 S.E.2d 483 (2011).

Owner or occupier of land has duty to exercise ordinary care for safety of invitees in discovering defects or dangers in premises or instrumentalities thereon, and imposes a liability for injuries resulting from such defects as a reasonable inspection would disclose. Fuller v. Louis Steyerman & Sons, 46 Ga. App. 830, 169 S.E. 508 (1933); Camp v. Curry-Arrington Co., 49 Ga. App. 594, 176 S.E. 49 (1934); Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939); Freeman v. Levy, 60 Ga. App. 861, 5 S.E.2d 61 (1939); McCrory Stores Corp. v. Ahern, 65 Ga. App. 334, 15 S.E.2d 797 (1941); Indian Springs Swimming Pool Corp. v. Maddox, 70 Ga. App. 842, 29 S.E.2d 724 (1944); Johnson v. John Deere Plow Co., 214 Ga. 645, 106 S.E.2d 901 (1959).

Whether owner/occupier knew or should have known of alleged defect is question of fact. — Given conflict between the experts' testimony concerning the obviously hazardous condition of a ramp and the inferences to be drawn from the absence of prior accidents, a question of fact existed whether the ramp was in a defective condition which the defendant in the exercise of ordinary care, knew or should have known would cause injury to an invitee. Haire v. City of Macon, 200 Ga. App. 744, 409 S.E.2d 670, cert. denied, 200 Ga. App. 896, 409 S.E.2d 670 (1991).

In an action arising from a plumber's fall through a fiberglass skylight, whether the building owner fulfilled the owner's duty to warn of the hidden danger of the roof's condition was a jury question. General Manufactured Housing, Inc. v. Murray, 233 Ga. App. 382, 504 S.E.2d 220 (1998).

Condominium association did not owe a duty of care to a condominium owner's husband, who was killed by the criminal acts of third parties in the condominium's common area parking lot, because the condominium owners had specifically contracted that the association did not have a duty to provide security. Bradford Square Condo. Ass'n v. Miller, 258 Ga. App. 240, 573 S.E.2d 405 (2002).

No foreseeable danger of hazardous condition upon which to impose

General Consideration (Cont'd)
3. Duty Owed to Invitee by Owner/ Occupier or Proprietor (Cont'd)

duty. — Customer failed to produce evidence that the condition which caused the customer's injury, a beer case placed on the floor by a customer, was a foreseeable danger or hazardous condition on the premises creating an unreasonable risk of harm, and the property owner's failure to protect the customer from the harm did not breach a duty under O.C.G.A. § 51-3-1. McDonald v. West Point Food Mart, Inc., 332 Ga. App. 753, 774 S.E.2d 774 (2015).

Owner or occupier of land is liable for failure to warn invitees of dangers or defects in such premises or instrumentalities, of which the owner or occupier knew or of which it was the owner's or occupier's duty to know in the exercise of ordinary care. Fuller v. Louis Steyerman & Sons, 46 Ga. App. 830, 169 S.E. 508 (1933); Camp v. Curry-Arrington Co., 49 Ga. App. 594, 176 S.E. 49 (1934); Tybee Amusement Co. v. Odum, 51 Ga. App. 1, 179 S.E. 415 (1935); Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939); Freeman v. Levy, 60 Ga. App. 861, 5 S.E.2d 61 (1939); Sheffield Co. v. Phillips, 69 Ga. App. 41, 24 S.E.2d 834 (1943); Indian Springs Swimming Pool Corp. v. Maddox, 70 Ga. App. 842, 29 S.E.2d 724 (1944); Brown v. Hall, 81 Ga. App. 874, 60 S.E.2d 414 (1950); Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952); Goldsmith v. Hazelwood, 93 Ga. App. 466, 92 S.E.2d 48 (1956); Jones v. West End Theatre Co., 94 Ga. App. 299, 94 S.E.2d 135 (1956); Ward v. VFW, Post 2588, 109 Ga. App. 563, 136 S.E.2d 481 (1964); Sutton v. Sutton, 145 Ga. App. 22, 243 S.E.2d 310 (1978); Atkins v. Tri-Cities Steel, Inc., 166 Ga. App. 349, 304 S.E.2d 409 (1983).

Duty to warn invitees applies to latent as well as patent defects. — The duty of the owner or occupier of premises to warn an invitee of dangers or defects of which the owner or occupier knew or in the exercise of ordinary care it was the owner's or occupier's duty to know applies to a latent peril as well as to a patent one. However, the actual result of an act or omission is not controlling in determining whether or not it was negligent, nor is the duty of the person doing or omitting to do an act to be estimated by what, after an injury has occurred, then first appears to be a proper precaution, but the question of negligence must be determined according to what should reasonably have been anticipated, in the exercise of ordinary care, as likely to happen. Swanson v. Choate, 108 Ga. App. 152, 132 S.E.2d 246 (1963).

Although invitee not liable as matter of law for failure to observe patent defect when owner lacked ordinary care to keep premises safe. — When the owner or occupier of premises fails to exercise ordinary care in keeping reasonably safe such premises for the use of those who go upon the premises as invitees, and when such an invitee is injured by a patent defect in such premises of which the injured party has no actual knowledge, it cannot be held as a matter of law that such injured party was lacking in ordinary care in failing to observe the defect in time to avoid the injury. Bray v. Barrett, 84 Ga. App. 114, 65 S.E.2d 612 (1951); Willis v. Byrd, 116 Ga. App. 555, 158 S.E.2d 458 (1967).

Proprietor under no duty to warn when invitee knows danger and assumes risk. — The basis of a proprietor's liability is the proprietor's superior knowledge and if the proprietor's invitee knows of the condition or hazard there is no duty on the part of the proprietor to warn the invitee and there is no liability for resulting injury because the invitee has so much knowledge as the proprietor does and then by voluntarily acting, in view of the invitee's knowledge, assumes the risks and dangers incident to the known condition. Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949); Rogers v. Atlanta Enters., Inc., 89 Ga. App. 903, 81 S.E.2d 721 (1954); Tatum v. Clemones, 105 Ga. App. 221, 124 S.E.2d 425 (1962); Lincoln v. Wilcox, 111 Ga. App. 365, 141 S.E.2d 765 (1965); Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969), aff'd, 424 F.2d 545 (5th Cir. 1970); Ramsey v. Mercer, 142 Ga. App. 827, 237 S.E.2d 450 (1977); Pound v. Augusta Nat'l, Inc., 158 Ga. App. 166, 279 S.E.2d 342 (1981); Gyles, Inc. v. Turner, 184 Ga. App. 376,

361 S.E.2d 538 (1987); Chisholm v. Fulton Supply Co., 184 Ga. App. 378, 361 S.E.2d 540 (1987).

Babysitter, who was an invitee in premises liability action based upon the babysitter's slipping and falling on a coin on the floor, could not recover because the babysitter's knowledge of the dangerous condition of the coins being on the floor of the property was at least that of the property owner. Ballard v. Burnham, 256 Ga. App. 531, 568 S.E.2d 743 (2002).

Because a customer seeking damages from a fall caused by tripping over a gas hose at a gas station admitted to having actual knowledge of the hazard at issue, the hose, the gas station did not have superior knowledge of the hazard, and the customer was unable to establish this element of the claim; thus, summary judgment in favor of the gas station was required. Right Stuff Food Stores, Inc. v. Gilchrist, 279 Ga. App. 784, 632 S.E.2d 405 (2006).

Victim's estate, as a matter of law, did not show that the owner violated the owner's duty of care under O.C.G.A. § 51-3-1 at the time the victim, who lived with the owner and the owner's son, who was the boyfriend, was shot by the boyfriend; the owner did not know more about the owner's son's violent designs on the victim than the victim knew, as the victim was with the boyfriend at the time the boyfriend was apprehended as armed and dangerous, friends of the couple noted the boyfriend's abusive treatment of the victim, and there was no evidence that the boyfriend had previously committed an assault or another such crime on or near the owner's property or against any member of the household. Hembree v. Spivey, 281 Ga. App. 693, 637 S.E.2d 94 (2006).

Because a party injured in a fall admitted to having actual knowledge not only of the alleged hazard which caused the fall, but of the specific danger the hazard presented, and as a result, appreciated the danger involved, the trial court erred in denying summary judgment to the premises owner as to the issue of liability, given that based on the foregoing, the party should have avoided any injury in the exercise of ordinary care. Callaway Gardens Resort, Inc. v. Bierman, 290 Ga. App. 111, 658 S.E.2d 895 (2008).

Summary judgment to property owners in a widow's action seeking damages for her husband's death as a result of a fall on the owners' property was warranted because the owners did not breach the owners' duty of care to the husband, who was an independent contractor as well as an invitee; the husband's fall from a ladder while cutting tree limbs was an ordinary danger associated with that task, of which the husband assumed the risk. Glenn v. Gibbs, 323 Ga. App. 18, 746 S.E.2d 658 (2013).

There is no duty to warn against obvious or patent dangers which may be observed and avoided by exercise of ordinary care. Georgia Farmers' Mkt. Auth. v. Dabbs, 150 Ga. App. 15, 256 S.E.2d 613 (1979).

Person is not expected to foresee and warn against dangers which are not reasonably expected, and which would not occur except under exceptional circumstances or from unexpected acts of the person injured. Sutton v. Sutton, 145 Ga. App. 22, 243 S.E.2d 310 (1978).

When an instrumentality is put to a use not intended, the owner or person in control is not liable for the resulting injuries unless such person knew or should have known that it would be diverted to such use. Savannah E. Side Corp. v. Robinson, 102 Ga. App. 426, 116 S.E.2d 613 (1960).

Owner is liable for injury if owner had either actual or constructive knowledge of defect prior to the time injury occurred. Farahmand v. Local Properties, Inc., 88 F.R.D. 80 (N.D. Ga. 1980).

Since the homeowner had no actual knowledge of the construction defect, and the homeowner established a lack of actionable constructive knowledge by demonstrating that the homeowner was incapable of discovering the defect by means of reasonable inspection, the homeowner has established as a matter of law that the homeowner discharged the duty of ordinary care owed to the invitee and summary adjudication in the homeowner's favor was authorized. Barksdale v. Nuwar, 203 Ga. App. 184, 416 S.E.2d 546 (1992).

No liability when invitee fails to show owner's actual or constructive knowledge. — In a premises liability

General Consideration (Cont'd)
3. Duty Owed to Invitee by Owner/ Occupier or Proprietor (Cont'd)

action filed by a guest of a property owner, because the guest failed to show that the owner had any actual or constructive knowledge of the alleged hazard that allegedly caused the guest's injuries, specifically, a hole in an otherwise flat, grassy area of the owner's yard, the court properly granted the owner summary judgment. Thomas v. Deason, 289 Ga. App. 753, 658 S.E.2d 165 (2008).

Premises owner and a company that provided maintenance services for the premises were not liable for personal injuries sustained when an invitee fell in a hidden hole on a grassy median separating two parking lots in a shopping center because there was no evidence that the owner and maintenance company, which conducted regular inspections of the property, had actual or constructive knowledge of the hole. Witt v. Ben Carter Props., LLC, 303 Ga. App. 107, 692 S.E.2d 749 (2010).

Premises owner was not liable for personal injuries sustained when a pull-down staircase used to access the premises' attic detached while a contractor was using it; the owner had no knowledge of any defect in the premises causing the accident, and any such defect was not discoverable by a reasonable inspection in the exercise of ordinary care. Ferguson v. Premier Homes, Inc., 303 Ga. App. 614, 695 S.E.2d 56 (2010).

Assuming that the plaintiff prison visitor was an invitee, the great weight of the evidence demanded a conclusion that defendant United States conformed to the standard of care required when visitors entered the premises. The plaintiff introduced no evidence of the defendant's actual knowledge of any problem with water on the floor or the brightness of the lights in the bathroom where the plaintiff fell, and the plaintiff failed to show constructive knowledge because the alleged yellowish substance was not on the floor near the toilet long enough for the defendant in the exercise of reasonable care to have discovered the substance, the defendant's reasonable inspection procedure would have negated any constructive knowledge imputed to the defendant, and the substantial weight of credible evidence required a conclusion that the lighting was more than bright enough to meet the standard of care. Tobar v. United States, 696 F. Supp. 2d 1373 (S.D. Ga. Sept. 21, 2009).

Trial court erred in denying an employer's motion for summary judgment in a guest's action to recover damages for injuries the guest sustained when an employee and an unidentified person assaulted the guest at a private party because the guest failed to come forward with evidence from which a jury could conclude that the employer had knowledge of circumstances that would lead a reasonable person to anticipate a criminal assault at the party and that the employer had more knowledge of the possibility of such an assault than the guest had; there was no evidence that the employer had any knowledge that would have indicated the employee or any other partygoer had a propensity for violence, and there was no evidence that the employer had knowledge that violence had broken out at any similar party or gathering in the area. B-T Two, Inc. v. Bennett, 307 Ga. App. 649, 706 S.E.2d 87 (2011).

Two restaurant owners were properly granted summary judgment in a suit based on O.C.G.A. § 51-3-1 after an invitee was physically attacked by two sons of one of the owners as the owners could not have reasonably foreseen or prevented the attack since there had been no previous attacks and neither had knowledge of the attack to have reasonably foreseen or prevented the attack. Carter v. Riggins, 323 Ga. App. 747, 748 S.E.2d 117 (2013).

Summary judgment for a restaurant in a slip and fall case was proper and was affirmed since there was no showing that the restaurant had actual or constructive knowledge of the grease which allegedly caused the slip and fall that was superior to that of the injured person; an inspection by the restaurant manager only 5 to 10 minutes before the incident was sufficient, as a matter of law, to establish that the restaurant exercised ordinary care under O.C.G.A. § 51-3-1 to

inspect the premises and keep safe. Markham v. Schuster's Enters., Inc., 268 Ga. App. 313, 601 S.E.2d 712 (2004).

In a case brought by an injured person against a restaurant, seeking damages arising from the injured person's slip and fall in a restroom in the restaurant, summary judgment for the restaurant was reversed; the restaurant failed to show that the restaurant lacked superior knowledge of the water condition in the restroom since the restaurant knew that a toilet in an adjacent restroom had overflown onto the floor, a restaurant employee had pushed water from the adjoining restroom into the restroom at issue, the restaurant was notified by the injured person's sister that there was water everywhere, the sister's warning to the injured person stopped short of expressly extending to the inside of the restroom, and there was no warning cone placed at either the door of or inside the restroom in question. Belcher v. Ky. Fried Chicken Corp., 266 Ga. App. 556, 597 S.E.2d 604 (2004).

Rules governing land proprietor's duty to an invitee presuppose that possessor knows of condition and has no reason to believe that the proprietor's invitees will discover the condition or realize the risk involved therein. Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949); Rogers v. Atlanta Enters., Inc., 89 Ga. App. 903, 81 S.E.2d 721 (1954); Jones v. West End Theatre Co., 94 Ga. App. 299, 94 S.E.2d 135 (1956); Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969), aff'd, 424 F.2d 545 (5th Cir. 1970); Ramsey v. Mercer, 142 Ga. App. 827, 237 S.E.2d 450 (1977); Pound v. Augusta Nat'l, Inc., 158 Ga. App. 166, 279 S.E.2d 342 (1981).

The liability of a proprietor which results from failure to keep the premises safe always depends on notice of the danger except when notice is presumed, as in cases of defective construction. Veterans Org. of Fort Oglethorpe, Ga., Inc. v. Potter, 111 Ga. App. 201, 141 S.E.2d 230 (1965).

Notice may be actual or constructive, but, if the latter, it must be shown to have existed for a length of time, or under such circumstances as to put the owner of the building on notice before the owner will be liable for resulting injuries. Fincher v. Fox, 107 Ga. App. 695, 131 S.E.2d 651 (1963).

When the defendant owes to the plaintiff a duty to exercise care to avoid injuring the plaintiff, the defendant will be charged with constructive knowledge of the existence of a defect or of a defective condition existing on the premises within the defendant's control which proximately causes the plaintiff's injuries. Rockmart Bank v. Hall, 114 Ga. App. 284, 151 S.E.2d 232 (1966).

Constructive knowledge may be based on a showing that a proprietor failed to exercise reasonable care in inspecting and keeping the proprietor's premises safe over a reasonable period of time, during which a dangerous condition was allowed to exist. Dillon v. Grand Union Co., 167 Ga. App. 381, 306 S.E.2d 670 (1983).

Constructive knowledge of dangerous condition. — Constructive knowledge of a dangerous condition may be based either on evidence that the dangerous condition lasted so long that the defendant should have discovered the condition, or on evidence that an employee of the defendant was in the immediate vicinity and could have easily seen the problem. Herrin v. Peeches Neighborhood Grill & Bar, Inc., 235 Ga. App. 528, 509 S.E.2d 103 (1998).

Summary judgment was properly granted because the victim failed to show that the restaurant had constructive knowledge of any allegedly inadequate lighting. The victim deposed that the victim could not recall the lighting conditions in the parking lot, whereas the restaurant managers testified that the lights were working on the night in question as indicated in daily maintenance logs. Bonner v. Southern Rest. Group, Inc., 271 Ga. App. 497, 610 S.E.2d 129 (2005).

In a slip and fall case filed by a retailer's patron alleging a breach of the retailer's duty to keep the retailer's premises reasonably safe, the trial court properly granted summary judgment to the retailer on the issue of whether the retailer's nearby employees were in a position to discover the hazard on which the patron slipped, specifically a grape on the floor; however, in the absence of clear evidence

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of how long the grape was present on the floor, and in the absence of evidence that the retailer actually carried out the retailer's inspection procedures, the retailer could not show as a matter of law that the retailer lacked constructive knowledge of the hazard which caused the patron's fall. Blocker v. Wal-Mart Stores, Inc., 287 Ga. App. 588, 651 S.E.2d 845 (2007).

There are two different classes of cases which may be based on constructive knowledge. The first is that type where liability of the owner is based on the fact that an employee of the owner was in the immediate area of the dangerous condition and could have easily seen the substance and removed the hazard. The second type of case is that based on the duty of the defendant to exercise reasonable care in inspecting and keeping the premises in safe condition, which requires that the defendant had been afforded a reasonable time within which to inspect and remove the hazard. Winn-Dixie Stores, Inc. v. Hardy, 138 Ga. App. 342, 226 S.E.2d 142 (1976).

In case of defective construction, notice to landlord or occupier is conclusively presumed. Tybee Amusement Co. v. Odum, 51 Ga. App. 1, 179 S.E. 415 (1935).

Prior accident as notice. — When evidence of a prior similar accident tends to show the condition and knowledge of that condition, the evidence is admissible; all that is required is that the prior accident be sufficient to attract the owner's attention to the dangerous condition which resulted in the litigated accident. Pembrook Mgt., Inc. v. Cossaboon, 157 Ga. App. 675, 278 S.E.2d 100 (1981).

Approach to premises. — An owner or occupier of land has a duty under O.C.G.A. § 51-3-1 with regard to the approach to the owner's or occupier's premises circumscribed by the owner's or occupier's right in the approach. Todd v. F.W. Woolworth Co., 258 Ga. 194, 366 S.E.2d 674 (1988).

If the owner's right in the approach is the fee, the owner's duty is the exercise of due care by one who has the rights of an owner of a fee. The owner has the widest latitude in the use of the approach and must exercise due care within that framework to keep the approach safe. Todd v. F.W. Woolworth Co., 258 Ga. 194, 366 S.E.2d 674 (1988).

If the owner's right in the approach is an easement, the owner's duty is to use due care towards the invitees in the exercise of the owner's rights under the easement. The owner has a more limited framework than the owner of a fee. The owner's duty does not require the owner to do things not permitted under the easement. Todd v. F.W. Woolworth Co., 258 Ga. 194, 366 S.E.2d 674 (1988).

If the approach is a public way, the owner's duty is to exercise due care within the confines of the owner's right in the public way. The owner's rights in the public way may be quite limited but nonetheless exist. Todd v. F.W. Woolworth Co., 258 Ga. 194, 366 S.E.2d 674 (1988).

The word "approaches" is construed to mean that property directly contiguous, adjacent to, and touching those entryways to premises under the control of an owner or occupier of land, through which the owner or occupier, by express or implied invitation, has induced or led others to come upon the owner's or occupier's premises for any lawful purpose, and through which such owner or occupier could foresee a reasonable invitee would find it necessary or convenient to traverse while entering or exiting in the course of the business for which the invitation was extended. By "contiguous, adjacent to, and touching," the legislature meant property within the last few steps taken by invitees, as opposed to "mere pedestrians," as they enter or exit the premises. Motel Properties, Inc. v. Miller, 263 Ga. 484, 436 S.E.2d 196 (1993).

Under certain circumstances, noncontiguous property can be deemed an "approach" because the landowner extended the approach to the landowner's premises by some positive action on the landowner's part, such as constructing a sidewalk, ramp, or other direct approach; such an exception is based on the fact that the owner or occupier of land, for the owner's or occupier's own particular benefit, has

affirmatively exerted control over a public way or another's property. Motel Properties, Inc. v. Miller, 263 Ga. 484, 436 S.E.2d 196 (1993).

Invitee, who was injured in a fall on rocks placed along the shoreline approximately 196 feet away from premises controlled by a motel, was not injured on an "approach" to the motel's premises so as to impose on the motel any duty to exercise ordinary care on the invitee's behalf. Motel Properties, Inc. v. Miller, 263 Ga. 484, 436 S.E.2d 196 (1993).

When the portion of a grass strip where the plaintiff fell was not contiguous and was more than a few steps from the hotel, the property did not meet the definition of "approach". Rischack v. City of Perry, 223 Ga. App. 856, 479 S.E.2d 163 (1996).

A resort was not liable to two injured guests in a premises liability action, and therefore was granted summary judgment since the stairs from which the guests fell leading to a beach area were not owned by the resort, and the guests failed to show that the steps were part of the approach to the resort or in any manner maintained by the resort. Harris v. Inn of Lake City, 285 Ga. App. 521, 647 S.E.2d 277 (2007).

Because the trial court correctly determined that the parking lot in which a customer fell was owned and maintained by the grocery store's landlord, not by the grocery store, and was not an "approach" to the premises for purposes of O.C.G.A. § 51-3-1, the grocery store was properly granted summary judgment as to the issue of liability in a customer's personal injury suit filed against the store. Robinson v. Kroger Co., 284 Ga. App. 488, 644 S.E.2d 316 (2007).

Bus stop where the amusement park customer was attacked was located on an approach to the amusement park's premises because the park took positive steps to exert control over that area, invited the park's customers to use the bus stop, and appropriated the bus stop solely for the park's benefit. Six Flags Over Georgia II, L.P. v. Martin, 335 Ga. App. 350, 780 S.E.2d 796 (2015).

Injury on handicapped ramp. — Because the record was devoid of any evidence to show that a handicap ramp was improperly designed or constructed, pursuant to O.C.G.A. § 51-3-1, a company had no duty to an invitee; consequently, the company was entitled to summary judgment in the invitee's action for slip and fall damages. Gibson v. Symbion, Inc., 277 Ga. App. 721, 627 S.E.2d 84 (2006).

Rainwater on floor of parking deck. — In a slip and fall case, summary judgment was properly granted to the defendant as there was no evidence that the rainwater hazard on the defendant's premises created an unreasonable risk of harm because the plaintiff slipped and fell in rainwater on the floor of the parking deck in a location where the plaintiff should have reasonably expected to find rainwater present; the plaintiff produced no evidence that the accumulation of rainwater in that area was unusual, abnormal, or unexpected given the location of the walkway and the weather conditions; and the defendant produced evidence that no unusual puddling or accumulation of water occurred in the parking deck, which was constructed with a slope to promote drainage and prevent puddling. Diaz v. MARTA, No. A17A0182, 2017 Ga. App. LEXIS 155 (Mar. 24, 2017).

Evidence of a prior substantially similar incident is admissible to show the existence of a dangerous condition and knowledge of that condition so long as the prior incident was sufficient to attract the owner's attention to the alleged dangerous condition which resulted in the litigated incident. McCoy v. Gay, 165 Ga. App. 590, 302 S.E.2d 130 (1983).

No liability for intervening illegal act. — Ordinarily, even when the proprietor's negligence is shown, the properietor would be insulated from liability by the intervention of an illegal act which is the proximate cause of the injury. However, the above rule has been held inapplicable if the defendant property owner had reasonable grounds for apprehending that such criminal act would be committed. Confetti Atlanta, Ltd. v. Gray, 202 Ga. App. 241, 414 S.E.2d 265 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 265 (1992).

Evidence of criminal activity. — Proof of two prior crimes at a location on the defendant's premises other than the asserted "dangerous" parking lot in which

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the plaintiff was assaulted had no relevancy or probative value with regard to the defendant's knowledge of that "dangerous condition." McCoy v. Gay, 165 Ga. App. 590, 302 S.E.2d 130 (1983); Nalle v. Quality Inn, Inc., 183 Ga. App. 119, 358 S.E.2d 281 (1987).

While a proprietor would ordinarily be insulated from liability arising from the proprietor's own negligence by the intervention of an illegal act which is the proximate cause of another's injury, this exception is inapplicable if the defendant-proprietor had reasonable grounds for apprehending that a criminal act would be committed. Arnold v. Athens Newspapers, Inc., 173 Ga. App. 735, 327 S.E.2d 845 (1985); Donaldson v. Olympic Health Spa, Inc., 175 Ga. App. 258, 333 S.E.2d 98 (1985).

If the proprietor has reason to anticipate a criminal act, the proprietor then has a duty to exercise ordinary care to guard against injury from dangerous characters. Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991).

Evidence of criminal activity at restaurant. — Evidence was sufficient to give rise to a triable issue as to whether a restaurant proprietor had a duty to exercise ordinary care to guard the proprietor's patrons against the risk posed by criminal activity since the proprietor knew about a purse snatching in the proprietor's parking lot and may have known that the proprietor's business was located in a "high crime" area. Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991).

There was no proof of lack of ordinary care in failing to take proper steps to prevent criminal acts since grocery store was maintained in a manner no different or less than that used by other stores, particularly in regard to the lack of security personnel and reliance on local police authorities to handle criminal matters that did arise. Winn-Dixie Stores, Inc. v. Nichols, 205 Ga. App. 308, 422 S.E.2d 209 (1992).

Since there had been no prior incidents of theft of customers' belongings in grocery store, as a matter of law, the store owed no duty to plaintiff to protect the plaintiff from this risk. Winn-Dixie Stores, Inc. v. Nichols, 205 Ga. App. 308, 422 S.E.2d 209 (1992).

In an action against a landlord by a tenant who was attacked and raped in the garage of her apartment building, even assuming the landlord had knowledge of several prior thefts, there was no evidence that prior crimes against individuals occurred prior to the attack and the attack was not reasonably foreseeable by the landlord. Doe v. Prudential-Bache/A.G. Spanos Realty Partners, 222 Ga. App. 169, 474 S.E.2d 31 (1996), aff'd, 268 Ga. 604, 492 S.E.2d 865 (1997).

So long as the occurrence of prior crimes should "attract the landlord's attention to the dangerous condition which resulted in the litigated incident," the prior crimes were relevant to the issue of foreseeability. Woodall v. Rivermont Apts. Ltd. Partnership, 239 Ga. App. 36, 520 S.E.2d 741 (1999).

Evidence that an apartment was located in a high crime area was relevant to the question of whether the increase in property crimes at the apartment should have placed the landlord on notice of the risk of violent crime. Woodall v. Rivermont Apts. Ltd. Partnership, 239 Ga. App. 36, 520 S.E.2d 741 (1999).

When the plaintiffs were victims of burglary, armed robbery, aggravated assault, and kidnapping in their apartment, prior similar occurrences did not require that, in the past, someone else was kidnapped for the purpose of forcing the opening of a safe or store; all that was required was that prior incidents be sufficient to attract the landlord's attention to the dangerous condition which resulted in the incident. FPI Atlanta, L.P. v. Seaton, 240 Ga. App. 880, 524 S.E.2d 524 (1999).

Evidence of criminal activity at nightclub. — In an action for injuries resulting from a fight in the parking lot of a nightclub, since the plaintiffs were unable to show superior knowledge on behalf of the owner of the leasehold and operator of the nightclub, the defendants were entitled to summary judgment. Habersham Venture, Ltd. v. Breedlove, 244 Ga. App. 407, 535 S.E.2d 788 (2000).

In a customer's personal injury action, a property owner was properly granted summary judgment, as the owner had no duty to foresee any danger from its criminally damaged pay phone falling on the customer's head, the way the injury occurred was not reasonably expected, and due to the fact that such could not occur except from the customer's unexpected acts. McAfee v. ETS Payphones, Inc., 283 Ga. App. 756, 642 S.E.2d 422 (2007).

Evidence of crimes committed in bar. — Under O.C.G.A. § 51-3-1, a bar owner was not liable for a customer's shooting of the bar's patrons unless this crime was foreseeable and the owner did not exercise ordinary care to prevent the crime. As crimes occurring outside the bar, and the theft of a customer's wallet inside the bar, did not give the owner notice sufficient to call the owner's attention to the danger of violence in the bar, evidence of those crimes was not admissible. Vega v. La Movida, Inc., 294 Ga. App. 311, 670 S.E.2d 116 (2008).

Evidence of criminal activity at restaurant. — Trial court properly granted summary judgment to a restaurant with regard to a stabbed patron's premises liability claim because there was no evidence that similar criminal activities occurred at the restaurant or in the parking lot and there was no evidence that the restaurant or the employees had any previous encounters with the drunk customer such that they should have been on notice of violent tendencies. Whitfield v. Tequila Mexican Rest. No. 1, Inc., 323 Ga. App. 801, 748 S.E.2d 281 (2013).

Right to control must be established when landowner is sought to be held liable for activities of a third person on the property with permission. Title ownership alone is not sufficient. Liability depends upon control, rather than ownership, of the premises. Daniel v. Georgia Power Co., 146 Ga. App. 596, 247 S.E.2d 139 (1978).

No liability attached even though the defendant owned the property, when exclusive, actual control and operation of the premises was exercised by another party, and the plaintiff failed to establish a breach of any duty owed by the defendant attributable to the defendant's occupation, actual control of, or operations on the property. Holiday Inns, Inc. v. Newton, 157 Ga. App. 436, 278 S.E.2d 85 (1981).

Question of whether or not party is owner or occupier of land depends on whether or not party has control of property, whether or not the owner or occupier has title thereto and whether or not the owner or occupier has a superior right to possession of property which is in the possession or control of another. Scheer v. Cliatt, 133 Ga. App. 702, 212 S.E.2d 29 (1975).

One who is in complete control over either land or chattels is under same duty to protect others as is possessor of land or chattels; the custodian in complete charge is not excused from liability by the fact that the custodian is acting for the benefit of another, but is subject to the same liability and has the same immunities as the possessor. Sharp-Boylston Co. v. Bostick, 90 Ga. App. 46, 81 S.E.2d 853 (1954).

Whether particular appurtenance or instrumentality of property is under control of owner or occupant is usually a question of fact. Scheer v. Cliatt, 133 Ga. App. 702, 212 S.E.2d 29 (1975); Food Giant, Inc. v. Witherspoon, 183 Ga. App. 465, 359 S.E.2d 223 (1987).

Bare record title sufficient to establish co-owner's right to control. — In a co-ownership situation where an owner does not actually control the activities of the co-owner/occupier, the right to control evidenced by bare record title ownership is sufficient to establish liability for the occupier's conduct. Daniel v. Georgia Power Co., 146 Ga. App. 596, 247 S.E.2d 139 (1978).

Premises liability did not fall onto licensee having no control over conditions of the premises. — In a premises liability action, the trial court properly granted summary judgment to a participant in a contest held by a licensee, without considering the question of whether the participant assumed the risk of falling by participating in a jump-rope in a suit and dress shoes, as that participant failed to show that the licensee had control over the condition of the premises where the contest was held, and had superior knowledge of the hazard or defect

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which allegedly caused the participant's injuries. Dixon v. Infinity Broad. East, Inc., 289 Ga. App. 71, 656 S.E.2d 211 (2007).

Owner and occupier of premises is guilty of negligence in knowingly maintaining premises in patently defective condition. Rogers v. Sears, Roebuck & Co., 45 Ga. App. 772, 166 S.E. 64 (1932).

The proprietor must refrain from creating, maintaining, or employing in the conduct of the proprietor's business a device or instrumentality which is apt in the ordinary course of human events to injure persons lawfully coming into the proprietor's establishment. Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958).

Ordinarily, defendant owner or proprietor would be allowed reasonable time to exercise care in inspecting and keeping premises in safe condition. Winn-Dixie Stores, Inc. v. Hardy, 138 Ga. App. 342, 226 S.E.2d 142 (1976); Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980).

Duty of proprietor to protect from misconduct of others. — It is the duty of a proprietor to protect an invitee from injury caused by the misconduct of employees, customers, and third persons if there is any reasonable apprehension of danger from the conduct of those persons or if injury could be prevented by the proprietor through the exercise of ordinary care and diligence. Confetti Atlanta, Ltd. v. Gray, 202 Ga. App. 241, 414 S.E.2d 265 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 265 (1992).

Proprietor must protect invitees from injury caused by misconduct of servants. — It is the duty of one who invites members of the general public to come to one's place of business to protect such customers or invitees from injury caused by the misconduct of one's own employees, in the conduct and scope of one's business, and from the misconduct of other persons who come upon the premises. Great Atl. & Pac. Tea Co. v. Cox, 51 Ga. App. 880, 181 S.E. 788 (1935).

Occupier of land is not liable for injuries sustained by invitee upon premises unless dangerous condition was created by occupier or occupier's employee, or by third person, and in the latter case there is liability only after the occupier has knowledge of, or by exercise of ordinary care could have discovered, the hazardous condition, and then fails to use reasonable care to eliminate the condition. Veterans Org. of Fort Oglethorpe, Ga., Inc. v. Potter, 111 Ga. App. 201, 141 S.E.2d 230 (1965).

Owner's liability for dangerous condition created by third person. — An owner of premises is liable in damages to a guest when the owner has reason to anticipate the misconduct of another guest inflicting the injury but not otherwise since the owner is not the insurer of the safety of guests. Veterans Org. of Fort Oglethorpe, Ga., Inc. v. Potter, 111 Ga. App. 201, 141 S.E.2d 230 (1965).

In a premise liability action, because questions of fact remained as to whether a student was a university's invitee at the time the student was shot, on what was alleged to be the university's property at the time of the assault and, thus, whether the university owed the student a duty of ordinary care, and no evidence was presented that the student lost an "invitee" status, summary judgment in the university's favor was reversed. Clark Atlanta Univ., Inc. v. Williams, 288 Ga. App. 180, 654 S.E.2d 402 (2007), cert. denied, 2008 Ga. LEXIS 227 (Ga. 2008).

An occupier of land is liable for injuries sustained by an invitee upon the occupier's premises through a dangerous condition created by a third person only after the occupier has knowledge of, or by the exercise of ordinary care could have discovered, the hazardous condition, and then fails to use reasonable care to eliminate it. Bowling v. Janmar, Inc., 142 Ga. App. 53, 234 S.E.2d 849 (1977).

Knowledge by the owner or "occupier" or one's employee of the dangerous condition created by a third person is a prerequisite to recovery under O.C.G.A. § 51-3-1. Holiday Inns, Inc. v. Newton, 157 Ga. App. 436, 278 S.E.2d 85 (1981).

Proprietor's duty to control actions of third persons. — If the conduct of

employees outside of the scope of their employment, or of third persons or customers, is such as to cause any reasonable apprehension of danger to other customers or invitees because of such conduct, it is the duty of the proprietor to interfere to prevent probable injury; and a failure so to interfere, and consequent damage, will subject such proprietor to an action for damages for such negligent failure to prevent the injury; but this duty of interference on the proprietor's part does not begin until the danger is apparent, or the circumstances are such as would put an ordinarily prudent man on notice of the probability of danger. Great Atl. & Pac. Tea Co. v. Cox, 51 Ga. App. 880, 181 S.E. 788 (1935); Willis v. Byrd, 116 Ga. App. 555, 158 S.E.2d 458 (1967).

When a customer is on the premises by the invitation of the proprietor, and while therein lawfully engaged, it is the duty of the proprietor to protect the customer from injury caused by the misconduct, not only of the proprietor's own employees, but of other customers and third persons. Adamson v. Hand, 93 Ga. App. 5, 90 S.E.2d 669 (1955).

It is the duty of a proprietor to protect an invitee from injury caused by the misconduct of employees, customers and third persons if there is any reasonable apprehension of danger from the conduct of said persons or if injury could be prevented by the proprietor through the exercise of ordinary care and diligence. Georgia Bowling Enters., Inc. v. Robbins, 103 Ga. App. 286, 119 S.E.2d 52 (1961); Hewett v. First Nat'l Bank, 155 Ga. App. 773, 272 S.E.2d 744 (1980).

A proprietor is bound to use reasonable care to protect invitees from injury not only from defects in the premises but also from other dangers arising from the use of the premises by the proprietor or the proprietor's licensees. Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979).

Two patrons sued a bar owner after the patrons were shot by another customer, alleging the owner negligently failed to provide adequate security inside the bar. Defense counsel argued that as the patrons knew their assailant, their knowledge of the danger the assailant posed was greater than the owner's, but the patrons failed to exercise ordinary care to avoid the danger, and since these facts were a defense to the negligence charge, counsel's comments were proper. Vega v. La Movida, Inc., 294 Ga. App. 311, 670 S.E.2d 116 (2008).

Proprietor not insurer against all acts by third persons. — It would impose too great a duty upon a proprietor and would make the proprietor the insurer of the safety of all patrons, which the proprietor is not, to require the proprietor at all times to have immediate knowledge of and to remove every article on which a patron might stumble and fall when the article is placed there, not by the proprietor or the proprietor's employees, but by other patrons. Hammonds v. Jackson, 132 Ga. App. 528, 208 S.E.2d 366 (1974).

Liability of general contractor. — A general contractor had a non-delegable duty to keep the premises and approaches to houses under construction safe and was liable for the acts or omissions of its independent contractors in this regard. Kaplan v. Pulte Home Corp., 245 Ga. App. 286, 537 S.E.2d 727 (2000).

Temporary possession by independent contractor. — Although there was evidence that the subsidiary companies owned the project premises or had employees or agents on the premises, the trial court did not err by directing a verdict in their favor pursuant to O.C.G.A. § 9-11-50(a) because when a property owner or occupier surrendered temporary possession and control of the property to an independent contractor to perform work on the property, the owner/occupier was generally not liable under O.C.G.A. § 51-3-1 for injuries sustained on the property by the contractor's invitees due to unsafe working conditions on the premises which the owner/occupier had no right to control. The record showed that the subsidiary companies surrendered possession and control of the project premises to the independent contractor to perform the work as an independent contractor, that none of the defendants interfered with the independent contractor's status as an independent contractor, and that the independent contractor had the duty

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to keep the project premises safe for its invitees; therefore, there was no evidence that the subsidiary companies had a duty under O.C.G.A. § 51-3-1 to keep the project premises safe. Ramcke v. Ga. Power Co., 306 Ga. App. 736, 703 S.E.2d 13 (2010), cert. denied, No. S11C0482, 2011 Ga. LEXIS 583 (Ga. 2011).

Assault on employer's property by foreseeable assailant. — Employer not liable for assault to employee by her boyfriend occurring in the employer's parking lot since the attack had no connection with employment and the place chosen just happened to be the employer's parking lot. Griffin v. AAA Auto Club S., Inc., 221 Ga. App. 1, 470 S.E.2d 474 (1996).

Since the attack on the plaintiff employee was not a random stranger attack but grew out of a private relationship which had no connection with the premises or employment whatsoever, the employer did not create or allow to exist an environment which placed the plaintiff at risk any more than if the employee had been at home or on the street. Johnson v. Holiday Food Stores, Inc., 238 Ga. App. 822, 520 S.E.2d 502 (1999).

Actions of third persons obviate application of res ipsa loquitur. — The fact that a person for whom a proprietor is not legally responsible (i.e., a visiting salesperson) might have accidentally discarded a foreign substance onto the floor of the premises removes the element of "exclusive physical control" and, therefore, renders the doctrine of res ipsa loquitur inapplicable. Dillon v. Grand Union Co., 167 Ga. App. 381, 306 S.E.2d 670 (1983).

Proprietor not liable for acts which reasonable care cannot discover or prevent. — If the resulting injury happened suddenly and without warning and the proprietor of premises could not, by the exercise of reasonable care, have discovered or prevented it, there could be no recovery. The duty of the proprietor to interfere to prevent probable injury does not begin until the danger is apparent, or the circumstances are such as would put an ordinarily prudent man on notice of the probability of danger. Lincoln v. Wilcox, 111 Ga. App. 365, 141 S.E.2d 765 (1965).

Owner or occupier breaches no duty to invitee if by exercising ordinary care the owner or occupier could not have discovered and prevented the condition or circumstances that proximately caused the injury. Rhodes v. B.C. Moore & Sons, 153 Ga. App. 106, 264 S.E.2d 500 (1980).

The general rule in such cases is not whether injuries result or the consequences were possible, but whether the injuries were probable, that is, likely to occur according to the usual experience of persons. Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979).

Proprietor is under no duty to continuously patrol premises in absence of facts showing that premises are unusually dangerous. Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980).

Effect of elevator's involvement in accident on duty owed invitee. — Cases holding that the standard of care owed an invitee injured in the use of an elevator is one of extraordinary diligence rather than ordinary care involve mechanical failure or improper use of the elevator and have no application when the elevator was merely the situs of a slip and fall. Hughes v. Hospital Auth., 165 Ga. App. 530, 301 S.E.2d 695 (1983).

Disputed facts as to storage facility owner's duty of care. — Disputed facts regarding whether the storage facility owner fulfilled the owner's duty of exercising ordinary care in keeping the owner's approaches safe by providing a walk board with no means of securing the board to a loading dock or moving van precluded summary judgment. McGinnis v. Admiral Moving & Storage Co., 223 Ga. App. 410, 477 S.E.2d 841 (1996).

Jury to determine status as licensee or invitee when property for sale. — Trial court erred in granting an electric company's motion for summary judgment in a visitor's personal injury action alleging that the company negligently maintained and inspected electrical wire the company had installed on

private property because the jury had to decide whether the visitor was a licensee or an invitee and then consider the company's liability as occupier of the premises under the appropriate premises liability standard; a jury could find that the visitor was an invitee rather than a licensee because there was evidence that the visitor was looking at real property that was being offered for sale, that the property owner received the benefit of a potential sale from the visit to the property, but there was also evidence that the visitor was a licensee. McGarity v. Hart Elec. Mbrshp. Corp., 307 Ga. App. 739, 706 S.E.2d 676 (2011).

Breach of duty presents jury question. — Questions of whether or not an owner breached the owner's duty of care to invitees, and whether an invitee exercised reasonable care for the invitee's own safety are normally for a jury, except in plain, palpable, and undisputed cases when reasonable minds cannot differ as to the conclusion to be reached. Pound v. Augusta Nat'l, Inc., 158 Ga. App. 166, 279 S.E.2d 342 (1981).

Erroneous charge as to duty to invitee. — A charge to the jury to the effect that such a landowner is under the duty to see that the premises are "in such condition that the person invited may approach and remain thereon in safety," was error, in that the court, instead of charging, according to the true rule, that the duty of the landowner is to keep the landowner's premises safe, placed upon the landowner the heavier burden of seeing that the person on the premises remained there in safety. Southern Ry. v. Bottoms, 35 Ga. App. 804, 134 S.E. 824 (1926).

4. Ordinary Care Standard

There is a clear distinction between duty owing to invitee and duty owing to a mere licensee; an owner owes to a licensee no duty as to the condition of the premises, unless imposed by statute, save that the owner should not knowingly let the licensee run upon a hidden peril, or willfully cause the licensee harm; while to one invited the owner is under obligation for reasonable security for the purposes of the invitation. Atlantic Coast Line R.R. v. O'Neal, 180 Ga. 153, 178 S.E. 451 (1934); Georgia Power Co. v. Sheats, 58 Ga. App. 730, 199 S.E. 582 (1938); Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939); Freeman v. Levy, 60 Ga. App. 861, 5 S.E.2d 61 (1939).

Duty of ordinary care that patron owes to invitees is same duty of ordinary care in keeping the premises safe which master owes to the servant; in either case, two elements must exist in order to merit recovery, fault on the part of the owner, and ignorance of the danger on the part of the invitee. Rogers v. Atlanta Enters., Inc., 89 Ga. App. 903, 81 S.E.2d 721 (1954); Braun v. Wright, 100 Ga. App. 295, 111 S.E.2d 100 (1959).

Person is required to exercise ordinary care to keep premises safe and free from hidden dangers with respect to invitee. Young v. Towles, 113 Ga. App. 471, 148 S.E.2d 455 (1966).

Duty to invitee is to exercise ordinary care to keep premises safe, not reasonably safe. Western & A.R.R. v. Hetzel, 38 Ga. App. 556, 144 S.E. 506 (1928); Flint River Cotton Mills v. Colley, 71 Ga. App. 288, 30 S.E.2d 426 (1944), rev'd on other grounds, 169 Ga. 246, 149 S.E. 876 (1929).

"Safe" and "reasonably safe" not synonymous terms. — There is a wide difference between exercising ordinary care to keep the premises safe and exercising such care to keep the premises reasonably safe. Massey v. Georgia Power Co., 85 Ga. App. 593, 69 S.E.2d 824 (1952).

The precise legal intent of term "ordinary care" must depend upon circumstances of each individual case. It is a relative and not an absolute term. Smith v. Ammons, 228 Ga. 855, 188 S.E.2d 866 (1972).

What ordinary care is must be determined in part by the standards of care generally regarded as adequate in similar situations. Angel v. Varsity, Inc., 113 Ga. App. 507, 148 S.E.2d 451 (1966).

The actual result of an act or omission is not controlling in determining whether or not it was negligent, nor is the duty of the person doing or omitting to do an act to be estimated by what, after an injury has occurred, then first appears to be a proper precaution, but the question of

General Consideration (Cont'd)
4. Ordinary Care Standard (Cont'd)

negligence must be determined according to what should reasonably have been anticipated, in the exercise of ordinary care, as likely to happen. Roberts v. Wicker, 213 Ga. 352, 99 S.E.2d 84 (1957); Savannah E. Side Corp. v. Robinson, 102 Ga. App. 426, 116 S.E.2d 613 (1960).

An ordinary care standard is whether a reasonably prudent person at the time and in the circumstances would have foreseen danger and what the person reasonably would have done to prevent injury; negligence is defective foresight judged by this standard rather than by hindsight of what actually happened and the effectiveness of the action taken. Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972); Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979).

The standard of care imposed by this section upon the owner or occupier of premises is measured by what the prudent man would do under the circumstances, and that whether in terms of "reasonable care," or "ordinary care," in keeping the premises "safe" or "reasonably safe" it is the same. Hammonds v. Jackson, 132 Ga. App. 528, 208 S.E.2d 366 (1974).

Ordinary care may vary with use to which property devoted. — Ordinary care and diligence, as applied to the keeping of premises in safe condition, is a very elastic term, varying the quantum of actual caution to be exercised according to the nature of the use to which the property is devoted. Townley v. Rich's, Inc., 84 Ga. App. 772, 67 S.E.2d 403 (1951); Jones v. Hunter, 94 Ga. App. 316, 94 S.E.2d 384 (1956); Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

Mere omission to act when there is a duty to act will amount to actionable negligence as to one to whom duty is due. However, no duty to act arises until one has notice, actual or constructive, that failure to so act will probably result in injury to another. Norris v. Macon Term. Co., 58 Ga. App. 313, 198 S.E. 272 (1938).

Landowner is not an insurer of an invitee's safety, because the law only requires such diligence toward making the premises safe as the ordinarily prudent person in such matters is accustomed to use. Barksdale v. Nuwar, 203 Ga. App. 184, 416 S.E.2d 546 (1992).

Exercise of ordinary care by owner to keep premises safe for invitees includes duty to anticipate negligence of others which is usual or likely to happen. Winn-Dixie Stores, Inc. v. Hardy, 138 Ga. App. 342, 226 S.E.2d 142 (1976); Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979).

Ordinary care does not require inspection when no apparent need exists. — When there is nothing in the evidence to indicate the propriety or the necessity of making an inspection to ascertain the possible or probable existence of any defects, ordinary diligence does not require an inspection when there is no reason to think an inspection is necessary. Roberts v. Wicker, 213 Ga. 352, 99 S.E.2d 84 (1957); McLaury v. McGregor, 110 Ga. App. 679, 139 S.E.2d 444 (1964); Hood v. McCall Clinic, Inc., 145 Ga. App. 314, 243 S.E.2d 571 (1978).

One is not chargeable with negligence in failing to discover and remedy danger which one would not have discovered by exercise of ordinary care, or which has not existed for a sufficient time to charge one with the duty of discovering it. Neither is a person bound to foresee and guard against casualties which are not reasonably to be expected, which would not occur save under exceptional circumstances, or which result from an unexpected act of the person injured. McCrory Stores Corp. v. Ahern, 65 Ga. App. 334, 15 S.E.2d 797 (1941); Savannah E. Side Corp. v. Robinson, 102 Ga. App. 426, 116 S.E.2d 613 (1960).

It is usually willful or wanton not to exercise ordinary care to prevent injury to person who is actually known to be, or reasonably expected to be, within the range of a dangerous act being done. Atlantic Coast Line R.R. v. O'Neal, 180 Ga. 153, 178 S.E. 451 (1934); Atlantic Steel Co. v. Cleaton, 52 Ga. App. 502, 183 S.E. 827 (1936).

Owner must not create or maintain dangerous condition. — The law demands of the owner of premises that the

owner neither create upon the property nor permit after reasonable opportunity to learn of its existence a structural condition of static danger which with foreseeable probability may be activated by the negligence of another and imperil persons lawfully upon the property. Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958).

Because an injured person provided no evidence, in responding to a summary judgment motion, that an ordinarily prudent operator of an outdoor establishment would have applied a urethane coating to wood handrails installed outside and would not have pressure washed them, summary judgment in favor of a park, an authority, and a city was proper in the injured person's claim seeking damages for getting a splinter from a bridge handrail. Hamblin v. City of Albany, 272 Ga. App. 246, 612 S.E.2d 69 (2005).

Pleadings. — When a dangerous or hazardous condition is created by the owner or occupier of the premises, allegations showing that the owner or occupier knew or could have known or have discovered such dangerous or hazardous condition are not required. Kroger Co. v. Anderson, 110 Ga. App. 696, 140 S.E.2d 108 (1964).

In order to state a cause of action in a case when the plaintiff alleges that due to an act of negligence by the defendant as the plaintiff slipped and fell on a foreign substance on the defendant's floor, the plaintiff must show: (1) that defendant had actual or constructive knowledge of the foreign substance; and (2) that the plaintiff was without knowledge of the substance or for some reason attributable to the defendant was prevented from discovering the foreign substance. Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980).

Ordinary care, negligence, and proximate cause present jury questions. — It is a question of fact for the jury, whether an owner exercised ordinary care in constructing the premises, and in keeping in a safe condition. Wynne v. Southern Bell Tel. & Tel. Co., 159 Ga. 623, 126 S.E. 388 (1925).

It is ordinarily a question of fact for a jury whether an owner or occupier of premises has exercised the proper care and diligence in keeping the premises safe for those invited thereon. Lake v. Cameron, 64 Ga. App. 501, 13 S.E.2d 856 (1941); DeKalb County Hosp. Auth. v. Theofanidis, 157 Ga. App. 811, 278 S.E.2d 712 (1981).

The plaintiff, being an invitee, because of mutuality of interest, was due ordinary care and it is for the jury to determine the issues of negligence. Martin v. Henson, 95 Ga. App. 715, 99 S.E.2d 251 (1957).

Ordinarily, whether the owner or occupant of land exercises ordinary care in keeping premises in a safe condition, upon which an invitee goes and is injured, whether the invitee could have avoided injury in the exercise of ordinary care, or whether both were negligent in some degree, as the proximate cause of an injury, or the absence of any negligence, are questions for jury determination, which the court will not decide as a matter of law on demurrer except as to acts declared by law to be negligence, or palpable and indisputable cases when reasonable minds cannot differ as to the conclusion to be reached. Colonial Stores, Inc. v. Donovan, 115 Ga. App. 330, 154 S.E.2d 659 (1967).

An owner of premises must, as to invitees, exercise ordinary care to keep premises safe, not reasonably safe. When an invitee is injured on the premises, the question of negligence, whose negligence and what negligence is for the jury to determine under all the facts and circumstances of the case. Simpson v. Dotson, 133 Ga. App. 120, 210 S.E.2d 240 (1974).

It is well-settled law that questions of negligence, diligence, contributory negligence, proximate cause, and the exercise of ordinary care for one's protection ordinarily are to be decided by a jury, and a court should not decide them except in plain and indisputable cases. Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979).

Question of reasonable foreseeability and statutory duty imposed by this section to exercise ordinary care to protect invitees, is for a jury's determination rather than summary adjudication by the courts when an intervening criminal act if the defendant had reasonable grounds for

General Consideration (Cont'd)
4. Ordinary Care Standard (Cont'd)

apprehending that such criminal act would be committed. Lay v. Munford, Inc., 235 Ga. 340, 219 S.E.2d 416 (1975).

When the defective condition is one of such character that reasonable and prudent men may reasonably differ as to whether an accident could or should have been reasonably anticipated from its existence or not, then the case is generally one for the jury; but when the defect, if any, was so slight that no careful or prudent man would reasonably anticipate any danger from its existence, but still an accident happened which could have been guarded against by the exercise of extraordinary care and foresight, the question of the defendant's responsibility is one of the law. McCrory Stores Corp. v. Ahern, 65 Ga. App. 334, 15 S.E.2d 797 (1941); Roberts v. Wicker, 213 Ga. 352, 99 S.E.2d 84 (1957); Griffith v. Morgan, 117 Ga. App. 216, 160 S.E.2d 420 (1968).

A number of factors chargeable to defendant, none of which of itself reaches negligence threshold, may in their totality make jury question on whether a defect results which should have been foreseen by the owner or occupier of the premises as posing a hazard to an invitee thereon. Lumbus v. D.L. Claborn Buick-Opel, Inc., 153 Ga. App. 807, 266 S.E.2d 526 (1980).

Plaintiff's contributory negligence cannot be implied as matter of law. — When an owner of land fails to comply with this section, and an invitee is injured by a patent defect, contributory negligence of the injured person cannot be implied as a matter of law. Wynne v. Southern Bell Tel. & Tel. Co., 159 Ga. 623, 126 S.E. 388 (1925).

Duty Owed to Children

There is a greater duty owed to small children lawfully upon premises than to older persons. Flint River Cotton Mills v. Colley, 71 Ga. App. 288, 30 S.E.2d 426 (1944).

Higher degree of care for children. — A well-defined distinction runs through the cases, between injuries caused by a dangerous statical condition and premises where dangerous active operations are being carried on, a much higher degree of care is necessary in protecting children in the latter case than in the former. Atlantic Steel Co. v. Cleaton, 52 Ga. App. 502, 183 S.E. 827 (1936).

"Due care" or "ordinary care" to avoid injury to another may involve a greater duty owed to small children lawfully upon premises than to older persons, and accordingly the degree of care may vary with the capacity of the invitee. Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 92 S.E.2d 720 (1956).

The degree of care owed to a child by a landlord with regard to common areas over which the landlord has retained control may be greater than that which would be owed to an adult under the same circumstances. Lidster v. Jones, 176 Ga. App. 392, 336 S.E.2d 287 (1985), cert. vacated sub nom. Pine Terrace Assocs., Ltd. v. Lidster, 255 Ga. 405, 341 S.E.2d 8 (1986).

With regard to minor invitees, the degree of care owed is proportioned to their ability to foresee and avoid perils which may be encountered; therefore, the degree of care owned a minor in a particular set of circumstances may be greater than that which would be owed an adult. Massey v. Hilton Heights Park, 121 Ga. App. 214, 173 S.E.2d 396 (1970).

One using or handling any instrumentality of an unusual and dangerous character is bound to take exceptional precautions to prevent injury thereby, and children of tender years and youthful persons generally are entitled to a degree of care proportioned to their ability to foresee and void the perils that may be thus encountered; therefore, the fact that the defendant's servants might or might not have intended to return to the place of construction when dynamite caps were left unguarded and exposed at some short or indefinite time thereafter would not relieve the defendant from taking the necessary and proper precautions during the interval, however short, during which the operatives were in fact absent. Lee v. Georgia Forest Prods. Co., 44 Ga. App. 850, 163 S.E. 267 (1932).

There is duty to keep turntable fastened so that child attracted thereto will not be injured. Ferguson v. Colum-

bus & Rome Ry., 75 Ga. 637 (1885).

Doctrine of turntable cases does not apply to moving car upon track of railroad company. Underwood v. Western & A.R.R., 105 Ga. 48, 31 S.E. 123 (1898).

Owner has no absolute duty to guard against all possible injuries to child. — When there is no negligence involved in the keeping and maintaining of the premises, and no actual notice of the peril of the child, there is no absolute duty to guard against every possible way in which a child might escape from the normal use of the premises and, by climbing upon portions thereof not intended for such use places oneself in danger of injury by falling. Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 92 S.E.2d 720 (1956).

While the owner of premises may owe more duty to a child than to an adult coming upon the owner's premises by implied invitation, yet the owner is not bound to guard every stairway, cellarway, retaining wall, shed, tree, and open window on the owner's premises, so that such child cannot climb to a precipitous place and fall off. Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 92 S.E.2d 720 (1956).

Owner is not insurer of safety of child, and accordingly is not liable for injuries resulting solely from the conduct of the child in misusing otherwise safe premises, which misuse by the child was unknown to the owner. McLaury v. McGregor, 110 Ga. App. 679, 139 S.E.2d 444 (1964); Lincoln v. Wilcox, 111 Ga. App. 365, 141 S.E.2d 765 (1965).

Turntable doctrine does not permit recovery from owner of vacant house when a child was injured entering therein. O'Connor v. Bruckner, 117 Ga. 451, 43 S.E. 731 (1903).

Child accompanying parent into store has invitee status. — A child who accompanies a parent customer into a store, or similar establishment does not come within the definition of a licensee contained in former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2), for the child does not enter such establishment "merely for his own interest, convenience or gratification," but the child's presence is essential and vital to the business conducted on the premises by the owner or proprietor; the child has the status of an invitee to whom the law requires ordinary care to be accorded. Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958).

Child of employee is invitee upon residential area maintained by company. — When the defendant mill maintained on its premises houses for its employees, in vicinity of which a reservoir was located, and incident to draining such reservoir for sanitary purposes invited employees and their children to catch and remove fish and turtles found therein, providing a ladder for the purpose, the child of an employee who was killed by falling into an open well three feet from the ladder was an invitee upon the premises. Flint River Cotton Mills v. Colley, 71 Ga. App. 288, 30 S.E.2d 426 (1944).

Child entering store to use restroom deemed licensee, not invitee. — In a parent's suit as a next friend to the parent's daughter, the trial court erred in denying summary judgment to a retailer and its employees on the parent's claim of tortious misconduct, as no evidence was presented that the child victim was the retailer's business invitee, but was merely a licensee under both O.C.G.A. §§ 51-3-1 and 51-3-2, as the child merely entered the business with the sole intent to use the restroom; however, summary judgment was properly denied as to the invasion of privacy, intentional infliction of emotional distress, false imprisonment, false arrest, and damages claims filed by the parent against the defendants. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Landowners duty to child as to latent construction defects. — Trial court erred in granting summary judgment to the property owners in a negligence claim because genuine issues of material fact remained as to whether the property owners violated applicable building codes in the construction of their deck, whether they exercised ordinary care in preventing injury to their guests from a defect in the deck or showed such indifference to the consequences as to justify a

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finding of wantonness, and whether an injured child had equal knowledge of the hazard and failed to exercise ordinary care for the child's own safety. Hicks v. Walker, 262 Ga. App. 216, 585 S.E.2d 83 (2003).

Carriers

Carrier owes duty of ordinary care with respect to member of public entering upon premises for purpose of doing business with the carrier, including persons coming to meet arriving passengers. Hightower v. City Council, 124 Ga. App. 537, 184 S.E.2d 678 (1971).

Carrier's duty of exercising ordinary care to furnish safe station facilities is not to be confused with carrier's duty to use extraordinary care in receiving, transporting and discharging its passengers. Delta Air Lines v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

Relationship of carrier and passenger terminates when passenger has been safely discharged and when the carrier is no longer bound to exercise extraordinary care for the passenger's safety, but is bound to use only the same degree of care for the passenger's safety as it would for the safety of any other member of the public upon its premises by invitation, express or implied. Delta Air Lines v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

Being no longer restricted to a designated route from the airplane on which one had been traveling, the individual was no longer a passenger when the individual stumbled over a low wall between the parking lot and the waiting area of the landing field and sustained the individual's injuries. Delta Air Lines v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

Duty of carrier by air in respect to maintenance of its premises for use of arriving or departing passengers is same as that of any owner or occupier of land to those whom one induces, by express or implied invitation, to enter one's premises for lawful purposes, and that duty is to exercise ordinary care in keeping the premises and approaches safe. Delta Air Lines v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

Duty of carrier to exercise ordinary care in keeping its premises safe exists not only with respect to those persons being received or who have been discharged as passengers, but also with respect to any member of the public entering such premises for the purposes of doing business with the carrier, including even persons coming to meet arriving passengers. Delta Air Lines v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

Railroad company bound by section. — The liability under this section of a railroad company as the owner or occupier of land, engaged in business, is the same as that of any person. Central of Ga. Ry. v. Hunter, 128 Ga. 600, 58 S.E. 154 (1907).

Railroad must exercise reasonable care to make right of way safe. Central of Ga. Ry. v. Lawley, 33 Ga. App. 375, 126 S.E. 273, cert. denied, 33 Ga. App. 828 (1925).

Person who goes to railroad station to meet and look after incoming passenger occupies status of invitee. Atlanta & W. Point R.R. v. Hyde, 45 Ga. App. 548, 165 S.E. 466 (1932).

Servant to carrier's passenger may be invitee. — A servant of a patron of a railroad who is on the premises of the railroad in connection with the servant's employment by the patron, waiting to be transported to a place where the servant would actually engage in the duties of the servant's employment, the servant's presence on the premises being incidental to the servant's employment and having been brought about by the servant's employer, is an invitee on the premises, and under the admissions in the pleadings and the evidence in this case, the plaintiff was an invitee on the premises of the defendant. Atlantic Coast Line R.R. v. Dupriest, 81 Ga. App. 773, 59 S.E.2d 767 (1950).

Person not invitee when entering premises to transact purely personal business with carrier's passenger. — When a person enters upon the premises of a railroad company to meet a train in order to see "a party" for the purpose of trying to procure through that person employment in which the railroad company

was in no wise interested or concerned, the presence of the person so entering upon the premises is purely for the person's own benefit and interest, and the person is a mere licensee, and not an invitee. Atlanta & W. Point R.R. v. Hyde, 45 Ga. App. 548, 165 S.E. 466 (1932).

Implied invitation. — When a stranger passing along the street on a rainy night might, while in the exercise of ordinary care, have believed that a privately owned roadway or driveway was but a continuation of the public street, and thus have been reasonably misled into driving thereupon in an effort to cross a railroad, there was what amounted to an implied invitation on the part of the defendant roadway owner to enter upon its premises. Williamson v. Southern Ry., 42 Ga. App. 9, 155 S.E. 113 (1930).

Ordinarily, only duty owing by a railway company to a trespasser upon or about the company's property is not wantonly or willfully to injure the trespasser after the trespasser's presence has been discovered. Central of Ga. Ry. v. Stamps, 48 Ga. App. 309, 172 S.E. 806 (1934).

After presence of trespasser upon track of defendant in front of its approaching train is discovered, it becomes the duty the trespasser of the agents in charge the trespasser's of the train to give him some warning of the trespasser's dangerous position. Fox v. Pollard, 52 Ga. App. 545, 183 S.E. 854 (1936).

Commercial Sales Establishments

Operator of retail mercantile establishment owes duty to those who come to operator's store to trade of using care and caution necessary to keep the store premises and approaches in a safe condition. Parsons v. Sears, Roebuck & Co., 69 Ga. App. 11, 24 S.E.2d 717 (1943).

When a person maintains a place of business at which the person sells goods or dispenses services to those who comply with the person's requirements as to compensation therefor, such person owes a duty, to those coming to the premises to trade with the person, of using the care and caution necessary to keep the premises and approaches thereto in a safe condition. Lake v. Cameron, 64 Ga. App. 501, 13 S.E.2d 856 (1941).

When a person maintains a place of business at which the person sells goods or dispenses services, such person owes a duty to those coming to the premises to trade with the person of using ordinary care and caution to keep the premises in a safe condition, and in the exercise of this duty, the merchandise and fixtures with which such person conducts the person's business, must not be so placed as to threaten injury to those visiting the store who are in the exercise of ordinary care for their own safety. Parsons, Inc. v. Youngblood, 105 Ga. App. 583, 125 S.E.2d 518 (1962); Colonial Stores, Inc. v. Donovan, 115 Ga. App. 330, 154 S.E.2d 659 (1967); Cox v. K-Mart Enters. of Ga., Inc., 136 Ga. App. 453, 221 S.E.2d 661 (1975), later appeal, 143 Ga. App. 30, 237 S.E.2d 432 (1977).

A storekeeper who balances merchandise on display in a precarious manner (or allows another to so arrange a display) should anticipate that slight force, not sufficient ordinarily to suggest to the actor who does not know of the peril that injury will result, may be sufficient to cause injury, and the storekeeper is not relieved of the consequences of this negligence by an intervening act which one should have anticipated. Colonial Stores, Inc. v. Donovan, 115 Ga. App. 330, 154 S.E.2d 659 (1967).

The owner of any business establishment owes a duty to exercise ordinary care in keeping the approaches and passages which the owner expects and invites the customers to traverse free of objects and conditions of which the owner has knowledge and which might foreseeably cause injury. Brown v. Iocovozzi, 117 Ga. App. 693, 161 S.E.2d 385 (1968).

Broad interpretation of invitee to shopping center. — Certainly, the defendants had "some interest" in the customer's visit since the defendants were owners of a shopping center and success of the defendants' shopping center venture depended on whether their tenants do a satisfactory volume of business. A customer is an invitee, and owners owe the customer the duty of using ordinary care

Commercial Sales
Establishments (Cont'd)

not to injure the customer in the place where invited. Hicks v. M.H.A., Inc., 107 Ga. App. 290, 129 S.E.2d 817 (1963).

Merchant does not become insurer of customer's safety; merchant is required only to exercise ordinary care to avoid injuring the customer. King Hdwe. Co. v. Teplis, 91 Ga. App. 13, 84 S.E.2d 686 (1954).

Merchant is not insurer of safety of merchant's customers, but the law requires such diligence toward making the premises safe as the ordinarily prudent businessman in such matters is accustomed to use. Winn-Dixie Stores, Inc. v. Hardy, 138 Ga. App. 342, 226 S.E.2d 142 (1976).

Store proprietor to which prospective customers are invited is not insurer of their safety while in store, but owes to the customers merely the duty of exercising ordinary care to keep the store in a safe condition for their proper use. Southern Grocery Stores, Inc. v. Greer, 68 Ga. App. 583, 23 S.E.2d 484 (1942).

Storekeeper is not insurer of safety of its customers, the duty imposed upon it under the law being to exercise ordinary care in keeping the premises and approaches safe. McMullan v. Kroger Co., 84 Ga. App. 195, 65 S.E.2d 420 (1951).

Proprietor of premises is not insurer of safety of persons thereon against all acts of coinvitees; and when the proprietor has used ordinary care to keep the premises safe, the proprietor not guilty of negligence. Watson v. McCrory Stores, Inc., 97 Ga. App. 516, 103 S.E.2d 648 (1958); Lincoln v. Wilcox, 111 Ga. App. 365, 141 S.E.2d 765 (1965); Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979).

True ground of liability is store proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. Angel v. Varsity, Inc., 113 Ga. App. 507, 148 S.E.2d 451 (1966); Mewborn v. Winn-Dixie Stores, Inc., 179 Ga. App. 284, 346 S.E.2d 95 (1986).

Defective container or packaging. — In an action by a customer against a drugstore for burns suffered when bleach spilled from a bottle as the customer removed it from a shelf, the jury was authorized to find that by placing a caustic substance contained in package without some sort of leakage protection, such as a protective wrap, at above the eye level of the average adult, the store should have anticipated that in the event of leakage, injury would result; reversing A.B.C. Drug Co. v. Monroe, 214 Ga. App. 136, 447 S.E.2d 315 (1994). Keaton v. A.B.C. Drug Co., 266 Ga. 385, 467 S.E.2d 558 (1996).

Knowledge of a puddle of water surrounded by ice, coupled with knowledge of the generally prevailing weather conditions, is knowledge of a probable danger of encountering additional ice under the surface of the water and a danger of slipping when walking thereon. Bloch v. Herman's Sporting Goods, Inc., 208 Ga. App. 280, 430 S.E.2d 86 (1993).

Because no evidence was presented that a hardware store had actual knowledge that a hazard existed, summary judgment for the hardware store was proper in a claim for damages arising from an incident when a box fell on a customer at the hardware store. Green v. Home Depot U.S.A., Inc., 277 Ga. App. 779, 627 S.E.2d 836 (2006).

If the proprietor has reason to anticipate a criminal act, the proprietor then has a duty to exercise ordinary care to guard against injury from dangerous characters. The proprietor is not the insurer of the invitee's safety, but is bound to exercise ordinary care to protect the invitee from unreasonable risks of which the proprietor has superior knowledge. Woods v. Kim, 262 Ga. App. 910, 429 S.E.2d 262 (1993).

Criminal activity in parking lot. — A judgment in favor of a customer in a premises liability action was upheld on appeal as the customer established that the retailer breached the duty of care owed to the customer when the customer was robbed of the customer's car and shot in the retailer's parking lot and that the retailer had foreseeable knowledge of such criminal activity. Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 659 S.E.2d 905 (2008).

Admission of evidence of prior criminal activity in retailer's parking

lot. — In a premises liability action brought by a customer against a retailer involving an occurrence wherein the customer was carjacked and shot in the retailer's parking lot, the trial court did not abuse the court's discretion by allowing into evidence prior incidents of criminal activity at the retailer's premises as, considering the location, nature, and extent of those prior criminal occurrences and their likeness to the incident involving the customer, the other occurrences were sufficiently similar. While there was no evidence of a prior incident in which the victim was shot and the victim's car was taken at gunpoint, such as what had occurred to the customer, the prior criminal occurrences did not need to be identical to the one involving the customer and there were several robberies and assaults with a deadly weapon upon the premises, as well as thefts of and from vehicles in the retailer's parking lot, which showed that it was reasonable to anticipate that an unauthorized entry into a vehicle might occur when the driver was nearby and that personal harm to the driver would result. Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 541, 659 S.E.2d 905 (2008).

Duty to protect from loiterers. — In an action for negligence against a store owner for a mugging that occurred in a vacant lot adjacent to the strip mall in which the store was located, summary judgment for the owner was erroneous, since the owner had specific knowledge of prior criminal attacks on the premises, attackers loitered on the owner's premises waiting for victims, and the attackers followed the victim from the owner's premises to the lot and assaulted the victim. Wilks v. Piggly Wiggly S., Inc., 207 Ga. App. 842, 429 S.E.2d 322 (1993).

Premises mentioned in this section must constitute actual store building and lot of land on which it rests, which is under the actual dominion and control of the owner or occupier. Elmore of Embry Hills, Inc. v. Porcher, 124 Ga. App. 418, 183 S.E.2d 923 (1971).

Premises being repaired. — Occupant of premises, notwithstanding fact that the occupant may have turned them over to independent contractor for repair, is not necessarily thereby relieved of duty to exercise ordinary care to keep the premises safe for a person lawfully coming upon the premises. Southern Grocery Stores, Inc. v. Cain, 50 Ga. App. 629, 179 S.E. 128 (1935).

When the occupant of premises which are used by the occupant in conducting a retail store in which business is done with the public and to which customers lawfully come to trade has merely permitted the landlord to come thereon for the purpose of making repairs in the floor, and has not relinquished control of the premises, and, while the repairs are being made, permits a customer to come into the store for the purpose of trading, the occupant nevertheless owes a duty to the customer to use ordinary care to have the premises safe. Southern Grocery Stores, Inc. v. Cain, 50 Ga. App. 629, 179 S.E. 128 (1935).

Failure of shopping mall owner to seal walls of transformer room did not render the owner liable for damage to property of clothing store caused by smoke and soot from transformer room fire which escaped into storeroom. Sugrue v. Flint Elec. Membership Corp., 155 Ga. App. 481, 270 S.E.2d 921 (1980).

Walls. — Owner of premises is not under duty as reasonably prudent man to make walls airtight so that gaseous matter cannot disseminate from one room to the other. Sugrue v. Flint Elec. Membership Corp., 155 Ga. App. 481, 270 S.E.2d 921 (1980).

Sidewalks. — Each owner or occupier is responsible for keeping sidewalk immediately in front of and adjacent to the owner's or occupier's store in safe condition, and that the responsibility for the parking area, and those stretches of pavement that are not in front of the premises of any owner or occupier, must be borne by the owner and operator of the shopping center, provided the owner or operator has retained control of the shopping center. Elmore of Embry Hills, Inc. v. Porcher, 124 Ga. App. 418, 183 S.E.2d 923 (1971).

Catch basins. — Because the catch basin was open and obvious, the property owners were under no duty to warn. Freyer v. Silver, 227 Ga. App. 253, 488 S.E.2d 728 (1997), aff'd, 234 Ga. App. 243, 507 S.E.2d 7 (1998).

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Steps. — It is duty of occupier to use ordinary care to maintain steps in the building used by its customers in a condition reasonably safe against accidents from slipping. Scott v. Rich's, Inc., 47 Ga. App. 548, 171 S.E. 201 (1933).

If, by reason of the negligence of the owner or occupier of a building to which the public is invited, the steps are maintained in a condition unsafe to the persons using the steps, and if by reason of such defect a person lawfully in the building using the steps is injured without fault on the person's part, the occupier or owner of the building is responsible in damages therefor. Scott v. Rich's, Inc., 47 Ga. App. 548, 171 S.E. 201 (1933).

Defective footway, walkway, or excavation. — One maintaining a defective footway, walkway, or excavation on the premises through which another falls may be held guilty of actionable negligence unless it appears for other reasons that the plaintiff cannot recover. Narjoe Timber & Supply Co. v. Hanson, 133 Ga. App. 506, 211 S.E.2d 380 (1974).

Maintenance of ramp. — When the pleadings and evidence before the court show that the defendant grocery store invited the plaintiff to use the ramp which had been constructed at the store's request as a facility to its business, the defendant owed the plaintiff as its business invitee a duty to exercise ordinary care to keep the ramp safe for the invitee's use. Scoggins v. Campbellton Plaza Corp., 114 Ga. App. 23, 150 S.E.2d 179 (1966).

Malfunctioning escalator. — Store owner's negligence was question for the jury since evidence showed that the store had actual knowledge for a ten-to-fifteen minute period that an escalator on its premises was malfunctioning and failed either to correct that potentially dangerous condition by stopping the malfunctioning escalator or otherwise, in the alternative, to warn its patrons of the existence of the potentially dangerous condition. Ellis v. Sears Roebuck & Co., 193 Ga. App. 797, 388 S.E.2d 920 (1989).

Footmats. — A retail market may be negligent in failing to provide footmats at the door leading from a private meat-cutting area of the store to the public area. Dillon v. Grand Union Co., 167 Ga. App. 381, 306 S.E.2d 670 (1983).

Rubber mat in front of store. — In a case in which a customer sued a store after the customer tripped on a rubber mat outside the store's entrance, the trial court erred in granting summary judgment for the store since genuine issues of material fact existed as to whether the store lacked superior knowledge of the hazard posed by the mat that caused the customer to trip and fall. Benefield v. Tominich, 308 Ga. App. 605, 708 S.E.2d 563 (2011).

Store shelf corner. — A customer who tripped and fell when the customer's pants cuff caught the outer corner of a store shelf was not entitled to recover against the store based on premises liability under O.C.G.A. § 51-3-1; the customer made the turn at issue many times before and did so while observing the hazard of which the customer complained, and given that the customer was able to observe the shelf corner for ten seconds before falling, the shelf corner was an open and obvious condition of which the customer had at least equal knowledge and could have avoided in the exercise of ordinary care. Wright v. K-Mart Corp., 286 Ga. App. 765, 650 S.E.2d 300 (2007), cert. denied, 2008 Ga. LEXIS 124 (Ga. 2008).

Openly visible static condition. — A store owner is not liable to a customer who slips and falls due to an openly visible "static condition", such as a hole or uneven place on the sidewalk at the edge of the store, and the owner has reason to believe the customer will discover the condition or realize the risk involved. Jeter v. Edwards, 180 Ga. App. 283, 349 S.E.2d 28 (1986).

A claim involving a static defect differs from other slip and fall cases in that when a person has successfully negotiated an alleged dangerous condition on a previous occasion, that person is presumed to have knowledge of it and cannot recover for a subsequent injury resulting therefrom. Herrin v. Peeches Neighborhood Grill & Bar, Inc., 235 Ga. App. 528, 509 S.E.2d 103 (1998).

Trial court properly found that a shopping center curb where an injured person fell was an open and obvious static condition and that the injured person failed to exercise reasonable care for their own safety; pursuant to O.C.G.A. § 51-3-1, the trial court properly granted summary judgment for the defendants in the injured person's claim because the injured person failed to show that the curb was negligently designed, constructed, maintained, or difficult to see, and contended only that the injured person failed to appreciate the height of the curb. Pirkle v. Robson Crossing, LLC, 272 Ga. App. 259, 612 S.E.2d 83 (2005).

Trial court did not err in granting a store owner summary judgment in a customer's action to recover damages for injuries the customer sustained when the customer fell from a curb in the store's parking lot because the customer had equal knowledge of any hazard presented by the height of the curb; even if the curbed sidewalk was hazardous, the condition was open and obvious and, thus, in the exercise of ordinary care, the customer could have avoided the hazard. McLemore v. Genuine Parts Co., 313 Ga. App. 641, 722 S.E.2d 366 (2012).

Because a customer did not testify that the purported distraction of people attending a tool show in any way obstructed the customer's view of a curb, the proof offered clearly put the case within the line of cases involving the plain view doctrine and effectively eliminated any distraction theory. McLemore v. Genuine Parts Co., 313 Ga. App. 641, 722 S.E.2d 366 (2012).

Holes in ground in orchard open to public to pick fruit. — Trial court erred in granting defendant orchard owners' motion for summary judgment after the plaintiff fell into a hole while picking fruit and, from the plaintiff's testimony concerning the size of the hole, a jury would have been authorized to infer both that it had been in existence for a substantial period of time and that it was large enough to have been observable during routine mowing and maintenance. Lawless v. Sasnett, 200 Ga. App. 398, 408 S.E.2d 432, cert. denied, 200 Ga. App. 896, 408 S.E.2d 432 (1991).

Dangerous adjacent construction activity. — The fact that the defendant shopping mall owners did not anticipate that the actual encroachment of dangerous construction activity onto their unpatrolled and unbarriered sidewalk would take the form of an intentional rather than an inadvertent act of the workers was immaterial; the defendants could still be found liable if the evidence was sufficient to authorize the jury to find that the defendants were on notice that the failure to take any precautions to protect their invitees on the adjacent sidewalk would result in some form of potential physical encroachment of the dangerous construction activity with an injurious result. Towles v. Cox, 181 Ga. App. 194, 351 S.E.2d 718 (1986).

Unruly bar patron. — Evidence raised a question of fact concerning whether restaurant employees could have foreseen the potential danger stemming from loud and unruly bar patron who eventually attacked plaintiff with a pool cue, such that factual question existed for the jury to resolve on the issue of negligence and diligence, and the trial court correctly denied defendant's motion for summary judgment. Good Ol' Days Downtown, Inc. v. Yancey, 209 Ga. App. 696, 434 S.E.2d 740 (1993).

There was sufficient evidence from which the jury could have concluded that a fight resulting in a bar patron's injuries was foreseeable and could have been avoided if the bar and the bar's owner had banished the patrons involved in the fight based on their duty to the patron, O.C.G.A. § 51-3-1. The patrons involved in the fight were chronically combative, had been banished on previous occasions, and were hostile and combative for hours before the subject fight. Mulligan's Bar & Grill v. Stanfield, 294 Ga. App. 250, 668 S.E.2d 874 (2008), cert. denied, No. S09C0351, 2009 Ga. LEXIS 192 (Ga. 2009).

Retailer's duty of care includes protecting invitees from tortious conduct by servants. — When a corporation, engaged in the retail mercantile business, impliedly extends an invitation to the public to trade in its store, it is required to exercise the same degree of diligence to protect its customers from the tortious misconduct of its employees as an

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individual must exercise to protect an invitee from the misconduct of such individual's agents and employees acting about their master's business and within the scope of their employment, though such misconduct of the corporation's agents and employees may involve elements of slander. Simpson v. Jacobs Pharmacy Co., 76 Ga. App. 232, 45 S.E.2d 678 (1947).

In suit against corporation engaged in the retail business for failure to exercise due care to protect its customers from the tortious misconduct of its servants and employees acting within the scope of and about their master's business, the fact that such misconduct may involve elements of slander does not prevent the plaintiff from having a cause of action against the corporation for breach of its duty towards the plaintiff as an invitee on its premises. Simpson v. Jacobs Pharmacy Co., 76 Ga. App. 232, 45 S.E.2d 678 (1947).

Customer must exercise ordinary care for customer's own safety, and must avoid effect of merchant's negligence after it becomes apparent to the customer or in the exercise of ordinary care the customer should have learned of it. King Hdwe. Co. v. Teplis, 91 Ga. App. 13, 84 S.E.2d 686 (1954).

When the plaintiff in descending the defendant's steps may have been looking at the steps and picking the plaintiff's way down as alleged in the petition, yet, when the plaintiff did not know the actual condition of the steps as the plaintiff alleges, it cannot be said as a matter of law that the plaintiff was under the circumstances guilty of negligence in using the steps, and that this negligence barred recovery. Scott v. Rich's, Inc., 47 Ga. App. 548, 171 S.E. 201 (1933).

It could not be said as a matter of law that the plaintiff's negligence, if any, would bar a recovery, the plaintiff having ascended the step in question in going into the passageway, in view of the plaintiff's poor eyesight and of allegations that the situation presented an appearance, to one going from the passageway to the lobby, different from what it was to one going from the lobby to the passageway. Boyd v. Gardner, 62 Ga. App. 662, 9 S.E.2d 202 (1940).

Grocery storekeeper's maintenance of a concrete bar from three and one-half inches to six inches high and five feet long, in the storekeeper's parking lot which could easily be seen by anyone with normal vision while walking there and exercising ordinary care for the storekeeper's own safety is not actionable. McMullan v. Kroger Co., 84 Ga. App. 195, 65 S.E.2d 420 (1951).

A grocery storekeeper is not bound to anticipate that customers would so disregard their own safety as to obstruct their vision with packages or sacks so as to be unable to see where they were walking. McMullan v. Kroger Co., 84 Ga. App. 195, 65 S.E.2d 420 (1951).

A customer is not bound to avoid tripping or stumbling over articles which are not usually or are unusually, obstructing the aisles of a store, and which in the exercise of ordinary care the customer did not observe. King Hdwe. Co. v. Teplis, 91 Ga. App. 13, 84 S.E.2d 686 (1954).

Trial court did not err in granting a lessee's motion for summary judgment in a customer's premises liability action under O.C.G.A. § 51-3-1 to recover damages for injuries the customer sustained when the customer fell down stairs in a shop because the customer failed to exercise ordinary care for the customer's own safety pursuant to O.C.G.A. § 51-11-7; despite the customer's inability to see beyond the merchandise, the customer continued to move in that direction, and the customer's attempt to walk between or over the thick clutter of merchandise, when there was not an aisle or clear area of floor visible, constituted a voluntary departure from the route designated and maintained by the lessee for the customers' safety and convenience and imposed a heightened duty of care for the customer's own safety. Bartlett v. McDonough Bedding Co., 313 Ga. App. 657, 722 S.E.2d 380 (2012).

Presence of foreign substance on floor. — When the alleged dangerous condition consists of the presence of a foreign substance on the floor, the proprietor's superior opportunity to discover the sub-

stance may be established by evidence that an employee was in the immediate area of the dangerous condition who could have easily seen the substance and removed the hazard. In order to make out a prima facie case under this theory, however, it must additionally be shown that the substance had been on the floor for a length of time sufficient to have enabled the employee to discover and remove the substance. Flowers v. Kroger Co., 191 Ga. App. 464, 382 S.E.2d 184 (1989).

Summary judgment for an employer was affirmed on an employee's premises liability negligence claim as no one, including the employee, saw any foreign substance or other matter on the floor and no one, including the employee, had any idea what caused the slip and fall; without evidence of the existence of a foreign substance that somehow caused a fall, there could be no evidence that the employer had any knowledge of the alleged danger. Chapman v. C.C. Dickson Co., 273 Ga. App. 640, 616 S.E.2d 478 (2005).

In a premises liability action against a retailer, because the patron failed to show proof that a single employee of the retailer was in the immediate area of the spill that allegedly caused the patron's fall, and could have easily seen and removed the spill prior to the slip and fall, or proof that the liquid had been there for a sufficient length of time that the retailer should have discovered and removed the spill during a reasonable inspection and: (1) inasmuch as the purported hazard was not readily visible to the patron; and (2) the patron failed to establish that the retailer's employees, who were at least 20 to 30 feet away, could have easily seen and removed the spill, or that the liquid had been on the retailer's floor long enough that the retailer should have discovered and removed the spill during a reasonable inspection, the trial court erred in denying the retailer's motion for summary judgment as to the retailer's liability to the patron. Kmart Corp. v. McCollum, 290 Ga. App. 551, 659 S.E.2d 913 (2008).

Store's motion for summary judgment in a patron's personal injury suit was denied because there existed genuine issues of disputed fact as to whether the store exercised reasonable care as required under O.C.G.A. § 51-3-1; there was conflicting evidence on the issue of the store's constructive knowledge of an alleged puddle of cooking oil on the floor since the store's evidence showed that the store's assistant manager inspected the floor about 10 minutes before the patron fell, and the patron testified that the patron was in the aisle for five to 10 minutes before falling, the patron did not see the assistant manager, and the assistant manager had to be called down from an upstairs office at the back of the building when the patron reported the incident. Williams v. Big Lots Stores, Inc., No. 1:07-CV-1593-TWT, 2008 U.S. Dist. LEXIS 57648 (N.D. Ga. July 28, 2008).

Presence of water on floor. — Whether the proprietor followed reasonable inspection procedures, which would have revealed water on the floor near the entrance on a rainy day, was a question of fact. Smith v. Toys "R" Us, Inc., 233 Ga. App. 188, 504 S.E.2d 31 (1998).

Owner of mall was not negligent as a matter of law since the owner had less than 90 seconds to clean up water spilled on the floor prior to the plaintiff's fall. Pickering Corp. v. Goodwin, 243 Ga. App. 831, 534 S.E.2d 518 (2000).

District court did not err in categorizing the plaintiff's case as a rainy-day slip and fall case because it had rained earlier in the day but was not raining at the time of the incident and did not err in concluding as a matter of law that the water accumulation was not unusual since the plaintiff conceded that the wet spot was difficult to discern and that the plaintiff could have tracked in the water on the plaintiff's shoes and when the store employees inspected the floor a few minutes before and a few minutes after the fall, and all the employees stated that the floor was clean and dry. Womack-Sang v. Publix Super Mkts., Inc., No. 13-15339, 2014 U.S. App. LEXIS 9185 (11th Cir. May 19, 2014) (Unpublished).

Presence of chicken blood and water on floor. — Because genuine material fact issues remained as to whether a supermarket's inspection procedures in the area in which a customer fell were reasonable and whether a reasonable inspection procedure would have detected a mixture

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of chicken blood and water on the floor, summary judgment in favor of the supermarket was reversed; moreover, the appeals court rejected the supermarket's claim that the customer had equal knowledge of the hazard since the customer had previously walked down the aisle before the customer fell there. Food Lion, LLC v. Walker, 290 Ga. App. 574, 660 S.E.2d 426 (2008).

Egg spillage on pavement outside food store. — Fact questions, precluding summary judgment in a slip and fall case, existed as to whether store employees had constructive knowledge of egg spillage on the pavement outside the store. Boss v. Food Giant, Inc., 193 Ga. App. 434, 388 S.E.2d 37 (1989).

No proof of delay between knowledge of spill and clean-up attempt. — In a slip and fall action, the trial court did not err in granting summary judgment in favor of the store as the aisle where the fall occurred had been inspected about 20 minutes before the fall, a cashier informed of the hazard told a bagger about the spill and the bagger went to get clean-up items and clean the spill, and there was no evidence that the patron fell after the cashier was notified of the spill or that there was any delay in the attempt to clean up the spill. Youngblood v. All American Quality Foods, Inc., 338 Ga. App. 817, 792 S.E.2d 417 (2016).

Knowledge on part of the proprietor that there is foreign substance on floor that could cause patrons to slip and fall may be either actual or constructive. Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980).

Proprietor's knowledge must be alleged and shown. — When a customer slips on a substance placed on the floor by others than the owner it is necessary to allege and prove either that the defendant had knowledge or that under the circumstances the owner was chargeable with constructive knowledge of the substance's existence. This is particularly applicable to spilled foods and liquids. Angel v. Varsity, Inc., 113 Ga. App. 507, 148 S.E.2d 451 (1966); Winn-Dixie Stores, Inc. v. Hardy, 138 Ga. App. 342, 226 S.E.2d 142 (1976); Garrison v. Rich's, 154 Ga. App. 663, 269 S.E.2d 513 (1980).

While owner or occupier of land is liable to invitees for the owner's or occupier's failure to exercise ordinary care in keeping premises safe, before owner can be held liable for slippery conditions of floors, produced by presence of a foreign substance thereon, proof should show that the owner or occupier was aware of the substance or would have known of the substance's presence had the owner or occupier exercised reasonable care and that the person injured was unaware of the substance. Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980); Jackson v. Camilla Trading Post, Inc., 218 Ga. App. 164, 460 S.E.2d 849 (1995).

Pawn shop was entitled to summary judgment in the plaintiff's personal injury action arising out of an injury caused by a saw, as the pawn shop did not breach its duty to inspect under O.C.G.A. § 51-3-1; the pawn shop's inspection of the saw, which included determining whether it operated properly, did not reveal the defect that caused it to turn immediately upon being plugged in. Walker v. Bruhn, 281 Ga. App. 149, 635 S.E.2d 322 (2006).

Patron's claims for damages for personal injuries allegedly sustained when the patron removed a bread maker from a merchant's shelf and several crock pots fell from another shelf failed because the patron failed to show, in accordance with O.C.G.A. § 51-3-1, that the merchant was actually or constructively aware of the allegedly perilous display of cookware; the patron presented no evidence that an employee of the merchant was in the immediate vicinity at the time of the incident and in a position to see and remove the danger, the patron did not offer evidence that the alleged hazard had existed for any significant amount of time prior to the incident, there was no evidence of prior incidents that might have put the merchant on notice of the hazard, and the merchant submitted evidence that all of the merchant's employees were trained to patrol the aisles and check for unsafe conditions and that one of the merchant's employees had walked through the aisle where the incident occurred shortly before

and did not observe anything out of the ordinary. Gootee v. Target Corp., 256 Fed. Appx. 253 (11th Cir. 2007) (Unpublished).

Parent's suit to recover damages for personal injuries suffered by the parent's minor child when a metal pamphlet rack fell on the child's foot in a retail store was properly dismissed on summary judgment; the parent failed to show that the retailer breached the retailer's duty of care under O.C.G.A. § 51-3-1, as there was no evidence that the retailer had actual knowledge of any defect in the rack, no constructive knowledge could be imputed to the retailer even if the rack was defectively constructed or installed, the retailer could not have easily seen and eliminated the hazardous condition, the parent did not offer any evidence that the defect existed a sufficient length of time that the retailer should have discovered it during a reasonable inspection, and because there was no record evidence indicating that the retailer constructed the rack, no presumption existed that the retailer knew of the defect. Jones v. Wal-Mart Stores, Inc., 256 Fed. Appx. 292 (11th Cir. 2007) (Unpublished).

Trial court erred in denying a motion for j.n.o.v. filed by the owners and operators of a thrift store because there was no evidence that the owners possessed superior knowledge of the hazard posed by the allegedly defective chair, such as whether the defect was one which would have been visible during an inspection or how long the defect had existed. Family Thrift, Inc. v. Birthrong, 336 Ga. App. 601, 785 S.E.2d 547 (2016).

Proprietor has no duty to know of all possible dangers caused by third persons. — It would impose too great a duty upon the proprietor and would make the proprietor the insurer of the safety of all patrons, which the proprietor is not, to require the proprietor at all times to have immediate knowledge of and to remove every article on which a patron might stumble and fall when the article is placed there, not by the defendant or the defendant's employees, but by other patrons. Watson v. McCrory Stores, Inc., 97 Ga. App. 516, 103 S.E.2d 648 (1958).

The trial court properly granted summary judgment to a retailer, in a customer's negligence action filed against it for injuries sustained when a tomato tower punctured an eye, as the customer's injury arose out of a third party's actions which the retailer did not and could not have foreseen, and hence no evidence was presented that the retailer breached a duty owed to the customer. Thomas v. Home Depot, U.S.A., Inc., 284 Ga. App. 699, 644 S.E.2d 538 (2007).

No duty to inspect or take other affirmative action when circumstances do not indicate need. — Since there was no actual knowledge of the alleged dangerous and unsafe condition, and there is nothing in the petition to show or indicate the propriety or necessity of making an inspection to ascertain the possible or probable existence of any defect, such as that other people had tripped or fallen on the steps, ordinary diligence did not as a matter of law require an inspection when the defendant had no reason to think an inspection was necessary. McCrory Stores Corp. v. Ahern, 65 Ga. App. 334, 15 S.E.2d 797 (1941).

The positive testimony that no snakes had been seen on the premises in the six years of an owner's tenure shows that an injury caused by running from a snake was unexpected; in the absence of knowledge of such a danger there is no duty on the part of the proprietor to keep the grass mowed short in order to guard against it. Nor does a plaintiff's testimony that there were snakes along a river a mile or so away raise such a duty when in fact there had been none in the area around the building. Williams v. Gibbs, 123 Ga. App. 677, 182 S.E.2d 164 (1971).

This section does not require a proprietor to patrol the floor constantly when there are no conditions making the premises unusually dangerous. Winn-Dixie Stores, Inc. v. Hardy, 138 Ga. App. 342, 226 S.E.2d 142 (1976).

Adequacy of inspection procedures questioned. — Store's motion for summary judgment in a patron's personal injury suit was denied because there existed genuine issues of disputed fact as to whether the store exercised reasonable care as required under O.C.G.A. § 51-3-1; the adequacy of the store's inspection procedure, which required inspection every

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two hours, could not be decided as a matter of law since there was evidence that the procedure was not followed, and there was further conflicting evidence on the issue of the store's constructive knowledge of an alleged puddle of cooking oil on the floor. Williams v. Big Lots Stores, Inc., No. 1:07-CV-1593-TWT, 2008 U.S. Dist. LEXIS 57648 (N.D. Ga. July 28, 2008).

Inspection of electrical wires. — Jury issue was presented as to whether an electric company exercised ordinary care to keep premises safe because it could not be concluded as a matter of law that the company's inspection procedure was reasonable when there was evidence that an electrical wire presented a safety hazard, that the wire should have been covered with a junction box and placed on a concrete pad, and that at the time of a visitor's injury the wire was not, and there was no evidence that any inspection was performed for at least five years between the initial post-installation inspection and the incident; a jury could find without expert testimony that the company had a duty to conduct more frequent inspections to ensure that the company's live electrical wires were not left uncovered from the evidence presented, and a jury could conclude that the company was negligent in failing to discover the exposed live wire through more frequent inspection of the company's equipment. McGarity v. Hart Elec. Mbrshp. Corp., 307 Ga. App. 739, 706 S.E.2d 676 (2011).

Customer's use of demonstration equipment. — An action by a customer who was injured using an exercise machine on display in a store could not survive summary judgment when evidence showed that the store used reasonable care in inspecting the machine, and that a loose nut on the machine was a hidden defect that could not have been foreseen. Anderson v. Service Merchandise Co., 230 Ga. App. 551, 496 S.E.2d 743 (1998).

Since the plaintiff's evidence failed to show actual or constructive notice of danger, there was no breach of duty to use ordinary care imposed upon the retailer. Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691 (1976).

Plaintiff could not recover for fall on supermarket's wet floor absent defendants' actual or constructive knowledge of the floor's dangerous condition. The existence of such knowledge is a matter for the jury when there is evidence from which it may be inferred. See Gold & White, Inc. v. Long, 159 Ga. App. 259, 283 S.E.2d 45 (1981).

Equal knowledge of danger. — In a slip-and-fall premises liability case, the trial court properly granted a store and two of the store's employees summary judgment because the uncontroverted evidence showed that the customer walked over the boxes once without incident and then walked over the boxes again when the fall occurred, thus, the customer had equal knowledge of the danger. Houston v. Wal-Mart Stores E., L.P., 324 Ga. App. 105, 749 S.E.2d 400 (2013).

Recurring hazard. — When condensation leaked from the ceiling for a long enough period of time to cause a couple of ceiling tiles to become wet-looking, while water dripped over a two- to three-foot area, it could be concluded that the leak occurred over an extended period, sufficient to put the defendant on notice that the previously known condensation hazard was recurring, and the trial court erred in granting summary judgment to the defendant. Lee v. Great Atl. & Pac. Tea Co., 237 Ga. App. 228, 513 S.E.2d 737 (1999).

Mere showing that employees were in immediate area of hazard. — In a slip-and-fall case based on an owner's alleged constructive knowledge of the hazard, action was not supported by a mere showing that owner's employees were in the immediate area of the hazard absent a showing that the employees had the means and opportunity to discover and remove the hazard. Mitchell v. Food Giant, Inc., 176 Ga. App. 705, 337 S.E.2d 353 (1985).

Necessity of pleading negligence. — In an action for damages for injuries received by an invitee of a store as a result of falling upon a stairway, under this section imposing upon the owner or occupier of land the duty of exercising ordinary care

to keep the premises in safe condition as to invitees, the plaintiff must allege negligence on the part of the defendant without at the same time barring the plaintiff from recovery by showing, through other facts, that the plaintiff failed to exercise ordinary care for the plaintiff's own safety. Watson v. McCrory Stores, Inc., 97 Ga. App. 516, 103 S.E.2d 648 (1958).

Sufficiency of pleadings. — A petition which alleged that the plaintiff, while present in the defendant's store as a customer, desiring to make a purchase from the defendant, was in a loud and angry tone, which could be heard by other customers present, falsely and unjustly accused by one of the defendant's clerks of having in a handbag a certain article belonging to the defendant, which charge humiliated and embarrassed the plaintiff, set out a cause of action for a willful and intentional tort, that is, the failure to protect the plaintiff as a customer, lawfully upon the defendant's premises, from injury caused by the misconduct of the defendant's employees. Sims v. Miller's, Inc., 50 Ga. App. 640, 179 S.E. 423 (1935).

Petition set forth a cause of action against a photographic studio for maintaining premises in such a way that a dangerous and treacherous situation (a step-down) existed as to a person going from a studio room down the passageway to the lobby. Boyd v. Gardner, 62 Ga. App. 662, 9 S.E.2d 202 (1940).

In an action for damages against the defendant corporation engaged in the retail pharmaceutical business, caused by false accusations of the clerk and manager of one of the defendant's retail stores, that the plaintiff, who was a customer in that store, was attempting to cheat and swindle the store out of a sum of money by falsely representing that the clerk had given the clerk a $10.00 bill from which to obtain the sum of 39 cents this being the purchase price of an article bought by the plaintiff in that store, and when the petition also alleged that the plaintiff was assaulted by one of the defendant's employees and was otherwise humiliated and embarrassed by such employees in the presence of other customers in that store, the allegations of the petition were sufficient, as against the general demurrer (now motion to dismiss) thereto, to set out a cause of action against the defendant corporation. Simpson v. Jacobs Pharmacy Co., 76 Ga. App. 232, 45 S.E.2d 678 (1947).

Petitions stated a cause of action against a hardware company for negligence in permitting a roll of chicken wire to be left in the aisle of the store where the plaintiff (plaintiff's wife) tripped over the wire, sustaining the injuries sued for. King Hdwe. Co. v. Teplis, 91 Ga. App. 13, 84 S.E.2d 686 (1954).

Resort obligation to protect from other guests. — The petition alleged a good cause of action against the owner of a public place for resort and recreation for failure to use ordinary care in the protection of the plaintiff guest against the misconduct of other guests. Adamson v. Hand, 93 Ga. App. 5, 90 S.E.2d 669 (1955).

Negligence in floor treatments. — When the plaintiff alleges that the plaintiff fell because of slippery wax, oil, or other finish that the defendant placed on the floor, the plaintiff must, at a minimum, show that defendant was negligent either in the materials the defendant used in treating the floor or in the application of those materials. Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980).

Evidence or allegations that after the accident, defendant, owner of premises, made changes or repairs are not permissible. Flint River Cotton Mills v. Colley, 71 Ga. App. 288, 30 S.E.2d 426 (1944).

Summary judgment proper when negligence not inferable from facts. — In action against store proprietor by plaintiff who slipped and fell, when there was no evidence that the defendant or the defendant's agents were guilty of any negligence, but simply showed that the plaintiff fell while shopping in the defendant's store, it could not be inferred from the record that the defendant negligently maintained the defendant's floor and summary judgment for the defendant was proper. Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980).

Whether proprietor exercised ordinary care is jury question. — When, in a department store to which the public is invited to do business, the top and edge of

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a stairway landing, which is used by the customers of the store, is covered with a metal strip, which through long use has become worn down, smooth, slick, slippery, dangerous and unsafe for use by the customers of the store, it is a question for the determination of the jury whether such department store in the exercise of ordinary care for the safety of its customers in the store should have discovered and remedied such defective and dangerous condition. Townley v. Rich's, Inc., 84 Ga. App. 772, 67 S.E.2d 403 (1951).

Whether alleged defects caused the plaintiff's fall and resulting injuries, and whether or not the defendant storekeeper actually knew of the alleged defects, or in the exercise of ordinary care should have discovered and repaired the defects or warned the plaintiff of the defects' presence, or whether the plaintiff in the exercise of ordinary care for the plaintiff's own safety should have discovered the defects in the floor and avoided the defects, were questions for determination by the jury. Jones v. Hunter, 94 Ga. App. 316, 94 S.E.2d 384 (1956).

Whether defendant liable for acts of servant towards invitee is jury question. — Under the allegations of the petition the plaintiff, at the time of the plaintiff's injury, was an invitee of the defendant cotton mill, and it was a question for the jury whether or not the act of the defendant's store manager, in striking and injuring the plaintiff, was so closely connected with the employer's business as to render the defendant liable for the willful assault of its servant. Crawford v. Exposition Cotton Mills, 63 Ga. App. 458, 11 S.E.2d 234 (1940).

Jury instructions. — In a personal injury action filed against an invitee against a commercial premises owner, the invitee's request that the trial court instruct the jury that an owner would be considered to have constructive knowledge of a foreign substance if it was shown that the owner did not have in place, or did not follow, a reasonable inspection procedure at the time of the incident, was properly denied, as the quoted portion of the requested charge was incorrect. Taylor v. AmericasMart Real Estate, LLC, 287 Ga. App. 555, 651 S.E.2d 754 (2007).

Home, Apartment, and Landowners

Ordinary care standard applicable to homeowners. — Before a recovery is authorized for the plaintiff in an action against a homeowner for injuries suffered by the plaintiff while in the home it must be shown that the conditions allegedly causing the injuries were less safe than those provided by ordinarily prudent homeowners for their invitees. Slaughter v. Slaughter, 122 Ga. App. 374, 177 S.E.2d 119 (1970).

In this personal injury action, the granting of summary judgment to the defendants was affirmed because the plaintiff's knowledge of icy conditions in the defendants' driveway at the time of the incident was at least equal, if not superior, to that of the defendants; as the plaintiff walked across the driveway four times. Kouche v. Farr, 317 Ga. App. 277, 730 S.E.2d 45 (2012).

Ordinary care does not require homeowner to mop continuously as guests (invitees) track water from the swimming pool into the basement or to give warning of such condition to them. Stanton v. Grubb, 114 Ga. App. 350, 151 S.E.2d 237 (1966).

Pleading negligence against homeowner. — When it is alleged that the defendant homeowner was negligent in permitting a board to be placed in its dangerous position and in failing to warn the plaintiff thereof, this allegation is tantamount to an averment that the defendant had actual knowledge of the defective condition of the premises and the petition thus set forth a cause of action even if the plaintiff had been a licensee rather than an invitee. Lenkeit v. Chandler, 97 Ga. App. 769, 104 S.E.2d 476 (1958).

No evidence was adduced to show that the homeowner had any knowledge or reasonable anticipation of a dangerous condition superior to that of the homebuilder or the defendant, the homebuilder's employee, rendering the homeowner not liable for the defendant's injuries sustained from a false scaffolding

board. Wimpey v. Otts, 207 Ga. App. 40, 427 S.E.2d 34 (1993).

Landowner's liability. — The true ground of liability is the landowner's superior knowledge of the perilous condition and the danger to persons coming upon the property. It is when the perilous condition is known to the owner and not known to the person injured that a recovery is permitted. Horney v. Panter, 204 Ga. App. 474, 420 S.E.2d 8 (1992).

Failure to provide security in trailer park. — Summary judgment was properly denied to a trailer park owner in a premises liability action based upon the murder of a tenant in the park since the owner had a duty to provide security to the park as a result of a contract it entered with all residents and failed to inform the residents that security was discontinued. Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559, cert. denied, 285 Ga. App. 90, 645 S.E.2d 559 (2007).

No evidence of constructive knowledge. — When no problem was readily discernible in the stairs outside an apartment either through inspection or regular walks through the property, and the plaintiff noticed no problems with the stairs even though the plaintiff went up and down them several times a day, and since no complaints had been made to the housing authority, there was no evidence that a reasonable inspection would have discovered the defect in the metal edging of the stairs, and thus no evidence of constructive knowledge. Padilla v. Hinesville Hous. Auth., 235 Ga. App. 409, 509 S.E.2d 698 (1998).

Injury from falling deck. — Homeowners' summary judgment motion should have been granted as the homeowners had no actual or constructive notice of a problem with a deck that collapsed, injuring the injured party; the home had been inspected one year earlier, and no problem with the deck was identified, although the inspection report indicated that the deck was not bolted to the house. Nailing a deck to a house was acceptable at the time of the inspection. Wingo v. Harrison, 268 Ga. App. 156, 601 S.E.2d 507 (2004).

Injury from defective awning. — Homeowner was not liable under O.C.G.A. § 51-3-1 to a contractor hired to clean pine straw on the homeowner's roof when the contractor rested the contractor's foot on an awning which gave way, leading to a fall and injuries, because there was no evidence that the owner had any knowledge, actual or constructive, of the defective attachment of the awning to the home. Sipple v. Newman, 313 Ga. App. 688, 722 S.E.2d 348 (2012).

Liability extends to excavations either on premises or immediately adjacent to sidewalk, highway, or private way habitually used by public. Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937).

When the owner of premises negligently maintains a pit or excavation upon the owner's land immediately adjacent to and abutting adjoining premises, and which, as a lot in a city upon which business is conducted, is in continuous use, and a person lawfully upon the adjoining premises in passing thereon immediately adjacent to the excavation, at night and without knowledge of the excavation, and without fault on the owner's part, makes a misstep and falls into the excavation and is injured, the owner of the premises containing the excavation is liable in damages for the injury. Cox v. Greenfield, 50 Ga. App. 699, 179 S.E. 178 (1935).

There is a duty on the part of a landowner not to maintain on the owner's premises a dangerous excavation so that persons passing along a street immediately adjoining may not be injured while in the exercise of ordinary care or when by necessity or accident they slightly deviate from such street or walkway. Wright v. Southern Ry., 62 Ga. App. 316, 7 S.E.2d 793 (1940).

When the defendant may have been negligent in failing to erect a barrier or guard for its culvert at a particular place, and would have been liable to the plaintiff if the plaintiff had casually or inadvertently walked or fallen into such culvert, the plaintiff was precipitated into such culvert by intervening negligent acts of the city and of the driver of the automobile, which acts were not such as would probably have occurred in the usual, natural and probable course of events, under the facts as pleaded the negligence of the defendant railway company, while con-

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tributing to the injury, did not constitute the proximate and efficient cause of the injury. Wright v. Southern Ry., 62 Ga. App. 316, 7 S.E.2d 793 (1940).

Public use of private way may amount to implied invitation. — If a landowner constructs a private way over the owner's property and for a long period of time acquiesces in its use by members of the general public or so constructs the private way in connection with a public road as to make it impossible, under all conditions, to distinguish between them, this would amount to an implied invitation, at least to the extent that the owner should anticipate the presence of members of the general public thereon. Norris v. Macon Term. Co., 58 Ga. App. 313, 198 S.E. 272 (1938).

Land adjacent to highway must be properly maintained. — When an owner of premises allows an excavation to be placed in dangerous proximity to a thoroughfare so that persons in the exercise of ordinary care might casually fall therein it is the duty of such owner to enclose the same as to afford reasonable immunity against danger, but when the adjacent land is level or approximately so and that which caused the injury is so far removed that a traveller in the exercise of ordinary care would not have been injured thereby, no duty to such traveller arises. Wright v. Southern Ry., 62 Ga. App. 316, 7 S.E.2d 793 (1940).

No duty owed to users of highway regarding land not adjacent thereto. — The owner of land traversed by a public highway is under no duty to a traveler along the highway to maintain in a safe condition for travel the abutting premises at a point such a distance from the highway that it cannot be reached by the ordinary deviations from the highway incident to careful traveling thereon, but can only be reached by a traveler who has, negligently and in a manner oblivious of his own safety, completely abandoned the highway and gone over onto the abutting premises. Williamson v. Southern Ry., 42 Ga. App. 9, 155 S.E. 113 (1930).

Gate in wildlife area. — The construction of a covered cable gate to divide a Wildlife Management Area from a Wildlife Refuge Area was a static condition on the premises in question. As such, the landowners owed a trespasser who was injured in a motorcycle accident involving the gate a duty not to wilfully or wantonly injure the trespasser. Trammell v. Baird, 262 Ga. 124, 413 S.E.2d 445 (1992).

Abandoned well. — While the landowners were told about an abandoned well on their property, they did not know where the well was, and nothing indicated where the well was; further, nothing indicated that the well was defectively covered rather than filled, and thus the landowners had no duty to inspect the property to locate the well or to inform an invitee of its existence. Sisson v. Elliott, 278 Ga. App. 156, 628 S.E.2d 232 (2006).

Apartment house owner required to maintain common areas. — While the duties of the owner of an apartment house who reserved a qualified right of possession of the halls, steps, porches, or other parts of the building of which common use was made by the tenants were as set out in former Code 1933, § 105-401 (see now O.C.G.A. § 51-3-1), and render the owner liable for injuries occasioned by the owner's failure to exercise ordinary care in keeping the premises and approaches safe, as to an owner and landlord who fully parts with possession of the premises, the liability was as provided in former Code 1933, § 61-112 (see now O.C.G.A. § 44-7-14) and related only to injuries occasioned by defective construction or failure to keep the premises in repair when there was a duty to repair and notice had been given of the defect. Maloof v. Blackmon, 105 Ga. App. 207, 124 S.E.2d 441 (1962).

No liability of condominium association to visitor. — Trial court properly granted summary judgment to a condominium association with regard to a visitor's negligence suit following an injury in a revolving door because the visitor failed to show that the door malfunctioned in any manner and, absent evidence of a defect in addition to a fall, the association had no liability to support a finding that the association had superior knowledge that the revolving doors were a hazard to the visitor. Siegel v. Park Ave. Condo.

Ass'n, 322 Ga. App. 337, 744 S.E.2d 876 (2013).

Condominium association had no contractual duty to remove snow and ice. — Trial court properly granted a condominium association summary judgment in a premises liability action because interpreting the condominium association documents established that the association did not have a duty to remove snow and ice from the common walkway where the resident fell. Scrocca v. Ashwood Condominium Ass'n, 326 Ga. App. 226, 756 S.E.2d 308 (2014).

Determination of common area as jury question. — The question of whether a particular area of an apartment building—i.e., a patio deck behind an apartment, from which a tenant fell after the railing gave way—was a common area over which the landlord retained a qualified right of possession, rendering the landlord liable for failure to exercise ordinary care in keeping the premises safe, or was an area which was in the exclusive possession of the tenant, rendering the landlord liable for failure to repair in the face of a notice of defect, was a matter for determination by the trier of fact, and the court properly instructed the jury as to both legal theories. Andres v. Roswell-Windsor Village Apts., 777 F.2d 670 (11th Cir. 1985).

Control of property relinquished. — Facts of the case established that the United States, through its agency of Housing and Urban Development, had relinquished possession and control of the house where the plaintiff's son was injured, to an independent contractor, and that the United States, therefore, was not liable for any negligent failure to maintain the property in a safe condition. Tisdale v. United States, 838 F. Supp. 592 (N.D. Ga. 1993), aff'd, 62 F.3d 1367 (11th Cir. 1995).

A property owner can delegate the responsibility of maintaining a safe workplace by relinquishing possession and control of the property to an independent contractor. Torrington Co. v. Hill, 219 Ga. App. 453, 465 S.E.2d 447 (1995).

Nothing prohibited a landlord from assigning by contract the landlord's duty to repair and maintain the premises. Rainey v. 1600 Peachtree, L.L.C., 255 Ga. App. 299, 565 S.E.2d 517 (2002).

In a premises liability action filed by a repairman arising from injuries suffered while repairing a roof, because the trial court properly found that an out-of-possession landlord and its tenants who surrendered control of the owned premises did not ratify the repairman's employer's actions in not providing safety equipment, and did not have superior knowledge of the dangers involved, the out-of-possession landlord and its tenants were properly granted summary judgment in the repairman's premises liability action. Saunders v. Indus. Metals & Surplus, Inc., 285 Ga. App. 415, 646 S.E.2d 294 (2007), cert. denied, 2007 Ga. LEXIS 624 (Ga. 2007).

The owner of an apartment building where an invitee was injured when a breezeway railing broke was not entitled to summary judgment on the theory that the owner was not liable for the negligent acts of the independent contractors who installed or inspected the railing during a renovation project; the owner had a nondelegable duty to keep its premises safe for the invitee and a material fact question existed as to whether the owner had given full and complete control to the independent contractors such that the owner was relieved of its duty to the invitee. Carpenter v. Sun Valley Props., LLC, 285 Ga. App. 1, 645 S.E.2d 35, cert. denied, 2007 Ga. LEXIS 563 (Ga. 2007).

Liability when clubhouse reserved. — Party guest, who was injured when the guest dove into a swimming pool adjacent to a condominium clubhouse, was an invitee, not a mere licensee, of the condominium association's premises, since the clubhouse had been reserved by a condominium homeowner on behalf of the party host. Plantation at Lenox Unit Owners' Ass'n v. Lee, 196 Ga. App. 420, 395 S.E.2d 817 (1990).

Lessees entitled to summary judgment as to tree trimmer's claims. — Trial court erred in denying the lessees' motion for summary judgment on the tree trimmer's premises liability claim as well as the spouse's derivative claim for loss of consortium because the tree trimmer nor the spouse offered any evidence that the

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lessees disturbed the ladder before the ladder collapsed and the lessees unequivocally denied touching the ladder, thus, to say the lessees caused the ladder to fall would be mere conjecture. Barclay v. Stephenson, 337 Ga. App. 365, 787 S.E.2d 322 (2016).

Apartment management may be liable for torts of servants. — Petition alleging that the plaintiff was maliciously shot and injured by the janitor of an apartment house while the plaintiff was present in the house as the guest of a tenant, the janitor, within the knowledge of the defendants (security deed holder and managing agents), being a man of vicious and dangerous character, having a propensity to assault and injure others without cause, and that the defendants were negligent in retaining the janitor as such employee after knowledge of this trait, is sufficient to state a cause of action against the defendants. Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937).

Apartment owner's liability for crimes of others. — After the plaintiff tenant was beaten, robbed, and raped in her apartment by an intruder, fact issues precluded summary judgment for the defendant apartment owner in her action alleging that the defendant failed to keep its premises reasonably safe by providing adequate security. Doe v. Briargate Apts., Inc., 227 Ga. App. 408, 489 S.E.2d 170 (1997).

In an action by an apartment tenant who was the victim of robbery, assault, and threatened rape in her apartment, evidence of prior criminal acts of robbery and assault on the premises gave rise to a triable issue of fact as to whether the apartment owner and manager failed in their duty to exercise ordinary care to safeguard tenants against foreseeable risks. Walker v. St. Paul Apts., Inc., 227 Ga. App. 298, 489 S.E.2d 317 (1997).

Trial court properly granted summary judgment to an apartment complex owner, and against the decedent's personal representative, in the latter's premises liability action against the former, as: (1) evidence was lacking that the vacant apartment where the decedent was murdered was negligently left unlocked; and (2) despite the criminal history of the area where the apartment was located, the owner had no reasonable belief to anticipate that a murder would have occurred on its premises; moreover, guesses or speculation which raised merely a conjecture or possibility were insufficient to create even an inference of fact for consideration on summary judgment. Wojcik v. Windmill Lake Apts., Inc., 284 Ga. App. 766, 645 S.E.2d 1 (2007), cert. denied, 2007 Ga. LEXIS 637 (Ga. 2007).

Lessor entitled to summary judgment. — In a wrongful death action filed by a decedent-lessee's administrator in which the decedent was killed when crossing a public highway that the lessor did not control, the lessor was properly granted summary judgment, as the administrator failed to show that the lessor was negligent per se or that the lessor breached either a common law or private duty owed to the lessee. Walton v. UCC X, Inc., 282 Ga. App. 847, 640 S.E.2d 325 (2006).

Decedent's own actions led to dangerous situation. — An apartment complex and its property manager were erroneously denied summary judgment in a wrongful death action filed against them by the decedent's estate, as neither defendant had superior knowledge that a criminal act would be committed on the premises, and because the decedent's own actions led to the dangerous situation regarding apprehension by bail bondsmen as the decedent failed to exercise ordinary care under the circumstances. Gateway Atlanta Apts., Inc. v. Harris, 290 Ga. App. 772, 660 S.E.2d 750 (2008).

Newspaper advertisement not necessarily invitation to inspect apartment. — Advertisement in a Sunday newspaper, headed "Apartments — Unfurnished," followed by a list of certain apartments at given addresses, together with brief description and prices, under which appeared the words, "Draper-Owens Co., Realtors," "521 Grant Bldg.," and "Wa 9511," was free from ambiguity, and, properly construed, did not constitute an invitation, express or im-

plied, to the public to inspect any of the premises, but was merely a notice that the listed apartments were available for leasing at named rentals, inviting any interested person to communicate with the advertiser. Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939).

Liability for acts of employees. — Under O.C.G.A. § 51-3-1, a landowner can be liable for third-party criminal attacks if the landowner has reasonable grounds to apprehend that such a criminal act would be committed but fails to take steps to guard against injury. Constructive knowledge of danger is sufficient to establish liability; a series of unforced entries and burglaries since a certain employee was hired by an apartment complex, the complex's knowledge that residents suspected an employee, and the fact that the employee was discovered in an apartment without authorization was sufficient to defeat a directed verdict motion on a claim against the complex after an individual was attacked and killed by an employee of the complex. TGM Ashley Lakes, Inc. v. Jennings, 264 Ga. App. 456, 590 S.E.2d 807 (2003).

Apartment complex leasing agent. — Because a minor child was bitten by another tenant's dog, an action by the parent of the child against the owner of the apartment complex and its leasing agent resulted in summary judgment against the parent, as the out-of-possession landlord's only liability to third persons was that of O.C.G.A. § 44-7-14, which was inapplicable; there was no showing that either the owner or agent had any type of knowledge of the dog's propensities or viciousness, and the agent was therefore not shown to be liable on any claim arising under O.C.G.A. § 51-3-1. Griffiths v. Rowe Props., 271 Ga. App. 344, 609 S.E.2d 690 (2005).

Injury occurring during real estate showing. — True ground of premises liability is the landowner's or occupier's superior knowledge of the perilous condition and the danger therefrom to persons coming upon the property, and it is when the perilous condition is known to the owner/occupier and not known to the person injured that a recovery is permitted; a trial court's summary judgment dismissing claims against real estate agents and brokers for injuries arising from a dog bite while the injured person was viewing listed property for sale was affirmed since there was no showing that the real estate agents and brokers had any knowledge that the dogs were dangerous. Gibson v. Rezvanpour, 268 Ga. App. 377, 601 S.E.2d 848 (2004).

Summary Judgment Inappropriate

Apartment owner liability relating to power cable hazards. — Summary judgment in favor of an apartment owner was inappropriate in light of the duty imposed by O.C.G.A. § 51-3-1 upon the party controlling the premises during a renovation project to guard against hazards associated with work activities near high-voltage power cables. Santana v. First Guaranty Mgt. Corp., 223 Ga. App. 472, 477 S.E.2d 857 (1996).

Issues of fact as to association of asphalt plant and convenience store frequented by employees where decedent/employee was shot and killed. — In a wrongful death action, a trial court did not err by denying a corporate officer's motion for summary judgment because a genuine issue of fact existed as to whether the corporate officer was the owner/operator of the convenience store where the decedent was shot and killed. Dixie Roadbuilders, Inc. v. Sallet, 318 Ga. App. 228, 733 S.E.2d 511 (2012).

Summary judgment was precluded for owner of auto tune-up shop after the passenger of a customer slipped and fell while the customer obtained help for a mechanical problem, and genuine issues of material fact existed as to the passenger's legal status, whether the owner had constructive knowledge of the alleged hazard, and whether the risk presented was reasonable. Hartley v. Macon Bacon Tune, Inc., 234 Ga. App. 815, 507 S.E.2d 259 (1998).

Tenant's duty does not include landlord's parking lot. — Trial court erred in denying tenant's motion for summary judgment in the invitee's slip and fall case against the tenant, as no dispute existed but that the invitee fell in the landlord-owned and maintained parking

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Inappropriate (Cont'd)

lot, and not in an area where the tenant owed a duty to exercise ordinary care for the invitee's safety, such as an "approach" to its store, which included the area up to and including the sidewalk in front of the tenant's store. Food Lion, Inc. v. Isaac, 261 Ga. App. 311, 582 S.E.2d 476 (2003).

In a personal injury action arising out of a slip and fall, because jury questions existed as to whether a premises owner's inspection procedure was reasonable, the appeals court refused to say that the owner lacked constructive knowledge of a hazard that allegedly caused a slip and fall as a matter of law. Thus, summary judgment entered in favor of the owner was reversed. Gibson v. Halpern Enters., 288 Ga. App. 790, 655 S.E.2d 624 (2007).

When premises owner was deemed to have superior knowledge of the hazard that was alleged to have caused the slip and fall, based on the testimony of the injured patron's daughter that the owner had actual knowledge of the hazard, summary judgment in the owner's favor was unauthorized, and the appeals court erred in finding otherwise. Dickerson v. Guest Servs. Co., 282 Ga. 771, 653 S.E.2d 699 (2007).

Injured party had equal knowledge of danger from alligators. — Court of appeals erred in affirming an order denying the owners of a planned residential development summary judgment in an estate's premises liability action because a guest had equal knowledge of the threat of alligators within the community; although the guest knew that the wild alligators were dangerous, the guest chose to go for a walk at night near a lagoon in a community in which the guest knew wild alligators were present. Landings Ass'n v. Williams, 291 Ga. 397, 728 S.E.2d 577 (2012).

Injured party's knowledge of particular hazard not established. — In a suit in which an injured party alleged liability based on static hazards, including design defects, and the failure to warn of those defects, whether it was reasonably foreseeable that the injured party would plummet over nine feet into the bottom of an unguarded hole while attempting to use a dumpster was a jury question; it could not be inferred from the evidence that the injured party often "used" a landfill and a particular dumpster and, thus, that the injured party knew or should have known about the particular hazard. Barton v. City of Rome, 271 Ga. App. 858, 610 S.E.2d 566 (2005).

Trial court erred in denying an employer's summary judgment motion on premises liability claims filed by a group of female employees claiming that a manager's act of installing a video surveillance system in a women's restroom was an intentional act and premises liability sounded in negligence; further, the women's prayers for mental anguish amounted to claims for negligent infliction of emotional distress and the women suffered no physical impact. Johnson v. Allen, 272 Ga. App. 861, 613 S.E.2d 657 (2005).

Summary judgment for an owner of a gas station was reversed as jury issues were created as to: (1) whether the customer had actual knowledge that an uncoiled hose in the parking lot ran to the passenger's side of the customer's car; (2) whether the customer should have also known that the hose ran to the passenger's side; (3) whether the hose was a large object that was in plain view at a location where it was customarily found and expected to be so that the customer should have seen or at least anticipated the hose in the exercise of ordinary care; and (4) whether the customer failed to exercise ordinary care by stepping off the curb without looking. Ward v. Autry Petroleum Co., 281 Ga. App. 877, 637 S.E.2d 483 (2006), cert. denied, 2007 Ga. LEXIS 158 (Ga. 2007).

When a worker was injured by falling through an opening on the second story of a house, it was error to grant summary judgment to the house's buyers and sellers in a suit under O.C.G.A. § 51-3-1; the worker's admission that the worker would have seen the opening had the worker looked up while ascending stairs did not establish as a matter of law a failure to exercise ordinary care, as the worker testified that the worker was looking at the worker's feet because the stairs were narrow and that when the worker had been in

the house previously, the opening was not there. Britton v. Farmer, 283 Ga. App. 733, 642 S.E.2d 415 (2007).

Liability for slip and fall on ice. — In a premises liability action arising from a slip and fall on ice by an injured lessee, because jury issues existed as to whether the party exercised the requisite care, and as to the premises owner's knowledge of the hazard, the trial court erred in granting summary judgment to the owner and an insurer and in reasoning that the lessee failed to exercise due care. Little v. Alliance Fire Prot., Inc., 291 Ga. App. 116, 661 S.E.2d 173 (2008).

Liability for fall on A-frame "wet floor" sign. — Theater patron tripped and fell on an A-frame "Wet Floor" sign that had been knocked to the floor. As the theater knew that the sign was present, and in view of evidence presented by the patron that these types of signs tended to collapse on contact with moving crowds, were a tripping hazard when knocked over, and should not be used in high-traffic areas, the theater was not entitled to summary judgment on the patron's premises liability claim. Am. Multi-Cinema, Inc. v. Brown, 285 Ga. 442, 679 S.E.2d 25 (2009).

Liability for fall on wet floor. — Summary judgment was denied to the defendant premises owner because: (1) the plaintiff customer presented sufficient evidence to show that the defendant had knowledge of a hazardous condition — water on the floor — because the floor was mopped 15 minutes prior to the plaintiff's fall and a wet-floor cone had been located near the fall; (2) the evidence was not conclusive that the plaintiff had equal or superior knowledge of the hazard or that the plaintiff failed to use reasonable care for the plaintiff's own safety; (3) there was a question of fact concerning whether rainy conditions caused or contributed to the hazard such that the defendant would prevail on the defendant's "rainy day" defense; and (4) it was unclear whether the plaintiff was on notice of the wet floor hazard prior to the plaintiff's fall. Ahuja v. Cumberland Mall, LLC, No. 1:10-CV-1038-JEC, 2011 U.S. Dist. LEXIS 109587 (N.D. Ga. Sept. 23, 2011).

Foreseeability issue. — In a customer's premises liability action, because factual issues existed as to whether a retailer knew or should have known of a hazardous condition when it left a rolled-up carpet mat leaning on its end in the produce department, and whether the retailer could foresee that it would be knocked over and become a tripping hazard, summary judgment in favor of the retailer, and against the customer, was reversed. Freeman v. Wal-Mart Stores, Inc., 281 Ga. App. 132, 635 S.E.2d 399 (2006).

A trial court erred by granting summary judgment to the owners of a restaurant in which a suing customer slipped and fell because there was evidence that three employees were within a few feet of the area where the customer fell and could have easily seen and removed the hazard; thus, a genuine issue of fact arose as to whether the owners had constructive knowledge of the sticky substance on the floor that the customer slipped on. Somers v. M.A.U., Inc., 289 Ga. App. 731, 658 S.E.2d 242 (2008).

Because the evidence and the inferences permitted the conclusion that the defendants controlled the premises and should have foreseen a victim's rape at a party in a recording studio, summary judgment on a theory of premises liability was not warranted. There was evidence that while the rape was occurring, an affiliate of the recording label that paid for the use of the studio knocked on the door and was asked to guard the door; a jury could infer that the affiliate, a representative of the label, had prior knowledge that the rapist was going to attack the victim or had previously attacked other women in a similar fashion. Westmoreland v. Williams, 292 Ga. App. 359, 665 S.E.2d 30 (2008), cert. denied, 2008 Ga. LEXIS 890 (Ga. 2008).

Trial court erred by granting summary judgment to a restaurant owner in a slip and fall case because the customer who fell in the parking lot introduced evidence to show that the owner failed to follow the owner's established inspection schedule, thereby raising an inference that the owner had constructive knowledge of the wooden object the customer fell from; thus, summary judgment was inappropriate. Samuels v. CBOCS, Inc., 319 Ga. App. 421, 742 S.E.2d 141 (2012).

Grant of summary judgment was re-

Summary Judgment Inappropriate (Cont'd)

versed because although there was no allegation that the company had actual knowledge of the stick in the parking lot, the customer introduced evidence to show that the company failed to follow the company's established inspection schedule, thereby raising an inference that the company had constructive knowledge of the object. Samuels v. CBOCS, Inc., 319 Ga. App. 421, 742 S.E.2d 141 (2012).

Slip and fall issues had to be determined by jury. — Trial court erred in granting a grocery store summary judgment in a customer's premises liability action seeking to recover damages for injuries the customer sustained when the customer fell in the store's restroom because the case presented the typical slip and fall case issues that had to be determined by a jury since the customer testified to slipping on water on the floor that the customer could only detect after the customer fell, and the testimony was supported by that of the person who was with the customer and also to some extent by the store's assistant manager; whether the water on the floor was open and obvious was a jury question given the conflicting testimony on whether the water could be seen, and whether the customer failed to exercise ordinary care for the customer's own safety because the customer had previously walked through the water on the floor was also an issue the jury had to decide. Mairs v. Whole Foods Mkt. Group, Inc., 303 Ga. App. 638, 694 S.E.2d 129 (2010).

Trial court erred by granting summary judgment for the defendant bus station in a premises liability suit under O.C.G.A. § 51-3-1 brought by the plaintiff customer who was attacked after a verbal altercation. Because the evidence was not plain, palpable, and undisputed, issues concerning the bus station's negligence and the customer's lack of ordinary care for personal safety were not susceptible to summary adjudication. Bennett v. Metro. Atlanta Rapid Transit Auth., 316 Ga. App. 565, 730 S.E.2d 52 (2012).

Independent Contractors

Independent contractor expected to determine safety. — An independent contractor is expected to determine for oneself whether the contractor's place of employment is safe or unsafe, and ordinarily may not recover against the owner for injuries sustained in the performance of the contract. Herrin v. Peeches Neighborhood Grill & Bar, Inc., 235 Ga. App. 528, 509 S.E.2d 103 (1998).

Burden of proving the surrender of possession and control of the property to an independent contractor is on the property owner. Hess v. Textron Auto. Exteriors, Inc., 245 Ga. App. 264, 536 S.E.2d 291 (2000).

Contractor in possession and control has duty to protect invitees. — A building contractor in possession and control of a building's premises is bound to take reasonable measures to protect persons on the premises by his invitation from injuries which might arise from hidden defects or places of unusual danger. Williams v. Nico Indus., Inc., 157 Ga. App. 814, 278 S.E.2d 677 (1981), overruled on other grounds, 250 Ga. 568, 300 S.E.2d 145 (1983), superceded by statute as stated in Williams v. Mitchell County Elec. Mbrshp. Corp., 279 Ga. 759, 582 S.E.2d 107 (2003). But see Preston v. Georgia Power Co., 227 Ga. App. 449, 489 S.E.2d 573 (1997), cert. denied, 525 U.S. 869, 119 S. Ct. 163, 142 L. Ed. 2d 134 (1998); Santana v. Georgia Power Co., 269 Ga. 127, 498 S.E.2d 521 (1998).

When a general contractor has received full and complete possession of an area for construction, reasonable care may require that one constantly monitor the site for risk of danger to others or erect barriers to prevent others from traveling into areas where they may be exposed to danger. Such responsibility may extend even to portions of the site being worked upon by subcontractors. Bartlett v. Holder Constr. Co., 244 Ga. App. 397, 535 S.E.2d 537 (2000).

Contractor not liable for occupier's invitees. — When the defendant is neither the owner nor the occupier of the

premises, but rather, an independent contractor, O.C.G.A. § 51-3-1 imposes no independent duty to inspect the premises of the occupier for the safety of the occupier's invitees. Greene v. Piedmont Janitorial Servs., Inc., 220 Ga. App. 743, 470 S.E.2d 270 (1996).

Slip and fall. — The defendant was not entitled to immunity in a slip and fall case, notwithstanding its assertion that the fall was caused by the actions of an independent contractor, as the duty imposed on owner/occupiers to exercise ordinary care in keeping the premises and approaches safe is statutory and, therefore, the defendant was liable for the acts and omissions of its independent contractor. Kroger Co. v. Strickland, 248 Ga. App. 613, 548 S.E.2d 375 (2001).

In a slip and fall case, the trial court properly granted summary judgment to a premises owner on grounds that: (1) no material issue of fact remained as to whether a roof repair contractor's injuries were caused by the owner's failure to keep the subject premises safe; (2) the contractor failed to present any evidence that a foreign substance or any unusual hazard on the roof surface caused the fall; (3) it was not raining on the day of the fall; and (4) prior to the fall, the contractor inspected the roof by walking the length of it and looking at it from below, satisfied that the area was safe. Hardnett v. Silvey, 285 Ga. App. 424, 646 S.E.2d 514 (2007).

In a slip and fall action filed by a mall patron against the mall's owner and its cleaning contractor, summary judgment was properly granted to the latter, as no evidence was presented that it wrongfully failed to clean the spot on which the patron slipped; however, summary judgment in the owner's favor was reversed, as it failed to present evidence of any reasonable inspection procedures, giving the patron the benefit of an inference of the owner's constructive knowledge of a hazard. Prescott v. Colonial Props. Trust, Inc., 283 Ga. App. 753, 642 S.E.2d 425 (2007).

The court of appeals upheld an order granting summary judgment to a janitorial services company on claims filed against it by a premises owner's invitee for damages sustained by the invitee resulting from a slip and fall on the owner's premises, as the janitorial services company was an independent contractor and not an owner occupier of the premises where the invitee fell, and hence it owed no contractual duty to the invitee. Taylor v. AmericasMart Real Estate, LLC, 287 Ga. App. 555, 651 S.E.2d 754 (2007).

Provider of janitorial services to a hospital was not negligent, pursuant to O.C.G.A. § 51-3-1 under a theory of premises liability, for a hospital employee's slip and fall because the provider was an independent contractor. The hospital's reservation of rights to ensure that provider carried out its obligations did not demonstrate that hospital directed or controlled the provider's work. Perkins v. Compass Group USA, Inc., 512 F. Supp. 2d 1296 (N.D. Ga. Mar. 7, 2007).

In an employee's slip and fall action against the employer's cleaning service for negligent application of furniture polish, the trial court correctly instructed the jury that the service did not have an independent duty under O.C.G.A. § 51-3-1 like an owner/occupier to inspect the premises for the safety of the employee's invitees. Williams v. Capitol Corporate Cleaning, Inc., 313 Ga. App. 61, 720 S.E.2d 228 (2011).

Contractor can be in possession and control of a portion of landowner's premises. Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969), aff'd, 424 F.2d 545 (5th Cir. 1970).

Landowners duty to warn of latent defects. — Evidence of nonconformity with Occupational Safety & Health Act (OSHA), 29 U.S.C. § 651 et seq., standards is admissible as proof of a landowner's superior knowledge of a defect in the premises under O.C.G.A. § 51-3-1; thus, the trial court did not err in admitting evidence of the landowner's OSHA violations, even though the plaintiff welder worked for a contractor and not directly for the landowner when the plaintiff was injured on the landowner's property. The personal injury verdict for the welder was reversed, however, based on an improper instruction that failed to clarify for the jury that the landowner could have discharged the landowner's duty to warn of latent defects on the premises by informing the contractor without also telling the

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contractor's employee, the injured welder. Long Leaf Indus., Inc. v. Mitchell, 252 Ga. App. 343, 556 S.E.2d 242 (2001).

Landowner or one in possession of land is relieved of duties of a landowner to those who come onto premises when possession and control is surrendered to independent contractor. The contractor then becomes the occupier of the land within the meaning of this section. If such possession and control were still in the landowner, it would be no defense to the landowner that the defective condition causing the injury was created by independent contractor if the landowner, by the exercise of ordinary care, could have discovered the defect. Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969), aff'd, 424 F.2d 545 (5th Cir. 1970).

Theory that the plaintiff was an invitee of the elevator company, employed to make alterations on elevator because the plaintiff was an employee and invitee of the lessee would not be sustainable since if the elevator company had exclusive control of the elevators, the plaintiff as an employee of the lessee would not have occupied the status of invitee as to the elevator either as to the elevator company or the lessee, in the absence of allegations showing an authorized invitation otherwise. Callaham v. Carlson, 85 Ga. App. 4, 67 S.E.2d 726 (1951).

Contractor with knowledge of potential hazard. — Since an independent contractor/invitee had constructive knowledge of a potential hazard, the employer/landowner was not liable for the injuries resulting from the existence of such hazard. Apostol-Athanasiou v. White, 176 Ga. App. 178, 335 S.E.2d 442 (1985).

Summary judgment for an owner was affirmed as an injured party's knowledge that the outside steps were slippery when wet was at least equal to that of the owner as the injured party had advised the owner's supervisory personnel that the steps were slippery when wet; as the injured party was not carrying equipment when the fall occurred, the need to carry equipment could not have precluded the injured party from taking a dry, inside stairway. Gillis v. Foodonics Int'l, Inc., 273 Ga. App. 759, 615 S.E.2d 854 (2005).

Contractor making repairs may assume occupier's duty towards invitees. — Since the defendant had by contract assumed the duty of maintaining and repairing building, which duty in the first instance devolved upon the owner, and actually entered upon such duty by repairing a part of the building, then its failure to repair another part of the building, resulting in injury to the plaintiff, rendered it liable, not because it had breached its contract with principal, but because, by assuming the total duty of repair and maintenance, it had caused the owner to rely upon it and prevented the job from being done by others, and had therefore breached a duty owing to the public generally and the plaintiff in particular of maintaining the premises in a reasonably safe condition. Sharp-Boylston Co. v. Bostick, 90 Ga. App. 46, 81 S.E.2d 853 (1954).

A general contractor engaged by the owner of property to perform construction or repair work thereon and who takes possession of the premises assumes the status of "occupier," and this sets in the duty to use ordinary care to see that the premises are in a reasonably safe condition for the workers on the project. Tyler v. Peel Corp., 371 F.2d 788 (5th Cir. 1967).

Servant of contractor as invitee. — The provisions of this section prescribe the duty which the proprietor of premises owes to a contractor's servant who comes lawfully upon the premises to repair machinery or instrumentalities thereon. Fulton Ice & Coal Co. v. Pece, 29 Ga. App. 507, 116 S.E. 57 (1923).

Owner not liable to employees of independent contractor. — The decisions seem to predicate the nonliability of owners of property, or contractees, to the employees of independent contractors, under circumstances when the work is free from the direction and control of the owner, or contractee, and possession of the premises is not retained by the contractee, either in whole or in part, on the fact that the servants of the contractor, or others coming upon the premises at the invitation of the independent contractor, are

invitees of the independent contractor and not of the contractee. McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299 (1949).

Worker's claim against a tire manufacturing plant, alleging a violation of O.C.G.A. § 51-3-1 due to a forklift having an emergency brake that did not work, thereby allowing the forklift to jump back while holding up a transformer, resulting in the worker's arm being crushed by the fallen transformer, failed; the independent contractor was doing work for the worker's own employer, the worker showed no evidence that the tire plant had actual or constructive knowledge of a defect in the forklift, and the forklift was not a part of the premises. Cooper Tire & Rubber Co. v. Merritt, 271 Ga. App. 16, 608 S.E.2d 714 (2004).

Employees of a subcontractor who were electrocuted while working on a construction project had not shown that the owner of the project had the necessary control to be liable under O.C.G.A. § 51-3-1. It was not enough that the owner had the right to visit the site, to ensure that the work conformed to the contract drawings and specifications, and to stop work on the project; there had to be such a retention of a right of supervision so that a contractor was not entirely free to do the work in the contractor's own way. Dalton v. 933 Peachtree, L.P., 291 Ga. App. 123, 661 S.E.2d 156 (2008).

Subcontractor is invitee of general contractor. — When the owner of premises employs a general contractor to construct a dwelling house upon the premises, and places the general contractor in possession and control of the premises, a subcontractor whom the general contractor employs to do certain work connected with the construction of the building is an invitee of the general contractor to whom the latter owes the duty of ordinary care. Braun v. Wright, 100 Ga. App. 295, 111 S.E.2d 100 (1959).

Property manager. — United States relinquished possession and control of property to a realty company through an area management broker contract, under which the realty company agreed to arrange for and supervise the management, rehabilitation, and maintenance of the property and to inspect the property on a regular basis and to eliminate any safety hazards that the inspection revealed; thus the realty company became the occupier of the property and thereby assumed the nondelegable duty under Georgia law to exercise ordinary care to keep the property safe. Tisdale v. United States, 62 F.3d 1367 (11th Cir. 1995).

In a slip and fall case, circumstantial evidence of a connection between an independent cleaning service and the liquid in which the plaintiff fell precluded summary judgment for the service. Kelley v. Piggly Wiggly S., Inc., 230 Ga. 508, 496 S.E.2d 732 (1998).

Employer under no general duty to contractor's employees. — In a wrongful death action premised on both negligence and negligence per se filed on behalf of a mother's deceased minor son, a premises owner was properly granted summary judgment as the independent contractor that hired the decedent, and not the premises owner, had sole control over its personnel, and the son's hazardous occupation on the owner's premises for a third party did not in and of itself demonstrate that the owner was in violation of Georgia's child labor laws; thus, the appeals court declined to reach the issue of whether an owner who knew or had reason to know that its independent contractor was employing a minor under the age of 16 to perform a dangerous occupation on the owner's premises was in violation of O.C.G.A. § 39-2-2. Benson-Jones v. Sysco Food Servs. of Atlanta, LLC, 287 Ga. App. 579, 651 S.E.2d 839 (2007).

No assumption of lessee's duties. — When the record showed that the lessee of a warehouse had at least five of its employees working in the warehouse each day and that, under the express terms of its contract with the defendant, who provided staff to operate the warehouse, it retained responsibility for maintaining certain aspects of the premises, no premises liability attached to the defendant independent contractor. Maddox v. Cumberland Distrib. Servs. of Ga., Inc., 236 Ga. App. 170, 511 S.E.2d 270 (1999).

Duties of premises owner not transferred to maintenance contractor. — Because there was no evidence to challenge the defendant maintenance contrac-

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tor's status as an independent contractor, the maintenance contractor was not subject to premises liability under O.C.G.A. § 51-3-1 since the duties imposed on the defendant premises owner by § 51-3-1 were not delegable. Ahuja v. Cumberland Mall, LLC, No. 1:10-CV-1038-JEC, 2011 U.S. Dist. LEXIS 109587 (N.D. Ga. Sept. 23, 2011).

In a couple's slip and fall case, the trial court did not err by granting summary judgment in favor of an independent contractor that had applied a de-icing mixture to the area on the night before the fall when there was no evidence the injured plaintiffs were third-party beneficiaries of the contract between the shopping center and the independent contractor and since there was no evidence that the independent contractor had been negligent. Davidson v. Meticulously Clean Sweepers, LLC, 329 Ga. App. 640, 765 S.E.2d 783 (2014).

Tree trimmer was independent contractor. — Widow's husband who offered to cut tree limbs on owners' property as part of a church fundraising activity was an independent contractor since there was no evidence that the owner retained the right to control various factors, such as when the limbs would be trimmed or the manner, method, and means of trimming the limbs. Glenn v. Gibbs, 323 Ga. App. 18, 746 S.E.2d 658 (2013).

Landlord Liability

General liability not controlled by this Code section. — The liabilities of an owner who had been transformed into a landlord was no longer fixed by former Code 1933, § 105-401 (see now O.C.G.A. § 51-3-1), but limited and determined by former Code 1933, § 61-112 (see now O.C.G.A.§ 44-7-14). Goettee v. Carlyle, 68 Ga. App. 288, 22 S.E.2d 854 (1942); Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145 (1965); Tribble v. Somers, 115 Ga. App. 847, 156 S.E.2d 130 (1967).

A landlord was not liable for injuries to a tenant suffered as the result of the independent criminal conduct of a third party which occurred within the premises over which the tenant had complete control; the owner's duty to the tenant was limited to that imposed under O.C.G.A. § 44-7-14, i.e., a duty to ensure that the leased premises were properly constructed and maintained. Plott v. Cloer, 219 Ga. App. 130, 464 S.E.2d 39 (1995).

An out-of-possession landlord's tort liability to third persons was determined under the premises set forth in O.C.G.A. § 44-7-14 and it was error to assess liability based upon principles of common law negligence. Martin v. Johnson-Lemon, 271 Ga. 120, 516 S.E.2d 66 (1999), reversing Lemon v. Martin, 232 Ga. App. 579, 502 S.E.2d 273 (1998).

Landlord was not liable for injuries a patron sustained in a restaurant owner's parking lot because although the landlord was responsible by verbal lease for the main structure, while the owner was responsible for maintaining the area where the injury occurred, and the landlord retained limited entry or inspection rights that were unrelated to the cause of the injuries, such limited rights did not evidence such dominion and control of the premises so as to vitiate the landlord's limited liability imposed by O.C.G.A. § 44-7-14 and replace it with the liability imposed by O.C.G.A. § 51-3-1. Lake v. APH Enters., LLC, 306 Ga. App. 317, 702 S.E.2d 654 (2010).

Out-of-possession landlord's duty to guests provided in O.C.G.A. § 44-7-14. — Because a landlord was an out-of-possession landlord, guests of the tenant were required to show pursuant to O.C.G.A. § 44-7-14 that their damages resulted either from failure to repair the premises or faulty construction of the premises. The guests could not prevail by meeting the less stringent negligence standard applicable to premises owners and occupiers generally, O.C.G.A. § 51-3-1. Aldredge v. Byrd, No. A17A0299, 2017 Ga. App. LEXIS 163 (Mar. 30, 2017).

Word "owner" as used in former Code 1933, § 105-401 (see now O.C.G.A. § 51-3-1) was not synonymous with "landlord," as the latter word is used in former Code 1933, § 61-112 (see now O.C.G.A. § 44-7-14); and since the owner of land has fully parted with both possession and right of

possession by any lawful contract of rental, the owner's liabilities are those prescribed by former Code 1933, §§ 61-112 and 105-401 was without application, though it is otherwise when the possession or the right of possession was not fully parted with. Augusta-Aiken Ry. & Elec. Corp. v. Hafer, 21 Ga. App. 246, 94 S.E. 252 (1917); Dobbs v. Noble, 55 Ga. App. 201, 189 S.E. 694 (1937); Edwards v. Lassiter, 67 Ga. App. 368, 20 S.E.2d 451 (1942); Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952); Howell Gas of Athens, Inc. v. Coile, 112 Ga. App. 732, 146 S.E.2d 145 (1965); Cooperwood v. Auld, 175 Ga. App. 694, 334 S.E.2d 22 (1985).

Liability for acts of others. — Generally, an employer is not liable for the torts of an independent contractor or its employee because the employer does not control the manner in which the independent contractor's work is done; but when the duty owed to an invitee by a landlord is statutory and nondelegable, the landlord may not escape liability by claiming the negligent act was done by a property manager or other "filter." Hickman v. Allen, 217 Ga. App. 701, 458 S.E.2d 883 (1995).

In an action against a landlord and apartment manager arising from the death of a tenant who was killed in a fight with another tenant, even assuming the defendants had a duty to intervene in the fight, there was no evidence the defendants breached this duty because the manager attempted to send the two men home and called police when the manager believed a fight was imminent. Traicoff v. Withers, 247 Ga. App. 428, 544 S.E.2d 177 (2000).

Tenant established a material fact issue as to whether a landlord should have reasonably foreseen the tenant's rape, based on evidence regarding a stranger's intrusion into another resident's apartment and the later rape of that resident by an attacker, who was the same man who raped the tenant; these incidents were similar, if not identical, to the tenant's rape, and summary judgment for the landlord in the tenant's premises liability claim was error. Mason v. Chateau Cmtys., Inc., 280 Ga. App. 106, 633 S.E.2d 426 (2006).

In an O.C.G.A. § 51-3-1 premises liability case in which a resident of a mobile home park was shot during a robbery of a mobile home where the resident was staying, the park manager and owner moved for summary judgment, arguing that the resident was precluded from recovery as a matter of law because the resident had equal or superior knowledge of the risk posed by criminal activity at the mobile home park and failed to exercise ordinary care for the resident's own safety. The owner and the manager conceded for purposes of their motion that they were aware of similar crimes that occurred at the park prior to the robbery at issue; irrespective of whether the resident had equal or superior knowledge of the risk of third-party criminal attacks at the park, a question of material fact existed as to whether the resident failed to exercise ordinary care for the resident's own safety. Vilchez v. ARC Cmtys. 17, LLC, No. 1;08-CV-03145-JTC, 2010 U.S. Dist. LEXIS 36417 (N.D. Ga. Feb. 22, 2010).

This section may have application in landlord-tenant situation when landlord does not fully part with right of possession. Kreiss v. Allatoona Landing, Inc., 108 Ga. App. 427, 133 S.E.2d 602 (1963).

When a landlord retains a qualified possession and general supervision of the premises the landlord may be liable for injuries arising from the landlord's failure to maintain the premises in proper repair even without actual knowledge, if in the exercise of ordinary care the landlord should have known thereof, and in such circumstances, the use of the words "owner or occupier" is synonymous with "landlord," that is, of a landlord who retains qualified possession and general supervision of the rented premises, as in the case of an apartment house owner. Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952).

A landlord, such as an apartment house owner, who retains qualified possession and general supervision of portions of the demised premises of which common use is made by the tenants, is liable in damages to the tenants and the other invitees for injuries occasioned by the landlord's failure to exercise ordinary care in keeping

Landlord Liability (Cont'd)

the premises and approaches safe. Nesmith v. Starr, 115 Ga. App. 472, 155 S.E.2d 24 (1967).

Landlord without actual notice of defect may be liable. — When the landlord retains a qualified possession and general supervision of the landlord's building, the landlord may be held liable for injuries arising from failure to maintain the building in proper repair, even without actual notice of the defect, if, in the exercise of ordinary care, the landlord should have known of it. Paul v. Sharpe, 181 Ga. App. 443, 352 S.E.2d 626 (1987).

Landowner can relinquish control over portion of premises and is thereafter relieved of duties of this section. Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969), aff'd, 424 F.2d 545 (5th Cir. 1970).

Retention of the right to approve tenant insurance policies and the right to enter the leased premises in emergencies and during business hours for landlord related purposes does not evidence such dominion and control of the premises so as to vitiate appellee's limited liability under O.C.G.A. § 44-7-14 and replace it with the liability imposed by O.C.G.A. § 51-3-1. Godwin v. Olshan, 161 Ga. App. 35, 288 S.E.2d 850 (1982).

Shopping center owner's duty to keep safe premises did not extend to leased areas in which tenant had exclusive possession and control. Stephens v. Clairmont Ctr., Inc., 230 Ga. App. 793, 498 S.E.2d 307 (1998).

Trial court properly granted summary judgment to warehouse owner on invitee's claim for damages after the invitee fell, during a party hosted by the tenant, from a skateboard ramp that the tenant installed and was injured as the warehouse owner's retention of the right to inspect the leased premises did not evidence such dominion and control of the premises so as to vitiate the warehouse owner's limited liability under O.C.G.A. § 44-7-14 and replace it with liability imposed by O.C.G.A. § 51-3-1, which imposed liability for those having a duty to exercise ordinary care in keeping premises safe. Ray v. Smith, 259 Ga. App. 749, 577 S.E.2d 807 (2003).

A landlord owed no duty to provide security at an office complex which was in the exclusive control of the tenant. Gale v. North Meadow Assocs. Joint Venture, 219 Ga. App. 801, 466 S.E.2d 648 (1995).

Lessor of offices in building who retains control of entrance and hallways owes duty of care to all invitees of the tenants. Lebby v. Atlanta Realty Corp., 25 Ga. App. 369, 103 S.E. 433 (1920).

Landlord who neither retains some control, or right of control, or assumes control over premises is ordinarily under no duty to inspect the premises and ascertain whether or not they are in a safe condition. Davis v. City of Atlanta, 84 Ga. App. 572, 66 S.E.2d 188 (1951).

Lessor owes no duty to strangers who enter premises for their own purposes. Jones v. Asa G. Candler, Inc., 22 Ga. App. 717, 97 S.E. 112 (1918).

Landlord's liability to tenant dependent upon actual or constructive notice of defects. — In order for the landlord to be liable it must appear that notice of the defective and unsafe condition of the premises had been given to the landlord, and a reasonable opportunity afforded the landlord to repair the defective condition; or it must appear that the landlord otherwise had knowledge of the defect in the premises that caused the tenant to receive personal injuries. Fincher v. Fox, 107 Ga. App. 695, 131 S.E.2d 651 (1963).

Liability of landlord to tenant for known dangerous condition. — When a portion of leased premises is dangerously out of repair and that condition is known to the tenant who continues to use that area, the tenant cannot recover from the landlord for damages resulting from the condition; but the severity of the doctrine of assumption of risk has been ameliorated in cases when its application would make the tenant "a captive" in the tenant's own home. Carey v. Bradford, 218 Ga. App. 325, 461 S.E.2d 290 (1995).

When a dangerous area is tenant's only access or only safe or reasonable access to the home, tenant's equal knowledge of the danger does not excuse the landlord of damages caused by the landlord's failure

to keep the premises in repair. Carey v. Bradford, 218 Ga. App. 325, 461 S.E.2d 290 (1995).

When a person appearing to park in a space at an apartment complex suddenly jumped the curb, crossed a sidewalk, and fatally struck a child, the complex's landlord was not liable to the child's parents for not installing "bumper stops" in the complex's parking lot because such devices were not required by any state, federal or local law or ordinance, and a highway traffic safety manual the parents' expert relied on in opining that such devices were required had limited application to parking lots and indicated they had a limited ability to shield pedestrians from vehicles. Sotomayor v. TAMA I, LLC, 274 Ga. App. 323, 617 S.E.2d 606 (2005).

When a person appearing to park in a space at an apartment complex suddenly jumped the curb, crossed a sidewalk, and fatally struck a child, the complex's landlord was not liable to the child's parents for not installing "bumper stops" in the complex's parking lot, even though it had installed them around its leasing office, because it was not shown they were installed to protect pedestrians, and there was no evidence that anyone had driven a car into the wall of one of the buildings at the complex, as occurred here, providing the landlord with notice of the possibility of such an event. Sotomayor v. TAMA I, LLC, 274 Ga. App. 323, 617 S.E.2d 606 (2005).

When a person appearing to park in a space at an apartment complex suddenly jumped the curb, crossed a sidewalk, and fatally struck a child, the complex's landlord was not liable to the child's parents because it was not reasonably foreseeable that such an event would occur. Sotomayor v. TAMA I, LLC, 274 Ga. App. 323, 617 S.E.2d 606 (2005).

Liability results only from landlord's failure to exercise ordinary care to make repairs after notice to the landlord of defective condition coupled with a failure to repair within a reasonable time. Fincher v. Fox, 107 Ga. App. 695, 131 S.E.2d 651 (1963).

Notice of separate and independent patent defect, in no way connected with latent defect which occasioned the injury, cannot be taken as constructive notice of latter, or as devolving upon the landlord any duty of inspection. Hendrick v. Muse, 48 Ga. App. 295, 172 S.E. 661 (1934).

Constructive knowledge is a question of fact. — Even though the landlord had purchased the premises only 12 days prior to the plaintiff's fall, it was not self-evident that such period of time was insufficient to discover the claimed hazard; thus, the issue of the landlord's constructive knowledge was for the jury. Yeh v. Arnold, 232 Ga. App. 725, 503 S.E.2d 645 (1998).

Evidence of knowledge of condition. — In certain circumstances, evidence of a similar prior occurrence is admissible to show knowledge on the owner's or landlord's part of a dangerous condition. Sparks v. Pine Forest Enters., Inc., 174 Ga. App. 598, 331 S.E.2d 34 (1985).

Incidents which occurred more than two months apart and involved different persons and conditions of surface and lighting and which occurred at a different address apparently some considerable distance apart were not sufficiently closely related or similar to the circumstances of each other as to be relevant evidence as to landlord's knowledge of a dangerous condition. Sparks v. Pine Forest Enters., Inc., 174 Ga. App. 598, 331 S.E.2d 34 (1985).

In action alleging apartment owner/managers' negligence in failing to provide a door sufficiently secured to deter criminal entry, evidence of other criminal incidents involving forced entry through a similar door that had occurred in the apartment complex during the three years prior to the attack on the plaintiff was admissible as evidence of the owner/managers' knowledge of the specific dangerous condition alleged. Bayshore Co. v. Pruitt, 175 Ga. App. 679, 334 S.E.2d 213 (1985).

Because a landlord knew that a v-notch in a curb was dangerous when covered with straw and knew that the tenants and their invitees regularly and improperly crossed the yard near the curb, the landlord was liable for an invitee's injuries under O.C.G.A. § 51-3-1 when the invitee fell in the v-notch. Brad Bradford Realty, Inc. v. Callaway, 276 Ga. App. 648, 624 S.E.2d 179 (2005).

Landlord Liability (Cont'd)

Guest of tenant is invitee upon premises of landlord when the guest is invited by the tenant and visits the tenant in such premises. Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958).

Guest of tenant is invitee. — Plaintiff while present in an apartment house as the guest of a tenant is an invitee within the purview of this principle. Henderson v. Nolting First Mtg. Corp., 184 Ga. 724, 193 S.E. 347 (1937).

As regards the liability of the owner of an apartment house, a guest of a tenant therein may be an invitee. Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952).

Landlord is liable to one lawfully brought on rented premises, by invitation of tenant, for injuries arising from failure to keep premises in repair, when the defect is known to the landlord or in the exercise of reasonable diligence could have been known, providing, of course, the person killed or injured was also in the exercise of due care. Rothberg v. Bradley, 85 Ga. App. 477, 69 S.E.2d 293 (1952).

Since the defendant knew, or in the exercise of ordinary care should have known, of the previous existence of alleged defects at the time the property was leased to the plaintiff's son the defendant's failure to remedy the defects or warn of their existence constituted a breach of duty owed by the defendant to invitees on the premises. Ramey v. Pritchett, 90 Ga. App. 745, 84 S.E.2d 305 (1954).

The guests of invitee tenants, those coming on the leased premises for business purposes beneficial to the tenant, and those doing business with the tenant are there by the tenant's invitation and stand in the tenant's shoes insofar as the guests suffer injury due to the negligence of the owner or occupier of the premises. Davis v. Garden Servs., Inc., 155 Ga. App. 34, 270 S.E.2d 228 (1980).

It is not essential that a direct contractual relation between the plaintiff and the owner be shown if the presence of the plaintiff is such that it should have been anticipated by the owner for the mutual benefit of the plaintiff and the owner's tenant. Davis v. Garden Servs., Inc., 155 Ga. App. 34, 270 S.E.2d 228 (1980).

Landlord's duty to tenant's invitees independent of lease terms. — The common-law duty of the defendant "to exercise ordinary care in keeping the premises and approaches safe" for invitees exist independently of any particular terms of a lease agreement between the defendant and a third party. Mitchell v. Gay, 111 Ga. App. 867, 143 S.E.2d 568 (1965).

Although landlord might be held liable for injuries so sustained, it does not preclude liability on part of lessee. Fuller v. Louis Steyerman & Sons, 46 Ga. App. 830, 169 S.E. 508 (1933).

Duty to child-guest of tenant. — When an eight-year-old child, paying the child's first visit to the apartment complex where the child's aunt and cousin lived, was injured when a bridge railing in a common area gave way as the child leaned on it, as to invitees on bridge, such as the child, liability of the owner and manager of the complex was not predicated upon wanton and willful negligence. The applicable standard of care is that prescribed by O.C.G.A. § 51-3-1. Paul v. Sharpe, 181 Ga. App. 443, 352 S.E.2d 626 (1987).

Where owner of property leases it to be used in conduct of business, those coming upon premises in connection with business are invitees of owner and proprietor. Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958); Atlanta Braves, Inc. v. Leslie, 190 Ga. App. 49, 378 S.E.2d 133 (1989).

Tenant owes no duty of protection to customers of cotenants. Smith v. Inman, 32 Ga. App. 24, 122 S.E. 632 (1924).

Landlord not liable. — Trial court erred in denying an apartment building owner's motion for summary judgment on an invitee's premises liability claim arising out of the invitee's slipping and falling in a puddle of water in the building's laundry room; the invitee offered no evidence that the owner had actual knowledge of the hazard, and could not show constructive knowledge given that the

owner inspected the laundry room every two hours and there was no evidence of any prior slip and fall. Patrick v. Macon Hous. Auth., 250 Ga. App. 806, 552 S.E.2d 455 (2001).

Summary judgment was properly entered for a landlord and a property manager (appellees) in a negligence suit filed by an injured party as appellees complied with state law as to the installation of smoke detectors contained in O.C.G.A. § 25-2-40(a)(2), and as evidence of any failure to maintain the detectors was inadmissible under O.C.G.A. § 25-2-40(g); as O.C.G.A. § 25-2-40(a)(2) was more specific, it governed over any conflicting statutory or common law duty of care, such as those contained in O.C.G.A. §§ 44-7-13 and 51-3-1, and as O.C.G.A. § 25-2-40(g) was enacted more recently than the older statutes, it controlled. Hill v. Tschannen, 264 Ga. App. 288, 590 S.E.2d 133 (2003).

In a wrongful death suit, because the record was devoid of any evidence that the landlords knew that a tenant, a nephew, had left a gun accessible and loaded on the day a visiting youth was shot, or any other occasion, the trial court erred in denying summary judgment for the landlords; since the landlords knew or should have known that the nephew would have friends occasionally come to visit at the leased premises, the landlords, as possessors of the land, would have been subject to liability for the youth's fatal injury by the loaded shotgun if, but only if, the landlords knew or had reason to know of the hazard in the nephew's loft room and then failed to exercise reasonable care to make the condition safe or to warn visitors, which such superior knowledge of the hazard on the part of the landlords was not shown. McCullough v. Reyes, 287 Ga. App. 483, 651 S.E.2d 810 (2007), cert. denied, 2008 Ga. LEXIS 178 (Ga. 2008).

In a social guest's suit for personal injuries brought against the tenants of certain real property as well as the property owner and the owner's property management company, the trial court properly granted summary judgment to the property owner as there was no evidence that the property owner had actual or constructive knowledge of any problem with the condition of or construction of the deck that fell while the guest was standing upon the deck. Silman v. Assocs. Bellemeade, 294 Ga. App. 764, 669 S.E.2d 663 (2008), aff'd, 286 Ga. 27, 685 S.E.2d 277 (2009).

Trial court erred by denying a building owner's motion for summary judgment under O.C.G.A. § 51-3-1 in an employee's action to recover damages for injuries the employee sustained when the door to a handicap bathroom stall the employee used at work fell off of the door's hinges because the owner had no actual knowledge of any problem with bathroom stall door hinges; the owner conducted reasonable inspections of the property as a matter of law and had never received a report of any problems with any bathroom door hinges before the employee's injury, and there was no evidence that an inspection of the hinge would have revealed any defect. Watts & Colwell Builders, Inc. v. Martin, 313 Ga. App. 1, 720 S.E.2d 329 (2011).

Dog bite. — Even assuming that a landlord retained possession and control of premises the landlord owned, the landlord was not liable for injuries sustained by the plaintiff when a tenant's dog bit the plaintiff since there was no evidence that the plaintiff had superior knowledge of any dangerous condition. Webb v. Danforth, 234 Ga. App. 211, 505 S.E.2d 860 (1998).

Trial court did not err in granting a dog owner summary judgment in a roommate's action under the vicious animal statute, O.C.G.A. § 51-2-7, and the premises liability statute, O.C.G.A. § 51-3-1, to recover damages for injuries the roommate sustained when the owner's dog attacked the roommate inside the owner's townhouse because the roommate had knowledge of the dog's vicious propensity equal to that of the owner's; the roommate's own testimony was that the roommate was aware of the dog's previous unprovoked attack and was nervous when around the dog, presumably because the roommate was afraid that the dog could attack again. Stolte v. Hammack, 311 Ga. App. 710, 716 S.E.2d 796 (2011).

Owner must have superior knowledge in dog bite cases. — In a typical dog bite case, regardless of whether the

Landlord Liability (Cont'd)

cause of action is based on the premises liability statute of O.C.G.A. § 51-3-1, or the dangerous animal liability statute of O.C.G.A. § 51-2-7, a plaintiff must produce evidence of the vicious propensity of the dog in order to show that the owner of the premises had superior knowledge of the danger. Custer v. Coward, 293 Ga. App. 316, 667 S.E.2d 135 (2008).

Dog owners entitled to summary judgment when no propensity to bite. — In a parent's personal injury action seeking to hold the dog owner's liable for injury to the parent's child, the dog owners were entitled to summary judgment because there was no evidence that the dog ever displayed vicious behavior or evinced a propensity to bite anyone prior to biting the child as required for such an action. Swanson v. Tackling, 335 Ga. App. 810, 783 S.E.2d 167 (2016).

Traffic signal device. — The trial court correctly concluded that apartment complex owner had no responsibility for installing or maintaining traffic signal device, as that duty is officially vested in municipalities by virtue of O.C.G.A. § 32-6-50. Zumbado v. Lincoln Property Co., 209 Ga. App. 163, 433 S.E.2d 301 (1993).

Fire detection and alarm system. — Whether a landlord provided an adequate fire detection and alarm system in a rented house was an issue of fact for the jury. Denise v. Cannon, 219 Ga. App. 765, 466 S.E.2d 885 (1995).

Apartment complex liability not foreseeable despite not installing a guardrail along a lake. — In a premises liability action involving the drowning death of a child following a car being driven into an apartment complex lake, the trial court did not err in granting summary judgment to the apartment complex because it could not be negligent as a matter of law for failing to foresee the events at issue, notwithstanding the complex's failure to install a guardrail along the lake. Allan v. Jefferson Lakeside, L.P., 333 Ga. App. 222, 775 S.E.2d 763 (2015).

Jury instructions. — When, in an action by the tenant's business invitee to recover damages from the landlord, the judge charged O.C.G.A. § 44-7-14, and then immediately charged O.C.G.A. § 51-3-1, the court charged what might be termed the qualifying section first, and then immediately charged the section which it was intended to qualify. The court thus went from the particular to the general rather than from the general to the particular, and this assembling in the charge of the language of the two sections if error, was not harmful to the plaintiff. Barnes v. Thomas, 72 Ga. App. 827, 35 S.E.2d 364 (1945).

Master's Liability to Servant

This section applies to a master-servant relationship, and it is not error to give a charge verbatim from this section in a negligence action by a servant against the master. Smith v. Ammons, 228 Ga. 855, 188 S.E.2d 866 (1972).

Duty of the master to use ordinary care to keep the master's premises safe so that the master's servants may perform their duties in safety is but a phrase of the ancient organized doctrine of the common law codified in this section which provides that when the owner or occupier of land, by express or implied invitation, induces or leads the others to come upon the master's premises for any lawful purpose, the master is liable in damages to such persons for injuries occasioned by the master's failure to exercise ordinary care in keeping the premises and the approaches safe. Nashville, C. & St. L. Ry. v. Hilderbrand, 48 Ga. App. 140, 172 S.E. 87 (1933); Elrod v. Ogles, 78 Ga. App. 376, 50 S.E.2d 791 (1948).

General rule of law declaring duty of master in regard to furnishing servant safe place to work is usually applied to permanent place, or one which is quasi permanent. It does not apply to such places as are constantly shifting and being transformed as a direct result of the servant's labor, and when the work in its progress necessarily changes the character for safety of the place in which it is performed as it progresses. Powell v. Shurling, 51 Ga. App. 67, 179 S.E. 653 (1935).

No cause of action when master had no knowledge of defective condition. — When in an action by an injured invitee (servant) for damages the petition failed to allege that the owner (master) had knowledge of the decayed condition of the underside of the outside stairway, but did allege this defect and rotten condition did not exist and was not apparent at the time of previous repairs to those steps and at the time of the invitee's fall the condition "could not be seen by ordinary observation," and in effect based the invitee's petition on the theory that it was the absolute duty of the owner (master) to make an inspection of the premises, for the purpose of keeping them in repair, irrespective of any apparent fact or circumstance which might, to a reasonably prudent person in the exercise of ordinary diligence, indicate the necessity of any such inspection, the judge did not err in sustaining the demurrer (now motion to dismiss) and in dismissing the petition. Williamson v. Kidd, 65 Ga. App. 285, 15 S.E.2d 801 (1941).

Neither in master and servant cases nor in invitee cases has a master or owner been held liable when one did not know of the danger and when one was not lacking in the exercise of ordinary diligence in discovering the danger; however, the master or owner need not have either actual knowledge or implied notice of the result of the danger. Elrod v. Ogles, 78 Ga. App. 376, 50 S.E.2d 791 (1948).

No specific allegations of knowledge necessary when pleadings show constructive knowledge. — It was not necessary in order for the petition seeking damages for the death of the plaintiff's husband, an employee of the defendant, to state a cause of action that it allege that the master or owner had either actual knowledge or implied notice that butane gas was in the well in which the servant or invitee was working; since the petition alleged that the master or owner knew that butane gas was installed on the master or owner's premises, knew that the tank and the pipeline were of secondhand material, knew that the gas line was buried at a point on the master or owner's property within four feet of the well where the servant or invitee would be at work, and knew that the men whom the master or owner procured to install the tank and pipe were unskilled in this type of work, the master or owner was chargeable with the knowledge that the pipeline was defective in that through rust and decay it had become weakened and was unfit for the transmission of butane gas and dangerous. Elrod v. Ogles, 78 Ga. App. 376, 50 S.E.2d 791 (1948).

Petition defective if facts show no knowledge on part of master. — Petition alleging that the plaintiff was employed by the defendant, and that the plaintiff was bitten by a dog on entering the premises, and that a defendant did not furnish the plaintiff with a safe place to work, in that keeping the dog endangered the plaintiff's life and safety while the plaintiff was in the performance of duties incident to the plaintiff's employment since no facts were alleged to show that the defendant had knowledge that the dog was vicious, or that it would be unsafe for the plaintiff to work in the house with the dog present, failed to set out a cause of action because of the failure to allege facts showing the defendant knew, or should have known of the danger. Hays v. Anchors, 71 Ga. App. 280, 30 S.E.2d 646 (1944).

Employee's knowledge of dangerous condition. — When the peanut market plant contracted with the employee's employer to remove and replace a motor from the top of a grain elevator at the plant, where the employee's injury was received from a danger that would ordinarily and naturally exist in doing the work which the employee was employed to perform, and since the employee could not have engaged in the work without knowing and seeing the identical condition which, as grounds of negligence, it was alleged that the master allowed to exist, the general rule of a master providing a safe work place to a servant or employee pursuant to O.C.G.A. § 51-3-1 did not apply. Howell v. Farmers Peanut Mkt. of Sowega, Inc., 212 Ga. App. 610, 442 S.E.2d 904 (1994).

Construction or demolition sites. — Construction or demolition sites by their inherent nature are naturally temporary and in a state of continuous alteration.

Master's Liability to Servant (Cont'd)

Since removal of asphalt shingles to reveal wooden shingles below perforce would have altered a roof's condition and affected the footing of persons working on the roof, an injury while doing this work was an exception to the general rule of a master providing a safe work place to a servant or employee pursuant to O.C.G.A. § 51-3-1. Elsberry v. Ivery, 209 Ga. App. 620, 434 S.E.2d 158 (1993).

Under facts alleged, petition did not show duty on defendants' part to warn servant of independent contractor as to the condition of the smokestack, which the servant climbed for the purpose of painting the smokestack. McDade v. West, 80 Ga. App. 481, 56 S.E.2d 299 (1949).

Customer employed by servant without authority not invitee of master. — When the defendant's servant had no authority to employ the plaintiff-customer to assist the servant in the manner alleged, the plaintiff became the servant of the defendant's servant when the plaintiff assisted the servant of the master and since in this capacity the plaintiff was not the servant or invitee of the defendant, the plaintiff could not recover for injuries received. Barber v. Rich's, Inc., 92 Ga. App. 880, 90 S.E.2d 666 (1955).

Company's responsibility for domestic dispute occurring on premises. — A company was not liable to a decedent's estate or the decedent's aunt for injuries inflicted on them by the decedent's estranged husband after the women fled their home seeking safety at the company's premises; the attack was not reasonably foreseeable by the company, and the decedent and the decedent's aunt had knowledge equal to or superior to that of the company that the husband had threatened to kill the decedent on the day of the attack and that the husband had a violent history and knew where the decedent worked. Cook v. Micro Craft, Inc., 262 Ga. App. 434, 585 S.E.2d 628 (2003).

Jury instructions improper if master held to standard above ordinary care. — It is a misdirection to charge the jury in language the effect of which is to subject the master to more extensive obligations than those indicated by the phrase "ordinary care" or its equivalents. Smith v. Ammons, 228 Ga. 855, 188 S.E.2d 866 (1972).

Whether servant contributorily negligent is jury question. — Whether plaintiff's spouse, employee-invitee of the defendant, was in the exercise of ordinary care in failing to discover the presence of gas in the well prior to the explosion, was a jury question. Elrod v. Ogles, 78 Ga. App. 396, 50 S.E.2d 791 (1948).

Whether master negligent also a jury question. — Whether the conditions leading to the death of the deceased, the owner or employer's knowledge of their existence, and the owner's or employer's failure to warn the servant or invitee of them, amounted to the lack of the exercise of ordinary care, was a jury question. Elrod v. Ogles, 78 Ga. App. 396, 50 S.E.2d 791 (1948).

Public Accommodation Facilities

It is the duty of innkeeper not only to furnish his guest or patron with shelter and comforts but also to exercise ordinary care to protect the guest from danger. Newton v. Candace, 94 Ga. App. 385, 94 S.E.2d 739 (1956).

Innkeeper is not insurer of guests' safety but has only a duty to see that the premises are reasonably safe. Truett v. Morgan, 153 Ga. App. 778, 266 S.E.2d 557 (1980).

Liability for grab bar in hotel bathroom pulling out of wall. — In a premises liability action, the trial court erred by granting summary judgment to the hotel owner because a jury question existed as to the hotel's exercise of reasonable care since there was testimony that another grab bar had been repaired previously and a jury could find that the hotel lacked reasonable inspection procedures and, thus, had at least constructive knowledge of the defect. Bright v. Sandstone Hospitality, LLC, 327 Ga. App. 157, 755 S.E.2d 899 (2014).

Duty of restaurant proprietor is to exercise ordinary care to keep premises safe. Angel v. Varsity, Inc., 113 Ga. App. 507, 148 S.E.2d 451 (1966).

Evidence that a restaurant parking lot had been in disrepair for many years authorized the finding that the defendant failed in the defendant's duty to carry out periodic inspections and to take reasonable steps to protect the invitees from those dangers foreseeable from the uneven parking lot. Jackson v. Waffle House, Inc., 245 Ga. App. 371, 537 S.E.2d 188 (2000).

Use of warning devices that themselves pose hazards. — Merchant's selection and use of devices, such as "Wet Floor" signs, designed to warn patrons of one hazard that have the inherent potential to expose the patron to a different one does not relieve the merchant of the duty to have the premises in a reasonably safe condition and not to expose the invitees to unreasonable risk. Am. Multi-Cinema, Inc. v. Brown, 285 Ga. 442, 679 S.E.2d 25 (2009).

Restaurant acted reasonably in fulfilling the restaurant's duty toward a customer by calling the police after the customer followed another patron outside into the parking lot and the patron produced a gun. Modesitt v. Waffle House, Inc., 213 Ga. App. 381, 444 S.E.2d 412 (1994).

Whether restaurant owner exercised due care is jury question. — Whether the proprietor of a public restaurant was negligent in failing to exercise ordinary care in protecting the plaintiff as a customer from an unlawful assault made upon the plaintiff by another customer who was drunk, quarrelsome, and arrogant, and whose condition was known to the proprietor, and when the offending customer had caused some commotion and argument before injuring the plaintiff, was a question for the jury, and the trial court erred in deciding it on demurrer (now motion to dismiss) and in dismissing the case. Hall v. Davis, 75 Ga. App. 819, 44 S.E.2d 685 (1947).

Although negligence may exist as matter of law. — While it may be true that the mere fact that there is a slight difference between floor levels in different parts of a restaurant which the public is invited to enter does not of itself constitute negligence, and that the mere fact that the floor of a restaurant which the public is invited to enter is highly polished, so as to be slippery, does not constitute negligence of itself, and that a restaurant which the public is invited to enter may be so dimly lighted as to be in a state of semidarkness does not constitute negligence of itself, it cannot be said as a matter of law that, in a restaurant where to the restauranteur's knowledge the three elements exist together, their combined effect is not to create a dangerous condition, nor that the restauranteur is not negligent in failing to give invitees notice or warning of such condition. Pilgreen v. Hanson, 89 Ga. App. 703, 81 S.E.2d 18 (1954), later appeal, 94 Ga. App. 423, 94 S.E.2d 752 (1956).

Restaurant owner was not liable to a guest who was injured in a drive-by shooting committed by the spouse of a waitress at the restaurant. Hillcrest Foods, Inc. v. Kiritsy, 227 Ga. App. 554, 489 S.E.2d 547 (1997).

Restaurant and employee thereof were not liable for injuries received by a patron during an altercation with another person since neither the restaurant nor the employee could have reasonably foreseen the consequences of failing to remove the assailant from the premises. Ableman v. Taco Bell Corp., 231 Ga. App. 761, 501 S.E.2d 26 (1998).

Even if a restaurant owner violated a duty to an invitee under O.C.G.A. § 51-3-1 to keep the premises safe, handcuffing the invitee too tightly when the invitee was arrested following an altercation at the restaurant was an intervening act by a police officer which was not foreseeable to the owner, was not triggered by the original negligence, and was sufficient by itself to cause the injury. Kline v. KDB, Inc., 295 Ga. App. 789, 673 S.E.2d 516 (2009).

Hair salon. — In an action by a patron against a hair salon for injuries allegedly caused by the collapse of a defectively designed and manufactured facial table, since there were issues of fact as to whether ordinary diligence required an inspection of the table by the salon sufficient to reveal the defect, summary judgment for the salon was not authorized. Brown v. Who's Three, Inc., 217 Ga. App. 131, 457 S.E.2d 186 (1995).

Public Accommodation Facilities (Cont'd)

Handicapped-accessible ramp. — Genuine issues of fact existed as to whether a handicapped-accessible ramp was unsafe and whether the plaintiff's use of the ramp was unreasonable. Davis v. GBR Properties, Inc., 233 Ga. App. 550, 504 S.E.2d 204 (1998).

Motels. — A motel owner is required to exercise ordinary care in keeping the premises safe. The owner has a duty to guests to afford premises that are reasonably safe for use, and a duty to inspect which would render the owner liable for injuries caused by defects which would be disclosed by a reasonable inspection. Coates v. Mulji Motor Inn, Inc., 178 Ga. App. 208, 342 S.E.2d 488 (1986).

An earlier burglary of one of the defendant's motel rooms where the lighting immediately outside was dim was admissible in the plaintiffs' suit alleging that as a result of poor lighting, the area immediately outside the motel room where the plaintiffs were attacked and robbed was a "defective condition" subjecting the plaintiffs to unreasonable risk of harm from criminal activity. Burdine v. Linquist, 177 Ga. App. 545, 340 S.E.2d 198 (1986).

Innkeeper had no duty to inform guests of prior criminal incidents cited by the plaintiffs since the incidents were sufficiently dissimilar to their assault/robbery to have placed the innkeeper on notice that reasonable grounds existed to believe that the subject criminal act was likely to occur. Burnett v. Stagner Hotel Courts, Inc., 821 F. Supp. 678 (N.D. Ga. 1993), aff'd, 42 F.3d 645 (11th Cir. 1994).

Summary judgment under O.C.G.A. § 9-11-56 was properly granted to a motel company, dismissing a guest's suit seeking to recover for injuries sustained in a slip and fall on the shower floor in the company's motel, because the guest failed to demonstrate that the shower floor presented a hazard, and even assuming that the guest had shown the existence of a hazard, the guest failed to show that the company possessed superior knowledge of the potential harm under O.C.G.A. § 51-3-1. Bryant v. DIVYA, Inc., 278 Ga. App. 101, 628 S.E.2d 163 (2006).

Summary judgment for a motel's owner was affirmed as although a guest allegedly bitten by a poisonous spider submitted an expert's affidavit that a pest control company breached the company's standard of care and affidavits that there were spider incidents at the owner's other properties, it was undisputed that the owner had no knowledge that there were venomous spiders in the rooms at the motel. Dew v. Motel Props., Inc., 282 Ga. App. 368, 638 S.E.2d 753 (2006), cert. denied, 2007 Ga. LEXIS 205 (Ga. 2007).

Court of appeals did not err in affirming an order granting a motel summary judgment in a spouse's wrongful death action, alleging that the failure of the motel's personnel to heed the spouse's concern about the guest amounted to a breach of duty to render aid to a guest because the motel had no duty to comply with the spouse's requests to attempt a rescue of the guest from the guest's medical peril; the alleged negligence in the spouse's suit could not be credibly cast as a condition of the premises or akin to a premises hazard like a smoke-filled building because any risk or problem stemming from a medical condition unrelated to and not caused by the guest's stay at the facility was not internal to the premises but rather internal to the guest. Rasnick v. Krishna Hospitality, Inc., 289 Ga. 565, 713 S.E.2d 835 (2011).

Motel swimming pool. — Whether a motel owner and the patron had equal knowledge of the dangers in using the motel's swimming pool at night without an underwater light being turned on was a question for the jury, when the motel owner knew that the underwater light was there and that was in part a safety device, knew that there was a steep slope, was experienced in caring for the pool, had observed its use by guests under various conditions, used it personally, and was familiar with its characteristics. Coates v. Mulji Motor Inn, Inc., 178 Ga. App. 208, 342 S.E.2d 488 (1986).

Hotel not liable for injuries suffered during fight. — Hotel was not liable to a person injured in a fight in the hotel because the party had equal or superior knowledge of the threat of harm posed by a co-worker based on an earlier

altercation outside of the front entrance of the hotel, the fact that the party saw the co-worker return to the hotel after hotel security broke up their fight, the fact that the party was aware that the co-worker wanted to continue fighting, and the fact that the party made a conscious decision to return to the hotel without attempting to contact hotel security. Snellgrove v. Hyatt Corp., 277 Ga. App. 119, 625 S.E.2d 517 (2006).

Hotel liability for acts of massage therapist. — Trial court properly directed a verdict in favor of a hotel in a guest's suit against the hotel on the guest's premises liability claim after a massage therapist allegedly sexually assaulted the guest because that claim required that the guest show a causal connection between the massage therapist's background and the injuries sustained, and the guest failed to show that the hotel knew or reasonably should have known that the massage therapist had a tendency to engage in behavior relevant to the guest's injuries. Tomsic v. Marriott Int'l, Inc., 321 Ga. App. 374, 739 S.E.2d 521 (2013).

Prior criminal activity. — In an action for damages caused when a guest was shot on hotel premises, summary judgment for the hotel was precluded when a record of criminal activity in parking lots of nearby hotels, including serious crimes against persons, coupled with a record of criminal activity in the hotel's own parking lot (a crime about once every two weeks) was sufficient to create a genuine issue of material fact on whether the hotel was put on notice that criminal conduct against the hotel's guests was foreseeable, creating a duty to protect the hotel's guests against violent crimes. Matt v. Days Inns of Am., Inc., 212 Ga. App. 792, 443 S.E.2d 290 (1994), aff'd, 265 Ga. 235, 454 S.E.2d 507 (1995).

Service station. — Mere knowledge by the owner or operator of a service station that one means of access to its premises has been blocked, the obstacle being placed on the property of a shopping center at the entrance of a common way connecting the two places of business, which way belongs to the shopping center and over which the owner and operator of the service station has a mere easement of passage, together with failure of the owner and operator of the service station to remove the obstacle so placed an undetermined period of time prior to the plaintiff's injuries caused by the latter's collision with the obstacle, or failure of such owner or operator to give warning does not constitute actionable negligence on the part of such owner and operator. Spindel v. Gulf Oil Corp., 100 Ga. App. 323, 111 S.E.2d 160 (1959).

Duty of amusement park. — In a premises liability suit brought by an amusement park customer who claimed that mildew underneath a mat caused the customer to slip, it could not be said that the park lacked constructive knowledge of the hazard; there were issues of fact as to whether the park had inspected the mat on the date of the incident and as to whether an alleged inspection had been adequate. Valentin v. Six Flags Over Ga., L.P., 286 Ga. App. 508, 649 S.E.2d 809 (2007).

Spectator Events and Facilities

Theater. — The owner of a motion-picture theatre is liable to its customers or patrons, who are invitees, when they purchase tickets and enter the theatre for the purpose of witnessing the show, when such owner is negligent in causing or allowing the slippery substance to be placed and remain on the floor in the theatre. United Theatre Enters., Inc. v. Carpenter, 68 Ga. App. 438, 23 S.E.2d 189 (1942).

After the plaintiff, as a member of the public entered the first floor of the theatre, which was poorly lighted, and walked in search of a seat, and, when the plaintiff reached a point near the right-hand side of the seat, fell into an open stairway, of which the plaintiff had no notice or knowledge, and which the plaintiff could not see, and was injured and was not warned by the ushers or other employees of the existence of such open stairway, the defendants were negligent. Smith v. Atlanta Enters., Inc., 46 Ga. App. 760, 169 S.E. 243 (1933).

Injured party failed to show that the theater had knowledge of a dangerous condition and that the injured party did

Spectator Events and Facilities (Cont'd)

not; the injured party was aware of the amount of light in the theater as the injured party had already walked upstairs to get to the seat, walked down several more stairs before falling, and if the injured party thought it was too dark to walk down the stairs, it was incumbent upon the injured party to inquire about alternatives. Lake v. Atlanta Landmarks, Inc., 257 Ga. App. 195, 570 S.E.2d 638 (2002).

No liability for player's attack on fan. — There being nothing in the petition to show that the assault complained of, or anything of such character, could or should have been anticipated by the defendant, or that the defendant failed to do anything that the defendant should have done for the safety or protection of the plaintiff as the defendant's invitee, the petition fails to show negligence, and the general demurrer (now motion to dismiss) thereto should have been sustained. Atlanta Baseball Co. v. Lawrence, 38 Ga. App. 497, 144 S.E. 351 (1928).

Since the defendant sponsored meetings on the defendant's premises, it could not be said that the plaintiff did not occupy position of invitee on the defendant's premises when the plaintiff allegedly received the injuries complained of. American Legion v. Simonton, 94 Ga. App. 184, 94 S.E.2d 66 (1956).

When sponsor of a soap box derby invited public to attend contest held on a public street, a person attending became an invitee by express invitation to the public generally. Macon Tel. Publishing Co. v. Graden, 79 Ga. App. 230, 53 S.E.2d 371 (1949).

When a petition alleges that a certain street of a municipality was set aside to the sponsor of a soap box derby for the purpose of conducting the derby for the entertainment of the public, and the races are conducted by such sponsor who received the benefit of valuable advertising by reason thereof, and the contest was attended by the public at the invitation of such sponsor, the sponsor became an occupier of the premises within the meaning of this section. Macon Tel. Publishing Co. v. Graden, 79 Ga. App. 230, 53 S.E.2d 371 (1949).

Defendant lodge was under duty to exercise ordinary care to keep clubroom and means of access thereto in reasonably safe condition for use by defendant's invitees. Hanson v. Atlanta Lodge No. 78 B.P.O. Elks, Inc., 88 Ga. App. 116, 76 S.E.2d 77 (1953).

Owner must know of danger for liability to attach. — Since the invitee's injury was caused by vomit on the owner's floor, before the owner would be liable therefor it must appear that the owner knew, or in the exercise of ordinary care should have known, that this substance was on the floor. United Theatre Enters., Inc. v. Carpenter, 68 Ga. App. 438, 23 S.E.2d 189 (1942).

Trial court properly granted summary judgment to the facility operator because an attendee, after attending a concert at the facility, slipped and fell on gum balls that had fallen from sweet gum trees; the operator was not liable under O.C.G.A. § 51-3-1, as the accumulation of gum balls from sweet gum trees was natural, and there was no evidence that it had become an obvious hazard. Leibel v. Sandy Springs Historic Cmty. Found., Inc., 281 Ga. App. 390, 636 S.E.2d 27 (2006).

Owner not insurer of absolute safety. — It would impose too great a duty upon the proprietor of a place of amusement and would make the proprietor the insurer of the safety of all patrons, which the proprietor is not, to require the proprietor at all times to have immediate knowledge of and to remove every article on which a patron might stumble and fall when the article is placed there, not by the defendant or the defendant's employees, but by other patrons. Jones v. West End Theatre Co., 94 Ga. App. 299, 94 S.E.2d 135 (1956).

Stadium owner was not liable for the plaintiff's injuries from a fall on a cup or liquid from the cup as the plaintiff was walking down the stairs after a game because it would be unduly burdensome, if not impossible, for the owner to implement inspection procedures to address this particular situation. Daniels v. Atlanta Nat'l League Baseball Club, Inc.,

240 Ga. App. 751, 524 S.E.2d 801 (1999).

Assumption of risk by patron. — When a person wishing to witness a professional baseball game purchases a ticket and chooses or accepts a seat in a portion of the grandstand which is unprotected, he voluntarily assumes the risk inherent in such a position, the person being presumed to know there is a likelihood of wild balls being thrown or batted into the grandstand thus unprotected; when during the warm-up preliminary to playing such a professional baseball game a wild ball is thrown into that portion of the grandstand occupied by such spectator and the spectator is injured, the spectator cannot recover. Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949).

By entering the theater, the patron voluntarily assumed the risk that other patrons might negligently throw popcorn cartons to the floor, and that patrons often did so, and, knowing that the management would not and did not attempt to clean the cartons up during the progress of the entertainment, the patron assumed the risk of finding one of the cartons in the patron's path. Rogers v. Atlanta Enters., Inc., 89 Ga. App. 903, 81 S.E.2d 721 (1954).

Plaintiffs' claim that a church induced them to walk on boards on an infield was rejected as the plaintiffs' photographs showed that although the track was fenced off from the bleachers, with the boards covering the only opening in the fencing, people attending the event had the options of either stepping off the boards as soon as they cleared the fencing or stepping over them altogether; the plaintiffs were under no compulsion to remain on the boards as the plaintiffs moved towards the infield, nor was the church responsible for the injured party's distraction as the party walked across the boards since the party knew of their dangerous condition before becoming distracted. Haggerty v. Hebron Baptist Church, Inc., 273 Ga. App. 371, 615 S.E.2d 148 (2005).

Injured party knew of dangerous condition. — Summary judgment for a church was affirmed as the injured party knew before a fall that the boards "were not anchored down," "were not flush with each other," and "moved" when a vehicle drove over the plaintiffs; the plaintiffs could not show that they lacked knowledge of the boards' dangerous condition and, therefore, could not prove that the church's negligence caused the fall. Haggerty v. Hebron Baptist Church, Inc., 273 Ga. App. 371, 615 S.E.2d 148 (2005).

Liability of sponsor of performance in leased facility. — Sponsor of performance at a public civic center that it had leased did not have a duty to inspect the leased premises and approaches to discover and to warn of the existence of the dangers of plate glass doors since the sponsor had no actual knowledge prior to the incident at issue that any glass door in the center had been broken and had no reason to think that an inspection was necessary. Zellers v. Theater of Stars, Inc., 171 Ga. App. 406, 319 S.E.2d 553 (1984).

Art center had no duty to provide on-site ambulance or automatic external defibrillator device. — Trial court did not err in entering summary judgment in favor of an arts center in a widow's wrongful death action because the center had no duty as a matter of law to provide an on-site ambulance or an automatic external defibrillator device at the concert the widow and her husband attended; the widow did not adduce any evidence that the traffic on the night her husband suffered a cardiac arrest was hazardous or that the ambulance that answered the 911 call was delayed by the concert crowd or traffic. Boller v. Robert W. Woodruff Arts Ctr., Inc., 311 Ga. App. 693, 716 S.E.2d 713 (2011).

Miscellaneous

Agent may be liable when possessing sole authority to manage property. — When a landowner gives an agent sole authority to manage property, including renting and repairing, and when it is specifically alleged that the agent agreed to and did in fact assume such authority for the landowner, the agent may be held individually liable for a violation of this duty, not as an agent, but as an independent tort-feasor whose breach of duty owed to a third person is the actionable

Miscellaneous (Cont'd)

negligence. Ramey v. Pritchett, 90 Ga. App. 745, 84 S.E.2d 305 (1954).

An agent who undertakes the sole and complete control and management of the principal's premises is liable to third persons, to whom a duty is owing on the part of the owner, for injuries resulting from the owner's negligence in failing to make or keep the premises in a safe condition. Ramey v. Pritchett, 90 Ga. App. 745, 84 S.E.2d 305 (1954).

Nursing home residents. — Because of the special relationship existing between a nursing home and its residents, the residents must generally be considered invitees of the home. Accordingly, as to such residents, the nursing home has a duty to exercise ordinary care in keeping its premises safe. Pye v. Taylor & Bird, Inc., 216 Ga. App. 814, 456 S.E.2d 63 (1995).

Rape by hospital nurse. — In a patient's suit against a hospital arising out of her rape by a male nurse, summary judgment was proper on the patient's negligent hiring claim, but her negligent retention and premises liability claims were supported by evidence of past sexual assaults at the hospital, including one incident of inappropriate touching by the male nurse. Little-Thomas v. Select Specialty Hospital-Augusta, Inc., 333 Ga. App. 362, 773 S.E.2d 480 (2015).

Boat dock. — Since the plaintiff tenant was an invitee on facilities provided by the defendant landlord as a means of egress and ingress between the shore and the tenant's rented dock slip, and since it appeared that the plaintiff was injured because in the course of repairs and renovations of the docks the defendant lined up a main floating dock with an auxiliary catwalk, leaving a space between the two, at a point where there had previously been an apron rounding out the angle of two intersecting dock areas, and had also disconnected the lights from this portion of the dock so that persons walking on the area at night would not be on notice of any difference between the structures, the facts set out presented a jury question as to negligence on the part of the defendant in failing to close or warn patrons against the hole between the dock section and catwalk at the point where the apron or flare between the intersecting dock sections had previously been located. Kreiss v. Allatoona Landing, Inc., 108 Ga. App. 427, 133 S.E.2d 602 (1963).

Employee of express company. — An employee of an express company who entered the premises for the purpose of removing certain goods for the defendant is an invited person within the terms of this section. Southern Paramount Pictures Co. v. Gaulding, 24 Ga. App. 478, 101 S.E. 311 (1919).

After a fast-food restaurant cashier struck a customer, then got into a fight with the customer, the customer's premises liability claim against the restaurant failed; the restaurant did not have knowledge that the cashier would engage in such conduct because the cashier had indicated in a job application that the cashier had not been convicted of a felony, and during the three months that the cashier worked at the restaurant prior to the altercation, there was no evidence that the cashier ever argued with, much less struck, customers. Dowdell v. Krystal Co., 291 Ga. App. 469, 662 S.E.2d 150 (2008), cert. denied, 2008 Ga. LEXIS 787 (Ga. 2008).

Grocery store. — The evidence failed to eliminate a factual issue as to whether grocery store exercised reasonable care in inspecting the property to make the property safe for the store's invitees; before the victim fell in spilled oil, the store manager became aware of the inadequacy of the manager's previous efforts to clean up all of the substance spilled by some children earlier in the evening, thereby creating a duty to reinspect the premises, and grocery store was unable to show that such a re-inspection occurred, further, the store manager's response to the discovery of the first spill reported by victim's family provided some assurance that the floor was clean when the family resumed their shopping; under these circumstances, victim cannot be said to have had equal or superior knowledge of the hazard as a matter of law, and the trial court erred in granting summary judgment for store. Burke v. Bi-Lo, Inc., 212 Ga. App. 115, 441 S.E.2d 429 (1994).

Owner of a grocery store was erroneously granted summary judgment in a negligence suit by a store patron who slipped on a grape and fell, as the testimony regarding the manager's unobstructed view of the area where the fall occurred, the manager's admission that the manager could have seen the grape, and the evidence that the manager and two other employees were in the immediate vicinity and could easily have removed the hazard had they seen it, all revealed that there was a genuine issue of material fact as to whether the store owner had constructive knowledge of the dangerous condition. Dix v. Kroger Co., 257 Ga. App. 19, 570 S.E.2d 89 (2002).

"Final approach" to employer's property. — At the very least, the last 10 to 15 yards of a road leading to a company's property, which included a railroad crossing where a car was struck by a train, constituted a final approach to that property; the evidence indicated that the company treated the road as an extension of its own property or as the functional equivalent of a private driveway. Combs v. Atlanta Auto Auction, Inc., 287 Ga. App. 9, 650 S.E.2d 709 (2007), cert. denied, 2008 Ga. LEXIS 156 (Ga. 2008).

Fairgrounds. — One who, by contract or otherwise, controls the operation of a fair and of the premises, invites the public to attend, and receives a percentage of the profits cannot avoid liability for a patron's injury resulting from defective amusement apparatus or devices on the grounds that the concessionaire in control of those devices is an independent contractor. Hayes v. Century 21 Shows, Inc., 116 Ga. App. 490, 157 S.E.2d 779 (1967).

Hospital gurneys. — Since a sheet-draped gurney cannot be considered either a "defect" or an "unusual" obstruction in a hospital facility, the mere fact that the gurney upon which the plaintiff's spouse lay happened to be sheet-draped would not serve to relieve the plaintiff of the plaintiff's duty to maintain a lookout ahead so as to discover and avoid a possibly injurious contact with the wheels of the gurney. Meriwether Mem. Hosp. Auth. v. Gresham, 202 Ga. App. 535, 414 S.E.2d 694, cert. denied, 202 Ga. App. 906, 414 S.E.2d 694 (1992).

Right of firefighter to go upon premises to extinguish fire is based on permission not invitation even if the owner or occupier turns in the alarm. London Iron & Metal Co. v. Abney, 245 Ga. 759, 267 S.E.2d 214 (1980).

Police officer does not enter premises by implied invitation. — The single circumstance of a plaintiff's being a police officer acting in the course of the officer's official duty has been held traditionally not to imply an assurance that the premises have been prepared and made safe for the particular visit and thus not to sustain a finding of implied invitation. London Iron & Metal Co. v. Abney, 245 Ga. 759, 267 S.E.2d 214 (1980).

Manhole. — It is immaterial, in a tort action who removed a manhole cover from premises under the defendant's control, if the defendant, in the exercise of ordinary care, should have discovered that it had been removed and should have either replaced it or placed barricades or warning lights around. Harvill v. Swift & Co., 102 Ga. App. 543, 117 S.E.2d 202 (1960).

Churches. — In a wrongful death action against a church as a premises owner, because the decedent's spouse, as administrator of the estate, failed to raise a material fact question of the church's liability for allowing its parishioners to park on the side of the roadway, and thus, obstruct the decedent's view of the adjacent intersection, causing the decedent to collide with an oncoming northbound vehicle, the church was properly granted summary judgment. Gay v. Redland Baptist Church, 288 Ga. App. 28, 653 S.E.2d 779 (2007).

Private property owners could forbid the possession of a weapon on the owners' premises as property law, tort law, and criminal law, such as that later codified in O.C.G.A. §§ 16-7-21(b)(3), 51-3-1, 51-3-2, 51-9-1, provided the canvas on which the Second Amendment was drafted and illustrated that the basis of the Second Amendment did not include protection for a right to carry a firearm in a place of worship against the church owner's wishes. GeorgiaCarry.Org, Inc v. Georgia, 687 F.3d 1244 (11th Cir. 2012).

Parking lots. — When a minor plaintiff, an invitee at a public parking lot,

Miscellaneous (Cont'd)

whose parent had paid consideration for parking, and had parked where directed by the person in charge of the parking lot, was injured by falling into a ten-foot pit behind the parking place, the defendant owner, who had filled up the lot level with the top of the pit, thus creating the dangerous instrumentality, and maintained it without guardrails or lights to prevent the patrons of the lot from falling into the pit or ditch, was liable under this section. Gray v. Watson, 54 Ga. App. 885, 189 S.E. 616 (1936).

When the facts pled show that the plaintiff, an invitee, did not see the "gully" on the parking lot of the defendant into which the plaintiff stepped and was injured, not because the plaintiff was not looking where the plaintiff was going, but because the formation of the "gully" was such that the shades and shadows of the vari-colored areas of that lot, at and about the gully, presented an optical illusion, the court cannot say, as a matter of law, that the ocular illusion while approaching the plaintiff's car for the purpose of entering therein on that part of the parking lot in question, was not or could not have been so presented to the plaintiff, and such question is for the jury. Smith v. Swann, 73 Ga. App. 144, 35 S.E.2d 787 (1945).

Owners of premises whereon the public is invited to come are not required to keep their parking lots and other such areas free from irregularities and trifling defects. Associated Distribs., Inc. v. Canup, 115 Ga. App. 152, 154 S.E.2d 32 (1967).

In order for the invitee to recover for injuries sustained when the invitee slipped and fell in the owner's parking lot, two elements must exist: (1) fault on the part of the owner; and (2) ignorance of the danger on the part of the invitee. Pound v. Augusta Nat'l, Inc., 158 Ga. App. 166, 279 S.E.2d 342 (1981).

Absent evidence that the owner reasonably inspected the parking lot for defects and that the ice formation was a new defect of which the owner had no notice or sufficient time to correct, it could not be said as a matter of law that complied with duty to business invitees to keep the premises safe. Kauffman v. Eastern Food & Gas, Inc., 246 Ga. App. 103, 539 S.E.2d 599 (2000).

City had actual notice of design defect in landfill for summary judgment purposes when an injured party's expert averred: (1) that there was an elevation difference of between eight and 10 feet between the working surface and the grade elevation near the bottom of a dumpster; (2) that cover plates installed over the opening did not continue along the full length of the dumpster and left a corner unprotected; and (3) that there were no visual markings to warn of the fall hazard. Barton v. City of Rome, 271 Ga. App. 858, 610 S.E.2d 566 (2005).

Naturally occurring ice. — The accumulation of naturally occurring ice does not negate an owner's duty to exercise ordinary care in inspecting the premises in every circumstance. Dumas v. Tripps of N.C., Inc., 229 Ga. App. 814, 495 S.E.2d 129 (1998).

When the plaintiff alleged that the plaintiff had slipped on ice in a parking lot, the trial court properly refused to give the plaintiff's proposed jury instruction as to an accumulation of naturally occurring ice; both the charge requested and the charge given covered a proprietor's duty to exercise ordinary care, including the duty to inspect the premises for dangerous conditions. Fowler Props. v. Dowland, 282 Ga. 76, 646 S.E.2d 197 (2007).

Trees. — Defendant was held to a standard of reasonable care in inspecting trees on its property to ensure safety. Wesleyan College v. Weber, 238 Ga. App. 90, 517 S.E.2d 813 (1999).

The jury was authorized to find that a four foot rotten cavity in a tree trunk had existed for such a period of time that the defendant property owner, in the exercise of ordinary care, should have discovered and removed this hazard to users of the street. Wesleyan College v. Weber, 238 Ga. App. 90, 517 S.E.2d 813 (1999).

Evidence of a prior substantially similar incident is admissible to show the existence of a dangerous condition and knowledge of that condition so long as the prior incident was sufficient to attract the owner's attention to the alleged dangerous condition which resulted in the litigated incident. McCoy v. Gay, 165 Ga.

App. 590, 302 S.E.2d 130 (1983).

Prior crimes at different location on defendant's premises. — Proof of two prior crimes at a location on the defendant's premises other than the asserted "dangerous" parking lot in which the plaintiff was assaulted had no relevancy or probative value with regard to the defendant's knowledge of that "dangerous condition." McCoy v. Gay, 165 Ga. App. 590, 302 S.E.2d 130 (1983); Nalle v. Quality Inn, Inc., 183 Ga. App. 119, 358 S.E.2d 281 (1987).

Receiver may be liable in official capacity for damage or injury resulting from lack of ordinary care in the maintenance of property, placed in the receiver by order of the court, to invitees injured thereby. Becknell v. McConnell, 142 Ga. App. 567, 236 S.E.2d 546 (1977).

Rest stop facilities. — Petition alleging that the defendant rest stop owed to the decedent bus passenger the duty of maintaining its premises and the approaches thereto in a reasonably safe condition, that this was a regular bus rest stop and the buses that necessarily stopped there had to be parked on a steep incline and in order for buses to remain safely parked at this place, it was necessary that "scotch" blocks be placed under the wheels of the bus, it having been furnished with and accepted such blocks for that express purpose, and that the defendant, with knowledge that the bus had stopped in front of the rest station, had failed in the performance of its duty in the above regard, resulting in the death of the decedent, set out facts tending to show that the defendant was liable to the plaintiffs. Scoggins v. Peggy Ann of Ga., Inc., 87 Ga. App. 19, 73 S.E.2d 79 (1952).

Truck stops. — In a slip and fall case based on an injured party's fall in a truck stop's shower, the truck stop owner was not entitled to summary judgment because its admitted lack of a regular inspection procedure created a genuine issue of material fact as to whether it had constructive knowledge of the condition which caused the injured party to fall, and it was not shown that the injured party failed to exercise care for the party's own safety, as the party removed two used bars of soap from the shower floor. Pylant v. Samuels Inc., 262 Ga. App. 358, 585 S.E.2d 696 (2003).

Billboard repair. — Being lifted by a forklift holding a makeshift platform not fixed to the forks entailed an open and obvious risk that the platform could move up, down, or sideways, causing the people on the platform to lose their balance without having a means to recover; because after two nights using the forklift and platform in this condition, an injured person was aware of and appreciated both actually and subjectively the risk of injury by falling, and freely and voluntarily chose to be lifted this way to work on a billboard, the trial court correctly granted summary judgment on the injured person's suit based on the theories of O.C.G.A. §§ 51-1-2 and 51-3-1. Sones v. Real Estate Dev. Group, Inc., 270 Ga. App. 507, 606 S.E.2d 687 (2004).

As a student in defendant's riding school, the plaintiff was an invitee on the defendant's premises and thus within the class of persons to whom the duty established by this section was owed by the defendant. Mitchell v. Gay, 111 Ga. App. 867, 143 S.E.2d 568 (1965).

Utilities. — A person having the right to use the land upon which an electric company has an easement, over which high-tension lines are built, is not a trespasser as to such company merely because the person sits upon the concrete base of the steel tower and touches the tower with the person's hand, such conduct not being inconsistent with the electric company's use of the easement and not being in itself unreasonable or unusual. Leonard v. Georgia Power Co., 58 Ga. App. 130, 197 S.E. 869 (1938), aff'd, 187 Ga. 608, 1 S.E.2d 579 (1939).

An electric company is bound to know that persons are likely to sit down on concrete bases supporting steel towers carrying high-tension wires, and to touch the steel towers, and it is liable for injuries due to its negligence in failing to exercise the degree of care commensurate with the danger attendant upon its failure to erect and maintain the lines so as not to cause injury to persons coming in contact with them. Leonard v. Georgia Power Co., 58 Ga. App. 130, 197 S.E. 869 (1938), aff'd, 187 Ga. 608, 1 S.E.2d 579 (1939).

Miscellaneous (Cont'd)

Electricity provided to appliances. — When wiring or other electrical appliances on private premises are owned and controlled by owner or occupant of premises, company which merely furnishes electricity is not liable for injuries caused by their defective condition, to the owner or occupant, or to third persons on the premises, except that the rule thus stated seems to be properly qualified to the extent that, whenever current is supplied with actual knowledge on the part of one supplying it of the defective and dangerous condition of one's customer's appliances, one will be charged with liability for injuries occasioned by supplying current for use on such defective wires or appliances. Hatcher v. Georgia Power Co., 40 Ga. App. 830, 151 S.E. 696 (1930).

Third-party criminal acts. — Landlord was not liable for injuries to a tenant who was shot while sitting on a bench outside the apartment building because the tenant was aware that it was dangerous to sit on the bench at night and that prior shootings had occurred on the block and, thus, the tenant's knowledge of the danger was at least equal to that of the landlord. Johnson v. Atlanta Hous. Auth., 243 Ga. App. 157, 532 S.E.2d 701 (2000).

Theater, as a premises owner, did not breach its duty to the injured party, as an invitee, to exercise ordinary care in keeping its premises and approaches safe, since the injured party's injuries were not caused by any nonfeasance or malfeasance on the theater's part, but upon the injured party's voluntary act of confronting a loud patron, appreciating the danger in doing so. Fernandez v. Ga. Theatre Co. II, 261 Ga. App. 892, 583 S.E.2d 926 (2003).

When a couple brought suit against a grocery store and the owner of a shopping center after one spouse was assaulted in the center's parking lot, summary judgment was properly granted for the store and the owner. The couple had failed to bring forward any evidence of a substantially similar crime that took place before the attack and thus had not shown that the attack was reasonably foreseeable. Drayton v. Kroger Co., 297 Ga. App. 484, 677 S.E.2d 316 (2009).

Meter reader is invitee when entering house in course of employment. — A meter reader of the Georgia Power Company in performing the reader's duties and going on the premises of persons to whom the reader's employer furnishes electric current to read the meters is an invitee of the owner of the premises in so doing. Sheffield Co. v. Phillips, 69 Ga. App. 41, 24 S.E.2d 834 (1943).

Floor mats can constitute hazards for which landowners may be liable. Whatley v. National Servs. Indus., Inc., 228 Ga. App. 602, 492 S.E.2d 343 (1997).

In a dog bite case, whether the cause of action is based on the premises liability statute or the dangerous animal liability statute, the plaintiffs were required to produce evidence of the vicious propensity of the dog in order to show the dangerous condition of which the premises owner had superior knowledge. Wade v. American Nat'l Ins. Co., 246 Ga. App. 458, 540 S.E.2d 671 (2000).

Trial court erred in denying an animal care clinic's motion for summary judgment in a guest's action to recover damages for injuries the guest sustained when a dog bit the guest because the guest failed to produce any evidence of the dog's vicious or dangerous propensity pursuant to O.C.G.A. §§ 51-2-7 and 51-3-1; the dog had never bitten or harmed anyone before the incident with the guest. Abundant Animal Care, LLC v. Gray, 316 Ga. App. 193, 728 S.E.2d 822 (2012).

Trial court did not err in granting a dog owner summary judgment in a nurse's action under the premises liability statute, O.C.G.A. § 51-3-1, to recover for injuries the nurse sustained when the dog bit the nurse while the nurse was at the owner's home because the nurse pointed to no evidence giving rise to a genuine issue of material fact on the dog's vicious propensity and the owner's knowledge thereof. Stennette v. Miller, 316 Ga. App. 425, 729 S.E.2d 559 (2012).

Prerequisite to recovery in dog bite case. — In a wrongful death action based on the death of an infant caused by a dog, the dog owner was entitled to summary judgment on the parents' claim for premises liability under O.C.G.A. § 51-3-1

since the parents failed to present evidence that the animal demonstrated dangerous propensities. Harper v. Robinson, 263 Ga. App. 727, 589 S.E.2d 295 (2003).

Condominium association's duty to its members only pursuant to O.C.G.A. § 51-3-1 with regard to the common elements of a condominium property may be circumscribed by the terms of the condominium instruments or contract, and a court must look to the terms of the contract, as well as O.C.G.A. § 44-3-70 et seq., in order to determine an association's duties, and in that regard, it is the paramount public policy of Georgia that courts will not lightly interfere with the freedom of parties to contract as a contracting party may waive or renounce that which the law has established in his or her favor, when it does not thereby injure others or affect the public interest. Bradford Square Condo. Ass'n v. Miller, 258 Ga. App. 240, 573 S.E.2d 405 (2002).

In a personal injury action against a community owners' association arising out of an injury to an owner in a common area of the community, a trial court did not err in construing a restrictive covenant to relieve the association of its duty to inspect the common area and maintain it in a safe condition under O.C.G.A. § 51-3-1; by providing that owners would use common areas at their own risk and peril, the covenant indicated an intention not merely to create a duty parallel to that ordinarily born by a landowner, but to shift the duty entirely to owners using the common area. Hayes v. Lakeside Vill. Owners Ass'n, 282 Ga. App. 866, 640 S.E.2d 373 (2006).

Patient visiting doctor's office. — Summary judgment was properly granted against an injured party, who testified to previously visiting a doctor's office and successfully crossing over protruding tree roots with little or no problem since the patient failed to prove that the doctor had more than an equal knowledge of the hazardous condition; thus, the doctor had no duty to warn. Pye v. Reagin, 262 Ga. App. 490, 586 S.E.2d 5 (2003).

Night depository at bank. — In a wrongful death suit based on the murder of a bank customer who was trying to use a night depository, summary judgment was properly entered for the bank. Although a previous late-night attempt to break into the bank's automated teller machine was at least marginally sufficient to put the bank on notice of the possibility of a criminal attack upon a bank customer at night in the same place, the decedent had knowledge that was equal to the bank's of the danger that was presented by the night depository's location in a secluded, poorly lit area. Norby v. Heritage Bank, 284 Ga. App. 360, 644 S.E.2d 185 (2007), cert. denied, 2007 Ga. LEXIS 553 (Ga. 2007).

RESEARCH REFERENCES

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Am. Jur. Proof of Facts. — Liability of an Owner or Operator of a Self-Service Filling Station for Injury or Death of a Business Invitee on the Premises, 46 POF3d 161.

C.J.S. — 65 C.J.S., Negligence, § 63 et seq.

ALR. — Liability for injury to person in street by fall of part of structure of completed building, 7 ALR 204; 138 ALR 1078.

Right to eject customer from store, 9 ALR 379; 33 ALR 421.

Liability of owner to licensee or invitee for conditions on premises recently vacated by tenant, 10 ALR 244.

Effect of verbal abuse to change one's status from licensee or invitee to trespasser, 12 ALR 254.

Liability of owner of premises for injury to person or property from debris in street due to fire, 14 ALR 224.

Duty of owner to licensee as to changing condition of premises, 20 ALR 202.

Duty and liability of owner or keeper of place of amusement respecting injuries to patrons, 22 ALR 610; 29 ALR 29; 38 ALR 357; 44 ALR 203; 53 ALR 855; 61 ALR 1289; 98 ALR 557.

Right of one injured while stopping or loitering in street, 24 ALR 766.

Liability of municipal corporations for injuries due to conditions in parks, 29 ALR 863; 42 ALR 263; 99 ALR 686; 142 ALR 1340.

Liability of abutting owner for injury from electrically charged object near sidewalk or highway, 30 ALR 1240.

Landlord's liability to one injured while using, for a purpose for which it was not intended, property remaining in the former's control, 30 ALR 1390; 49 ALR 564; 12 ALR2d 217.

Duty and liability respecting condition of store or shop, 33 ALR 181; 43 ALR 866; 46 ALR 1111; 58 ALR 136; 100 ALR 710; 162 ALR 949.

Liability for personal injury by barbed wire, 36 ALR 545.

Responsibility of owner or occupant of abutting property for injury due to ice or snow on sidewalk as affected by his practice of removing it, 41 ALR 266.

Special injury to property interest as condition of right to enjoin diversion of dedicated property, 41 ALR 1410.

Liability for injury to person on business premises, in consequence of passing through wrong doorway, 42 ALR 1098.

Liability of owner of office building or tenement house for loss of or damage to property of tenant due to dishonesty or negligence of owner's employee, 42 ALR 1335.

Liability of operator of logging road or other private railroad for injury to person on track, 46 ALR 1076.

Landlord's responsibility for injury to stranger due to tenant's negligence as to doors, guards, etc., provided by former, but in tenant's possession and control, 47 ALR 846.

Liability to trespasser or bare licensee as affected by distinction between active and passive negligence, 49 ALR 778; 156 ALR 1226.

Liability for conditions in space between lot lines and sidewalk actually within limits of street, but apparently part of the abutting property, 56 ALR 220.

Liability for injury to elevator passenger as affected by the fact that sides of car are open and unprotected, 57 ALR 259.

Use of space within lot lines, as part of public sidewalk as affecting owner's responsibility for its condition, 58 ALR 1042.

Duty toward invitee as regards explosives, 60 ALR 1069.

Liability for injury by stepping or falling into opening in sidewalk while doors were open or cover off, 70 ALR 1358.

Landlord's liability for injuries to strangers outside premises as affected by covenant to repair or reservation of right to enter to make repairs, 89 ALR 480.

Duty and liability of carrier toward one accompanying departing passenger or present to meet incoming one, with respect to conditions at or about station, 92 ALR 614.

Liability of owner or occupant of premises for injury to person thereon by dog not owned or harbored by former, 92 ALR 732.

Liability of one exercising the rights of an owner of realty for injuries due to its condition, as affected by want of legal title, 96 ALR 1068; 130 ALR 1525.

Effect of notice on ticket for amusement device to limit liability of proprietor for injury to patron, 97 ALR 582.

Duty to guard against danger to children by electric wires, 100 ALR 621.

"Safe place" statutes as applicable to municipalities or other public bodies when engaged in performing a governmental function, 114 ALR 428.

Duty to guard against operation of elevator by unauthorized person, 117 ALR 989.

Liability of owner or occupier of premises other than store or shop for personal injury to another due to slippery condition of floor, 118 ALR 425.

Liability of owner or occupant of premises for injury to one who falls over obstructions placed to protect lawn, 129 ALR 740.

Violation of statute or ordinance regarding safety of building or premises as creating or affecting liability for injuries or death, 132 ALR 863.

Liability for death or injury on or near golf course, 138 ALR 541; 82 ALR2d 1183.

Duty and liability as regards lighting conditions in theater, 143 ALR 61.

Responsibility of operator of place of amusement for negligence of concessionaire or the latter's employees, 145 ALR 962.

Duty of owner or occupier of premises to persons thereon upon invitation of, or otherwise in connection with, licensee, 146 ALR 651.

Standing railroad car or streetcar and appliances as attractive nuisance, 152 ALR 1263.

Innkeeper's liability for injury to or death of child guest, or child who accompanies guest, 153 ALR 577.

Breach of lessor's agreement to repair as ground of liability for personal injury to tenant or one in privity with latter, 163 ALR 300; 78 ALR2d 1238.

Liability for injury in connection with automatic elevator, 6 ALR2d 391.

Liability of carrier for injuries to person boarding vehicle or ship for social or other purposes in connection with a passenger, 11 ALR2d 1075.

Liability of landlord to one using fire escape for other than intended purpose, 12 ALR2d 217.

Liability of barber, beauty shop or specialist, barber college, or school of beauty culture, for injury to patron, 14 ALR2d 860; 93 ALR3d 897.

Liability to patron of public amusement for accidental injury from cause other than assault, hazards of game or amusement, or condition of premises, 16 ALR2d 912.

Liability for injury resulting from swinging door, 16 ALR2d 1161.

Liability of owner or operator of park or other premises on which baseball or other game is played, for injuries by ball to person on nearby street, sidewalk, or premises, 16 ALR2d 1458.

Liability of proprietor for injury to customer or patron caused by pushing, crowding, etc., of other patrons, 20 ALR2d 8.

Liability for injury to customer or patron from defect in or fall of seat, 21 ALR2d 420.

Storekeeper's duty and liability to one passing through store to another destination, 23 ALR2d 1135.

Oil and gas tanks, pipes and pipelines, and apparatus and accessories thereof as constituting attractive nuisance, 23 ALR2d 1157.

Applicability of res ipsa loquitur doctrine to fall of object or substance from ceiling of place of public resort, 24 ALR2d 643.

Landlord's liability for injury or death due to defects in exterior stairs, passageways, areas, or structures used in common by tenants, 26 ALR2d 468; 65 ALR3d 14; 68 ALR3d 382.

Seller's or manufacturer's liability for injuries as affected by buyer's or user's allergy or unusual susceptibility to injury from article, 26 ALR2d 963.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 31 ALR2d 190.

Liability of owner or occupant for condition of covering over opening or vault in sidewalk, 31 ALR2d 1334.

Liability of motor carrier to passenger for injuries assertedly caused by failure to heat conveyance adequately, 33 ALR2d 1358.

Liability of owner or operator of auto race track for injury to patron, 37 ALR2d 391.

Liability for injury to or death of child from burns caused by hot ashes, cinders, or other hot waste material, 42 ALR2d 930.

Liability of storekeeper for injury of customer by another customer's use or handling of stock or equipment, 42 ALR2d 1103.

Liability of builder or owner of building under construction for injuries received on premises by infant, 44 ALR2d 1253.

Child accompanying business visitor to store, shop, or the like as invitee or licensee, 44 ALR2d 1319.

Liability of landowner for injury or death of child caused by cut or puncture from broken glass or other sharp object, 47 ALR2d 1048.

Liability of private owner or operator of bathing resort or swimming pool for injury or death of patron, 48 ALR2d 104.

Liability of owner or operator of theater or other place of amusement for injury to patron using stairway or steps, 55 ALR2d 866.

Liability of innkeeper to guest injured while using ramp or similar inclined surface, 58 ALR2d 1173.

Liability of innkeeper for injury to guest using steps or stairs, 58 ALR2d 1178.

Duty and liability of an innkeeper to visitor or caller of registered guest, 58 ALR2d 1201.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of litter or debris on floor, 61 ALR2d 6.

Liability of proprietor of store, office, or

similar business premises for injury from fall due to presence of obstacle placed or dropped on floor, 61 ALR2d 110.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of litter or debris on stairway, 61 ALR2d 174.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of obstacle placed or dropped on steps, 61 ALR2d 205.

Liability of proprietor of store, office, or similar business premises for injury from fall on floor made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 ALR2d 6.

Liability of proprietor of store, office, or similar business premises for injury from fall on steps made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 ALR2d 131.

Independent contractor's or subcontractor's liability for injury or death of third person occurring during excavation work not in street or highway, 62 ALR2d 1052.

Liability of proprietor of store, office, or similar business premises for fall on floor made slippery by waxing or oiling, 63 ALR2d 591.

Liability of proprietor of store, office, or similar business premises for fall on floor made slippery by washing or cleaning, 63 ALR2d 694.

Liability of proprietor of store, office, or similar business premises for injury from fall due to defect in floor or floor covering, 64 ALR2d 335.

Liability of proprietor of store, office, or similar business premises for injury from fall due to defect in stairway, 64 ALR2d 398.

Liability of proprietor of store, office, or similar business premises for fall on steps slippery by nature or through wear, 64 ALR2d 471.

Liability of contractor or owner of building being demolished for injuries to infant on premises, 64 ALR2d 972.

Liability of proprietor of store, office, or similar business premises for injury from fall on ramp or inclined floor, 65 ALR2d 420.

Liability of proprietor of store, office or similar business premises for injury from fall on stepdown or other one-step change in floor level, 65 ALR2d 471.

Liability of owner or operator to adult trespasser in or on motor vehicle or equipment, 65 ALR2d 798.

Liability of proprietor of store, office, or similar business premises for injury from fall down open stairway, or into trap door or similar floor-level opening, 66 ALR2d 331.

Liability of proprietor of store, office, or similar business premises for fall due to improper lighting of steps or stairway, 66 ALR2d 443.

Liability of municipality for torts in connection with airport, 66 ALR2d 634.

Liability to patron of scenic railway, roller coaster, or miniature railway, 66 ALR2d 689.

Liability of private owner or operator of picnic ground for injury or death of patron, 67 ALR2d 965.

Liability of owner, occupant, or operator of premises or machinery or equipment for injury or death resulting from contact of crane, derrick, or other movable machine with electric line, 69 ALR2d 160; 14 ALR4th 913.

Amusements: liability for injury from slide or chute, 69 ALR2d 1067.

Innkeeper's liability for injury to guest using exterior passageways or walks, 69 ALR2d 1107.

Liability of innkeeper, restauranteur, or tavern keeper or injury occurring on or about premises to guest or patron by person other than proprietor or his servant, 70 ALR2d 628.

Hospital's liability to visitor injured as result of condition of exterior walks, steps, or grounds, 71 ALR2d 427.

Hospital's liability to visitor injured by slippery, obstructed, or defective interior floors or steps, 71 ALR2d 436.

Liability of innkeeper for injury by object thrown or falling because of conduct of guest, 74 ALR2d 1241.

Liability for injury to one on or near merry-go-round, 75 ALR2d 792.

Duty owed to, and status of, social guest of employee on employer's business premises, 78 ALR2d 107.

Liability for injury or death due to physical condition of church premises, 80 ALR2d 806.

Liability of proprietor of business premises for injury from fall on exterior walk,

ramp, or passageway connected with the building in which the business is conducted, 81 ALR2d 750.

Liability for injury to person in street by glass falling from window, door, or wall, 81 ALR2d 897.

Liability of private promoter or operator of public fireworks exhibition or display for personal injury, death, or property damage, 81 ALR2d 1207.

Liability for injury or death on or near golf course, 82 ALR2d 1183.

Liability for injury from overhead door, 83 ALR2d 743.

Liability of strip or other surface mine or quarry operator to person, other than employee, injured or killed during mining operations, 84 ALR2d 733.

Liability of owner, lessee, or operator for injury or death on or near loop-o-plane, Ferris wheel, miniature car, or similar rides, 86 ALR2d 350.

Landlord's liability for personal injury or death of tenant or his privies from heating system or equipment, 86 ALR2d 791.

Landlord's liability for personal injury or death of tenant or privies from electrical system or equipment, 86 ALR2d 838.

Liability of consignee for personal injury or death of one other than his employee in connection with carrier unloading operations, 86 ALR2d 1399.

Liability of abutting owner or occupant for condition of sidewalk, 88 ALR2d 331.

Liability of owner or operator of theater or other place of amusement to patron injured by condition of or defect in lavatory, restroom, or toilet facilities, 88 ALR2d 1090.

Liability to spectator at basketball game injured as result of hazards of game, 89 ALR2d 1163.

Liability of proprietor of store, office, or similar business premises for injury sustained when customer or patron strikes head (or other portion of body) on overhead beam or similar overhead structure or projection, 90 ALR2d 329.

Liability of proprietor of bowling alley for injury to patron, 92 ALR2d 1074.

Duty of proprietor toward visitor upon premises on private business with or errand or work for employee, 94 ALR2d 6.

Liability of operator of skiing, tobogganing, or bobsledding facilities for injury to patron or participant, 94 ALR2d 1431; 95 ALR3d 203.

"Economic benefit" or "public invitation" as test of licensee-invitee status, 95 ALR2d 992.

Liability of owner or operator of shopping center to patrons for injuries from defects or conditions in sidewalks, walks, or pedestrian passageways, 95 ALR2d 1341.

Liability of owner or occupant of building for personal injury or death of person in street resulting from objects falling or thrown from building interior, 97 ALR2d 1431.

Railroad's liability for injury or death of one other than employee because of alleged unsafe or defective condition of its own freight car which he was loading or unloading, 99 ALR2d 176.

Liability of hotel, motel, summer resort, or private membership club or association operating swimming pool, for injury or death of guest or member, or of member's guest, 1 ALR3d 963.

Liability to prospective tenant or purchaser for injury resulting from condition of premises, 3 ALR3d 976.

Liability of owner or operator of interior parking facility for bodily injury to nonemployees on premises, 4 ALR3d 938.

Liability of owner or operator of garage or gasoline filling station for bodily injury to nonemployees on premises, 8 ALR3d 6.

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron, 8 ALR3d 1393.

Liability of owner or operator of trampoline center for injury to or death of spectator or patron, 8 ALR3d 1427.

Private person's duty and liability for failure to protect another against criminal attack by third person, 10 ALR3d 619.

Liability of owner or operator of funeral home for injury sustained by patron or invitee due to condition of premises, 14 ALR3d 629.

Liability for injury to one attending wrestling or boxing match or exhibition, 14 ALR3d 993.

Liability for injury to one attending hockey game or exhibition, 14 ALR3d 1018.

Liability of social club for injury to or death of nonmember, 15 ALR3d 1013.

Liability for injury to patron of billiard or poolroom, 15 ALR3d 1420.

Hospital's liability to patient or prospective patient injured as result of physical condition of premises, 16 ALR3d 1237.

Landlord's liability to tenant's business patron injured as a result of defective condition of premises, 17 ALR3d 422.

What constitutes "public" use affecting landlord's liability to tenant's invitees for defects in leased premises, 17 ALR3d 873.

Abutting owner's liability for injury from ice formed on sidewalk by discharge of precipitation due to artificial conditions on premises, 18 ALR3d 428.

Liability, for injury to patron, of owner or operator of retail store failing to provide carryout service, 21 ALR3d 931.

Liability of owner or occupant of premises for injuries sustained by mail carrier, 21 ALR3d 1099.

Premises liability: proceeding in the dark as contributory negligence, 22 ALR3d 286.

Premises liability: proceeding in the dark along outside path or walkway as contributory negligence, 22 ALR3d 599.

Premises liability: proceeding in the dark on outside steps or stairs as contributory negligence, 23 ALR3d 365.

Premises liability: proceeding in the dark across exterior premises as contributory negligence, 23 ALR3d 441.

Premises liability insurance: coverage of injury sustained on or in connection with sidewalks or ways adjacent to certain named property, 23 ALR3d 1230.

Liability of owner or operator of self-service laundry for personal injury or damages to patron or frequenter of premises from defect in premises or appliances, 23 ALR3d 1246.

Liability of owner or operator for injury to patron of fair, carnival, or the like, from operation of sideshows, games, or similar concessions, 24 ALR3d 945.

Premises liability: proceeding in the dark on inside steps or stairs as contributory negligence, 25 ALR3d 446.

Liability of owner or operator of power lawnmower for injuries resulting to third person from its operation, 25 ALR3d 1314.

Telephone company's liability for injuries sustained by user of public telephone or telegraph as a result of condition of premises on which instrument was installed, 25 ALR3d 1432.

Liability of owner or operator of drive-in movie theater for injury or death to patron or frequenter, 26 ALR3d 1314.

Premises liability: proceeding in the dark across interior premises as contributory negligence, 28 ALR3d 605.

Liability of owner or occupant of premises to building or construction inspector coming upon premises in discharge of duty, 28 ALR3d 891.

Liability of owner or operator of premises for injury to meter reader or similar employee of public service corporation coming to premises in course of duties, 28 ALR3d 1344.

Status of injured adult as trespasser on land not owned by electricity supplier, as affecting its liability for injuries inflicted upon him by electric wires it maintains thereon, 30 ALR3d 777.

Liability of owner or operator of premises for injury to person coming to premises in course of delivery or pickup of merchandise or similar products, 32 ALR3d 9.

Tort liability of public schools and institutions of higher learning for accidents due to condition of buildings or equipment, 34 ALR3d 1166.

Modern status of the rule absolving a possessor of land of liability to those coming thereon for harm caused by dangerous physical conditions of which the injured party knew and realized the risk, 35 ALR3d 230.

Tort liability of private schools and institutions of higher learning for accidents due to condition of buildings, equipment, or outside premises, 35 ALR3d 975.

Premises liability: liability of owner or occupant to garbage or trash man coming on premises in course of duty, 36 ALR3d 610.

Hospital's liability to patient injured going to or using bathroom or toilet facilities, 36 ALR3d 1235.

Liability of physician or dentist for injury to patient from physical condition of office premises, 36 ALR3d 1341.

Liability of owner or operator of parking lot for personal injuries allegedly result-

ing from condition of premises, 38 ALR3d 10.

Liability of owner or operator of parking lot for personal injuries caused by movement of vehicles, 38 ALR3d 138.

Liability of dance hall proprietor or operator for injury to patron resulting from conditions of premises, 38 ALR3d 419.

Tort liability of private schools and institutions of higher learning for negligence of, or lack of supervision by, teachers and other employees or agents, 38 ALR3d 908.

Liability of operator of business premises to patron injured by condition of adjacent property, 39 ALR3d 579.

Liability of landlord for injury or death occasioned by swimming pool maintained for tenants, 39 ALR3d 824.

Liability of owner or operator of park for mobile homes or trailers for injuries caused by appliances or other instruments on premises, 41 ALR3d 324.

Liability of owner or operator of trailer camp or park for injury or death from condition of premises, 41 ALR3d 546.

Liability of owner or operator of automatic carwash facility for personal injury or property damage to nonemployees on premises, 41 ALR3d 690.

Liability of business establishments, places of accommodation or recreation, and the like, for injury or damage occurring on the premises caused by the accidental starting up of parked motor vehicle, 43 ALR3d 952.

Liability in connection with injury allegedly caused by defective condition of private road or driveway, 44 ALR3d 355.

Liability of owner or operator of drive-in restaurant for injury or death to patron, 45 ALR3d 1428.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises, 48 ALR3d 1027.

Liability of lessee of particular premises in shopping center for injury to patron from condition on portion of premises not included in his leasehold, 48 ALR3d 1163.

Liability of owner or operator of business premises for injuries to patron caused by insect or small animal, 48 ALR3d 1257.

Landlord's liability to tenant or tenant's invitees for injury or death due to ice or snow in areas or passageways used in common by tenants, 49 ALR3d 382.

Liability of owner or operator of store or similar place of business for injury to child climbing or playing on furniture, fixtures, displays, or the like, 50 ALR3d 1227.

Liability of bank for injuries sustained by customer in course of bank robbery, 51 ALR3d 711.

Liability for injuries from ice or snow on residential premises, 54 ALR3d 558.

Liability of abutting landowner for injury to municipal employee engaged in constructing or repairing sewers or drains, 58 ALR3d 1085.

Liability of innkeeper to guest for injury due to fire, 60 ALR3d 1217.

Liability of owner or operator for injury caused by door of automatic passenger elevator, 63 ALR3d 893.

Liability in action based upon negligence, for injury to or death of, person going upon cemetery premises, 63 ALR3d 1252.

Liability of landlord for personal injury or death due to inadequacy or lack of lighting on portion of premises used in common by tenants, 66 ALR3d 202.

Landlord's liability for personal injury or death due to defects in appliances supplied for use of different tenants, 66 ALR3d 374.

Landlord's liability for injury or death due to defects in exterior steps or stairs used in common by tenants, 67 ALR3d 490.

Landlord's liability for injury or death due to defects in interior steps or stairs used in common by tenants, 67 ALR3d 587.

Liability of storekeeper for death of or injury to customer in course of robbery, 72 ALR3d 1269.

Liability of owner or operator of theatre or other amusement to patron assaulted by another patron, 75 ALR3d 441.

Liability of swimming facility operator for injury to or death of diver allegedly resulting from hazardous condition in water, 85 ALR3d 750.

Liability of swimming facility operator for injury or death allegedly resulting from defects of diving board, slide, or other swimming pool equipment, 85 ALR3d 849.

Store or business premises slip-and-fall: modern status of rules requiring showing of notice of proprietor of transitory interior condition allegedly causing plaintiff's fall, 85 ALR3d 1000.

Liability of swimming facility operator for injury or death allegedly resulting from condition of deck, bathhouse, or other area in vicinity of water, 86 ALR3d 388.

Liability of swimming facility operator for injury to or death of swimmer allegedly resulting from hazardous condition in water, 86 ALR3d 1021.

Liability of operator of swimming facility for injury or death allegedly resulting from absence of or inadequacy of rescue equipment, 87 ALR3d 380.

Liability of swimming facility operator for injury or death allegedly caused by failure to adequately fence facility, 87 ALR3d 886.

Liability of operator or nonresidential swimming facility for injury or death allegedly resulting from failure to provide or exercise proper supervision, 87 ALR3d 1032.

Liability of swimming facility operator for injury or death inflicted by third person, 90 ALR3d 533.

Liability to spectator at baseball game who is hit by ball or injured as a result of other hazards of game, 91 ALR3d 24.

Liability of hotel or motel operator for injury or death resulting to guest from defects in furniture in room or suite, 91 ALR3d 483.

Liability for injuries in connection with revolving door on nonresidential premises, 93 ALR3d 132.

Liability of hotel or motel operator for injury or death of guest or privy resulting from condition in plumbing or bathroom of room or suite, 93 ALR3d 253.

Applicability of res ipsa loquitur doctrine in action for injury to patron of beauty salon, 93 ALR3d 897.

Liability for injuries in connection with allegedly dangerous or defective doormat on nonresidential premises, 94 ALR3d 389.

Liability of storekeeper to customer injured by shopping cart, baby stroller, or similar vehicle handled or controlled by another customer, 94 ALR3d 439.

Liability of owner or operator of boat livery for injury to patron, 94 ALR3d 876.

Liability for injuries in connection with ice or snow on nonresidential premises, 95 ALR3d 15.

Liability for injury on, or in connection with, escalator, 1 ALR4th 144.

Liability of urban redevelopment authority or other state or municipal agency or entity for injuries occurring in vacant or abandoned property owned by governmental entity, 7 ALR4th 1129.

Liability of owner or occupant of premises to fireman coming thereon in discharge of his duty, 11 ALR4th 597.

Liability of owner or occupant of premises for injury or death resulting from contact of crane, derrick, or other movable machine with electric line, 14 ALR4th 913.

Liability of theater owner or operator for injury to or death of patron resulting from lighting conditions on premises, 19 ALR4th 1110.

Liability of owner of store, office, or similar place of business to invitee falling on tracked-in water or snow, 20 ALR4th 438.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser, 22 ALR4th 294.

Liability of operator of grocery store to invitee slipping on spilled liquid or semiliquid substance, 24 ALR4th 696.

Liability of hotel or motel operator for injury to guest resulting from assault by third party, 28 ALR4th 80.

Liability of hotel or motel for guest's loss of money from room by theft or robbery committed by person other than defendant's servant, 28 ALR4th 120.

Liability of owner or occupant of premises to police officer coming thereon in discharge of officer's duty, 30 ALR4th 81.

Liability of dog owner for injuries sustained by person frightened by dog, 30 ALR4th 986.

Tavernkeeper's liability to patron for third person's assault, 43 ALR4th 281.

Parking facility proprietor's liability for criminal attack on patron, 49 ALR4th 1257.

Tennis club's liability for tennis player's injuries, 52 ALR4th 1253.

Liability to one struck by golf ball, 53 ALR4th 282.

Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 ALR4th 530.

Ski resort's liability for skier's injuries resulting from condition of ski run or slope, 55 ALR4th 632.

Baseball player's right to recover for baseball-related personal injuries from nonplayer, 55 ALR4th 664.

Duty and liability of subcontractor to employee of another contractor using equipment or apparatus of former, 55 ALR4th 725.

Liability for injury to customer or other invitee of retail store by falling of displayed, stored, or piled objects, 61 ALR4th 27.

Liability to one struck by golf club, 63 ALR4th 221.

Liability of proprietor of private gymnasium, reducing salon, or similar health club for injury to patron, 79 ALR4th 127.

Liability of cosmetology school for injury to patron, 81 ALR4th 444.

Landlord's liability to third person for injury resulting from attack off leased premises by dangerous or vicious animal kept by tenant, 89 ALR4th 374.

Duty of retail establishment, or its employees, to assist patron choking on food, 2 ALR5th 966.

Liability for personal injury or death allegedly caused by defect in church premises, 8 ALR5th 1.

Liability for injury or death from collision with guy wire, 8 ALR5th 177.

Admissibility of evidence of absence of other accidents or injuries at place where injury or damage occurred, 10 ALR5th 371.

Air carrier's liability for injury from condition of airport premises, 14 ALR5th 662.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party, 31 ALR5th 550.

Liability of owner or operator of skating rink for injury to patron, 38 ALR5th 107.

Liability for injury to customer from object projecting into aisle or passageway in store, 40 ALR5th 135.

Liability for injury to customer or patron from amusement device maintained by store or shopping center for use of customers, 40 ALR5th 807.

Liability of proprietor of store, business, or place of amusement, for injury to one using baby stroller, shopping cart, or the like, furnished by defendant, 42 ALR5th 159.

Landlord's liability for failure to protect tenant from criminal acts of third person, 43 ALR5th 207.

Liability of owner or operator of business premises for injuries from electrically operated door, 44 ALR5th 525.

Apportionment of liability between landowners and assailants for injuries to crime victims, 54 ALR5th 379.

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron, 54 ALR5th 513.

Liability of hotel, motel, resort, or private membership club or association operating swimming pool, for injury or death of member, 55 ALR5th 463.

Liability of owner or operator of self-service filling station for injury or death of patron, 60 ALR5th 379.

Liability of owner of private residential swimming pool for injury or death occasioned thereby, 64 ALR5th 1.

Liability of owner, operator, or other parties, for personal injuries allegedly resulting from snow or ice on premises of parking lot, 74 ALR5th 49.

Comparative negligence, contributory negligence, and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow, 83 ALR5th 589.

Liability of owner of store, office, or similar place of business to invitee falling on tracked-in water or snow, 123 ALR5th 1.

Liability of owner or operator of store or similar place of business for injury resulting from defective or dangerous shelves, displays, racks, counters, or the like, 1 ALR6th 297.

Liability for injury on or in connection with escalator, 63 ALR 6th 495.

51-3-2. Duty of owner of premises to licensee.

(a) A licensee is a person who:

(1) Is neither a customer, a servant, nor a trespasser;

(2) Does not stand in any contractual relation with the owner of the premises; and

(3) Is permitted, expressly or impliedly, to go on the premises merely for his own interests, convenience, or gratification.

(b) The owner of the premises is liable to a licensee only for willful or wanton injury. (Code 1933, § 105-402.)

History of Code section. — The language of this Code section is derived in part from the decision in Petree v. Davison-Paxon-Stokes Co., 30 Ga. App. 490, 118 S.E. 697 (1923).

Law reviews. — For article discussing origin and construction of Georgia provision concerning duty of landowner to licensees, see 14 Ga. L. Rev. 239 (1980). For article, "Changes in Liability Standards for Owners and Occupiers," see 20 Ga. St. B. J. 41 (1983). For annual survey of tort law, see 57 Mercer L. Rev. 363 (2005). For survey article on tort law, see 60 Mercer L. Rev. 375 (2008).

For note discussing Georgia's approach to social guests injured on the land of another, and advocating elevation of the expressly invited social guest to the status of invitee, see 6 Ga. St. B. J. 130 (1969).

For comment advocating revision of this section to distinguish between injuries caused by condition of the premises and those caused by landowner's affirmative acts, in light of Potts v. Amis, 62 Wash. 777, 384 P.2d 825 (1963), see 15 Mercer L. Rev. 523 (1964). For comment discussing motel owner's duty of care to infants, in light of Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966), see 18 Mercer L. Rev. 480 (1967). For comment on Nesmith v. Starr, 115 Ga. App. 473, 155 S.E.2d 24 (1967), see 4 Ga. St. B. J. 518 (1968). For comment on Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rep. 97, 443 P.2d 561, 32 A.L.R.3d 496 (1968), applying a reasonable man test to the host in a personal injury suit brought by a social guest, rather than classifying plaintiff's status, see 20 Mercer L. Rev. 338 (1969). For comment on Ryckeley v. Georgia Power Co., 122 Ga. App. 107, 176 S.E.2d 493 (1970), see 23 Mercer L. Rev. 431 (1972). For comment, "A New Beginning for the Attractive Nuisance Doctrine in Georgia," see 34 Mercer L. Rev. 433 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
Duty Owed to Children
1. In General
2. Attractive Nuisance Doctrine
Applicability to Specific Cases

General Consideration

Court of Appeals does not have jurisdiction to hold this section unconstitutional in order to abolish common-law categories of invitee, licensee and trespasser and substitute the standard of reasonable care on the part of the occupier of premises in view of the probability of harm to entrants. Meyberg v. Dodson, 136 Ga. App. 324, 221 S.E.2d 200 (1975).

Manifest purpose and intent of this

section is to deal with liability of an owner or occupier of land to licensees on account of willful and wanton neglect. Atlanta & W. Point R.R. v. Wise, 190 Ga. 254, 9 S.E.2d 63 (1940).

This section is plain and unambiguous. Anderson v. Cooper, 214 Ga. 164, 104 S.E.2d 90 (1958).

"Knowledge" of risk involved in particular condition implies that chance of harm and gravity of threatened harm are appreciated. Haag v. Stone, 127 Ga. App. 235, 193 S.E.2d 62 (1972).

Licensee is person who is neither customer, nor servant, nor trespasser, and does not stand in any contractual relation with the owner of the premises, and who is permitted expressly or impliedly to go thereon merely for one's own interest, convenience, or gratification. Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939).

License is inferred when object is mere pleasure or benefit of person using. Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975).

Known licensee. — After the presence of a licensee is known, exactly the same acts of caution may be required of the owner to satisfy the legal duty as would be necessary if the licensee were invited. Cooper v. Corporate Property Investors, 220 Ga. App. 889, 470 S.E.2d 689 (1996).

Whether person is invitee or licensee depends upon nature of relation or contact with owner of premises. If the relationship solely benefits the injured person, that person is at most a licensee. Frankel v. Antman, 157 Ga. App. 26, 276 S.E.2d 87 (1981).

General test as to whether person is invitee or licensee is whether the injured person at the time of the injury had present business relations with the owner of the premises which would render the person's presence of mutual aid to both, or whether the person's presence on the premises was for the person's own convenience, or on business with others than the owner of the premises. Cobb v. First Nat'l Bank, 58 Ga. App. 160, 198 S.E. 111 (1938); Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939); Pries v. Atlanta Enters., Inc., 66 Ga. App. 464, 17 S.E.2d 902 (1941); Brown v. Hall, 81 Ga. App. 874, 60 S.E.2d 414 (1950); Atkins v. Tri-Cities Steel, Inc., 166 Ga. App. 349, 304 S.E.2d 409 (1983); Burkhead v. American Legion, Post Number 51, Inc., 175 Ga. App. 56, 332 S.E.2d 311 (1985).

The determining question as to whether a visitor is an invitee by implication or a licensee is whether or not the owner or occupant of the premises will receive some benefit, real or supposed, or has some interest in the purpose of the visit. Anderson v. Cooper, 214 Ga. 164, 104 S.E.2d 90 (1958); Dawson v. American Heritage Life Ins. Co., 121 Ga. App. 266, 173 S.E.2d 424 (1970).

In determining what is necessary to elevate a person above the status of a licensee, the statutory definition is plain and unambiguous, and must be applied as a whole; so that even if the person "is neither a customer, nor a servant, nor a trespasser, and does not stand in any contractual relation with the owner of the premises" the person must also come within the test which follows, and not be a person who is permitted expressly or impliedly to go on the premises merely for the person's own interest, convenience, or gratification. Dawson v. American Heritage Life Ins. Co., 121 Ga. App. 266, 173 S.E.2d 424 (1970).

Whether a person is an invitee or a licensee depends upon the nature of the person's relation or contact with the owner (or tenant) of the premises. If the relation solely benefits the person injured, one is at most a licensee. If, on the other hand, the relation was of mutual interest to the parties, one is an invitee. Chatham v. Larkins, 134 Ga. App. 856, 216 S.E.2d 677 (1975).

Person is licensee when at time of injury the person's presence on the premises was for the person's own convenience, or on business with others than the owner of the premises. Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975).

When an accident victim and the victim's companions returned to a restaurant's parking lot, the victim's entry thereon after closing hours was evidence

General Consideration (Cont'd)

from which the jury could find the victim was a mere licensee, and the owners and occupiers of the premises owed the victim only the duty not to wilfully or wantonly injure the victim. Savage v. Flagler Co., 258 Ga. 335, 368 S.E.2d 504 (1988).

Mere permission to enter premises creates the relation of licensee; invitation, express or implied, is necessary to create the more responsible relation and the consequent higher duty upon the owner or proprietor. Atlanta & W.P.R.R. v. Hyde, 45 Ga. App. 548, 165 S.E. 466 (1932).

Summary judgment inappropriate when status unclear. — Summary judgment is unavailable to a landowner against a person who sustains injury on real property when questions of fact exist as the injured person's status while on the property as to any duty of the landowner arising therefrom with particular reference to the law as to the liability of owners of recreational areas. North v. Toco Hills, Inc., 160 Ga. App. 116, 286 S.E.2d 346 (1981).

When the plaintiff was manager of a restaurant adjacent to and leased from a motel, and when the plaintiff was in the motel lobby at the request of the desk clerk and was shot during a robbery of the motel, the plaintiff's status as an invitee or licensee was an issue of disputed material fact making denial of summary judgment motions by both parties appropriate. Bishop v. Mangal Bhai Enters., Inc., 194 Ga. App. 874, 392 S.E.2d 535 (1990).

Summary judgment was precluded for owner of auto tune-up shop, since the passenger of a customer slipped and fell while the customer obtained help for a mechanical problem, and genuine issues of material fact existed as to the passenger's legal status, whether the owner had constructive knowledge of the alleged hazard, and whether the risk presented was reasonable. Hartley v. Macon Bacon Tune, Inc., 234 Ga. App. 815, 507 S.E.2d 259 (1998).

In order for a visitor to occupy status of implied invitee, as distinguished from mere licensee, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which the occupant permits to be carried on there; there must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant. Hall v. Capps, 52 Ga. App. 150, 182 S.E. 625 (1935); Morse v. Sinclair Auto. Serv. Corp., 86 F.2d 298 (5th Cir. 1936); Georgia Power Co. v. Sheats, 58 Ga. App. 730, 199 S.E. 582 (1938).

Principle on which courts distinguish case of implied license from one of implied invitation seems to be this: when the privilege of the user exists for the common interest or mutual advantage of both parties it will be a case of invitation; but if the privilege exists for the mere pleasure and benefit of the party exercising the privilege, it will be a case of license. Atlantic Steel Co. v. Cleaton, 52 Ga. App. 502, 183 S.E. 827 (1936).

Test of "mutuality of interest" is generally used in reference to a business in which the occupant is engaged or which the occupant permits to be carried on there; it has no application in regard to a mere social guest. Laurens v. Rush, 116 Ga. App. 65, 156 S.E.2d 482 (1967).

No invitation implied when no mutual benefits. — In the absence of some relation which inures to the benefit of the two, or to that of the owner, no invitation may be implied, and the injured person must be regarded as a licensee. Cobb v. First Nat'l Bank, 58 Ga. App. 160, 198 S.E. 111 (1938); Pries v. Atlanta Enters., Inc., 66 Ga. App. 464, 17 S.E.2d 902 (1941).

Visit disconnected from business purpose confers licensee status. — When a visit is made on express invitation, but the purpose of the visit is wholly disconnected with the business in which the occupant is engaged, such an invitee occupies the status of a mere licensee. Hall v. Capps, 52 Ga. App. 150, 182 S.E. 625 (1935); Morse v. Sinclair Auto. Serv. Corp., 86 F.2d 298 (5th Cir. 1936).

An express invitation, like the one implied, does not give to the recipient the legal status of an invitee, unless the recipient's visit is in some way connected with

the business in which the occupant is engaged; the basis of the rule appears to be that an occupant of real estate ordinarily has the right and privilege of using it as the occupant sees fit, without responsibility or liability, except from hidden pitfalls, to a visitor entering thereon merely for one's own interest, curiosity, or pleasure, but the visitor must take the premises subject to any ordinary accompanying risks, the same as the occupant personally. Hall v. Capps, 52 Ga. App. 150, 182 S.E. 625 (1935).

Summary judgment should have been granted in favor of a store and its employees on a tortious misconduct claim in a parent's action arising out of the employees' claim that the parent's child stole from the store because the child did not meet the legal definition of an invitee under O.C.G.A. § 51-3-1; the child had to be regarded as a licensee under O.C.G.A. § 51-3-2(a)(3) because the child entered the store only to use its bathroom and had no intention of shopping there. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Person is not licensee unless person has permission, express or implied, to go upon property of another, and the authorities are not agreed as to whether such permission may be implied by habitual use of property or general custom and reference thereto. The general rule is that a person who owns or controls property owes no duty to a trespasser upon it, except not to willfully or recklessly injure the person; and this rule applies alike to adults and to children of tender years. Atlantic Coast Line R.R. v. O'Neal, 180 Ga. 153, 178 S.E. 451 (1934).

Invitee who goes beyond area specified in invitation becomes mere licensee. — An owner's invitation, and the protection due an invitee thereunder, extend to those portions of the premises necessary for ingress and egress and on parts necessary or incidental to the mutual business or purposes of the invitation; but an invitee who leaves such places for others on the premises not included in the invitation and disconnected with the objects of the invitation is, as to such parts of the premises, a mere licensee. Augusta Amusements, Inc. v. Powell, 93 Ga. App. 752, 92 S.E.2d 720 (1956).

If an invitee does not go beyond that part of the premises to which, as it reasonably appears to the invitee the invitation extends, the invitee does not become a licensee, but if the invitee does go beyond that part to which the invitee is invited, the invitee becomes a mere licensee. Atkins v. Tri-Cities Steel, Inc., 166 Ga. App. 349, 304 S.E.2d 409 (1983).

Plaintiff who entered defendant's premises for purpose of securing employment with defendant was mere licensee. Leach v. Inman, 63 Ga. App. 790, 12 S.E.2d 103 (1940).

User of merchant's premises after hours becomes licensee. — One who uses the premises of a merchant at a time beyond that to which an implied invitation extends is a mere licensee. Armstrong v. Sundance Entertainment, Inc., 179 Ga. App. 635, 347 S.E.2d 292 (1986).

Social guest in defendant's private home is mere licensee. Bryant v. Rucker, 121 Ga. App. 395, 173 S.E.2d 875 (1970); Ramsey v. Mercer, 142 Ga. App. 827, 237 S.E.2d 450 (1977); Barry v. Cantrell, 150 Ga. App. 439, 258 S.E.2d 61 (1979); Frankel v. Antman, 157 Ga. App. 26, 276 S.E.2d 87 (1981).

If plaintiff is a social guest in the defendant's home, the plaintiff is classified as a bare licensee, even though the plaintiff was expressly invited. Wren v. Harrison, 165 Ga. App. 847, 303 S.E.2d 67 (1983).

Social guests who were invited by the defendants to stay at the defendants' house after a wedding were licensees at the time one of them fell down an unguarded and unlighted stairwell leading to the basement. Knisely v. Gasser, 198 Ga. App. 795, 403 S.E.2d 85 (1991).

In a slip and fall action between a daughter and the daughter's mother, because the evidence showed that the daughter was a mere social guest or licensee in the mother's home at the time of the daughter's injury, and not an invitee, present only in the home for the daughter's convenience, and the mother did not act with any intent to harm the daughter, the mother was properly granted summary judgment on the issue of liability for

General Consideration (Cont'd)

the daughter's personal injuries resulting from a slip and fall. Behforouz v. Vakil, 281 Ga. App. 603, 636 S.E.2d 674 (2006).

Possessor of land is subject to liability for physical harm caused to licensees by condition on land if, but only if: (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger; and (b) the possessor fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved; and (c) the licensees do not know or have reason to know of the condition and the risk involved. Patterson v. Thomas, 118 Ga. App. 326, 163 S.E.2d 331 (1968); Haag v. Stone, 127 Ga. App. 235, 193 S.E.2d 62 (1972); London Iron & Metal Co. v. Abney, 245 Ga. 759, 267 S.E.2d 214 (1980).

Degree of care owed to social guest is less than that owed to invitee and the owner of such premises is liable only for willful or wanton injury. Ramsey v. Mercer, 142 Ga. App. 827, 237 S.E.2d 450 (1977).

Licensee must take premises as the licensee finds them. Rawlings v. Pickren, 45 Ga. App. 261, 164 S.E. 223 (1932); Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939).

As a general rule, owner of private grounds is under no obligation to keep them in safe condition for benefit of trespassers, bare licensees, or others who come upon the grounds, not by any invitation, express or implied, but for their own purposes, their pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be. Rawlins v. Pickren, 45 Ga. App. 261, 164 S.E. 223 (1932).

Owner owes no duty to licensee to inspect premises or to prepare safe place for the licensee's reception. Kahn v. Graper, 114 Ga. App. 572, 152 S.E.2d 10 (1966).

Under this section, owner is under duty not to willfully or wantonly injure licensee. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Duty owed to licensee. — The owner or person in charge of private grounds owes to a licensee thereon a duty to refrain from willfully or wantonly injuring the licensee, or wantonly and recklessly exposing the licensee to hidden perils, and a duty to exercise ordinary care to avoid injuring the licensee after the licensee's presence on the premises is, or should be, discovered. Rawlins v. Pickren, 45 Ga. App. 261, 164 S.E. 223 (1932).

An owner owes to a licensee no duty as to the condition of the premises, unless imposed by statute, save that the owner should not knowingly let the licensee run upon a hidden peril, or willfully cause the licensee harm. Mortgage Comm'n Servicing Corp. v. Brock, 60 Ga. App. 695, 4 S.E.2d 669 (1939); Freeman v. Levy, 60 Ga. App. 861, 5 S.E.2d 61 (1939); Pries v. Atlanta Enters., Inc., 66 Ga. App. 464, 17 S.E.2d 902 (1941); Young v. Towles, 113 Ga. App. 471, 148 S.E.2d 455 (1966); Patterson v. Young, 118 Ga. App. 326, 163 S.E.2d 331 (1968); Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975).

The owner or occupier of premises owes to a mere licensee only the duty not to injure the licensee willfully or wantonly once the licensee's presence is discovered nor to maintain a pitfall or mantrap on the premises. Clark v. Rich's, Inc., 114 Ga. App. 242, 150 S.E.2d 716 (1966).

Owner must not deliberately set traps or pitfalls for licensee. — To the licensee, as to the trespasser, no duty arises of keeping the usual condition of the premises up to any given standard of safety, except that they must not contain pitfalls, man traps, and things of that character; the duty of the owner or occupier of the premises being merely not to willfully or wantonly injure the licensee by deliberate act, or by negligence in permitting some extraordinary concealed danger to exist and failing to warn the licensee thereof. Central of Ga. Ry. v. Ledbetter, 46 Ga. App. 500, 168 S.E. 81 (1933); Hall v. Capps, 52 Ga. App. 150, 182 S.E. 625 (1935); Morse v. Sinclair Auto. Serv. Corp., 86 F.2d 298 (5th Cir. 1936).

The owner of premises owes to a li-

censee no duty of keeping the condition of the premises up to any given standard of safety, except that the premises must not contain pitfalls, mantraps, or things of that character. Flynn v. Inman, 49 Ga. App. 186, 174 S.E. 551 (1934); Ricks v. Boatwright, 95 Ga. App. 267, 97 S.E.2d 635 (1957); Abney v. London Iron & Metal Co., 152 Ga. App. 238, 262 S.E.2d 505 (1979), aff'd, 245 Ga. 759, 267 S.E.2d 214 (1980).

The duty generally owed a licensee by the owner or proprietor of premises is not to willfully and wantonly injure the licensee, which includes the obligation not to lay for the licensee or permit to exist pitfalls or man traps in which it may be reasonably anticipated the licensee will become ensnared; that is, concealed perils to which it may be reasonably anticipated the licensee may become a victim. Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958).

While the landowner cannot intentionally injure or lay a trap for a trespasser or a licensee upon land, the landowner owes no other duty to the licensee. Kahn v. Graper, 114 Ga. App. 572, 152 S.E.2d 10 (1966).

An owner owes a licensee an obligation not to lay for the licensee or permit to exist pitfalls or man traps in which it may be reasonably anticipated the licensee will become ensnared. Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975).

No evidence of willfulness. — Owners of property containing a tree were not liable to an individual after the individual's eardrum was punctured by a branch from the tree overhanging a sidewalk as there was no evidence of willfulness; it was clear that the tree and its overhanging branches were visible to the individual and were in no way a pitfall, mantrap, or hidden peril. Perkins v. Kranz, 316 Ga. App. 171, 728 S.E.2d 804 (2012).

The doctrine of mantrap applies to the duties owed by owners or occupiers of property. Queen v. City of Douglasville, 232 Ga. App. 68, 500 S.E.2d 918 (1998).

The standard "willful or wanton" imports deliberate acts or omissions, or that which discloses inference of conscious indifference to consequences. Washington v. Trend Mills, Inc., 121 Ga. App. 659, 175 S.E.2d 111 (1970).

Ordinary care required. — It is usually willful or wanton not to exercise ordinary care to prevent injuring a person who is actually known to be, or reasonably is expected to be, within the range of a dangerous act being done. Atlantic Steel Co. v. Cleaton, 52 Ga. App. 502, 183 S.E. 827 (1936); Atlantic Coast Line R.R. v. Heath, 57 Ga. App. 763, 196 S.E. 125 (1938); Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975); Barry v. Cantrell, 150 Ga. App. 439, 258 S.E.2d 61 (1979).

Homeowner's statements regarding fault did not prove willful or wanton conduct. — Homeowner's statements that the homeowner felt like the homeowner was at fault for an injured party's fall off of a deck were merely expressions of benevolence and were legally immaterial; the statements did not create questions of fact that precluded summary judgment as without willful or wanton conduct, the homeowner was not liable for the injured party's injuries. Trulove v. Jones, 271 Ga. App. 681, 610 S.E.2d 649 (2005).

If servants of the defendant were guilty of willful and wanton negligence which resulted in the plaintiff's injury, then the plaintiff's negligence, however gross, will not defeat recovery. Fox v. Pollard, 52 Ga. App. 545, 183 S.E. 854 (1936).

Exact point where ordinary negligence or lack of ordinary care passes into and becomes willful and wanton negligence is question for jury, under definite instruction from the trial judge that the facts must show that the failure to exercise ordinary care was not only negligence but that it amounted to willful and wanton negligence. Humphries v. Southern Ry., 51 Ga. App. 585, 181 S.E. 135 (1935).

In order for owner of premises to be liable for injuries to licensee from hidden danger, it is necessary that the owner know of the danger, or by the exercise of ordinary care could have known thereof. Coffer v. Bradshaw, 46 Ga. App. 143, 167 S.E. 119 (1932).

General Consideration (Cont'd)

Allegation that defendant knew or ought to have known of alleged defective condition is at best allegation of implied notice. Flynn v. Inman, 49 Ga. App. 186, 174 S.E. 551 (1934).

Homeowner owed no duty for obvious danger of broom handle. — In a licensee's personal injury action, the trial court properly found that a homeowner was entitled to summary judgment as a matter of law, as the homeowner owed no duty to the licensee to warn of the obviousness of a broom handle, tools on the floor, or the couch corner, which the licensee alleged caused a fall, as such were plainly visible and not hidden perils. Ellis v. Hadnott, 282 Ga. App. 584, 639 S.E.2d 559 (2006).

Owner must exercise ordinary care when licensee's presence known. — Owner or proprietor of the premises must not wantonly and willfully injure the licensee; and since the licensee's presence as a result of the license is at all times probable, some care must be taken to anticipate the licensee's presence, and ordinary care and diligence must be used to prevent injuring the licensee after the licensee's presence is known or reasonably should be anticipated. Central of Ga. Ry. v. Ledbetter, 46 Ga. App. 500, 168 S.E. 81 (1933); Atlantic Steel Co. v. Cleaton, 52 Ga. App. 502, 183 S.E. 827 (1936); Barry v. Cantrell, 150 Ga. App. 439, 258 S.E.2d 61 (1979).

After a proprietor or owner of property becomes aware, or should anticipate the presence of the licensee, the duty rests upon the owner or proprietor to exercise ordinary care to avoid injuring the licensee. Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958); Abney v. London Iron & Metal Co., 152 Ga. App. 238, 262 S.E.2d 505 (1979), aff'd, 245 Ga. 759, 267 S.E.2d 214 (1980).

After the presence of the licensee is known, exactly the same acts of caution may be required of the proprietor, to satisfy the legal duty, as would be necessary if the licensee were invited. Barry v. Cantrell, 150 Ga. App. 439, 258 S.E.2d 61 (1979).

Duty to trespasser. — This section does not apply when a trespasser is injured but an owner must not harm the trespasser by the use of active negligence. Rome Furnace Co. v. Patterson, 120 Ga. 521, 48 S.E. 166 (1904).

Fact that plaintiff might be trespasser does not alone necessarily negate any right of recovery for the plaintiff's injuries. Holcomb v. Ideal Concrete Prods., 140 Ga. App. 857, 232 S.E.2d 272 (1976).

In the case of trespasser, liability arises only when injury has been occasioned by willful and wanton negligence of proprietor or owner; no duty of anticipating the trespasser's presence is imposed, and the duty to use ordinary care to avoid injuring the trespasser after the trespasser's presence and danger is actually known is, in point of fact, merely the duty not to injure the trespasser wantonly or willfully. Atlantic Steel Co. v. Cleaton, 52 Ga. App. 502, 183 S.E. 827 (1936).

Failure to exercise ordinary care to prevent injury to trespasser after the trespasser's presence has become actually known may amount to wantonness. Humphries v. Southern Ry., 51 Ga. App. 585, 181 S.E. 135 (1935).

Owner not bound to anticipate presence of trespassers. — While every person should so use one's property that such use will not in the usual and ordinary course of human activities result in injury to others, yet as a general rule, one is not bound to anticipate the presence of trespassers on private property, but is, on the other hand, entitled to assume that other persons will obey the law, and not trespass. Norris v. Macon Term. Co., 58 Ga. App. 313, 198 S.E. 272 (1938).

No liability when licensee has equal knowledge of danger. — It is usually wilful or wanton not to exercise ordinary care to prevent injuring a licensee who is actually known to be, or reasonably is expected to be, within range of a dangerous act being done; however, if a licensee has equal knowledge of the dangerous condition or the risks involved, such as the presence of ice on driveway, there is no wilful or wanton action on the part of the owner and there is no liability to the

licensee. Evans v. Parker, 172 Ga. App. 416, 323 S.E.2d 276 (1984).

Defendant landowner was not liable for injuries allegedly sustained when the plaintiff slipped and fell on a frost-covered bridge on the defendant's land since the plaintiff was aware of the presence of frost on the bridge and had equal knowledge of the incline of the bridge, having recently crossed it. Nixon v. Edmonson, 177 Ga. App. 662, 340 S.E.2d 278 (1986).

Governmental liability to people using state land. — The Georgia Department of Natural Resources' liability to people who use state land is similar to that which a possessor of land owes a licensee under O.C.G.A. § 51-3-2. Lee v. Dep't of Natural Res. of Ga., 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Cited in Jackson v. Sheppard, 62 Ga. App. 142, 8 S.E.2d 410 (1940); Flint River Cotton Mills v. Colley, 71 Ga. App. 288, 30 S.E.2d 426 (1944); Nabors v. Atlanta Biltmore Corp., 77 Ga. App. 730, 49 S.E.2d 688 (1948); American Legion v. Simonton, 94 Ga. App. 184, 94 S.E.2d 66 (1956); Nechtman v. Wellington Plaza, Inc., 97 Ga. App. 40, 102 S.E.2d 57 (1958); Martin v. Seaboard Airline R.R., 101 Ga. App. 819, 115 S.E.2d 248 (1960); Hicks v. M.H.A., Inc., 107 Ga. App. 290, 129 S.E.2d 817 (1963); Stanton v. Grubb, 114 Ga. App. 350, 151 S.E.2d 237 (1966); Chambers v. Peacock Constr. Co., 115 Ga. App. 670, 155 S.E.2d 704 (1967); Hospital Auth. v. Morelli, 116 Ga. App. 26, 156 S.E.2d 667 (1967); Murray Biscuit Co. v. Hutto, 119 Ga. App. 377, 167 S.E.2d 182 (1969); Mion Constr. Co. v. Rutledge, 123 Ga. App. 777, 182 S.E.2d 500 (1971); Blair v. Manderson, 126 Ga. App. 235, 190 S.E.2d 584 (1972); Rutledge v. City of Atlanta, 130 Ga. App. 99, 202 S.E.2d 571 (1973); Rodriguez v. Newby, 131 Ga. App. 651, 206 S.E.2d 585 (1974); Strickland v. ITT Rayonier, Inc., 162 Ga. App. 317, 291 S.E.2d 396 (1982); Strickland v. Strickland, 198 Ga. App. 440, 402 S.E.2d 66 (1991); Lipham v. Federated Dep't Stores, Inc., 208 Ga. App. 385, 430 S.E.2d 590 (1993); Stanfield v. Kime Plus, Inc., 210 Ga. App. 316, 436 S.E.2d 54 (1993); Riley v. Brasunas, 210 Ga. App. 865, 438 S.E.2d 113 (1993); Ballenger Paving Co. v. Gaines, 231 Ga. App. 565, 499 S.E.2d 722 (1998); Hannah v. Hampton Auto Parts, Inc., 234 Ga. App. 392, 506 S.E.2d 910 (1998); Barnes v. St. Stephen's Missionary Baptist Church, 260 Ga. App. 765, 580 S.E.2d 587 (2003); McCullough v. Reyes, 287 Ga. App. 483, 651 S.E.2d 810 (2007).

Duty Owed to Children

1. In General

Greater quantum of care, though not greater degree of care, may be necessary when child of tender years is involved and a dangerous thing exists on the premises. Higginbotham v. Winborn, 135 Ga. App. 753, 218 S.E.2d 917 (1975); Wren v. Harrison, 165 Ga. App. 847, 303 S.E.2d 67 (1983).

The owner of lands on which a dangerous thing exists may be in legal duty bound to use a greater quantum of precaution in behalf of an infant licensee thereon than the owner would in behalf of an adult invited guest. The sum of the whole matter is included in the expression frequently enunciated that "duties arise out of circumstances." Barry v. Cantrell, 150 Ga. App. 439, 258 S.E.2d 61 (1979).

A well-defined distinction runs through the cases, between injuries caused by a dangerous statical condition and premises when dangerous active operations are being carried on, a much higher degree of care is necessary in protecting children in the latter case than in the former. Atlantic Steel Co. v. Cleaton, 52 Ga. App. 502, 183 S.E. 827 (1936).

Child accompanying parent into store is invitee rather than licensee. — A child who accompanies the parent customer into a store, or similar establishment does not come within the definition of a licensee contained in this section, for the child does not enter such establishment "merely for his own interest, convenience or gratification," but the child's presence is essential and vital to the business conducted on the premises by the owner or proprietor; the child has the status of an invitee to whom the law requires ordinary care to be accorded. Cooper v. Anderson, 96 Ga. App. 800, 101 S.E.2d 770 (1957), aff'd, 214 Ga. 164, 104 S.E.2d 90 (1958).

Duty Owed to Children (Cont'd)
1. In General (Cont'd)

Child social guest licensee rather than invitee. — A four-year-old child, though permitted "almost daily" for a period of more than two years to call upon and play with the four-year-old son of the owner or occupant of real property, does not, in so doing, enter onto the premises for any purpose connected with the business of the owner or occupant or for any purpose beneficial to the owner or occupant and, therefore, the owner does not by virtue of such permissive play, even though known to the owner or occupant, enter onto such premises as an invitee of the owner or occupant of the premises, but is, as to such owner or occupant, merely a licensee. Handiboe v. McCarthy, 114 Ga. App. 541, 151 S.E.2d 905 (1966).

Trial court erred in granting summary judgment to the property owners in a negligence claim because genuine issues of material fact remained as to the whether the property owners violated applicable building codes in the construction of their deck, whether they exercised ordinary care in preventing injury to their guests from a defect in the deck or showed such indifference to consequences as to justify a finding of wantonness, and whether their injured grandchild, a licensee, had equal knowledge of the hazard and failed to exercise ordinary care for the grandchild's personal safety. Hicks v. Walker, 262 Ga. App. 216, 585 S.E.2d 83 (2003).

Child entering store to use restroom deemed licensee, not invitee. — In a parent's suit as a next friend to the parent's daughter, the trial court erred in denying summary judgment to a retailer and its employees on the parent's claim of tortious misconduct, as no evidence was presented that the child victim was the retailer's business invitee, but was merely a licensee under both O.C.G.A. §§ 51-3-1 and 51-3-2, as the child merely entered the business with the sole intent to use the restroom; however, summary judgment was properly denied as to the invasion of privacy, intentional infliction of emotional distress, false imprisonment, false arrest and damages claims filed by the parent against the defendants. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Child injured in shed. — Defendant homeowners were properly granted summary judgment in a premise liability action arising from an injury sustained by a child while the child and the homeowners' children were playing in a shed, and a pulley fell from an I-beam and broke the child's leg since the child was a licensee, and the homeowners did not know that the child was in the shed or that the child would play with a pulley and chain in the shed. Bartlett v. Maffett, 247 Ga. App. 749, 545 S.E.2d 329 (2001).

Child falling from dock. — When a child and the child's parents were social guests of defendant and the child was on the defendant's dock under the supervision of the child's parents at the time the child drowned, and they were familiar with its construction and their son's limitations, since the duty of providing a safe playground for a child rests upon the child's parents, any breach of that duty must be imputed to the parents, rather than the defendant, although the dock had no handrails and from some positions a cabinet in the center of the dock partially obstructed the view. Wren v. Harrison, 165 Ga. App. 847, 303 S.E.2d 67 (1983).

Unauthorized jury charge. — When question of whether child was licensee was not raised by evidence, a charge on that issue was unauthorized. Williams v. Worsley, 235 Ga. App. 806, 510 S.E.2d 46 (1998).

2. Attractive Nuisance Doctrine

Attractive nuisance is maintained when owner keeps premises in such state or condition as to lure and attract children to play upon or around some dangerous instrumentality; and of course, when such a state of facts exists, the owner or creator of such "attractive nuisance" owes a higher measure of duty to the public generally than it does when this principle is not applicable. Atlantic Coast Line R.R. v. O'Neal, 180 Ga. 153, 178 S.E. 451 (1934).

When a railroad company leaves a dangerous machine, such as a turntable, unfastened in a city, on a lot which is not securely inclosed, and when people and children are wont to visit it and pass through it, this is negligence on the part of such company; and when an infant of ten or 12 years of age resorted to the turntable, and in riding upon the turntable was dangerously and seriously injured, the railroad company is liable for damages for such injuries to the infant. Carter v. La Mance, 40 Ga. App. 695, 151 S.E. 406 (1930).

All persons are presumed to anticipate the natural and reasonable consequences of their own conduct, and the theory of the so-called "turntable cases" in that one who sets before young children a temptation, which one has reason to believe may lead them into danger, must use ordinary care to protect them from harm; thus a child, who would otherwise occupy the status of a trespasser, will be taken to have received an implied invitation to enter upon the premises of another, when it is shown that one does so on account of having been allured thereto by reason of the maintenance of an instrumentality such as would naturally and reasonably attract young children. Clary Maytag Co. v. Rhyne, 41 Ga. App. 72, 151 S.E. 686 (1930).

One who maintains dangerous instrumentalities or appliances on one's premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, is liable to a child who is injured therefrom. Atlantic Coast Line R.R. v. O'Neal, 48 Ga. App. 706, 172 S.E. 740, rev'd on other grounds, 180 Ga. 153, 178 S.E. 451 (1934).

The attractive nuisance doctrine, sometimes called the "turntable doctrine," is that, when a person, who has an instrumentality, agency, or condition upon the person's own premises, or who creates such condition on the premises of another, or in a public place, which may reasonably be apprehended to be a source of danger to children, is under a duty to take such precautions as one reasonably prudent would take to prevent injury to children of tender years whom one knows to be accustomed to resort there, or who may, by reason of something there which may be expected to attract them, come there to play. Atlantic Coast Line R.R. v. O'Neal, 48 Ga. App. 706, 172 S.E. 740, rev'd on other grounds, 180 Ga. 153, 178 S.E. 451 (1934).

When the defendants were aware of the custom of children to play in and around the defendant's premises, the defendants are bound to anticipate the presence of such children and are under a duty to use ordinary care to avoid injuring the children after their presence is known or reasonably should be anticipated. Holcomb v. Ideal Concrete Prods., 140 Ga. App. 857, 232 S.E.2d 272 (1976).

Attractive nuisance doctrine has been held not to apply to ponds when there is no unusual danger. McCall v. McCallie, 48 Ga. App. 99, 171 S.E. 843 (1933).

Extension of turntable doctrine to pool of water. — Court will not extend turntable doctrine to an ordinary case of a landowner merely allowing a pool of water or pond to stand on a vacant lot. Carter v. La Mance, 40 Ga. App. 695, 151 S.E. 406 (1930).

A person who creates or maintains a pond of water upon private premises is under no duty to maintain it in a condition of safety, as against drowning, for children who, with the mere acquiescence and knowledge of the owner but without express or implied invitation, come upon the premises and go in the pond. St. Clair v. City of Macon, 43 Ga. App. 598, 159 S.E. 758 (1931).

When children and others had been bathing in the defendant's lake for a long time, and the defendant knew this and did not forbid the children to do so, but permitted free swimming, bathing, and fishing in the lake, this did not render those of the public who so used the lake, invitees of the defendants, expressly or impliedly from known customary permissive use. McCall v. McCallie, 48 Ga. App. 99, 171 S.E. 843 (1933).

When the plaintiff's infant son, nine years old, in company with another, went upon the premises of the defendants to bathe in an artificial pond thereon, which use was permitted and acquiesced in by

Duty Owed to Children (Cont'd)
2. Attractive Nuisance
Doctrine (Cont'd)

the defendants, and stepped into a deep hole in the pond and was drowned, the defendants were not liable to the plaintiff for the death of the plaintiff's son in that they maintained an attractive nuisance and failed to provide signs or other warning that the deep hole was in the pond, or in that the children failed to have ropes or cables around the hole so as to keep small children from stepping into the same. McCall v. McCallie, 48 Ga. App. 99, 171 S.E. 843 (1933).

The danger of drowning in a swimming pool or other pond or lake is an apparent, open danger, the knowledge of which is common to all, including a boy nine years of age; and there is no just view, consistent with recognized rights of property owners, which would compel one owning such water to fill it up or surround it with an impenetrable wall. McCall v. McCallie, 48 Ga. App. 99, 171 S.E. 843 (1933).

Although an owner of land may know of the habit of children to visit a pond on the owner's premises and bathe, the owner is as a rule under no obligation to erect barriers or take other precautions to prevent the children from being injured thereby. McCall v. McCallie, 48 Ga. App. 99, 171 S.E. 843 (1933).

The owner of unfenced land on which, within 100 to 120 feet of a passing highway, is a pool of water, apparently clear and pure, but in fact poisonous, is not liable for the deaths of trespassing children, who went into the water and died of the poison, when it is at least doubtful whether the water could be seen from any place where the children lawfully were, and there is nothing to show that the pool was what led them to enter the land, and it does not appear that children were in the habit of going to the place. Atlantic Coast Line R.R. v. O'Neal, 48 Ga. App. 706, 172 S.E. 740, rev'd on other grounds, 180 Ga. 153, 178 S.E. 451 (1934).

The attractive nuisance theory of recovery does not apply to natural ponds or water hazards. Wren v. Harrison, 165 Ga. App. 847, 303 S.E.2d 67 (1983).

Principles of this section were not applicable when a small child playing in defendant's back yard, with the defendant's knowledge, was injured while tinkering with the fastening apparatus of the tail gate of defendant's truck. Conkle v. Conkle, 90 Ga. App. 802, 84 S.E.2d 599 (1954).

No cause of action against the defendant is shown by the petition from which it appeared that the plaintiff, a child, was injured by the soil pan of a bulldozer falling on the child when playing with other children, in accordance with a custom known to the defendant, on an unenclosed, vacant lot on which the defendant was constructing a house and on which the defendant had parked or stored the bulldozer in a statical condition, with the soil pan suspended in the air instead of resting upon the ground, even though the defendant had actual knowledge of the presence of the children on the lot, as this useful machinery, so parked in its statical condition, did not constitute such a hidden peril as to make the defendant guilty of willful and wanton negligence in failing to warn the children away from the bulldozer. Brown v. Bone, 85 Ga. App. 22, 68 S.E.2d 190 (1951).

No cause of action is stated in a petition in which nine year old plaintiff seeks to recover the injuries alleged to have been received when the plaintiff visited a guest of the defendant's motel, with the implied knowledge of the defendant, and stuck the plaintiff's hand into the wringer attachment of an electrical washing machine provided by the defendant for the use of the defendant's motel guests even though it was alleged that the wringer was a dangerous, unguarded, attractive nuisance to small children. Ricks v. Boatwright, 95 Ga. App. 267, 97 S.E.2d 635 (1957).

Owner not compelled to prevent remote or improbable injuries to children. — While it is true that it is actionable negligence for one to leave unguarded on a part of one's own premises, which one knows is frequented by children of tender years for the purpose of play, a dangerous thing or condition which may injure such children, one is not required to provide against remote or improbable injuries to children playing upon one's land, and as to a natural condition or common dangers

existing in the order of nature, the attractive nuisance doctrine does not apply, and it is the duty of parents to warn their children of such dangers. McCall v. McCallie, 48 Ga. App. 99, 171 S.E. 843 (1933).

Applicability to Specific Cases

Entry into property restricted to employee use. — Defendant was not liable when the plaintiff, whose status was that of a trespasser or at best a licensee, went into a part of the defendant's property restricted to employees, used a piece of furniture to gain access to an ordinarily inaccessible area and then walked to the rear of that area where the plaintiff fell. Frank Mayes & Assocs. v. Massood, 238 Ga. App. 416, 518 S.E.2d 903 (1999).

Failure to follow building code. — Trial court did not err in granting co-owners' motions for summary judgment in a wrongful death action filed by a decedent's mother and sister because the co-owners did not have superior knowledge of the danger posed by the retaining wall from which the decedent fell and the decedent had actual knowledge of the hazard; the fact that an owner was negligent per se in failing to comply with a building code does not impose liability if the owner lacks superior knowledge of the hazard. Barnes v. Morganton Baptist Ass'n, 306 Ga. App. 755, 703 S.E.2d 359 (2010).

Defective condition of residential premises. — When it is alleged that the defendant was negligent in permitting board to be placed in dangerous position and in failing to warn the plaintiff thereof, this allegation is tantamount to an averment that the defendant had actual knowledge of the defective condition of the premises and the petition thus set forth a cause of action even if the plaintiff had been a licensee rather than an invitee. Lenkeit v. Chandler, 97 Ga. App. 769, 104 S.E.2d 476 (1958).

As a matter of law as to a licensee the mere construction and maintenance of a residence in such manner that adjoining door-ways of identical appearance open into a bedroom or bathroom and an unlighted flight of basement stairs from a common hallway is not actionable negligence. LaBranche v. Johnson, 127 Ga. App. 244, 193 S.E.2d 228 (1972).

Because the plaintiff, a licensee, had successfully traversed frayed carpet at the defendant homeowners' porch door at least 20 times and stated that on one of those visits, the plaintiff stumbled while exiting through the same doorway and that the plaintiff believed that the carpet had also caused that stumble, the plaintiff's testimony made it clear that the plaintiff knew or should have known of the risks associated with the carpet at the threshold and the grant of summary judgment by the trial court in favor of the defendants was, therefore, proper. Odum v. Gibson, 245 Ga. App. 394, 537 S.E.2d 801 (2000).

Defective stairways. — The duty to the licensee is slightly higher than the duty to the trespasser because the trespasser's presence, as a result of the license, is at all times probable and some care must be taken to anticipate the trespasser's presence and when the alleged injury is caused by the alleged dangerous statical condition of the stairway, no duty arises with reference to the trespasser or the licensee of keeping the usual condition of the premises up to any given standard of safety, except that they must not contain pitfalls, mantraps, and things of that character. Leach v. Inman, 63 Ga. App. 790, 12 S.E.2d 103 (1940).

When a trespasser is seeking to recover for an injury caused by a dangerous statical condition of the premises, as in the case of a stairway negligently constructed and maintained, liability of the owner of the premises arises only where the injury has been occasioned by willful and wanton negligence of the owner or proprietor thereof, there is no duty of anticipating the trespasser's presence and when the trespasser's presence and danger is not in fact known, no duty arises on the part of the owner of keeping the usual condition of the premises up to any given standard except that it must not contain pitfalls, mantraps, and things of that character. Leach v. Inman, 63 Ga. App. 790, 12 S.E.2d 103 (1940).

When the injury for which a recovery is sought is caused by the dangerous statical condition of the premises (stairway), the

Applicability to Specific Cases (Cont'd)

injury to the licensee has to be occasioned by willful and wanton negligence and while the owner or proprietor of the premises must not willfully and wantonly injure the licensee, yet the owner is not free from a duty to the licensee. Leach v. Inman, 63 Ga. App. 790, 12 S.E.2d 103 (1940).

When the alleged injury is caused by the dangerous, statical condition of a stairway, and no dangerous active operations were being carried on and no active negligence is involved, no duty arises with reference to the licensee of keeping the usual condition of the premises up to any standard of safety except that they must not contain a pitfall, a mantrap, or other things of that character. Kahn v. Graper, 114 Ga. App. 572, 152 S.E.2d 10 (1966).

Defective brick wall. — Denial of an owner's summary judgment motion was reversed as the owner's duty to a licensee under O.C.G.A. § 51-3-2(b) arose after the owner became aware of, or should have anticipated the presence of, the licensee near the peril and the owner had no knowledge that the licensee, who was invited into the owner's home by the owner's friends, was on the owner's property and should not have anticipated the licensee's presence near a defective brick wall; the licensee's claim that the defective wall was a mantrap or pitfall was rejected as that doctrine rested upon the theory that the owner was expecting a trespasser or licensee and had prepared the premises to do the trespasser injury. Buce v. Fudge, 281 Ga. App. 221, 635 S.E.2d 788 (2006), cert. denied, 2007 Ga. LEXIS 107 (Ga. 2007).

Determining status as licensee in private home. — When a defendant owner of a house, permits the purchaser of the incomplete house, to occupy it as the purchaser's home with the purchaser's family, an inference can be drawn that the defendant impliedly permits third persons to enter the premises to make welcoming visits, and thus that such visitors are licensees. MacKenna v. Jordan, 123 Ga. App. 801, 182 S.E.2d 550 (1971).

When the purpose of three men in going to the home of the defendant was to see the renovation that had been made and that while there they toured the home, talked about duck hunting and drank beer, this authorized a determination by the jury that the plaintiff was a licensee in the defendant's home at the time of the plaintiff's injury. Delk v. Sellers, 149 Ga. App. 439, 254 S.E.2d 446 (1979).

Homeowner not liable for adult's pool drowning. — Homeowner could not be held liable for a guest's drowning as the homeowner was neither required by law, with respect to any extraordinary duty, nor by the circumstances, regarding any personal conditions of adult-guest, to watch over the guest, and there is no rule of general "foreseeability" that all persons who swim may drown. Belcher v. James, 207 Ga. App. 796, 429 S.E.2d 165 (1993).

Homeowner not liable for child's drowning in pool. — An owner of property was not liable for the drowning of an 11-year old social guest in a swimming pool since the existence and condition of the pool was open and obvious and there was no evidence the drowning was caused by any defect in the pool. Hemphill v. Johnson, 230 Ga. App. 478, 497 S.E.2d 16 (1998).

Developer not liable for drowning in lake. — When a decedent entered a lake to rescue the decedent's minor son, the decedent became, at most, a licensee; since an owner or occupier of property owed no duty to trespassers or licensees other than to refrain from willfully or wantonly injuring them, and since there was no evidence that a developer acted in a willful or wanton manner, summary judgment for the developer in a wrongful death case arising from the decedent's drowning was proper. Brazier v. Phoenix Group Mgmt., 280 Ga. App. 67, 633 S.E.2d 354 (2006), cert. denied, 2007 Ga. LEXIS 113 (2007).

Homeowner not liable for party's injuries from fall off of deck. — Homeowner was not liable for an injured party's injuries because the injured party was injured when the homeowner rolled into a pool at the prodding of a boy and the injured party jumped out of the way; the injured party had an equal knowledge of the obvious lack of railings on the deck.

Trulove v. Jones, 271 Ga. App. 681, 610 S.E.2d 649 (2005).

An owner was not liable to a guest, who was a licensee, for a failure to warn the guest of the low railing on a balcony as the condition of the balcony constituted a static condition, not a hidden peril, pitfall, or mantrap; there was no evidence that the owner wilfully or wantonly injured the guest or that the owner knowingly exposed the guest to a dangerous activity, hidden peril, pitfall, or mantrap under O.C.G.A. § 51-3-2(b). Jordan v. Bennett, 312 Ga. App. 838, 720 S.E.2d 301 (2011).

Accidental shooting by third party. — Premises owner and its operator were properly granted summary judgment in an action filed against them by a decedent's administrator, as the decedent, who was granted permission to hunt on the property without a permit, was not shown to be anything other than a licensee, no breach of any duty owed to the decedent as a licensee was presented, and an intervening illegal act by a third party was the proximate cause of the decedent's death; moreover, because the evidence showed that there had never been an accidental shooting of one hunter by another on the premises, no basis existed for holding that the owners or operator should have foreseen that a third party would come onto the property and illegally shoot at a target which the third party could not identify. Hadden v. ARE Props., LLC, 280 Ga. App. 314, 633 S.E.2d 667 (2006).

Friend visiting a student on university campus was licensee. — Board of Regents was not liable to a university campus visitor who, while intoxicated, tripped on a landscape pipe in a pine-straw landscaped area off a walkway and tumbled into an eight-foot-deep window well because the visitor was a licensee and the only duty was to avoid wilful or wanton injury; the window well was not a mantrap. Scully v. Bd. of Regents of the Univ. Sys. of Ga., 332 Ga. App. 873, 775 S.E.2d 230 (2015), cert. denied, 2015 Ga. LEXIS 741 (Ga. 2015).

Visitor without definite appointment deemed licensee. — A visitor's decision to stop by a condominium residence, without first calling to make a definite appointment with the resident, served only the visitor's convenience, and the visitor's status at best was that of a licensee. Planned Community Servs., Inc. v. Spielman, 187 Ga. App. 703, 371 S.E.2d 193, cert. denied, 187 Ga. App. 908, 371 S.E.2d 193 (1988).

Injured party was a licensee after the injured party entered into the lobby of a radio station just to be with the injured party's child, who was being interviewed, and had no other business at the station; the station did not obtain a benefit by virtue of the injured party's visit and did not impliedly invite the public at large into its lobby. Howard v. Gram Corp., 268 Ga. App. 466, 602 S.E.2d 241 (2004).

Entry into adjacent yard on way to visit nearby house. — In a suit seeking damages sustained when the plaintiff stepped in a hole in the defendant's backyard and injured herself, even assuming the plaintiff was originally an invitee when the plaintiff went to the defendant's front door, and regardless of however innocent the plaintiff's subsequent decision to enter the defendant's backyard, in order to visit a friend in a nearby house, may have been, at the time of the plaintiff's injury, the plaintiff, as a matter of law, was not on a portion of the premises to which as the situation might reasonably appear to the plaintiff's an implied invitation extended. The plaintiff was, therefore, at the time of injury, a licensee, to whom the owner or proprietor of the premises is liable only for wilful or wanton injury. Swanson v. Smith, 199 Ga. App. 471, 405 S.E.2d 301 (1991).

There is a duty on the part of the landowner not to maintain on the landowner's premises dangerous excavation so that persons passing along a street immediately adjoining may not be injured while in the exercise of ordinary care or when by necessity or accident they slightly deviate from such street or walkway. Wright v. Southern Ry., 62 Ga. App. 316, 7 S.E.2d 793 (1940).

When an owner of premises allows an excavation to be placed in dangerous proximity to a thoroughfare so that persons in the exercise of ordinary care might casually fall therein it is the duty of such owner so to inclose the excavation as to afford reasonable immunity against dan-

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ger, but when the adjacent land is level or approximately so and that which caused the injury is so far removed that a traveller in the exercise of ordinary care would not have been injured thereby, no duty to such traveller arises. Wright v. Southern Ry., 62 Ga. App. 316, 7 S.E.2d 793 (1940).

When the defendant may have been negligent in failing to erect a barrier or guard for its culvert at a particular place, and would have been liable to the plaintiff if the plaintiff had casually or inadvertently walked or fallen into such culvert, the plaintiff was precipitated into such culvert by intervening negligent acts of the city and of the driver of the automobile, which acts were not such as would probably have occurred in the usual, natural and probable course of events, under the facts as pleaded the negligence of the defendant railway company, while contributing to the injury, did not constitute the proximate and efficient cause of the injury. Wright v. Southern Ry., 62 Ga. App. 316, 7 S.E.2d 793 (1940).

Lease contract provision relieving landlord of obligation to keep premises in repair is not effective as against third persons lawfully on the premises, even if the tenant knew of the defective condition. Flagler Co. v. Savage, 258 Ga. 335, 368 S.E.2d 504 (1988).

Party in railroad station for personal business with passenger is mere licensee. — When a person enters upon the premises of a railroad company to meet a train in order to see "a party" for the purpose of trying to procure employment in which the railroad company was not interested or concerned, the presence of the person so entering upon the premises is purely for the person's own benefit and interest, and the person is a mere licensee, and not an invitee. Atlanta & W. Point R.R. v. Hyde, 45 Ga. App. 548, 165 S.E. 466 (1932), later appeal, 47 Ga. App. 139, 169 S.E. 854 (1933).

Railroad not liable to deceased licensee if its maintenance of uninsulated electrical wire not willful and wanton. — After the decedent was electrocuted when a pipe the decedent was removing from the ground came into contact with an uninsulated high voltage wire 25 feet above the ground, the defendant railroad is not liable since the decedent was a licensee, and the defendant's maintenance of uninsulated wire 25 feet above ground level did not constitute "willful or wanton injury," for recovery for damages. Leisner v. Atlantic Coast Line R.R., 420 F.2d 682 (5th Cir. 1969).

Railroad owed no duty to keep crossing free of weeds. — The alleged failure of the defendant railroad company to keep its right-of-way at a private crossing clear of weeds and bushes does not violate any duty owed to the plaintiff's decedent. The owner of the premises owes no such duty to a licensee or trespasser. Wise v. Atlanta & W. Point R.R., 61 Ga. App. 372, 6 S.E.2d 135 (1939), aff'd, 190 Ga. 254, 9 S.E.2d 63 (1940).

Fact that pedestrians frequently used part of right of way to walk without objection would not make one walking thereon licensee. Humphries v. Southern Ry., 51 Ga. App. 585, 181 S.E. 135 (1935).

Only duty owing by railway company to trespasser is not to wantonly or willfully injure the trespasser after the trespasser's presence has been discovered. Humphries v. Southern Ry., 51 Ga. App. 585, 181 S.E. 135 (1935); Collett v. Atlanta, B. & C.R.R., 51 Ga. App. 637, 181 S.E. 207 (1935); Fox v. Pollard, 52 Ga. App. 545, 183 S.E. 854 (1936); Groves v. Southern Ry., 61 Ga. App. 651, 7 S.E.2d 208 (1940).

After the presence of a trespasser upon the track of the defendant in front of its approaching train is discovered, it becomes the duty of the agents in charge of the train to give the trespasser some warning of the trespasser's dangerous position. Humphries v. Southern Ry., 51 Ga. App. 585, 181 S.E. 135 (1935); Fox v. Pollard, 52 Ga. App. 545, 183 S.E. 854 (1936).

Lack of ordinary care on part of railway company in failing to anticipate trespasser's presence would not render the company liable when the trespasser was personally guilty of lack of ordinary care in exposing oneself to peril, but might render the company liable if the

presence of the trespasser on the track at such a time and place was free from a lack of ordinary care on the trespasser's part. Southern Ry. v. Kelley, 52 Ga. App. 137, 182 S.E. 631 (1935).

Failure of plaintiff to stop and look at rail crossing not negligence as matter of law. — It cannot be said as a matter of law that the failure of a person approaching and entering upon a railroad crossing, and unaware of the approach of a train, to stop, look, and listen, renders such person guilty of such lack of ordinary care as would prevent recovery except in cases of willful and wanton conduct on the part of the defendant company. Wise v. Atlanta & W. Point R.R., 61 Ga. App. 372, 6 S.E.2d 135 (1939), aff'd, 190 Ga. 254, 9 S.E.2d 63 (1940).

Failure of railway to discover or anticipate trespasser not willful or wanton conduct. — The mere failure of the employees of a railway company to discover the presence of a trespasser at a place where, and a time when, it was their duty to anticipate the presence of trespassers, and thereafter to take such needful and proper measures for the trespasser's protection as ordinary care might require, might amount to a lack of ordinary care on the part of the railroad company, but would not, in and of itself, amount to willful and wanton misconduct. Humphries v. Southern Ry., 51 Ga. App. 585, 181 S.E. 135 (1935); Southern Ry. v. Kelley, 52 Ga. App. 137, 182 S.E. 631 (1935).

Railroad may have duty to anticipate trespassers when known circumstances make their presence likely. — When, however, from the locality, circumstances, and known habits of the public generally, there is reason to apprehend that the track in front of the locomotive may not be clear of human beings, then the duty of anticipating the presence of and danger to such trespassers devolves on the employees of the company operating the train. Southern Ry. v. Kelley, 52 Ga. App. 137, 182 S.E. 631 (1935).

If the presence of a trespasser on the track at the time and place of the injury is brought about by peculiar facts and circumstances which relieve the trespasser from the guilt of a lack of ordinary care in thus exposing oneself, the company might be liable for a mere lack of ordinary care on the company's part in failing to anticipate the trespasser's presence at a time when and a place where the company was charged with such duty, and in thereafter failing to take such proper precautions for the trespasser safety as might seem reasonably necessary. Southern Ry. v. Kelley, 52 Ga. App. 137, 182 S.E. 631 (1935).

Whether the locality, the time, and the circumstances of an injury to one using the right of way, and the known habits and frequency of the public in using it, create such a condition as will charge the servants of the company operating the locomotive with the special duty of looking out for the presence of a trespasser at the time and place of the injury, is generally a question for the jury, in the light of all the evidence introduced. Southern Ry. v. Kelley, 52 Ga. App. 137, 182 S.E. 631 (1935).

When a number of persons habitually, with the knowledge and without the disapproval of a railroad company, use a private passageway for the purpose of crossing the tracks of the company at a given point, the employees of the company in charge of a train, who are aware of the custom, are bound, on a given occasion, to anticipate that persons may be upon the tracks at this point; and they are under a duty to take such precautions to prevent injury to such persons as would meet the requirements of ordinary care and diligence. The imposition of such a duty on the part of the servants of the railroad company would not relieve a person going upon the tracks at the crossing from the duty of exercising ordinary care for his own safety. Wise v. Atlanta & W. Point R.R., 61 Ga. App. 372, 6 S.E.2d 135 (1939), aff'd, 190 Ga. 254, 9 S.E.2d 63 (1940).

Railroad's failure to take some preventive measure once trespasser discovered may be wanton. — Even though a trespasser may not be deficient in any of the trespasser's faculties of sight or hearing, or there be no surrounding physical conditions to interfere with or hinder the exercise of such faculties, and while the agents in charge of the train have the right to conclude and act on the

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conclusion that such person will leave the track in time to save oneself from injury, in that they are then under no duty to check the speed of the train, yet as a matter of ordinary prudence and care, it is their duty to sound the whistle and ring the bell, as a warning of the approaching danger, and the jury would be authorized to find that such negligence, under the circumstances, amounted to wantonness. Humphries v. Southern Ry., 51 Ga. App. 585, 181 S.E. 135 (1935); Fox v. Pollard, 52 Ga. App. 545, 183 S.E. 854 (1936).

It is for jury to find whether failure to use ordinary care in operation of train amounts to wanton or willful conduct. Atlantic Coast Line R.R. v. Heath, 57 Ga. App. 763, 196 S.E. 125 (1938).

Failure of employer to install signals at railroad crossing. — When the car in which an employee's children were traveling was struck by a train after the driver dropped off the employee at the employer's facility, the fact that the children were licensees did not prevent the employee from bringing a premises liability claim against the employer for its failure to comply with a zoning ordinance requiring the employer to pay for the installation of traffic signals at the railroad crossing where the accident occurred. Combs v. Atlanta Auto Auction, Inc., 287 Ga. App. 9, 650 S.E.2d 709 (2007), cert. denied, 2008 Ga. LEXIS 156 (Ga. 2008).

Res ipsa loquitur insufficient to establish prima facie case by trespasser when presence not discovered at time of accident. — When there were no allegations of willful and wanton negligence, nor is there any proof of the negligence, proof by plaintiff that injuries were caused by running of train would not make out a prima facie case against defendant railroad, as he was at a place where defendant owed him no duty until after he was discovered, and there was no evidence showing this fact. Collett v. Atlanta, B. & C.R.R., 51 Ga. App. 637, 181 S.E. 207 (1935).

This section cannot be taken as having reference to independent tort by railroad company in the operation of its trains, but, according to its own language and by reason of its context and indicated source, must be construed as only having reference to the liability of an owner or occupier of premises to one injured on account of a failure to keep the premises and approaches in a proper state of repair. Atlanta & W. Point R.R. v. Wise, 190 Ga. 254, 9 S.E.2d 63 (1940); Southern Ry. v. Liley, 75 Ga. App. 489, 43 S.E.2d 576 (1947); Martin v. Seaboard Air Line R.R., 103 Ga. App. 281, 119 S.E.2d 56 (1961).

Pony ride on vacant lot. — When the uncontradicted evidence shows that there was no mutuality of interest, monetary or otherwise, between a patron of a pony ride and the operator of a gas station who was also the unknowing occupier of the vacant lot where the ride was set up, the plaintiff was, as to the defendant, at most only a licensee. Walker v. Reed, 180 Ga. App. 165, 348 S.E.2d 707 (1986).

Go-cart accident. — Homeowners did not breach any duty owed to an eight-year-old child who was killed while riding as a passenger on a go-cart driven by their grandson. Bunn v. Landers, 230 Ga. App. 744, 498 S.E.2d 109 (1998).

Rollerblading accident. — Trial court properly granted summary judgment to homeowners on parent and next friend's negligence suit against them after the parent and next friend's 11-year-old child sat at the top of a rollerblading ramp, slid down it, and fractured the child's wrist in the process as the child was a social invitee, which made the child a licensee on their property and, thus, the homeowners only owed the child a duty not to willfully or wantonly injure the child; since the record did not show any evidence that the homeowners willfully or wantonly injured the child, inasmuch as the homeowners were not home at the time and did not even know the child was on their property, the trial court properly granted summary judgment to the homeowners on the parent and next friend's claim that the dangerous condition on their property caused the child's injury. Rice v. Elliott, 256 Ga. App. 87, 567 S.E.2d 721 (2002).

Duty owed to firefighter. — Georgia has adopted the position that a firefight-

er's status as to the landowner whose property the firefighter comes upon in order to fight a fire is that of a licensee but in view of the statutory language defining a "licensee," it would perhaps be more appropriate to state, as does the Restatement of the Law of Torts (2nd ed.) § 345, p. 228, that firefighters are sui generis but treated "on the same footing as licensees." Ingram v. Peachtree S., Ltd., 182 Ga. App. 367, 355 S.E.2d 717 (1987).

While a firefirefighter may recover for negligence independent of the fire, a landowner is not liable for negligence in causing the fire. Hence, the status of invitee or licensee, if pertinent at all, only comes into play in determining what duty is owed the firefighter with regard to events extrinsic to the fire's inception. Ingram v. Peachtree S., Ltd., 182 Ga. App. 367, 355 S.E.2d 717 (1987).

Emergency medical technician. — Given the emergency circumstances with which a property owner was faced, it was unreasonable to expect the owner to have exercised the same degree of care in preparing the owner's home and property for the arrival of the emergency personnel as the owner would have been required to exercise before welcoming an invitee in a non-emergency situation. Accordingly, under the circumstances presented in the case, the emergency medical technician who responded to the scene and was injured on the owner's property was a licensee as a matter of law under O.C.G.A. § 51-3-2(a). Sands v. Lindsey, 314 Ga. App. 160, 723 S.E.2d 471 (2012).

Emergency medical technician (EMT) failed to demonstrate that a jury issue existed as to whether a property owner breached the owner's duty to the EMT as a licensee. The EMT failed to cite to any authority supporting a conclusion that the owner's oversights, occurring when the owner left open the owner's front door but left closed the owner's glass storm door in anticipation of the arrival of the EMT in response to an emergency situation, evidenced a wanton disregard for the EMT's safety, as opposed to mere negligence. Sands v. Lindsey, 314 Ga. App. 160, 723 S.E.2d 471 (2012).

Defects in wiring at boat dock deemed "mantrap." — If the defendants should have known of the hazards created by the defects in wiring at their boat dock and the injured social guest did not, the wiring may have constituted the sort of "hidden peril," "pitfall," or "mantrap" which the premises owner was obligated, even to a bare licensee, to correct. If there was such a "mantrap," the defendants' conduct may have been willful or wanton. Bragg v. Missroon, 186 Ga. App. 803, 368 S.E.2d 564 (1988).

A pond, either natural or man-made, cannot be deemed a man-trap, and when the plaintiff fails to show the defendant's actual knowledge of hidden stumps and roots within the lake, summary judgment for the defendant is proper. Nye v. Union Camp Corp., 677 F. Supp. 1220 (S.D. Ga. 1987), aff'd, 849 F.2d 1479 (11th Cir. 1988).

Mantrap not created by indoor/outdoor carpeting in residential yard. — A small depression in the defendant's residential yard, two or three steps from the concrete sidewalk (that the plaintiff did not use), which hole was covered by a corner of indoor/outdoor carpeting, did not constitute a mantrap or pitfall. Hawkins v. Brown, 228 Ga. App. 311, 491 S.E.2d 423 (1997).

Placement of gravel on private roadway. — It cannot be said that the placement of gravel on a private roadway which is under construction constitutes a pitfall or mantrap. Nor can it be said to be a dangerous or hazardous condition from which a deliberate attempt to inflict injury can be inferred. Francis v. Haygood Contracting, Inc., 199 Ga. App. 74, 404 S.E.2d 136, cert. denied, 199 Ga. App. 906, 404 S.E.2d 136 (1991).

Planting of shrubbery beside a drainage ditch. — Defendant's actions do not evidence the level of intent for willfulness or wantonness required to show the violation of a duty to a licensee. Aldredge v. Symbas, 248 Ga. App. 578, 547 S.E.2d 295 (2001).

Landlord's duty to tenant's visitors. — A landlord is liable to a person injured while visiting a tenant for the visitor's own personal advantage only for willful or wanton injury to the visitor, a licensee. Brown v. Clay, 166 Ga. App. 694, 305 S.E.2d 367 (1983).

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Relative as licensee. — Since there was no evidence that the homeowner derived any benefit from the half-brother's presence in the home, the half-brother was a mere social guest or licensee and the half-brother's voluntary act of cutting the lawn for the homeowner did not change this status, nor the homeowner's duty of care to the half-brother. Robinson v. Turner, 164 Ga. App. 515, 297 S.E.2d 522 (1982).

Burns from hot water in residential shower. — Homeowner could be held liable for burns suffered by a guest taking a shower based on the owner's intentional conduct in increasing the water temperature combined with the homeowner's negligent omission in failing to mention this fact when the guest announced the intention to bathe. Waldo v. Moore, 241 Ga. App. 797, 527 S.E.2d 887 (2000).

Carpet scraps. — Guest of the homeowner was a licensee while visiting the homeowner at the homeowner's mobile home and thus the homeowner owed the guest a duty to not willfully or wantonly injure the guest; accordingly, the trial court erred in granting summary judgment to the homeowner as a trier of fact had to consider whether the homeowner had superior knowledge that carpet scrap was a hazard to the guest. Williams v. Truett, 251 Ga. App. 46, 553 S.E.2d 350 (2001).

Potholes. — Trial court erred in denying summary judgment to both a city and the Department of Transportation, in a slip and fall case filed against them by a pedestrian, as: (1) the pedestrian conceded that the pedestrian was a licensee with equal constructive knowledge of any hazard posed by potholes; (2) the pothole in which the pedestrian fell was not a concealed or camouflaged danger; and (3) no evidence was presented that the pothole was maintained wilfully or wantonly. Ga. DOT v. Strickland, 279 Ga. App. 753, 632 S.E.2d 416 (2006).

Former employee deemed licensee. — Former employee who returned to the place of employment after business hours at the employee's own behest, in order to retrieve the employee's personal effects after the employee was terminated, was a licensee, not an invitee. Rucker v. Troll Book Fairs, 232 Ga. App. 189, 501 S.E.2d 301 (1998).

Knowledge of gunfire potential. — Property owner was not liable in wrongful death action since the decedent was, at most, a social guest or licensee since the parent failed to show that the property owner had any knowledge about the actual danger of firearms being discharged on New Year's Eve at or near the owner's property and there was no evidence of substantially similar crimes occurring on the owner's property. Spear v. Calhoun, 261 Ga. App. 835, 584 S.E.2d 71 (2003).

Fallen deck. — In a social guest's suit for personal injuries brought against the tenants of certain real property as well as the property owner and the owner's property management company, the trial court properly granted summary judgment to the property owner as there was no evidence that the property owner had actual or constructive knowledge of any problem with the condition of or construction of the deck that fell while the guest was standing upon the deck. Silman v. Assocs. Bellemeade, 294 Ga. App. 764, 669 S.E.2d 663 (2008), aff'd, 286 Ga. 27, 685 S.E.2d 277 (2009).

Food inspector invitee. — Federal food inspector was an invitee under O.C.G.A. § 51-3-1, not a licensee under O.C.G.A. § 51-3-2, because the inspector was not present at an owner's chicken processing plant merely for the inspector's own pleasure or convenience but rather pursuant to the United States Department of Agriculture (USDA) responsibilities; the owner could not have legally conducted business without the presence of USDA inspectors, which indicated that the owner received an advantage from the inspector's presence on the property and, thus, was easy to infer that the owner invited the inspector onto the premises in order to ensure compliance with federal regulations so that the owner could operate the plant. Sanderson Farms, Inc. v. Atkins, 310 Ga. App. 423, 713 S.E.2d 483 (2011).

Delivery driver on construction site. — In a construction site delivery

driver's claims against a general contractor and a subcontractor arising out of injuries that occurred when the driver was struck by a concrete-filled hose on the construction site, as to the subcontractor, the driver was a licensee because there was no evidence that the driver's presence was for their mutual benefit, but as to the general contractor, the question of whether the driver was a licensee or invitee was for the jury. Card v. Dublin Constr. Co., 337 Ga. App. 804, 788 S.E.2d 845 (2016), cert. denied, 2017 Ga. LEXIS 151 (Ga. 2017); cert. denied, 2017 Ga. LEXIS 140 (Ga. 2017).

RESEARCH REFERENCES

Am. Jur. 2d. — 62 Am. Jur. 2d, Premises Liability, § 111 et seq.

Am. Jur. Proof of Facts. — Negligent Excavation — Cave-In on Worker, 21 POF3d 217.

C.J.S. — 65A C.J.S., Negligence, § 490 et seq.

ALR. — Proximate cause as determining landlord's liability, where injury results to a third person from a nuisance that becomes such only upon tenant's using the premises, 4 ALR 740.

Duty of abutting owner to continue safeguard against injury which he has voluntarily furnished, 5 ALR 936.

Right of third person to enter premises against objection of the landlord, 6 ALR 465; 43 ALR 206.

Liability of owner to licensee or invitee for conditions on premises recently vacated by tenant, 10 ALR 244.

Effect of verbal abuse to change one's status from licensee or invitee to trespasser, 12 ALR 254.

Liability of adjoining property owner for injury to one deviating from highway or frequented path, 14 ALR 1397; 159 ALR 136.

Duty to guard against danger to children by electric wires, 17 ALR 833; 41 ALR 1337; 49 ALR 1053; 100 ALR 621.

Status of passenger in ordinary coach who enters Pullman coach for temporary purpose, 18 ALR 71.

Sublessee or assignee of lease as trespasser, 18 ALR 503.

Liability for injury by articles temporarily placed in space between sidewalk and curb, 22 ALR 1495.

Liability for injury to one in street by object falling from window, 29 ALR 77; 53 ALR 462.

Attractive nuisances, 36 ALR 34; 39 ALR 486; 45 ALR 982; 53 ALR 1344; 60 ALR 1444.

Liability of vendor or grantor of real estate for personal injury to purchaser or third person due to defective condition of premises, 41 ALR 842.

Liability to trespasser or bare licensee as affected by distinction between active and passive negligence, 49 ALR 778; 156 ALR 1226.

Liability for conditions in space between lot lines and sidewalk actually within limits of street, but apparently part of the abutting property, 56 ALR 220.

Liability for injury to elevator passenger as affected by the fact that sides of car are open and unprotected, 57 ALR 259.

Duty and liability respecting condition of store or shop, 58 ALR 136; 100 ALR 710; 162 ALR 949.

Use of space within lot lines, as part of public sidewalk as affecting owner's responsibility for its condition, 58 ALR 1042.

Liability for injury to child guest on one's premises, 60 ALR 108.

Liability for injury by stepping or falling into opening in sidewalk while doors were open or cover off, 70 ALR 1358.

Landlord's liability for injuries to strangers outside premises as affected by covenant to repair or reservation of right to enter to make repairs, 89 ALR 480.

Right of one other than owner or lessee of premises to benefit of rule that restricts duty toward trespasser or licensee to abstention from willful or wanton injury, 90 ALR 886.

Duty and liability of carrier toward one accompanying departing passenger or present to meet incoming one, with respect to conditions at or about station, 92 ALR 614.

Liability of owner or occupant of premises for injury to person thereon by dog not owned or harbored by former, 92 ALR 732.

Liability of one exercising the rights of

an owner of realty for injuries due to its condition, as affected by want of legal title, 96 ALR 1068; 130 ALR 1525.

Rule of property owner's immunity from liability for injury to or death of trespasser, absent wanton or willful conduct, as affected by fact that danger zone extends beyond the property, 102 ALR 218.

Duty of federal courts to follow decision of state courts as to doctrine of attractive nuisance, 103 ALR 703.

Liability of railroad company for injury to trespassers or licensees other than employees or passengers struck by object projecting, or thrown, from passing train, 112 ALR 850.

"Safe place" statutes as applicable to municipalities or other public bodies when engaged in performing a governmental function, 114 ALR 428.

Duty to guard against operation of elevator by unauthorized person, 117 ALR 989.

Liability of owner or occupier of premises other than store or shop for personal injury to another due to slippery condition of floor, 118 ALR 425.

Liability of owner or occupant of premises for injury to one who falls over obstructions placed to protect lawn, 129 ALR 740.

Liability for injury or death on or near golf course, 138 ALR 541; 82 ALR2d 1183.

Liability, under attractive nuisance doctrine or related principle, for injury to children jumping or falling from nondefective and statutory object or structure reached by climbing, 145 ALR 322.

Duty of owner or occupier of premises to persons thereon upon invitation of, or otherwise in connection with, licensee, 147 ALR 651.

Entering dark place on unfamiliar premises as contributory negligence, 163 ALR 587.

Unintentional intrusion on land of another as affecting right of recovery for injuries, 174 ALR 471.

Attractive nuisance doctrine as applied to vehicles or their contents, 3 ALR2d 758.

Breach of assumed duty to inspect property as ground of liability for damage or injury to third person, 6 ALR2d 284.

Liability for injury in connection with automatic elevator, 6 ALR2d 391.

Liability for injury of child on electric transmission tower or pole, 6 ALR2d 754.

Liability of landowner for drowning of child, 8 ALR2d 1254.

Liability for injury by explosive or the like found by, or left accessible to, a child, 10 ALR2d 22.

Liability of carrier for injuries to person boarding vehicle or ship for social or other purposes in connection with a passenger, 11 ALR2d 1075.

Liability of landlord to one using fire escape for other than intended purpose, 12 ALR2d 217.

Liability for injury resulting from swinging door, 16 ALR2d 1161.

Storekeeper's duty and liability to one passing through store to another destination, 23 ALR2d 1135.

Applicability of res ipsa loquitur doctrine to fall of object or substance from ceiling of place of public resort, 24 ALR2d 643.

Liability for injury to guest in home or similar premises, 25 ALR2d 598.

Intoxication of person injured or killed as affecting applicability of last clear chance doctrine, 26 ALR2d 308.

Landlord's liability for injury or death due to defects in exterior stairs, passageways, areas, or structures used in common by tenants, 26 ALR2d 468; 65 ALR3d 14; 68 ALR3d 382.

Liability of landowner for injury to or death of child caused by cave-in or landslide, 28 ALR2d 195.

Liability of landowner for injury to or death of child resulting from piled or stacked lumber or other building materials, 28 ALR2d 218.

Passenger on freight elevator as attractive nuisance, 28 ALR2d 1222.

Liability of owner or occupant for condition of covering over opening or vault in sidewalk, 31 ALR2d 1334.

Duty of landowner to erect fence or other device to deter trespassing children from entering third person's property on which dangerous condition exists, 39 ALR2d 1452.

Liability of builder or owner of building under construction for injuries received on premises by infant, 44 ALR2d 1253.

Child accompanying business visitor to store, shop, or the like as invitee or licensee, 44 ALR2d 1319.

Liability of landowner for injury or death of adult falling down unhoused well, cistern, mine shaft, or the like, 46 ALR2d 1069.

Liability of owner or occupant of premises to injured person permitted to use power tools or appliances, 46 ALR2d 1377.

Liability of landowner for injury or death of child caused by cut or puncture from broken glass or other sharp object, 47 ALR2d 1048.

Duty of a possessor of land to warn adult licensees of danger, 55 ALR2d 525.

Duty and liability of an innkeeper to visitor or caller of registered guest, 58 ALR2d 1201.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of litter or debris on floor, 61 ALR2d 6.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of obstacle placed or dropped on floor, 61 ALR2d 110.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of litter or debris on stairway, 61 ALR2d 174.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of obstacle placed or dropped on steps, 61 ALR2d 205.

Liability of proprietor of store, office, or similar business premises for injury from fall on floor made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 ALR2d 6.

Liability of proprietor of store, office, or similar business premises for injury from fall on steps made slippery by tracked-in or spilled water, oil, mud, snow, and the like, 62 ALR2d 131.

Attractive nuisance doctrine as applied to machine or machinery in motion other than vehicles, railroad cars, or streetcars, 62 ALR2d 898.

Independent contractor's or subcontractor's liability for injury or death of third person occurring during excavation work not in street or highway, 62 ALR2d 1052.

Liability of proprietor of store, office, or similar business premises for injury from fall due to defect in floor or floor covering, 64 ALR2d 335.

Liability of proprietor of store, office, or similar business premises for injury from fall due to defect in stairway, 64 ALR2d 398.

Liability of proprietor of store, office, or similar business premises for fall on steps slippery by nature or through wear, 64 ALR2d 471.

Hospital's liability to visitor injured as result of condition of exterior walks, steps, or grounds, 71 ALR2d 427.

Hospital's liability to visitor injured by slippery, obstructed, or defective interior floors or steps, 71 ALR2d 436.

Place or manner of depositing snow moved by abutting owner or occupant as affecting his liability to pedestrian injured in street, 71 ALR2d 793.

Duty owed to, and status of, social guest of employee on employer's business premises, 78 ALR2d 107.

Liability for injury or death due to physical condition of church premises, 80 ALR2d 806.

Liability for injury from overhead door, 83 ALR2d 743.

Liability of strip or other surface mine or quarry operator to person, other than employee, injured or killed during mining operations, 84 ALR2d 733.

Liability for injury or death of child in refrigerator, 86 ALR2d 709.

Status of one who enters a store or other place of public resort solely for purpose of using facilities accessible to public, such as telephone, mailbox, lavatory, or the like, 93 ALR2d 784.

Duty of proprietor toward visitor upon premises on private business with or errand or work for employee, 94 ALR2d 6.

Liability of owner or occupant of building for personal injury or death of person in street resulting from objects falling or thrown from building interior, 97 ALR2d 1431.

Liability of owner of vacant building for injury to child trespassing on premises, 99 ALR2d 461.

Liability of hotel, motel, summer resort, or private membership club or association operating swimming pool, for injury or death of guest or member, or of member's guest, 1 ALR3d 963.

Liability of owner or operator of interior parking facility for bodily injury to nonemployees on premises, 4 ALR3d 938.

Liability for injury or death of child social guest, 20 ALR3d 1127.

Liability of owner of private residential swimming pool for injury or death occasioned thereby, 20 ALR3d 1395.

Liability of owner or occupant of premises for injuries sustained by mail carrier, 21 ALR3d 1099.

Premises liability: proceeding in the dark as contributory negligence, 22 ALR3d 286.

Premises liability: proceeding in the dark along outside path or walkway as contributory negligence, 22 ALR3d 599.

Premises liability: proceeding in the dark along inside hall or passageway as contributory negligence, 24 ALR3d 388.

Liability of owner or operator of power lawnmower for injuries resulting to third person from its operation, 25 ALR3d 1314.

Telephone company's liability for injuries sustained by user of public telephone or telegraph as a result of condition of premises on which instrument was installed, 25 ALR3d 1432.

Duty of possessor of land to warn child licensees of danger, 26 ALR3d 317.

Modern status of the rule absolving a possessor of land of liability to those coming thereon for harm caused by dangerous physical conditions of which the injured party knew and realized the risk, 35 ALR3d 230.

Tort liability of private schools and institutions of higher learning for accidents due to condition of buildings, equipment, or outside premises, 35 ALR3d 975.

Liability of owner or operator of parking lot for personal injuries allegedly resulting from condition of premises, 38 ALR3d 10.

Liability of owner or operator of parking lot for personal injuries caused by movement of vehicles, 38 ALR3d 138.

Liability of owner or operator of automatic carwash facility for personal injury or property damage to nonemployees on premises, 41 ALR3d 690.

Liability of business establishments, places of accommodation or recreation, and the like, for injury or damage occurring on the premises caused by the accidental starting up of parked motor vehicle, 43 ALR3d 952.

Liability in connection with injury allegedly caused by defective condition of private road or driveway, 44 ALR3d 355.

Use of set gun, trap, or similar device on defendant's own property, 47 ALR3d 646.

Liability for injuries from ice or snow on residential premises, 54 ALR3d 559.

Attractive nuisance doctrine as applied to trees, shrubs, and the like, 59 ALR3d 848.

Liability in action based upon negligence, for injury to or death of, person going upon cemetery premises, 63 ALR3d 1252.

Animals as attractive nuisance, 64 ALR3d 1069.

Landlord's liability for injury or death due to defects in areas of building (other than stairways) used in common by tenants, 65 ALR3d 14.

Landlord's liability for injury or death due to defects in exterior steps or stairs used in common by tenants, 67 ALR3d 490.

Landlord's liability for injury or death due to defects in interior steps or stairs used in common by tenants, 67 ALR3d 587.

Liability of storekeeper for death of or injury to customer in course of robbery, 72 ALR3d 1269.

Liability of operator of swimming facility for injury or death allegedly resulting from absence of or inadequacy of rescue equipment, 87 ALR3d 380.

Liability of swimming facility operator for injury or death allegedly caused by failure to adequately fence facility, 87 ALR3d 886.

Liability for injuries in connection with ice or snow on nonresidential premises, 95 ALR3d 15.

Liability of governmental unit or private owner or occupant of land abutting highway for injuries or damage sustained when motorist strikes tree or stump on abutting land, 100 ALR3d 510.

Tenant's agreement to indemnify landlord against all claims as including losses resulting from landlord's negligence, 4 ALR4th 798.

Liability of lessee to persons injured by defects in premises or property after surrender of possession by lessee, 11 ALR4th 579.

Liability of owner or occupant of prem-

ises to fireman coming thereon in discharge of his duty, 11 ALR4th 597.

Liability of owner or occupant of premises for injury or death resulting from contact of crane, derrick, or other movable machine with electric line, 14 ALR4th 913.

Res ipsa loquitur as to cause of or liability for real-property fires, 21 ALR4th 929.

Modern status of rules conditioning landowner's liability upon status of injured party as invitee, licensee, or trespasser, 22 ALR4th 294.

Liability of owner or occupant of premises to police officer coming thereon in discharge of officer's duty, 30 ALR4th 81.

Liability of dog owner for injuries sustained by person frightened by dog, 30 ALR4th 986.

Liability to adult social guest injured otherwise than by condition of premises, 38 ALR4th 200.

Liability to one struck by golf ball, 53 ALR4th 282.

Ski resort's liability for skier's injuries resulting from condition of ski run or slope, 55 ALR4th 632.

Baseball player's right to recover for baseball-related personal injuries from nonplayer, 55 ALR4th 664.

Liability to one struck by golf club, 63 ALR4th 221.

Landlord's liability to third person for injury resulting from attack off leased premises by dangerous or vicious animal kept by tenant, 89 ALR4th 374.

Liability for personal injury or death allegedly caused by defect in church premises, 8 ALR5th 1.

Breach of assumed duty to inspect property as ground for liability to third party, 13 ALR5th 289.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party, 31 ALR5th 550.

Liability of owner or operator of business premises for injuries from electrically operated door, 44 ALR5th 525.

Liability of hotel, motel, resort, or private membership club or association operating swimming pool, for injury or death of member, 55 ALR5th 463.

Liability of owner, operator, or other parties, for personal injuries allegedly resulting from snow or ice on premises of parking lot, 74 ALR5th 49.

51-3-3. Lawful possessor of land owes no duty of care to trespasser.

(a) As used in this Code section, the term "possessor of land" means the landowner, occupant of the land, holder of any easement to the land, or lessee of the land.

(b) A lawful possessor of land owes no duty of care to a trespasser except to refrain from causing a willful or wanton injury.

(c) Georgia common law as it exists and is applied to the doctrine of attractive nuisance, in effect as of January 1, 2014, shall not be construed to be altered by this Code section.

(d) This Code section shall not affect any immunities from or defenses to civil liability to which a lawful possessor of land may be entitled. (Code 1981, § 51-3-3, enacted by Ga. L. 2014, p. 351, § 2/SB 125.)

Editor's notes. — Ga. L. 2014, p. 351, § 1/SB 125, not codified by the General Assembly, provides that: "It is the intent of the General Assembly to codify and preserve Georgia common law regarding the duties owed by possessors of land to trespassers as of January 1, 2014. The General Assembly finds that the provi-

sions of the American Law Institute's *Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm,* §§ 50-52 (2012), which seek to impose broad new duties on those who own, occupy, or control premises, including the duty to exercise reasonable care to all trespassers, do not reflect the public policy of the State of Georgia. It is also the intent of the General Assembly to preserve the attractive nuisance doctrine and Georgia common law as it relates to the attractive nuisance doctrine."

Law reviews. — For annual survey on real property, see 66 Mercer L. Rev. 151 (2014). For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014). For article on the 2014 enactment of this Code section, see 31 Ga. St. U.L. 217 (2014).

ARTICLE 2

OWNERS OF PROPERTY USED FOR RECREATIONAL PURPOSES

Cross references. — Snow skiing safety, T. 43, C. 43A. Roller skating safety, § 51-1-43.

Law reviews. — For annual survey of administrative law, see 56 Mercer L. Rev. 31 (2004).

JUDICIAL DECISIONS

Constitutionality. — Recreational Property Act, O.C.G.A. § 51-3-20 et seq., is not unconstitutionally vague as applied to the facts in suits arising out of the bombing in Centennial Olympic Park during the 1996 Olympic Games because it provides fair notice to persons of normal intelligence that a park created to celebrate the spirit of a historic athletic and cultural event and to provide a gathering place for visitors to relax and enjoy themselves constitutes property available to the public for recreational purposes so as to come within the immunity provisions of the Act. Anderson v. Atlanta Comm. for the Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000).

The Recreational Property Act, O.C.G.A. § 51-3-20 et seq., did not unconstitutionally violate the plaintiffs' due process and equal protection rights in suits arising out of the bombing in Centennial Olympic Park during the 1996 Olympic Games because the Act reasonably promotes the legitimate governmental purpose of making recreational property more accessible to the public and the classification it draws between those persons injured while on recreational property and those persons injured on other premises is rationally related to this legitimate purpose. Anderson v. Atlanta Comm. for the Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000).

The Recreational Property Act, O.C.G.A. § 51-3-20 et seq., does not violate the provision in Ga. Const. 1983, Art. III, Sec. V, Par. III, prohibiting the passage of a law which refers to more than one subject matter. Anderson v. Atlanta Comm. for the Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000).

Commercial interests mixed with recreational activities. — In situations where commercial interests are mixed with recreational activities, a balancing test to determine whether an activity is "recreational" requires that all social and economic aspects of the activity be examined; relevant considerations on this question include, without limitation, the intrinsic nature of the activity, the type of service or commodity offered to the public, and the activity's purpose and consequence. Anderson v. Atlanta Comm. for the Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — School's Failure to Maintain Children's Play Area Properly, 9 POF2d 729.

Defectively Designed or Constructed Swimming Pool, 12 POF2d 545.

Sport Injury — Negligence, 15 POF2d 1.

Playground Accidents — Human Impact Tolerance, 21 POF2d 701.

Dangerous or Defective Amusement Ride, 25 POF2d 613.

Negligent Operation or Public Swimming Pool, 34 POF2d 63.

Negligent Operation of Private Swimming Pool, 38 POF2d 1.

Inadequate Protection of Spectator at Sporting Event, 45 POF2d 407.

Liability for Trampoline Injury, 45 POF2d 469.

Assumption of Risk Defense in Sports or Recreation Injury Cases, 30 POF3d 161.

Liability for Errant Golf Ball Shots, 31 POF3d 87.

Negligent Operation of Gymnasium, Health Club, or Similar Facility, 40 POF3d 111.

Liability of Ski Area Operator for Skiing Accident, 45 POF3d 115.

ALR. — Effect of statute limiting landowner's liability for personal injury to recreational user, 47 ALR4th 262.

Liability to one struck by golf ball, 53 ALR4th 282.

Ski resort's liability for skier's injuries resulting from condition of ski run or slope, 55 ALR4th 632.

Baseball player's right to recover for baseball-related personal injuries from nonplayer, 55 ALR4th 664.

Liability of owner or operator of skating rink for injury to patron, 38 ALR5th 107.

51-3-20. Purpose of article.

The purpose of this article is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting the owners' liability toward persons entering thereon for recreational purposes. (Ga. L. 1965, p. 476, § 1.)

Law reviews. — For article, "Of Rocks and Hard Places: The Value of Risk Choice," see 42 Emory L.J. 1 (1993). For annual survey article on local government law, see 52 Mercer L. Rev. 341 (2000). For annual survey of administrative law, see 56 Mercer L. Rev. 31 (2004). For survey article on local government law, see 59 Mercer L. Rev. 285 (2007).

JUDICIAL DECISIONS

Purpose of article. — O.C.G.A. Art. 2, C. 3, T. 51 has been adopted to encourage landowners to make land and water areas available to the public by limiting the liability in connection therewith, prescribing the duty of care owed by landowners to those using the land for recreational purposes, the duty of care owed by landowners to invitees and permittees. North v. Toco Hills, Inc., 160 Ga. App. 116, 286 S.E.2d 346 (1981).

Article applies to private and public owners. — O.C.G.A. Art. 2, C. 3, T. 51 applies to private owners of land as well as to public owners of land. Welch v. Douglas County, 199 Ga. App. 269, 404 S.E.2d 450, cert. denied, 199 Ga. App. 907, 404 S.E.2d 450 (1991).

O.C.G.A. Art. 2, C. 3, T. 51 was applicable to playground on public school property. Edmondson v. Brooks County Bd. of Educ., 205 Ga. App. 662, 423 S.E.2d 413 (1992).

O.C.G.A. Art. 2, C. 3, T. 51 applied to playground equipment on church property. Maleare v. Peachtree City Church of Christ, Inc., 213 Ga. App. 593, 445 S.E.2d 321 (1994).

O.C.G.A. Art. 2, C. 3, T. 51 applied to a community athletic association. South Gwinnett Athletic Ass'n v. Nash, 220 Ga. App. 116, 469 S.E.2d 276 (1996).

"Public" construed. — One must permit the free use of one's facilities or land by the public generally or by a particular class of the public, such as Little Leaguers, Boy Scouts, etc., and permitting free use by classes of individuals is not sufficient. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., was not limited to privately held land; a welcome center where a traveler was injured was recreational, and thus the department which owned the welcome center was immune from liability and any connection between brochures offered at the welcome center and the state's eventual "profit" from increased tax revenue was far too tenuous to render the venture commercial. Matheson v. Ga. DOT, 280 Ga. App. 192, 633 S.E.2d 569 (2006).

Applicability of article depends on public purpose, not size of tract. — Applicability of O.C.G.A. Art. 2, C. 3, T. 51 does not hinge on the size of the tract involved. The important criterion is the purpose for which the public is permitted on the property. If the public is invited to further the business interests of the owner — e.g., for sales of food, merchandise, services, etc. — then the article will not shield the owner from liability even though the public receives some recreation as a side benefit. Cedeno v. Lockwood, Inc., 250 Ga. 799, 301 S.E.2d 265 (1983) (rejecting rationale of Erickson v. Century Mgt. Co., 154 Ga. App. 508, 268 S.E.2d 779 (1980)).

Fact finder was required to resolve conflicts in evidence which showed that a park where a bomb exploded during the 1996 Olympics had both commercial and recreational aspects before the trial court could determine if an Olympic committee was immune from liability for injuries and death, pursuant to Georgia's Recreational Property Act, O.C.G.A. § 51-3-20 et seq., and the state supreme court ruled that, on remand, the jury could consider evidence of the committee's purpose as demonstrated before, during, and after the bomb exploded. Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 598 S.E.2d 471 (2004).

City sidewalks. — Applying O.C.G.A. Art. 2, C. 3, T. 51 to a municipal sidewalk does not place it in conflict with O.C.G.A. § 32-4-93, which sets forth circumstances in which a city may be liable for defects in its streets and sidewalks; simply stated, the article will control when the sidewalk is used for a "recreational purpose" and the other requirements of this article are satisfied, and O.C.G.A. § 32-4-93 will apply in other cases. City of Tybee Island v. Godinho, 270 Ga. 567, 511 S.E.2d 517 (1999).

Sidewalk along beach outside protection of O.C.G.A. Art. 2, C. 3, T. 51 when, although people who used the sidewalk often spent money at businesses in the defendant city, the city was not in the business of entertainment or recreation and did not seek to make a profit from the use of the sidewalk. City of Tybee Island v. Godinho, 270 Ga. 567, 511 S.E.2d 517 (1999).

Article not applicable to residential swimming pool. — Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., adopted to promote the public use of land facilities, was not meant to apply to the friendly neighbor who permits one's friends and neighbors to use one's swimming pool without charge. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Article not applicable to vacant lots in residential areas. — The purpose of the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., is the limiting of the liability of persons making land and areas available to the public for recreational purposes and does not apply to vacant lots in residential areas. Shepard v. Wilson, 123 Ga. App. 74, 179 S.E.2d 550 (1970).

Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., is not applicable when use of land is expressly denied to potential users by posting of "keep out" signs in area. Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (1972).

Conclusion that Recreational Property Act waived sovereign and official immunities was erroneous. — Although finding that official immunity shielded a county employee from liability for injuries suffered by a child when that child fell from a swing on county property

that the employee previously inspected, and that sovereign immunity shielded the county, the trial court nonetheless erred in concluding that the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., waived these immunities as: (1) implied waivers of governmental immunity were not to be favored; (2) the employee was entitled to official or qualified immunity, which could not be waived; and (3) even assuming a partial waiver of sovereign and official immunity through enactment of the Act, no evidence was presented that the employee acted willfully and the defect complained about by the child's parent was apparent to those using the property. Norton v. Cobb, 284 Ga. App. 303, 643 S.E.2d 803 (2007), cert. denied, 2007 Ga. LEXIS 634 (Ga. 2007).

Liability under this article distinguished from general liability to licensees. — The owner or occupier of premises coming within the terms of the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., did not have "substantially" the same duties toward a user of the premises as that owed to a licensee under former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2). Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Under the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., the injured party coming within the provisions of that Act would be obligated to show a willful and malicious failure to guard or warn, that is, a failure to use even slight care; whereas a licensee under former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2) may recover by showing a lack of ordinary care, which under the circumstances may amount to willful and wanton negligence. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Under the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., the owner's liability for willful and wanton acts was limited solely to the willful and malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Perhaps as to such willful and malicious acts, the duty was substantially similar to that owed to a licensee under former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2), but to that extent only, as the owner, under that section had a broader duty which may have involved acts other than failure to guard against or warn against the dangers stated under the Act. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Fee charged for use of park. — The trial court did not err in granting summary judgment to the defendant since the trial court was authorized to conclude as a matter of law that the $4.00 fee charged to each vehicle to enter the park did not constitute a charge for the recreational use of the park land itself and the plaintiff's alleged injuries resulted from the plaintiff's general recreational usage of the park premises, for which no fee was charged, rather than from the use of any of the facilities for which a fee was charged. Therefore, the provisions of the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., operate to prevent the plaintiff from recovering from the defendant based on allegations of simple negligence. Quick v. Stone Mt. Mem. Ass'n, 204 Ga. App. 598, 420 S.E.2d 36, cert. denied, 204 Ga. App. 922, 420 S.E.2d 36 (1992).

Tripping on debris in state park. — Spouse's action against the Georgia Department of Natural Resources, seeking damages for injuries sustained when the injured spouse tripped on a debris pile that was located near a public restroom on state land, was barred by the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq. Lee v. Dep't of Natural Res. of Ga., 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Allegation of simple negligence barred recovery. — Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against the city by an injured motorcycle driver as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for

recreational purposes without charge. Carroll v. City of Carrollton, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

Drowning. — Trial court properly granted summary judgment to the Georgia Department of Natural Resources and a power company in a mother's wrongful death action after the mother's child drowned at a visit to a state park as the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., absolved the entities from any liability since there was no evidence that the drowning resulted from a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Ray v. Ga. Dep't of Natural Res., 296 Ga. App. 700, 675 S.E.2d 585 (2009).

County did not waive protection of the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., by purchasing liability insurance. Welch v. Douglas County, 199 Ga. App. 269, 404 S.E.2d 450, cert. denied, 199 Ga. App. 907, 404 S.E.2d 450 (1991).

County's activities involving routine maintenance and clean-up of a ball field did not waive the immunity provided under the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq. Welch v. Douglas County, 199 Ga. App. 269, 404 S.E.2d 450, cert. denied, 199 Ga. App. 907, 404 S.E.2d 450 (1991).

Church-sponsored festival. — In a case in which a parent's child was injured while attending a church-sponsored festival, the church was shielded from liability by the Recreational Property Act, O.C.G.A. § 51-3-20 et seq. There was no evidence that the church was actively seeking to recruit new members during the festival or that the church recruited any new members as a result of the festival. Word of Faith Ministries, Inc. v. Hurt, 323 Ga. App. 296, 746 S.E.2d 777 (2013).

Issue should be submitted to jury for balancing test analysis. — Grant of summary judgment in favor of the city in a wrongful-death action brought by the decedent's spouse was improper under the Recreational Property Act (RPA), O.C.G.A. § 51-3-20 et seq., because the trial court was required to submit the issue to the jury to perform the required balancing test, considering the totality of the circumstances. Upon the jury's resolution of the factual issue, the trial court was required to apply the jury's finding and determine as a matter of law whether or not the RPA applied to limit the city's liability in the case. Butler v. Carlisle, 299 Ga. App. 815, 683 S.E.2d 882 (2009), cert. denied, No. S10C0052, 2010 Ga. LEXIS 155 (Ga. 2010).

Cited in Stone Mt. Mem. Ass'n v. Herrington, 225 Ga. 746, 171 S.E.2d 521 (1969); Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (1972); North v. Toco Hills, Inc., 160 Ga. App. 116, 286 S.E.2d 346 (1981); Lockwood, Inc. v. Cedeno, 164 Ga. App. 34, 295 S.E.2d 753 (1982); Godinho v. City of Tybee Island, 231 Ga. App. 377, 499 S.E.2d 389 (1998); Anderson v. Atlanta Comm. for the Olympic Games, Inc., 261 Ga. App. 895, 584 S.E.2d 16 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 62 Am. Jur. 2d, Premises Liability, §§ 184 et seq., 453 et seq. 62A Am. Jur. 2d*, Premises Liability, § 626 et seq.

C.J.S. — 65A C.J.S., Negligence, § 490 et seq.

ALR. — Liability of private owner or operator of picnic ground for injury or death of patron, 67 ALR2d 965.

Private owner's liability to trespassing children for injury sustained by sledding, tobogganing, skiing, skating, or otherwise sliding on his land, 19 ALR3d 184.

Liability of business establishments, places of accommodation or recreation, and the like, for injury or damage occurring on the premises caused by the accidental starting up of parked motor vehicle, 43 ALR3d 952.

Liability for injury or death of nonparticipant caused by water skiing, 67 ALR3d 1218.

Liability of swimming facility operator for injury to or death of diver allegedly resulting from hazardous condition in water, 85 ALR3d 750.

Liability of swimming facility operator for injury or death allegedly resulting

from defects of diving board, slide, or other swimming pool equipment, 85 ALR3d 849.

Liability of operator of swimming facility for injury or death allegedly resulting from absence of or inadequacy of rescue equipment, 87 ALR3d 380.

Liability of swimming facility operator for injury or death allegedly caused by failure to adequately fence facility, 87 ALR3d 886.

Liability of operator of nonresidential swimming facility for injury or death allegedly resulting from failure to provide or exercise proper supervision, 87 ALR3d 1032.

Liability of swimming facility operator for injury to or death of trespassing child, 88 ALR3d 1197.

Liability of swimming facility operator for injury or death inflicted by third person, 90 ALR3d 533.

51-3-21. Definitions.

As used in this article, the term:

(1) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land.

(2) "Land" means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.

(3) "Owner" means the possessor of a fee interest, a tenant, a lessee, an occupant, or a person in control of the premises.

(4) "Recreational purpose" includes, but is not limited to, any of the following or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, aviation activities, nature study, water skiing, winter sports, and viewing or enjoying historical, archeological, scenic, or scientific sites. (Ga. L. 1965, p. 476, § 2; Ga. L. 2014, p. 825, § 2/HB 494.)

JUDICIAL DECISIONS

"Charge" construed. — Alleged benefits of advertising and promotion of sales of the defendant's products from the opening to the public of picnic grounds and a lake on the defendant's property are not a "charge" as defined by paragraph (1) of this section. Bourn v. Herring, 225 Ga. 67, 166 S.E.2d 89 (1969), appeal dismissed sub nom. Herring v. R.L. Mathis Certified Dairy Co., 400 U.S. 922, 91 S. Ct. 192, 27 L. Ed. 2d 183 (1970).

State park's collection of a $1.00 parking fee upon all motor vehicles did not constitute a charge imposing liability for personal injuries sustained by a park visitor under the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq. Majeske v. Jekyll Island State Park Auth., 209 Ga. App. 118, 433 S.E.2d 304 (1993).

The fee charged to youths and teams participating in a softball program at a park owned by a city and county recreation board was not the "charge" referred to in O.C.G.A. § 51-3-21 so as to render the protection of the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., inapplicable to the defendant; the charge referred to in the Act is what is imposed to obtain permission to enter the premises. Spivey v. City of Baxley, 210 Ga. App. 772, 437 S.E.2d 623 (1993).

While the fee imposed by the city to access the stadium was nominal, the city nevertheless required members of the

public to pay to enter the stadium and, thus, the fee fell squarely within the definition of "charge." Mayor & Aldermen of Garden City v. Harris, 339 Ga. App. 452, 793 S.E.2d 628 (2016).

After the plaintiff sued the United States over injuries the plaintiff allegedly sustained when the plaintiff fell down stairs within a federally owned campground, the United States was insulated from liability under Georgia's Recreational Property Act, O.C.G.A. § 51-3-20, because O.C.G.A. § 51-3-25(2)'s exception to non-liability for landowners who charged admission fees did not apply since the fees the United States charged campers were not admission fees, which were prohibited by federal law, but were assessed to defray the costs of providing utilities. Swafford v. United States, 839 F.3d 1365 (11th Cir. 2016).

"Land" construed. — Nothing on the face of this section indicates in any way an intention on the part of the General Assembly to limit its effect to privately owned land such as land held by farmers. Stone Mt. Mem. Ass'n v. Herrington, 225 Ga. 746, 171 S.E.2d 521 (1969).

"Recreational purpose" construed. — When a building owner asserted it had opened its property to the public for "recreational purposes," showed that people come to the Underground Atlanta area for entertainment, and also showed that the plaintiffs were sightseers and had taken pictures of the area, such facts did not indicate "recreational purposes" as defined in paragraph (4) of O.C.G.A. § 51-3-21. Cedeno v. Lockwood, Inc., 250 Ga. 799, 301 S.E.2d 265 (1983).

A park created to celebrate the spirit of an historic athletic and cultural event and to provide a gathering place for visitors to relax and enjoy themselves constitutes property available to the public for recreational purposes so as to come within the immunity provisions of the Recreational Property Act, O.C.G.A. § 51-3-20 et seq. Anderson v. Atlanta Comm. for the Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000).

Recreational Property Act, O.C.G.A. § 51-3-20 et seq., applies to spectators at athletic events when no admission charge is imposed. Spivey v. City of Baxley, 210 Ga. App. 772, 437 S.E.2d 623 (1993).

Summary judgment was inappropriate when a fact issue remained as to whether a lot owner's clearing of property subject to an easement interfered with the easement holders' rights to use the land for recreational purposes, such as enjoying the land in its natural uncut state. E. Beach Props. v. Taylor, 250 Ga. App. 798, 552 S.E.2d 103 (2001).

Summary judgment was improperly entered in favor of an Olympic Committee since a genuine issue of material fact existed about whether the operation of the Olympic Park was a commercial or a recreational venture; on remand, the jury was ordered to resolve the question of whether the nature of the Park at the time of the underlying explosion which caused the death or injury of those involved in the litigation was commercial or recreational, and the court was to decide whether the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., applied to the Park and insulated the Committee from liability. Anderson v. Atlanta Comm. for the Olympic Games, Inc., 261 Ga. App. 895, 584 S.E.2d 16 (2003), aff'd, sub nom. Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 598 S.E.2d 471 (2004).

Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against by an injured motorcycle driver as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. Carroll v. City of Carrollton, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

Hunting is among the many recreational purposes recognized by the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq. Lee v. Dep't of Natural Res. of Ga., 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Park in which substantial profit made. — Stone Mountain Park premises

are a public recreation area, notwithstanding the fact that substantial revenues may be derived from the sale of special permits, concessions, and tickets to rides and other attractions located on the premises. Hogue v. Stone Mt. Mem. Ass'n, 183 Ga. App. 378, 358 S.E.2d 852, cert. denied, 183 Ga. App. 906, 358 S.E.2d 852 (1987).

Cemetery maintenance company. — Whether the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., applied to a cemetery maintenance company was a question for the jury; liability could be imposed based upon theories that the maintenance company acted as the cemetery owner's agent. Martin v. Dempsey Funeral Servs. of Ga., Inc., 319 Ga. App. 343, 735 S.E.2d 59 (2012).

Cited in Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (1972); Erickson v. Century Mgt. Co., 154 Ga. App. 508, 268 S.E.2d 779 (1980); Georgia Marble Co. v. Warren, 183 Ga. App. 866, 360 S.E.2d 286 (1987); Cooley v. City of Carrollton, 249 Ga. App. 387, 547 S.E.2d 689 (2001).

51-3-22. Duty of owner of land to those using same for recreation generally.

Except as specifically recognized by or provided in Code Section 51-3-25, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes. (Ga. L. 1965, p. 476, § 3.)

Law reviews. — For survey article on torts, see 34 Mercer L. Rev. 271 (1982).

JUDICIAL DECISIONS

Applicability. — Applicability of the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., does not hinge on the size of the track involved. Cedeno v. Lockwood, Inc., 250 Ga. 799, 301 S.E.2d 265 (1983).

Liability distinguished from general liability to licensees. — The owner or occupier of premises coming within the terms of the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., did not have "substantially" the same duties toward a user of the premises as that owed to a licensee under former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2). Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Under Ga. L. 1965, p. 476, § 3 (see now O.C.G.A. § 51-3-22) the injured party coming within the provisions of the statute would be obligated to show a willful and malicious failure to guard or warn, that was, a failure to use even slight care; whereas a licensee under former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2 may recover by showing a lack of ordinary care, which under the circumstances may amount to willful and wanton negligence. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Under Ga. L. 1965, p. 476, § 3 (see now O.C.G.A. § 51-3-22), the owner's liability for willful and wanton acts are limited solely to the willful and malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Perhaps as to willful and malicious acts described in the statute, the duty is substantially similar to that owed to a licensee under former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2), but to that extent only, as the owner, under that section has a broader duty which may involve acts other than failure to guard against or warn against the dangers stated under Ga. L. 1965, p. 476, § 3. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Public use not proven. — Trial court

erred in granting summary judgment for a school board as to an injured party's personal injury claim based on the Georgia Recreational Purposes Act, specifically O.C.G.A. §§ 51-3-22 and 51-3-23, as the school board presented no evidence that the playground was open to the public and the injured party presented evidence that the playground: (1) was fenced-in; (2) was only for the use of children enrolled in the school; and (3) was not open to any segment of the general public. Hart v. Appling County Sch. Bd., 266 Ga. App. 300, 597 S.E.2d 462 (2004).

Willful failure to guard or warn would require actual knowledge of owner that its property is being used for recreational purposes; that a condition exists involving an unreasonable risk of death or serious bodily harm; that the condition is not apparent to those using the property; and that having this knowledge, the owner chooses not to guard or warn in disregard of the possible consequences. This test excludes either constructive knowledge or a duty to inspect. McGruder v. Georgia Power Co., 126 Ga. App. 562, 191 S.E.2d 305 (1972), rev'd on other grounds, 229 Ga. 811, 194 S.E.2d 440 (1972).

Willful failure imports conscious, knowing, voluntary, intentional failure, a purpose or willingness to make the omission, rather than a mere inadvertent, accidental, involuntary, inattentive, inert or passive omission. McGruder v. Georgia Power Co., 126 Ga. App. 562, 191 S.E.2d 305 (1972), rev'd on other grounds, 229 Ga. 811, 194 S.E.2d 440 (1972).

Landowner is not liable for injury suffered when land was made available for recreational purposes and when the injured party entered the land and was making use of the land for that purpose. Lockwood, Inc. v. Cedeno, 164 Ga. App. 34, 295 S.E.2d 753 (1982), rev'd on other grounds, 250 Ga. 799, 301 S.E.2d 265 (1983).

Fee for use of park. — The trial court did not err in granting summary judgment to the defendant since the trial court was authorized to conclude as a matter of law that the $4.00 fee charged to each vehicle to enter the park did not constitute a charge for the recreational use of the park land itself and the plaintiff's alleged injuries resulted from the plaintiff's general recreational usage of the park premises, for which no fee was charged, rather than from the use of any of the facilities for which a fee was charged. Therefore, the provisions of the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., operate to prevent the plaintiff from recovering from the defendant based on allegations of simple negligence. Quick v. Stone Mt. Mem. Ass'n, 204 Ga. App. 598, 420 S.E.2d 36, cert. denied, 204 Ga. App. 922, 420 S.E.2d 36 (1992).

Injury at welcome center. — Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., was not limited to privately held land; a welcome center where a traveler was injured was recreational, and thus the department which owned the welcome center was immune from liability and any connection between brochures offered at the welcome center and the state's eventual "profit" from increased tax revenue was far too tenuous to render the venture commercial. Matheson v. Ga. DOT, 280 Ga. App. 192, 633 S.E.2d 569 (2006).

Injury to motorcyclist. — Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against it by an injured motorcycle driver as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. Carroll v. City of Carrollton, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

Employee entering hospital for "recreational purposes". — A provider of janitorial services to a hospital as an independent contractor was not liable, pursuant to O.C.G.A. §§ 51-3-22 and 51-3-25, in a slip and fall case involving a hospital employee because the employee was unable to argue that the employee entered the hospital for recreational pur-

poses and, even if the hospital could be deemed a recreational area, the hospital as business owner and occupier could not delegate duty to keep the premises in reasonably safe condition. Perkins v. Compass Group USA, Inc., 512 F. Supp. 2d 1296 (N.D. Ga. Mar. 7, 2007).

Complaint referencing "recreational". — Pedestrian's complaint for injuries suffered while walking on a city-owned recreational walkway were barred by the Recreational Property Act, O.C.G.A. §§ 51-3-22 and 51-3-23. The pedestrian could not circumvent the judicial admissions in the pedestrian's first complaint by amending it to remove references to "recreational." City of Chickamauga v. Hentz, 300 Ga. App. 249, 684 S.E.2d 372 (2009).

No shield to property owner in the business of entertainment. — The important criterion is the purpose for which the public is permitted on the property. If the public is invited to further the business interests of the owner — e.g., for sales of food, merchandise, services, etc. — then the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., will not shield the owner from liability even though the public receives some recreation as a side benefit. Cedeno v. Lockwood, Inc., 250 Ga. 799, 301 S.E.2d 265 (1983).

Owner not liable when fee not charged. — Since no fee was charged for the recreational use of the defendant's land, the defendant was not liable to an individual injured while bicycling on a trail alleged to be unsafe and dangerous, of which danger it was alleged the defendant knew or should have known. Brannon v. Stone Mt. Mem. Ass'n, 165 Ga. App. 120, 299 S.E.2d 176 (1983).

Owner held not liable to injured bicyclist. — Since no fee was charged for recreational use of the defendant's land, the defendant was not liable to the individual injured while bicycling on the trail alleged to be unsafe and dangerous, of which danger it was alleged the defendant knew or should have known. Brannon v. Stone Mt. Mem. Ass'n, 165 Ga. App. 120, 299 S.E.2d 176 (1983).

City was not liable for injury occurring on a walkway maintained by the county recreational authority to provide access to a park and river. Julian v. City of Rome, 237 Ga. App. 822, 517 S.E.2d 79 (1999).

City and its employees were entitled to summary judgment under O.C.G.A. T. 51, C. 3 in an action seeking damages for injuries sustained by a participant in a program of the city that provided free after-school recreational and swimming therapy to certain disabled individuals. Cooley v. City of Carrollton, 249 Ga. App. 387, 547 S.E.2d 689 (2001).

Olympic Park bombing. — Summary judgment was improperly entered in favor of an Olympic Committee since a genuine issue of material fact existed about whether the operation of the Olympic Park was a commercial or a recreational venture; on remand, the jury was ordered to resolve the question of whether the nature of the Park at the time of the underlying explosion which caused the death or injury of those involved in the litigation was commercial or recreational, and the court was to decide whether the Recreational Property Act, O.C.G.A. 51-3-20 et seq., applied to the Park and insulated the Committee from liability. Anderson v. Atlanta Comm. for the Olympic Games, Inc., 261 Ga. App. 895, 584 S.E.2d 16 (2003), aff'd, sub nom. Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 598 S.E.2d 471 (2004).

Cited in Stone Mt. Mem. Ass'n v. Herrington, 225 Ga. 746, 171 S.E.2d 521 (1969); Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (1972); Erickson v. Century Mgt. Co., 154 Ga. App. 508, 268 S.E.2d 779 (1980); North v. Toco Hills, Inc., 160 Ga. App. 116, 286 S.E.2d 346 (1981); Cedeno v. Lockwood, Inc., 250 Ga. 799, 301 S.E.2d 265 (1983); Anderson v. Atlanta Comm. for the Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000); Norton v. Cobb, 284 Ga. App. 303, 643 S.E.2d 803 (2007).

51-3-23. Effect of invitation or permission to use land for recreation.

Except as specifically recognized by or provided in Code Section 51-3-25, an owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreational purposes does not thereby:

(1) Extend any assurance that the premises are safe for any purpose;

(2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed; or

(3) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons. (Ga. L. 1965, p. 476, § 4.)

JUDICIAL DECISIONS

Section not applicable to invitation to use residential swimming pool. — Georgia Recreational Property Act, adopted to promote the public use of land and facilities, was not meant to apply to the friendly neighbor who permits friends and neighbors to use one's swimming pool without charge. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Liability distinguished from general liability to licensees. — The owner or occupier of premises coming within the terms of the Georgia Recreational Property Act did not have "substantially" the same duties toward a user of the premises as that owed to a licensee under former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2). Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Under Ga. L. 1965, p. 476, § 4 (see now O.C.G.A. § 51-3-23), the injured party coming within the provisions of Ga. L. 1965, p. 476, § 4 would be obligated to show a willful and malicious failure to guard or warn, that is, a failure to use even slight care; whereas a licensee under former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2) may recover by showing a lack of ordinary care, which under the circumstances may amount to willful and wanton negligence. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Public use not proven. — Trial court erred in granting summary judgment for a school board as to an injured party's personal injury claim based on the Georgia Recreational Purposes Act, O.C.G.A. § 51-3-20 et seq., specifically O.C.G.A. §§ 51-3-22 and 51-3-23, as the school board presented no evidence that the playground was open to the public and the injured party presented evidence that the playground: (1) was fenced-in; (2) was only for the use of children enrolled in the school; and (3) was not open to any segment of the general public. Hart v. Appling County Sch. Bd., 266 Ga. App. 300, 597 S.E.2d 462 (2004).

Parking fee not "charge." — State park's collection of a $1.00 parking fee upon all motor vehicles did not constitute a charge imposing liability for personal injuries sustained by a park visitor under the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq. Majeske v. Jekyll Island State Park Auth., 209 Ga. App. 118, 433 S.E.2d 304 (1993).

Voluntary fee not a "charge." — Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., applied to a negligence action against the boys and girls club because the nominal voluntary fee some members paid did not constitute a "charge" to the public as contemplated by the Act. Gayle v. Frank Callen Boys & Girls Club, Inc., 322 Ga. App. 412, 745 S.E.2d 695 (2013).

Attractive nuisance theory was inapplicable since the injured child was not a trespasser but rather a person permitted on the property but to whom only a limited duty of care was owed. Edmondson v. Brooks County Bd. of Educ., 205 Ga. App. 662, 423 S.E.2d 413 (1992).

Fee for use of park. — The trial court did not err in granting summary judgment to the defendant since the trial court was authorized to conclude as a matter of law that the $4.00 fee charged to each vehicle to enter the park did not constitute a charge for the recreational use of the park land itself and the plaintiff's alleged injuries resulted from the plaintiff's general recreational usage of the park premises, for which no fee was charged, rather than from the use of any of the facilities for which a fee was charged. Therefore, the provisions of the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., operate to prevent the plaintiff from recovering from the defendant based on allegations of simple negligence. Quick v. Stone Mt. Mem. Ass'n, 204 Ga. App. 598, 420 S.E.2d 36, cert. denied, 204 Ga. App. 922, 420 S.E.2d 36 (1992).

Power company liability under Georgia Recreational Property Act. — The Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., provided immunity to the defendant power company as the owner of recreational property in an action arising from the murder of a teenage boy on a 65 acre tract made available at no charge to the public for boating, fishing, sailing, swimming, picnicking, camping, hunting, hiking, and scenic viewing of a lake and surrounding area since: (1) the boy was not on the property to further any commercial interests of the power company; (2) there was no mixture of commercial and recreational activities taking place on the property; (3) there was no admission fee to get onto the property, no parking fees, and no costs for the use of any of the facilities once a visitor entered the property; and (4) there were no vendors on the property from whom visitors could buy anything. Hendrickson v. Georgia Power Co., 240 F.3d 966 (11th Cir. 2001).

Debris pile on state land. — Evidence did not show that the Georgia Department of Natural Resources violated the Georgia Recreational Property Act (RPA), O.C.G.A. § 51-3-20 et seq., because it willfully and maliciously failed to warn people of the danger posed by a debris pile that was located near a public restroom on state land, and the trial court's judgment finding that the RPA applied to an action which a spouse filed against the Department seeking damages for injuries sustained when the injured spouse tripped on the debris pile, and dismissing the action, was upheld. Lee v. Dep't of Natural Res. of Ga., 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Application to rest areas. — Recreational Property Act (RPA), O.C.G.A. § 51-3-20 et seq., applies to rest areas maintained by the Georgia Department of Transportation (DOT), and the DOT was entitled to summary judgment as a matter of law with regard to a visitor's premises liability and negligence suit against the DOT resulting from the visitor's trip and fall while attempting to place garbage in a trash can at a rest area, because the DOT was immune from liability as a result of the application of the RPA and the visitor failed to show that the DOT was wilful or wanton in its placement of its trash can or that it charged money for the use of their rest areas. Ga. DOT v. Thompson, 270 Ga. App. 265, 606 S.E.2d 323 (2004).

Application to welcome center. — Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., was not limited to privately held land; a welcome center where a traveler was injured was recreational, and thus the department which owned the welcome center was immune from liability and any connection between brochures offered at the welcome center and the state's eventual "profit" from increased tax revenue was far too tenuous to render the venture commercial. Matheson v. Ga. DOT, 280 Ga. App. 192, 633 S.E.2d 569 (2006).

Motorcycle driver injured on public land. — Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against it by an injured motorcycle driver as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on

allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. Carroll v. City of Carrollton, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

Drowning. — Trial court properly granted summary judgment to the Georgia Department of Natural Resources and a power company in a mother's wrongful death action after the mother's child drowned at a visit to a state park as the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., absolved the entities from any liability since there was no evidence that the drowning resulted from a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Ray v. Ga. Dep't of Natural Res., 296 Ga. App. 700, 675 S.E.2d 585 (2009).

References to "recreational" in complaint. — Pedestrian's complaint for injuries suffered while walking on a city-owned recreational walkway were barred by the Recreational Property Act, O.C.G.A. §§ 51-3-22 and 51-3-23. The pedestrian could not circumvent the judicial admissions in the pedestrian's first complaint by amending the complaint to remove references to "recreational." City of Chickamauga v. Hentz, 300 Ga. App. 249, 684 S.E.2d 372 (2009).

Complaint for injuries suffered on recreational walkway. — Pedestrian's complaint for injuries suffered while walking on a city-owned recreational walkway were barred by the Recreational Property Act (RPA), O.C.G.A. § 51-3-20 et seq. The pedestrian could not circumvent the judicial admissions in the pedestrian's first complaint by amending the complaint to remove references to "recreational." City of Chickamauga v. Hentz, 300 Ga. App. 249, 684 S.E.2d 372 (2009).

Factual dispute as to whether purpose of property was commercial or recreational. — Trial court erred in granting summary judgment to cemetery owner and maintenance company in a visitor's personal injury action because the evidence presented a factual dispute as to whether the owner's purpose of the property was commercial or recreational; the owner pointed to evidence reflecting that the cemetery did not limit access, was open to the public, and was available to the public for recreational purposes such as picnics, jogging, or walking pets, while the evidence also reflected that the owner operated the cemetery as part of the owner's for-profit business and sold grave sites and interment rights for burial in accordance with a commercial enterprise. Martin v. Dempsey Funeral Servs. of Ga., Inc., 319 Ga. App. 343, 735 S.E.2d 59 (2012).

Cited in Stone Mt. Mem. Ass'n v. Herrington, 225 Ga. 746, 171 S.E.2d 521 (1969); Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (1972); Epps v. Chattahoochee Brick Co., 140 Ga. App. 426, 231 S.E.2d 443 (1976); Erickson v. Century Mgt. Co., 154 Ga. App. 508, 268 S.E.2d 779 (1980); North v. Toco Hills, Inc., 160 Ga. App. 116, 286 S.E.2d 346 (1981); Georgia Marble Co. v. Warren, 183 Ga. App. 866, 360 S.E.2d 286 (1987); Nye v. Union Camp Corp., 677 F. Supp. 1220 (S.D. Ga. 1987); Cooley v. City of Carrollton, 249 Ga. App. 387, 547 S.E.2d 689 (2001); Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne, 278 Ga. 116, 598 S.E.2d 471 (2004); Norton v. Cobb, 284 Ga. App. 303, 643 S.E.2d 803 (2007); Word of Faith Ministries, Inc. v. Hurt, 323 Ga. App. 296, 746 S.E.2d 777 (2013).

RESEARCH REFERENCES

ALR. — Liability of owner of private residential swimming pool for injury or death occasioned thereby, 64 ALR5th 1.

51-3-24. Applicability of Code Sections 51-3-22 and 51-3-23 to owner of land leased to state or subdivision for recreation.

Unless otherwise agreed in writing, Code Sections 51-3-22 and 51-3-23 shall be deemed applicable to the duties and liability of an owner of land leased to the state or any subdivision thereof for recreational purposes. (Ga. L. 1965, p. 476, § 5.)

JUDICIAL DECISIONS

Cited in Stone Mt. Mem. Ass'n v. Herrington, 225 Ga. 746, 171 S.E.2d 521 (1969); Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (1972); Erickson v. Century Mgt. Co., 154 Ga. App. 508, 268 S.E.2d 779 (1980).

51-3-25. Certain liability not limited.

Nothing in this article limits in any way any liability which otherwise exists:

(1) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity; or

(2) For injury suffered in any case when the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that, in the case of land leased to the state or a subdivision thereof, any consideration received by the owner for the lease shall not be deemed a charge within the meaning of this Code section. (Ga. L. 1965, p. 476, § 6.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, "thereof, any consideration" was substituted for "thereof any, consideration" in paragraph (2).

JUDICIAL DECISIONS

Willful acts construed. — Under Ga. L. 1965, p. 476, § 6 (see now O.C.G.A. § 51-3-25), the injured party coming within the provisions of that statute would be obligated to show a willful and malicious failure to guard or warn, that is, a failure to use even slight care; whereas a licensee under former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2) may recover by showing a lack of ordinary care, which under the circumstances may amount to willful and wanton negligence. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Under Ga. L. 1965, p. 476, § 6 (see now O.C.G.A. § 51-3-25), the owner's liability for willful and wanton acts are limited solely to the willful and malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Perhaps as to willful and malicious acts described in the statute, the duty is substantially similar to that owed to a licensee under former Code 1933, § 105-402 (see now O.C.G.A. § 51-3-2), but to that extent only, as the owner, under that section has a broader duty which may involve acts other than failure to guard against or warn against the dangers stated under the Georgia Recreational Property Act,

O.C.G.A. § 51-3-20 et seq. Herring v. Hauck, 118 Ga. App. 623, 165 S.E.2d 198 (1968).

Although finding that official immunity shielded a county employee from liability for injuries suffered by a child when that child fell from a swing on county property that the employee previously inspected, and that sovereign immunity shielded the county, the trial court nonetheless erred in concluding that the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., waived these immunities as: (1) implied waivers of governmental immunity were not to be favored; (2) the employee was entitled to official or qualified immunity, which could not be waived; and (3) even assuming a partial waiver of sovereign and official immunity through enactment of the Act, no evidence was presented that the employee acted willfully and the defect complained about by the child's parent was apparent to those using the property. Norton v. Cobb, 284 Ga. App. 303, 643 S.E.2d 803 (2007), cert. denied, 2007 Ga. LEXIS 634 (Ga. 2007).

Willful failure to guard or warn would require actual knowledge of owner that its property is being used for recreational purposes; that a condition exists involving an unreasonable risk of death or serious bodily harm; that the condition is not apparent to those using the property; and that having this knowledge, the owner chooses not to guard or warn in disregard of the possible consequences. This test excludes either constructive knowledge or a duty to inspect. McGruder v. Georgia Power Co., 126 Ga. App. 562, 191 S.E.2d 305 (1972), rev'd on other grounds, 229 Ga. 811, 194 S.E.2d 440 (1972); Spivey v. City of Baxley, 210 Ga. App. 772, 437 S.E.2d 623 (1993).

Willful failure imports a conscious, knowing, voluntary, intentional failure, a purpose of willingness to make the omission, rather than a mere inadvertent, accidental, involuntary, inattentive, inert, or passive omission. McGruder v. Georgia Power Co., 126 Ga. App. 562, 191 S.E.2d 305 (1972), rev'd on other grounds, 229 Ga. 811, 194 S.E.2d 440 (1972).

Open and obvious danger. — A lessee's failure to guard or warn against dangerous conditions at a recreation area is not willful if the danger is open and obvious. Georgia Marble Co. v. Warren, 183 Ga. App. 866, 360 S.E.2d 286 (1987); Edmondson v. Brooks County Bd. of Educ., 205 Ga. App. 662, 423 S.E.2d 413 (1992).

As a prerequisite to immunity under the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., the owner cannot charge a fee for admission to the property. However, the fact that no fee is charged does not assure applicability of this Act. Cedeno v. Lockwood, Inc., 250 Ga. 799, 301 S.E.2d 265 (1983).

Admission fees charged by campers. — After the plaintiff sued the United States over injuries the plaintiff allegedly sustained when the plaintiff fell down stairs within a federally owned campground, the United States was insulated from liability under Georgia's Recreational Property Act, O.C.G.A. § 51-3-20, because O.C.G.A. § 51-3-25's exception to non-liability for landowners that charged admission fees did not apply since the fees the United States charged campers were not admission fees, which were prohibited by federal law, but were assessed to defray the costs of providing utilities. Swafford v. United States, 839 F.3d 1365 (11th Cir. 2016).

Liability when fee not charged. — In order to recover under the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., from the defendant-owner, which did not charge a fee, the plaintiffs must show a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Georgia Marble Co. v. Warren, 183 Ga. App. 866, 360 S.E.2d 286 (1987).

Attractive nuisance theory was inapplicable when an injured child was not a trespasser but rather a person permitted on the property but to whom only a limited duty of care was owed. Edmondson v. Brooks County Bd. of Educ., 205 Ga. App. 662, 423 S.E.2d 413 (1992).

Fee for use of park. — The trial court did not err in granting summary judgment to the defendant since the trial court was authorized to conclude as a matter of law that the $4.00 fee charged to each

vehicle to enter the park did not constitute a charge for the recreational use of the park land itself and the plaintiff's alleged injuries resulted from the plaintiff's general recreational usage of the park premises, for which no fee was charged, rather than from the use of any of the facilities for which a fee was charged. Therefore, the provisions of the Georgia Recreational Property Act, O.C.G.A. § 51-3-20 et seq., operate to prevent plaintiff from recovering from defendant based on allegations of simple negligence. Quick v. Stone Mt. Mem. Ass'n, 204 Ga. App. 598, 420 S.E.2d 36, cert. denied, 204 Ga. App. 922, 420 S.E.2d 36 (1992).

Tripping on debris on public land. — Evidence did not show that the Georgia Department of Natural Resources violated the Georgia Recreational Property Act (RPA), O.C.G.A. § 51-3-20 et seq., because it willfully and maliciously failed to warn people of the danger posed by a debris pile that was located near a public restroom on state land, and the trial court's judgment finding that the RPA applied to an action which a spouse filed against the Department seeking damages for injuries sustained when the injured spouse tripped on the debris pile, and dismissing the action, was upheld. Lee v. Dep't of Natural Res. of Ga., 263 Ga. App. 491, 588 S.E.2d 260 (2003).

Injury to motorcycle driver. — Trial court did not err in granting summary judgment to a city on allegations of negligence asserted against it by an injured motorcycle driver as the Recreational Property Act (Act), O.C.G.A. § 51-3-20 et seq., prevented the driver from recovering from the city based on allegations of simple negligence; moreover, the Act clearly applied because it was undisputed that the injuries occurred when the driver collided with the cable fence on the city's recreational property, and the city permitted the general public to use the park and open field where the accident occurred for recreational purposes without charge. Carroll v. City of Carrollton, 280 Ga. App. 172, 633 S.E.2d 591 (2006).

Injury from swing in park. — A park user who fell from a swing did not show that a city had actual knowledge of a dangerous condition under O.C.G.A. § 51-3-25 as there was no evidence that any city employee had read instructions about the swing, newspaper articles did not convey such knowledge, and replacing equipment in 1999 was not probative of actual knowledge in 2003. Collins v. City of Summerville, 284 Ga. App. 54, 643 S.E.2d 305 (2007).

When a city park user fell from a swing, there was evidence that the city had actual knowledge of the condition of the ground under the swing and the user presented no evidence that the grass and soil beneath the swing was one involving unreasonable risk of death or serious bodily harm; moreover, the condition of the ground was readily apparent to any user of the swings. Collins v. City of Summerville, 284 Ga. App. 54, 643 S.E.2d 305 (2007).

Independent contractor's fall in hospital. — A provider of janitorial services to a hospital as an independent contractor was not liable, pursuant to O.C.G.A. §§ 51-3-22 and 51-3-25, in a slip and fall case involving a hospital employee because the employee was unable to argue that the employee entered the hospital for recreational purposes and, even if the hospital could be deemed a recreational area, the hospital as business owner and occupier could not delegate its duty to keep the premises in reasonably safe condition. Perkins v. Compass Group USA, Inc., 512 F. Supp. 2d 1296 (N.D. Ga. Mar. 7, 2007).

Drowning in state park. — Trial court properly granted summary judgment to the Georgia Department of Natural Resources and a power company in a parent's wrongful death action after the parent's child drowned at a visit to a state park as the Recreational Property Act, O.C.G.A. § 51-3-20 et seq., absolved the entities from any liability since there was no evidence that the drowning resulted from a willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. Ray v. Ga. Dep't of Natural Res., 296 Ga. App. 700, 675 S.E.2d 585 (2009).

Cited in Stone Mt. Mem. Ass'n v. Herrington, 225 Ga. 746, 171 S.E.2d 521 (1969); Washington v. Trend Mills, Inc., 121 Ga. App. 659, 175 S.E.2d 111 (1970);

Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (1972); Erickson v. Century Mgt. Co., 154 Ga. App. 508, 268 S.E.2d 779 (1980); North v. Toco Hills, Inc., 160 Ga. App. 116, 286 S.E.2d 346 (1981); Majeske v. Jekyll Island State Park Auth., 209 Ga. App. 118, 433 S.E.2d 304 (1993); Anderson v. Atlanta Comm. for the Olympic Games, Inc., 273 Ga. 113, 537 S.E.2d 345 (2000); Cooley v. City of Carrollton, 249 Ga. App. 387, 547 S.E.2d 689 (2001); Anderson v. Atlanta Comm. for the Olympic Games, Inc., 261 Ga. App. 895, 584 S.E.2d 16 (2003); Word of Faith Ministries, Inc. v. Hurt, 323 Ga. App. 296, 746 S.E.2d 777 (2013).

RESEARCH REFERENCES

ALR. — Preemption of state statute, law, ordinance, or policy with respect to employment- and education-related issues involving aliens, 88 A.L.R.6th 627.

51-3-26. Construction of article.

Nothing in this article shall be construed to:

(1) Create a duty of care or ground of liability for injury to persons or property; or

(2) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this article to exercise care in his use of the land and in his activities thereon or from the legal consequences of failure to employ such care. (Ga. L. 1965, p. 476, § 7.)

JUDICIAL DECISIONS

Cited in Stone Mt. Mem. Ass'n v. Herrington, 225 Ga. 746, 171 S.E.2d 521 (1969); Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (1972); Erickson v. Century Mgt. Co., 154 Ga. App. 508, 268 S.E.2d 779 (1980); North v. Toco Hills, Inc., 160 Ga. App. 116, 286 S.E.2d 346 (1981).

ARTICLE 3

OWNERS OF PROPERTY USED FOR OTHER PURPOSES

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, Article 3 of Chapter 3 of Title 51 was created.

51-3-30. Liability of landowner or hunter for injury caused by wildlife crossing public roadway.

A landowner who allows wildlife to traverse the owner's property, or a person hunting game on such property with permission, shall be immune from civil liability for damage and injuries which may be caused by wildlife which traverse the landowner's property and enter a public roadway or right of way, provided that the conduct of the landowner or person hunting game does not constitute gross negligence

or willful and wanton misconduct. (Code 1981, § 51-1-52, enacted by Ga. L. 2008, p. 702, § 4/HB 239; Code 1981, § 51-3-30, as redesignated in 2009 pursuant to Code Section 28-9-5.)

Cross references. — Hunting, T. 27, C. 3, A. 1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, Code Section 51-1-52, as enacted by Ga. L. 2008, p. 702, § 4/HB 239, was redesignated as Code Section 51-3-30.

51-3-31. Agritourism defined; immunity for civil liability; warnings.

(a) For the purposes of this Code section, the term "agritourism" shall carry the same meaning as set out in subparagraph (p)(7)(B) of Code Section 48-5-7.4.

(b) A landowner who charges admission for a person who is 18 years of age or older to hunt or fish on the owner's property or to enter the owner's property for the purposes of agritourism shall be immune from civil liability for any injuries caused by the inherent risk associated with agritourism, hunting, or fishing activity, provided that:

(1) The landowner's conduct does not constitute gross negligence or willful and wanton misconduct;

(2) The landowner has posted at the main point of entry, if present, to the property a sign with a warning notice stating the following:

(A) In the case of agritourism:

"Warning

Under Georgia law, there is no liability for an injury or death of a participant at least 18 years of age in a registered agritourism activity conducted at this registered agritourism location if such injury or death results from the inherent risks of such agritourism activity. Inherent risks of agritourism activities include, but shall not be limited to, the potential of you to act in a negligent manner that may contribute to your injury or death and the potential of another participant to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this registered agritourism activity."

(B) In the case of a landowner who charges admission for a person who is 18 years of age or older to hunt or fish on the owner's property:

"Warning

Under Georgia law, there is no liability for an injury or death of a hunting or fishing participant at least 18 years of age conducted at

this location if such injury or death results from the inherent risks of such hunting or fishing activity. Inherent risks of hunting or fishing activities include, but shall not be limited to, the potential of you to act in a negligent manner that may contribute to your injury or death and the potential of another participant to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this hunting or fishing activity."

The warning notice specified in this paragraph shall appear on the sign in black letters, with each letter to be a minimum of one inch in height; and

(3) The person who has paid admission to the landowner to enter such landowner's property to hunt, fish, or for the purposes of agritourism has signed a waiver of liability form stating that the person entering the landowner's property has waived all civil liability against the landowner for any injuries caused by the inherent risk associated with agritourism, hunting, or fishing activity. Such waiver of liability form shall mirror the language provided for in paragraph (2) of this subsection regarding the warning notice.

(c) This Code section shall be supplemental to all other provisions of law that provide defenses to property owners. This Code section shall not create any new cause of action against a property owner or additional liability to property owners. (Code 1981, § 51-3-31, enacted by Ga. L. 2009, p. 444, § 2/HB 529.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, Code Section 51-1-53, as enacted by Ga. L. 2009, p. 444, § 2/HB 529, was redesignated as Code Section 51-3-31.

Editor's notes. — Ga. L. 2009, p. 444, § 3/HB 529, not codified by the General Assembly, provides that this Code section shall apply to all causes of action arising on or after May 1, 2009.

ARTICLE 4

LIABILITY OF SPACE FLIGHT ENTITIES

Effective date. — This article became effective July 1, 2017.

51-3-41. Definitions.

As used in this article, the term:

(1) "Crew member" means any employee of a space flight entity or any contractor or subcontractor of a space flight entity who performs activities directly relating to the launch, reentry, or other operation of or in a spacecraft, launch vehicle, or reentry vehicle.

(2) "Launch" means a placement or attempted placement of a launch vehicle, reentry vehicle, or spacecraft in a suborbital trajectory, in Earth orbit, or in outer space, including activities involved in the preparation of a launch vehicle, reentry vehicle, or spacecraft for such placement or attempted placement.

(3) "Launch vehicle" means any contrivance and its stages or components designed to operate or place a spacecraft in a suborbital trajectory, in Earth orbit, or in outer space.

(4) "Local government" means a county, municipal corporation, or consolidated government of the State of Georgia.

(5) "Local governmental unit" means a local government and any office, agency, department, commission, board, body, division, instrumentality, or institution thereof.

(6) "Person" means an individual, proprietorship, corporation, firm, partnership, association, or other such entity.

(7) "Reentry" means a return or attempt to return of a launch vehicle, reentry vehicle, or spacecraft from a suborbital trajectory, from Earth orbit, or from outer space to Earth, including activities involved in the recovery of a launch vehicle, reentry vehicle, or spacecraft.

(8) "Reentry vehicle" means any contrivance and its stages or components designed to return from Earth orbit or outer space to Earth substantially intact. The term "reentry vehicle" shall include a reusable launch vehicle.

(9) "Reusable launch vehicle" means a launch vehicle that is designed to return to Earth substantially intact for use in more than one launch or that contains vehicle stages that may be recovered for future use in the operation of a substantially similar launch vehicle.

(10) "Spacecraft" means any object and its components designed to be launched for operations in a suborbital trajectory, in Earth orbit, or in outer space, including, but not limited to, a satellite, a payload, an object carrying a crew member or space flight participant, and any subcomponents of the launch vehicle or reentry vehicle specifically designed or adapted for such object.

(11) "Space flight activities" means activities and training in any phase of preparing for or undertaking space flight, including, but not limited to, the:

(A) Preparation of a launch vehicle, reentry vehicle, payload, spacecraft, crew member, or space flight participant for launch, space flight, or reentry;

(B) Conduct of the launch;

(C) Conduct occurring between the launch and reentry;

(D) Conduct of reentry and descent;

(E) Conduct of the landing;

(F) Conduct of post landing recovery of a launch vehicle, reentry vehicle, payload, spacecraft, crew member, or space flight participant; and

(G) Conduct of embarking or disembarking of a launch vehicle, reentry vehicle, payload, spacecraft, crew member, or space flight participant.

(12) "Space flight entity" means:

(A) A person which conducts space flight activities and which, to the extent required by federal law, has obtained the appropriate Federal Aviation Administration license or other authorization, including any safety approval and a payload determination that may be required under federal law or the laws of the State of Georgia;

(B) A manufacturer or supplier of components, services, spacecrafts, launch vehicles, or reentry vehicles used in space flight activities;

(C) An employee, officer, director, owner, stockholder, member, manager, advisor, or partner of the entity, manufacturer, or supplier;

(D) An owner or lessor of real property on which space flight activities are conducted;

(E) A state agency or local governmental unit with a contractual relationship with any person described in subparagraphs (A) through (D) of this paragraph; or

(F) A state agency or local governmental unit having jurisdiction in the territory in which space flight activities are conducted.

(13) "Space flight participant" means an individual who:

(A) Is not a crew member; and

(B)(i) Is carried aboard a spacecraft, launch vehicle, or reentry vehicle; or

(ii) Has indicated a desire to be carried aboard a spacecraft, launch vehicle, or reentry vehicle as demonstrated by paying any deposit or fee required, if any, to be carried aboard a spacecraft, launch vehicle, or reentry vehicle or by participating in any

training program or orientation session that may be required by a space flight entity.

(14) "Space flight participant injury" means harm or damage sustained by a space flight participant, including bodily harm, emotional distress, death, disability, or any other loss.

(15) "State agency" means any department, commission, or other institution of the executive branch of the government of the State of Georgia.

(16) "This state" means the State of Georgia, all land and water over which it has either exclusive or concurrent jurisdiction, and the airspace above such land and water. (Code 1981, § 51-3-41, enacted by Ga. L. 2017, p. 348, § 1/HB 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2017, the designation "(a)" was deleted from the beginning of this Code section.

51-3-42. Civil or criminal liability for injuries during space flight.

(a) Except as provided in subsection (b) of this Code section, a space flight entity shall not be civilly liable to or criminally responsible for any person for a space flight participant injury arising out of inherent risks associated with any space flight activities occurring in or originating from this state if the space flight participant has:

(1) Signed the warning and agreement required by Code Section 51-3-43; and

(2) Given written informed consent as may be required by 51 U.S.C. Section 50905 or other federal law.

(b) Nothing in this Code section shall:

(1) Limit liability for a space flight participant injury:

(A) Proximately caused by the space flight entity's gross negligence for the safety of the space flight participant; or

(B) Intentionally caused by the space flight entity;

(2) Limit the liability of any space flight entity against any person other than a space flight participant who meets the requirements of paragraphs (1) and (2) of subsection (a) of this Code section;

(3) Limit liability for the breach of a contract for use of real property by a space flight entity; or

(4) Preclude an action by the federal government, the State of Georgia, or any state agency to enforce a valid statute or rule or regulation.

(c) The limitations on legal liability afforded to a space flight entity by the provisions of this article shall be in addition to any other limitations of legal liability provided by federal law or the laws of this state. (Code 1981, § 51-3-42, enacted by Ga. L. 2017, p. 348, § 1/HB 1.)

U.S. Code. — Section 50905 of Title 51 of the United States Code, referred to in this Code section, governs license applications and requirements for commercial space launch activities.

51-3-43. Required warning and agreement for space flight; requirements for enforceability.

(a) A space flight participant shall sign a warning and agreement before participating in any space flight activity. Such warning and agreement shall be in writing and include the following language:

"WARNING AND AGREEMENT

UNDER GEORGIA LAW THERE IS NO LIABILITY FOR INJURY, DEATH, OR OTHER LOSS RESULTING FROM ANY INHERENT RISKS OF SPACE FLIGHT ACTIVITIES. SUCH INHERENT RISKS OF SPACE FLIGHT ACTIVITIES INCLUDE, WITHOUT LIMITATION, THE POTENTIAL FOR SERIOUS BODILY INJURY, SICKNESS, PERMANENT DISABILITY, PARALYSIS, AND LOSS OF LIFE; EXPOSURE TO EXTREME CONDITIONS AND CIRCUMSTANCES; ACCIDENTS, CONTACT, OR COLLISION WITH OTHER SPACE FLIGHT PARTICIPANTS, SPACE FLIGHT VEHICLES, AND EQUIPMENT; AND DANGERS ARISING FROM ADVERSE WEATHER CONDITIONS AND EQUIPMENT FAILURE.

I UNDERSTAND AND ACKNOWLEDGE THAT BY SIGNING THIS WARNING AND AGREEMENT, I HAVE EXPRESSLY ACCEPTED AND ASSUMED ALL RISKS AND RESPONSIBILITIES FOR INJURY, DEATH, AND OTHER LOSS THAT MAY RESULT FROM THE INHERENT RISKS ASSOCIATED WITH PARTICIPATION IN ANY SPACE FLIGHT ACTIVITIES. I FURTHER UNDERSTAND AND AGREE THAT BY SIGNING THIS WARNING AND AGREEMENT, I HAVE EXPRESSLY WAIVED ALL CLAIMS OF MY HEIRS, EXECUTORS, ADMINISTRATORS, SUCCESSORS, AND ASSIGNEES FOR ANY INJURY, DEATH, AND OTHER LOSS THAT MAY RESULT FROM MY PARTICIPATION IN ANY SPACE FLIGHT ACTIVITIES DUE TO THE INHERENT RISKS ASSOCIATED WITH PARTICIPATION IN SPACE FLIGHT ACTIVITIES.

FURTHER WARNING: DO NOT SIGN UNLESS YOU HAVE READ AND UNDERSTOOD THIS WARNING AND AGREEMENT."

(b) The warning and agreement under subsection (a) of this Code section shall be considered effective and enforceable if it is:

(1) In writing;

(2) In a document separate from any other agreement between the space flight participant and the space flight entity other than a warning, consent, or assumption of risk statement required under federal law or under applicable laws of another state;

(3) Printed in capital letters in not less than 10-point bold type;

(4) Signed by the space flight participant;

(5) Signed by a competent witness; and

(6) Provided to the space flight participant at least 24 hours prior to such space flight participant's participation in any space flight activity.

(c) A warning and agreement that is in writing and signed by a space flight participant that is in compliance with the requirements of this Code section shall be considered effective and enforceable as to the heirs, executors, administrators, successors, and assignees of the space flight participant with respect to a space flight entity's civil liability or criminal responsibility for a space flight participant injury to such space flight participant.

(d) A warning and agreement executed pursuant to this Code section shall not limit liability for a space flight participant injury:

(1) Proximately caused by the space flight entity's gross negligence evidencing willful or wanton disregard for the safety of the space flight participant; or

(2) Intentionally caused by a space flight entity.

(e) A warning and agreement executed in compliance with this Code section shall not be deemed unconscionable or against public policy. (Code 1981, § 51-3-43, enacted by Ga. L. 2017, p. 348, § 1/HB 1.)

51-3-44. Governing law.

Any litigation, action, suit, or other arbitral, administrative, or judicial proceeding at law or equity against a space flight entity pertaining to space flight activities shall be governed by the laws of the State of Georgia. (Code 1981, § 51-3-44, enacted by Ga. L. 2017, p. 348, § 1/HB 1.)

CHAPTER 4

WRONGFUL DEATH

Sec.
51-4-1. Definitions.
51-4-2. Persons entitled to bring action for wrongful death of spouse or parent; survival of action; release of wrongdoer; disposition of recovery; exemption from liability for decedent's debts; recovery not barred when child born out of wedlock.
51-4-3. Persons entitled to bring action for wrongful death of wife or mother; survival of action; service on and intervention of parties not joining; effect of final judgment [Repealed].
51-4-4. Wrongful death of child.
51-4-5. Recovery by personal representative for wrongful death and for certain expenses.
51-4-6. Notification of licensing boards of judgments against health care provider.

Cross references. — Homicide generally, § 16-5-1 et seq. Administrative penalties for killing or injuring another person while hunting, § 27-2-25.1. Liability of railroad employers for injuries to employees generally, § 34-7-40 et seq.

Law reviews. — For article discussing historical background of wrongful death statutes in America, see 9 Ga. B. J. 261 (1947). For article, "Actions for Wrongful Death in Georgia," see 9 Ga. B. J. 368 (1947). For article surveying actions for wrongful death in Georgia, see 14 Ga. B. J. 48 (1951). For article, "Actions for Wrongful Death in Georgia: Part One," see 19 Ga. B. J. 277 (1957). For article, "Actions for Wrongful Death in Georgia: Part Two," see 19 Ga. B. J. 439 (1957). For article, "Actions for Wrongful Death in Georgia: Part Two," section two, see 20 Ga. B. J. 152 (1957). For article, "Actions for Wrongful Death in Georgia: Parts Three and Four," see 21 Ga. B. J. 339 (1959). For article discussing types of wrongful conduct involved in wrongful death actions in Georgia, see 22 Ga. B. J. 325 (1960). For article discussing the use of mortality tables in determining the value of life earnings of the deceased in wrongful death actions, with emphasis on the Carlisle table, see 9 Ga. St. B. J. 293 (1973). For article, "Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action," see 34 Emory L.J. 295 (1985). For article, "Damage Calibrations Under the Federal Tort Claims Act," see 25 Ga. St. B. J. 100 (1988). For article, "Pre-Impact Pain and Suffering," see 26 Ga. St. B. J. 60 (1989). For article, "The Case for Allowing Punitive Damages in Georgia Wrongful Death Actions: The Need to Remove an Unjust Anomaly in Georgia Law," see 45 Mercer L. Rev. 1 (1993).

For note, "Products Liability in Georgia," see 12 Ga. L. Rev. 83 (1977).

For comment discussing the prohibition of wrongful death suits under Georgia's strict liability in Ford Motor Co. v. Carter, 239 Ga. 657, 238 S.E.2d 361 (1977), see 29 Mercer L. Rev. 649 (1978). For table covering actions from wrongful death in Georgia, see 10 Ga. B. J. 28 (1947). For comment, "'Am I My Brother's Keeper?': Reforming Criminal Hazing Laws Based on Assumption of Care," see 63 Emory L.J. 925 (2014). For comment, "Having an Affair May Shorten Your Life: The Ashley Madison Suicides," see 33 Georgia St. U.L. Rev. 455 (2017).

JUDICIAL DECISIONS

This chapter does not violate due process clause of U.S. Const., amend. 14. — Legislative provision imposing a penalty does not invade judicial functions.

Western & A.R.R. v. Michael, 175 Ga. 1, 165 S.E. 37 (1932).

The wrongful death statute does not violate the equality clause of U.S. Const., amend. 14, because in no action ex delicto in this state, save when predicated on such statute, can a plaintiff recover in a case bottomed on simple negligence more than actual compensation. In the exercise of the state's broad police power, the General Assembly can create a measure of damages for homicides resulting from ordinary negligence as well as for homicide resulting from wanton, willful, or criminal negligence. Western & A.R.R. v. Michael, 175 Ga. 1, 165 S.E. 37 (1932).

Wrongful death acts, being statutory rather than common-law remedies, are to be strictly construed. Watson v. Thompson, 185 Ga. 402, 195 S.E. 190, answer conformed to, 58 Ga. App. 177, 198 S.E. 116 (1938); St. Paul Fire & Marine Ins. Co. v. Miniweather, 119 Ga. App. 617, 168 S.E.2d 341 (1969); Higginbotham v. Ford Motor Co., 540 F.2d 762 (5th Cir. 1976); Stiltjes v. Ridco Exterminating Co., 178 Ga. App. 438, 343 S.E.2d 715, aff'd, 256 Ga. 255, 347 S.E.2d 568 (1986).

Actions for wrongful death are statutory in origin and repose in person or persons to whom such right is given by statute solely by reason of the survivor's relationship to the deceased. Burns v. Brickle, 106 Ga. App. 150, 126 S.E.2d 633 (1962).

Wrongful death statute is one that is intended to inflict punishment upon wrong-doers who bring about death of human being by negligence. — Lord Campbell's act and the various statutes in this country based upon it are nothing more than a method of punishing negligence by civil action. This is nothing more nor less than a legislative imposition of a penalty upon the person who causes the death of another by negligence, the penalty to go to the person injured. Harden v. United States, 485 F. Supp. 380 (S.D. Ga. 1980), aff'd, 688 F.2d 1025 (5th Cir. 1982).

Provisions of this chapter should be construed together and a construction given to one provision, unless manifestly inapplicable, should be applied to the others. Vickers v. Vickers, 210 Ga. 488, 80 S.E.2d 817 (1954); Burns v. Brickle, 106 Ga. App. 150, 126 S.E.2d 633 (1962).

Aim of wrongful death statutes is to strike at the evil of negligent destruction of human life by imposing liability upon those who are responsible either directly through themselves or indirectly through their employees for homicides. Western & A.R.R. v. Michael, 175 Ga. 1, 165 S.E. 37 (1932).

While wrongful death statute is punitive so far as the defendant is concerned, it is compensatory so far as the plaintiff is concerned; but exact compensation for the loss sustained is not the primary object of the statute, though in many cases this result may be brought about. Harden v. United States, 485 F. Supp. 380 (S.D. Ga. 1980), aff'd, 688 F.2d 1025 (5th Cir. 1982).

Georgia law does not make basis of recovery for wrongful death the mental or physical suffering of person bringing action. The action to recover damages on account of negligent homicide is not an action seeking to recover for mental pain and suffering. Hudson v. Cole, 102 Ga. App. 300, 115 S.E.2d 825 (1960); YMCA v. Bailey, 112 Ga. App. 684, 146 S.E.2d 324 (1965), cert. denied, 385 U.S. 868, 87 S. Ct. 131, 17 L. Ed. 2d 95 (1966).

Georgia two-year limitation of action for wrongful death is public policy of this state, and it bars the institution of such litigation after a lapse of this period and the period cannot be extended by the legislatures of foreign states. Taylor v. Murray, 231 Ga. 852, 204 S.E.2d 747 (1974).

"Discovery rule" does not apply. — The "discovery rule", which provides that the right of action does not "accrue" until the injured person discovers the cause of one's injury, does not apply to a wrongful death action alleging a failure to warn. Miles v. Ashland Chem. Co., 261 Ga. 726, 410 S.E.2d 290 (1991).

Plea of collateral estoppel is available in wrongful death action. Montgomery v. DeKalb Steel, Inc., 144 Ga. App. 191, 240 S.E.2d 741 (1977).

Although former Code 1933, § 3-505 (see now O.C.G.A. § 9-2-41) alllowed

for survivorship of tort actions in Georgia, it was distinct from Georgia's wrongful death statute, former Code 1933, § 105-1301 et seq. (see now O.C.G.A. § 51-4-1 et seq.), which creates a new cause of action in certain individuals for recovery of the full value of the life of the deceased. Anderson v. Jones, 508 F. Supp. 399 (N.D. Ga. 1980); Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984), aff'd in part, rev'd in part on other grounds on reh'g en banc, 774 F.2d 1495 (11th Cir. 1985), cert. denied, 476 U.S. 1115, 106 S. Ct. 1970, 90 L. Ed. 2d 654; 476 U.S. 1124, 106 S. Ct. 1993, 90 L. Ed. 2d 673 (1986); 493 U.S. 817, 110 S. Ct. 70, 107 L. Ed. 2d 37 (1989).

Plaintiffs may not bring wrongful death action if the deceased personally would have been barred by the covenant not to sue. Although it is true that the action created by the wrongful death statute is different from the cause of action which the plaintiff would have possessed had the plaintiff lived, and a defense which would have been good against the plaintiff is good against the plaintiff's representatives in a wrongful death action. Wade v. Watson, 527 F. Supp. 1049 (N.D. Ga. 1981), aff'd, 731 F.2d 890 (11th Cir. 1984).

Since the covenant not to sue would have barred the deceased's cause of action for simple negligence, it will bar the plaintiffs' cause of action for simple negligence under the wrongful death statute as well. But, the issue of gross negligence is not mooted by the covenant not to sue. Wade v. Watson, 527 F. Supp. 1049 (N.D. Ga. 1981), aff'd, 731 F.2d 890 (11th Cir. 1984).

Standing. — Wrongful death laws did not contemplate the absurd result and "legal impossibility" of a wrongdoer having to sue oneself to recover for the wrongful death of a spouse, which the wrongdoer caused, and it was equally plain that the legislature did not intend that a murdering spouse financially benefit from the murder by possessing the ability to pursue the right of action for the victim's death against any other parties potentially liable for the homicide, nor did the legislature intend that the killer render oneself immune from civil liability because only the wrongdoer held the cause of action as the surviving spouse; such circumstances would completely subvert the very purposes of the wrongful death laws. Carringer v. Rodgers, 276 Ga. 359, 578 S.E.2d 841 (2003).

Bifurcated trial in federal court. — When count I claimed that the decedent was an employee of the defendant railroads under the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., and count II was a wrongful death claim brought under the provisions of O.C.G.A. § 51-4-1 et seq., by which it was contended that if the deceased was not a railroad employee, the death was, nevertheless, caused by the defendants' negligence, and the trial court ordered a bifurcated trial at which the jury would first try the issue of the decedent's employment status, and based upon the verdict entered an order dismissing Count I, that order eliminated the Federal Employers' Liability Act claim and made the case removable to a federal court for trial of the wrongful death count. Decubas v. Norfolk S. Corp., 683 F. Supp. 259 (M.D. Ga. 1988).

Cited in Threatt v. American Mut. Liab. Ins. Co., 173 Ga. 350, 160 S.E. 379 (1931); King v. Patellis, 181 Ga. 157, 181 S.E. 667 (1935); Zachry v. City Council, 78 Ga. App. 746, 52 S.E.2d 339 (1949); Davis v. Atlanta Gas Light Co., 82 Ga. App. 460, 61 S.E.2d 510 (1950); Wallace v. Ener, 521 F.2d 215 (5th Cir. 1975); Smallwood v. Bickers, 139 Ga. App. 720, 229 S.E.2d 525 (1976); Mason v. Ford Motor Co., 307 F.3d 1271 (11th Cir. 2002).

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Survival of action or cause of action for wrongful death against representative of wrongdoer, 61 ALR 830; 171 ALR 1392.

Civil liability for death or injury in prize fights, 71 ALR 189.

"Sentimental" losses, including mental anguish, loss of society, and loss of marital, filial, or parental care and guidance, as elements of damages in action for wrongful death, 74 ALR 11.

Admissibility of evidence, and propriety and effect of questions, statements, comments, etc., tending to show that defendant in a personal-injury or death action carries liability insurance, 74 ALR 849; 95 ALR 388; 105 ALR 1319; 4 ALR2d 761.

Nature of differences between lex loci and lex fori which will sustain or defeat jurisdiction of a cause of action for death arising under the law of another state or country, 77 ALR 1311.

Retrospective effect of statute relating to causes of action for death dependent upon prior statute, 77 ALR 1338.

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Exemplary or punitive damages as recoverable in action for death, 94 ALR 384.

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Judgment in action for personal injuries to or death of one person as res judicata or conclusive of matters there litigated in subsequent action for personal injury to or death of another person in the same accident, 104 ALR 1476.

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Death of tort-feasor before death of injured person as precluding action for death, 112 ALR 343.

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Shortening of life expectancy as element of damages recoverable in action by person injured or in action under survival or death statute, 131 ALR 1351.

Liability for death or injury on or near golf course, 138 ALR 541; 82 ALR2d 1183.

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Presumption of due care by person killed in accident as supporting or aiding inference of negligence by defendant, or

inference that latter's negligence was proximate cause of accident, 144 ALR 1473.

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Limitation applicable to action for personal injury as affecting action for death resulting from injury, 167 ALR 894.

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Law of state where ticket was purchased, rather than law of state where accident occurred, as governing in action against carrier for death of passenger, 13 ALR2d 650.

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Right of action for wrongful death as subject to claims of creditors, 35 ALR2d 1443.

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Right of defendant in action for personal injury, property damage, or death, to bring in new parties as cross defendants to his counterclaim or the like, 46 ALR2d 1253.

Power of court, in action under foreign wrongful death statute, to decline jurisdiction on ground of inconvenience of forum, 48 ALR2d 850.

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Proper forum and right to maintain action for airplane accident causing death over or in high seas, 66 ALR2d 1002.

Retroactive effect of statute changing manner and method of distribution of recovery or settlement for wrongful death, 66 ALR2d 1444.

Recovery of nominal damages in a wrongful death action, 69 ALR2d 628.

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Competency of witness in wrongful death action as affected by dead man statute, 77 ALR2d 676.

Participation in gambling activities as bar to action for personal injury or death, 77 ALR2d 961.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in an action for personal injury or death, 81 ALR2d 733.

Pension, retirement income, social security payments, and the like, of deceased, as affecting recovery in wrongful death action, 81 ALR2d 949.

Admissibility of evidence of plaintiff's or decedent's drawing from partnership or other business as evidence of earning capacity, in action for personal injury or death, 82 ALR2d 679.

Liability of owner of horse to person injured or killed when kicked, bitten, knocked down, and the like, 85 ALR2d 1161.

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What law governs the distribution, apportionment, or disposition of damages recovered for wrongful death, 92 ALR2d 1129.

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Fact that tortfeasor is member of class of beneficiaries as affecting right to maintain action for wrongful death, 95 ALR2d 585.

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Admissibility, in wrongful death action for pecuniary loss suffered by next of kin, etc., of evidence as to decedent's personal qualities with respect to sobriety or morality, 99 ALR2d 972.

Liability for injury to or death of passenger in connection with a fire drill or abandonment-of-ship drill aboard a vessel, 8 ALR3d 650.

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Modern status of rule denying a common-law recovery for wrongful death, 61 ALR3d 906.

Liability of manufacturer or seller for injury or death allegedly caused by use of contraceptive, 70 ALR3d 315.

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Liability of swimming facility operator for injury to or death of swimmer allegedly resulting from hazardous condition in water, 86 ALR3d 1021.

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Validity of release of prospective right to wrongful death action, 92 ALR3d 1232.

Liability for injury or death from ski lift, ski tow, or similar device, 95 ALR3d 203.

Liability for civilian skydiver's or parachutist's injury or death, 95 ALR3d 1280.

Products liability: personal injury or death allegedly caused by defect in motorcycle or its parts, supplies, or equipment, 98 ALR3d 317.

Liability of persons furnishing intoxicating liquor for injury to or death of consumer, outside coverage of civil damage acts, 98 ALR3d 1230.

Liability of common carrier for personal injury or death of passenger occasioned by inhalation of gases or fumes from exhaust, 99 ALR3d 751.

Products liability: personal injury or death allegedly caused by defect in steering system in motor vehicle, 100 ALR3d 158.

Modern status of effect of state workmen's compensation act on right of third-person tortfeasor to contribution or indemnity from employer of injured or killed workman, 100 ALR3d 350.

Motor carrier's liability for personal injury or death of passenger caused by debris, litter, or other foreign object on floor or seat of vehicle, 1 ALR4th 1249.

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Negligence of one parent contributing to injury or death of child as barring or reducing damages recoverable by other parent for losses suffered by other parent as result of injury or death of child, 26 ALR4th 396.

Judgment in favor of, or adverse to, person injured as barring action for his death, 26 ALR4th 1264.

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Excessiveness or inadequacy of damages awarded for personal injuries resulting in death of persons engaged in farming, ranching, or agricultural labor, 46 ALR4th 220.

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Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations, 47 ALR4th 134.

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Future disease or condition, or anxiety relating thereto, as element of recovery, 50 ALR4th 13.

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Liability to one struck by golf ball, 53 ALR4th 282.

Wrongful death: surviving parent's minority as tolling limitation period on suit for child's wrongful death, 54 ALR4th 362.

Primary liability of private chain franchisor for injury or death caused by franchise premises or equipment, 59 ALR4th 1142.

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Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 ALR4th 131.

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Admissibility, after enactment of Rule 411, Federal Rules of Evidence, of evidence of liability insurance in negligence actions, 40 ALR Fed. 541.

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Tortious maintenance or removal of life supports, 100 A.L.R.6th 477.

Validity, construction, and application of state exemption statutes for proceeds of personal injury or wrongful death lawsuits, 99 A.L.R.6th 481.

51-4-1. Definitions.

As used in this chapter, the term:

(1) "Full value of the life of the decedent, as shown by the evidence" means the full value of the life of the decedent without deducting for any of the necessary or personal expenses of the decedent had he lived.

(2) "Homicide" includes all cases in which the death of a human being results from a crime, from criminal or other negligence, or from property which has been defectively manufactured, whether or not as the result of negligence. (Ga. L. 1887, p. 43, § 1; Civil Code 1895, § 3829; Civil Code 1910, § 4425; Ga. L. 1924, p. 60, § 2; Code 1933, §§ 105-1301, 105-1308; Ga. L. 1978, p. 2218, § 2.)

Law reviews. — For article, "Economic Evaluation of Damages in Personal Injury and Wrongful Death Litigation," see 19 Ga. St. B. J. 60 (1982). For annual survey of law of torts, see 38 Mercer L. Rev. 351 (1986). For article, "Problems in Calculating and Awarding Compensatory Damages for Wrongful Death Under the Federal Tort Claims Act," see 36 Emory L.J. 149 (1987). For article, "The Discount Rate in Georgia Personal Injury and Wrongful Death Damage Calculations," see 13 Ga. St. U.L. Rev. 431 (1997). For article, "Calculating Economic Damages in Georgia Personal Injury and Wrongful Death Cases," see 22 Ga. St. B. J. 18 (2017).

For comment on Rogers v. Hime, 76 Ga. App. 523, 46 S.E.2d 367 (1948), see 11 Ga. B. J. 75 (1948). For comment on Complete Auto Transit Co. v. Floyd, 249 F.2d 396 (5th Cir. 1957), holding that a statute

which, if applied, would subject the defendant to double recovery of medical and funeral expenses was unconstitutional as against that defendant because it deprives the defendant of its property without due process of law, see 21 Ga. B. J. 244 (1958).

JUDICIAL DECISIONS

Analysis

General Considerations
Homicide
Damages
Jury Instructions

General Considerations

Standing. — Legislature intended that there always be a right of recovery in the case of the homicide of a child, under O.C.G.A. § 19-7-1(c), and when the child's surviving spouse was precluded from this right of recovery, the child's parent had standing to bring a cause of action for the wrongful death of the child in order to recover for the full value of the child's life. Carringer v. Rodgers, 276 Ga. 359, 578 S.E.2d 841 (2003).

Causation. — Trial court erred in granting summary judgment for the Georgia Department of Transportation (DOT) in a wrongful death action as there was a question of fact as to causation because although the parents' evidence that there was a gouge in the shoulder the day after the collision was not direct evidence to contradict the DOT's evidence that there was not a gouge on the day of the collision, the parents' experts agreed that the severe drop-off the driver encountered when the driver left the east-side roadway and lost control of the car. Karwacki v. Ga. DOT, 276 Ga. App. 628, 624 S.E.2d 171 (2005).

Parents' wrongful death claim under O.C.G.A. § 19-7-1 pertaining to an unclipped rear seat failed on summary judgment because the unclipped seat did not contribute to their child's fatal skull fracture, and there was thus no evidence showing proximate causation under O.C.G.A. § 51-1-11(b)(1) between the unclipped seat and the child's death; the parents also did not assert a survival action in order to permit recovery for pain and suffering in that such damages were not permitted under O.C.G.A. §§ 19-7-1 and 51-4-1. Davenport v. Ford Motor Co., No. 1:05-cv-3047-WSD, 2007 U.S. Dist. LEXIS 91245 (N.D. Ga. Dec. 11, 2007).

Proper construction of the statute is that it gives a right of action for damages for any negligence which was actionable at common law. — Wrongful Death Act did not undertake to state or define what "other negligence" meant. Caskey v. Underwood, 89 Ga. App. 418, 79 S.E.2d 558 (1953).

To extent that this section permits recovery of more than loss to survivor it is punitive. Harden v. United States, 485 F. Supp. 380 (S.D. Ga. 1980), aff'd, 688 F.2d 1025 (5th Cir. 1982).

Official immunity for wrongful death. — When officers responded to a call reporting a domestic disturbance at a residence, the decedent resisted the officers attempt to arrest the decedent, and the officer shot and killed the decedent, it was error to grant the shooting officer official immunity as to a wrongful death claim because a jury could find that the officer intentionally shot the decedent after the struggle ended and at a time when the decedent was lying on the floor, unarmed and compliant. Felio v. Hyatt, No. 14-15702, 2016 U.S. App. LEXIS 1230 (11th Cir. Jan. 26, 2016) (Unpublished).

Mental suffering caused by death is not element of damage. Glawson v. Southern Bell Tel. & Tel. Co., 9 Ga. App. 450, 71 S.E. 747 (1911).

The emotional upset of the plaintiff in a wrongful death action, if any, cannot be considered by the jury in awarding damages, if any. YMCA v. Bailey, 112 Ga. App. 684, 146 S.E.2d 324 (1965), cert. denied, 385 U.S. 868, 87 S. Ct. 131, 17 L. Ed. 2d 95 (1966).

When party's negligence is willful and wanton, that party is debarred from pleading that the other party was trespasser, or was negligent or was a wrongdoer. McKinsey v. Wade, 136 Ga. App. 109, 220 S.E.2d 30 (1975).

Burden is upon the plaintiff to prove that death resulted "from a crime or from criminal or other negligence." Kickasola v. Jim Wallace Oil Co., 144 Ga. App. 758, 242 S.E.2d 483, cert. denied, 436 U.S. 921, 98 S. Ct. 2272, 56 L. Ed. 2d 764 (1978).

Evidence that the defendant pled guilty to act in prior criminal proceeding is admissible in evidence. Kickasola v. Jim Wallace Oil Co., 144 Ga. App. 758, 242 S.E.2d 483, cert. denied, 436 U.S. 921, 98 S. Ct. 2272, 56 L. Ed. 2d 764 (1978).

Justification is defense which renders behavior noncriminal. Kickasola v. Jim Wallace Oil Co., 144 Ga. App. 758, 242 S.E.2d 483, cert. denied, 436 U.S. 921, 98 S. Ct. 2272, 56 L. Ed. 2d 764 (1978).

Proof that decedent was sole support of widow and her children is irrelevant, and the allowance of such evidence is harmful error. Central of Ga. Ry. v. Prior, 142 Ga. 536, 83 S.E. 117 (1914).

Mortuary tables are admissible in evidence to establish the full value of the life of the children's deceased father. David v. Southwestern R.R., 41 Ga. 223 (1870).

Evidence offered by expert on value of life of deceased may take into account statistical studies and inflationary trends. Georgia S. & Fla. Ry. v. Odom, 152 Ga. App. 664, 263 S.E.2d 469 (1979).

Transfer of property to spouse pending unliquidated wrongful death claim. — Summary judgment was error when an issue of fact remained as to whether an unliquidated wrongful death claim at the time of a killer's property transfer without consideration to the killer's spouse rendered the killer insolvent and material issues remained as to fraud. Bryant v. Browning, 259 Ga. App. 467, 576 S.E.2d 925 (2003).

Procedural due process satisfied. — Georgia's state law provision for review of the personnel board's decision through certiorari to the county superior court satisfies the requirements of procedural due process. Jones v. City of E. Point, 795 F. Supp. 408 (N.D. Ga. 1992), aff'd, 987 F.2d 775 (11th Cir. 1993).

Official liability for detainee's suicide. — Liability for detainee's suicide was determined accordingly: immunity for county commissioners with no authority over the operations of the jail or the sheriff's department; immunity for jail administrator with no knowledge of decedent's incarceration; and potential respondeat superior liability for sheriff with knowledge of the decedent's suicidal intent and ratification of the negligent acts of the decedent's subordinates. Merideth v. Grogan, 812 F. Supp. 1223 (N.D. Ga. 1992), aff'd, 985 F.2d 579 (11th Cir. 1993).

Cited in Western & A.R.R. v. Gray, 172 Ga. 286, 157 S.E. 482 (1931); Georgia R.R. & Banking Co. v. Farmer, 45 Ga. App. 130, 164 S.E. 71 (1932); Western & A.R.R. v. Michael, 178 Ga. 1, 172 S.E. 66 (1933); Hunt v. Western & A.R.R., 49 Ga. App. 33, 174 S.E. 222 (1934); Shermer v. Crowe, 53 Ga. App. 418, 186 S.E. 224 (1936); Thompson v. Watson, 186 Ga. 396, 197 S.E. 774 (1938); Hawkins v. National Sur. Corp., 63 Ga. App. 367, 11 S.E.2d 250 (1940); Atlanta, B. & C.R.R. v. Thomas, 64 Ga. App. 253, 12 S.E.2d 494 (1940); Atlantic Coast Line R.R. v. Mitchell, 157 F.2d 880 (5th Cir. 1946); Lewis v. Williams, 78 Ga. App. 494, 51 S.E.2d 532 (1949); Brewer v. United States, 108 F. Supp. 889 (M.D. Ga. 1952); Dixon v. Ross, 94 Ga. App. 187, 94 S.E.2d 86 (1956); Complete Auto Transit, Inc. v. Floyd, 249 F.2d 396 (5th Cir. 1957); Willitt v. Purvis, 276 F.2d 129 (5th Cir. 1960); Hartz v. United States, 415 F.2d 259 (5th Cir. 1969); Bulloch County Hosp. Auth. v. Fowler, 227 Ga. 638, 182 S.E.2d 443 (1971); Smith, Kline & French Labs. v. Just, 126 Ga. App. 643, 191 S.E.2d 632 (1972); Ford Motor Co. v. Carter, 239 Ga. 657, 238 S.E.2d 361 (1977); Kickasola v. Jim Wallace Oil Co., 144 Ga. App. 758, 242 S.E.2d 483 (1978); Self v. Executive Comm. of Ga. Baptist Convention, Inc., 151 Ga. App. 698, 259 S.E.2d 695 (1979); Greenway v. Peabody Int'l Corp., 163 Ga. App. 698, 294 S.E.2d 541 (1982); Allrid v.

General Considerations (Cont'd)

Emory Univ., 166 Ga. App. 130, 303 S.E.2d 486 (1983); McQurter v. City of Atlanta, 572 F. Supp. 1401 (N.D. Ga. 1983); Reliance Ins. Co. v. Bridges, 168 Ga. App. 874, 311 S.E.2d 193 (1983); Donson Nursing Facilities v. Dixon, 176 Ga. App. 700, 337 S.E.2d 351 (1985); Gilmere v. City of Atlanta, 864 F.2d 734 (11th Cir. 1989); Dowling v. Lopez, 211 Ga. App. 578, 440 S.E.2d 205 (1993); Manning v. Manning, 270 Ga. 86, 508 S.E.2d 157 (1998).

Homicide

Georgia wrongful death statute is unusual, in that it permits recovery only for the "homicide" of various family members. Higginbotham v. Ford Motor Co., 540 F.2d 762 (5th Cir. 1976).

Under the Wrongful Death Act, O.C.G.A. § 51-4-1 et seq., and O.C.G.A. § 19-7-1(c), the parent of a decedent child who was murdered by the decedent's surviving spouse had standing to bring a cause of action for the wrongful death of the child against the murdering spouse and/or another individual or entity proximately causing the child's death; the parent could recover for the full value of the life of the child. Carringer v. Rodgers, 276 Ga. 359, 578 S.E.2d 841 (2003).

Language "other negligence" embraces homicide resulting from any negligence other than criminal negligence, and includes a homicide resulting from simple or ordinary negligence. Western & A.R.R. v. Michael, 175 Ga. 1, 165 S.E. 37 (1932).

"Homicide" action includes products liability action. — By including "death caused by defectively manufactured property," in the definition of "homicide," O.C.G.A. § 51-4-1 provides the spouse with the right to recover for the wrongful death of the plaintiff's spouse, in a products liability action. Timms v. Verson Allsteel Press Co., 520 F. Supp. 1147 (N.D. Ga. 1981).

O.C.G.A. § 51-4-1 makes one liable for wrongful death under the strict liability provisions existing in O.C.G.A. § 51-1-11 to the same extent the latter code section makes one liable for injury to person or property. Stiltjes v. Ridco Exterminating Co., 256 Ga. 255, 347 S.E.2d 568 (1986).

Sale of goods. — A wrongful death action may not be predicated on a breach of warranty arising from the sale of goods, except specified articles intended for human consumption or use. Ryals v. Billy Poppell, Inc., 192 Ga. App. 787, 386 S.E.2d 513 (1989).

Sale of firearm to suicide victim. — Genuine issues of material fact as to what store employees should have reasonably foreseen as a result of the sale of a rifle to a mentally incompetent customer, who later killed oneself with it, precluded summary judgment for the store in a wrongful death action. Knight v. Wal-Mart Stores, Inc., 889 F. Supp. 1532 (S.D. Ga. 1995).

Vehicle not manufactured by defendant. — Defendant used-car dealer could not be held liable under a complaint alleging that the plaintiffs' decedent was killed while driving a used car purchased from the defendant which was defective when manufactured and that the car was covered by an express warranty of merchantability, issued by the defendant at the time of purchase, since the vehicle in question was not manufactured by the defendant. Ryals v. Billy Poppell, Inc., 192 Ga. App. 787, 386 S.E.2d 513 (1989).

Negligent driving resulting in death under Georgia and Iraqi law. — Georgia law provided for recovery for wrongful death caused by negligence, O.C.G.A. § 51-4-1, and recovery for wrongful death was available in all cases in which the death of a human being resulted from a crime, or from criminal or other negligence; that included when a wrongful death was caused by negligent unsafe driving. Iraqi law similarly provided for a cause of action for wrongful death in Iraqi Civil Law art. 203 and Iraqi Civ. Code No. 40, art. 227, which provided that every person had the right of passage on the public road provided the person observed the safety precautions so that the person would not cause injury to a third party or to oneself when safety precautions may be taken; because the parents alleged that the company violated the lieutenant colonel's right of safe passage on a public road by negligent driving that ultimately resulted in the lieutenant col-

onel's death, and because the company's negligence resulted in death, a cause of action existed under Iraqi law, and Iraqi law on that issue was thus not inconsistent with Georgia public policy. Baragona v. Kuwait Gulf Link Transp. Co., 691 F. Supp. 2d 1346 (N.D. Ga. 2007).

Pesticides. — Paragraph (2) of O.C.G.A. § 51-4-1, as amended in 1978, would permit a claim against a pesticide manufacturer for strict liability based on inadequate warnings or instructions regarding its pesticides. Stiltjes v. Ridco Exterminating Co., 256 Ga. 255, 347 S.E.2d 568 (1986).

When there is some evidence from which jury could reach conclusion that shooting in self-defense was justified, there would be no tortious misconduct and a verdict for the defendant is sustainable. Kickasola v. Jim Wallace Oil Co., 144 Ga. App. 758, 242 S.E.2d 483, cert. denied, 436 U.S. 921, 98 S. Ct. 2272, 56 L. Ed. 2d 764 (1978).

Since the evidence for the plaintiff widow was insufficient to authorize the finding that the defendant employee was not justified in killing the spouse of the plaintiff, the verdict against the defendant employee, the employee's master and the defendant agent who hired the employee, was unauthorized. Hanna v. Estridge, 59 Ga. App. 182, 200 S.E. 174 (1938).

Parents not responsible for decedent's death while attending party. — Parents were entitled to summary judgment dismissing a wrongful death suit as there was no genuine issue of material fact regarding whether the parents could have foreseen that the decedent would attend a party their minor child held at their home in their absence, or that the decedent would voluntarily ingest prescription drugs furnished by a third person. Tims v. Hasselberger, 298 Ga. App. 256, 679 S.E.2d 731 (2009).

Intentional termination of life support a wrongful death claim, not a malpractice claim. — The trial court properly refused to dismiss a plaintiff's claim asserting tortious termination of life support based on the defendant's argument that it was really a medical malpractice claim and, therefore, required an expert medical affidavit under O.C.G.A. § 9-11-9.1; because such a claim is a suit for wrongful death, not medical malpractice, no expert medical affidavit was necessary. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Damages

Measure of damages. — When the defendant is liable and there is no reason to reduce the damages, the plaintiff is entitled to recover the value of the decedent's life. Western & A.R.R. v. Reed, 35 Ga. App. 538, 134 S.E. 134 (1926).

The measure of recovery is the full value of the life of the deceased, irrespective of its real value to the person in whom the cause of action is vested. Western & A.R.R. v. Michael, 175 Ga. 1, 165 S.E. 37 (1932).

In a wrongful death action, the measure of damages is "the full value of the life" and no authority requires that the "full value" itself, once arrived at, must be reduced any more than "market value," once arrived at, must be reduced when that measure of damages is applicable. City of Macon v. Smith, 117 Ga. App. 363, 160 S.E.2d 622 (1968).

Factfinder is permitted wide latitude in calculating the "full value" of the decedents' lives. Economic losses associated with the decedents' deaths may be considered, as well as any noneconomic, intangible losses deemed relevant, however, consideration of the personal expenses and income taxes that the decedents would have incurred had the decedents lived is not permitted. Childs v. United States, 923 F. Supp. 1570 (S.D. Ga. 1996).

After the court charged the jury that if the plaintiffs were entitled to recover damages, the plaintiffs could recover "the full value of the life of deceased without deduction" for the personal expenses of that person, had they lived, and that the measure of damages was the full value of the life of the child as found by the jury's enlightened conscience, there was no error. Williams v. Worsley, 235 Ga. App. 806, 510 S.E.2d 46 (1998).

Evidence of a decedent's sex life, abortions, missing work due to being pregnant

Damages (Cont'd)

out of wedlock, and giving up children for adoption was inadmissible in a wrongful death action prosecuted on behalf of decedent's child. Brock v. Wedincamp, 253 Ga. App. 275, 558 S.E.2d 836 (2002).

Gross value of the spouse's life, regardless of dependency, or previous contribution to the plaintiff's support is the proper measure of damages. Boswell v. Barnhart, 96 Ga. 521, 23 S.E. 414 (1895).

Full value of life of decedent is its present value, and that is arrived at by determining from the evidence the gross value of the life of the decedent, and then reducing this amount to its present cash value. Central of Ga. Ry. v. Keating, 45 Ga. App. 811, 165 S.E. 873 (1932), rev'd on other grounds, 177 Ga. 345, 170 S.E. 493 (1933).

Full value of life of spouse to oneself is the test. Atlantic, V. & W.R.R. v. McDilda, 125 Ga. 468, 54 S.E. 140 (1906).

Term "full value of the life of the decedent" is construed to mean gross sum that deceased would have earned to end of the deceased's life reduced to its present cash value. The law fixes the basis of the jury's calculation, but does not prescribe any Procrustean method by which the damage must be arrived at. In arriving at the amount of damages, the jury should consider the age of the deceased at the time of death, the deceased's health, the deceased's habits, the amount of money the deceased was earning, the deceased's expectation of life, the probable loss of employment, voluntary abstinence from work, dullness in business, reduction of wages, the increasing infirmities of age, with a corresponding diminution of earning capacity, and other causes which may contribute to illustration of the gross earnings of a lifetime. Pollard v. Boatwright, 57 Ga. App. 565, 196 S.E. 215 (1938).

Full value may include other considerations. — While a jury may, depending upon the facts of the case, determine that the full value of the decedent's life is the gross sum that the decedent would have earned to the end of the decedent's life, had the decedent lived, reduced to its present cash value, the jury is not bound to find that lifetime earnings reduced to present value is the "full value of the life of the decedent" but such is an aid only to the jury in making such determination. Bulloch County Hosp. Auth. v. Fowler, 124 Ga. App. 242, 183 S.E.2d 586 (1971), overruled on other grounds, 131 Ga. App. 321, 205 S.E.2d 421 (1974).

The "full value of the life of the decedent" consists of two elements, the economic value of the deceased's normal life expectancy and the intangible element incapable of exact proof. Therefore, in arriving at the value of the life of the decedent the jury is not bound to find that lifetime earnings reduced to present value is the full value of the life of the decedent, but such is an aid only to the jury in making such determination. Miller v. Jenkins, 201 Ga. App. 825, 412 S.E.2d 555 (1991), cert. denied, 201 Ga. App. 904, 412 S.E.2d 555 (1992).

The phrase "without deducting for any of the necessary or personal expenses of the decedent had he lived" means that the standard of recovery is not confined to the actual pecuniary loss of the plaintiff, but includes the full monetary value of the life of the deceased, no matter how much of that value would have found its way into the hands of the plaintiff had the deceased lived. Har-Pen Truck Lines v. Mills, 378 F.2d 705 (5th Cir. 1967).

Upon proof as to person's age, health, and value of the person's services, the jury may estimate the value of life, and reduce that value to its present cash value, by any method satisfactory to them which produces a definite result that is fair and reasonable and is authorized by the evidence. Central of Ga. Ry. v. Keating, 45 Ga. App. 811, 165 S.E. 873 (1932), rev'd on other grounds, 177 Ga. 345, 170 S.E. 493 (1933).

Deceased spouse being co-beneficiary of services did not discount value. — In a spouse's wrongful death suit against the Georgia Department of Transportation, the trial court did not err by allowing the surviving spouse's economic expert to testify as to the value of the deceased spouse's household services without isolating and subtracting the value the deceased spouse had re-

ceived as the fact that the deceased spouse may have been a co-beneficiary of a service for the household did not discount the value of the service to the other members of the household. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898 (2008).

In estimating value of ordinary services rendered by decedent, jury is authorized to take into consideration what may be the value of many services incapable of exact proof, but measured in the light of their own observation and experience. Pollard v. Kent, 59 Ga. App. 118, 200 S.E. 542 (1938); Smith v. McBride, 119 Ga. App. 94, 166 S.E.2d 407 (1969).

In cases of infants of tender years, it is impossible to give exact evidence of pecuniary value of the probable loss and the question of damages of the loss is left to sound judgment, experience, and conscience of the jury without any exact proof thereof. The enlightened conscience of a jury means also the jury's informed conscience. Seaboard Coast Line R.R. v. Duncan, 123 Ga. App. 479, 181 S.E.2d 535 (1971).

In arriving at "full value," jury may take into consideration items which must be reduced to present cash value, such as the lifetime income of the deceased, if any, or the value of services rendered by a deceased wife or mother when there is direct evidence of the monetary value of such services. City of Macon v. Smith, 117 Ga. App. 363, 160 S.E.2d 622 (1968).

It is not "full value of the life" measure of damages, which must be reduced, but only properly reducible items which aid jury in arriving at full value. City of Macon v. Smith, 117 Ga. App. 363, 160 S.E.2d 622 (1968).

In a wrongful death action, the "full value of the life of the decedent" includes compensation for sums payable as loss of earnings. State Farm Mut. Auto. Ins. Co. v. Five Transp. Co., 246 Ga. 447, 271 S.E.2d 844 (1980).

Loss of services may be awarded as part of the full value of a deceased child's life. South Fulton Medical Ctr. Inc. v. Poe, 224 Ga. App. 107, 480 S.E.2d 40 (1996).

Construction almost universally followed for wrongful death statutes is that jury are confined to pecuniary loss, and that nothing can be allowed by way of solatium for the grief and wounded feelings of the beneficiaries, or to compensate them for the mere loss of society or of companionship which they have suffered. Bulloch County Hosp. Auth. v. Fowler, 124 Ga. App. 242, 183 S.E.2d 586 (1971), overruled on other grounds, 131 Ga. App. 321, 205 S.E.2d 421 (1974).

Veteran's benefits received by decedent. — Regardless of whether compensation paid to a veteran for disability is characterized as arising from services rendered by the decedent, or as compensation for a disability, the benefits constitute readily provable income of the decedent which ceased because of the decedent's death, and are admissible to prove the economic component of the full value of the decedent's life. Consolidated Freightways Corp. v. Futrell, 201 Ga. App. 233, 410 S.E.2d 751, cert. denied, 201 Ga. App. 903, 410 S.E.2d 751 (1991).

Damages for depriving deceased's minor child of guidance and assistance of the child's father were not recoverable, as such, separately from the value of life of the deceased and could be considered only the question of value of the life of the deceased. Southern Ry. v. Turner, 89 Ga. App. 785, 81 S.E.2d 291 (1954).

Wrongful death action should not include expenses of decedent's last illness. — Trial court erroneously expanded the scope of wrongful death actions under the Wrongful Death Act, O.C.G.A. § 51-4-1 et seq., to include the expenses of the decedent's last illness when the trial court satisfied the O.C.G.A. § 44-14-470(b) medical services lien of a hospital out of the limited insurance proceeds instead of satisfying the decedent's children's wrongful death claims out of the proceeds since: (1) the children filed a wrongful death complaint; (2) the available insurance proceeds were then deposited into a court registry without the decedent's estate ever making a claim for medical payments; and (3) the available insurance proceeds were insufficient to cover the children's wrongful death claims. Nash v. Allstate Ins. Co., 256 Ga. App. 143, 567 S.E.2d 748 (2002).

Damages (Cont'd)

Evidence of church activities and religious beliefs. — Generally, evidence of a decedent's church activities and religious beliefs are not relevant to prove pecuniary loss in a wrongful death action. However, such evidence may be relevant as an aspect of the intangible element of the full value of the life of a deceased. Consolidated Freightways Corp. v. Futrell, 201 Ga. App. 233, 410 S.E.2d 751, cert. denied, 201 Ga. App. 903, 410 S.E.2d 751 (1991).

Interest may be added from time of death to the verdict. Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69 (1915); City of Thomasville v. Jones, 17 Ga. App. 625, 87 S.E. 923 (1916).

Punitive damages are not available in a wrongful death claim, since O.C.G.A. § 51-4-1, to the extent it permits recovery of more than the actual loss to the survivor, is itself punitive. Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

Settlement of claim. — When a claim under this section is settled, the estate of the deceased is not entitled to proceeds. Cooper v. Cooper, 30 Ga. App. 710, 119 S.E. 335 (1923).

There can be no recovery for future earnings of person injured unless there is evidence of life expectancy; however, when the age of the person in question is shown, expectancy of life may be determined by the jury without having the mortality tables before them or without any other direct evidence on the subject. Western & A.R.R. v. Groover, 42 Ga. App. 200, 155 S.E. 500 (1930).

No need for evidence of future earnings in case of young child. — In the case of a parent suing for the death of a minor child, it is not necessary for the evidence to show what the future earnings might be in cases when there is no selection of a vocation or other facts from which future earnings can be determined. Collins v. McPherson, 91 Ga. App. 347, 85 S.E.2d 552 (1954).

Jury Instructions

In wrongful death case, charge to jury on damages in language of this section is sufficient. Radcliffe v. Maddox, 45 Ga. App. 676, 165 S.E. 841 (1932).

Jury instructions. — Failure to charge the jury with more particularity concerning intangible factors was not harmful error since the instructions given combined with a mortality table and an instruction given regarding its use, adequately and fully charged the jury regarding the measure of damages. Miller v. Jenkins, 201 Ga. App. 825, 412 S.E.2d 555 (1991), cert. denied, 201 Ga. App. 904, 412 S.E.2d 555 (1992).

Instructions on mortality tables. — Proper instructions for use of mortality and annuity tables are found in Florida C. & P.R.R. v. Burney, 98 Ga. 1, 26 S.E. 730 (1895).

It was error to charge jury on question of prospects of increased earnings of deceased since there was no evidence to authorize the charge. Wimpy v. Rogers, 58 Ga. App. 67, 197 S.E. 656 (1938).

No charge on future earning capacity of child unnecessary when no evidence presented. — When there is no evidence whatever on earnings or earning capacity, and when such evidence is not necessary to a recovery, and when the jury has not been instructed by the trial court to determine the full value of the life of the deceased child based on what the child would have earned during the child's life expectancy, it is not error for the trial court to leave the full value of the life of the child to the enlightened conscience of an impartial jury, based on evidence of the child's age, the child's precocity, the services rendered by the child up to the time of the child's death, the circumstances of the family, and from experience and knowledge of human affairs on the part of the jury, and to fail to charge that any amount awarded the plaintiff as the full value of the life of the deceased daughter should be reduced to present cash value. Collins v. McPherson, 91 Ga. App. 347, 85 S.E.2d 552 (1954).

Jury instruction erroneous when reference made to value of decedent's life to person bringing suit. — When the first sentence of a charge is clearly erroneous in that the charge states that

the plaintiff's recovery shall be confined to "her pecuniary interest in the life of her daughter, or the value of that life to the plaintiff," and, it is clear that the second sentence of a charge properly stated the measure of damages, the trial judge did not expressly call the attention of the jury to the incorrect statement, and explain to the jury that the charge was erroneous, the charge clearly could have misled the jury and confused the jury. Hudson v. Cole, 102 Ga. App. 300, 115 S.E.2d 825 (1960).

Charge was calculated to mislead jury into belief that defendant company was guilty of criminal negligence since the court's definition of "homicide" was taken directly from the language of this section and there is no error in the court's giving this definition in the language of the section. Georgia R.R. & Banking Co. v. Farmer, 45 Ga. App. 130, 164 S.E. 71 (1932).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 8 Am. Jur. Pleading and Practice Forms, Death, § 4.

ALR. — Skier's liability for injuries to or death of another person, 75 ALR5th 583.

51-4-2. Persons entitled to bring action for wrongful death of spouse or parent; survival of action; release of wrongdoer; disposition of recovery; exemption from liability for decedent's debts; recovery not barred when child born out of wedlock.

(a) The surviving spouse or, if there is no surviving spouse, a child or children, either minor or sui juris, may recover for the homicide of the spouse or parent the full value of the life of the decedent, as shown by the evidence.

(b)(1) If an action for wrongful death is brought by a surviving spouse under subsection (a) of this Code section and the surviving spouse dies pending the action, the action shall survive to the child or children of the decedent.

(2) If an action for wrongful death is brought by a child or children under subsection (a) of this Code section and one of the children dies pending the action, the action shall survive to the surviving child or children.

(c) The surviving spouse may release the alleged wrongdoer without the concurrence of the child or children or any representative thereof and without any order of court, provided that such spouse shall hold the consideration for such release subject to subsection (d) of this Code section.

(d)(1) Any amount recovered under subsection (a) of this Code section shall be equally divided, share and share alike, among the surviving spouse and the children per capita, and the descendants of children shall take per stirpes, provided that any such recovery to

which a minor child is entitled and which equals less than $15,000.00 shall be held by the natural guardian of the child, who shall hold and use such money for the benefit of the child and shall be accountable for same; and any such recovery to which a minor child is entitled and which equals $15,000.00 or more shall be held by a guardian of the property of such child.

(2) Notwithstanding paragraph (1) of this subsection, the surviving spouse shall receive no less than one-third of such recovery as such spouse's share.

(e) No recovery had under subsection (a) of this Code section shall be subject to any debt or liability of the decedent.

(f) In actions for recovery under this Code section, the fact that a child has been born out of wedlock shall be no bar to recovery. (Laws 1850, Cobb's 1851 Digest, p. 476; Ga. L. 1855-56, p. 154, § 4; Code 1863, § 2913; Code 1868, § 2920; Code 1873, § 2971; Ga. L. 1878-79, p. 59, §§ 1, 2; Code 1882, § 2971; Ga. L. 1887, p. 43, § 1; Civil Code 1895, §§ 3828, 3829; Civil Code 1910, §§ 4424, 4425; Ga. L. 1924, p. 60, §§ 1, 2; Code 1933, §§ 105-1302, 105-1303, 105-1304, 105-1305; Ga. L. 1973, p. 488, § 1; Ga. L. 1985, p. 1253, § 1; Ga. L. 1986, p. 10, § 51; Ga. L. 1988, p. 1720, § 17; Ga. L. 1993, p. 1055, § 1; Ga. L. 1998, p. 605, § 1.)

Editor's notes. — Ga. L. 1998, p. 605, § 2, not codified by the General Assembly, provided that the Act shall be applicable to all wrongful death actions arising on or after July 1, 1998.

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986). For article, "What's a Human Life Really Worth? Recovering Damages for Decedents' Non-Economic Losses in Georgia Wrongful Death Actions," see 7 Ga. St. U.L. Rev. 439 (1991). For annual survey article discussing trial practice and procedure, see 52 Mercer L. Rev. 447 (2000). For annual survey on appellate practice and procedure, see 61 Mercer L. Rev. 31 (2009).

For note advocating consistency of inheritance and wrongful death rights with adopted child's new legal status, see 23 Mercer L. Rev. 1003 (1972). For note, "Standing to Sue for Wrongful Death in Georgia When a Spouse and Children Survive the Tortious Death: Mack v. Moore," see 3 Ga. St. U.L. Rev. 281 (1987). For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 233 (1993).

For comment on Bloodworth v. Jones, 191 Ga. 193, 11 S.E.2d 658 (1940), see 3 Ga. B. J. 65 (1941). For comment on Odom v. Atlantic & W.P.R.R., 78 Ga. App. 477, 51 S.E.2d 466 (1949), see 12 Ga. B. J. 76 (1949). For comment advocating recognition in Georgia of the rights of illegitimate children to recover for wrongful death of father, in light of Armijo v. Wesselius, 73 Wash. 2d 716, 440 P.2d 471 (1968), see 20 Mercer L. Rev. 469 (1969).

JUDICIAL DECISIONS

Analysis

General Consideration
Procedure
Wrongful death of spouse
Wrongful death of child

STEPPARENTS
DECISIONS UNDER FORMER § 51-4-3

General Consideration

Constitutionality. — The amendment of 1924 adding the words "minor or sui juris" after the words "child or children" is constitutional. Peeler v. Central of Ga. Ry., 163 Ga. 784, 137 S.E. 24 (1927).

The equality demanded by U.S. Const., amend. 14 is not violated by embracing homicides arising from ordinary or simple negligence with those arising from wanton, willful, or criminal negligence. Such a classification is not arbitrary. In making its classification, the General Assembly is not required to make a distinction arising from different degrees of negligence; but it can embrace all wrongful homicides under one classification, and subject them to the same penalties. Western & A.R.R. v. Michael, 175 Ga. 1, 165 S.E. 37 (1932).

A plaintiff's not being able to recover punitive damages in a wrongful death action does not violate the plaintiff's right to equal protection of the laws. Berman v. United States, 572 F. Supp. 1486 (N.D. Ga. 1983).

There is no denial of equal protection in O.C.G.A. § 51-4-2 giving greater rights to surviving spouses than to children to sue for wrongful death since there is a rational basis for the differentiation in the need to designate a representative of the beneficiaries of any recovery, which the statute provides shall be distributed between the surviving spouse and the children. Mack v. Moore, 256 Ga. 138, 345 S.E.2d 338 (1986).

The 1985 amendment to O.C.G.A. § 51-4-2 and the General Assembly's repeal of O.C.G.A § 51-4-3 corrected the constitutional infirmity which caused this court to declare § 51-4-2 unconstitutional in Tolbert v. Murrell, 253 Ga. 566, 322 S.E.2d 487 (1984), i.e., the disparate treatment of different classes of children. Mack v. Moore, 256 Ga. 138, 345 S.E.2d 338 (1986).

The 1985 amendment to O.C.G.A. § 51-4-2, conferring exclusive standing upon the surviving spouse to bring a wrongful death action, could not be applied retroactively to bar a son's suit on a claim which arose prior to the effective date of the amendment (April 10, 1985). Cole v. Roberts, 648 F. Supp. 415 (M.D. Ga. 1986).

Strict construction. — Georgia's wrongful death cause of action was statutorily created and did not evolve from common law, and because it was not available at common law, it must be strictly construed. Potts v. United Technologies Corp., 879 F. Supp. 1196 (N.D. Ga. 1994).

Creation of a cause of action for wrongful death depends upon state statutes, for no such right existed at common law. Edenfield v. Jackson, 251 Ga. 491, 306 S.E.2d 911 (1983).

The statutory right to bring an action for wrongful death enures only to the decedent's spouse and children who are living at the time the action accrues. Tolbert v. Maner, 271 Ga. 207, 518 S.E.2d 423 (1999).

In a suit for legal malpractice and unjust enrichment, a superior court properly found that an attorney was entitled to summary judgment on an unjust enrichment claim because a decedent's first wife and the first wife's two children conferred no benefit on the attorney in an underlying case; neither the first wife nor the first wife's children were authorized to pursue an action for the wrongful death of the decedent as that right belonged to the second wife, the surviving spouse pursuant to O.C.G.A. § 51-4-2. Rommelman v. Hoyt, 295 Ga. App. 19, 670 S.E.2d 808 (2008), cert. denied, No. S09C0516, 2009 Ga. LEXIS 203 (Ga. 2009).

Claims for wrongful death and pain and suffering are distinct. — An individual's claim for wrongful death and an estate's claim for the decedent's pain and suffering are distinct causes of action. Smith v. Memorial Medical Ctr., Inc., 208 Ga. App. 26, 430 S.E.2d 57 (1993).

Children's rights adequately protected. — Since the decedent's children contended that they possess a property right in the action for their father's wrongful death and they further asserted that O.C.G.A. § 51-4-2, in granting his surviving third wife the exclusive right to initi-

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ate that action, denied them an effective procedure through which they might vindicate their right, it was held that since the surviving spouse owes a duty to the children to prudently assert, prosecute, or settle the wrongful death claim and the failure to do this could subject the spouse to liability for breach of duty as a representative, any property interest that the children might have in an action for their parent's wrongful death was adequately protected. O'Kelley v. Hospital Auth., 256 Ga. 373, 349 S.E.2d 382 (1986), appeal dismissed, 480 U.S. 926, 107 S. Ct. 1559, 94 L. Ed. 2d 753 (1987).

District court did not err in dismissing the claims of decedent's childrens' guardians as decedent's spouse had a blood relationship with the children and was present and able to manage the estate of the deceased spouse. Mann v. Taser Int'l, Inc., 588 F.3d 1291 (11th Cir. 2009).

Under common law, right to recover for negligent homicide of husband, wife, parent, or child did not exist. — The Acts from which this chapter was codified establish liability for wrongful death where none existed before. Burns v. Brickle, 106 Ga. App. 150, 126 S.E.2d 633 (1962).

This section changed the common-law rule that action for damages on account of death of human being would not lie and, therefore, must be strictly construed. Weems v. Saul, 52 Ga. App. 470, 183 S.E. 661 (1936); Adams v. Powell, 67 Ga. App. 460, 21 S.E.2d 111 (1942).

This section gives a right which did not exist at common law and should therefore receive a strict construction. Boggan v. Boggan, 145 Ga. App. 401, 243 S.E.2d 664 (1978).

Legislative intent. — It was the purpose of the General Assembly in the passage of this Act to exclude dependency as a prerequisite essential to a child's right to recover for the homicide of a parent; and the provision of the Act entitling a child, whether minor or sui juris, to recover damages for the homicide of its parent, properly construed, makes the question whether the child is dependent upon such parent in any respect wholly immaterial. Peeler v. Central of Ga. Ry., 163 Ga. 784, 137 S.E. 24 (1927).

This section evidences an intent to give a right of action for the homicide of the father only when death is caused by the tort of one other than a member of the class designated. Thompson v. Watson, 186 Ga. 396, 197 S.E. 774 (1938), disapproved sub nom Walden v. Coleman, 217 Ga. 599, 124 S.E.2d 265 (1962).

Construction suggesting full participation. — Current version of O.C.G.A. § 51-4-2 does not contain the language from the 1960 amendment specifically providing that fewer than all survivors may bring a wrongful death action, but the Court of Appeals of Georgia holds that although the current law does not explicitly say that full participation is not required, the language of the statute strongly implies it. Caldwell v. Evans, 334 Ga. App. 68, 778 S.E.2d 235 (2015).

Cause of death. — A wrongful death action could not be maintained in the absence of evidence that the defendant physician's misdiagnosis was the proximate cause of the decedent's death. Dowling v. Lopez, 211 Ga. App. 578, 440 S.E.2d 205 (1993).

Cited in Carruthers v. City of Hawkinsville, 171 Ga. 313, 155 S.E. 520 (1930); Holloman v. Henry Grady Hotel Co., 42 Ga. App. 347, 156 S.E. 275 (1930); Western & A.R.R. v. Gray, 172 Ga. 286, 157 S.E. 482 (1931); City Ice Delivery Co. v. Turley, 44 Ga. App. 32, 160 S.E. 517 (1931); Georgia R.R. & Banking Co. v. Farmer, 45 Ga. App. 130, 164 S.E. 71 (1932); Western & A.R.R. v. Bennett, 47 Ga. App. 629, 171 S.E. 187 (1933); Western & A.R.R. v. Michael, 178 Ga. 1, 172 S.E. 66 (1933); Hunt v. Western & A.R.R., 49 Ga. App. 33, 174 S.E. 222 (1934); Edwards v. Southern Ry., 52 Ga. App. 557, 184 S.E. 370 (1936); Shermer v. Crowe, 53 Ga. App. 418, 186 S.E. 224 (1936); Thompson v. Watson, 186 Ga. 396, 197 S.E. 774 (1938); Hawkins v. National Sur. Corp., 63 Ga. App. 367, 11 S.E.2d 250 (1940); Maddox v. First Nat'l Bank, 191 Ga. 106, 11 S.E.2d 662 (1940); Atlanta, B. & C.R.R. v. Thomas, 64 Ga. App. 253, 12 S.E.2d 494 (1940); Lewis v. Williams, 78 Ga. App. 494, 51 S.E.2d 532 (1949); Brawner v. Guyton,

81 Ga. App. 583, 59 S.E.2d 539 (1950); Atlantic Coast Line R.R. v. Mims, 199 F.2d 582 (5th Cir. 1952); New Amsterdam Cas. Co. v. Freeland, 216 Ga. 491, 117 S.E.2d 538 (1960); Willitt v. Purvis, 276 F.2d 129 (5th Cir. 1960); Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961); Dunn v. Caylor, 218 Ga. 256, 127 S.E.2d 367 (1962); Hartz v. United States, 415 F.2d 259 (5th Cir. 1969); Walker v. Hall, 226 Ga. 68, 172 S.E.2d 411 (1970); Andrews v. Pollard, 121 Ga. App. 69, 172 S.E.2d 857 (1970); Bulloch County Hosp. Auth. v. Fowler, 227 Ga. 638, 182 S.E.2d 443 (1971); Lynn v. Wagstaff Motor Co., 126 Ga. App. 516, 191 S.E.2d 324 (1972); Davis v. Cox, 131 Ga. App. 611, 206 S.E.2d 655 (1974); Stancill v. McKenzie Tank Lines, 497 F.2d 529 (5th Cir. 1974); Janelle v. Seaboard Coast Line R.R., 524 F.2d 1259 (5th Cir. 1975); Ford Motor Co. v. Carter, 239 Ga. 657, 238 S.E.2d 361 (1977); Watkins v. United States, 462 F. Supp. 980 (S.D. Ga. 1977); Lambert v. Allen, 146 Ga. App. 617, 247 S.E.2d 200 (1978); Star Jewelers, Inc. v. Durham, 147 Ga. App. 68, 248 S.E.2d 51 (1978); Self v. Executive Comm. of Ga. Baptist Convention, Inc., 151 Ga. App. 698, 259 S.E.2d 695 (1979); Farahmand v. Local Properties, Inc., 88 F.R.D. 80 (N.D. Ga. 1980); Johnson v. Parrish, 159 Ga. App. 613, 284 S.E.2d 111 (1981); McMahan v. Koppers Co., 654 F.2d 380 (5th Cir. 1981); Timms v. Verson Allsteel Press Co., 520 F. Supp. 1147 (N.D. Ga. 1981); Adams v. Wright, 162 Ga. App. 550, 293 S.E.2d 446 (1982); Tolbert v. Murrell, 253 Ga. 566, 322 S.E.2d 487 (1984); Tarver v. Martin, 175 Ga. App. 689, 334 S.E.2d 18 (1985); GMC v. Rasmussen, 255 Ga. 544, 340 S.E.2d 586 (1986); Duffee v. Rader, 178 Ga. App. 517, 344 S.E.2d 258 (1986); Jones v. Jones, 184 Ga. App. 709, 362 S.E.2d 403 (1987); Stegman v. Horton Homes, Inc., 843 F. Supp. 707 (M.D. Ga. 1994); Stegman v. Horton Homes, Inc., 845 F. Supp. 1571 (M.D. Ga. 1994); Williams v. Department of Human Resources, 234 Ga. App. 638, 507 S.E.2d 230 (1998); Williams v. Georgia Dep't of Human Resources, 272 Ga. 624, 532 S.E.2d 401 (2000).

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Addition of child as party. — Because an administratrix amended a wrongful death complaint to reflect that such was filed in both a capacity as the administratrix of the decedent's estate and as next friend of the decedent's minor children, and there was a direct connection between the old and new parties, the complaint, as amended, related back to the original complaint; further, because the record showed that the decedent's children reached their majority after the complaint was filed, the trial court did not err in adding them as real parties in interest. Rockdale Health Sys. v. Holder, 280 Ga. App. 298, 640 S.E.2d 52 (2006).

Applicable statute of limitations. — In a wrongful death action, the Georgia statute of limitations was applicable because it constituted substantive law under Maryland's choice of law rules. Potts v. United Technologies Corp., 879 F. Supp. 1196 (N.D. Ga. 1994).

Lack of jurisdiction to allow exception to statute. — Intermediate appellate court erred in reversing a trial court's denial of a health care providers' motion for summary judgment in a wrongful death claim; although the trial court lacked jurisdiction to allow an exception to O.C.G.A. § 51-4-2(a) to authorize a guardian to bring the wrongful death claim, Ga. Const. 1983, Art. VI, Sec. I, Para. VIII required that the trial court's ruling be vacated and the case remanded with direction to transfer the case to superior court. Blackmon v. Tenet Healthsystem Spalding, Inc., 284 Ga. 369, 667 S.E.2d 348 (2008).

Conflict of laws. — Statute conferring right upon widow to recover damages for wrongful death of her husband has no extraterritorial operation, and the courts of this state cannot administer it for the purpose of redressing tortious injuries inflicted in another state. Green v. Johnson, 71 Ga. App. 777, 32 S.E.2d 443 (1944).

Federal statute exclusive remedy for longshoreman's death. — The federal Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 et seq.) fixes and limits the rights of longshoremen or their legal representatives in suits against third persons as well as for claims against their employers, to the exclusion of the remedy provided by this section. Moore v. Christiensen S.S. Co., 53

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F.2d 299 (5th Cir. 1931).

Election between federal and state remedies. — Since the plaintiff had an option of suing one tort-feasor by itself under the Federal Employers' Liability Act or of suing either or both tort-feasors under the state wrongful death law and exercised the former option and recovered thereby, the plaintiff could not then sue the second tort-feasor under the state law. Dixon v. Ross, 94 Ga. App. 187, 94 S.E.2d 86 (1956).

Standing to challenge substitution/addition of plaintiffs. — Trial court's order permitting a substitution and addition of the plaintiffs in a medical malpractice case following the deaths of the named plaintiffs was affirmed because the defendant lacked standing to complain that fewer than all of the decedent's surviving children were named plaintiffs under O.C.G.A. § 51-4-2. Caldwell v. Evans, 334 Ga. App. 68, 778 S.E.2d 235 (2015).

Lack of standing. — Trial court properly granted the plaintiffs' motion to add and substitute parties in a wrongful death action because the defendant lacked standing to complain that fewer than all of the surviving children were named plaintiffs under O.C.G.A. § 51-4-2. Caldwell v. Evans, 334 Ga. App. 68, 778 S.E.2d 235 (Oct. 1, 2015).

Wife acts both as individual and representative of children. — Although the statute confers exclusive standing upon the surviving spouse, it does not vest in the spouse all of the rights to the claim since the spouse is required to share the proceeds with the children. This means the spouse acts not solely as an independent party but rather as an individual and as the representative of the children. Mack v. Moore, 256 Ga. 138, 345 S.E.2d 338 (1986).

Children have no separate or joint cause of action while widow survives. — Under the statutes, if their is a surviving widow, the right of action is vested in her, and she alone may bring the suit; and this is not altered by the provision that the children shall share in the recovery. Bloodworth v. Jones, 191 Ga. 193, 11 S.E.2d 658, answer conformed to, 63 Ga. App. 748, 12 S.E.2d 111 (1940).

When the death of a husband and father is caused by alleged negligence of another person, the right of action to recover for the homicide is in the surviving widow, and one standing in loco parentis to the surviving children, to whom the widow has relinquished parental control, may not sue for their benefit to recover for the homicide of their father, even though the widow may waive and renounce her right in favor of the children, may elect to permit the person to whom she has relinquished parental control to proceed for their benefit, and may herself fail and refuse to bring the action. Bloodworth v. Jones, 191 Ga. 193, 11 S.E.2d 658, answer conformed to, 63 Ga. App. 748, 12 S.E.2d 111 (1940).

This section makes no provision for the children of a deceased father to institute an action for his wrongful homicide while the widow of the deceased is still in life. Odom v. Atlanta & W.P.R.R., 78 Ga. App. 477, 51 S.E.2d 466 (1949).

This section makes no provision for the children of a deceased father to institute an action for his wrongful homicide while the widow of the deceased is still in life. Odom v. Atlanta & W.P.R.R., 208 Ga. 45, 64 S.E.2d 889 (1951).

This section cannot be construed to vest in the children, jointly with the widow or separately, the right to sue for the recovery of damages for the death of their father so long as the widow survives. Western & A.R.R. v. Davis, 116 Ga. App. 831, 159 S.E.2d 134 (1967).

This section gives a right of action to the children only in the event there is no widow; if there be a widow, the right to sue is vested in her and not in the children, or jointly in her and the children. Western & A.R.R. v. Davis, 116 Ga. App. 831, 159 S.E.2d 134 (1967).

As long as widow is alive, only she may bring action; and even if she fails and refuses, children may not act through a next friend. Lynn v. Wagstaff Motor Co., 126 Ga. App. 516, 191 S.E.2d 324 (1972).

This section gives a right of action to the children only in the event there is no widow. Watkins v. United States, 462 F. Supp. 980 (S.D. Ga. 1977), aff'd, 587 F.2d 279 (5th Cir. 1979).

So long as there is a surviving widow, the right of action under this section is in her and no action by the children may be brought. Lambert v. Allen, 146 Ga. App. 617, 247 S.E.2d 200 (1978).

Decedent's children and sister lacked standing because surviving spouse was proceeding with wrongful death action. — Under O.C.G.A. § 51-4-2(a), a surviving spouse could bring a wrongful death action against drug manufacturers with respect to her husband's death, but when the surviving spouse was proceeding with the action, the decedent's children and sister did not have standing. Moore v. Mylan Inc., No. 1:11-CV-03037-MHS, 2012 U.S. Dist. LEXIS 6897 (N.D. Ga. Jan. 5, 2012).

Suit by child when widow fails to bring action. — A minor child may bring an action for wrongful death of his mother when his stepfather left the state shortly after the deceased's death with no intention of pursuing a wrongful death action. Emory Univ. v. Dorsey, 207 Ga. App. 808, 429 S.E.2d 307 (1993).

Rule applies even if widow's refusal to sue fraudulent. — The cause of action for wrongful death of a husband vests in the widow and the children have no right to sue so long as the widow is in life even if the widow's refusal to bring the suit is fraudulent. Lawrence v. Whittle, 146 Ga. App. 686, 247 S.E.2d 212 (1978).

Administrator of deceased wife is not proper party to proceed with suit for death of husband unless there are no living children of deceased. Campbell v. Western & A.R.R., 57 Ga. App. 209, 194 S.E. 927 (1938).

When the administrator of the deceased wife appeared and was made a party to the suit for the husband's death and the defendant subsequently made a motion to dismiss the suit because the administrator had not shown that there were no children of the deceased to whom the action would survive, and when upon the hearing of this motion it appeared that there were children of the deceased father to whom the action should survive, the proper procedure would have been for the trial judge not to have dismissed the petition, but to refuse to allow the suit to proceed at the instance of such administrator, and to thereupon issue a rule calling on such children to show cause on the named day why they should not be made parties thereto, and in default thereof the petition be dismissed. Campbell v. Western & A.R.R., 57 Ga. App. 209, 194 S.E. 927 (1938).

Since the wife's action for the husband's death survives to the administrator of the deceased plaintiff, being charged with the duty of prosecuting the pending action of the deceased, the administrator should, voluntarily and on the administrator's own motion, appear before the court and be made a party thereto, which should be done by an order of the court and not an amendment of the petition striking the deceased's name therefrom, and in default of doing so within a reasonable time the case may be dismissed for want of prosecution. Campbell v. Western & A.R.R., 57 Ga. App. 209, 194 S.E. 927 (1938).

No action for death of one standing in loco parentis. — When the plaintiff's father died when the plaintiff was four years of age, and the plaintiff's mother died about one year later, on her deathbed relinquishing to her daughter, the plaintiff's older sister, all right to the custody, control, and services of the petitioner in consideration of that daughter agreeing to accept custody of the petitioner and to maintain and educate the petitioner until he was 21 years of age, and in all respects to stand in loco parentis to the petitioner which the plaintiff's sister did until her death, nevertheless since the plaintiff's sister met her death because of the negligence of the defendant, the petition in which the plaintiff sought recovery of the defendant was properly dismissed on general demurrer (now motion to dismiss). Weems v. Saul, 52 Ga. App. 470, 183 S.E. 661 (1936).

When a woman 36 years of age entered the home of her married sister and her sister's husband, under a contract by the terms of which she was to work for and help them as though she was one of the family, and they were to maintain and support her, and "adopt her as their adopted daughter, and make her one of the family and an heir to their estate," and when the contract was performed on both sides so long as the married sister and her

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husband lived, the person who thus assumed by contract the relation of a child had no cause of action for the negligent homicide of her sister and brother-in-law, either under the wrongful death statute, providing for suit, in certain circumstances, by a child for the homicide of its parent, or upon the theory that she (the claimant) had sustained actual loss and damage in being deprived of the support which the decedents had furnished and were bound to furnish to her under the contract referred to. Avery v. Southern Ry., 44 Ga. App. 613, 162 S.E. 648 (1931).

Nursing home was not entitled to compel arbitration of a wrongful death suit because the plaintiff, the decedent's child, did not have the decedent's power of attorney or the decedent's express or implied consent to sign the arbitration agreement on the decedent's behalf; the child, by signing the agreement, did not express an intent to surrender any of the child's own rights; and the child was not estopped by signing it from pursuing a wrongful death claim in the child's individual capacity. Hogsett v. Parkwood Nursing & Rehab. Ctr., Inc., 2014 U.S. Dist. LEXIS 19436 (N.D. Ga. Feb. 14, 2014).

Compelling arbitration of beneficiaries wrongful death claim was error. — Although litigation of any tort claims by the decedent's estate against the defendants was barred by the arbitration agreement, the trial court's order compelling arbitration of the beneficiaries' wrongful death claim against a nursing home and its owners/operators (defendants) was error because litigation of the wrongful death claims asserted by the beneficiaries was not barred. Norton v. United Health Services of Georgia, Inc., 336 Ga. App. 51, 783 S.E.2d 437 (2016).

Guardian's approval of settlement held not required. — Court, in approving settlement of wrongful death action brought by surviving spouse, was not required to secure the approval of the guardian of the decedent's minor child. Morris v. Clark, 189 Ga. App. 228, 375 S.E.2d 616 (1989).

Settlement with one or more beneficiaries does not bar any others from proceeding with wrongful death action. — The settling tortfeasor is deemed to have waived the rule against splitting a cause of action. Lynn v. Wagstaff Motor Co., 126 Ga. App. 516, 191 S.E.2d 324 (1972).

If widow receives adverse determination on release issue, she will remain as her children's representative, and indeed, could not appear as next friend. Lynn v. Wagstaff Motor Co., 126 Ga. App. 516, 191 S.E.2d 324 (1972).

Fruits of recovery under this section are not part of decedent's estate and are not subject to any debt or liability of any character of deceased. They belong to the widow and the children of the deceased, both minors and adults, whether they were dependent upon the deceased or not, and are distributable according to the law of descents. Vickers v. Vickers, 210 Ga. 488, 80 S.E.2d 817 (1954).

Health plan fiduciary met its burden for obtaining a preliminary injunction under Fed. R. Civ. P. 65 and 29 U.S.C. § 1132(a)(3) of ERISA as to a portion of a medical malpractice settlement allocated to claims of the estate under O.C.G.A. § 51-4-5(b) for individual medical bills, but fiduciary was not entitled to a portion of the settlement allocated to the decedent's daughter for a wrongful death claim under O.C.G.A. § 51-4-2(a) because the claim belonged to the daughter and not to the estate and wrongful death statute was not preempted by 29 U.S.C. § 1144(a) of ERISA in that the statute did not sufficiently "relate to" the ERISA plan. Diamond Crystal Brands, Inc. v. Wallace, 531 F. Supp. 2d 1366 (N.D. Ga. 2008).

All children necessary parties in suit by children to recover full value of father's life. — When a wrongful death claim seeks recovery for the full value of the life of the father, and whether or not the children may have a separate cause of action for their share, are necessary parties for any action asserting the right to recover the full value of the life of the father. Gordon v. Gillespie, 135 Ga. App. 369, 217 S.E.2d 628 (1975).

Petition defective when other children refuse to join. — Petition brought by some of the children for the negligent

homicide of their father is defective when the only reason given for the failure of the other children to join in the suit is that the children refuse to join. Pollard v. Reid, 56 Ga. App. 594, 193 S.E. 370 (1937).

Fact that one party not entitled to recovery not a bar to suit by other children. — Each beneficiary has a separate cause of action for the death of a husband and father. The fact that one of them will not be entitled to damages (e.g., his negligence caused the death) does not bar the others from bringing suit for a proportional part of the value of the life. Lynn v. Wagstaff Motor Co., 126 Ga. App. 516, 191 S.E.2d 324 (1972).

When one of parties entitled to join in action dies before commencement of action, provisions relating to survival in subsection (b) manifestly do not apply, but the restrictions requiring joint action do apply. Hood v. Southern Ry., 169 Ga. 158, 149 S.E. 898 (1929).

Res judicata. — A recovery by an administrator for personal injuries to the plaintiff's deceased husband is not a bar to an action under this section. Spradlin v. Georgia Ry. & Elec. Co., 139 Ga. 575, 77 S.E. 799 (1913).

Plea of adultery in defense. — When the defendant pleads that the homicide resulted after the deceased has debauched the former's daughter, an urgent danger of a new act of adultery must be proved. Putnam v. Taylor, 21 Ga. App. 537, 94 S.E. 862 (1918).

Marital problems as defense. — When in the opening statement, the plaintiff's attorney said that the deceased and her husband had "been together since 1963," the court did not abuse the court's discretion in allowing testimony of the simple fact that there was a period of time the two were separated. Cornelius v. Macon-Bibb County Hosp. Auth., 243 Ga. App. 480, 533 S.E.2d 420 (2000).

Right of child to portion of wrongful death settlement. — When a child's mother received a wrongful death settlement from the death of the child's father, she was obligated to set aside a portion of the amount for the child. Warnock v. Davis, 267 Ga. 336, 478 S.E.2d 124 (1996).

Wrongful death claim for intentional termination of patient's life support tolled due to infancy of patient's child. — Two year statute of limitations for wrongful death applied to a suit alleging tortious termination of life support of a parent and that limitations period was tolled based on the infancy of the parent's child, who was born to the parent prior to the defendant terminating the parent's life support. DeKalb Med. Ctr., Inc. v. Hawkins, 288 Ga. App. 840, 655 S.E.2d 823 (2007), cert. denied, 2008 Ga. LEXIS 477 (Ga. 2008).

Sharing of proceeds from recovery. — Due process does not require that a surviving spouse be given notice of one's statutory duty to share the proceeds from a wrongful death recovery with the decedent's children. Harris v. Boyd, 193 Ga. App. 467, 388 S.E.2d 60 (1989).

Fiduciary duty in allocating settlement proceeds. — When the surviving spouse acted in different capacities -- as the children's representative, as executrix of the estate and in her own interest for loss of consortium -- the question whether she breached her fiduciary duty to the children in allocating settlement proceeds was for the jury. Home Ins. Co. v. Wynn, 229 Ga. App. 220, 493 S.E.2d 622 (1997).

Tolling of statute of limitations for minor child. — Georgia Supreme Court upheld a $2.5 million wrongful death judgment because both the Court and the Georgia Court of Appeals have allowed other persons acting in a representative capacity to maintain a wrongful death action on behalf of a minor child when the surviving spouse declined to pursue the claim. Rai v. Reid, 294 Ga. 270, 751 S.E.2d 821 (2013).

Official immunity improper in wrongful death action. — When officers responded to a call reporting a domestic disturbance at a residence, the decedent resisted the officers' attempt to arrest the decedent, and the officer shot and killed the decedent, it was error to grant the shooting officer official immunity as to a wrongful death claim because a jury could find that the officer intentionally shot the decedent after the struggle ended and at a time when the decedent was lying on the floor, unarmed and compliant. Felio v. Hyatt, No. 14-15702, 2016 U.S. App. LEXIS 1230 (11th Cir. Jan. 26, 2016) (Unpublished).

Wrongful death of spouse

Deceased spouse being co-beneficiary of household services not discounted. — In a spouse's wrongful death suit against the Georgia Department of Transportation, the trial court did not err by allowing the surviving spouse's economic expert to testify as to the value of the deceased spouse's household services without isolating and subtracting the value the deceased spouse had received as the fact that the deceased spouse may have been a co-beneficiary of a service for the household did not discount the value of the service to the other members of the household. DOT v. Baldwin, 292 Ga. App. 816, 665 S.E.2d 898 (2008).

In federal civil rights action arising from death of husband at hands of police officers, the widow may recover the full value of the deceased's life. McQurter v. City of Atlanta, 572 F. Supp. 1401 (N.D. Ga. 1983), appeal dismissed, 724 F.2d 881 (11th Cir. 1984).

Under federal law, the decedent's surviving spouse entitled to decedent's medical records. — A nursing home was obliged to release a decedent's medical records to the decedent's surviving spouse who was pursuing a wrongful death action, since under O.C.G.A. §§ 31-33-2(a)(2)(B) and 51-4-2, the spouse was authorized to access those records and the trial court's order requiring the release of the records complied with the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d et seq. Alvista Healthcare Ctr., Inc. v. Miller, 296 Ga. App. 133, 673 S.E.2d 637 (2009).

Word "widow" is used to identify person who was wife of deceased at his death and not to designate one according to her relationship to the children, and is not used in the sense of "mother." Odom v. Atlanta & W.P.R.R., 78 Ga. App. 477, 51 S.E.2d 466 (1949).

Common-law wife. — If decedent were survived by a common-law wife, then she, rather than his children, had exclusive standing to bring the wrongful death action. Georgia Osteopathic Hosp. v. O'Neal, 198 Ga. App. 770, 403 S.E.2d 235 (1991).

This section vests right of action in case of wrongful death of husband and father in the widow, to be held by her subject to the law of descents, as if it were personal property descending to the widow and children from the deceased. Dixon v. Ross, 94 Ga. App. 187, 94 S.E.2d 86 (1956).

Effect of separation or subsequent marriage. — Separation of the husband and wife before the action arose is no defense. Nor is the right divested by a subsequent remarriage. Georgia R.R. & Banking Co. v. Garr, 57 Ga. 277 (1876); Central of Ga. Ry. v. Bond, 111 Ga. 13, 36 S.E. 299 (1900).

Recovery by widow for homicide of husband. — A widow has a right of recovery when the husband, had he lived, would have a right of action. Western & A.R.R. v. Strong, 52 Ga. 461 (1874).

Each of the beneficiaries specified by this section has cause of action which mother, if in life, asserts by action for all of them. Walden v. Coleman, 217 Ga. 599, 124 S.E.2d 265 (1962); Travelers Ins. Co. v. Houck, 118 Ga. App. 154, 162 S.E.2d 781 (1968); Davis v. Cox, 131 Ga. App. 611, 206 S.E.2d 655 (1974).

When wife sues for homicide of her husband, and during pendency thereof dies, action survives to children of the deceased if any be in life. In such a case, if there be no children, the action survives "to the personal representative of the deceased plaintiff." Campbell v. Western & A.R.R., 57 Ga. App. 209, 194 S.E. 927 (1938).

Death of widow temporarily suspends suit for wrongful death of husband. — Upon the death of a wife suing for the homicide of her husband, the suit does not abate but is suspended. However, nothing further can properly be done in the action until the person or persons in whose favor the action survives is brought or voluntarily appears before the court by proper proceedings. Campbell v. Western & A.R.R., 57 Ga. App. 209, 194 S.E. 927 (1938).

Even if there were a will, recovery under this section is no part of estate of deceased, and widow holds the estate subject to law of descents. Boggan v. Boggan, 145 Ga. App. 401, 243 S.E.2d 664 (1978).

Fund recovered by widow for damages for homicide of her husband, was not by reason of this section, exempt from process of garnishment for payment of widow's individual debt in a suit against the widow. Hamilton v. Hardwick, 47 Ga. App. 513, 170 S.E. 826 (1933).

Parent of decedent. — An adult decedent's parent did not have standing to bring a wrongful death claim under O.C.G.A. § 51-4-2, as a surviving spouse had exclusive standing to bring a wrongful death action; although an exception applied in the context of a superior court exercising its constitutionally granted powers of equity, the parent had brought the action in state court, which did not have such equitable powers. Blackmon v. Tenet Healthsystem Spalding, Inc., 288 Ga. App. 137, 653 S.E.2d 333 (2007), rev'd on other grounds, 284 Ga. 369, 667 S.E.2d 348 (2008).

Suicide is defense. — When a husband committed suicide, after receipt of a written notice to him to resign his position in a corporation, no recovery was allowed. Stevens v. Steadman, 140 Ga. 680, 79 S.E. 564, 17 L.R.A. (n.s.) 1009 (1913).

Transfer of property to spouse pending unliquidated wrongful death claim. — Summary judgment was error when an issue of fact remained as to whether an unliquidated wrongful death claim at the time of a killer's property transfer without consideration to the killer's spouse rendered the killer insolvent and material issues remained as to fraud. Bryant v. Browning, 259 Ga. App. 467, 576 S.E.2d 925 (2003).

Wrongful death of child

Word "child" or "children" as used in this section means legitimate child or children. Adams v. Powell, 67 Ga. App. 460, 21 S.E.2d 111 (1942).

Words "child or children" may include either legitimate or illegitimate children. — If there is no widow, subsection (a) of O.C.G.A. § 51-4-2allows recovery for the wrongful death of a father by a child or children, proven to be such, whether legitimate or illegitimate. Edenfield v. Jackson, 251 Ga. 491, 306 S.E.2d 911 (1983).

Son's right to bring action. — Under the plain language of O.C.G.A. § 51-4-2(a), the decedent's son had the right to bring a wrongful death action for the father's death and a wrongful death claim brought by the administrator of the decedent's estate was properly dismissed. King v. Goodwin, 277 Ga. App. 188, 626 S.E.2d 165 (2006).

Attorney-client relationships with children. — An attorney representing the surviving spouse who was prosecuting not only her own interests, but also the children's interests in a wrongful death action, had an attorney-client relationship with the children. Home Ins. Co. v. Wynn, 229 Ga. App. 220, 493 S.E.2d 622 (1997).

Administratrix of estate was not proper party to bring wrongful death action for surviving illegitimate child; however, the defect of failure of the proper party to bring the action was cured by a post-verdict amendment naming as an additional party plaintiff the minor child "b/n/f Monica Williams" which effectively changed the administratrix to next friend of the decedent's minor child. Weldon v. Williams, 170 Ga. App. 589, 317 S.E.2d 570 (1984).

Children born of void marriage not annulled by court not barred from suit. — Children born of a marriage which was void because their mother had wedded their father without obtaining a divorce from her surviving spouse but which had not been annulled by a competent court are entitled to sue as the plaintiffs for the tortious homicide of their father. Andrews v. Willis, 133 Ga. App. 697, 212 S.E.2d 24 (1975).

Suit by posthumous child born out of wedlock. — Decedent's posthumous, out-of-wedlock child was entitled to pursue a wrongful death claim under O.C.G.A. § 51-4-2 to the exclusion of the decedent's parents. Under the statute pertaining to descent and distribution, O.C.G.A. § 53-2-1(a)(1), the posthumous child qualified as the decedent's child, and to ignore the laws of descent and distribution would run counter to the essence of a wrongful death claim; simply because the decedent's parents wished to share in any award did not render an inequitable result in light of the priority ordinarily

Wrongful death of child (Cont'd)

given to children by O.C.G.A. § 19-7-1(c)(2). deVente v. Flora, 300 Ga. App. 10, 684 S.E.2d 91 (2009).

When the state Workers' Compensation Law is not applicable, natural children have rights to recover damages for death of their parents. U.S. Fid. & Guar. Co. v. Dunbar, 112 Ga. 102, 143 S.E.2d 663 (1965).

Child may maintain action at law for recovery of share of damages recovered by a widow. Griffith v. Griffith, 128 Ga. 371, 57 S.E. 698 (1907).

Negligence of surviving spouse does not bar children's recovery. — A verdict may be returned for the surviving spouse as the representative of the decedent's child, even though the surviving spouse's negligence was equal to or greater than the defendant's negligence. Matthews v. Douberley, 207 Ga. App. 578, 428 S.E.2d 588 (1993).

Rights of minor children abandoned by surviving spouse. — Since the surviving spouse had abandoned his minor children and could not be found, the factual circumstances demanded the exercise of the court's equitable powers to preserve the rights of the minor children. The trial court should have allowed the minors, who had no remedy at law, to maintain an action for the wrongful death of their mother. Brown v. Liberty Oil & Ref. Corp., 261 Ga. 214, 403 S.E.2d 806 (1991).

Surviving children have action for homicide of their father, upon death of mother. City of Elberton v. Thornton, 138 Ga. 776, 76 S.E. 62 (1912).

Dependency upon parent is not now necessary element for recovery in wrongful death action. Limbaugh v. Woodall, 121 Ga. App. 638, 175 S.E.2d 135 (1970).

Exclusion of dependency as prerequisite. — It was the purpose of Act respecting recovery for the homicide of a parent to exclude dependency as a prerequisite essential to a child's right to recover and the question whether the child is dependent upon such parent in any respect is wholly immaterial. Vickers v. Vickers, 210 Ga. 488, 80 S.E.2d 817 (1954).

Child could sue for negligent homicide of the child's natural father under this section although adopted by aunt and in such cases no dependency is required to be shown. New Amsterdam Cas. Co. v. Freeland, 101 Ga. App. 754, 115 S.E.2d 443 (1960), rev'd on other grounds, 216 Ga. 491, 117 S.E.2d 538 (1960).

When a minor child born in lawful wedlock and having a living father, but no mother, was legally adopted by the child's aunt, and since the minor continued to live with the aunt as her adopted child, and since while so living the child's natural father was killed, the minor, at the time of the death of the child's natural father, was the "child" of the decedent within the meaning of this section. Macon, D. & S.R.R. v. Porter, 195 Ga. 40, 22 S.E.2d 818 (1942).

This section cannot be read to mean that child who has two parental relationships at same point in time, may bring wrongful death actions on either. Limbaugh v. Woodall, 121 Ga. App. 638, 175 S.E.2d 135 (1970).

Relation of parent and child does not arise from virtual adoption. Limbaugh v. Woodall, 121 Ga. App. 638, 175 S.E.2d 135 (1970).

One cannot be legally or statutorily adopted by another after latter is deceased. Limbaugh v. Woodall, 121 Ga. App. 638, 175 S.E.2d 135 (1970).

Sibling of decedent allowed to amend complaint. — Decedent's sibling, as the purported representative of the decedent's spouse, filed a wrongful death suit against medical providers within five years of the alleged negligent acts and, within a reasonable time after the providers objected to the sibling's standing, filed a motion to amend the complaint to name the decedent's spouse as the real party in interest. As the proposed amendment did not "initiate" a new claim, the medical malpractice statute of repose, O.C.G.A. § 9-3-71(b), did not prevent amendment of the complaint even though the motion to amend was filed more than five years after the alleged negligence. Rooks v. Tenet Health Sys. GB, Inc., 292 Ga. App. 477, 664 S.E.2d 861 (2008).

Descendant of a child who predeceased a parent was not entitled to

recover in a wrongful death action filed by the deceased parent's surviving children. Tolbert v. Maner, 271 Ga. 207, 518 S.E.2d 423 (1999).

Recovery by parent of deceased when murdered by spouse. — After the Georgia Supreme Court concluded that because the police officer, as the son's wife and murderer, was precluded from recovery, the son's mother had standing to assert claims for her son's wrongful death and funeral expenses under Georgia law; therefore, the district court erred by dismissing the mother's state law claims. Carringer v. Rodgers, 331 F.3d 844 (11th Cir. 2003).

Stepparents

Child had no right of action for homicide of a stepparent, even though the child depended on the stepparent for support and the latter stood "in loco parentis" to the child. Marshall v. Macon Sash, Door & Lumber Co., 103 Ga. 725, 30 S.E. 571 (1898); Weems v. Saul, 52 Ga. App. 470, 183 S.E. 661 (1936).

Rights created by this section are not taken away when natural parents are divorced and child has stepparent or stepparents. U.S. Fid. & Guar. Co. v. Dunbar, 112 Ga. App. 102, 143 S.E.2d 663 (1965).

There is no right of any kind for children of widow who are stepchildren of deceased to participate in recovery under this section. St. Paul Fire & Marine Ins. Co. v. Miniweather, 119 Ga. App. 617, 168 S.E.2d 341 (1969).

Decisions Under Former § 51-4-3

Annotations to former § 51-4-3, relating to actions for the wrongful death of a wife or spouse, appear below inasmuch as this Code section (as a result of the 1985 amendment) now appears to govern those causes of action (decided under former Code 1933, § 105-1306).

Since the former statute gave a right of action not had under common law, it must be limited strictly to meaning of language employed and not extended beyond the statute's plain and explicit terms. Lovett v. Garvin, 232 Ga. 747, 208 S.E.2d 838 (1974) (decided under former Code 1933, § 105-1306).

Child or children as used in former Code 1933, § 105-1306 has the same meaning as shown by former Code 1933, §§ 105-1302, 105-1303, 105-1304, and 105-1305 (see now O.C.G.A. § 51-4-2). Lewis v. Williams, 78 Ga. App. 494, 51 S.E.2d 532 (1949) (decided under former Code 1933, § 105-1306).

Virtual adoption. — After a woman 36 years of age entered the home of her married sister and her sister's husband, under a contract by the terms of which she was to work for and help them as though she was one of the family, and they were to maintain and support her, and "adopt her as their adopted daughter, and make her one of the family and an heir to their estate," and since the contract was performed on both sides so long as the married sister and her husband lived, the person who thus assumed by contract the relation of a child had no cause of action for the negligent homicide of her sister and brother-in-law, either under former § 51-4-3 providing for suit, in certain circumstances, by a child for the homicide of its parent, or upon the theory that she (the claimant) had sustained actual loss and damage in being deprived of the support which the decedents had furnished and were bound to furnish to her under the contract referred to. Avery v. Southern Ry., 44 Ga. App. 613, 162 S.E. 648 (1931) (decided under former Civil Code 1910, § 4424).

Gist of wrongful death action is not injury suffered by deceased, but injury suffered by beneficiaries, resulting from death of the deceased. Lovett v. Garvin, 232 Ga. 747, 208 S.E.2d 838 (1974) (decided under former Code 1933, § 105-1306).

Cause of action in wrongful death action, while dependent upon fact of actionable tort against deceased, accrues only by reason of death. Lovett v. Garvin, 232 Ga. 747, 208 S.E.2d 838 (1974) (decided under former Code 1933, § 105-1306).

Right of action accrues at time of death of wife from injuries inflicted, not at the time injuries were inflicted. Lovett v. Garvin, 232 Ga. 747, 208 S.E.2d 838 (1974) (decided under former Code 1933, § 105-1306).

Decisions Under Former
§ **51-4-3** (Cont'd)

Nothing in language of the former statute stated or implied that husband must be married to wife at time injuries are inflicted. Lovett v. Garvin, 232 Ga. 747, 208 S.E.2d 838 (1974) (decided under former Code 1933, § 105-1306).

General Assembly did not intend to authorize action by child against his father for wrongful death of his mother, but intended to authorize an action only against third persons other than the father. Harrell v. Gardner, 115 Ga. App. 171, 154 S.E.2d 265 (1967) (decided under former Code 1933, § 105-1306).

Former statute did not authorize child to bring action for wrongful death of his mother against estate of his stepfather, since the mother, had she been in life, would have had no right of action against her husband for injuries received. Horton v. Brown, 117 Ga. App. 47, 159 S.E.2d 489 (1967); Jones v. Swett, 244 Ga. 715, 261 S.E.2d 610 (1979) (decided under former Code 1933, § 105-1306).

When a child's stepfather, if living, must be joined as a party plaintiff in a suit for the death of the mother, he cannot be a plaintiff and defendant in the same action, and thus no cause of action arises against him as being responsible for the mother's death, and none survives as against his personal representative. Wrinkle v. Rampley, 97 Ga. App. 453, 103 S.E.2d 435 (1958) (decided under former Code 1933, § 105-1306).

When homicide is that of mother who leaves husband and child or children, the right of action given to husband and children is joint. Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941) (decided under former Code 1933, § 105-1306).

Since the statute declares that the husband and children should sue jointly and not separately, it is in that sense that it is spoken of as a joint cause of action, or a joint right of action. It is a joint right to bring the suit; that right, if it be exercised at all, to be by all of them who survived her. Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941) (decided under former Code 1933, § 105-1306).

Former statute itself did not describe the right of action for wrongful death as a joint cause of action. It merely declares that the plaintiffs shall sue jointly and not separately. Therefore, if the deceased left a husband and children, or a husband and child, or children and no husband, an action for her death could not be maintained unless the husband, in the event she left a husband and all the children surviving her, were named as plaintiffs in the action. Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941) (decided under former Code 1933, § 105-1306).

Cause of action is jointly given to the husband and children surviving at the time action is brought, irrespective of the age of the children and questions of dependency and contribution. In the event of a recovery they are entitled jointly to the full value of the life of the deceased as shown by the evidence. Lewis v. Williams, 78 Ga. App. 494, 51 S.E.2d 532 (1949) (decided under former Code 1933, § 105-1306).

Minor children residing with their father cannot maintain independent and separate suit for the negligent homicide of their mother. Denham v. Texas Co., 19 Ga. App. 662, 91 S.E. 1070 (1917) (decided under former Civil Code 1910, § 4424).

When the father is living, child or children cannot sue for death of mother without making husband party plaintiff. Wrinkle v. Rampley, 97 Ga. App. 453, 103 S.E.2d 435 (1958) (decided under former Code 1933, § 105-1306).

For possibly conflicting trends regarding the joint nature of husband's and children's rights of action for wrongful death, see Hood v. Southern Ry., 169 Ga. 158, 149 S.E. 898 (1929); Jones v. Seaboard Air Line Ry., 44 Ga. App. 604, 162 S.E. 305 (1932); Watson v. Thompson, 185 Ga. 402, 195 S.E. 190, answer conformed to, 58 Ga. App. 177, 198 S.E. 116 (1938) (decided under former Civil Code 1910, § 4424 and former Code 1933, § 105-1306).

For case which interprets Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941), as allowing each beneficiary separate cause of action, see Walden v. Coleman, 217 Ga. 599, 124 S.E.2d 265 (1962) (decided under former Code 1933, § 105-1306).

Action may proceed without joinder of all children. — Because former O.C.G.A. 51-4-3 expressly provided for prosecution of the suit by fewer than all of the children, and requires only that the children be served so that the children may intervene in the case as an additional plaintiff at any time before final judgment, the logical conclusion is that the action could continue without a particular child's participation. American Erectors, Inc. v. Hanie, 157 Ga. App. 687, 278 S.E.2d 196 (1981) (decided under former Code 1933, § 105-1306).

Necessary parties to suit may be joined after period of limitations has run. — When original petition for homicide of wife and mother, although not brought in the names of all parties plaintiff, was brought within the period of limitations for the institution of the suit, the suit was not barred by the statute of limitations because of a failure within the period of the statute to make all the children (necessary parties) parties plaintiff; and an amendment to the petition adding an additional child as plaintiff who was a necessary party, made after the period of the statute of limitations, related to the bringing of the suit, so that the suit stood as if it were originally brought in the name of all the parties and within the period of the statute of limitations. Wallace v. Brannen, 56 Ga. App. 856, 193 S.E. 901 (1937) (decided under former Code 1933, § 105-1306).

When a husband brings suit for the wrongful death of his deceased wife before the statute of limitations has run, the children of the deceased wife may be added by amendment after the expiration of the period of the statute of limitations because the amendment relates back to the bringing of the suit. Southern Ry. v. Waldrup, 76 Ga. App. 356, 45 S.E.2d 775 (1947) (decided under former Code 1933, § 105-1306).

Effect of contributory negligence by plaintiff-husband. — The right of a husband and children to recover for the homicide of the wife must be determined in part by the rule which in effect declares that no plaintiff can recover when the plaintiff's own negligence contributes to the injury or exceeds that of the defendant. Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941) (decided under former Code 1933, § 105-1306).

One whose negligence has brought about a calamity to one whom the former is legally bound to watch over and protect from injury cannot be allowed to profit by the results of the former's own inexcusable, if not criminal, neglect and misconduct. The object of this rule is not to shield a negligent defendant from the penalty of wrongdoing, but merely to deny aid to a plaintiff who, though equally guilty, nevertheless comes into a court of justice and demands the fruits of the plaintiff's own unpardonable neglect of both moral and a legal duty. Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941) (decided under former Code 1933, § 105-1306).

If the husband be negligent, but his negligence is less than that of the defendant charged with the homicide of the wife, he should be permitted a recovery, but when there is a child, his part thereof should be less than one half the value of the wife's life, reduced by a sum proportioned to the amount of fault attributable to him, with the further proviso that if by the exercise of ordinary care he could have avoided the consequences caused by the defendant, he is not entitled to recover at all. Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941) (decided under former Code 1933, § 105-1306).

Child's right to recover is not derived from father, and negligence of father does not deprive child of right to recover. Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941) (decided under former Code 1933, § 105-1306).

Negligence of one beneficiary cannot be charged against another. Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941) (decided under former Code 1933, § 105-1306).

Dependency not required. — A child may recover for the homicide of his

Decisions Under Former
§ **51-4-3** (Cont'd)

mother (the mother leaving no husband or other children) without showing that he was dependent upon her and that she contributed to his support. Petty v. Louisville & N.R.R., 39 Ga. App. 689, 148 S.E. 308 (1929) (decided under former Civil Code 1910, § 4424).

Dependency upon a parent is not now a necessary element for recovery in a wrongful death action. Limbaugh v. Woodall, 121 Ga. App. 638, 175 S.E.2d 135 (1970) (decided under former Code 1933, § 105-1306).

Cause of action for wrongful death which is available to husband and child or children surviving wife is separate and distinct cause of action from that of wife for her pain and suffering. Complete Auto Transit, Inc. v. Floyd, 214 Ga. 232, 104 S.E.2d 208 (1958) (decided under former Code 1933, § 105-1306).

A husband's suit for wrongful death of his wife is not part of the same cause of action as his suit as administrator for his wife's pain and suffering and her medical, hospital, and funeral expenses so as to raise the issue of res judicata. Forrester v. Southern Ry., 268 F. Supp. 194 (N.D. Ga. 1967) (decided under former Code 1933, § 105-1306).

Wife's administrator may sue separately for pain and suffering. — Prior recovery on behalf of husband and minor children from the party causing the death of the wife for the full value of the life of the wife does not constitute a bar to a subsequent action by the administrator of the wife's estate against the same party to recover for her pain and suffering. Complete Auto Transit, Inc. v. Floyd, 214 Ga. 232, 104 S.E.2d 208 (1958) (decided under former Code 1933, § 105-1306).

Action to recover for death of wife and mother is separate cause of action from action to recover for death of child. Forrester v. Southern Ry., 268 F. Supp. 194 (N.D. Ga. 1967) (decided under former Code 1933, § 105-1306).

Pleas of res judicata or of estoppel by judgment are available in connection with actions under this section when requirements of pleas are made to appear. Smith v. Wood, 115 Ga. App. 265, 154 S.E.2d 646 (1967) (decided under former Code 1933, § 105-1306).

Jury instruction. — The trial judge erred in charging the jury that before the plaintiff could recover the plaintiff must prove that the plaintiff was dependent upon the plaintiff's deceased mother and that she contributed to the plaintiff's support. However, that error was cured by a subsequent charge which informed the jury of the court's error and gave the correct law on the subject. Petty v. Louisville & N.R.R., 39 Ga. App. 689, 148 S.E. 308 (1929) (decided under former Civil Code 1910, § 4424).

RESEARCH REFERENCES

Am. Jur. 2d. — 22A Am. Jur. 2d, Death, §§ 72 et seq., 274 et seq.

41 Am. Jur. 2d, Husband and Wife, § 196 et seq, 242.

C.J.S. — 25A C.J.S., Death, §§ 23, 74 et seq., 124 et seq.

ALR. — Damages for wrongful death of spouse as affected by personal relations of the spouses, or the marital misconduct of either spouse, 18 ALR 1409; 90 ALR 920.

Recovery under common law or state death statute where cause of action under Federal Employers' Liability Act fails for want of proof that deceased or injured person was an employee of defendant, 66 ALR 429.

Right to maintain death action where sole beneficiary of recovery is wife of defendant, 96 ALR 479.

Effect of existence of nearer related but nondependent member upon right to sue under death statute in behalf of more remotely related but dependent member of same class, 162 ALR 704.

Common-law recovery of funeral expenses from tort-feasor by husband, wife, or other relative of deceased, 3 ALR2d 932.

Action against spouse or estate for causing death of other spouse, 28 ALR2d 662.

Child adopted by another as beneficiary of action or settlement for wrongful death of natural parent, 67 ALR2d 745.

Right of recovery, under wrongful death statute, for benefit of illegitimate child or children of decedent, 72 ALR2d 1235.

Admissibility, in wrongful death action brought for benefit of minor children, of evidence of decedent's desertion, nonsupport, abandonment, or the like, of said children, 79 ALR2d 819.

Remarriage of surviving spouse, or possibility thereof, as affecting action for wrongful death of deceased spouse, 87 ALR2d 252; 88 ALR3d 926.

Action for death of adoptive parent, by or for benefit of adopted or equitably adopted child, 94 ALR2d 1237; 97 ALR3d 347.

Wife's right of action for loss of consortium, 36 ALR3d 900.

Death action by or in favor of parent against unemancipated child, 62 ALR3d 1299.

Action for death of stepparent by or for benefit of stepchild, 68 ALR3d 1220.

Right of spouse to maintain action for wrongful death as affected by fact that injury resulting in death occurred before marriage, 69 ALR3d 1046.

Right of illegitimate child, after Levy v. Louisiana, to recover under state wrongful death statute for death of putative father, 78 ALR3d 1230.

Minority of surviving children as tolling limitation period in state wrongful death action, 85 ALR3d 162.

Action against parent by or on behalf of unemancipated minor child for wrongful death of other parent, 87 ALR3d 849.

Admissibility of evidence of, or propriety of comment as to, plaintiff spouse's remarriage, or possibility thereof, in action for damages for death of other spouse, 88 ALR3d 926.

Effect of death of beneficiary upon right of action under death statute, 13 ALR4th 1060.

Excessiveness or inadequacy of damages awarded for personal injuries resulting in death of homemaker, 47 ALR4th 100.

Excessiveness or inadequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations, 47 ALR4th 134.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of parent, 61 ALR4th 251.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse, 61 ALR4th 309.

Effect of death of beneficiary, following wrongful death, upon damages, 73 ALR4th 441.

Admissibility of evidence, in action for personal injury or death, of injured party's use of intoxicants or illegal drugs on issue of life expectancy, 86 ALR4th 1135.

Fraudulent concealment of cause of action for wrongful death as affecting period of limitations, 88 ALR4th 851.

Action by or on behalf of minor child, or presumed minor child, for loss of parental consortium — impact of other legal concepts and theories of recovery, 6 A.L.R.7th 4.

Action by or on behalf of minor child, or presumed minor child, for loss of parental consortium — proof, evidentiary considerations, limits of recovery, parties, 5 A.L.R.7th 4.

Action by or on behalf of minor child, or presumed minor child, for loss of parental consortium — general considerations, 4 A.L.R.7th 1.

51-4-3. Persons entitled to bring action for wrongful death of wife or mother; survival of action; service on and intervention of parties not joining; effect of final judgment.

Reserved. Repealed by Ga. L. 1985, p. 1253, § 2, effective April 10, 1985.

Editor's notes. — This Code section was based on Ga. L. 1887, p. 43, § 1; Civil Code 1895, § 3828; Civil Code 1910, § 4424; Ga. L. 1924, p. 60, § 1; Code 1933, § 105-1306; Ga. L. 1939, p. 233, § 1; Ga. L. 1960, p. 968, § 1; Ga. L. 1971, p. 359, § 1; Ga. L. 1981, Ex. Sess., p. 8.

Present provisions concerning persons entitled to bring an action for the wrongful death of a spouse or parent appear in § 51-4-2.

51-4-4. Wrongful death of child.

The right to recover for the homicide of a child shall be as provided in Code Section 19-7-1. (Code 1933, § 105-1307, enacted by Ga. L. 1980, p. 1154, § 2.)

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

For note, "Not Just For Kids: Why Georgia's Statutory Disinheritance of Deadbeat Parents Should Extend to Intestate Adults," see 43 Ga. L. Rev. 867 (2009).

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Limit on recovery. — Recovery for wrongful death in Georgia is limited to the full value of the life without deduction for necessary or personal expenses of decedent and does not include recovery for mental anguish or emotional distress. Ob-Gyn Assocs. v. Littleton, 259 Ga. 663, 386 S.E.2d 146 (1989), overruled on other grounds, Lee v. State Farm Mut. Ins. Co., 272 Ga. 583, 533 S.E.2d 82 (2000), overruled on other grounds, Shores v. Modern Transp. Servs., 262 Ga. App. 293, 585 S.E.2d 664 (2003).

Lack of standing. — Father lacked standing to recover for the child's wrongful death pursuant to O.C.G.A. §§ 19-7-1(c) and 51-4-4 as the father had abandoned the child pursuant to O.C.G.A. § 19-7-1(b)(3); the father never supported the child, nor did the father ever visit the child in the many years after the child's hospitalization in infancy, there was no evidence that the father attempted to learn where the child resided in order to initiate visitation or support, and the father was obligated under O.C.G.A. § 19-7-2 to support the child, even though the divorce decree did not require it. Baker v. Sweat, 281 Ga. App. 863, 637 S.E.2d 474 (2006).

The defense of accident is to be confined to its strict sense as an occurrence which takes place in the absence of negligence and for which no one would be liable, unless there is evidence authorizing a finding that the occurrence was an "accident" as thus defined, a charge on that defense is error. Battle v. Kovalski, 202 Ga. App. 471, 414 S.E.2d 700 (1992).

Recovery by parent of deceased when murdered by spouse. — After the Georgia Supreme Court concluded that because the police officer, as the son's wife and murderer, was precluded from recovery, the son's mother had standing to assert claims for her son's wrongful death and funeral expenses under Georgia law; therefore, the district court erred by dismissing the mother's state law claims. Carringer v. Rodgers, 331 F.3d 844 (11th Cir. 2003).

Nonresident alien parents. — Because nonresident alien parents of a decedent were entitled to bring an action under O.C.G.A. § 51-4-4, an administratrix did not have standing to pursue the action under O.C.G.A. § 51-4-5. Auto Doors, Inc.

v. Zivoluba, 277 Ga. App. 288, 626 S.E.2d 256 (2006).

Divorced parent with custody entitled to cause of action for minor's death. — The Georgia wrongful death statute in effect between April 4, 1979 and March 25, 1980 gave, at least by necessary implication, a right of action to the divorced parent who had custody of the child during the child's minority, regardless of whether at the time of the death the child was a minor or sui juris. Cain v. Vontz, 703 F.2d 1279 (11th Cir. 1983).

Cited in DeLoach v. Floyd, 160 Ga. App. 728, 288 S.E.2d 65 (1981); Childers v. Tauber, 160 Ga. App. 713, 288 S.E.2d 5 (1981); Adams v. Wright, 162 Ga. App. 550, 293 S.E.2d 446 (1982); Solomon v. Sapp, 169 Ga. App. 267, 312 S.E.2d 166 (1983); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984); Stegman v. Horton Homes, Inc., 843 F. Supp. 707 (M.D. Ga. 1994).

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ALR. — Effect of death of beneficiary upon right of action under death statute, 13 ALR4th 1060.

Recovery of damages for grief or mental anguish resulting from death of child — modern cases, 45 ALR4th 234.

Excessive and adequacy of damages for personal injuries resulting in death of minor, 49 ALR4th 1076.

Wrongful death: surviving parent's minority as tolling limitation period on suit for child's wrongful death, 54 ALR4th 362.

Workers' compensation act as precluding tort action for injury to or death of employee's unborn child, 55 ALR4th 792.

Excessiveness or adequacy of damages awarded for parents' noneconomic loss caused by personal injury or death of child, 61 ALR4th 413.

Effect of death of beneficiary, following wrongful death, upon damages, 73 ALR4th 441.

Recovery of damages for loss of consortium resulting from death of child — modern status, 77 ALR4th 411.

Who, other than parent, may recover for loss of consortium on death of minor child, 84 ALR5th 687.

51-4-5. Recovery by personal representative for wrongful death and for certain expenses.

(a) When there is no person entitled to bring an action for the wrongful death of a decedent under Code Section 51-4-2 or 51-4-4, the administrator or executor of the decedent may bring an action for and may recover and hold the amount recovered for the benefit of the next of kin. In any such case the amount of the recovery shall be the full value of the life of the decedent.

(b) When death of a human being results from a crime or from criminal or other negligence, the personal representative of the deceased person shall be entitled to recover for the funeral, medical, and other necessary expenses resulting from the injury and death of the deceased person. (Ga. L. 1924, p. 60, § 1; Code 1933, §§ 105-1309, 105-1310; Ga. L. 1952, p. 245, § 1; Ga. L. 1969, p. 762, § 1; Ga. L. 1980, p. 1154, § 3; Ga. L. 1985, p. 1253, § 3.)

Law reviews. — For article surveying torts law, see 34 Mercer L. Rev. 271 (1982). For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

For note, "Piercing the Marital Veil: Interspousal Tort Immunity After Harris v. Harris," see 36 Mercer L. Rev. 1013 (1985).

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Claims for wrongful death and pain and suffering are distinct. — An individual's claim for wrongful death and an estate's claim for the decedent's pain and suffering are distinct causes of action. Smith v. Memorial Medical Ctr., Inc., 208 Ga. App. 26, 430 S.E.2d 57 (1993).

Health plan fiduciary met burden for obtaining a preliminary injunction under Fed. R. Civ. P. 65 and 29 U.S.C. § 1132(a)(3) of ERISA as to portion of a medical malpractice settlement allocated to claims of the estate under O.C.G.A. § 51-4-5(b) for individual medical bills, but fiduciary was not entitled to a portion of the settlement allocated to decedent's daughter for a wrongful death claim under O.C.G.A. § 51-4-2(a) because the claim belonged to the daughter and not to the estate and wrongful death statute was not preempted by 29 U.S.C. § 1144(a) of ERISA in that the statute did not sufficiently "relate to" the ERISA plan. Diamond Crystal Brands, Inc. v. Wallace, 531 F. Supp. 2d 1366 (N.D. Ga. 2008).

Wrongful death or survival nature of section. — Insofar as subsection (b) of O.C.G.A. § 51-4-5 gives the personal representative the right to recover a deceased's ante mortem expenses, it is not a true wrongful death provision but a mere survival statute. It is only to the extent that the subsection constitutes a provision for liability in case of funeral expenses growing out of wrongful death that it is a true wrongful death provision rather than a mere survival statute. Gay v. Piggly Wiggly S., Inc., 183 Ga. App. 175, 358 S.E.2d 468, cert. denied, 183 Ga. App. 906, 358 S.E.2d 468 (1987).

Right of administrator of unborn child's estate. — The administrator of the estate of an unborn child had standing to bring a wrongful death action on behalf of the child after it was shown that the mother of the child died in the accident and the identity of the father was unknown. Reese v. United States, 930 F. Supp. 1537 (S.D. Ga. 1995).

Subsection (b) unconstitutional to extent it permits double recovery from same party. — Since a husband is liable to furnish his wife the necessaries of life and a cause of action exists in the husband against a person who negligently causes a wife's death for her medical, hospital, and funeral expenses by reason thereof, this section, to the extent it confers upon the wife's administrator a right to recover for these things from the same person, deprives the defendant of the defendant's property without due process of law in that it requires the defendant to pay one to whom the defendant is under no legal liability so to do. Complete Auto Transit, Inc. v. Floyd, 214 Ga. 232, 104 S.E.2d 208 (1958).

Act which does not purport to repeal the husband's right of action but creates an additional right of action in the personal representative of a decedent subjects the defendant to a double recovery and violates due process. Complete Auto Transit, Inc. v. Floyd, 214 Ga. 232, 104 S.E.2d 208 (1958).

Subsection (a) does not permit double recovery against defendant, but rather provides that the administrator or executor of the decedent may sue for the full value of the decedent's life, for the benefit of the next of kin, only if there is no other person entitled to sue. Garvin v. Lovett, 131 Ga. App. 46, 205 S.E.2d 124, aff'd, 232 Ga. 747, 208 S.E.2d 838 (1974).

Construction with O.C.G.A. § 19-7-1. — Court rejected a husband's argument that as the court-appointed personal representative of his wife's estate he was the only one vested with a cause of action for recovery of funeral, medical, and other necessary expenses resulting from his wife's death pursuant to O.C.G.A. § 51-4-5(b); however, when there was a right of recovery under O.C.G.A. § 19-7-1,

§ 51-4-5 did not apply. Belluso v. Tant, 258 Ga. App. 453, 574 S.E.2d 595 (2002).

Despite evidence of a parent's cruel treatment of the parent's decedent son, the trial court erred in finding that the parent forfeited parental rights, and thus lost the status as a parent and, in so doing, lost the right to recover as an heir of the decedent's estate as the loss of parental power did not necessarily result in a parent's loss of a right to inherit as an heir from the estate of that parent's child, short of having the parent's rights terminated prior to the child's death; hence, summary judgment against the parent on the issue was reversed. Blackstone v. Blackstone, 282 Ga. App. 515, 639 S.E.2d 369 (2006).

Expression "next of kin" needs no construction. It means what it says and does not mean a person among a group of dependents who, in comparison with all the other members of the group, is the next of kin to the decedent, though not, as against all other persons, the next of kin or nearest of kin to the decedent. Jackson v. Central of Ga. Ry., 86 Ga. App. 557, 71 S.E.2d 899 (1952).

Decedent's siblings could not, even as "next of kin," maintain an action in their own name since the right of action lies with the administrator of the decedent's estate. Walden v. John D. Archbold Mem. Hosp., 197 Ga. App. 275, 398 S.E.2d 271 (1990), but see First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc., 282 Ga. 883, 655 S.E.2d 605 (2008).

Determining "next of kin" by applying descent and distribution law. — In determining who was included in the term "next of kin" under O.C.G.A. § 51-4-5(a), it was appropriate to employ a previous appellate decision which answered the same question by referring to the law of descent and distribution as once the courts interpret a statute, that interpretation becomes an integral part of the statute, under the laws of statutory construction. Hence, a share of the decedent's wrongful death settlement was to be distributed, per stripes, to the children of decedent's deceased siblings. Stewart v. Bourn, 250 Ga. App. 755, 552 S.E.2d 450 (2001).

Nonresident alien parents of decedent entitled to bring action. — Because nonresident alien parents of a decedent were entitled to bring an action under O.C.G.A. § 51-4-4, an administratrix did not have standing to pursue the action under O.C.G.A. § 51-4-5. Auto Doors, Inc. v. Zivoluba, 277 Ga. App. 288, 626 S.E.2d 256 (2006).

This statutory provision expressly authorizes administrator to bring suit for homicide when circumstances exist as enumerated in the statute; the action is one purely at law, sounding in tort. Dowell v. Pollard, 182 Ga. 792, 187 S.E. 25 (1936).

Temporary administrator is authorized to maintain suit provided for under this section. Wilson v. Pollard, 190 Ga. 74, 8 S.E.2d 380 (1940).

The representative of a parent's estate is not authorized to bring an action for wrongful death of the parent's minor child if there is a surviving parent or other person entitled to bring it. Hosley v. Davidson, 211 Ga. App. 529, 439 S.E.2d 742 (1993).

Wrongful death action not barred by prior personal injury recovery. — The fact that there had been a prior recovery for a child's personal injury claim and the father's claim for medical and rehabilitation expenses did not extinguish the right of the father to pursue a wrongful death action arising from the subsequent death of the child allegedly due to the original injuries. Winding River Village Condominium Ass'n v. Barnett, 218 Ga. App. 35, 459 S.E.2d 569 (1995).

Subsection (b) not retroactive in effect. — Statute authorizing recovery of medical and funeral expenses by the personal representative of the estate in cases of wrongful death and statute providing for survival of causes of action confers upon personal representative a new substantive right and is not remedial only. Statute therefore may not be given a retroactive effect so as to apply to the estate of one who died prior to its passage. Biddle v. Moore, 87 Ga. App. 524, 74 S.E.2d 552 (1953).

Wrongdoer should not profit from wrongs. — In a wrongful death action, when the surviving spouse, who was the

wrongdoer responsible for the spouse's death, cannot bring the action, the cause of action belongs to the decedent's parent and a court erred in refusing to use its equitable powers to allow the decedent's parent to sue on behalf of the parent's daughter. Belluso v. Tant, 258 Ga. App. 453, 574 S.E.2d 595 (2002).

Statutory right to bring an action for wrongful death. — After the Georgia Supreme Court concluded that because the police officer, as the son's wife and murderer, was precluded from recovery, the son's mother had standing to assert claims for her son's wrongful death and funeral expenses under Georgia law; therefore, the district court erred by dismissing the mother's state law claims. Carringer v. Rodgers, 331 F.3d 844 (11th Cir. 2003).

Under the plain language of O.C.G.A. § 51-4-2(a), the decedent's son had the right to bring a wrongful death action for the father's death and a wrongful death claim brought by the administrator of the decedent's estate was properly dismissed. King v. Goodwin, 277 Ga. App. 188, 626 S.E.2d 165 (2006).

Medical malpractice action subject to limitations under O.C.G.A. § 9-3-71(a). — Because the evidence presented on appeal adequately showed that the decedent estate's claim filed by the personal representative under O.C.G.A. § 51-4-5 was filed two months after the two-year statute of limitation under O.C.G.A. § 9-3-71(a) expired, despite the application of O.C.G.A. § 9-3-92, the trial court properly dismissed the claim as time-barred. Goodman v. Satilla Health Servs., 290 Ga. App. 6, 658 S.E.2d 792 (2008).

When right of action in case lies with administratrix, minority of decedent's next of kin does not toll applicable statute of limitations. Deloach v. Emergency Medical Group, 155 Ga. App. 866, 274 S.E.2d 38 (1980).

In action under this section, suit is on behalf of decedent's next of kin, not the estate, and former Code 1933, § 3-803 (see now O.C.G.A. § 9-3-92) did not and cannot have application to a case when the decedent's estate is in no wise interested or concerned. Deloach v. Emergency Medical Group, 155 Ga. App. 866, 274 S.E.2d 38 (1980).

Former Code 1933, § 3-803 (see now O.C.G.A. 9-3-92), providing for the tolling of the statute of limitations in favor of an "estate" during the time between the death of a person and representation on the person's estate, had no application to a suit for damages brought by an administrator under former Code 1933, §§ 105-1309 and 105-1310 (see now O.C.G.A. § 51-4-5) to recover for benefit of a dependent next of kin of the deceased, since the action was one in which the estate was nowise interested or concerned, but under the statute the parties interested were permitted merely to use the name of the administrator in bringing the suit. Patellis v. King, 52 Ga. App. 118, 182 S.E. 808 (1935).

In action under this section, administrator or executor of decedent may sue for and recover and hold amount recovered for benefit of next of kin. Deloach v. Emergency Medical Group, 155 Ga. App. 866, 274 S.E.2d 38 (1980).

In suit brought by administrator for benefit of designated relatives, recovery does not become part of estate of deceased, the administrator in bringing the suit acting merely as a quasi-trustee or nominal party for those entitled to the fund, and the administrator's only duty on receipt of the proceeds of recovery being to pay them to the proper beneficiaries. Patellis v. King, 52 Ga. App. 118, 182 S.E. 808 (1935).

Amounts recovered not subject to debts of estate. — An action by an administrator is not brought by the administrator as such, but the administrator's name and office are merely lent to the beneficiary for the purpose of enforcing the individual rights of the latter, and not for the purpose of recovering a claim owing to the estate; the amount of the recovery is, therefore, not subject to debts owed by the decedent, and in the recovery the estate as such has no claim right or concern. Patellis v. King, 52 Ga. App. 118, 182 S.E. 808 (1935).

Funeral and burial expenses. — The administrator of the estates of a parent and the parent's minor child was the proper party to bring an action for funeral

and burial expenses of the decedents. Hosley v. Davidson, 211 Ga. App. 529, 439 S.E.2d 742 (1993).

Adequacy of damages. — A verdict for less than the amount of the plaintiff's proved medical expenses is not so inadequate as to require a new trial when there was testimony showing that the plaintiff's complaints were at least partially related to the plaintiff's physical condition prior to the collision. Trowell v. Weston, 154 Ga. App. 572, 269 S.E.2d 74 (1980).

Cited in Thompson v. Watson, 186 Ga. 396, 197 S.E. 774 (1938); Bloodworth v. Jones, 191 Ga. 193, 11 S.E.2d 658 (1940); Montgomery v. Southern Ry., 78 Ga. App. 370, 51 S.E.2d 66 (1948); West v. Mathews, 104 Ga. App. 57, 121 S.E.2d 41 (1961); Winston v. City of Austell, 123 Ga. App. 183, 179 S.E.2d 665 (1971); Cohn v. Combs, 126 Ga. App. 292, 190 S.E.2d 546 (1972); Isom v. Schettino, 129 Ga. App. 73, 199 S.E.2d 89 (1973); Williams v. Ray, 146 Ga. App. 333, 246 S.E.2d 387 (1978); Parham v. Hughes, 441 U.S. 347, 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979); DeLoach v. Floyd, 160 Ga. App. 728, 288 S.E.2d 65 (1981); McQurter v. City of Atlanta, 572 F. Supp. 1401 (N.D. Ga. 1983); Lucas v. Bob Hurst Mazda-Peugeot Autos., 174 Ga. App. 212, 329 S.E.2d 593 (1985); Cole v. Roberts, 648 F. Supp. 415 (M.D. Ga. 1986); Jones v. Jones, 184 Ga. App. 709, 362 S.E.2d 403 (1987); Gilmere v. City of Atlanta, 864 F.2d 734 (11th Cir. 1989); Bryant v. Browning, 259 Ga. App. 467, 576 S.E.2d 925 (2003); Alvista Healthcare Ctr. v. Miller, 286 Ga. 122, 686 S.E.2d 96 (2009).

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C.J.S. — 25A C.J.S., Death, §§ 176-178.

ALR. — Measure of damage for death where recovery is based upon loss to decedent's estate, 26 ALR 593, 163 ALR 253.

Right of foreign domiciliary, or of ancillary, personal representative to maintain an action for death, under statute of the forum which provides that the action shall be brought by the personal representative, 65 ALR 563; 52 ALR2d 1048.

Delay in procuring appointment of personal representative of deceased or of person causing his death in event of latter's death, as extending period for bringing an action for death, 70 ALR 472.

Right of foreign domiciliary, or of ancillary, personal representative to maintain action for death under Federal Employers' Liability Act, 73 ALR 593; 163 ALR 1284.

Right of action for death, where deceased left no next of kin, or person within class of beneficiaries named in the statute creating the right of action, 117 ALR 953.

Kind of verdict or judgment, or verdicts or judgments, where administrator or executor whose decedent was negligently killed brings an action which combines a cause of action for benefit of estate and another for statutory beneficiaries, 124 ALR 621.

Action against spouse or estate for causing death of other spouse, 28 ALR2d 662.

Capacity of local or foreign personal representative to maintain action for death under foreign statute providing for action by personal representative, 52 ALR2d 1016.

Capacity of foreign domiciliary, or of ancillary, personal representative to maintain action for death, under statute of forum providing for action by personal representative, 52 ALR2d 1048.

Power and responsibility of executor or administrator as to compromise or settlement of action or cause of action for death, 72 ALR2d 285.

Tolling or interruption of running of statute of limitations pending appointment of executor or administrator for tort-feasor in personal injury or death action, 47 ALR3d 179.

Recovery, in action for benefit of decedent's estate in jurisdiction which has both wrongful death and survival statutes, of value of earnings decedent would have made after death, 76 ALR3d 125.

Effect of death of beneficiary upon right of action under death statute, 13 ALR4th 1060.

Effect of settlement with and acceptance of release from one wrongful death beneficiary upon liability of tortfeasor to

other beneficiaries or decedent's personal representative, 21 ALR4th 275.

Assignability of proceeds of claim for personal injury or death, 33 ALR4th 82.

Recovery of damages for grief or mental anguish resulting from death of child — modern cases, 45 ALR4th 234.

Effect of death of beneficiary, following wrongful death, upon damages, 73 ALR4th 441.

51-4-6. Notification of licensing boards of judgments against health care provider.

(a) As used in this Code section, the term "health care provider" shall have the same meaning as set forth in Code Section 16-5-5.

(b) Within ten days of a judgment, a health care provider against whom a judgment has been obtained under the provisions of this chapter shall notify in writing the applicable licensing board for his or her licensure, certification, registration, or other authorization to conduct such health care provider's occupation so that disciplinary action may be taken as determined necessary by the applicable board. (Code 1981, § 51-4-6, enacted by Ga. L. 2012, p. 637, § 3/HB 1114.)

Editor's notes. — Ga. L. 2012, p. 637, § 4/HB 1114, not codified by the General Assembly, provides that: "This Act shall not apply to any offense committed before the effective date of this Act." This Act became effective May 1, 2012.

Law reviews. — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 278 (2012).

CHAPTER 5

LIBEL AND SLANDER

Sec.
51-5-1. Libel defined; publication prerequisite to recovery.
51-5-2. Newspaper libel defined; publication prerequisite to recovery.
51-5-3. What constitutes publication of libel.
51-5-4. Slander defined; when special damage required; when damage inferred.
51-5-5. Inference of malice; rebuttal thereof; effect of rebuttal.
51-5-6. Truth as justification.
51-5-7. Privileged communications.
51-5-8. Absolute privilege of allegations in pleadings.
51-5-9. Right of action for malicious use of privilege.
51-5-10. Liability for defamatory statements in visual or sound broadcast; damages.
51-5-11. Admissibility of evidence in libel action concerning correction and retraction; effect thereof on damages.
51-5-12. Admissibility of evidence in defamation action concerning correction and retraction; effect on damages.

Cross references. — Constitutional guarantee of free speech and press, Ga. Const. 1983, Art. I, Sec. I, Para. V. Invasion of privacy through electronic mediums, T. 16, C. 11, Pt. 3. Criminal defamation, § 16-11-40.

Law reviews. — For note applying first amendment free speech tests to commercial and noncommercial defamation of corporations and their products and services, see 27 Emory L.J. 755 (1978). For note on standards of fault governing litigants in defamation actions in light of first amendment rights, see 29 Mercer L. Rev. 841 (1978).

For comment, "You've Got Libel: How the Can-Spam Act Delivers Defamation Liability to Spam-Fighters and Why the First Amendment Should Delete the Problem," see 58 Emory L.J. 1013 (2009).

JUDICIAL DECISIONS

In Georgia, libel and slander Code sections are a codification of common law. American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962).

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Liability for Abusive Language, 16 POF2d 493.

Sufficiency of Retraction of Defamatory Statement, 40 POF2d 649.

Invasion of Privacy by Public Disclosure of Private Facts, 43 POF2d 449.

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Proof of Liability for Violation of Privacy of Internet User by Use of Cookies or Other Means, 67 POF3d 249.

Media Outage, 68 POF3d 179.

Proof of Circumstances Establishing Constitutional Malice in a Defamation Cause of Action, 71 POF3d 321.

ALR. — What constitutes variance between pleading and proof of defamatory words, 2 ALR 367.

Necessity and sufficiency of proof that libel or slander in which the plaintiff's name was used was published or spoken concerning plaintiff, 3 ALR 1279.

Libel and slander: communications between different offices of corporation, 5 ALR 455.

Libel and slander: charging one with failure to keep his contracts, 5 ALR 1362.

Libel and slander: publisher's liability as affected by his ignorance of writer's libelous intention, 10 ALR 672.

Proof of other defamatory statements in civil action for libel or slander, 12 ALR 1026; 86 ALR 1297.

Charging merchant with using false weights or measures as libel or slander, 13 ALR 1019; 106 ALR 437.

Character of libel or slander for which criminal prosecution will lie, 19 ALR 1470.

Libel and slander of another employee, or former employee, as within scope of employee's authority, 24 ALR 133; 29 ALR 225.

Libel or slander as affected by mistake in statement or publication as to name or description of person to whom it relates, 26 ALR 454; 41 ALR 485.

Proof of good character or reputation of plaintiff in action for libel or slander, 28 ALR 762.

Abusive words as slander or libel, 37 ALR 883.

Libel or slander affecting bank, 37 ALR 1348.

Discharge of employee under imputation of dishonesty as supporting action ex delicto other than libel or slander, 43 ALR 1078.

Libel and slander: false imputation of matrimonial intentions, 44 ALR 1424.

Libel and slander: imputing disease as actionable per se, 45 ALR 1114.

Libel and slander: liability of member of a credit association for reporting one as a delinquent debtor, 48 ALR 573.

Parties plaintiff to actions based on libel or slander of a firm or its members, 52 ALR 912.

Action by corporation for libel or slander, 52 ALR 1199; 86 ALR 442.

Libel and slander: charging one with being a bastard or illegitimate, 53 ALR 548.

Libel and slander: what imputations against clergyman are actionable, 53 ALR 637.

Libel and slander: defamation of one in his character as a political leader or "boss," 55 ALR 854.

Failure to deny or to reply to charge or to take other steps to mitigate damages as affecting recovery for libel or slander, 56 ALR 255.

Libel or slander by imputation of drunkenness, 58 ALR 1157.

Libel or slander of stockholder or officer by publication or statement which reflects on him as well as on corporation, 58 ALR 1233.

Attachment in libel and slander cases, 61 ALR 1347.

Libel and slander: imputation of mental disorder, impairment of mental faculties, or want of mental capacity, as actionable per se, 66 ALR 1257.

Libel and slander: publication or statement as defamatory, by reason of extrinsic facts, of person not referred to nor intended to be referred to, 69 ALR 734.

Law of libel and slander in its application to reflections on ability or skill of public performers, or persons associated with public performances as managers, trainers, etc., 72 ALR 921.

Admissibility in behalf of defendant in action for libel or slander or similar charges made by other persons against plaintiff, 74 ALR 732.

Mental or physical suffering as element of damages for libel or slander, 90 ALR 1175.

Libel and slander: words or publication imputing marital discord as actionable per se, 92 ALR 1128.

Law of libel or slander as applied to motion pictures, 99 ALR 878.

Admissibility in action for slander or libel of evidence of aversion or contempt

manifested as consequence of libelous or slanderous publication, to show its hurtful tendency, 105 ALR 944.

Right of action for damages because of methods used in attempting to collect debts, 106 ALR 1453.

Libel and slander: imputation of price-cutting, 118 ALR 317.

Libel and slander: imputation of association with persons of race or nationality as to which there is social prejudice, 121 ALR 1151.

Libel or slander: propriety, where actual damages are not shown, in instructions on compensatory damages which do not embody jury's right to award small or nominal damages, 122 ALR 853.

Libel and slander: defamation of deceased person as ground of action by members of his family, or other persons associated with him, in their own right, because of its tendency to subject them to ridicule or contempt, 132 ALR 891.

Provocation as mitigating damages in action for libel or slander, 132 ALR 932.

Libel and slander: imputation of poverty, 137 ALR 913.

Libel and slander: publication of notice of cessation of relationship of principal and agent or employer and employee, or of business or professional relationship, 138 ALR 671.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 ALR 1066.

Civil liability for defamation of dead, 146 ALR 739.

Liability for injury to person or damage to property as result of "blackout," 147 ALR 1442; 148 ALR 1401; 150 ALR 1448; 153 ALR 1433; 154 ALR 1459; 155 ALR 1458; 158 ALR 1463.

Libel and slander: statements regarding labor relations or disputes, 150 ALR 932; 19 ALR2d 694.

Libel and slander: words reflecting upon one in his character as employee as actionable per se, 6 ALR2d 1008.

Validity, construction, and application of statute limiting damages recoverable for defamation, 13 ALR2d 277.

Liability of police or other peace officer or his bond for defamation, 13 ALR2d 897.

Civil liability for insulting or abusive language not amounting to defamation, 15 ALR2d 108.

Liability for permitting walls or other portions of place of public resort to be occupied with matter defamatory of plaintiff, 28 ALR2d 1454.

Imputation of perjury or false swearing as actionable per se, 38 ALR2d 161.

Liability for statement or publication representing plaintiff as cruel to or killer of animals, 39 ALR2d 1388.

Libel and slander: statements respecting race, color, or nationality as actionable, 46 ALR2d 1287.

Injunction as remedy against defamation of person, 47 ALR2d 715.

Libel and slander: statement or publication that plaintiff has been indicted or is under indictment, 52 ALR2d 1178.

Libel and slander: actionability of statement imputing incapacity, inefficiency, misconduct, fraud, dishonesty, or the like to public officer or employee, 53 ALR2d 8.

Liability of insurance company for libel or slander by its agents or employees, 55 ALR2d 828.

Defamatory nature of charges or imputations in conditional or alternative form, 59 ALR2d 928.

Libel and slander: criticism of literary or artistic works, 64 ALR2d 245.

Defamatory nature of statements reflecting on plaintiff's religious beliefs, standing, or activities, 87 ALR2d 453.

Liability of partners or partnership for libel, 88 ALR2d 474.

Reliance on facts not stated or referred to in publication, as support for defense of fair comment in defamation case, 90 ALR2d 1279.

What evidence is admissible to identify plaintiff as person defamed, 95 ALR2d 227.

Constitutional aspects of libel or slander of public officials, 95 ALR2d 1450.

Right and remedy of drawer of check against collecting bank which receives it on forged indorsement and collects it from drawee bank, 99 ALR2d 637.

Libel and slander: charge of being a "crook," 1 ALR3d 844.

Libel and slander: false news reports as to births, betrothals, marriages, divorces, or similar marital matters, 9 ALR3d 559.

Libel and slander: statements as to plaintiff's charging excessive or exorbitant prices or fees, 11 ALR3d 884.

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Propriety of publishing identity of sexual assault victim, 40 ALR5th 787.

Libel and slander: charging one with breach or nonperformance of contract, 45 ALR5th 739.

Defamation: publication of letter to editor in newspaper as actionable, 54 ALR5th 443.

51-5-1. Libel defined; publication prerequisite to recovery.

(a) A libel is a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule.

(b) The publication of the libelous matter is essential to recovery. (Orig. Code 1863, § 2916; Code 1868, § 2923; Code 1873, § 2974; Code 1882, § 2974; Civil Code 1895, § 3832; Civil Code 1910, § 4428; Code 1933, § 105-701.)

Law reviews. — For article advocating recognition of an action for testamentary libel, see 27 Mercer L. Rev. 1147 (1976). For article, "Defamation in Georgia Local Government Law: A Brief History," see 16 Ga. L. Rev. 627 (1982). For annual survey of law of torts, see 38 Mercer L. Rev. 351 (1986). For article, "Defamation and Invasion of Privacy," see 27 Ga. St. B. J. 18 (1990).

For comment on Braden v. Baugham, 74 Ga. App. 802, 41 S.E.2d 581 (1947), see 9 Ga. B. J. 456 (1947). For comment criticizing Gouldman-Taber Pontiac, Inc. v. Zerbst, 213 Ga. 682, 100 S.E.2d 881 (1957) wherein plaintiff was held to have only a qualified right of privacy when defendant disclosed plaintiff's debts to third-party employer, see 9 Mercer L. Rev. 227 (1957). For comment on Gouldman-Taber Pontiac, Inc. v. Zerbst, 96 Ga. App. 48, 99 S.E.2d 475 (1957), holding that defen-

dant's act of writing petitioner's employer to assist in collecting an alleged debt which was disputed by petitioner was an invasion of her right to privacy, see 20 Ga. B. J. 256 (1957). For comment on Arvey Corp. v. Peterson, 178 F. Supp. 132 (E.D. Pa. 1959), finding dictation of material to stenographer — sufficient publication to support an action for libel, see 11 Mercer L. Rev. 381 (1960). For comment on American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962), see 25 Ga. B. J. 310 (1963). For comment on Rives v. Atlanta Newspapers, Inc., 110 Ga. App. 184, 138 S.E.2d 100 (1964), see 1 Ga. St. B. J. 236. For comment on Hinkle v. Alexander, 244 Ore. 267, 417 P.2d 586 (1966), suggesting adoption by Georgia of a uniform rule on proof of damages in libel actions, see 18 Mercer L. Rev. 297 (1966). For comment criticizing Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E.2d 496 (1966), see 18 Mercer L. Rev. 519 (1967). For comment, "Room for Error Online: Revising Georgia's Retraction Statute to Accommodate the Rise of Internet Media," see 28 Ga. St. U.L. Rev. 923 (2012).

JUDICIAL DECISIONS

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General Consideration

This section is a codification of common law. Hardboard Mach. Co. v. Coastal Prods. Corp., 289 F. Supp. 496 (M.D. Ga. 1967), aff'd, 398 F.2d 833 (5th Cir. 1968).

Legislative intent. — Legislature, when it enacted this section, intended Georgia's law of defamation to be consistent with that of the common law, which permitted a corporation a cause of action for libel. Eason Publications v. Atlanta Gazette, Inc., 141 Ga. App. 321, 233 S.E.2d 232 (1977).

An individual, albeit a government official, libeled for action taken in the individual's official capacity, may sue for libel. Cox Enters., Inc. v. Carroll City/County Hosp. Auth., 247 Ga. 39, 273 S.E.2d 841 (1981).

Elements of viable defamation claim. — A viable defamation claim under Georgia law consists of: (1) a false and defamatory statement concerning the plaintiff: (2) an unprivileged communication to a third party; (3) fault by the defendant amounting at least to negligence; and (4) special harm or the action ability of the statement irrespective of special harm. Publication of the statement is imperative and, without publication, the defamation claim fails. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Liability of corporation. — A corporation may make a libelous publication. Howe Mach. Co. v. Souder, 58 Ga. 64 (1877); Behre v. National Cash Register Co., 100 Ga. 213, 27 S.E. 986, 62 Am. St. R. 320 (1897).

Corporation may bring action for libel. Eason Publications v. Atlanta Gazette, Inc., 141 Ga. App. 321, 233 S.E.2d 232 (1977).

Governmental entity is absolutely barred from prosecuting cause of action for libel regardless of whether the libel was against the governmental entity in its governmental or its proprietary function. Cox Enters., Inc. v. Carroll City/County Hosp. Auth., 247 Ga. 39, 273 S.E.2d 841 (1981).

Hospital authority cannot sue for libel. Cox Enters., Inc. v. Carroll City/County Hosp. Auth., 247 Ga. 39, 273 S.E.2d 841 (1981).

Generally, rule of respondeat supe-

rior, under which principal is liable for torts of its employee committed while acting in scope of employment, is applicable in libel cases. Ray v. Henco Elecs., Inc., 156 Ga. App. 394, 274 S.E.2d 602 (1980).

Libel against group or general class of persons. — If defamatory words are used broadly in respect to a general class of persons, and there is nothing that points, or by colloquium or innuendo can be made to apply, to a particular member thereof, such member has no right of action; but if the language is employed toward a comparatively small group of persons, or a restricted or local portion of a general class, and is so framed as to make defamatory imputations against all members of the small or restricted group, any member thereof may sue; on the other hand, if the words used in respect to the small or restricted group expressly but impersonally and indefinitely refer to one or more of the several members thereof, one of the members, in order to maintain one's action, must establish the application of the language to the member. Constitution Publishing Co. v. Leathers, 48 Ga. App. 429, 172 S.E. 923, later appeal, 50 Ga. App. 137, 177 S.E. 261 (1934).

Action for libel abates when defendant dies. — If one publishes libelous material within meaning of this section and the perpetrator dies, the maxim actio personalis moritur com persona will apply, with the result that what has been done is but naught. Citizens' & S. Nat'l Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313 (1933).

Party merely delivering statement from another not subject to libel action. — When one person dictates a defamatory statement concerning a certain person to one who reproduces it on a typewriter in affidavit form and delivers it to the one so dictating, the person so delivering the affidavit is not chargeable with libel as there was no publication by that person. Allen v. American Indem. Co., 63 Ga. App. 894, 12 S.E.2d 127 (1940).

Foundation of action for defamation is injury done to reputation, that is, injury to character in the opinion of others arising from publication. Ajouelo v. Auto-Soler Co., 61 Ga. App. 216, 6 S.E.2d 415 (1939).

Generally, any defamatory statement, written or oral, is actionable when published. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

"Opinion" not exempt from defamation law. — There is no wholesale defamation exemption for anything that might be labeled "opinion." Any defamatory expression on matters of public concern that is provable as false may carry liability under state defamation law. Eidson v. Berry, 202 Ga. App. 587, 415 S.E.2d 16 (1992), cert. denied, 202 Ga. App. 905, 415 S.E.2d 16 (1992).

Written publication need only affect personal reputation to be actionable. Huey v. Sechler, 107 Ga. App. 467, 130 S.E.2d 754 (1963).

To maintain action for libel, matter published must either be libelous per se, or it must be so stated that it may reasonably be construed, by innuendo, to be libelous. McCravy v. Schneer's, 47 Ga. App. 703, 171 S.E. 391 (1933).

To maintain action for libel, matter published must be communicated to some person other than plaintiff. McCravy v. Schneer's, 47 Ga. App. 703, 171 S.E. 391 (1933); Nelson v. Wainwright, 223 Ga. 429, 156 S.E.2d 82 (1967).

Libel cause of action is set out if it shows plaintiff suffered injury to the plaintiff's reputation, for which right of action no special damages are necessary. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960).

Libel must be false as well as malicious. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978); Jones v. Neighbor Newspapers, Inc., 142 Ga. App. 365, 236 S.E.2d 23 (1977).

When the petition in a libel action affirmatively shows that the printed matter relied on to constitute the libel is not false, but on the other hand shows it to be true, then such petition fails to state a cause of action for libel, the falsity of the printed matter being an essential element to such a cause of action. Savannah News-Press, Inc. v. Harley, 100 Ga. App. 387, 111 S.E.2d 259 (1959).

In order to prevail in a suit for libel,

General Consideration (Cont'd)

Georgia law requires that the plaintiff show the statement was false and "malicious." In this context, "malice" means ill will, and "malicious" denotes statements deliberately calculated to injure. Georgia courts refer to this as "common-law malice," and distinguish it from actual or "constitutional" malice. Straw v. Chase Revel, Inc., 813 F.2d 356 (11th Cir.), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987).

Good faith and substantial accuracy complete defense for publisher. — Newspapers are not ordinarily held to the exact facts or to the most minute details of the transactions they publish. What is usually required is that the publication shall be substantially accurate; and if the article is published by the newspaper in good faith and the same is substantially accurate, the newspaper has a complete defense. Jones v. Neighbor Newspapers, Inc., 142 Ga. App. 365, 236 S.E.2d 23 (1977).

Less than complete report of truth may still constitute defense. — As long as the facts in a newspaper are not misstated, distorted, or arranged so as to convey a false and defamatory meaning, there is no liability for a somewhat less than complete report of the truth. Jones v. Neighbor Newspapers, Inc., 142 Ga. App. 365, 236 S.E.2d 23 (1977).

"Reasonable publisher" standard. — In libel actions under O.C.G.A. § 51-5-1, the standard of conduct required of a publisher is a negligence standard defined by reference to the procedures a reasonable publisher in the same position would have employed prior to the publishing of the allegedly libelous statement; publishers are held to the skill and experience normally exercised by members of their profession. Triangle Publications, Inc. v. Chumley, 253 Ga. 179, 317 S.E.2d 534 (1984).

Plaintiff may recover in libel action when defamation is apparent from writing itself, without the necessity of alleging or proving special damages, and it is not necessary that the plaintiff be engaged in the pursuit of the plaintiff's trade, business, or profession at the time of publication. Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965), aff'd, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

Libel does not arise as to third person when true information is stated as to another party. Lowry v. Credit Bureau, Inc., 444 F. Supp. 541 (N.D. Ga. 1978).

What constitutes libel per se. — Statements which tend to injure one in one's trade, occupation, or business are libelous per se. John D. Robinson Corp. v. Southern Marine & Indus. Supply Co., 196 Ga. App. 402, 395 S.E.2d 837 (1990).

Libel per se consists of a charge that one is guilty of a crime, dishonesty, or immorality. Grayson v. Savannah News-Press, Inc., 110 Ga. App. 561, 139 S.E.2d 347 (1964); Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978); Eidson v. Berry, 202 Ga. App. 587, 415 S.E.2d 16 (1992), cert. denied, 202 Ga. App. 905, 415 S.E.2d 16 (1992).

When charge is made in writing and is exhibited to third person and is false, it constitutes libel which is actionable per se, without proof of special damage. Caswell v. Porter, 51 Ga. App. 513, 180 S.E. 860 (1935).

Statements which tend to injure one in one's trade, occupation, or business are libelous per se, and no allegation of special damage need be made to support an action for libel or slander based on such statements. Walker v. Sheehan, 80 Ga. App. 606, 56 S.E.2d 628 (1949).

Inference may also be harmful. — Libelous charge is just as effectively harmful, and therefore actionable per se whether harmful effect results from words which directly and unequivocally make charge, or whether it results from words which do so indirectly or by inference. It is the harmful effect of the defamatory language which renders it actionable per se, and not its directness or unequivocal nature. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960).

Publication which on its face was necessarily within the statutory definitions of former Code 1933, §§ 105-201, 105-203, and 105-701 (see

now O.C.G.A. §§ 51-1-2, 51-1-4, and 51-5-1) was considered libelous per se. Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir.), cert. denied, 444 U.S. 832, 100 S. Ct. 62, 62 L. Ed. 2d 42 (1979).

Burden of proof. — In a case arising within the context of a labor dispute, the plaintiffs may not avail themselves of Georgia's libel law, or the remedies thereunder, unless the plaintiffs can show by clear and convincing evidence that the complained of statements were circulated with actual malice. Douglas v. Maddox, 233 Ga. App. 744, 505 S.E.2d 43 (1998).

Special damages need not be proved. — When the language of a publication is libelous per se, the plaintiff may recover general damages without proof of special damages. Weatherholt v. Howard, 143 Ga. 41, 84 S.E. 119 (1915); Harrison v. Pool, 24 Ga. App. 587, 101 S.E. 765 (1919).

No proof of special damage is necessary in the case of libel per se. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

When petition alleged libel per se and an injury to the plaintiff's reputation, an allegation of special damages was unnecessary. Sheley v. Southeastern Newspapers, Inc., 87 Ga. App. 167, 73 S.E.2d 211 (1952).

Loss of employment, income, or profits is categorized as special damages and is sufficient injury upon which to predicate an action for libel when the defamatory words are not libelous per se. Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985, 94 S. Ct. 1580, 39 L. Ed. 2d 882 (1974).

Construction of words. — To determine if the words published constitute a libel, within the provisions of this section, the natural and obvious meaning to those who will read is the proper test. Hugh v. McCarty, 40 Ga. 444 (1869).

Language of alleged libel is to be taken in its plain and natural meaning, and to be understood by courts and juries as other people would understand it, and according to the sense in which it appears to have been used and the ideas it is adapted to convey to those who read it. Grayson v. Savannah News-Press, Inc., 110 Ga. App. 561, 139 S.E.2d 347 (1964).

Publication alleged to be libelous must be construed in light of all the attending circumstances, the cause and occasion of the publication, and all other extraneous matters which will tend to explain the allusion or point out the person in question. Brandon v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940); Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946); World Ins. Co. v. Peavy, 110 Ga. App. 651, 139 S.E.2d 440 (1964).

Words ordinarily harmless may from context convey such meaning as to give ground for action. Anderson v. Kennedy, 47 Ga. App. 380, 170 S.E. 555 (1933).

Words harmless in themselves may become libelous when the circumstances under which are published are such as to convey a covert meaning to the reader reflecting injuriously upon the reputation of the person to whom refer. Brandon v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940); World Ins. Co. v. Peavy, 110 Ga. App. 651, 139 S.E.2d 440 (1964).

Words which are sometimes actionable, when taken in connection with entire article may be deprived of their usual sting and afford no ground for recovery. Anderson v. Kennedy, 47 Ga. App. 380, 170 S.E. 555 (1933).

Words which, if merely spoken, would not be actionable in absence of special damage may be libelous when printed if the words are false and tend to injure reputation and bring one into public hatred, contempt, or ridicule. Ordinarily, general damages only need be alleged in an action for libel. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960).

Defamatory words must refer to some ascertained or ascertainable person, and that person must be plaintiff; if the words used really contain no reflection on any particular individual, no averment or innuendo can make defamatory, and an innuendo cannot make the person certain who was uncertain before. Constitution Publishing Co. v. Leathers, 48 Ga. App. 429, 172 S.E. 923.

Publication claimed to be defamatory must be read and construed in

General Consideration (Cont'd)

sense in which readers to whom it is addressed would ordinarily understand it. Brandon v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940); Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946); Grayson v. Savannah News-Press, Inc., 110 Ga. App. 561, 139 S.E.2d 347 (1964).

When the language of a publication is reasonably susceptible of the construction that it makes a libelous charge, it becomes libelous when it conveys that charge and would be so understood by the person to whom the writing might be communicated. Brandon v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940).

When language does not directly and expressly contain a libel, it may do so if the words are capable of such construction, and would be so understood by persons to whom the words might be communicated. Brandon v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940).

The language of an alleged libel must be construed, not by what the writer intended to mean, but by the construction which would be placed upon it by the average reader. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

In determining whether words are capable of a defamatory meaning, the judge will construe the words according to the fair and natural meaning which will be given the words by reasonable persons of ordinary intelligence, and will not consider what person setting themselves to work to deduce some unusual meaning might succeed in extracting from the words. Hardboard Mach. Co. v. Coastal Prods. Corp., 289 F. Supp. 496 (M.D. Ga. 1967), aff'd, 398 F.2d 833 (5th Cir. 1968).

An alleged defamatory publication must be construed in the sense in which the readers to whom the publication is addressed would ordinarily, naturally, and normally interpret it, and plain, nondefamatory, unambiguous words may not be enlarged by innuendo. Dun & Bradstreet, Inc. v. Miller, 398 F.2d 218 (5th Cir. 1968).

Language must be construed, not only by what the speaker intends to mean, but also by what the average and reasonable reader may understand to mean. Montgomery v. Pacific & S. Co., 131 Ga. App. 712, 206 S.E.2d 631, aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988).

Witnesses are allowed to give their understanding of word published and spoken. Hodsdon v. Whitworth, 153 Ga. App. 783, 266 S.E.2d 561 (1980).

Purpose of innuendo. — Words which are clearly not defamatory cannot have their meaning enlarged by innuendo. Words which are libelous per se need no innuendo. Between these extremes lies the case of ambiguous language, when it is for the jury to say whether, in view of all the facts charged, the publication amounted to a libel. Central of Ga. Ry. v. Sheftall, 118 Ga. 865, 45 S.E. 687 (1903).

The office of an innuendo is to explain that which is of doubtful or ambiguous meaning in the language of the publication. Piedmont Cotton Mills v. James, 59 Ga. App. 239, 200 S.E. 457 (1938).

Use of innuendo permitted only when words are ambiguous. — The law of Georgia is consistent in requiring the factor of ambiguous language as a prerequisite for the employment of innuendo. Dun & Bradstreet, Inc. v. Miller, 398 F.2d 218 (5th Cir. 1968).

Words which are clearly not libelous cannot have their natural meaning changed by innuendo. Central of Ga. Ry. v. Sheftall, 118 Ga. 865, 45 S.E. 687 (1903); World Ins. Co. v. Peavy, 110 Ga. App. 651, 139 S.E.2d 440 (1964).

When the language alleged to be libelous is so clear, certain, and unambiguous that the only possible construction is that it is not libelous or defamatory, innuendo cannot be used to enlarge upon the meaning of the words. World Ins. Co. v. Peavy, 110 Ga. App. 651, 139 S.E.2d 440 (1964).

Plaintiff cannot by innuendo draw from writing a conclusion not justified by language used, but it is competent for the plaintiff to explain in this way an ambiguous publication, to point out the intention of the author, and to show wherein the effect of the language was to injure the plaintiff's reputation. Brandon

v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940); Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946).

Words which are plain and unambiguous and do not impute crime cannot, by innuendo, have their meaning enlarged and extended so as to impute crime. Estes v. Sterchi Bros. Stores, 50 Ga. App. 619, 179 S.E. 222 (1935).

If the plain, unambiguous words contained in the publication do not impute a criminal offense, the meaning thereof cannot be enlarged or extended by an innuendo for that purpose; but when the language used is capable of being understood in a double sense, the one criminal and the other innocent, the plaintiff, by making the proper allegations in the plaintiff's declaration, may, by an innuendo, aver the meaning with which the plaintiff thinks it was published, and the jury may find whether the publication was made with that meaning or not. Brandon v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940).

Words which are libelous per se do not need an innuendo. World Ins. Co. v. Peavy, 110 Ga. App. 651, 139 S.E.2d 440 (1964).

Essential ingredient of action for libel is malice, express or implied, but when the language used is actionable per se, malice is implied, except when the occasion of the utterance renders it privileged, in which case, while the occasion does not excuse if the accusation is maliciously made, the burden is put upon the plaintiff to establish malice. Edmonds v. Atlanta Newspapers, Inc., 92 Ga. App. 15, 87 S.E.2d 415 (1955).

Proof that writing is false, and that it maligns private character or mercantile standing of another, is itself evidence of legal malice. Montgomery v. Pacific & S. Co., 131 Ga. App. 712, 206 S.E.2d 631, aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988).

Publication of an opinion on a matter which is wholly subjective, not capable of proof or disproof, and with respect to which reasonable men might differ, such as the rating of an attorney by the publisher of a legal directory, is not libelous. Bergen v. Martindale-Hubbell, Inc., 176 Ga. App. 745, 337 S.E.2d 770 (1985), appeal dismissed and cert. denied, 479 U.S. 803, 107 S. Ct. 45, 93 L. Ed. 2d 7 (1986).

An affidavit before a magistrate, made for the purpose of causing an arrest, will not support an action for libel, though falsely and maliciously made. Watkins v. Laser/Print-Atlanta, Inc., 183 Ga. App. 172, 358 S.E.2d 477 (1987).

Defamation by broadcast includes elements of both libel and slander. S & W Seafoods Co. v. Jacor Broadcasting, 194 Ga. App. 233, 390 S.E.2d 228 (1990), cert. denied, 194 Ga. App. 912, 390 S.E.2d 228 (1991).

Comments broadcast by radio talk-show host on a restaurant review segment of the host's listener call-in show broadcast were not actionable under the statute, either because they were shown not to have been false or because they fell within the ambit of protected speech. S & W Seafoods Co. v. Jacor Broadcasting, 194 Ga. App. 233, 390 S.E.2d 228 (1990), cert. denied, 194 Ga. App. 912, 390 S.E.2d 228 (1991).

Cited in Rakestraw v. Brogdon, 56 Ga. 549 (1876); Invester v. Coe, 33 Ga. App. 620, 127 S.E. 790 (1925); Horton v. Georgian Co., 175 Ga. 261, 165 S.E. 443 (1932); Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944); Moore v. Gregory, 72 Ga. App. 614, 34 S.E.2d 624 (1945); Braden v. Baugham, 74 Ga. App. 802, 41 S.E.2d 581 (1947); Shiver v. Valdosta Press, 82 Ga. App. 406, 61 S.E.2d 221 (1950); Freeman v. Busch Jewelry Co., 98 F. Supp. 963 (N.D. Ga. 1951); Haggard v. Shaw, 100 Ga. App. 813, 112 S.E.2d 286 (1959); Savannah News-Press, Inc. v. Hartridge, 104 Ga. App. 22, 120 S.E.2d 918 (1961); Savannah News-Press, Inc. v. Hartridge, 110 Ga. App. 203, 138 S.E.2d 173 (1964); Peacock Constr. Co. v. Erickson's, Inc., 121 Ga. App. 544, 174 S.E.2d 276 (1970); Molton v. Commercial Credit Corp., 127 Ga. App. 390, 193 S.E.2d 629 (1972); Europa Hair, Inc. v. Browning, 133 Ga. App. 753, 212 S.E.2d 862 (1975); Neal v. McCall, 134 Ga. App. 680, 215 S.E.2d 537 (1975); Garren v. Southland Corp., 235 Ga. 784, 221 S.E.2d 571 (1976); Lester v. Trust Co., 144 Ga. App. 526, 241

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S.E.2d 633 (1978); Spaulding v. Rich's, Inc., 146 Ga. App. 693, 247 S.E.2d 218 (1978); Morton v. Gardner, 242 Ga. 852, 252 S.E.2d 413 (1979); Georgia Power Co. v. Busbin, 159 Ga. App. 416, 283 S.E.2d 647 (1981); Spelsberg v. Sweeney, 514 F. Supp. 622 (S.D. Ga. 1981); Jones v. Thornton, 172 Ga. App. 412, 323 S.E.2d 217 (1984); Majik Mkt. v. Best, 684 F. Supp. 1089 (N.D. Ga. 1987); Gantt v. Patient Communication Systems, 200 Ga. App. 35, 406 S.E.2d 796 (1991); Kitchen Hardware, Ltd. v. Kuehne & Nagel, Inc., 205 Ga. App. 94, 421 S.E.2d 550 (1992); Roberts v. Lane, 210 Ga. App. 10, 435 S.E.2d 227 (1993); Mills v. Ellerbee, 177 Bankr. 731 (Bankr. N.D. Ga. 1995); Agee v. Huggins, 888 F. Supp. 1573 (N.D. Ga. 1995); Blomberg v. Cox Enters., Inc., 228 Ga. App. 179, 491 S.E.2d 430 (1997); Bd. of Pub. Safety v. Jordan, 252 Ga. App. 577, 556 S.E.2d 837 (2001); Hoffmann-Pugh v. Ramsey, 193 F. Supp. 2d 1295 (N.D. Ga. 2002); Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002); Simmons v. Futral, 262 Ga. App. 838, 586 S.E.2d 732 (2003); No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

Slander Distinguished

Libel and slander are similar and related but do not give rise to same causes of action. Griffin v. Branch, 116 Ga. App. 627, 158 S.E.2d 452 (1967).

Definition of slander has been incorporated into definition of libel, and false and defamatory statements made in regard to another in "his trade, office, or profession calculated to injure him therein" also constitutes an action for libel. Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985, 94 S. Ct. 1580, 39 L. Ed. 2d 882 (1974).

The definition of slander in Georgia has been incorporated into the definition of libel. Smith v. First Nat'l Bank, 837 F.2d 1575 (11th Cir.), cert. denied, 488 U.S. 821, 109 S. Ct. 64, 102 L. Ed. 2d 41 (1988).

A charge made against another "in reference to his trade, office, or profession, calculated to injure him therein," although embodied in the definition of slander, gives rise to an action for libel as well, and a person against whom such an allegation is made need not allege or prove special damages. Dun & Bradstreet, Inc. v. Miller, 398 F.2d 218 (5th Cir. 1968).

Although part of the definition of slander, a charge made against another "in reference to his trade, office, or profession" which is "calculated to injure him therein" also gives rise to a libel action. Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir.), cert. denied, 444 U.S. 832, 100 S. Ct. 62, 62 L. Ed. 2d 42 (1979).

Oral publication of written defamation constitutes libel, not slander, and in such case the normal rules of respondeat superior would apply. Land v. Delta Airlines, 147 Ga. App. 738, 250 S.E.2d 188 (1978).

If words are slanderous they would not become less defamatory by publishing them in writing, though words which might not be actionable per se as slander may be libelous per se when put in writing or print. Griffin v. Branch, 116 Ga. App. 627, 158 S.E.2d 452 (1967).

Publication

Necessity of publication. — Before there can be a recovery for libel under O.C.G.A. § 51-5-1, there must be communication to any person other than the party libeled. Sigmon v. Womack, 158 Ga. App. 47, 279 S.E.2d 254 (1981).

A parent's claims of defamation against a school official were either time-barred or, if viable, failed as a matter of law because: (1) there was no claim that the alleged defamatory letter was published to anyone other than the parent; and (2) without publication, there could be no cause of action for defamation. Chisolm v. Tippens, 289 Ga. App. 757, 658 S.E.2d 147, cert. denied, 129 S. Ct. 576, 172 L.Ed.2d 431 (2008).

Necessity of understanding of libelous nature of publication. — In order to effect the publication of a libel there must be a reading of it and, not only that, there must be an understanding of its meaning by the person reading it. Sigmon v. Womack, 158 Ga. App. 47, 279 S.E.2d 254 (1981).

It is not enough that the language used is reasonably capable of a defamatory interpretation if the recipient did not in fact so understand it. Sigmon v. Womack, 158 Ga. App. 47, 279 S.E.2d 254 (1981).

Control of libel required. — Defendant in a libel action was entitled to summary judgment since it was not shown that the defendant exercised any control over the content of the libelous statement. Mullinax v. Miller, 242 Ga. App. 811, 531 S.E.2d 390 (2000).

Invited libel. — To constitute an invited libel it is enough that the complainant requests or consents to the presence of a third party and solicits the publication of matter which the complainant knows or has reasonable cause to suspect will be unfavorable to the complainant. Sophianopoulos v. McCormick, 192 Ga. App. 583, 385 S.E.2d 682 (1989).

After the university professor sought the assistance of a professional association in resolving a complaint with the professor's superiors, and knew that they would respond with information unfavorable to the professor, the professor's actions were sufficient to constitute an invited libel. Sophianopoulos v. McCormick, 192 Ga. App. 583, 385 S.E.2d 682 (1989).

When the only communication of allegedly libelous matter was between a former employer and the agent of a prospective employer, and when the former employee had expressly authorized such communication, there was no publication in the sense contemplated in this statutory scheme. Kenney v. Gilmore, 195 Ga. App. 407, 393 S.E.2d 472, cert. denied, 195 Ga. App. 407, 393 S.E.2d 472 (1990).

Publication of false statement which tends to injure reputation of another and expose one to public hatred, contempt, or ridicule, will be presumed to be malicious publication; the burden is on the publisher to rebut this presumption. Montgomery v. Pacific & S. Co., 131 Ga. App. 712, 206 S.E.2d 631, aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988).

Dischargeability in bankruptcy. — Count based on Tortious Interference with Business Relations is not excepted from discharge by 11 U.S.C. § 1328(a)(4) because that count did not involve personal injury. However, count II based on defamation involved personal injury and may therefore be excepted from discharge. Finally, count III, for punitive damages under O.C.G.A. § 51-12-5.1, may also be excepted from discharge under 11 U.S.C. § 1328(a)(4) to the extent punitive damages are awarded based on personal injury. Adams v. Adams (In re Adams), 478 B.R. 476 (Bankr. N.D. Ga. 2012).

Publication of libelous matter imposes on publisher burden of rebutting accompanying presumption of malice. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

There is publication of libel when it is made known to single person other than plaintiff. Piedmont Cotton Mills v. James, 59 Ga. App. 239, 200 S.E. 457 (1938).

Rule that there is no publication when words are communicated only to person defamed is subject to exception or qualification. Thus, in the case of a libel, whether the general rule extends to a disclosure by the person libeled is to be determined by the causal relation existing between the libel and the publication. There may be a publication when the sender intends or has reason to suppose that the communication will reach third persons, which happens, or which result naturally flows from the sending. Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (1946).

Letter written by defendant to plaintiff, sent by registered mail, without more, does not amount to publication. McCravy v. Schneer's, 47 Ga. App. 703, 171 S.E. 391 (1933).

Letter from accounting firm to employer sufficient publication. — With regard to a controller's claims for defamation and tortious interference against an accounting/auditing firm that wrote a letter to the controller's employer that resulted in the controller's termination from employment, the trial court erred by dismissing the complaint after concluding that the alleged defamatory statements were inactionable privileged communications that had not been published since

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the controller sufficiently alleged malice, the communications between the accounting/auditing firm and the employer were conditionally privileged under O.C.G.A. § 51-5-7, and the controller sufficiently alleged publication of the statements. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Communication of information to secretary, or to others within corporate framework, is not publication. Peacock v. Retail Credit Co., 302 F. Supp. 418 (N.D. Ga. 1969), aff'd, 429 F.2d 31 (5th Cir. 1970), cert. denied, 401 U.S. 938, 91 S. Ct. 927, 28 L. Ed. 2d 217 (1971).

Memorandum sent by an organization's executive director to the organization's officers regarding a payment made to the organization's treasurer and the treasurer's affiliation with a corporate member was an intracorporate communication, and as such did not satisfy the publication requirement of O.C.G.A. § 51-5-1(b). Koly v. Enney, 508 F. Supp. 2d 1254 (N.D. Ga. 2007), rev'd on other grounds, 269 Fed. Appx. 861 (11th Cir. 2008).

Every publication of libelous matter is a separate cause of action, regardless of the time, place or publisher of the original publication. Peacock v. Retail Credit Co., 302 F. Supp. 418 (N.D. Ga. 1969), aff'd, 429 F.2d 31 (5th Cir. 1970), cert. denied, 401 U.S. 938, 91 S. Ct. 927, 28 L. Ed. 2d 217 (1971).

After a libel is published, and subsequently the same libel is again published by an independent party, without participation by the first publisher, the republication is independent and separate from the first publication. It is an independent tort. Peacock v. Retail Credit Co., 302 F. Supp. 418 (N.D. Ga. 1969), aff'd, 429 F.2d 31 (5th Cir. 1970), cert. denied, 401 U.S. 938, 91 S. Ct. 927, 28 L. Ed. 2d 217 (1971).

Printing libel is regarded as publication when possession of printed matter is delivered with expectation that it will be read by some third person, provided that such result actually follows. Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (1946).

Publisher of matter is responsible, not only for actual words published, but for innuendo that may arise from such words. Montgomery v. Pacific & S. Co., 131 Ga. App. 712, 206 S.E.2d 631, aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988).

Generally, republisher of defamatory statement is equally liable with original publisher thereof. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

No liability attaches to republication of defamatory matter if republication thereof is privileged. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Report on the quality of a painting job containing the writer's expression of the writer's opinions about deficiencies in the work was not libelous. Davis v. Sherwin-Williams Co., 242 Ga. App. 907, 531 S.E.2d 764 (2000).

If a supervisor has a duty to report a matter, the supervisor's report is not considered published for purposes of the tort of libel merely because it has been placed in the subject employee's personnel file. Cartwright v. Wilbanks, 247 Ga. App. 187, 541 S.E.2d 393 (2000).

Tortious act in defamation action occurs at place where libelous material is delivered and circulated. Process Control Corp. v. Witherup Fabrication & Erection, Inc., 439 F. Supp. 1284 (N.D. Ga. 1977).

When the plaintiff alleges publication of libelous matter at certain designated times and places, the plaintiff cannot at trial show publication at different time and place from those alleged since such testimony would tend to prove a separate cause of action, as each publication of matter shown to be libelous constitutes a separate cause of action. Western Union Tel. Co. v. Vickers, 71 Ga. App. 204, 30 S.E.2d 440 (1944).

A communication made by one corporate agent to another is not publication in the legal sense. Lepard v. Robb, 201 Ga. App. 41, 410 S.E.2d 160 (1991); Ekokotu v. Pizza Hut, Inc., 205 Ga. App. 534, 422 S.E.2d 903, cert. denied, 205 Ga. App. 899, 422 S.E.2d 903 (1992).

Memorandum in which a vice chairper-

son of an organization alleged that the organization's vice president and treasurer acted improperly in violation of the organization's conflict of interest rules by allowing the treasurer to receive payment for work that the treasurer performed for the organization, was not actionable under O.C.G.A. § 51-5-1(b) because the memorandum was not considered to have been published in accordance with O.C.G.A. § 51-5-3 but instead was an intracorporate memorandum; it was sent only to board members and contained information related to organization business. Koly v. Enney, 269 Fed. Appx. 861 (11th Cir. 2008) (Unpublished).

Employer's investigation of employee's job performance. — Publication of allegedly defamatory information in the course of an employer's investigation of an employee's job performance, when made to persons in authority, is not "publication" within the meaning of the law. Lepard v. Robb, 201 Ga. App. 41, 410 S.E.2d 160 (1991); Ekokotu v. Pizza Hut, Inc., 205 Ga. App. 534, 422 S.E.2d 903, cert. denied, 205 Ga. App. 899, 422 S.E.2d 903 (1992).

A letter written by a physician containing allegedly defamatory remarks about the plaintiff, a hospital nurse, which was given to the hospital administrator and the director of human resources was not published within the meaning of subsection (b) of O.C.G.A. § 51-5-1, since it was not shown to anyone who did not need to see it for employment purposes. Luckey v. Gioia, 230 Ga. App. 431, 496 S.E.2d 539 (1998).

Publication of allegedly defamatory information in the course of an employer's investigation of an employee's job performance, when made to persons in authority, is not "publication" within the meaning of subsection (b) of O.C.G.A. § 51-5-1 and, whether the communication was made maliciously and with knowledge of falsity is immaterial when there has been no publication, for without publication there is no libel or slander. Kramer v. Kroger Co., 243 Ga. App. 883, 534 S.E.2d 446 (2000).

Privileged statement not published. — A report by a medical consultant to an insurance company was privileged since it was made in the performance of the consultant's private duty to the company. Even assuming the report contained libelous matter, such disclosure was not the "publication of libelous matter." Haezebrouck v. State Farm Mut. Auto. Ins. Co., 216 Ga. App. 809, 455 S.E.2d 842 (1995).

Statements in document subpoenaed for workers' compensation hearing. — Even if statements were libelous and were published in workers' compensation hearing, they were not actionable inasmuch as the document in which they appeared had been subpoenaed by the plaintiff for use in the hearing, and there can be no recovery for an invited libel. Auer v. Black, 163 Ga. App. 787, 294 S.E.2d 616 (1982).

Public Officials

Editorial opinion not libel. — Editorial opinion that a candidate hoped to fool voters by running for public office after the candidate changed the candidate's name to one that was similar to the present governor did not imply an assertion of objective fact that might be proved false. Rather, it was merely speculation as to the candidate's motive based on the candidate's behavior which could not be proven as absolutely true or false and was the sort of opinion that is not actionable as libel. Collins v. Cox Enters., Inc., 215 Ga. App. 679, 452 S.E.2d 226 (1994).

Public official cannot recover for libelous statements unless official can prove statements were made with "actual malice." — Actual malice is defined as "knowledge that the statement is false or reckless disregard of whether it is false or not." Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985, 94 S. Ct. 1580, 39 L. Ed. 2d 882 (1974).

Proof of actual malice or reckless disregard required. — Damages cannot be awarded to public official for defamatory falsehood relating to official conduct in absence of proof of actual malice or reckless disregard of whether statement was true or false. Even when the statement is false, the plaintiff must meet this standard. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976),

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aff'd, 580 F.2d 859 (5th Cir. 1978).

Guideline for ruling on summary judgment. — Inasmuch as the First Amendment mandates that a public figure plaintiff prove actual malice by clear and convincing evidence, a court ruling on a motion for summary judgment in such a case must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists — that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Barber v. Perdue, 194 Ga. App. 287, 390 S.E.2d 234 (1989), cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 414 (1990).

When actual malice is shown, presumed and punitive damages are recoverable if applicable state law permits such damages, and hence special damages need not be shown. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Publisher is liable only on clear proof that defamatory falsehood was made with knowledge of its falsity or with reckless disregard for truth. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

"Reckless disregard for truth" construed. — United States Supreme Court has equated reckless disregard of the truth with subjective awareness of probable falsity; thus, in a libel or slander action there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the defendant's publication. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Constitutional standard of proof of actual malice is that of convincing clarity. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Public figures include those persons who, though not public officials, are involved in issues in which public has justified and important interest. Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who one is or what one has done. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Private individual is one who has not accepted public office nor assumed influential role in ordering society, that is to say, occupies a role of special prominence in the affairs of society or thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, such persons invite attention and comment. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Nonmedia individual defendant accorded constitutional rights. — When the plaintiff is found to be a public figure, a nonmedia individual defendant, whose allegedly defamatory comments are made on telecast, can be accorded rights provided in New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed 2d 686 (1964), which defines the level of constitutional protection accorded to a person who makes alleged defamatory statements about a public person. Woy v. Turner, 573 F. Supp. 35 (N.D. Ga. 1983).

It is for trial judge to determine whether proof shows the plaintiff to be public official. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Whether matter is of public or general concern is question of law for court. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Limited-purpose public figure. — A former city employee who was indicted for theft was a limited-purpose public figure for purposes of a libel suit the employee brought. The controversy, involving the alleged theft of city money by a high-ranking official with direct control over the city's funds, constituted an issue of public concern; the employee was pivotal to the controversy; and the alleged defamation directly related to the employ-

ee's participation in the controversy. Jones v. Albany Herald Publ'g Co., 290 Ga. App. 126, 658 S.E.2d 876 (2008).

Statements attributed to school officials. — District court correctly found that the claimant's complaint alleging Georgia torts of slander, libel, and defamation of character failed to identify any specific written or verbal statements attributed to the school officials because the claimant conceded that the claimant did not know who made the statements which formed the basis of the tort claims, and Georgia tort law made it clear it had not waived its sovereign immunity for tort claims against state officers or employees. Sarver v. Jackson, No. 08-16903, 2009 U.S. App. LEXIS 19735 (11th Cir. Sept. 2, 2009) (Unpublished).

Pleading and Practice

Actions for injuries to reputation must be brought within one year from date of alleged defamatory acts, regardless of whether or not the plaintiff had knowledge of the act or acts at the time of their occurrence. Davis v. Hospital Auth., 154 Ga. App. 654, 269 S.E.2d 867 (1980).

Injunction will not be granted to restrain slander or libel, when there is no infringement of property right. McFarlan v. Manget, 179 Ga. 17, 174 S.E. 712 (1934).

Joint cause of action for libel. — Allegation in a petition in a suit for libel that a writing, which it was alleged was libelous, was written and signed by both defendants on a check issued by one of the defendants, was an allegation of the commission of a joint act by both defendants, and showed a joint, and a joint and several, cause of action. Piedmont Cotton Mills v. James, 59 Ga. App. 239, 200 S.E. 457 (1938).

Pleading of libelous words. — Failure to copy the libel in the declaration, or to set forth its words according to their exact tenor, is only bad pleading in matter of form. Such a defect is amendable. White v. Parks & Co., 93 Ga. 633, 20 S.E. 78 (1894).

Pleading libel by innuendo. — The distinction between pleading libel per se and pleading libel by use of words of covert meaning is that in the former no innuendo need be alleged, the words themselves, if in fact untrue, being a sufficient basis for the action, while in the latter, it is necessary that the pleader allege that a covert meaning attached to the words and that the words were understood by the readers in the covert sense, which was untrue in fact. Grayson v. Savannah News-Press, Inc., 110 Ga. App. 561, 139 S.E.2d 347 (1964).

When charging libel by innuendo or because of a covert meaning it is essential that the pleader allege what the covert meaning is and that the author of the libel intended the statements in the article to be so understood, and that they were in fact so understood by those who read it. Griffin v. Branch, 116 Ga. App. 627, 158 S.E.2d 452 (1967).

Notice and opportunity to be heard. — Trial court erred in granting summary judgment on an election candidate's claim for defamation by a radio broadcast as the candidate did not have a full and fair opportunity to meet and attempt to controvert the assertions with respect to that claim. Howard v. Pope, 282 Ga. App. 137, 637 S.E.2d 854 (2006).

When language used is capable of being understood in double sense, plaintiff may, by innuendo, aver meaning with which the plaintiff thinks it was published, and the jury may find whether the publication was made with that meaning or not. Piedmont Cotton Mills v. James, 59 Ga. App. 239, 200 S.E. 457 (1938); Sheley v. Southeastern Newspapers, Inc., 87 Ga. App. 167, 73 S.E.2d 211 (1952).

When the writing may be understood by the average reader in either of two senses, it is proper to allege in what sense it was actually understood by the reader. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960).

Defense of privilege is not defense that must be affirmatively pled nor specifically pled and is sufficiently raised by motion to dismiss under Ga. L. 1972, p. 689, §§ 4 and 5 (see now O.C.G.A. § 9-11-12(b)). Europa Hair, Inc. v. Browning, 133 Ga. App. 753, 212 S.E.2d 862 (1975).

When article in action for libel was not libelous for any reason urged by

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the plaintiff, the court did not err in dismissing petition on general demurrer (now motion to dismiss). Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946).

If words in an action for libel are incapable of the meaning ascribed to the words by the innuendo, and are prima facie not actionable, the judge at the trial may stop the case. Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946).

If the petition fails to set out a cause of action for any reason, it is the duty of the trial court to dismiss it on general demurrer (now motion to dismiss). Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946).

Trial judge decision on libel. — A trial judge may adjudge and determine, as a matter of law, that a writing complained of in a libel suit is not libelous. Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946).

When words in an action for libel are not libelous per se, and, in the light of the extrinsic facts averred, could not possibly be construed to have a defamatory meaning, the judge may dismiss the declaration on demurrer (now motion to dismiss), or, during the trial, may withdraw the case from the jury. Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946).

Although the general rule is that it is for a jury to determine whether or not the alleged libelous publication was in fact libelous and whether or not it concerned the plaintiff, since there is no connection between the alleged libelous publication and the plaintiff, either directly or by way of colloquium, it is not error for the trial judge to decide the case as a matter of law. Willis v. Upshaw, 95 Ga. App. 241, 97 S.E.2d 520 (1957).

If the petition shows on its face that the printed matter is either true or privileged a general demurrer (now motion to dismiss) to the petition will lie for the reason that the petition on the petition's face sets out no cause of action. Savannah News-Press, Inc. v. Harley, 100 Ga. App. 387, 111 S.E.2d 259 (1959).

In an action for libel, when the alleged defamatory words are as a matter of law not actionable per se, and when the petition does not set out any proper or legitimate item of special damage, and when it fails to allege by way of innuendo that the words complained of convey a covert meaning, wholly different from the ordinary and natural interpretation usually put upon them, and that the author of the libel intended them to be understood in their covert sense, and that they were in fact so understood by those who read them, the petition does not set out a cause of action and should be dismissed on general demurrer (now motion to dismiss). Hardboard Mach. Co. v. Coastal Prods. Corp., 289 F. Supp. 496 (M.D. Ga. 1967), aff'd, 398 F.2d 833 (5th Cir. 1968).

Georgia law clearly does not contemplate submission of the question of liability when no ambiguity appears and the statements are not libelous per se. Dun & Bradstreet, Inc. v. Miller, 398 F.2d 218 (5th Cir. 1968).

In libel cases, when no substantial danger to reputation is apparent, summary judgment is appropriate since the press should be more carefully guarded against exposure to liability for defamation than when clearly defamatory content warns it of liability. Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir.), cert. denied, 444 U.S. 832, 100 S. Ct. 62, 62 L. Ed. 2d 42 (1979).

Because of importance of free speech, summary judgment is rule, and not exception, in defamation cases. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Jury Questions

Question whether particular publication is libelous is question of fact for determination by jury. Constitution Publishing Co. v. Leathers, 48 Ga. App. 429, 172 S.E. 923, later appeal, 50 Ga. App. 137, 177 S.E. 261 (1934); Mead v. True Citizen, Inc., 203 Ga. App. 361, 417 S.E.2d 16 (1992).

Whenever the words spoken or published are susceptible of two constructions, one of which would make them libelous and the other not, it is for the jury to say whether in fact the words are libelous. Beazley v. Reid, 68 Ga. 380 (1882); Colvard v. Black, 110 Ga. 642, 36 S.E. 80 (1900); Jones v. Poole, 62 Ga. App.

309, 8 S.E.2d 532 (1940); Brandon v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940); World Ins. Co. v. Peavy, 110 Ga. App. 651, 139 S.E.2d 440 (1964).

When the language of a publication is reasonably susceptible of the construction that it makes a libelous charge, it becomes libelous when it conveys that charge and would be so understood by the persons to whom the writing might be communicated; and ordinarily it is for the jury to say whether the writing is in fact libelous or not. Western Union Tel. Co. v. Vickers, 71 Ga. App. 204, 30 S.E.2d 440 (1944).

Whether the words used in an alleged publication were libelous or not is, in Georgia, generally a question for the jury. Walker v. Sheehan, 80 Ga. App. 606, 56 S.E.2d 628 (1949); Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950); Hartridge v. Savannah News-Press, Inc., 107 Ga. App. 274, 129 S.E.2d 536 (1963).

If a publication claimed to be defamatory is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read. Grayson v. Savannah News-Press, Inc., 110 Ga. App. 561, 139 S.E.2d 347 (1964).

If a publication has no necessarily defamatory meaning, but can be understood in more than one way, one of which is defamatory, then it is for the jury to decide if, on the basis of some innuendo resulting from the circumstances surrounding the publication, the publication in fact had that defamatory meaning. Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir.), cert. denied, 444 U.S. 832, 100 S. Ct. 62, 62 L. Ed. 2d 42 (1979).

As a general rule, the question of whether a particular publication is libelous is a question for the jury, but if its meaning is not ambiguous and can reasonably have but one interpretation, the question is one of law for the judge. Morrison v. Hayes, 176 Ga. App. 128, 335 S.E.2d 596 (1985).

Issue of whether the words used in a letter written by a former employee of a firm to customers about the firm's new owners were defamatory was subject to more than one interpretation and, thus, was an issue for jury determination. John D. Robinson Corp. v. Southern Marine & Indus. Supply Co., 196 Ga. App. 402, 395 S.E.2d 837 (1990).

It is for jury to say whether words as applied to the plaintiff were in fact libel, that is, whether they were understood and taken in a libelous sense. Hardboard Mach. Co. v. Coastal Prods. Corp., 289 F. Supp. 496 (M.D. Ga. 1967), aff'd, 398 F.2d 833 (5th Cir. 1968).

Whether libelous matter referred to the plaintiff or to another person was question of fact for jury to determine, in considering all the facts and circumstances, including the manner of publication. Walker v. Sheehan, 80 Ga. App. 606, 56 S.E.2d 628 (1949); Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Effect of words on public also jury question. — The question as to what effect would be produced upon the public by reading the words employed in the publication, and the question whether or not the tendency of the alleged publication was to bring the petitioner into hatred, contempt, or ridicule, is an issue of fact for the jury, and not a matter to be determined as a matter of law by the court. As a general rule, the question whether a particular publication is libelous, as well as whether the alleged libelous matter was published of and concerning the plaintiff, is a matter of fact to be determined by the jury. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

When words in action for libel are libelous per se, judge can so instruct jury, leaving to it only determination of amount of damages. Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946).

It is error to charge the jury that an imputation of perjury is actionable per se, since the words in their ordinary sense did not mean legal or criminal perjury. Hugh v. McCarty, 40 Ga. 444 (1869).

Question whether libel referred to entire class, or to some particular one in it, was for jury. Hardy v. Williamson,

Jury Questions (Cont'd)

86 Ga. 551, 12 S.E. 874 (1891).

Defendant's summary question of whether character portrayed plaintiff was for jury. — With regard to a person's defamation suit against a book author and a publisher, the trial court properly denied the motions for summary judgment filed by the author and the publisher as the character in the book at issue shared 26 similarities with the person, the person was acknowledged to have been the inspiration for the character and, therefore, the person was permitted to prove that, despite the fictional label, the character bore such a close resemblance to the person that a jury could reasonably conclude that the character was intended to portray the person. Smith v. Stewart, 291 Ga. App. 86, 660 S.E.2d 822 (2008).

Truthfulness of statements made about defendant is question of fact for the jury. Hub Motor Co. v. Zurawski, 157 Ga. App. 850, 278 S.E.2d 689 (1981).

Jury issue on liability of parents for teen's social networking page. — In a libel action involving a teen creating a disparaging social networking page about another teen, the trial court erred by granting the posting teen's parents summary judgment because a reasonable jury could find that the parents proximately caused some part of the victim's injuries by allowing the false and offensive statements to remain on display and continue to reach readers for an additional 11 months after learning of the teen's actions. Boston v. Athearn, 329 Ga. App. 890, 764 S.E.2d 582 (2014).

Erroneous instructions on libel. — Jury was incorrectly instructed that in order to find the defendant magazine liable for libel, the malicious statements must have been "deliberately calculated to injure"; the natural and plain connotation of the phrase incorrectly suggests that the jury must find that the defendant subjectively intended to injure the plaintiff as a prerequisite for liability. Schafer v. Time, Inc., 142 F.3d 1361 (11th Cir. 1998).

Applicability to Specific Cases

It is not libelous per se to refer to one as a divorced man. Duncan v. Credit Serv. Exch., 56 Ga. App. 551, 193 S.E. 591 (1937).

It is not libelous to charge person with doing of thing which person may legally and properly do. Garland v. State, 211 Ga. 44, 84 S.E.2d 9 (1954); Grayson v. Savannah News-Press, Inc., 110 Ga. App. 561, 139 S.E.2d 347 (1964).

To charge person in writing with committing forgery is actionable per se, when writing is read by others and charge is untrue. Western Union Tel. Co. v. Vickers, 71 Ga. App. 204, 30 S.E.2d 440 (1944).

Unfavorable commercial publicity as such is not defamation, since it lacks element of personal disgrace necessary for defamation. Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir.), cert. denied, 444 U.S. 832, 100 S. Ct. 62, 62 L. Ed. 2d 42 (1979).

Statement that performance of contract was inadequate. — The defendant city commissioner was entitled to summary judgment on a cause of action for defamation based on commissioner's statement that the plaintiff corporation's performance on a contract was inadequate since such statement was an opinion, subjective by definition, and was not capable of being proved false. Info. Sys. & Networks Corp. v. City of Atlanta, 281 F.3d 1220 (11th Cir. 2002).

Statement to employer on medical condition. — An action for libel encompasses an expression in writing of a false and malicious defamation which tends to harm a person's reputation or would cause a person to be subject to public hatred, contempt, or ridicule. A hospital administrator's letter to the medical director's direct employer stating the medical director had been diagnosed with an infectious disease did not amount to actionable libel because it conveyed the truth, did not involve a publication, and was made in good faith. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Employer's report of employee's suspected theft to police. — Even if a former employee was able to prove the elements of defamation under O.C.G.A. § 51-5-1(a), the employer was protected against the employee's defamation claims

by the privilege outlined in O.C.G.A. § 51-5-7(3) because the employer acted in good faith in filing a loss report with the police when the employee, a pharmacist, was seen on a hidden camera taking hydrocodone pills from the employer's pharmacy and admitted to doing so, and 92% of the employer's medication losses occurred when the employee was working. McIntyre v. Eckerd Corp., 251 Fed. Appx. 621 (11th Cir. 2007) (Unpublished).

Action may exist for defamation of business or trade. — The privilege of free speech does not confer upon one individual the right to use that privilege to the injury of another and if one prints or publishes words concerning another, or one's business, which are themselves false, the law will presume that it was done maliciously, and award damages accordingly. Ajouelo v. Auto-Soler Co., 61 Ga. App. 216, 6 S.E.2d 415 (1939); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982), aff'd, 729 F.2d 1466 (11th Cir.), cert. denied, 469 U.S. 857, 105 S. Ct. 185, 83 L. Ed. 2d 119 (1984).

Petition in suit for damages for libel, in which the petitioner denied that the petitioner was a bankrupt, as had been stated, and alleged special damages to the petitioner's business by the publication of the alleged false and malicious report, was good against general demurrer (now motion to dismiss). Duncan v. Credit Serv. Exch., 56 Ga. App. 551, 193 S.E. 591 (1937).

Petition which alleged that the defendant placed or pasted on the front windows and door of the plaintiff's place of business, which was located on a main business street, four red cards about four by six inches on which was printed in large bold type the libelous matter, and that such pasted and published notices were read by certain named individuals, sufficiently alleged publication of the libelous matter. Walker v. Sheehan, 80 Ga. App. 606, 56 S.E.2d 628 (1949).

Lost business profits recoverable. — Amendment seeking to recover as special damages lost earnings of the plaintiff's business did not seek to recover future profits and was not, therefore, subject to that objection. Walker v. Sheehan, 80 Ga. App. 606, 56 S.E.2d 628 (1949).

Advertisements between two competing companies. — Statements made by the plaintiff were privileged communications, so the plaintiff was entitled to summary judgment against the defendants' counterclaims for libel. Hickson Corp. v. N. Crossarm Co., 235 F. Supp. 2d 1352 (N.D. Ga. 2002).

Libel action may be brought by corporation damaged by false information supplied to advertisers. — Georgia's libel statute did not preclude a corporation, as opposed to an individual, from bringing a libel action against a rival competitor based on allegations that the rival maliciously published false information to the advertisers that injured the standing and business reputation of the corporation and exposed the corporation to ridicule in the business and public communities. State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting & Body Works, 312 Ga. App. 756, 719 S.E.2d 597 (2011).

Suit against corporation for agent's libel must allege vicarious liability. — In a suit against a corporation for a libel by one of its agents, when the libelous matter is otherwise sufficiently set forth, an allegation that the libel by the agent was within the scope of the company's business and in the course of the agent's employment is sufficient to charge the corporation with libel. World Ins. Co. v. Peavy, 110 Ga. App. 651, 139 S.E.2d 440 (1964).

Creditor has right to ask debtor to pay what the debtor owes without being subject to action for libel. McCravy v. Schneer's, 47 Ga. App. 703, 171 S.E. 391 (1933).

A mere written statement that a person who is not engaged in a vocation which requires credit fails and refuses to pay a debt, and which does not affect the person in the person's business or profession, and which does not impute insolvency to the person, but which is made to the person's employer solely for the purpose of urging the employer to induce the alleged debtor to make payment of the debt, is not libelous per se, and does not render the author of the statement liable without proof of special damage. Estes v. Sterchi Bros. Stores, 50 Ga. App. 619, 179 S.E. 222 (1935).

Applicability to Specific Cases (Cont'd)

False and libelous credit report cannot be held to invade person's right to privacy by placing the person in false light in public eye unless it is disseminated in public. Peacock v. Retail Credit Co., 302 F. Supp. 418 (N.D. Ga. 1969), aff'd, 429 F.2d 31 (5th Cir. 1970), cert. denied, 401 U.S. 938, 91 S. Ct. 927, 28 L. Ed. 2d 217 (1971).

Allegations regarding credit report insufficient to support action. — In suit for libel based on the furnishings to several loan companies of a credit report, allegations in the petition that certain amounts represented by the defendant's report to be owed by the plaintiff were not legal obligations, that certain debts had been paid, and that one loan was being paid on, without indication of when such payments were made, were subject to general demurrer (now motion to dismiss). Duncan v. Credit Serv. Exch., 56 Ga. App. 551, 193 S.E. 591 (1937).

When the borrowers relied on the lender's report to credit bureaus of a default on a sale contract and of the amounts remaining due and owing for their libel counterclaim, but there was no evidence that the report was either false or maliciously made, the trial court properly granted summary judgment to the lenders. Reeder v. GMAC, 235 Ga. App. 617, 510 S.E.2d 337 (1998).

Debtor's defamation claim, under O.C.G.A. § 51-5-1(a), against a creditor for reporting the creditor's repossession of collateral from the debtor to the credit reporting agencies, was properly summarily dismissed because such a claim was preempted by the Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., absent the creditor's malice or willful intent to injure the debtor, which were not shown. Corbin v. Regions Bank, 258 Ga. App. 490, 574 S.E.2d 616 (2002).

Lender did not commit libel against a borrower under O.C.G.A. § 51-5-1(a) when the lender posted a foreclosure notice or when the lender reported late payments to a credit reporting agency because the borrower did not allege that the lender made any false statements. Steed v. EverHome Mortg. Co., 308 Fed. Appx. 364 (11th Cir. 2009) (Unpublished).

Publication implying criminal record. — Petition for damages, which alleges that the defendant published a writing that the plaintiff was "wanted for forgery" at a named place, and that the writing directly or by innuendo charged the plaintiff with having committed the offense of forgery at such place, and was an untrue and malicious defamation of the plaintiff, set out a cause of action for libel. Western Union Tel. Co. v. Vickers, 71 Ga. App. 204, 30 S.E.2d 440 (1944).

When alleged libelous matter consisted of a circular, partly in printing and containing a picture of the plaintiff with a placard across the plaintiff's chest with a number in large white numerals on it, the court did not err in allowing the witnesses to testify as to the impression made upon them by the circular. Western Union Tel. Co. v. Vickers, 71 Ga. App. 204, 30 S.E.2d 440 (1944).

Summary judgment not permitted when the evidence would have permitted a jury to find that the publishers knew that the assertion was false or published with a reckless disregard for the truth and that, therefore, the defendants had acted with malice. Douglas v. Maddox, 233 Ga. App. 744, 505 S.E.2d 43 (1998).

Verdict awarding general damages in a libel suit filed by an attorney against a former client, which showed that the client published facts intimating that the attorney bribed judges, contrary to O.C.G.A. § 16-10-2, was upheld as: (1) the jury could reasonably conclude that the attorney was a limited public figure, and was properly charged on that issue; (2) the client failed to seek any remedy regarding the verdict entered; (3) the trial court did not err in prohibiting the client from offering testimony about corrupt individuals who were exposed as a result of the publication about the attorney; and (4) based on the evidence of the publication on the client's web site, neither a directed verdict or judgment notwithstanding the verdict in the client's favor was authorized. Milum v. Banks, 283 Ga. App. 864, 642 S.E.2d 892 (2007).

Campaign literature implying criminal record. — In a 42 U.S.C. § 1983 suit by political opponents of a

sheriff who, the opponents claimed, libeled the opponents by identifying them as criminals in campaign literature, a majority of the defamatory statements were protected by the First Amendment as rhetorical hyperbole, except for a flier displaying a mug shot of one of the citizens with a caption falsely identifying that citizen as a "convicted" criminal; being patently false, the latter statement was actionable under O.C.G.A. § 51-5-1 because only truth was a defense under O.C.G.A. § 51-5-6. Bennett v. Hendrix, 325 Fed. Appx. 727 (11th Cir. 2009) (Unpublished).

Speculation on laundering of money. — Looking at the broadcast as a whole, any defamatory implication that money flowed through the company to terrorists was presented as mere speculation. Any further implication that the company acted knowingly in laundering money to assist terrorists or terrorist groups remained so unspoken that it, too, could only be speculation and surmise. Mar-Jac Poultry, Inc. v. Katz, No. (RMC), 2011 U.S. Dist. LEXIS 33582 (DC Mar. 30, 2011).

Letter setting forth board member's judgments, tax liens, and crimes. — In a defamation suit brought by a board member of a vacation resort community owners' association against a property owner who wrote a letter detailing the board member's civil judgments, tax liens, and criminal charges, the trial court properly granted the property owner summary judgment as the statements regarding the judgments, tax liens, and criminal charges were garnered from public records and were true. Additionally, the property owner's assessment that the board member was not fit to manage the association's funds if the board member was not able to manage personal finances was the opinion of the property owner and served no basis for the defamation action. McCall v. Couture, 293 Ga. App. 305, 666 S.E.2d 637 (2008).

Employee's personnel record. — When there was a notation upon a former employee's personnel record in the file of a corporate employer that the employee was "discharged for shortages," if defamatory, constitutes a privileged communication, this fact does not prevent its oral publication by an employee from constituting the publication of a libel rather than the commission of slander, an oral defamation. Southland Corp. v. Garren, 138 Ga. App. 246, 225 S.E.2d 920, rev'd on other grounds, 237 Ga. 484, 228 S.E.2d 870 (1976).

Teenager's promiscuity. — Summary judgment was properly entered for the newspaper defendants on a teenager's claim for false light invasion of privacy as even assuming that the articles painted the teenager in a false light as promiscuous, the teenager could not recover on the claim as the circumstances of the death of a young man in the city attorney's pool were of public interest and concern. Torrance v. Morris Publ'g Group, LLC, 281 Ga. App. 563, 636 S.E.2d 740 (2006), cert. denied, 2007 Ga. LEXIS 160 (Ga. 2007).

Defamation of judge or jury. — A publication which tends to impeach the integrity and honesty of jurors or judges in their office, and which denounces a verdict or judgment as infamous, is directed at the individuals and is libelous. Piedmont Cotton Mills v. James, 59 Ga. App. 239, 200 S.E. 457 (1938).

It is libelous and actionable per se to charge judge with unfitness in office and improper conduct in trying cases. Piedmont Cotton Mills v. James, 59 Ga. App. 239, 200 S.E. 457 (1938).

It is libelous per se to charge justice of peace with giving false judgment. Piedmont Cotton Mills v. James, 59 Ga. App. 239, 200 S.E. 457 (1938).

Defamation of legislator. — To publish that a member of the General Assembly was very closely allied with some criminal or corrupt organization might be a reflection upon the member's integrity, motives, and character, and possibly would expose the member to public hatred, contempt, or ridicule, but language that the plaintiff was very closely allied with the labor unions, and used the member's influence in every way possible to secure the enactment of bills sponsored by organized labor, cast no imputation upon the plaintiff's character and was not actionable per se. Anderson v. Kennedy, 47 Ga. App. 380, 170 S.E. 555 (1933).

Defamation of political candidate. — Charging a candidate with being un-

Applicability to Specific Cases (Cont'd)

faithful to the party which has nominated the candidate and with conniving with an opposing party for support has been held not libelous, although the rule is otherwise if a charge of treachery and dishonesty is made against the candidate. Watkins v. Augusta Chronicle Publishing Co., 49 Ga. App. 43, 174 S.E. 199 (1934).

That publications respecting political affairs, public officers and candidates for office are in a measure privileged is recognized by the overwhelming weight of authority. One who seeks public office, or any person who claims approval or patronage from the public, waives one's right of privacy. Watkins v. Augusta Chronicle Publishing Co., 49 Ga. App. 43, 174 S.E. 199 (1934).

Trial court erroneously granted summary judgment against an election candidate, and in favor of the incumbent, on the former's defamation claims stemming from a printed newspaper advertisement, as issues of fact remained as to the actual malice exhibited by the incumbent in publishing the advertisement and the flagrant accusations stated therein went beyond the criticism, hostility, and unfairness a candidate might expect to encounter while running for political office. Howard v. Pope, 282 Ga. App. 137, 637 S.E.2d 854 (2006).

Charge that person has violated trade code, when it appears that no such code was in existence, is not actionable libel or slander. Vandhitch v. Alverson, 52 Ga. App. 308, 183 S.E. 105 (1935).

An averment that the defendants falsely and fraudulently caused news items to be published in the papers to the effect that the plaintiff had violated the barbers' code adopted by the National Recovery Administration, and had been guilty of unfair practices under that code, failed to show any actionable libel, since it was further alleged that the federal government refused to accept the proposed code, and returned the plaintiff's acceptance of that code with the advice that it was of no effect. Vandhitch v. Alverson, 52 Ga. App. 308, 183 S.E. 105 (1935).

Libel by will. — If a paper executed as a will expresses libelous matter, and the act of the executor in propounding the will is relied on to complete the offense and afford ground for recovery against the estate, such reliance must fail because the testator has died and if it be said that the act of the executor in propounding the will could be taken into account, the reply is that the executor was a creature or agency of the law to administer the estate, and was not the testator's representative in the continuation or consummation of the testator's wrong. Citizens' & S. Nat'l Bank v. Hendricks, 176 Ga. 692, 168 S.E. 313 (1933).

Libel per quod. — Because the record established that the plaintiffs did not sustain any financial or economic damage as a result of the inclusion of this advertisement in the seminar material, the plaintiffs had no claim for libel per quod. Zarach v. Atlanta Claims Ass'n., 231 Ga. App. 685, 500 S.E.2d 1 (1998).

Statements made in good faith performance of private duty. — Because a report and videotape prepared by an investigator in connection with the plaintiff's workers compensation claim were privileged communications, the trial court did not err in granting summary judgment against the plaintiff on a defamation claim arising from production of the report and videotape. Ass'n Servs., Inc. v. Smith, 249 Ga. App. 629, 549 S.E.2d 454 (2001).

Letter by vendor's attorney alleging damages to property. — Letter sent by vendor's attorney alleging that, after collapse of sales transaction, property had been found to have been damaged by purchaser, was not libelous per se since the letter made no reference to the property having been intentionally or criminally damaged as contemplated by the criminal statute. Morrison v. Hayes, 176 Ga. App. 128, 335 S.E.2d 596 (1985).

A posted notice intended for store employees stating that the plaintiff "is not allowed in the store" did not support an action for defamation when such words did not tend to injure the plaintiff's reputation or expose the plaintiff to "public hatred, contempt, or ridicule." Chance v. Munford, Inc., 178 Ga. App. 252, 342 S.E.2d 746 (1986).

Imputation of crime. — When the defendant included in a writing a statement saying that the defendant was not saying the plaintiffs were responsible for shooting the defendant's cat, it did not negate the other portions of the writing, including the statement that the plaintiffs were the "prime suspects" in a police investigation, which the jury was entitled to conclude was the equivalent of imputing a crime to the plaintiffs. Harcrow v. Struhar, 236 Ga. App. 403, 511 S.E.2d 545 (1999).

Newspaper article and headline. — In an action by a contractor against a newspaper and the newspaper's editor because: (1) the average reader would have interpreted a printed headline's use of the term "rape" as an attempt to convey the severity of the damage to the land that the contractor inflicted rather than to characterize the contractor's conduct that resulted in the damage as criminal; and (2) the article referred to by the headline did not constitute libel per se as the editor unquestionably did not intend, and readers did not interpret, the word "rape" as having any sexual connotation in the context used in the article, the editor and the newspaper were properly granted summary judgment as to the contractor's libel and libel per se claims. Lucas v. Cranshaw, 289 Ga. App. 510, 659 S.E.2d 612 (2008).

When the overall tone of a newspaper article about the plaintiffs' apparent interest in drug figures might lead the average reader to believe that the plaintiffs were in one way or another linked with the drug trafficker in some illicit capacity, an issue of fact was created which precluded summary judgment in the libel action. Southland Publishing Co. v. Brogdon, 179 Ga. App. 726, 347 S.E.2d 694 (1986).

Reporter mistaken about crime not libel. — In a libel suit, a former city employee who was indicted for theft did not show that a reporter acted with actual malice in writing that the employee pled guilty to a felony, when the employee actually pled nolo contendere to a misdemeanor, and that the employee paid $4,700 in restitution for funds the employee "stole," when the restitution order did not give the purpose of the restitution. The reporter stated that the reporter had been "mixed up" about the nature of the plea and thought that the crime was a felony because the restitution exceeded $500; the only indication on the indictment, which was on felony charges, that the employee pled guilty to lesser charges was a small handwritten note; and the reporter's conclusion that the restitution was to replace stolen money was a reasonable inference drawn from the indictment, which charged the employee with theft by taking. Furthermore, the employee did not show that the newspaper acted with actual malice by leaving online for seven months an uncorrected version of the article that contained inaccurate statements about the employee's plea and restitution. Jones v. Albany Herald Publ'g Co., 290 Ga. App. 126, 658 S.E.2d 876 (2008).

Reporter inadvertently wrote wrong name in story. — Since the reporter who wrote the story testified in a deposition that the reporter reviewed the police report of the burglary and inadvertently looked at the wrong line and picked up the plaintiff's name from the report as the victim of the crime, and subsequently wrote a correction, which was published the following week in the next edition of the paper, the trial court did not err in granting summary judgment to the defendant in this libel action. Mead v. True Citizen, Inc., 203 Ga. App. 361, 417 S.E.2d 16 (1992).

Newspaper cartoon. — Since (1) an exaggerated cartoon character appearing in defendant newspaper was not recognizable as plaintiff; (2) the headline of the accompanying article did not refer to the plaintiff; and (3) the article did not in any way reflect upon the plaintiff or the plaintiff's employment, the plaintiff's claims of libel, libel per se, and invasion of privacy (false light and appropriation) were properly dismissed on summary judgment. Collins v. Creative Loafing Savannah, Inc., 264 Ga. App. 675, 592 S.E.2d 170 (2003).

Publicity from broadcast. — Since publicity from the defendant's broadcast related solely to the operation of the plaintiff's business, the broadcast did not violate the plaintiff's right to be let alone and

Applicability to Specific Cases (Cont'd)

the trial court did not err in granting summary judgment on the plaintiff's claim. Jaillett v. Georgia TV Co., 238 Ga. App. 885, 520 S.E.2d 721 (1999).

Allegation of criminal activity in a radio broadcast by anonymous caller. — Trial court erred in granting summary judgment to a media company in a defamation action pursuant to O.C.G.A. §§ 51-5-1 and 51-5-4; the trial court erred in finding that a musician was a public figure, as the musician was only known locally, and a false claim by an anonymous caller played on the air by a disc jockey was not a matter of public concern, and erred in finding that O.C.G.A. § 51-5-10(a) shielded the company, as there was an issue of fact as to whether the disc jockey made a defamatory statement as well. Riddle v. Golden Isles Broad., LLC, 275 Ga. App. 701, 621 S.E.2d 822 (2005).

False report of death. — Absent special circumstances, the publication of a false report of death, such as a false obituary, is not libelous per se, and it is not defamatory to say therein that a person is dead. Thomason v. Times-Journal, Inc., 190 Ga. App. 601, 379 S.E.2d 551 (1989).

Announcement of "retirement" of discharged contractor. — Company's announcement to its customers that the plaintiff had retired, when in fact the plaintiff had been terminated by the company, did not constitute defamation or libel; moreover, they were privileged, made in the best interests of the company, and were not shown to have been made with malice or in bad faith. Kitfield v. Henderson, Black & Greene, 231 Ga. App. 130, 498 S.E.2d 537 (1998).

A letter written by an agent of a condominium association, mailed to the homeowner-lessor of the condominium occupied by the plaintiff was made only to one who had reason to receive the information which concerned the plaintiff's rental property and income and the plaintiff's duties and responsibilities to the condominium association and, therefore, did not constitute publication of the allegedly defamatory matter as required to state a cause of action for libel. Carter v. Willowrun Condominium Ass'n, 179 Ga. App. 257, 345 S.E.2d 924 (1986).

The director of a property owners' association was not, either because of the director's stature in the community or because of the director's status as a candidate for re-election to the Board of Directors of the association, a "public figure" for all purposes. Sewell v. Eubanks, 181 Ga. App. 545, 352 S.E.2d 802 (1987).

Allegations in a mailer accusing the director of a property owners' association, who was also an employee of a local bank, of "posing as a property owner" and improperly "benefiting by reduced fees" tended to expose the director to public contempt for dishonest or even fraudulent activities, which actions could also be considered incompatible with the proper exercise of the banking business. Sewell v. Eubanks, 181 Ga. App. 545, 352 S.E.2d 802 (1987).

Documents found not to be libelous. See Mays v. Hospital Auth., 582 F. Supp. 425 (N.D. Ga. 1984).

Documents found not to be defamatory. — Plaintiffs did not demonstrate that the inclusion of the plaintiffs' ad in the defendant's seminar material was defamatory as a matter of law; no words accompanied ad explaining the purpose behind its inclusion in the material nor were there any words charging the plaintiffs with participating in insurance fraud or operating the plaintiffs' business in a criminal, dishonest, or immoral manner. Zarach v. Atlanta Claims Ass'n., 231 Ga. App. 685, 500 S.E.2d 1 (1998).

Bank's report that the plaintiff was delinquent in the plaintiff's credit card account, after the ex-spouse signed the plaintiff's name to the application for the account and, in fact, the plaintiff had no account with the bank, was not libelous per se. Smith v. First Nat'l Bank, 837 F.2d 1575 (11th Cir. 1988), cert. denied, 488 U.S. 821, 109 S. Ct. 64, 102 L. Ed. 2d 41 (1988).

Disclosure of contaminated waterways was not actionable. — Since the defendant did not misstate, mischaracterize, or misattribute the results of chemical tests revealing contamination of public waterways near the plain-

tiff's landfill operations, and since the defendant demanded and received a retraction upon a newspaper's accusation of the plaintiff, the statements were not actionable as a matter of law. Speedway Grading Corp. v. Gardner, 206 Ga. App. 439, 425 S.E.2d 676 (1992).

Book published in Ramsey case. — Book, concerning death of the employer's child, was not defamatory as a matter of law under O.C.G.A. § 51-5-1(a) because the statements indicated that the employer did not consider the housekeeper a suspect and stated that the housekeeper was a good, sweet person. Hoffman-Pugh v. Ramsey, 312 F.3d 1222 (11th Cir. 2002).

No physical injury from defamation in book. — With regard to a person's defamation suit against a book author, a publisher, and secondary publishers, the trial court erred by denying the motions for summary judgment filed by the author, the publisher, and the secondary publishers with regard to the person's claims asserting invasion of privacy and infliction of emotional distress claims as the invasion of privacy claim was encompassed by the defamation claim, and the person failed to show any evidence of a physical injury resulting from the alleged negligence. Smith v. Stewart, 291 Ga. App. 86, 660 S.E.2d 822 (2008).

Plaintiff failed to establish that parents entertained serious doubts as to the truth. — In an action in which the plaintiff, who was named by the parents of a murdered child on national television and in the parents' book about their daughter's murder as a potential suspect, filed suit against the parents, asserting both a libel and slander claim, the parents were granted summary judgment on the libel claim; the plaintiff failed to establish that when the parents wrote the book, the parents in fact entertained serious doubts as to the truth of the publication. Wolf v. Ramsey, 253 F. Supp. 2d 1323 (N.D. Ga. 2003).

Scout leader. — Summary judgment dismissing the libel suit was error because when the letter was read as a whole, it could have been found libelous as tending to injure the Boy Scout troop leader's reputation and expose the leader to public hatred, contempt, and ridicule; an average reader could have reasonably construed it to state or imply that the troop leader was immoral because the leader found "nothing really wrong had occurred" when tobacco, alcohol, and pornography were distributed to scouts by a leader and scouts were sexually harassed or abused by a leader. Brittain v. Gast, 259 Ga. App. 124, 575 S.E.2d 899 (2003).

Pleading of libel sufficient based on corporate action. — Company and the owners stated a claim for libel under O.C.G.A. §§ 51-5-1 and 51-5-3 when the evidence at trial showed that the second corporation knew that the atomic absorption test results were unreliable and inaccurate, but reported those results to Georgia Department of Transportation (GDOT) anyway, which directly led to GDOT finding the company in default. Based on the chemist for the second corporation's testimony that the chemist's boss told the chemist that the samples came for the company, a reasonable jury could have found that the second corporation continued to perform the inaccurate testing for pecuniary gain, with the knowledge that the conduct would harm the company. Douglas Asphalt Co. v. Qore, Inc., No. CV206-229, 2010 U.S. Dist. LEXIS 50141 (S.D. Ga. May 20, 2010).

E-mail statement reciting facts about goods. — Trial court's grant of partial summary judgment in favor of an individual in an action by a distributor of manufactured log home packages for breach of contract and libel based on an e-mail was proper as the individual recited a number of factual statements regarding structural engineering, window and door sizing, and material costs which could be disputed by the distributor, but the distributor failed to present any evidence that those statements were not true. Barna Log Homes of Ga., Inc. v. Wischmann, 310 Ga. App. 844, 714 S.E.2d 402 (2011), cert. denied, No. S11C1800, 2012 Ga. LEXIS 218 (Ga. 2012).

Truthful social media postings not defamation. — Judgment notwithstanding the verdict and directed verdicts in a defamation case were affirmed because the plaintiff was properly found to be a public figure in the spheres of running and Christian evangelism and there was

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no evidence of actual malice as to the social media postings, which alleged that the plaintiff was having multiple affairs with married women and had not completed all of the long distance runs, were true; there was no evidence of violations of O.C.G.A. § 16-9-93 or O.C.G.A. § 16-9-93.1. Bickerstaff v. SunTrust Bank, 299 Ga. 459, 788 S.E.2d 787 (2016), cert. denied, 137 S. Ct. 571, 196 L. Ed. 2d 447 (U.S. 2016).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, §§ 1 et seq., 223 et seq.

Am. Jur. Pleading and Practice Forms. — 16B Am. Jur. Pleading and Practice Forms, Libel and Slander, § 1.

C.J.S. — 53 C.J.S., Libel and Slander, §§ 1 et seq., 87 et seq.

ALR. — Placarding debtor as libel, 3 ALR 1596.

Libel by recall petition, 43 ALR 1268.

Bank's return of a check or bill to holder without presentation to the drawee as libel upon drawer, 53 ALR 800.

Imputing to lawyer solicitation of business or fomenting of litigation as libelous, 112 ALR 177.

Injunction as remedy in case of trade libel, 148 ALR 853.

Liability of partners or partnership for libel, 88 ALR2d 474.

Libel: imputing credit unworthiness to nontrader, 99 ALR2d 700.

Libel by will, 21 ALR3d 754.

Relevancy of matter contained in pleading as affecting privilege within law of libel, 38 ALR3d 272.

Postadoption visitation by natural parent, 46 ALR4th 326.

Libel or slander: defamation by gestures or acts, 46 ALR4th 403.

Defamation: publication by intracorporate communication of employee's evaluation, 47 ALR4th 674.

Publication of allegedly defamatory matter by plaintiff ("self-publication") as sufficient to support defamation action, 62 ALR4th 616.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state, 83 ALR4th 1006.

Who is "public official" for purposes of defamation action, 44 ALR5th 193.

Reportorial privilege as to nonconfidential news information, 60 ALR5th 75.

Liability for statement or publication charging plaintiff with killing of, cruelty to, or inhumane treatment of animals, 69 ALR5th 645.

Libel and slander: statements regarding labor relations or disputes, 94 ALR5th 149.

Defamation of manufacturer, regarding product, other than through statement charging breach or nonperformance of contract, 104 ALR5th 523.

Defamation of building contractor or subcontractor other than through statement charging breach or nonperformance of contract, 106 ALR5th 475.

Defamation of member of clergy, 108 ALR5th 495.

Defamation of church member by church or church official, 109 ALR5th 541.

Criticism or disparagement of physician's character, competence, or conduct as defamation, 16 ALR6th 1.

Defamation of psychiatrist, psychologist, or counselor, 67 ALR6th 437.

Defamation of psychiatrist, psychologist, or counselor, 67 A.L.R.6th 437.

51-5-2. Newspaper libel defined; publication prerequisite to recovery.

(a) Any false and malicious defamation of another in any newspaper, magazine, or periodical, tending to injure the reputation of the person and expose him to public hatred, contempt, or ridicule, shall constitute a newspaper libel.

(b) The publication of the libelous matter is essential to recovery. (Ga. L. 1893, p. 131, § 1; Civil Code 1895, § 3835; Civil Code 1910, § 4431; Code 1933, § 105-703.)

Law reviews. — For article, "The Supreme Court on Privacy and the Press," see 12 Ga. L. Rev. 215 (1978). For annual survey of tort law, see 58 Mercer L. Rev. 385 (2006). For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009). For annual survey of law on torts, see 62 Mercer L. Rev. 317 (2010).

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General Consideration

Libel is either per se or per quod. — Defamatory words which are actionable per se are those which are recognized as injurious on their face — without the aid of extrinsic proof. However, if words do not appear defamatory on their face but become defamatory only by the aid of extrinsic facts, the words are not defamatory per se, but per quod, and are said to require innuendo. Macon Tel. Publishing Co. v. Elliott, 165 Ga. App. 719, 302 S.E.2d 692, cert. vacated, 251 Ga. 544, 307 S.E.2d 491 (1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984).

In considering whether a writing is defamatory as a matter of law, the Court of Appeals looks not at the evidence of what the extrinsic circumstances were at the time indicated in the writing, but at what construction would be placed upon it by the average reader. Macon Tel. Publishing Co. v. Elliott, 165 Ga. App. 719, 302 S.E.2d 692, cert. vacated, 251 Ga. 544, 307 S.E.2d 491 (1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984).

Legislature intended this section to provide one cause of action, and only one for combined process of printing and publishing, and thus the number of readers does not increase the one libel, nor constitutes multiple causes of action. Rives v. Atlanta Newspapers, Inc., 220 Ga. 485, 139 S.E.2d 395 (1964).

Publication coming within definition of this section is actionable without any averment of special damage to the plaintiff or of actual malice on the part of the defendant. Southland Publishing Co. v. Sewell, 111 Ga. App. 803, 143 S.E.2d 428 (1965).

Publication of matter which is false and malicious is libelous if publication tends to injure the reputation. Horton v. Georgian Co., 175 Ga. 261, 165 S.E. 443 (1932).

It is true that, if an article tends in any way, by any reasonable construction, to be a malicious defamation of the plaintiff, tending to injure the plaintiff's reputation and expose the plaintiff to public hatred, contempt, or ridicule, such as suggesting that the plaintiff was indicted for a crime involving moral turpitude when, as a matter of fact, the plaintiff was not, the article should be considered as libelous yet, if the article be only a fair report of the action of the grand jury, it cannot be considered as such. Constitution Publishing Co. v. Andrews, 50 Ga. App. 116, 177 S.E. 258 (1934).

A false defamation of another, by means of a newspaper publication which may tend to injure the reputation of any individual and expose the individual to either hatred, contempt, or ridicule is libelous. Southland Publishing Co. v. Sewell, 111 Ga. App. 803, 143 S.E.2d 428 (1965).

Presumption of malice. — The publication of a statement in writing, which is

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untrue, and which may tend to injure the reputation of another and expose the person to public hatred, contempt, or ridicule, will be presumed to have been a malicious publication until sufficient evidence has been produced to rebut the presumption. Horton v. Georgian Co., 175 Ga. 261, 165 S.E. 443 (1932).

Defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff though the words used may at first sight appear only to apply to a class of individuals, and not to be specially defamatory of any one member of that class, still an action may be maintained by any one individual of that class who can satisfy the jury that the words referred especially to the plaintiff. The words must be capable of bearing such special application, or the judge should stop the case. Davis v. Macon Tel. Publishing Co., 93 Ga. App. 633, 92 S.E.2d 619 (1956).

Readers must understand words to apply to plaintiff. — Although a specific intent by one publishing a libel against another to refer to or injure the latter is not ordinarily necessary to constitute a cause of action, it is nevertheless true that the public reading a libelous newspaper, or those to whom the libel is uttered, must understand the words to refer to the plaintiff; and that even when the defamatory matter shows that the name of the person libeled is identical with the name of the plaintiff, it must appear from the face of the petition that the plaintiff is the person to whom reference was made. Minday v. Constitution Publishing Co., 52 Ga. App. 51, 182 S.E. 53 (1935).

Headline and body of article must be considered together. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960).

Words which, if merely spoken, would not be actionable in absence of special damage may be libelous when printed if they are false and tend to injure the reputation and bring one into public hatred, contempt, or ridicule. Ordinarily, general damages only need be alleged in an action for libel. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960).

If words are slanderous would not become less defamatory by publishing in writing, though words which might not be actionable per se as slander may be libelous per se when put in writing or print. Griffin v. Branch, 116 Ga. App. 627, 158 S.E.2d 452 (1967).

Certain newspaper publications are privileged but the privilege is not absolute; it is conditional only and the "liberty of the press" will not authorize a violation of this section. Horton v. Georgian Co., 175 Ga. 261, 165 S.E. 443 (1932).

"News" account must be factually accurate. — To fit within the zone of protection afforded "news", an account must be factually accurate. Maples v. National Enquirer, 763 F. Supp. 1137 (N.D. Ga. 1990).

Less than full report of truth may still be defense. — As long as facts in a newspaper column is not misstated, distorted or arranged so as to convey a false and defamatory meaning, there is no liability for a somewhat less than complete report of the truth, even if the newspaper happens to recognize an element of humor in the situation reported and conveys this, either impliedly or expressly, as well as some of its own editorial opinions in that regard. Mathews v. Atlanta Newspapers, Inc., 116 Ga. App. 337, 157 S.E.2d 300 (1967).

Whether or not libelous material is read is immaterial once it is shown that it was exposed to public view. Rives v. Atlanta Newspapers, Inc., 220 Ga. 485, 139 S.E.2d 395 (1964).

Fact that newspaper published libel as statement by another not justification. — The fact that the defendant's newspaper published the alleged libelous charge as a statement made by another person constitutes no justification. Kirkland v. Constitution Publishing Co., 38 Ga. App. 632, 144 S.E. 821 (1928), aff'd, 169 Ga. 264, 149 S.E. 869 (1929).

Intention of defendant newspaper in publishing alleged libel is immaterial unless the publication be privileged or unless the words, which are otherwise entirely innocent and unambiguous, are alleged to contain a covert meaning. Southeastern Newspapers, Inc. v. Walker, 76 Ga. App. 57, 44 S.E.2d 697 (1947).

One publication is only one libel, but each new printing of paper and its exposure to public view constitutes new libel actionable at law under this section. Rives v. Atlanta Newspapers, Inc., 220 Ga. 485, 139 S.E.2d 395 (1964).

In publication of multi-editioned newspaper, there exists separate cause of action for each edition containing allegedly libelous material. Cox Enters., Inc. v. Gilreath, 142 Ga. App. 297, 235 S.E.2d 633 (1977).

Bearer of libel is as guilty as its author so far as publication is concerned. Crowe v. Constitution Publishing Co., 63 Ga. App. 497, 11 S.E.2d 513 (1940).

Reporter's knowledge imputed to employer. — If a reporter has knowledge of the falsity of statements attributed to the plaintiff in an article, this knowledge can be imputed to the newspaper-employer as the rule in Georgia in libel is that the malicious conduct of an employee is imputed to the employer, provided it is within the scope of the employee's authority. Macon Tel. Publishing Co. v. Elliott, 165 Ga. App. 719, 302 S.E.2d 692, cert. vacated, 251 Ga. 544, 307 S.E.2d 491 (1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984).

Group libel. — One who publishes matter concerning a family in its collective capacity, which is so framed as to make defamatory imputations against all members of the family, assumes the risk of its being libelous as to any member thereof because the libel applies to each individual member throughout the class by the use, without discrimination, of the collective appellation. Leathers v. Constitution Publishing Co., 50 Ga. App. 137, 177 S.E. 261 (1934).

Showing application to plaintiff personally. — When newspaper article refers to two or more members of family, one of them in order to maintain action, had to show application of language used to the member. Leathers v. Constitution Publishing Co., 50 Ga. App. 137, 177 S.E. 261 (1934).

Complaint by father of subject of article. — Statements which could be considered to lower the plaintiff's reputation as a dutiful father, since the statements portrayed him as furnishing the intimate details of his daughter's grief for publication in a national tabloid, could form the basis of a libel complaint, even though the plaintiff personally was not the subject of the article containing the statements. Maples v. National Enquirer, 763 F. Supp. 1137 (N.D. Ga. 1990).

Pleading injury to professional reputation. — In a declaration claiming damages for words calculated to injure the plaintiff's reputation as an attorney at law, it is not sufficient to allege that the defendant was an attorney, it must be stated and proven that the words were used "in reference to his profession." Aiken v. Constitution Publishing Co., 72 Ga. App. 250, 33 S.E.2d 555 (1945).

Trial court may, as matter of law, hold that newspaper article complained of is not libelous. Aiken v. May, 73 Ga. App. 502, 37 S.E.2d 225 (1946).

In newspaper libel cases, when no substantial danger to reputation is apparent, summary judgment is appropriate since the press should be more carefully guarded against exposure to liability for defamation than when clearly defamatory content warns it of liability. Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir.), cert. denied, 444 U.S. 832, 100 S. Ct. 62, 62 L. Ed. 2d 42 (1979).

Improper conduct by public officer. — An article charging a public officer with unbecoming and improper conduct merely to get fees, tends to expose the officer to public contempt within the provisions of this section. Augusta Evening News v. Radford, 91 Ga. 494, 17 S.E. 612, 44 Am. St. R. 53, 20 L.R.A. 533 (1893).

Opinions expressed in letter to editor about police officer. — Former police officer sued a newspaper for libel based on a letter to the editor the newspaper printed. As a public figure, the officer had to establish actual malice on the part of the newspaper under O.C.G.A. § 51-5-7(9) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), but failed to do so because the statements at issue were opinions that were not susceptible of being proved true or false. Evans v. Sandersville Georgian, Inc., 296 Ga. App. 666, 675 S.E.2d 574 (2009).

Article based on reports of police authorities. — Trial court's denial of

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summary judgment motions filed by a newspaper and a reporter in a libel action brought by a healthcare worker was error because truthful reports of information received from any arresting officer or police authorities were conditionally privileged under O.C.G.A. § 51-5-7(8), and the articles at issue accurately reflected statements in a police investigative report and made by a sheriff; the reporter's affidavit reflected that the reporter accurately reported statements made by the sheriff, and the healthcare worker did not come forward with any evidence to rebut the reporter's affidavit. Additionally, reading a headline in conjunction with one of the articles, the average reader would have believed that the healthcare worker had been arrested and charged with aiding another to escape from custody, which was true at the time. Cmty. Newspaper Holdings, Inc. v. King, 299 Ga. App. 267, 682 S.E.2d 346 (2009).

Summary judgment in favor of a newspaper was proper. — Summary judgment in favor of a newspaper in a father's defamation case was proper because the newspaper's statements that accurately reflected an incident report prepared by police officers and the father's arrest warrant were privileged, a statement that the father was trying to protect the daughter by preparing a false lab report and making false statements was the opinion of the writer, and thus was not libelous, and a statement that the father was removed from a position with the police department's crimestoppers the day of the arrest was substantially true, since the father was removed one week after the arrest, and was therefore not false for purposes of defamation. Austin v. PMG Acquisition, LLC, 278 Ga. App. 539, 629 S.E.2d 417 (2006).

Summary judgment was properly granted for the newspaper defendants on a teenager's libel claim as the statement that the teenager's window had to be nailed shut to prevent the teenager from letting boys in the teenager's room was privileged as it was based on information received from police authorities; the teenager did not come forward with evidence of malice. Torrance v. Morris Publ'g Group, LLC, 281 Ga. App. 563, 636 S.E.2d 740 (2006), cert. denied, 2007 Ga. LEXIS 160 (Ga. 2007).

Decision granting summary judgment in favor of a newspaper corporation and various reporters on a decedent's claims of libel was proper as a reasonable reader would have understood information allegedly linking the decedent to a bombing was preliminary in nature and published during the very early stages of an ongoing investigation into the bombing. Bryant v. Cox Enters., 311 Ga. App. 230, 715 S.E.2d 458 (2011), cert. denied, No. S11C1916, 2012 Ga. LEXIS 37 (Ga. 2012).

Remarks of counsel falsely published. — A publication is made in a newspaper, of the proceedings of a judicial trial, in which appear what purport to be slanderous remarks of counsel, made during the progress of the case, which were not in fact made by the counsel, the publisher is liable to the party aggrieved. Atlanta News Publishing Co. v. Medlock, 123 Ga. 714, 51 S.E. 756, 3 L.R.A. (n.s.) 1139 (1905).

Omission of information from a statement admittedly published will not support an action for libel. Jim Walter Homes, Inc. v. Strickland, 185 Ga. App. 306, 363 S.E.2d 834 (1987), cert. denied, 185 Ga. App. 910, 363 S.E.2d 834 (1988).

Cited in Abernathy v. News Publishing Co., 45 Ga. App. 693, 165 S.E. 924 (1932); Barwick v. Wind, 203 Ga. 827, 48 S.E.2d 523 (1948); Shiver v. Valdosta Press, 82 Ga. App. 406, 61 S.E.2d 221 (1950); Savannah News Press, Inc. v. Grayson, 102 Ga. App. 59, 115 S.E.2d 762 (1960); Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965); Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980); Sigmon v. Womack, 158 Ga. App. 47, 279 S.E.2d 254 (1981); Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

Construction of Words

When words are clear and unambiguous, they will be construed in their ordinary and natural sense, and a court will hold as a matter of law that they are not libelous, however, the courts have extended the rule, with regard to the necessity of alleging the intention of the

author of the allegedly libelous matter, to include those situations where though the words are clear and unambiguous they are used with a covert meaning and the author intended in such covert sense. Southeastern Newspapers, Inc. v. Walker, 76 Ga. App. 57, 44 S.E.2d 697 (1947).

Language alleged to be defamatory must be construed as a whole, that is, the words must be construed in connection with other parts of the conversation or published matter, written or printed. Thus, in determining whether a publication is libelous the headlines of the article cannot be disregarded, nor the character of display of the headlines. Constitution Publishing Co. v. Andrews, 50 Ga. App. 116, 177 S.E. 258 (1934).

The entire article or publication is to be considered, and the language used must be interpreted even by the jury in the light of its ordinary significance, unless the circumstances show that by innuendo it has another meaning which was intended by the publisher. Constitution Publishing Co. v. Andrews, 50 Ga. App. 116, 177 S.E. 258 (1934).

Ordinary understanding of words. — Publication claimed to be defamatory must be read and construed in the sense in which readers to whom it is addressed would ordinarily understand it. So the whole item, including display lines, should be read and construed together, and its meaning and signification thus determined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, upon the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read. Constitution Publishing Co. v. Andrews, 50 Ga. App. 116, 177 S.E. 258 (1934).

The language of an alleged libel must be construed, not by what the writer intended to mean, but by the construction which would be placed upon it by the average and reasonable reader. Whether or not an average and reasonable reader, under the circumstances, in reading the libelous article may have determined that the unnamed party referred to therein is the plaintiff in this case is a question for a jury to determine. Davis v. Macon Tel. Publishing Co., 93 Ga. App. 633, 92 S.E.2d 619 (1956).

When writing may be understood by average reader in either of two senses, it is proper to allege in what sense it was actually understood by the reader. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960).

When the words used are capable of having two or more different meanings, the words are ambiguous, and the plaintiff may allege the meaning with which the plaintiff claims the words were published, and it is for the jury to determine whether the words were so published. Macon Tel. Publishing Co. v. Elliott, 165 Ga. App. 719, 302 S.E.2d 692, cert. vacated, 251 Ga. 544, 307 S.E.2d 491 (1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984).

Admitting testimony of readers. — Testimony of readers of alleged defamatory language as to what the readers understood the words to mean may be admitted when the meaning is doubtful or ambiguous. Macon Tel. Publishing Co. v. Elliott, 165 Ga. App. 719, 302 S.E.2d 692, cert. vacated, 251 Ga. 544, 307 S.E.2d 491 (1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984).

Electronic Publication

Publication on website compared. — Verdict awarding general damages in a libel suit filed by an attorney against a former client, which showed that the client published facts intimating that the attorney bribed judges, contrary to O.C.G.A. § 16-10-2, was upheld as: (1) the jury could reasonably conclude that the attorney was a limited public figure, and was properly charged on that issue; (2) the client failed to seek any remedy regarding the verdict entered; (3) the trial court did not err in prohibiting the client from offering testimony about corrupt individuals who were exposed as a result of the publication about the attorney; and (4)

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based on the evidence of the publication on the client's web site, neither a directed verdict or judgment notwithstanding the verdict in the client's favor was authorized. Milum v. Banks, 283 Ga. App. 864, 642 S.E.2d 892 (2007).

Damages

When the petition alleged libel per se and injury to the plaintiff's reputation, allegation of special damages was unnecessary. Sheley v. Southeastern Newspapers, Inc., 87 Ga. App. 167, 73 S.E.2d 211 (1952).

A libel cause of action is set out if it shows the plaintiff suffered an injury to the plaintiff's reputation for which right of action no special damages are necessary. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960).

Award of damages without finding of malicious action. — Although malice is an element in both malicious prosecution and libel and slander, the jury awarding compensatory and punitive damages against the defendant in a suit for malicious prosecution and libel and slander did not necessarily make a factual finding that the defendant acted maliciously, since the jury was charged that malice may be inferred and that malice may consist of a "general disregard of the right consideration of mankind" and that it could award punitive damages if the circumstances showed "an entire want of care, and an indifference to consequences." Daniel v. Jenkins, 70 Bankr. 408 (Bankr. N.D. Ga. 1987).

Jury Issues

Whether statement damaged plaintiff's reputation is jury question. — When a court cannot say, in a libel action, as a matter of law that a newspaper article does not tend to injure the plaintiff's reputation in the minds of the average reader, a jury question is presented. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960).

When a petition presents a jury question as to whether the alleged false statements in a newspaper article, in the context alleged, would be understood by the average reader in such manner as to injure the plaintiff's reputation and subject the plaintiff to public ridicule and contempt, a cause of action for newspaper libel is stated. Floyd v. Atlanta Newspapers, Inc., 102 Ga. App. 840, 117 S.E.2d 906 (1960).

Under allegations in libel case, it was jury question whether the newspaper charged commission of crime in printing that the plaintiff had badly treated the child by various specified acts. Crowe v. Constitution Publishing Co., 63 Ga. App. 497, 11 S.E.2d 513 (1940).

Whether the language in question charged the commission of a crime or not it was question for the jury whether it intended to injure the reputation of the plaintiff and to expose the plaintiff to public hatred, contempt, or ridicule. Crowe v. Constitution Publishing Co., 63 Ga. App. 497, 11 S.E.2d 513 (1940).

When in an action for libel the publication sued on is ambiguous and capable of being understood in a double sense, the one criminal and the other innocent, it is a question for the jury to determine whether or not the publication is susceptible to the criminal or the innocent interpretation under all the facts and attendant circumstances of the publication. Southeastern Newspapers, Inc. v. Walker, 76 Ga. App. 57, 44 S.E.2d 697 (1947).

When the words published are ambiguous and capable of being understood in a double sense, the one criminal and the other innocent, the plaintiff may by proper allegation aver the meaning with which the plaintiff claims that it was published and the jury may find whether it was published with that meaning or not. Sheley v. Southeastern Newspaper, Inc., 87 Ga. App. 167, 73 S.E.2d 211 (1952).

Jury question. — When words are capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, which of the two meanings will be attributed to it by those to whom it is addressed or by whom it may be read. Macon Tel. Publishing Co. v. Elliott, 165 Ga. App. 719, 302 S.E.2d 692, cert. vacated, 251 Ga. 544, 307 S.E.2d 491 (1983),

cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984).

Except when an alleged writing is not defamatory as a matter of law, the general rule is that the issue of defamation is a matter of fact to be determined by a jury. Macon Tel. Publishing Co. v. Elliott, 165 Ga. App. 719, 302 S.E.2d 692, cert. vacated, 251 Ga. 544, 307 S.E.2d 491 (1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984).

Under Georgia law, when an article may be ascribed more than one meaning, one of which would be libelous and actionable and the other not, it is for the jury to say which meaning will be attributed to it by a reader. Maples v. National Enquirer, 763 F. Supp. 1137 (N.D. Ga. 1990).

As a general rule, the question whether a particular publication is libelous, that is, whether the published statement was defamatory, is a question for the jury. Stalvey v. Atlanta Bus. Chronicle, Inc., 202 Ga. App. 597, 414 S.E.2d 898, cert. denied, 202 Ga. App. 907, 414 S.E.2d 898 (1992).

Trial court erred by granting summary judgment to a publisher in a former creative director's defamation suit regarding a story published that the creative director was demoted for poor performance as opposed to having stepped down voluntarily as a result of not enjoying certain executive aspects of the promotion because there was sufficient evidence to create a jury issue on each essential element of the claim, such as whether the creative director was demoted voluntarily or whether it was due to unsatisfactory performance, and the falsity of the report, which depended on whether the demotion resulted from dissatisfaction or not. However, the trial court properly granted the creative director's former employer and its chief executive officer summary judgment on an invasion of privacy claim since the creative director had signed a release after termination of employment, which expressly stated that the former employer and the chief executive officer were not liable for any invasion of privacy claim. Gettner v. Fitzgerald, 297 Ga. App. 258, 677 S.E.2d 149 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, §§ 223 et seq., 227 et seq.

C.J.S. — 53 C.J.S., Libel and Slander, §§ 1 et seq., 149 et seq.

ALR. — Libelous or privileged character of publication by newspaper based on matter received from news agency or regular correspondent, 86 ALR 475.

Libel and slander: false news reports as to births, betrothals, marriages, divorces, or similar marital matters, 9 ALR3d 559.

Actionability of false newspaper report that plaintiff has been arrested, 93 ALR3d 625.

Libel by newspaper headlines, 95 ALR3d 660.

Defamation: publication of "Letter to Editor" in newspaper as actionable, 99 ALR3d 573.

Defamation: privilege attaching to news report of criminal activities based on information supplied by public safety officers — modern status, 47 ALR4th 718.

Reportorial privilege as to nonconfidential news information, 60 ALR5th 75.

Liability of newspaper for libel and slander — 21st century cases, 22 ALR6th 553.

51-5-3. What constitutes publication of libel.

A libel is published as soon as it is communicated to any person other than the party libeled. (Orig. Code 1863, § 2918; Code 1868, § 2925; Code 1873, § 2976; Code 1882, § 2976; Civil Code 1895, § 3834; Civil Code 1910, § 4430; Code 1933, § 105-705.)

Law reviews. — For comment on Walter v. Davidson, 214 Ga. 187, 104 S.E.2d 113 (1958), holding that defamatory statements made by a member of faculty before a chaplain, another member of faculty, are privileged as a result of their relationship as colleagues, see 21 Ga. B. J. 239 (1958). For comment on Arvey Corp. v. Peterson, 178 F. Supp. 132 (E.D. Pa. 1959), finding dictation of material to stenographer sufficient publication to support an action for libel, see 11 Mercer L. Rev. 381 (1960). For comment on Rives v. Atlanta Newspaper, Inc., Case No. 40617, Ga. App., July 16, 1964, rehearing denied, July 30, 1964, see 1 Ga. St. B. J. 236 (1964). For comment, "Room for Error Online: Revising Georgia's Retraction Statute to Accommodate the Rise of Internet Media," see 28 Ga. St. U.L. Rev. 923 (2012).

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Necessity of publication. — Before there can be a recovery for libel under O.C.G.A. § 51-5-1, there must be communication to any person other than the party libeled. Sigmon v. Womack, 158 Ga. App. 47, 279 S.E.2d 254 (1981).

A parent's claims of defamation against a school official were either time-barred or, if viable, failed as a matter of law because: (1) there was no claim that the alleged defamatory letter was published to anyone other than the parent; and (2) without publication, there could be no cause of action for defamation. Chisolm v. Tippens, 289 Ga. App. 757, 658 S.E.2d 147 (2008), cert. denied, 129 S. Ct. 576, 172 L.Ed.2d 431 (2008).

Statute of limitations barred claim. — Conspiracy to defame action against a police officer was properly dismissed on statute of limitations grounds as: (1) under O.C.G.A. § 51-5-3, a libel was published as soon as it was communicated, and the claim accrued no later than the date of the officer's last communication with the newspaper defendants; (2) there was no evidence that the officer directed or procured the reporters to record and publish the officer's comments; (3) under O.C.G.A. § 9-3-33, a party had one year from the date that a slanderous statement was uttered or published to bring suit; (4) case law did not support the teenager's claim that the limitation period for conspiracy to defame ran from the date of the publication of the articles; and (5) an invasion of privacy claim was not an injury to the teenager's person and was not subject to the two-year limitation period in O.C.G.A. § 9-3-33 since the interest protected was clearly that of reputation. Torrance v. Morris Publ'g Group, LLC, 281 Ga. App. 563, 636 S.E.2d 740 (2006), cert. denied, 2007 Ga. LEXIS 160 (Ga. 2007).

Printing libel is regarded as publication when possession of the printed matter is delivered with the expectation that it will be read by some third person, provided that such result actually follows. Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (1946).

Word "communicated" and word "publication" are broad enough to include reading aloud of written defamation. Garren v. Southland Corp., 235 Ga. 784, 221 S.E.2d 571 (1976).

Oral communication of written defamation constitutes publication of libel. Garren v. Southland Corp., 235 Ga. 784, 221 S.E.2d 571 (1976).

Libel may be published by transmission thereof through telegraph; the writing of a message and the delivery of it to the telegraph company for transmission to the plaintiff constitutes a publication by the writer of the message. Brandon v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940).

Letter written and mailed by one agent of corporation within scope of the agent's employment to another agent of same corporation does not amount to publication so as to constitute a libel as against the corporation. George v. Georgia Power Co., 43 Ga. App. 596, 159 S.E. 756 (1931).

Intracorporate communications. — Memorandum in which a vice chairperson of an organization alleged that the organization's vice president and treasurer acted improperly in violation of the organization's conflict of interest rules by allowing the treasurer to receive payment for work that the treasurer performed for

the organization, was not actionable under O.C.G.A. § 51-5-1(b) because the memorandum was not considered to have been published in accordance with O.C.G.A. § 51-5-3 but instead was an intracorporate memorandum because it was sent only to board members and contained information related to organization business. Koly v. Enney, 269 Fed. Appx. 861 (11th Cir. 2008) (Unpublished).

Circulation of employment evaluation within company not publication. — There is no publication giving rise to a claim for libel when a report written by the immediate supervisor evaluating the performance of duties by a corporate employee, being critical of the employee and the employee's performance, is sent to the employee personally, to the director of the division of the corporation in which the employee works, to members of the office personnel committee, whose duties include the evaluating of the performance of employees on the job for retention on the job, transfer, promotion or discharge, this being done largely through the use of personnel files maintained on the employees, and to the secretary of the committee who is in charge of the maintenance of the files. Taylor v. St. Joseph Hosp., 136 Ga. App. 831, 222 S.E.2d 671 (1975).

Dictation of letter to stenographer. — Letter dictated to stenographer and sent to agent of corporation is not published within the meaning of this section. Central of Ga. Ry. v. Jones, 18 Ga. App. 414, 89 S.E. 429 (1916).

Reading termination notice in presence of others. — That the author of the termination notice read it to the employee in the presence of the co-manager of the store who had general supervisory authority does not constitute publication and, the fact that in filling out an application employee personally informed a prospective employer that the employee was terminated by the employee's previous employer for "misappropriation of company funds" does not constitute a publication of a libel by the former employer; in this regard the employee libeled oneself by the employee's own voluntary action. Sigmon v. Womack, 158 Ga. App. 47, 279 S.E.2d 254 (1981).

Statements in document subpoenaed for workers' compensation hearing. — Even if the statements were libelous and were published in the workers' compensation hearing, were not actionable inasmuch as the document in which appeared had been subpoenaed by the plaintiff for use in the hearing, and there can be no recovery for an invited libel. Auer v. Black, 163 Ga. App. 787, 294 S.E.2d 616 (1982).

Publication to plaintiff's representatives. — There is no actionable publication of libel when alleged libelous statements are communicated to one whom the plaintiff had appointed to represent the plaintiff at a meeting with the defendant at the plaintiff's request. King v. Masson, 148 Ga. App. 229, 251 S.E.2d 107 (1978).

Parental liability for social networking posting by teen. — In a libel action involving a teen creating a disparaging social networking page about another teen, the trial court erred by granting the posting teen's parents summary judgment because a reasonable jury could find that the parents proximately caused some part of the victim's injuries by allowing the false and offensive statements to remain on display and continue to reach readers for an additional 11 months after learning of the teen's actions. Boston v. Athearn, 329 Ga. App. 890, 764 S.E.2d 582 (2014).

The rule, that there is no publication when words are communicated only to person defamed, is subject to exception or qualification. Thus, in the case of a libel, whether the general rule extends to a disclosure by the person libeled is to be determined by the causal relation existing between the libel and the publication. There may be a publication when the sender intends or has reason to suppose that the communication will reach third persons, which happens, or which result naturally flows from the sending. Colonial Stores, Inc. v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (1946).

Letter sent to others. — While letter addressed to person libeled does not constitute publication, copies sent by author to third persons does constitute publication. Brandon v. Arkansas Fuel Oil Co., 64 Ga. App. 139, 12 S.E.2d 414 (1940).

When the plaintiff in action for libel alleges publication of libelous matter

at certain designated times and places, the plaintiff cannot at trial show publication at a different time and place from those alleged since such testimony would tend to prove a separate cause of action as each publication of matter shown to be libelous constitutes a separate cause of action. Western Union Tel. Co. v. Vickers, 71 Ga. App. 204, 30 S.E.2d 440 (1944).

"Did publish" as a sufficient allegation. — The averment in the plaintiff's petition, that the defendant "did publish" the alleged libelous matter, imported a communication to others. Morgan v. Black, 132 Ga. 67, 63 S.E. 821 (1909).

Separate publication not material for amendment. — An amendment which sought to add to a petition, by declaring upon another and distinct publication alleged to have been libelous, was properly rejected. Colvard v. Black, 110 Ga. 642, 36 S.E. 80 (1900).

Plaintiff may join all previous publications in same petition. Central of Ga. Ry. v. Sheftall, 118 Ga. 865, 45 S.E. 687 (1903).

Burden of proof. — The plaintiff has the burden of proof on the question of the publication of the defamatory matter; to satisfy this burden, it is necessary that the plaintiff show not only that the defendant spoke or wrote or otherwise prepared the defamatory matter or made it available to a third person, but also that the third person understood its significance. Sigmon v. Womack, 158 Ga. App. 47, 279 S.E.2d 254 (1981).

Invited libel. — To constitute an invited libel it is enough that the complainant requests or consents to the presence of a third party and solicits the publication of matter which the complainant knows or has reasonable cause to suspect will be unfavorable to the complainant. Sophianopoulos v. McCormick, 192 Ga. App. 583, 385 S.E.2d 682 (1989).

When a university professor sought the assistance of a professional association in resolving a complaint with the professor's superiors and knew that the superiors would respond with information unfavorable to the professor, the professor's actions were sufficient to constitute an invited libel. Sophianopoulos v. McCormick, 192 Ga. App. 583, 385 S.E.2d 682 (1989).

Reevaluation of punitive damages. — Since the jury might not have awarded the total amount of attorney fees or the sum of $10,000 for punitive damages if were considering the husband's liability alone, reversal of judgment against the wife warranted a new trial for reevaluation of these damages. Roberts v. Lane, 210 Ga. App. 10, 435 S.E.2d 227 (1993).

Cited in Aiken v. Constitution Publishing Co., 72 Ga. App. 250, 33 S.E.2d 555 (1945); American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962); Dickey Constr. Co. v. Georgia S.E. Corp., 116 Ga. App. 791, 159 S.E.2d 180 (1967); Georgia Power Co. v. Busbin, 159 Ga. App. 416, 283 S.E.2d 647 (1981); Mays v. Hospital Auth., 582 F. Supp. 425 (N.D. Ga. 1984); Merritt v. Brantley, 936 F. Supp. 988 (S.D. Ga. 1996); Kramer v. Kroger Co., 243 Ga. App. 883, 534 S.E.2d 446 (2000); Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002); Gettner v. Fitzgerald, 297 Ga. App. 258, 677 S.E.2d 149 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, § 223 et seq.

C.J.S. — 53 C.J.S., Libel and Slander, § 87 et seq.

ALR. — Libel and slander: entries in records as a publication, 7 ALR 900.

Libel and slander: communication of defamatory matter only to person defamed as a publication which will support a civil action, 24 ALR 237; 46 ALR 562.

Communication of defamatory matter only to person defamed as a publication which will support a civil action, 46 ALR 562.

Communication to agent or representative of person defamed as publication or as privileged, 172 ALR 208.

Admissibility on question of damages in action for libel or slander of testimony as to the impression or effect of the matter upon the minds of individuals, 12 ALR2d 1005.

Conflict of laws with respect to the "single publication" rule as to defamation,

invasion of privacy, or similar tort, 58 ALR2d 650.

Liability of publisher of defamatory statement for its repetition or republication by others, 96 ALR2d 373.

What constitutes "publication" of libel in order to start running of period of limitations, 42 ALR3d 807.

Libel and slander: dictation to defendant's secretary, typist, or stenographer as publication, 62 ALR3d 1207.

Defamation: publication by intracorporate communication of employee's evaluation, 47 ALR4th 674.

Publication of allegedly defamatory matter by plaintiff ("self-publication") as sufficient to support defamation action, 62 ALR4th 616.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state, 83 ALR4th 1006.

Criticism or disparagement of physician's character, competence, or conduct as defamation, 16 ALR6th 1.

51-5-4. Slander defined; when special damage required; when damage inferred.

(a) Slander or oral defamation consists in:

(1) Imputing to another a crime punishable by law;

(2) Charging a person with having some contagious disorder or with being guilty of some debasing act which may exclude him from society;

(3) Making charges against another in reference to his trade, office, or profession, calculated to injure him therein; or

(4) Uttering any disparaging words productive of special damage which flows naturally therefrom.

(b) In the situation described in paragraph (4) of subsection (a) of this Code section, special damage is essential to support an action; in the situations described in paragraphs (1) through (3) of subsection (a) of this Code section, damage is inferred. (Orig. Code 1863, § 2919; Code 1868, § 2926; Code 1873, § 2977; Code 1882, § 2977; Civil Code 1895, § 3837; Civil Code 1910, § 4433; Code 1933, § 105-702.)

Cross references. — Form to be used in action for words, § 9-10-204.

Law reviews. — For article, "Defamation and Invasion of Privacy," see 27 Ga. St. B. J. 18 (1990). For annual survey article on tort law, see 50 Mercer L. Rev. 335 (1998). For survey article on law of torts, see 59 Mercer L. Rev. 397 (2007). For survey article on tort law, see 60 Mercer L. Rev. 375 (2008).

For comment on Braden v. Baugham, 74 Ga. App. 802, 41 S.E.2d 581 (1947), see 9 Ga. B. J. 456 (1947). For comment on Woolf v. Colonial Stores, Inc., 76 Ga. App. 565, 46 S.E.2d 620 (1948), see 11 Ga. B. J. 70 (1948). For comment discussing slander in reference to one's business or occupation, in light of Keefe v. O'Brien, 203 Misc. 113, 116 N.Y.S.2d 286 (S. Ct. 1952), holding that words accusing labor leader of communism insufficient to constitute slander per se as words did not concern person in his occupation, see 15 Ga. B. J. 357 (1953). For comment on American Broadcasting-

Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962), see 25 Ga. B. J. 310 (1963). For comment on Hinkle v. Alexander, 244 Ore. 267, 417 P.2d 586 (1966), suggesting adoption by

Georgia of a uniform rule on proof of damages in libel actions, see 18 Mercer L. Rev. 297 (1966).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases

General Consideration

This section is a codification of common law. Blackstock v. Fisher, 95 Ga. App. 117, 97 S.E.2d 322 (1957); Hardboard Mach. Co. v. Coastal Prods. Corp., 289 F. Supp. 496 (M.D. Ga. 1967), aff'd, 398 F.2d 833 (5th Cir. 1968).

The definition of slander in Georgia has been incorporated into the definition of libel. Smith v. First Nat'l Bank, 837 F.2d 1575 (11th Cir.), cert. denied, 488 U.S. 821, 109 S. Ct. 64, 102 L. Ed. 2d 41 (1988).

Word "trade" is sufficiently broad to include employment by another. Rogers v. Adams, 98 Ga. App. 155, 105 S.E.2d 364 (1958).

False statement about trade required. — Slander per se pursuant to O.C.G.A. § 51-5-4(a)(3) is a false statement against a plaintiff in reference to the plaintiff's trade, office, or profession, calculated to injure the plaintiff therein. Crown Andersen, Inc. v. Ga. Gulf Corp., 251 Ga. App. 551, 554 S.E.2d 518 (2001).

Tort of trade libel not recognized under Georgia law. — Georgia law did not recognize the tort of trade libel because the tort of trade libel overlapped with several torts already recognized under Georgia law, particularly defamation and tortious interference with business relations. State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting & Body Works, 312 Ga. App. 756, 719 S.E.2d 597 (2011).

Scope of section. — Under this section slander may consist in falsely and maliciously imputing to another a crime, charging one with having some contagious disorder, ascribing to one guilt of some debasing act which may exclude one from society (in all of which general damages may be forthcoming) or making charges against one calculated to injure one in one's trade, office, or profession, in which case special damages must be proved. Kaufman v. Atlanta Lawn Tennis Ass'n, 150 Ga. App. 315, 257 S.E.2d 383 (1979).

Words to be slanderous, must impute to another a crime punishable by law; or charge one having some contagious disorder, or being guilty of some debasing act which may exclude one from society; or a charge made against another with reference to one's trade, office, or profession calculated to injure one therein; or any disparaging words productive of special damages flowing naturally therefrom. In the last case, the special damage is essential to support the action; in the first three, damage is inferred. Anderson v. Fussell, 75 Ga. App. 866, 44 S.E.2d 694 (1947).

If the words spoken are ambiguous and are not understood by the one hearing them or intended, as imputing a crime; or charging the plaintiff with having some contagious disorder or being guilty of some debasing act, which may exclude the plaintiff from society; or charges made against the plaintiff in reference to the plaintiff's trade, office, or profession, calculated to injure the plaintiff therein, there can be no recovery unless special damages are shown. Southland Corp. v. Garren, 135 Ga. App. 77, 217 S.E.2d 347 (1975), rev'd on other grounds, 235 Ga. 784, 221 S.E.2d 571 (1976).

Elements of viable defamation claim. — A viable defamation claim under Georgia law consists of: (1) a false and defamatory statement concerning the plaintiff: (2) an unprivileged communication to a third party; (3) fault by the defendant amounting at least to negligence; and (4) special harm or the action ability of the statement irrespective of special harm. Publication of the state-

ment is imperative and, without publication, the defamation claim fails. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Publication. — Publication of a slander to a third person is sufficient. Pavlovski v. Thornton, 89 Ga. 829, 15 S.E. 822 (1892).

Generally, publication is accomplished by communication of the slander to anyone other than the person slandered. Kurtz v. Williams, 188 Ga. App. 14, 371 S.E.2d 878, cert. denied, 188 Ga. App. 912, 371 S.E.2d 878 (1988).

When the communication is intracorporate, or between members of unincorporated groups or associations, and is heard by one who, because of his/her duty or authority has reason to receive the information, there is no publication of the allegedly slanderous material, and without publication, there is no cause of action for slander. Kurtz v. Williams, 188 Ga. App. 14, 371 S.E.2d 878, cert. denied, 188 Ga. App. 912, 371 S.E.2d 878 (1988); Agee v. Huggins, 888 F. Supp. 1573 (N.D. Ga. 1995).

Single accusation of ignorance or lack of skill inadequate. — Language imputing to a business or professional man ignorance or mistake on a single occasion and not accusing that individual of general ignorance or lack of skill is not slander per se under O.C.G.A. § 51-5-4(a)(3). Crown Andersen, Inc. v. Ga. Gulf Corp., 251 Ga. App. 551, 554 S.E.2d 518 (2001).

Slander per se under O.C.G.A. § 51-5-4(a)(3) is not shown when the statements at issue pertain only to a single instance. Crown Andersen, Inc. v. Ga. Gulf Corp., 251 Ga. App. 551, 554 S.E.2d 518 (2001).

Complaint failed to state claim for defamation. — Although an ex-spouse's complaint described the ex-spouse's business ventures before asserting that the defendants inflicted injury to the ex-spouse's reputation, as the complaint pled neither a defamatory statement in reference to the ex-spouse's trade, office, or profession under O.C.G.A. § 51-5-4(a)(3), nor special damages under § 51-5-4(a), the defamation claims failed. Walker v. Walker, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

Mortgage borrower failed to state a claim for slander based on a loan servicer's alleged communication of false information regarding the borrower's payment history to credit reporting agencies and an insurer; the borrower did not allege that the servicer made any oral statement to those third parties. The borrower did not state a claim for libel because the complaint did not sufficiently allege that any false written statements were made with malice. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

Sufficiency of pleading. — Because former bank employees had alleged defamatory statements that both imputed to the employees a crime punishable by law and made charges against the employees in reference to the employees' trade or profession, damage was presumed and the employees were not required to plead special damages on the employees' defamation claim against the bank and a supervisor. Nevertheless, to provide the bank and the supervisor with the notice they needed to defend against the claim, more specific facts regarding the content and context of the allegedly defamatory statements were required. Wylie v. Denton, 323 Ga. App. 161, 746 S.E.2d 689 (2013).

The doctrine of respondeat superior does not apply in slander cases, and a corporation is not liable for the slanderous utterances of an agent acting within the scope of one's employment, unless it affirmatively appears that the agent was expressly directed or authorized to slander the plaintiff. Lepard v. Robb, 201 Ga. App. 41, 410 S.E.2d 160 (1991).

Under this section, charges made "against another in reference to his trade, office, or profession, calculated to injure him therein" are actionable per se because in such instances damage is inferred. Hardboard Mach. Co. v. Coastal Prods. Corp., 289 F. Supp. 496 (M.D. Ga. 1967), aff'd, 398 F.2d 833 (5th Cir. 1968).

A charge made against another in reference to one's trade, office, or profession, calculated to injure one therein, is actionable per se unless made under circumstances which constitute it a privileged

General Consideration (Cont'd)

communication. Sherwood v. Boshears, 157 Ga. App. 542, 278 S.E.2d 124 (1981).

Statements which tend to injure one in his or her trade, occupation, or business have been held to be libelous per se, and one need not prove special damages in such instances. Hub Motor Co. v. Zurawski, 157 Ga. App. 850, 278 S.E.2d 689 (1981).

Slanderous charge is actionable per se, whether words directly or indirectly, by intimation or innuendo, contain slander. The slanderous charge is just as effectively harmful, and therefore actionable per se, that is, without proof of special damages, whether the harmful effect results from words which directly and unequivocally make a charge or whether it results from words which do so indirectly or by inference. It is the harmful effect of defamatory language as it is understood which renders it actionable per se, and not its directness or unequivocal nature. Southland Corp. v. Garren, 135 Ga. App. 77, 217 S.E.2d 347 (1975), rev'd on other grounds, 235 Ga. 784, 221 S.E.2d 571 (1976).

When special damages are not averred, action for slander must fall within one of the categories enumerated in this section. Barry v. Baugh, 111 Ga. App. 813, 143 S.E.2d 489 (1965).

Gist of action of slander is unfavorable impression created in mind of third party by an alleged tort-feasor in using defamatory words of and concerning another in the hearing of such third party. When a word is reasonably susceptible of two meanings, one of which is innocent and the other defamatory, the plaintiff may allege by innuendo the meaning in which it was used, and it is for the jury to say whether or not the word as used was slanderous. Kaplan v. Edmondson, 68 Ga. App. 151, 22 S.E.2d 343 (1942).

To be actionable, statement must be both false and malicious. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Dischargeability in bankruptcy. — Count based on tortious interference with business relations is not excepted from discharge by 11 U.S.C. § 1328(a)(4) because that count did not involve personal injury. However, count II based on defamation involved personal injury and may therefore be excepted from discharge. Finally, count III, for punitive damages under O.C.G.A. § 51-12-5.1, may also be excepted from discharge under 11 U.S.C. § 1328(a)(4) to the extent punitive damages are awarded based on personal injury. Adams v. Adams (In re Adams), 478 B.R. 476 (Bankr. N.D. Ga. 2012).

When words published are in reference to plaintiff's trade, it is unnecessary to allege or prove special damage in order to recover. Southland Corp. v. Garren, 138 Ga. App. 246, 225 S.E.2d 920, rev'd on other grounds, 237 Ga. 484, 228 S.E.2d 870 (1976).

When the allegedly slanderous remarks involve the defendants' business, proof of special damages is not required. Acrotube, Inc. v. J.K. Fin. Group, Inc., 653 F. Supp. 470 (N.D. Ga. 1987).

Words to be actionable per se, as tending to injure one in one's trade, profession or business, must contain charge in reference to such. Mell v. Edge, 68 Ga. App. 314, 22 S.E.2d 738 (1942).

Charge made against another in reference to one's trade, must be something that affects one's character generally in one's trade. Rogers v. Adams, 98 Ga. App. 155, 105 S.E.2d 364 (1958).

Under this section, the charge must be of something that affects the plaintiff's character generally in one's trade. The speaker must have had the trade or profession of the plaintiff in view, and utter the words in reference to it. Hardboard Mach. Co. v. Coastal Prods. Corp., 289 F. Supp. 496 (M.D. Ga. 1967), aff'd, 398 F.2d 833 (5th Cir. 1968).

Must reference trade or business. — Determination as to a motion to dismiss for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6), required that the court evaluate whether the defamation and slander per se claims were pled sufficiently pursuant to Fed. R. Civ. P. 8(a) such that there was a viable legal theory stated and, accordingly, statements were found to be defamatory when those statements were opinion statements which implied an assertion of objective fact regard-

ing the alleged undue influence exerted over patients and that nephrologists had no ethics or morals; however, there was no slander per se sufficiently asserted pursuant to O.C.G.A. § 51-5-4(a)(3) to avoid dismissal when statements that the nephrologists were barred from practicing at a dialysis center and that the nephrologists had been fired did not reference the center's trade or business. DaVita Inc. v. Nephrology Assocs., P.C., 253 F. Supp. 2d 1370 (S.D. Ga. 2003).

Generally, any defamatory statement, written or oral, is actionable when published. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Meaning of statements may be gathered from circumstances. — Intent and meaning of alleged defamatory statements may be gathered not only from the words themselves but from the circumstances under which they are uttered as well. Burrow v. K-Mart Corp., 166 Ga. App. 284, 304 S.E.2d 460 (1983).

Words are to be interpreted in sense that person of ordinary capacity who heard them spoken would understand them. Blackstock v. Fisher, 95 Ga. App. 117, 97 S.E.2d 322 (1957).

Language must be construed, not only by what the speaker intends it to mean, but also by what the average and reasonable reader may understand it to mean. Montgomery v. Pacific & S. Co., 131 Ga. App. 712, 206 S.E.2d 631, aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988).

For a defamatory oral utterance to be slanderous as imputing a crime, the statement must not only be such as may convey to the auditor the impression that the crime in question is being charged, but it must be couched in such language as might reasonably be expected to convey that meaning to any one who happened to hear the utterance. Jones v. Poole, 62 Ga. App. 309, 8 S.E.2d 532 (1940); Anderson v. Fussell, 75 Ga. App. 866, 44 S.E.2d 694 (1947).

Ordinary signification in popular parlance of statement made is vital question in each case of slander, or, in other words, it is a question of the natural and obvious meaning of the words used. Hardboard Mach. Co. v. Coastal Prods. Corp., 289 F. Supp. 496 (M.D. Ga. 1967), aff'd, 398 F.2d 833 (5th Cir. 1968).

When words are innocent or justifiable they will not support an action even though they may have occasioned some special damage, and it has been said that in per quod actions it is not only necessary to show that the language used did produce actual damage, but it must also appear that such language was defamatory and scandalous. Hardboard Mach. Co. v. Coastal Prods. Corp., 289 F. Supp. 496 (M.D. Ga. 1967), aff'd, 398 F.2d 833 (5th Cir. 1968).

Publisher of matter is responsible, not only for actual words published, but for innuendo that may arise from such words. Montgomery v. Pacific & S. Co., 131 Ga. App. 712, 206 S.E.2d 631, aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988).

True scope and meaning of statement cannot be enlarged or restricted by innuendo. Morris v. Evans, 22 Ga. App. 11, 95 S.E. 385 (1918); Hardeman v. Sinclair Ref. Co., 41 Ga. App. 315, 152 S.E. 854 (1930); Christian v. Ransom, 52 Ga. App. 218, 183 S.E. 89 (1935).

If the words spoken are plain and unambiguous and do not impute a crime, the words cannot be enlarged and extended by innuendo. Christian v. Ransom, 52 Ga. App. 218, 183 S.E. 89 (1935).

If words are clearly not defamatory, the words cannot have their meaning enlarged by innuendo. Blackstock v. Fisher, 95 Ga. App. 117, 97 S.E.2d 322 (1957).

When the plain import of the words spoken imputes no criminal offense, the words cannot have their meaning enlarged by innuendo. Burrow v. K-Mart Corp., 166 Ga. App. 284, 304 S.E.2d 460 (1983).

The office of innuendo is merely to explain ambiguity, when the precise meaning of terms employed in an alleged slanderous statement may require elucidation. Hardeman v. Sinclair Ref. Co., 41 Ga. App. 315, 152 S.E. 854 (1930); Chris-

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tian v. Ransom, 52 Ga. App. 218, 183 S.E. 89 (1935).

Words spoken without aid of innuendo are actionable in that their plain import is understandable by a reasonably intelligent person familiar with the English language. Davidson v. Walter, 93 Ga. App. 290, 91 S.E.2d 520 (1956), rev'd on other grounds, 214 Ga. 487, 104 S.E.2d 113 (1958).

Rumors not permissible support for defendant's statements. — A charge that the plaintiff has had a bastard child by a particular person, and is kept by the plaintiff for the plaintiff's own use, cannot be met and supported by proof as to the neighborhood rumor or reputation upon these matters. Richardson v. Roberts, 23 Ga. 215 (1857).

Malice is one of the essential elements of slander, but when language used is actionable per se, malice is implied, except when the occasion of the utterance renders it privileged, in which case, while the occasion does not excuse if the accusation is maliciously made, the burden is put upon the plaintiff to establish malice. Cochran v. Sears, Roebuck & Co., 72 Ga. App. 458, 34 S.E.2d 296 (1945).

Conspiracy to slander. — One who has not uttered slanderous words may nevertheless be liable therefor if they were uttered by another in furtherance of a conspiracy to which one was a party. The conspiracy may be established by showing that both parties were present when the slanderous words were uttered, and that their utterance by one of the parties was with the consent of the other and in pursuance of a common design and purpose. Jordan v. Hancock, 91 Ga. App. 467, 86 S.E.2d 11 (1955).

Pleading when liability depends on extrinsic facts. — If words are not actionable, except as they are applied to the person and intrinsic matter in reference to which they were spoken, the declaration is not subject to dismissal. Little v. Barlow, 26 Ga. 423 (1858); Spence v. Johnson, 142 Ga. 267, 82 S.E. 646, 1916A Ann. Cas. 1195 (1914).

Pleading alleged meaning of ambiguous words. — When words are ambiguous and capable of being understood in a double sense, the one criminal and the other innocent, the plaintiff may by proper allegation aver the meaning with which the plaintiff claims that it was published and the jury may find whether it was published with that meaning or not. Blackstock v. Fisher, 95 Ga. App. 117, 97 S.E.2d 322 (1957).

Effect of procedural default of pleading. — By deeming claims of wrongful termination and slander as admitted due to a defendant's default in the action for failing to answer, the trial court erred by precluding the defendant from offering evidence to contradict those claims at a hearing on damages, since the well-pled allegations of the complaint failed to allege that the defendant's oral statements imputing a crime to the plaintiff were made to anyone outside of the professional corporation; therefore, the plaintiff's complaint failed to state a claim for slander. Fink v. Dodd, 286 Ga. App. 363, 649 S.E.2d 359 (2007).

Substitution of words by amendment allowed. — It has been held that a petition alleging words under this section directly charging a particular act may be amended by the substitution of other words charging the same act. Hawks v. Patton, 18 Ga. 52, 63 Am. Dec. 266 (1855); Craven v. Walker, 101 Ga. 845, 29 S.E. 152 (1897); Jones v. Bush, 131 Ga. 421, 62 S.E. 279 (1908).

Motion to dismiss proper when no cause as defined in this section set forth. — When no allegations were contained in a petition as to any injury to the plaintiff in the plaintiff's trade, office, or profession, and no contagious disorder or debasing act was alleged, and since no special damages were alleged in the petition, the petition does not set forth a cause of action for slander and was subject to dismissal on demurrer (now motion to dismiss). Anderson v. Fussell, 75 Ga. App. 866, 44 S.E.2d 694 (1947).

Demurrer (now motion to dismiss) to petition for defamation should not be sustained unless alleged defamatory words are incapable of defamatory meaning, and the test is whether, in the circumstances, the words discredit a person in the minds of the community.

Huey v. Sechler, 107 Ga. App. 467, 130 S.E.2d 754 (1963).

Erroneous instruction to jury. — When, under the allegations of the petition and the evidence submitted on the trial, a verdict for general damages could have been legally found, it was error to instruct the jury in a way calculated to impress them that the plaintiff could not recover unless special damages were proved. Flanders v. Daley, 124 Ga. 714, 52 S.E. 687 (1906); Zielinski v. Clorox Co., 227 Ga. App. 760, 490 S.E.2d 448 (1997), rev'd on other grounds, 270 Ga. 38, 504 S.E.2d 683 (1998).

Whenever words spoken or published are susceptible of two constructions, it is for jury to say whether they are libelous. Jones v. Poole, 62 Ga. App. 309, 8 S.E.2d 532 (1940).

If a publication has no necessarily defamatory meaning, but can be understood in more than one way, one of which is defamatory, then it is for the jury to decide if, on the basis of some innuendo resulting from the circumstances surrounding the publication, the publication in fact had that defamatory meaning. Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir.), cert. denied, 444 U.S. 832, 100 S. Ct. 62, 62 L. Ed. 2d 42 (1979).

Whether auditors understood slanderous nature of words is also jury question. — Accusations made by the defendant against the plaintiff in the presence of third persons were ambiguous, and it was a question of fact for the determination of a jury whether or not the auditors of the utterances understood the defendant to charge the plaintiff with crimes. Blackstock v. Fisher, 95 Ga. App. 117, 97 S.E.2d 322 (1957).

Libel and slander are similar and related but do not give rise to the same causes of action. Griffin v. Branch, 116 Ga. App. 627, 158 S.E.2d 452 (1967).

Words which might not be actionable per se as slander may be libelous per se when put in writing or print. Griffin v. Branch, 116 Ga. App. 627, 158 S.E.2d 452 (1967).

Defamation by broadcast includes elements of both libel and slander. S & W Seafoods Co. v. Jacor Broadcasting, 194 Ga. App. 233, 390 S.E.2d 228 (1990), cert. denied, 194 Ga. App. 912, 390 S.E.2d 228 (1991).

Disclosure of contaminated waterways was not actionable. — Since the defendant did not misstate, mischaracterize, or misattribute the results of chemical tests revealing contamination of public waterways near the plaintiff's landfill operations, and when the defendant demanded and received a retraction upon a newspaper's accusation of the plaintiff, the statements were not actionable as a matter of law. Speedway Grading Corp. v. Gardner, 206 Ga. App. 439, 425 S.E.2d 676 (1992).

Defamation complaint timely filed. — Natural gas marketer's defamation complaint was timely filed because the complaint was filed on the first anniversary of the date of publication; O.C.G.A. § 1-3-1(d)(3) applies to the one-year statute of limitation for injuries to the reputation found in O.C.G.A. § 9-3-33, so that the first day shall not be counted in determining whether a claim is timely filed. Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 713 S.E.2d 456 (2011).

Special damages must be shown to establish a cause of action based on mere derogatory remarks. Connell v. Houser, 189 Ga. App. 158, 375 S.E.2d 136 (1988).

Special damages must be pled. — Since the appellee did not include in an amended complaint a plea for special damages under O.C.G.A. § 9-11-9(g), the defamation count of the amended complaint was limited to a claim alleging slander per se; employment of the Milkovich factors determined only that the alleged opinion was actionable as slander, but the Milkovich factors had no bearing on whether the words used constituted slander per se; statements which could have been interpreted as having the purpose of injuring the appellee's business by stating or implying that the appellee was going out of the real estate development business in which the appellee was still engaged and leaving the area, were not recognizable as injurious on their face, and the appellant was entitled to summary judgment on the appellee's slander per se claim. Bellemeade, LLC v. Stoker,

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

Damages. — General damages for slander may be recovered under O.C.G.A. § 51-12-2(a) when a defendant has intentionally and wantonly injured the plaintiff's reputation through slander without proof of any amount; after an injured party claimed that the slander concerned the injured party's profession, damage was inferred under O.C.G.A. § 51-5-4(b). Galardi v. Steele-Inman, 259 Ga. App. 249, 576 S.E.2d 555 (2002).

Bankruptcy. — An award for the intentional tort of slander is nondischargeable in bankruptcy. Fincher v. Holt, 173 Bankr. 806 (Bankr. M.D. Ga. 1994).

Cited in Watkins v. Augusta Chronicle Publishing Co., 49 Ga. App. 43, 174 S.E. 199 (1934); Brownlee v. Ford, 73 Ga. App. 861, 38 S.E.2d 626 (1946); Southland Publishing Co. v. Sewell, 111 Ga. App. 803, 143 S.E.2d 428 (1965); Tench v. Ivie, 121 Ga. App. 114, 173 S.E.2d 237 (1970); Perry v. Regents of Univ. Sys., 127 Ga. App. 42, 192 S.E.2d 518 (1972); Smith v. Moeller, 132 Ga. App. 184, 207 S.E.2d 669 (1974); Pacific & S. Co. v. Montgomery, 233 Ga. 175, 210 S.E.2d 714 (1974); McKinnon v. Trivett, 136 Ga. App. 59, 220 S.E.2d 63 (1975); Bradley v. Tenneco Oil Co., 146 Ga. App. 161, 245 S.E.2d 862 (1978); Brown v. Scott, 151 Ga. App. 366, 259 S.E.2d 642 (1979); Athens Observer, Inc. v. Anderson, 245 Ga. 63, 263 S.E.2d 128 (1980); Cleveland v. Greengard, 162 Ga. App. 201, 290 S.E.2d 545 (1982); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982); Anderson v. Housing Auth., 171 Ga. App. 841, 321 S.E.2d 378 (1984); Medlin v. Carpenter, 174 Ga. App. 50, 329 S.E.2d 159 (1985); Majik Mkt. v. Best, 684 F. Supp. 1089 (N.D. Ga. 1987); Stone v. McMichen, 186 Ga. App. 510, 367 S.E.2d 839 (1988); Deal v. Builders Transp., Inc., 192 Ga. App. 511, 385 S.E.2d 293 (1989); Barber v. Perdue, 194 Ga. App. 287, 390 S.E.2d 234 (1989); Smith v. Turner, 764 F. Supp. 632 (N.D. Ga. 1991); Kitchen Hardware, Ltd. v. Kuehne & Nagel, Inc., 205 Ga. App. 94, 421 S.E.2d 550 (1992); Fly v. Kroger Co., 209 Ga. App. 75, 432 S.E.2d 664 (1993); Mills v. Ellerbee, 177 Bankr. 731 (Bankr. N.D. Ga. 1995); Jacobs v. Shaw, 219 Ga. App. 425, 465 S.E.2d 460 (1995); Ultima Real Estate Invs. v. Saddler, 237 Ga. App. 635, 516 S.E.2d 360 (1999); Hoffmann-Pugh v. Ramsey, 193 F. Supp. 2d 1295 (N.D. Ga. 2002); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006); Taylor v. Calvary Baptist Temple, 279 Ga. App. 71, 630 S.E.2d 604 (2006).

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Actionable imputation may be made by use of cant or slang words or provincialisms which, according to their ordinary meaning are not defamatory. Blackstock v. Fisher, 95 Ga. App. 117, 97 S.E.2d 322 (1957).

Corporation liable upon proof of express authority. — A corporation is liable for slander committed by an agent when it affirmatively appears that the agent was expressly directed or authorized to speak the words in question. Headley v. Maxwell Motor Sales Corp., 25 Ga. App. 26, 102 S.E. 374, cert. denied, 25 Ga. App. 840 (1920).

Corporation not liable for agent's slander absent authorization. — The mere averment in a petition that the slanderous utterance was made by the "manager" of the defendant's store, "in charge of the business of the defendant and so acting at the time complained of," was insufficient to authorize a recovery upon the theory of slander since the utterance was not made by one who prima facie was the alter ego of the corporation, and presumably was authorized to speak for the corporation, and, since there was no allegation of any express direction or authority from the corporation to speak the words in question. Sims v. Miller's, Inc., 50 Ga. App. 640, 179 S.E. 423 (1935).

A corporation is not liable for slanderous and defamatory utterances of one of its agents, when not ordered and directed or authorized by it, even though spoken by such agent within the scope of the agent's duties and for the benefit of the corporation. Russell v. Dailey's, Inc., 58 Ga. App. 641, 199 S.E. 665 (1938).

In an action against employee against corporate employer and its manager for allegedly slanderous statements by manager to employee, petition fails to state a

cause of action when it does not affirmatively appear from the allegations of the petition that the defendant was expressly directed or authorized by the defendant company to speak the words of which complaint is made. Braden v. Baugham, 74 Ga. App. 802, 41 S.E.2d 581 (1947).

A corporation is not liable for damages resulting from the speaking of false, malicious, or defamatory words by one of its agents, even when in uttering such words the speaker was acting for the benefit of the corporation and within the scope of the duties of one's agency, unless it affirmatively appears that the agent was expressly directed or authorized by the corporation to speak the words in question. Cochran v. Sears, Roebuck & Co., 72 Ga. App. 458, 34 S.E.2d 296 (1945); World Ins. Co. v. Peavy, 110 Ga. App. 527, 139 S.E.2d 155 (1964); Zayre of Atlanta, Inc. v. Sharpton, 110 Ga. App. 587, 139 S.E.2d 339 (1964); Molton v. Commercial Credit Corp., 127 Ga. App. 390, 193 S.E.2d 629 (1972); Brackett v. Faust, 145 Ga. App. 248, 243 S.E.2d 667 (1978).

A corporation is not liable for the slanderous utterances of an agent acting within the scope of the agent's employment, unless it affirmatively appears that the agent was expressly directed or authorized to slander the plaintiff. Chambers v. Gap Stores, Inc., 180 Ga. App. 233, 348 S.E.2d 592 (1986).

Same general principles apply as to language concerning one in trade and public office. Language concerning one in office, which imputes to one a want of integrity, or misfeasance in one's office, or which is calculated to diminish public confidence in one, or charges one with the breach of some public trust, is actionable. Huey v. Sechler, 107 Ga. App. 467, 130 S.E.2d 754 (1963); Finnish Allatoona's Interstate Right, Inc. v. Burruss, 131 Ga. App. 572, 206 S.E.2d 679 (1974).

Alleging improper conduct by plaintiff in course of business. — When a person says to another, of a young woman who had visited him in his office alone on a business errand, that she, while in his office, did not act like a "lady," and this was said to her employer, and of her, concerning her conduct in the transaction of the business for which she was employed, after she had gone to the office of the person who made this remark about her, and, on account thereof she lost her job, they were made of her in reference to her trade or profession, and were calculated to injure her therein. When the charge was false and she had done nothing to justify it, it amounted to slander for which an action in damages lies as provided in this section. Stanley v. Moore, 48 Ga. App. 704, 173 S.E. 190 (1934).

In the context of the plaintiff's supervisor's attempt to enter a storage unit rented by the plaintiff, the supervisor's saying "we're going to get to the bottom of this" suggested to a reasonable listener at most that the supervisor suspected wrongdoing and intended to investigate; the phrase did not amount to a statement that wrongdoing had occurred. Palombi v. Frito-Lay, Inc., 241 Ga. App. 154, 526 S.E.2d 375 (1999).

Radio personality adequately stated a claim for slander per quod under O.C.G.A. § 51-5-4(a)(4) against a former on-air partner for implying to listeners that the radio personality had been fired for misconduct because such an implication, although not actionable per se, injured the radio personality in the radio personality's trade or business and caused special damages in the form of future lost job prospects. No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

Because a genuine issue of material fact existed as to whether a 42 U.S.C. § 1983 plaintiff wrote postdated checks with present consideration for payment of a business debt, the issue whether the payee slandered the plaintiff under O.C.G.A. § 51-5-4(a)(1) by making unfounded accusations and conspiring with a sheriff's deputy to incarcerate the plaintiff until the plaintiff covered the checks could not be summarily determined as a matter of law. Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

Trial court erred in dismissing a natural gas marketer's defamation action pursuant to O.C.G.A. § 9-11-12(b)(6) because the complaint stated a claim for defamation; the complaint alleged that an attorney, a law firm, and a communications

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company falsely stated that the marketer engaged in deliberate misinformation and deceived, cheated, and misled the marketer's customers by charging the customers artificially inflated rates after a hurricane and that the marketer suffered damage to the marketer's character, reputation, and business as a result of the statements, and given that market rates for natural gas were quantifiable, the defamatory statements were capable of being proved false. Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 713 S.E.2d 456 (2011).

Supervisor's reference to employee as "bullethead," "stupider," and "crazy." — Employee's evidence that the employee's supervisor called the employee "bullethead" (because the employee had been shot in the head) and told another employee that the employee was in a "stupider" state and that the employee was "crazy" failed to support the employee's defamation claim; the statements were not false and did not refer to the employee's profession as required by O.C.G.A. § 51-5-4(a)(3). Cook-Benjamin v. MHM Corr. Servs., No. 13-15960, 2014 U.S. App. LEXIS 13368 (11th Cir. July 11, 2014) (Unpublished).

Action by company against employees for defamation. — In an action by a corporation against two former employees and a competitor, the corporation alleged that one of the employees made three statements to current employees and others: that the former employee had lied to the corporation's customers; that the corporation was looking for a buyer; and that the corporation was beefing up the corporation's books to make a sale go through. The trial court did not err in granting summary judgment on the defamation claims because the statements were not defamatory per se. The first statement only alleged that the former employee lied, not that the employee was directed to do so by the corporation. The second and third statements were neither damaging nor derogatory. Gordon Document Prods. v. Serv. Techs., 308 Ga. App. 445, 708 S.E.2d 48 (2011).

Statements made in good faith performance of public duty. — Trial court erred in denying the appellant's motion for summary judgment on the appellee's claim for defamation (slander and slander per se) as the 911 call by the appellant's employee to report that the employee had seen the appellee, a convicted felon, standing on the porch of the appellee's apartment, cocking a sawed-off shotgun was privileged because the transcript of the employee's 911 call showed that the employee called the police because the employee believed the employee had a civic duty to report witnessing what the employee thought was criminal conduct; and the appellee did not present any evidence, either direct or circumstantial, of actual malice. Examination Mgmt. Servs. v. Steed, 340 Ga. App. 51, 794 S.E.2d 687 (2016).

Alleging plaintiff has disease. — When the statements tended to show affliction with a contagious disease, and calculated to injure the plaintiff in the plaintiff's profession, and the evidence did not affirmatively show that the alleged slanderous statements were privileged; a prima facie case for the plaintiff was made out, and the court erred in granting a nonsuit. Brown v. McCann, 36 Ga. App. 812, 138 S.E. 247 (1927).

Petition failed to set out a cause of action for slander against company nurse and supervisor, for informing fellow employees and child welfare worker that the plaintiff suffered from venereal disease, which information was not true. Cochran v. Sears, Roebuck & Co., 72 Ga. App. 458, 34 S.E.2d 296 (1945).

Although an allegation of slander encompassed a charge that a person had a contagious disorder that allowed for that person to be excluded from society, the lab technician's oral report to the lab director and the lab director's oral report to the hospital administrator that the medical director had tested positive for an infectious disease did not constitute actionable slander as the oral report conveyed the truth, did not involve a publication, and was not shown to have been made other than in good faith. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Calling plaintiff "public whore." — To state that the plaintiff, a pure and

chaste lady of unblemished character, was "a public whore," in the presence of the father of the defendant's wife and other members of her family, was actionable. Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952).

Sexual relationships. — Accusing the plaintiff of having sexual relations with a person other than one's spouse constituted slander per se. Baskin v. Rogers, 229 Ga. App. 250, 493 S.E.2d 728 (1997).

Calling plaintiff unqualified for corporate position. — Petition alleging that the defendant willfully, maliciously, and falsely said to named persons that the plaintiff was unqualified for the position which one held in a named corporation, and that as a result of these statements the plaintiff was demoted to another position at a reduction in salary, states a cause of action in slander, it not appearing from the allegations that any question involving a privileged communication is involved. Rogers v. Adams, 98 Ga. App. 155, 105 S.E.2d 364 (1958).

Statements made in intra-corporate investigation of employee privileged. — An employee sued the employer for defamation based on a confidential investigation of charges of the employee's alleged misconduct. The claim failed as: (1) the employee produced no evidence of any defamatory statement; and (2) statements made during intra-corporate investigations conducted in good faith performance of a private duty were privileged and were not "published" for purposes of a defamation claim. Lewis v. Meredith Corp., 293 Ga. App. 747, 667 S.E.2d 716 (2008).

Insulting language to customer by store clerk. — A cause of action is alleged by a petition which asserts that the plaintiff while an invitee on the premises of another for the purpose of transacting business was subjected to opprobrious, insulting, and abusive words amounting to slander by a clerk employed to deal with the business-invitee. Zayre of Atlanta, Inc. v. Sharpton, 110 Ga. App. 587, 139 S.E.2d 339 (1964).

To accuse another of crime punishable by law is slander. Zakas v. Mills, 148 Ga. App. 220, 251 S.E.2d 135 (1978); Corbin v. First Nat'l Bank, 151 Ga. App. 33, 258 S.E.2d 697 (1979).

Imputing crime is actionable per se. — The statement, "Mr. Page (plaintiff in an action for damages for slander) stole my hog, and I am going to prosecute him for it," imputes to plaintiff a crime punishable by law, and is actionable per se. King v. Page, 45 Ga. App. 195, 164 S.E. 106 (1932).

No evidence of slanderous words imputing crime. — The words "jumped on him" do not of themselves imply a crime, and since the plaintiff did not aver by any proper allegations any meaning which would enlarge the words by innuendo, no cause of action was stated as to slanderous words imputing a crime. Anderson v. Fussell, 75 Ga. App. 866, 44 S.E.2d 694 (1947).

Slander during meeting discussing failure to disclose criminal conviction in employment environment. — Unidentified loss prevention supervisor who escorted a terminated employee off the employer's premises and was present during the meeting in which the employee was terminated for failing to disclose a crime on an application had authority to know why the employee was terminated; publication to the unidentified supervisor did not preclude summary judgment for the defendants in the employee's slander suit, even though the employee and the unidentified supervisor did not work in the same location. McClesky v. Home Depot, Inc., 272 Ga. App. 469, 612 S.E.2d 617 (2005).

Employee who was back-up supervisor had a qualified privilege to receive information that an employee was terminated for failure to disclose a crime on an application because the back-up supervisor was a friend to the terminated employee and initiated the request for information and persisted in questioning the reason for the termination, the back-up supervisor's ability to complete work was directly impacted by the termination, and the back up supervisor was provided the information in confidence and privacy. McClesky v. Home Depot, Inc., 272 Ga. App. 469, 612 S.E.2d 617 (2005).

Trial court erred in directing a verdict in favor of a dentist on a former employee's slander claim; statements made by the dentist to others that indicated that

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the employee filed a false police report regarding the dentist's assault and battery of the employee were sufficient to support a claim for slander per se under O.C.G.A. § 51-5-4. Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285 (2008).

It is not necessary that crime should be charged in express words; if the hearers understand that this is meant. Lewis v. Hudson, 44 Ga. 568 (1872).

Prima facie case. — When the language imputes to the plaintiff guilt of an indictable offense, the plaintiff establishes a prima facie case upon proof that the slanderous language, substantially as alleged in the petition, was used by the defendant. Redfearn v. Thompson, 10 Ga. App. 550, 73 S.E. 949 (1912); Carter v. Norton, 25 Ga. App. 79, 102 S.E. 648 (1920).

To charge falsely that one has acted deceitfully in conducting one's business affairs is actionable per se. Dickey v. Brannon, 118 Ga. App. 33, 162 S.E.2d 827 (1968).

To charge a person, in the presence of others, with committing forgery is actionable per se, although it is not stated to what instrument the name was forged. A plaintiff need not describe the offense imputed to the plaintiff with the technical nicety required in indictments; it is sufficient if the language used is understood by others as charging a crime. Russell v. Dailey's, Inc., 58 Ga. App. 641, 199 S.E. 665 (1938).

Words imputing to plaintiff crime of larceny are slanderous per se. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

The statement that one is "short" in one's account does not necessarily impute to the person the crime of larceny after trust, where, according to the true meaning of the statement and the language accompanying it, the offense would not be complete unless there had been a refusal to pay for or deliver the property which it might be inferred had been appropriated. The word "short" does not of itself imply a crime. Hardeman v. Sinclair Ref. Co., 41 Ga. App. 315, 152 S.E. 854 (1930).

To charge one orally with stealing is slander or defamation per se, and damage to the slandered person is inferred therefrom. Ingram v. Kendrick, 48 Ga. App. 278, 172 S.E. 815 (1934).

To make charge that another is a thief is actionable per se. Franklin v. Evans, 55 Ga. App. 177, 189 S.E. 722 (1937).

Statement using the term "illegal." — Even though a speaker may have used the term "illegal" in reference to the actions of another party, those words did not accuse the speaker of committing any crime punishable by law; rather, the words were simply accusations of unethical, tortious behavior and, as such, were not defamatory. Parks v. Multimedia Techs., Inc., 239 Ga. App. 282, 520 S.E.2d 517 (1999); Dagel v. Lemcke, 245 Ga. App. 243, 537 S.E.2d 694 (2000).

Remark which neither specified the nature of the alleged "illegal activities" nor whether the purported "illegal activities" bore any relationship to scouting or to a scoutmaster was not slander under O.C.G.A. § 51-5-4(a)(1). McGee v. Gast, 257 Ga. App. 882, 572 S.E.2d 398 (2002).

Terminated employee's allegations concerning state board's purported statements to the media that the employee was engaged in extravagant seminars and was misusing state funds constituted slander. Bd. of Pub. Safety v. Jordan, 252 Ga. App. 577, 556 S.E.2d 837 (2001).

Slander claim not preempted by Labor Management Relations Act. — Trial court erred in dismissing an employee's claim that a union business agent slandered the employee because no interpretation of collective bargaining agreements was required, and the employee could proceed on the claim since the claim was not preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; to the extent the employee contended that the agent made statements in the agent's individual capacity to individuals outside the scope of the collective bargaining agreements, then those statements would have been made outside the scope of the agent's employment, and the statements would not be privileged as

the good faith performance of a legal duty. Eason v. Marine Terminals Corp., 309 Ga. App. 669, 710 S.E.2d 867 (2011).

Alleging plaintiff's demotion was for unsatisfactory performance versus voluntary. — Trial court erred by granting summary judgment to a publisher in a former creative director's defamation suit regarding a story published that the creative director was demoted for poor performance as opposed to having stepped down voluntarily as a result of not enjoying certain executive aspects of the promotion because there was sufficient evidence to create a jury issue on each essential element of the claim, such as whether the creative director was demoted voluntarily or whether it was due to unsatisfactory performance, and the falsity of the report, which depended on whether the demotion resulted from dissatisfaction or not. However, the trial court properly granted the creative director's former employer and its chief executive officer summary judgment on an invasion of privacy claim since the creative director had signed a release after termination of employment, which expressly stated that the former employer and the chief executive officer were not liable for any invasion of privacy claim. Gettner v. Fitzgerald, 297 Ga. App. 258, 677 S.E.2d 149 (2009).

If merely fraud, dishonesty, immorality, or vice be imputed, no action lies without proof of special damage. Roberts v. Ramsey, 86 Ga. 432, 12 S.E. 644 (1890); Ford v. Lamb, 116 Ga. 655, 42 S.E. 998 (1902); Morris v. Evans, 22 Ga. App. 11, 95 S.E. 385 (1918); Christian v. Ransom, 52 Ga. App. 218, 183 S.E. 89 (1935).

To publish falsely of another in reference to one's business that one has mortgaged one's property is not actionable per se, without allegations of special damage. Dickey v. Brannon, 118 Ga. App. 33, 162 S.E.2d 827 (1968).

Statements made in good faith pursuant to investigation by police of crime are made in performance of public duty and are privileged. Corbin v. First Nat'l Bank, 151 Ga. App. 33, 258 S.E.2d 697 (1979).

Statements made in good faith performance of private duty. — Because a report and videotape prepared by an investigator in connection with the plaintiff's workers compensation claim were privileged communications, the trial court did not err in granting summary judgment against the plaintiff on the plaintiff's defamation claim arising from production of the report and videotape. Ass'n Servs., Inc. v. Smith, 249 Ga. App. 629, 549 S.E.2d 454 (2001).

Unfavorable commercial publicity as such is not defamation, since it lacks the element of personal disgrace necessary for defamation. Southard v. Forbes, Inc., 588 F.2d 140 (5th Cir.), cert. denied, 444 U.S. 832, 100 S. Ct. 62, 62 L. Ed. 2d 42 (1979).

Crime not imputed by request to examine packages. — When there was a large and prominently displayed sign at the entrance which advised all patrons that the store reserved the right to inspect all packages, and the "store greeter" did that and nothing more — although, as viewed by the plaintiff, the greeter was neither discreet nor polite — the greeter's words and actions, even as interpreted by the plaintiff, amounted to nothing more than: "I'm going to check your boxes, it's my job," and no criminal offense was imputed to the plaintiff. Burrow v. K-Mart Corp., 166 Ga. App. 284, 304 S.E.2d 460 (1983).

Award of $100,000 for falsely accusing plaintiff of murder not excessive. — Pursuant to O.C.G.A. § 51-12-12, a trial court set aside as excessive a jury's award to a musician of $100,000 in general damages for slander per se committed by a radio station personality. This was error since the evidence showed the radio broadcast falsely accusing the musician of murder damaged the musician's reputation and career, which was based on the musician's reputation as a positive role model for fathers. Riddle v. Golden Isles Broad., LLC, 292 Ga. App. 888, 666 S.E.2d 75 (2008).

Special damages shown. — Defamation plaintiff, a radio personality, alleged sufficient facts to make plausible a finding of special damages, a required element of a claim for slander per quod under O.C.G.A. § 51-5-4(b) because, under the Twombly pleading standard, the plaintiff

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alleged that disparaging on-air statements by the defendant, the plaintiff's former radio partner, could have negative consequences on the plaintiff's potential listenership, fans, and potential future employment in radio. No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

Special damages not shown. — Since the plaintiff remained employed and received all raises due the plaintiff, when the plaintiff offered no evidence that the plaintiff's failure to receive a part-time job for which the plaintiff applied was the result of the plaintiff's alleged defamation, and since the plaintiff's voluntary act of hiring an attorney when the plaintiff was a witness before a personnel review board did not actually flow from the defendants' allegedly tortious acts, the plaintiff showed no special damages. Meyer v. Ledford, 170 Ga. App. 245, 316 S.E.2d 804 (1984).

Breach of agreement despite absence of special damages. — The failure of the plaintiffs to produce evidence of special damages in an action alleging the violation of a settlement agreement which included a non-disparagement clause did not require the reversal of a grant of partial summary judgment for the plaintiffs only on the narrow issue of whether breach of the non-disparagement clause occurred. Eichelkraut v. Camp, 236 Ga. App. 721, 513 S.E.2d 267 (1999).

Derogatory name calling. — Words used by the defendant in calling the plaintiff a m-----f----- did not impute any violation of law by the plaintiff and did not amount to slander per se; although the statement could be characterized as derogatory name-calling, special damages would have to be shown. Bullock v. Jeon, 226 Ga. App. 875, 487 S.E.2d 692 (1997).

Scatological or hyperbolic statements not actionable as defamation per se. — Radio personality failed to adequately state a claim for slander per se under O.C.G.A. § 51-5-4(a)(3) against a former on-air partner for making disparaging and scatological on-air comments about the plaintiff's character and appearance, and the quality of a film that the plaintiff had released because the comments amounted to opinion or immature name-calling that no listener would believe described a fact that could be proved false. No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

Statements did not imply commission of adultery. — Statements that defamation plaintiff and a man not the plaintiff's spouse were "hugged up with each other" or "wrapped up with each other" in public do not imply that the plaintiff committed the offense of adultery and at most constitute "disparaging words" which are actionable only when special damage is incurred. Meyer v. Ledford, 170 Ga. App. 245, 316 S.E.2d 804 (1984).

Juror not deprived of liberty interest by "harmful" comment by state judge. — An out-of-court comment by a state court judge about a juror in a murder trial who voted against the death penalty, that the judge considered lodging perjury charges against the juror, however seriously it may have harmed the juror's reputation, did not deprive the juror of any constitutionally protected liberty interest. The juror's interest in the juror's reputation was protected by state tort law. Emory v. Peeler, 756 F.2d 1547 (11th Cir. 1985).

Imputing intent to engage in subornation of perjury. — Defendant's phone conversation with a witness in which the defendant told the witness that the defendant was aware that the plaintiff was offering a portion of any damages recovered to helpful witnesses and that if a witness were to provide false testimony the defendant would have to report them for perjury prosecution did impute to the plaintiff the commission of a crime so as to constitute actionable defamation without a showing of special damages. Hodges v. Tomberlin, 170 Ga. App. 842, 319 S.E.2d 11 (1984).

An overstatement relating only to the emotion and fervor with which plaintiff may have accomplished the plaintiff's admitted acts would consti-

tute a privileged non-actionable communication, deviating from the "truth" only in degree rather than in kind and thus could not form the basis of action for libel. Tetrault v. Shelton, 179 Ga. App. 746, 347 S.E.2d 636 (1986).

Stating mother "unfit to have a kid." — In a defamation action, statements by the father of a child that "[mother] give women in general a bad name . . . I want to take that kid from her . . . [s]he's unfit to have a kid" were not slander or libel per se since did not impute any specific crime, debasing act, dishonesty or immorality and, because the mother failed to plead or prove any special damages, the trial court correctly granted summary judgment to the father and the newspaper that published the remarks. Webster v. Wilkins, 217 Ga. App. 194, 456 S.E.2d 699 (1995).

Oral allegation of child abuse to Department of Family and Children Services amounted to publication. — Although under O.C.G.A. § 49-5-40(b), reports made to the Department of Family and Children Services (DFACS) are confidential, the law of defamation requires only that the statement be disseminated to any person other than the person slandered. Therefore, a landlord's oral allegations to a DFACS employee that a tenant committed child abuse amounted to "publication" for purposes of O.C.G.A. § 51-5-4. Brown v. Rader, 299 Ga. App. 606, 683 S.E.2d 16 (2009).

Person alleging child abuse held immune from liability for slander. — As a tenant admitted at a deposition that the tenant's son was sometimes in their home, which the tenant knew was contaminated with toxic mold, without a mask, the landlord had reasonable cause to allege to authorities that the tenant was guilty of child abuse, and was thus entitled to immunity from the tenant's slander claim under O.C.G.A. § 19-7-5(f). Brown v. Rader, 299 Ga. App. 606, 683 S.E.2d 16 (2009).

Physician's statements about nurse-midwife. — Factual question, precluding summary judgment, was raised as to whether the physician's allegedly slanderous statements about a nurse-midwife were made either in the ordinary course of the business of a professional partnership or with the authority of the physician's partners. Sweeney v. Athens Regional Medical Ctr., 709 F. Supp. 1563 (M.D. Ga. 1989).

Defendant's statements that plaintiff had removed defendant's shelves and thrown their contents on the floor did not create a cause of action for slander, since such statements, the truth of which were acknowledged by the plaintiff, were made to a police officer and insurance agent inspecting the alleged damage. Tetrault v. Shelton, 179 Ga. App. 746, 347 S.E.2d 636 (1986).

No evidence of oral defamation. See Mays v. Hospital Auth., 582 F. Supp. 425 (N.D. Ga. 1984).

In an action against a church for slander based on statements made to the congregation, the trial court had jurisdiction concerning charges that members were guilty of crimes, but the court was not competent to adjudicate charges that members were witches and practiced witchcraft, since they related to religious faith, belief, and practice. First United Church v. Udofia, 223 Ga. App. 849, 479 S.E.2d 146 (1996).

Comments broadcast by radio talk-show host on a restaurant review segment of the host's listener call-in show broadcast were not actionable under O.C.G.A. § 51-5-4, either because they were shown not to have been false or because they fell within the ambit of protected speech. S & W Seafoods Co. v. Jacor Broadcasting, 194 Ga. App. 233, 390 S.E.2d 228 (1990), cert. denied, 194 Ga. App. 912, 390 S.E.2d 228 (1991).

Allegation of criminal activity in a radio broadcast by anonymous caller. — Trial court erred in granting summary judgment to a media company in a defamation action pursuant to O.C.G.A. §§ 51-5-1 and 51-5-4; the trial court erred in finding that a musician was a public figure as the musician was only known locally, and a false claim by an anonymous caller played on the air by a disc jockey was not a matter of public concern, and erred in finding that O.C.G.A. § 51-5-10(a) shielded the company, as there was an issue of fact as to whether the disc jockey made a defamatory state-

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ment as well. Riddle v. Golden Isles Broad., LLC, 275 Ga. App. 701, 621 S.E.2d 822 (2005).

Communications made in good faith in prosecution of crime were privileged. — Statements which were made in good faith, and in compliance with a criminal investigation, were not slanderous, and were privileged; therefore, the claim was properly dismissed on a summary judgment motion. Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006).

Speculation on laundering of money. — Looking at the broadcast as a whole, any defamatory implication that money flowed through the company to terrorists was presented as mere speculation. Any further implication that the company acted knowingly in laundering money to assist terrorists or terrorist groups remained so unspoken that it, too, could only be speculation and surmise. Mar-Jac Poultry, Inc. v. Katz, No. (RMC), 2011 U.S. Dist. LEXIS 33582 (DC Mar. 30, 2011).

Publicity from broadcast. — When publicity from the defendant's broadcast related solely to the operation of the plaintiff's business, the broadcast did not violate the plaintiff's right to be let alone and the trial court did not err in granting summary judgment on the plaintiff's claim. Jaillett v. Georgia TV Co., 238 Ga. App. 885, 520 S.E.2d 721 (1999).

Newspaper article and headline. — In an action by a contractor against a newspaper and the newspaper's editor because: (1) the average reader would have interpreted a printed headline's use of the term "rape" as an attempt to convey the severity of the damage to the land that the contractor inflicted rather than to characterize the contractor's conduct that resulted in the damage as criminal; and (2) the article referred to by the headline did not constitute libel per se as the editor unquestionably did not intend, and readers did not interpret, the word "rape" as having any sexual connotation in the context used in the article, the editor and the newspaper were properly granted summary judgment as to the contractor's libel and libel per se claims. Lucas v. Cranshaw, 289 Ga. App. 510, 659 S.E.2d 612 (2008).

Although a healthcare worker argues that a newspaper headline libeled the healthcare worker by implying that the healthcare worker was, in fact, an accomplice in a prisoner escape from a hospital, a charge which was later dismissed, reading the headline in conjunction with the article, the average reader would have believed that the healthcare worker had been arrested and charged with aiding another to escape from custody, which was true at the time; the trial court's denial of a summary judgment motion filed by the newspaper and the reporter was error. Cmty. Newspaper Holdings, Inc. v. King, 299 Ga. App. 267, 682 S.E.2d 346 (2009).

Failure to investigate. — In an action by a high school football coach against the superintendent of schools and a television station news reporter, a television news report concerning allegations of the coach's prior involvement in illegal gambling did not constitute "defamacast," slander, or false light invasion of privacy, even if the reporter failed to investigate adequately. Brewer v. Rogers, 211 Ga. App. 343, 439 S.E.2d 77 (1993).

False accusation that the owner of rental property failed to insure or pay property taxes on such property could reasonably be construed to refer to one's "trade, profession, business"; therefore, the accusation was actionable per se and proof of special damages was not required. Strange v. Henderson, 223 Ga. App. 218, 477 S.E.2d 330 (1996).

Statements made were not malicious. — In an action in which the plaintiff, who was named by the parents of a murdered child on national television and in the parents' book about their daughter's murder as a potential suspect, filed suit against the parents, asserting both a libel and slander claim, the parents were granted summary judgment on the slander claim after the court found that: (1) even though a photograph of the plaintiff appeared on the screen when the parents made the statement, it was undisputed that the parents had no control over the editing decisions; and (2) even had the

parents intended to refer to the plaintiff, the statements were still not malicious. Wolf v. Ramsey, 253 F. Supp. 2d 1323 (N.D. Ga. 2003).

Calling plaintiff alcoholic and promiscuous in book. — With regard to a person's defamation suit against a book author and a publisher, the trial court properly denied the motions for summary judgment filed by the author and the publisher, and properly found that the person did not need to plead nor present evidence of special damages in support of the claim as the published statements in the book that the person was a promiscuous alcoholic required no extrinsic evidence to demonstrate that the statements were injurious on their face. Smith v. Stewart, 291 Ga. App. 86, 660 S.E.2d 822 (2008).

Opinion statements regarding America's loss on Sept. 11, 2001 are not slanderous. — In a suit between feuding neighbors, the trial court properly held that the words spoken by one against the other, which the latter alleged were disparaging against America's loss on September 11, 2001, were not slanderous, as they were an expression of pure opinion, which was neither provable as true nor as false; as a result, the neighbor who uttered the allegedly slanderous comments was entitled to summary judgment on the other's claim of slander per se. Bullard v. Bouler, 286 Ga. App. 218, 649 S.E.2d 311 (2007).

Natural gas marketer not a limited purpose public figure. — Trial court erred in finding that a natural gas marketer was a limited purpose public figure because there were no affidavits, depositions, or other evidence that could support such a conclusion; the complaint and the complaint's attachments reflected that the marketer was an energy giant with at least 600 customers in Georgia who tried to maintain a class-action suit against the marketer for allegedly locking the customers into three-year contracts at inflated prices, and those statements did not show that the marketer was either a household word or that the marketer held a position of such persuasive power and influence that the marketer had to be deemed a public figure for all purposes. Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 713 S.E.2d 456 (2011).

Alleging plaintiff misappropriated funds. — With regard to a slander count asserted by a former insurance agent against another agent, the trial court did not err by denying the other agent's motion for a directed verdict with regard to statements made that the former insurance agent misappropriated an insurance company's funds as the statements consisted of charges with regard to the former insurance agent's trade, office, or profession, calculated to injure and, therefore, were properly considered by the jury, pursuant to O.C.G.A. § 51-5-4(a)(3). Am. Southern Ins. Group, Inc. v. Goldstein, 291 Ga. App. 1, 660 S.E.2d 810 (2008), cert. denied, No. S08C1555, 2008 Ga. LEXIS 680 (Ga. 2008).

Statements attributed to school officials. — District court correctly found that the claimant's complaint alleging Georgia torts of slander, libel, and defamation of character failed to identify any specific written or verbal statements attributed to the school officials because the claimant conceded that the claimant did not know who made the statements which formed the basis of the tort claims, and Georgia tort law made it clear it had not waived its sovereign immunity for tort claims against state officers or employees. Sarver v. Jackson, No. 08-16903, 2009 U.S. App. LEXIS 19735 (11th Cir. Sept. 2, 2009) (Unpublished).

Neighbor was not liable for conspiracy to commit slander. — Judgment against a neighbor for the slander of a homeowner in the neighborhood was reversed because the neighbor was not present when another neighbor uttered slanderous remarks regarding the homeowner to a third party, and there was no evidence that the neighbor directed or acquiesced in the slander, although the two neighbors had conspired to have the homeowner arrested and to otherwise harass the homeowner. Turnage v. Kasper, 307 Ga. App. 172, 704 S.E.2d 842 (2010).

Truthful social media postings not defamation. — Judgment notwithstanding the verdict and directed verdicts in a defamation case were affirmed because the plaintiff was properly found to be a

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public figure in the spheres of running and Christian evangelism and there was no evidence of actual malice as to the social media postings, which alleged that the plaintiff was having multiple affairs with married women and had not completed all of the long distance runs, were true; there was no evidence of violations of O.C.G.A. § 16-9-93 or O.C.G.A. § 16-9-93.1. Bickerstaff v. SunTrust Bank, 299 Ga. 459, 788 S.E.2d 787 (2016), cert. denied, 137 S. Ct. 571, 196 L. Ed. 2d 447 (U.S. 2016).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, § 1 et seq.

Am. Jur. Pleading and Practice Forms. — 16B Am. Jur. Pleading and Practice Forms, Libel and Slander, § 1.

Am. Jur. Proof of Facts. — Slander of Title, 7 POF2d 133.

C.J.S. — 53 C.J.S., Libel and Slander, §§ 1 et seq., 284 et seq.

ALR. — Statement with reference to discharge from private employment as actionable per se, 66 ALR 1499.

Defamatory words spoken with regard to a customer's conduct as constituting actionable slander, 92 ALR 1174.

Statute of limitation applicable to action for slander of title, 131 ALR 837.

Joint liability for slander, 26 ALR2d 1031.

Venue of action for slander, 70 ALR2d 1340.

What amounts to special damage in action for slander of title, 4 ALR4th 532.

Allowance of punitive damages in action for slander of title or disparagement of property, 7 ALR4th 1219.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation — post New York Times Cases, 57 ALR4th 404.

Liability for statement or publication charging plaintiff with killing of, cruelty to, or inhumane treatment of animals, 69 ALR5th 645.

Defamation of church member by church or church official, 109 ALR5th 541.

Criticism or disparagement of physician's character, competence, or conduct as defamation, 16 ALR6th 1.

Defamation by television — actual malice, 42 ALR6th 353.

51-5-5. Inference of malice; rebuttal thereof; effect of rebuttal.

In all actions for printed or spoken defamation, malice is inferred from the character of the charge. However, the existence of malice may be rebutted by proof. In all cases, such proof shall be considered in mitigation of damages. In cases of privileged communications, such proof shall bar a recovery. (Orig. Code 1863, § 2917; Code 1868, § 2924; Code 1873, § 2975; Code 1882, § 2975; Civil Code 1895, § 3833; Civil Code 1910, § 4429; Code 1933, § 105-706.)

Law reviews. — For article, "Defamation in Georgia Local Government Law: A Brief History," see 16 Ga. L. Rev. 627 (1982).

For comment discussing admissibility of evidence of malice not previously pleaded, in light of Van Gundy v. Wilson, 84 Ga. App. 429, 66 S.E.2d 93 (1951), see 14 Ga. B. J. 358 (1952).

JUDICIAL DECISIONS

Analysis

General Consideration
Cases Involving Public Figures

General Consideration

Constitutionality. — The appellant court would not hold that O.C.G.A. § 51-5-5 was unconstitutional because it allows "malice" to be "inferred from the character of the charge" since that provision clearly relates to O.C.G.A. § 51-5-1, which requires that a statement be "false and malicious" in order to constitute libel. This means malice in the common-law sense, not actual malice. Straw v. Chase Revel, Inc., 813 F.2d 356 (11th Cir.), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987).

Malice in law of defamation may be used in two senses: First, in a special or technical sense to denote absence of lawful excuse or to indicate absence of privileged occasion. Such malice is known as "implied" malice or "malice in law." There is no imputation of ill will with intent to injury. Second, "malice" involving intent of mind and heart, or ill will against a person, and is classified as "express malice" or "malice in fact." Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Malice in constitutional sense is distinguished from common-law sense of ill will, hatred or charges calculated to injure. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Constitutional malice does not involve the motives of the speaker or publisher, though they may be wrong, but rather it is one's awareness of actual or probable falsity, or one's reckless disregard for their falsity. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Presumption of legal malice. — The publication of a libel raises a presumption of malice. Holmes v. Clisby, 121 Ga. 241, 48 S.E. 934, 104 Am. St. R. 103 (1904).

The publication of a statement in writing, which is untrue, and which may tend to injure the reputation of another and expose one to public hatred, contempt, or ridicule, will be presumed to have been a malicious publication until sufficient evidence has been produced to rebut the presumption. Southland Publishing Co. v. Sewell, 111 Ga. App. 803, 143 S.E.2d 428 (1965).

When language used is actionable per se, legal malice is implied unless utterance is privileged, in which case the plaintiff must establish malice. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

Proof that writing is false, and that the writing maligns private character or mercantile standing of another, is itself evidence of legal malice. Montgomery v. Pacific & S. Co., 131 Ga. App. 712, 206 S.E.2d 631, aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988).

Publication coming within definition of former Code 1933, § 105-703 (see now O.C.G.A. § 51-5-2) was actionable without any averment of actual malice on the part of the defendant. Southland Publishing Co. v. Sewell, 111 Ga. App. 803, 143 S.E.2d 428 (1965).

Actual malice is not presumed, and is matter of proof by the plaintiff. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Manner of statement is material upon question of malice, and if the facts believed to be true are exaggerated, overdrawn, or colored to the detriment of the plaintiff, or are not stated fully and fairly with respect to the plaintiff, the court or jury may properly consider these circumstances as tending to prove actual malice. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

While one may, on a privileged occasion and without malice, publish to the interested persons what may be false, if one honestly believes it to be true, one is not by this rule given a license to overdraw, exaggerate, or to color the facts of one's communication. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

To prove actual malice there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the defendant's publication. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Proof is supplied when totality of circumstances suggests actual malice, even though the publisher may testify that the publisher acted in good faith (or

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without malice). Melton v. Bow, 145 Ga. App. 272, 243 S.E.2d 590, aff'd, 241 Ga. 629, 247 S.E.2d 100, cert. denied, 439 U.S. 985, 99 S. Ct. 576, 58 L. Ed. 2d 656 (1978).

Constitutional standard demands that proof of actual malice be made with convincing clarity. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

"Reckless disregard of truth" is equivalent of actual malice. Melton v. Bow, 145 Ga. App. 272, 243 S.E.2d 590, aff'd, 241 Ga. 629, 247 S.E.2d 100, cert. denied, 439 U.S. 985, 99 S. Ct. 576, 58 L. Ed. 2d 656 (1978).

Knowledge of the falsity of the statement, a reckless disregard of whether it was false or true, or a serious doubt as to its truth, is imperative to proof of malice in the constitutional sense as to statements within the First Amendment immunity. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Actual malice is constitutional issue to be decided initially by trial judge vis-a-vis motions for summary judgment and directed verdict, applying the test of actual knowledge or reckless disregard of the truth. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976); Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

If jury finds that actual malice exists, punitive damages may be awarded. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Existence of malice may be rebutted by proof, want of actual malice then going in mitigation of damages. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Lack of malice in cases of privileged communications will bar recovery. Rucker v. Gandy, 158 Ga. App. 104, 279 S.E.2d 259 (1981).

Since the defendant's direct testimony was that the defendant was motivated to report the defendant's concerns about the level of emergency room care solely out of a sense of duty and concern for patient safety and that the defendant bore no animus against the plaintiff, when there was no other evidence of ill will, and when there was a showing of privilege in the disclosure of patient information, the plaintiff's failure to show express malice made summary judgment against the plaintiff proper. Dominy v. Shumpert, 235 Ga. App. 500, 510 S.E.2d 81 (1998).

Medical director could not recover for slander allegedly made when lab technician reported to lab director, and lab director reported to hospital administrator that the medical director had been diagnosed with an infectious disease as such communications were privileged and the medical director had not shown the privilege was defeated by actual malice as the communications were made so that people could protect themselves and not to harm the medical director. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Proof that communication is privileged rebuts prima facie presumption of malice in law. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Effect of privilege is to require plaintiff to prove actual malice. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Proof of falsity and legal malice cannot destroy defense of absolute privilege, but actual malice will remove a conditional privilege. Land v. Delta Airlines, 147 Ga. App. 738, 250 S.E.2d 188 (1978).

If privilege is not absolute, but conditional only, existence of express malice would render the libel actionable. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Effects of existence of malice on privileged and unprivileged communications. — The only difference made by the statute between a communication not privileged and one that is privileged is that, in the former or unprivileged class, one of malice goes in mitigation of damages, while in the latter class of privileged communications, absence of malice constitutes a bar to recovery. These matters are to be submitted to and passed on by the

jury, the court taking care to instruct the jury as to the law governing their finding. Rogers v. Adams, 98 Ga. App. 155, 105 S.E.2d 364 (1958).

Words spoken in jest and retraction as rebuttal of malice. — Malice is an "aggravating circumstance." The existence of malice would not be conclusively rebutted by proof of a retraxit, accompanied by an explanation that the words were spoken merely in jest, and only for the purpose of "teasing" the person to whom they were addressed. Barker v. Green, 34 Ga. App. 574, 130 S.E. 599 (1925).

Burden of proving falsity. — Georgia law puts the burden of proving falsity on the plaintiff. Only the element of malice may be inferred under O.C.G.A. § 51-5-5. Straw v. Chase Revel, Inc., 813 F.2d 356 (11th Cir.), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987).

Burden of proof when privilege exists. — When the utterance is privileged, the burden is on the plaintiff to establish malice. Lester v. Thurmond, 51 Ga. 118 (1874); Hendrix v. Daughtry, 3 Ga. App. 481, 60 S.E. 206 (1908); Ivester v. Coe, 33 Ga. App. 620, 127 S.E. 790 (1925).

When the defendant has made prima facie showing of privilege the burden is then upon the plaintiff to establish that the publication was made with actual malice. WSAV-TV, Inc. v. Baxter, 119 Ga. App. 185, 166 S.E.2d 416 (1969), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988) (overruling application of actual malice standard to non-public figure plaintiff).

Whether such malice exists is jury question. — Whether a communication which is conditionally privileged is used with a bona fide intent to protect the speaker's or writer's own interests when it is concerned, or whether such communication is uttered maliciously is a question of fact for the jury to determine. Lamb v. Fedderwitz, 72 Ga. App. 406, 33 S.E.2d 839 (1945).

Proof of actual malice. — In cases against a media defendant involving either a public figure plaintiff, or a private plaintiff seeking punitive damages, actual malice must be proven; it may not be presumed. In such cases, the potential constitutional pitfalls posed by O.C.G.A. § 51-5-5 may be avoided by the trial judge, who need only explain what common-law malice means under that section, and carefully distinguish it from actual malice. Straw v. Chase Revel, Inc., 813 F.2d 356 (11th Cir.), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987).

Evidence insufficient to establish malice. — A company's announcement to its customers that the plaintiff had retired, when in fact the plaintiff had been terminated by the company, did not constitute defamation or libel; moreover, they were privileged, made in the best interests of the company, and were not shown to have been made with malice or in bad faith. Kitfield v. Henderson, Black & Greene, 231 Ga. App. 130, 498 S.E.2d 537 (1998).

Failure to instruct clearly on actual malice. — When the court never charged the jury that only a finding of actual malice would support an award of punitive damages in a libel action against a media defendant, the case must be reversed and remanded for a new trial, for a redetermination of the actual malice issue and the appropriate amount, if any, of punitive damages, but the compensatory award will be affirmed. Straw v. Chase Revel, Inc., 813 F.2d 356 (11th Cir.), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987).

Mitigation of damages when good faith not proved. — Evidence which may be insufficient to so establish good faith as to sustain a plea of privilege in an action for a libel may still be sufficient to rebut the inference of malice and mitigate the damages. Holmes v. Clisby, 121 Ga. 241, 48 S.E. 934, 104 Am. St. R. 103 (1904).

Opinion statements regarding America's loss on Sept. 11, 2001 are not slanderous. — In a suit between feuding neighbors, the trial court properly held that the words spoken by one against the other, which the latter alleged were disparaging against America's loss on September 11, 2001, were not slanderous, as they were an expression of pure opinion, which was neither provable as true

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nor as false; as a result, the neighbor who uttered the allegedly slanderous comments was entitled to summary judgment on the other's claim of slander per se. Bullard v. Bouler, 286 Ga. App. 218, 649 S.E.2d 311 (2007).

Cited in Hugh v. McCarty, 40 Ga. 444 (1869); Atlanta Post Co. v. McHenry, 26 Ga. App. 341, 106 S.E. 324 (1921); Conklin v. Augusta Chronicle Publishing Co., 276 F. 288 (5th Cir. 1921); Abernathy v. News Publishing Co., 45 Ga. App. 693, 165 S.E. 924 (1932); Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944); Shiver v. Valdosta Press, 82 Ga. App. 406, 61 S.E.2d 221 (1950); Sheley v. Southeastern Newspapers, Inc., 87 Ga. App. 167, 73 S.E.2d 211 (1952); Davidson v. Walter, 93 Ga. App. 290, 91 S.E.2d 520 (1956); Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976); Brown v. Scott, 151 Ga. App. 366, 259 S.E.2d 642 (1979); Cleveland v. Greengard, 162 Ga. App. 201, 290 S.E.2d 545 (1982); Lincoln Log Homes Mktg., Inc. v. Holbrook, 163 Ga. App. 592, 295 S.E.2d 567 (1982); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982); Mays v. Hospital Auth., 582 F. Supp. 425 (N.D. Ga. 1984); Peoples v. Guthrie, 199 Ga. App. 119, 404 S.E.2d 442 (1991); Mills v. Ellerbee, 177 Bankr. 731 (Bankr. N.D. Ga. 1995); Strange v. Henderson, 223 Ga. App. 218, 477 S.E.2d 330 (1996); No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

Cases Involving Public Figures

Defamed public officials and public figures can recover only upon showing of actual malice, i.e., only on clear and convincing proof that the defamatory falsehood was made with knowledge of the falsity or with reckless disregard for the truth. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

The defamatory statement against a public figure may be false but it is still not actionable unless the statement was uttered with knowledge of the statement's falsity or in reckless disregard for the truth. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

A public figure might be allowed a civil remedy for a statement about the public figure only if the speaker knew the speaker's statement was false, or entertained serious doubts as to whether the statement was true or false. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

If prima facie showing is made that there did not exist actual malice in constitutional sense, burden is cast upon plaintiff public figure to come forward with proof that the statements were made with knowledge that the statements were false or with reckless disregard of whether the statements were false or not. If the plaintiff fails in this duty of rebuttal, summary judgment is proper. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Constitutional measure of actual malice. — When the plaintiff is a public figure, First Amendment concerns arise, and, consequently, a constitutional, rather than a common-law or statutory, measure of actual malice is used in an action for libel or slander. Smith v. Turner, 764 F. Supp. 632 (N.D. Ga. 1991).

Factors inapplicable to proof of actual malice in constitutional sense. — The speaker's motives (though malicious in the statutory or common-law sense) or what a reasonable man in the same circumstances may have said, or the lack of or inadequacy of prior investigation are all inapplicable to the question of actual malice in the constitutional sense as to defamation of a public figure. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Publisher of business newsletter. — Since the defendant asserted that the plaintiff was a "public figure" in the business community by virtue of the plaintiff being the publisher of a business newsletter, it was held that at the time that the defendant's offensive editorial appeared, the plaintiff's magazine had a limited circulation of 750 among a small sector of the business community and this does not make the plaintiff a public figure in the general sense, nor could it be said that the plaintiff injected oneself into a public controversy by truthfully reporting that the defendant's company had filed for bankruptcy since the company was in a Chap-

ter 11 reorganization. Straw v. Chase Revel, Inc., 813 F.2d 356 (11th Cir.), cert. denied, 484 U.S. 856, 108 S. Ct. 164, 98 L. Ed. 2d 118 (1987).

When summary judgment appropriate. — Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff public figure can prove actual malice, it should grant summary judgment for the defendant. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976); Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

When public figures bring defamation actions, summary judgment, rather than a trial on the merits, is a proper vehicle for affording constitutional protection, when there is no substantive basis for a finding of knowing falsity or reckless disregard. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

To survive a defendant's motion for summary judgment in an action for libel and slander, a plaintiff who is a public figure must produce evidence that the speaker knew the charge was false or at least had serious doubts concerning its truth. Smith v. Turner, 764 F. Supp. 632 (N.D. Ga. 1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, §§ 4, 5, 9, 25, 27, 33 et seq.

C.J.S. — 53 C.J.S., Libel and Slander, §§ 7, 83 et seq.

ALR. — What constitutes variance between pleading and proof of defamatory words, 2 ALR 367.

May actual malice which will defeat conditional privilege in libel or slander coexist with belief in truth of imputation, 18 ALR 1160.

Presumption and burden of proof regarding mitigation of damages, 134 ALR 242.

Sufficiency of plaintiff's allegations in defamation action as to defendant's malice, 76 ALR2d 696.

Libel and slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice, 20 ALR3d 988.

Sufficiency of showing of malice or lack of reasonable care to support credit agency's liability for circulating inaccurate credit report, 40 ALR3d 1049.

Who is "public official" for purposes of defamation action, 44 ALR5th 193.

Criticism or disparagement of physician's character, competence, or conduct as defamation, 16 ALR6th 1.

Defamation by television — actual malice, 42 ALR6th 353.

51-5-6. Truth as justification.

The truth of the charge made may always be proved in justification of an alleged libel or slander. (Orig. Code 1863, § 2921; Code 1868, § 2928; Code 1873, § 2979; Code 1882, § 2979; Civil Code 1895, § 3839; Civil Code 1910, § 4435; Code 1933, § 105-708.)

Law reviews. — For article, "Defamation in Georgia Local Government Law: A Brief History," see 16 Ga. L. Rev. 627 (1982).

JUDICIAL DECISIONS

Libel must be false as well as malicious. Jones v. Neighbor Newspapers, Inc., 142 Ga. App. 365, 236 S.E.2d 23 (1977).

Truth is perfect defense in civil action for libel or slander. Savannah News-Press, Inc. v. Hartridge, 110 Ga. App. 203, 138 S.E.2d 173 (1964).

When the petition in a libel action affirmatively shows that the printed matter relied on to constitute the libel is not false, but on the other hand shows it to be true,

then such petition fails to state a cause of action for libel, the falsity of the printed matter being an essential element to such a cause of action. Savannah News-Press, Inc. v. Harley, 100 Ga. App. 387, 111 S.E.2d 259 (1959).

If the petition shows on the petition's face that the printed matter is either true or privileged, a general demurrer (now motion to dismiss) to the petition will lie for the reason that the petition on the petition's face sets out no cause of action. Savannah News-Press, Inc. v. Harley, 100 Ga. App. 387, 111 S.E.2d 259 (1959).

The truth of the charge may always be proved in justification of the libel or slander. Rucker v. Gandy, 158 Ga. App. 104, 279 S.E.2d 259 (1981).

Fact that medical director had tested positive for an infectious disease was true; thus, the medical director's claims for libel and slander based on communications made that stated the medical director had been diagnosed with an infectious disease could not be sustained since the truth was a perfect defense in a civil action for libel or slander. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Memorandum in which a vice chairperson of an organization alleged that the organization's vice president and treasurer acted improperly in violation of the organization's conflict of interest rules by allowing the treasurer to receive payment for work that the treasurer performed for the organization, did not present an actionable libel claim, as the information in the memorandum qualified as opinion or was true, thus presenting a defense under O.C.G.A. § 51-5-6. Koly v. Enney, 269 Fed. Appx. 861 (11th Cir. 2008) (Unpublished).

Under Georgia law, O.C.G.A. § 51-5-6, truth was an absolute defense in a defamation action. Thus, the plaintiff was not likely to succeed on the merits of a defamation claim and was not entitled to a preliminary injunction. Windsor v. United States, No. 09-13998, 2010 U.S. App. LEXIS 10344 (11th Cir. May 20, 2010) (Unpublished).

Real estate developer did not show defamation on the part of home buyers because the buyers in the buyers' communications with others concerning drainage problems on the buyers' property which the buyers purchased from the developer addressed factually true information, pursuant to O.C.G.A. § 51-5-6, and the buyers' communications were privileged, pursuant to O.C.G.A. § 51-5-7, as there was no showing of malice pursuant to O.C.G.A. § 51-5-9. Chaney v. Harrison & Lynam, LLC, 308 Ga. App. 808, 708 S.E.2d 672 (2011).

Statement that criminal charges were about to be brought against the plaintiff was in fact true at the time the statement was made and therefore could not constitute an actionable slander. Tetrault v. Shelton, 179 Ga. App. 746, 347 S.E.2d 636 (1986).

Substantial accuracy constitutes defense of truth. — Newspapers are not ordinarily held to the exact facts or to the most minute details of the transactions they publish. What is usually required is that the publication shall be substantially accurate; and if the article is published by the newspaper in good faith and the same is substantially accurate, the newspaper has a complete defense. Jones v. Neighbor Newspapers, Inc., 142 Ga. App. 365, 236 S.E.2d 23 (1977).

As long as the facts in a newspaper are not misstated, distorted, or arranged so as to convey a false and defamatory meaning, there is no liability for a somewhat less than complete report of the truth. Jones v. Neighbor Newspapers, Inc., 142 Ga. App. 365, 236 S.E.2d 23 (1977).

Defendant in defamation action cannot automatically escape liability by swearing that statements were made with belief that statements were true. Williams v. Trust Co., 140 Ga. App. 49, 230 S.E.2d 45 (1976).

Rumors not basis of justification. — Rumors that the subject matter of the charge was true will not support a plea of truth. Cox v. Strickland, 101 Ga. 482, 28 S.E. 655 (1897).

An omission from an otherwise truthful communication of a reference to the underlying extenuating circumstances regarding the termination of the plaintiff's employment did not render those communications false and actionable defamations. Yandle v. Mitchell Motors, Inc., 199 Ga. App. 211, 404 S.E.2d

313, cert. denied, 199 Ga. App. 907, 404 S.E.2d 313 (1991).

If truth of article is proven, it is immaterial altogether whether it may have been viewed as in "poor taste" by anybody, for the defense of justification is established and the defendant is entitled to a verdict. Savannah News-Press, Inc. v. Hartridge, 110 Ga. App. 203, 138 S.E.2d 173 (1964).

Character of plaintiff in issue. — In an action of slander, the plea of justification puts the plaintiff's general character in issue. Bryan v. Gurr, 27 Ga. 378 (1859).

Bad character of the plaintiff merely serves to mitigate damages, and cannot operate as a bar. Redfearn v. Thompson, 10 Ga. App. 550, 73 S.E. 949 (1912).

False identification as convicted criminal in campaign materials. — In a 42 U.S.C. § 1983 suit by political opponents of a sheriff who, they claimed, libeled them by identifying them as criminals in campaign literature, a majority of the defamatory statements were protected by the First Amendment as rhetorical political hyperbole, except for a flier displaying a mug shot of one of the citizens with a caption falsely identifying that citizen as a "convicted" criminal; because the citizen had never been convicted, the latter statement was actionable under O.C.G.A. § 51-5-1 because truth was not a defense under O.C.G.A. § 51-5-6. Bennett v. Hendrix, 325 Fed. Appx. 727 (11th Cir. 2009) (Unpublished).

Plea of privilege is not waived by plea of justification. Etchison v. Pergerson, 88 Ga. 620, 15 S.E. 680 (1892).

Truth available as defense even when statement not privileged. — When a slander per se is not privileged, the defendant may defend by denying the utterance of the words, or by setting up the truth in defense. Ivester v. Coe, 33 Ga. App. 620, 127 S.E. 790 (1925); McIntosh v. Williams, 160 Ga. 461, 128 S.E. 672 (1925).

Time that knowledge of truth was ascertained by defendant is immaterial. Cox v. Strickland, 101 Ga. 482, 28 S.E. 655 (1897).

Plaintiff failed to establish that parents entertained serious doubts to the truth. — In an action in which the plaintiff, who was named by the parents of a murdered child on national television and in the parents' book about their daughter's murder as a potential suspect, filed suit against the parents, asserting both a libel and slander claim, the parents were granted summary judgment on the libel claim; the plaintiff failed to establish that when the parents wrote the book, the parents in fact entertained serious doubts as to the truth of the publication. Wolf v. Ramsey, 253 F. Supp. 2d 1323 (N.D. Ga. 2003).

Statements in letter setting forth board member's judgments, tax liens, and crimes were true. — In a defamation suit brought by a board member of a vacation resort community owners' association against a property owner who wrote a letter detailing the board member's civil judgments, tax liens, and criminal charges, the trial court properly granted the property owner summary judgment as the statements regarding the judgments, tax liens, and criminal charges were garnered from public records and were true. Additionally, the property owner's assessment that the board member was not fit to manage the association's funds if the board member was not able to manage personal finances was the opinion of the property owner and served no basis for the defamation action. McCall v. Couture, 293 Ga. App. 305, 666 S.E.2d 637 (2008).

Defense of truth inapplicable in creditor's slander of title claim. — Trial court erred in granting partial summary judgment to a limited liability company (LLC) and the company's member on a creditor's slander of title claim based on the defense of truth because the lis pendens was not valid; a prior action the LLC and member filed against a debtor, and the interests asserted therein, did not involve the real property at issue. McChesney v. IH Riverdale, LLC, 307 Ga. App. 77, 704 S.E.2d 244 (2010).

Truthful social media postings not defamation. — Judgment notwithstanding the verdict and directed verdicts in a defamation case were affirmed because the plaintiff was properly found to be a public figure in the spheres of running and Christian evangelism and there was

no evidence of actual malice as to the social media postings, which alleged that the plaintiff was having multiple affairs with married women and had not completed all of the long distance runs, were true; there was no evidence of violations of O.C.G.A. § 16-9-93 or O.C.G.A. § 16-9-93.1. Bickerstaff v. SunTrust Bank, 299 Ga. 459, 788 S.E.2d 787 (2016), cert. denied, 137 S. Ct. 571, 196 L. Ed. 2d 447 (U.S. 2016).

Truthfulness of statements made about defendant is question of fact for the jury. Hub Motor Co. v. Zurawski, 157 Ga. App. 850, 278 S.E.2d 689 (1981).

Truthfulness is a question of fact for the jury. Military Circle Pet Ctr. No. 94, Inc. v. Cobb County, 665 F. Supp. 909 (N.D. Ga. 1987), aff'd in part and rev'd in part, 877 F.2d 973 (11th Cir. 1989); Stone v. McMichen, 186 Ga. App. 510, 367 S.E.2d 839 (1988); Stalvey v. Atlanta Bus. Chronicle, Inc., 202 Ga. App. 597, 414 S.E.2d 898, cert. denied, 202 Ga. App. 907, 414 S.E.2d 898 (1992); Sparks v. Ellis, 205 Ga. App. 263, 421 S.E.2d 758, cert. denied, 205 Ga. App. 901, 421 S.E.2d 758 (1992).

Except when the plaintiff makes acknowledgment of truthfulness. — Although truthfulness is normally a question of fact for the jury, since the party claiming to have been defamed has conclusively acknowledged the truthfulness of the communication at issue, it may be resolved as a matter of law. Kersey v. United States Shoe Corp., 211 Ga. App. 655, 440 S.E.2d 250 (1994).

Privilege inapplicable to slander of title claim. — Defense of truth, O.C.G.A. § 51-5-6, did not entitle a limited liability company and the company's member to summary judgment on an owner's slander of title claim because a prior action the LLC and member filed against the owner, the prior action, and the interests asserted therein, did not involve the owner's real property. Meadow Springs, LLC v. IH Riverdale, LLC, 307 Ga. App. 72, 704 S.E.2d 239 (2010).

Cited in Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965); Dun & Bradstreet, Inc. v. Miller, 398 F.2d 218 (5th Cir. 1968); Retail Credit Co. v. Russell, 234 Ga. 765, 218 S.E.2d 54 (1975); McKinnon v. Trivett, 136 Ga. App. 59, 220 S.E.2d 63 (1975); Spaulding v. Rich's, Inc., 146 Ga. App. 693, 247 S.E.2d 218 (1978); Georgia Power Co. v. Busbin, 159 Ga. App. 416, 283 S.E.2d 647 (1981); Carey v. Glen Restaurants, Inc., 166 Ga. App. 638, 305 S.E.2d 171 (1983); Anderberg v. Georgia Elec. Membership Corp., 175 Ga. App. 14, 332 S.E.2d 326 (1985); Watkins v. Laser/Print-Atlanta, Inc., 183 Ga. App. 172, 358 S.E.2d 477 (1987); Jim Walter Homes, Inc. v. Strickland, 185 Ga. App. 306, 363 S.E.2d 834 (1987); Wrenn v. Ledbetter, 697 F. Supp. 483 (N.D. Ga. 1988); Davis v. Sherwin-Williams Co., 242 Ga. App. 907, 531 S.E.2d 764 (2000); No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007); Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, §§ 251-253.

C.J.S. — 53 C.J.S., Libel and Slander, § 161 et seq.

ALR. — Common report as defense to action for libel or slander, 43 ALR 887.

Admissibility, for purpose of diminishing damages in an action for libel or slander, of particular facts reflecting upon plaintiff's character or reputation, 130 ALR 854.

Joinder in defamation action, of denial and plea of truth of statement, 21 ALR2d 813.

Necessity and sufficiency of plaintiff's allegations as to falsity in defamation action, 85 ALR2d 460.

Reliance on facts not stated or referred to in publication, as support for defense of fair comment in defamation case, 90 ALR2d 1279.

51-5-7. Privileged communications.

The following communications are deemed privileged:

(1) Statements made in good faith in the performance of a public duty;

(2) Statements made in good faith in the performance of a legal or moral private duty;

(3) Statements made with a good faith intent on the part of the speaker to protect his or her interest in a matter in which it is concerned;

(4) Statements made in good faith as part of an act in furtherance of the person's or entity's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, as defined in subsection (c) of Code Section 9-11-11.1;

(5) Fair and honest reports of the proceedings of legislative or judicial bodies;

(6) Fair and honest reports of court proceedings;

(7) Comments of counsel, fairly made, on the circumstances of a case in which he or she is involved and on the conduct of the parties in connection therewith;

(8) Truthful reports of information received from any arresting officer or police authorities; and

(9) Comments upon the acts of public men or public women in their public capacity and with reference thereto. (Orig. Code 1863, § 2922; Code 1868, § 2929; Code 1873, § 2980; Code 1882, § 2980; Ga. L. 1893, p. 131, § 2; Civil Code 1895, §§ 3836, 3840; Civil Code 1910, §§ 4432, 4436; Code 1933, §§ 105-704, 105-709; Ga. L. 1996, p. 260, § 2; Ga. L. 2016, p. 341, § 3/HB 513.)

The 2016 amendment, effective July 1, 2016, substituted "the person's or entity's right of petition or free speech under the Constitution" for "the right of free speech or the right to petition government for a redress of grievances under the Constitution" in paragraph (4).

Cross references. — Privileged communications, § 24-5-501, et seq.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a semicolon was substituted for a period at the end of paragraph (4).

Law reviews. — For article, "Defamation in Georgia Local Government Law: A Brief History," see 16 Ga. L. Rev. 627 (1982). For article surveying torts law, see 34 Mercer L. Rev. 271 (1982). For annual survey on law of torts, see 42 Mercer L. Rev. 431 (1990). For article, "Defamation and Invasion of Privacy," see 27 Ga. St. B. J. 18 (1990). For annual survey article discussing developments in the law of evidence, see 51 Mercer L. Rev. 279 (1999). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008). For annual survey of law on torts, see 62 Mercer L. Rev. 317 (2010). For

article on the 2016 amendment of this Code section, see 33 Georgia St. U.L. Rev. 109 (2016).

For note criticizing qualified privilege enjoyed by mercantile agencies and advocating absolute denial of such privilege, see 11 Mercer L. Rev. 221 (1959).

For comment on Lamb v. Fedderwitz, 68 Ga. App. 233, 22 S.E.2d 657 (1942), see 5 Ga. B. J. 45 (1943). For comment regarding privileged communication by employer, in light of Cochran v. Sears, Roebuck & Co., 72 Ga. App. 458, 34 S.E.2d 296 (1945), see 8 Ga. B. J. 225 (1945). For comment on Barwick v. Wind, 203 Ga. 827, 48 S.E.2d 523 (1948), see 11 Ga. B. J. 230 (1948). For comment regarding privilege of counsel's publications during a trial when such statements are material and relevant, in light of Wall v. Blalock, 245 N.C. 219, 95 S.E.2d 450 (1956), see 8 Mercer L. Rev. 372 (1957). For comment on Walter v. Davidson, 214 Ga. 187, 104 S.E.2d 113 (1958), holding that defamatory statements made by a member of faculty before a chaplain, another member of faculty, are privileged as a result of their relationship as colleagues, see 21 Ga. B. J. 239 (1958). For comment on Savannah News Press, Inc. v. Grayson, 102 Ga. App. 59, 115 S.E.2d 762 (1960), see 23 Ga. B. J. 421 (1961). For comment, "Lee v. Dong-A Ilbo: Use of Official Report Privilege to Protect Defamatory Statements in Press Account Based on Foreign Government Report," see 23 Ga. L. Rev. 275 (1988).

JUDICIAL DECISIONS

Analysis

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General Consideration

Former Code 1933, §§ 105-704 and 105-709 (see now O.C.G.A. § 51-5-7) was construed in light of former Code 1933, § 105-711 (see now O.C.G.A. § 51-5-8), which provided that all charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally sufficient to obtain it or not, are privileged, and that however false and malicious, they are not libelous. Shiver v. Valdosta Press, 82 Ga. App. 406, 61 S.E.2d 221 (1950).

Quotations from pleadings conditionally privileged. — A letter sent by the defendant bank to the bank's shareholders, which letter quoted from the bank's verified answer to the plaintiff's original complaint, was not absolutely privileged since the letter itself was not a pleading; the publishing of quotations from pleadings in such a letter is protected only by a conditional privilege. O'Neal v. Home Town Bank, 237 Ga. App. 325, 514 S.E.2d 669 (1999).

Former Code 1933, §§ 105-704, 105-709, and 105-710 (see now O.C.G.A. §§ 51-5-7 and 51-5-9) should be construed together. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944).

If petition alleging libel states truth, the defendants are liable, unless the alleged publication was absolutely privileged. In an action for libel, that a writing constituted a conditional privilege is generally a matter for plea. But if it appears upon the face of the petition that the communication was really privileged, this may be taken advantage of by demurrer (now motion to dismiss). Fedderwitz v. Lamb, 195 Ga. 691,

25 S.E.2d 414 (1943).

Evidentiary privilege not created. — O.C.G.A. § 51-5-7 creates a defense to an action for libel or slander but does not create evidentiary privileges. Zielinski v. Clorox Co., 270 Ga. 38, 504 S.E.2d 683 (1998), reversing Zielinski v. Clorox Co., 227 Ga. App. 760, 490 S.E.2d 448 (1997).

Privileged communications bar recovery in actions for slander or libel. Zakas v. Mills, 148 Ga. App. 220, 251 S.E.2d 135 (1978).

Privilege is a defense to printed or spoken defamation, and lack of malice in cases of privileged communications will bar recovery. Rucker v. Gandy, 158 Ga. App. 104, 279 S.E.2d 259 (1981).

Defense to invasion of privacy claim. — The existence of a conditional privilege for fair and honest reporting is a defense which precludes a claim for invasion of privacy. Munoz v. American Lawyer Media, 236 Ga. App. 462, 512 S.E.2d 347 (1999).

Elements of privilege defense. — To make the defense of privilege complete good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons must all appear. Sherwood v. Boshears, 157 Ga. App. 542, 278 S.E.2d 124 (1981).

Defense of privilege in libel action is one of confession and avoidance, that is, admission of publication but on privileged occasion and bona fide in promotion of object for which privilege was granted. Auer v. Black, 163 Ga. App. 787, 294 S.E.2d 616 (1982).

Privileged communications enumerated in this section are conditional privileges. Lamb v. Fedderwitz, 68 Ga. App. 233, 22 S.E.2d 657 (1942), aff'd, 195 Ga. 691, 25 S.E.2d 414 (1943); Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Characteristic feature of absolute, as distinguished from conditional privilege, is that in the former the question of malice is not open. Wilson v. Sullivan, 81 Ga. 238, 7 S.E. 274 (1888); Fedderwitz v. Lamb, 195 Ga. 691, 25 S.E.2d 414 (1943).

Duty and interest which are sought to be protected with conditional privilege must spring from something other than a mere undertaking to speak of others. Retail Credit Co. v. Russell, 234 Ga. 765, 218 S.E.2d 54 (1975).

Great underlying principle upon which doctrine of privileged communications rests is public policy. This is more especially the case with absolute privilege, when the interests and the necessities of society require that the time and occasion of the publication or utterance, even though it be both false and malicious, shall protect the defamer from all liability to prosecution, for the sake of the public good. It rests upon the same necessity that requires the individual to surrender the individual's personal rights, and to suffer loss for the benefit of the common welfare. Happily for the citizen, this class of privilege is restricted to narrow and well-defined limits. Fedderwitz v. Lamb, 195 Ga. 691, 25 S.E.2d 414 (1943).

Good faith and good intention are necessary and essential ingredients of privileged communications. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944), later appeal, 72 Ga. App. 406, 33 S.E.2d 839 (1945); Elder v. Cardoso, 205 Ga. App. 144, 421 S.E.2d 753 (1992).

Statements to a television station were privileged under O.C.G.A. § 51-5-7(4) and the Anti-Strategic Lawsuits Against Public Participation statute, O.C.G.A. § 9-11-11.1, as the statements were related to the policies and procedures of the humane society and involved issues of public concern; the activist made the statements in good faith, believing that efforts could influence or persuade government officials and the public at large to help change the problems at the humane society. Harkins v. Atlanta Humane Soc'y, 273 Ga. App. 489, 618 S.E.2d 16 (2005).

An individual does not exercise good faith for a conditional privilege when the individual republishes unreasonable statements or statements obtained under circumstances that would put a reasonable person on inquiry as to the truth and accuracy of the statement. Smith v. Vencare, Inc., 238 Ga. App. 621, 519 S.E.2d 735 (1999).

Willful falsehood and negligence negates good faith. — Willful falsehood cannot be uttered in good faith, and there-

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fore can never be the subject of a privileged communication. This rule also applies when negligence in failing to ascertain the meaning of the words was proved. Holmes v. Clisby, 121 Ga. 241, 48 S.E. 934 (1904); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982), aff'd, 729 F.2d 1466 (11th Cir.), cert. denied, 469 U.S. 857, 105 S. Ct. 185, 83 L. Ed. 2d 119 (1984).

Truth not material. — The truth of the words used is not material if privileged by the provisions of this section. Gillis v. Powell, 129 Ga. 403, 58 S.E. 1051 (1907).

Effect of privilege is to require plaintiff to prove actual malice. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

When language used is actionable per se, malice is implied unless the utterance is privileged, in which case the plaintiff must establish malice. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

When a reporter's news story is shown by the plaintiff's own evidence to have been privileged, malice will not be implied in its utterance although it charges the commission of a crime. In such circumstances, it is incumbent upon the plaintiff to show actual or express malice. Edmonds v. Atlanta Newspapers, Inc., 92 Ga. App. 15, 87 S.E.2d 415 (1955).

Proof of malice. — In order to prove malice sufficient to forfeit the statutory privilege, it must be shown that the defendant acted willfully, corruptly, or maliciously. A showing of mere negligence is insufficient to create an issue as to the defendant's malice. Heard v. Neighbor Newspapers, Inc., 190 Ga. App. 756, 380 S.E.2d 279, rev'd on other grounds, 289 Ga. 458, 383 S.E.2d 553 (1989).

To make defense of privilege complete in action for libel, good faith, an interest to be upheld, a statement limited in the statement's scope to this scope to this purpose, a proper occasion and publication in a proper manner and to proper persons only, must appear; the absence of any one or more of these constituent elements will, as a general rule, prevent the party from relying upon the privilege. All of these questions are, however, questions of fact for the jury to determine according to the circumstances of each case under appropriate instructions from the court. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944); Western Union Tel. Co. v. Vickers, 71 Ga. App. 204, 30 S.E.2d 440 (1944); Cochran v. Sears, Roebuck & Co., 72 Ga. App. 458, 34 S.E.2d 296 (1945); Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951); Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952); Land v. Delta Airlines, 147 Ga. App. 738, 250 S.E.2d 188 (1978).

In order to make the defense of privilege complete the defendant must show, among other things, a proper occasion for the utterance, and that the publication was limited to proper persons. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

Privileged statement must be no broader than interest to be subserved demands. The persons to whom the statement is published must be limited to those to whom the interest to be promoted requires that the information should be given. Layson v. Odom, 55 Ga. App. 868, 192 S.E. 75 (1937).

In a privileged communication the statements must be no broader than the interest to be subserved demands, and if statements wholly unnecessary for the protection of the interest intended to be subserved should be included, this would be a circumstance to be considered by the jury in determining whether the communication was really made in good faith, or was made maliciously. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944).

In order to claim limited privilege under this section, communications must be made only to proper person, and the privilege may not be used as a cloak for venting private malice. Melton v. Bow, 241 Ga. 629, 247 S.E.2d 100, cert. denied, 439 U.S. 985, 99 S. Ct. 576, 58 L. Ed. 2d 656 (1978).

Mere publication to stranger will not always destroy privilege, if it appears that the communication, prima facie privileged, was made in the hearing of third persons not legally interested, when

the presence of such persons was merely casual, and not sought by the defendant. Layson v. Odom, 55 Ga. App. 868, 192 S.E. 75 (1937).

An attorney can claim privilege to which the client is entitled. Sherwood v. Boshears, 157 Ga. App. 542, 278 S.E.2d 124 (1981).

Doctor's report which was pertinent to workers' compensation claim. — Statements in narrative report of doctor who had also been an employer of the workers' compensation claimant were made by the doctor in the performance of the doctor's duties, public and private, and were made to protect the doctor's own interest in the matter; moreover, the report was pertinent and material to the claim for workers' compensation, a legal matter, already filed by the claimant. Thus, however false and malicious such statements would be, the statements would not be libelous. Auer v. Black, 163 Ga. App. 787, 294 S.E.2d 616 (1982).

Radio broadcast on public interest matter constitutionally protected. — A radio broadcast on a matter of public interest is not granted a statutory privilege since a report on matters of public concern is not one of those categories covered by statute, but that does not mean there exists no constitutional privilege for publishing or broadcasting matters of public concern. Those statements are privileged to the extent that the states may not impose strict liability for such statements, for to require absolute accuracy of all published statements would stifle the freedom of the press. Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350, cert. denied, 186 Ga. App. 917, 368 S.E.2d 350 (1988).

Question of privilege is one which must be raised by plea and submitted to jury as issue of fact. McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936).

Generally, the question of whether a communication was privileged is a jury question. Southern Bus. Machs. of Savannah, Inc. v. Norwest Fin. Leasing, Inc., 194 Ga. App. 253, 390 S.E.2d 402, cert. denied, 194 Ga. App. 912, 390 S.E.2d 402 (1990); Kennedy v. Johnson, 205 Ga. App. 220, 421 S.E.2d 746, cert. denied, 205 Ga. App. 900, 421 S.E.2d 746 (1992).

Defense of privilege must be affirmatively pled. — In order to avail oneself of the defense that the statement made by the defendant was a privileged communication under this section, the defendant should have filed a plea setting out the defense or alleged facts in the defendant's answer, showing that the communication was privileged. Ingram v. Kendrick, 48 Ga. App. 278, 172 S.E. 815 (1934).

Statement is pleaded as privileged, all facts calculated to throw light upon true character of the occasion are admissible. McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936).

Defense of privilege is established, jury must then determine whether privilege was used merely as cloak for venting private malice and not bona fide in promotion of the object for which the privilege is granted, i.e., the dissemination of news in which the general public has an interest. If no malice is found to have been involved in the publication of the article, the defense of privilege having been established, a verdict for the defendant should be returned. But, if the jury finds the presence of malice and lack of bona fides in the publication of the article as news in which the general public has an interest, the plaintiff is entitled to prevail. Savannah News-Press, Inc. v. Hartridge, 110 Ga. App. 203, 138 S.E.2d 173 (1964).

Jury instruction on privilege improper when evidence indicates no privilege. — When it appears without dispute from the evidence that the alleged libelous article was not privileged as being a fair and honest report of court proceedings, or as being a truthful report of information received from any arresting officer of police authority, the court errs in giving in charge to the jury the law with reference to what constitutes a privileged publication. Wood v. Constitution Publishing Co., 57 Ga. App. 123, 194 S.E. 760 (1937), aff'd, 187 Ga. 377, 200 S.E. 131 (1938).

Jury to determine good faith. — The question whether a newspaper acted in

General Consideration (Cont'd)

good faith in publishing a criticism must be determined by the jury. Augusta Evening News v. Radford, 91 Ga. 494, 17 S.E. 612, 44 Am. St. R. 53, 20 L.R.A. 533 (1893).

The question of privilege and good faith is inherently one for the jury. Sweeney v. Athens Regional Medical Ctr., 709 F. Supp. 1563 (M.D. Ga. 1989); WMH, Inc. v. Thomas, 195 Ga. App. 61, 392 S.E.2d 539, aff'd in part, 260 Ga. 654, 398 S.E.2d 196 (1990).

Jury to determine malice. — Good faith and malice are both matters that are questions of fact to be submitted to and determined by a jury. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944).

Factors considered by jury in determining existence of malice. — In connection with the defense of privilege the generally accepted customs and usages of the newspaper business in the community, including all publications having a general circulation there, as to the treatment of news items of this type may be shown, and the jury may consider whether the treatment given this particular story was or was not in keeping with the customs and usages as a circumstance in determining the presence or absence of malice on the part of the publisher against the plaintiff in the publication of the story. Savannah News-Press, Inc. v. Hartridge, 110 Ga. App. 203, 138 S.E.2d 173 (1964).

Whether conditionally privileged communication used with bona fide intent is jury question. — Whether a communication which is conditionally privileged is used with a bona fide intent to protect the speaker's or writer's own interests when it is concerned, or whether such communication is uttered maliciously is a question of fact for the jury to determine. Lamb v. Fedderwitz, 72 Ga. App. 406, 33 S.E.2d 839 (1945).

Privileged communications do not extend to reports which are not fair and honest, but which include additional matter in the way of statements or inferences of the publisher. Horton v. Georgian Co., 175 Ga. 261, 165 S.E. 443 (1932).

Cited in Swafford v. Keaton, 23 Ga. App. 238, 98 S.E. 122 (1919); Alumbaugh v. State, 39 Ga. App. 559, 147 S.E. 714 (1929); Abernathy v. News Publishing Co., 45 Ga. App. 693, 165 S.E. 924 (1932); Colonial Stores, Inc. v. Coker, 77 Ga. App. 227, 48 S.E.2d 150 (1948); Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952); Savannah News-Press, Inc. v. Hartridge, 104 Ga. App. 22, 120 S.E.2d 918 (1961); Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965); Holder Constr. Co. v. Ed Smith & Sons, 124 Ga. App. 89, 182 S.E.2d 919 (1971); Angles v. Wyatt, 124 Ga. App. 393, 184 S.E.2d 43 (1971); Jones v. Neighbor Newspapers, Inc., 142 Ga. App. 365, 236 S.E.2d 23 (1977); Christner v. Eason, 146 Ga. App. 139, 245 S.E.2d 489 (1978); Sparks v. City of Atlanta, 496 F. Supp. 770 (N.D. Ga. 1980); Dixie Beer Co. v. Boyett, 158 Ga. App. 622, 281 S.E.2d 356 (1981); Citizens & S. Bank v. McDowell, 160 Ga. App. 69, 286 S.E.2d 58 (1981); Mewbourn v. Harris, 162 Ga. App. 102, 290 S.E.2d 315 (1982); Cleveland v. Greengard, 162 Ga. App. 201, 290 S.E.2d 545 (1982); Todd v. Physicians & Surgeons Community Hosp., 165 Ga. App. 656, 302 S.E.2d 378 (1983); Kobeck v. Nabisco, Inc., 166 Ga. App. 652, 305 S.E.2d 183 (1983); Wright v. Southern Bell Tel. & Tel. Co., 169 Ga. App. 454, 313 S.E.2d 150 (1984); Fiske v. Stockton, 171 Ga. App. 601, 320 S.E.2d 590 (1984); Henson v. American Family Corp., 171 Ga. App. 724, 321 S.E.2d 205 (1984); Anderson v. Housing Auth., 171 Ga. App. 841, 321 S.E.2d 378 (1984); Sparks v. Parks, 172 Ga. App. 823, 324 S.E.2d 784 (1984); Clayton v. Macon Tel. Publishing Co., 173 Ga. App. 466, 326 S.E.2d 789 (1985); Savannah Bank & Trust Co. v. Sumner, 174 Ga. App. 229, 329 S.E.2d 910 (1985); Arrowsmith v. Williams, 174 Ga. App. 690, 331 S.E.2d 30 (1985); Tetrault v. Shelton, 179 Ga. App. 746, 347 S.E.2d 636 (1986); Cohen v. Hartlage, 179 Ga. App. 847, 348 S.E.2d 331 (1986); Straw v. Chase Revel, Inc., 813 F.2d 356 (11th Cir. 1987); F.S. Assocs. v. McMichael's Constr. Co., 197 Ga. App. 705, 399 S.E.2d 479 (1990); Green v. Sun Trust Banks, Inc., 197 Ga. App. 804, 399 S.E.2d 712 (1990); Kitchen Hardware, Ltd. v. Kuehne & Nagel, Inc., 205 Ga. App. 94, 421 S.E.2d 550 (1992); Hammer v. Slater, 20 F.3d 1137 (11th Cir. 1994); Ellenberg v. Those Certain Under-

writers at Lloyd's (In re Prime Com. Corp.), 187 Bankr. 785 (Bankr. N.D. Ga. 1995); NationsBank v. SouthTrust Bank, 226 Ga. App. 888, 487 S.E.2d 701 (1997); Blomberg v. Cox Enters., Inc., 228 Ga. App. 179, 491 S.E.2d 430 (1997); Baskin v. Rogers, 229 Ga. App. 250, 493 S.E.2d 728 (1997); Fleming v. U-Haul Co., 246 Ga. App. 681, 541 S.E.2d 75 (2000); No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007); Shiva Mgmt., LLC v. Walker, 308 Ga. App. 878, 708 S.E.2d 710 (2011).

Statements Relating to Public Duty

Statements made bona fide in performance of public duty are privileged; communications made by a public official with respect to one's official duties are privileged. However, this privilege may be lost when the official acts willfully, corruptly, or maliciously. McKinnon v. Trivett, 136 Ga. App. 59, 220 S.E.2d 63 (1975); Goolsby v. Wilson, 146 Ga. App. 288, 246 S.E.2d 371 (1978).

Privileged communication status of bona fide statements in performance of public duty may be lost when the official acts willfully, corruptly, or maliciously. King v. Masson, 148 Ga. App. 229, 251 S.E.2d 107 (1978); Van Geter v. Housing Auth., 167 Ga. App. 432, 306 S.E.2d 707 (1983), aff'd, 252 Ga. 196, 312 S.E.2d 309 (1984).

Statements made in good faith pursuant to investigation by police of crime are made in performance of public duty and are privileged. Hardaway v. Sherman Enters., Inc., 133 Ga. App. 181, 210 S.E.2d 363 (1974), cert. denied, 421 U.S. 1003, 95 S. Ct. 2405, 44 L. Ed. 2d 672 (1975); Zakas v. Mills, 148 Ga. App. 220, 251 S.E.2d 135 (1978); Brown v. Scott, 151 Ga. App. 366, 259 S.E.2d 642 (1979).

Statements made in pursuit of detecting a criminal. — Bona fide communications in the prosecution of an inquiry for the purpose of detecting a criminal are privileged. Ventress v. Rosser, 73 Ga. 534 (1884).

Statements made in an effort to recover stolen property are privileged. Chapman v. Battle, 124 Ga. 574, 52 S.E. 812 (1905); Taylor v. Chambers, 2 Ga. App. 178, 58 S.E. 369 (1907).

Privilege of statement or communication by official. — Statement which a sheriff provided to the Georgia Department of Labor (DOL), after the sheriff decided not to rehire an employee and the employee filed a claim for workers' compensation benefits was privileged, and the trial court ruled correctly that the sheriff was entitled to summary judgment on the employee's claim alleging slander, even though the sheriff's statement was published by a newspaper one week later and the newspaper published a follow-on article which stated that the sheriff stood by the statement the sheriff made to the DOL. Cooper-Bridges v. Ingle, 268 Ga. App. 73, 601 S.E.2d 445 (2004).

Statements pursuant to fire department investigation. — When a statement was given at the request of a superior officer in the course of an official investigation concerning improper conduct by a fire department official, it was privileged under O.C.G.A. § 51-5-7. Meyer v. Ledford, 170 Ga. App. 245, 316 S.E.2d 804 (1984).

Report of witness regarding criminal conduct. — Trial court erred in denying the appellant's motion for summary judgment on the appellee's claim for defamation (slander and slander per se) as the 911 call by the appellant's employee to report that the employee had seen the appellee, a convicted felon, standing on the porch of the appellee's apartment, cocking a sawed-off shotgun was privileged because the transcript of the employee's 911 call showed that the employee called the police because the employee believed the employee had a civic duty to report witnessing what the employee thought was criminal conduct; and the appellee did not present any evidence, either direct or circumstantial, of actual malice. Examination Mgmt. Servs. v. Steed, 340 Ga. App. 51, 794 S.E.2d 687 (2016).

Privilege accorded by paragraph (1) of this section is upon grounds of public policy. Hardaway v. Sherman Enters., Inc., 133 Ga. App. 181, 210 S.E.2d 363 (1974), cert. denied, 421 U.S. 1003, 95 S. Ct. 2405, 44 L. Ed. 2d 672 (1975).

Statements Relating to Public Duty (Cont'd)

It is jury question whether privileged communication status of bona fide statements in performance of a public duty was used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted. King v. Masson, 148 Ga. App. 229, 251 S.E.2d 107 (1978).

Statements Relating to Private Duty

Statements in response to inquiries as to another person, when inquirer is one naturally interested in the other's welfare, are privileged. They are statements made in the performance of a private moral duty. Whitley v. Newman, 9 Ga. App. 89, 70 S.E. 686 (1911); Cochran v. Sears, Roebuck & Co., 72 Ga. App. 458, 34 S.E.2d 296 (1945).

Communication is qualifiedly privileged when made in good faith in answer to one having an interest in information sought, or if volunteered, when the person to whom the communication is made has an interest in it, and the person by whom it is made stands in such a relation to one as to make it a proper or responsible duty to give the information. Cochran v. Sears, Roebuck & Co., 72 Ga. App. 458, 34 S.E.2d 296 (1945); Thomas v. Hillson, 184 Ga. App. 302, 361 S.E.2d 278 (1987).

Commercial agency reports not privileged. — Reports furnished by a commercial agency to subscribers are not privileged. Johnson v. Bradstreet Co., 77 Ga. 172, 4 Am. St. R. 77 (1886).

Information forwarded under agreement. — A contract to pry into and give information concerning the business of another will make a false communication injurious to another privileged under this section. Western Union Tel. Co. v. Pritchett, 108 Ga. 411, 34 S.E. 216 (1899).

Telegram to police charging criminal disposition of mortgaged property is not privileged. Williams v. Equitable Credit Co., 33 Ga. App. 441, 126 S.E. 855 (1925).

Testimony before church tribunal. — This clause operates as a protection of testimony of a member before a church tribunal, even though the conduct of a nonmember is involved. Etchison v. Pergerson, 88 Ga. 620, 15 S.E. 680 (1892).

Internal corporate statements not privileged. — O.C.G.A. § 51-5-7 did not apply to preclude the introduction of statements made by a plant supervisor to management and corporate counsel at a meeting regarding the investigation of an embezzlement scheme at the plant. Zielinski v. Clorox Co., 270 Ga. 38, 504 S.E.2d 683 (1998), reversing Zielinski v. Clorox Co., 227 Ga. App. 760, 490 S.E.2d 448 (1997).

Business correspondence. — Statements made in a letter written in the normal course of business in an effort to resolve a bona fide dispute between two parties concerning their respective rights clearly fall within the purview of subdivision (3) of O.C.G.A. § 51-5-7. Layfield v. Turner Adv. Co., 181 Ga. App. 824, 354 S.E.2d 14 (1987).

Conversations from employment situations. — In a former employer's suit to enforce noncompetition and nonsolicitation clauses, summary judgment was properly granted in favor of the employer on a former employee's defamation counterclaim because alleged slander by a coworker was not authorized by the employer and alleged libel was only published intracompany; moreover, statements made about an employee in good faith in the performance of a duty were privileged under O.C.G.A. § 51-5-7. H&R Block Eastern Enters. v. Morris, 606 F.3d 1285 (11th Cir. 2010).

Announcement of "retirement" of discharged contractor. — A company's announcement to its customers that plaintiff had retired, when in fact the plaintiff had been terminated by the company, did not constitute defamation or libel; moreover, the statements were privileged, made in the best interests of the company, and were not shown to have been made with malice or in bad faith. Kitfield v. Henderson, Black & Greene, 231 Ga. App. 130, 498 S.E.2d 537 (1998).

Insurance information. — Letters sent by an insurance company to life insurance policy holders containing information which might, if not revealed, cause

their coverage to lapse or be cancelled, were privileged. Willis v. United Family Life Ins., 226 Ga. App. 661, 487 S.E.2d 376 (1997).

Private duty privilege must be pled as affirmative defense. — Asphalt testing company was not entitled to summary judgment regarding a defamation claim as to its test reports because the company failed to assert an affirmative defense of private duty privilege under O.C.G.A. § 51-5-7 in order to avail the company of avoidance of a defamation claim made against the testing company. Douglas Asphalt Co. v. Qore, Inc., No. CV206-229, 2009 U.S. Dist. LEXIS 11002 (S.D. Ga. Feb. 13, 2009).

Statement in student disciplinary hearing. — Expelled respiratory therapy student failed to prove malice as required under O.C.G.A. § 51-5-9 after the student's mentor in an externship program denied signing a letter the student presented as evidence at the student's expulsion hearing that the student had permission to leave the student's shift for a job interview; a showing of malice was required because the mentor's statements in the expulsion hearing were conditionally privileged under O.C.G.A. § 51-5-7. Wertz v. Allen, 313 Ga. App. 202, 721 S.E.2d 122 (2011).

Statements Relating to Speaker's Interests

Paragraph (3) states a conditional privilege and burden rests upon the defendants to prove elements thereof including bona fide intent. Hardboard Mach. Co. v. Coastal Prods. Corp., 289 F. Supp. 496 (M.D. Ga. 1967), aff'd, 398 F.2d 833 (5th Cir. 1968).

Essential elements of privilege. — To make the defense of privilege complete, under this paragraph, good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons must all appear. Sheftall v. Central of Ga. Ry., 123 Ga. 589, 51 S.E. 646 (1905).

If a communication is properly to be classed as one made in the interest of the defendant, the question whether it is or is not privileged would be dependent upon the intention with which it was published. If bona fide, with the sole purpose of protecting oneself, it would be; if otherwise, it would not. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944).

Collection of debts as "interest" of creditor. — Statements made in good faith, to effect the collection of an indebtedness justly due, are privileged. Whitley v. Newman, 9 Ga. App. 89, 70 S.E. 686 (1911).

Blacklisting of person as delinquent debtor, who owes writer nothing, is not privileged. Western Union Tel. Co. v. Pritchett, 108 Ga. 411, 34 S.E. 216 (1899).

Communication between employer and employees. — This section will protect an employer who charged a clerk with theft of a pair of shoes, in the presence of other clerks, for the purpose of effecting a return of those shoes. Shehan v. Keen, 26 Ga. App. 339, 106 S.E. 190 (1921).

Communication that employee stole railroad ticket. — Communication by the officials of a railroad to the conductors and superintendent of division that one of the employees had stolen tickets is privileged. Central of Ga. Ry. v. Sheftall, 118 Ga. 865, 45 S.E. 687 (1903).

Pollution prevention as interest of resident. — Defendant, a resident near the landfill which the defendant suspected of contaminating public waterways, was materially affected by its operations, and the defendant's good faith statements made in furtherance of the defendant's interest against extending the landfill's permit were privileged. Speedway Grading Corp. v. Gardner, 206 Ga. App. 439, 425 S.E.2d 676 (1992).

Publication of foreclosure ads. — Publications of foreclosure ads were privileged as a matter of law and as such privileged as a matter of summary judgment against claims of slander, libel, and defamation. Hyre v. Denise, 214 Ga. App. 552, 449 S.E.2d 120 (1994).

Relevancy of statement to arbitrator. — Statements by a landlord to an arbitrator concerning the tenant are not privileged unless the statements are relevant to the business in hand. Jones v. Forehand, 89 Ga. 520, 16 S.E. 262, 32 Am. St. R. 81 (1892).

Intention is question of fact. — The question of intention under O.C.G.A.

Statements Relating to Speaker's Interests (Cont'd)

§ 51-5-7 is a question of fact, to be submitted to and determined by a jury. Holmes v. Clisby, 118 Ga. 820, 45 S.E. 684 (1903); Watkins v. Laser/Print-Atlanta, Inc., 183 Ga. App. 172, 358 S.E.2d 477 (1987).

As to whether a communication which is qualifiedly privileged is used with a bona fide intent to protect the speaker or writer's own interest when it is concerned, or whether such communication is uttered maliciously, is a question of fact for the jury trying the case to determine. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944).

Malice charge justified. — The trial court did not err in charging the jury that to find libel in an employee's letter to the company, the jury must find that the employee acted with actual malice as the conditional privilege in O.C.G.A. § 51-5-7 concerns itself with whether the accused acted with "a good faith intention" to protect a viable interest. Peeples v. Citizens S. Com. Corp., 209 Ga. App. 157, 433 S.E.2d 319 (1993).

Jury instruction on privileged communication properly refused. — Trial court did not err in refusing to give a jury instruction on privileged communications under O.C.G.A. § 51-5-7(3) when the materialman's lien claimant's claim of lien was not properly limited in scope; the lien claimant's lien was almost eight times the amount the claimant supplied in labor and materials for improvement of the property. Amador v. Thomas, 259 Ga. App. 835, 578 S.E.2d 537 (2003).

Conditional privilege entitled speaker to summary judgment. — Because a property owner made statements concerning valuation by a county appraiser in good faith which were limited in scope and made during a proper meeting, and such statements were based on the owner's interest in a property, the owner was entitled to a conditional privilege under O.C.G.A. §§ 9-11-11.1 and 51-5-7(4) from the appraiser's defamation claims; as the appraiser failed in the burden of showing malice by the owner, the trial court should have granted summary judgment to the owner on defamation claims as well as all tort claims based on communications, including invasion of privacy, negligence, and emotional distress. Smith v. Henry, 276 Ga. App. 831, 625 S.E.2d 93 (2005).

Reports of Legislative and Judicial Bodies and Court Proceedings

It is essential to privileged character of newspaper publication that it be fair and honest report of proceedings of legislative or judicial body or of court proceedings, or that it be truthful report of information received from any arresting officer or police authority. A newspaper article which purports to be a report of a court proceeding is manifestly not a fair and honest report, when it falsely and untruly states that a person has been proceeded against when in fact it clearly and unequivocally appears from the proceedings that the person proceeded against was another and different person from the one referred to in the newspaper article. Wood v. Constitution Publishing Co., 57 Ga. App. 123, 194 S.E. 760 (1937), aff'd, 187 Ga. 377, 200 S.E. 131 (1938).

Fair and honest report of judicial proceeding is conditionally privileged. Cook v. Atlanta Newspapers, Inc., 98 Ga. App. 818, 107 S.E.2d 260 (1959).

If a jury finds that the report of a matter was fair and honest, even though in some material particular the facts developed in the recorder's court and reported may have been false, the defense of privilege is established. Savannah News-Press, Inc. v. Hartridge, 110 Ga. App. 203, 138 S.E.2d 173 (1964).

Qualified privilege is not right to publish, but rather it it is right to be free from legal liability for libel when and if fair, accurate and nonmalicious reports of judicial, legislative and other proceedings are published. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950); Finish Allatoona's Interstate Right, Inc. v. Burruss, 131 Ga. App. 572, 206 S.E.2d 679 (1974).

To qualify for privilege as to judicial proceedings, newspaper report of such proceeding must present fully, fairly and accurately impartial account of proceedings. Although it

must be accurate, at least with regard to all material matters, a substantially accurate report may be privileged, as mere inaccuracies not affecting materially the purport of the article are immaterial. It is not necessary that the report be verbatim, and it may consist of an abridged or condensed statement, provided such statement is a fair one. Shiver v. Valdosta Press, 82 Ga. App. 406, 61 S.E.2d 221 (1950).

Determining whether administrative body exercises judicial or quasi-judicial function. — It is generally held that in the exercise of public functions subordinate boards or tribunals, though not created as courts, may at times exercise powers which are judicial, but it is clear that it is the nature of the act to be performed rather than the office, board, or body which performs it, that determines whether or not it is the discharge of a judicial or a quasi-judicial function. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

Real test as to legislative or judicial character of proceeding depends upon subject of inquiry; it is judicial to punish for infraction of, or to enforce, an existing rule. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

Newspaper report of quasi-judicial proceeding of public body need only be fair and accurate to qualify for the conditional privilege of this section. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

What is usually required is that the publication shall be substantially accurate; and if the article is published by the newspaper in good faith and the article is substantially accurate, the newspaper has a complete defense. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

As long as the facts are not misstated, distorted or arranged so as to convey a false and defamatory meaning, there is no liability for a somewhat less than complete report of the truth. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

When newspaper article is not fair and honest report of court proceedings purported to be reported in article, its publication is not privileged. Wood v. Constitution Publishing Co., 57 Ga. App. 123, 194 S.E. 760 (1937), aff'd, 187 Ga. 377, 200 S.E. 131 (1938).

The publication of any statement by a newspaper made upon its own authority and not purporting to be a report of a judicial proceeding or information received from an arresting officer or a police authority, is not privileged under the law which renders privileged a fair and honest report of court proceedings or a truthful report of information received from any arresting officer or police authority. The publication constitutes a charge by the person uttering it, and the person is responsible therefor. Wood v. Constitution Publishing Co., 57 Ga. App. 123, 194 S.E. 760 (1937), aff'd, 187 Ga. 377, 200 S.E. 131 (1938).

When in a report of a court proceeding, the newspaper article goes further and adds additional defamatory matter, such additions, if false, render the whole publication unprotected by the privilege. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

There is no privilege as to judicial proceedings when the newspaper report of such proceedings is not accurate and correct, or when the article is not done in good faith but with an express desire to vent "private malice" on another, even though, on its face, the article shows that the reporter was either merely quoting from the court petition verbatim or was repeating the substance of the allegations thereof. Shiver v. Valdosta Press, 82 Ga. App. 406, 61 S.E.2d 221 (1950).

Privilege not applicable when news story malicious. — Newspaper reports privileged under this section are conditional, and if the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted, the party defamed shall have a right of action. Savannah News-Press, Inc. v. Hartridge, 110 Ga. App. 203, 138 S.E.2d 173 (1964).

Proof of express malice negates privilege. — If a court or jury finds that the article complained of was privileged, this privilege would be denied to the defendant upon further proof by the petitioner of express malice. Davis v. Macon Tel. Publishing Co., 93 Ga. App. 633, 92 S.E.2d 619 (1956).

Reports of Legislative and Judicial Bodies and Court Proceedings (Cont'd)

Publisher must not declare on the publisher's own authority existence of facts which are only asserted in proceedings; the publisher is limited to reporting the fact of the assertion. Wood v. Constitution Publishing Co., 57 Ga. App. 123, 194 S.E. 760 (1937), aff'd, 187 Ga. 377, 200 S.E. 131 (1938).

No privilege attaches to publisher's personal view of court record. — The publisher must add nothing of the publisher's own. The publisher must not state the publisher's opinion of the conduct of the parties, or impute motives therefor; the publisher must not insinuate that a particular witness committed perjury. That is not a report of what occurred, and to this no privilege attaches. Augusta Chronicle Publishing Co. v. Arrington, 42 Ga. App. 746, 157 S.E. 394 (1931).

Privilege as to statements made in judicial proceeding exists although publication is with reference to mere stranger not party to suit, provided the publication was relevant or material to the proceeding. Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952).

Testimony delivered in judicial proceeding and before court with jurisdiction to consider questions at issue is absolutely privileged. — No actionable liability attaches to a witness for any statement in the witness's testimony (no matter how false or malicious it may be), unless the witness, without being asked, volunteers a false and malicious defamatory statement which is not pertinent, and which the witness neither believes to be true nor has any sufficient reason to believe to be material. Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952).

The testimony of a witness is absolutely privileged if it has some relation to the judicial proceeding in which the witness is testifying. Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952).

The answers of a witness in direct response to questions by counsel (which have not been forbidden by the court) are absolutely privileged; and though the statements of the witness in testimony thus adduced be not only defamatory and malicious, but knowingly false, a prosecution for perjury is the only redress provided by law. Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952).

Testimony is absolutely privileged, conditioned on the fact that it is responsive to questions asked by counsel and not disallowed by the court. Horton v. Tingle, 113 Ga. App. 512, 149 S.E.2d 185 (1966).

Strict legal materiality or relevancy is not required to confer privilege as to statements made in judicial proceeding; and in determining what is relevant or pertinent the courts are liberal, resolving all doubt in favor of relevancy or pertinency. Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952); Horton v. Tingle, 113 Ga. App. 512, 149 S.E.2d 185 (1966).

Slanderous statement given in evidence. — Whether alleged slanderous statement given as evidence in open court is matter of absolute or merely conditional privilege determines whether or not it can be actionable as slander. Horton v. Tingle, 113 Ga. App. 512, 149 S.E.2d 185 (1966).

Statements to jury by defendant. — A defendant cannot be held liable for any language used by the defendant in the course of the defendant's statement to the jury as it is privileged. Nelson v. Davis, 9 Ga. App. 131, 70 S.E. 599 (1911).

Qualified privilege attaches to proceedings of, and accurate news accounts of, administrative agencies of government. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

Administrative proceedings by governmental agencies to discipline, remove from office, or revoke a license are quasi-judicial in nature and are entitled, as a minimum, to a qualified privilege. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

Newspaper report of decision in divorce case. — A newspaper item copied from a decision of the Supreme Court in a divorce case is privileged communication. Conklin v. Augusta Chronicle Publishing Co., 276 F. 288 (5th Cir. 1921).

Broadcaster's report that an attorney had been found guilty of conspiring to aid a client in evading payment of federal income tax, when in fact the attor-

ney was acquitted of the charges against the attorney, could not be considered to be accurate or even "substantially accurate" so as to bring it within the protection of the privilege of O.C.G.A. § 51-5-7. Western Broadcasting of Augusta, Inc. v. Wright, 182 Ga. App. 359, 356 S.E.2d 53 (1987).

The trial court erred in granting the defendant newspaper's motion for summary judgment on the issue of libel. — Summary judgment was not appropriate since material issues of fact existed as to whether the defendant exercised reasonable care in publishing an article about the plaintiff attorney and made a fair and honest report of court proceedings. Nix v. Cox Enters., Inc., 247 Ga. App. 689, 545 S.E.2d 319 (2001).

Failure to identify and submit documents. — In a libel action arising from a newspaper article based on reports of a Federal Aviation Administration inspection of plaintiff airlines, the defendant was not entitled to summary judgment on the basis of privilege because it failed to present evidence identifying portions of the record that demonstrated an absence of a genuine issue of material fact and by failing to submit the documents or reports to which the article allegedly referred. AirTran Airlines v. Plain Dealer Publishing Co., 66 F. Supp. 2d 1355 (N.D. Ga. 1999).

Comments of Counsel

Address to jury. — This section is a privilege as to bona fide remarks by counsel addressing the jury. Lester v. Thrumond, 51 Ga. 118 (1874); Atlanta News Publishing Co. v. Medlock, 123 Ga. 714, 51 S.E. 756, 3 L.R.A. (n.s.) 1139 (1905).

False publication of remarks of counsel are not protected. Atlanta News Publishing Co. v. Medlock, 123 Ga. 714, 51 S.E. 756, 3 L.R.A. (n.s.) 1139 (1905).

Attorney's defamatory remark. — When the defendant failed to come forward with evidence that a defamatory remark by an attorney was made to, or heard by, anyone other than the defendant, the attorney was entitled to summary judgment. JarAllah v. Schoen, 243 Ga. App. 402, 531 S.E.2d 778 (2000).

Because privilege conditional, summary judgment denied. — Because the comments-of-counsel privilege is conditional, the question of malice is open and because good faith, among other factors, must be shown, the court will deny the defendant's motion for summary judgment with regard to a solicitor's liability for defamation. Military Circle Pet Ctr. No. 94, Inc. v. Cobb County, 665 F. Supp. 909 (N.D. Ga. 1987), aff'd in part and rev'd in part, 877 F.2d 973 (11th Cir. 1989).

Attorney's letter not privileged. — Alleged libelous statements contained in a letter from the defendant's attorney to the appraisers who were valuing the shareholder's stock upon resignation were not protected by the comments-of-counsel privilege. Sparks v. Ellis, 205 Ga. App. 263, 421 S.E.2d 758, cert. denied, 205 Ga. App. 901, 421 S.E.2d 758 (1992).

Reports Based on Police Authorities

Phrase "any arresting officer or police authorities." — The connecting thread of the constituent terms of the phrase "any arresting officer or police authorities" is the police power, as exercised by public agencies in the interest of the public safety. These terms are to apply only to those persons who are authorized by lawful authority to arrest other persons, and to persons and agencies that are authorized by lawful authority to initiate and conduct criminal prosecutions. Heard v. Neighbor Newspapers, Inc., 289 Ga. 458, 383 S.E.2d 553 (1989).

"A truthful report" is a fair and honest report of information obtained from police records and police authorities. But when the petition denies that the police officer ever gave the information attributed to the officer in the article complained of, and that the listings and reports referred to did not exist, there is no privilege as a matter of law, because it affirmatively appears that the article complained of was not based upon information furnished by an arresting officer or police authority. Davis v. Macon Tel. Publishing Co., 93 Ga. App. 633, 92 S.E.2d 619 (1956).

Summary judgment was properly granted for the newspaper defendants on a teenager's libel claim as the statement

Reports Based on Police Authorities (Cont'd)

that the teenager's window had to be nailed shut to prevent the teenager from letting boys in the teenager's room was privileged as the statement was based on information received from police authorities; the teenager did not come forward with evidence of malice. Torrance v. Morris Publ'g Group, LLC, 281 Ga. App. 563, 636 S.E.2d 740 (2006), cert. denied, 2007 Ga. LEXIS 160 (Ga. 2007).

Report based on police information not privileged when inaccurate. — While a newspaper is privileged to publish a fair and honest report of information received from an arresting officer or police authorities, the publication is not privileged when the newspaper, in undertaking to publish only an account of a court proceeding, or the report of information given by an arresting officer or the police authorities, amounting only to a mere charge by the arresting officers or the police authorities of the commission of a crime, goes further and publishes a statement that the person charged with the commission of the crime is in fact guilty of the crime. Augusta Chronicle Publishing Co. v. Arrington, 42 Ga. App. 746, 157 S.E. 394 (1931).

Welfare fraud investigator not "police authority." — Newspaper's "truthful report" was beyond the scope of the immunity provision of paragraph (7) of O.C.G.A. § 51-5-7 since the welfare fraud investigator from whom the newspaper received the published information had power only to conduct inquiries into possible fraud and abuse, and had no power to arrest, nor did the office by which the investigator was employed have the power to initiate or conduct criminal prosecution. Heard v. Neighbor Newspapers, Inc., 289 Ga. 458, 383 S.E.2d 553 (1989).

Statements accurately reflecting report. — Two of the four statements made by a newspaper which a father claimed were false, that the father created a fake lab report which showed that the daughter had a blood alcohol content of 0.0 on the night she was cited for underage drinking, and that the actual lab report showed a blood alcohol content of 0.17, accurately reflected an incident report prepared by officers and the father's arrest warrant, and thus were privileged. Austin v. PMG Acquisition, LLC, 278 Ga. App. 539, 629 S.E.2d 417 (2006).

Newspaper articles accurately reflects statements made in police report and by sheriff. — Trial court's denial of summary judgment motions filed by a newspaper and a reporter in a libel action brought by a healthcare worker was error because truthful reports of information received from any arresting officer or police authorities were conditionally privileged under O.C.G.A. § 51-5-7(8), and the articles at issue accurately reflected statements in a police investigative report and made by a sheriff; the reporter's affidavit reflected that the reporter accurately reported statements made by the sheriff, and the healthcare worker did not come forward with any evidence to rebut the reporter's affidavit. Additionally, reading a headline in conjunction with one of the articles, the average reader would have believed that the healthcare worker had been arrested and charged with aiding another to escape from custody, which was true at the time. Cmty. Newspaper Holdings, Inc. v. King, 299 Ga. App. 267, 682 S.E.2d 346 (2009).

Acts of Public Officials

Acts and conduct of public officials are subject to just criticism and comment by the press. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

Debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

Broadcast based on a National Guard report on the investigation of allegations of sexual harassment by an individual officer was within the conditional privileges of O.C.G.A. § 51-5-7. Lawton v. Georgia Television Co., 216 Ga. App. 768, 456 S.E.2d 274 (1995).

Editors have right to express in editorial columns their opinions as to matters of public interest. Morton v.

Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

Privilege set out under paragraph (8) of this section is not absolute. It is conditional. If used as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted, the party defamed has a cause of action. DeLoach v. Maurer, 130 Ga. App. 824, 204 S.E.2d 776 (1974).

Newspaper is not privileged to publish libelous charge about public official as respects the conduct of the official's office. Kirkland v. Constitution Publishing Co., 38 Ga. App. 632, 144 S.E. 821 (1928), aff'd, 169 Ga. 264, 149 S.E. 869 (1929).

A publication of and concerning the acts of public officials, if untrue and libelous, is not afforded immunity. While the acts and conduct of public officials are subject to just criticism and comment by the press, the exercise of such right should be unrestricted only when the statements made in the publication are supported by the facts. A public officer has the same right to protection against newspaper libel as a private citizen. Freedom and "liberty of the press" do not give a publisher the right to publish libelous statements. Barwick v. Wind, 203 Ga. 827, 48 S.E.2d 523 (1948).

Opinions expressed in letter to editor about officer. — Former police officer sued a newspaper for libel based on a letter to the editor the newspaper printed. As a public figure, the officer had to establish actual malice on the part of the newspaper under O.C.G.A. § 51-5-7(9) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), but failed to do so because the statements at issue were opinions that were not susceptible of being proved true or false. Evans v. Sandersville Georgian, Inc., 296 Ga. App. 666, 675 S.E.2d 574 (2009).

Privilege in paragraph (8) of this section will not be sustained if actual malice is shown and thus whether the comments were privileged is for the jury. DeLoach v. Maurer, 130 Ga. App. 824, 204 S.E.2d 776 (1974).

Recovery by public officials requires showing of actual malice. — Constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to official conduct unless the official proves that the statement was made with actual malice. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

A public official might be allowed the civil remedy of recovery of damages for slander or libel only if the official establishes that the utterance was false and made with actual malice, that is, with knowledge of the statement's falsity or in reckless disregard of whether the statement was false or true. Williams v. Church's Fried Chicken, Inc., 158 Ga. App. 26, 279 S.E.2d 465 (1981).

Actual malice not shown. — Statements made by the defendant in the defendant's capacity as a county commissioner to other members of the county commission, state officials and county officials who were officially interested in the matter, were privileged, and deputy warden about whom statements had been made could not prove actual malice by the defendant since the defendant was acting on the fact that the defendant had received numerous complaints about the warden, and the defendant had no reason to dispute or doubt such reports. DeBerry v. Knowles, 172 Ga. App. 101, 321 S.E.2d 824 (1984).

Position of teacher or instructor in state or public educational institution is not that of public officer or official, but the teacher is merely an employee thereof. Butts v. Curtis Publishing Co., 242 F. Supp. 390 (N.D. Ga. 1964), aff'd, 351 F.2d 702 (5th Cir. 1965), aff'd, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

Applicability to Specific Cases

Personal report of committee, appointed by court to investigate attorney is as privileged as the formal charges filed by the court or other person authorized to do so, and as other judicial proceedings, so far as libel is concerned. James v. Brandon, 61 Ga. App. 719, 7 S.E.2d 305 (1940).

Broadcasting or publishing of news stories of what happens in community in which public has legitimate interest is qualified privileged communication, unless relating to matters

Applicability to Specific Cases (Cont'd)

as to which the law confers an absolute privilege. WSAV-TV, Inc. v. Baxter, 119 Ga. App. 185, 166 S.E.2d 416 (1969), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988); Montgomery v. Pacific & S. Co., 131 Ga. App. 712, 206 S.E.2d 631, aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988).

Report on the quality of a painting job containing the writer's expression of opinions about deficiencies in the work was privileged and did not provide a basis for the plaintiff's claim of libel. Davis v. Sherwin-Williams Co., 242 Ga. App. 907, 531 S.E.2d 764 (2000).

Conditional privilege of doctor-patient communication. — When occurring in the context of the obstetrician-patient relationship, communications concerning referrals to pediatricians may be conditionally privileged under O.C.G.A. § 51-5-7; however, the existence of a conditional privilege is not the legal equivalent of the nonexistence of an actionable publication. Elder v. Cardoso, 205 Ga. App. 144, 421 S.E.2d 753 (1992).

Statements concerning emergency room care privileged. — When the defendant doctor expressed the doctor's concerns about the proper level of emergency room care to the proper hospital officials, the doctor's statements provided a proper case for disclosure of patient information and were conditionally privileged. Dominy v. Shumpert, 235 Ga. App. 500, 510 S.E.2d 81 (1998).

Discussion about employee's medical condition. — Hospital administrator and contract employer had an interest in protecting the safety of their patients and their own corporate interests and, thus, communications made by or between them that the medical director had tested positive for an infectious disease were privileged because the evidence only showed that they were pursuing those interests; the evidence did not show that their privilege to make such communications was waived as the evidence did not show the communications were made with actual malice, that is, with an intent to harm the medical director. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

Slander claim not preempted by Labor Management Relations Act. — Trial court erred in dismissing an employee's claim that a union business agent slandered the employee because no interpretation of collective bargaining agreements was required, and the employee could proceed on the claim since the claim was not preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; to the extent the employee contended that the agent made statements in the agent's individual capacity to individuals outside the scope of the collective bargaining agreements, then those statements would have been made outside the scope of the agent's employment, and the statements would not be privileged as the good faith performance of a legal duty. Eason v. Marine Terminals Corp., 309 Ga. App. 669, 710 S.E.2d 867 (2011).

Defamation based on drug testing claim preempted by Labor Management Relations Act. — Trial court did not err in dismissing the employees' defamation claims against the employers because the claims required the interpretation of collective bargaining agreements and were preempted by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; determining whether the employees were defamed by the employers' actions of posting false positive drug test results required the examination of the employers' rights and obligations under the collective bargaining agreements to decide whether their actions were privileged or authorized. Eason v. Marine Terminals Corp., 309 Ga. App. 669, 710 S.E.2d 867 (2011).

A report by a medical consultant to an insurance company was privileged since the report was made in the performance of the consultant's private duty to the company. Even assuming the report contained libelous matter, such disclosure was not the "publication of libelous matter." Haezebrouck v. State Farm Mut. Auto. Ins. Co., 216 Ga. App. 809, 455 S.E.2d 842 (1995).

Mere fact that child was detained at juvenile home at time child made certain statements would not render statements privileged. Crowe v. Constitution Publishing Co., 63 Ga. App. 497, 11 S.E.2d 513 (1940).

There is no conditional privilege in regard to credit reporting. Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985, 94 S. Ct. 1580, 39 L. Ed. 2d 882 (1974).

Recall petitions. — Allegations made in recall petitions are not absolutely privileged, but are only conditionally privileged as "comments upon the acts of public men in their public capacity and with reference thereto." Davis v. Shavers, 225 Ga. App. 497, 484 S.E.2d 243 (1997), aff'd, 269 Ga. 75, 495 S.E.2d 23 (1998), aff'd, Davis v. Shavers, 269 Ga. 75, 495 S.E.2d 23 (1998).

Statements made to district attorney in defamation action privileged. — In an action by a former employee against an employer for defamation and invasion of privacy, statements made by the defendant to the district attorney's office were privileged if made in good faith. Zielinski v. Clorox Co., 215 Ga. App. 97, 450 S.E.2d 222 (1994).

Statements made in good faith pursuant to investigation by police of crime are made in performance of public duty and are privileged. Corbin v. First Nat'l Bank, 151 Ga. App. 33, 258 S.E.2d 697 (1979).

Employer's report of employee's suspected theft to police. — Employer was protected against a former employee's defamation claims by the privilege outlined in O.C.G.A. § 51-5-7(3) because the employer acted in good faith in filing a loss report with the police when the employee, a pharmacist, was seen on a hidden camera taking hydrocodone pills from the employer's pharmacy and admitted to doing so, and 92% of the employer's medication losses occurred when the employee was working. McIntyre v. Eckerd Corp., 251 Fed. Appx. 621 (11th Cir. 2007) (Unpublished).

Communications which would otherwise be slanderous are protected as privileged, if made in good faith by injured person in prosecution of inquiry regarding crime which one believes to have been committed upon one's property, and for the purpose of detecting the criminal or bringing one to punishment. Hardaway v. Sherman Enters., Inc., 133 Ga. App. 181, 210 S.E.2d 363 (1974), cert. denied, 421 U.S. 1003, 95 S. Ct. 2405, 44 L. Ed. 2d 672 (1975).

The law does not put roadblocks before those who may have information and prevent the communication of information to police officers. Indeed, it is made the duty of one having such information to report it to those in authority. Hardaway v. Sherman Enters., Inc., 133 Ga. App. 181, 210 S.E.2d 363 (1974), cert. denied, 421 U.S. 1003, 95 S. Ct. 2405, 44 L. Ed. 2d 672 (1975).

Statements which were made in good faith, and in compliance with a criminal investigation, were not slanderous, and were privileged; therefore, the claim was properly dismissed on a summary judgment motion. Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006).

Anonymous letter critical of employees. — Hospital superintendent's disclosure of an anonymous letter regarding the conduct of an employee was privileged since the letter was privately communicated only to persons who, by reason of their job functions, needed to be informed of all the factors involved in the deliberations concerning the employee's possible transfer. Williams v. Cook, 192 Ga. App. 811, 386 S.E.2d 665, cert. denied, 192 Ga. App. 903, 386 S.E.2d 665 (1989).

Accounting firm's statements to employer were not privileged. — With regard to a controller's claims for defamation and tortious interference against an accounting/auditing firm that wrote a letter to the controller's employer that resulted in the controller's termination from employment, the trial court erred by dismissing the complaint after concluding that the alleged defamatory statements were inactionable privileged communications that had not been published since the controller sufficiently alleged malice, the communications between the accounting/auditing firm and the employer were conditionally privileged under O.C.G.A. § 51-5-7, and the controller sufficiently alleged publication of the statements.

Applicability to Specific Cases (Cont'd)

Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Circular accusing plaintiff of crime. — According to the express terms of the alleged libelous circular, the defendant company wanted information leading to the arrest of the plaintiff, the jury could consider the plaintiff's act in offering to surrender to the officers and to the defendant company and the steps thereafter taken by the defendant company with respect to the alleged libelous circular on the question of the good faith of the defendant company in issuing and publishing the circular. Western Union Tel. Co. v. Vickers, 71 Ga. App. 204, 30 S.E.2d 440 (1944).

Allegation of criminal act libelous except when fair report of grand jury action. — It is true that, if an article tends in any way, by any reasonable construction, to be a malicious defamation of the plaintiff, tending to injure the plaintiff's reputation and expose the plaintiff to public hatred, contempt, or ridicule, such as suggesting that the plaintiff was indicted for a crime involving moral turpitude when, as a matter of fact, the plaintiff was not, the article should be considered as libelous yet, if the article be only a fair report of the action of the grand jury, the article cannot be considered as such. Constitution Publishing Co. v. Andrews, 50 Ga. App. 116, 177 S.E. 258 (1934).

Reports prepared by immediate supervisor of employee evaluating her performance and intended for use within corporation are conditionally privileged. There is no publication when the report is circulated only to those whose responsibility it would be to be cognizant of such facts. Land v. Delta Airlines, 147 Ga. App. 738, 250 S.E.2d 188 (1978).

Reports on prospective employees. — If reports of merchants made in good faith to each other in reference to the character and conduct of prospective employees are to be regarded as privileged communications, limitations of the rule under which such communications are privileged must be definitely defined; for the right to publish defamatory matters should, in the interest of society, be closely guarded, and the rule under which one claims the privilege to do so strictly construed. Jordan v. Hancock, 91 Ga. App. 467, 86 S.E.2d 11 (1955).

Prospective employer has legitimate interest in report on employee's qualifications. — As a general rule, a communication in respect of the character or qualifications of an employee or former employee may be made to any person who has a legitimate interest in the subject matter thereof, such as a prospective employer. Land v. Delta Airlines, 147 Ga. App. 738, 250 S.E.2d 188 (1978).

Employee is duty bound to report that fellow employee had been arrested for shoplifting in one of employer's stores, and report is therefore privileged. Fisher v. J.C. Penney Co., 135 Ga. App. 913, 219 S.E.2d 626 (1975).

Employer's disclosure of reason for discharge. — In defamation cases involving an employer's disclosure to other employees of the reasons for a plaintiff's discharge, the general rule is that a qualified privilege exists when the disclosure is limited to those employees who have a need to know by virtue of the nature of their duties and other employees who are otherwise directly affected either by the discharged employee's termination or the investigation of the offense leading to termination. Jones v. J.C. Penney Co., 164 Ga. App. 432, 297 S.E.2d 339 (1982).

Unidentified loss prevention supervisor who escorted a terminated employee off the employer's premises and was present during the meeting in which the employee was terminated for failing to disclose a crime on an application had authority to know why the employee was terminated; publication to the unidentified supervisor did not preclude summary judgment for the defendants in the employee's slander suit, even though the employee and the unidentified supervisor did not work in the same location. McClesky v. Home Depot, Inc., 272 Ga. App. 469, 612 S.E.2d 617 (2005).

Employee who was back-up supervisor had a qualified privilege to receive information that an employee was terminated

for failure to disclose a crime on an application because the back-up supervisor was a friend to the terminated employee and initiated the request for information and persisted in questioning the reason for the termination, the back-up supervisor's ability to complete work was directly impacted by the termination, and the back up supervisor was provided the information in confidence and privacy. McClesky v. Home Depot, Inc., 272 Ga. App. 469, 612 S.E.2d 617 (2005).

Statements made in intra-corporate investigation of employee privileged. — An employee sued the employer for defamation based on a confidential investigation of charges of the employee's alleged misconduct. The claim failed as: (1) the employee produced no evidence of any defamatory statement; and (2) statements made during intra-corporate investigations conducted in good faith performance of a private duty were privileged and were not "published" for purposes of a defamation claim. Lewis v. Meredith Corp., 293 Ga. App. 747, 667 S.E.2d 716 (2008).

Despite actual malice showing, employer immune from liability. — When the defendant president, in the good faith exercise of the president's duty to the president's non-profit farm bureau, made a communication to the plaintiff employee's employer to have the employee transferred, the president came within the privilege of O.C.G.A. § 51-5-7 and the privilege was not overcome by a showing of actual malice. Culpepper v. Thompson, 254 Ga. App. 569, 562 S.E.2d 837 (2002).

A statement made by an employee to an immediate supervisor in the course of the employee's employment and concerning a matter directly related to the performance of the employee's job does not constitute a publication sufficient to support an action for slander. Griggs v. K-Mart Corp., 175 Ga. App. 726, 334 S.E.2d 341 (1985).

When the defendant was duty bound to report theft, charge against the plaintiff thereafter became matter of public investigation and the statements made in connection therewith are not an invasion of privacy. Zakas v. Mills, 148 Ga. App. 220, 251 S.E.2d 135 (1978).

No claim for tortious interference with employment. — Since the actions of the employers of a state-certified teacher in investigating and reporting alleged violations of rules and standards were privileged under O.C.G.A. § 51-5-7, the plaintiff's claim for tortious interference with employment failed. Brewer v. Schacht, 235 Ga. App. 313, 509 S.E.2d 378 (1998).

Privilege inapplicable in slander of title claim. — Trial court erred in granting a limited liability company (LLC) and the company's members summary judgment in an owner's action for slander of title, tortious interference with contract, and tortious interference with economic opportunities because the LLC and member did not show that they had an interest to uphold in a commission such that they were entitled as a matter of law to the privilege set forth in O.C.G.A. § 51-5-7(3); a letter accompanying the transmission of a complaint against the owner and a notice of lis pendens on the owner's real property to a bank did not refer to a commission owed to either the LLC or member but rather to one owed to another entity. Meadow Springs, LLC v. IH Riverdale, LLC, 307 Ga. App. 72, 704 S.E.2d 239 (2010).

Except as provided by statute, newspaper is not privileged in publications made therein, but is liable on account thereof in the same manner as other persons, and defamatory matter does not become privileged simply for the reason it is published as news. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

When the defendant cross-claimed that opposing candidate had published defamatory statements about the defendant, it was a question for the jury to determine whether such statements were privileged and evidence as to the plaintiff's alleged sources of information was relevant and admissible. McRae v. Boykin, 50 Ga. App. 866, 179 S.E. 535 (1935), rev'd on other grounds, 182 Ga. 252, 185 S.E. 246 (1936).

State Board of Medical Examiners' jurisdiction and functions meet necessary criteria for it to be "quasi-judicial" body and news reports

Applicability to Specific Cases (Cont'd)

of proceedings of the Board, if otherwise fair and honest are entitled to the conditional privilege accorded by this section. Morton v. Stewart, 153 Ga. App. 636, 266 S.E.2d 230 (1980).

Statement accusing theft not privileged when not properly limited in scope. — It cannot be said as a matter of law that the alleged statement by the defendants, that the plaintiff had stolen goods of defendant corporation worth $1,000.00 or more, was made only to proper persons on a proper occasion and was properly limited in its scope so as to be a privileged communication, when it appears from the allegations of the petition that the alleged charge was made not only in the presence of certain police officers but also in the presence of three neighbors of the plaintiff, only one of whom was alleged to be an employee of the defendant. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

Newspaper articles on board member of metropolitan transit authority found to be privileged communications. See Murray v. Williams, 166 Ga. App. 865, 305 S.E.2d 502 (1983).

Misidentification of traffic offender by witness. — In an action against a company for false imprisonment and malicious prosecution, when the company's employee misidentified a person as the driver of an automobile which caused an accident and, as a result, that person was charged with a traffic violation, the furnishing of the person's name was privileged since the witness' identification was not made in bad faith or with malice, and neither the witness nor the employer commanded the officer to arrest or prosecute. Arnold v. Premium Distrib. Co., 166 Ga. App. 862, 305 S.E.2d 454 (1983).

Advertisements between two competing companies. — Statements made by the plaintiff were privileged communications so the plaintiff was entitled to summary judgment against the defendants' counterclaims for libel. Hickson Corp. v. N. Crossarm Co., 235 F. Supp. 2d 1352 (N.D. Ga. 2002).

Statements made in good faith performance of private duty. — Because a report and videotape prepared by an investigator in connection with the plaintiff's workers compensation claim were privileged communications, the trial court did not err in granting summary judgment against the plaintiff on the plaintiff's defamation claim arising from production of the report and videotape. Ass'n Servs., Inc. v. Smith, 249 Ga. App. 629, 549 S.E.2d 454 (2001).

Attorney's privileged comments entitled summary judgment on slander claims. — Because an attorney's statements regarding a doctor, made in the form of two phone messages to the doctor's patients, were privileged, as they were made in anticipation of a lawsuit the attorney was preparing to file, were not slanderous, and did not interfere with the doctor's business relations, the attorney was entitled to summary judgment on the doctor's claims of slander and tortious interference with business relations. Vito v. Inman, 286 Ga. App. 646, 649 S.E.2d 753 (2007), cert. denied, 2007 Ga. LEXIS 770 (Ga. 2007).

Not applicable in fraud claims. — Trial court erred by granting summary judgment to an estate executor in a suit asserting fraud and other claims brought by two siblings as the trial court incorrectly determined that the privileges set forth in O.C.G.A. §§ 51-5-7(2) and 51-5-8 applied to the fraud claims and neither collateral estoppel nor res judicata barred the action since a prior probate court proceeding did not involve the same issues. Further, the probate court would have had no jurisdiction over the fraud and intentional interference with a gift claims. Morrison v. Morrison, 284 Ga. 112, 663 S.E.2d 714 (2008).

Attorney's conduct in custody dispute not necessarily privileged. — Although nearly all of an ex-spouse's allegations against an attorney involved the attorney's conduct in a custody dispute, as the complaint alleged the attorney lied about the ex-spouse's mental health and spread negative information about the ex-spouse, it was conceivable that the ex-spouse could establish that some of these acts were not privileged under

O.C.G.A. § 51-5-7(7) and were tortious. Thus, those claims should not have been dismissed. Walker v. Walker, 293 Ga. App. 872, 668 S.E.2d 330 (2008).

Statements by home buyers about drainage problems. — Real estate developer did not show defamation on the part of home buyers because the buyers in the buyers' communications with others concerning drainage problems on the buyers' property which the buyers purchased from the developer addressed factually true information, pursuant to O.C.G.A. § 51-5-6, and the buyers' communications were privileged, pursuant to O.C.G.A. § 51-5-7, as there was no showing of malice pursuant to O.C.G.A. § 51-5-9. Chaney v. Harrison & Lynam, LLC, 308 Ga. App. 808, 708 S.E.2d 672 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, § 257 et seq.

C.J.S. — 53 C.J.S., Libel and Slander, §§ 104 et seq., 150 et seq.

ALR. — Statement or testimony in lunacy proceeding as privileged within law of libel and slander, 2 ALR 1582.

Libel and slander: privilege of communication in relation to member, or prospective member, of society, other than church, 3 ALR 1654; 15 ALR 453.

Libel and slander: privilege in reports or statements about school pupils, 12 ALR 147.

Testimony of witness as basis of civil action for damages, 12 ALR 1247; 54 ALR2d 1298.

Libel and slander: privilege of statement or communication by official charged with prosecution or detection of crime, 15 ALR 249.

Relative provinces of court and jury as to privileged occasion and privileged communication in law of libel and slander, 26 ALR 830.

Libel and slander: privilege of statements made during trial by one not on the witness stand or acting as attorney for another, 44 ALR 389.

Libel and slander: privilege as to reports of judicial proceedings as attaching to publication of pleadings before hearing, 52 ALR 1438; 104 ALR 1124.

Libel and slander: privilege of communications between government officials as affected by their general publication, 53 ALR 1526.

Presumption and burden of proof as to malice when defamatory statement or writing is made on an occasion of qualified privilege, 54 ALR 1143.

Proceeding to obtain search warrant as judicial proceeding within rule of privilege in libel and slander, 58 ALR 723.

Libel and slander: privilege as to communications respecting church matters, 63 ALR 649.

Libel and slander: privilege as to communications to one spouse reflecting on other spouse, 69 ALR 1023.

Communication between relatives or members of a family as publication or subject of privilege within law of libel and slander, 78 ALR 1182.

Libelous or privileged character of publication by newspaper based on matter received from news agency or regular correspondent, 86 ALR 475.

Taking deposition as judicial proceeding as regards law of privilege in libel and slander, 90 ALR 66.

Libel and slander: qualified privilege as regards publication of matters in relation to members of private or quasi public bodies in newspapers or journals of general circulation or in those intended primarily for circulation among their members, 92 ALR 1029.

Libel and slander: privilege of communications made to employee regarding conduct of another employee or former employee, 98 ALR 1301.

Doctrine of privilege or fair comment as applicable to misstatements of fact in publication (or oral communication) relating to public officer or candidate for office, 110 ALR 413; 150 ALR 358.

Libel and slander: garbled, inaccurate, or mistaken report of judicial proceedings as within privilege, 120 ALR 1236.

Police investigation as within rule of privilege relative to report of judicial proceedings, 132 ALR 495.

Libel and slander: scope of absolute

privilege of executive officer, 132 ALR 1340.

Libel and slander: privilege of communications made by private person or concern to public authorities regarding one not in public employment, 136 ALR 543.

Libel and slander: privilege regarding communications to police or other officer respecting commission of crime, 140 ALR 1466.

Libel and slander: privilege as regards publication of judicial opinion, 146 ALR 913.

Libel and slander: doctrine of privilege or of fair comment and criticism as applicable to statement or publication imputing impropriety or dishonesty in bringing or defending civil action or proceeding, 148 ALR 1173.

Doctrine of privilege or fair comment as applicable to misstatements of fact in publication (or oral communication) relating to public officer or candidate for office, 150 ALR 358.

Libel and slander: privilege in respect of communication to employer regarding indebtedness of employee, 151 ALR 1104.

Libel and slander: statements in the nature of comment upon judicial, legislative, or administrative proceeding, or the decision therein, as within privilege accorded to proceeding or report thereof, 155 ALR 1346.

Libel and slander: lack of jurisdiction as destroying privilege of defamatory allegations or statements in judicial proceedings, 158 ALR 592.

Libel and slander: communication to defendant's employee or business associate as publication or as privileged, 166 ALR 114.

Libel and slander: defamation of one relative to another by person not related to either, as subject of qualified privilege, 25 ALR2d 1388.

Libel and slander: report of mercantile agency as privileged, 30 ALR2d 776.

Libel and slander: statements in briefs as privileged, 32 ALR2d 423.

Libel and slander: statements or utterances by member of municipal council, or of governing body of other political subdivision, in course of official proceedings, as privileged, 40 ALR2d 941.

Libel and slander: findings, report, or the like of judge or person aiding in judicial capacity as privilege, 42 ALR2d 825.

Libel and slander: privilege applicable to judicial proceedings as extending to administrative proceedings, 45 ALR2d 1296.

Libel and slander: proceedings, presentments, investigations, and reports of grand jury as privileged, 48 ALR2d 716.

Pleading or raising defense of privilege in defamation action, 51 ALR2d 552.

Testimony of witness as basis of civil action for damages, 54 ALR2d 1298.

Libel and slander: statements in counsel's argument to jury as privileged, 61 ALR2d 1300.

Libel and slander: privilege of statements by physician, surgeon, or nurse concerning patient, 73 ALR2d 325.

Libel and slander: privilege in connection with proceedings to disbar or discipline attorney, 77 ALR2d 493.

Reliance on facts not stated or referred to in publication, as support for defense of fair comment in defamation case, 90 ALR2d 1279.

Libel and slander: application of privilege attending statements made in course of judicial proceedings to pretrial deposition and discovery procedures, 23 ALR3d 1172.

Libel and slander: public officer's privilege as to statements made in connection with hiring and discharge, 26 ALR3d 492.

Libel and slander: public officer's privilege in connection with accusations that another has been guilty of sedition, subversion, espionage, or similar behavior, 33 ALR3d 1330.

Libel and slander: out-of-court communications between attorneys made preparatory to, or in the course or aftermath of, civil judicial proceedings as privileged, 36 ALR3d 1328.

Libel and slander: qualified privilege of reply to defamatory publication, 41 ALR3d 1083.

Libel and slander: privilege of reporting judicial proceedings as extending to proceeding held in secret or as to which record is sealed by court, 43 ALR3d 634.

Libel and slander: employer's privilege as to communications to news media concerning employees, 52 ALR3d 739.

Libel and slander: privileged nature of

communications made in course of grievance or arbitration procedure provided for by collective bargaining agreement, 60 ALR3d 1041.

Libel and slander: privileged nature of communication to other employers or employees' union of reasons for plaintiff's discharge, 60 ALR3d 1080.

Libel and slander: privileged nature of statements or utterances by member of school board in course of official proceedings, 85 ALR3d 1137.

Libel and slander: privileged nature of communications between insurer and insured, 85 ALR3d 1161.

Privilege of newsgatherer against disclosure of confidential sources or information, 99 ALR3d 37.

Libel and slander: reports of pleadings as within privilege for reports of judicial proceedings, 20 ALR4th 576.

Libel and slander: attorneys' statements to parties other than alleged defamed party or its agents, in course of extrajudicial investigation or preparation relating to pending or anticipated civil litigation as privileged, 23 ALR4th 932.

Libel and slander: privileged nature of statements or utterances by members of governing body of public institution of higher learning in course of official proceedings, 33 ALR4th 632.

Defamation: publication by intracorporate communication of employee's evaluation, 47 ALR4th 674.

Defamation: privilege attaching to news report of criminal activities based on information supplied by public safety officers — modern status, 47 ALR4th 718.

Immunity of police or other law enforcement officer from liability in defamation action, 100 ALR5th 341.

Defamation of church member by church or church official, 109 ALR5th 541.

Individual and corporate liability for libel and slander in electronic communications, including e-mail, internet and websites, 3 ALR6th 153.

Libel and slander: construction and application of the neutral reportage privilege, 13 ALR6th 111.

Liability of newspaper for libel and slander — 21st century cases, 22 ALR6th 553.

51-5-8. Absolute privilege of allegations in pleadings.

All charges, allegations, and averments contained in regular pleadings filed in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally sufficient to obtain it or not, are privileged. However false and malicious such charges, allegations, and averments may be, they shall not be deemed libelous. (Civil Code 1895, § 3842; Civil Code 1910, § 4438; Code 1933, § 105-711.)

History of Code section. — The language of this Code section is derived in part from the decision in Wilson v. Sullivan, 81 Ga. 238, 7 S.E. 274 (1888).

Law reviews. — For article, "Defamation Liability for Attorney Speech: A Policy-Based and Civility-Oriented Reconsideration of the Absolute Privilege for Attorneys," see 10 Ga. St. U.L. Rev. 431 (1994). For annual survey article discussing tort law, see 51 Mercer L. Rev. 461 (1999). For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

For comment on Taliferro v. Sims, 187 F.2d 6 (5th Cir. 1951), see 14 Ga. B. J. 103 (1951). For comment on Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952), see 15 Ga. B. J. 81 (1952). For case comment, "Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem," see 21 Ga. L. Rev. 429 (1986). For comment, "Lee v. Dong-A Ilbo: Use of Official Report Privilege to Protect Defamatory Statements in Press Account Based on Foreign Government Report," see 23 Ga. L. Rev. 275 (1988).

JUDICIAL DECISIONS

Former Code 1933, § 105-711 (see now O.C.G.A. § 51-5-8) provided for an absolute privilege in civil cases, while the privileges provided for in former Code 1933, §§ 105-704 and 105-709 (see now O.C.G.A. § 51-5-7) were conditional. Savannah News-Press, Inc. v. Hartridge, 110 Ga. App. 203, 138 S.E.2d 173 (1964).

Court of competent jurisdiction. — State court was competent to adjudicate an action brought by the Georgia Higher Education Assistance Corporation on a note given for a federally funded student loan; thus, the complainant was privileged against a counterclaim seeking damages for libel, slander, and perjury. Garrett v. Georgia Higher Educ. Assistance Corp., 217 Ga. App. 415, 457 S.E.2d 677 (1995).

Commission filings. — Statements in a request to investigate a real estate brokerage applicant filed with the Real Estate Commission pursuant to O.C.G.A. § 43-40-27 are entitled to absolute privilege under O.C.G.A. § 51-5-8. Skoglund v. Durham, 233 Ga. App. 158, 502 S.E.2d 814 (1998).

Privilege extends to filing of notice of lis pendens. Ferguson v. Atlantic Land & Dev. Corp., 248 Ga. 69, 281 S.E.2d 545 (1981).

After the purchasers requested specific performance of a contract requiring the property involved to be sold to them, the property was "directly involved," lis pendens was proper, the pleadings were privileged, and its filing was simply notice of the suit, not defamation of the title. Panfel v. Boyd, 187 Ga. App. 639, 371 S.E.2d 222 (1988).

Privilege inapplicable to improperly filed lis pendens. See South River Farms v. Bearden, 210 Ga. App. 156, 435 S.E.2d 516 (1993).

Trial court erred in granting partial summary judgment to a limited liability company (LLC) and the company's member on a creditor's slander of title claim because the act of the LLC and member of sending copies of a notice of lis pendens and complaint to a bank did not fall under the absolute privilege contained in O.C.G.A. § 51-5-8; the lis pendens was not valid because a prior action the LLC and member filed against a debtor, and the interests asserted therein, did not involve the real property at issue. McChesney v. IH Riverdale, LLC, 307 Ga. App. 77, 704 S.E.2d 244 (2010).

Privilege inapplicable when lis pendens invalid. — Trial court erred in granting a limited liability company and the company's members summary judgment in an owner's action for slander of title, tortious interference with contract, and tortious interference with economic opportunities because the act of sending copies of a notice of lis pendens on the owner's property and a complaint against the owner to a bank did not fall under the absolute privilege of O.C.G.A. § 51-5-8 since the lis pendens was not valid. Meadow Springs, LLC v. IH Riverdale, LLC, 307 Ga. App. 72, 704 S.E.2d 239 (2010).

Proposed order was privileged. — A proposed order prepared by a party in the course of a judicial proceeding at the direction of the judge is absolutely privileged as an official court document. Williams v. Stepler, 227 Ga. App. 591, 490 S.E.2d 167 (1997).

Counterclaim for slander dismissed. — Complaint was without merit because the slander of title counterclaims was based on statements made by the defendant in the defendant's complaint and notice of lis pendens, which are privileged. Alcovy Properties, Inc. v. MTW Inv. Co., 212 Ga. App. 102, 441 S.E.2d 288 (1994), appeal dismissed, 223 Ga. App. 230, 477 S.E.2d 395 (1996).

Lien filing privileged. — Contractor's filing of a lien and action to enforce the lien were privileged under O.C.G.A. § 51-5-8. Eurostyle, Inc. v. Jones, 197 Ga. App. 188, 397 S.E.2d 620 (1990).

While liens were improperly filed by a supplier, the property owner failed to show that the statements in the lien notices were false; further, the trial court could also have found that the liens were privileged under O.C.G.A. § 51-5-8 and, thus, dismissal of the owner's slander of title action was proper. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161 (2006).

Summary judgment was properly granted to real property buyers in an action by the sellers, alleging slander of title under O.C.G.A. § 51-9-11, as the sellers failed to assert actionable claims when lis pendens filed against the property were proper and privileged under O.C.G.A. § 51-5-8; further, any failure to remove or properly mark the lis pendens pursuant to O.C.G.A. § 44-14-612 after the sellers voluntarily dismissed the claim did not form the basis of a slander of title claim against the buyers. Exec. Excellence, LLC v. Martin Bros. Invs., LLC, 309 Ga. App. 279, 710 S.E.2d 169 (2011).

The libel of a suit being filed is no libel at all. HFC v. Gilley, 167 Ga. App. 195, 306 S.E.2d 85 (1983).

All allegations made in pleadings are absolutely privileged, provided the allegations are material and relevant to relief sought, and the court has jurisdiction to grant that relief. "Absolute" means at all times and without any exceptions. It means that the law has decreed that there can be no damages ever for such allegations. Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952), later appeal, 88 Ga. App. 131, 76 S.E.2d 229 (1953).

While this section does not use the term "absolute privilege," Georgia courts have said that it is recognized as a part of law of state. Fedderwitz v. Lamb, 195 Ga. 691, 25 S.E.2d 414 (1943).

Characteristic feature of absolute privilege is that question of malice is not open; all inquiry into good faith is closed. Fedderwitz v. Lamb, 195 Ga. 691, 25 S.E.2d 414 (1943).

Former Code 1933, §§ 105-710 and 105-711 (see now O.C.G.A. §§ 51-5-8 and 51-5-9) must be construed together. Finish Allatoona's Interstate Right, Inc. v. Burruss, 131 Ga. App. 572, 206 S.E.2d 679 (1974).

Underlying principle upon which the doctrine of privileged communications rests is public policy. — This is especially the case with absolute privilege, when the interest and the necessities of society require that the time and occasion of the publication or utterance, even though it be both false and malicious, shall protect the defamer from all liability to prosecution, for the sake of the public good. It rests upon the same necessity that requires the individual to surrender the individual's personal rights, and to suffer loss for the benefit of the common welfare. Happily for the citizen, this class of privilege is restricted to narrow and well-defined limits. Fedderwitz v. Lamb, 195 Ga. 691, 25 S.E.2d 414 (1943).

Action for libel founded on allegations in pleading fails to state claim upon which relief can be granted. Garrett v. DeWorken, 148 Ga. App. 656, 252 S.E.2d 81 (1979).

In testing pleadings, marks of absolute privilege are relevancy and materiality. When these are wanting, there is no privilege, or only conditional privilege at most. Finish Allatoona's Interstate Right, Inc. v. Burruss, 131 Ga. App. 572, 206 S.E.2d 679 (1974).

Existence of malice in making false allegations is immaterial. The code declares such allegations privileged. Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952), later appeal, 88 Ga. App. 131, 76 S.E.2d 229 (1953).

Section does not bar abusive litigation claim. — The privilege established under O.C.G.A. § 51-5-8 does not bar a claim for abusive litigation pursuant to O.C.G.A. § 51-7-80 et seq. Kluge v. Renn, 226 Ga. App. 898, 487 S.E.2d 391 (1997).

Section not applicable to liens. — Although under this section, allegations in pleadings are privileged even if false and malicious, this rule would not apply to a lien as it is strictly construed and is not a pleading. Carl E. Jones Dev., Inc. v. Wilson, 149 Ga. App. 679, 255 S.E.2d 135 (1979).

A lien is not a pleading for purposes of O.C.G.A. § 51-5-8 and statements made within a surveyor's lien are not afforded absolute privilege until the lien becomes attached to a lawsuit and verified notice of the suit is filed under O.C.G.A. § 44-14-361.1, at which point, the lien becomes an act of legal, or judicial process, and achieves the formality, solemnity, and status of a sworn statement. Simmons v. Futral, 262 Ga. App. 838, 586 S.E.2d 732 (2003).

Libel claim by debtor untimely. — Trial court did not err in entering judg-

ment in favor of a company on a debtor's libel claim because the debtor's claim was untimely under O.C.G.A. § 9-3-33; the debtor's libel claim was based upon the company's allegations in a deficiency claim against the debtor, which was filed in January 2007, and the company's subsequent failure to dismiss the claim after the debt was discharged in bankruptcy in March 2008, and the debtor first asserted the claim in September 2009. Furthermore, the trial court did not err because the debtor's allegations were privileged under O.C.G.A. § 51-1-8 and, as such, were not libelous as a matter of law. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Privilege applicable to EEOC proceedings. — Equal Employment Opportunity Commission (EEOC) proceedings were quasi-judicial in nature, thus, the former employers' statements to the EEOC in response to the former employee's EEOC charge were absolutely privileged under O.C.G.A. § 51-5-8 and the employee's defamation claim failed on the employers' motion for summary judgment. Collins v. Onyx Waste Servs. of N. Am., LLC, No. 7:04-cv-70 (HL), 2005 U.S. Dist. LEXIS 38258 (M.D. Ga. Dec. 20, 2005).

This section protects statements in affidavit impeaching the credit of a person seeking an attachment. Conley v. Key, 98 Ga. 115, 25 S.E. 914 (1896).

Quotations from pleadings conditionally privileged. — A letter sent by the defendant bank to its shareholders, which letter quoted from the bank's verified answer to the plaintiff's original complaint, was not absolutely privileged since the letter itself was not a pleading; the publishing of quotations from pleadings in such a letter is protected only by a conditional privilege. O'Neal v. Home Town Bank, 237 Ga. App. 325, 514 S.E.2d 669 (1999).

Disclosure of promissory note with borrower's social security number attached to complaint was privileged. — A borrower could not recover against a lender for invasion of privacy or violation of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq., based on the lender's attaching the note on which it sought to recover, which contained the borrower's Social Security number, to its complaint. The pleading was privileged under O.C.G.A. § 51-5-8. Finnerty v. State Bank & Trust Co., 301 Ga. App. 569, 687 S.E.2d 842 (2009).

There is no privilege as to judicial proceedings when newspaper report of such proceedings is not accurate and correct, or when the report is not done in good faith but with an express desire to vent "private malice" on another, even though, on its face, the article shows that the reporter was either merely quoting from the court petition verbatim or was repeating the substance of the allegations thereof. Shiver v. Valdosta Press, 82 Ga. App. 406, 61 S.E.2d 221 (1950).

To qualify for the privilege as to judicial proceedings, a newspaper report of such proceedings must present fully, fairly and accurately an impartial account of the proceedings. Although it must be accurate, at least with regard to all material matters, a substantially accurate report may be privileged as mere inaccuracies not affecting materially the purport of the article are immaterial. It is not necessary that the report be verbatim, and it may consist of an abridged or condensed statement, provided such statement is a fair one. Shiver v. Valdosta Press, 82 Ga. App. 406, 61 S.E.2d 221 (1950).

In camera summarization of evidence. — Allegedly slanderous statement made in an attorney's in camera summarization of relevant evidence during the course of a federal court trial, while not a pleading within the meaning of O.C.G.A. § 51-5-8, was nonetheless absolutely privileged. Bell v. Anderson, 194 Ga. App. 27, 389 S.E.2d 762 (1989).

Allegations made in recall petitions are not absolutely privileged, but are only conditionally privileged as "comments upon the acts of public men in their public capacity and with reference thereto." Davis v. Shavers, 225 Ga. App. 497, 484 S.E.2d 243 (1997), aff'd, 269 Ga. 75, 495 S.E.2d 23 (1998).

Petition for appointment of guardian. — Statements contained in a petition for appointment of a guardian were privileged. Cleveland v. Williamson, 194 Ga. App. 476, 391 S.E.2d 22 (1990).

Privilege applied in tortious interference with contract action. — Any statements attributed to the defendant by the press, which were taken from court documents, could not provide a basis for a claim of tortious interference with contract. Phillips v. MacDougald, 219 Ga. App. 152, 464 S.E.2d 390 (1995).

Attorney's letter not privileged. — Alleged libelous statements contained in a letter from the defendant's attorney to appraisers who were valuing the shareholder's stock upon resignation were not protected under O.C.G.A. § 51-5-8. Sparks v. Ellis, 205 Ga. App. 263, 421 S.E.2d 758, cert. denied, 205 Ga. App. 901, 421 S.E.2d 758 (1992).

Letter from accounting firm to controller's employer not privileged. — With regard to a controller's claims for defamation and tortious interference against an accounting/auditing firm that wrote a letter to the controller's employer that resulted in the controller's termination from employment, the trial court erred by dismissing the complaint after concluding that the alleged defamatory statements were inactionable privileged communications that had not been published since the controller sufficiently alleged malice, the communications between the accounting/auditing firm and the employer were conditionally privileged under O.C.G.A. § 51-5-7, and the controller sufficiently alleged publication of the statements. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

In an action for nonpayment of a bill, a copy of the bill which the plaintiff doctor attached to the complaint was clearly both relevant and material to the plaintiff doctor's suit. Garner v. Roberts, 238 Ga. App. 738, 520 S.E.2d 255 (1999).

Slander of title claim involving corporation. — Trial court erred in granting partial summary judgment to a limited liability company (LLC) and the company's member on a creditor's slander of title claim on the ground that the filing and publication of the notice of lis pendens were privileged under O.C.G.A. § 51-5-7(3) because the LLC and member did not show that they had an interest to uphold in a commission such that they were entitled as a matter of law to the privilege set forth in O.C.G.A. § 51-5-7(3); a letter accompanying the transmission of the complaint and notice of lis pendens to a bank did not refer to a commission owed to either the LLC or the member but rather to one owed to another entity. McChesney v. IH Riverdale, LLC, 307 Ga. App. 77, 704 S.E.2d 244 (2010).

Application in criminal case. — The defendant's malice murder and aggravated battery convictions were upheld on appeal, as the trial court did not err in introducing into evidence the pleadings filed in a civil lawsuit brought by the defendant against the victim and others, as the pleadings, albeit privileged, were introduced to show the defendant's motive or state of mind. Taylor v. State, 282 Ga. 44, 644 S.E.2d 850 (2007), cert. denied, 552 U.S. 950, 128 S. Ct. 384, 169 L. Ed. 2d 263 (2007).

Arrest warrants. — Trial court committed no error in dismissing the defamation claim predicated on the allegedly false statements by the defendant made in the arrest warrant application and the warrant application hearing, but erred in dismissing the claim to the extent that the claim could be construed as alleging that the defendant communicated unprivileged, defamatory statements to third parties outside the context of the warrant application proceedings. Renton v. Watson, 319 Ga. App. 896, 739 S.E.2d 19 (2013).

Section not applicable to fraud claim. — Trial court erred by granting summary judgment to an estate executor in a suit asserting fraud and other claims brought by two siblings as the trial court incorrectly determined that the privileges set forth in O.C.G.A. §§ 51-5-7(2) and 51-5-8 applied to the fraud claims and neither collateral estoppel nor res judicata barred the action since a prior probate court proceeding did not involve the same issues. Further, the probate court would have had no jurisdiction over the fraud and intentional interference with a gift claims. Morrison v. Morrison, 284 Ga. 112, 663 S.E.2d 714 (2008).

Cited in Gibbs v. Bank of Tifton, 21 Ga. App. 653, 94 S.E. 827 (1918); Bennett v. Bellinger, 40 Ga. App. 557, 150 S.E. 566

(1929); White v. Holderby, 192 F.2d 722 (5th Cir. 1951); Jordan v. Burger King Corp., 124 Ga. App. 652, 185 S.E.2d 577 (1971); Berger v. Shea, 150 Ga. App. 812, 258 S.E.2d 621 (1979); Fiske v. Stockton, 171 Ga. App. 601, 320 S.E.2d 590 (1984); Henson v. American Family Corp., 171 Ga. App. 724, 321 S.E.2d 205 (1984); Stewart v. Walton, 254 Ga. 81, 326 S.E.2d 738 (1985); Rothstein v. L.F. Still & Co., 181 Ga. App. 113, 351 S.E.2d 513 (1986); Watkins v. Laser/Print-Atlanta, Inc., 183 Ga. App. 172, 358 S.E.2d 477 (1987); Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988); South River Farms v. Bearden, 210 Ga. App. 156, 435 S.E.2d 516 (1993); Hightower v. Kendall Co., 225 Ga. App. 71, 483 S.E.2d 294 (1997); Clark v. Clark, 969 F. Supp. 1319 (S.D. Ga. 1997); Sanders v. Brown, 257 Ga. App. 566, 571 S.E.2d 532 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, § 280 et seq.

C.J.S. — 53 C.J.S., Libel and Slander, §§ 119, 121 et seq.

ALR. — Proceeding to obtain search warrant as judicial proceeding within rule of privilege in libel and slander, 58 ALR 723.

Libel and slander: privilege as to allegations in judicial proceedings contrary to facts as previously adjudicated, 136 ALR 1414.

Libel and slander: absolute privilege in respect of pleadings or other judicial matters as available to one who is neither a party, an attorney for a party, nor a witness, but who causes the inclusion of the defamatory matter, 144 ALR 633.

Libel and slander: doctrine of privilege or of fair comment and criticism as applicable to statement or publication imputing impropriety or dishonesty in bringing or defending civil action or proceeding, 148 ALR 1173.

Libel and slander: lack of jurisdiction as destroying privilege of defamatory allegations or statements in judicial proceedings, 158 ALR 592.

Libel and slander: statements in briefs as privileged, 32 ALR2d 423.

Libel and slander: privilege in connection with proceedings to disbar or discipline attorney, 77 ALR2d 493.

Libel and slander: application of privilege attending statements made in course of judicial proceedings to pretrial deposition and discovery procedures, 23 ALR3d 1172.

Relevancy of matter contained in pleading as affecting privilege within law of libel, 38 ALR3d 272.

Libel and slander: reports of pleadings as within privilege for reports of judicial proceedings, 20 ALR4th 576.

51-5-9. Right of action for malicious use of privilege.

In every case of privileged communications, if the privilege is used merely as a cloak for venting private malice and not bona fide in promotion of the object for which the privilege is granted, the party defamed shall have a right of action. (Orig. Code 1863, § 2923; Code 1868, § 2930; Code 1873, § 2981; Code 1882, § 2981; Civil Code 1895, § 3841; Civil Code 1910, § 4437; Code 1933, § 105-710.)

Law reviews. — For article, "Defamation and Invasion of Privacy," see 27 Ga. St. B. J. 18 (1990).

JUDICIAL DECISIONS

Former Code 1933, §§ 105-704, 105-709, and 105-710 (see now O.C.G.A. §§ 51-5-7 and 51-5-9) should be construed together. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944).

Former Code 1933, §§ 105-710 and 105-711 (see now O.C.G.A. §§ 51-5-8 and 51-5-9) must be construed together. Finish Allatoona's Interstate Right, Inc. v. Burruss, 131 Ga. App. 572, 206 S.E.2d 679 (1974).

Scope of section. — Former Code 1882, § 2981 (see now O.C.G.A. § 51-5-9) includes every case of conditional privilege under former Code 1882, § 2980 (see now O.C.G.A. § 51-5-7) and had no application to absolute privileges, such as former Civil Code 1895, § 3842 (see now O.C.G.A. § 51-5-8). Wilson v. Sullivan, 81 Ga. 238, 7 S.E. 274 (1888).

Elements required to maintain privilege. — To make the defense of privilege complete in an action of slander, good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only must appear. The absence of any one or more of these conditions will revoke the privilege. Van Geter v. Housing Auth., 167 Ga. App. 432, 306 S.E.2d 707 (1983), aff'd, 252 Ga. 196, 312 S.E.2d 309 (1984).

Privilege accorded to communications mentioned in this section is but conditional privilege, and in every such case, if the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted, the party defamed has a right to action. Veazy v. Blair, 86 Ga. App. 721, 72 S.E.2d 481 (1952); Morton v. Gardner, 155 Ga. App. 600, 271 S.E.2d 733 (1980).

Charges against members made by a church legitimately undertaking an investigation of misconduct were privileged, but there was no privilege for charges actually known to be false and made with the purpose of injuring another. First United Church v. Udofia, 223 Ga. App. 849, 479 S.E.2d 146 (1996).

Defense of "privilege" admits publication of allegedly defamatory matter but asserts it was done on privileged occasion and bona fide in promotion of the object for which the privilege was granted. Morton v. Gardner, 155 Ga. App. 600, 271 S.E.2d 733 (1980).

In order to claim limited privilege under former Code 1933, §§ 105-704 and 105-709 (see now O.C.G.A. § 51-5-7), communications must be made only to proper person, and privilege may not be used as a cloak for venting a private malice. Melton v. Bow, 241 Ga. 629, 247 S.E.2d 100, cert. denied, 439 U.S. 985, 99 S. Ct. 576, 58 L. Ed. 2d 656 (1978).

Good faith and good intention are necessary and essential ingredients of privileged communications. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944).

Proof that communication as made was privileged will defeat recovery unless actual malice on the part of the defendant exists. Van Gundy v. Wilson, 84 Ga. App. 429, 66 S.E.2d 93 (1951); Morton v. Gardner, 155 Ga. App. 600, 271 S.E.2d 733 (1980).

If communication is generally termed absolutely privileged under the law, there can be no recovery. Jordan v. Hancock, 91 Ga. App. 467, 86 S.E.2d 11 (1955).

If the privilege extended to the communication is absolute, it is immaterial whether there may have been a malicious publication, but when the privilege is a qualified one the privilege must be exercised in good faith and without malice. WSAV-TV, Inc. v. Baxter, 119 Ga. App. 185, 166 S.E.2d 416 (1969), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988).

Actual malice standard. — Under Georgia law, the constitutional "actual malice" standard for public figure defamation cases in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) applies to cases involving O.C.G.A. § 51-5-9, even in the context of private figure plaintiffs. Hammer v. Slater, 20 F.3d 1137 (11th Cir. 1994).

When the plaintiff alleges that communication was "malicious use" of

privilege, express malice must be proven. Morton v. Gardner, 155 Ga. App. 600, 271 S.E.2d 733 (1980).

Proof that a defendant acted with actual malice in making a statement defeats the defense of privilege under O.C.G.A. § 51-5-9. To prove actual malice, a plaintiff must show that a defendant knew that the statements were false or published them with reckless disregard of whether they were false or not; conclusory allegations by the plaintiff of malice are insufficient, in the absence of substantiating facts or circumstances, to raise a material issue for trial. Cooper-Bridges v. Ingle, 268 Ga. App. 73, 601 S.E.2d 445 (2004).

Malice not inferred. — Malice towards psychology intern could not be drawn indirectly from the direct evidence of the supervisor's controversy with colleagues over supervision of the intern. Cohen v. Hartlage, 179 Ga. App. 847, 348 S.E.2d 331 (1986).

Real estate developer did not show defamation on the part of home buyers because the buyers in the buyers communications with others concerning drainage problems on the buyers property which the buyers purchased from the developer addressed factually true information, pursuant to O.C.G.A. § 51-5-6, and the buyers communications were privileged, pursuant to O.C.G.A. § 51-5-7, as there was no showing of malice pursuant to O.C.G.A. § 51-5-9. Chaney v. Harrison & Lynam, LLC, 308 Ga. App. 808, 708 S.E.2d 672 (2011).

Sufficient allegation of malice. — With regard to a controller's claims for defamation and tortious interference against an accounting/auditing firm that wrote a letter to the controller's employer that resulted in the controller's termination from employment, the trial court erred by dismissing the complaint after concluding that the alleged defamatory statements were inactionable privileged communications that had not been published since the controller sufficiently alleged malice, the communications between the accounting/auditing firm and the employer were conditionally privileged under O.C.G.A. § 51-5-7, and the controller sufficiently alleged publication of the statements. Saye v. Deloitte & Touche, LLP, 295 Ga. App. 128, 670 S.E.2d 818 (2008).

Malice not shown. — Expelled respiratory therapy student failed to prove malice as required under O.C.G.A. § 51-5-9 after the student's mentor in an externship program denied signing a letter the student presented as evidence at the student's expulsion hearing that the student had permission to leave the student's shift for a job interview; a showing of malice was required because the mentor's statements in the expulsion hearing were conditionally privileged under O.C.G.A. § 51-5-7. Wertz v. Allen, 313 Ga. App. 202, 721 S.E.2d 122 (2011).

If occasion of utterance renders it privileged, in which case burden is put upon the plaintiff to establish malice. Cochran v. Sears, Roebuck & Co., 72 Ga. App. 458, 34 S.E.2d 296 (1945); Edmonds v. Atlanta Newspapers, Inc., 92 Ga. App. 15, 87 S.E.2d 415 (1955).

Effect of privilege is to require the plaintiff to prove actual malice. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

While the burden is on the defendant to establish its defense that the communication was a privileged one, when it has made a prima facie showing of privilege the burden is then upon the plaintiff to establish that the publication was made with actual malice. WSAV-TV, Inc. v. Baxter, 119 Ga. App. 185, 166 S.E.2d 416 (1969), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988) (overruling application of actual malice standard to non-public figure plaintiff).

After a newspaper presented uncontroverted evidence that its editor and publisher believed an article to be newsworthy and of interest to the public, and that neither the publisher nor the reporter harbored hatred or ill will toward the plaintiff, the burden shifted to the plaintiff to point to specific evidence of actual malice. Munoz v. American Lawyer Media, 236 Ga. App. 462, 512 S.E.2d 347 (1999).

When a city employee sued a city manager for defamation, due to statements made about the employee to a reporter,

and the city manager asserted the defense of privilege, the employee did not defeat that defense, under O.C.G.A. § 51-5-9, by showing the city manager acted with actual malice because the city manager's evidence established a lack of malice, shifting the burden to the employee to show evidence of the city manager's malice; furthermore, the employee's nine "facts," from which the employee claimed malice could be inferred, did not rise above the level of conclusory allegations and speculation, and did not create a jury issue, so the city manager was entitled to summary judgment. Rabun v. McCoy, 273 Ga. App. 311, 615 S.E.2d 131 (2005), overruled on other grounds by West v. City of Albany, 2017 Ga. LEXIS 177 (Ga. 2017).

Falsity of statement as evidence of malice. — The falsity of a communication, maligning the private character and mercantile standing of another is itself evidence of malice under this section. Johnson v. Bradstreet Co., 77 Ga. 172, 4 Am. St. R. 77 (1886).

Conscious knowledge of falsehood amounts to abuse of privilege. — When the communication is made maliciously with conscious knowledge that the communication is false, there is such abuse of the privilege claimed as to deny to the defendants the right to claim its protection from liability. Jordan v. Hancock, 91 Ga. App. 467, 86 S.E.2d 11 (1955).

"Actual malice" as defined by New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), is knowledge that the defamatory matter was false or it was published with reckless disregard of whether it was false or not. Morton v. Gardner, 155 Ga. App. 600, 271 S.E.2d 733 (1980).

Evidence not relevant to prove slanderous utterance may be relevant upon question of malice in that it is competent to show the state of mind of the parties at the approximate time of the remarks, and is of probative value. Van Gundy v. Wilson, 84 Ga. App. 429, 66 S.E.2d 93 (1951).

It is question for jury to determine whether comment was actuated with malice. McIntosh v. Williams, 160 Ga. 461, 128 S.E. 672 (1925).

Good faith and malice are both matters that can be inquired into, except in case of absolute privilege, and are questions of fact to be submitted to and determined by a jury. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944).

If statements wholly unnecessary for the protection of the interest intended to be subserved should be included, this would be a circumstance to be considered by the jury in determining whether the communication was really made in good faith, or was made maliciously. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944).

As to whether a communication which is qualifiedly privileged is used with a bona fide intent to protect the speaker or when the writer's own interest is concerned, or whether such communication is uttered maliciously, is a question of fact for the jury trying the case to determine. Lamb v. Fedderwitz, 71 Ga. App. 249, 30 S.E.2d 436 (1944).

Evidence created a question of fact with regard to defendant corporation's privilege and its "actual malice" in directing its attorney to forward to the plaintiff and the plaintiff's employer a letter seeking the return of any confidential commercial information which the plaintiff may have taken upon the plaintiff's departure from the corporation. Quikrete Cos. v. Schelble, 186 Ga. App. 330, 367 S.E.2d 114 (1988).

Summary judgment. — When the plaintiff charged malice, affidavits from each of the individual defendants indicating that the defendants acted properly in the course of their duties and without malice toward the plaintiff eliminated any genuine issue of material fact and placed the burden on the plaintiff to come forward with a showing of malice; since the plaintiff failed to make such a showing, summary judgment against the plaintiff was proper. Meyer v. Ledford, 170 Ga. App. 245, 316 S.E.2d 804 (1984).

Defendant did not establish absence of actual malice as to a newspaper article concerning a prior lawsuit filed by the present defendant against the present plaintiff and containing allegedly defamatory statements contributable to the present defendant in order to prevail on a motion for summary judgment. Fiske v. Stockton, 171 Ga. App. 601, 320 S.E.2d 590 (1984).

In a libel action, when the challenged communication between the plaintiff's former employer and the plaintiff's prospective employer was accurate, and the former employer asserted that the employer bore no ill will toward the plaintiff, the trial court properly granted summary judgment to the defendant. Kenney v. Gilmore, 195 Ga. App. 407, 393 S.E.2d 472, cert. denied, 195 Ga. App. 407, 393 S.E.2d 472 (1990).

Cited in Sheftall v. Central of Ga. Ry., 123 Ga. 589, 51 S.E. 646 (1905); Lamb v. Fedderwitz, 72 Ga. App. 406, 33 S.E.2d 839 (1945); Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952); Savannah News-Press, Inc. v. Hartridge, 110 Ga. App. 203, 138 S.E.2d 173 (1964); Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965); Sherwood v. Boshears, 157 Ga. App. 542, 278 S.E.2d 124 (1981); Jones v. J.C. Penney Co., 164 Ga. App. 432, 297 S.E.2d 339 (1982); Richardson v. King, 170 Ga. App. 169, 316 S.E.2d 582 (1984); Anderson v. Housing Auth., 171 Ga. App. 841, 321 S.E.2d 378 (1984); Clayton v. Macon Tel. Publishing Co., 173 Ga. App. 466, 326 S.E.2d 789 (1985); Williams v. Cook, 192 Ga. App. 811, 386 S.E.2d 665 (1989); Freeman v. Piedmont Hosp., 209 Ga. App. 845, 434 S.E.2d 764 (1993); AirTran Airlines v. Plain Dealer Publishing Co., 66 F. Supp. 2d 1355 (N.D. Ga. 1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, § 263 et seq.

C.J.S. — 53 C.J.S., Libel and Slander, §§ 108 et seq., 245, 259, 266.

51-5-10. Liability for defamatory statements in visual or sound broadcast; damages.

(a) The owner, licensee, or operator of a visual or sound broadcasting station or network of stations and the agents or employees of any owner, licensee, or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound broadcast by one other than the owner, licensee, or operator or an agent or employee thereof, unless it is alleged and proved by the complaining party that the owner, licensee, operator or the agent or employee has failed to exercise due care to prevent the publication or utterance of the statement in the broadcast.

(b) In no event shall any owner, licensee, or operator or the agents or employees of any owner, licensee, or operator of such a station or network of stations be held liable for any damages for any defamatory statement uttered over the facilities of the station or network by or on behalf of any candidate for public office.

(c) In any action for damages for any defamatory statement published or uttered in or as a part of a visual or sound broadcast, the complaining party shall be allowed only such actual, consequential, or punitive damages as have been alleged and proved. (Ga. L. 1949, p. 1137, §§ 1-3.)

Law reviews. — For note discussing possible tort consequences of invasions of privacy by television, see 3 Mercer L. Rev. 327 (1952). For note on defamation in radio and television, see 15 Mercer L. Rev. 450 (1964).

For comment on American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962), see 25 Ga. B. J. 310 (1963). For comment, "Room for Error Online: Revising Georgia's Retraction Statute to Accommodate the Rise of Internet Media," see 28 Ga. St. U.L. Rev. 923 (2012).

JUDICIAL DECISIONS

Usual rules of respondeat superior apply. — Since a "defamacast" is not considered "slander," the usual rules of respondeat superior are applicable, as with libel. Williamson v. Lucas, 166 Ga. App. 403, 304 S.E.2d 412 (1983).

In television and radio cases, courts historically based classification of defamatory matter on whether or not a prepared script was used; a libel being found when the script is used and "slander" when extemporaneous remarks are made. American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962).

Defamation by telecast is now actionable by law regardless of whether it be libel or slander. Montgomery v. Pacific & S. Co., 131 Ga. App. 712, 206 S.E.2d 631, aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974), overruled on other grounds, Diamond v. American Family Corp., 186 Ga. App. 681, 368 S.E.2d 350 (1988).

Defamation by radio and television falls into a new category: in this category, defamation by broadcast, or "defamacast," is actionable per se. American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962).

Allegation of criminal activity in a radio broadcast by anonymous caller. — Trial court erred in granting summary judgment to a media company in a defamation action pursuant to O.C.G.A. §§ 51-5-1 and 51-5-4; the trial court erred in finding that a musician was a public figure, as the musician was only known locally, and a false claim by an anonymous caller played on the air by a disc jockey was not a matter of public concern, and erred in finding that O.C.G.A. § 51-5-10(a) shielded the company, as there was an issue of fact as to whether the disc jockey made a defamatory statement as well. Riddle v. Golden Isles Broad., LLC, 275 Ga. App. 701, 621 S.E.2d 822 (2005).

Award of $100,000 for slander per se in radio broadcast not excessive. — Pursuant to O.C.G.A. § 51-12-12, a trial court set aside as excessive a jury's award to a musician of $100,000 in general damages for slander per se committed by a radio personality. This was error since the evidence showed the radio broadcast falsely accusing the musician of murder damaged the musician's reputation and career, which was based on the musician's reputation as a positive role model for fathers. Riddle v. Golden Isles Broad., LLC, 292 Ga. App. 888, 666 S.E.2d 75 (2008).

Failure to investigate. — In an action by a high school football coach against the superintendent of schools and a television station news reporter, a television news report concerning allegations of the coach's prior involvement in illegal gambling did not constitute "defamacast," slander, or false light invasion of privacy, even if the reporter failed to investigate adequately. Brewer v. Rogers, 211 Ga. App. 343, 439 S.E.2d 77 (1993).

As long as the state does not impose liability without fault, it may define for itself the appropriate standard of liability for publisher or broadcaster of defamatory falsehood injurious to a private individual. Any rule of strict liability that would amount to a guaranty of accuracy of factual assertions is unacceptable. Thus, a negligence standard is established when defamation of a private individual by publication is involved. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978).

Subsection (c) applies to station owner. — Subsection (c) of O.C.G.A. § 51-5-10 is not limited to allegedly defamatory statements made by a person other than the owner of the station or the owner's agents. Williamson v. Lucas, 166 Ga. App. 403, 304 S.E.2d 412 (1983).

"Actual damages" is not necessarily limited to pecuniary loss, or loss of

ability to earn money. Fuqua Television, Inc. v. Fleming, 134 Ga. App. 731, 215 S.E.2d 694 (1975).

Loss of distributorship. — When the plaintiff testified that, in addition to humiliation and embarrassment, the plaintiff had lost an opportunity to purchase a milk distributorship, there was ample evidence from which the jury could have found actual, consequential, and punitive damages. Williamson v. Lucas, 166 Ga. App. 403, 304 S.E.2d 412 (1983).

Standard for determining damage amount. — Once the determination had been made that damages should be awarded, the proper standard for determining the amount was "the enlightened conscience of impartial jurors," which was not in conflict with O.C.G.A. § 51-5-10. Williamson v. Lucas, 171 Ga. App. 695, 320 S.E.2d 800 (1984).

Failure to charge subsection (c). — The trial court erred in refusing to charge that the plaintiff's recovery, if any, should be limited to the "actual, consequential, or punitive damages alleged and proved," and the error was not harmless when at no place in the charge was the jury instructed that the plaintiff would have to prove each element of damages. Williamson v. Lucas, 166 Ga. App. 403, 304 S.E.2d 412 (1983).

Loss of office by candidate cannot be said to be natural, immediate, and legal consequence of alleged libelous charge and due exclusively to it. Special damages for loss of office have no proper place in a suit for libel brought by a candidate for the reason that such damages alleged are too remote and speculative to justify serious consideration. Anderson v. Kennedy, 47 Ga. App. 380, 170 S.E. 555 (1933).

Whether station's broadcast is justified is jury question. — Whether a broadcasting station was justified in telecasting the matter at issue should not be determined by the trial court or an appellate court as a matter of law. Justification should be determined by a jury. Pacific & S. Co. v. Montgomery, 233 Ga. 175, 210 S.E.2d 714 (1974).

Cited in Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, §§ 241, 242.

C.J.S. — 53 C.J.S., Libel and Slander, §§ 1 et seq., 149, 156, 157 et seq., 284 et seq.

ALR. — Legal aspects of radio communication and broadcasting, 82 ALR 1106; 89 ALR 420; 104 ALR 872; 124 ALR 982; 171 ALR 765.

Doctrine of privilege or fair comment as applicable to misstatements of fact in publication (or oral communication) relating to public officer or candidate for office, 150 ALR 358.

Defamation by radio or television, 50 ALR3d 1311.

Invasion of privacy by radio or television, 56 ALR3d 386.

Liability for personal injury or death allegedly resulting from television or radio broadcast, 20 ALR4th 327.

Libel and slander: necessity of expert testimony to establish negligence of media defendant in defamation action by private individual, 37 ALR4th 987.

Liability of internet service provider for internet or e-mail defamation, 84 ALR5th 169.

51-5-11. Admissibility of evidence in libel action concerning correction and retraction; effect thereof on damages.

(a) In any civil action for libel which charges the publication of an erroneous statement alleged to be libelous, it shall be relevant and competent evidence for either party to prove that the plaintiff requested retraction in writing at least seven days prior to the filing of the action or omitted to request retraction in this manner.

(b) In any such action, the defendant may allege and give proof of the following matters, as applicable:

(1)(A) That the matter alleged to have been published and to be libelous was published without malice;

(B) That the defendant, in a regular issue of the newspaper or other publication in question, within seven days after receiving written demand, or in the next regular issue of the newspaper or other publication following receipt of the demand if the next regular issue was not published within seven days after receiving the demand, corrected and retracted the allegedly libelous statement in as conspicuous and public a manner as that in which the alleged libelous statement was published; and

(C) That, if the plaintiff so requested, the retraction and correction were accompanied, in the same issue, by an editorial in which the allegedly libelous statement was specifically repudiated; or

(2) That no request for correction and retraction was made in writing by the plaintiff.

(c) Upon proof of the facts specified in paragraph (1) or (2) of subsection (b) of this Code section, the plaintiff shall not be entitled to any punitive damages and the defendant shall be liable only to pay actual damages. The defendant may plead the publication of the correction, retraction, or explanation, including the editorial, if demanded, in mitigation of damages. (Ga. L. 1958, p. 54, § 1; Ga. L. 1960, p. 198, § 1; Ga. L. 1986, p. 272, § 1.)

Law reviews. — For comment, "Room for Error Online: Revising Georgia's Retraction Statute to Accommodate the Rise of Internet Media," see 28 Ga. St. U.L. Rev. 923 (2012).

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"Publication," as used in O.C.G.A. § 51-5-11(b), means a communication made to any person other than the party libeled. Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

Verdict awarding general damages in a libel suit filed by an attorney against a former client, which showed that the client published facts intimating that the attorney bribed judges, contrary to O.C.G.A. § 16-10-2, was upheld as: (1) the jury could reasonably conclude that the attorney was a limited public figure, and was properly charged on that issue; (2) the client failed to seek any remedy regarding the verdict entered; (3) the trial court did not err in prohibiting the client from offering testimony about corrupt individuals who were exposed as a result of the publication about the attorney; and (4) based on the evidence of the publication, on the client's web site neither a directed verdict or judgment notwithstanding the verdict in the client's favor was authorized. Milum v. Banks, 283 Ga. App. 864, 642 S.E.2d 892 (2007).

Statements made in radio talk show. — O.C.G.A. § 51-5-11 is clearly inapplicable to defamatory statements made in a radio talk show, it being clear, giving the words "newspaper or other publication" their ordinary signification, that

the General Assembly intended that the section apply exclusively to the printed media. Williamson v. Lucas, 171 Ga. App. 695, 320 S.E.2d 800 (1984).

Subsection (c) applies only to libel. — The retraction provisions of subsection (c) of O.C.G.A. § 51-5-11 apply only to libel actions, that is, actions against a publisher, and not to any case based on an alleged slanderous statement made by a defendant to a newspaper reporter. Van Geter v. Housing Auth., 167 Ga. App. 432, 306 S.E.2d 707 (1983), aff'd, 252 Ga. 196, 312 S.E.2d 309 (1984).

Plain language of O.C.G.A. § 51-5-11 stated that the section is applicable only to any civil action for libel; a trial court erred by barring punitive damages arising from a claim of tortious interference with business relations based on O.C.G.A. § 51-5-11. U.S. Micro Corp. v. Atlantix Global Sys., LLC, 278 Ga. App. 599, 630 S.E.2d 416 (2006).

Failure to request retraction on Internet bulletin board posting. — Georgia's retraction statute, O.C.G.A. § 51-5-11, applies to libel actions involving publications on an Internet bulletin board; thus, since a limited-purpose public figure failed to request a retraction, although the public figure asked the Internet service provider to delete the messages, the public figure was precluded from obtaining punitive damages. Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

Failure to request charge on retraction. — When, in a defamation action, the defendants failed to submit to the trial court a charge based on subsection (c) of O.C.G.A. § 51-5-11, they may not question on appeal the trial court's failure to give a charge on retraction, in view of O.C.G.A. § 5-5-24(b). Williamson v. Lucas, 166 Ga. App. 403, 304 S.E.2d 412 (1983).

Cited in Fuqua Television, Inc. v. Fleming, 134 Ga. App. 731, 215 S.E.2d 694 (1975); Jones v. Neighbor Newspapers, Inc., 142 Ga. App. 365, 236 S.E.2d 23 (1977); Stange v. Cox Enters., Inc., 211 Ga. App. 731, 440 S.E.2d 503 (1994); Schafer v. Time, Inc., 142 F.3d 1361 (11th Cir. 1998); No Witness, LLC v. Cumulus Media Partners, LLC, No. 1:06-CV-1733 JEC, 2007 U.S. Dist. LEXIS 83761 (N.D. Ga. Nov. 13, 2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d, Libel and Slander, §§ 319 et seq., 383, 456 et seq., 471 et seq.

ALR. — Retraction as affecting right of action or amount of damages for libel or slander, 13 ALR 794.

Libel and slander: who is protected by statute restricting recovery unless retraction is demanded, 84 ALR3d 1249.

Individual and corporate liability for libel and slander in electronic communications, including e-mail, internet and websites, 3 ALR6th 153.

51-5-12. Admissibility of evidence in defamation action concerning correction and retraction; effect on damages.

(a) In any civil action for a defamatory statement which charges the visual or sound broadcast of an erroneous statement alleged to be defamatory, it shall be relevant and competent evidence for either party to prove that the plaintiff requested retraction or omitted to request retraction.

(b) In any such action, the defendant may allege and give proof of the following matters, as applicable:

(1)(A) That the matter alleged to have been broadcast and to be defamatory was published without malice;

(B) That the defendant, in a regular broadcast of the station over which the broadcast in question was made, within three days after receiving written demand, corrected and retracted the allegedly defamatory statement in as conspicuous and public a manner as that in which the alleged defamatory statement was broadcast; and

(C) That, if the plaintiff so requested, the retraction and correction were accompanied, on the same day, by an editorial in which the allegedly defamatory statement was specifically repudiated; or

(2) That no request for correction and retraction was made by the plaintiff.

(c) Upon proof of the facts specified in paragraph (1) or (2) of subsection (b) of this Code section, the plaintiff shall not be entitled to any punitive damages and the defendant shall be liable only to pay actual damages. The defendant may plead the broadcast of the correction, retraction, or explanation, including the editorial, if demanded, in mitigation of damages. (Code 1981, § 51-5-12, enacted by Ga. L. 1989, p. 408, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1989, "conspicuous" was substituted for "conspicious" in subparagraph (b)(1)(B).

Law reviews. — For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 330 (1989).

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Cited in Mathis v. Cannon, 276 Ga. 16, 573 S.E.2d 376 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 50 Am. Jur. 2d., Libel and Slander, §§ 319 et seq., 383, 456 et seq., 471 et seq.

CHAPTER 6

FRAUD AND DECEIT

Sec.
51-6-1. Right of action for fraud accompanied by damage.
51-6-2. When misrepresentation of material fact actionable as deceit; effect of mere concealment; knowledge of falsehood essential to deceit; when knowledge implied.
51-6-3. Letters to obtain credit.
51-6-4. Fraud by acts or silence; estoppel to assert title.

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Federal Securities Exchange Act. — Georgia Blue Sky Law, O.C.G.A. § 10-5-1 et seq., rather than the Georgia general fraud and deceit statutes, O.C.G.A. §§ 51-6-1 and 51-6-2, are most analogous to actions under § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5, and therefore the two-year statute of limitations rather than the four-year statute applies to such claims. Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 788 F.2d 1500 (11th Cir. 1986).

Cited in International Horizons, Inc. v. Committee of Unsecured Creditors, 16 Bankr. 484 (N.D. Ga. 1981).

RESEARCH REFERENCES

ALR. — Broker's liability for fraud or misrepresentation concerning development or nondevelopment of nearby property, 71 ALR4th 511.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death, 14 ALR5th 242.

Liability of vendor or real-estate broker for failure to disclose information concerning off-site conditions affecting value of property, 41 ALR5th 157.

51-6-1. Right of action for fraud accompanied by damage.

Fraud, accompanied by damage to the party defrauded, always gives a right of action to the injured party. (Orig. Code 1863, § 2900; Code 1868, § 2906; Code 1873, § 2957; Code 1882, § 2957; Civil Code 1895, § 3813; Civil Code 1910, § 4409; Code 1933, § 105-301.)

Cross references. — Equity jurisdiction over fraud, § 23-2-50 et seq.

Law reviews. — For article, "Consumer Protection Against Sellers Misrepresentations," see 20 Mercer L. Rev. 414 (1969). For article discussing ex parte rescission of sales contract for fraud and suit for fraud and deceit, in light of City Dodge, Inc. v. Gardner, 232 Ga. 766, 208 S.E.2d 794 (1974), see 11 Ga. St. B. J. 172 (1975).

For comment on Gardner v. Celanese Corp. of America, 88 Ga. App. 642, 76 S.E.2d 817 (1953), see 16 Ga. B. J. 340 (1954). For comment on Whiten v. Orr Constr. Co., 109 Ga. App. 267, 136 S.E.2d 136 (1964), see 1 Ga. St. B. J. 234 (1964). For comment, "Damage Awards and Computer Systems — Trends," see 35 Emory L.J. 255 (1986).

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Analysis

General Consideration
Application to Specific Cases

General Consideration

Essential elements of action for fraud and deceit are: (1) that the defendant made the representations; (2) that at the time the defendant knew the representations were false; (3) that the defendant made the representations with the intention and purpose of deceiving the plaintiff; (4) that the plaintiff reasonably relied upon such representations; and (5) that the plaintiff sustained the alleged loss and damage as the proximate result of the representations having been made. Brown v. Ragsdale Motor Co., 65 Ga. App. 727, 16 S.E.2d 176 (1941); Cosby v. Asher, 74 Ga. App. 884, 41 S.E.2d 793 (1947); McBurney v. Woodward, 84 Ga. App. 807, 67 S.E.2d 398 (1951); Aderhold v. Zimmer, 86 Ga. App. 204, 71 S.E.2d 270 (1952); Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959); Anderson v. R.H. Macy & Co., 101 Ga. App. 894, 115 S.E.2d 430 (1960); McLendon v. Galloway, 216 Ga. 261, 116 S.E.2d 208 (1960); Wiseman Baking Co. v. Parrish Bakeries of Ga., Inc., 103 Ga. App. 61, 118 S.E.2d 190 (1961); Dixie Seed Co. v. Smith, 103 Ga. App. 386, 119 S.E.2d 299 (1961); Vaughan v. Oxenborg, 105 Ga. App. 295, 124 S.E.2d 436 (1962); Blanchard v. West, 115 Ga. App. 814, 156 S.E.2d 164 (1967); D.A.D., Inc. v. Citizens & S. Bank, 227 Ga. 111, 179 S.E.2d 71 (1971); Hannah v. Belger, 436 F.2d 96 (5th Cir. 1971); Romedy v. Willett Lincoln-Mercury, Inc., 136 Ga. App. 67, 220 S.E.2d 74 (1975); Hardy v. Gordon, 146 Ga. App. 656, 247 S.E.2d 166 (1978); Windjammer Assocs. v. Hodge, 153 Ga. App. 758, 266 S.E.2d 540 (1980), overruled on other grounds, 246 Ga. 85, 269 S.E.2d 1 (1980); Tolar Constr. Co. v. GAF Corp., 154 Ga. App. 127, 2 S.E.2d 635 (1980); Eckerd's Columbia, Inc. v. Moore, 155 Ga. App. 4, 270 S.E.2d 249 (1980); DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989), cert. denied, 494 U.S. 1081, 110 S. Ct. 1813, 108 L. Ed. 2d 943 (1990), aff'd in part, rev'd in part on other grounds, 990 F.2d 1186 (11th Cir. 1993).

Actionable fraud will not result from misrepresentations which are immaterial, not relied upon, or which the plaintiff in the exercise of reasonable diligence should have ascertained to be untrue. Vaughan v. Oxenborg, 105 Ga. App. 295, 124 S.E.2d 436 (1962).

Constructive knowledge is not sufficient basis upon which to predicate action for fraud. Derryberry v. Robinson, 154 Ga. App. 694, 269 S.E.2d 525 (1980).

It is only fraud which results in damage that is actionable. Hinton v. Mack Purchasing Co., 41 Ga. App. 823, 155 S.E. 78 (1930).

By the express language of O.C.G.A. § 51-6-1, only fraud which results in damage is actionable. Pelletier v. Stuart-James Co., 863 F.2d 1550 (11th Cir. 1989).

Issue of value. — A general averment that the value of an item is exceedingly less than the price paid is merely conclusory and does not raise a fact issue as to value sufficient for a fraud claim to survive a summary judgment. Poe v. Sears Roebuck & Co., 1 F. Supp. 2d 1472 (N.D. Ga. 1998).

Falsehood or a lie, without damage, will not entitle the plaintiff to recover; but if there is damage with a lie, there is deceit, and injury to the party injured by the deceit is entitled to redress. Foster v. Sikes, 202 Ga. 122, 42 S.E.2d 441 (1947).

Any misrepresentation intended to deceive and which does deceive is fraud, for which a party is entitled to a remedy at law. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

Finding of willful misrepresentation required. — Court's failure to instruct the jury that it must find a willful misrepresentation before the jury could find the defendant liable for fraud was erroneous, misleading, and harmful, re-

General Consideration (Cont'd)

quiring the grant of a new trial. Trailmobile, Inc. v. Barton Envtl., Inc., 167 Ga. App. 1, 306 S.E.2d 1 (1983).

Failure to perform in accordance with promise lacking in mutuality cannot provide basis for actionable fraud. Kinard Realty, Inc. v. Evans, 152 Ga. App. 813, 264 S.E.2d 282 (1979).

Fraud cannot consist in mere speculation about future performance which amounts to no more than puffing. Vaughan v. Oxenborg, 105 Ga. App. 295, 124 S.E.2d 436 (1962).

Action for fraud not permitted if the plaintiff failed to exercise due diligence. — Fraud cannot form the basis of an action or a defense thereto, in the absence of any trust or confidential relationship, if it appears that the person relying on the fraud as a basis for the action or in defense thereto had equal and ample opportunity to prevent the happening of the occurrence, and made it possible through a failure to exercise proper diligence. Anderson v. R.H. Macy & Co., 101 Ga. App. 894, 115 S.E.2d 430 (1960); Lorick v. Na-Churs Plant Food Co., 150 Ga. App. 209, 257 S.E.2d 332 (1979).

Misrepresentation observable by both parties to contract. — A misrepresentation as to a matter of law amounting only to a misrepresentation as to a legal liability, which induces the making of a contract, does not constitute fraud which would authorize an action for deceit, when the matter is equally open to the observation of both parties, and there is no relation of trust or confidence between them. Salter v. Brown, 56 Ga. App. 792, 193 S.E. 903 (1937).

A petition for fraud and deceit must show that one who relied upon the representations of another used the means available to one, in the exercise of diligence, to discover the truth. One failing to inform oneself, but having equal opportunity of learning the truth, must suffer the consequences of one's neglect. Blanchard v. West, 115 Ga. App. 814, 156 S.E.2d 164 (1967).

A fraud plaintiff must have used due diligence in attempting to establish the truth or falsity of a defendant's assertions. DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989), cert. denied, 494 U.S. 1081, 110 S. Ct. 1813, 108 L. Ed. 2d 943 (1990), aff'd in part, rev'd in part on other grounds, 990 F.2d 1186 (11th Cir. 1993).

"Due diligence" demands reasonable care. — The due diligence requirement does not go so far as to require the exhaustion of all available means to ascertain the truth of the representation, but demands only reasonable care, which is a jury question. DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989), cert. denied, 494 U.S. 1081, 110 S. Ct. 1813, 108 L. Ed. 2d 943 (1990), aff'd in part, rev'd in part on other grounds, 990 F.2d 1186 (11th Cir. 1993).

Repetition after plaintiff's denial. — When the plaintiff repeatedly confronts the defendant with the apparent falsity of its representations, and the defendant repeatedly confirms its original statement, asserting special knowledge, reliance is justified. DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989), cert. denied, 494 U.S. 1081, 110 S. Ct. 1813, 108 L. Ed. 2d 943 (1990), aff'd in part, rev'd in part on other grounds, 990 F.2d 1186 (11th Cir. 1993).

Fraud which would relieve a party who can read must be fraud which prevents the party from reading. The exception to this rule is when the perpetrator of the alleged fraud is a fiduciary of the victim of the alleged fraud. Stewart v. Boykin, 165 Ga. App. 868, 303 S.E.2d 50 (1983).

Liability for fraud involves questions of law, as well as fact, and is properly decided only if the jury is instructed as to the applicable legal standards. Jones v. Miles, 656 F.2d 103 (5th Cir. 1981).

It is the province of the jury to pass upon all circumstances of alleged fraud, and to determine whether or not the party defrauded exercised diligence in discovering the falsity of the misrepresentations. Daniel v. Dalton News Co., 48 Ga. App. 772, 173 S.E. 727 (1934).

Questions of fraud, and the truth and materiality of representations made by a defendant, and whether the plaintiff could have protected oneself by the exercise of

proper diligence, are matters which usually should be submitted to a jury, and the court will not solve them on demurrer (now motion to dismiss), except in plain and undisputable cases. Blanchard v. West, 115 Ga. App. 814, 156 S.E.2d 164 (1967).

Waiver of action for fraud. — A person who voluntarily enters into a later agreement after full knowledge of all material facts waives one's right to a cause of action for common-law fraud. Jones v. Miles, 656 F.2d 103 (5th Cir. 1981).

Class action. — If fraud based upon oral misrepresentations, as opposed to written misrepresentations, is the gravamen of the complaint, the matter is not appropriate for class action treatment. This is so because of the necessity for individual proof of detrimental reliance. Stevens v. Thomas, 257 Ga. 645, 361 S.E.2d 800 (1987).

Type of damages permitted in fraud case. — In the insured party's fraud claim against the insurer alleging a conspiracy to intentionally undervalue automobile property damage claims, the total-loss valuation under the policy's appraisal provision did not moot the fraud claim; damages in the fraud claim were not limited to damage to the vehicle and included, under O.C.G.A. § 51-6-1, damages naturally flowing from the fraud itself. McGowan v. Progressive Preferred Ins. Co., 281 Ga. 169, 637 S.E.2d 27 (2006).

Right to recover even nominal damages. — When there is fraud or breach of a legal or private duty accompanied by any damage, the law gives a right to recover damages, even only nominal damages, as compensation. Holmes v. Drucker, 201 Ga. App. 687, 411 S.E.2d 728 (1991).

Punitive damages are permitted in Georgia cases involving fraud. Shingleton v. Armor Velvet Corp., 621 F.2d 180 (5th Cir. 1980).

Fraud, if found, will justify punitive damages. Gower v. Cohn, 643 F.2d 1146 (5th Cir. 1981).

Punitive damages might be awarded in connection with a state securities violation, but only if in accord with the requirements of O.C.G.A. § 51-6-1. Jones v. Miles, 656 F.2d 103 (5th Cir. 1981).

Award precluded by notice of appeal. — Award of damages under O.C.G.A. § 51-6-1 required reversal because a timely notice of appeal was filed which divested the trial court of jurisdiction to make such an award. Hall v. Hidy, 263 Ga. 422, 435 S.E.2d 215 (1993).

Cited in Christian v. Penn, 7 Ga. 434 (1849); Terhune v. Dever, 36 Ga. 648 (1867); Cochran v. Jones, 85 Ga. 678, 11 S.E. 811 (1890); Burpee v. Holmes, 132 Ga. 464, 64 S.E. 486 (1909); Gafford v. Twitty, 154 Ga. 682, 115 S.E. 105 (1922); Hoffman v. Lynch, 23 F.2d 518 (N.D. Ga. 1928); Keiley v. Citizens' Sav. Bank & Trust Co., 173 Ga. 11, 159 S.E. 527 (1931); Equitable Bldg. & Loan Ass'n v. Brady, 175 Ga. 43, 164 S.E. 674 (1932); Simmons v. May, 53 Ga. App. 454, 186 S.E. 441 (1936); Sikes v. Foster, 74 Ga. App. 350, 39 S.E.2d 585 (1946); Jackson v. Smith, 92 Ga. App. 677, 89 S.E.2d 526 (1955); Allstadt v. Johnson, 97 Ga. App. 584, 103 S.E.2d 683 (1958); Mooney v. Tallant, 397 F. Supp. 680 (N.D. Ga. 1975); McNeal v. Paine, Webber, Jackson & Curtis, Inc., 598 F.2d 888 (5th Cir. 1979); Pelletier v. Schultz, 157 Ga. App. 64, 276 S.E.2d 118 (1981); Everson v. Franklin Disct. Co., 248 Ga. 811, 285 S.E.2d 530 (1982); McGaha v. Kwon, 161 Ga. App. 216, 288 S.E.2d 289 (1982); Crosby v. Wenzoski, 164 Ga. App. 266, 296 S.E.2d 162 (1982); Big Ben Agri-Services, Inc. v. Bank of Meigs, 174 Ga. App. 493, 330 S.E.2d 422 (1985); Southern Disct. Co. v. Kirkland, 181 Ga. App. 263, 351 S.E.2d 685 (1986); Reynolds v. Flint River Technical Inst., 223 Ga. App. 240, 477 S.E.2d 393 (1996); Chandler v. MVM Constr., Inc., 232 Ga. App. 385, 501 S.E.2d 533 (1998).

Application to Specific Cases

Actionable fraud for purposes of lex loci delicti. — Because only fraud which results in damage is actionable, the "last event" necessary to make an actor liable for fraud is the injury, and consequently, for purposes of lex loci delicti, the place of the wrong is where that injury is sustained. IBM v. Kemp, 244 Ga. App. 638, 536 S.E.2d 303 (2000).

Breach of creditor's agreement to extend payments does not give rise to action for fraud. — Although creditor

Application to Specific Cases (Cont'd)

may have made an agreement, without consideration, to extend the debtor's time of payment, a failure to comply therewith did not give rise to cause of action for breach of contract, neither did it, under the allegations of the petition, make out a cause of action for fraud and deceit. Tallent v. Scarratt, 51 Ga. App. 577, 181 S.E. 141 (1935).

Cutting off equities of note maker creates liability. — The wrongful transfer of a negotiable note to a bona fide purchaser, thereby cutting off the maker's valid defense, gives rise to a cause of action under this section for the damages resulting therefrom. Jones v. Crawford, 107 Ga. 318, 33 S.E. 51, 45 L.R.A. 95 (1899); Detwiler v. Bainbridge Grocery Co., 119 Ga. 981, 47 S.E. 553 (1904).

Damage from fraudulent sale recouped. — A vendee, in an action by the vendor for the purchase price of land, may recoup actual damages resulting from a misrepresentation of the vendor of the boundaries of the land. James v. Elliott, 44 Ga. 237 (1871).

Effect of plaintiff's contributory negligence. — When a prospective purchaser of a quantity of goods represented to the owner of the goods who was offering the goods for sale that one could not afford to pay the market value because there was a processing tax imposed by the United States government on the goods and the seller, relying on the purchaser's representation as to the existence of a processing tax, sold the goods to the purchaser at the value of the tax less, per ton, but the pretended processing tax imposed was in fact void, the purchaser having instituted legal proceedings in court for the purpose of enjoining its collection, and having obtained an injunction enjoining same, the purchaser's misrepresentation of the purchaser's liability for the payment of the processing tax was as to a matter equally open to the observation of the seller and, therefore, constituted no fraud affording ground for a cause of action for deceit. Salter v. Brown, 56 Ga. App. 792, 193 S.E. 903 (1937).

Evidence failed to establish fraud and deceit alleged as the evidence amounted only to promise to pay money in future. Bullard v. Western Waterproofing Co., 63 Ga. App. 547, 11 S.E.2d 713 (1940).

Misrepresentation to assignor of salary that such is owed by employer. — One who receives a purported assignment of salary to secure an antecedent debt is not damaged merely by false and fraudulent representations by the assignor to the effect that one's employer is indebted to one for such salary. Hinton v. Mack Purchasing Co., 41 Ga. App. 823, 155 S.E. 78 (1930).

Summary judgment for a corporation was proper in fraud action. — Trial court properly granted summary judgment to a corporation on a limited liability company's fraud claim as: (1) the contract contained an integration clause and other representations could not be used to vary the contract; (2) the contract was more specific than the Georgia Limited Liability Partnership Act, specifically O.C.G.A. § 14-11-305(1), and the contract prevailed; (3) the contract provided that any member could engage in conflict of interest transactions, that the corporation could compete directly with the joint venture, and that the corporation had complete control of the joint venture's business; and (4) the corporation held 51 percent of the membership and could consent to a change in the joint venture's purpose or scope. Alimenta (USA), Inc. v. Oil Seed South, LLC, 276 Ga. App. 62, 622 S.E.2d 363 (2005).

Misrepresentation of bank's solvency. — Petition serving a recovery by the plaintiffs as depositors against individuals who were officers and directors of the bank, because of the publication of false statements and personal misrepresentations in regard to the bank's solvency, which did not show actual fraud on the part of the defendants, failed to state a cause of action against them for fraud and deceit. Green v. Perryman, 186 Ga. 239, 197 S.E. 880 (1938).

Bank's payment of company's checks when account funds insufficient. — When a car auction contended that a bank's practice of paying a car company's checks when the account had insufficient funds constituted fraud because such payment misled the car auc-

tion as to the company's credit worthiness but the evidence showed that the auction relied upon past credit history in extending credit and that it had no knowledge that the bank paid checks when the account had insufficient funds until some checks were dishonored, the bank did not act fraudulently because there was no misrepresentations, no reliance, and no intent to deceive. Georgia Cas. & Sur. Co. v. Tennille Banking Co. (In re Smith), 51 Bankr. 904 (Bankr. M.D. Ga. 1985).

Misrepresentation by contractor as to work required. — Petition by subcontractor for damages due to increased costs of work performed by virtue of misrepresentations by contractor as to nature of work required was an action for fraud and deceit. Rich's, Inc. v. Kirwan Bros., 97 Ga. App. 58, 102 S.E.2d 648 (1958).

Misrepresentation by director to person purchasing stock concerning financial condition of corporation is actionable. Daniel v. Dalton News Co., 48 Ga. App. 772, 173 S.E. 727 (1934).

Misrepresentation on financial statement in connection with loan. — In suit against the defendants, for a tort consisting of fraudulent representations made by them in their financial statements, whereby the borrower obtained money from the plaintiff, the plaintiff could waive the right to sue on the note and the contract of guaranty and bring an action for damages on account of alleged fraud and deceit by the defendant, whereby the lender advanced the money to its subsequent injury. Allen v. Hartsfield Co., 52 Ga. App. 549, 183 S.E. 821 (1936).

Misrepresentation of property values. — As against attack by general demurrer (now motion to dismiss), allegations of fraud and deceit which showed that the defendant deliberately concealed facts within the defendant's knowledge affecting value, as an inducement to sell, which facts the plaintiff sought to discover, are sufficient to support a cause of action. Blanchard v. West, 115 Ga. App. 814, 156 S.E.2d 164 (1967).

Misrepresentation of quality of goods. — Evidence that within two weeks of purchase of used 1975 Oldsmobile from dealer (contract containing an express disclaimer of all warranties), the engine of the automobile burned up and had to be replaced was sufficient evidence to support verdict for fraud and deceit, with actual and punitive damages. Bob Maddox Dodge, Inc. v. McKie, 155 Ga. App. 263, 270 S.E.2d 690 (1980).

When the purchaser of personal property has been injured by the false and fraudulent representations of the seller as to the subject matter thereof, the purchaser ordinarily has an election whether to rescind the contract, return the article, and sue in tort for fraud and deceit, or whether to affirm the contract, retain the article, and seek damages resulting from the fraudulent misrepresentation. Bob Maddox Dodge, Inc. v. McKie, 155 Ga. App. 263, 270 S.E.2d 690 (1980).

No cause of action for fraud exists in one who buys or accepts security in land while failing to exercise any diligence for one's protection, and asserts that one blindly relied on the representations of the seller as to matters of which one could have informed oneself. Third World, Ltd. No. II v. Brewmasters of Augusta, Inc., 155 Ga. App. 352, 270 S.E.2d 891 (1980).

No cause of action for fraud by subscription contest loser when winner used fraudulent means. — When two contestants in a contest for soliciting subscriptions to a newspaper, submitted to the newspaper putting on the contest their claims for a prize to be awarded under the rules of the contest, and the judges determined the contest according to the rules by awarding the prize to the contestant who obtained the largest number of votes for obtaining subscriptions to the newspaper, the losing party had no remedy by suit at law against the winning party to whom the prize had been awarded, for any redress arising out of any fraud perpetrated by the winning party in the procurement of the subscriptions whereby the judges of the contest were induced to award the prize erroneously. Harrison v. Jones, 52 Ga. App. 852, 184 S.E. 889 (1936).

Representation that land title is unencumbered. — After the owner of land represented to the purchaser that there was no encumbrance against the premises

Application to Specific Cases (Cont'd)

sold, thereby inducing the purchaser to purchase the land, and the land was found later to be encumbered, this constituted a fraudulent representation for which relief will be given the purchaser. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

In a suit by the seller for the purchase money of land, the defendant purchaser is entitled to plead that the defendant was not put in possession of the premises and that the seller was guilty of false and fraudulent representations as to the existence of liens on the premises and, upon proof of such facts, a verdict in the defendant's favor is authorized. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

Representation that title to goods is unencumbered. — When it is shown that goods were furnished upon the false representation that property was free from any lien or encumbrance, and this was known to be so by the accused when the accused made it, it was not necessary to prove how, or to what extent, the furnishers of the goods were damaged thereby. The encumbrance upon the property was in itself proof of damage. Bolton v. State, 43 Ga. App. 759, 159 S.E. 910 (1931).

Statement of one who has purchased an option, to the seller, that one intends to exercise the option, will give rise to cause of action if the statement is false and fraudulent, is material, and is acted upon by the recipient to the recipient's injury. Floyd v. Morgan, 62 Ga. App. 711, 9 S.E.2d 717 (1940).

Stock subscription induced by fraud. — As between a stockholder and the corporation, unless special circumstances alter the case, the general rule that contracts obtained by fraud may be avoided by the party defrauded applies to a stock subscription induced by the fraud of the company through the company's authorized agents, and so likewise when only the rights of other shareholders are affected, the company being solvent and a going concern. Daniel v. Dalton News Co., 48 Ga. App. 772, 173 S.E. 727 (1934).

Stock sale induced by fraud. — When a purchaser seeks damages against a party other than the seller of the security the sale of which gave rise to a federal securities claim, the Georgia statute most resembling a Rule 10b-5 cause of action is the Georgia general fraud statute as found in O.C.G.A. § 51-6-1. In re N. Am. Acceptance Corp. Sec. Cases, 513 F. Supp. 608 (N.D. Ga. 1981).

When contract is rescinded and action is brought for fraud, disclaimer of warranty is no longer binding. Bob Maddox Dodge, Inc. v. McKie, 155 Ga. App. 263, 270 S.E.2d 690 (1980).

Physician's duty to disclose risks. — Physician was not under an affirmative obligation, either under statute or common law, to disclose the physician's drug use to the physician's patients prior to rendering services, and the physician's failure to make such disclosure could not be the basis for an independent cause of action against the physician. Albany Urology Clinic, P.C. v. Cleveland, 272 Ga. 296, 528 S.E.2d 777 (2000), reversing Cleveland v. Albany Urology Clinic, P.C., 235 Ga. App. 838, 509 S.E.2d 664 (1998).

Holder claims permitted. — In response to a certified question asking whether Georgia common law recognized fraud claims based on forbearance in the sale of publicly traded securities, the Supreme Court answered that Georgia law permitted holder claims, and the limitations imposed in other jurisdictions were appropriate. Negligent misrepresentation claims, like fraud claims, can be based on forbearance in the sale of publicly traded securities, and the direct communication and specific reliance limitations on fraud claims by "holders" also apply to negligent misrepresentation claims. Holmes v. Grubman, 286 Ga. 636, 691 S.E.2d 196 (2010).

Intentionally false statements from attorney. — While a client's complaint contained a count for fraud, the client failed to allege any specific facts to state a cause of action for fraud pursuant to O.C.G.A. §§ 9-11-9, 51-6-1, and 51-6-2(b) because the complaint failed to allege any specific facts indicating that a former attorney intentionally made false statements to the client during the course of the representation of the client. Fortson v. Freeman, 313 Ga. App. 326, 721 S.E.2d 607 (2011).

Whether failure to disclose was breach of fiduciary duty. — In a dispute between a manager and a member of an LLC over the member's alleged failure to disclose a contractor's financial problems and failure to supervise the contractor in the contractor's site work, issues of fact remained regarding whether the member had a fiduciary duty to inform the manager of the problems. Inland Atl. Old Nat'l Phase I, LLC v. 6425 Old Nat'l, LLC, 329 Ga. App. 671, 766 S.E.2d 86 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraud and Deceit, § 12.

C.J.S. — 37 C.J.S., Fraud, §§ 12 et seq., 20, 25, 102-104, 109 et seq.

ALR. — Obligee's concealment of facts or evasive answers as fraud against surety, 8 ALR 1485.

May offense of obtaining money or property by false pretenses or confidence game be predicated on obtaining loan or renewal thereof, 24 ALR 397; 52 ALR 1167.

Rights and remedies of one whose funds are fraudulently used in the purchase or improvement of real property, 47 ALR 371; 48 ALR 1269.

Fraud of vendee or buyer inducing vendor or seller to accept less favorable terms as sustaining an action in tort, 52 ALR 1153.

Opportunity of buyer of personal property to ascertain facts as affecting claim of fraud on part of seller in misrepresenting property, 61 ALR 492.

Gift by husband as fraud on wife, 64 ALR 466; 49 ALR2d 521.

Promises and statements as to future events as fraud, 68 ALR 635; 91 ALR 1296; 125 ALR 879.

Cancellation or rescission of contract for vendee's failure to comply therewith as affecting his right in tort against the vendor for the latter's fraud, 74 ALR 169.

Admissibility of evidence of good character of party for truth and honesty on issue of fraud in civil action, 78 ALR 643.

Civil liability of bank officer or director permitting deposit after insolvency of bank, 87 ALR 1402.

Right of action for damages against third person for fraud in inducing marriage, 88 ALR 786.

Action for fraud or deceit predicated upon oral contract within the statute of frauds or the transaction of which the oral contract was a part, 104 ALR 1420.

Dealings between seller and buyer after latter's knowledge of former's fraud as waiver of claim for damages on account of fraud, 106 ALR 172.

Effect of action as an election of remedy or choice of substantive rights in case of fraud in sale of property, 123 ALR 378.

Excessive security for debt as affecting question of fraud upon creditors, 138 ALR 1051.

Condition and measure of damages in tort action for fraud inducing loan, 162 ALR 698.

Location of land as governing venue of action for damages for fraud in sale of real property, 163 ALR 1312.

Pleading avoidance of delay in discovery of fraud in order to toll statute of limitations, 172 ALR 265.

Right with respect to proceeds of life insurance of one whose funds have been wrongfully used to pay premiums, 24 ALR2d 672.

Admissibility, in tort action for fraud, of evidence as to price for which the assertedly defrauded purchaser of property sold it, 31 ALR2d 1064.

Misrepresentation as to third person's present intention as to future act as actionable fraud, 40 ALR2d 971.

Tort liability for damages for misrepresentations as to area of real property sold or exchanged, 54 ALR2d 660.

Gift or other voluntary transfer by husband as fraud on wife, 49 ALR2d 521.

Right of action for fraud, duress, or the like, causing instant plaintiff to release or compromise a cause of action against third person, 58 ALR2d 500.

Right of life insurer to restitution of payments made because of fraud as to death of insured, 59 ALR2d 1107.

Measure of damages recoverable for fraud as to the credit or financial condition of a third person, 72 ALR2d 943.

Liability of one putative spouse to other for wrongfully inducing entry into or co-

habitation under illegal, void, or nonexistent marriage, 72 ALR2d 949.

Criminal responsibility for fraud or false pretenses in connection with home repairs or installations, 99 ALR2d 925.

Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 ALR3d 719.

Employer's misrepresentations as to employee's or agent's future earnings as actionable fraud, 16 ALR3d 1311.

Receiver's personal liability for negligence in failing to care for or maintain property in receivership, 20 ALR3d 967.

Duty of vendor of real estate to give purchaser information as to termite infestation, 22 ALR3d 972.

Criminal liability for unauthorized use of a credit card, 24 ALR3d 986.

Measure of damages for fraudulently inducing employment contract, 24 ALR3d 1388.

Employer's misrepresentation as to prospect, or duration, of employment as actionable fraud, 24 ALR3d 1412.

Actionability of conspiracy to give or to procure false testimony or other evidence, 31 ALR3d 1423.

Insurer's tort liability for acts of adjuster seeking to obtain settlement or release, 39 ALR3d 739.

Workmen's compensation provision as precluding employee's action against employer for fraud, false imprisonment, defamation, or the like, 46 ALR3d 1279.

Consumer class actions based on fraud or misrepresentation, 53 ALR3d 534.

Validity of express statutory grant of power to state to seek, or to court to grant, restitution of fruits of consumer fraud, 59 ALR3d 1222.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property, 61 ALR3d 922.

Fraud in connection with franchise or distributorship relationship, 64 ALR3d 6.

Tax preparer's liability to taxpayer in connection with preparation of tax returns, 81 ALR3d 1119.

Liability of estate for tort of executor, administrator, or trustee, 82 ALR3d 892.

Recovery of punitive damages in action by purchasers of real property charging fraud or misrepresentation, 19 ALR4th 801.

Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold, 46 ALR4th 546.

51-6-2. When misrepresentation of material fact actionable as deceit; effect of mere concealment; knowledge of falsehood essential to deceit; when knowledge implied.

(a) Willful misrepresentation of a material fact, made to induce another to act, upon which such person acts to his injury, will give him a right of action. Mere concealment of a material fact, unless done in such a manner as to deceive and mislead, will not support an action.

(b) In all cases of deceit, knowledge of the falsehood constitutes an essential element of the tort. A fraudulent or reckless representation of facts as true when they are not, if intended to deceive, is equivalent to a knowledge of their falsehood even if the party making the representation does not know that such facts are false. (Orig. Code 1863, § 2901; Code 1868, § 2907; Code 1873, § 2958; Code 1882, § 2958; Civil Code 1895, § 3814; Civil Code 1910, § 4410; Code 1933, § 105-302.)

Law reviews. — For note discussing limits of tort action for deceit as a consumer remedy, see 25 Emory L.J. 445 (1976). For note, "Misrepresentations and Nondisclosures in the Insurance Application," see 13 Ga. L. Rev. 876 (1979).

For comment on Aderhold v. Zimmer, 86 Ga. App. 204, 71 S.E.2d 270 (1952), see 15

Ga. B. J. 355 (1953). For comment on Gardner v. Celanese Corp. of America, 88 Ga. App. 642, 76 S.E.2d 817 (1953), see 16 Ga. B. J. 340 (1954). For comment on Whiten v. Orr Constr. Co., 109 Ga. App. 267, 136 S.E.2d 136 (1964), see 1 Ga. St. B. J. 234 (1964).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

In suit sounding in tort for damages on account of actual fraud, gist of action is purpose and design to deceive. Penn Mut. Life Ins. Co. v. Taggart, 38 Ga. App. 509, 144 S.E. 400 (1928); Leatherwood v. Boomershine Motors, Inc., 53 Ga. App. 592, 186 S.E. 897 (1936); Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959); Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

The gist of an action for damages in tort based on the falsity of representation is that they must have involved actual moral guilt. Dundee Land Co. v. Simmons, 204 Ga. 248, 49 S.E.2d 488 (1948).

In an action sounding in tort for damages resulting from fraudulent misrepresentation, the gist of the action is the deceit intended. Central Chevrolet, Inc. v. Campbell, 129 Ga. App. 30, 198 S.E.2d 362 (1973).

Deceit action not assignable. — An action of deceit is not assignable. Bates & Co. v. Forsyth, 64 Ga. 232 (1879).

Rescission action inconsistent with deceit. — An action of deceit, is inconsistent with an action for rescission, but a mere offer to restore if unaccepted will not operate as a bar to the first named action. Commercial City Bank v. Mitchell, 25 Ga. App. 837, 105 S.E. 57 (1920).

Essential elements of action for fraud and deceit are: (1) that the defendant made the representations; (2) that at the time the defendant knew the representations were false; (3) that the defendant made the representations with the intention and purpose of deceiving the plaintiff; (4) that the plaintiff reasonably relied upon such representations; and (5) that the plaintiff sustained the alleged loss and damage as the proximate result of the representations having been made. Brown v. Ragsdale Motor Co., 65 Ga. App. 727, 16 S.E.2d 176 (1941); Cosby v. Asher, 74 Ga. App. 884, 41 S.E.2d 793 (1947); McBurney v. Woodward, 84 Ga. App. 807, 67 S.E.2d 398 (1951); Aderhold v. Zimmer, 86 Ga. App. 204, 71 S.E.2d 270 (1952); Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959); McLendon v. Galloway, 216 Ga. 261, 116 S.E.2d 208 (1960); Anderson v. R.H. Macy & Co., 101 Ga. App. 894, 115 S.E.2d 430 (1960); Wiseman Baking Co. v. Parrish Bakeries of Ga., Inc., 103 Ga. App. 61, 118 S.E.2d 190 (1961); Dixie Seed Co. v. Smith, 103 Ga. App. 386, 119 S.E.2d 299 (1961); Vaughan v. Oxenborg, 105 Ga. App. 295, 124 S.E.2d 436 (1962); Blanchard v. West, 115 Ga. App. 814, 156 S.E.2d 164 (1967); D.A.D., Inc. v. Citizens & S. Bank, 227 Ga. 111, 179 S.E.2d 71 (1971); Hannah v. Belger, 436 F.2d 96 (5th Cir. 1971); Romedy v. Willett Lincoln-Mercury, Inc., 136 Ga. App. 67, 220 S.E.2d 74 (1975); Hardy v. Gordon, 146 Ga. App. 656, 247 S.E.2d 166 (1978); Windjammer Assocs. v. Hodge, 153 Ga. App. 758, 266 S.E.2d 540 (1980), overruled on other grounds, 246 Ga. 85, 269 S.E.2d 1 (1980); Tolar Constr. Co. v. GAF Corp., 154 Ga. App. 127, 267 S.E.2d 635 (1980); Eckerd's Columbia, Inc. v. Moore, 155 Ga. App. 4, 270 S.E.2d 249 (1980); Ekstedt v. Charter Medical Corp., 192 Ga. App. 248, 384 S.E.2d 276 (1989).

A material misrepresentation, constituting actual fraud, may give rise to an independent action in tort for deceit, to recover for damage thus occasioned. In such a suit it is necessary to show, not only that a material misrepresentation was made for the purpose of inducing the

General Consideration (Cont'd)

plaintiff to act, that the plaintiff had a right to act, and that the plaintiff did act thereon to the plaintiff's injury, but it must be shown that such representation was willfully and knowingly false, or what the law regards as the equivalent of knowledge, a reckless or fraudulent representation about that which the party pretends to know, but about which the plaintiff knows that the plaintiff does not know, and by which false pretense the plaintiff's purpose and intent is to deceive. Leatherwood v. Boomershine Motors, Inc., 53 Ga. App. 592, 186 S.E. 897 (1936); Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959); Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

In an action for deceit, there are traditional elements which must be proved, and a material misrepresentation or concealment is one of them, as is knowledge of the falsehood, or reckless disregard of the true facts. Grainger v. Jackson, 122 Ga. App. 123, 176 S.E.2d 279 (1970).

The element of intention to deceive is as necessary in an action based on concealment as one based on wilful misrepresentation. An action for fraud and deceit must be based upon a representation (or concealment) which was made with the intention and purpose of deceiving the opposite party and for the purpose of injuring the party. Conner v. Branch, 185 Ga. App. 565, 364 S.E.2d 890, cert. denied, 185 Ga. App. 909, 364 S.E.2d 890 (1988).

Civil fraud and theft by deception have different elements and showing that there are jury issues as to fraud does not necessarily show that there are jury issues as to theft by deception; a failure to show the level of intent needed for proving theft by deception would preclude a jury issue on that crime as a predicate act for RICO purposes, defeating a RICO claim. Avery v. Chrysler Motors Corp., 214 Ga. App. 602, 448 S.E.2d 737 (1994).

Right to recover even nominal damages. — When there is fraud or breach of a legal or private duty accompanied by any damage, the law gives a right to recover damages, even only nominal damages, as compensation. Holmes v. Drucker, 201 Ga. App. 687, 411 S.E.2d 728 (1991).

In order to give rise to an action for damages, the defendant's fraud must be actual, i.e., the misrepresentation must be made either knowingly or with reckless disregard for the consequences. Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734 (1983).

There is no requirement of privity as a predicate to liability for either fraud or conspiracy to defraud. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

Fraud may exist from misrepresentation by either party, made with design to deceive, or which does actually deceive the other party, and in the latter case renders the sale voidable at the election of the party injured. McBurney v. Woodward, 84 Ga. App. 807, 67 S.E.2d 398 (1951).

Fraud may be perpetrated by willful misrepresentations made by one person to another, with a design to mislead and which do actually mislead another; it may be perpetrated by signs and tricks, and even silence may in some instances amount to fraud. King v. Towns, 102 Ga. App. 895, 118 S.E.2d 121 (1960).

Fraud is either actual or constructive and either constitutes legal fraud. — Actual fraud involves moral guilt since there must be an intentional purpose to deceive. Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Either actual or constructive fraud may consist in misrepresentation of material fact. Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959); Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Independent affirmative action in tort based upon fraudulent misrepresentations in order to be actionable must be based upon actual fraud. Brown v. Ragsdale Motor Co., 65 Ga. App. 727, 16 S.E.2d 176 (1941).

An essential element of any fraud claim is that the defendant knew the defendant's representation was false. First Fin. Sav. & Loan Ass'n v. Title Ins.

Co., 557 F. Supp. 654 (N.D. Ga. 1982).

Whether fraud is actual depends on whether false representation was made with purpose and intent to deceive. Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959); Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Any misrepresentation intended to deceive and which does deceive is fraud, for which a party is entitled to a remedy at law. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

Misrepresentations as to question of law cannot constitute remediable fraud, as such representations are ordinarily regarded as mere expressions of opinion. This is especially true when there is no confidential relationship between the parties. Brown v. Mack Trucks, Inc., 111 Ga. App. 164, 141 S.E.2d 208 (1965).

A misrepresentation as to a matter of law amounting only to a misrepresentation as to a legal liability, which induces the making of a contract, does not constitute fraud which would authorize an action for deceit, when the matter is equally open to the observation of both parties, and there is no relation of trust or confidence between the parties. Salter v. Brown, 56 Ga. App. 792, 193 S.E. 903 (1937).

Innocent misrepresentations cannot amount to anything more than constructive fraud, and, as such, are not creative of any independent right of action for damages in tort in favor of the injured party; but they may support an action in equity to rescind a contract so induced. Gaultney v. Windham, 99 Ga. App. 800, 109 S.E.2d 914 (1959); Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

"Innocent" or "constructive" fraud exists only as an equitable doctrine and will not support an action in tort for damages. Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734 (1983).

Concealment of a defect is actionable when there is a duty of disclosure. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

Concealment of material facts may amount to fraud when direct inquiry is made, and the truth evaded, or when the concealment is of intrinsic qualities of the article which the other party by the exercise of ordinary prudence and caution could not discover. Georgia-Carolina Brick & Tile Co. v. Brown, 153 Ga. App. 747, 266 S.E.2d 531 (1980).

Falsehood or lie, without damage, will not entitle the plaintiff to recover; but if there be damage with a lie, there is deceit, and injury to the party injured by the deceit is entitled to redress. Foster v. Sikes, 202 Ga. 122, 42 S.E.2d 441 (1947).

Knowledge of falsity is essential element in cause of action for deceit based upon fraud. Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

A "misrepresentation" presupposes knowledge of the falsity of the representation and does not include representations as to future acts or events. Gross v. Ideal Pool Corp., 181 Ga. App. 483, 352 S.E.2d 806 (1987).

Although affirmation of what is not known to be true, or believed to be true, is equally as unjustifiable as the affirmation of what is positively known to be false. Boroughs v. Belcher, 211 Ga. 273, 85 S.E.2d 422 (1955).

Misrepresentation of future event. — While fraud cannot generally be based on instances of misrepresentations as to future events, it may consist of such instances if, when misrepresentation is made, defendant knows that the future event will not take place. Hines v. Good Housekeeping Shop, 161 Ga. App. 318, 291 S.E.2d 238 (1982).

Promise made without present intent to perform is misrepresentation of material fact and is sufficient to support a cause of action for fraud. Middlebrooks v. Lonas, 246 Ga. 720, 272 S.E.2d 687 (1980).

A promisee states a cause of action for inceptive fraud if the promisee alleges that the promisor made a promise, even as to a future event, and at the time of making it the promisee had no intention of performing. Sams v. Duncan &

General Consideration (Cont'd)

Copeland, Inc., 153 Ga. App. 765, 266 S.E.2d 546 (1980), overruled on other grounds, Wood v. Dan P. Holl & Co., 169 Ga. App. 839, 315 S.E.2d 51 (1984), overruled on other grounds as stated in, Parker v. Crider Poultry Inc., 275 Ga. 361, 565 S.E.2d 797 (2002).

Post-contract revelation of fraud. — When the alleged fraud was the concealment of a material fact which induced a contract, the tort of fraud is complete when the contract is executed and cannot be obviated by a post-contract representation of the true facts. Preiser v. Jim Letts Oldsmobile, Inc., 160 Ga. App. 658, 288 S.E.2d 219 (1981).

Effect of disclaimer of warranties. — When the purchaser did not receive the car described and identified in the bill of sale, but instead received one-half of the described vehicle welded to one-half of another unidentified and unidentifiable vehicle, the disclaimer of warranties in the bill of sale was not a sufficient defense against an action for deceit. Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E.2d 533 (1982).

Scienter is an essential element in an action for damages based upon fraud. Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

It is indispensable to recovery that scienter be both alleged and proved. Central Chevrolet, Inc. v. Campbell, 129 Ga. App. 30, 198 S.E.2d 362 (1973).

Georgia's fraud law requires not only knowledge but also intent to deceive or cause reliance. Kirk v. First Nat'l Bank, 439 F. Supp. 1141 (M.D. Ga. 1977).

Element of intention to deceive is as necessary in action based on concealment as one based on willful misrepresentation. Camp Realty Co. v. Jennings, 77 Ga. App. 149, 47 S.E.2d 917 (1948).

False representations to be basis of prosecution for cheating and swindling must relate either to the past or the present; no promise or statement as to what may occur in the future, however false, will serve as a basis for such a prosecution. Scarborough v. State, 51 Ga. App. 667, 181 S.E. 230 (1935).

In actions for fraud, misrepresentations relied on must relate to past or existing facts. Brown v. Mack Trucks, Inc., 111 Ga. App. 164, 141 S.E.2d 208 (1965); Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

It is generally rule that actionable fraud cannot be based on statements and promises as to future events. Sams v. Duncan & Copeland, Inc., 153 Ga. App. 765, 266 S.E.2d 546 (1980), overruled on other grounds, Wood v. Dan P. Holl & Co., 169 Ga. App. 839, 315 S.E.2d 51 (1984).

In suit for fraud, one essential element is proof that the plaintiff relied on the misrepresentation and was injured as a result of that reliance. Hannah v. Belger, 436 F.2d 96 (5th Cir. 1971).

Misrepresentations are not actionable unless hearer was justified in relying on the misrepresentations in the exercise of common prudence and diligence. Daugert v. Holland Furnace Co., 107 Ga. App. 566, 130 S.E.2d 763 (1963).

Misrepresentations are not actionable unless the complaining party was justified in relying thereon in the exercise of common prudence and diligence. When the representation consists of general commendations or mere expressions of opinion, hope, expectation, and the like, the party to whom it is made is not justified in relying upon it and assuming it to be true; one is bound to make inquiry and examination for oneself so as to ascertain the truth. Brown v. Mack Trucks, Inc., 111 Ga. App. 164, 141 S.E.2d 208 (1965).

Lack of knowledge by plaintiff implied. — Although the plaintiff fails to allege lack of knowledge that the representations were false, this element may be implied from the facts stated therein. Cheney v. Powell, 88 Ga. 629, 15 S.E. 750 (1892).

Plaintiff not required to exhaust all means at the plaintiff's disposal to ascertain the truth of representations before acting thereon. Gibson v. Home Folks Mobile Home Plaza, Inc., 533 F. Supp. 1211 (S.D. Ga. 1982).

No cause of action when the plaintiff failed to exercise due diligence. — Fraud cannot form the basis of an action or a defense thereto, in the absence of any trust or confidential relationship, if it appears that the person relying on the fraud as a basis for the action or in defense thereto had equal and ample opportunity to prevent the happening of the occurrence, and made it possible through a failure to exercise proper diligence. Anderson v. R.H. Macy & Co., 101 Ga. App. 894, 115 S.E.2d 430 (1960).

A petition for fraud and deceit must show that one who relied upon the representations of another used the means available to the petitioner, in the exercise of diligence, to discover the truth. One failing to inform oneself, but having equal opportunity of learning the truth, must suffer the consequences of one's neglect. Blanchard v. West, 115 Ga. App. 814, 156 S.E.2d 164 (1967).

One who fails to investigate or use ordinary care to verify a statement made by another may not recover under this section, even if the statement is later found to be an intentional misrepresentation and fraud is proven. Hannah v. Belger, 436 F.2d 96 (5th Cir. 1971).

A false statement is not fraud when there is no reason why the statement should be believed or acted upon, and there is no legal relief afforded when one blindly relied on the representations of the seller as to matters of which one could have informed oneself. Maxey-Bosshardt Lumber Co. v. Maxwell, 127 Ga. App. 429, 193 S.E.2d 885 (1972).

The complaining party in a suit for deceit cannot prevail if by the exercise of due diligence one could have obtained knowledge of the truth. Funding Sys. Leasing Corp. v. Pugh, 530 F.2d 91 (5th Cir. 1976).

In the absence of special circumstances one must exercise ordinary diligence, failure to do which will bar an action based on fraud. Hubert v. Beale Roofing, Inc., 158 Ga. App. 145, 279 S.E.2d 336 (1981); Bragg v. Sirockman, 169 Ga. App. 643, 314 S.E.2d 478 (1984).

One cannot claim to be defrauded about a matter equally open to the observation of all parties when no special relation of trust or confidence exists. Hubert v. Beale Roofing, Inc., 158 Ga. App. 145, 279 S.E.2d 336 (1981); Bragg v. Sirockman, 169 Ga. App. 643, 314 S.E.2d 478 (1984).

With equal opportunities for knowing the truth, a party grossly failing to inform oneself must take the consequence of one's neglect. Bimbo Bldrs., Inc. v. Stubbs Properties, Inc., 158 Ga. App. 280, 279 S.E.2d 730 (1981).

One may not voluntarily accept the statements and representations of another and act thereon, instead of looking for oneself, and then obtain relief in equity from the obligation which one assumes. Bimbo Bldrs., Inc. v. Stubbs Properties, Inc., 158 Ga. App. 280, 279 S.E.2d 730 (1981).

Georgia law does not require a defrauded party to exhaust all means at one's disposal to ascertain the truth of representations before acting thereon. Gibson v. Home Folks Mobile Home Plaza, Inc., 533 F. Supp. 1211 (S.D. Ga. 1982).

In order to show fraud and misrepresentation as a defense to an action based on contract, it must be shown that the defendant exercised due care to discover the fraud and that the defendant relied upon the false representations to the defendant's injury. Bimbo Bldrs., Inc. v. Stubbs Properties, Inc., 158 Ga. App. 280, 279 S.E.2d 730 (1981).

Pleading misrepresentation of material fact. — Misrepresentations as to an existing and material fact, amounting to fraud, when made either by a principal or through an agent, whereby another is induced to enter upon an obligation in writing, may, as between the parties, be alleged and proved. Pressley v. Jones, 64 Ga. App. 419, 13 S.E.2d 394 (1941).

Necessity of pleading intention to deceive. — An action for fraud and deceit must allege that the representation (or the concealment) was made with the intention and purpose of deceiving the opposite party, and for the purpose of injuring that party. Camp Realty Co. v. Jennings, 77 Ga. App. 149, 47 S.E.2d 917 (1948).

To make out a cause of action for fraud and deceit it is necessary to allege that the person defrauding by false statements or by representations inducing the other per-

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son to act to one's injury knew that the representations were false and made the representation with the intent to deceive and defraud on existing facts. C.M. Miller Co. v. Ramey, 82 Ga. App. 807, 62 S.E.2d 768 (1950).

Evidence of fraud or deceit. — Fraud is "in itself subtle," and circumstances apparently trivial or almost inconclusive, if separately considered, may by their number and joint operation be sufficient to constitute conclusive proof. Grainger v. Jackson, 122 Ga. App. 123, 176 S.E.2d 279 (1970).

To support an action of deceit on the grounds of failure to disclose a material fact, the evidence must show that there was a concealment of a material fact, that such concealment was done to induce another to act, and that it was done in such a manner as to deceive and mislead. McDaniel v. Green, 156 Ga. App. 549, 275 S.E.2d 124 (1980).

Since the first element of fraud was that the defendant made a false representation, once the defendant pointed to the absence of evidence to support this element of the plaintiff's fraud claim, the plaintiff had to come forward with specific evidence giving rise to a triable issue, which the plaintiff did not do. Johnson v. Rodier, 242 Ga. App. 496, 529 S.E.2d 442 (2000).

Reliance by the plaintiff on statements of the defendant may be proved by parol evidence. Chandler-Blackstad Mercantile Co. v. Price & Co., 10 Ga. App. 383, 73 S.E. 413 (1912); Hixon v. Hinkle, 156 Ga. 341, 118 S.E. 874 (1923); Barron G. Collier, Inc. v. Bailey, 31 Ga. App. 197, 120 S.E. 427 (1923).

Plaintiff is incompetent to answer question of what conduct of the defendant, in the plaintiff's opinion, constituted conspiracy to defraud. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

Jury instructions. — When the plaintiff is proceeding ex delicto for deceit, it is not cause for a new trial to the defendant that the judge in the judge's charge to the jury, which included this section, gave that part of the section dealing with "mere concealment." Deibert v. McWhorter, 34 Ga. App. 803, 132 S.E. 110 (1926).

Charge given on concealment found adequate. See Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

Charge as to existence of either actual or constructive fraud improper. — In action to hold a corporate vice-president personally liable for a shipment of labels on the theory that the vice-president fraudulently induced the shipment by promising personal payment without present intention to perform, it was error to charge that fraud could be actual or constructive, for the corporate officer either committed actual fraud or did not; and the charge required a new trial as it tended to mislead the jury to a finding of liability merely for failure to pay. Goodlett v. Ray Label Corp., 171 Ga. App. 377, 319 S.E.2d 533 (1984).

Charge improper when showing of intent to deceive inadequate. — Trial court erred in charging the jury that an authorized representative who signs one's name to an instrument is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity when the only pertinent signature was the corporate officer's signature on the shipment invoice as the person who "received" the shipment; it was not harmless error because the evidence in the case did not demand a finding that when the corporate officer promised the shipper it would get its money, the officer did so willfully or recklessly with intent to deceive. Goodlett v. Ray Label Corp., 171 Ga. App. 377, 319 S.E.2d 533 (1984).

Imposition of punitive damages in action for fraudulent misrepresentation is jury question. Shingleton v. Armor Velvet Corp., 621 F.2d 180 (5th Cir. 1980).

It is for jury to determine whether statements constitute misrepresentations and if so, whether such misrepresentations are such as to be material to the transaction, as well as whether such misrepresentations induced the party alleged to be defrauded to pursue some course which he would not otherwise have pursued except for the fraud. King v.

Towns, 102 Ga. App. 895, 118 S.E.2d 121 (1960).

It is province of jury to pass upon all circumstances of alleged fraud, and to determine whether or not the party defrauded exercised diligence in discovering the falsity of the misrepresentations. Johnson v. Renfroe & McCrary, 73 Ga. 138 (1884); Summerour v. Pappa, 119 Ga. 1, 45 S.E. 713 (1903); Daniel v. Dalton News Co., 48 Ga. App. 772, 173 S.E. 727 (1934).

Questions of fraud, and the truth and materiality of representations made by a defendant, and whether the plaintiff could have protected oneself by the exercise of proper diligence, are matters which usually should be submitted to a jury, and the court will not solve them on demurrer (now motion to dismiss), except in plain and undisputable cases. Blanchard v. West, 115 Ga. App. 814, 156 S.E.2d 164 (1967).

Because there was evidence that the defendant made false statements denying that any bonuses had been paid by the city, the defendant knew that the statements were false, and the plaintiff relied on the alleged false statements by not receiving 5% of the revenues the defendant received from the city, the trial court erred in granting summary judgment to the defendant on the plaintiff's fraud claim alleging that the defendant had misrepresented and concealed revenues it had received from the city in the form of performance bonuses. Nebo Ventures, LLC v. NovaPro Risk Solutions, L.P., 324 Ga. App. 836, 752 S.E.2d 18 (2013).

Materiality of misrepresentations is usually question for jury. King v. Towns, 102 Ga. App. 895, 118 S.E.2d 121 (1960).

The materiality of a misrepresentation is a jury question. Whether a party exercised due diligence to ascertain the truth is also for jury resolution. Famiglietti v. Brevard Medical Investors, Ltd., 197 Ga. App. 164, 397 S.E.2d 720 (1990).

Question of diligence of party defrauded relating to whether one exercised due care to ascertain truth is usually matter for jury. King v. Towns, 102 Ga. App. 895, 118 S.E.2d 121 (1960).

The question whether the plaintiff could, by the exercise of ordinary diligence, have discovered the falsity of the representations, is for the determination of the jury. Daugert v. Holland Furnace Co., 107 Ga. App. 566, 130 S.E.2d 763 (1963); Scoggins v. Puckett, 219 Ga. 282, 133 S.E.2d 17 (1963).

Whether or not a party used reasonable diligence in investigating or attempting to verify a representation by another which was relied upon by the party is ordinarily a question for the jury. However, when there is absolutely no evidence to show that any attempt to ascertain the truth of the representation was made, there is no issue for the jury's consideration and a directed verdict should be granted. Hannah v. Belger, 436 F.2d 96 (5th Cir. 1971).

Scienter in actions based on fraud is issue of fact for jury. Hertz Corp. v. Cox, 430 F.2d 1365 (5th Cir. 1970), cert. denied, 414 U.S. 825, 94 S. Ct. 129, 38 L. Ed. 2d 59 (1973).

Cited in James v. Elliott, 44 Ga. 237 (1871); Cooley v. King & Co., 113 Ga. 1163, 39 S.E. 486 (1901); Bankers' Health & Life Ins. Co. v. Givens, 43 Ga. App. 43, 157 S.E. 906 (1931); Keiley v. Citizens' Sav. Bank & Trust Co., 173 Ga. 11, 159 S.E. 527 (1931); Equitable Bldg. & Loan Ass'n v. Brady, 175 Ga. 43, 164 S.E. 674 (1932); Jenkins v. Cobb, 47 Ga. App. 456, 170 S.E. 698 (1933); Smith v. Pennington, 192 Ga. 478, 15 S.E.2d 727 (1941); Beavers v. Williams, 199 Ga. 113, 33 S.E.2d 343 (1945); Dundee Land Co. v. Simmons, 204 Ga. 248, 49 S.E.2d 488 (1948); Edwards v. Stiles, 81 Ga. App. 138, 58 S.E.2d 260 (1950); Culverhouse v. Wofford, 86 Ga. App. 58, 70 S.E.2d 805 (1952); Rountree v. Todd, 210 Ga. 226, 78 S.E.2d 499 (1953); Patterson v. Correll, 92 Ga. App. 214, 88 S.E.2d 327 (1955); Jackson v. Smith, 92 Ga. App. 677, 89 S.E.2d 526 (1955); Allstadt v. Johnson, 97 Ga. App. 584, 103 S.E.2d 683 (1958); HFC v. Harmon, 102 Ga. App. 320, 116 S.E.2d 319 (1960); Bagley v. Firestone Tire & Rubber Co., 104 Ga. App. 736, 123 S.E.2d 179 (1961); Vaughan v. Oxenborg, 105 Ga. App. 295, 124 S.E.2d 436 (1962); Jackson v. Hatch, 115 Ga. App. 623, 155 S.E.2d 676 (1967); City Dodge, Inc. v. Atkins, 118 Ga. App. 676, 164 S.E.2d 864 (1968); Cato v. English, 228 Ga. 120, 184 S.E.2d 161 (1971); Petty v. Lee, 132 Ga. App. 780, 209 S.E.2d 239 (1974); Mooney

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v. Tallant, 397 F. Supp. 680 (N.D. Ga. 1975); Rosenberg v. Mossman, 140 Ga. App. 694, 231 S.E.2d 417 (1976); Flint-Ocmulgee Dev. Corp. v. Liles, 141 Ga. App. 163, 233 S.E.2d 25 (1977); Lancaster v. Eberhardt, 141 Ga. App. 534, 233 S.E.2d 880 (1977); Garrison v. Department of Transp., 240 Ga. 840, 242 S.E.2d 615 (1978); Mahan v. Jackson, 147 Ga. App. 495, 249 S.E.2d 311 (1978); Osterneck v. E.T. Barwick Indus., Inc., 79 F.R.D. 47 (N.D. Ga. 1978); Roberts v. Patton, 149 Ga. App. 333, 254 S.E.2d 484 (1979); Garden of Eden, Inc. v. Eastern Sav. Bank, 244 Ga. 63, 257 S.E.2d 897 (1979); Ivey Contracting Co. v. Elliott, 151 Ga. App. 361, 259 S.E.2d 658 (1979); Trust Co. v. Associated Grocers Coop., 152 Ga. App. 701, 263 S.E.2d 676 (1979); McNeal v. Paine, Webber, Jackson & Curtis, Inc., 598 F.2d 888 (5th Cir. 1979); Windjammer Assocs. v. Hodge, 246 Ga. 85, 269 S.E.2d 1 (1980); Adbe Distrib. Co. v. Hundred E. Credit Corp., 156 Ga. App. 787, 275 S.E.2d 347 (1980); Coleman v. Ellenberg (In re Cohen), 6 Bankr. 708 (Bankr. N.D. Ga. 1980); Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981); Everson v. Franklin Disct. Co., 248 Ga. 811, 285 S.E.2d 530 (1982); Duncan v. Poythress, 515 F. Supp. 327 (N.D. Ga. 1981); Lively v. Garnick, 160 Ga. App. 591, 287 S.E.2d 553 (1981); McGaha v. Kwon, 161 Ga. App. 216, 288 S.E.2d 289 (1982); Levine v. Peachtree-Twin Towers Co., 161 Ga. App. 103, 289 S.E.2d 306 (1982); Plough Broadcasting Co. v. Dobbs, 163 Ga. App. 264, 293 S.E.2d 526 (1982); Robert & Co. Assocs. v. Rhodes-Haverty Partnership, 250 Ga. 680, 300 S.E.2d 503 (1983); Diamond v. Lamotte, 709 F.2d 1419 (11th Cir. 1983); Mr. Transmission, Inc. v. Thompson, 173 Ga. App. 773, 328 S.E.2d 397 (1985); Walker v. Williams, 177 Ga. App. 830, 341 S.E.2d 487 (1986); Graham v. Cook, 179 Ga. App. 603, 347 S.E.2d 623 (1986); Graham v. Hogan, 185 Ga. App. 842, 366 S.E.2d 219 (1988); Seale v. Miller, 698 F. Supp. 883 (N.D. Ga. 1988); O'Brien v. Union Oil Co., 699 F. Supp. 1562 (N.D. Ga. 1988); Tyler v. Pepsico, Inc., 198 Ga. App. 223, 400 S.E.2d 673 (1990); Tower Fin. Serv., Inc. v. Jarrett, 199 Ga. App. 248, 404 S.E.2d 622 (1991); Hahne v. Wylly, 199 Ga. App. 811, 406 S.E.2d 94 (1991); O'Berry v. Cooper, 202 Ga. App. 97, 413 S.E.2d 736 (1991); American Demolition, Inc. v. Hapeville Hotel Ltd. Partnership, 202 Ga. App. 107, 413 S.E.2d 749 (1991); Baranco, Inc. v. Bradshaw, 217 Ga. App. 169, 456 S.E.2d 592 (1995); Cobb County v. Jones Group, 218 Ga. App. 149, 460 S.E.2d 516 (1995); Reynolds v. Flint River Technical Inst., 223 Ga. App. 240, 477 S.E.2d 393 (1996); Plane v. Uniforce MIS Servs. of Ga., Inc., 223 Ga. App. 731, 479 S.E.2d 18 (1996); Longino v. Bank of Ellijay, 228 Ga. App. 37, 491 S.E.2d 81 (1997); Tart v. IMV Energy Sys. of Am., 374 F. Supp. 2d 1172 (N.D. Ga. 2005); Golden Atlanta Site Dev., Inc. v. Tilson, 299 Ga. App. 646, 683 S.E.2d 166 (2009).

Application to Specific Cases

Effect of plaintiff's contributory negligence. — When a prospective purchaser of a quantity of goods represented to the owner of the goods who was offering them for sale that one could not afford to pay the market value because there was a processing tax imposed by the United States government on the goods and the seller, relying on the purchaser's representation as to the existence of a processing tax, sold the goods to the purchaser at the value of the tax less, per ton, but the pretended processing tax imposed was in fact void, the purchaser having instituted legal proceedings in court for the purpose of enjoining its collection, and having obtained an injunction enjoining same, the purchaser's misrepresentation of the purchaser's liability for the payment of the processing tax was as to a matter equally open to the observation of the seller and, therefore, constituted no fraud affording a ground for a cause of action for deceit. Salter v. Brown, 56 Ga. App. 792, 193 S.E. 903 (1937).

In the absence of a confidential relationship a party may not rely and act on the misrepresentations of an opposite party as to the contents of a written instrument when the party signing can read and when no artifice or fraud is practiced which prevents the party signing from

reading the instrument. Robi v. Goldstein, 100 Ga. App. 606, 112 S.E.2d 165 (1959).

The law demands of every one that one make use of one's own facilities to avoid being defrauded. No other rule could safely be adopted and enforced by the courts with reference to written instruments. It is essential to all business relationships that the validity and solemnity of written contracts, freely and voluntarily executed, be upheld. Maxey-Bosshardt Lumber Co. v. Maxwell, 127 Ga. App. 429, 193 S.E.2d 885 (1972).

Diligence to detect fraud is as much incumbent upon a party who labors under no disability, as to do any other act in which one's interest is involved. One must look about one, and see what villainies environ one. If one has been caught in a net, one must feel for meshes. Maxey-Bosshardt Lumber Co. v. Maxwell, 127 Ga. App. 429, 193 S.E.2d 885 (1972).

One having the capacity and opportunity to read a written contract, and who signs the contract, not under any emergency, and whose signature is not obtained by trick or artifice of the other party, cannot afterwards set up fraud in the procurement of one's signature to the instrument. Maxey-Bosshardt Lumber Co. v. Maxwell, 127 Ga. App. 429, 193 S.E.2d 885 (1972).

Such things as soil, timber, or springs on land are open to inspection, and the purchaser is willfully negligent if the purchaser fails to look and see for oneself, and neither law nor equity will relieve one from one's own want of diligence. Bimbo Bldrs., Inc. v. Stubbs Properties, Inc., 158 Ga. App. 280, 279 S.E.2d 730 (1981).

Party may generally rely on statements of others. — When the basis upon which the contract was entered upon lies in the existence or nonexistence of certain material facts, the verity of which must be ascertained from the statement of one acquainted with such facts, each of the contracting parties has a right to rely upon the truth of the other's statements with reference thereto, when such statements relate to matters apparently within the knowledge of the party asserting them; and to do this without checking the statements with the declarations of other and different persons, in order, by such an investigation, to test their probable truth. Deibert v. McWhorter, 34 Ga. App. 803, 132 S.E. 110 (1926).

While it is true that in some cases a plea of fraud may be disallowed when a buyer has sufficient opportunity to ascertain the facts and is not prevented from doing so by any artifice or fraud of the seller, when it is not apparent how a buyer of stock could have ascertained the insolvency of a bank, otherwise than by asking its officers, one has the right to accept the statement of one's seller as an officer on that subject. Floyd v. Boss, 174 Ga. 544, 163 S.E. 606 (1932).

The purchaser had a right to rely on seller's eight-month income statement and yearly projection therefrom; due diligence before relying on the representation did not require inspection of books to ascertain fraud. Gibson v. Home Folks Mobile Home Plaza, Inc., 533 F. Supp. 1211 (S.D. Ga. 1982).

If contract is invalid overall for uncertainty, it is immaterial that realty involved was incorrectly described by willful misrepresentation. Berry v. Discount Lumber & Supply Co., 235 Ga. 320, 219 S.E.2d 434 (1975).

If there has been false representation as to past or existing fact, offense of cheating and swindling is complete, notwithstanding there may have been, as a part of the inducement to the person defrauded to part with the person's money, a promise by the swindler to be performed in the future. Scarborough v. State, 51 Ga. App. 667, 181 S.E. 230 (1935).

Concealment of insolvency of maker of promissory note, if known by a holder who is negotiating it, is deceit. Gordon v. Irvine, 105 Ga. 144, 31 S.E. 151 (1898).

Declaration to attaching officer that property has been destroyed is actionable. Davis v. Scott, 141 Ga. 33, 80 S.E. 284 (1913).

It is not necessary that deceit in question should have been sole inducement which led the plaintiff to make an investment, it is sufficient if it influenced the plaintiff's conduct materially. Scoggins v. Puckett, 219 Ga. 282, 133 S.E.2d 17 (1963).

Application to Specific Cases (Cont'd)

Failure to prove reliance and false representation. — In a product liability action for injuries allegedly suffered from breast implants, the plaintiff's claims based on fraud and misrepresentation failed because the plaintiff was unable to show any reliance on the alleged misrepresentations of the manufacturer. Allison v. McGhan Medical Corp., 184 F.3d 1300 (11th Cir. 1999).

Professional basketball player was not liable to inexperienced businessmen who invested and lost money by hosting sports event-related parties based on an oral agreement with two men claiming to act as the player's agents. The businessmen's fraud in the inducement claim under O.C.G.A. § 51-6-2 failed because the player did not personally make any representations to the businessmen and did not authorize or ratify any representations made by the purported agents. J'Carpc, LLC v. Wilkins, 545 F. Supp. 2d 1330 (N.D. Ga. 2008).

Misrepresentation about health hazard of one item to induce sale of another. — Evidence that by the use of scheme, artifice, or method, the defendant obtained a written contract for sale of stainless steel cookware, with full knowledge that the plaintiff was laboring under the misapprehension that food cooked in aluminum cookware becomes impregnated with a cancer-producing substance involved a representation of a present fact to establish an immediate fear in the plaintiff for the plaintiff's own health and that of the plaintiff's family, and the jury was authorized to conclude that the contract was the result of undue influence amounting to fraud on the part of the defendant. King v. Towns, 102 Ga. App. 895, 118 S.E.2d 121 (1960).

Bank's payment of company's checks when account funds insufficient. — A car auction contended that a bank's practice of paying a car company's checks when the account had insufficient funds constituted fraud because such payment misled the car auction as to the company's credit worthiness. However, the evidence showed that the auction relied upon past credit history in extending credit and that it had no knowledge that the bank paid checks when the account had insufficient funds until some checks were dishonored. Therefore, the bank did not act fraudulently, because there was no misrepresentations, no reliance, and no intent to deceive. Georgia Cas. & Sur. Co. v. Tennille Banking Co. (In re Smith), 51 Bankr. 904 (Bankr. M.D. Ga. 1985).

Representations as to employment contract terminable at will. — Since the plaintiff had been employed by the defendant since 1973, in 1979 the plaintiff was injured in a job-related accident and received workers' compensation benefits therefor, approximately one year later the defendants allegedly promised the plaintiff that the plaintiff could return to work for the defendants upon the plaintiff's obtaining a full release from the plaintiff's physician, and the plaintiff persuaded the attending physician to execute a full release so that the plaintiff could return to work, even though the plaintiff was not completely recovered from the plaintiff's injuries, under Georgia law the promise allegedly made by the defendant is unenforceable and cannot form the basis for fraud because the underlying employment contract, being terminable at will, is unenforceable. Phillips v. Liberty T.V. Cable, Inc., 166 Ga. App. 411, 304 S.E.2d 516 (1983).

Dealership's role in odometer statement. — Trial court erred by granting summary judgment to an auto dealership on a buyer's claim for fraud against the dealership because the record created a question of fact as to whether the dealership issued a substantially inaccurate odometer statement even when more than one employee either knew that the written statement was false or recklessly disregarded the possibility that it was so. Alvear v. Sandy Springs Toyota, Inc., 332 Ga. App. 798, 775 S.E.2d 172 (2015).

Sale of "clipped" vehicle by car dealer. — Evidence was sufficient to support jury finding that the defendant car dealer misstated the subject matter of sale recklessly, either knowing that the car had been "clipped," meaning that one-half of the described vehicle had been welded to one-half of an unidentified vehicle, or avoiding knowledge because of failure or

refusal of employees involved with the automobile to examine it when a cursory examination upon either purchase or resale would have divulged the fact that it was illegally reassembled and could not be sold under license umbrella it had assumed. Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E.2d 533 (1982).

Misrepresentation as to insurance coverage. — A petition which alleges that the defendant, an insurance agent, represented that the defendant had issued a binder insuring the property when the defendant knew that the defendant had not, or, that the defendant promised that the defendant would issue a binder when in fact the defendant had no intention of doing so, that the defendant made the misrepresentations with the purpose of making the plaintiff believe the plaintiff was insured as of a certain date when, in fact, the plaintiff was not, that the plaintiff relied upon the misrepresentations and sustained a loss and damage as a result thereof, states a cause of action for deceit. Clark v. Kelly, 217 Ga. 449, 122 S.E.2d 731 (1961).

Charging excess insurance premiums. — See Hubbard v. Stewart, 651 F. Supp. 294 (M.D. Ga. 1987).

Bankruptcy case. — When the debtor failed to disclose to the creditor that business assets were no longer available to secure a loan upon its renewal, the debt was not dischargeable in bankruptcy because the renewal was obtained by false pretenses. Suntrust Bank v. Brandon (In re Brandon), 297 B.R. 308 (Bankr. S.D. Ga. 2002).

Debtor's actions constituted fraud when the debtor made a representation to another shareholder that no further commissions would be paid from a talent agency to which the shareholder would be entitled; the representation was false; the debtor knew the representation was false; the debtor repeated the representation in response to multiple questions by the shareholder; and the shareholder's reliance was justified and reasonable. The debt was nondischargeable because the justifiable reliance standard required under Georgia law was the same as required under the Bankruptcy Code provision. Hot Shot Kids Inc. v. Pervis (In re Pervis), 512 B.R. 348 (Bankr. N.D. Ga. 2014).

Sloppy business practices. — Summary judgment was properly granted on a fraud count since the homeowners merely showed sloppy business practices on the part of a building supplier without evidence from which either knowledge of falsity at the time of the alleged misrepresentation or intent to deceive could reasonably be inferred. Hicks v. McLain's Bldg., Materials, Inc., 209 Ga. App. 191, 433 S.E.2d 114 (1993).

Misrepresentation by contractor as to work required. — Petition by subcontractor for damages due to increased costs of work performed by virtue of misrepresentations by contractor as to nature of work required was an action for fraud and deceit. Rich's, Inc. v. Kirwan Bros., 97 Ga. App. 58, 102 S.E.2d 648 (1958).

Misrepresentation of price that vendor paid for land is deceitful. Administrator of Green v. Bryant, 2 Ga. 66 (1847).

Misrepresentation in connection with sale of real estate. — In an action by a purchaser to rescind a contract for the purchase of real estate on the ground of the fraudulent concealment of a material fact, when the allegations of fact were insufficient to show actual fraud, in that there was no duty to communicate the material fact in question, which the purchaser could have discovered by exercising ordinary care, and there were no misrepresentations, no cause of action was stated. Kirven v. Blackett, 208 Ga. 178, 65 S.E.2d 791 (1951).

Claims of house purchasers against a lender that held a mortgage on the property at the time of the sale could not survive summary judgment since the purchasers could not show that they had any contact with the lender prior to the sale. Ali v. Fleet Fin., Inc., 232 Ga. App. 13, 500 S.E.2d 914 (1998).

There was no evidence from which the jury could reasonably infer that the defendant real estate agent knew about the defects in the home purchased by the plaintiff when such knowledge rested upon the assumption that because the defendant said that the sellers were "friends" and because the defendant was

Application to Specific Cases (Cont'd)

their listing agent, that the defendant must have known of the defects. ReMax North Atlanta v. Clark, 244 Ga. App. 890, 537 S.E.2d 138 (2000).

Trial court correctly granted summary judgment in favor of an appraisal company and a real estate appraiser on a seller's claim that they engaged in wilful misconduct because the seller alleged that the company and appraiser made wilful misrepresentations by merely choosing not to change alleged negligent misrepresentations as to fair market value after being informed of the negligence, but that did not support a claim that the company and appraiser made wilful misrepresentations. Wingate Land, LLC v. ValueFirst, Inc., 314 Ga. App. 24, 722 S.E.2d 868 (2012).

No actionable misrepresentations regarding community improvement district. — Since it was undisputed that no agent of a municipality actually knew that a community improvement district had not been created until after the relevant misrepresentations had been made, and there was no evidence elsewhere of any intent on the behalf of the municipality to deceive the plaintiffs, no cause of action accrued under O.C.G.A. § 51-6-2. Circle H Dev., Inc. v. City of Woodstock, 206 Ga. App. 473, 425 S.E.2d 891 (1992).

Promise concerning payment to real estate developer. — Promise by real estate broker that the broker "will see" that the developer and landowner of lots was paid "on the first draw" of the construction loan was not uttered with the intent to deceive since the statement was made two years before and during that time the developer had been paid for all lots except the two now the subject of the action. Community Fed. Sav. & Loan Ass'n v. Foster Developers, Inc., 179 Ga. App. 861, 348 S.E.2d 326 (1986).

Purchaser's suit against developer. — In a purchaser's suit against a co-developer asserting claims for conversion, fraud and deceit, conspiracy to commit fraud and deceit, piercing the corporate veil, punitive damages, and attorney fees and costs of litigation, the trial court properly denied the co-developer's motion for summary judgment as genuine issues of fact existed as to whether the co-developer misrepresented that the developer owned the property; whether the investment contract was a security or not; and whether the co-developer's actions supported an award of punitive damages sought by the purchaser. Of significance, it was not relevant that the co-developer was not a party to the sale/purchase agreement/investment contract at issue as the claims against the co-developer involved the alleged inducement the co-developer engaged in to have the purchaser contract with the developer. Golden Atlanta Site Dev., Inc. v. R. Nahai & Sons, Inc., 299 Ga. App. 654, 683 S.E.2d 627 (2009).

Proof of concealment of encumbrance on property at a state, would be sufficient to authorize jury to infer actual moral fraud on the part of the seller. Burpee v. Holmes, 132 Ga. 464, 64 S.E. 486 (1909).

No evidence of false information from bank to property owners in foreclosure. — Property owners' intentional and negligent misrepresentation claims against a bank failed because the property owners failed to show that the bank supplied false information to the owners as required by O.C.G.A. § 51-6-2. Mortensen v. Bank of Am., N.A., No. (CDL), 2011 U.S. Dist. LEXIS 132637 (M.D. Ga. Nov. 17, 2011).

Misrepresentation in connection with sale of stock. — In an action to rescind a sale of stock for fraud, the official connection of the defendant with the bank, affording the defendant the opportunity for knowing the condition of the bank, was a fact to be considered by the jury in determining whether the defendant knowingly made false statements as to the value of the stock. Floyd v. Boss, 174 Ga. 544, 163 S.E. 606 (1932).

A misrepresentation by a director to a person purchasing stock concerning the financial condition of the corporation is actionable. Camp v. Carithers, 6 Ga. App. 608, 65 S.E. 583 (1909); Daniel v. Dalton News Co., 48 Ga. App. 772, 173 S.E. 727 (1934).

Misrepresentation on financial statement in connection with loan. — In suit against the defendants, for a tort consisting of fraudulent representations made by them in their financial statements, whereby the borrower obtained money from the plaintiff, the plaintiff could waive the right to sue on the note and the contract of guaranty and bring an action for damages on account of alleged fraud and deceit by the defendant, whereby the lender advanced the money to its subsequent injury. Allen v. Hartsfield Co., 52 Ga. App. 549, 183 S.E. 821 (1936).

Misrepresentation of plaintiff's employment status by defendant. — Petition stated a cause of action for fraud and deceit under the provisions of this section since the petition alleged that use of the term "furlough status" by the defendant, in falsely designating the plaintiff's employment status with it, prevented the plaintiff's employment elsewhere, when in truth the plaintiff's employment with the defendant was at an end. Gardner v. Celanese Corp., 88 Ga. App. 642, 76 S.E.2d 817 (1953).

Misrepresentation of property values. — As against attack by general demurrer (now motion to dismiss), allegations of fraud and deceit which show that the defendant deliberately concealed facts within the defendant's knowledge affecting value, as an inducement to sell, which facts the plaintiff sought to discover, are sufficient to support a cause of action. Blanchard v. West, 115 Ga. App. 814, 156 S.E.2d 164 (1967).

Contrary to the caveator's insertion, no evidence was presented to show that the testator's grandson's statements about the caveator were willful misrepresentations that caused the testator to change the testator's will to disinherit the caveator. Harper v. Harper, 274 Ga. 542, 554 S.E.2d 454 (2001).

No misrepresentation exists when no evidence that defendant knew information was incorrect. — Since there may have been some evidence to authorize the inference that the bank was insolvent at the time of the transaction, but the evidence as to this issue was mainly, if not entirely, retrospective; and there was no proof whatsoever that the defendants when dealing with the plaintiff had an actual knowledge of such insolvency, it could not have been inferred that the defendants were guilty of fraud in not disclosing the fact to the plaintiff. Hill v. Hicks, 44 Ga. App. 817, 163 S.E. 253 (1932).

Refusal to charge jury on fraud not improper when evidence fails to present issue. — In a suit by an attorney to recover an alleged fee, when no issue of fraud or misrepresentation of material facts, or concealment of such was presented by the pleading or the evidence, it was not error to refuse to permit the plaintiff to read this section in the presence of the jury, nor to refuse to give in charge to the jury the substance of those sections. Edwards v. Watkins, 52 Ga. App. 684, 184 S.E. 437 (1936).

Representations as to condition of chattels. — Representation that a chattel is sound, if honestly made, and believed to be true by the party making them, though not true in fact, is not actionable. Wooten v. Calahan, 32 Ga. 382 (1861).

Representations that land title is unencumbered. — After the owner of land represented to the purchaser that there was no encumbrance against the premises sold, thereby inducing the purchaser to purchase it, and it was found later to be encumbered, this constituted a fraudulent representation for which relief will be given to the purchaser. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

In a suit by the seller for the purchase money of land, the defendant purchaser is entitled to plead that the purchaser was not put in possession of the premises and that the seller was guilty of false and fraudulent representations as to the existence of liens on the premises, and, upon proof of such facts, a verdict in the plaintiff's favor is authorized. Oliver v. O'Kelley, 48 Ga. App. 762, 173 S.E. 232 (1934).

Opinion evidence insufficient. — Claim that the defendant sellers made false statements, when the defendants told the plaintiff that there was no problem with the horse that would prevent the horse from being shown, was not proved

Application to Specific Cases (Cont'd)

when opinion evidence presented by the plaintiff about the horse's poor prior condition and prognosis was completely refuted by evidence that the horse had successfully competed in horse shows before the sale. Sheffield v. Darby, 244 Ga. App. 437, 535 S.E.2d 776 (2000).

Stock subscription induced by fraud. — As between a stockholder and the corporation, unless special circumstances alter the case, the general rule that contracts obtained by fraud may be avoided by the party defrauded applies to a stock subscription induced by the fraud of the company through its authorized agents, and so likewise when only the rights of other shareholders are affected, the company being solvent and "a going concern." Daniel v. Dalton News Co., 48 Ga. App. 772, 173 S.E. 727 (1934).

When action for damages for fraud is instituted, allegation of constructive knowledge is sufficient when the petition alleges that there was constructive knowledge of a defect represented not to exist and that the representation that the defect did not exist was made with the intention of deceiving the vendee. Wade Ford, Inc. v. Perrin, 111 Ga. App. 794, 143 S.E.2d 420 (1965).

Unauthorized practice of law. — Defendant's fraudulent conduct in connection with unauthorized practice of law provided an evidentiary basis for the jury's verdict as to all five elements of the plaintiff's fraud claim. Ledee v. Devoe, 250 Ga. App. 15, 549 S.E.2d 167 (2001).

Making of a will. — Trial court properly granted a will beneficiary summary judgment on the issue of fraud because there was no evidence in the record that would create a genuine issue of material fact as to fraud since the alleged two misrepresentations were not shown to have been relied upon by the testator when the will was created. Johnson v. Burrell, 294 Ga. 301, 751 S.E.2d 301 (2013).

Medical consent. — Grant of partial summary judgment pursuant to O.C.G.A. § 9-11-56 to a physician in a patient's action alleging breach of fiduciary duty and battery arising from an alleged failure to obtain valid consent prior to performing a medical procedure was erroneous since the physician had represented to the patient that the physician had made the patient's orthopedic surgeon aware of the treatment plans and that the surgeon approved of them, but there was no direct evidence that the surgeon had actually received the plans and had been aware of them and approved of them; accordingly, the jury could have found that the physician misrepresented that situation with an intent to deceive pursuant to O.C.G.A. § 51-6-2(b), which would have constituted sufficient fraud to have vitiated the consent. Petzelt v. Tewes, 260 Ga. App. 802, 581 S.E.2d 345 (2003).

Expert testimony was required in medical fraud suit. — Trial court did not err by granting a doctor summary judgment in a medical fraud suit because the suing patient failed to present expert testimony as to whether the pre-surgery x-rays should have put a doctor on notice of a deformity as such a determination was not within a layperson's common understanding and experience and, instead, required expert testimony. Johnson v. Johnson, 323 Ga. App. 836, 747 S.E.2d 518 (2013).

Duty not established. — State benefit health plan claims administrator was properly granted summary judgment in an action challenging its review of a physician's corporation's health plan claims because, in part, the administrator had no duty to produce its policies absent a confidential relationship, which was not established merely by the corporation's trust and confidence in the administrator. Brown v. Blue Cross Blue Shield of Ga., Inc., 260 Ga. App. 796, 581 S.E.2d 636 (2003).

Whether failure to disclose was breach of fiduciary duty. — In a dispute between a manager and a member of an LLC over the member's alleged failure to disclose a contractor's financial problems and failure to supervise the contractor in the contractor's site work, issues of fact remained regarding whether the member had a fiduciary duty to inform the manager of the problems. Inland Atl. Old Nat'l Phase I, LLC v. 6425 Old Nat'l, LLC, 329 Ga. App. 671, 766 S.E.2d 86 (2014).

Intentionally false statements from an attorney. — While a client's complaint contained a count for fraud, the client failed to allege any specific facts to state a cause of action for fraud pursuant to O.C.G.A. §§ 9-11-9, 51-6-1, and 51-6-2(b) because the complaint failed to allege any specific facts indicating that a former attorney intentionally made false statements to the client during the course of the representation of the client. Fortson v. Freeman, 313 Ga. App. 326, 721 S.E.2d 607 (2011).

Misrepresentation of car's condition was fraud for action under the Georgia Fair Business Practices Act. — Establishing an unfair or deceptive act or practice under the Georgia Fair Business Practices Act does not require proof of intentional conduct because the words "volitional" and "intentional" are not synonymous; thus, even if the used car salesperson did not know whether the car had been in a wreck, since the salesperson certainly knew that the salesperson did not know the real condition of the car, the salesperson's misrepresentation could constitute fraud under O.C.G.A. § 51-6-2(b). Marrale v. Gwinnett Place Ford, 271 Ga. App. 303, 609 S.E.2d 659 (2005).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraud and Deceit, §§ 12 et seq., 48 et seq., 137 et seq., 194 et seq.

Am. Jur. Trials. — Misrepresentation in Automobile Sales, 13 Am. Jur. Trials 253.

C.J.S. — 37 C.J.S., Fraud, §§ 18 et seq., 39 et seq.

ALR. — May offense of obtaining money or property by false pretenses or confidence game be predicated on obtaining loan or renewal thereof, 24 ALR 397; 52 ALR 1167.

Genuine making of instrument for purpose of defrauding as constituting forgery, 41 ALR 229; 46 ALR 1529; 51 ALR 568.

Fraud of vendee or buyer inducing vendor or seller to accept less favorable terms as sustaining an action in tort, 52 ALR 1153.

Liability of infant in tort for inducing contract by misrepresenting his age, 67 ALR 1264.

Cancellation or rescission of contract for vendee's failure to comply therewith as affecting his right in tort against the vendor for the latter's fraud, 74 ALR 169.

Civil liability of bank officer or director permitting deposit after insolvency of bank, 87 ALR 1402.

Right of action for damages against third person for fraud in inducing marriage, 88 ALR 786.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense in prosecution based on false representations, 95 ALR 1249; 128 ALR 1520.

Financial statement by borrower as basis of loan or extension of credit, 104 ALR 921.

Concealment of or failure to disclose existence of person interested in estate as extrinsic fraud which will support attack on judgment in probate proceedings, 113 ALR 1235.

Right of public board or officials to rely on misrepresentations by other party to contract relating to matters as to which former had, or should have had, special knowledge in their official capacity, 123 ALR 1063.

Independent advice as essential to validity of transaction between persons occupying a confidential or fiduciary relationship, 123 ALR 1505.

Fraud predicated upon misrepresentation by grantee or transferee regarding grantor's or transferrer's title, 136 ALR 1299.

Duty of vendor of real property to disclose to purchaser condition of building thereon which affects health or safety of persons using same, 141 ALR 967.

Crime of false pretenses as predictable upon present intention not to comply with promise or statement as to future act, 168 ALR 833.

Liability of vendor's real estate broker

or agent to purchaser for misrepresentations as to, or nondisclosure of, physical defects of property sold, 8 ALR2d 550.

Misrepresentation as to loan commitment on real estate as ground of action, counterclaim, or rescission by vendee, 14 ALR2d 1347.

Avoidance of release of claim for personal injuries on ground of misrepresentation as to matters of law by tort-feasor or his representative insurer, 21 ALR2d 272.

Misrepresentation as to matters of foreign law as actionable, 24 ALR2d 1039.

False representations as to income, profits, or productivity of property as fraud, 27 ALR2d 14.

Misrepresentation by one other than insurance agent as to coverage, exclusion, or legal effect of insurance policy, as actionable, 29 ALR2d 213.

Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 ALR2d 184.

Misrepresentation as to third person's present intention as to future act as actionable fraud, 40 ALR2d 971.

False statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense, 53 ALR2d 1215.

Tort liability for damages for misrepresentations as to area of real property sold or exchanged, 54 ALR2d 660.

Broker's liability for damages or losses sustained by vendor of real property to vendee because of broker's misrepresentations, 61 ALR2d 1237.

Liability of one putative spouse to other for wrongfully inducing entry into or cohabitation under illegal, void, or nonexistence marriage, 72 ALR2d 949.

Liability of vendor of structure for failure to disclose that it was built on filled ground, 80 ALR2d 1453.

Modern status of rule requiring actual knowledge of latent defect in leased premises as prerequisite to landlord's liability to tenant injured thereby, 88 ALR2d 586.

Criminal responsibility for fraud or false pretenses in connection with home repairs or installations, 99 ALR2d 925.

"Out of pocket" or "benefit of bargain" as proper rule of damages for fraudulent representations inducing contract for the transfer of property, 13 ALR3d 875.

Employer's misrepresentations as to employee's or agent's future earnings as actionable fraud, 16 ALR3d 1311.

Duty of vendor of real estate to give purchaser information as to termite infestation, 22 ALR3d 972.

Employer's misrepresentation as to prospect, or duration, of employment as actionable fraud, 24 ALR3d 1412.

Actionability of conspiracy to give or to procure false testimony or other evidence, 31 ALR3d 1423.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property, 61 ALR3d 922.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees, 77 ALR3d 6.

Real estate broker's liability for misrepresentation as to income from or productivity of property, 81 ALR3d 717.

Practices forbidden by state deceptive trade practice and consumer protection acts, 89 ALR3d 449.

Fraud predicated on vendor's misrepresentation or concealment of danger of possibility of flooding or other unfavorable water conditions, 90 ALR3d 568.

Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act, 19 ALR4th 959.

Real estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property, 46 ALR4th 546.

"Wrongful adoption" causes of action against adoption agencies where children have or develop mental or physical problems that are misrepresented or not disclosed to adoptive parents, 74 ALR5th 1.

51-6-3. Letters to obtain credit.

No action shall be sustained for deceit in a representation to obtain credit for another unless the misrepresentation is in writing and is signed by the party to be charged therewith. (Orig. Code 1863, § 2902; Code 1868, § 2908; Code 1873, § 2959; Code 1882, § 2959; Civil Code 1895, § 3815; Civil Code 1910, § 4411; Code 1933, § 105-303; Ga. L. 1992, p. 6, § 51.)

Cross references. — Letters of credit generally, T. 11, Art. 5.

JUDICIAL DECISIONS

This section is an affirmative defense under Georgia law that must be set forth in a responsive pleading or be waived. Funding Sys. Leasing Corp. v. Pugh, 530 F.2d 91 (5th Cir. 1976).

Defendant need not derive any benefit from the fraud. Young v. Hall, 4 Ga. 95 (1848); Callaway v. Wynne, 27 Ga. App. 723, 109 S.E. 679 (1921).

Expression of opinion of the credit of another is not actionable. Wrenn & Sons v. Truitt, 116 Ga. 708, 43 S.E. 52 (1902).

This section does not apply to action against stock brokers who induced party to buy worthless stock in a corporation, by falsely stating the commercial standing of some of the directors who have personally guaranteed to repurchase the stock at the option of the plaintiff. Howard v. Allgood, 143 Ga. 550, 85 S.E. 757 (1915).

Cited in Smith v. Jewett, 10 Ga. App. 294, 73 S.E. 549 (1912); Gellis v. B.L.I. Constr. Co., 148 Ga. App. 527, 251 S.E.2d 800 (1978); Mr. Transmission, Inc. v. Thompson, 173 Ga. App. 773, 328 S.E.2d 397 (1985); Gorlin v. Halpern, 184 Ga. App. 10, 360 S.E.2d 729 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraud and Deceit, §§ 125 et seq., 184 et seq.

C.J.S. — 37 C.J.S., Fraud, § 80 et seq.

ALR. — May offense of obtaining money or property by false pretenses or confidence game be predicated on obtaining loan or renewal thereof, 24 ALR 397; 52 ALR 1167.

Liability of persons undertaking to supply credit or other commercial information for negligence or fraud of themselves or their agents, 102 ALR 1070.

Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 ALR2d 184.

Construction of statute requiring representations as to credit, etc., of another to be in writing, 32 ALR2d 743.

False statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense, 53 ALR2d 1215.

Measure of damages recoverable for fraud as to the credit or financial condition of a third person, 72 ALR2d 943.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees, 77 ALR3d 6.

51-6-4. Fraud by acts or silence; estoppel to assert title.

(a) A fraud may be committed by acts as well as words.

(b) One who silently stands by and permits another to purchase his property, without disclosing his title, is guilty of such a fraud as estops him from subsequently setting up such title against the purchaser. (Orig. Code 1863, § 2908; Code 1868, § 2915; Code 1873, § 2966; Code 1882, § 2966; Civil Code 1895, § 3823; Civil Code 1910, § 4419; Code 1933, § 105-304.)

Law reviews. — For comment on Cohen v. Pullman Co., 243 F.2d 725 (5th Cir. 1957), holding that an oral agreement to sell land which is unenforceable because of the statute of frauds cannot be the basis for recovery of damages in fraud and deceit as the purpose of the statute of frauds is to prevent persons from being liable for nonperformance of such claimed promises, see 20 Ga. B. J. 427 (1958).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases

General Consideration

This section is based upon equitable duty of disclosure. Reeves v. B.T. Williams & Co., 160 Ga. 15, 127 S.E. 293 (1925); Reynolds v. Huckeba, 231 Ga. 792, 204 S.E.2d 149 (1974).

Record title is no defense to this rule. Markham v. O'Connor, 52 Ga. 183 (1874).

This section only operates in favor of a bona fide purchaser without notice. Brown v. Tucker, 47 Ga. 485 (1873); Meetze v. Potts, 6 Ga. App. 189, 64 S.E. 672 (1909); Broadway Apt. Co. v. Barnett, 30 Ga. App. 562, 118 S.E. 601 (1923); Shaw v. Green, 180 Ga. 760, 180 S.E. 732 (1935).

One who silently stands by and permits another to purchase one's property, without disclosing one's title, is not guilty of such a fraud as estops one from subsequently setting up such title against a purchaser with notice. Shaw v. Green, 180 Ga. 760, 180 S.E. 732 (1935).

Former Code 1933, § 38-115 (see now O.C.G.A. § 24-14-27) limited former Code 1933, § 105-304 (see now O.C.G.A. § 51-6-4) to purchasers without notice. Fuller v. Calhoun Nat'l Bank, 59 Ga. App. 419, 1 S.E.2d 86 (1939).

This section is inapplicable when a party had actual knowledge of the rights of the other party who remained silent or when such party relied upon their own investigation or was not shown to have placed any reliance on the statement, action or inaction of the one claimed to be estopped. Anderson v. Manning, 221 Ga. 421, 144 S.E.2d 772 (1965).

Constructive fraud at least may be implied from a failure to speak, when one uses silence for the purpose of gaining an unconscionable advantage. Reynolds v. Huckeba, 231 Ga. 792, 204 S.E.2d 149 (1974).

In order to raise estoppel by conduct or matters in pais, party to whom representation or concealment is made must have been ignorant, actually and permissibly, of the truth of the matter; if one knew or under all the circumstances ought to have known the facts, the representation, silence, or concealment is wholly unavailing. Carmichael v. Texas Co., 52 Ga. App. 751, 184 S.E. 397 (1936).

Principle stated in this section does not depend for its operation upon existence or absence of mere constructive notice, nor will such record, a recorded deed, necessarily constitute convenient means of acquiring such knowledge, within the meaning of former Code 1933, § 38-115 (see now O.C.G.A. § 24-14-27). This latter section should be construed in harmony with the former. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705 (1943); Anderson v. Man-

ning, 221 Ga. 421, 144 S.E.2d 772 (1965).

Recorded deed was not necessarily such convenient means of acquiring knowledge of title, within the contemplation of former § 24-4-25 (see now O.C.G.A. § 24-14-27), as to abrogate the effect of former Code 1933, § 105-304 (see now O.C.G.A. § 51-6-4) on one who remained silent while a third party represented to another that the party owned certain property which in actuality belonged to the aphonic one. Anderson v. Manning, 221 Ga. 421, 144 S.E.2d 772 (1965); Pressley v. Maxwell, 242 Ga. 360, 249 S.E.2d 49 (1978).

Heirs of defrauder are estopped by this section. Caraker v. Brown, 152 Ga. 677, 111 S.E. 51 (1922).

Silence of preceding administrator at illegal sheriff's sale will not bind present administrator. Sellars v. Cheney, 70 Ga. 790 (1883).

Use of property by husband for business purposes will estop the wife to claim title thereto. Ford v. Blackshear Mfg. Co., 140 Ga. 670, 79 S.E. 576 (1913).

Warehouseman's knowledge of weight expected. — Mere knowledge of warehouseman that assignee would expect the goods to be of certain weight will not operate as an estoppel. Citizens & S. Bank v. Union Whse. & Compress Co., 157 Ga. 434, 122 S.E. 327 (1924).

Pleading fraud. — While the broad statement that the conduct of the defendant constituted fraud would be insufficient without an allegation of circumstances from which the court might determine whether the pleader reached the right conclusion in saying that a fraud was committed, still it is not essential to state more facts than may be necessary to carry conviction of the existence of fraud. Wall v. Wall, 176 Ga. 757, 168 S.E. 893 (1933).

Burden of proof is upon party relying upon representation as estoppel to show that one acted upon the representation in good faith and in ignorance of the real facts. Elliott v. Keith, 102 Ga. 117, 29 S.E. 155 (1897); Stonecipher v. Kear, 131 Ga. 688, 63 S.E. 215, 127 Am. St. R. 248 (1908).

Burden of showing absence of notice or knowledge rests on such purchaser relying on alleged estoppel. Carmichael v. Texas Co., 52 Ga. App. 751, 184 S.E. 397 (1936).

Cited in McCune v. McMichael, 29 Ga. 312 (1859); Burton v. Black, 32 Ga. 53 (1861); Roberts v. Davis, 72 Ga. 819 (1884); Mercier v. Copelan, 73 Ga. 636 (1884); Veal v. Robinson, 76 Ga. 838 (1886); Brooks v. Matthews, 78 Ga. 739, 3 S.E. 627 (1887); McLennan v. Graham, 106 Ga. 211, 32 S.E. 118 (1898); Norman v. McMillan, 151 Ga. 363, 107 S.E. 325 (1921); Warner v. Hill, 153 Ga. 510, 112 S.E. 478 (1922); Varn v. Bloodworth, 157 Ga. 300, 121 S.E. 380 (1924); Jackson v. Lipham, 158 Ga. 557, 123 S.E. 887 (1924); Peacock v. Horne, 159 Ga. 707, 126 S.E. 813 (1925); May v. Yearty, 34 Ga. App. 29, 128 S.E. 67 (1925); Watkins Co. v. Rivers, 37 Ga. App. 559, 140 S.E. 770 (1927); Burton v. Parris, 168 Ga. 407, 148 S.E. 11 (1929); Union Cent. Life Ins. Co. v. Smith, 184 Ga. 158, 190 S.E. 651 (1937); Lankford v. Holton, 195 Ga. 317, 24 S.E.2d 292 (1943); Jackson v. Moultrie Prod. Credit Ass'n, 76 Ga. App. 768, 47 S.E.2d 127 (1948); Westbrook v. Beusse, 79 Ga. App. 654, 54 S.E.2d 693 (1949); Olson v. Newsom, 236 Ga. 480, 224 S.E.2d 358 (1976); Ringer v. Lockhart, 240 Ga. 82, 239 S.E.2d 349 (1977); Georgia Farm Bureau Mut. Ins. Co. v. First Fed. Sav. & Loan Ass'n, 152 Ga. App. 16, 262 S.E.2d 147 (1979); In re North Am. Acceptance Corp. Sec. Cases, 513 F. Supp. 608 (N.D. Ga. 1981); McGaha v. Kwon, 161 Ga. App. 216, 288 S.E.2d 289 (1982).

Applicability to Specific Cases

If owner of property stands silently by and permits another to mortgage it, the owner will be estopped to assert the owner's title thereto as against the mortgage. Dunson v. Harris, 45 Ga. App. 450, 164 S.E. 910 (1932).

Presence and conduct of plaintiff at judicial sale did not estop the plaintiff from claiming title to the segregated and uninventoried property of that sale which, it appears without dispute, actually belonged to the plaintiff, since the jury could have found that the particular property was not actually sold, and was not intended to be sold as part of the stock of goods. Brooks v. Guthrie, 42 Ga.

Applicability to Specific Cases (Cont'd)

App. 296, 155 S.E. 793 (1930).

Spouse estopped to claim title to property passed to creditor by security deed after spouse failed to disclose title. — While a jury would have been authorized to find that even if the deed from the husband to the wife was based upon a valuable consideration, so that its record constituted constructive notice, if she, nevertheless, witnessed the security deed to the creditor with knowledge of its contents; and that the creditor, in ignorance of the true title, relied upon such security deed as conveying a good title from the grantor, and extended credit on the faith thereof, the wife would be estopped from asserting title of the jury so believed. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705 (1943).

The fact that a deed from a husband to his wife, under which a wife claimed title, may have been based upon a valuable consideration and duly recorded would not necessarily prevent a subsequent purchaser, by security deed, from relying upon the principle of estoppel, if he was in fact ignorant of the true title. Roop Grocery Co. v. Gentry, 195 Ga. 736, 25 S.E.2d 705 (1943).

Ownership by virtue of unrecorded deeds. — In a quiet title action brought by executors of a landowner's estate, the trial court erred in granting summary judgment to a purchaser of the property because genuine issues remained as to whether the purchaser had notice that the landowner owned the property by virtue of unrecorded deeds. There was also a genuine issue as to whether the executors were precluded by estoppel under O.C.G.A. § 51-6-4 from claiming title. Montgomery v. Barrow, 286 Ga. 896, 692 S.E.2d 351 (2010).

No fraud shown on part of developer. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court properly granted summary judgment to the developer as, even if the developer knew of the sale of the lot to the purchasers, such sale did not estop the developer from the developer's claim against the lot pursuant to the developer's security deed; however, the trial court did err by denying the equitable subrogation claim asserted by the purchasers' lender since exercising subrogation did not prejudice the developer in any manner. Byers v. McGuire Props., 285 Ga. 530, 679 S.E.2d 1 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraud and Deceit, § 194 et seq.

C.J.S. — 37 C.J.S., Fraud, § 28 et seq.

ALR. — Failure to perform the duty to make disclosures which rests upon one because of trust or confidential relation as fraud for which equity, in an independent suit, will relieve against a judgment, 5 ALR 672.

Fraudulent misrepresentation or concealment by a contracting party concerning title to property or other subjects which are matters of public record, 33 ALR 853; 56 ALR 1217.

Estoppel of one not a party to a transaction involving real property by failure to disclose his interest in the property, 50 ALR 668.

Quantum of proof in civil case on issue involving fraudulent, dishonest, or criminal misappropriation of property, 62 ALR 1449.

Permitting record title to real property to stand in another's name as estopping owner to avail himself of statute or rule requiring authority to contract regarding real estate to be in writing, 78 ALR 588.

Public records as notice of facts starting running of statute of limitations against action based on fraud, 137 ALR 268.

Duty of vendor of real property to disclose to purchaser condition of building thereon which affects health or safety of persons using same, 141 ALR 967.

Liability of vendor of structure for failure to disclose that it was built on filled ground, 80 ALR2d 1453.

Fraud predicated on vendor's misrepresentation or concealment of danger of possibility of flooding or other unfavorable water conditions, 90 ALR3d 568.

Real estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property, 46 ALR4th 546.

CHAPTER 7

FALSE ARREST, FALSE IMPRISONMENT, MALICIOUS PROSECUTION, AND ABUSIVE LITIGATION

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False Arrest

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False Imprisonment

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Article 5

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51-7-80. Definitions.
51-7-81. Liability for abusive litigation.
51-7-82. Defenses.
51-7-83. Measure of damages.
51-7-84. Notice of claim asserted; when action must be brought.
51-7-85. Exclusive remedy.

Cross references. — Personal liability of municipal officers for special damages resulting from official acts performed in oppressive or malicious manner, § 36-33-4.

Law reviews. — For annual survey of trial practice and procedure law, see 41 Mercer L. Rev. 391 (1989). For survey of 1995 Eleventh Circuit cases on trial practice and procedure, see 47 Mercer L. Rev. 907 (1996).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Malicious Prosecution, 7 POF2d 181.

Abuse of Process — Debt Collection, 7 POF2d 413.

Malicious Prosecution — Good Faith Reliance on Advice of Counsel in Bringing Suit, 26 POF2d 275.

Wrongful Attachment, 36 POF2d 149.

Compensatory Damages for False Imprisonment, 13 POF3d 111.

Am. Jur. Trials. — Civil Consequences of Criminal Conduct, 51 Am. Jur. Trials 337.

ALR. — Liability of better business bureau or similar organization in tort, 50 ALR4th 745.

ARTICLE 1

FALSE ARREST

Law reviews. — For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009). For annual survey on trial practice and procedure, see 61 Mercer L. Rev. 363 (2009).

51-7-1. Right of action for false arrest.

An arrest under process of law, without probable cause, when made maliciously, shall give a right of action to the party arrested. (Orig. Code 1863, § 2935; Code 1868, § 2942; Code 1873, § 2993; Code 1882, § 2993; Civil Code 1895, § 3854; Civil Code 1910, § 4450; Code 1933, § 105-1001.)

Law reviews. — For article, "Georgia Local Government Officers: Rights for Their Wrongs," see 13 Ga. L. Rev. 747 (1979).

JUDICIAL DECISIONS

Actions for malicious arrest and prosecution are not favored by courts. Ventress v. Rosser, 73 Ga. 534 (1884); Price v. Cobb, 60 Ga. App. 59, 3 S.E.2d 131 (1939).

Legislative intent. — The provisions of law relative to false or malicious arrest are intended to protect and remunerate those who have been wantonly abused under color of authority. Jackson v. Norton, 75 Ga. App. 650, 44 S.E.2d 269 (1947).

Injured party was not able to recover under O.C.G.A. § 51-1-6 for the declarant's alleged violation of the criminal statutes. O.C.G.A. § 16-10-26, prohibiting giving a false report of a crime, and O.C.G.A. § 16-10-24, prohibiting obstructing or hindering the police, as these statutes did not provide for a civil cause of action; furthermore, the legislature had provided statutory civil remedies in the form of false arrest under O.C.G.A. § 51-7-1 and malicious prosecution under O.C.G.A. § 51-7-40. Jastram v. Williams, 276 Ga. App. 475, 623 S.E.2d 686 (2005).

Elements of action under this section are similar to action for malicious prosecution. Waters v. Winn, 142 Ga. 138, 82 S.E. 537 (1914).

Arrest is taking, seizing, or detaining of person of another, either by touching or putting hands on that person, or by any act indicating an intention to take such person into custody, and which subjects such person to the actual control and will of the person making the arrest; it is sufficient if the arrested person understands that the person is in the power of the one arresting and submits in consequence thereof. Conoly v. Imperial Tobacco Co., 63 Ga. App. 880, 12 S.E.2d 398 (1940).

When restraint was unlawful and contravention of other person's right, arrest was unlawful, and a right of action accrued to the person arrested against the person who had thus unlawfully arrested the person and restrained the person of the person's liberty. Turney v. Rhodes, 42 Ga. App. 104, 155 S.E. 112 (1930).

Arrest established. — Even though a customer was told the customer was not under arrest, but the customer was prevented from leaving the security office of the store, an arrest was established. Simmons v. Kroger Co., 218 Ga. App. 721, 463 S.E.2d 159 (1995), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Whoever arrests or imprisons person without warrant is guilty of a tort, unless the person can justify under one of the exceptions prescribed by law. Jackson v. Norton, 75 Ga. App. 650, 44 S.E.2d 269 (1947).

An arrest without a warrant, unless made under circumstances declared by statute to warrant arrest without warrant, is illegal and is a tort for which an action will lie as well as when arrest is under process of law but without probable cause and maliciously made. Standard Sur. & Cas. Co. v. Johnson, 74 Ga. App. 823, 41 S.E.2d 576 (1947).

Probable cause for arrest. — Whether a store's security guard acted reasonably in relying on unverified information from a source the guard never identified when the guard arrested a customer created an issue of fact regarding the presence or absence of probable cause. Simmons v. Kroger Co., 218 Ga. App. 721, 463 S.E.2d 159 (1995), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Plaintiff could not sustain claims of false arrest and malicious prosecution against a police officer and city because there was no evidence of lack of probable cause or malice. Stanford v. City of Manchester, 246 Ga. App. 129, 539 S.E.2d 845 (2000).

Defendant bank was properly granted summary judgment on the plaintiff patron's civil claim for false arrest after: (1) it was undisputed that the patron refused to leave the bank after being repeatedly asked by bank representatives to do so; (2) such refusal clearly provided probable cause within the meaning of O.C.G.A. § 51-7-3 for the patron's arrest for criminal trespass under O.C.G.A. § 16-7-21(b); and (3) such probable cause defeated the "without probable cause" element of the false arrest claim under O.C.G.A. § 51-7-1. Mohamud v. Wachovia Corp., 260 Ga. App. 612, 580 S.E.2d 259 (2003).

Because the plaintiff had gone to the police stations and told two other officers that the arresting officer had better stop harassing the plaintiff, and because the arresting officer had stopped the plaintiff for traffic violations on two separate occasions during the week or two prior to a parking lot incident, believing that the plaintiff was involved in drug activity, the plaintiff had failed to carry the burden of showing lack of probable cause, and the arresting officer was entitled to summary judgment on the false arrest claim. Perrin v. City of Elberton, No. 3:03-CV-106 (CDL), 2005 U.S. Dist. LEXIS 13230 (M.D. Ga. July 1, 2005).

In an action alleging false arrest, malicious prosecution, and false imprisonment, as the arresting officers were parties, not disinterested witnesses. their deposition testimony that the arrest of both plaintiffs was based solely upon their professional judgment, constituted a mere statement of self-serving opinion and a legal conclusion that could not support the grant of summary judgment; moreover, a jury, not a judge, was to construe the facts upon which such opinion was based and could reach a diametrically different conclusion to that reached by the witness. Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006).

When the defendant police captain saw nude dancing plus alcohol being served, the captain had probable cause to issue a citation to the plaintiff nightclub operator for violating a county ordinance, and since there was no evidence of malice, the nightclub operator's malicious arrest claim failed. Curves, LLC v. Spalding County, 685 F.3d 1284 (11th Cir. 2012).

Arrestee's false arrest claim failed because probable cause existed to arrest the arrestee for burglary; an eyewitness ob-

served the arrestee and another person entering a vacant home, officers found that the home's back door appeared to have been damaged, and the arrestee and the other person admitted that they did not have permission to enter. Gray v. Ector, No. 12-11323, 2013 U.S. App. LEXIS 19261 (11th Cir. Sept. 18, 2013) (Unpublished).

Arrestee's state law false arrest claim failed because the arrest was supported by probable cause. Smith v. City of Fairburn, Ga., No. 16-11800, 2017 U.S. App. LEXIS 2656 (11th Cir. Feb. 15, 2017) (Unpublished).

When victim of and witnesses to robbery had identified the defendant from the photo lineup, there was both sufficient information to provide probable cause for the defendant's arrest and no evidence of malice in the application for the arrest warrant, and therefore no action for false arrest and malicious prosecution. Franklin v. Consolidated Gov't, 236 Ga. App. 468, 512 S.E.2d 352 (1999).

Question of arrest is for jury. — In a tort action filed by a parent as next friend of the parent's minor daughter alleging various torts including false arrest, because the record showed that the defendants took the child and led the child around by the hand, whether an arrest was made was a question for the jury. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

While false or malicious arrest may be tort, it is likewise breach of condition of sheriff's official bond, when the false or malicious arrest is done colore officii. Jackson v. Norton, 75 Ga. App. 650, 44 S.E.2d 269 (1947).

Person has cause of action against officer who arrests the person when the arrest is not made in good faith and is arbitrary and illegal on the part of such officer. Jackson v. Norton, 75 Ga. App. 650, 44 S.E.2d 269 (1947).

If criminal process is sued out without probable cause and arrest is made under it, remedy of accused depends on whether or not one is actually prosecuted under the warrant. After the arrest, if the warrant is dismissed or not followed up, the remedy is for malicious arrest. But, if the action is carried on to a prosecution, an action for malicious prosecution is the exclusive remedy, and an action for malicious arrest will not lie. Barnes v. Gossett Oil Co., 56 Ga. App. 220, 192 S.E. 254 (1937); Smith v. Embry, 103 Ga. App. 375, 119 S.E.2d 45 (1961), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672, S.E.2d 7 (2008).

If warrant or process is valid, malicious arrest or malicious prosecution is exclusive remedy and an action for false imprisonment will not lie. Lovell v. Drake, 60 Ga. App. 325, 3 S.E.2d 783 (1939).

Only distinction between malicious arrest and malicious prosecution lies in whether prosecution was "carried on," and the plaintiff must show a termination to prove malicious arrest. Smith v. Embry, 103 Ga. App. 375, 119 S.E.2d 45 (1961), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672, S.E.2d 7 (2008).

False arrest, false imprisonment, and malicious prosecution are not mutually exclusive, and a plaintiff can proceed before a jury on all three theories. Wal-Mart Stores, Inc. v. Johnson, 249 Ga. App. 84, 547 S.E.2d 320 (2001), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

False imprisonment and false arrest distinguished. — Because the elements of false imprisonment and false arrest are different, the denial of summary judgment on one claim does not preclude the grant of summary judgment on the other. Simmons v. Kroger Co., 218 Ga. App. 721, 463 S.E.2d 159 (1995), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

An arrest without a warrant cannot constitute a false/malicious arrest under O.C.G.A. § 51-7-1. Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Because it was undisputed that the employee was never arrested pursuant to a warrant, the employee's false arrest claim lacked merit, and the trial court did not err when the court granted summary judgment to the employer on that claim. Smith v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518 (2014).

Action accrues when proceeding terminates. — To recover in tort for malicious arrest, the arrested party has the burden of showing that the prior criminal proceeding, whatever its extent, has terminated in the party's favor, and the action does not accrue until the proceeding terminates. McCord v. Jones, 168 Ga. App. 891, 311 S.E.2d 209 (1983).

Statute of limitations. — Actions for malicious prosecution, for malicious abuse of legal process, for false arrest or false imprisonment, or for malicious use of civil process were all actions for damages for injuries to the person of the party complainant; and under former Code 1933, § 3-1004 (see now O.C.G.A. § 9-3-33) such actions were not barred until two years after the issues arise. McCullough v. Atlantic Ref. Co., 50 Ga. App. 237, 177 S.E. 601 (1934), rev'd on other grounds, 181 Ga. 502, 182 S.E. 898 (1935).

Petition for malicious prosecution will not lie unless it is alleged that prosecution has terminated in favor of petitioner. Hughes v. Georgia Power Co., 65 Ga. App. 163, 15 S.E.2d 466 (1941); Mathews v. Murray, 101 Ga. App. 216, 113 S.E.2d 232 (1960).

Punitive damages are not recoverable in absence of actual damages. Kilgore v. National Life & Accident Ins. Co., 110 Ga. App. 280, 138 S.E.2d 397 (1964).

Claim for damages subject to assault and battery endorsement. — Trial court did not err in finding that, under the policy, the plaintiff's claim for damages for false imprisonment arose out of an assault and battery and were thus subject to the $50,000 sublimit in the assault and battery endorsement because under the clear language of the endorsement, the plaintiff's damages for false imprisonment and false arrest arose out of an alleged assault and battery and the assault and battery were the genesis of the plaintiff's claims for false imprisonment and arrest. Zook v. Arch Specialty Ins. Co., 336 Ga. App. 669, 784 S.E.2d 119 (2016).

Arrest of police officer for nonpayment of taxes. — A police officer is liable for damages resulting from the arrest of a person who has paid the person's street tax, since no ordinance of a penal nature was shown to justify the officer's act. McDonald v. Lane, 80 Ga. 497, 5 S.E. 628 (1888).

Arrest under false charge of swindling creates liability. — An arrest caused by making a false and malicious charge of swindling and advising that a warrant be issued is actionable. Stevens v. Little-Cleckler Constr. Co., 18 Ga. App. 483, 89 S.E. 597 (1916).

Liability of railroad officer for arrest. — No liability arises when the officer of a railroad company arrests one standing on a moving train under circumstances indicating that one is stealing a ride. Summers v. Southern Ry., 118 Ga. 174, 45 S.E. 27 (1903).

Officer's independent judgment in making arrest. — Actions for false arrest, malicious prosecution, and false imprisonment may successfully be defended by an uncontroverted affidavit of the arresting officer that the decision to arrest the plaintiff was made solely by the officer in the exercise of the officer's professional judgment and independently of any exhortations by the defendants. Jacobs v. Shaw, 219 Ga. App. 425, 465 S.E.2d 460 (1995).

Official immunity. — Police officer's conduct in arresting the plaintiff, while unprofessional, was not willful, fraudulent, corrupt, or malicious; therefore, the officer enjoyed limited immunity. Yarbrough v. Kirkland, 249 Ga. App. 523, 548 S.E.2d 670 (2001).

Minor incapable of consent. — Summary judgment was properly denied on a parent's claim of intentional infliction of emotional distress, false arrest, false imprisonment, and invasion of privacy arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because the child was below the age of 13, the age of criminal responsibility under O.C.G.A. § 16-3-1, and was legally incapable of giving consent to their actions under O.C.G.A. §§ 51-11-2 and 51-11-6. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Evidence of malice precluded grant of summary judgment. — Summary judgment was properly denied on a par-

ent's false arrest claim under O.C.G.A. § 51-7-1 arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because whether an arrest took place when employees led the child back into the store to be questioned about the alleged theft, whether they had probable cause to do so under O.C.G.A. § 51-7-3, and whether they acted maliciously under O.C.G.A. § 51-7-2 were issues of fact to be resolved by a jury. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Summary judgment improper. — Trial court erred in granting summary judgment in favor of a corporation and the corporation's president in an employee's action alleging malicious prosecution and malicious arrest because genuine issues of fact remained as to the issues of probable cause and malice; although the president averred that the president did not know that the employee was not licensed when the president hired the employee, the affidavits the employee submitted indicated otherwise. McKissick v. S. O. A., Inc., 299 Ga. App. 772, 684 S.E.2d 24 (2009).

Trial court erred in granting summary judgment to a police officer in an arrestee's action alleging false arrest because a question of fact remained as to whether the officer apprehended the arrestee for disorderly conduct knowing that there was no probable cause to do so when nothing in the arrestee's testimony suggested that the arrestee either cursed the officer or physically obstructed the officer at any time before being handcuffed; the officer failed to provide undisputed evidence showing that an arrest for physical obstruction was justified, and the officer was not aware at the time of the arrest that the arrestee had an outstanding warrant for failure to appear. Jones v. Warner, 301 Ga. App. 39, 686 S.E.2d 835 (2009).

Trial court erred by refusing to file in forma pauperis complaint. — Trial court erred by refusing an inmate's request to proceed in forma pauperis under O.C.G.A. § 9-15-2(d) and to file the inmate's complaint because the court could not decipher the inmate's complaint as construing the complaint in the light most favorable to the inmate, the inmate did state justiciable claims for false arrest, false imprisonment, and violation of the inmate's civil rights. Thompson v. Reichert, 318 Ga. App. 23, 733 S.E.2d 342 (2012).

Cited in Brookshier v. Williams, 19 Ga. App. 685, 91 S.E. 1056 (1917); Bradley v. Tenneco Oil Co., 146 Ga. App. 161, 245 S.E.2d 862 (1978); Webster v. City of East Point, 164 Ga. App. 605, 294 S.E.2d 588 (1982); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982); McCord v. Jones, 168 Ga. App. 891, 311 S.E.2d 209 (1983); Nunnally v. Revco Disct. Drug Ctrs. of Ga., Inc., 170 Ga. App. 320, 316 S.E.2d 608 (1984); Stover v. Watson, 180 Ga. App. 16, 348 S.E.2d 463 (1986); Carruth v. Roberts, 189 Ga. App. 247, 375 S.E.2d 499 (1988); Robbins v. Lanier, 198 Ga. App. 592, 402 S.E.2d 342 (1991); Britt v. Whitehall Income Fund, 891 F. Supp. 1578 (M.D. Ga. 1993); Desmond v. Troncalli Mitsubishi, 243 Ga. App. 71, 532 S.E.2d 463 (2000); Fleming v. U-Haul Co., 246 Ga. App. 681, 541 S.E.2d 75 (2000); Draper v. Reynolds, 278 Ga. App. 401, 629 S.E.2d 476 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, §§ 3, 4.

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, False Imprisonment, § 2.

ALR. — Advice or order from superior officers as defense to a police officer for making an unlawful arrest, 3 ALR 647.

Liability for loss of property left unprotected when owner was wrongfully arrested, 5 ALR 362.

Liability of municipality for arrest and detention of person upon false pretense that he or she is afflicted with a contagious disease, 12 ALR 249.

Malice and want of probable cause as elements of action for false imprisonment, 19 ALR 671; 137 ALR 504.

Detention as result of dispute over payment of bill for cash service as false imprisonment, 26 ALR 1333.

Excessiveness or inadequacy of dam-

ages for false imprisonment or arrest, 35 ALR2d 273.

When statute of limitations begins to run against action for false imprisonment or false arrest, 49 ALR2d 922.

Pleading good faith or lack of malice in mitigation of damages in action for false arrest or imprisonment, 49 ALR2d 1460.

False arrest or imprisonment: entrapment as precluding justification of arrest or imprisonment, 15 ALR3d 963.

Attorneys' fees as element of damages in action for false imprisonment or arrest, or for malicious prosecution, 21 ALR3d 1068.

Immunity of prosecuting attorney or similar officer from action for false arrest or imprisonment, 79 ALR3d 882.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment, 93 ALR3d 1109.

False imprisonment: liability of private citizen, calling on police for assistance after disturbance or trespass, for false arrest by officer, 98 ALR3d 542.

Liability for negligently causing arrest or prosecution of another, 99 ALR3d 1113.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 35 ALR4th 441.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested, 39 ALR4th 705.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 ALR4th 165.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 ALR4th 1031.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 ALR5th 195.

Construction and application of Federal Tort Claims Act provision (28 USCA § 2680(h)) excepting from coverage claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process, 152 ALR Fed. 605.

51-7-2. Malice defined.

Malice consists in personal spite or in a general disregard of the right consideration of mankind, directed by chance against the individual injured. (Orig. Code 1863, § 2936; Code 1868, § 2943; Code 1873, § 2994; Code 1882, § 2994; Civil Code 1895, § 3855; Civil Code 1910, § 4451; Code 1933, § 105-1002.)

JUDICIAL DECISIONS

Malice improperly defined. — A definition of malice is too broad which makes the offensive nature of the act to the person claimed to be injured, and not the state of mind of the actor, the test. McPherson v. Chandler, 137 Ga. 129, 72 S.E. 948 (1911).

General malice actionable. — O.C.G.A. § 51-7-2 provides that malice may be general as well as personal, and when the record showed that the defendant bore a general ill will toward anyone who, like plaintiff, used a road crossing on the plaintiff's property without permission, rational jurors could properly infer malice. Branson v. Donaldson, 206 Ga. App. 723, 426 S.E.2d 218 (1992).

Malice can be inferred when there is a total absence of probable cause and, thus, the element of malice in an action for false arrest could not be considered until the issue of probable cause was resolved by the jury. Simmons v. Kroger Co., 218 Ga. App. 721, 463 S.E.2d 159 (1995), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Malice required for malicious pros-

ecution action. — Judgment on claim of forgery was reversed because the defendant's reliance on the bare allegations of the affidavit of the payee on the check without taking any steps to verify the information in it created a fact issue for the jury about whether the defendants' acts were wanton or were done with a reckless disregard for or a conscious indifference to the rights of the plaintiff and, thus, whether the defendants acted with the malice necessary to support a malicious prosecution action. McClelland v. Courson's 441 South Station, Inc., 248 Ga. App. 170, 546 S.E.2d 300 (2001).

Summary judgment precluded by factual issues. — Summary judgment was properly denied on a parent's false arrest claim under O.C.G.A. § 51-7-1 arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because whether an arrest took place when employees led the child back into the store to be questioned about the alleged theft, whether the employees had probable cause to do so under O.C.G.A. § 51-7-3, and whether the employees acted maliciously under O.C.G.A. § 51-7-2 were issues of fact to be resolved by a jury. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Trial court erred in denying a police officer summary judgment as to the arrestees' malicious prosecution claim because that claim was barred by official immunity when the officer's actions against the arrestees did not show malice but were an effort to restrain the arrestees and control an uncertain situation; one of the arrestees approached the officer and began arguing with the officer while the officer was speaking to a suspect in custody, and when the arrestee reached into the truck to retrieve the arrestee's purse, the officer was concerned for the officer's safety. Valades v. Uslu, 301 Ga. App. 885, 689 S.E.2d 338 (2009), cert. denied, No. S10C0803, 2010 Ga. LEXIS 519 (Ga. 2010); overruled on other grounds by Harrison v. McAfee, 2016 Ga. App. LEXIS 417 (Ga. Ct. App. 2016).

Cited in Stewart v. Mulligan, 11 Ga. App. 660, 75 S.E. 991 (1912); Pollard v. Phelps, 56 Ga. App. 408, 193 S.E. 102 (1937); Kitchens v. Jefferson County, 85 Ga. App. 902, 70 S.E.2d 527 (1952); Godfrey v. Home Stores, Inc., 101 Ga. App. 269, 114 S.E.2d 202 (1960); City of Hawkinsville v. Wilson & Wilson, Inc., 231 Ga. 110, 200 S.E.2d 262 (1973); Deavers v. Standridge, 144 Ga. App. 673, 242 S.E.2d 331 (1978); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982); Barber v. H & H Muller Enters., Inc., 197 Ga. App. 126, 397 S.E.2d 563 (1990); Northern Telecom, Inc. v. Wilkerson, 219 Ga. App. 710, 466 S.E.2d 221 (1995); Willis v. Brassell, 220 Ga. App. 348, 469 S.E.2d 733 (1996); Franklin v. Consolidated Gov't, 236 Ga. App. 468, 512 S.E.2d 352 (1999); Woodward v. Gray, 241 Ga. App. 847, 527 S.E.2d 595 (2000); Desmond v. Troncalli Mitsubishi, 243 Ga. App. 71, 532 S.E.2d 463 (2000); Stanford v. City of Manchester, 246 Ga. App. 129, 539 S.E.2d 845 (2000); Fleming v. U-Haul Co., 246 Ga. App. 681, 541 S.E.2d 75 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, § 45 et seq.

C.J.S. — 54 C.J.S., Malicious Prosecution, § 53 et seq.

ALR. — Pleading good faith or lack of malice in mitigation of damages in action for false arrest or imprisonment, 49 ALR2d 1460.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment, 93 ALR3d 1109.

51-7-3. Lack of probable cause defined; question for jury.

Lack of probable cause shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused. Lack of probable cause

shall be a question for the jury, under the direction of the court. (Orig. Code 1863, § 2937; Code 1868, § 2944; Code 1873, § 2995; Code 1882, § 2995; Civil Code 1895, § 3856; Civil Code 1910, § 4452; Code 1933, § 105-1003.)

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Burden of proof, in these cases, is on plaintiff. Joiner v. Ocean S.S. Co., 86 Ga. 238, 12 S.E. 361 (1890).

Although O.C.G.A. § 51-7-3 provides that lack of probable cause "shall be a question for the jury," there is nothing to send to the jury when the plaintiff does not at least raise some evidence creating an issue of fact on the matter. Pinkston v. City of Albany, 196 Ga. App. 43, 395 S.E.2d 587 (1990); Britt v. Whitehall Income Fund, 891 F. Supp. 1578 (M.D. Ga. 1993).

Probable cause was demonstrated as matter of law. — What facts and circumstances amount to probable cause is a pure question of law, but the burden of proof to show lack of probable cause is on the plaintiff and there is nothing to send to the jury if the plaintiff does not raise some evidence creating an issue of fact as to each element of the tort of false arrest; thus, the defendant bank was properly granted summary judgment on the plaintiff patron's claim for false arrest when: (1) it was undisputed that the patron refused to leave the bank after being repeatedly asked by bank representatives to do so; (2) such refusal clearly provided probable cause within the meaning of O.C.G.A. § 51-7-3 for the patron's arrest for criminal trespass under O.C.G.A. § 16-7-21(b); and (3) such probable cause defeated an element of the false arrest claim. Mohamud v. Wachovia Corp., 260 Ga. App. 612, 580 S.E.2d 259 (2003).

Evidence sufficient to convict. — When security guard in a grocery store was concerned about the defendant from the time the defendant entered the store because of the defendant's apparent intoxication and suspicious comments, but the guard did not confront the defendant until a crime was committed in the guard's presence, the record is devoid of evidence to suggest that the security guard acted out any motivation other than a desire to protect the property and patrons of the store and to prevent the defendant from disrupting the store or offending the other shoppers. Amason v. Kroger Co., 204 Ga. App. 695, 420 S.E.2d 314 (1992).

When the victim of and witnesses to robbery had identified the defendant from a photo lineup, there was both sufficient information to provide probable cause for the defendant's arrest and no evidence of malice in the application for the arrest warrant, and therefore no action for false arrest and malicious prosecution. Franklin v. Consolidated Gov't, 236 Ga. App. 468, 512 S.E.2d 352 (1999).

Summary judgment precluded by factual issues. — Summary judgment was properly denied on a parent's false arrest claim under O.C.G.A. § 51-7-1 arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because whether an arrest took place when employees led the child back into the store to be questioned about the alleged theft, whether the employees had probable cause to do so under O.C.G.A. § 51-7-3, and whether the employees acted maliciously under O.C.G.A. § 51-7-2 were issues of fact to be resolved by a jury. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

In a malicious prosecution case brought against a medical professional company and the company's owning doctor by the company's former office manager and a former part-time worker after those former employees were charged with theft and fraud but the charges were dismissed, the trial court erred by granting the company summary judgment since there existed genuine issues of material fact as to whether a new chief operating officer hired for the company, and an agent for the company, had misrepresented the officer's knowledge that the part-time

worker had been re-hired by the company to work on an office manual and paid accordingly. However, there existed no evidence that the owning doctor made any knowing misrepresentations to the investigating detective since the owning doctor had no knowledge that the part-time worker had been rehired at any time. Barnette v. Coastal Hematology & Oncology, P. C., 294 Ga. App. 733, 670 S.E.2d 217 (2008).

Summary judgment improper. — Trial court erred in granting summary judgment in favor of a corporation and the corporation's president in an employee's action alleging malicious prosecution and malicious arrest because genuine issues of fact remained as to the issues of probable cause and malice; although the president averred that the president did not know that the employee was not licensed when the president hired the employee, the affidavits the employee submitted indicated otherwise. McKissick v. S. O. A., Inc., 299 Ga. App. 772, 684 S.E.2d 24 (2009).

Trial court erred in granting summary judgment to a police officer in an arrestee's action alleging false arrest because a question of fact remained as to whether the officer apprehended the arrestee for disorderly conduct knowing that there was no probable cause to do so when nothing in the arrestee's testimony suggested that the arrestee either cursed the officer or physically obstructed the officer at any time before being handcuffed; the officer failed to provide undisputed evidence showing that an arrest for physical obstruction was justified, and the officer was not aware at the time of the arrest that the arrestee had an outstanding warrant for failure to appear. Jones v. Warner, 301 Ga. App. 39, 686 S.E.2d 835 (2009).

Cited in Brookshier v. Williams, 19 Ga. App. 685, 91 S.E. 1056 (1917); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982); Nunnally v. Revco Disct. Drug Ctrs. of Ga., Inc., 170 Ga. App. 320, 316 S.E.2d 608 (1984); Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984); Carruth v. Roberts, 189 Ga. App. 247, 375 S.E.2d 499 (1988); McGonagil v. Treadwell, 216 Ga. App. 850, 456 S.E.2d 260 (1995); Northern Telecom, Inc. v. Wilkerson, 219 Ga. App. 710, 466 S.E.2d 221 (1995); Stanford v. City of Manchester, 246 Ga. App. 129, 539 S.E.2d 845 (2000); Fleming v. U-Haul Co., 246 Ga. App. 681, 541 S.E.2d 75 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, § 50 et seq.

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, False Imprisonment, § 64.

C.J.S. — 54 C.J.S., Malicious Prosecution, § 29 et seq.

ALR. — Pleading good faith or lack of malice in mitigation of damages in action for false arrest or imprisonment, 49 ALR2d 1460.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment, 93 ALR3d 1109.

51-7-4. Arrest under civil process of person exempt from such arrest.

The willful arrest, under civil process, of a person exempt by law from such arrest shall be deemed malicious until the contrary shall be proved. (Orig. Code 1863, § 2938; Code 1868, § 2945; Code 1873, § 2996; Code 1882, § 2996; Civil Code 1895, § 3857; Civil Code 1910, § 4453; Code 1933, § 105-1004.)

RESEARCH REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d, Arrest, § 103 et seq.

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, False Imprisonment, § 14.

ARTICLE 2

FALSE IMPRISONMENT

Law reviews. — For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009).

51-7-20. False imprisonment defined.

False imprisonment is the unlawful detention of the person of another, for any length of time, whereby such person is deprived of his personal liberty. (Orig. Code 1863, § 2932; Code 1868, § 2939; Code 1873, § 2990; Code 1882, § 2990; Civil Code 1895, § 3851; Civil Code 1910, § 4447; Code 1933, § 105-901.)

Cross references. — Criminal penalties for false imprisonment, §§ 16-5-41, 16-5-42.

Law reviews. — For article surveying torts law, see 34 Mercer L. Rev. 271 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
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General Consideration

This section is a codification of common law. Westberry v. Clanton, 136 Ga. 795, 72 S.E. 238 (1911); Mansour v. Mobley, 96 Ga. App. 812, 101 S.E.2d 786 (1957).

False imprisonment is an intentional tort, not a tort of negligence. Williams v. Smith, 179 Ga. App. 712, 348 S.E.2d 50 (1986).

False imprisonment is an intentional tort. The action must be brought within two years of its accrual, which is from the release from imprisonment. Collier v. Evans, 199 Ga. App. 763, 406 S.E.2d 90 (1991).

To arrest one illegally and detain one for any length of time is a criminal offense, and is likewise a tort for which an action for damages will lie; if the imprisonment be the act of several persons, they may be sued jointly or severally. Livingston v. Schneer's Atlanta, Inc., 61 Ga. App. 637, 7 S.E.2d 190 (1940); Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

Whoever arrests or imprisons person without warrant is guilty of a tort, unless one can justify under one of the exceptions prescribed by law; and the burden of proving that the case lies within the exception rests upon the person making the arrest or inflicting the imprisonment. Sheppard v. Hale, 58 Ga. App. 140, 197 S.E. 922 (1938); Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

Suspected shoplifting. — O.C.G.A. § 51-7-60 implicitly recognizes the right of a shop owner to protect oneself from shoplifting by detaining a customer who

has acted in a suspicious manner. Fields v. Kroger Co., 202 Ga. App. 475, 414 S.E.2d 703 (1992).

Right of action for false imprisonment accrues at time of release from imprisonment. Meyers v. Glover, 152 Ga. App. 679, 263 S.E.2d 539 (1979), overruled on other grounds, McCord v. Jones, 168 Ga. App. 891, 311 S.E.2d 209 (1983).

Statute of limitations. — Actions for malicious prosecution, for malicious abuse of legal process, for false arrest or false imprisonment, or for malicious use of civil process were all actions for damages for injuries to the person of the party complainant; and under former Code 1933, § 3-1004 (see now O.C.G.A. § 9-3-33) such actions were not barred until two years after the issues arise. McCullough v. Atlantic Ref. Co., 50 Ga. App. 237, 177 S.E. 601 (1934), rev'd on other grounds, 181 Ga. 502, 182 S.E. 898 (1935).

Action for false imprisonment will not lie when it appears that arrest and imprisonment were by virtue of valid process. See Grist v. White, 14 Ga. App. 147, 80 S.E. 519 (1914); Mathews v. Murray, 101 Ga. App. 216, 113 S.E.2d 232 (1960); Fleming v. U-Haul Co., 246 Ga. App. 681, 541 S.E.2d 75 (2000); Stanford v. City of Manchester, 246 Ga. App. 129, 539 S.E.2d 845 (2000).

When a detention is predicated upon procedurally valid process, false imprisonment is not an available remedy. Williams v. Smith, 179 Ga. App. 712, 348 S.E.2d 50 (1986); Britt v. Whitehall Income Fund, 891 F. Supp. 1578 (M.D. Ga. 1993).

When there was no evidence of invalid process there was no claim for false imprisonment. Franklin v. Consolidated Gov't, 236 Ga. App. 468, 512 S.E.2d 352 (1999).

When the detention is predicated on no process, false imprisonment is an available remedy and liability depends upon whether a detention without supporting process was legally authorized under the circumstances. Gantt v. Patient Communication Systems, 200 Ga. App. 35, 406 S.E.2d 796 (1991), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

If warrant or process is void, action for false imprisonment is exclusive remedy. Lovell v. Drake, 60 Ga. App. 325, 3 S.E.2d 783 (1939); Lowe v. Turner, 115 Ga. App. 503, 154 S.E.2d 792 (1967).

If warrant or process is valid, malicious arrest or malicious prosecution is exclusive remedy and an action for false imprisonment will not lie. Lovell v. Drake, 60 Ga. App. 325, 3 S.E.2d 783 (1939).

False imprisonment, false arrest, and malicious prosecution are not mutually exclusive, and a plaintiff can proceed before a jury on all three theories. Wal-Mart Stores, Inc. v. Johnson, 249 Ga. App. 84, 547 S.E.2d 320 (2001), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

When detention is maliciously procured by civil process, rather than criminal, the appropriate cause of action would be for malicious use of process. Williams v. Smith, 179 Ga. App. 712, 348 S.E.2d 50 (1986).

Officer's independent judgment in making arrest. — Actions for false arrest, malicious prosecution, and false imprisonment may successfully be defended by an uncontroverted affidavit of the arresting officer that the decision to arrest the plaintiff was made solely by the officer in the exercise of the officer's professional judgment and independently of any exhortations by the defendants. Jacobs v. Shaw, 219 Ga. App. 425, 465 S.E.2d 460 (1995).

Official immunity for police personnel. — Summary judgment in favor of police personnel was proper in an action against the police chief and officers for false imprisonment under O.C.G.A. § 51-7-20 because the record did not show any support for the plaintiff's contentions that the actions of the police officers in arresting the plaintiff following an altercation demonstrated the requisite malice to overcome official immunity under state law. Plaintiff's unsupported allegations of conspiracy to frame the plaintiff for an altercation are insufficient to pierce the protections of official immunity on these claims. Goree v. City of Atlanta, 276 Fed. Appx. 919 (11th Cir. 2008) (Unpublished).

Warrantless detention by private person amounts to false imprisonment unless it comes within certain specific exceptions. McWilliams v. Interstate

General Consideration (Cont'd)

Bakeries, Inc., 439 F.2d 16 (5th Cir. 1971).

There is illegal arrest and false imprisonment of another when one is detained for any length of time against one's will. Everett, Ridley & Co. v. Holcomb, 1 Ga. App. 794, 58 S.E. 287 (1907); Conoly v. Imperial Tobacco Co., 63 Ga. App. 880, 12 S.E.2d 398 (1940); Burrow v. K-Mart Corp., 166 Ga. App. 284, 304 S.E.2d 460 (1983).

False imprisonment at common law and elsewhere consists in the unlawful detention of the person of another for any length of time, whereby one is deprived of one's personal liberty, and furnishes a right of action for damages to the person so detained. Mansour v. Mobley, 96 Ga. App. 812, 101 S.E.2d 786 (1957).

Restraint used. — The restraint used to create the detention must be against the plaintiff's will and be accomplished by either force or fear. Bryant v. Wal-Mart Stores, Inc., 203 Ga. App. 770, 417 S.E.2d 688, cert. denied, 203 Ga. App. 905, 417 S.E.2d 688 (1992).

Any restraint, however slight, upon another's liberty to come and go as one pleases, constitutes arrest. Turney v. Rhodes, 42 Ga. App. 104, 155 S.E. 112 (1930); Conoly v. Imperial Tobacco Co., 63 Ga. App. 880, 12 S.E.2d 398 (1940); Burrow v. K-Mart Corp., 166 Ga. App. 284, 304 S.E.2d 460 (1983).

Restraint constituting false imprisonment may arise out of words, acts, gestures, or the like, which induce a reasonable apprehension that force will be used if the plaintiff does not submit, and it is sufficient if they operate upon the will of the person threatened and result in a reasonable fear of personal difficulty or personal injuries. Mansour v. Mobley, 96 Ga. App. 812, 101 S.E.2d 786 (1957); Abner v. W.T. Grant Co., 110 Ga. App. 592, 139 S.E.2d 408 (1964); Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432 (1964); Seligman & Latz of Atlanta, Inc. v. Grant, 116 Ga. App. 539, 158 S.E.2d 483 (1967); Burrow v. K-Mart Corp., 166 Ga. App. 284, 304 S.E.2d 460 (1983).

Touching or laying hands on person is not sufficient to constitute unlawful detention. Markovitz v. Blake, 26 Ga. App. 153, 105 S.E. 622 (1921); Hines v. Adams, 27 Ga. App. 155, 107 S.E. 618 (1921).

One who actively instigates or procures an arrest, without lawful process, is generally regarded as principal for whom the officer acts, and one may be liable to respond in damages. Webb v. Prince, 62 Ga. App. 749, 9 S.E.2d 675 (1940); Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

Generally, a private person who causes or directs the arrest of another by an officer without a warrant may be held liable for false imprisonment in the absence of justification. Webb v. Prince, 62 Ga. App. 749, 9 S.E.2d 675 (1940).

No liability attaches unless defendant caused plaintiff's detention. — However maliciously and without probable cause, the defendant may act in reporting to an officer facts which justify an arrest if the arrest is made without the defendant's command, request or direction, the defendant is not liable. Webb v. Prince, 62 Ga. App. 749, 9 S.E.2d 675 (1940).

One who merely states to an officer what one knows of a supposed offense, even though one expresses the opinion that there is ground for the arrest, but without making any charge or requesting an arrest, does not thereby make oneself liable for false imprisonment. Webb v. Prince, 62 Ga. App. 749, 9 S.E.2d 675 (1940).

Although defendant need not have expressly directed arrest. — In order to render responsible a person causing the arrest of another without a warrant it is not necessary that one direct the arrest in express terms; it is sufficient that the person alleged to have caused the plaintiff's arrest, by one's conduct and acts, should have procured and directed the arrest. Webb v. Prince, 62 Ga. App. 749, 9 S.E.2d 675 (1940).

Only elements essential to a cause of action are detention and its unlawfulness; malice and want of probable cause need not be shown. Westberry v. Clanton, 136 Ga. 795, 72 S.E. 238 (1911); Wyatt v. Baker, 41 Ga. App. 750, 154 S.E. 816 (1930); Vlass v. McCrary, 60 Ga. App. 744, 5 S.E.2d 63 (1939); Conoly v. Imperial Tobacco Co., 63 Ga. App. 880, 12 S.E.2d

398 (1940); Abner v. W.T. Grant Co., 110 Ga. App. 592, 139 S.E.2d 408 (1964); Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432 (1964); Seligman & Latz of Atlanta v. Grant, 116 Ga. App. 539, 158 S.E.2d 483 (1967); Young v. City of Atlanta, 631 F. Supp. 1498 (N.D. Ga. 1986).

In an action to recover damages for false imprisonment, the only essential elements of the action are the detention and the unlawfulness of the detention. Burrow v. K-Mart Corp., 166 Ga. App. 284, 304 S.E.2d 460 (1983).

The only essential elements for false imprisonment are: (1) detention; and (2) the unlawfulness thereof. Collier v. Evans, 199 Ga. App. 763, 406 S.E.2d 90 (1991).

Citizen's arrest lawful when probable cause exists. — An arrest by a private person when one has probable cause to believe an offense is being committed in one's presence is a lawful arrest so as to defeat an allegation of false imprisonment. Nunnally v. Revco Disct. Drug Ctrs. of Ga., Inc., 170 Ga. App. 320, 316 S.E.2d 608 (1984).

To sustain action for false imprisonment, it is not necessary to show malice and want of probable cause, but it is only essential to show that the imprisonment was unlawful. Sheppard v. Hale, 58 Ga. App. 140, 197 S.E. 922 (1938); Lowe v. Turner, 115 Ga. App. 503, 154 S.E.2d 792 (1967).

In a case of illegal arrest and false imprisonment, probable cause is not essential to support a case; however, evidence affording reasonable and probable cause, or suspicion of the plaintiff's guilt, is relevant in mitigation of damages. Conoly v. Imperial Tobacco Co., 63 Ga. App. 880, 12 S.E.2d 398 (1940).

In a false imprisonment case premised upon a warrantless arrest, the mere existence of probable cause standing alone has no real defensive bearing on the issue of liability. Collins v. Sadlo, 167 Ga. App. 317, 306 S.E.2d 390 (1983).

The existence of probable cause standing alone is not a complete defense because, even if probable cause to believe a crime has been committed exists, a warrantless arrest would still be illegal unless it was accomplished pursuant to one of the "exigent circumstances" applicable to law enforcement officers enumerated in O.C.G.A. § 17-4-20 or applicable to private persons as set forth in O.C.G.A. § 17-4-60. Arbee v. Collins, 219 Ga. App. 63, 463 S.E.2d 922 (1995).

A person need not make an effort to escape or await application of open force before the person can recover for false imprisonment, but there must be restraint whether by force or fear. J.H. Harvey Co. v. Speight, 178 Ga. App. 812, 344 S.E.2d 701 (1986).

Person need not make effort to escape or to await application of open force (and possibly suffer physical injury) before one can recover for false imprisonment, but there must be actual physical restrain whether by force or fear. Abner v. W.T. Grant Co., 110 Ga. App. 592, 139 S.E.2d 408 (1964); J.H. Harvey Co. v. Speight, 178 Ga. App. 812, 344 S.E.2d 701 (1986).

It is no defense that person perpetrating illegal arrest or imprisonment is ignorant of illegality of one's acts; knowingly committing or participating in the act is sufficient to fix liability. Lowe v. Turner, 115 Ga. App. 503, 154 S.E.2d 792 (1967).

Proof that plaintiff in false imprisonment suit was actually guilty of crime for which the plaintiff was illegally arrested can be used to mitigate damages. McWilliams v. Interstate Bakeries, Inc., 439 F.2d 16 (5th Cir. 1971).

Direction of verdict by court improper. — The court has no authority to direct a verdict unless the case is very plain. Manning v. Mitchell, 73 Ga. 660 (1884).

False imprisonment and false arrest distinguished. — Because the elements of false imprisonment and false arrest are different, the denial of summary judgment on one claim does not preclude the grant of summary judgment on the other. Simmons v. Kroger Co., 218 Ga. App. 721, 463 S.E.2d 159 (1995), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Cited in Thorpe v. Wray, 68 Ga. 359 (1882); Michael v. Bacon, 5 Ga. App. 331, 63 S.E. 228 (1908); Butler v. Tattnall, 140 Ga. 579, 79 S.E. 456 (1913); Brookshier v. Williams, 19 Ga. App. 685, 91 S.E. 1056 (1917); Collins v. United States Fid. &

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Guar. Co., 72 Ga. App. 875, 35 S.E.2d 474 (1945); Brown v. Triton, Inc., 115 Ga. App. 785, 156 S.E.2d 200 (1967); Wilder v. Irvin, 423 F. Supp. 639 (N.D. Ga. 1976); Kendrick v. Metropolitan Psychiatric Ctr., Inc., 158 Ga. App. 839, 282 S.E.2d 361 (1981); Colonial Stores, Inc. v. Fishel, 160 Ga. App. 739, 288 S.E.2d 21 (1981); Harrison v. Johnson, 161 Ga. App. 54, 289 S.E.2d 287 (1982); Nunnally v. Revco Disct. Drug Ctrs. of Ga., Inc., 170 Ga. App. 320, 316 S.E.2d 608 (1984); Luckie v. Piggly-Wiggly S., Inc., 173 Ga. App. 177, 325 S.E.2d 844 (1984); Scott Hous. Sys. v. Hickox, 174 Ga. App. 23, 329 S.E.2d 154 (1985); Franklin v. Piggly Wiggly Food S., Inc., 175 Ga. App. 20, 332 S.E.2d 329 (1985); Williams v. Summit Psychiatric Ctrs., 185 Ga. App. 264, 363 S.E.2d 794 (1987); Smith v. Holeman, 212 Ga. App. 158, 441 S.E.2d 487 (1994); Kelly v. Curtis, 21 F.3d 1544 (11th Cir. 1994); Jackson v. KMart Corp., 851 F. Supp. 469 (M.D. Ga. 1994); Wallace v. Stringer, 250 Ga. App. 850, 553 S.E.2d 166 (2001).

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Since the plaintiff was not guilty of a criminal offense, the plaintiff's arrest without warrant justified an award of damages against the officer who made the arrest and the persons who procured the officer to do so. Sheppard v. Hale, 58 Ga. App. 140, 197 S.E. 922 (1938).

Under allegations that the plaintiff was arrested without a warrant when the plaintiff was not guilty of any offense under the laws of this state or under any city ordinance and, without being carried before a committing magistrate, was held under arrest and deprived of the plaintiff's liberty until the plaintiff and the plaintiff's brother paid to the defendant a sum of money, whereupon the defendant accepted the money and caused or permitted the plaintiff to be released from custody, the arrest and detention of the plaintiff were clearly illegal, and a cause of action for false imprisonment was set out. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

In a 42 U.S.C. § 1983 suit filed by a Florida business person alleging false arrest based upon the business person giving postdated checks to a Georgia payee, issues of fact remained with respect to the business person's false imprisonment/false arrest claims under O.C.G.A. § 51-7-20 against a Georgia sheriff's deputy and the payee; the defense in O.C.G.A. § 51-7-21 did not apply because the Georgia arrest warrant was invalid, and the safe harbor provision in O.C.G.A. § 16-9-20(h)(2) had no relevance to the good cause inquiry under O.C.G.A. § 51-7-21. Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

Claim was ripe for adjudication. — While a city and two police officers argued that an arrestee's claim of false imprisonment under O.C.G.A. § 51-7-20 was not ripe because the arrestee's criminal prosecution had not terminated in the arrestee's favor, it was not certain that the arrest was procured by an invalid arrest warrant and it was not beyond doubt that the arrestee could prove a set of facts to support a false imprisonment claim. Holmes v. City of East Point, 2005 U.S. Dist. LEXIS 38201 (N.D. Ga. Dec. 20, 2005).

Time limitation. — Plaintiffs' malicious prosecution claim was not time barred by the applicable two-year statute of limitations because that claim did not accrue until the charges against the plaintiffs were dropped, which was within the two-year limitations period; the plaintiffs' claim for false imprisonment was time barred because the plaintiffs were no longer falsely imprisoned after the defendants obtained an arrest warrant, which was more than two years prior to the plaintiffs filing their complaint, and the plaintiffs did not suffer a continuing tort of false imprisonment once the plaintiffs were held pursuant to the warrant. Black v. Wigington, No. 1:12-CV-03365-RWS, 2015 U.S. Dist. LEXIS 13003 (N.D. Ga. Feb. 4, 2015), aff'd in part and rev'd on other grounds, 811 F.3d 1259 (11th Cir. Ga. 2016).

Trial court erred by refusing to file in forma pauperis complaint. — Trial court erred by refusing an inmate's request to proceed in forma pauperis under O.C.G.A. § 9-15-2(d) and to file the in-

mate's complaint because the court could not decipher the inmate's complaint as construing the complaint in the light most favorable to the inmate, the inmate did state justiciable claims for false arrest, false imprisonment, and violation of the inmate's civil rights. Thompson v. Reichert, 318 Ga. App. 23, 733 S.E.2d 342 (2012).

Private citizen who forcibly detained the plaintiff who had indecently exposed oneself to the citizen and arrest did not occur until four days after the offense, was guilty of falsely imprisoning the plaintiff. McWilliams v. Interstate Bakeries, Inc., 439 F.2d 16 (5th Cir. 1971).

Illegal detention of plaintiff at defendant's command. — Allegations that the defendants, without swearing out any warrant or taking any other proceeding, procured, directed and instructed certain police officers to arrest and detain the plaintiff, that the plaintiff was not then nor had the plaintiff been violating any law, nor was the plaintiff attempting to escape, that after the plaintiff's arrest by the police officer the plaintiff was taken into custody and restrained of the plaintiff's liberty, and that the plaintiff was afterwards charged with illegal parking, but was acquitted after a trial thereon, set out a cause of action for false imprisonment. Livingston v. Schneer's Atlanta, Inc., 61 Ga. App. 637, 7 S.E.2d 190 (1940).

Allegation that the defendant restaurant operators "called in said officers and caused plaintiff's arrest," (when the plaintiff, being a customer, tried to cash a check), taken in connection with the context, when it was alleged that the arrest was caused and instigated by the defendants, amounted to an allegation that the defendants, through the defendants' agents, procured or directed the arrest of the plaintiff, and the petition therefore set out a cause of action. Webb v. Prince, 62 Ga. App. 749, 9 S.E.2d 675 (1940).

Appellee's claim of false imprisonment failed as a matter of law as the undisputed evidence showed that the appellant did not cause or direct the police to detain the appellee because the evidence showed only that the appellant's employee reported having seen the appellee with what the employee believed was an illegal sawed-off shotgun, but the employee did not swear out a warrant against the appellee nor did the employee urge or direct the police to arrest the appellee; the employee's 911 call prompted an investigation only; and the arresting officers stated unequivocally that the officers independently decided to detain the appellee based on the appellee's disorderly conduct and efforts to obstruct their investigation. Examination Mgmt. Servs. v. Steed, 340 Ga. App. 51, 794 S.E.2d 687 (2016).

Illegal restraint of refugees. — Each of the four refugees was detained without an arrest warrant and without being told of the charges against them. The refugees showed that the former Bosnian-Serb soldier subjected them to restraint and physical violence in detention and was complicit in their ongoing arbitrary detention; therefore, the former soldier was liable to the refugees under Georgia law for false imprisonment. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

Summary judgment was improperly granted to the employer because a question of fact remained as to whether the employer procured the employee's false imprisonment when there was a conflict in the evidence about whether the employer caused the detective to arrest the employee when the evidence did not show, as a matter of law, that the police made a sufficiently independent investigation of the theft; and a question of fact remained as to whether the detective had probable cause to arrest the employee in connection with the theft as there was a dispute about whether the employee actually saw a person take the electronics out of a case and failed to report it, giving rise to a reasonable suspicion that the employee was working with the thieves. Smith v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518 (2014).

In a claim that the employer procured the employee's false imprisonment when the employee was arrested by a detective, although the employee offered the employee's report of the detective's question to a loss prevention officer for the employer about what to do with the employee after the employee arrived at the police

Applicability to Specific Cases (Cont'd)

station to show the truth of the matter asserted — that was, that the employer had some substantial control over the police investigation — the detective's question as reported by the employee was admissible at trial as an inconsistent statement made prior to the detective's later testimony that the detective never asked the question at all. Smith v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518 (2014).

Illegal restraint of minor. — Irrespective of whether the minor wrongfully charged with burglary voluntarily accompanied the police officer and private citizen charging the minor with that offense from the schoolhouse, when the minor's parent thereafter demanded that the police officer and the private citizen deliver the minor to the parent, their refusal to do so and their retention of the minor in their custody and taking the minor elsewhere constituted a restraint of the minor's liberty. Conoly v. Imperial Tobacco Co., 63 Ga. App. 880, 12 S.E.2d 398 (1940).

Summary judgment was properly denied on a parent's claim of intentional infliction of emotional distress, false arrest, false imprisonment, and invasion of privacy arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because the child was below the age of 13, the age of criminal responsibility under O.C.G.A. § 16-3-1, and was legally incapable of giving consent to their actions under O.C.G.A. §§ 51-11-2 and 51-11-6. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Whether unlawful detention took place was factual question. — Summary judgment was properly denied on a parent's false imprisonment claim under O.C.G.A. § 51-7-20 arising out of an accusation by store employees that the parent's nine-year-old child stole from the store, even if the child were old enough to consent, because whether the child was unlawfully detained or imprisoned when an employee led the child back into the store by the hand for questioning about the alleged theft was a factual question to be resolved by a jury. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Action arising from arrest of invited guest in an action for false imprisonment, when an employee of an apartment complex had given notice to the plaintiff that the plaintiff was forbidden to enter the property, even though the plaintiff entered as the guest of a tenant, the employee had probable cause to arrest and detain the plaintiff for malicious trespass when the plaintiff deviated from the purpose for which the plaintiff was invited and entered upon a portion of the premises unrelated to the invitation. Arbee v. Collins, 219 Ga. App. 63, 463 S.E.2d 922 (1995).

Illegal restraint of person in elevator. — When a person who has gone into an office building, whether the person is lawfully or illegally there, is ordered to enter an elevator in the building and to go to the basement of the building, and is carried, by the persons so ordering and the operator of the elevator, against the person's will and over the person's protest, the transportation of the person to the basement of the building is done for a purpose other than to eject the person from the building, the forcing of the person into the elevator and the taking of the person, against the person's will, to the basement of the building, constitutes an illegal arrest and an illegal restraint of the person's liberty. Turney v. Rhodes, 42 Ga. App. 104, 155 S.E. 112 (1930).

Momentary pause in progress of patron through check out line was not too inconsequential to constitute "detention" or "imprisonment" for purposes of the patron's false imprisonment claim. Williams v. Food Lion, Inc., 213 Ga. App. 865, 446 S.E.2d 221 (1994).

Store patron's voluntary surrender of freedom. — Grocery store was not liable for false imprisonment when a patron by the patron's own free choice surrendered the patron's freedom of motion by remaining in the checking aisle to clear oneself of suspicion. Williams v. Food Lion, Inc., 213 Ga. App. 865, 446 S.E.2d 221 (1994).

Loss of position by detained person. — When a person loses one's position, as the result of an unlawful detention, it is a proper element of damages. Waters v. National Woolen Mills, 142 Ga. 133, 82 S.E. 535 (1914).

Employer did not restrain employee. — For purposes of the employee's false imprisonment claim based on the employee's encounter with two loss prevention officers in the employer's back office, the evidence did not authorize a conclusion that the employee was detained as the employee signed a statement that no threats and promises were made by anyone to get the employee to make a statement and that the employee had complete freedom to leave the premises throughout; and the employee testified at a deposition that the loss prevention officers told the employee at or before the conclusion of the encounter that the employee was free to leave, that the officers never touched the employee, and that the officers never suggested that the officers were going to arrest the employee or have the employee arrested. Smith v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518 (2014).

Summary judgment was improperly granted in favor of the employer based on the employer procuring the employee's false imprisonment when the employee was arrested by a detective because, although two of the loss prevention officers both averred that neither of them encouraged or directed the police to arrest the employee, the officers told a third loss prevention officer that the officers were going to obtain the employee's arrest based on a videotape; there was a conflict in the evidence as to whether the employer directly or indirectly caused police to arrest the employee; and a question of fact remained regarding whether the detective had probable cause to believe that the employee was involved in the theft or lied when denying being so involved. Smith v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518 (2014).

Money paid to secure release not accord and satisfaction barring suit for false imprisonment. — Alleged payment of money by the plaintiff to the defendants, demanded of the plaintiff for the plaintiff's release from illegal imprisonment, did not amount to an accord and satisfaction or bar the plaintiff from maintaining an action for false imprisonment or for slander. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

Party not liable for false imprisonment when not authorized to provide release. — When it was not alleged that the duties of the foreperson included any control by the foreperson over the gates and doors to the factory, the foreperson's refusal to "allow" the doors and gates to be opened and the petitioner to be released from the factory, did not amount to a restraint by the foreperson of the plaintiff's liberty and, therefore, constituted no false imprisonment. Timmons v. Fulton Bag & Cotton Mills, 45 Ga. App. 670, 166 S.E. 40 (1932).

Arrest for contempt of court. — Plaintiff's detention was not a false imprisonment since the judicial order authorizing the sheriff to arrest the plaintiff for contempt of court was in the nature of a warrant, and the process had therefore been properly issued. Carruth v. Roberts, 189 Ga. App. 247, 375 S.E.2d 499 (1988).

Party not liable for false imprisonment when judge improperly jails other litigant for contempt. — When a court has jurisdiction of the subject matter, including as such jurisdiction to render a judgment adjudicating the defendant in contempt of court and committing the defendant to imprisonment, but when, in the particular case, the court in the judgment rendered may have exceeded the court's jurisdiction by the rendition of a judgment adjudicating the defendant in contempt and ordering the defendant to jail, a litigant or the litigant's attorney, who in good faith prosecutes the suit and invokes the ruling and judgment of the court, is not, when the defendant is afterwards, in the proceedings, by a judgment of the court adjudicated in contempt and committed to jail, guilty of false imprisonment. Melton v. Jenkins, 50 Ga. App. 615, 178 S.E. 754 (1935).

Section applicable to employer's illegal restraint of employee. — The unmistakable language of this section makes it clear that the unlawful detention

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of the person of another depriving that person of one's personal liberty is an actionable tort even though the one restrained is an employee of the offender and is at the time of the illegal restraint being paid by the offender. Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432 (1964).

This section does not apply to case of admitted embezzler who intends to plead guilty and undertakes restitution under the belief that restitution will lessen the punishment and under assurance of assistance by agents of the bank to be rendered after the plea is entered in lessening the punishment. Hawkes v. Mobley, 174 Ga. 481, 163 S.E. 494 (1932).

Unlawful arrest of landowner. — A person, upon whose land a crew of a telephone company erected poles without authority, may remove the poles, and if a constable arrests the person without a warrant for such acts, an action for false imprisonment will lie. Holliday v. Coleman, 12 Ga. App. 779, 78 S.E. 482 (1913).

Wrong person arrested. — The arrest of the wrong person by a sheriff without a warrant gives rise to a cause of action. Mitchell v. Malone, 77 Ga. 301 (1886).

Restaurant manager told a security guard to follow a car the manager believed was occupied by patrons who had left without paying; it was actually occupied by siblings who had paid their bill. As police detained the siblings without a warrant, the siblings had a claim for false imprisonment under O.C.G.A. § 51-7-20; neither malice nor lack of probable cause had to be shown, and it was not alleged that the siblings were arrested pursuant to exigent circumstances. Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Warrant naming another person. — Sole remedy of person who was arrested pursuant to a warrant naming another person was for the false imprisonment, not false arrest or malicious prosecution. Reese v. Clayton County, 185 Ga. App. 207, 363 S.E.2d 618 (1987).

Good faith identification of suspect. — Store's establishment of the store employee's good faith identification of the defendants as robbery suspects did not render the defendants' detention unlawful as required by O.C.G.A. § 51-7-20. Mayor & Aldermen v. Wilson, 214 Ga. App. 170, 447 S.E.2d 124 (1994), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

False imprisonment from exercise of dominion over plaintiff's property. — The exercise of dominion over one's property serves also to exercise dominion over the person owning such property. Burrow v. K-Mart Corp., 166 Ga. App. 284, 304 S.E.2d 460 (1983).

Probable cause and exigent circumstances found to exist so as to justify warrantless detention. Hill v. Georgia Power Co., 786 F.2d 1071 (11th Cir. 1986).

Detention not found. — When the plaintiff was observed by several different store employees who characterized the plaintiff's behavior as "suspicious" and was later followed to a parking lot where the plaintiff was asked by an assistant store manager if the plaintiff had anything belonging to the store, there was no detention which could support the plaintiff's action for false imprisonment. Lord v. K-Mart Corp., 177 Ga. App. 651, 340 S.E.2d 225 (1986).

Since the plaintiff was not touched or physically detained but was merely asked a question, and the plaintiff's response to that question provoked no further action on the defendant's part, no detention occurred. Fields v. Kroger Co., 202 Ga. App. 475, 414 S.E.2d 703 (1992).

The trial court did not err in granting summary judgment to an employer on an employee's claim for false imprisonment since there was no evidence that the employee was ever physically restrained in an office or threatened with physical force. The employee argued that the employee was threatened with the loss of the employee's job and with criminal prosecution, but such threats did not constitute detention for purposes of a false imprisonment claim. Shannon v. Office Max N. Am., Inc., 291 Ga. App. 834, 662 S.E.2d 885 (2008).

Photographer could not establish a claim for false imprisonment because the assistant chief of police was acting under

the auspices of a valid temporary protective order (TPO) when the assistant chief of police ordered the photographer to leave a council meeting, and the later dismissal of a council member's petition for stalking TPO did not change the fact that the TPO was in effect at the time of the meeting. Davis v. Wallace, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Trial court did not err in granting summary judgment in favor of the employer on the employee's claim of false imprisonment as the employee was never detained at the employer's store as the employee signed a statement that the employee had complete freedom to leave the premises throughout the questioning by two loss prevention officers for the employer. Smith v. Wal-Mart Stores East, LP, 330 Ga. App. 340, 765 S.E.2d 518 (2014).

Proper detention by store. — There was probable cause for the defendant store to detain the plaintiff when it appeared that the plaintiff had used another person's charge account without authorization. Mitchell v. Lowe's Home Ctrs., Inc., 234 Ga. App. 339, 506 S.E.2d 381 (1998).

A claim of false imprisonment based upon involuntary mental examination and treatment is analytically identical to any other claim for false imprisonment. Williams v. Smith, 179 Ga. App. 712, 348 S.E.2d 50 (1986).

One who is admitted as a mental health patient pursuant to a physician's "good faith" compliance with the applicable procedures of O.C.G.A. § 37-3-40 et seq. has no right of recovery for false imprisonment. Williams v. Smith, 179 Ga. App. 712, 348 S.E.2d 50 (1986).

If one is taken into custody pursuant to a procedurally valid certificate of a physician authorizing involuntary mental treatment, the resulting detention is not "unlawful." Although such detention may give rise to other claims, a cause of action for false imprisonment is not among them. Williams v. Smith, 179 Ga. App. 712, 348 S.E.2d 50 (1986).

If one is held in custody pursuant to a void or defective physician's certificate of mental illness, there is a viable claim for false imprisonment, but only if the certificate was not issued in "good faith." Williams v. Smith, 179 Ga. App. 712, 348 S.E.2d 50 (1986).

Illegal restraint of hospital patient. — Summary judgment in favor of a hospital was not warranted since there was evidence that the patient never voluntarily admitted herself to the hospital's behavioral health unit and was held there after demanding to be released. Brand v. University Hosp., 240 Ga. App. 824, 525 S.E.2d 374 (1999).

Directed verdict was precluded in action against hospital and physician for false imprisonment and assault, when there were jury questions as to whether there was a grave emergency justifying the plaintiff's admission for treatment, whether the consent of the plaintiff's daughter satisfied a "next of kin" requirement, and whether the doctors could proceed under legally implied consent. Davis v. Charter By-The-Sea, Inc., 183 Ga. App. 213, 358 S.E.2d 865 (1987).

In an action alleging false arrest, malicious prosecution, and false imprisonment, as the arresting officers were parties, not disinterested witnesses, their deposition testimony that the arrest of both the plaintiffs was based solely upon their professional judgment, constituted a mere statement of self-serving opinion and a legal conclusion that could not support the grant of summary judgment; moreover, a jury, not a judge, was to construe the facts upon which such opinion was based and could reach a diametrically different conclusion to that reached by the witness. Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006).

Officer arresting restaurant invitee. — Summary judgment was properly granted to a police officer on a restaurant invitee's false imprisonment claim under O.C.G.A. § 51-7-20. The officer, who was told by the restaurant manager that the invitee refused an order to leave the premises, had probable cause to arrest the invitee without a warrant for criminal trespass under O.C.G.A. § 16-7-21. Kline v. KDB, Inc., 295 Ga. App. 789, 673 S.E.2d 516 (2009).

Arrest for driving under the influence. — In an arrest for driving under the influence, the arrestee's false imprison-

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ment claim failed because the officer was entitled to official immunity since the officer was performing a discretionary act when the officer arrested the arrestee; the arrestee's general allegations of malice did not overcome official immunity. Bannister v. Conway, 2013 U.S. Dist. LEXIS 152569 (N.D. Ga. Oct. 23, 2013).

Official immunity did not apply. — Under respondeat superior, a principal had no defense based on an agent's immunity from civil liability for an act committed in the course of employment; thus, because the official immunity of a public employee did not protect a governmental entity from liability under respondeat superior, a trial court's summary judgment for a city based on allegations of false arrest was improper, despite the fact that the officers carrying out the arrest were immune. Rodriguez v. Kraus, 275 Ga. App. 118, 619 S.E.2d 800 (2005).

Deputy did not show entitlement to official immunity under Ga. Const. 1983, Art. I, Sec. II, Para. IX(d) as to the claims of false arrest and malicious prosecution because the plaintiff offered evidence tending to show that the deputy violated Ga. Const. 1983, Art. I, Sec. I, Para. XXIII and O.C.G.A. § 51-7-20; thus, there were material fact issues precluding summary judgment. Jordan v. Mosley, 487 F.3d 1350 (11th Cir. 2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d, False Imprisonment, § 1 et seq.

C.J.S. — 35 C.J.S., False Imprisonment, § 1 et seq.

ALR. — Civil liability of judicial officer for false imprisonment, 13 ALR 1344; 55 ALR 282; 173 ALR 802.

Malice and want of probable cause as elements of action for false imprisonment, 19 ALR 671; 137 ALR 504.

Necessity of showing termination of prosecution in action for false imprisonment, 25 ALR 1518.

Detention as result of dispute over payment of bill for cash service as false imprisonment, 26 ALR 1333.

Charge of larceny and circumstances accompanying same as detention that will support action for false imprisonment, 31 ALR 314.

Liability of jailer for false imprisonment, 46 ALR 806.

False imprisonment predicated upon conduct of master towards servant not amounting to actual arrest, 49 ALR 1309.

Action for malicious prosecution or false arrest based on extradition proceeding, 55 ALR 353.

Venue of civil action for false imprisonment, 133 ALR 1122.

Liability, for false imprisonment or arrest, of a private person answering call of known or asserted peace or police officer to assist in making arrest which turns out to be unlawful, 29 ALR2d 825.

When statute of limitations begins to run against action for false imprisonment or false arrest, 49 ALR2d 922.

Truant or attendance officer's liability for assault and battery or false imprisonment, 62 ALR2d 1328.

Judgment in false imprisonment action as res judicata in later malicious prosecution action, or vice versa, 86 ALR2d 1385.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 98 ALR2d 966; 3 ALR4th 1057.

False arrest or imprisonment: entrapment as precluding justification of arrest or imprisonment, 15 ALR3d 963.

False imprisonment: civil liability of private person as affected by invalidity of statute or ordinance for violation of which arrest was made, 16 ALR3d 535.

Liability, for false arrest or imprisonment, of private person detaining child, 20 ALR3d 1441.

Attorneys' fees as element of damages in action for false imprisonment or arrest, or for malicious prosecution, 21 ALR3d 1068.

Liability of attorney acting for client, for false imprisonment or malicious prosecution of third party, 27 ALR3d 1113; 46 ALR4th 249.

Liability for false imprisonment predicated upon institution of, or conduct in connection with, insanity proceedings, 30 ALR3d 523.

Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters, 47 ALR3d 998.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment, 93 ALR3d 1109.

False imprisonment: liability of private citizen, calling on police for assistance after disturbance or trespass, for false arrest by officer, 98 ALR3d 542.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 3 ALR4th 1057.

False imprisonment in connection with confinement in nursing home or hospital, 4 ALR4th 449.

Construction and application of state statute providing compensation for wrongful conviction and incarceration, 34 ALR4th 648.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 35 ALR4th 441.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested, 39 ALR4th 705.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 ALR4th 165.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 ALR5th 195.

Construction and application of Federal Tort Claims Act provision (28 USCA § 2680(h)) excepting from coverage claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process, 152 ALR Fed. 605.

51-7-21. Effect of good faith on liability for imprisonment under warrant.

If imprisonment is by virtue of a warrant, neither the party who procured the warrant in good faith nor the officer who executed the warrant in good faith shall be liable for false imprisonment even if the warrant is defective in form or is void for lack of jurisdiction. In such cases, good faith must be determined from the circumstances. A judicial officer issuing a warrant in good faith shall not be liable for false imprisonment, provided that, when he has no jurisdiction, there shall be a presumption against such officer's good faith. (Orig. Code 1863, § 2933; Code 1868, § 2940; Code 1873, § 2991; Code 1882, § 2991; Civil Code 1895, § 3852; Civil Code 1910, § 4448; Code 1933, § 105-902.)

Law reviews. — For article, "Georgia Local Government Officers: Rights for Their Wrongs," see 13 Ga. L. Rev. 747 (1979).

JUDICIAL DECISIONS

This section changes the common law rule. Berger v. Saul, 113 Ga. 869, 39 S.E. 326 (1901).

What constitutes warrant. — Process issued by a superior court clerk under an order of the judge, which caused the arrest of the plaintiff, is a warrant. Butler v. Tattnall Bank, 140 Ga. 579, 79 S.E. 456 (1913).

A judgment is in the nature of a warrant for the arrest of the accused, and an officer who makes an arrest thereunder will not be liable either for malicious arrest or false imprisonment if the officer acts in

good faith in attempting to execute the judgment of the municipal court imposing what would be deemed to be an illegal fine for tying an animal to a public stake in the town's street. Williams v. Sewell, 121 Ga. 665, 49 S.E. 732 (1905).

Void process and bad faith essential. — Under this section, two things are necessary to be shown: void process and bad faith. Calhoun v. Little, 106 Ga. 336, 32 S.E. 86 (1898); Page v. Citizens Banking Co., 111 Ga. 73, 36 S.E. 418 (1900).

Evidence of bad faith. — Want of ordinary care in making an arrest is inconsistent with good faith. Blocker v. Clark, 126 Ga. 484, 54 S.E. 1022 (1906).

A re-arrest on the same day is evidence of bad faith. Thorpe v. Wray, 68 Ga. 359 (1882).

Motives immaterial when warrant valid. — An imprisonment resulting from an arrest under a valid warrant will not give a right of action, regardless of the motives. Page v. Citizens Banking Co., 111 Ga. 73, 36 S.E. 418, 78 Am. St. R. 144, 51 L.R.A. 463 (1900).

Section does not apply when arrest is without any warrant. Franklin v. Amerson, 118 Ga. 860, 45 S.E. 698 (1903).

Section does not apply to acts of judicial officer when passing on question of jurisdiction. Calhoun v. Little, 106 Ga. 336, 32 S.E. 86 (1898).

Section does not apply to ministerial acts. — This section seems to provide that even a judicial officer who in bad faith issues either a defective or void warrant will be liable in an action for false imprisonment, at the instance of the person imprisoned thereunder, when the act is done out of court and is largely ministerial in its nature, though to some extent judicial. Wyatt v. Baker, 41 Ga. App. 750, 154 S.E. 816 (1930).

While the mayor of a municipality is not liable in damages for acts done in the exercise of the judicial function, the act of the defendant in committing the plaintiff to jail in purported execution of the judgment previously imposed was purely ministerial and was not one for which the defendant could claim the exemption which exists as to judicial acts. Wyatt v. Baker, 41 Ga. App. 750, 154 S.E. 816 (1930).

Section does not apply if warrant invalid. — In a 42 U.S.C. § 1983 suit filed by a Florida business person alleging false arrest based upon the plaintiff giving postdated checks to a Georgia payee, issues of fact remained with respect to the business person's false imprisonment/false arrest claims under O.C.G.A. § 51-7-20 against a Georgia sheriff's deputy and the payee; the defense in O.C.G.A. § 51-7-21 did not apply because the Georgia arrest warrant was invalid, and the safe harbor provision in O.C.G.A. § 16-9-20(h)(2) had no relevance to the good cause inquiry under O.C.G.A. § 51-7-21. Brown v. Camden County, 583 F. Supp. 2d 1358 (S.D. Ga. 2008).

Burden of proving identity of person arrested. — The party making the arrest, by virtue of a warrant, takes the responsibility of proving the identity of the person so arrested. Johnston v. Riley, 13 Ga. 97 (1853).

Cited in Manning v. Mitchell, 73 Ga. 660 (1884); Brookshier v. Williams, 19 Ga. App. 685, 91 S.E. 1056 (1917); Teasley v. Nelson, 39 Ga. App. 773, 148 S.E. 534 (1929); Webster v. City of East Point, 164 Ga. App. 605, 294 S.E.2d 588 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d, False Imprisonment, § 1 et seq.

C.J.S. — 35 C.J.S., False Imprisonment, § 1 et seq.

ALR. — Civil liability of judicial officer for false imprisonment, 13 ALR 1344; 55 ALR 282; 173 ALR 802.

Malice and want of probable cause as elements of action for false imprisonment, 19 ALR 671, 137 ALR 504.

Justification in action for false imprisonment by proof of existence of ground other than that on which arrest was made, or one of several grounds on which it was made, 64 ALR 653.

Liability for false arrest or imprisonment under a warrant as affected by mistake as to identity of person arrested, 10 ALR2d 750.

Pleading good faith or lack of malice in

mitigation of damages in action for false arrest or imprisonment, 49 ALR2d 1460.

Immunity of prosecuting attorney or similar officer from action for false arrest or imprisonment, 79 ALR3d 882.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment, 93 ALR3d 1109.

Liability for false arrest or imprisonment under warrant as affected by mistake as to identity of person arrested, 39 ALR4th 705.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 ALR4th 1031.

51-7-22. False imprisonment by several persons.

If false imprisonment is the act of several persons, they may be subject to an action jointly or separately. If jointly, all shall be responsible for the entire recovery. (Orig. Code 1863, § 2934; Code 1868, § 2941; Code 1873, § 2992; Code 1882, § 2992; Civil Code 1895, § 3853; Civil Code 1910, § 4449; Code 1933, § 105-903.)

JUDICIAL DECISIONS

Since the plaintiff was not guilty of a criminal offense, the plaintiff's arrest without a warrant justified award of damages, against the officer who made the arrest and the persons who procured the officer to do so. Sheppard v. Hale, 58 Ga. App. 140, 197 S.E. 922 (1938).

If action for false imprisonment is one in tort, sureties on defendant sheriffs' bonds are not proper parties to the action and should have been stricken when objection was made. Jackson v. Norton, 75 Ga. App. 650, 44 S.E.2d 269 (1947).

Verdict for separate sums against joint defendants will be set aside and a new trial granted to all of them. McCalla v. Shaw, 72 Ga. 458 (1884).

Cited in Radney v. Levine, 75 Ga. App. 137, 42 S.E.2d 644 (1947); Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951); Greenbaum v. Brooks, 110 Ga. App. 661, 139 S.E.2d 432 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d, False Imprisonment, § 35 et seq.

C.J.S. — 35 C.J.S., False Imprisonment, § 43 et seq.

ALR. — Construction and application of Federal Tort Claims Act provision (28 USCA § 2680(h)) excepting from coverage claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process, 152 ALR Fed. 605.

ARTICLE 3

MALICIOUS PROSECUTION

Cross references. — Abusive litigation, § 51-7-80 et seq.

Law reviews. — For annual survey on law of torts, see 61 Mercer L. Rev. 335 (2009).

51-7-40. Right of action for malicious prosecution.

A criminal prosecution which is carried on maliciously and without any probable cause and which causes damage to the person prosecuted shall give him a cause of action. (Orig. Code 1863, § 2924; Code 1868, § 2931; Code 1873, § 2982; Code 1882, § 2982; Civil Code 1895, § 3843; Civil Code 1910, § 4439; Code 1933, § 105-801.)

Editor's notes. — Georgia law makes a distinction between an action for malicious prosecution and one for malicious use of civil process. The former is strictly a remedy for a malicious criminal prosecution and is governed by the Code sections in this article. The latter action has its basis in the common law. The essential elements of both actions, however, are substantially similar.

Law reviews. — For annual survey on law of torts, see 42 Mercer L. Rev. 431 (1990).

For comment on Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952), see 15 Ga. B. J. 81 (1952). For case comment, "Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem," see 21 Ga. L. Rev. 429 (1986).

JUDICIAL DECISIONS

Analysis

General Consideration
Application to Specific Cases

General Consideration

The elements of malicious prosecution include: (1) prosecution for a criminal offense; (2) the prosecution instigated under a valid warrant, accusation, or summons; (3) termination of the prosecution in favor of the plaintiff; (4) malice; (5) want of probable cause; and (6) damage to the plaintiff. Medoc Corp. v. Keel, 166 Ga. App. 615, 305 S.E.2d 134 (1983); Young v. City of Atlanta, 631 F. Supp. 1498 (N.D. Ga. 1986); Commercial Plastics & Supply Corp. v. Molen, 182 Ga. App. 202, 355 S.E.2d 86 (1987).

Showing of malice necessary for malicious prosecution. — Among the essential elements of a claim for malicious prosecution are: (1) a prosecution instituted maliciously and (2) without probable cause which (3) has terminated favorably to the plaintiff. J.C. Penney Co. v. Miller, 182 Ga. App. 64, 354 S.E.2d 682 (1987); Atlantic Zayre, Inc. v. Meeks, 194 Ga. App. 267, 390 S.E.2d 398 (1990).

Defendants' reliance on the bare allegations of the payee's affidavit without taking any steps to verify the information in the affidavit created a fact issue for the jury about whether the defendants' acts were wanton or were done with a reckless disregard for or a conscious indifference to the rights of the plaintiff and, thus, whether the defendants acted with the malice necessary to support a malicious prosecution action. McClelland v. Courson's 441 South Station, Inc., 248 Ga. App. 170, 546 S.E.2d 300 (2001).

Confined to pursuit of a criminal action. — The term "malicious prosecution" is confined to the pursuit of a criminal action and not one for the recovery of damages arising out of a civil tort. Atlantic Mut. Ins. Co. v. Atlantic Datcom, Inc., 139 F.3d 1344 (11th Cir. 1998).

Tort of malicious prosecution cannot be governed by rules applicable to negligence. Munford, Inc. v. Anglin, 174 Ga. App. 290, 329 S.E.2d 526 (1985).

Criminal prosecution maliciously carried on without any probable cause whereby damage ensues to person prosecuted shall give one cause of action; in such cases the recovery shall not be confined to the actual damage sustained but shall be regulated by the circumstances of each case. Simmons v.

Edge, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

Actions for malicious arrest and malicious prosecution are not favored by courts. — The action is strictly guarded and the circumstances under which it may be maintained are accurately stated. Hearn v. Batchelor, 47 Ga. App. 213, 170 S.E. 203 (1933); Price v. Cobb, 60 Ga. App. 59, 3 S.E.2d 131 (1939).

While action for malicious prosecution will be strictly guarded and the circumstances on which it is based must be accurately stated and all proper guard and protection should be thrown around those who, in obedience to the mandates of duty, may be compelled to originate and carry on a criminal prosecution, the courts should not discourage actions for malicious prosecutions by establishing harsh rules of evidence, or by the rigid principles of law, by force of which a party may be deprived of an important remedy for a real injury. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Although malicious prosecution actions are not favored, it is public policy to encourage citizens to bring to justice those who are apparently guilty. Day Realty Assocs. v. McMillan, 247 Ga. 561, 277 S.E.2d 663 (1981).

"Malice" contemplated by law in action for malicious prosecution is the same as in an action for malicious arrest, and may consist in personal spite or in a general disregard of the right consideration of mankind, directed by chance against the individual. Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

"Probable cause" defined. — Probable cause may be defined as the existence of such facts and circumstances in the mind of a reasonable person, the reaction of those facts and circumstances upon the mind of such reasonable person, and the reasonable acting on the facts within the mind of the prosecutor, so as to cause a belief the person was guilty of the crime for which the prosecution was being pursued. When the facts are not in dispute and establish probable cause, the question is one for the court and not a jury. Booker v. Eddins, 183 Ga. App. 449, 359 S.E.2d 211 (1987), overruled on other grounds, Cincinnati Ins. Co. v. Premier Tractor & Trailer Repair, Inc., 192 Ga. App. 243, 384 S.E.2d 449 (1989).

Adjudication as evidence of probable cause. — Since the adjudication entered by the juvenile court constituted a finding of guilt by the ultimate fact finder in the case, it must be considered conclusive on the issue of whether the arrest was supported by probable cause. J.C. Penney Co. v. Miller, 182 Ga. App. 64, 354 S.E.2d 682 (1987).

Gist of action for alleged malicious criminal prosecution is carrying on of such prosecution maliciously and without probable cause, and there can be no recovery unless both of these elements are proved. Coker v. Tate, 40 Ga. App. 801, 151 S.E. 535 (1930).

Fundamental basis of action for damages on account of malicious prosecution is that the defendants charged and prosecuted the plaintiff, with a penal offense against the laws of this state. Smith v. Embry, 103 Ga. App. 375, 119 S.E.2d 45 (1961), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672, S.E.2d 7 (2008).

Actions for damages are recognized for the malicious prosecution, without probable cause, of a case, either criminal or civil, when the person of the defendant has been arrested or the defendant's property seized, and when damage accrued to the defendant as a result therefrom, the first action having terminated in the defendant's favor. Guth v. Walker, 92 Ga. App. 490, 88 S.E.2d 821 (1955).

Mere fact that person has been charged with criminal offense and upon trial was acquitted would not give right of action against prosecutor. The plaintiff must go further and prove the prosecution was instituted with malice and without probable cause. Ayala v. Sherrer, 135 Ga. App. 431, 218 S.E.2d 84 (1975).

When there is no evidence of malice other than such inference as may be drawn from proof of the want of probable cause, and that proof shows some circumstances pointing to the guilt of the accused, the essential ingredient of malice is not so established as to entitle the plaintiff to recover in an action for malicious

General Consideration (Cont'd)

prosecution or malicious arrest. Barber v. H & H Muller Enters., Inc., 197 Ga. App. 126, 397 S.E.2d 563 (1990).

In order to maintain action for malicious prosecution all of following necessary elements must be proven to the satisfaction of the jury: (1) that the offense charged was a criminal prosecution; (2) that the criminal prosecution was carried on maliciously by the defendant; (3) that the criminal prosecution was finally terminated legally in favor of the plaintiff; (4) that the criminal prosecution was carried on by the defendant without any probable cause; and (5) that as a result of the criminal prosecution by the defendant, damage ensued to the plaintiff. Cary v. Highland Bakery, Inc., 50 Ga. App. 553, 179 S.E. 197 (1935); Davis v. Gilbert, 67 Ga. App. 277, 19 S.E.2d 920 (1942); Hight v. Steely, 86 Ga. App. 137, 70 S.E.2d 886 (1952); Ellis v. Knowles, 90 Ga. App. 40, 81 S.E.2d 884 (1954); Lovinger v. Pfeffer, 107 Ga. App. 636, 131 S.E.2d 137 (1963); Cooper v. Public Fin. Corp., 146 Ga. App. 250, 246 S.E.2d 684 (1978).

Probable cause arising from denial of directed verdict of acquittal. — Probable cause is established when a trial judge denies a motion for directed verdict of acquittal in a criminal prosecution after hearing the state's evidence. However, this can be overcome by proving the order denying the motion was procured by use of fraud or corruption. Akins v. Warren, 258 Ga. 853, 375 S.E.2d 605 (1989).

Summary judgment for the defendant was proper after the defendant showed the denial of a motion for directed verdict in the prior criminal case and the plaintiff failed to meet the plaintiff's burden to offer counter evidence and generate a genuine issue of fact whether probable cause existed. Akins v. Warren, 258 Ga. 853, 375 S.E.2d 605 (1989).

The defendant in a malicious prosecution action is entitled to judgment as a matter of law if the plaintiff is shown to have moved unsuccessfully for a directed verdict of acquittal in the underlying criminal proceeding. Bi-Lo, Inc. v. McConnell, 199 Ga. App. 154, 404 S.E.2d 327 (1991).

One of the essential elements of an action for malicious prosecution, the lack of probable cause, cannot be established as a matter of law if in the preceding criminal action the court denied the claimant's motion for directed verdict of acquittal and that ruling stands unreversed and untainted by fraud or corruption. Wingster v. Huntley's Jiffy Stores, Inc., 200 Ga. App. 252, 407 S.E.2d 481 (1991).

Plaintiff's failure to move for a directed verdict during the trial of the underlying criminal case, along with the trial court's failure to direct a verdict of acquittal sua sponte, was not equivalent to the plaintiff moving for a directed verdict which was denied. Bi-Lo, Inc. v. McConnell, 199 Ga. App. 154, 404 S.E.2d 327 (1991).

Strictly speaking, term "malicious prosecution" is applicable only to carrying on of criminal case, and in this sense only is it used in the Code; when damages are sought for the malicious carrying on of a civil suit, the cause of action is for the malicious use of process. However, the essential elements in a cause of action for the malicious prosecution of a criminal case and the malicious use of process in a civil suit are the same. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939).

Malicious prosecution actions do not lie except when criminal proceeding has been "carried on"; there must be a prosecution. South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935).

It is not sufficient to show merely that a warrant was sworn out and then dismissed or settled; it must be averred and proven that the prosecution, put into motion by the warrant, was carried on. South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935).

The trial court errs in refusing to direct a verdict in favor of the defendant as to a malicious prosecution claim since there was no evidence that the criminal charges against the plaintiff were brought before a committing court, grand jury, or other tribunal following the plaintiff's arrest. Walker v. Bishop, 169 Ga. App. 236, 312 S.E.2d 349 (1983).

Instigation of prosecution. — When the plaintiff failed to put forward evidence

sufficient to establish that the defendant "instigated" the prosecution of the plaintiff, the defendant's motion for summary judgment on the issue of malicious prosecution was granted. Jackson v. KMart Corp., 851 F. Supp. 469 (M.D. Ga. 1994).

Magistrate's order requiring the plaintiff to attend the warrant application hearing was not a "summons" as that term was understood in the malicious prosecution context. Renton v. Watson, 319 Ga. App. 896, 739 S.E.2d 19 (2013).

Initiation of criminal action need not be expressly directed by party to be held liable. Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

When the defendant merely states what the defendant believes, leaving the decision to prosecute entirely to the uncontrolled discretion of the officer, or if the officer makes an independent investigation, or prosecutes for an offense other than the one charged by the defendant, the latter is not regarded as having instigated the proceeding; but if it is found that the defendant's persuasion was the determining factor in inducing the officer's decision, or that the defendant gave information which the defendant knew to be false and so unduly influenced the authorities, the defendant may be held liable. Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

The law draws a fine line of demarcation between cases when a party directly or indirectly urges a law enforcement official to begin criminal proceedings and cases when a party merely relays facts to an official who then makes an independent decision to arrest or prosecute. In the former case there is potential liability for false imprisonment or malicious prosecution; in the latter case there is not. Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

Official immunity. — Trial court erred in denying a police officer summary judgment as to the arrestees' malicious prosecution claim because that claim was barred by official immunity when the officer's actions against the arrestees did not show malice but were an effort to restrain the arrestees and control an uncertain situation; one of the arrestees approached the officer and began arguing with the officer while the officer was speaking to a suspect in custody, and when arrestee reached into the truck to retrieve the arrestee's purse, the officer was concerned for the officer's safety. Valades v. Uslu, 301 Ga. App. 885, 689 S.E.2d 338 (2009), cert. denied, No. S10C0803, 2010 Ga. LEXIS 519 (Ga. 2010); overruled on other grounds by Harrison v. McAfee, 2016 Ga. App. LEXIS 417 (Ga. Ct. App. 2016).

Police detective was entitled to qualified immunity in a teacher's suit against the detective for malicious prosecution after the detective investigated the teacher and arrested the teacher for child molestation following complaints from three 10-year-old students that the teacher was asking to touch the students, touching the students, and asking the students not to say anything about the actions. Marshall v. Browning, 310 Ga. App. 64, 712 S.E.2d 71 (2011).

No liability when arrest result of independent investigation. — When the plaintiff's arrest was the result of the arresting officer's independent investigation and not affected by information provided or withheld by the defendant's agents, the defendant cannot be regarded as having instigated the proceeding, and, therefore, may not be held liable for malicious prosecution. Huff v. Household Int'l, 184 Ga. App. 296, 361 S.E.2d 273 (1987).

Failure to investigate. — A defendant may be liable for failing to investigate before instigating a criminal prosecution when a reasonable person would have investigated, and there may be liability for false imprisonment or malicious prosecution when a party directly or indirectly initiates a criminal proceeding without waiting for a police investigation. Medoc Corp. v. Keel, 166 Ga. App. 615, 305 S.E.2d 134 (1983).

No cause of action for malicious prosecution exists against a person who merely relays facts to an official who then makes an independent decision to arrest or prosecute. Shepard v. Byrd, 581 F. Supp. 1374 (N.D. Ga. 1984).

Conspiracy to prosecute. — A conspiracy to prosecute, without proof of an overt act, is not actionable. Wall v. Seaboard Air-Line Ry., 18 Ga. App. 457, 89 S.E. 533 (1916).

General Consideration (Cont'd)

Action for malicious prosecution is not restricted to presentment on which malicious prosecution is based and the plaintiff tried, but, at the option of the plaintiff, may include also any previous indictment or process on which a previous action for malicious prosecution was based but dismissed because such former criminal prosecution had not terminated as required by law; and this is true, notwithstanding the present presentment was a reindictment of the petitioner on the charge contained in the former indictment nol prossed under the sanction of the court. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

If warrant or process is valid, malicious arrest or malicious prosecution is exclusive remedy and an action for false imprisonment will not lie. Lovell v. Drake, 60 Ga. App. 325, 3 S.E.2d 783 (1939).

Malicious prosecution, false arrest, and false imprisonment are not mutually exclusive, and a plaintiff can proceed before a jury on all three theories. Wal-Mart Stores, Inc. v. Johnson, 249 Ga. App. 84, 547 S.E.2d 320 (2001), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

It is essential that warrant or other accusation or summons charging the plaintiff with a criminal offense be a valid warrant, accusation, or summons charging such person with some criminal offense. Cary v. Highland Bakery, Inc., 50 Ga. App. 553, 179 S.E. 197 (1935).

If the warrant or process is void, an action for false imprisonment is the exclusive remedy. Lovell v. Drake, 60 Ga. App. 325, 3 S.E.2d 783 (1939).

Warrant presumed legal and valid. — When, in a petition in a suit for malicious prosecution, a criminal warrant which purported to be predicated upon information contained in an affidavit was alleged as the basis for the prosecution, but when the affidavit contained no jurat, and it did not appear otherwise that the affidavit was sworn to, yet, since the affidavit could in fact have been duly sworn to, and when it did not appear that the affidavit was in fact not duly sworn to, the warrant presumably was issued upon an affidavit duly sworn to, and was presumably legal and valid. Crowe v. Vaughn, 40 Ga. App. 848, 151 S.E. 692 (1930).

Related charges arising from same transaction. — In a case involving related charges arising from the same transaction, when the court trying the criminal case determines there is sufficient evidence for one of the charges to go to the jury, that is sufficient to show the existence of reasonable grounds for prosecuting other charges reasonably arising from the same transaction. Remeneski v. Klinakis, 222 Ga. App. 12, 473 S.E.2d 223 (1996).

Only distinction between malicious arrest and malicious prosecution lies in question of whether or not prosecution was "carried on." — The difference between malicious prosecution and malicious arrest is that the former contains the additional element of showing that a prosecution, whatever its extent, was carried on and terminated in favor of the plaintiff. Barber v. H & H Muller Enters., Inc., 197 Ga. App. 126, 397 S.E.2d 563 (1990).

If arrest warrant is dismissed after hearing evidence, verdict of guilty upon indictment charging same offense precludes recovery for malicious prosecution on the ground of probable cause as well as lack of favorable termination of the prosecution. Ayala v. Sherrer, 234 Ga. 112, 214 S.E.2d 548, answer conformed to, 135 Ga. App. 431, 218 S.E.2d 84 (1975).

Arrest under warrant which does not charge violation of penal statute will not support action for malicious prosecution. Livingston v. Schneer's Atlanta, Inc., 61 Ga. App. 637, 7 S.E.2d 190 (1940).

When warrant is issued by civil court on which the plaintiff is arrested and imprisoned, and a commitment hearing or trial is had thereon, the warrant constitutes criminal prosecution or prosecution of the person charged in the affidavit and warrant for a criminal offense, and when such prosecution is maliciously carried on, a right of action accrues to the person so arrested, imprisoned, and prosecuted, since the prosecution is also carried on without any

probable cause. Wall v. Spurlock, 85 Ga. App. 379, 69 S.E.2d 379 (1952).

Cause of action for malicious prosecution does not contemplate that criminal process, under which the plaintiff is tried, must be invalid process, though it may be; the motif in the procurement of the indictment or presentment and in the trial of the plaintiff on the process, in bringing into existence the former and in impelling the latter, done with malice and without probable cause, is that which is material. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Action does not accrue until termination of proceedings against arrestee. — The cause of action of malicious arrest does not accrue until the definite termination, by dismissal or otherwise, of the proceeding against the arrested party. McCord v. Jones, 168 Ga. App. 891, 311 S.E.2d 209 (1983).

Construction with other statutory provisions. — Construed with former Code 1933, § 105-801 (see now O.C.G.A. § 51-7-40), former Code 1933, § 105-806 (see now O.C.G.A. § 51-7-41) required that criminal prosecution must have terminated favorably to the person prosecuted before the right of action for malicious prosecution accrued. Ayala v. Sherrer, 234 Ga. 112, 214 S.E.2d 548 (1975).

Final termination of criminal case favorably to the defendant amounting to final ending of prosecution is termination such as constitutes a basis for a suit for malicious prosecution. Williams v. Marbut, 52 Ga. App. 588, 183 S.E. 820 (1936).

Termination of prosecution by agreement of parties. — When the termination of the prosecution has been brought about by compromise and agreement of the parties, an action for malicious prosecution cannot be maintained. Commercial Plastics & Supply Corp. v. Molen, 182 Ga. App. 202, 355 S.E.2d 86 (1987).

Finding of grand jury, necessary to return of indictment or presentment, is not of itself a judgment such as would constitute an essential ingredient of the action for malicious prosecution, without which the action would fail; therefore, it is not necessary that the petition allege that the witnesses giving perjured testimony to the grand jury, on which the presentment was allegedly returned, have been convicted of the offense of perjury in giving such testimony. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Essential element which must be established to authorize recovery is existence of malice. Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967).

Plaintiff is required to present evidence of malice in order to establish a prima facie case of malicious prosecution. McMillan v. Day Realty Assocs., 156 Ga. App. 660, 275 S.E.2d 352 (1980), rev'd on other grounds, 247 Ga. 561, 277 S.E.2d 663 (1981).

Malice may be inferred from a total lack of probable cause. Medoc Corp. v. Keel, 166 Ga. App. 615, 305 S.E.2d 134 (1983).

Basis of action for malicious prosecution is not alone preferring of the bill of indictment; it is the spirit or motive that brought into life the warrant or bill of indictment. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Desire and attempt to injure must coexist with actual trial of plaintiff, but may relate back and antedate trial, and be evidenced, in the procurement of a first indictment or subsequent processes, and by other attending material facts and circumstances. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Officer's independent judgment in making arrest. — Actions for false arrest, malicious prosecution, and false imprisonment may successfully be defended by an uncontroverted affidavit of the arresting officer that the decision to arrest the plaintiff was made solely by the officer in the exercise of the officer's professional judgment and independently of any exhortations by the defendants. Jacobs v. Shaw, 219 Ga. App. 425, 465 S.E.2d 460 (1995).

In an action alleging false arrest, malicious prosecution, and false imprisonment, as the arresting officers were parties, not disinterested witnesses, their deposition testimony that the arrest of both plaintiffs was based solely upon their professional judgment, constituted a mere

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statement of self-serving opinion and a legal conclusion that could not support the grant of summary judgment; moreover, a jury, not a judge, was to construe the facts upon which such opinion was based and could reach a diametrically different conclusion to that reached by the witness. Adams v. Carlisle, 278 Ga. App. 777, 630 S.E.2d 529 (2006).

Want of probable cause is essential element of malicious prosecution cause of action. Kviten v. Nash, 150 Ga. App. 589, 258 S.E.2d 271 (1979).

In suit for malicious prosecution, gravamen of action is want of probable cause on part of person instituting prosecution. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940); Davis v. Gilbert, 67 Ga. App. 277, 19 S.E.2d 920 (1942); Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967); Sanfrantello v. Sears, Roebuck & Co., 118 Ga. App. 205, 163 S.E.2d 256 (1968); Morgan v. Mize, 118 Ga. App. 534, 164 S.E.2d 565 (1968); Corbin v. First Nat'l Bank, 151 Ga. App. 33, 258 S.E.2d 697 (1979).

Want of probable cause is the gravamen of an action for malicious prosecution, and there can be no recovery by the plaintiff when there was any probable cause for the prosecution, even though it may appear that the prosecutor was actuated by improper motives. Tanner-Brice Co. v. Barrs, 55 Ga. App. 453, 190 S.E. 676 (1937).

Ordinarily, the question of want of probable cause is one for jury resolution, unless from the undisputed facts it is obvious to the court that it does or does not exist. Medoc Corp. v. Keel, 166 Ga. App. 615, 305 S.E.2d 134 (1983).

Existence of probable cause defeated the plaintiff's actions for false arrest and malicious prosecution in the plaintiff's detention and prosecution for shoplifting charge for which the plaintiff was acquitted. Nunnally v. Revco Disct. Drug Ctrs. of Ga., Inc., 170 Ga. App. 320, 316 S.E.2d 608 (1984).

Trial court did not err in granting summary judgment to property owner on priest's malicious prosecution claim, as probable cause existed to prosecute the priest since a police officer saw the priest violate a restraining order by committing a criminal trespass and by threatening another person; probable cause also existed because the two restraining order violations arose out of the same incident and were reasonably related even though the criminal charge for aggravated stalking arising out of the threat's made to the property owner's employee was later merged into another offense. Holmes v. Achor Ctr., Inc., 260 Ga. App. 882, 581 S.E.2d 390 (2003).

Claim constitutes a compulsory counterclaim. — A claim for abuse of judicial process is derivative of the judicial process utilized by the plaintiff and must be brought as a compulsory counterclaim. Smith v. Pierce, 179 Ga. App. 724, 347 S.E.2d 692 (1986).

In actions for malicious prosecution, question is not whether the plaintiff was guilty, but whether the defendant had reasonable cause to so believe — whether the circumstances were such as to create in the mind of the defendant a reasonable belief that there was probable cause for the prosecution. Sirmans v. Peterson, 42 Ga. App. 707, 157 S.E. 341 (1931); Davis v. Stephens, 45 Ga. App. 227, 164 S.E. 111 (1932); South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935); Tanner-Brice Co. v. Barrs, 55 Ga. App. 453, 190 S.E. 676 (1937); West v. Baumgartner, 228 Ga. 671, 187 S.E.2d 665 (1972); Ayala v. Sherrer, 135 Ga. App. 431, 218 S.E.2d 84 (1975); McMillan v. Day Realty Assocs., 156 Ga. App. 660, 275 S.E.2d 352 (1980), rev'd on other grounds, 247 Ga. 561, 277 S.E.2d 663 (1981); Achor Ctr., Inc. v. Holmes, 219 Ga. App. 399, 465 S.E.2d 451 (1995).

Absolute defense to claim of malicious prosecution can rest upon either lack of malice or existence of probable cause. Patton v. Southern Bell Tel. & Tel. Co., 387 F.2d 360 (5th Cir. 1968).

Innocence of the plaintiff is not essential element to the plaintiff's cause of action for malicious prosecution, and mere proof, though conclusive, of the plaintiff's innocence would not entitle the plaintiff to recover damages. Lovinger v. Pfeffer, 107 Ga. App. 636, 131 S.E.2d 137 (1963).

Whether the plaintiff was guilty or innocent of the charge for which the plaintiff was prosecuted is not material. Morgan v. Mize, 118 Ga. App. 534, 164 S.E.2d 565 (1968).

Statute of limitations for malicious prosecution is two years. Brown v. Quarles, 154 Ga. App. 350, 268 S.E.2d 403 (1980).

In action for malicious prosecution, injured party may recover severally or jointly against any or all of the tort-feasors conspiring to prosecute the plaintiff maliciously and without probable cause. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Nonjoinder of parties. — A petition for malicious prosecution is not demurrable (now subject to motion to dismiss) for nonjoinder of parties defendant which fail to name as defendants the judge, the solicitor general (now district attorney), and the lawyer assisting in the prosecution, when they are alleged to have knowingly participated in a plot falsely and maliciously to criminally prosecute the plaintiff without probable cause to the plaintiff's injury. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Pleading malicious prosecution. — While actions for malicious prosecution are not favored by the courts and should be strictly guarded, and the circumstances under which the actions may be maintained should be accurately stated, the rules of pleading do not require more than that the plaintiff clearly and concisely state the material ultimate facts upon which the recovery must depend; the evidentiary facts necessary to sustain the ultimate facts alleged need not and should not be set forth in the pleadings. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

As to actions for malicious prosecution, the declaration, petition, or complaint must affirmatively show that a judicial proceeding was instituted against the plaintiff, and the original proceeding, including process, must be adequately described. Smith v. Embry, 103 Ga. App. 375, 119 S.E.2d 45 (1961), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672, S.E.2d 7 (2008).

Dismissal of petition. — A petition that fails to allege either want of probable cause or favorable termination of prior suit is demurrable (now subject to motion to dismiss). Marable v. Mayer, 78 Ga. 710, 3 S.E. 429 (1887).

Sufficiency of complaint. — In a suit for malicious prosecution against a number of defendants, when it is alleged in the petition that one of the defendants, at the procurement and instigation of the others, instituted two criminal prosecutions against the plaintiff, by procuring the issuance of two warrants charging the plaintiff with the commission of the crimes of forgery and perjury, under which warrants the plaintiff was arrested by an officer and held in custody for a while, that the charges were, with the knowledge of all defendants, false, and that the making of the charges and prosecutions carried on were done by the defendants maliciously and without probable cause, and that the prosecutions terminated favorably to the plaintiff, and further prosecutions under the warrants were abandoned by the defendants, to the plaintiff's damage in the manner and amount alleged, the petition sets out a cause of action against all the defendants, and is good as against general demurrer (now motion to dismiss). Crowe v. Vaughn, 40 Ga. App. 848, 151 S.E. 692 (1930).

Petition for damages based on alleged malicious criminal prosecution, without probable cause, of the plaintiff, by two named defendants, filed after the prosecution had finally terminated in favor of the plaintiff, which alleged that the two defendants maliciously advised, persuaded, and procured the sheriff to swear out a murder warrant by falsely telling the sheriff that the plaintiff had murdered a certain deputy sheriff and that if the sheriff would arrest the plaintiff the defendants would furnish the evidence to convict the plaintiff, set out a cause of action. Selman v. Goddard, 186 Ga. 103, 197 S.E. 250 (1938).

When under ultimate facts alleged the plaintiff pleaded conspiracy to prosecute the plaintiff for murder, the malice to prosecute and injure the plaintiff, and prosecute without probable cause, and that the prosecution had ended favorably to the plaintiff, together with other supporting allegations, as against a general

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demurrer (now motion to dismiss), the petition was good. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

When the plaintiff was arrested and prosecuted under a valid warrant and a valid accusation and the petition alleged that the plaintiff's prosecution was without probable cause and with malice, that the prosecution terminated favorably to the plaintiff, and that the defendants knew the plaintiff was not guilty of the offense for which the defendants caused the plaintiff to be prosecuted, the petition set out a cause of action. Davison-Paxon Co. v. Norton, 69 Ga. App. 77, 24 S.E.2d 723 (1943).

Injured party was not able to recover under O.C.G.A. § 51-1-6 for the declarant's alleged violation of the criminal statutes. O.C.G.A. § 16-10-26, prohibiting giving a false report of a crime, and O.C.G.A. § 16-10-24, prohibiting obstructing or hindering the police, as these statutes did not provide for a civil cause of action; furthermore, the legislature had provided statutory civil remedies in the form of false arrest under O.C.G.A. § 51-7-1 and malicious prosecution under O.C.G.A. § 51-7-40. Jastram v. Williams, 276 Ga. App. 475, 623 S.E.2d 686 (2005).

In a case brought under 42 U.S.C. § 1983, a former employee's malicious prosecution claim failed since the complaint did not allege either the existence of any criminal proceedings, or a termination of such proceedings in the employee's favor, both of which were elements for a malicious prosecution claim under O.C.G.A. § 51-7-40. Boyd v. Peet, 249 Fed. Appx. 155 (11th Cir. 2007) (Unpublished).

Burden of proof. — The burden of proof is on the plaintiff who must show that the former action was maliciously carried on, without probable cause, and had terminated in the plaintiff's favor. Thornton v. Story, 24 Ga. App. 503, 101 S.E. 309 (1919); O'Berry v. Davis, 31 Ga. App. 755, 121 S.E. 857 (1924); Darnell v. Shirley, 31 Ga. App. 764, 122 S.E. 252 (1924).

Plaintiff must show affirmatively that the prosecution was malicious and without probable cause, both concurring. Hearn v. Batchelor, 47 Ga. App. 213, 170 S.E. 203 (1933); South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935); Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940); Campbell v. Tatum, 71 Ga. App. 58, 30 S.E.2d 56 (1944).

In an action for damages for an alleged malicious criminal prosecution, the controlling issues are: (1) whether the prosecution was carried on maliciously; and (2) whether it was carried on without any probable cause. Campbell v. Tatum, 71 Ga. App. 58, 30 S.E.2d 56 (1944).

In order to recover in a suit for malicious prosecution, the plaintiff must show the presence of malice and prove that, under the facts as they appeared to the defendant after reasonable inquiry, the defendant lacked probable cause for bringing criminal charges against the plaintiff. Williamson v. Alderman, 148 Ga. App. 297, 251 S.E.2d 153 (1978).

When the plaintiff failed to set forth specific facts tending to show that probable cause did not exist for the plaintiff's arrest and that the charges were instead motivated by malice, the defendant's motion for summary judgment on the issue of malicious prosecution was granted. Jackson v. KMart Corp., 851 F. Supp. 469 (M.D. Ga. 1994).

Plaintiff could not sustain claims of false arrest and malicious prosecution against a police officer and city because there was no evidence of lack of probable cause or malice. Stanford v. City of Manchester, 246 Ga. App. 129, 539 S.E.2d 845 (2000).

Burden of proving actual guilt of plaintiff necessarily rests upon defendant. Lovinger v. Pfeffer, 107 Ga. App. 636, 131 S.E.2d 137 (1963).

Shifting burden of proof. — By merely denying the plaintiff's allegation that criminal charges were false, the defendants do not shift to the plaintiff the burden of proving the plaintiff's innocence, because the burden resting on the plaintiff was to prove the essential elements of the plaintiff's case and no more. Lovinger v. Pfeffer, 107 Ga. App. 636, 131 S.E.2d 137 (1963).

It would be erroneous for trial judge to charge that burden of proving innocence was on the plaintiff. Lovinger v. Pfeffer,

107 Ga. App. 636, 131 S.E.2d 137 (1963).

Award of damages without finding of malicious action. — Although malice is an element in both malicious prosecution and libel and slander under these sections, the jury awarding compensatory and punitive damages against the defendant in a suit for malicious prosecution and libel and slander did not necessarily make a factual finding that the defendant acted maliciously, when the jury was charged that malice may be inferred and that malice may consist of a "general disregard of the right consideration of mankind" and that it could award punitive damages if the circumstances showed "an entire want of care, and an indifference to consequences." Daniel v. Jenkins, 70 Bankr. 408 (Bankr. N.D. Ga. 1987).

Attorney fees as recoverable damages. — Attorney fees paid to defend against the criminal prosecution instigated constitute recoverable damages in an action for malicious prosecution. Medoc Corp. v. Keel, 166 Ga. App. 615, 305 S.E.2d 134 (1983).

Cited in Cook v. Walker, 30 Ga. 519 (1860); Rogers v. Tillman, 72 Ga. 479 (1884); Mimbs v. Battle, 13 Ga. App. 737, 79 S.E. 922 (1913); Brookshier v. Williams, 19 Ga. App. 685, 91 S.E. 1056 (1917); Harbin v. Georgia Stages, Inc., 62 Ga. App. 890, 10 S.E.2d 211 (1940); Sloan v. Glaze, 72 Ga. App. 415, 33 S.E.2d 846 (1945); Walker v. Maxwell, 203 Ga. 393, 46 S.E.2d 923 (1948); Gilstrap v. Gann, 101 Ga. App. 622, 115 S.E.2d 226 (1960); Brown v. Triton, Inc., 115 Ga. App. 785, 156 S.E.2d 200 (1967); Baird v. Collier, 123 Ga. App. 276, 180 S.E.2d 577 (1971); Gaddy v. Gilbert, 140 Ga. App. 508, 231 S.E.2d 403 (1976); Wilder v. Irvin, 423 F. Supp. 639 (N.D. Ga. 1976); Bradley v. Tenneco Oil Co., 146 Ga. App. 161, 245 S.E.2d 862 (1978); Bi-Lo, Inc. v. Stanciel, 148 Ga. App. 614, 251 S.E.2d 834 (1979); Citizens & S. Bank v. McDowell, 160 Ga. App. 69, 286 S.E.2d 58 (1981); Sizemore Sec. Int'l, Inc. v. Lee, 161 Ga. App. 332, 287 S.E.2d 782 (1982); Voliton v. Piggly Wiggly, 161 Ga. App. 813, 288 S.E.2d 924 (1982); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982); Fiske v. Ramey, 171 Ga. App. 210, 319 S.E.2d 26 (1984); K Mart Corp. v. Griffin, 160 Ga. App. 69, 286 S.E.2d 58 (1988); Wilson v. Wheeler's, Inc., 190 Ga. App. 250, 378 S.E.2d 498 (1989); Robbins v. Lanier, 198 Ga. App. 592, 402 S.E.2d 342 (1991); Patterson v. Butler, 200 Ga. App. 657, 409 S.E.2d 531 (1991); Williams v. Taylor, 202 Ga. App. 720, 415 S.E.2d 498 (1992); Blackford v. Wal-Mart Stores, Inc., 17 F.3d 367 (11th Cir. 1994); Marriott Corp. v. Allen, 218 Ga. App. 877, 463 S.E.2d 716 (1995); Kelly v. Serna, 87 F.3d 1235 (11th Cir. 1996); Brooks v. H & H Creek, Inc., 223 Ga. App. 635, 478 S.E.2d 451 (1996); Tate v. Holloway, 231 Ga. App. 831, 499 S.E.2d 72 (1998); K-Mart Corp. v. Lovett, 241 Ga. App. 26, 525 S.E.2d 751 (1999); Desmond v. Troncalli Mitsubishi, 243 Ga. App. 71, 532 S.E.2d 463 (2000); Fleming v. U-Haul Co., 246 Ga. App. 681, 541 S.E.2d 75 (2000); Sherrill v. Stockel, 252 Ga. App. 276, 557 S.E.2d 8 (2001).

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Malice required for malicious prosecution action. — Judgment on claim of forgery was reversed because the defendant's reliance on the bare allegations of the affidavit of the payee on the check without taking any steps to verify the information in it created a fact issue for the jury about whether the defendants' acts were wanton or were done with a reckless disregard for or a conscious indifference to the rights of the plaintiff and, thus, whether the defendants acted with the malice necessary to support a malicious prosecution action. McClelland v. Courson's 441 South Station, Inc., 248 Ga. App. 170, 546 S.E.2d 300 (2001).

It is the nature of the prosecution, not the express legal charge, which is the crucial ingredient; thus, when the act charged by the defendant was precisely the offense for which the plaintiff was ultimately prosecuted, the defendant could be found to have instigated the criminal proceeding. Willis v. Brassell, 220 Ga. App. 348, 469 S.E.2d 733 (1996).

Conviction precludes claim for malicious prosecution. — Defendant's conviction for a zoning code violation precluded a claim for malicious prosecution when it is essential to the maintenance of an action for malicious prosecution that the plaintiff prove that the prosecution

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not only terminated, but terminated in the plaintiff's favor. Morton v. McCoy, 204 Ga. App. 595, 420 S.E.2d 40, cert. denied, 204 Ga. App. 922, 420 S.E.2d 40 (1992).

Claim not barred by judicial estoppel. — Employee's malicious prosecution claim was not barred by judicial estoppel as the claim was not viable until after the employee filed a Chapter 7 bankruptcy petition; the employee was not required under 11 U.S.C. § 541(a)(7) to amend the petition to reflect the malicious prosecution claim. Vojnovic v. Brants, 272 Ga. App. 475, 612 S.E.2d 621 (2005).

When victim of and witnesses to robbery had identified the defendant from a photo lineup, there was both sufficient information to provide probable cause for the plaintiff's arrest and no evidence of malice in the arrest and, therefore, no action for false arrest and malicious prosecution. Franklin v. Consolidated Gov't, 236 Ga. App. 468, 512 S.E.2d 352 (1999).

Probable cause, settlement of action, bars claim. — A corporation's criminal prosecution of a former employee could not provide a basis for the employee's latter claim of malicious prosecution and intentional infliction of emotional distress, given a magistrate's finding of probable cause and a settlement by the employee of the claim. Biven Software, Inc. v. Newman, 222 Ga. App. 112, 473 S.E.2d 527 (1996).

Lack of probable cause. — A contractor accused a property owner of theft by deception by falsely asserting that the owner refused to pay for a fence; the owner was arrested, but the charges were later dropped. That the magistrate found probable cause to issue the arrest warrant was not a defense, as the magistrate was not disinterested; the magistrate had several ex parte meetings with and gave legal advice to the contractor, and assisted the contractor in using the threat of criminal prosecution in an attempt to coerce the owner into paying the disputed portion of the bill. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

As a contractor's dispute with a homeowner over a bill for building a fence was a civil matter, and the Georgia Constitution prohibits imprisonment for debt, a magistrate lacked probable cause to issue a warrant to arrest the homeowner for theft by deception. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Action arising from alleged malicious prosecution for shoplifting. — The policy of this state that there can be no recovery in an action for false arrest or false imprisonment arising out of the detention, with reasonable cause, of one suspected of shoplifting was applicable in a malicious prosecution action for an alleged shoplifting. Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967).

Tenant's reentry into vacated premises. — Because the tenant ceased to be a tenant upon vacating the premises before the rental term ended, the tenant's attempted reentry was a criminal trespass which constituted probable cause for the landlord to swear out a warrant against the tenant and, therefore, summary judgment for the landlord was proper. Erfani v. Bishop, 251 Ga. App. 20, 553 S.E.2d 326 (2001).

Action involving criminal trespass. — In light of their understanding of prior litigation, the defendants reasonably believed that the plaintiff was guilty of criminal trespass. Holmes v. Achor Ctr. Inc., 242 Ga. App. 887, 531 S.E.2d 773 (2000).

Because the first officer did not lack probable cause to arrest the plaintiff for criminal trespass based on the report of suspicious behavior by the private security officer for the park, the first officer's supervisor's statement that a magistrate stated there was probable cause to arrest the plaintiff for criminal trespass, and the first officer's independent observation of the plaintiff during the investigatory detention, summary judgment was granted to the first officer on the plaintiff's malicious prosecution claim. Proescher v. Bell, 966 F. Supp. 2d 1350 (N.D. Ga. Aug. 21, 2013).

Defendants assumed risk of malicious prosecution in bringing action without full inquiry. — When the defendants, operators of a trailer court, sought to eject the plaintiff (invitee of certain tenants) or to prosecute the plaintiff for trespass without inquiring as to the plain-

tiff's right to be on the premises, the defendants did so at their own risk. Ellis v. Knowles, 90 Ga. App. 40, 81 S.E.2d 884 (1954).

When a store manager did not follow investigative policy and practices of the defendant store prior to taking out a warrant charging the plaintiff, a victim of financial identity fraud, with issuance of a bad check, there was a jury question as to the existence of probable cause. Nicholl v. Great Atl. & Pac. Tea Co., 238 Ga. App. 30, 517 S.E.2d 561 (1999).

Defense of ongoing prosecution. — Although the dismissal of the warrant on felony bad check offense without prejudice for lack of venue was not a conclusive termination of the prosecution, it constituted prima facie evidence that the prosecution had terminated in favor of the defendant by reason of the prosecutor's voluntary abandonment, and the burden thus shifted to the prosecutor to show in support of the prosecutor's motion that the prosecution had not ended; given the lack of any evidence that the prosecution had been reinstituted or was otherwise not abandoned, the trial court erred by granting the prosecutor's motion and dismissing the action for malicious prosecution. Vadner v. Dickerson, 212 Ga. App. 255, 441 S.E.2d 527 (1994).

Defendant did not instigate prosecution of plaintiff. — Evidence did not establish that the defendant instigated a criminal prosecution of the plaintiff since the prosecution of the plaintiff began, not with the provision of any information to the authorities by the defendant, but by happenstance during an ongoing investigation into abuse of surplus government property, and the defendant only denied involvement in any alteration of certain documents which created an inference that the plaintiff had committed forgery. Kaiser v. Tara Ford, Inc., 248 Ga. App. 481, 546 S.E.2d 861 (2001).

Because the undisputed facts of the second officer's limited participation as a backup officer did not amount to the "instigation" that would cause the second officer to be named as a "prosecutor" in a claim of malicious prosecution under Georgia law, the malicious prosecution claim against the second officer was required to be dismissed. Proescher v. Bell, 966 F. Supp. 2d 1350 (N.D. Ga. Aug. 21, 2013).

Fact that plaintiff in action for malicious institution of lunacy proceedings designated action as one of malicious prosecution does not require conclusion that it is predicated on this section, nor is a designation of a cause of action the proper means of determining its legal effect. Guth v. Walker, 92 Ga. App. 490, 88 S.E.2d 821 (1955).

False allegations by solicitor general (now district attorney) as prosecuting officer. — Allegations that the solicitor general (now district attorney) appeared several times before the adjourned session of the grand jury and urged the grand jury to indict the plaintiff for a certain murder, stating that the plaintiff was guilty and that evidence of the crime would unfold at the trial, that the solicitor general knew such representations were false, that there was no probable cause to suspect the plaintiff of the crime, and that all of such acts were committed as a part of a common scheme of the defendants to falsely charge and maliciously prosecute the plaintiff, negated the presumption of legality of the acts of the solicitor general as the duly qualified prosecuting officer of the state. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

While officers of court are presumed to have acted legally, this is a rebuttable presumption, and allegations that the prosecuting officer, or the counsel, employed to assist in the prosecution, acted knowingly and with malice and without probable cause in any or all stages of the malicious prosecution alleged, whether procuring the indictments or trying the plaintiff, or securing testimony illegally to further the prosecution, will save the petition against demurrer (now motion to dismiss). Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Malicious prosecution based on illegal search warrant. — Charge that the defendant illegally executed a search warrant which the defendant personally illegally procured set forth a cause of action for malicious prosecution under this section. Hollinshed v. Shadrick, 95

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Ga. App. 88, 97 S.E.2d 165 (1957).

Principal's liability for agent's malicious prosecution. — The principal is liable in a proper case for malicious prosecution when the prosecution same is conducted by the agent in furtherance of the business of the principal and within the scope of the agent's authority. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

When the plaintiff told the agent of the corporation that the plaintiff did not have sufficient funds in the bank to cover the check, and the agent within the scope of the agent's authority accepted the check in payment of merchandise sold on behalf of the corporation, the defendant corporation was thus charged with knowledge of facts concerning the transaction, which disclosed that the plaintiff was not guilty of the crime charged against the plaintiff, and the jury would be authorized to return a verdict against the defendant corporation for malicious prosecution. Barnes v. Gossett Oil Co., 58 Ga. App. 102, 197 S.E. 902 (1938).

In order for the bank to be held liable for a malicious prosecution instigated by a false statement made by the bank's agent or the bank's executive vice president, it must appear that the bank authorized such malicious prosecution, and that the prosecution was done by the officer and agent, acting within the scope of their employment or at the discretion or command of the bank. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

A bank is not liable for malicious prosecution in which its vice president participated, encouraged, aided, and purported to act for the corporation, when it does not affirmatively appear that the bank authorized the vice president to engage in such prosecution or aid and abet therein or that the bank assented thereto or ratified the prosecution. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

General rule is that authority conferred upon agent to collect debt does not imply authority to cause arrest so as to render the principal liable in an action for malicious prosecution in the absence of ratification or adoption of the agent's act. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

Agent's liability. — Agent of the defendant corporation who authorized a criminal prosecution against the plaintiff and agent who, acting under specific authority of the corporation, took a warrant for the plaintiff's arrest (for giving a check with insufficient funds in the bank) could not be held liable therefor in a joint action against them and the corporation for malicious prosecution, since they had laid before the solicitor fairly and truthfully all of the facts which were within their knowledge or which reasonably could have been ascertained by them. Barnes v. Gossett Oil Co., 58 Ga. App. 102, 197 S.E. 902 (1938).

In a malicious prosecution case brought against a medical professional company and the company's owning doctor by the company's former office manager and a former part-time worker after those former employees were charged with theft and fraud but the charges were dismissed, the trial court erred by granting the company summary judgment since there existed genuine issues of material fact as to whether a new chief operating officer hired for the company, and an agent for the company, had misrepresented the officer's knowledge that the part-time worker had been re-hired by the company to work on an office manual and paid accordingly. However, there existed no evidence that the owning doctor made any knowing misrepresentations to the investigating detective since the owning doctor had no knowledge that the part-time worker had been rehired at any time. Barnette v. Coastal Hematology & Oncology, P. C., 294 Ga. App. 733, 670 S.E.2d 217 (2008).

Action arising from arrest of invited guest. — In an action for malicious prosecution, when an employee of an apartment complex had given notice to the plaintiff that the plaintiff was forbidden to enter the property, even though the plaintiff entered as the guest of a tenant, the employee had probable cause to arrest the plaintiff for malicious trespass when the plaintiff deviated from the purpose for which the plaintiff was invited and entered upon a portion of the premises un-

related to the invitation. Arbee v. Collins, 219 Ga. App. 63, 463 S.E.2d 922 (1995).

Action arising from passing of bad check. — Trial court erred in granting summary judgment to the defendants because a factual issue remained as to whether the defendants maliciously prosecuted the plaintiff based on evidence showing that the plaintiff went to the defendants with documents which indicated that the plaintiff did not write the dishonored check and that the return of a certified letter had indicated the address to which the letter was sent was not the plaintiff's home. Joseph v. Home Depot, Inc., 246 Ga. App. 868, 542 S.E.2d 618 (2000).

Whether probable cause existed to prosecute allegedly fraudulent check writing is jury question. — The gravamen of the offense of writing a check knowing there were insufficient funds was an intent to defraud, which is not shown when there is an extension of credit at the time the check is given, and the question of whether or not the criminal process was instituted without probable cause and with malice should, under facts authorizing conflicting inferences, have been submitted to the jury in a malicious prosecution action under proper instructions from the court. Barnes v. Gossett Oil Co., 56 Ga. App. 220, 192 S.E. 254 (1937), later appeal, 58 Ga. App. 102, 197 S.E. 902 (1937).

Guilt in fact defense. — In a suit alleging malicious prosecution that was dismissed by the court without trial, evidence of guilt in fact of the accused is admissible as a defense to the damage element of the tort and, if so proved, is a bar to recovery. Wal-Mart Stores, Inc. v. Blackford, 264 Ga. 612, 449 S.E.2d 293 (1994).

Effect of subsequent acquittal on appeal. — After a defendant was convicted by a jury of bribery and the grand jury had found probable cause when the situation was presented to it by the district attorney, a subsequent acquittal on appeal does not indicate malicious prosecution, since the evidence was at least convincing enough to support a jury decision, even though erroneous. Rice v. Mansour, 176 Ga. App. 617, 337 S.E.2d 25 (1985).

After the plaintiff was found guilty of one of the charges against the plaintiff, the plaintiff's claim failed to satisfy the third and fifth elements of malicious prosecution. Young v. City of Atlanta, 631 F. Supp. 1498 (N.D. Ga. 1986).

Dismissal of delinquency petition. — Juvenile court proceedings cannot reasonably be viewed as having terminated favorably to the plaintiff, given the fact that the referee found the plaintiff to be guilty of shoplifting beyond a reasonable doubt and the ultimate dismissal of the delinquency petition was obviously based solely on the referee's determination, made at the conclusion of the informal 90-day probationary period, that the appellant had demonstrated a lack of need for court-ordered treatment or rehabilitation. J.C. Penney Co. v. Miller, 182 Ga. App. 64, 354 S.E.2d 682 (1987).

Trial court properly denied the employer's motion for directed verdict as to a malicious prosecution claim because the employee showed that the employer authorized the employee to write checks to the employee and then reported the money stolen, the employer manufactured and post-dated documents to erroneously show that employee wrote checks in violation of company policy and that the employee was not authorized to use a credit card, and the employer hired investigators to inquire about the alleged theft, who then contacted the police and provided the fabricated documents. Vojnovic v. Brants, 272 Ga. App. 475, 612 S.E.2d 621 (2005).

Evidence established malice and lack of probable cause. — In an attempt to pressure a property owner into paying the disputed portion of a bill, a contractor accused the owner of theft by deception by falsely asserting that the owner refused to pay for a fence; the owner was arrested, but the charges were later dropped. As the contractor acted with malice and lacked probable cause to initiate criminal proceedings, the owner properly prevailed on a malicious prosecution claim. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Conduct supported punitive damages award. — A contractor's using the threat of criminal prosecution in an at-

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tempt to pressure a property owner into paying a disputed bill, which resulted in the owner's being arrested and jailed, supported an award of punitive damages under O.C.G.A. § 51-12-5.1(b). Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Employee action alleging malicious prosecution. — Trial court erred in granting summary judgment in favor of a corporation and the corporation's president in an employee's action alleging malicious prosecution and malicious arrest because genuine issues of fact remained as to the issues of probable cause and malice; although the president averred that the president did not know that the employee was not licensed when the president hired the employee, the affidavits the employee submitted indicated otherwise. McKissick v. S. O. A., Inc., 299 Ga. App. 772, 684 S.E.2d 24 (2009).

Neighbors liable for intentional infliction of emotional distress and malicious prosecution. — Homeowner's judgments against the homeowner's neighbors for malicious prosecution and intentional infliction of emotional distress did not constitute a double recovery because separate conduct supported the emotional distress claim including the neighbors gathering outside the homeowner's home to celebrate the homeowner's arrest and publicly humiliate the homeowner in front of the homeowner's spouse and children. Turnage v. Kasper, 307 Ga. App. 172, 704 S.E.2d 842 (2010).

Relevance of prior criminal history in malicious prosecution. — Malicious prosecution case was remanded to the trial court because the trial court, after concluding that the plaintiff's past criminal history was relevant, should have thereafter considered whether the plaintiff's prior arrests nevertheless should be excluded because of their inherently prejudicial nature or because they potentially would confuse or mislead the jury. Rivers v. K-Mart Corp., 321 Ga. App. 788, 743 S.E.2d 464 (2013).

Trial court's findings upheld on appeal. — A trial court's findings in favor of a customer on the customer's counterclaim for malicious prosecution in a contractor's breach of contract and trover claim were upheld as the evidence established that the contractor had signed a sworn affidavit stating that the customer committed criminal fraud by not paying for an installed fence on the customer's property and refused to pay when the amount due was merely in dispute and the customer had, in fact, tendered a check for a portion of the amount due indicating that the remaining balance was in dispute. The fact that the contractor's execution of those false statements had consequences not intended, namely that the customer spent two nights in jail, was insufficient to absolve the contractor's liability for making the statements. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, §§ 1 et seq., 6 et seq.

Am. Jur. Pleading and Practice Forms. — 1 Am. Jur. Pleading and Practice Forms, Abuse of Process, § 2. 17 Am. Jur. Pleading and Practice Forms, Malicious Prosecution, § 1 et seq.

C.J.S. — 54 C.J.S., Malicious Prosecution, § 1 et seq.

ALR. — Institution of prosecution on false information without investigation as showing lack of probable cause, 5 ALR 1688.

Injury incident to notoriety or publicity as an element of damages in action for malicious prosecution, 37 ALR 658.

Expense of litigation, other than taxable costs, as basis of separate action against party to former suit, 39 ALR 1218.

Action for malicious prosecution or false arrest based on extradition proceeding, 55 ALR 353.

Status, character, competency, or personal interest of attorney as affecting rule regarding advice of counsel in action for malicious prosecution, 81 ALR 516.

Liability of municipality or other political unit for malicious prosecution, 103 ALR 1512.

Entry of judgment under power of attorney to confess judgment as ground of action for malicious prosecution, 112 ALR 331.

Defendant's acquiescence in, approval of, or silence regarding, acts of another for which he was not otherwise responsible as ground of liability in action for malicious prosecution or false arrest, 120 ALR 1322.

Right, in civil action for malicious prosecution, to prove or rely on facts not known to defendant when he began prosecution or action which show or tend to show guilt or liability of plaintiff, 125 ALR 897.

Malicious prosecution: may prosecutor avoid liability on the ground of probable cause or absence of malice, despite the fact that his motive was to collect debt, enforce claim for damages, or recover property, 139 ALR 1088.

Malicious prosecution predicated upon prosecution, institution, or instigation of administrative proceedings, 143 ALR 157.

Malicious prosecution: possession of stolen property as probable cause, 172 ALR 1340.

Civil liability of law enforcement officers for malicious prosecution, 28 ALR2d 646; 81 ALR4th 1031.

Maintainability of malicious prosecution action by one prosecuted on charge not amounting to a crime or under defective accusation, 36 ALR2d 786.

Malicious prosecution or similar tort action predicated upon disciplinary proceedings against an attorney, 52 ALR2d 1217.

Assignability of claim for malicious prosecution, 76 ALR2d 1286.

Judgment in false imprisonment action as res judicata in later malicious prosecution action, or vice versa, 86 ALR2d 1385.

Probable cause or want thereof, in malicious prosecution action, as question of law for court or of fact for jury, 87 ALR2d 183.

Liability of attorney acting for client, for false imprisonment or malicious prosecution of third party, 27 ALR3d 1113; 46 ALR4th 249.

Use of criminal process to collect debt as abuse of process, 27 ALR3d 1202.

Admissibility of defendant's rules or instructions for dealing with shoplifters, in action for false imprisonment or malicious prosecution, 31 ALR3d 705.

Malicious prosecution predicated upon prosecution, institution, or instigation or disciplinary proceeding against member of medical or allied profession, 39 ALR3d 473.

Malicious prosecution: liability of perpetrator of crime for damages to innocent persons subjected to prosecution for the commission of such crime, 40 ALR3d 1005.

Threatening, instituting, or prosecuting legal action as invasion of right of privacy, 42 ALR3d 865.

Civil liability of judicial officer for malicious prosecution or abuse of process, 64 ALR3d 1251.

May action for malicious prosecution be predicated on defense or counterclaim in civil suit, 65 ALR3d 901.

Malicious prosecution: liability for instigation or continuation of prosecution of plaintiff mistakenly identified as person who committed an offense, 66 ALR3d 10.

Proceedings for injunction or restraining order as basis of malicious prosecution action, 70 ALR3d 536.

Immunity of prosecuting attorney or similar officer from action for false arrest or imprisonment, 79 ALR3d 882.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Civil liability of attorney for abuse of process, 97 ALR3d 688.

Liability for negligently causing arrest or prosecution of another, 99 ALR3d 1113.

Venue in action for malicious prosecution, 12 ALR4th 1278.

Termination of criminal proceedings as result of compromise or settlement of accused's civil liability as precluding malicious prosecution action, 26 ALR4th 565.

Liability of attorney, acting for client, for malicious prosecution, 46 ALR4th 249.

Malicious prosecution: defense of acting on advice of justice of the peace, magistrate, or lay person, 48 ALR4th 250.

Liability of better business bureau or similar organization in tort, 50 ALR4th 745.

Liability of police or peace officers for

false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 ALR4th 1031.

Admissibility of evidence of polygraph test results, or offer or refusal to take test, in action for malicious prosecution, 10 ALR5th 663.

Construction and application of Federal Tort Claims Act provision (28 USCA § 2680(h)) excepting from coverage claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process, 152 ALR Fed. 605.

51-7-41. Accrual of right of action.

The criminal prosecution forming the basis for an action for malicious prosecution must be ended before the right of action for malicious prosecution accrues. (Orig. Code 1863, § 2931; Code 1868, § 2938; Code 1873, § 2989; Code 1882, § 2989; Civil Code 1895, § 3850; Civil Code 1910, § 4446; Code 1933, § 105-806.)

JUDICIAL DECISIONS

To maintain action for malicious prosecution, the plaintiff must prove that the prosecution terminated in the plaintiff's favor. If the termination has been brought about by compromise of the parties, an action for malicious prosecution cannot be maintained. Coggins v. General Motors Acceptance Corp., 47 Ga. App. 314, 170 S.E. 308 (1933).

A petition seeking damages for a malicious prosecution must allege the termination of the proceeding out of which the writ issued, in favor of the plaintiff. Sykes v. South Side Atlanta Bank, 53 Ga. App. 450, 186 S.E. 464 (1936).

Construed with former Code 1933, § 105-801 (see now O.C.G.A. § 51-7-40), former Code 1933, § 105-806 (see now O.C.G.A. § 51-7-41) required that the criminal prosecution must have terminated, favorably to the person prosecuted, before the right of action for malicious prosecution accrues. Ayala v. Sherrer, 234 Ga. 112, 214 S.E.2d 548, answer conformed to, 135 Ga. App. 431, 218 S.E.2d 84 (1975).

In malicious use of legal process cases, it is incumbent upon the complaining party to show a successful termination of the previous litigation. Such prerequisite of a successful termination does not exist in an action for malicious abuse of process. Goodwin Agency, Inc. v. Chesser, 131 Ga. App. 686, 206 S.E.2d 568 (1974).

It is essential to the maintenance of an action for malicious prosecution that the plaintiff prove that the prosecution not only terminated, but terminated in the plaintiff's favor. Laster v. Star Rental, Inc., 181 Ga. App. 609, 353 S.E.2d 37 (1987), aff'd, 190 Ga. App. 1, 378 S.E.2d 320, cert. denied, 493 U.S. 829, 110 S. Ct. 97, 107 L. Ed. 2d 61 (1989).

Absence of probable cause required. — Before action of malicious prosecution can be pursued, not only must there have been termination of a criminal case favorably to the accused, but absence of probable cause for prosecution must appear. Meyers v. Glover, 152 Ga. App. 679, 263 S.E.2d 539 (1979), overruled on other grounds, McCord v. Jones, 168 Ga. App. 891, 311 S.E.2d 209 (1983).

Prosecution may be ended, within meaning of this section, either by action, or perhaps inaction, of the prosecutor or of the magistrate, the district attorney, or a grand or petit jury. Reed v. Arrington-Blount Ford, Inc., 148 Ga. App. 595, 252 S.E.2d 13 (1979).

Final termination of criminal case favorably to the defendant, and amounting to final ending of prosecution, is such a termination favorably to the defendant as constitutes a basis for a suit for malicious prosecution. Williams v. Marbut, 52 Ga. App. 588, 183 S.E. 820 (1936).

Allegation that proceeding had been abandoned by the defendant is proper allegation of successful termination thereof in favor of the plaintiffs. Tyler v. Upchurch, 31 Ga. App. 599, 121 S.E. 521 (1924); Hollinshed v. Shadrick, 95 Ga. App. 88, 97 S.E.2d 165 (1957).

Although compromise of parties not a termination. — When an action has been compromised, this section does not apply. Waters v. Winn, 142 Ga. 138, 82 S.E. 537, 1915A L.R.A. 601, 1915D Ann. Cas. 1248 (1914); Laster v. Star Rental, Inc., 181 Ga. App. 609, 353 S.E.2d 37 (1987), aff'd, 190 Ga. App. 1, 378 S.E.2d 320, cert. denied, 493 U.S. 829, 110 S. Ct. 97, 107 L. Ed. 2d 61 (1989).

A voluntary abandonment of a prosecution merely by agreement or compromise does not constitute a favorable ending for the accused. Sykes v. South Side Atlanta Bank, 53 Ga. App. 450, 186 S.E. 464 (1936).

It being essential to a right of action for a malicious prosecution by a defendant in a criminal prosecution that the prosecution must have terminated favorably to the defendant, the petition, in a suit brought by the defendant in a criminal proceeding against the prosecutor, to recover damages for an alleged malicious prosecution, wherein the only allegation as respects the termination of the criminal proceedings is that the plaintiff, after the defendant has instituted criminal proceedings against the plaintiff, made an adjustment and settled the matter at a discount with the prosecutor, and that the prosecution was never further pursued, but that the warrant went dismissed by the operation of law, fails to show a termination of the criminal prosecution favorable to the plaintiff as the defendant in the criminal prosecution, and therefore fails to set out a cause of action. Smith v. Otwell, 51 Ga. App. 741, 181 S.E. 493 (1935).

Dismissal of warrant by magistrate at request of prosecutor, and dismissal of warrant by magistrate, without consent of prosecutor, constitute termination of the prosecution favorable to the plaintiff within the meaning of this section. Ayala v. Sherrer, 234 Ga. 112, 214 S.E.2d 548 (1975).

Favorable termination in commitment hearing. — When the prosecutor announces before the magistrate at the commitment hearing that the prosecutor has no evidence to offer, procures an order discharging the accused and dismissing the warrant, and no further action is taken thereon, these facts may constitute a favorable determination. Page v. Citizens Banking Co., 111 Ga. 73, 36 S.E. 418 (1900); Sykes v. South Side Atlanta Bank, 53 Ga. App. 450, 186 S.E. 464 (1936).

Diligence of prosecutor prevents termination. — The discharge of one arrested on a warrant will not operate as a termination of the prosecution if the prosecutor, with due diligence, carries on the case in a court of competent jurisdiction. Hartshorn v. Smith, 104 Ga. 235, 30 S.E. 666 (1898).

It is too early to bring action for malicious prosecution on heels of nolle prosequi because the plaintiff is still exposed to prosecution for the same offense. Price v. Cobb, 60 Ga. App. 59, 3 S.E.2d 131 (1939).

Filing of nolle prosequi may cause action to accrue subject to state's right to reinstate prosecution. However, the filing of a nolle prosequi by the prosecutor and dismissal of the action by the trial court constitutes prima facie a termination of the prosecution in favor of the person arrested and is sufficient to commence the running of the statute of limitations subject to the right of the state to reinstate the action within the six-month period. Bailey v. General Apt. Co., 139 Ga. App. 713, 229 S.E.2d 493 (1976).

Nolle prosequi becomes final termination if state takes no further action. — When no further action is taken by the state to reinstate the indictment and toll the statute of limitations, the original nolle prosequi progresses from a prima facie termination of the action to an irrebuttable conclusion of finality. Bailey v. General Apt. Co., 139 Ga. App. 713, 229 S.E.2d 493 (1976).

Continuity of malicious prosecution is not necessarily broken by intervening entry of nolle prosequi on an indictment originally charging the defendant with the crime for which the de-

fendant is later again indicted, tried, and acquitted, even though a previous action for malicious prosecution, based upon the first indictment, failed and was dismissed because the entry of nolle prosequi did not result in a termination of that prosecution favorable to the plaintiff or amount to any termination at all. Therefore, in an action for malicious prosecution on a final process, there is no necessity that the former prosecution based on the previous process must have terminated favorably to the plaintiff or terminated at all; it is the same prosecution on the final process that must be alleged to have terminated, and favorably to the plaintiff. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Cause of action for malicious prosecution was not defeated when a former indictment was procured at the instance of the defendants as prosecutors and nol prossed, and subsequently, a presentment, returned within six months of the nolle prosequi on the former indictment, was only returned by special presentment without instigation from the defendants in the technical sense of prosecutors. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Failure to find illegal articles named in search warrant is satisfaction of requirement that action must be terminated favorably to the plaintiffs. Hollinshed v. Shadrick, 95 Ga. App. 88, 97 S.E.2d 165 (1957).

Action for malicious prosecution is not restricted to presentment on which malicious prosecution is based and the plaintiff tried, but, at the option of the plaintiff, may include also any previous indictment or process on which a previous action for malicious prosecution was based but dismissed because such former criminal prosecution had not terminated as required by law; and this is true, notwithstanding the present presentment was a reindictment of the petitioner on the charge contained in the former indictment nol prossed under the sanction of the court. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Waiver of preliminary hearing irrelevant when case ultimately terminated in favor of criminal defendant. — Fact that before favorable termination of the criminal case, the defendant, appearing before committing the magistrate before whom the criminal warrant which had been taken out by the prosecution for the defendant's arrest was returnable, waived a preliminary hearing and moved that the prosecution be transferred to the state court, which was done, did not alter the proposition that the case finally resulted favorably to the defendant and as such formed the basis of a suit by the defendant for malicious prosecution. Williams v. Marbut, 52 Ga. App. 588, 183 S.E. 820 (1936).

When after levy of distress warrant no counter-affidavit is filed and property is sold to satisfy alleged indebtedness for rent, prosecution of such proceeding is not at end so as to give right of action so as to give right of action for a malicious use of legal process to the alleged tenant against the person suing out the distress warrant; but in such a case it is essential to the right of action referred to that an issue should have been formed by a counter-affidavit filed, and that this issue should have terminated favorably to the alleged tenant. Sparrow v. Weld, 47 Ga. App. 254, 170 S.E. 301 (1933).

When arrest warrant is dismissed after hearing evidence, verdict of guilty upon indictment charging same offense precludes recovery for malicious prosecution on the ground of probable cause as well as lack of favorable termination of the prosecution. Ayala v. Sherrer, 234 Ga. 112, 214 S.E.2d 548 (1975).

Statute of limitations. — Actions for malicious prosecution, for malicious abuse of legal process, for false arrest or false imprisonment, or for malicious use of civil process were all actions for damages for injuries to the person of the party complainant; and under former Code 1933, § 3-1003 (see now O.C.G.A. § 9-3-33) such actions were not barred until two years after the same arise. McCullough v. Atlantic Ref. Co., 50 Ga. App. 237, 177 S.E. 601 (1934), rev'd on other grounds, 181 Ga. 502, 182 S.E. 898 (1935).

A suit for malicious prosecution must be brought within two years after the underlying criminal prosecution is ended in the plaintiff's favor. Daniel v. Georgia R.R.

Bank & Trust Co., 255 Ga. 29, 334 S.E.2d 659 (1985) (underlying prosecution was nolle prossed).

Trial court erred by granting summary judgment in favor of the defendant on the malicious prosecution claim based on the prosecution occurring outside the policy period because since the insurance policy did not specify, coverage was triggered on the claim when the insured set in motion the legal machinery of the state; thus, the statute of limitation did not begin to run until favorable termination of the underlying criminal proceeding against the plaintiff, therefore, the claim was timely. Zook v. Arch Specialty Ins. Co., 336 Ga. App. 669, 784 S.E.2d 119 (2016).

Trigger time for malicious prosecution claim. — Georgia Court of Appeals adopts the majority rule that when the contract does not specify, insurance coverage is triggered on a potential claim for malicious prosecution when the insured sets in motion the legal machinery of the state. Zook v. Arch Specialty Ins. Co., 336 Ga. App. 669, 784 S.E.2d 119 (2016).

Sufficiency of complaint. — When the plaintiff was arrested and prosecuted under a valid warrant and a valid accusation and the petition alleged that the plaintiff's prosecution was without probable cause and with malice; that the prosecution terminated favorably to the plaintiff; and that the defendants knew the plaintiff was not guilty of the offense for which the defendants caused the plaintiff to be prosecuted, the petition set out a cause of action. Davison-Paxon Co. v. Norton, 69 Ga. App. 77, 24 S.E.2d 723 (1943).

Alleging abandonment of prosecution. — While the procuring from the committing court of an order discharging the defendant in a warrant amounts to a termination of the prosecution when no further action is taken, the mere allegation of such discharge, without at least showing in general terms that the prosecution has been terminated, does not meet the requirements of this section. Rogers Co. v. Murray, 35 Ga. App. 49, 132 S.E. 139 (1926).

Cited in Marable v. Mayer, 78 Ga. 710, 3 S.E. 429 (1887); McDaniel v. Nelms, 96 Ga. 366, 23 S.E. 407 (1895); Dugas v. Darden, 65 Ga. App. 394, 15 S.E.2d 901 (1941); White v. Holderby, 192 F.2d 722 (5th Cir. 1951); Godfrey v. Home Stores, Inc., 101 Ga. App. 269, 114 S.E.2d 202 (1960); Ayala v. Sherrer, 135 Ga. App. 431, 218 S.E.2d 84 (1975); Monumental Properties, Inc. v. Johnson, 136 Ga. App. 39, 220 S.E.2d 55 (1975); Primas v. Saulsberry, 152 Ga. App. 88, 262 S.E.2d 251 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, § 6 et seq.

C.J.S. — 54 C.J.S., Malicious Prosecution, §§ 5 et seq., 89 et seq.

ALR. — Unreversed conviction as conclusive in action for malicious prosecution, 69 ALR 1062.

Discontinuance of prosecution because of defendant's failure to submit himself to jurisdiction as termination necessary to support action for malicious prosecution, 128 ALR 929.

Dismissal by magistrate or other inferior court for lack or insufficiency of evidence as a final termination of prosecution as regards action for malicious prosecution, 135 ALR 784.

Discharge in habeas corpus proceedings as constituting favorable termination of criminal proceedings requisite to maintenance of malicious prosecution action, 30 ALR2d 1128.

Admissibility and permissible use, in malicious prosecution action, of documentary evidence showing that prior criminal proceedings against instant plaintiff were terminated in his favor, 57 ALR2d 1086.

When cause of action accrues, for purpose of starting the running of the statute of limitations against an action for malicious prosecution, 87 ALR2d 1047.

Termination of criminal proceedings as result of compromise or settlement of accused's civil liability as precluding malicious prosecution action, 26 ALR4th 565.

Nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution, 30 ALR4th 572.

Construction and application of Federal

Tort Claims Act provision (28 USCA § 2680(h)) excepting from coverage claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process, 152 ALR Fed. 605.

51-7-42. Inquiry before committing court or magistrate as prosecution.

For purposes of this article, an inquiry before a committing court or a magistrate shall amount to a prosecution. (Orig. Code 1863, § 2930; Code 1868, § 2937; Code 1873, § 2988; Code 1882, § 2988; Civil Code 1895, § 3849; Civil Code 1910, § 4445; Code 1933, § 105-805; Ga. L. 1983, p. 884, § 4-1.)

JUDICIAL DECISIONS

Swearing out of warrant, when not followed by arrest, is not prosecution under this section. Swift v. Witchard, 103 Ga. 193, 29 S.E. 762 (1897).

If defendant is brought before magistrate, this section applies, even though the prosecution is later abandoned. Page v. Citizens Banking Co., 111 Ga. 73, 36 S.E. 418 (1900).

Plaintiff's appearance before the municipal court amounted to a prosecution. K-Mart Corp. v. Lovett, 241 Ga. App. 26, 525 S.E.2d 751 (1999).

Inquiry defined. — Proceeding in which, after the plaintiff's arrest, the plaintiff was brought before a magistrate who asked questions and bound the plaintiff's case over for the grand jury and set bond, was an inquiry even though the plaintiff did not answer any questions, and was sufficient "prosecution" to provide the basis for a malicious prosecution action. Branson v. Donaldson, 206 Ga. App. 723, 426 S.E.2d 218 (1992).

Attorney's 42 U.S.C. § 1983 malicious prosecution claim against a police officer failed because the attorney was unable to show that the attorney's U.S. Const., amend. 4 rights were violated because the attorney was freed on bail immediately after appearing before a magistrate judge on the day following the attorney's arrest, which was warrantless and therefore did not constitute legal process or an inquiry under O.C.G.A. § 51-7-42. Love v. Oliver, 450 F. Supp. 2d 1336 (N.D. Ga. 2006).

Cited in Hartshorn v. Smith, 104 Ga. 235, 30 S.E. 666 (1898); South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935); Peppas v. Miles, 82 Ga. App. 438, 61 S.E.2d 429 (1950); Wall v. Spurlock, 85 Ga. App. 379, 69 S.E.2d 379 (1952); Gaddy v. Gilbert, 140 Ga. App. 508, 231 S.E.2d 403 (1976); Bradley v. Tenneco Oil Co., 146 Ga. App. 161, 245 S.E.2d 862 (1978); Oden & Sims Used Cars, Inc. v. Thurman, 165 Ga. App. 500, 301 S.E.2d 673 (1983); Jones v. Warner, 301 Ga. App. 39, 686 S.E.2d 835 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, § 7 et seq.

C.J.S. — 54 C.J.S., Malicious Prosecution, §§ 9et seq., 59 et seq.

ALR. — Malicious prosecution predicated upon prosecution, institution, or instigation of administrative proceedings, 143 ALR 157.

51-7-43. Lack of probable cause defined; question for jury.

Lack of probable cause shall exist when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for

proceeding but his desire to injure the accused. Lack of probable cause shall be a question for the jury, under the direction of the court. (Orig. Code 1863, § 2925; Code 1868, § 2932; Code 1873, § 2983; Code 1882, § 2983; Civil Code 1895, § 3844; Civil Code 1910, § 4440; Code 1933, § 105-802.)

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases

General Consideration

Applicability to actions for malicious use of civil process. — The provisions of this section, applicable to an action for malicious prosecution, provide appropriate guidelines for determining the existence of malice and want of probable cause in an action for malicious use of civil process. American Plan Corp. v. Beckham, 125 Ga. App. 416, 188 S.E.2d 151 (1972).

The policy of the courts and the state is to disfavor malicious prosecution actions and to encourage citizens to bring to justice persons who are apparently guilty. K-Mart Corp. v. Coker, 261 Ga. 745, 410 S.E.2d 425 (1991).

This section pertains to actions for malicious prosecution or malicious use of legal process and has no application to action for trespass. Wilson v. Dunaway, 112 Ga. App. 241, 144 S.E.2d 542 (1965).

Absence of probable cause for prosecution is necessary in order to maintain action for malicious prosecution. Sykes v. South Side Atlanta Bank, 53 Ga. App. 450, 186 S.E. 464 (1936).

Lack of probable cause to prosecute is the essential element of an action for malicious prosecution. Allen v. Wometco Cable TV, 198 Ga. App. 103, 400 S.E.2d 362 (1990), cert. denied, 198 Ga. App. 897, 400 S.E.2d 362 (1991).

In actions for malicious prosecution, question is not whether the plaintiff was guilty, but whether the defendant had reasonable cause to so believe, whether the circumstances were such as to create in the mind of the defendant a reasonable belief that there was probable cause for the prosecution. Sirmans v. Peterson, 42 Ga. App. 707, 157 S.E. 341 (1931); Davis v. Stephens, 45 Ga. App. 227, 164 S.E. 111 (1932); South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935); Tanner-Brice Co. v. Barrs, 55 Ga. App. 453, 190 S.E. 676 (1937); West v. Baumgartner, 228 Ga. 671, 187 S.E.2d 665 (1972); Ayala v. Sherrer, 135 Ga. App. 431, 218 S.E.2d 84 (1975); McMillan v. Day Realty Assocs., 156 Ga. App. 660, 275 S.E.2d 352 (1980), rev'd on other grounds, 247 Ga. 561, 277 S.E.2d 663 (1981); Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981); McMillan v. Day Realty Assocs., 159 Ga. App. 366, 283 S.E.2d 298 (1981).

The issue in a suit for malicious prosecution is want of probable cause on the part of the person instituting the prosecution, not the plaintiff's guilt or innocence. Gibson's Prods. Co. v. McDaniel, 122 Ga. App. 264, 176 S.E.2d 548 (1970).

There can be no recovery by the plaintiff when there was any probable cause for prosecution, even though it may appear that the prosecutor was actuated by improper motives. Davis v. Gilbert, 67 Ga. App. 277, 19 S.E.2d 920 (1942); Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947); Smith v. Ragan, 140 Ga. App. 33, 230 S.E.2d 89 (1976).

Probable cause defined. — Probable cause is defined to be the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of crime for which one was prosecuted. Sirmans v. Peterson, 42 Ga. App. 707, 157 S.E. 341 (1931); Davis v. Ste-

General Consideration (Cont'd)

phens, 45 Ga. App. 227, 164 S.E. 111 (1932); South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935); Tanner-Brice Co. v. Barrs, 55 Ga. App. 453, 190 S.E. 676 (1937); Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967); Morgan v. Mize, 118 Ga. App. 534, 164 S.E.2d 565 (1968); Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

Probable cause for the institution of proceedings in court is supported by such facts as would authorize an honest belief in the prosecutor, as a reasonable and prudent person, that the action and the means taken in prosecution of it are just, legal, and proper. Harber v. Davison-Paxon Co., 46 Ga. App. 457, 167 S.E. 781 (1933).

Want of probable cause exists when the circumstances are such as to satisfy a reasonable man that the prosecutor had no ground for proceeding but a desire to injure the accused. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Probable cause is that apparent state of facts which seems to exist after reasonable and proper inquiry. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947); McMillan v. Day Realty Assocs., 156 Ga. App. 660, 275 S.E.2d 352 (1980), rev'd on other grounds, 247 Ga. 561, 277 S.E.2d 663 (1981).

While probable cause need not approach absolute certainty as to the facts, and it is not inconsistent with a considerable element of doubt, it must be more than mere conjecture or unfounded suspicion. Beyond this, the belief must be supported by appearances known to the defendant at the time, and a prosecution instituted without probable cause cannot be justified by anything, short of guilt in fact, which comes to the knowledge of the defendant later. The appearances must be such as to lead a reasonable man to set the criminal proceeding in motion. The defendant is not necessarily required to verify the defendant's information, when it appears to be reliable; but when a reasonable man would investigate further before beginning the prosecution, the defendant may be liable for failure to do so. All such factors as the reliability of the source, the availability of further information and the difficulty of obtaining it, the reputation of the accused, and the accused's opportunity to offer an explanation, and the apparent necessity of prompt action, are to be considered in determining whether it was reasonable to act without verification. Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

Probable cause does not depend upon actual state of case in point of fact, but upon honest and reasonable belief of party commencing prosecution, and the reasonable and probable cause must appear to have existed in the party's mind at the time of the party's proceeding. South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935); Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947); Sanfrantello v. Sears, Roebuck & Co., 118 Ga. App. 205, 163 S.E.2d 256 (1968).

All that is really required is honest belief, or strong ground of suspicion, of plaintiff's guilt, and a reasonable ground for the belief or suspicion, and that may be upon information from others as well as from personal knowledge. South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935).

Causal deficiency in action for malicious prosecution exists when circumstances are such as to satisfy reasonable man that the defendant had no reasonable ground for proceeding except the defendant's desire to injure the person sued. Powell v. Cohen, 116 Ga. App. 48, 156 S.E.2d 495 (1967).

Probable cause existed for arrest for criminal trespass. — Because the first officer did not lack probable cause to arrest the plaintiff for criminal trespass based on the report of suspicious behavior by the private security officer for the park, the first officer's supervisor's statement that a magistrate stated that there was probable cause to arrest the plaintiff for criminal trespass, and the first officer's independent observation of the plaintiff during the investigatory detention, summary judgment was granted to the first officer on the plaintiff's malicious prosecution claim. Proescher v. Bell, 966 F. Supp. 2d 1350 (N.D. Ga. Aug. 21, 2013).

Arrest based upon warrant which is void furnishes no basis for action

for malicious prosecution. Lowe v. Turner, 115 Ga. App. 503, 154 S.E.2d 792 (1967).

Advice of counsel based on all facts. — A prosecution instituted on the advice of the solicitor general, given after a full, fair and complete statement of the facts by the prosecutor, is a defense. Ventress v. Rosser, 73 Ga. 534 (1884); Baker v. Langley, 3 Ga. App. 751, 60 S.E. 371 (1908); Thornton v. Story, 24 Ga. App. 503, 101 S.E. 309 (1919).

Belief by prosecutors after full knowledge of the facts, that such facts constitute crimes when they do not, constitutes probable cause. West v. Baumgartner, 228 Ga. 671, 187 S.E.2d 665 (1972).

Although certainty of conviction not required. — Under this section, it has been held that the prosecutor is not required to be fully satisfied with the truth of the charge, nor to guarantee a conviction. Rigdon v. Jordan, 81 Ga. 668, 7 S.E. 857 (1888).

Acting on advice of counsel not necessarily sufficient in itself to establish probable cause. — While a defendant to an action for malicious prosecution may show that the defendant was acting on the advice of counsel in instituting the prosecution which is the basis of the action against the defendant, the mere fact that the defendant so acted on advice of counsel while it may go to the mitigation of the damages, is not sufficient as a matter of law to show that the defendant acted with probable cause. Fox v. J.W. Davis & Co., 55 Ga. 298 (1875); Peppas v. Miles, 82 Ga. App. 438, 61 S.E.2d 429 (1950).

Prior rulings of guilt in similar prosecutions show probable cause as matter of law. West v. Baumgartner, 228 Ga. 671, 187 S.E.2d 665 (1972).

Motive is immaterial when probable cause exists. Darnell v. Shirley, 31 Ga. App. 764, 122 S.E. 252 (1924).

This section is not exhaustive of all cases where lack of probable cause shall exist. South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935).

Burden of showing absence of probable cause is on plaintiff. Sykes v. South Side Atlanta Bank, 53 Ga. App. 450, 186 S.E. 464 (1936); Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947); Hight v. Steely, 86 Ga. App. 137, 70 S.E.2d 886 (1952); Morgan v. Mize, 118 Ga. App. 534, 164 S.E.2d 565 (1968); Patton v. Southern Bell Tel. & Tel. Co., 387 F.2d 360 (5th Cir. 1968); Ayala v. Sherrer, 135 Ga. App. 431, 218 S.E.2d 84 (1975).

The burden of proving the want of probable cause is on the plaintiff and the plaintiff does not in any reasonable sense carry this burden unless the plaintiff shows by the plaintiff's evidence that, under the facts as the facts appeared to the prosecutor at the time of the prosecution, the prosecutor could have had no reasonable grounds for believing the plaintiff to be guilty of the charge for which the plaintiff was prosecuted. Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967); Morgan v. Mize, 118 Ga. App. 534, 164 S.E.2d 565 (1968); West v. Baumgartner, 228 Ga. 671, 187 S.E.2d 665 (1972); Ayala v. Sherrer, 135 Ga. App. 431, 218 S.E.2d 84 (1975); Smith v. Ragan, 140 Ga. App. 33, 230 S.E.2d 89 (1976); McMillan v. Day Realty Assocs., 156 Ga. App. 660, 275 S.E.2d 352 (1980), rev'd on other grounds, 247 Ga. 561, 277 S.E.2d 663 (1981).

In an action to recover damages for an alleged malicious criminal prosecution, the plaintiff carries the burden of proving not only that such prosecution was maliciously carried on, but also that it was carried on without any probable cause. Hill v. Trend Carpet, 154 Ga. App. 446, 268 S.E.2d 682 (1980).

Plaintiff must prove damages. — In an action for malicious use of legal process, the plaintiff must show that the plaintiff was arrested, the plaintiff's property seized under the process, or that the plaintiff suffered some special damage by reason of the suing out of the process. Haverty Furn. Co. v. Thompson, 46 Ga. App. 739, 169 S.E. 213 (1933).

Evidence of probable cause. — All material evidence is admissible which tends on the one hand to prove or disprove the want of probable cause. McLaren v. Birdsong & Sledge, 24 Ga. 265 (1858).

Evidence of threat is admissible. Goggans v. Monroe, 31 Ga. 331 (1860).

Binding over of the defendant by the magistrate is prima facie, but not conclusive, evidence of probable

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cause. Lindsay v. West, 6 Ga. App. 284, 64 S.E. 1005 (1909); Sykes v. South Side Atlanta Bank, 53 Ga. App. 450, 186 S.E. 464 (1936).

The grand jury's return of an indictment against a potential plaintiff, the issuance of a warrant for the arrest of a plaintiff or the consultation of counsel before the securing of an arrest warrant for a plaintiff are all prima facie but not conclusive evidence that probable cause existed for the prosecution of the plaintiff. Shepard v. Byrd, 581 F. Supp. 1374 (N.D. Ga. 1984).

It is not sufficient proof of lack of probable cause that grand jury returned no indictment, but it is a circumstance which the jury may consider in determining whether or not there was probable cause. Hearn v. Batchelor, 47 Ga. App. 213, 170 S.E. 203 (1933).

If accused is convicted in trial court, such conviction, if not procured by fraud, is conclusive of probable cause, although the conviction may be set aside by the Supreme Court. Davis v. Gilbert, 67 Ga. App. 277, 19 S.E.2d 920 (1942).

Indictment by grand jury is prima facie evidence of probable cause. Darnell v. Shirley, 31 Ga. App. 764, 122 S.E. 252 (1924); Harris v. Gray, 58 Ga. App. 689, 199 S.E. 831 (1938); Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940); Hill v. Trend Carpet, 154 Ga. App. 446, 268 S.E.2d 682 (1980); Rowe v. CSX Transp., Inc., 219 Ga. App. 380, 465 S.E.2d 476 (1995).

Probable cause established. — When the trial judge, having heard all of the state's evidence, considers a motion on behalf of an accused and rules that the evidence is sufficient as a matter of law to support a conviction, such a holding suffices as to the existence of probable cause. Monroe v. Sigler, 256 Ga. 759, 353 S.E.2d 23 (1987); Allen v. Montgomery Ward & Co., 186 Ga. App. 337, 367 S.E.2d 120 (1988).

Evidence of abandonment of prosecution. — The fact that the prosecution was abandoned, or that the person charged with a criminal offense has, upon the trial therefor, been acquitted, is not sufficient to prove want of probable cause. Stuckey v. Savannah, Fla. & W. Ry., 102 Ga. 782, 29 S.E. 920 (1898); Thornton v. Story, 24 Ga. App. 503, 101 S.E. 309 (1919).

Proof that the accused was discharged and acquitted, without a trial and upon a second demand therefor, because of the inability of the prosecutor to obtain the attendance of the witnesses relied upon to establish the charge, serves only to show that the prosecution terminated. Darnell v. Shirley, 31 Ga. App. 764, 122 S.E. 252 (1924).

Parol evidence. — The defendant may show by parol evidence that the indictment was nol prossed because of a variance between the original charge and the offense charged by the indictment. O'Berry v. Davis, 31 Ga. App. 755, 121 S.E. 857 (1924).

Question of probable cause is mixed question of law and fact. Hearn v. Batchelor, 47 Ga. App. 213, 170 S.E. 203 (1933); Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940); Gibson's Prods. Co. v. McDaniel, 122 Ga. App. 264, 176 S.E.2d 548 (1970); American Plan Corp. v. Beckham, 125 Ga. App. 416, 188 S.E.2d 151 (1972); McMillan v. Day Realty Assocs., 156 Ga. App. 660, 275 S.E.2d 352 (1980), rev'd on other grounds, 247 Ga. 561, 277 S.E.2d 663 (1981); Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

Whether the circumstances alleged to show probable cause existed is a matter of fact, to be determined by the jury; but whether the circumstances amount to probable cause is a question of law for the court. Hearn v. Batchelor, 47 Ga. App. 213, 170 S.E. 203 (1933); Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940); American Plan Corp. v. Beckham, 125 Ga. App. 416, 188 S.E.2d 151 (1972).

Ordinarily, existence of probable cause is question for the jury, but when the material facts are not in dispute, the question becomes one of law for the court. Woodruff v. Doss, 20 Ga. App. 639, 93 S.E. 316 (1917); Morgan v. Mize, 118 Ga. App. 534, 164 S.E.2d 565 (1968); Abernathy v. Dover, 139 Ga. App. 323, 228 S.E.2d 359 (1976).

Under this section, probable cause is a question for the jury unless from undisputed facts it is obvious to the court that it does or does not exist. Harmon v. Redding, 135 Ga. App. 124, 218 S.E.2d 32 (1975); Medoc Corp. v. Keel, 166 Ga. App. 615, 305 S.E.2d 134 (1983).

Unless the facts regarding probable cause are undisputed, it is a question for the jury. Gantt v. Patient Communication Systems, 200 Ga. App. 35, 406 S.E.2d 796 (1991), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Want of probable cause is question for jury, under direction of court. Hearn v. Batchelor, 47 Ga. App. 213, 170 S.E. 203 (1933); Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940); American Plan Corp. v. Beckham, 125 Ga. App. 416, 188 S.E.2d 151 (1972); Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975); Smith v. Ragan, 140 Ga. App. 33, 230 S.E.2d 89 (1976); Williamson v. Alderman, 148 Ga. App. 297, 251 S.E.2d 153 (1978).

When the plaintiff introduces sufficient evidence to infer a want of probable cause, the case should be submitted to the jury on this point, provided there is sufficient evidence to carry the case to the jury on the question of malice. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

Findings of jury generally binding on appellate court. — The question of the existence of probable cause is ordinarily one of fact for the jury, and the finding of the jury as to questions of fact is conclusive on the appellate court when supported by evidence. Campbell v. Tatum, 71 Ga. App. 58, 30 S.E.2d 56 (1944).

This section does not mean that jury would be authorized to find want of probable cause without any evidence whatsoever to establish the fact. Spratlin v. Manufacturers Acceptance Corp., 105 Ga. App. 463, 125 S.E.2d 110 (1962).

Once facts are determined, whether the facts amount to probable cause is a question of law. Gibson's Prods. Co. v. McDaniel, 122 Ga. App. 264, 176 S.E.2d 548 (1970).

Question of probable cause becomes one of law when averments or proof are lacking or fail sufficiently to negative presumptions of law that probable cause existed. Sykes v. South Side Atlanta Bank, 53 Ga. App. 450, 186 S.E. 464 (1936).

When material facts are not in dispute, the existence of probable cause is a question of law to be determined by the court. Sirmans v. Peterson, 42 Ga. App. 707, 157 S.E. 341 (1931); Tanner-Brice Co. v. Barrs, 55 Ga. App. 453, 190 S.E. 676 (1937); Spratlin v. Manufacturers Acceptance Corp., 105 Ga. App. 463, 125 S.E.2d 110 (1962); Fletcher v. Georgia Power Co., 117 Ga. App. 696, 161 S.E.2d 369 (1968); West v. Baumgartner, 228 Ga. 671, 187 S.E.2d 665 (1972); S.S. Kresge Co. v. Kicklighter, 135 Ga. App. 114, 217 S.E.2d 418 (1975); Ayala v. Sherrer, 135 Ga. App. 431, 218 S.E.2d 84 (1975); Diamond v. Marland, 395 F. Supp. 432 (S.D. Ga. 1975); Abernathy v. Dover, 139 Ga. App. 323, 228 S.E.2d 359 (1976); Smith v. Ragan, 140 Ga. App. 33, 230 S.E.2d 89 (1976); Williamson v. Alderman, 148 Ga. App. 297, 251 S.E.2d 153 (1978); Kviten v. Nash, 150 Ga. App. 589, 258 S.E.2d 271 (1979); McMillan v. Day Realty Assocs., 156 Ga. App. 660, 275 S.E.2d 352 (1980), rev'd on other grounds, 247 Ga. 561, 277 S.E.2d 663 (1981).

When it is clear from the evidence that the prosecutor did not have probable cause for prosecution of the plaintiff, a verdict for the defendant is demanded. Harris v. Gray, 58 Ga. App. 689, 199 S.E. 831 (1938); Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940); Gibson's Prods. Co. v. McDaniel, 122 Ga. App. 264, 176 S.E.2d 548 (1970); Ayala v. Sherrer, 135 Ga. App. 431, 218 S.E.2d 84 (1975); Hill v. Trend Carpet, 154 Ga. App. 446, 268 S.E.2d 682 (1980).

In suit for damages for alleged malicious prosecution, evidence will be closely scrutinized, and if it appears from that testimony which is uncontradicted, and which is neither incredible, impossible, or inherently improbable, that there were sufficient facts before the prosecutor in carrying on the prosecution, which would warrant a conclusion by the prosecutor, as a reasonable man, that the plaintiff was guilty of the offense charged, a verdict for the plaintiff will not be al-

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lowed to stand. South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935); Tanner-Brice Co. v. Barrs, 55 Ga. App. 453, 190 S.E. 676 (1937).

Summary judgment improper. — Trial court erred in granting summary judgment to a police officer in an arrestee's action alleging malicious prosecution because: (1) a question of fact remained as to whether the officer had probable cause to charge the arrestee with disorderly conduct; (2) the charge against the arrestee was pending for well over a year before the case was called in magistrate court; and (3) the fact that the party that first brought the charges later moved to dismiss them and that the trial court granted the motion did not alter the conclusion that for purposes of O.C.G.A. § 51-7-43, a "prosecution" occurred. Jones v. Warner, 301 Ga. App. 39, 686 S.E.2d 835 (2009).

Cited in Wilcox v. McKenzie, 75 Ga. 73 (1885); Brookshier v. Williams, 19 Ga. App. 685, 91 S.E. 1056 (1917); Norman v. Young, 35 Ga. App. 221, 132 S.E. 414 (1926); Jones v. Elsas, 46 Ga. App. 34, 166 S.E. 444 (1932); Johns v. Gibson, 60 Ga. App. 585, 4 S.E.2d 480 (1939); Sloan v. Glaze, 72 Ga. App. 415, 33 S.E.2d 846 (1945); Wall v. Spurlock, 85 Ga. App. 379, 69 S.E.2d 379 (1952); Timeplan Loan & Inv. Corp. v. Colbert, 108 Ga. App. 753, 134 S.E.2d 476 (1963); Bradley v. Tenneco Oil Co., 146 Ga. App. 161, 245 S.E.2d 862 (1978); Wilborn v. Elliott, 149 Ga. App. 541, 254 S.E.2d 755 (1979); Great Atl. & Pac. Tea Co. v. Burgess, 157 Ga. App. 632, 278 S.E.2d 174 (1981); Ferguson v. Atlantic Land & Dev. Corp., 248 Ga. 69, 281 S.E.2d 545 (1981); Nunnally v. Revco Disct. Drug Ctrs. of Ga., Inc., 170 Ga. App. 320, 316 S.E.2d 608 (1984); Rice v. Mansour, 176 Ga. App. 617, 337 S.E.2d 25 (1985); Abiodun v. Citizens & S. Nat'l Bank, 192 Ga. App. 159, 384 S.E.2d 248 (1989); White v. Atlanta Hous. Auth., 205 Ga. App. 574, 423 S.E.2d 40 (1992); Wal-Mart Stores, Inc. v. Blackford, 264 Ga. 612, 449 S.E.2d 293 (1994); Fleming v. U-Haul Co., 246 Ga. App. 681, 541 S.E.2d 75 (2000).

Applicability to Specific Cases

Alleged honest mistake not proof in itself of good faith. — The fact that the defendant offered the excuse for suing out the proceedings that it was an honest mistake on its part, and that on discovery of the mistake it dismissed the proceedings, does not show, of itself, that the defendant acted in good faith and for justifiable ends, and does not show the existence of such facts and circumstances, although not amounting to probable cause, as were calculated to produce at the time in the mind of a prudent and reasonable person a well-grounded belief of the plaintiff's liability. Haverty Furn. Co. v. Thompson, 46 Ga. App. 739, 169 S.E. 213 (1933).

Binding over merely prima facie evidence of probable cause. — The fact that the magistrate before whom the accused was brought when the accused was arrested upon a warrant bound the accused over to answer to the charge made in the warrant did not ipso facto establish that probable cause existed for making the affidavit and causing the warrant to be issued, but, at most, was only prima facie evidence, which could be rebutted either by direct or circumstantial evidence. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

Prima facie evidence of intent. — Prima facie evidence that probable cause existed was permissibly based on the magistrate's and trial court's determination of malice. Parks v. Norred & Assocs., 206 Ga. App. 494, 426 S.E.2d 12 (1992).

Corporations acting on advice of attorney. — An action of malicious prosecution will lie against a corporation, but advice of its attorney may justify its action. Stuckey v. Savannah, Fla. & W. Ry., 102 Ga. 782, 29 S.E. 920 (1898).

Criminal prosecution of plaintiff motivated by defendant's desire to injure. — Since the jury was authorized to find from the evidence that the plaintiff had quit working for the defendant once before because the defendant had refused to pay for amounts expended by the plaintiff in the settlement of claims to customers for damaged and lost laundry, and had

returned to the defendant's employ only when persuaded to do so by promises of the defendant that the defendant would pay the plaintiff the sums so expended by the plaintiff, which promises the defendant failed to carry out, and when the jury was authorized to find that the defendant was indebted to the plaintiff at the time the plaintiff left the plaintiff's employment, but nevertheless stated he had rather see the plaintiff in the chain gang than have any money the plaintiff might owe the plaintiff, and was authorized to find that the criminal prosecution had terminated in favor of the plaintiff, the judge directing a verdict of not guilty on motion of the solicitor general, these facts and circumstances were sufficient to satisfy the jury as reasonable men that the defendant had no ground for proceeding against the plaintiff with the criminal prosecution but the defendant's desire to injure the plaintiff, and were sufficient to authorize the jury to find that the prosecution had been carried on by the defendant maliciously and without probable cause. Campbell v. Tatum, 71 Ga. App. 58, 30 S.E.2d 56 (1944).

Directed verdict error when contested issue as to whether prosecutor made good faith allegations. — When the sole contested issue relates to whether or not the communications as made to the magistrate, on the faith of which one's advice was given, were made by the prosecutor in good faith, as the true and correct facts of the transaction, it is error to direct a verdict for the defendant. Martin v. Reitz, 152 Ga. App. 854, 264 S.E.2d 305 (1980).

Evidence that prosecutor acted to harass plaintiff presents jury question. — When the prosecutor wrote the plaintiff in a suit for malicious prosecution that the prosecutor would swear out a warrant "causing a lot of embarrassment and an additional cost" if the plaintiff did not pay the demand, the obvious purpose was the collection of a debt, and was evidence of the want of probable cause which should be submitted to the jury. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

Failure to account for trust money constitutes probable cause. — After the plaintiff was entrusted with money by the defendant for which the plaintiff did not account, which was known to the defendant, this constituted probable cause for the prosecution of the plaintiff for the crime in connection with the stealing and conversion of the money. Harris v. Gray, 58 Ga. App. 689, 199 S.E. 831 (1938).

Evidence sufficient to prosecute for shoplifting. — There was probable cause to prosecute a store customer for the offense of shoplifting after the customer removed a lipstick from its package, abandoned the empty package with the price tag, walked through the store for at least 20 minutes with the lipstick in the customer's hand, failed to return the lipstick to a nearby service desk as the customer left, and instead discarded the tube in a handbag on a rack where no employee would be likely to discover the lipstick and return it to its original package. K-Mart Corp. v. Coker, 261 Ga. 745, 410 S.E.2d 425 (1991).

Probable cause to charge theft by taking. — Even though the plaintiff had been given temporary custody of the defendant employer's truck, the plaintiff's retention of the truck after the plaintiff was ordered to return the truck gave the employer probable cause to charge the plaintiff with theft by taking. Tate v. Holloway, 231 Ga. App. 831, 499 S.E.2d 72 (1998).

Evidence of lack of probable cause. — Evidence that the defendant failed to make reasonable inquiry, failed to disclose material information, and falsified material information was sufficient basis for finding that the defendant instigated the prosecution and that there was no probable cause to arrest the plaintiff. Willis v. Brassell, 220 Ga. App. 348, 469 S.E.2d 733 (1996).

Action arising from arrest of invited guest. — In an action for malicious prosecution, when an employee of an apartment complex had given notice to the plaintiff that the plaintiff was forbidden to enter the property, even though the plaintiff entered as the guest of a tenant, the employee had probable cause to arrest the plaintiff for malicious trespass when the plaintiff deviated from the purpose for

Applicability to Specific Cases (Cont'd)

which the plaintiff was invited and entered upon a portion of the premises unrelated to the invitation. Arbee v. Collins, 219 Ga. App. 63, 463 S.E.2d 922 (1995).

Instituting suit after debt paid. — When the defendant having admitted that the plaintiff had paid the mortgage debt in full, and that it was due to a mistake on its part that the proceedings were instituted against the plaintiff, by means of which it hoped to gain an unfair advantage of the plaintiff, the evidence authorized the jury to infer that the action was begun maliciously, there being a total want of probable cause. Haverty Furn. Co. v. Thompson, 46 Ga. App. 739, 169 S.E. 213 (1933).

When the plaintiff had purchased a rug from the defendant on credit and executed a chattel mortgage to secure the unpaid purchase money, and thereafter paid the chattel mortgage in full, receiving from the defendant its receipt in full; and thereafter the defendant instituted chattel mortgage foreclosure proceedings against the plaintiff in a justice's court, alleging a balance due on the purchase price of the rug and caused a levy on the rug to be made, this made a prima facie case of total want of probable cause. Haverty Furn. Co. v. Thompson, 46 Ga. App. 739, 169 S.E. 213 (1933).

Initiation of criminal action need not be expressly directed by party to be held liable. Martin v. Reitz, 152 Ga. App. 854, 264 S.E.2d 305 (1980).

Distinction must be taken between actually instigating criminal proceedings and merely laying information before law enforcement official without in any way attempting to influence the official's judgment. Martin v. Reitz, 152 Ga. App. 854, 264 S.E.2d 305 (1980).

Knowing use of false testimony creates probable cause for malicious prosecution. — When one causes another to be criminally prosecuted by means of knowingly false testimony for an end personal to oneself (such as revenge, or in an effort to collect an unowed debt), this constitutes probable cause for malicious prosecution. Powell v. Cohen, 116 Ga. App. 48, 156 S.E.2d 495 (1967).

Probable cause based on facts alleged by reliable witnesses. — When two witnesses, whom the testimony did not show were obviously unworthy of belief and whose statements did not appear upon their face to be false, detailed to the prosecutor, after warrant was taken for the plaintiff but before the plaintiff was arrested and required to give bond, facts which, if true, clearly showed the plaintiff guilty of the charge made against the plaintiff such facts alone were sufficient to show probable cause for the prosecution. South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935).

Prosecutor must make fair and complete statement of facts. — In order to later be insulated from liability because of the action of the magistrate in issuing the warrant in a malicious prosecution case, the defendant prosecutor must make a fair, full and complete statement of the facts as they exist. Martin v. Reitz, 152 Ga. App. 854, 264 S.E.2d 305 (1980).

Suit not necessarily without probable cause when fraud adequately alleged. — Since the existence of fraud may be inferred from established facts, a suit to recover the value of merchandise obtained by the defendant from the plaintiff, when it was alleged in the petition that the defendant procured the merchandise fraudulently by falsely representing to the clerks in the plaintiff's store that the defendant had a charge account with the plaintiff, was not necessarily instituted and carried on without probable cause as to the existence of the fraud alleged, although the facts alleged may not in fact have constituted fraud. Harber v. Davison-Paxon Co., 46 Ga. App. 457, 167 S.E. 781 (1933).

Employer's fraud. — While an employee's motion for directed verdict at a related criminal trial was denied, a jury could reasonably find that ruling was obtained by the fraud of the employer and the employee's supervisors who concealed exculpatory evidence resulting in a lack of probable cause for the employee's prosecution could be found. Wolf Camera, Inc. v. Royter, 253 Ga. App. 254, 558 S.E.2d 797 (2002).

Whether prosecutor exercised sufficient diligence to determine if conviction was possible is jury question. — While a prosecutor need not be fully satisfied of the truth of the charge that the prosecutor makes in the prosecutor's affidavit, and the prosecutor is not required to have a sufficient statement of fact to guarantee a conviction, nevertheless when slight diligence would have brought to the prosecutor's attention facts which would have shown conclusively that there could be no conviction, whether or not the prosecutor was guilty of malicious prosecution is a question of fact to be determined by the jury. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

Statements made in good faith to police officers or others investigating criminal activity cannot be the basis of action for malicious prosecution. Moses v. Revco Disct. Drug Ctrs. of Ga., Inc., 164 Ga. App. 73, 296 S.E.2d 384 (1982), overruled on other grounds, 196 Ga. App. 463, 395 S.E.2d 867 (1990).

Detective believed children's testimony over teacher's testimony. — Police detective was entitled to qualified immunity in a teacher's suit against the detective for malicious prosecution after the detective investigated the teacher and arrested the teacher for child molestation following complaints from three 10-year-old students that the teacher was asking to touch the children, touching the children, and asking the children not to say anything about the actions. Marshall v. Browning, 310 Ga. App. 64, 712 S.E.2d 71 (2011).

Trial court's findings upheld on appeal. — A trial court's findings in favor of a customer on the customer's counterclaim for malicious prosecution in a contractor's breach of contract and trover claim were upheld as the evidence established that the contractor had signed a sworn affidavit stating that the customer committed criminal fraud by not paying for an installed fence on the customer's property and refused to pay when the amount due was merely in dispute and the customer had, in fact, tendered a check for a portion of the amount due indicating that the remaining balance was in dispute. The fact that the contractor's execution of those false statements had consequences not intended, namely that the customer spent two nights in jail, was insufficient to absolve the contractor's liability for making the statements. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, § 50 et seq.

C.J.S. — 54 C.J.S., Malicious Prosecution, § 29 et seq.

ALR. — Institution of prosecution on false information without investigation as showing lack of probable cause, 5 ALR 1688.

Malicious prosecution: acting on advice of justice of the peace, magistrate, or layman, 12 ALR 1230.

Acquittal, discharge, or discontinuance as evidence of want of probable cause in action for malicious prosecution, 24 ALR 261; 59 ALR2d 1413.

Malicious prosecution: may prosecutor avoid liability on the ground of probable cause or absence of malice, despite the fact that his motive was to collect debt, enforce claim for damages, or recover property, 139 ALR 1088.

Malicious prosecution: possession of stolen property as probable cause, 172 ALR 1340.

Reliance on advice of prosecution attorney as defense to malicious prosecution action, 10 ALR2d 1215.

Necessity and sufficiency of allegations in complaint for malicious prosecution or tort action analogous thereto that defendant or defendants acted without probable cause, 14 ALR2d 264.

Judgment in prior civil proceedings adverse to instant plaintiff in malicious prosecution as evidence of probable cause, 58 ALR2d 1422.

Malicious prosecution: commitment, binding over, or holding for trial by examining magistrate or commissioner as evidence of probable cause, 68 ALR2d 1168.

Conclusiveness, as evidence of probable cause in malicious prosecution action, of

conviction as affected by the fact that it was reversed or set aside, 86 ALR2d 1090.

Probable cause or want thereof, in malicious prosecution action, as question of law for court or of fact for jury, 87 ALR2d 183.

Malicious prosecution: effect of grand jury indictment on issue of probable cause, 28 ALR3d 748.

Confession as defense in action for malicious prosecution, 66 ALR3d 95.

Malicious prosecution: defense of acting on advice of justice of the peace, magistrate, or lay person, 48 ALR4th 250.

51-7-44. Inference of malice from lack of probable cause; rebuttal of inference.

A total lack of probable cause is a circumstance from which malice may be inferred; however, the inference may be rebutted by proof. (Orig. Code 1863, § 2929; Code 1868, § 2936; Code 1873, § 2987; Code 1882, § 2987; Civil Code 1895, § 3848; Civil Code 1910, § 4444; Code 1933, § 105-804.)

JUDICIAL DECISIONS

Applicability to actions for malicious use of civil process. — The provisions of this section, applicable to an action for malicious prosecution, also provide appropriate guidelines for determining the existence of malice and want of probable cause in an action for malicious use of civil process. American Plan Corp. v. Beckham, 125 Ga. App. 416, 188 S.E.2d 151 (1972).

The "malice" contemplated by law in an action for malicious prosecution is the same as in an action for malicious arrest. Darnell v. Shirley, 31 Ga. App. 764, 122 S.E. 252 (1924).

Malice may be inferred from want of probable cause. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

Although a jury cannot infer a lack of probable cause from malice, a jury is authorized to infer malice from a lack of probable cause. Kviten v. Nash, 150 Ga. App. 589, 258 S.E.2d 271 (1979).

Inasmuch as the jury was authorized to find a total want of probable cause for the prosecution of the plaintiff, the jury could properly infer from the want of probable cause the malice necessary to support the judgment for malicious prosecution. Great Atl. & Pac. Tea Co. v. Burgess, 157 Ga. App. 632, 278 S.E.2d 174 (1981).

Because the preliminary hearing dismissed the plaintiff's charge, the jury could properly infer malice. K-Mart Corp. v. Lovett, 241 Ga. App. 26, 525 S.E.2d 751 (1999).

In an action regarding the malicious prosecution of an employee for theft, the jury could infer malice from the lack of probable cause for the employee's prosecution shown by the employer's and supervisors' concealment of exculpatory evidence. Wolf Camera, Inc. v. Royter, 253 Ga. App. 254, 558 S.E.2d 797 (2002).

While want of probable cause is sometimes circumstance from which malice may be inferred, this is so only in cases when there is total want of such cause. McMillan v. Day Realty Assocs., 156 Ga. App. 660, 275 S.E.2d 352 (1980), rev'd on other grounds, 247 Ga. 561, 277 S.E.2d 663 (1981).

Lack of probable cause not inferable from malice. — Malice may be inferred from a total want of probable cause, but the lack of probable cause cannot be inferred from the existence of the most express malice. Hearn v. Batchelor, 47 Ga. App. 213, 170 S.E. 203 (1933); Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940); American Plan Corp. v. Beckham, 125 Ga. App. 416, 188 S.E.2d 151 (1972); Wilborn v. Elliott, 149 Ga. App. 541, 254 S.E.2d 755 (1979).

Malice may consist of general disregard of right and consideration of mankind, directed by chance against the

individual injured. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

Want of probable cause is question for jury, under direction of court. American Plan Corp. v. Beckham, 125 Ga. App. 416, 188 S.E.2d 151 (1972).

Question of probable cause is mixed question of law and fact. Whether the circumstances alleged to show probable cause existed is a matter of fact, to be determined by the jury; but whether they amount to probable cause is a question of law for the court. American Plan Corp. v. Beckham, 125 Ga. App. 416, 188 S.E.2d 151 (1972).

Probable cause defined. — Probable cause is totally absent in a malicious prosecution or false arrest action when the circumstances would satisfy a reasonable person that the accuser had no ground for proceeding except a desire to injure the accused. Lolmaugh v. T.O.C. Retail, Inc., 210 Ga. App. 605, 436 S.E.2d 708 (1993).

Probable cause, settlement of action, bars claim. — A corporation's criminal prosecution of a former employee could not provide a basis for the employee's latter claim of malicious prosecution and intentional infliction of emotional distress, given a magistrate's finding of probable cause and a settlement by the employee of the claim. Biven Software, Inc. v. Newman, 222 Ga. App. 112, 473 S.E.2d 527 (1996).

Some evidence of possible guilt negates finding of malice. — When there is no evidence of malice other than such inference as may be drawn from proof of the want of probable cause, and that proof shows some circumstances pointing to the guilt of the accused, although insufficient to exclude every other reasonable hypothesis, the essential ingredient of malice is not so established as to entitle the plaintiff in an action for malicious prosecution to recover. McMillan v. Day Realty Assocs., 156 Ga. App. 660, 275 S.E.2d 352 (1980), rev'd on other grounds, 247 Ga. 561, 277 S.E.2d 663 (1981).

Admission of evidence of sufficient funds to show malice in prosecution for passing bad checks. — When one who had sufficient funds on deposit in a bank to pay a check drawn against the account if presented promptly, was prosecuted for the offense of violating the bad check laws and acquitted, and then brings an action against the prosecutor for malicious prosecution, and offers in evidence a check, proffered in settlement of the civil liability after the prosecution was begun but before it ended, such check is admissible in evidence for the purpose of throwing light on the question of whether or not there was malice on the part of the prosecutor, for whatever probative value the jury might see fit to give it. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

Alleged honest mistake not proof in itself of good faith. — The fact that the defendant offered the excuse for suing out the proceedings that it was an honest mistake on its part, and that on discovery of the mistake it dismissed the proceedings, does not show, of itself, that the defendant acted in good faith and for justifiable ends, and does not show the existence of such facts and circumstances, although not amounting to probable cause, as were calculated to produce at the time in the mind of a prudent and reasonable person a well-grounded belief of the plaintiff's liability. Haverty Furn. Co. v. Thompson, 46 Ga. App. 739, 169 S.E. 213 (1933).

Directed verdict proper when evidence indicates no malice. — When there is no evidence whatever of any fraudulent conduct or improper motive on the part of the prosecutor, or of any other person dealing with the criminal prosecution, and it appears from the uncontradicted evidence that the accused was bound over by the magistrates who presided at the preliminary hearing on the warrant, that the accused was subsequently indicted by the grand jury investigating it, and that there were some slight circumstances pointing to the accused's guilt, though not enough to exclude every other reasonable hypothesis, a finding that the prosecution was malicious is without any evidence to support it; in such a case the direction of a verdict for the defendant would be in order. Brown v. Scott, 151 Ga. App. 366, 259 S.E.2d 642 (1979).

Instituting suit after debt paid. — When the defendant having admitted that

the plaintiff had paid the mortgage debt in full, and that it was due to a mistake on the defendant's part that the proceedings were instituted against the plaintiff, by means of which it hoped to gain an unfair advantage of the plaintiff, the evidence authorized the jury to infer that the action was begun maliciously, there being a total want of probable cause. Haverty Furn. Co. v. Thompson, 46 Ga. App. 739, 169 S.E. 213 (1933).

After the plaintiff had purchased a rug from the defendant on credit and executed a chattel mortgage to secure the unpaid purchase money, and thereafter paid the chattel mortgage in full, receiving from the defendant its receipt in full; and thereafter the defendant instituted the chattel mortgage foreclosure proceedings against the plaintiff in a justice's court, alleging a balance due on the purchase price of the rug and caused a levy on the rug to be made, this made a prima facie case of total want of probable cause. Haverty Furn. Co. v. Thompson, 46 Ga. App. 739, 169 S.E. 213 (1933).

Prosecutor's knowledge that defendant is not guilty. — The fact that the prosecutor continued with the prosecution after the prosecutor knew that the accused was not guilty of the offense charged, and the prosecutor's other conduct, raised an inference of fact that the prosecutor acted with a malicious design. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

Whether prosecutor exercised sufficient diligence to determine if conviction was possible is jury question. — While a prosecutor need not be fully satisfied of the truth of the charge that the prosecutor makes in the prosectuor's affidavit, and the prosecutor is not required to have a sufficient statement of fact to guarantee a conviction, nevertheless when slight diligence would have brought to the prosecutor's attention facts which would have shown conclusively that there could be no conviction, whether or not the prosecutor was guilty of malicious prosecution is a question of fact to be determined by the jury. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

When the prosecutor by the use of slight diligence could have known there was no probable cause for making an affidavit forming the basis of a criminal prosecution, circumstances raised a question of fact to be passed upon by the jury, since malice may be inferred from the facts and circumstances of a case. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

When announced object of criminal prosecution is to embarrass accused and put the accused to additional cost if certain payment is not made, malice may be inferred, and when there is a want of probable cause of the guilt of the accused, such object within itself raised a question of fact to be passed upon by the jury; it may be inferred from this effort to collect a debt that the criminal prosecution was maliciously carried on, and a jury would be authorized so to find. Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947).

Agent failed to conduct reasonable inquiry. — In a malicious prosecution case brought against a medical professional company and the company's owning doctor by the company's former office manager and a former part-time worker after those former employees were charged with theft and fraud but the charges were dismissed, the trial court erred by granting the company summary judgment since there existed genuine issues of material fact as to whether a new chief operating officer hired for the company, and an agent for the company, had misrepresented the officer's knowledge that the part-time worker had been re-hired by the company to work on an office manual and paid accordingly. However, there existed no evidence that the owning doctor made any knowing misrepresentations to the investigating detective since the owning doctor had no knowledge that the part-time worker had been rehired at any time. Barnette v. Coastal Hematology & Oncology, P. C., 294 Ga. App. 733, 670 S.E.2d 217 (2008).

Cited in Johns v. Gibson, 60 Ga. App. 585, 4 S.E.2d 480 (1939); Wall v. Spurlock, 85 Ga. App. 379, 69 S.E.2d 379 (1952); Progressive Life Ins. Co. v. Doster, 98 Ga. App. 641, 106 S.E.2d 307 (1958); Crawford v. Theo, 112 Ga. App. 83, 143 S.E.2d 750

(1965); Baird v. Collier, 123 Ga. App. 276, 180 S.E.2d 577 (1971); Gaddy v. Gilbert, 140 Ga. App. 508, 231 S.E.2d 403 (1976); McMillan v. Day Realty Assocs., 159 Ga. App. 366, 283 S.E.2d 298 (1981); Medoc Corp. v. Keel, 166 Ga. App. 615, 305 S.E.2d 134 (1983); Rowe v. CSX Transp., Inc., 219 Ga. App. 380, 465 S.E.2d 476 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, § 45 et seq.

C.J.S. — 54 C.J.S., Malicious Prosecution, § 45 et seq.

ALR. — Actual belief on part of prosecutor as element of probable cause in action for malicious prosecution, 65 ALR 225.

51-7-45. Evidence in determination of probable cause.

For consideration of the existence of probable cause, the evidence given during the criminal prosecution by the person accused of the malicious prosecution may be submitted to the jury by either party. The credibility of such evidence shall be determined by the jury. (Orig. Code 1863, § 2926; Code 1868, § 2933; Code 1873, § 2984; Code 1882, § 2984; Civil Code 1895, § 3845; Civil Code 1910, § 4441; Code 1933, § 105-803.)

JUDICIAL DECISIONS

In action for damages for malicious prosecution, the prosecutor may show that the prosecutor really acted in good faith in instituting and carrying on the prosecution, and that the prosecutor believed, although mistakenly, that the accused was really guilty. Good faith may be shown by the circumstances of the transaction, and want of probable cause exists when the circumstances are such as to satisfy a reasonable man that the prosecutor had no ground for proceeding but for one's desire to injure the accused. Hearn v. Batchelor, 47 Ga. App. 213, 170 S.E. 203 (1933).

In suit for damages for alleged malicious prosecution, evidence will be closely scrutinized, and if it appears from that testimony which is uncontradicted, and which is neither incredible, impossible, or inherently improbable, that there were sufficient facts before the prosecutor in carrying on the prosecution, which would warrant a conclusion by the prosecutor, as a reasonable man, that the plaintiff was guilty of the offense charged, a verdict for the plaintiff will not be allowed to stand. South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935).

Advice of solicitor general (now attorney general) is no defense to suit for malicious prosecution unless the advice is given after a full, fair, and complete statement by the prosecutor of all the facts known to the prosecutor. Hearn v. Batchelor, 47 Ga. App. 213, 170 S.E. 203 (1933).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, § 139 et seq.

C.J.S. — 54 C.J.S., Malicious Prosecution, § 29 et seq.

ALR. — Admissibility in action for malicious prosecution of zeal and activity by defendant in pushing prosecution, 49 ALR 265.

Status, character, competency, or personal interest of attorney as affecting rule

regarding advice of counsel in action for malicious prosecution, 81 ALR 516.

Malicious prosecution: possession of stolen property as probable cause, 172 ALR 1340.

Probable cause or want thereof, in malicious prosecution action, as question of law for court or of fact for jury, 87 ALR2d 183.

51-7-46. Immunity of grand jurors from action for malicious prosecution; liability of person instigating presentment.

(a) No member of a grand jury shall be subject to an action for malicious prosecution based upon a presentment made by the grand jury.

(b) If a presentment is made at the instigation of a third person, from malice on his part and without probable cause, he shall be liable to an action for malicious prosecution just as if he were named as prosecutor. (Orig. Code 1863, § 2927; Code 1868, § 2934; Code 1873, § 2985; Code 1882, § 2985; Civil Code 1895, § 3846; Civil Code 1910, § 4442; Code 1933, § 105-807.)

Cross references. — Grand juries generally, § 15-12-60 et seq.

JUDICIAL DECISIONS

Grand jury immune from malicious prosecution action. — The grand jury as a body and its members individually, being an arm of the law and a part of the machinery of government, are not subject to question in any court for its or their action in the performance of grand jury duties, and no rule of law of which the court has any knowledge is better settled than this. Cook v. Sikes, 210 Ga. 722, 82 S.E.2d 641 (1954).

As to grand jury, no writ of prohibition will lie since it is not an inferior court. Almand v. Brock, 227 Ga. 586, 182 S.E.2d 97 (1971).

Defendant officer did not instigate prosecution of plaintiff. — Because the undisputed facts of the second officer's limited participation as a backup officer did not amount to the "instigation" that would cause the second officer to be named as a "prosecutor" in a claim of malicious prosecution under Georgia law, the malicious prosecution claim against the second officer was required to be dismissed. Proescher v. Bell, 966 F. Supp. 2d 1350 (N.D. Ga. Aug. 21, 2013).

Cited in Thornton v. Marshall, 92 Ga. 548, 17 S.E. 926 (1893).

RESEARCH REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d, Grand Jury, § 38.

C.J.S. — 3B C.J.S., Grand Juries, § 224.

ALR. — Immunity of prosecuting officer from action for malicious prosecution, 34 ALR 1504; 56 ALR 1255; 118 ALR 1450.

Liability of attorney, acting for client, for malicious prosecution, 46 ALR4th 249.

51-7-47. Measure of damages.

Recovery in actions for malicious prosecution shall not be confined to the actual damage sustained by the accused but shall be regulated by the circumstances of each case. (Orig. Code 1863, § 2928; Code 1868, § 2935; Code 1873, § 2986; Code 1882, § 2986; Civil Code 1895, § 3847; Civil Code 1910, § 4443; Code 1933, § 105-808.)

JUDICIAL DECISIONS

In action for malicious prosecution, the plaintiff is not restricted to actual damages but may recover such damages as are authorized under all the circumstances in the case. Wilborn v. Elliott, 149 Ga. App. 541, 254 S.E.2d 755 (1979); Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

A criminal prosecution, maliciously carried on without any probable cause whereby damage ensues to the person prosecuted shall give the person a cause of action; in such cases the recovery shall not be confined to the actual damage sustained but shall be regulated by the circumstances of each case. Simmons v. Edge, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

Plaintiff may introduce matters of aggravation. Rigdon v. Jordan & Stewart, 81 Ga. 668, 7 S.E. 857 (1888).

Jury may weigh worldly circumstances. — It is the general rule that evidence of the parties' worldly circumstances is inadmissible. The reverse is true, however, in malicious prosecution cases, and the jury is constrained, in determining damages, to weigh worldly circumstances along with other relevant considerations. Atlantic Zayre, Inc. v. Meeks, 194 Ga. App. 267, 390 S.E.2d 398 (1990).

In case of malicious prosecution, there is no exact measure of damages except enlightened conscience of impartial jurors, and that the worldly circumstances of the parties and all the attendant facts should be weighed, except that if there be proof of expenses or loss of time the court should discriminate between the two types of damages and should not leave the entire measure of damages to the unlimited discretion of the jury. Simmons v. Edge, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

The jury should weigh the worldly circumstances of the parties, all the attendant facts, and the proof of expenses, loss of time, and other damages. Medoc Corp. v. Keel, 166 Ga. App. 615, 305 S.E.2d 134 (1983).

The measure of damages in malicious prosecution cases is the enlightened conscience of impartial jurors. Atlantic Zayre, Inc. v. Meeks, 194 Ga. App. 267, 390 S.E.2d 398 (1990).

Attorney fees, bail bonds, and loss of time are special damages which may be recovered in action for malicious prosecution. Segars v. Cornwell, 128 Ga. App. 245, 196 S.E.2d 341 (1973).

Attorney fees, bail bonds, and loss of time arising from the defense of the criminal prosecution are distinguishable from the expenses of litigation arising from the subsequent tort action, and represent a proper element of actual damages. Rae v. Griffin, 160 Ga. App. 96, 286 S.E.2d 64 (1981).

Malicious prosecution verdict allowing the expense of defending the criminal charge is authorized, assuming evidence on this issue was received by the jury without objection. Rae v. Griffin, 160 Ga. App. 96, 286 S.E.2d 64 (1981).

Attorney fees paid to defend against the criminal prosecution instigated constitute recoverable damages in an action for malicious prosecution. Medoc Corp. v. Keel, 166 Ga. App. 615, 305 S.E.2d 134 (1983).

Evidence of pecuniary circumstances is admissible in actions for malicious prosecution. Coleman v. Allen, 79 Ga. 637, 5 S.E. 204 (1887); Simmons v. Edge, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

Vindictive or punitive damages are only allowed when the act of the defen-

dant was influenced by malicious motives and without probable cause. Dixie Broadcasting Corp. v. Rivers, 209 Ga. 98, 70 S.E.2d 734 (1952), later appeal, 88 Ga. App. 131, 76 S.E.2d 229 (1953); Atlantic Zayre, Inc. v. Meeks, 194 Ga. App. 267, 390 S.E.2d 398 (1990).

Punitive damages instruction proper. — The trial court did not err in instructing the jury on punitive damages when there was sufficient evidence from which rational jurors could infer both lack of probable cause and malice in light of the defendant's failure to verify the substance of the defendant's claim (property damage) before swearing out warrants. Branson v. Donaldson, 206 Ga. App. 723, 426 S.E.2d 218 (1992).

Jury instructions on damages. — It was not harmful error in a suit for malicious trespass (by virtue of a levy under an execution against another) in charging to the jury the language of former Code 1933, § 105-808 (see now O.C.G.A. § 51-7-47), although it relates to cases of malicious prosecution, since the rule as here generally stated was substantially similar to that of former Code 1933, § 105-2002 (see now O.C.G.A. § 51-12-5), relating to exemplary damages in cases of aggravating circumstances, which was applicable to the case, and which the judge also charged. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939).

In a suit for malicious prosecution, a charge that "reasonable counsel fees and expenses of defending the criminal case would be legitimate items on which damages could be awarded if the plaintiff is entitled to recover" was not erroneous. Sloan v. Glaze, 72 Ga. App. 415, 33 S.E.2d 846 (1945).

Appeals court review of damage award limited in scope. — An appeals court has no power to review and set aside the finding of the jury as to damages because their verdict is claimed to be excessive, unless it appears that the verdict was due to prejudice or bias, or was influenced by corrupt means. Kviten v. Nash, 150 Ga. App. 589, 258 S.E.2d 271 (1979).

Cited in Stewart v. Mulligan, 11 Ga. App. 660, 75 S.E. 991 (1912); Auld v. Colonial Stores, Inc., 76 Ga. App. 329, 45 S.E.2d 827 (1947); Progressive Life Ins. Co. v. Doster, 98 Ga. App. 641, 106 S.E.2d 307 (1958); Lovinger v. Pfeffer, 107 Ga. App. 636, 131 S.E.2d 137 (1963); Gibson's Prods., Inc. v. Edwards, 146 Ga. App. 678, 247 S.E.2d 183 (1978); Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981); Atlantic Zayre, Inc. v. Williams, 172 Ga. App. 43, 322 S.E.2d 83 (1984); Munford, Inc. v. Anglin, 174 Ga. App. 290, 329 S.E.2d 526 (1985); Willis v. Brassell, 220 Ga. App. 348, 469 S.E.2d 733 (1996); K-Mart Corp. v. Lovett, 241 Ga. App. 26, 525 S.E.2d 751 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, § 109 et seq.

C.J.S. — 54 C.J.S., Malicious Prosecution, §§ 148 et seq.

ALR. — Expense of litigation, other than taxable costs, as basis of separate action against party to former suit, 39 ALR 1218.

Attorneys' fees as element of damages in action for false imprisonment or arrest, or for malicious prosecution, 21 ALR3d 1068.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 35 ALR4th 441.

Excessiveness or inadequacy of compensatory damages for malicious prosecution, 50 ALR4th 843.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 ALR5th 195.

ARTICLE 4

DETENTION OR ARREST ON SUSPICION OF SHOPLIFTING OR FILM PIRACY

51-7-60. Preclusion of recovery for detention or arrest of person suspected of shoplifting under certain circumstances.

Whenever the owner or operator of a mercantile establishment or any agent or employee of the owner or operator detains, arrests, or causes to be detained or arrested any person reasonably thought to be engaged in shoplifting or refund fraud and, as a result of the detention or arrest, the person so detained or arrested brings an action for false arrest or false imprisonment against the owner, operator, agent, or employee, no recovery shall be had by the plaintiff in such action where it is established by competent evidence:

(1) That the plaintiff had so conducted himself or herself or behaved in such manner as to cause a person of reasonable prudence to believe that the plaintiff, at or immediately prior to the time of the detention or arrest, was committing the offense of shoplifting, as defined by Code Section 16-8-14, or refund fraud as defined in Code Section 16-8-14; or

(2) That the manner of the detention or arrest and the length of time during which such plaintiff was detained was under all the circumstances reasonable. (Ga. L. 1958, p. 693, § 1; Ga. L. 2014, p. 404, § 2-4/SB 382.)

Cross references. — Shoplifting, § 16-8-14.

Editor's notes. — Ga. L. 2014, p. 404, § 3-1/SB 382, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2014, and shall apply to all conduct occurring on or after such date."

Law reviews. — For article surveying torts law, see 34 Mercer L. Rev. 271 (1982). For annual survey on law of torts, see 42 Mercer L. Rev. 431 (1990).

JUDICIAL DECISIONS

Legislative intent. — The General Assembly has declared it the public policy of this state that there should be no recovery in an action for false arrest or false imprisonment arising out of the detention or arrest of one who the owner or operator (or their agents or employees) might, by reason of the owner's or operator's conduct or behavior, have had reasonable cause to believe was shoplifting. Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967).

The policy of this state that there can be no recovery in an action for false arrest or false imprisonment arising out of the detention, with reasonable cause, of one suspected of shoplifting was applicable in a malicious prosecution action for an alleged shoplifting. Turner v. Bogle, 115 Ga. App. 710, 155 S.E.2d 667 (1967).

The General Assembly provides a reasonable course of conduct under O.C.G.A. § 51-7-60 which a merchant may follow in affording protection to the merchant's displayed merchandise without incurring an unreasonable exposure to tort liability in

doing so. Swift v. S.S. Kresge Co., 159 Ga. App. 571, 284 S.E.2d 74 (1981).

It was the intention of the legislature that the provisions now codified as paragraphs (1) and (2) be read in the conjunctive, notwithstanding the use of the disjunctive in O.C.G.A. § 51-7-60 because the code revision committee's substitution of the word "or" for "or provided" between the paragraphs tends to give the statute a potentially irrational effect. K Mart Corp. v. Adamson, 192 Ga. App. 884, 386 S.E.2d 680 (1989).

Applicability of section. — O.C.G.A. § 51-7-60 did not apply when the appellants were not suspected of shoplifting but rather of passing counterfeit currency. Taylor v. Super Disct. Mkt., Inc., 212 Ga. App. 155, 441 S.E.2d 433 (1994).

Strict construction. — O.C.G.A. § 51-7-60 makes no reference to the detention of people for reasons other than suspected shoplifting, and being in derogation of common law, it must be strictly construed. Hampton v. Norred & Assocs., 216 Ga. App. 367, 454 S.E.2d 222 (1995).

Tortious misconduct claim not necessarily barred by section. — O.C.G.A. § 51-7-60 insulates a merchant and the merchant's agents from liability for words spoken in the course of an arrest or detention only if there was a basis for a reasonable belief that a person was shoplifting: the provision did not necessarily bar a claim of tortious misconduct. Simmons v. Kroger Co., 218 Ga. App. 721, 463 S.E.2d 159 (1995), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d 7 (2008).

Merchant and agents are protected against liability if their conduct springs from a reasonable belief that the party detained or arrested was engaged in shoplifting in merchant's store. Swift v. S.S. Kresge Co., 159 Ga. App. 571, 284 S.E.2d 74 (1981).

No liability can be affixed for the making of statements or assertions by a merchant or the merchant's agents under the theory of tortious misconduct if there was basis for a reasonable belief that the detainee was in fact engaged in shoplifting in the store. Swift v. S.S. Kresge Co., 159 Ga. App. 571, 284 S.E.2d 74 (1981).

Manner of detention. — When the plaintiff put forth sufficient evidence to challenge the reasonableness of the manner of the plaintiff's detention, i.e., that the plaintiff was subjected to "gratuitous and unnecessary indignities," and inasmuch as the reasonableness of the length of detention is impacted by the manner of detention, there was an issue of fact as to the reasonableness of the length of the plaintiff's detention sufficient to deny the defendant's motion for summary judgment. Jackson v. KMart Corp., 851 F. Supp. 469 (M.D. Ga. 1994).

"Reasonableness" of detention not demonstrated by compliance with private guidelines. — Compliance with one's own private guidelines governing the detention of suspected shoplifters would not demonstrate that the arrest or detention was "reasonable," nor would the failure to adhere to such guidelines demonstrate "unreasonableness" in and of itself. Luckie v. Piggly-Wiggly Southern, Inc., 173 Ga. App. 177, 325 S.E.2d 844 (1984).

Employee's failure to adhere to private guidelines did not necessarily demonstrate unreasonableness in the detention of a suspected shoplifter. Grand Union Co. v. Miller, 232 Ga. App. 857, 503 S.E.2d 49 (1998), aff'd in part and rev'd in part, 270 Ga. 537, 512 S.E.2d 887 (1999).

Momentary pause in progress of patron through a check out line was not too inconsequential to constitute "detention" or "imprisonment" for purposes of the patron's false imprisonment claim. Williams v. Food Lion, Inc., 213 Ga. App. 865, 446 S.E.2d 221 (1994).

Evidence of shoplifting. — When the plaintiff carried a tape measure the same size, shape and color of a roll of price tags used by shoplifters to alter prices on goods, the jury would have been authorized to find that the plaintiff's conduct was such as to excite a reasonably prudent man having knowledge of pricing tags and their use by shoplifters. S.S. Kresge Co. v. Carty, 120 Ga. App. 170, 169 S.E.2d 735 (1969).

When the indictment of the plaintiff by the grand jury on charges of theft by deception was based on the very same facts giving rise to the plaintiff's detention by the defendant, there was a presumption that the plaintiff acted in a manner

such that a reasonable person would have believed the plaintiff was shoplifting. Jackson v. KMart Corp., 851 F. Supp. 469 (M.D. Ga. 1994).

Magistrate's finding of probable cause was sufficient to justify the defendant store's belief that the plaintiff was shoplifting and, further, the plaintiff's entry into a pretrial diversion program and acceptance of community service penalties established that the plaintiff was not one "who is in fact innocent of any such misconduct." Gerry v. K-Mart, 222 Ga. App. 364, 474 S.E.2d 260 (1996).

Determination of whether defendant acted with reasonable prudence or whether manner and length of detention were reasonable were matters for jury, not the court, to determine. United States Shoe Corp. v. Jones, 149 Ga. App. 595, 255 S.E.2d 73 (1979); Crowe v. J.C. Penney, Inc., 177 Ga. App. 586, 340 S.E.2d 192 (1986); Bi-Lo, Inc. v. McConnell, 199 Ga. App. 154, 404 S.E.2d 327 (1991).

When the manager admitted that the manager made no attempt to verify the plaintiff's explanation of the plaintiff's actions, the jury was justified in its determination that the supermarket's manager acted unreasonably by allowing the plaintiff to remain handcuffed and immobilized in the back room of the store and by initiating prosecution of the shoplifting charge for which the plaintiff was never convicted. Colonial Stores, Inc. v. Fishel, 160 Ga. App. 739, 288 S.E.2d 21 (1981).

Unsolicited statements made by two of the plaintiff's co-workers, reporting that the plaintiff was periodically purloining store goods, furnished probable cause for the defendant store owner to investigate and reasonably detain the plaintiff for the purpose of questioning the plaintiff about possible theft. Crowe v. J.C. Penney, Inc., 177 Ga. App. 586, 340 S.E.2d 192 (1986).

Determination of whether defendant through its agents acted with reasonable prudence is for jury, and will not be controlled by this court. Gibson's Prods., Inc. v. Edwards, 146 Ga. App. 678, 247 S.E.2d 183 (1978).

Reasonable cause to believe customer had not paid. — Food store manager had cause as a reasonably prudent person to believe that the customer had not paid for the Brunswick stew, since the customer had gone twice to the deli in the space of a few minutes, the customer had made three shopping forays in approximately twenty minutes, and neither the deli clerk nor the manager saw the customer check out the first two times. Brown v. Winn-Dixie Atlanta, Inc., 194 Ga. App. 130, 389 S.E.2d 530 (1989).

Store patron's voluntary surrender of freedom. — Grocery store was not liable for false imprisonment when a patron by the patron's own free choice surrendered the patron's freedom of motion by remaining in the checking aisle to clear oneself of suspicion. Williams v. Food Lion, Inc., 213 Ga. App. 865, 446 S.E.2d 221 (1994).

False imprisonment of child accused of shoplifting. — Summary judgment was properly denied on a parent's false imprisonment claim under O.C.G.A. § 51-7-20 arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because whether the child's detention was justified by the employees' reasonable belief that the child was shoplifting under O.C.G.A. § 51-7-60 was a jury question; the actions relied upon by the employees were, for the most part, not the result of the child's suspicious actions or behavior, and whether the employees acted with reasonable prudence was a matter for the jury to decide. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Detention not shown. — When the plaintiff was observed by several different store employees who characterized the plaintiff's behavior as "suspicious" and was later followed to a parking lot where the plaintiff was asked by an assistant store manager if the plaintiff had anything belonging to the store, there was no detention which could support the plaintiff's action for false imprisonment. Lord v. K-Mart Corp., 177 Ga. App. 651, 340 S.E.2d 225 (1986).

Since the plaintiff was not touched or physically detained but was merely asked a question, and the plaintiff's response to that question provoked no further action

on the defendant's part, no detention occurred. Fields v. Kroger Co., 202 Ga. App. 475, 414 S.E.2d 703 (1992).

Summary judgment inappropriate. — Summary judgment in favor of the merchant was inappropriate after the plaintiffs testified that a security employee detained the plaintiffs for an hour to an hour and a half and verbally and physically abused the plaintiffs, thereby raising a triable issue of fact. Brown v. Super Disc. Mkts., Inc., 223 Ga. App. 174, 477 S.E.2d 839 (1996).

Adjudication of guilt protects from liability. — Adjudication of guilt of shoplifting entered by a juvenile court protected the defendant from liability for false imprisonment since the provision in O.C.G.A. § 51-7-60 that no recovery shall be had in an action for false arrest or false imprisonment when it is established by competent evidence: "(1) [T]hat the plaintiff, at or immediately prior to the time of the detention or arrest, was committing the offense of shoplifting," is merely a restatement of the probable cause standard. J.C. Penney Co. v. Miller, 182 Ga. App. 64, 354 S.E.2d 682 (1987).

Cited in Dixon v. S.S. Kresge, Inc., 119 Ga. App. 776, 169 S.E.2d 189 (1969); Godwin v. Gibson Prods. Co., 121 Ga. App. 59, 172 S.E.2d 467 (1970); Ross v. Rich's, Inc., 129 Ga. App. 716, 201 S.E.2d 159 (1973); Tomblin v. S.S. Kresge Co., 132 Ga. App. 212, 207 S.E.2d 693 (1974); Cash v. State, 136 Ga. App. 149, 221 S.E.2d 63 (1975); Miller v. Roses' Stores, Inc., 151 Ga. App. 158, 259 S.E.2d 162 (1979); Arnold v. Eckerd Drugs of Ga., Inc., 183 Ga. App. 211, 358 S.E.2d 632 (1987); Winn-Dixie Stores, Inc. v. Nichols, 205 Ga. App. 308, 422 S.E.2d 209 (1992); Mitchell v. Walmart Stores, Inc., 223 Ga. App. 328, 477 S.E.2d 631 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Malicious Prosecution, § 57.

ALR. — Admissibility of defendant's rules or instructions for dealing with shoplifters, in action for false imprisonment or malicious prosecution, 31 ALR3d 705.

Construction and effect, in false imprisonment action, of statute providing for detention of suspected shoplifters, 47 ALR3d 998.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Retailer's surveillance of fitting or dressing rooms as invasion of privacy, 38 ALR4th 954.

51-7-61. Activation of antishoplifting device as constituting probable cause for detention; notice of such device to be posted.

(a) As used in this Code section, the term "antishoplifting or inventory control device" means a mechanism or other device designed and operated for the purpose of detecting the removal of specially marked or tagged merchandise from a mercantile establishment or similar enclosure or from a protected area within such an enclosure.

(b) In the case of a mercantile establishment utilizing an antishoplifting or inventory control device, the automatic activation of the device as a result of a person exiting the establishment or a protected area within the establishment shall constitute reasonable cause for the detention of the person so exiting by the owner or operator of the establishment or by an agent or employee of the owner or operator. Each detention shall be made only in a reasonable manner and only for

a reasonable period of time sufficient for any inquiry into the circumstances surrounding the activation of the device.

(c) This Code section shall apply only with respect to mercantile establishments in which a notice has been posted in a clear and visible manner advising patrons of the establishment that an antishoplifting or inventory control device is being utilized in the establishment. (Ga. L. 1979, p. 762, § 1.)

Cross references. — Shoplifting, § 16-8-14.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, a colon was deleted following "the term" in subsection (a).

JUDICIAL DECISIONS

Failure by employee to deactivate antishoplifting tag. — It makes no difference to "reasonable cause," as used in subsection (b) of O.C.G.A. § 51-7-61, whether or not negligence on the part of a store employee in failing to deactivate a special tag on merchandise set off an antishoplifting device. What matters is whether the method and time of detention were reasonable within the statutory limitations. Estes v. Jack Eckerd Corp., 184 Ga. App. 98, 360 S.E.2d 649 (1987); Mitchell v. Walmart Stores, Inc., 223 Ga. App. 328, 477 S.E.2d 631 (1996).

Observations of store manager constitute visual "inquiry." — When store manager, after the antishoplifting alarm had sounded, observed the customer remove from the customer's pocket and then place on a rack an item of merchandise for which the plaintiff had not paid and with which the plaintiff had attempted to leave the store, such observations constituted a visual "inquiry into the circumstances surrounding the activation" of the antishoplifting device. Arnold v. Eckerd Drugs of Ga., Inc., 183 Ga. App. 211, 358 S.E.2d 632 (1987).

RESEARCH REFERENCES

ALR. — Admissibility of defendant's rules or instructions for dealing with shoplifters, in action for false imprisonment or malicious prosecution, 31 ALR3d 705.

51-7-62. Actions for false arrest and false imprisonment for individuals suspected of film piracy.

Whenever the owner, operator, or lessee of a motion picture exhibition facility or any agent or employee of the owner, operator, or lessee detains, arrests, or causes to be detained or arrested any person reasonably thought to be engaged in film piracy in violation of Code Section 16-8-62 and, as a result of the detention or arrest, the person so detained or arrested brings an action for false arrest or false imprisonment against the owner, operator, lessee, agent, or employee, no recovery shall be had by the plaintiff in such action where it is established by competent evidence:

(1) That the plaintiff had so conducted himself or herself or behaved in such manner as to cause a person of reasonable prudence

to believe that the plaintiff, at or immediately prior to the time of the detention or arrest, was committing the offense of film piracy, as defined by Code Section 16-8-62; or

(2) That the manner of the detention or arrest and the length of time during which such plaintiff was detained was under all the circumstances reasonable. (Code 1981, § 51-7-62, enacted by Ga. L. 2004, p. 341, § 2.)

ARTICLE 5

ABUSIVE LITIGATION

Cross references. — Malicious prosecution, § 51-7-40 et seq.

Law reviews. — For note on 1989 enactment of this article, see 6 Ga. St. U.L. Rev. 337 (1989). For note on 1989 enactment of this article, see 6 Ga. St. U.L. Rev. 330 (1989).

JUDICIAL DECISIONS

Construction. — The abusive litigation tort is in derogation of the common law, and must be strictly limited to the meaning of the language used, and not extended beyond the plain and explicit statutory terms. Kirsch v. Meredith, 211 Ga. App. 823, 440 S.E.2d 702 (1994).

Under O.C.G.A. Art. 5, Ch. 7, T. 51, claims are not limited to "parties," but may be made against any person who actively initiates, continues, or procures abusive proceedings. Watkins v. M & M Clays, Inc., 199 Ga. App. 54, 404 S.E.2d 141 (1991); Kirsch v. Meredith, 211 Ga. App. 823, 440 S.E.2d 702 (1994).

Absolute privilege not bar. — The privilege established under O.C.G.A. § 51-5-8 does not bar a claim for abusive litigation pursuant to O.C.G.A. Art. 5, Ch. 7, T. 51,. Kluge v. Renn, 226 Ga. App. 898, 487 S.E.2d 391 (1997).

Premature claim. — Claim for abusive litigation and attorney fees could not be maintained until underlying litigation had concluded. McCullough v. McCullough, 263 Ga. 794, 439 S.E.2d 486 (1994).

Entry of consent decree barred claim. — Entry of a consent decree incorporating the parties' settlement in a divorce proceeding barred the wife's subsequent action against the husband for abusive litigation. Kluge v. Renn, 226 Ga. App. 898, 487 S.E.2d 391 (1997).

RESEARCH REFERENCES

ALR. — Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in same proceeding in which abuse occurred — state cases, 82 ALR4th 1115.

51-7-80. Definitions.

As used in this article, the term:

(1) "Civil proceeding" includes any action, suit, proceeding, counterclaim, cross-claim, third-party claim, or other claim at law or in equity.

(2) "Claim" includes any allegation or contention of fact or law asserted in support of or in opposition to any civil proceeding, defense, motion, or appeal.

(3) "Defense" includes any denial of allegations made by another party in any pleading, motion, or other paper submitted to the court for the purpose of seeking affirmative or negative relief, and any affirmative defense or matter asserted in confession or avoidance.

(4) "Good faith," when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position, means that to the best of a person's or his or her attorney's knowledge, information, and belief, formed honestly after reasonable inquiry, that such civil proceeding, claim, defense, motion, appeal, or other position is well grounded in fact and is either warranted by existing law or by reasonable grounds to believe that an argument for the extension, modification, or reversal of existing law may be successful.

(5) "Malice" means acting with ill will or for a wrongful purpose and may be inferred in an action if the party initiated, continued, or procured civil proceedings or process in a harassing manner or used process for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based.

(6) "Person" means an individual, corporation, company, association, firm, partnership, society, joint-stock company, or any other entity, including any governmental entity or unincorporated association of persons with capacity to sue or be sued.

(7) "Without substantial justification," when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position, means that such civil proceeding, claim, defense, motion, appeal, or other position is:

(A) Frivolous;

(B) Groundless in fact or in law; or

(C) Vexatious.

(8) "Wrongful purpose" when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position results in or has the effect of:

(A) Attempting to unjustifiably harass or intimidate another party or witness to the proceeding; or

(B) Attempting to unjustifiably accomplish some ulterior or collateral purpose other than resolving the subject controversy on its merits. (Code 1981, § 51-7-80, enacted by Ga. L. 1989, p. 408, § 2.)

Law reviews. — For article, "Appeals, Interlocutory and Discretionary Applications, and Post-Judgment Motions in the Georgia Courts: The Current Practice and the Need for Reform Legislation," see 44 Mercer L. Rev. 17 (1992). For annual survey article discussing trial practice and procedure, see 52 Mercer L. Rev. 447 (2000). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Overbroad restrictions on right of access to courts unconstitutional. — The legislature has provided remedies for hapless defendants hauled into court for the purpose of harassment, but overbroad restrictions on the right of access to the courts will not pass constitutional muster. In re Carter, 235 Ga. App. 551, 510 S.E.2d 91 (1998).

What constitutes "civil proceeding." — Allegations relating solely to prelitigation actions did not state a viable claim for abusive litigation under O.C.G.A. § 51-7-80. Ward v. Coastal Lumber Co., 196 Ga. App. 249, 395 S.E.2d 601 (1990).

Malice not established. — Trial court did not err in granting a judgment in favor of a company on a debtor's abusive litigation claim because the debtor failed to present any evidence that the company pursued the company's claim against the debtor to recover the amount due on a loan with malice pursuant to O.C.G.A. § 51-7-80(5). Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Persons entitled to notice. — Insurer which took an active part in the continuation of proceedings against an insured in an automobile negligence case could be named as the defendant in an abusive litigation claim, and was entitled to specific written notice by registered or certified mail or other means evidencing receipt by the "addressee." Talbert v. Allstate Ins. Co., 200 Ga. App. 312, 408 S.E.2d 125, cert. denied, 200 Ga. App. 897, 408 S.E.2d 125 (1991).

Notice required prior to suit. — When a construction company's counterclaims alleging abusive litigation under O.C.G.A. §§ 9-15-14 and 51-7-80 et seq., alleged in the pleading that the claims constituted "notice" to assert such claims under O.C.G.A. § 51-7-81, the trial court properly determined that they were not counterclaims and, accordingly, dismissed them for want of subject matter jurisdiction under O.C.G.A. § 9-11-12(h)(3); it was also found that the required notice provided in O.C.G.A. § 51-7-84(b) was not provided prior to the filing of a claim, nor was the prior litigation ended in the defendants' favor, both of which were requirements in order to bring such a claim, and disposing of the claim under a summary judgment analysis, pursuant to O.C.G.A. § 9-11-56, was proper. Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Punitive damages are excluded from the tort of abusive litigation. Snellings v. Sheppard, 229 Ga. App. 753, 494 S.E.2d 583 (1998).

Claim lacked substance. — Claim that creditor maliciously used the process of the bankruptcy court to obtain ownership of a partnership's motel business lacked substance when the partnership omitted from its allegations the guaranty contract which gave the creditor the legal right to pursue an action against the partnership as well as the factual disparity that the partnership was still in bankruptcy. Westinghouse Credit Corp. v. Hall, 144 Bankr. 568 (S.D. Ga. 1992).

Abusive litigation not found. — Dismissal of an action involving an employment dispute without prejudice was not a final termination of the case as required for an abusive litigation action. Hallman v. Emory Univ., 225 Ga. App. 247, 483 S.E.2d 362 (1997).

Because the Court of Appeals of Georgia merely found in a prior action between the parties that an employer failed to prove its claims against its former employee at trial, and that holding did not amount to a binding determination that those claims were without substantial justification or that the employer engaged in abusive lit-

igation, the trial court properly granted summary judgment to the employer as to the former employee's abusive litigation claims; moreover, although questions of reasonableness were generally for the jury, given that the employer was successful at every stage of the litigation prior to the appeal, the trial court was authorized to determine as a matter of law that the company acted in good faith in filing and pursuing its claims. Bacon v. Volvo Serv. Ctr., Inc., 288 Ga. App. 399, 654 S.E.2d 225 (2007).

Strategic lawsuits against public participation. — There is no requirement that a party first seek to invoke O.C.G.A. § 9-15-14 or O.C.G.A. § 51-7-80 before seeking the protections of O.C.G.A. § 9-11-11.1. Hagemann v. City of Marietta, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

Relevancy found. — Evidence of the defendants' financial condition was relevant to the plaintiffs' abusive litigation claim against the defendants. Snellings v. Sheppard, 229 Ga. App. 753, 494 S.E.2d 583 (1998).

Award of attorney's fees premature. — An award of attorney fees to the purchaser of building supplies in a supplier's action to recover sums allegedly due for the supplies was in error because the underlying litigation had not yet been concluded when the attorney fee award was made. Cox Interior, Inc. v. Bayland Props., LLC, 293 Ga. App. 612, 667 S.E.2d 452 (2008).

Claim not "without substantial justification." — Trial court did not err in granting a realty company's motion to dismiss a limited liability company's (LLC) complaint for abusive litigation because it could not establish that a realty company acted without substantial justification as required by O.C.G.A. § 51-7-81; the realty company's failure to withdraw the notices of lis pendens based upon the non-final dismissal of its clients' specific performance claim did not demonstrate that it continued the notices of lis pendens without substantial justification. Petroleum Realty II v. Morris, Manning & Martin, 317 Ga. App. 102, 728 S.E.2d 896 (2012).

Cited in Johnson v. Lomas Mtg. USA, Inc., 201 Ga. App. 562, 411 S.E.2d 731 (1991); Ibrahim v. Talley & Assocs., 214 Ga. App. 609, 448 S.E.2d 707 (1994); Kirsch v. Jones, 219 Ga. App. 50, 464 S.E.2d 4 (1995); Owens v. Generali-United States Branch, 224 Ga. App. 290, 480 S.E.2d 863 (1997); Swafford v. Bradford, 225 Ga. App. 486, 484 S.E.2d 300 (1997); Kendrick v. Funderburk, 230 Ga. App. 860, 498 S.E.2d 147 (1998); Davis v. Butler, 240 Ga. App. 72, 522 S.E.2d 548 (1999); Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004); Fortson v. Hotard, 299 Ga. App. 800, 684 S.E.2d 18 (2009).

51-7-81. Liability for abusive litigation.

Any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another shall be liable for abusive litigation if such person acts:

(1) With malice; and

(2) Without substantial justification. (Code 1981, § 51-7-81, enacted by Ga. L. 1989, p. 408, § 2.)

Law reviews. — For article, "Rule 11: Is the Cure Justified by the Disease?," see 28 Ga. St. B. J. 228 (1992). For article, "Of Frivolous Litigation and Runaway Juries: A View from the Bench," see 41 Ga. L. Rev. 431 (2007).

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Georgia's abusive litigation statutes do not apply to lawsuits in federal courts. Great W. Bank v. Southeastern Bank, 234 Ga. App. 420, 507 S.E.2d 191 (1998).

Applicability to Workers' Compensation Act. — O.C.G.A. § 51-7-81 does not authorize a claim for abusive litigation in the context of the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq. Patterson v. Cox Enters., Inc., 201 Ga. App. 222, 411 S.E.2d 85 (1991).

Notice required prior to suit. — When a construction company's counterclaims alleging abusive litigation under O.C.G.A. §§ 9-15-14 and 51-7-80 et seq., alleged in the pleading that the claims constituted "notice" to assert such claims under O.C.G.A. § 51-7-81, the trial court properly determined that they were not counterclaims and, accordingly, dismissed the claims for want of subject matter jurisdiction under O.C.G.A. § 9-11-12(h)(3); it was also found that the required notice provided in O.C.G.A. § 51-7-84(b) was not provided prior to the filing of a claim, nor was the prior litigation ended in the defendants' favor, both of which were requirements in order to bring such a claim, and disposing of the claim under a summary judgment analysis, pursuant to O.C.G.A. § 9-11-56, was proper. Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003).

Stated purpose of O.C.G.A. § 51-7-84 is to give the prospective defendant to an abusive litigation claim an opportunity to voluntarily withdraw the complaint. Even if a notice given in an earlier case complied with § 51-7-84, that notice cannot satisfy the notice requirement in a later case because the plaintiff is not given the opportunity to withdraw the complaint in the later action. Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

Defendants' counterclaim against a business owner alleged abusive litigation in violation of O.C.G.A. § 51-7-80 et seq. Since the counterclaim did not comply with the notice provisions of O.C.G.A. § 51-7-84 and despite the fact that the defendants gave the owner such notice in a prior action between the parties this could not constitute compliance with § 51-7-84 and, therefore, the counterclaim had to be dismissed. Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

Trial court did not err in granting judgment in favor of a company on a debtor's abusive litigation claim because the debtor did not provide the company with the requisite advance notice of the debtor's abusive litigation claim; O.C.G.A. § 51-7-84(a) specifically requires notice to the opposing party as a condition precedent to any claim for abusive litigation so that the party will have the opportunity to voluntarily discontinue the proceeding at issue. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Persons against whom claim for abusive litigation may be brought. — An attorney who provided an expert affidavit in support of a legal malpractice claim was not an "active participant" in the malpractice litigation and, accordingly, was not liable to the attorney charged with professional malpractice under an abusive litigation theory. Kirsch v. Meredith, 211 Ga. App. 823, 440 S.E.2d 702 (1994).

Claim lacked substance. — Claim that the creditor maliciously used the process of the bankruptcy court to obtain ownership of a partnership's motel business lacked substance when the partnership omitted from its allegations the guaranty contract which gave the creditor the legal right to pursue an action against the partnership as well as the factual disparity that the partnership was still in bankruptcy. Westinghouse Credit Corp. v. Hall, 144 Bankr. 568 (S.D. Ga. 1992).

A claim for abusive litigation was not established after the plaintiff failed to give the written notice required by O.C.G.A. § 51-7-84 and when, at the time it was prosecuted, the defendant's suit was not without substantial justification. Phillips v. MacDougald, 219 Ga. App. 152, 464 S.E.2d 390 (1995).

Claim not timely brought. — Creditor's motion to amend its claim for sanctions against the debtor under O.C.G.A.

§ 9-15-14 to state a claim under O.C.G.A. § 51-7-81 was denied, as the amendment was untimely and inequitable, being filed two years after the debtor had been granted a discharge and the time for filing claims had long since passed. In re Fowler, No. 03-92256-MGD, 2006 Bankr. LEXIS 2322 (Bankr. N.D. Ga. July 10, 2006).

Claim not "without substantial justification." — Because at the time it filed suit the insurer's position with respect to insurer direct tort actions and insurer direct tort actions for medical payments was not frivolous, groundless in fact or law, or vexatious, the action was not "without substantial justification" so as to sustain a claim for abusive litigation. Owens v. Generali-United States Branch, 224 Ga. App. 290, 480 S.E.2d 863 (1997).

Trial court did not err in granting a realty company's motion to dismiss a limited liability company's (LLC) complaint for abusive litigation because it could not establish that a realty company acted without substantial justification as required by O.C.G.A. § 51-7-81; the realty company's failure to withdraw the notices of lis pendens based upon the non-final dismissal of its clients' specific performance claim did not demonstrate that it continued the notices of lis pendens without substantial justification. Petroleum Realty II v. Morris, Manning & Martin, 317 Ga. App. 102, 728 S.E.2d 896 (2012).

Malice not established in pursuing debtor. — Trial court did not err in granting judgment in favor of a company on a debtor's abusive litigation claim because the debtor failed to present any evidence that the company pursued the company's claim against the debtor to recover the amount due on a loan with malice pursuant to O.C.G.A. § 51-7-80(5). Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

Plaintiff, as plaintiff in actions, could not base suit on O.C.G.A. § 51-7-81. — Plaintiff does not allege that the defendant attorney took an active part in the initiation, continuation, or procurement of civil proceedings against the plaintiff. Indeed, the plaintiff was the plaintiff in the two cases involving these parties — in the case against a contracting party and the instant action involving the defendant attorney. Thus, the plaintiff has failed to state a claim for abusive litigation. Fortson v. Hotard, 299 Ga. App. 800, 684 S.E.2d 18 (2009).

Summary judgment. — Issues of material fact as to whether attorneys' action against a former client based upon a contingency agreement was abusive litigation precluded summary judgment. Kendrick v. Funderburk, 230 Ga. App. 860, 498 S.E.2d 147 (1998).

Since the trial court found as a matter of law that the underlying action was brought with substantial justification, summary judgment was appropriate. Davis v. Butler, 240 Ga. App. 72, 522 S.E.2d 548 (1999).

Because the Court of Appeals of Georgia merely found in a prior action between the parties that an employer failed to prove its claims against its former employee at trial, and that holding did not amount to a binding determination that those claims were without substantial justification or that the employer engaged in abusive litigation, the trial court properly granted summary judgment to the employer as to the former employee's abusive litigation claims; moreover, although questions of reasonableness were generally for the jury, given that the employer was successful at every stage of the litigation prior to the appeal, the trial court was authorized to determine as a matter of law that the company acted in good faith in filing and pursuing its claims. Bacon v. Volvo Serv. Ctr., Inc., 288 Ga. App. 399, 654 S.E.2d 225 (2007).

Attorney's fees improper before underlying suit terminated. — Trial court erred in charging a jury on attorney's fees under O.C.G.A. § 51-7-81 because a claim under § 51-7-81 could not be brought as a counterclaim and was premature. The jury awarded fees against both the buyers and buyers' counsel, which was only permitted under § 51-7-81 and not under O.C.G.A. § 13-6-11; because the jury may have based the jury's award on an improper theory, a new trial on attorney's fees was required. Goldsmith v. Peterson, 307 Ga. App. 26, 703 S.E.2d 694 (2010).

Cited in Johnson v. Lomas Mtg. USA, Inc., 201 Ga. App. 562, 411 S.E.2d 731

(1991); Ibrahim v. Talley & Assocs., 214 Ga. App. 609, 448 S.E.2d 707 (1994); Kirsch v. Jones, 219 Ga. App. 50, 464 S.E.2d 4 (1995); Williams v. Binion, 227 Ga. App. 893, 490 S.E.2d 217 (1997); O'Neal v. Home Town Bank, 237 Ga. App. 325, 514 S.E.2d 669 (1999); Carroll County Water Auth. v. Bunch, 240 Ga. App. 533, 523 S.E.2d 412 (1999).

RESEARCH REFERENCES

ALR. — Construction and application of Federal Tort Claims Act provision (28 USCA § 2680(h)) excepting from coverage claims arising out of false imprisonment, false arrest, malicious prosecution, or abuse of process, 152 ALR Fed. 605.

51-7-82. Defenses.

(a) It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted has voluntarily withdrawn, abandoned, discontinued, or dismissed the civil proceeding, claim, defense, motion, appeal, civil process, or other position which the injured person claims constitutes abusive litigation within 30 days after the mailing of the notice required by subsection (a) of Code Section 51-7-84 or prior to a ruling by the court relative to the civil proceeding, claim, defense, motion, appeal, civil process, or other position, whichever shall first occur; provided, however, that this defense shall not apply where the alleged act of abusive litigation involves the seizure or interference with the use of the injured person's property by process of attachment, execution, garnishment, writ of possession, lis pendens, injunction, restraining order, or similar process which results in special damage to the injured person.

(b) It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted acted in good faith; provided, however, that good faith shall be an affirmative defense and the burden of proof shall be on the person asserting the actions were taken in good faith.

(c) It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted was substantially successful on the issue forming the basis for the claim of abusive litigation in the underlying civil proceeding. (Code 1981, § 51-7-82, enacted by Ga. L. 1989, p. 408, § 2.)

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Attorney not liable. — An attorney who filed an adultery counterclaim in a divorce proceeding based on information provided to the attorney by the client acted reasonably, established a good faith defense, and was not liable on an abusive litigation claim. Kluge v. Renn, 226 Ga. App. 898, 487 S.E.2d 391 (1997).

Summary judgment should not have been granted to financial advisor asserting an abusive litigation claim against a client's former wife who had

sued the advisor and others for alleged fraud in causing her to terminate a trust that was to fund her alimony obligation after the former husband died since there was evidence that the advisor made misrepresentations to the former wife's attorney. Payne v. Kanes, 234 Ga. App. 524, 507 S.E.2d 266 (1998).

Complete defense offered to abuse of litigation claim. — Purchaser's abuse of litigation claim was properly dismissed under O.C.G.A. § 9-11-12(b)(6) because the lender's dispossessory claim against the purchaser and seller, the subject of the abuse of litigation claim, succeeded, which was a complete defense under O.C.G.A. § 51-7-82(c). LaSonde v. Chase Mortg. Co., 259 Ga. App. 772, 577 S.E.2d 822 (2003).

Lack of ante-litem notice an affirmative defense. — Abusive litigation statutes are silent as to any requirement that a defense based upon the ante-litem notice be affirmatively pled and proven by a defendant; thus, the legislature never intended to make the lack of ante-litem notice an affirmative defense. Davis v. Wallace, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Cited in Woodall v. Hayt, Hayt & Landau, 198 Ga. App. 624, 402 S.E.2d 359 (1991); Kirsch v. Jones, 219 Ga. App. 50, 464 S.E.2d 4 (1995); Great W. Bank v. Southeastern Bank, 234 Ga. App. 420, 507 S.E.2d 191 (1998); Bacon v. Volvo Serv. Ctr., Inc., 288 Ga. App. 399, 654 S.E.2d 225 (2007).

51-7-83. Measure of damages.

(a) A plaintiff who prevails in an action under this article shall be entitled to all damages allowed by law as proven by the evidence, including costs and expenses of litigation and reasonable attorney's fees.

(b) If the abusive litigation is in a civil proceeding of a court of record and no damages other than costs and expenses of litigation and reasonable attorney's fees are claimed, the procedures provided in Code Section 9-15-14 shall be utilized instead.

(c) No motion filed under Code Section 9-15-14 shall preclude the filing of an action under this article for damages other than costs and expenses of litigation and reasonable attorney's fees. Any ruling under Code Section 9-15-14 is conclusive as to the issues resolved therein. (Code 1981, § 51-7-83, enacted by Ga. L. 1989, p. 408, § 2.)

Law reviews. — For article, "Of Frivolous Litigation and Runaway Juries: A View from the Bench," see 41 Ga. L. Rev. 431 (2007).

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Litigation expenses and attorney fees cannot be awarded until the claimant has prevailed on the claimant's underlying abusive litigation claim. Williams v. Clark-Atlanta Univ., Inc., 200 Ga. App. 51, 406 S.E.2d 559 (1991).

Appellate review of attorney fees. — An award of attorney fees under both subsections (a) and (b) of O.C.G.A. § 9-15-14 was reviewable on direct appeal along with a judgment under O.C.G.A. § 51-7-83. Hallman v. Emory Univ., 225 Ga. App. 247, 483 S.E.2d 362 (1997).

Attorney's fees denied. — Creditor's motion to amend the creditor's claim for sanctions against the debtor under O.C.G.A. § 9-15-14 to state a claim under O.C.G.A. § 51-7-81 was denied as the amendment was untimely and inequitable, and resolution of the claim under the

former section was conclusive. In re Fowler, No. 03-92256-MGD, 2006 Bankr. LEXIS 2322 (Bankr. N.D. Ga. July 10, 2006).

Attorney's fees improper before underlying suit terminated. — Trial court erred in charging a jury on attorney's fees under O.C.G.A. § 51-7-81 because a claim under § 51-7-81 could not be brought as a counterclaim and was premature. The jury awarded fees against both the buyers and buyers' counsel, which was only permitted under § 51-7-81 and not under O.C.G.A. § 13-6-11; because the jury may have based the jury's award on an improper theory, a new trial on attorney's fees was required. Goldsmith v. Peterson, 307 Ga. App. 26, 703 S.E.2d 694 (2010).

Cited in First Union Nat'l Bank v. Cook, 223 Ga. App. 374, 477 S.E.2d 649 (1996); Great W. Bank v. Southeastern Bank, 234 Ga. App. 420, 507 S.E.2d 191 (1998).

51-7-84. Notice of claim asserted; when action must be brought.

(a) As a condition precedent to any claim for abusive litigation, the person injured by such act shall give written notice by registered or certified mail or statutory overnight delivery or some other means evidencing receipt by the addressee to any person against whom such injured person intends to assert a claim for abusive litigation and shall thereby give the person against whom an abusive litigation claim is contemplated an opportunity to voluntarily withdraw, abandon, discontinue, or dismiss the civil proceeding, claim, defense, motion, appeal, civil process, or other position. Such notice shall identify the civil proceeding, claim, defense, motion, appeal, civil process, or other position which the injured person claims constitutes abusive litigation.

(b) An action or claim under this article requires the final termination of the proceeding in which the alleged abusive litigation occurred and must be brought within one year of the date of final termination. (Code 1981, § 51-7-84, enacted by Ga. L. 1989, p. 408, § 2; Ga. L. 2000, p. 1589, § 3.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For annual survey article on legal ethics, see 52 Mercer L. Rev. 323 (2000). For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For survey article on local government law, see 60 Mercer L. Rev. 263 (2008). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

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Persons entitled to notice. — Insurer which took an active part in the continuation of proceedings against its insured in an automobile negligence case could be named as a defendant in an abusive litigation claim, and was entitled to specific written notice by registered or certified mail or other means evidencing receipt by the "addressee." Talbert v. Allstate Ins. Co., 200 Ga. App. 312, 408 S.E.2d 125, cert. denied, 200 Ga. App. 897, 408 S.E.2d 125 (1991).

An abusive litigation letter sent to the insurer's attorney, an agent and representative of the defendant law firm, and plainly naming the insurer provided suf-

ficient notice. Owens v. Generali-United States Branch, 224 Ga. App. 290, 480 S.E.2d 863 (1997).

Summary judgment should not have been granted to a litigant asserting an abusive litigation claim against the brother of a woman who had sued the litigant and others for alleged fraud concerning a domestic relations matter, since the litigant had not provided the notice required under subsection (a) of O.C.G.A. § 51-7-84, even though the litigant contended that the litigant had not been aware of the brother's role in the original fraud action as the statute makes no exception to the notice requirement. Payne v. Kanes, 234 Ga. App. 524, 507 S.E.2d 266 (1998).

Letter sent to a defendant in the plaintiff's action for abusive litigation through that defendant's attorney was not sufficient to put the attorney and the professional corporation on notice because it failed to identify them as defendants. Carroll County Water Auth. v. Bunch, 240 Ga. App. 533, 523 S.E.2d 412 (1999).

Failure to give notice. — Since there was no evidence that the notice requirement as a condition precedent had ever been satisfied, summary judgment in favor of the defendant was properly granted. Davis v. Butler, 240 Ga. App. 72, 522 S.E.2d 548 (1999).

Purchaser's abuse of litigation claim against the lender was properly dismissed under O.C.G.A. § 9-11-12(b)(6), because the purchaser failed to give written notice to the lender as was required by O.C.G.A. § 51-7-84(a). LaSonde v. Chase Mortg. Co., 259 Ga. App. 772, 577 S.E.2d 822 (2003).

When a construction company's counterclaims alleging abusive litigation under O.C.G.A. §§ 9-15-14 and 51-7-80 et seq., alleged in the pleading that the claims constituted "notice" to assert such claims under O.C.G.A. § 51-7-81, the trial court properly determined that they were not counterclaims and, accordingly, dismissed them for want of subject matter jurisdiction under O.C.G.A. § 9-11-12(h)(3); it was also found that the required notice provided in O.C.G.A. § 51-7-84(b) was not provided prior to the filing of a claim, nor was the prior litigation ended in the defendants' favor, both of which were requirements in order to bring such a claim, and disposing of the claim under a summary judgment analysis, pursuant to O.C.G.A. § 9-11-56, was proper. Langley v. Nat'l Labor Group, Inc., 262 Ga. App. 749, 586 S.E.2d 418 (2003).

The trial court properly dismissed the tenants' tort claims based on the tenants' failure to comply with the notice requirements of O.C.G.A. § 51-7-84, applying to parties alleging abusive litigation; the tenants could not avoid the notice requirements merely by characterizing their claims arising from an allegedly abusive lawsuit as conspiracy, perjury, forgery, or theft. Slone v. Myers, 288 Ga. App. 8, 653 S.E.2d 323 (2007), cert. denied, 555 U.S. 881, 129 S. Ct. 196, 172 L.Ed.2d 140 (2008).

Stated purpose of O.C.G.A. § 51-7-84 is to give the prospective defendant to an abusive litigation claim an opportunity to voluntarily withdraw the complaint. Even if a notice given in an earlier case complied with § 51-7-84, that notice cannot satisfy the notice requirement in a later case because the plaintiff is not given the opportunity to withdraw the complaint in the later action. Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

Defendants' counterclaim against a business owner alleged abusive litigation in violation of O.C.G.A. § 51-7-80 et seq. Since the counterclaim did not comply with the notice provisions of O.C.G.A. § 51-7-84 and despite the fact that the defendants gave the owner such notice in a prior action between the parties this could not constitute compliance with § 51-7-84 and, therefore, the counterclaim had to be dismissed. Baylis v. Daryani, 294 Ga. App. 729, 669 S.E.2d 674 (2008).

Trial court did not err in granting judgment in favor of a company on a debtor's abusive litigation claim because the debtor did not provide the company with the requisite advance notice of the debtor's abusive litigation claim; O.C.G.A. § 51-7-84(a) specifically requires notice to the opposing party as a condition precedent to any claim for abusive litigation so that the party will have the opportunity to voluntarily discontinue the proceeding at

issue. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

O.C.G.A. § 51-7-82(a) had no application because a photographer never supplied an ante-litem notice and city council members, an assistant chief of police, and a law firm never voluntarily withdrew, abandoned, discontinued, or dismissed any action against the photographer, and they were entitled to point to the photographer's failure to comply with O.C.G.A. § 51-7-84 in defending against the photographer's claims; the statutory framework does not prohibit the assertion of a defense based upon the lack of ante-litem notice in an abusive litigation case alleging interference with property and special damages, but to the contrary, the notice requirement is expressly made a condition precedent in every claim for abusive litigation, under § 51-7-84. Davis v. Wallace, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Abusive litigation statutes are silent as to any requirement that a defense based upon the ante-litem notice be affirmatively pled and proven by a defendant; thus, the legislature never intended to make the lack of ante-litem notice an affirmative defense. Davis v. Wallace, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

City council members, an assistant chief of police, and a law firm, did not waive the members right to an ante-litem notice defense to a photographer's abusive litigation claims by failing to raise the issue as an affirmative defense in a timely responsive pleading because O.C.G.A. § 51-7-84(a) expressly described the notice as a "condition precedent" to an abusive litigation claim, which placed the burden upon the photographer to provide such notice in order to assert the claims; although a defendant may point to the absence of notice in defending an abusive litigation claim, nothing in the statutory framework makes this an affirmative defense that must be pled in a responsive pleading or waived. Davis v. Wallace, 310 Ga. App. 340, 713 S.E.2d 446 (2011).

Dismissal of action not final termination. — A client's voluntary dismissal of a legal malpractice action was not a "final termination" for purposes of the attorney's abusive litigation claim. Stocks v. Glover, 220 Ga. App. 557, 469 S.E.2d 677 (1996).

Premature claim. — Defendant's assertion of an abusive litigation claim in the counterclaim was premature since it was brought before the termination of the plaintiff's action. Jacobs v. Littleton, 241 Ga. App. 403, 525 S.E.2d 433 (1999).

A declaratory judgment suit did not constitute abusive litigation under O.C.G.A. § 51-7-84(b) because the action had not terminated. Hagemann v. City of Marietta, 287 Ga. App. 1, 650 S.E.2d 363 (2007), cert. denied, 2008 Ga. LEXIS 128 (Ga. 2008).

An award of attorney fees to the purchaser of building supplies in a supplier's action to recover sums allegedly due for the supplies was in error because the underlying litigation had not yet been concluded when the attorney fee award was made. Cox Interior, Inc. v. Bayland Props., LLC, 293 Ga. App. 612, 667 S.E.2d 452 (2008).

Claim not timely brought. — Creditor's motion to amend its claim for sanctions against debtor under O.C.G.A. § 9-15-14 to state a claim under O.C.G.A. § 51-7-81 was denied, as the amendment was untimely and inequitable, being filed two years after the debtor had been granted a discharge and the time for filing claims had long since passed. In re Fowler, No. 03-92256-MGD, 2006 Bankr. LEXIS 2322 (Bankr. N.D. Ga. July 10, 2006).

Abusive litigation claim dismissed. — Because there was no evidence that the one asserting a claim for abusive litigation had sent a notice of the claim to the other party, any claim for abusive litigation must be dismissed. Westinghouse Credit Corp. v. Hall, 144 Bankr. 568 (S.D. Ga. 1992).

Failure to given written notice results in dismissal. — Plaintiff's action for abusive litigation was properly dismissed for failure to give written notice to the attorneys that the plaintiff intended to sue the attorneys personally. Merchant v. Mitchell, 241 Ga. App. 173, 525 S.E.2d 710 (1999).

Statute of limitations prohibited action. — Parent's claim for abusive litigation, which was brought one year and one day after the litigation that was the

subject of the claim was terminated by the appellate court's decision that went unchallenged, was not timely as Georgia statutory law was not met because the claim was not filed within the required one year of the final termination of the earlier proceeding. Wilson v. Hinely, 259 Ga. App. 615, 578 S.E.2d 254 (2003).

Filing of the abusive litigation suit was justified and proper given the absence of any clear authority under Georgia law as to precisely when the statute of limitations commenced, following the dismissal of an anti-SLAPP action, under O.C.G.A § 51-7-84(b). Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004).

Cited in Jones v. Bienert, 197 Ga. App. 554, 398 S.E.2d 830 (1990); Paino v. Connell, 207 Ga. App. 553, 428 S.E.2d 446 (1993); Fortson v. Hotard, 299 Ga. App. 800, 684 S.E.2d 18 (2009).

51-7-85. Exclusive remedy.

On and after April 3, 1989, no claim other than as provided in this article or in Code Section 9-15-14 shall be allowed, whether statutory or common law, for the torts of malicious use of civil proceedings, malicious abuse of civil process, nor abusive litigation, provided that claims filed prior to such date shall not be affected. This article is the exclusive remedy for abusive litigation. (Code 1981, § 51-7-85, enacted by Ga. L. 1989, p. 408, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1989, "April 3, 1989" was substituted for "the effective date of this article" near the beginning of the Code section.

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Section not applicable. Fabe v. Floyd, 199 Ga. App. 322, 405 S.E.2d 265, cert. denied, 199 Ga. App. 906, 405 S.E.2d 265 (1991).

A claim for tortious interference with contract cannot be predicated upon an allegedly improper filing of a lawsuit. Phillips v. MacDougald, 219 Ga. App. 152, 464 S.E.2d 390 (1995).

Preemption. — Grant of summary judgment was affirmed because the trial court did not err in holding that the company's claims against the law firm fell within the purview of the abusive litigation statute, should have been brought under that statute, and thus were preempted by the exclusivity provisions of O.C.G.A. § 51-7-85. Meadow Springs Recovery, LLC v. Wofford, 319 Ga. App. 79, 734 S.E.2d 100 (2012).

Punitive damages excluded in claim governed by Yost. — In an abusive litigation claim governed by Yost v. Torok, 256 Ga. 92, 344 S.E.2d 414 (1986) punitive damages are excluded, as the tort itself is designed as a deterrent. Rice v. Cropsey, 203 Ga. App. 272, 416 S.E.2d 786, cert. denied, 203 Ga. App. 907, 416 S.E.2d 786 (1992).

After the plaintiff filed the plaintiff's complaint in December of 1988, and the defendant filed an answer and counterclaim in February of 1989, the awarding of punitive damages was governed by Yost and not O.C.G.A. § 51-7-85. Rice v. Cropsey, 203 Ga. App. 272, 416 S.E.2d 786, cert. denied, 203 Ga. App. 907, 416 S.E.2d 786 (1992).

Cited in Seckinger v. Holtzendorf, 200 Ga. App. 604, 409 S.E.2d 76 (1991); Sneakers of Cobb County v. Cobb County, 265 Ga. 410, 455 S.E.2d 834 (1995); Great W. Bank v. Southeastern Bank, 234 Ga. App. 420, 507 S.E.2d 191 (1998); Hagemann v. City of Marietta, 287 Ga. App. 1, 650 S.E.2d 363 (2007).

CHAPTER 8

FORCIBLE ENTRY AND DETAINER

51-8-1 through 51-8-11.

Reserved. Repealed by Ga. L. 1983, p. 884, § 4-2, effective July 1, 1983.

Editor's notes. — This chapter was based on Laws 1833, Cobb's 1851 Digest, p. 813; Ga. L. 1851-52, p. 261, § 1; Ga. L. 1853-54, p. 42, § 1; Orig. Code 1863, §§ 3988—3994; Ga. L. 1865-66, p. 35, § 1; Ga. L. 1865-66, p. 222, § 1; Code 1868, §§ 4014—4022; Code 1873, §§ 4085—4093; Ga. L. 1876, p. 98, § 1; Code 1882, §§ 4085—4093; Civil Code 1895, §§ 4823—4832; Ga. L. 1898, p. 88, § 1; Civil Code 1910, §§ 5395—5405; Code 1933, §§ 105-1601—105-1611; and Ga. L. 1981, Ex. Sess., p. 8.

CHAPTER 9

INJURIES TO REAL ESTATE

Sec.
51-9-1. Cause of action for interference with enjoyment of property.
51-9-2. Recovery of possession of lands; damages.
51-9-3. Recovery for wrongful interference with possession of land.
51-9-4. Action for trespass by person having title.
51-9-5. Effect of holding title when possession claimed by two persons.
51-9-6. Damages for continuing trespass.
51-9-7. Diversion, obstruction, or pollution of stream as trespass.
51-9-8. Interference with underground streams.
51-9-9. Interference with rights of owner above and below surface of property.
51-9-10. Interference with right of way or right of common.
51-9-11. Slander or libel concerning title to land.

Cross references. — Time limitation on bringing of actions for trespass upon or damage to real property, § 9-3-30.

RESEARCH REFERENCES

ALR. — Rights and obligations, with respect to adjoining landowners, arising out of secondary recovery of gas, oil, and other fluid minerals, 19 ALR4th 1182.

Res ipsa loquitur as to cause of or liability for real-property fires, 21 ALR4th 929.

Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 ALR4th 530.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 ALR4th 603.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death, 14 ALR5th 242.

51-9-1. Cause of action for interference with enjoyment of property.

The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie. (Orig. Code 1863, § 2955; Code 1868, § 2962; Code 1873, § 3013; Code 1882, § 3013; Civil Code 1895, § 3874; Civil Code 1910, § 4470; Code 1933, § 105-1401.)

Cross references. — Justifiable use of force in defense of property, §§ 16-3-23, 16-3-24. Criminal trespass and damage to property, § 16-7-20 et seq. Unauthorized entry onto property for purpose of buying junk, § 43-22-4. Actions against joint wrongdoers, § 51-12-30.

Law reviews. — For article, "The Business Tort — Interference with Contractual Relationships or Business Expecta-

tions," see 19 Ga. St. B. J. 66 (1982). For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003). For article, "Timber! - Falling Tree Liability in Georgia," see 10 Ga. St. B. J. 10 (No. 2, 2004). For article, "Keep Out! The Efficacy of Trespass, Nuisance and Privacy Torts as Applied to Drones," see 33 Georgia St. U.L. Rev. 359 (2017).

JUDICIAL DECISIONS

Analysis

General Consideration
Applicability to Specific Cases

General Consideration

Common law has not been changed as it pertains to direct damage to realty but is codified in this section. Brooks v. Ready Mix Concrete Co., 94 Ga. App. 791, 96 S.E.2d 213 (1956).

One who commits trespass upon land of another is subject to be sued as trespasser, whether one is acting personally or as an agent for another. Gill v. First Christian Church, Atlanta Ga., Inc., 216 Ga. 454, 117 S.E.2d 164 (1960); Bodin v. Gill, 216 Ga. 467, 117 S.E.2d 325 (1960).

No right to carry firearm in place of worship. — Private property owners could forbid the possession of a weapon on the owners' premises as property law, tort law, and criminal law, such as that later codified in O.C.G.A. §§ 16-7-21(b)(3), 51-3-1, 51-3-2, 51-9-1, provided the canvas on which the Second Amendment was drafted, and illustrated that the basis of the Second Amendment did not include protection for a right to carry a firearm in a place of worship against the church owner's wishes. GeorgiaCarry.Org, Inc v. Georgia, 687 F.3d 1244 (11th Cir. 2012).

Code gives right of action for absolute liability if one's property is injured directly by another's use of the property. Brooks v. Ready Mix Concrete Co., 94 Ga. App. 791, 96 S.E.2d 213 (1956).

Liability for trespass upon real property produced by voluntary act is absolute and does not have to be grounded in negligence so long as the act causing the trespass or invasion was intended. Brooks v. Ready Mix Concrete Co., 94 Ga. App. 791, 96 S.E.2d 213 (1956).

Section does not impose blanket rule or absolute liability on all trespassers. — With the exception of the situation where a party is engaged in an abnormally dangerous activity, an unintentional and nonnegligent entry onto another's land does not automatically subject an individual to liability even though the entry causes harm to the possessor. C.W. Matthews Contracting Co. v. Wells, 147 Ga. App. 457, 249 S.E.2d 281 (1978).

Georgia recognizes distinction between willful trespasser, as against an innocent trespasser, one who believes one is right in entering the premises in question. C.W. Matthews Contracting Co. v. Wells, 147 Ga. App. 457, 249 S.E.2d 281 (1978).

Violation of this section or common law may arise if facts establish either that the defendants conspired as individuals to deprive the plaintiff of the plaintiff's protected property rights, or that all or some of the defendants acted as agents on behalf of their principal. Spencer v. Moore Bus. Forms, Inc., 441 F. Supp. 60 (N.D. Ga. 1977).

To maintain action for trespass or injury to realty, it is essential that plaintiff show either that the plaintiff was owner or was in possession at time of trespass. Palmer v. Pennington, 179 Ga. 76, 175 S.E. 380 (1934); Coleman v. Nail, 49 Ga. App. 51, 174 S.E. 178 (1934); James v. Riley, 181 Ga. 454, 182 S.E. 604 (1935); Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936); Southern Union Mut. Ins. Co. v. Mingledorff, 211 Ga. 514, 87 S.E.2d 54 (1955); Davis v. Palmer, 213 Ga. 862, 102 S.E.2d 478 (1958); Lyons v. Bassford, 242 Ga. 466, 249 S.E.2d 255 (1978).

When the plaintiff has legal title, even though out of possession, the plaintiff may maintain trespass. Williams v. Aycock, 52 Ga. App. 386, 183 S.E.

628 (1936), cert. dismissed, 183 Ga. 800, 189 S.E. 841 (1937).

Court erred in removing to federal court suit for damages and injuries occasioned by trespass by telegraph company and individual in running a wire over the plaintiff's roof and attaching it to the plaintiff's land. Belt v. Western Union Tel. Co., 63 Ga. App. 469, 11 S.E.2d 509 (1940).

Compensatory damages for trespass awarded by jury ($15,000) were excessive since only $40.00 actual pecuniary loss, resulting from the broken gate, was involved. Woodbury v. Whitmire, 246 Ga. 349, 271 S.E.2d 491 (1980).

Cited in Central R.R. v. Brinson, 70 Ga. 207 (1883); Austin v. Augusta Term. Ry., 108 Ga. 671, 34 S.E. 852, 47 L.R.A. 755 (1899); Luke v. DuPree, 158 Ga. 590, 124 S.E. 13 (1924); Rood v. Newman, 74 Ga. App. 686, 41 S.E.2d 183 (1947); Roughton v. Thiele Kaolin Co., 209 Ga. 577, 74 S.E.2d 844 (1953); Rhine v. Sanders, 100 Ga. App. 68, 110 S.E.2d 128 (1959); Nottingham v. Wrigley, 221 Ga. 386, 144 S.E.2d 749 (1965); Campbell v. Carroll, 121 Ga. App. 497, 174 S.E.2d 375 (1970); Brand v. Montega Corp., 233 Ga. 32, 209 S.E.2d 581 (1974); Brinkley & West, Inc. v. Foremost Ins. Co., 499 F.2d 928 (5th Cir. 1974); Baker v. Wilson, 143 Ga. App. 488, 238 S.E.2d 587 (1977); Pittman v. Cohn Communities, Inc., 240 Ga. 106, 239 S.E.2d 526 (1977); Walker v. GMC, 152 Ga. App. 526, 263 S.E.2d 266 (1979); Nestle Co. v. J.H. Ewing & Sons, 153 Ga. App. 328, 265 S.E.2d 61 (1980); Spencer v. Moore Bus. Forms, Inc., 87 F.R.D. 118 (N.D. Ga. 1980); Boss v. Bassett Indus. of N.C., Inc., 163 Ga. App. 246, 292 S.E.2d 885 (1982); Rabun v. Kimberly-Clark Corp., 678 F.2d 1053 (11th Cir. 1982); Vest v. Waring, 565 F. Supp. 674 (N.D. Ga. 1983); Rouse v. Crum, 169 Ga. App. 439, 313 S.E.2d 140 (1984); Roberts v. Southern Wood Piedmont Co., 173 Ga. App. 757, 328 S.E.2d 391 (1985); American Game & Music Serv., Inc. v. Knighton, 178 Ga. App. 745, 344 S.E.2d 717 (1986); Majik Mkt. v. Best, 684 F. Supp. 1089 (N.D. Ga. 1987); Miller v. Smith & Smith Land Surveyors, 194 Ga. App. 474, 391 S.E.2d 20 (1990); Artrac Corp. v. Austin Kelley Adv., Inc., 197 Ga. App. 772, 399 S.E.2d 529 (1990); Historic Macon Station Ltd. Partnership v. Piedmont-Forrest Corp., 152 Bankr. 358 (Bankr. M.D. Ga. 1993).

Applicability to Specific Cases

Architect may be liable for improper discharge of surface water, due to faulty design, from the client's property. Bodin v. Gill, 216 Ga. 467, 117 S.E.2d 325 (1960).

This state recognizes cause of action when one maliciously and wrongfully, and with intent to injure, harms the business of another. Wise v. State Bd. for Examination, Qualification & Registration of Architects, 247 Ga. 206, 274 S.E.2d 544 (1981), overruled in part by Innovative Clinical & Consulting Servs. v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352 (2005), appeal dismissed, 454 U.S. 804, 102 S. Ct. 76, 70 L. Ed. 2d 73 (1981).

Attempted wrongful foreclosure allegations did not state a claim for trespass under O.C.G.A. § 51-9-1 since the mortgagors did not allege property damage or an entry onto their property resulting from a mortgagee's initiation of foreclosure proceedings; therefore, the four-year limitations period under O.C.G.A. § 9-3-30 did not apply to the mortgagors' attempted wrongful disclosure claim arising from a 2001 foreclosure action, and the claim was time-barred. Hauf v. HomEq Servicing Corp., No. 4:05-CV-109 (CDL), 2007 U.S. Dist. LEXIS 9439 (M.D. Ga. Feb. 9, 2007).

District court did not err in dismissing the debtor's wrongful foreclosure claim against the bank and a law firm without leave to amend because the debtor could no longer amend as a matter of course, and amending the complaint would be futile as the debtor alleged no facts suggesting that the bank did not have legal right to foreclose, and the record reflected that the bank, through the law firm, gave adequate notice so the debtor would not have been able to state a claim under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k, wrongful foreclosure claim, or trespass claim as each of those claims would have been predicated on improper foreclosure proceedings. Mu-

Applicability to Specific Cases (Cont'd)

hammad v. JPMorgan Chase Bank, NA, No. 13-13851, 2014 U.S. App. LEXIS 9901 (11th Cir. May 29, 2014) (Unpublished).

Act is malicious when thing done is with knowledge of the plaintiff's rights, and with intent to interfere therewith. Wise v. State Bd. for Examination, Qualification & Registration of Architects, 247 Ga. 206, 274 S.E.2d 544, overruled in part by Innovative Clinical & Consulting Servs. v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352 (2005), appeal dismissed, 454 U.S. 804, 102 S. Ct. 76, 70 L. Ed. 2d 73 (1981).

The essential thing is the intent to cause the result. If the actor does not have this intent, the actor's conduct does not subject the actor to liability even if it has the unintended effect of deterring the third person from dealing with the other. Wise v. State Bd. for Examination, Qualification & Registration of Architects, 247 Ga. 206, 274 S.E.2d 544, overruled in part by Innovative Clinical & Consulting Servs. v. First Nat'l Bank, 279 Ga. 672, 620 S.E.2d 352 (2005), appeal dismissed, 454 U.S. 804, 102 S. Ct. 76, 70 L. Ed. 2d 73 (1981).

Term malicious or maliciously means any unauthorized interference, or any interference without legal justification or excuse. Personal ill will or animosity is not essential. Aetna Life Ins. Co. v. Harley, 365 F. Supp. 1210 (N.D. Ga. 1973).

Contractor for state engaged in work on public project is not liable for damage to private property resulting from work performed unless that damage results from the contractor's negligence or willful tort. C.W. Matthews Contracting Co. v. Wells, 147 Ga. App. 457, 249 S.E.2d 281 (1978).

Contractual right is right in rem, and parties to contract have property right in the agreement. Piedmont Cotton Mills, Inc. v. H.W. Ivey Constr. Co., 109 Ga. App. 876, 137 S.E.2d 528 (1964).

Contractor could have been liable in trespass. — Summary judgment was not warranted on an owner's trespass claim because if the owner produced some evidence that a contractor had notice that a foreclosure was wrongful, then the contractor could have been liable for trespass under O.C.G.A. § 51-9-1. Santiago v. Cauley, No. CV203-099, 2005 U.S. Dist. LEXIS 34768 (S.D. Ga. Dec. 6, 2005).

One under duty to render performance has property interest in contract in that one has the right to render the required performance free from unjustified and unprivileged intentional invasions that retard performance or make the performance more difficult or expensive. Interference of that type constitutes an actionable tort which embraces within its scope all intentional invasions of contractual relations, including any act injuring or destroying property and so interfering with the performance itself, regardless of whether breach of contract is induced. Piedmont Cotton Mills, Inc. v. H.W. Ivey Constr. Co., 109 Ga. App. 876, 137 S.E.2d 528 (1964).

No action for interference with nonbinding oral contract. — Borrowers were precluded from bringing an action against a bank for tortious interference with their contract to sell land to a prospective buyer when the alleged contract was an oral agreement which was not binding on the prospective buyer. Dickens v. Calhoun First Nat'l Bank, 189 Ga. App. 798, 377 S.E.2d 715 (1989).

Interference with contractual relations by third party, such as inducing one to breach one's contract with another, is an actionable tort for which the party guilty is liable in damages. Piedmont Cotton Mills, Inc. v. H.W. Ivey Constr. Co., 109 Ga. App. 876, 137 S.E.2d 528 (1964); Sheppard v. Post, 142 Ga. App. 646, 236 S.E.2d 680 (1977); McDaniel v. Green, 156 Ga. App. 549, 275 S.E.2d 124 (1980).

Intentional, nonprivileged interference by a third party with another's contractual rights and relations is actionable under Georgia law. Suber v. Bulloch County Bd. of Educ., 722 F. Supp. 736 (S.D. Ga. 1989).

It is actionable maliciously or without justifiable cause to induce one to break one's contract with another to the damage of the latter. The theory of this doctrine is that the parties to a contract have a property right therein, which a third party has no more right maliciously to deprive them

of, or injure them in, than one would have to injure their property. Such an injury amounts to a tort for which the injured party may seek compensation by an action in tort for damages. Aetna Life Ins. Co. v. Harley, 365 F. Supp. 1210 (N.D. Ga. 1973).

County school board and its members could not be liable for tortious interference with a school teacher's contractual relations, when neither the board nor its members, who were sued only in their official capacities, were "third parties" to the teacher's contract. Suber v. Bulloch County Bd. of Educ., 722 F. Supp. 736 (S.D. Ga. 1989).

Tort of interference with contractual relations is not limited to procurement of breach of contract. Piedmont Cotton Mills, Inc. v. H.W. Ivey Constr. Co., 109 Ga. App. 876, 137 S.E.2d 528 (1964).

Interference with contractual right or relationship need not result in breach of contract to be actionable. It is sufficient if the invasion retards performance of the duties under the contract or makes the performance more difficult or expensive. McDaniel v. Green, 156 Ga. App. 549, 275 S.E.2d 124 (1980).

Evidence of interference with possessory interest required. — Even though the wife of the seller had threatened the buyers with bodily harm, had gotten a temporary restraining order against their improvement of the property, and had caused them to be unable to convey good title to any potential purchaser of the property, there was no evidence that the seller's wife ever interfered with the buyers' possessory interest in the realty, and the trial court erred in concluding that the appellant had violated O.C.G.A. § 51-9-1. Hamil v. Stanford, 264 Ga. 801, 449 S.E.2d 118 (1994).

In a case in which a car buyer appealed a district court's entry of summary judgment in favor of the lender, the buyer's evidence did not give rise to a civil trespass claim under O.C.G.A. § 51-9-1. There was no showing that the lender interfered with the buyer's right to possession. Goia v. Citifinancial Auto, 499 Fed. Appx. 930 (11th Cir. Dec. 3, 2012) (Unpublished).

Interference with remainder interest. — In a case in which (1) the United States brought a trespass claim against the resident on property owned by the United States and managed by the National Park Service; (2) the United States moved for a preliminary injunction; (3) O.C.G.A. § 51-9-1 defined trespass broadly; (4) the resident was bound by the restriction in the deed that the resident's right of construction was limited to a single-family residence; (5) the construction that defendant proposed to complete was spatially separate from the resident's house; and (6) the United States alleged that the construction prejudiced its remainder interest, the United States was likely to succeed on its claim for trespass. United States v. Jenkins, 714 F. Supp. 2d 1213 (S.D. Ga. 2008).

Noncompete clauses. — When a former employer was required to obtain a court order enjoining a former employee from working for a competitor in violation of a noncompete agreement, any "interference" in the employee's enjoyment of the employee's contractual relations with another was not such an unauthorized act, or one without legal justification, so as to give rise to liability for interference with contract rights. Colquitt v. Network Rental, Inc., 195 Ga. App. 244, 393 S.E.2d 28 (1990).

If intentional interference is to be required, it presupposes knowledge of the plaintiff's interests or, at least, of facts that would lead a reasonable man to believe in their existence. Piedmont Cotton Mills, Inc. v. H.W. Ivey Constr. Co., 109 Ga. App. 876, 137 S.E.2d 528 (1964).

Malicious interference with right of named beneficiary to insurance proceeds would fall within scope of tortious interference with contractual relations. However, it does not necessarily follow that one commits a tort by filing a lawsuit, regardless of its merit, in which claims are made to insurance proceeds for which another is the named beneficiary. Aetna Life Ins. Co. v. Harley, 365 F. Supp. 1210 (N.D. Ga. 1973).

Employment is private property. Wiley v. Georgia Power Co., 134 Ga. App. 187, 213 S.E.2d 550 (1975), overruled on other grounds, Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1978).

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Individual's employment, trade, or calling is property right and the wrongful interference therewith is an actionable wrong. Georgia Power Co. v. Busbin, 145 Ga. App. 438, 244 S.E.2d 26, rev'd on other grounds, 242 Ga. 612, 250 S.E.2d 442 (1978).

Malicious interference with employment contract. — In the consideration of a willful and malicious procurement of a breach of an employment contract, there are two categories of cases: (1) when there is a definite term of employment and the corporation or employer by discharging an employee would be liable for the breach of the employment contract; (2) when, even though the contract is terminable at will, a party with no authority to discharge the employee, being activated by an unlawful scheme or purpose to injure and damage the employee, maliciously and unlawfully persuades the employer to breach the contract with the employee. McElroy v. Wilson, 143 Ga. App. 893, 240 S.E.2d 155 (1977), cert. denied, 435 U.S. 931, 98 S. Ct. 1506, 55 L. Ed. 2d 528 (1978).

When the employment was terminable at will and the evidence clearly shows that the employee was discharged by one who had the authority to do so, the employee's allegations as to improper motive for firing and improper method of processing grievances are legally irrelevant and present no genuine issues of material fact. McElroy v. Wilson, 143 Ga. App. 893, 240 S.E.2d 155 (1977), cert. denied, 435 U.S. 931, 98 S. Ct. 1506, 55 L. Ed. 2d 528 (1978).

Trial court properly entered a judgment on the pleadings for a corporation on a president's intentional interference with an employment contract claim as the corporation owned a majority interest in a limited liability company employer and was not a stranger to the contract. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Trial court properly entered a judgment on the pleadings for a corporation on a president's intentional interference claim as to the president's prospective employment with the prospective buyer of a limited liability company (LLC) as the president failed to show an employment offer from the buyer; the president's claim was predicated on the corporation's termination of the president from a job at the LLC and failed because the corporation was not a stranger to the employment contract. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Right of attorney to practice law is property and the attorney is said to have a property interest in the attorney's fees and emoluments by the common law or by contract expressed or implied with the attorney's client. Studdard v. Evans, 108 Ga. App. 819, 135 S.E.2d 60 (1964).

Suit for trespass to realty failed after the plaintiff complained of a county code enforcement officer entering the plaintiff's property and taking photographs of the plaintiff's continued code violation of maintaining the plaintiff's junkyard of vehicles. Officer's actions were within the scope of the officer's official duties as a county code enforcement officer. Morton v. McCoy, 204 Ga. App. 595, 420 S.E.2d 40, cert. denied, 204 Ga. App. 922, 420 S.E.2d 40 (1992).

There was no basis for a homeowner's trespass claim against a real estate firm and two of the firm's agents. There was no evidence that the agents refused to leave the property after being asked to leave or that the agents interfered with the homeowner's possessory interest in the property. Udoinyion v. Re/Max, 289 Ga. App. 580, 657 S.E.2d 644 (2008), cert. denied, 2008 Ga. LEXIS 481 (Ga. 2008).

Home builder's right to exclude others from property. — A home builder had the right to exclude a home inspector from trespassing on its properties and properly exercised that right by instructing the inspector not to enter its properties. Pope v. Pulte Home Corp., 246 Ga. App. 120, 539 S.E.2d 842 (2000).

Injuries caused by concussion resulting from dynamite blasting constitute trespass to realty, and one who voluntarily sets the force in motion is absolutely liable to the injured party, despite the exercise of due care. Berger v.

Plantation Pipeline, Co., 121 Ga. App. 362, 173 S.E.2d 741 (1970).

Flooding after plugging of underground drainage pipe. — In a suit involving two landowning couples, it was error to grant summary judgment to the second couple on the first couple's nuisance claim after the second couple plugged an underground drainage pipe. Taking an action that diverted excess water onto another's property could constitute a trespass. Merlino v. City of Atlanta, 283 Ga. 186, 657 S.E.2d 859 (2008).

Electromagnetic radiation. — In an action against a utility and power company for damages on theories of trespass and nuisance arising from electromagnetic radiation, a grant of summary judgment on the trespass claim and directed verdict on the nuisance claim were proper for policy reasons since the scientific evidence was inconclusive regarding the invasive quality of magnetic fields from power lines. Jordan v. Georgia Power Co., 219 Ga. App. 690, 466 S.E.2d 601 (1995).

To enter dwelling house without license, is in law, a trespass. Collins v. Baker, 51 Ga. App. 669, 181 S.E. 425 (1935).

Mere entering or breaking into house occupied by another and taking possession of personalty therein belonging to occupant, is not necessarily trespass or a violation of the rights of the owner. Such acts, unless done without authority of law or contrary to some right of the owner, or without the owner's consent, constitute no tortious or actionable wrong. Beall v. King, 47 Ga. App. 502, 170 S.E. 896 (1933).

Landlord liable to tenant for trespass. — Under this section, it has been held that a landlord was liable in an action by the tenant when the landlord removed cotton seed from the premises because the tenant failed to pay the charges therefor. Shores v. Brooks, 81 Ga. 468, 8 S.E. 429, 12 Am. St. R. 332 (1888).

Forcible eviction of tenant may constitute trespass by landlord. — A malicious and forcible eviction of the tenant by the landlord, although under a warrant to dispossess regularly issued when the tenant has not breached the contract of rental and is entitled to the possession of the rented premises (and this is known to the landlord), when the tenant did not arrest the proceedings by counter affidavit because of inability to give the required bond, and there had been no suit terminated in favor of the tenant, constitutes a trespass against the tenant's right to possession for which the tenant has a cause of action sounding in tort against the landlord. Hall v. John Hancock Mut. Life Ins. Co., 50 Ga. App. 625, 179 S.E. 183 (1935).

Summary judgment for a lender in an owner's suit claiming that the lender trespassed on the owner's property was proper because the security deed provided that the lender was allowed to take action to preserve its interest in the property in the event of a default on the payments, and the owners admitted they were in default of those payments. Tacon v. Equity One, Inc., 280 Ga. App. 183, 633 S.E.2d 599 (2006).

Unauthorized intrusion of landlord on leased premises constitutes trespass even as against the tenant to the same extent as an entry or intrusion by a stranger. University Apts., Inc. v. Uhler, 84 Ga. App. 720, 67 S.E.2d 201 (1951).

Neighboring landowners' suit for trespass and negligence. — Trial court properly denied a neighbor's motion for summary judgment and the appellate court reversed the denial of the cross-motion for summary judgment filed by the adjoining landowners in a trespass and negligence suit because the neighbor purchased property without first obtaining a survey and the adjoining landowners' home was already encroaching upon the neighbor's property by two feet at the time of the purchase; the adjoining landowners were not liable for their predecessor's conduct in building the house and a fence across the property line of the neighbor's predecessor in title, in the absence of evidence that their predecessor was acting as their agent, and were, therefore, entitled to summary judgment. Navajo Constr., Inc. v. Brigham, 271 Ga. App. 128, 608 S.E.2d 732 (2004).

Evidence was sufficient to support a finding that a willful trespass occurred when a neighbor directed the construction of a sewer lateral across an adjacent own-

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er's property to tie into the owner's sewer line when the neighbor knew that the neighbor had neither a written easement nor permission from the owner to do so. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Landowners repairing another party's dam. — Landowners of lakefront property committed trespass when the landowners went onto a corporation's dam and plugged the weakened dam. Bishop Eddie Long Ministries, Inc. v. Dillard, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

Award of $22,000 for trespass during survey not excessive. — In a trespass counterclaim stemming from an unannounced survey by an adjacent land owner, a jury's award of $22,000 properly withstood motions for relief from the judgment because there was evidence to support the verdict and even if the award, which had not been specifically enumerated as general or nominal damages, was awarded as nominal damages, such damages could vary widely in Georgia and were not subject to being set aside based solely on the amount. Wright v. Wilcox, 262 Ga. App. 659, 586 S.E.2d 364 (2003).

Cutting down trees. — The trial court erred in granting a directed verdict in favor of an engineering firm regarding the landowners' claim of trespass resulting from having trees cut from the landowners' property as the landowners' right to the enjoyment of the property was disturbed. Walls v. Moreland Altobelli Assocs., 290 Ga. App. 199, 659 S.E.2d 418 (2008).

Jury decides reasonableness of continuing intrusion. — A store owner's claim that the defendant's failure to leave store premises immediately upon being asked to leave gave rise to a cause of action for trespass, and whether the defendant's remaining on the premises for upwards of four and a half minutes was a reasonable time was for the jury to decide. Bullock v. Jeon, 226 Ga. App. 875, 487 S.E.2d 692 (1997).

Injury to estate held by landlord. — The petition of the plaintiff, alleging title to a given tract of land in the plaintiff, unlawful cutting of trees thereon, and the plaintiff's unlawful ouster therefrom, set up a cause of action for injury to the plaintiff's freehold interest, although the plaintiff had rented the land to a tenant for the year in which the trespass was committed. Allen v. Potter, 153 Ga. 24, 111 S.E. 549 (1922).

It is invasion of plaintiff's property rights to run telegraph wire over the plaintiff's building and attach it to the plaintiff's land, and this is a trespass for which an action would lie. Belt v. Western Union Tel. Co., 63 Ga. App. 469, 11 S.E.2d 509 (1940).

Possession of land gave owners the right to sue telephone company for trespass. — Landowners had the right to bring a trespass action against a utility company and the company's subcontractor for laying cable on the landowners' property without permission. Even if there was a deficiency in the landowners' title, their bare possession of the property was sufficient to support their claim pursuant to O.C.G.A. §§ 51-9-2 and 51-9-3. Lee v. Southern Telecom Co., 303 Ga. App. 642, 694 S.E.2d 125 (2010).

Entering land wrongfully and cutting timber from land would be trespass. and this is so whether the trespassers are acting for themselves or as agents for another. Both the principal and the agents would be liable in a proper case. Gloss v. Jacobs, 86 Ga. App. 161, 71 S.E.2d 253 (1952).

Interference with license to cut timber. — An employee of one who purchases standing timber may maintain an action against the vendor, if the latter refuses to permit the employee to enter on the land. Daniel v. Perkins Logging Co., 9 Ga. App. 842, 72 S.E. 438 (1911); Hughes v. Bivins, 31 Ga. App. 198, 121 S.E. 590 (1923).

When one causes levy to be made in property in possession of and belonging to person not the defendant without probable cause, one is trespasser even though the levy was directed by one's attorney and if the attorney causes such levy to be made without probable cause, one is a joint trespasser with one's client. Orr v. Floyd, 95 Ga. App. 401, 97 S.E.2d 920 (1957).

Person whose property was levied on under execution against another may sue for damages on account of trespass, independently of the technical rules controlling cases of malicious use or abuse of legal process, and without the necessity of first filing a claim and obtaining a favorable decision thereon, and although a petition may contain language appropriate to an action for malicious use of process, the action will not be dismissed on general demurrer (now motion to dismiss) because of failure to allege a favorable conclusion of the levy proceeding, when, considered as a whole, it may properly be construed as an action for trespass. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939).

Plaintiff whose property is sold at marshal's sale, which was void because based on excessive levy can maintain action for trespass against one committing a trespass against one's title and right to possession. Williams v. Aycock, 52 Ga. App. 386, 183 S.E. 628 (1936), cert. dismissed, 183 Ga. 809, 189 S.E. 841 (1937).

Landlord's interference with tenant's use. — When the plaintiff alleged a right of use and possession as tenant of certain premises, and a willful and wanton violation of this right by the defendant, one's landlord, in tearing down the porch and steps at the entrance to the premises, thereby requiring one to use a ladder in order to enter and leave the premises, though no actual injury to one's purse or person is shown, this trespass interfered with one's enjoyment of the use and possession, and caused one to suffer inconvenience, humiliation, and embarrassment, and the petition sets forth a cause of action as against a general demurrer (now motion to dismiss). Ivey v. Davis, 81 Ga. App. 598, 59 S.E.2d 256 (1950).

Landlord's fencing off of rear of leased premises, thereby restricting service station tenant's access to a fuel tank and storage room, presented a question of fact as to whether the landlord's actions interfered with the tenant's complete enjoyment of the premises for the purposes for which the premises were leased. Lewis v. Rickenbaker, 174 Ga. App. 371, 330 S.E.2d 140 (1985).

Unemployment compensation. — No cause of action exists for "tortious interference with one's claim for unemployment compensation," in part because the inchoate expectation of receiving unemployment compensation benefits prior to a final determination of eligibility does not constitute a vested property right, generally, and in part because to allow such a cause of action would render illusory the finality afforded administrative determinations. Miles v. Bibb Co., 177 Ga. App. 364, 339 S.E.2d 316 (1985).

Malicious interference with real estate contract. — To recover in an action against a real estate agent for interfering with a contract to sell a home, the potential vendor must show that the real estate agent maliciously and without justifiable cause induced or procured the potential vendees to break their contract with the vendor, and thereby damaged the vendor. Combs v. Edenfield, 184 Ga. App. 75, 360 S.E.2d 743 (1987).

Lender's recordation of an erroneous security deed did not constitute unlawful interference with two cotenants' realty since there was no evidence that the lender ever interfered with the cotenants' possessory interests in the realty and the error in the security deed had no legal effect whatsoever on the cotenants' actual title to the property. Tower Fin. Servs., Inc. v. Mapp, 198 Ga. App. 563, 402 S.E.2d 286 (1991).

Bank did not interfere with marital property interest. — There was no basis for a claim that the bank interfered with the wife's interest in or possession of the former marital residence since the wife's loss of property rights in the foreclosure by the new lender was not the result of any action taken by the bank, but was caused when, against the advice of her attorney, the wife waived her rights and voluntarily agreed to the substitution of the mortgage in favor of the new lender. Watson v. Wachovia Nat'l Bank, 207 Ga. App. 780, 429 S.E.2d 111 (1993).

Request for lender's representatives to leave not shown. — In a case in which a car buyer appealed a district court's entry of summary judgment in favor of the lender, the buyer's evidence did not give rise to a civil trespass claim

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under O.C.G.A. § 51-9-1. There was no evidence that the lender's representatives did not leave when requested to do so or that the buyer asked the lender's representative to leave. Goia v. Citifinancial Auto, 499 Fed. Appx. 930 (11th Cir. Dec. 3, 2012) (Unpublished).

Trespass based on foreclosure. — After the mortgage lender's affiliate foreclosed the debtor's property but the lender, not the affiliate, was the holder of a security deed, there was a genuine issue of material fact as to whether the affiliate was liable to the debtor for causing the successful bidder's entry and possession of property which the debtor still held title to and which neither the affiliate, the affiliate's counsel, nor the bidder had a right to enter. McDaniel v. SunTrust Bank (In re McDaniel), 523 B.R. 895 (Bankr. M.D. Ga. 2014).

Authority of sheriff to invite individuals onto private land. — Trial court improperly granted summary judgment to a television station in a trespass case; it was for the jury to decide whether station personnel reasonably believed that a county sheriff had authority to invite them onto the property in question to report on the execution of a search warrant. Nichols v. Ga. TV Co., 250 Ga. App. 789, 552 S.E.2d 550 (2001).

Arrestee failed to state a trespass claim against arresting officers because the officers were acting within the officers' official capacities at the time of the arrest. Lavassani v. City of Canton, 760 F. Supp. 2d 1346 (N.D. Ga. 2010).

No trespass shown in case involving burial urn. — Trial court properly found there was no claim for trespass against a funeral director because there was no evidence that the director refused to leave the plaintiff's house or realty after being asked to leave, or that the director interfered with the plaintiff's possessory interest in the urn containing the ashes of the decedent. Justice v. SCI Ga. Funeral Servs., 329 Ga. App. 635, 765 S.E.2d 778 (2014).

Officers entitled to immunity for trespass. — Under the Georgia Constitution, state officials are entitled to official immunity for their discretionary actions unless the officials acted with "actual malice" or an "actual intent to cause injury." The plaintiffs argument that the deputies' entry was so unlawful that it raised an inference of actual malice was rejected as the deputies observed a torn screen, found a door unlocked, and believed that the residence may have been burglarized thereby justifying the trespass. Black v. Wigington, 811 F.3d 1259 (11th Cir. 2016).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 40. 75 Am. Jur. 2d, Trespass, §§ 4 et seq., 18 et seq., 24 et seq.

Am. Jur. Proof of Facts. — Tortious Interference with Contractual Relationship Involving Sale of Real Estate, 64 POF3d 273.

C.J.S. — 86 C.J.S., Torts, § 77. 87 C.J.S., Trespass, §§ 2, 8, 16 et seq.

ALR. — Authority from public official as affecting responsibility of public service corporation for infringing property rights, 1 ALR 403.

Depreciation in market value of land as affecting the general rule that cause of action arises when injury is inflicted, and not when cause is created, 3 ALR 682.

Rights and remedies of tenant who remains in possession of all or part of the premises against landlord for interfering with his possession or enjoyment, 20 ALR 1369; 28 ALR 1333; 64 ALR 900.

Injunction against interference with property as conversion thereof, 34 ALR 726.

Remedy of mortgagee or other holder of lien on real property against third person for damage to or trespass on property, 37 ALR 1120.

Jurisdiction of action at law for damages for tort concerning real property in another state or country, 42 ALR 196; 30 ALR2d 1219.

Liability of one on whose property acci-

dental fire originates for damages from spread thereof, 42 ALR 783; 111 ALR 1140; 17 ALR5th 547.

Liability of landlord for interfering with tenants of lessee, 70 ALR 1477.

Duty of federal courts to follow state court decisions as regards torts affecting real property, 71 ALR 1102.

Measure of owner's damages for temporary appropriation of or injury to real property by municipality or other public authority, 87 ALR 1384.

Liability of officer charged with duty of keeping record of instruments affecting title to or interest in property for mistakes or defects in respect to records, 94 ALR 1303.

Dispossession without legal process by one entitled to possession of real property as ground of action, other than for recovery of possession or damage to his person, by person dispossessed, 101 ALR 476.

Liability for punitive or exemplary damages or statutory penalty or one intentionally or negligently starting fire which caused an injury to person or property, 104 ALR 412.

Applicability of statutes providing for multiple damages or penalty for wrongful trespass as affected by the defendant's purpose or intent, 111 ALR 79.

Construction and application of statute providing for multiple damages for ejection from real estate, 126 ALR 127.

Rights and remedies in case of encroachment of trees, shrubbery, or other vegetation across boundary line, 128 ALR 1221.

Right of licensee of real property to injunction against, or damages for, trespass by third person, 139 ALR 1204.

Liability of owner of standing timber or timber rights for damages to the owner of the land in connection with the cutting and removal of the timber by the former or his servant, or by an independent contractor, 151 ALR 636.

Right of vendee under executory contract to bring action against third person for damage to land, 151 ALR 938.

Liability of irrigation district for damages, 160 ALR 1165.

Implied contract in case of trespass upon real property, 167 ALR 796.

Jurisdiction of action at law for damages for tort concerning real property in another state or country, 30 ALR2d 1219.

Casting of light on another's premises as constituting actionable wrong, 5 ALR2d 705.

Tenant's or subtenant's right to damages for claimed constructive eviction or breach of covenant based upon notice to tenant to vacate or other termination notice, 14 ALR2d 1450.

Liability of one selling or distributing liquid or bottled fuel gas, for personal injury, death, or property damage, 17 ALR2d 888; 41 ALR3d 782.

Liability for property damage by concussion from blasting, 20 ALR2d 1372.

Judgment for insurer who paid property damage as bar to another action against same tort-feasor by owner or another subrogated insurer for additional property damage arising from same tort, and vice versa, 22 ALR2d 1455.

Liability for overflow or escape of water from excavation made in course of construction, 23 ALR2d 827.

Mandatory injunction to compel removal of encroachments by adjoining landowner, 28 ALR2d 679.

Liability of landowner for damages caused by overflow, seepage, or the like resulting from defect in artificial underground drain, conduit or pipe, 44 ALR2d 960.

Measure and elements of damages for pollution of a stream, 49 ALR2d 253.

Life tenant's right of action for injury or damage to property, 49 ALR2d 1117.

Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street, 64 ALR2d 866.

Right to recover attorney's fees for wrongful attachment, 65 ALR2d 1426.

Recovery for unauthorized geophysical or seismograph exploration or survey, 67 ALR2d 444.

Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

Liability of excavators for damages to noncoterminous tract from removal of lateral support, 87 ALR2d 710.

Municipal liability for property damage under mob violence statutes, 26 ALR3d 1198.

Landowner's right to relief against pol-

lution of his water supply by industrial or commercial waste, 39 ALR3d 910.

Liability of governmental entity for issuance of permit for construction which caused or accelerated flooding, 62 ALR3d 514.

Liability of one excavating in highway for injury to public utility cables, conduits, or the like, 73 ALR3d 987.

Airport operations or flight of aircraft as nuisance, 79 ALR3d 253.

Modern status of rules governing interference with drainage of surface waters, 93 ALR3d 1193.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 ALR4th 603.

Tort liability for pollution from underground storage tank, 5 ALR5th 1.

State and local government control of pollution from underground storage tanks, 11 ALR5th 388.

Liability for spread of fire intentionally set for legitimate purpose, 25 ALR5th 391.

51-9-2. Recovery of possession of lands; damages.

The bare right to possession of lands shall authorize their recovery by the owner of such right, as well as damages for the withholding of such right. (Orig. Code 1863, § 2956; Code 1868, § 2963; Code 1873, § 3014; Code 1882, § 3014; Civil Code 1895, § 3875; Civil Code 1910, § 4471; Code 1933, § 105-1402.)

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

For comment on Ivey v. Davis, 81 Ga. App. 598, 59 S.E.2d 256 (1950), see 13 Ga. B. J. 86 (1950).

JUDICIAL DECISIONS

Requirements for litigation. — To maintain action for trespass or injury to realty it is essential that the plaintiff show either that the plaintiff was owner or was in possession at the time of the trespass. Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936).

Possession is one degree of title, and implies a present right to deal with property at pleasure and to exclude other persons from meddling with it. Justice v. Aikin, 104 Ga. 714, 30 S.E. 941 (1898).

Person merely deriving support from land has no action. — One entitled to a support from land has no estate therein and cannot recover damages by virtue of this section from one who enters thereon. Borum v. Gregory, 119 Ga. 766, 47 S.E. 192 (1904).

Prior lawful possession of land alone is sufficient to support action of ejectment against a mere intruder who takes possession by force and who shows no better title. Johnson v. Jones, 68 Ga. 825 (1882); Horton v. Murden, 117 Ga. 72, 43 S.E. 786 (1903).

No possession of public right of way. — When a builder's trucks damaged grass near a curb in front of a landowner's house, and the grass was entirely within a public right of way owned by a county, the landowner did not have standing to sue the builder for trespass based on "possession" of the right of way under O.C.G.A. § 51-9-2; although the landowner could use the right of way in the same manner as other members of the public, the landowner's interest was not such that the landowner could assert that the landowner possessed the right of way to the

exclusion of others. Moses v. Traton Corp., 286 Ga. App. 843, 650 S.E.2d 353 (2007), cert. denied, 2007 Ga. LEXIS 743 (Ga. 2007).

Petition alleging rightful possession of land and illegal interference therewith is good against general demurrer (now motion to dismiss). Mizell v. Byington, 73 Ga. App. 872, 38 S.E.2d 692 (1946).

Possession of land gave owners the right to sue telephone company for trespass. — Landowners had the right to bring a trespass action against a utility company and the company's subcontractor for laying cable on the landowners' property without permission. Even if there was a deficiency in the landowners' title, their bare possession of the property was sufficient to support their claim pursuant to O.C.G.A. §§ 51-9-2 and 51-9-3. Lee v. Southern Telecom Co., 303 Ga. App. 642, 694 S.E.2d 125 (2010).

Tenant's right of action for wrongful eviction. — A malicious and forcible eviction of the tenant by the landlord, although under a warrant to dispossess regularly issued, when the tenant has not breached the contract of rental and is entitled to possession of the rented premises, and this is known to the landlord, and when the tenant does not arrest the proceedings by counter affidavit because of inability to give the required bond, and there had been no suit which terminated in favor of the tenant, constitutes a trespass against the tenant's right to possession for which the tenant has a cause of action sounding in tort against the landlord. Mizell v. Byington, 73 Ga. App. 872, 38 S.E.2d 692 (1946).

While the petition is a suit by a tenant against the landlord to recover damages for malicious and forcible eviction of the plaintiff by the defendant under a warrant to dispossess, which was not resisted by a counter affidavit, in which it is alleged that the plaintiff had not violated the contract of rental, but was entitled to remain in possession under the contract, and it may fail to allege a cause of action for malicious use of process in that it does not appear that the suit had terminated favorably to the plaintiff, nevertheless it alleges a cause of action for a trespass against the plaintiff's right of possession. Mizell v. Byington, 73 Ga. App. 872, 38 S.E.2d 692 (1946).

Repossession by true owner of lands held in trust from trustee gives no cause of action in tort. — When the trust receipt executed by the plaintiff, to the defendant, recited the receipt by the plaintiff from the defendant of certain property, which was acknowledged to be the property of the defendant, which the plaintiff agreed to hold at the plaintiff's own risk and to return to the defendant or its order upon demand, the repossessing of the property by the defendant afforded to the plaintiff no right of action in tort against the defendant for an alleged unlawful repossession and conversion of the property, for breach of contract. Dunn Motors, Inc. v. General Motors Acceptance Corp., 46 Ga. App. 459, 167 S.E. 897 (1933).

Bare claim of title insufficient to support suit for trespass for cutting timber. — When a plaintiff is not entitled to recover either on bare title or bare possession, and the suit is not one to recover possession of the land or damages for withholding possession but rather an action on trespass for the cutting of timber, a bare claim of title is not sufficient. Norman v. Chafin, 110 Ga. App. 234, 138 S.E.2d 279 (1964).

Cited in Bennett v. Rewis, 211 Ga. 507, 87 S.E.2d 52 (1955); Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969); Standard Oil Co. v. Mount Bethel United Methodist Church, 230 Ga. 341, 196 S.E.2d 869 (1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 40. 75 Am. Jur. 2d, Trespass, § 28 et seq.

C.J.S. — 87 C.J.S., Trespass, § 17 et seq.

ALR. — Possession of real property as notice of divorce coexistent interests of possessor, 74 ALR 355.

Dispossession without legal process by one entitled to possession of real property

as ground for action, other than for recovery of possession or damage to his person, by person dispossessed, 101 ALR 476.

Right of licensee of real property to injunction against, or damages for, trespass by third person, 139 ALR 1204.

Recovery by tenant of damages for physical injury or mental anguish occasioned by wrongful eviction, 17 ALR2d 936.

Life tenant's right of action for injury or damage to property, 49 ALR2d 1117.

Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 ALR3d 177.

51-9-3. Recovery for wrongful interference with possession of land.

The bare possession of land shall authorize the possessor to recover damages from any person who wrongfully interferes with such possession in any manner. (Orig. Code 1863, § 2957; Code 1868, § 2964; Code 1873, § 3015; Code 1882, § 3015; Civil Code 1895, § 3876; Civil Code 1910, § 4472; Code 1933, § 105-1403.)

Law reviews. — For article, "Keep Out! The Efficacy of Trespass, Nuisance and Privacy Torts as Applied to Drones," see 33 Georgia St. U.L. Rev. 359 (2017).

For comment on Ivey v. Davis, 81 Ga. App. 598, 59 S.E.2d 256 (1950), see 13 Ga. B. J. 86 (1950).

JUDICIAL DECISIONS

This section is a codification of common law, and the possession referred to is the actual possession of the property. Ault v. Meager, 112 Ga. 148, 37 S.E. 185 (1900); Downing v. Anderson, 126 Ga. 373, 55 S.E. 184 (1906); Fender v. Gardner, 153 Ga. 460, 112 S.E. 368 (1922).

Constructive possession under recorded deed that passed no title is insufficient. Ault v. Meager, 112 Ga. 148, 37 S.E. 185 (1900).

Action may be based on prescriptive title. — An action for trespass or injury to realty predicated upon ownership does not necessarily require a perfect paper title, but may be based on prescriptive title. James v. Riley, 181 Ga. 454, 182 S.E. 604 (1935).

Possession of part of tract under color of title will not extend to rest of tract claimed. Fender v. Gardner, 153 Ga. 460, 112 S.E. 368 (1922).

Possession under bond for title is sufficient. Rosette v. Shelton, 159 Ga. 422, 126 S.E. 242 (1924).

Mere possession as not constituting insurable interest. — Mere possession of property, although giving the possessor certain rights against a trespasser, is in and of itself not sufficient to constitute an insurable interest. Splish Splash Waterslides, Inc. v. Cherokee Ins. Co., 167 Ga. App. 589, 307 S.E.2d 107 (1983).

Possessory rights curtailed by abandonment. — Bare possession of land, though not coupled with title, gives the possessor certain rights; but these rights end when the possession is abandoned. Taylor v. Keen, 10 Ga. App. 106, 72 S.E. 934 (1911).

Section inapplicable to action by owner. — Statute providing that bare possession of land shall authorize possessor to recover damages from any person wrongfully interfering with such possession is inapplicable to actions by owners of property for damages. Florence v. Lovell, 75 Ga. App. 401, 43 S.E.2d 728 (1947).

Action for damages for trespass will lie in favor of tenant in possession of premises. Farmers' Mut. Fire Ins. Co. v. Harris, 50 Ga. App. 75, 177 S.E. 65 (1935).

To maintain action for trespass or injury to realty, it is essential that

plaintiff show either that the plaintiff was owner or was in possession at time of trespass. Palmer v. Pennington, 179 Ga. 76, 175 S.E. 380 (1934); Coleman v. Nail, 49 Ga. App. 51, 174 S.E. 178 (1934); James v. Riley, 181 Ga. 454, 182 S.E. 604 (1935); Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936); Southern Union Mut. Ins. Co. v. Mingledorff, 211 Ga. 514, 87 S.E.2d 54 (1955); Davis v. Palmer, 213 Ga. 862, 102 S.E.2d 478 (1958); Lyons v. Bassford, 242 Ga. 466, 249 S.E.2d 255 (1978).

Compensatory damages awarded for trespass. — Jury was entitled to award a property owner compensatory and punitive damages pursuant to O.C.G.A. §§ 51-9-3 and 51-12-5.1 because a willful trespass occurred when a neighbor directed the construction of a sewer lateral across the owner's property to tie into the owner's sewer line when the neighbor knew that the neighbor had neither a written easement nor permission from the owner to do so. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

One who is bona fide in possession of land under claim of ownership may, upon proof of such possession and such circumstances as would render the issuance of the writ of injunction necessary and proper, maintain an action to enjoin interference with one's possession. Lyons v. Bassford, 242 Ga. 466, 249 S.E.2d 255 (1978).

When the petition shows the defendant to be the owner of the land, the plaintiff must show the plaintiff's right of possession. Whitehead v. Nix, 114 Ga. App. 409, 151 S.E.2d 480 (1966).

Possession alone as against trespasser is sufficient prima facie evidence to enjoin continuing trespass. Oliver v. Irvin, 219 Ga. 647, 135 S.E.2d 376 (1964).

An injunction will be granted when an insolvent defendant is committing waste on land possessed by the plaintiff. Benson v. Taylor, 122 Ga. 581, 50 S.E. 348 (1905).

To constitute actual possession by enclosure, land must be completely enclosed; but it is not necessary that it should be completely enclosed on every side by artificial means, such as fences. Natural barriers, in part, may be utilized, provided, in connection with fences, they constitute a complete enclosure which indicates complete and notorious dominion over land. An enclosure of land, in part by fences, in part by the high banks of a creek, and in part by a rocky shoal, if all together make a complete enclosure, may constitute actual possession of that land. McCrea v. Georgia Power Co., 179 Ga. 1, 174 S.E. 798 (1934).

Petition alleging rightful possession of land and illegal interference therewith is good against general demurrer (now motion to dismiss). Mizell v. Byington, 73 Ga. App. 872, 38 S.E.2d 692 (1946).

Remaindermen are proper parties but not necessarily indispensable parties to enjoin continuing trespass. Oliver v. Irvin, 219 Ga. 647, 135 S.E.2d 376 (1964).

Bare claim of title insufficient to support suit for trespass for cutting timber. — When a plaintiff is not entitled to recover either on bare title or bare possession, and the suit is not one to recover possession of the land or damages for withholding possession but rather an action on trespass for the cutting of timber, a bare claim of title is not sufficient. Norman v. Chafin, 110 Ga. App. 234, 138 S.E.2d 279 (1964).

Landlord's interference with tenant's right of possession. — When the plaintiff alleged a right of use and possession as tenant of certain premises, and a willful and wanton violation of this right by the defendant, the defendant's landlord, in tearing down the porch and steps at the entrance to the premises, thereby requiring the tenant to use a ladder in order to enter or leave the premises, though no actual injury to one's purse or person is shown, this trespass interfered with the tenant's enjoyment of the use and possession and caused the tenant to suffer inconvenience, humiliation, and embarrassment, and the petition sets forth a cause of action as against a general demurrer (now motion to dismiss). Ivey v. Davis, 81 Ga. App. 598, 59 S.E.2d 256 (1950).

Right of recovery by tenant. — When an intruder illegally interferes with

or evicts a tenant, the tenant can recover the value of the premises for rent during the remainder of the time. Bass v. West, 110 Ga. 698, 36 S.E. 244 (1900); Daniel v. Perkins Logging Co., 9 Ga. App. 842, 72 S.E. 438 (1911).

Effect of subsequent purchase of premises by tenant. — Since the plaintiff was not the owner of the freehold when the trespass was committed but bought it afterwards, the plaintiff's recovery should be restricted to the damages which the plaintiff personally sustained as the tenant in possession, the right of recovery for damage by permanent injury to the freehold being in the person who then owned the premises under the provisions of former Code 1933, § 105-1404 (see now O.C.G.A. § 51-9-4). Burkhalter v. Oliver, 88 Ga. 473, 14 S.E. 704 (1891).

Tenant's right of action for forcible eviction by landlord. — A landlord who without legal process forcibly and violently ejects a tenant and the tenant's personal goods from the rented premises is liable to the latter in an action of trespass, although the tenant was holding over beyond this term, was in arrears for rent, and had received legal notice to quit. Collins v. Baker, 51 Ga. App. 669, 181 S.E. 425 (1935).

When a tenant has not breached the contract of rental but is entitled to possession of the rented premises, and this is known to the landlord, the act of the landlord in maliciously causing a warrant to issue to dispossess the tenant, and thereby causing the tenant to be forcibly evicted from the premises, constitutes a trespass by the landlord against the tenant's right of possession, for which the tenant has a cause of action in tort against the landlord. Yopp v. Johnson, 51 Ga. App. 925, 181 S.E. 596 (1935).

A malicious and forcible eviction of the tenant by the landlord, although under a warrant to dispossess regularly issued, when the tenant has not breached the contract of rental and is entitled to possession of the rented premises, and this is known to the landlord, and when the tenant does not arrest the proceedings by counter affidavit because of an inability to give the required bond, and there had been no suit which terminated in favor of the tenant, constitutes a trespass against the tenant's right to possession for which the tenant has a cause of action sounding a tort against the landlord. Mizell v. Byington, 73 Ga. App. 872, 38 S.E.2d 692 (1946).

While the petition is a suit by a tenant against the landlord to recover damages for malicious and forcible eviction of the plaintiff by the defendant under a warrant to dispossess, which was not resisted by counter affidavit, in which it is alleged that the plaintiff had not violated the contract of rental, but was entitled to remain in possession under the contract, and it may fail to allege a cause of action for a malicious use of process in that it does not appear that the suit had terminated favorably to the plaintiff, nevertheless it alleges a cause of action for a trespass against the plaintiff's right of possession. Mizell v. Byington, 73 Ga. App. 872, 38 S.E.2d 692 (1946).

Liability of railroad for fires. — The bare possession of land authorizes the possessor to recover damages against a railroad due to a fire negligently set. Flint River & N.E.R.R. v. Maples, 10 Ga. App. 573, 73 S.E. 957 (1912).

Possession of land gave owners the right to sue telephone company for trespass. — Landowners had the right to bring a trespass action against a utility company and the company's subcontractor for laying cable on the landowners' property without permission. Even if there was a deficiency in the landowners' title, their bare possession of the property was sufficient to support their claim pursuant to O.C.G.A. §§ 51-9-2 and 51-9-3. Lee v. Southern Telecom Co., 303 Ga. App. 642, 694 S.E.2d 125 (2010).

Proceeds and profits of land recoverable. — It has been held that a plaintiff may sue for the recovery of the proceeds and profits of land if the plaintiff be entitled to them, even if the plaintiff has not the legal title to the land. Oglesby v. Stodghill, 23 Ga. 590 (1857).

Measure of damages. — The measure of damages to the owner of land and the measure of damage to a tenant in possession of land are entirely separate and distinct. Zugar v. Glen Falls Indem. Co., 63 Ga. App. 660, 11 S.E.2d 839 (1940).

Cited in Yahoola River & Cane Creek Hydraulic Hose Mining Co. v. Irby, 40 Ga. 479 (1869); Central R.R. v. Brinson, 70 Ga. 207 (1883); Whiddon v. Williams Lumber Co., 98 Ga. 700, 25 S.E. 770 (1896); Hughes v. Bivins, 31 Ga. App. 198, 121 S.E. 590 (1923); Pollard v. Walton, 55 Ga. App. 353, 190 S.E. 396 (1937); Crump v. McEntire, 190 Ga. 684, 10 S.E.2d 186 (1940); Bennett v. Rewis, 211 Ga. 507, 87 S.E.2d 52 (1955); Ammons v. Central of Ga. Ry., 215 Ga. 758, 113 S.E.2d 438 (1960); Bethel Farm Bureau v. Anderson, 217 Ga. 529, 123 S.E.2d 754 (1962); Greenway v. Griffith, 225 Ga. 632, 170 S.E.2d 423 (1969); Standard Oil Co. v. Mount Bethel United Methodist Church, 230 Ga. 341, 196 S.E.2d 869 (1973).

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trespass, §§ 30 et seq., 33 et seq.

C.J.S. — 87 C.J.S., Trespass, § 17 et seq.

ALR. — Dispossession without legal process by one entitled to possession of real property as ground of action, other than for recovery of possession or damage to his person, by person dispossessed, 101 ALR 476.

Right of licensee of real property to injunction against, or damages for, trespass by third person, 139 ALR 1204.

Life tenant's right of action for injury or damage to property, 49 ALR2d 1117.

Right of landlord legally entitled to possession to dispossess tenant without legal process, 6 ALR3d 177.

51-9-4. Action for trespass by person having title.

The person having title to lands, if no one is in actual possession under the same title with him, may bring an action for a trespass thereon. If a tenant is in possession and the trespass is one which injures the freehold, the owner or a remainderman or reversioner may still bring the action. (Orig. Code 1863, § 2958; Code 1868, § 2965; Code 1873, § 3016; Code 1882, § 3016; Civil Code 1895, § 3877; Civil Code 1910, § 4473; Code 1933, § 105-1404.)

Cross references. — Criminal trespass, § 16-7-21.

JUDICIAL DECISIONS

This section changes the rule of common law which required the plaintiff to be in possession. Atlantic & Gulf R.R. v. Fuller, 48 Ga. 423 (1873).

When the plaintiff has legal title, even though out of possession, the plaintiff may maintain trespass. Williams v. Aycock, 52 Ga. App. 386, 183 S.E. 628 (1936), cert. denied, 183 Ga. 800, 189 S.E. 841 (1937).

This section allows an action of trespass by the true owner, even though the owner was not in possession of the land at the time, provided that the land is vacant, and the owner shows the owner is the true owner by showing title. Tootle v. Player, 113 Ga. App. 305, 147 S.E.2d 867 (1966).

To maintain action for trespass or injury to realty, it is essential that plaintiff show either that the plaintiff was the owner or was in possession at the time of the trespass. Palmer v. Pennington, 179 Ga. 76, 175 S.E. 380 (1934); Coleman v. Nail, 49 Ga. App. 51, 174 S.E. 178 (1934); James v. Riley, 181 Ga. 454, 182 S.E. 604 (1935); Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936); Southern Union Mut. Ins. Co. v. Mingledorff, 211 Ga. 514, 87 S.E.2d 54 (1955); Davis v. Palmer, 213 Ga. 862, 102

S.E.2d 478 (1958); Lyons v. Bassford, 242 Ga. 466, 249 S.E.2d 255 (1978).

To maintain an action for an injunction to prevent the defendant from committing a continuing trespass on certain lands, it was necessary for the plaintiff to show title in the plaintiff or actual possession of that portion of the tract upon which the alleged wrong was being committed. Tolnas v. Pope, 212 Ga. 50, 90 S.E.2d 420 (1955).

Plaintiff must prove good title in the plaintiff. Yahoola River & Cane Creek Hydraulic Hose Mining Co. v. Irby, 40 Ga. 479 (1869); Gaskins v. Gray Lumber Co., 6 Ga. App. 167, 64 S.E. 714 (1909).

Petition need not contain abstract of title or fact of tenancy. — In an action for trespass upon realty, it is not necessary for the plaintiff to set forth in the plaintiff's petition, or attach thereto, an abstract of the title upon which the plaintiff relies. Burns v. Horkan, 126 Ga. 161, 54 S.E. 946 (1906); Allen v. Potter, 153 Ga. 24, 111 S.E. 549 (1922).

Possession alone, as against trespasser, is sufficient prima facie evidence to enjoin continuing trespass. Oliver v. Irvin, 219 Ga. 647, 135 S.E.2d 376 (1964).

Remaindermen are proper parties but not necessarily indispensable parties to enjoin continuing trespass. Oliver v. Irvin, 219 Ga. 647, 135 S.E.2d 376 (1964).

When trespass to realty occurs after death of an intestate, prima facie right to sue therefor is in the intestate's heirs at law, especially when it does not appear that the administrator was in possession at the time of the trespass. Smith v. Fischer, 52 Ga. App. 598, 184 S.E. 406 (1936).

Bare claim of title insufficient to support suit for trespass for cutting timber. — When a plaintiff is not entitled to recover either on bare title or bare possession, and the suit is not one to recovery possession of the land or damages for withholding possession but rather an action on trespass for the cutting of timber, a bare claim of title is not sufficient. Norman v. Chafin, 110 Ga. App. 234, 138 S.E.2d 279 (1964).

When landlord without legal process forcibly and violently ejects tenant from rented premises, the landlord is liable to the latter in action of trespass although the tenant was holding over beyond the tenant's term, was in arrears for rent, and had received legal notice to quit. Real Estate Loan Co. v. Pugh, 43 Ga. App. 570, 159 S.E. 587 (1931), later appeal, 47 Ga. App. 443, 170 S.E. 698 (1933).

Trespass must have caused actual damage to the property; it is not enough that the plaintiff might suffer some damage at some point in the future. Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta, 986 F. Supp. 1406 (N.D. Ga. 1997).

Plaintiff whose property is sold at marshal's sale, which was void because based on excessive levy, holds legal title to premises, and can maintain an action for trespass against one committing a trespass against one's title and right to possession. Williams v. Aycock, 52 Ga. App. 386, 183 S.E. 628 (1936), cert. dismissed, 183 Ga. 800, 189 S.E. 841 (1937).

Purchase of paramount title. — A grantee, upon discovery that the grantee has bought an invalid title, may procure the paramount outstanding title from the true owner, and upon so doing will not be estopped from asserting such title in an action of trespass. Moore v. Vickers, 126 Ga. 42, 54 S.E. 814 (1906).

Removal of gravel by trespasser. — Under this section, one in possession of land by a tenant has a right of action against a mere trespasser who commits an injury to the land by the removal of gravel. Mayor of Cartersville v. Lyon, 69 Ga. 577 (1882).

Cited in Markham v. Brown, 37 Ga. 277, 92 Am. Dec. 73 (1867); Citizens & S. Bank v. Edelstein, 38 Ga. App. 56, 142 S.E. 307 (1928); Tompkins v. Atlantic Coast Line R.R., 89 Ga. App. 171, 79 S.E.2d 41 (1953); Brooks v. Ready Mix Concrete Co., 94 Ga. App. 791, 96 S.E.2d 213 (1956); Campion v. McLeod, 108 Ga. App. 261, 132 S.E.2d 848 (1963); Ellenberg v. Pinkerton's, Inc., 130 Ga. App. 254, 202 S.E.2d 701 (1973); Merz v. Professional Health Control of Augusta, Inc., 175 Ga. App. 110, 332 S.E.2d 333 (1985); De Castro v. Durrell, 295 Ga. App. 194, 671 S.E.2d 244 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trespass, §§ 33 et seq.

C.J.S. — 87 C.J.S., Trespass, § 20 et seq.

ALR. — Right after redemption from tax sale or forfeiture to maintain action for trespass committed between sale or forfeiture and redemption, 33 ALR 302.

Trespass by acts above surface, 42 ALR 945.

Right of third person to enter premises against objection of landlord, 43 ALR 206.

Liability of grantor or lessor of property which he does not own to true owner for trespass by lessee or grantee, 127 ALR 1015.

Right of licensee of real property to injunction against, or damages for, trespass by third person, 139 ALR 1204.

Measure of damages for tenant's failure to surrender possession of rented premises, 32 ALR2d 582.

51-9-5. Effect of holding title when possession claimed by two persons.

If two persons claim to have actual possession of the same land, the person having legal title shall be deemed to be in possession and the other person shall be considered a trespasser. (Orig. Code 1863, § 2959; Code 1868, § 2966; Code 1873, § 3017; Code 1882, § 3017; Civil Code 1895, § 3878; Civil Code 1910, § 4474; Code 1933, § 105-1405.)

JUDICIAL DECISIONS

This section raises presumption of actual possession in favor of one who has legal title, until the contrary is proved. Stamper v. Griffin, 20 Ga. 312, 65 Am. Dec. 628 (1956).

True owner's rights good as against trespasser. — One who is the owner of land and takes possession of the same while it is vacant, and thus prevents an intruder who is temporarily absent from reentering thereon, is not liable to the intruder in damages on account of such entry on the land. Varellas v. Varellas, 109 Ga. App. 279, 136 S.E.2d 21 (1964).

Cited in Graves v. Ashburn, 215 U.S. 331, 30 S. Ct. 108, 54 L. Ed. 217 (1909).

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trespass, § 30 et seq.

C.J.S. — 87 C.J.S., Trespass, § 17 et seq.

ALR. — Possession of real property as notice of diverse coexistent interests of possessor, 74 ALR 355.

51-9-6. Damages for continuing trespass.

Damages for a continuing trespass are limited to those which have occurred before an action is commenced. Subsequent damages flowing from a continuation of the trespass give a new cause of action. (Civil Code 1895, § 3884; Civil Code 1910, § 4480; Code 1933, § 105-1406.)

History of Code section. — The language of this Code section is derived in part from the decision in Savannah & Ogeechee Canal Co. v. Bourguin, 51 Ga. 378 (1874).

Law reviews. — For article, "Keep Out! The Efficacy of Trespass, Nuisance and Privacy Torts as Applied to Drones," see 33 Georgia St. U.L. Rev. 359 (2017).

JUDICIAL DECISIONS

Section not applicable in ejectment action. — O.C.G.A. § 51-9-6 did not apply to limit damages in an ejectment action by a landowner against an outdoor sign company. Outdoor Sys. v. Woodson, 221 Ga. App. 901, 473 S.E.2d 204 (1996).

Intent of this section is that in suit for continuing trespass the plaintiff cannot recover damages arising after suit is filed, except as a "new cause of action," to be declared upon in a new and different suit. Savannah Elec. & Power Co. v. Horton, 44 Ga. App. 578, 162 S.E. 299 (1932).

Plaintiff's election. — The plaintiff, at the plaintiff's election, may sue for any damages which have resulted from a continuous trespass within the statute of limitations, before the entire injury is done. Other damages might be made the basis of a new action. Becker v. Donalson, 133 Ga. 864, 67 S.E. 92 (1910).

When all damages claimed resulted from continuing trespass committed, declaration was not subject to special demurrers (now motions to dismiss). Gloss v. Jacobs, 86 Ga. App. 161, 71 S.E.2d 253 (1952).

Damages sustained by reason of nuisance which may be abated, or continuing but not permanent trespass, are recoverable up to time of bringing suit, the reason being that the trespass or nuisance may or may not be continued after the suit is commenced, and if continued, a new cause of action arises therefor. Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800 (1951).

Damages from continuing trespass may be setoff in an equitable action for specific performance, cancellation of deeds, and damage to the land in question. Becker v. Donalson, 133 Ga. 864, 67 S.E. 92 (1910).

Permanent injury to freehold. — This section does not apply to a suit for permanent injury to the freehold. Central of Ga. Ry. v. Kelly, 7 Ga. App. 464, 67 S.E. 118 (1910).

Cited in Williams v. Aycock, 52 Ga. App. 386, 183 S.E. 628 (1936); Groover v. Hightower, 59 Ga. App. 491, 1 S.E.2d 446 (1939); Calhoun v. Edwards, 202 Ga. 95, 42 S.E.2d 426 (1947).

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trespass, §§ 19, 88 et seq.

C.J.S. — 87 C.J.S., Trespass, § 139.

ALR. — Measure of damages for interference with percolating waters, 35 ALR 1222; 55 ALR 1385; 109 ALR 395.

Measure of damages for injury to or destruction of growing crop, 175 ALR 159.

Right of trespasser to credit for expenditures in producing, as against his liability for value of, oil or minerals, 21 ALR2d 380.

Measure and elements of damages for pollution of a stream, 49 ALR2d 253.

Easements: way by necessity where property is accessible by navigable water, 9 ALR3d 600.

Recovery in trespass for injury to land caused by airborne pollutants, 2 ALR4th 1054.

51-9-7. Diversion, obstruction, or pollution of stream as trespass.

The owner of land through which nonnavigable watercourses flow is entitled to have the water in such streams come to his land in its natural and usual flow, subject only to such detention or diminution as may be caused by a reasonable use of it by other riparian proprietors. The diverting of the stream in whole or in part from its natural and usual flow, or the obstructing thereof so as to impede its course or cause it to overflow or injure the land through which it flows or any right appurtenant thereto, or the polluting thereof so as to lessen its value to the owner of such land shall constitute a trespass upon the property. (Orig. Code 1863, § 2960; Code 1868, § 2967; Code 1873, § 3018; Code 1882, § 3018; Civil Code 1895, § 3879; Civil Code 1910, § 4475; Code 1933, § 105-1407.)

History of Code section. — The language of this Code section is derived in part from the decisions in Pool v. Lewis, 41 Ga. 162 (1870); White v. East Lake Land Co., 96 Ga. 415, 23 S.E. 393 (1895); Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S.E. 807 (1909).

Cross references. — Control of water pollution and surface-water use generally, § 12-5-20. Property rights in water generally, T. 44, C. 8.

Law reviews. — For article, "Riparian Rights in Georgia," see 18 Ga. B. J. 401 (1956). For article, "Georgia Water Law, Use and Control Factors," see 19 Ga. B. J. 119 (1956). For article on principles of water law in the southeast, see 13 Mercer L. Rev. 344 (1962). For article, "Surface Waters and the Civil Law Rule," see 23 Emory L.J. 1015 (1974). For article discussing legal questions relating to interbasin transfer of water supply, see Ga. St. B. J. 48 (1976). For article, "Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law Governing the Allocation of Georgia Water," see 38 Ga. L. Rev. 1009 (2004). For article, "Special Challenges to Water Markets in Riparian States," see 21 Ga. St. U.L. Rev. 305 (2004).

For note, "Regulation of Artificial Lakes and Recreational Subdivisions in Georgia," recommending methods for future regulation, see 8 Ga. St. B. J. 580 (1972).

JUDICIAL DECISIONS

Law with regard to respective rights of owners of land on nonnavigable streams is based upon old maxim of Justinian. — "Water runs and it ought to run in the manner in which it was accustomed to run." Goble v. Louisville & Nashville R.R., 187 Ga. 243, 200 S.E. 259 (1938).

This section is a codification of common law. Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S.E. 87 (1909).

Rights extend to owners on either side of stream. — The provisions of O.C.G.A. § 51-9-7 extend to owners of parcels on either side of a stream, as well as to upper and lower riparian owners. Dawson v. Wade, 257 Ga. 552, 361 S.E.2d 181 (1987).

Obstruction of nonnavigable stream so as to impede its course or cause it to overflow or injure land of another is trespass upon one's property. Groover v. Hightower, 59 Ga. App. 491, 1 S.E.2d 446 (1939).

Riparian rights are part of soil and go with soil, and a plaintiff if not required to wait and perhaps in future be compelled to meet a claim of right adverse to the plaintiff's title. Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806 (1936).

It matters not whether use to which running water can be applied is pres-

ent or prospective; riparian proprietor has a right to which the proprietor would by law be entitled. Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806 (1936).

Owner of land to or through which nonnavigable stream flows has right to flow of water which is equal to owner's right to soil which underlies stream; such a right comes within the constitutional provision that private property may not be taken or damaged for public purposes without payment of just and adequate compensation. Davis v. Cobb County, 61 Ga. App. 712, 7 S.E.2d 324 (1940).

As to the diversion of a nonnavigable stream in Georgia, there is no exception to the rule that a riparian owner has a right equal to one's right to the soil which underlies the stream that the water should continue to run as it did before the diversion. Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806 (1936).

No riparian proprietor has right to use water to prejudice of other proprietors above or below the proprietor; the proprietor has no property in the water itself, but a simply usufruct while it passes along. Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806 (1936); Goble v. Louisville & Nashville R.R., 187 Ga. 243, 200 S.E. 259 (1938).

Lower riparian owner is entitled to have water flow upon one's land in its natural state free from adulteration. Kingsley Mill Corp. v. Edmonds, 208 Ga. 374, 67 S.E.2d 111 (1951).

Riparian owner is not to be held responsible for effects of forces of nature, to wit, the vicissitudes of the weather, which may cause trees upon one's land to become rotten and thereby break off and fall into the main channel of a watercourse, and one owes no duty either to a lower or upper riparian owner to remove these obstructions, so as to release water thereby caused to be backed over the land of an upper riparian owner, and, therefore, a failure to do so, even after notice, does not subject such owner to an action ex delicto for damages. Cole v. Bradford, 52 Ga. App. 854, 184 S.E. 901 (1936).

No liability unless diversion is by "artificial means." — A landowner is not liable for the diversion or obstruction of surface water unless the landowner diverts or obstructs the natural flow of water by "artificial means." Bracey v. King, 199 Ga. App. 831, 406 S.E.2d 265 (1991).

Downstream owner not obligated to remove beaver dam. — A beaver dam is naturally created, as opposed to an artificially created obstruction, and therefore constitutes a natural obstruction which a downstream owner is under no legal obligation to remove. Bracey v. King, 199 Ga. App. 831, 406 S.E.2d 265 (1991).

Petition of lower riparian owner showing adulteration, by upper riparian owner, of water flowing through their properties with resultant damage to such lower owner, is not demurrable (now subject to motion to dismiss) as stating no cause of action. Vickers v. City of Fitzgerald, 216 Ga. 476, 117 S.E.2d 316 (1960), overruled on other grounds, City of Chamblee v. Maxwell, 264 Ga. 635, 452 S.E.2d 488 (1994).

When petition disclosed that the plaintiff was not the riparian owner at the time the action was filed, the petition did not state a cause of action either for legal or equitable relief on account of the erection by the defendants of a dam across a nonnavigable stream flowing through the property of the defendants and across land occupied by the plaintiff with consent of the owner. Moulton v. Bunting McWilliams Post No. 658, VFW, 213 Ga. 859, 102 S.E.2d 593 (1958).

Irrigation is not per se a diversion of water prohibited by law. Pyle v. Gilbert, 245 Ga. 403, 265 S.E.2d 584 (1980), overruled on other grounds, Tunison v. Harper, 286 Ga. 687, 690 S.E.2d 819 (2010).

Reasonable amount of water may be diverted for irrigation, under the general right of use for domestic and agricultural purposes. Pyle v. Gilbert, 245 Ga. 403, 265 S.E.2d 584 (1980), overruled on other grounds, Tunison v. Harper, 286 Ga. 687, 690 S.E.2d 819 (2010).

By common law, right to take fish belongs essentially to right of soil in streams where the tide does not ebb and flow. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930).

If riparian owner owns upon both sides of stream, no one but the owner may come within limits of owner's land and take fish there. The same right applies so far as the owner's land extends to the thread of the stream, where the owner owns upon one side only. Within these limits, by the common law, the owner's rights of fishery are sole and exclusive. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930).

Lower riparian owners may sue jointly. — Several lower riparian landowners have such a community of interest and right in the enjoyment of a nonnavigable stream that they may join in a petition to restrain a trespass. Horton v. Fulton, 130 Ga. 466, 60 S.E. 1059 (1908).

No recovery where title is in third party. — A person cannot recover under this section when the title to the land is in a third person. Morris v. McCamey, 9 Ga. 160 (1850).

County's liability for interference with stream due to construction. — When a county, grading a road under contract with the Highway Department, hauls dirt 100 feet from the right of way and dumps the dirt into a spring on land adjoining the plaintiffs, and stops up the spring and cuts off a stream which flowed upon and through the plaintiffs' property, it is liable in damages for the difference between the value of the plaintiffs' land before and after the stoppage of the flow of water. Davis v. Cobb County, 61 Ga. App. 712, 7 S.E.2d 324 (1940).

Injunction against interference with creek by placing trestle across it. — A cause of action was set forth in a petition alleging that the defendant placed a trestle across a creek, leaving an opening inadequate to carry the natural flow of water in times of freshet, with the result that debris, sand, and logs collected on the upper side of the trestle, causing partial obstruction of the flow of the stream; that on a day named, when heavy rains fell, the logs and debris thus collected completely stopped the flow of the water, thereby causing the fill and trestle of the defendant to form a complete dam; that as a result the embankment and fill of the defendant broke away and suddenly released the entire volume of impounded water on the plaintiff's land, rendering it worthless by reason of its being washed away by these floods of water; that the injuries were occasioned by the maintenance by the defendant of the fill and embankment in a negligent manner; that the maintenance of the trestle and fill was a continuing nuisance; that the defendant had begun to rebuild in the manner as it theretofore existed; and that the recurring damage would give rise to a multiplicity of suits and constitute a recurring trespass with resultant irreparable damages; the prayers being for an injunction to prevent the defendant from maintaining the defendant's trestle in the manner undertaken, and for damages to that part of the land rendered totally worthless. Goble v. Louisville & Nashville R.R., 187 Ga. 243, 200 S.E. 259 (1938).

Injunction to prevent interference by upper riparian owner. — When a lower riparian proprietor files a petition praying for injunction against an upper riparian proprietor, who is threatening to interfere with one's rights in a nonnavigable stream flowing through one's land by diverting a part of the water above the lands of the complainant and turning it into another stream, the defendant admitting that it is the defendant's purpose to divert the water, it will be error to refuse an injunction upon the ground that the threatening injury is such as to result in no material damages to the complainant. McNabb v. Houser, 171 Ga. 744, 156 S.E. 595 (1931); Robertson v. Arnold, 182 Ga. 664, 186 S.E. 806 (1936).

Interlocutory injunction not improper when some evidence indicates pollution of stream. — When no question of prescriptive rights was involved in suit by a dairy farmer seeking to enjoin a manufacturing company from polluting a stream, and when there was evidence, though conflicting, that the stream was being polluted, and that the petitioner had not acquiesced or consented for the water from the defendants' sewerage disposal plant to be discharged upon the defendant's land, the trial court did not abuse the court's discretion in granting an interlocutory injunction. Kingsley Mill Corp. v. Edmonds, 208 Ga. 374, 67 S.E.2d 111 (1951).

Right to use water power. — The owner of a mill whose dam and machinery are suited to the size and capacity of the stream has a right to the reasonable use of the water to propel the owner's machinery, but the owner must return it to its natural channel before it passes upon the land of the proprietor below. Pool v. Lewis, 41 Ga. 162, 5 Am. R. 526 (1870).

Rights of landowner adjacent to nonnavigable stream may be lost by prescription. Seaboard Air-Line Ry. v. Sikes, 4 Ga. App. 7, 60 S.E. 868 (1908).

Riparian owner's passivity to another's construction activity not automatically an estoppel. — Something more than mere passivity or inaction upon the part of a riparian owner of lands upon a stream, while another is cleaning out and constructing a ditch at large expense for the purpose of diverting water from such stream, is generally necessary to create an estoppel, although the riparian owner may know of such expenditure and make no objection. McNabb v. Houser, 171 Ga. 744, 156 S.E. 595 (1931).

Section not applicable to damage by surface water. — A municipal corporation is not liable for an overflow of surface water created by ice and snow which injures the property of an abutting landowner. Phinizy v. City Council, 47 Ga. 260 (1872).

Suit may be maintained for damages growing out of nuisance constituted by trestle and fill inadequately constructed and negligently maintained, when the damages sued for were inflicted within four years before the time of filing suit, though the act which originally caused the nuisance was not done within the period of limitation of the action. Goble v. Louisville & Nashville R.R., 187 Ga. 243, 200 S.E. 259 (1938).

A railroad company, in its construction and maintenance of its culverts, trestle, and embankments, is bound so to construct and maintain them that the accumulation of water from freshets which in the usual course of events are likely to occur will not cause breaks in its embankments and consequent inundation of lands below. Goble v. Louisville & Nashville R.R., 187 Ga. 243, 200 S.E. 259 (1938).

Cited in Anneberg v. Kurtz, 197 Ga. 188, 28 S.E.2d 769 (1944); Roughton v. Thiele Kaolin Co., 209 Ga. 577, 74 S.E.2d 844 (1953); Piedmont Cotton Mills, Inc. v. General Whse. No. Two, Inc., 222 Ga. 164, 149 S.E.2d 72 (1966); Clemones v. Alabama Power Co., 250 F. Supp. 433 (N.D. Ga. 1966); First Kingston Corp. v. Thompson, 223 Ga. 6, 152 S.E.2d 837 (1967); Wright v. Lovett, 132 Ga. App. 729, 209 S.E.2d 15 (1974); Payne v. Whiting, 140 Ga. App. 390, 231 S.E.2d 796 (1976).

OPINIONS OF THE ATTORNEY GENERAL

Parol license to flood lands given by owner operates as easement when acted on and money is spent in constructing dam. 1954-56 Op. Att'y Gen. p. 555.

RESEARCH REFERENCES

Am. Jur. 2d. — 78 Am. Jur. 2d, Waters, §§ 55 et seq., 171 et seq., 191 et seq.

C.J.S. — 93 C.J.S., Waters, §§ 19 et seq., 49 et seq.

ALR. — Duty to refrain from improving or using one's property in anticipation of flooding of the property by another's wrong, 19 ALR 423.

Right of grantor of railroad right of way or his privy to recover damages for interference with surface water by construction of road, 19 ALR 487.

Right of riparian owner to embank against flood or overflow water from stream, 22 ALR 956; 53 ALR 1180.

Liability of owner of flowage rights for draining off water to the damage of property overflowed, 29 ALR 1325.

Measure of damages for interference with percolating waters, 35 ALR 1222; 55 ALR 1385; 109 ALR 395.

Injury by percolation or seepage from ponded water, 38 ALR 1244.

Pollution of stream by mining operations, 39 ALR 891.

Riparian or littoral owner's right of

view over navigable water, 52 ALR 1186.

Prescriptive right of lower as against upper owner to flow of stream, 53 ALR 201.

Transfer of riparian right to use water to nonriparian land, 54 ALR 1411.

Constitutionality of statutes affecting riparian rights, 56 ALR 277.

Extend of detention or retardation of water incident to riparian rights, 70 ALR 220.

Duty of lower land to receive surface water diverted to upper land by artificial conditions outside of both tracts, 72 ALR 344.

Estoppel of one riparian owner to complain to diversion of water by another riparian owner, 74 ALR 1129.

What constitutes natural drainway or watercourse for flow of surface water, 81 ALR 262.

Right of riparian landowners to continuance of artificial conditions established above or below their land, 88 ALR 130.

Right to injunction to protect water rights as affected by fact that party seeking injunction contemplates no immediate use of rights, or by doctrine of comparative injury, 106 ALR 687.

Obstruction or diversion of, or other interference with, flow of surface water as taking or damaging property within constitutional provision against taking or damaging without compensation, 128 ALR 1195.

Liability for overflow or escape of water from reservoir, ditch, or artificial pond, 169 ALR 517.

Right of riparian owner to construct dikes, embankments, or other structures necessary to maintain or restore bank of stream or to prevent flood, 23 ALR2d 750.

When statute of limitation commences to run against damage from overflow of land caused by artificial construction or obstruction, 5 ALR2d 302.

Right of riparian owner to continuation of periodic and seasonal overflows from stream, 20 ALR2d 656.

Liability of person obstructing stream, ravine, or similar area by debris or waste, for damages caused by flooding or the like, 29 ALR2d 447.

Liability for obstruction or diversion of subterranean waters in use of land, 29 ALR2d 1354.

Measure and elements of damages for pollution of a stream, 49 ALR2d 253.

Relative riparian or littoral rights respecting the removal of water from a natural, private, nonnavigable lake, 54 ALR2d 1450.

Right of private sewerage system owner to enjoin unauthorized persons from using facilities, 76 ALR2d 1329.

Landowner's right to relief against pollution of his water supply by industrial or commercial waste, 39 ALR3d 910.

Propriety of injunctive relief against diversion of water by municipal corporation or public utility, 42 ALR3d 426.

Applicability of rule of strict or absolute liability to overflow or escape of water caused by dam failure, 51 ALR3d 965.

Liability for overflow of water confined or diverted for public power purposes, 91 ALR3d 1065.

Modern status of rules governing interference with drainage of surface waters, 93 ALR3d 1193.

Liability for diversion of surface water by raising surface level of land, 88 ALR4th 891.

51-9-8. Interference with underground streams.

The course of a stream of water underground and its exact condition before its first use are so difficult of ascertainment that trespass may not be brought for any supposed interference with the rights of a proprietor. (Orig. Code 1863, § 2961; Code 1868, § 2968; Code 1873, § 3019; Code 1882, § 3019; Civil Code 1895, § 3880; Civil Code 1910, § 4476; Code 1933, § 105-1408.)

Law reviews. — For article, "Water Rights, Public Resources, and Private Commodities: Examining the Current and Future Law Governing the Allocation of Georgia Water," see 38 Ga. L. Rev. 1009 (2004).

JUDICIAL DECISIONS

This section does not prohibit action for damages for pollution or poisoning of ground, water table or underground waters; the statute deals specifically with the "riparian" rights of the owner of the water in an underground stream. North Ga. Petroleum Co. v. Lewis, 128 Ga. App. 653, 197 S.E.2d 437 (1973).

This section does not apply where stream can be traced from point it sinks to point it emerges. Saddler v. Lee, 66 Ga. 45 (1880).

Section not applicable to action for injunction against adjacent land owner who is diverting water from a well defined underground stream, causing irreparable damage to a mineral spring on the petitioner's land. Saint Armand v. Lehman, 120 Ga. 253, 47 S.E. 949 (1904); Stoner v. Patten, 124 Ga. 754, 52 S.E. 894 (1906).

Interference with underground stream provides no cause of action. — While under former Code 1933, § 105-1407 (see now O.C.G.A. § 51-9-7), the owner of land through which nonnavigable watercourses flow was entitled to have the water in such streams come to the owner's land in its natural flow, subject to uses there stated, the owner could, under former Code 1933, § 105-1408 (see now O.C.G.A. § 51-9-8), make no legal complaint because the owner of the land on which the head or source of such stream was located, or others, in some manner disturbs the subterranean water that enters that spring, thereby causing the stream to cease flowing altogether. City of Atlanta v. Hudgins, 193 Ga. 618, 19 S.E.2d 508 (1942).

Alleged interference with underground flow of water to wells. — Portion of amended petition seeking damages because of alleged interference by the defendants' negligence with the underground flow of water to four wells did not show any cause of action since there was nothing in the amended petition to show that these wells were supplied by any defined underground stream. City of Atlanta v. Hudgins, 193 Ga. 618, 19 S.E.2d 508 (1942).

Burden of proof. — The burden of proving that an underground stream flows in a marked or well defined channel is on the plaintiff. Stoner v. Patten, 132 Ga. 178, 63 S.E. 897 (1909).

RESEARCH REFERENCES

Am. Jur. 2d. — 78 Am. Jur. 2d, Waters, §§ 217 et seq., 234 et seq.

C.J.S. — 93 C.J.S., Waters, § 204 et seq.

ALR. — Subterranean and percolating waters; springs; wells, 55 ALR 1385; 109 ALR 395.

Estoppel of one riparian owner to complain of diversion of water by another riparian owner, 74 ALR 1129.

Liability for obstruction or diversion of subterranean waters in use of land, 29 ALR2d 1354.

Liability for pollution of subterranean waters, 38 ALR2d 1265.

51-9-9. Interference with rights of owner above and below surface of property.

The owner of realty has title downwards and upwards indefinitely; and an unlawful interference with his rights, either below or above the surface, gives him a right of action. (Orig. Code 1863, § 2962; Code

1868, § 2969; Code 1873, § 3020; Code 1882, § 3020; Civil Code 1895, § 3881; Civil Code 1910, § 4477; Code 1933, § 105-1409.)

Cross references. — Extent of title downward and upward indefinitely, § 44-1-2. Leasing of mining interests in land, § 44-6-102. Determination of ownership of gas injected into underground storage reservoir, § 46-4-58.

Law reviews. — For article, "Keep Out! The Efficacy of Trespass, Nuisance and Privacy Torts as Applied to Drones," see 33 Georgia St. U.L. Rev. 359 (2017).

JUDICIAL DECISIONS

These statements as to ownership above surface are based upon common-law maxim, cujus est solum ejus est usque ad coelum — who owns the soil owns also to the sky. These provisions of the Code should therefore be construed in the light of the authoritative content of the maxim itself. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Language of this section that title to land extends upwards indefinitely would seem to be limitation upon ad coelum doctrine, indicating by implication that the title will include only such portions of the upper space as may be seized and appropriated by the owner of the soil. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Even if this section were intended to express the ad coelum theory in its entirety, it remains true that the maxim can have only such legal signification as it brings from the common law. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Construction with Groundwater Use Act. — O.C.G.A. § 51-9-9 and the Groundwater Use Act of 1972, O.C.G.A. § 12-5-90 et seq., can be read in harmony with one another; O.C.G.A. § 51-9-9, as interpreted by the Supreme Court of Georgia, grants a property interest to a real property owner in everything that lies beneath the surface, including groundwater, and the Groundwater Use Act imposes upon that ownership right certain regulatory limits. In re Durango Ga. Paper Co., 336 B.R. 594 (Bankr. S.D. Ga. 2005).

Owner of land is preferred claimant to airspace above it, and the owner is entitled to redress for any use thereof which results in an injury to the owner or to the owner's property. Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958).

Possession is basis of all ownership, and that which man can never possess would seem to be incapable of being owned. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Space in far distance above earth is in actual possession of no one, and, being incapable of such possession, title to the land beneath does not necessarily include title to such space. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942).

The legal title can hardly extend above an altitude representing the reasonable possibility of man's occupation and dominion, although as respects the realms beyond this the owner of the land may complain of any use tending to diminish the free enjoyment of the soil beneath. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942).

Owner of land has title to and right to control airspace above it to distance of at least 75 feet above the owner's buildings thereon (but the owner's title to the airspace above the owner's land is not necessarily limited to an altitude of that height). Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958).

Occupant of soil is entitled to be free from danger or annoyance by any use of superincumbent space, and for any use infringement of this right the occupant may apply to the law for appropriate redress or relief. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Owner had interest in groundwater. — Based on the clear and unambigu-

ous language of O.C.G.A. § 51-9-9 and Boardman Petroleum, a debtor, as the property owner, had at a minimum, a bona fide claim of ownership to everything that was above and below the debtor's property including the groundwater lying beneath the surface; for the purposes of the Bidding Procedures Order, the debtor had an asset of indeterminate value which was an asset of the bankruptcy estate and could be offered for sale in the manner provided. In re Durango Ga. Paper Co., 336 B.R. 594 (Bankr. S.D. Ga. 2005).

Continuing nuisance by airplane flight. — Since the evidence showed that at least 75 flights were made over the plaintiff's school building daily at altitudes of from 50 to 75 feet, just over the top of the plaintiff's trees, that the danger necessarily created thereby to the life and safety of those occupying the plaintiff's premises, the noise and vibration caused thereby, and the distracting effect on the plaintiff's students made further operation of the plaintiff's school impracticable, and that by such flights the right to enjoy freely the use of the plaintiff's property has been substantially lessened, a continuing nuisance was established which equity would enjoin. Scott v. Dudley, 214 Ga. 565, 105 S.E.2d 752 (1958).

Flight of aircraft across land of another cannot be said to be trespass without taking into consideration question of altitude. It might or might not amount to a trespass, according to the circumstances including the degree of altitude, and even when the act does not constitute a trespass, it could be a nuisance as when it "worketh hurt, inconvenience, or damage," to the preferred claimant, namely, the owner of the soil, or to a rightful occupant thereof. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942).

Overhanging building. — The space is up there, and the owner of the land has the first claim upon it. If another should capture and possess it, as by erecting a high building with a fixed overhanging structure, this alone will show that the space affected is capable of being possessed, and consequently the owner of the soil beneath the overhanging structure may be entitled to ejectment or to an action for trespass. Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

Encroachment on foundation. — Ejectment will lie to recover land of which the plaintiff has been ousted by the erection of a foundation below the surface beyond the plaintiff's own line. Wachstein v. Christopher, 128 Ga. 229, 57 S.E. 511, 119 Am. St. R. 381, 11 L.R.A. (n.s.) 917 (1907).

Person who owns surface may dig therein and apply all that is found therein to one's own personal purposes at one's free will and pleasure. City of Hawkinsville v. Clark, 135 Ga. App. 875, 219 S.E.2d 577 (1975).

Use or digging of well on one's own property is generally a perfectly lawful undertaking and the exercise of a right in property. City of Hawkinsville v. Clark, 135 Ga. App. 875, 219 S.E.2d 577 (1975).

Municipality not vested with arbitrary discretion to refuse well permit. — While a municipality may make reasonable rules and regulations looking to the protection, safety, and health of its citizens and may require permits for the exercise of its power of regulation, the grant or refusal of a permit to dig a well cannot be left to arbitrary discretion. City of Hawkinsville v. Clark, 135 Ga. App. 875, 219 S.E.2d 577 (1975).

RESEARCH REFERENCES

ALR. — Right of abutting owner to permanent use of subsurface of street or highway, 7 ALR 646.

Severance of title or rights to oil and gas in place from title to surface, 29 ALR 586; 146 ALR 880.

Meaning of term "surface" as employed in conveyance or devise, 31 ALR 1530.

Trespass by acts above surface, 42 ALR 945.

Recovery for trespass which demonstrates lack of mineral resources supposed to exist, 52 ALR 104.

Liability of adjoining owner for destruction or weakening of lateral support by act of God or sudden unforeseen natural force, 132 ALR 997.

Liability for property damage by concussion from blasting, 20 ALR2d 1372.

Liability for obstruction or diversion of subterranean waters in use of land, 29 ALR2d 1354.

Liability of mine operator for damage to surface structure by removal of support, 32 ALR2d 1309.

Recovery for unauthorized geophysical or seismograph exploration or survey, 67 ALR2d 444.

Solid mineral royalty as real or personal property, 68 ALR2d 728.

Earth, sand, or gravel as subject of conversion, 84 ALR2d 790.

Liability of excavators for damages to noncoterminous tract from removal of lateral support, 87 ALR2d 710.

What constitutes reasonably necessary use of the surface of the leasehold by a mineral owner, lessee, or driller under an oil and gas lease or drilling contract, 53 ALR3d 16.

Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Airport operations or flight of aircraft as constituting taking or damaging of property, 22 ALR4th 863.

51-9-10. Interference with right of way or right of common.

The unlawful interference with a right of way or a right of common constitutes a trespass to the party entitled thereto. (Orig. Code 1863, § 2963; Code 1868, § 2970; Code 1873, § 3021; Code 1882, § 3021; Civil Code 1895, § 3882; Civil Code 1910, § 4478; Code 1933, § 105-1410.)

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For summary review article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

What constitutes "unlawful interference." — Defendant surveyor's erroneous plat, which resulted, at most, in a cloud on the plaintiff's title in the form of a purported conveyance to the Department of Transportation by adjoining landowners of the access rights to the plaintiff's property, was not an "unlawful interference" with the plaintiff's property. Walker v. Hurd, 195 Ga. App. 855, 394 S.E.2d 925 (1990).

LLC that declared Chapter 11 bankruptcy committed trespass in violation of O.C.G.A. § 51-9-10 when the LLC interfered with a pilot's right to use an airport the LLC owned after the LLC gave the pilot permission to do so, but the pilot's right was limited to use of the taxiways and runway and the pilot violated § 51-9-10 by entering the airport for other purposes after being told not to do so; although the court awarded the LLC $100 for the pilot's trespass and the pilot $600 for the LLC's trespass, neither party showed that the opposing party committed a private nuisance in violation of Georgia law, and the court refused to award punitive damages under O.C.G.A. § 51-12-5.1 or attorney's fees under O.C.G.A. § 13-6-11 to either party. Flyboy Aviation Props., LLC v. Franck (In re Flyboy Aviation Props., LLC), 525 B.R. 510 (Bankr. N.D. Ga. 2015).

Highway is public way open and free to any one who has occasion to pass along it on foot or with any kind of vehicle. Holland v. Shackelford, 220 Ga. 104, 137 S.E.2d 298 (1964).

Streets and public places belong to general as well as local public. Holland v. Shackelford, 220 Ga. 104, 137 S.E.2d 298 (1964).

Owners of property which abuts public road have right to use and enjoyment of such road in common with all other members of public, as well as other rights such as ingress and egress which do not belong to the public generally. Holland v. Shackelford, 220 Ga. 104, 137 S.E.2d 298 (1964).

Landowner may maintain suit to enjoin further interference with the landowner's means of egress to and ingress from public highway, when such interference amounts to a continuing nuisance or trespass, and when an injunction would prevent a multiplicity of suits. Barham v. Grant, 185 Ga. 601, 196 S.E. 43 (1937); Holland v. Shackelford, 220 Ga. 104, 137 S.E.2d 298 (1964).

One whose means of egress from and ingress to one's property abutting on a public highway is illegally and unnecessarily interfered with by the placing of obstructions in and the plowing up of the portion of such way lying in the highway by another, not the public authority charged with the duty of maintaining and keeping in repair such highway, suffers a special injury and may maintain an action for damages therefore against the wrongdoer; one's injury being different from that suffered by the public at large, although such obstruction and interference may also constitute a public nuisance. Barham v. Grant, 185 Ga. 601, 196 S.E. 43 (1937); Holland v. Shackleford, 220 Ga. 104, 137 S.E.2d 298 (1964).

Damages for one whose means of egress and ingress to one's property abutting on public highway is illegally and unnecessarily interfered with may be depreciation in market value, if the obstruction is a permanent one, or the damage to business and loss of profits. Punitive damages may be recovered when the circumstances are such as to justify the allowance thereof. Barham v. Grant, 185 Ga. 601, 196 S.E. 43 (1937); Holland v. Shackleford, 220 Ga. 104, 137 S.E.2d 298 (1964).

Damage to grass on public right of way did not interfere with neighboring landowner's egress or ingress. — When a builder's trucks damaged grass near a curb in front of a landowner's house, and the grass was entirely within a public right of way owned by a county, the landowner did not have standing to sue the builder for trespass based on O.C.G.A. § 51-9-10; the landowner had provided no evidence of interference with the right to ingress and egress over the public right of way, but rather the landowner retained the full enjoyment of the right to come and go over the right of way as the landowner pleased. Moses v. Traton Corp., 286 Ga. App. 843, 650 S.E.2d 353 (2007), cert. denied, 2007 Ga. LEXIS 743 (Ga. 2007).

Destruction of easement actionable. — The destruction of an easement which the railroad company contracted to give a landowner in consideration of the landowner's relinquishment of an existing private road essential to the enjoyment of the landowner's property, is a trespass. Atkinson v. Kreis, 140 Ga. 52, 78 S.E. 465 (1913).

Destruction of right of common pasturage. — An action will lie for the destruction of a right of common pasturage. Davis v. Gurley, 44 Ga. 582 (1872).

Control of railroad over right of way. — The dominion of a railroad corporation over its trains, tracts and "right of way" is complete and exclusive. Fluker v. Georgia R.R. & Banking Co., 81 Ga. 461, 8 S.E. 529 (1889).

Measure of damages. — When an unauthorized use of a private way occurs, the damages are measured by the injury sustained. Johnson & Co. v. Arnold, 91 Ga. 659, 18 S.E. 370 (1893).

The measure of damages when a private way is closed is the depreciation in the value of the land. Atkinson v. Kreis, 140 Ga. 52, 78 S.E. 465 (1913).

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trespass, §§ 24 et seq, 36 et seq.

C.J.S. — 87 C.J.S., Trespass, § 3 et seq.

ALR. — Proper remedy for interference with right of way, 47 ALR 552.

Easements: way by necessity where property is accessible by navigable water, 9 ALR3d 600.

Right to maintain gate or fence across right of way, 52 ALR3d 9.

51-9-11. Slander or libel concerning title to land.

The owner of any estate in lands may bring an action for libelous or slanderous words which falsely and maliciously impugn his title if any damage accrues to him therefrom. (Orig. Code 1863, § 2964; Code 1868, § 2971; Code 1873, § 3025; Code 1882, § 3025; Civil Code 1895, § 3883; Civil Code 1910, § 4479; Code 1933, § 105-1411.)

Law reviews. — For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004).

JUDICIAL DECISIONS

Essential elements. — In order to sustain an action under this section, the plaintiff must allege and prove the uttering and publishing of the slanderous words; that the words were malicious; that the plaintiff sustained special damage thereby; and that the plaintiff possessed an estate in the property slandered. Schoen v. Maryland Cas. Co., 147 Ga. 151, 93 S.E. 82 (1917); Daniels v. Johnson, 191 Ga. App. 70, 381 S.E.2d 87 (1989).

Because a jury had sufficient evidence to infer that a seller, acting in concert with others, slandered the successor's title to its computer software, in violation of O.C.G.A. § 51-9-11, the trial court properly entered judgment in favor of the successor. Compris Techs., Inc. v. Techwerks, Inc., 274 Ga. App. 673, 618 S.E.2d 664 (2005).

Failure to adequately plead special damages defeated the borrower's claim for libel of title. Phillips v. Ocwen Loan Servicing, LLC, No. 1:12-cv-3861-WSD, 2013 U.S. Dist. LEXIS 129721 (N.D. Ga. Sept. 10, 2013).

Oral claim of title actionable. — A mere verbal claim or an oral assertion of ownership is not a cloud which can be removed by decree. The remedy in such cases is by an action for damages under this section. Weyman v. City of Atlanta, 122 Ga. 539, 50 S.E. 492 (1905).

When right to action accrues. — In an action for false, slanderous, and malicious words impugning the title to the plaintiff's lands, the right of action accrues to the plaintiff upon the doing of the act complained of, just as in injuries to personal reputation. King v. Miller, 35 Ga. App. 427, 133 S.E. 302 (1926).

No cause of action. — While liens were improperly filed by a supplier, the property owner failed to show that the statements in the lien notices were false; further, the trial court could also have found that the liens were privileged under O.C.G.A. § 51-5-8 and, thus, dismissal of the owner's slander of title action was proper. Roofing Supply of Atlanta, Inc. v. Forrest Homes, Inc., 279 Ga. App. 504, 632 S.E.2d 161 (2006).

Summary judgment was properly granted to real property buyers in an action by the sellers, alleging slander of title under O.C.G.A. § 51-9-11 as the sellers failed to assert actionable claims when lis pendens filed against the property were proper and privileged under O.C.G.A. § 51-5-8; further, any failure to remove or properly mark the lis pendens

pursuant to O.C.G.A. § 44-14-612 after the sellers voluntarily dismissed the claim did not form the basis of a slander of title claim against the buyers. Exec. Excellence, LLC v. Martin Bros. Invs., LLC, 309 Ga. App. 279, 710 S.E.2d 169 (2011).

This tort was subject to defense of privilege as codified in former Code 1933, § 105-711 (see now O.C.G.A. § 51-5-8). Berger v. Shea, 150 Ga. App. 812, 258 S.E.2d 621 (1979); Panfel v. Boyd, 187 Ga. App. 639, 371 S.E.2d 222 (1988), aff'd, 195 Ga. App. 891, 395 S.E.2d 80 (1990).

Sufficiency of pleading. — A petition alleging that the defendant has willfully, falsely, and maliciously stated to a prospective purchaser from the owner of land that the defendant owned it, had deeds to it, and would well it, stated a cause of action for what ever special damages were sustained by the owner as a consequence thereof. Copeland v. Carpenter, 203 Ga. 18, 45 S.E.2d 197 (1947).

Property owner's defamation of title action failed because the owner's conclusory allegations that the owner had fully paid a surveyor's bill for work done, although sworn to, did not, without more, create a material issue of fact regarding the falsity of statements in a surveyor's lien; thus, the owner failed to establish an essential element of defamation of title and summary judgment in favor of the surveyor was appropriate. Simmons v. Futral, 262 Ga. App. 838, 586 S.E.2d 732 (2003).

Lack of standing. — Since the contractor was not the owner of the property, the contractor lacked standing to assert a claim for damages. Bishop Contracting Co. v. North Ga. Equip. Co., 203 Ga. App. 655, 417 S.E.2d 400, cert. denied, 203 Ga. App. 905, 417 S.E.2d 400 (1992).

In action for slander to title under this section, the plaintiff could recover only such special damages as the plaintiff actually sustained as a consequence of the alleged wrongful acts, and the plaintiff was required to plead them plainly, fully, and distinctly and with that particularity necessary to put the defendant on notice of their character. Copeland v. Carpenter, 203 Ga. 18, 45 S.E.2d 197 (1947).

Allegations insufficient to prove special damages. — Allegations that the contractor's lien prevented the homeowner from obtaining funds necessary to complete the house and prevented the homeowner from selling the house, without offering specific figures for the damage allegedly suffered, were insufficient to prove special damages. Harmon v. Cunard, 190 Ga. App. 19, 378 S.E.2d 351 (1989).

Petition which a husband and wife filed against an attorney, seeking $50,000 "for humiliation and embarrassment" they experienced because an attorney initiated a foreclosure action after they refused to pay a promissory note, did not state a claim for special damages, and the state supreme court held that the trial court properly granted the attorney's motion for summary judgment on the husband and wife's claim alleging slander of title, even though the trial court dismissed the claim on other grounds. Latson v. Boaz, 278 Ga. 113, 598 S.E.2d 485 (2004).

Trial court erred in awarding a limited liability company special and general damages on the company's counterclaim against a mortgage broker for slander of title because, even if the evidence was sufficient to prove that a lien the broker recorded for a claimed brokerage fee over the LLC's real property constituted false and malicious publication of defamatory words against the property, there was a lack of evidence of special damages resulting therefrom; attorney fees the LLC incurred to remove the lien from the property did not constitute special damages, an essential element necessary to sustain the action, and general evidence that the lien hindered the LLC's ability to obtain a loan was also insufficient to establish special damages. M&M Mortg. Co. v. Grantville Mill, LLC, 302 Ga. App. 46, 690 S.E.2d 630 (2010).

Trial court did not err by granting summary judgment to the defendants on the plaintiff's claim of slander of title alleging that the estate suffered special damages by the loss in value of the slandered property because the plaintiff failed to raise an issue of fact regarding special damages as the plaintiff did not bring forth any facts regarding the value of the property at any time between April 2009, the date the forged assignment was recorded, to March

2011, the date of the Supreme Court's decision quieting title to the property; and the plaintiff did not show how the value of the property during that period suffered from the fact that the forged assignment was recorded. Veatch v. Aurora Loan Servs., LLC, 331 Ga. App. 597, 771 S.E.2d 241 (2015).

Directed verdict granted. — Manufacturer was entitled to a directed verdict on the customer's slander of title claim since the customer failed to point to any evidence that the manufacturer acted with malice in filing a lien notice to protect its rights to recover the contract balance and failed to show that the lien notice was inaccurate. Premier Cabinets, Inc. v. Bulat, 261 Ga. App. 578, 583 S.E.2d 235 (2003).

Summary judgment proper when no evidence of malice in slander of title action. — Summary judgment was warranted to investors on a developer's claims of tortious interference with contract and business relations, as well as slander of title, as the investors asserted that the investors filed a lis pendens and delivered a lis pendens to a bank in good faith to protect the investors' business interests, and a developer failed in the developer's burden of pointing to specific evidence in order to create a triable issue on the malice with intent to injure element. Meadow Springs, LLC v. IH Riverdale, LLC, 323 Ga. App. 478, 747 S.E.2d 47 (2013).

Fact issues remaining prevent award of summary judgment. — When fact issues remained as to a foreclosure allegedly resulting from a non-existent debt, thus slandering the title to the underlying property, summary judgment was reversed. Boaz v. Latson, 260 Ga. App. 752, 580 S.E.2d 572 (2003).

Litigation and attorney fees. — Costs of litigation and attorney fees cannot constitute the required special damage, as such costs and fees will be present in any suit and treating them as special damage would render the special damage requirement meaningless. Accordingly, the trial court properly concluded that a cause of action for defamation of title could not be maintained as a matter of law. Hicks v. McLain's Bldg., Materials, Inc., 209 Ga. App. 191, 433 S.E.2d 114 (1993).

Trial court erred in finding that a jury question remained on a property owner's claim against a subcontractor who had filed liens on the property for slander of title; under O.C.G.A. § 51-9-11, the owner could recover only such special damages as the owner actually sustained, and the owner only presented evidence of the attorney fees the owner incurred, which were not special damages. Seaboard Constr. Co. v. Kent Realty Brunswick, LLC, 331 Ga. App. 742, 771 S.E.2d 429 (2015).

Jury instructions. — In Georgia, there is no tort for the wrongful filing of a claim of materialman's or mechanic's lien. When a materialman's or mechanic's lien is improperly filed, the cause of action, if any, is for defamation concerning land under O.C.G.A. § 51-9-11. In order to sustain an action of this kind, the plaintiff must allege and prove the uttering and publishing of the slanderous words; that the words were false; that the words were malicious; that the plaintiff sustained special damage thereby; and that the plaintiff possessed an estate in the property slandered. Consequently, the court erred in instructing the jury that failure to provide the property owner with statutory notice renders the lien claimant liable for damages. Amador v. Thomas, 259 Ga. App. 835, 578 S.E.2d 537 (2003).

Cited in King v. Neill, 33 Ga. App. 552, 126 S.E. 896 (1925); Copeland v. Carpenter, 206 Ga. 822, 59 S.E.2d 245 (1950); Ferguson v. Atlantic Land & Dev. Corp., 158 Ga. App. 33, 279 S.E.2d 470 (1981); Lincoln Log Homes Mktg., Inc. v. Holbrook, 163 Ga. App. 592, 295 S.E.2d 567 (1982); F.S. Assocs. v. McMichael's Constr. Co., 197 Ga. App. 705, 399 S.E.2d 479 (1990); Rapps v. Cooke, 234 Ga. App. 131, 505 S.E.2d 566 (1998); Sanders v. Brown, 257 Ga. App. 566, 571 S.E.2d 532 (2002).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Proof of Slander or Disparagement of Title to Real Property, 55 POF3d 509.

Am. Jur. Trials. — Slander of Title by Improper Recording of Notice of Default, 28 Am. Jur. Trials 229.

C.J.S. — 53 C.J.S., Libel and Slander, § 310 et seq.

ALR. — Libel and slander: imputation that property sold or offered for sale is subject to an encumbrance, 50 ALR 279.

Malice as element of action for slander of title, 129 ALR 179.

Recording of instrument purporting to affect title as slander of title, 39 ALR2d 840.

What constitutes special damages in action for slander of title, 4 ALR4th 532.

Allowance of punitive damages in action for slander of title or disparagement of property, 7 ALR4th 1219.

Slander of title: sufficiency of plaintiff's interest in real property to maintain action, 86 ALR4th 738.

CHAPTER 10

INJURIES TO PERSONALTY

Sec.
51-10-1. Right of action for deprivation of possession of personalty.
51-10-2. Who may bring an action for interference with possession of chattel.
51-10-3. Abuse of or damage to personalty as trespass.
51-10-4. Rights of action of bailee and bailor for trespass.
51-10-5. Right of action for injury to remainder or reversionary interest in personalty; joint action with tenant in possession.
51-10-6. Owner's right of action for damage to or theft involving personal property.

Cross references. — Time limitations on bringing of actions for injuries to personalty and recovery of personal property, §§ 9-3-31, 9-3-32.

51-10-1. Right of action for deprivation of possession of personalty.

The owner of personalty is entitled to its possession. Any deprivation of such possession is a tort for which an action lies. (Orig. Code 1863, § 2965; Code 1868, § 2972; Code 1873, § 3026; Code 1882, § 3026; Civil Code 1895, § 3885; Civil Code 1910, § 4481; Code 1933, § 105-1701.)

Cross references. — Criminal penalties for offenses involving theft, T. 16, C.8. Right of action to recover personal property, § 44-12-150 et seq.

Law reviews. — For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 51-10-1 provides an adequate post-deprivation remedy for seizure and retention of personal property without due process of law. Grant v. Newsome, 201 Ga. App. 710, 411 S.E.2d 796 (1991).

Any act which deprives owner of personal property of possession is tort for which the injured party may maintain action. Thombley v. Hightower, 52 Ga. App. 716, 184 S.E. 331 (1936).

When property taken was personalty, and alleged to have been taken without owner's consent, such action is tortious and a trespass for which damages may be recovered. Lowery v. McTier, 99 Ga. App. 423, 108 S.E.2d 771 (1959).

O.C.G.A. § 51-10-1 embodies the common-law action of trover and conversion. Grant v. Newsome, 201 Ga. App. 710, 411 S.E.2d 796 (1991).

Action of trover is action for recovery of possession of chattels belonging to plaintiff. Youngblood v. Duncan, 49 Ga. App. 300, 175 S.E. 411 (1934).

Conversion defined. — Any distinct act of dominion wrongfully asserted over another's property in denial of one's right or inconsistent with it is a conversion.

Bromley v. Bromley, 106 Ga. App. 606, 127 S.E.2d 836 (1962).

Possession of property with a claim of title adverse to that of the true owner is sufficient evidence of a conversion. Bromley v. Bromley, 106 Ga. App. 606, 127 S.E.2d 836 (1962).

Conversion based on breach of fiduciary duty. — Trial court properly granted a judgment on the pleadings for a limited liability company (LLC), as a president failed to allege a breach of fiduciary duty by the LLC. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Trial court erred in granting a judgment on the pleadings for two founders of a limited liability company and a corporation as a tort action could be based on a duty imposed by law, a president arguably had a breach of fiduciary duty claim, and the fact that the allegedly converted items were intangible did not bar the conversion claim; the claim that the president had abandoned the conversion claim as to the corporation was rejected as it was based on a conclusory allegation. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Conversion established by improper disposal of personal property. — Trial court properly found a couple liable for converting personal property belonging to an owner with whom the couple were involved in a dispute over certain real property since the couple wrongfully had a salvage company dispose of the personal property instead of complying with O.C.G.A. § 44-7-55(c), by placing the property at the front of the lot. However, the damages award of $192,487.13 in favor of the owner was vacated as the owner's opinion testimony as to the value of the owner's property was insufficient for valuation purposes. Washington v. Harrison, 299 Ga. App. 335, 682 S.E.2d 679 (2009), cert. denied, No. S09C2052, 2010 Ga. LEXIS 45 (Ga. 2010).

Criminal statute did not authorize private right of action. — O.C.G.A. §§ 44-12-20 and 51-10-1 did not authorize a mortgage borrower to bring a claim against a loan servicer for theft by conversion based on criminal statutes; the criminal statutes did not create a private right of action, and the borrower was limited to a tort claim for conversion. Stroman v. Bank of Am. Corp., 852 F. Supp. 2d 1366 (N.D. Ga. 2012).

Specific money. — There can be a conversion of specific money as well as chattels. Grant v. Newsome, 201 Ga. App. 710, 411 S.E.2d 796 (1991).

A plaintiff in an action for conversion of specific money may recover lost interest. Punitive damages are also recoverable. Grant v. Newsome, 201 Ga. App. 710, 411 S.E.2d 796 (1991).

Tort of conversion applied to specific money since the money was identifiable and traceable. Hot Shot Kids Inc. v. Pervis (In re Pervis), 497 B.R. 612 (Bankr. N.D. Ga. 2013).

Debtor's retention of another shareholder's share of funds constituted conversion because the other shareholder was entitled to the funds; the debtor received the debtor's share, held it, and spent it; the shareholder demanded the money; and the debtor refused to return the money. Hot Shot Kids Inc. v. Pervis (In re Pervis), 512 B.R. 348 (Bankr. N.D. Ga. 2014).

Trespass to personalty may be continuous and it consists of any unlawful deprivation of its possession; this can be done by wrongful levy as well as by a wrongful sale. Atlantic Co. v. Farris, 62 Ga. App. 212, 8 S.E.2d 665 (1940).

Against whom action to recover personal property may be maintained. — The true owner of personal property, which has been stolen from the owner, may maintain the owner's action in trover against one who purchases the same from another and pays to that person the purchase price thereof, although the defendant has no knowledge that the property has been stolen and in good faith believes that the person selling the property to the defendant has the right to dispose thereof; and the subsequent sale of such property by the defendant to a third person, before the acquisition of any knowledge that the property was stolen property, constitutes a conversion thereof by the defendant. Briscoe v. Pool, 50 Ga. App. 147, 177 S.E. 346 (1934).

O.C.G.A. § 51-10-1 covers the unauthorized seizure of personal property

by police officers. Byrd v. Stewart, 811 F.2d 554 (11th Cir. 1987); Lindsey v. Storey, 936 F.2d 554 (11th Cir. 1991).

Recovery of damages against government official. — O.C.G.A. § 51-10-1 authorizes the recovery of damages when a government official, without lawful authority, has temporarily deprived an individual of his or her property. Grant v. Newsome, 201 Ga. App. 710, 411 S.E.2d 796 (1991).

Pretrial detainee's 42 U.S.C. § 1983 federal due process claims concerning the loss of the detainee's personal property by prison officers was dismissed upon summary judgment because the detainee could pursue the claims pursuant to O.C.G.A. § 51-10-1 as the underlying incidents concerning the loss of theft of the detainee's property did not appear to be the result of an established state procedure. Price v. Busbee, No. 5:04-CV-313 (CAR), 2006 U.S. Dist. LEXIS 8159 (M.D. Ga. Feb. 21, 2006).

In a 42 U.S.C. § 1983 case when: (1) a pro se state inmate alleged that prison employees confiscated and destroyed the inmate's personal property; (2) the inmate did not allege that the confiscation was pursuant to established state procedure; and (3) O.C.G.A. § 51-10-1 provided the inmate with a post-deprivation remedy in state court, there was no Fourteenth Amendment due process violation; the complaint was dismissed as frivolous pursuant to 28 U.S.C. § 1915A. Poole v. Hart, No. 7:07-CV-35 (HL), 2007 U.S. Dist. LEXIS 30037 (M.D. Ga. Apr. 24, 2007).

Trial court erred in refusing to allow a prison inmate to proceed on a state law conversion claim against the Georgia Department of Corrections under the Georgia Tort Claims Act (GTCA), O.C.G.A. § 50-21-20 et seq., because the inmate stated a claim for conversion against the Department under the GTCA; the inmate alleged that prison officials wrongfully confiscated the inmate's personal property contrary to the Department's Standard Operating Procedures. Romano v. Ga. Dep't of Corr., 303 Ga. App. 347, 693 S.E.2d 521 (2010).

Trial court did not err in disallowing a prison inmate to file a conversion claim against a warden and corrections officers under the Georgia Tort Claims Act (GTCA), O.C.G.A. § 50-21-20 et seq., because their actions were clothed with official immunity under the GTCA, O.C.G.A. § 50-21-25(b), since they were acting within the scope of their official duties when they confiscated the inmate's personal property; the inmate acknowledged that the Georgia Department of Corrections had to be named as a defendant, which necessarily amounted to a concession that Department employees were not proper defendants, and their alleged tortious conduct occurred while they were acting within the scope of their official duties. Romano v. Ga. Dep't of Corr., 303 Ga. App. 347, 693 S.E.2d 521 (2010).

Conversion established by improper disposal of company property. — Trial court did not err in denying property owners' motions for a directed verdict and for judgment notwithstanding the verdict on a limited liability company's (LLC) counterclaim for conversion, which was predicated on the owners' disposal of pipe fixtures the LLC owned, because the evidence was sufficient to support the LLC's counterclaim for conversion; the owners exercised dominion and control over the pipe fixtures by having the fixtures removed from the owners' property and disposed of at a landfill, and even if the LLC acted wrongfully by depositing and storing the pipe fixtures on the owners' property, there was evidence that the owners failed to exercise due care in removing the expensive fixtures by having the fixtures dumped at a landfill with no consideration given as to the fixtures ultimate fate. Parris Props., LLC v. Nichols, 305 Ga. App. 734, 700 S.E.2d 848 (2010).

The federal Employee Retirement Income Security Act, 29 U.S.C. § 1051 et seq., provides an exclusive remedy and clearly preempts state law claims such as claims for conversion and conspiracy to violate applicable ERISA statutes, which are based in tort, which in turn means they must be considered to be based on state law. Chambers v. Kaleidoscope, Inc., 650 F. Supp. 359 (N.D. Ga. 1986).

Fact that person removing another's property may be police officer does not operate to change rule of

this section, if the officer's action in so doing was not authorized by law or some valid municipal ordinance. Vaughn v. Glenn, 44 Ga. App. 426, 161 S.E. 672 (1931), aff'd, 178 Ga. 30, 172 S.E. 28 (1933).

When, a chief of county police, acting through a deputy, without lawful warrant or authority other than the badge of office, seizes and carries away from the possession of another an automobile, a suit in trover by such person against the chief of county police is not a suit against the county or state. Norred v. Dispain, 119 Ga. App. 29, 166 S.E.2d 38 (1969).

Since an automobile, was in an inoperable and unrentable condition at the time it was taken by the police, and was in the same condition, or worse, when returned to the plaintiff upon the plaintiff giving a bond therefor, the defendant cannot avoid liability for rental by unlawfully refusing to surrender possession of the property to the plaintiff and thus preventing the property from being repaired and placed in a rentable condition. Norred v. Dispain, 119 Ga. App. 29, 166 S.E.2d 38 (1969).

Garnishment is not conversion. — A garnishment filed by an attorney for a lender did not constitute conversion of the bank account since the garnishment was a temporary seizure by legal process. Taylor v. Gelfand, 233 Ga. App. 835, 505 S.E.2d 222 (1998).

Conversion claim barred by judicial estoppel. — Summary judgment for finance company was affirmed as an individual's conversion claim was barred by judicial estoppel since: (1) the individual represented in Chapter 7 bankruptcy proceedings that the individual did not have any contingent or unliquidated claims; (2) the individual knew when the bankruptcy petition was filed that the individual's car had been taken without the individual's permission; (3) the bankruptcy trustee accepted the individual's representations as true for purposes of discharging the individual; and (4) any successful pursuit of the claim would allow the individual to realize gains inaccessible to the creditors. Zahabiuon v. Auto. Fin. Corp., 281 Ga. App. 55, 635 S.E.2d 342 (2006).

Judgment on the pleadings improper. — Trial court erred in entering judgment on the pleadings for the defendants as, while in a conversion count, a chief executive officer arguably attempted to create a tort claim from a breach of contract, the officer alleged that the defendants owed a fiduciary duty. Tidikis v. Network for Med. Communs. & Research, LLC, 274 Ga. App. 807, 619 S.E.2d 481 (2005).

Summary judgment on conversion claim not warranted. — Summary judgment was not warranted because a couple could be liable to an owner for conversion under O.C.G.A. § 51-10-1 if it was true that the couple lied regarding the whereabouts of the owner's belongings and that the couple sold some of the owner's possessions. Santiago v. Cauley, No. CV203-099, 2005 U.S. Dist. LEXIS 34768 (S.D. Ga. Dec. 6, 2005).

Deputy was not entitled to summary judgment on a conversion claim because the deputy admitted to taking the plaintiffs' camera without a warrant, while the plaintiffs' car was impounded, which raises the issue of unlawful possession. Moreover, the circumstances under which the impounding occurred, the alleged wrongful arrest of the plaintiffs', only add to the inference of unlawful possession of the plaintiffs' property. Carter v. Butts Cnty., 821 F.3d 1310 (11th Cir. 2016).

Genuine dispute remained as to a plaintiff's conversion claim because the evidence supported a finding that the local crew conducting the trash-out removed and threw away at least some personal possessions at the property. Mwangi v. Fannie Mae, 162 F. Supp. 3d 1315 (N.D. Ga. 2016).

No conversion shown. — In a suit alleging a claim for trespass to personality after a creditor erroneously took the property of two non-debtors when the creditor executed a writ of possession of a debtor, the non-debtors neither possessed the items when the levy occurred nor did the non-debtors expect to regain possession of the items at any particular time and therefore failed to state a claim for trespass to personality; the undisputed evidence showed that the non-debtors loaned the items in question to the debtor for use in the debtor's dental practice with the understanding that the debtor could use

the items as long as needed. Dierkes v. Crawford Orthodontic Care, P.C., 284 Ga. App. 96, 643 S.E.2d 364 (2007).

Court of appeals did not err in affirming the trial court's order granting defense attorneys and their law firm summary judgment in an administrator's action alleging that they converted estate property when they accepted certain sums as payment for their services in representing a decedent's widow after the widow was indicted for the decedent's murder because O.C.G.A. § 53-1-5 did not place possession or an immediate right to possession of the estate property in the administrator at the time the widow dispersed and appellees received the funds in issue; when the widow dispersed the funds, the widow had qualified as executor of the decedent's estate and letters testamentary had been issued to the widow, the widow had not yet pled guilty to the murder charges, no final judgment of conviction had been entered in regard to the criminal indictment, and the widow's felonious and intentional killing of the decedent had not been established by clear and convincing evidence in any judicial proceeding. Levenson v. Word, 286 Ga. 114, 686 S.E.2d 236 (2009).

Cited in Whatley v. Manry, 60 Ga. App. 273, 3 S.E.2d 839 (1939); J. & C. Ornamental Iron Co. v. Watkins, 114 Ga. App. 688, 152 S.E.2d 613 (1966); Strickland v. Vaughn, 221 Ga. App. 636, 472 S.E.2d 159 (1996); Taylor v. Powertel, Inc., 250 Ga. App. 356, 551 S.E.2d 765 (2001); Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277 (N.D. Ga. 2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trespass, §§ 11 et seq.

C.J.S. — 87 C.J.S., Trespass, § 7 et seq.

ALR. — Liability for property lost or stolen at the time of a personal injury, 1 ALR 737.

Duty and liability of one in possession of real property in respect of personal property which he finds thereon belonging to another, 131 ALR 165.

Liability for injury to person or damage to property as result of "blackout," 154 ALR 1459; 155 ALR 1458; 158 ALR 1463.

Right to recover attorney's fees for wrongful attachment, 65 ALR2d 1426.

Measure and elements of damages, in action other than one against a carrier, for conversion, injury, loss, or destruction of livestock, 79 ALR2d 677.

What conduct by repossessing chattel mortgagee or conditional vendor entails tort liability, 99 ALR2d 358.

Punitive damages for wrongful seizure of chattel by one claiming security interest, 35 ALR3d 1016.

Employer's liability for theft or disappearance of employee's property left at place of employment, 46 ALR3d 1306.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment, 61 ALR3d 984.

Liability of estate for tort of executor, administrator, or trustee, 82 ALR3d 892.

Liability for killing or injuring, by motor vehicle, livestock or fowl on highway, 55 ALR4th 822.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death, 14 ALR5th 242.

Construction and application of Parratt-Hudson doctrine, providing that where deprivation of property interest is occasioned by random and unauthorized conduct of state officials, procedural due process inquiry is limited to issue of adequacy of postdeprivation remedies provided by state, 89 A.L.R.6th 1.

51-10-2. Who may bring an action for interference with possession of chattel.

Interference with the mere possession of a chattel, even if the possession is without title or is wrongful, shall give a right of action to the possessor, except as against the true owner or the person wrongfully

deprived of possession. (Orig. Code 1863, § 2966; Code 1868, § 2973; Code 1873, § 3027; Code 1882, § 3027; Civil Code 1895, § 3886; Civil Code 1910, § 4482; Code 1933, § 105-1702.)

JUDICIAL DECISIONS

Bare possession, either of land or chattel, authorizes possessor to recover damages from any person who wrongfully in any manner interferes with such possession. Collins v. Baker, 51 Ga. App. 669, 181 S.E. 425 (1935).

Interference with bare possession of property will give rise to cause of action for damages in favor of possessor. Zugar v. Glen Falls Indem. Co., 63 Ga. App. 660, 11 S.E.2d 839 (1940).

Person in possession of personal property may recover the property from any one wrongfully depriving the person of possession, although a third party holds legal title to the property by a bill of sale to secure a debt. Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79 (1934).

Plaintiff may make out trover case by proof of the plaintiff's peaceable possession of property sued for and wrongful interference therewith by defendant, who neither shows that the plaintiff was wrongfully deprived of the property nor that the plaintiff was the true owner thereof. Powell v. Riddick, 89 Ga. App. 505, 80 S.E.2d 70 (1954).

Right of special possession will support trover action. — Right of possession, through some special title in property, such as the legal impounding of cattle by the defendant, detention of property by the defendant for charges as depository for hire will defeat an action of trover by the holder of the legal title to such property as also will a right of possession through some special title in property support an action of trover even as against the holder of the legal title to the property. Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79 (1934).

To recover in trover action, plaintiff must first show either title or right of possession. Powell v. Riddick, 89 Ga. App. 505, 80 S.E.2d 70 (1954).

Possession of personal property stands as prima facie evidence of title, until evidence to the contrary is introduced. Powell v. Riddick, 89 Ga. App. 505, 80 S.E.2d 70 (1954).

Against whom action to recover personal property may be maintained. — The true owner of personal property, which has been stolen from the owner, may maintain the owner's action in trover against one who purchases the property from another and pays to that person the purchase price thereof, although the defendant has no knowledge that the property has been stolen and in good faith believes that the person selling the property to the defendant has the right to dispose thereof; and the subsequent sale of such property by the defendant to a third person, before the acquisition of any knowledge that the property was stolen property, constitutes a conversion thereof by the defendant. Briscoe v. Pool, 50 Ga. App. 147, 177 S.E. 346 (1934).

Mere possession insufficient to retain possession as against true owner. — Mere possession of property by a defendant in a suit in trover under a contract with the plaintiff by which the defendant was to make repairs upon the property, when the defendant had not completed the contract but had only ordered from a factory necessary parts for the making of the repairs and had made arrangements in the defendant's shop for the purpose of making the repairs, affords, as against the right and title of the plaintiff as the true owner of the property, no right to the possession of the property by the defendant merely for the purpose of enabling the defendant to complete the contract when the defendant claims no lien on the property. Denny v. Belsinger, 52 Ga. App. 851, 184 S.E. 914 (1936).

Buyer at foreclosure sale had no claim against true owner of car. — Because a foreclosure sale of a car had been held void, buyers who purchased the car after the foreclosure were not the car's true owners and could not bring a claim of

trespass to personalty against the corporation that was the car's true owner. Mitsubishi Motors Credit of Am., Inc. v. Sheridan, 286 Ga. App. 791, 650 S.E.2d 357 (2007), cert. denied, No. S07C1842, 2007 Ga. LEXIS 751 (Ga. 2007).

Possession must be in plaintiff's own right and not as agent. — While, at common law and by statute in this state, mere possession of a chattel will give a right of action for any interference therewith, such possession must be in the plaintiff's own right, and not as agent of another. Zugar v. Glen Falls Indem. Co., 63 Ga. App. 660, 11 S.E.2d 839 (1940).

As against wrongdoer, mere possession of property by one in one's own right will support action of trover as such wrongdoer will not be heard to set up the "jus tertii." Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79 (1934).

Vendee in conditional sale contract may maintain trover against third person wrongfully depriving the vendee of possession of such property. Painter v. McGaha, 6 Ga. App. 54, 64 S.E. 129 (1909); Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79 (1934).

Damage to unauthorized cotenant's property. — Landlord could not raise question of tenant's possessory interest in damaged goods in tenant's action for damages to unauthorized cotenant's property due to alleged unlawful eviction by landlord. Kerlin v. Lane Co., 165 Ga. App. 622, 302 S.E.2d 369 (1983).

Protection of purchasers for value. — This section does not operate to divest the title of bona fide purchaser of property which was acquired when the true owner lost possession through negligence and fraud of the owner's agents. Macon, Dublin & Savannah R.R. v. Heard Bros., 27 Ga. App. 382, 108 S.E. 481 (1921).

Purchaser at a sheriff's sale. — A purchaser at a sheriff's sale is protected only when the sale of property set apart by an ordinary was the only property of the debtor. Gillespie v. Chastain, 57 Ga. 218 (1876).

Pendency of actions. — The pendency of a suit to recover possession of personalty by possessory warrant is no ground for an abatement of a suit in trover between the same parties for the conversion of the same property. Palmer v. Shiver, 31 Ga. App. 605, 121 S.E. 852 (1924).

When the plaintiff in a trover action alleges facts upon which the plaintiff bases the plaintiff's title, it becomes question of law, whether or not the facts alleged support the allegation of ownership. Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79 (1934).

Allegation in trover suit to effect that plaintiff is owner of property sued for is sufficient and is not subject to demurrer (now motion to dismiss) as being a conclusion of the pleader, and the plaintiff cannot be required to allege the plaintiff's evidence upon which the plaintiff expects to show title to the property. Livingston v. Epsten-Roberts Co., 50 Ga. App. 25, 177 S.E. 79 (1934).

Measure of damages to special interest. — While in an ordinary trover action brought by the owner of the entire interest in property, the plaintiff may recover in an alternative verdict the highest proved value of the property, when the plaintiff has no title but only a special interest in the property, and elects to take a money verdict, the measure of the damage is the value of that interest. Zugar v. Glen Falls Indem. Co., 63 Ga. App. 660, 11 S.E.2d 839 (1940).

Necessity of alleging extent of special interest in order to measure damages. — In an action by the holder of a special interest in property for damages alleged to have been caused by failure of sheriff to make levy and seizure of the property under a bail-trover proceeding, it is necessary to allege the extent of the interest held in order to determine the amount of the damages, damages being given as compensation for injury done and a failure to make such allegations as to the damage done to the special interest will subject the petition to demurrer (now motion to dismiss). Zugar v. Glen Falls Indem. Co., 63 Ga. App. 660, 11 S.E.2d 839 (1940).

Action by estate administrator to recover legal fees paid by spouse who killed other spouse. — Court of appeals did not err in affirming the trial court's

order granting defense attorneys and their law firm summary judgment in an administrator's action alleging that they converted estate property when they accepted certain sums as payment for their services in representing a decedent's widow after the widow was indicted for the decedent's murder because O.C.G.A. § 53-1-5 did not place possession or an immediate right to possession of the estate property in the administrator at the time the widow dispersed and appellees received the funds in issue; when the widow dispersed the funds, the widow had qualified as executor of the decedent's estate and letters testamentary had been issued to the widow, the widow had not yet pled guilty to the murder charges, no final judgment of conviction had been entered in regard to the criminal indictment, and the widow's felonious and intentional killing of the decedent had not been established by clear and convincing evidence in any judicial proceeding. Levenson v. Word, 286 Ga. 114, 686 S.E.2d 236 (2009).

Cited in Daniel v. Perkins Logging Co., 9 Ga. App. 842, 72 S.E. 438 (1911); Palmer v. Shiver, 31 Ga. App. 605, 121 S.E. 852 (1924); Pollard v. Walton, 55 Ga. App. 353, 190 S.E. 396 (1937); Sellers v. Sellers, 76 Ga. App. 410, 46 S.E.2d 205 (1948).

RESEARCH REFERENCES

Am. Jur. 2d. — 63C Am. Jur. 2d, Property, § 58.

C.J.S. — 87 C.J.S., Trespass, § 14 et seq.

ALR. — Recovery by conditional seller or buyer, or person standing in his shoes, against third person for damage or destruction of property, 67 ALR2d 582.

Recovery by chattel mortgage or mortgagor, or person standing in his shoes, against third person for damage or destruction of property, 67 ALR2d 1599.

Measure and elements of damages, in action other than one against a carrier, for conversion, injury, loss, or destruction of livestock, 79 ALR2d 677.

What conduct by repossessing chattel mortgagee or conditional vendor entails tort liability, 99 ALR2d 358.

51-10-3. Abuse of or damage to personalty as trespass.

Any unlawful abuse of or damage done to the personal property of another constitutes a trespass for which damages may be recovered. (Orig. Code 1863, § 2968; Code 1868, § 2975; Code 1873, § 3029; Code 1882, § 3029; Civil Code 1895, § 3888; Civil Code 1910, § 4485; Code 1933, § 105-1703.)

Law reviews. — For comment, "The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization," see 63 Emory L.J. 1163 (2014).

JUDICIAL DECISIONS

Gist of action of trespass to personal property is injury done to possession of property. Duncan v. Ellis, 63 Ga. App. 687, 11 S.E.2d 841 (1940).

When a debtor sued a bank for breach of contract, trespass, conversion, tortious interference with contractual relations, and tortious interference with business relations, a judgment notwithstanding the verdict was correctly granted on the trespass claim because the debtor did not show, under O.C.G.A. § 51-10-3, that the bank abused or damaged the debtor's personal property as the bank, under a management agreement, owned the invoices regarding which there was alleged to have been a trespass. Dalton Diversified, Inc. v. AmSouth Bank, 270 Ga. App. 203, 605 S.E.2d 892 (2004).

Action of trespass to personalty is

concurrent with action of trover and conversion, although the two actions are not entirely coextensive. Maryland Cas. Ins. Co. v. Welchel, 257 Ga. 259, 356 S.E.2d 877 (1987).

This section defines trespass in its broadest sense, and comprehends any misfeasance, transgression, or offense, which damages another's health, reputation, or property. Cox v. Strickland, 120 Ga. 104, 47 S.E. 912 (1904); Williams v. Inman, 1 Ga. App. 321, 57 S.E. 1009 (1907); King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

When property taken was personalty, and alleged to have been taken without the owner's consent, such action is tortious and a trespass for which damages may be recovered. Lowery v. McTier, 99 Ga. App. 423, 108 S.E.2d 771 (1959).

Plaintiff need not prove possession if plaintiff has title. — When personal property is carried away, the plaintiff need not prove possession if the plaintiff has title to the property. Crenshaw v. Moore, 10 Ga. 384 (1851); Atlanta, Birmingham & Atl. R.R. v. Minchew, 7 Ga. App. 566, 67 S.E. 678 (1910).

Trespass to personalty may be continuous and it consists of any unlawful deprivation of one's possession; this can be done by wrongful levy as well as by a wrongful sale. Atlantic Co. v. Farris, 62 Ga. App. 212, 8 S.E.2d 665 (1940).

Recovery for trespass to personal property is limited to compensation (actual damages), in the absence of aggravations for which exemplary or punitive damages are allowed. Duncan v. Ellis, 63 Ga. App. 687, 11 S.E.2d 841 (1940).

One who aids, abets, or directs by conduct or words, in perpetration of trespass, is liable equally with actual trespassers. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

One who procures or assists in the commission of a trespass, or does an act which ordinarily induces its commission, is liable therefor as the actual perpetrator. King v. Citizens Bank, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

Fact that person removing another's property may be police officer does not operate to change rule of this section, if the person's action in so doing was not authorized by law or some valid municipal ordinance. Vaughn v. Glenn, 44 Ga. App. 426, 161 S.E. 672 (1931), aff'd, 178 Ga. 30, 172 S.E. 28 (1933).

A constable who seizes property by virtue of a process issuing from a court without jurisdiction in a bail-trover case is a trespasser, although the constable may act in good faith and without malice. Minhinnett v. Jackson, 45 Ga. App. 207, 164 S.E. 96 (1932).

A constable who seizes the property of another under a void process issued by a court without jurisdiction, or makes such seizure without benefit of any process at all, is a trespasser and may be sued for damage resulting to the property from the trespasser's illegal act. Reese v. Bice, 87 Ga. App. 519, 74 S.E.2d 476 (1953).

An officer who attempts an illegal seizure without warrant or process of any kind is a mere trespasser; therefore, the officer cannot defend on the ground that the opposite party peaceably surrendered the object to the officer, believing the officer's representations that the officer was acting as an officer of court although the officer was not in fact doing so. Reese v. Bice, 87 Ga. App. 519, 74 S.E.2d 476 (1953).

Officer's action not illegal. — Arrestee failed to state a claim of trespass to property based on the fact that officers investigating a situation took a drink from the arrestee's store because the record showed that an officer was given permission by the store clerk to fix a fountain drink and there was no evidence that money or property was taken or stolen by the officers. Lavassani v. City of Canton, 760 F. Supp. 2d 1346 (N.D. Ga. 2010).

Person whose property has been levied on under execution against another may sue for damages on account of trespass, independently of the technical rules controlling cases of malicious use or abuse of legal process, and without the necessity of first filing a claim and obtaining a favorable decision thereon. Duncan v. Ellis, 63 Ga. App. 687, 11 S.E.2d 841 (1940).

A person not a party to a process for

seizure of property whose property has been levied on thereunder, has his remedy by an action for damages on account of the trespass against those who caused or made the levy, independently of the technical rules applicable to malicious use or abuse of legal process. Wilson v. Dunaway, 112 Ga. App. 241, 144 S.E.2d 542 (1965).

Trespass by domestic animals. — If domestic animals, such as oxen and horses, injure any one in person or property when they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury unless the owner knows they are accustomed to do mischief; and such knowledge must be alleged and proved. But if they are wrongfully in the place where they do the mischief, the owner is liable, though the owner had no notice that they were accustomed to do so before. Reed v. Southern Express Co., 95 Ga. 108, 22 S.E. 133 (1894); Clark v. State, 35 Ga. App. 241, 132 S.E. 650 (1926).

Punitive damages for trespass by wrongful levy. — When one sues for trespass because the defendant caused process against an outsider to be levied on property which the plaintiff owned and held in lawful possession, in order to authorize the imposition of punitive or exemplary damages there must be evidence of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to the consequences. Duncan v. Ellis, 63 Ga. App. 687, 11 S.E.2d 841 (1940); Wilson v. Dunaway, 112 Ga. App. 241, 144 S.E.2d 542 (1965).

Cited in Raleigh & G.R.R. v. Western & Atl. R.R., 6 Ga. App. 616, 65 S.E. 586 (1909); Dean v. State, 151 Ga. 371, 106 S.E. 792 (1921); Whatley v. Manry, 60 Ga. App. 273, 3 S.E.2d 839 (1939); J. & C. Ornamental Iron Co. v. Watkins, 114 Ga. App. 688, 152 S.E.2d 613 (1966); Scott v. Leder, 164 Ga. App. 334, 297 S.E.2d 103 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d, Trespass, §§ 11 et seq.

ALR. — Measure of damages for destruction of or injury to commercial vehicle, 4 ALR 1350; 169 ALR 1074.

Measure of damages for injury to or destruction of growing crop, 175 ALR 159.

Recovery for mental shock or distress in connection with injury to or interference with tangible property, 28 ALR2d 1070.

What is an action for damages to personal property within venue statute, 29 ALR2d 1270.

Right of defendant in action for personal injury, property damage, or death, to bring in new parties as cross defendants to his counterclaim or the like, 46 ALR2d 1253.

Measure and elements of damages, in action other than one against a carrier, for conversion, injury, loss, or destruction of livestock, 79 ALR2d 677.

Liability for property damage caused by vibrations, or the like, without blasting or explosion, 79 ALR2d 966.

Liability of garageman to one ordering repair of motor vehicle, for defective work, 92 ALR2d 1408; 1 ALR4th 347; 23 ALR4th 274.

Statutes of limitation concerning actions of trespass as applicable to actions for injury to property not constituting a common-law trespass, 15 ALR3d 1228.

Landlord's liability for damage to tenant's property caused by water, 35 ALR3d 143.

Liability for injury caused by spraying or dusting of crops, 37 ALR3d 833.

Personal injury or property damage caused by lightning as basis of tort liability, 46 ALR4th 1170.

Maintainability of burglary charge, where entry into building is made with consent, 58 ALR4th 335.

Liability policy coverage for insured's injury to third party's investments, anticipated profits, good will, or the like, unaccompanied by physical property damage, 18 ALR5th 187.

51-10-4. Rights of action of bailee and bailor for trespass.

Where the possession of personalty is in a bailee, a trespass committed during the existence of the bailment shall give a right of action to the bailee for the interference with his special property and a concurrent right of action to the bailor for the interference with his general property. (Orig. Code 1863, § 2969; Code 1868, § 2976; Code 1873, § 3030; Code 1882, § 3030; Civil Code 1895, § 3889; Civil Code 1910, § 4486; Code 1933, § 105-1704.)

Cross references. — Bailments generally, § 44-12-40 et seq.

JUDICIAL DECISIONS

Bailor has right of action against third party for damage to bailed property resulting in injury to the bailor's rights of general property or reversion. Cincinnati, N.O. & Tex. Pac. Ry. v. Hilley, 121 Ga. App. 196, 173 S.E.2d 242 (1970).

Bailor's right of action against third party for damage to bailed property is not affected by subsequent repairing by bailee, whether gratuitous or not. This is a matter to be adjusted between the bailor and the bailee and does not affect the grounds or the measure of liability of a third party tort-feasor by whose neglect the property was damaged. Cincinnati, N.O. & Tex. Pac. Ry. v. Hilley, 121 Ga. App. 196, 173 S.E.2d 242 (1970).

Limitation on bailor's action against third party. — A plaintiff in a trover action whose interest in property is that of a bailee or a special interest, may bring an action against the sheriff and the sheriff's bondsmen for alleged failure to seize the property or make the bond required in trover proceedings brought by such holder of the special interest, but the real owner would have no cause of action against a sheriff for the sheriff's failure to make a levy in such a case, the plaintiff's rights not having been affected by such failure to act. Zugar v. Glen Falls Indem. Co., 63 Ga. App. 660, 11 S.E.2d 839 (1940).

Bailee may sue bailor after demand. — A bailor who forcibly retakes property from the possession of the bailee, may be sued therefor after a demand has been made. Boyd v. McArthur, 120 Ga. 974, 48 S.E. 358 (1904).

Damages alleged for injury to special interest in property. — While in an ordinary trover action brought by the owner of the entire interest in property, the plaintiff may recover in an alternative verdict the highest proved value of the property, when the plaintiff has no title but only a special interest in the property, and elects to take a money verdict, the measure of the damage is the value of that interest. Zugar v. Glen Falls Indem. Co., 63 Ga. App. 660, 11 S.E.2d 839 (1940).

Cited in Sawyer v. Allison, 151 Ga. App. 334, 259 S.E.2d 721 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 8A Am. Jur. 2d, Bailments, § 159 et seq.

C.J.S. — 8 C.J.S., Bailments, § 152 et seq.

ALR. — Bailee's reimbursement of bailor as affecting latter's right of action against tort-feasor for damaging subject of bailment, 166 ALR 206.

Liability of bailee of airplane for damage thereto, 17 ALR2d 913; 44 ALR3d 862.

Liability of attorney for loss of client's money or personal property in his possession or entrusted to him, 26 ALR2d 1340.

Bailee's duty to insure bailed property, 28 ALR3d 513.

51-10-5. Right of action for injury to remainder or reversionary interest in personalty; joint action with tenant in possession.

A remainderman or reversioner of personalty may bring an action against a wrongdoer for any injury tending to destroy the existence or ultimate value of the property. In such cases the tenant in possession may bring an action jointly with the remainderman or reversioner for the injury to the entire estate, the recovery being held under like limitations. (Orig. Code 1863, § 2970; Code 1868, § 2977; Code 1873, § 3031; Code 1882, § 3031; Civil Code 1895, § 3890; Civil Code 1910, § 4487; Code 1933, § 105-1705.)

JUDICIAL DECISIONS

Bailor has cause of action against third person for damage to reversionary interest. — A bailor has a right of action against a third party for damage to the bailed property resulting in injury to the bailor's rights of general property or reversion. Cincinnati, N.O. & Tex. Pac. Ry. v. Hilley, 121 Ga. App. 196, 173 S.E.2d 242 (1970).

Cited in Johnson v. Lovett, 31 Ga. 187 (1860); Venable v. Everett, 63 Ga. 633 (1879); Sawyer v. Allison, 151 Ga. App. 334, 259 S.E.2d 721 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d, Life Tenants and Remaindermen, § 277.

C.J.S. — 31 C.J.S., Estates, § 117 et seq.

ALR. — Right of reversioner or remainderman to maintain action or suit in respect of easement, 138 ALR 1006.

51-10-6. Owner's right of action for damage to or theft involving personal property.

(a) Any owner of personal property shall be authorized to bring a civil action to recover damages from any person who willfully damages the owner's personal property or who commits a theft as defined in Article 1 of Chapter 8 of Title 16 involving the owner's personal property. The owner of the personal property may recover as follows:

(1) In any such action, the property owner may recover compensatory damages which may include, in addition to the value of the personal property, any other loss sustained as a result of the willful damage or theft offense; and

(2) In any such action in which the value of the total claim, including exemplary damages, is less than $5,000.00, the property owner may recover compensatory damages, as described in paragraph (1) of this subsection, and additionally may recover liquidated exemplary damages equal to $300.00 or triple the amount of the entire loss sustained by the property owner as a result of the willful

damage or theft offense, whichever is greater, and the cost of maintaining the civil action if all of the following apply:

(A) The property owner, at least 30 days prior to the filing of the action, provided written notice of a demand by personal delivery or certified mail or statutory overnight delivery, return receipt requested, for payment of the value of that personal property, the amount of any other loss sustained as a result of the willful damage or theft offense, and the liquidated exemplary damages set out in this paragraph upon the person who willfully damaged the property or who committed the theft offense;

(B) Either the person who willfully damaged the personal property or who committed the theft offense did not make payment to the property owner of the amount specified in the demand within 30 days after the date of receipt of the written demand or did not enter into an agreement with the property owner during that 30 day period for such payment, or the person who willfully damaged the personal property or who committed the theft offense entered into an agreement with the property owner during that 30 day period for such payment but the person did not make such payment in accordance with the terms of the agreement; and

(C) The property owner did not file a civil complaint against the person who willfully damaged the personal property or who committed the theft offense prior to the expiration of 30 days after the date of service of the written demand upon the person, or, if the person had entered into an agreement with the property owner during that 30 day period for payment, prior to the day on which the person failed to make payment in accordance with the terms of the agreement, whichever is applicable.

(b) The person or persons against whom the property owner brings a civil action pursuant to this Code section shall be entitled to recover reasonable attorney's fees and court costs upon a finding that the claimant raised a claim which was without reasonable, factual, or legal support.

(c) For purposes of paragraph (2) of subsection (a) of this Code section, written notice of demand for payment shall be substantially as follows:

"Upon reasonable cause, notice is given of (my) (our) demand for payment of damages in the amount of (state amount claimed: total should be $300.00 or triple the amount of the entire loss sustained by the property owner as a result of the willful damage or theft offense, whichever is greater) arising out of your (willful damage, theft, or unlawful conversion) of the following personal property owned by (the undersigned or other owner):

(List affected property) _____

_____

_____

Pursuant to Code Section 51-10-6 of the Official Code of Georgia Annotated, you are further notified that if the above-stated amount is not paid, or a written agreement as to its payment is not reached, within 30 days of the date you receive this letter, (I) (we) (other owner) intend to bring an action against you for such amount, plus attorney's fees, plus court costs, and such other relief as the law provides.

_____"

(d) If a property owner whose personal property was willfully damaged or was the subject of a theft offense provides written notice of demand for payment upon a person who willfully damaged the personal property or who committed the theft offense, and the person makes payment in accordance with the demand within 30 days after the date of service of the written demand upon him or the person enters into an agreement with the property owner during that 30 day period for such payment and makes payment in accordance with the agreement, the property owner shall not file a civil complaint against the person in relation to the willful property damage or theft offense.

(e) In a civil action to recover damages for willful damage to personal property or for a theft offense, the trier of fact may determine that an owner's property was willfully damaged or that a theft offense involving the owner's personal property has been committed, whether or not any person has pleaded guilty to or has been convicted of any criminal offense or has been adjudicated delinquent in relation to any act involving the owner's personal property.

(f) As used in this Code section, the term "value" means the retail value of any personal property that is offered for sale by a mercantile establishment or the replacement value of any other personal property.

(g) If a civil action is filed pursuant to Article 4 of Chapter 12 of Title 44 to recover personal property or damages resulting from willful damage to or theft of such personal property, no civil action authorized by this Code section shall be permitted.

(h) The measure of damages provided for in this Code section shall not be applicable in cases involving the unauthorized cutting or cutting and carrying away of timber from the property of another. In such cases, damages shall be awarded in accordance with Code Section 51-12-50. (Code 1981, § 51-10-6, enacted by Ga. L. 1988, p. 404, § 1; Ga. L. 1991, p. 1126, §§ 1-3; Ga. L. 2000, p. 1589, § 3; Ga. L. 2014, p. 404, § 2-5/SB 382; Ga. L. 2014, p. 695, § 5/HB 790.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2014, p. 404, § 3-1/SB 382, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2014, and shall apply to all conduct occurring on or after such date."

JUDICIAL DECISIONS

Failure to state claim. — Plaintiff failed to plead a claim to recover damages for conversion under O.C.G.A. § 51-10-6 based on a violation of two criminal statutes — theft by conversion of payments for property improvements and theft by taking — as the plaintiff did not allege any of the necessary elements to establish the violations and did not allege that the defendant was charged with or found guilty of a violation of those statutes. Harlander v. Turner (In re Turner), No. 15-04037-EJC, 2017 Bankr. LEXIS 917 (Bankr. S.D. Ga. Mar. 31, 2017); Vanbenschoten v. Turner (In re Turner), No. 16-04004-EJC, 2017 Bankr. LEXIS 918 (Bankr. S.D. Ga. Mar. 31, 2017).

No private right of action. — Consent judgment entered against the debtor with respect to funds for a construction project did not establish nondischargeability for willful conversion of payments for real property improvements because the consent judgment did not establish a constructive trust in favor of the creditor for the debtor's willful conversion under state laws as there was no evidence the debtor was guilty of a violation of a criminal statute and there was no civil action to remedy the harm from that particular criminal law violation. Pioneer Constr., Inc. v. May (In re May), 518 B.R. 99 (Bankr. S.D. Ga. 2014).

Cited in Ragsdale v. South Fulton Mach. Works, Inc. (In re Whitacre Sunbelt, Inc.), 211 Bankr. 411 (Bankr. N.D. Ga. 1997); Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302 (11th Cir. 2007); Honig v. Comcast of Ga. I, LLC, 537 F. Supp. 2d 1277 (N.D. Ga. 2008).

CHAPTER 11

DEFENSES TO TORT ACTIONS

Article 1

General Provisions

Sec.
51-11-1. Authorization to act as justification; effect of plea.
51-11-2. Effect of consent.
51-11-3. Extenuation and mitigation of damages.
51-11-4. Arbitrament and award.
51-11-5. Former recovery and pendency of another action.
51-11-6. Infancy.
51-11-7. Effect of plaintiff's failure to avoid consequences of defendant's negligence.
51-11-8. Liability of person employed by compressed gas dealer who provides assistance upon request of law enforcement agency.
51-11-9. Immunity from civil liability for threat or use of force in defense of habitation.
51-11-10. Property owner selling timber not liable for trespass or conversion of property caused by third party; establishment of property boundaries.

Article 2

Satisfaction

51-11-20. Satisfaction and settlement of tort authorized; what agreements allowed where tort constitutes crime.
51-11-21. Tender of damages in tort action; effect of continuing tender.

Cross references. — Employee's assumption of risk of ordinary risks of employment, § 34-7-23. Assumption of risks of employment by railroad employees, § 34-7-43.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Last Clear Chance, 32 POF2d 625.

The Seatbelt Defense, 3 POF3d 171.

Act of God, 6 POF3d 319.

Existence of "Sudden Emergency", 8 POF3d 399.

Assumption of Risk Defense in Sports or Recreation Injury Cases, 30 POF3d 161.

Plaintiff's Negligence, Provocation or Assumption of Risk as Defense in Dogbite Case, 39 POF3d 133.

Application of the "Plain View Doctrine" to Trip-and-Fall Claims, 41 POF3d 65.

Proof of Seatbelt Defense, 65 POF3d 1.

ALR. — Tennis club's liability for tennis player's injuries, 52 ALR4th 1253.

ARTICLE 1

GENERAL PROVISIONS

51-11-1. Authorization to act as justification; effect of plea.

If the defendant in a tort action was authorized to do the act complained of, he may plead such authorization as justification. The effect of such plea is to admit that the act was done and to entitle the defendant to all the privileges of one holding the affirmative of the

issue. Such plea, however, shall not give the defendant the right to open and conclude the argument before the jury unless it is filed before the plaintiff submits any evidence to the jury. (Orig. Code 1863, § 2983; Code 1868, § 2996; Code 1873, § 3051; Code 1882, § 3051; Ga. L. 1888, p. 35, § 1; Civil Code 1895, § 3891; Civil Code 1910, § 4488; Code 1933, § 105-1801.)

Law reviews. — For article, the right to open and conclude the argument in tort cases, see 22 Ga. B. J. 297 (1960).

JUDICIAL DECISIONS

Law prior to amendment of 1888, permitted the defendant to file plea after the plaintiff had concluded the plaintiff's case. Ransone v. Christian, 56 Ga. 351 (1876).

Defendant cannot file plea after plaintiff concluded case. Central of Ga. Ry. v. Morgan, 110 Ga. 168, 35 S.E. 345 (1900).

For defendant to be entitled to open and conclude argument by virtue of plea of justification, the defendant must have admitted enough to make out prima facie case, for the plaintiff, and such admission must be made, and the right to open and conclude asserted, before the plaintiff submits any evidence in the case. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939).

When a suit for trespass on account of an unlawful levy on personalty, plea of justification admitted only that the alleged levy was made, without admitting that the property belonged to the plaintiff claimant, or was in the plaintiff's possession at the time of the levy, and no claim was filed, and the entry of levy did not show in whose possession the property was found, and the plea of justification was that the property belonged to the defendant in fi. fa., the defendant in the suit for damages (plaintiff in execution) would not be entitled to the opening and conclusion, since the plea failed to admit a prima facie tort, such as would authorize the recovery of any damages. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939).

Plea of justification must admit all acts charged. — Under this section, which places certain burdens and awards certain privileges to the defendant, the plea, to meet the legal requirements, must in effect be one of confession and avoidance — that is, it must admit the commission of the acts charged in the petition as they are therein alleged; and a plea which only partially admits the commission of the acts charged is not a plea of justification, and does not entitle the defendant to the opening and conclusion of the argument. Smith v. Cole, 96 Ga. App. 300, 99 S.E.2d 907 (1957).

Plea which admits act of detention and alleges that detention was authorized by law is plea of justification, and it is not necessary, in order that the plea entitle the defendant to all the privileges of one holding the affirmative of the issue, that it go further and admit the unlawfulness of the detention, since the plea of justification admits the act to be done and presents as the only issue for determination the justification or lack of justification for the act. Wyatt v. Baker, 45 Ga. App. 448, 165 S.E. 133 (1932).

Insulting language as justification. — Opprobrious words which justify an assault and battery must be such as are uttered in the presence of the assaulting party and which, in their nature, are supposed to arouse the passions, and justify, under certain circumstances to be adjudged by the jury, instant and appropriate resentment, not disproportioned to the provocation. Robinson v. De Vaughn, 59 Ga. App. 37, 200 S.E. 213 (1938).

When the words used are obviously not of an opprobrious nature, so as to justify an assault and battery, the court may determine, as a matter of law, that they are not. Robinson v. De Vaughn, 59 Ga. App. 37, 200 S.E. 213 (1938).

Authority to arrest. — The first clause of former Code 1933, § 105-1801 (see now O.C.G.A. § 51-11-1) permitted a defendant to plead in justification, such matters as the authority to arrest one without a warrant under former Code 1933, § 27-207 (see now O.C.G.A. § 17-4-20). McPherson v. Chandler, 137 Ga. 129, 72 S.E. 948 (1911).

Police officer can prove the officer's affirmative defense of privilege by showing that person arrested was sufficiently named in the warrant and was reasonably believed to be the person intended. Stewart v. Williams, 243 Ga. 580, 255 S.E.2d 699 (1979).

Defendant police officer who pleads justification must show for warrantless arrest that the officer acted on probable cause, and for an arrest under a warrant that the officer reasonably executed it. Stewart v. Williams, 243 Ga. 580, 255 S.E.2d 699 (1979).

Officer's entitlement to immunity. — After an officer fatally shot a decedent, there were genuine issues of material fact about whether the officer was entitled to official immunity from the state law claims against the officer because there was a genuine dispute as to whether the officer used such force as was reasonably believed to be necessary to prevent death or great bodily injury or the commission of a forcible felony. Hampton v. Atzert, No. 14-11728, 2014 U.S. App. LEXIS 21226 (11th Cir. Nov. 4, 2014) (Unpublished).

Action by police officer in self defense. — Because a police officer does not lose the right to defend oneself when the officer acts in the officer's official capacity, an injurious work-related act committed by the officer, but justified by self-defense, comes within the scope of official immunity. Kidd v. Coates, 271 Ga. 33, 518 S.E.2d 124 (1999).

Verdict of justification sustainable when evidence indicates reasonable grounds for self-defense. — When there is some evidence from which a jury could reach the conclusion that a shooting resulted from the fears of a reasonable man that one's own life is in danger and that shooting in self-defense was justified, there would be no tortious misconduct and a verdict for the defendant is sustainable. Kickasola v. Jim Wallace Oil Co., 144 Ga. App. 758, 242 S.E.2d 483, cert. denied, 436 U.S. 921, 98 S. Ct. 2272, 56 L. Ed. 2d 764 (1978).

Loose and informal pleading. — When a loose and informal plea of justification is treated as sufficient, the court will do likewise. Savannah Elec. Co. v. Lowe, 27 Ga. App. 350, 108 S.E. 313 (1921).

Justification constitutes a complete defense to an action for wrongful death. Parrott v. Wilson, 707 F.2d 1262 (11th Cir.), cert. denied, 464 U.S. 936, 104 S. Ct. 344, 78 L. Ed. 2d 311 (1983).

Admission by deputy sheriff that deputy did not intend to hurt decedent. — After the decedent was killed while being arrested by the defendant deputy sheriff, since the defendant freely admitted that the defendant had no intention to even hurt the decedent, the conclusion must be made that the defendant's admission precludes the court from holding that the defendant's actions were justified as a matter of law. Patterson v. Fuller, 654 F. Supp. 418 (N.D. Ga. 1987).

Cited in Phoenix Ins. Co. v. Gray, 113 Ga. 424, 38 S.E. 992 (1901); Cable Co. v. Parantha, 118 Ga. 913, 45 S.E. 787 (1906); Darby v. Moore, 144 Ga. 758, 87 S.E. 1067 (1916); Ingram v. Kendrick, 48 Ga. App. 278, 172 S.E. 815 (1934); South Ga. Grocery Co. v. Banks, 52 Ga. App. 1, 182 S.E. 61 (1935); Sellers v. Brown, 84 Ga. App. 614, 66 S.E.2d 765 (1951); Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965); Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976); Swift v. S.S. Kresge Co., 159 Ga. App. 571, 284 S.E.2d 74 (1981); Hodsdon v. Whitworth, 162 Ga. App. 793, 293 S.E.2d 70 (1982); Bendiburg v. Dempsey, 707 F. Supp. 1318 (N.D. Ga. 1989).

OPINIONS OF THE ATTORNEY GENERAL

Medical examiner entitled to plead justification. — A medical examiner who, for analytical purposes, drew a blood sample from a person at the direction of

the peace officer in charge of the investigation, and pursuant to the authority and under the conditions set forth in Ga. L. 1974, p. 561, § 1 (see now O.C.G.A. § 45-16-46), was protected from civil liability under former Code 1933, § 105-1801 (see now O.C.G.A. § 51-11-1). 1978 Op. Att'y Gen. No. 78-61.

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 49 et seq.

C.J.S. — 86 C.J.S., Torts, § 12 et seq.

ALR. — Danger of apparent danger of great bodily harm or death as condition of self-defense in civil action for assault and battery, personal injury, or death, 25 ALR2d 1215.

Civil liability of law enforcement officers for malicious prosecution, 28 ALR2d 646; 81 ALR4th 1031.

Pleading self-defense or other justification in civil assault and battery action, 67 ALR2d 405.

51-11-2. Effect of consent.

As a general rule no tort can be committed against a person consenting thereto if that consent is free, is not obtained by fraud, and is the action of a sound mind. The consent of a person incapable of consenting, such as a minor, may not affect the rights of any other person having a right of action for the injury. (Orig. Code 1863, § 2985; Code 1868, § 2998; Code 1873, § 3053; Code 1882, § 3053; Civil Code 1895, § 3893; Civil Code 1910, § 4490; Code 1933, § 105-1803.)

Law reviews. — For note, "The Evolution of the Doctrine of Informed Consent," see 12 Ga. L. Rev. 581 (1978).

For comment discussing withdrawal of consent by patient as grounds for assault and battery charge against physician, in light of Mims v. Boland, 110 Ga. App. 477, 138 S.E.2d 902 (1964), see 16 Mercer L. Rev. 463 (1965).

JUDICIAL DECISIONS

There is no difference between consent principle and principle of assumption of risk. The doctrine of assumption of risk in general is of recent development, but has been applied to Georgia under the consent doctrine but almost always in the name of contributory negligence. Roberts v. King, 102 Ga. App. 518, 116 S.E.2d 885 (1960).

Assumption of risk means that plaintiff has given the plaintiff's express consent to relieve defendant of obligation of conduct toward the plaintiff and to take the plaintiff's chance of injury from a known risk. The result is that the defendant is simply under no legal duty to protect the plaintiff. Roberts v. King, 102 Ga. App. 518, 116 S.E.2d 885 (1960).

Necessary elements of assumption of risk by guest have been clearly defined as follows: first, there must be a hazard or danger inconsistent with the safety of the guest; second, the guest must have a knowledge and appreciation of the hazards; and third, there must be acquiescence or willingness on the part of the guest to proceed in the face of danger. Roberts v. King, 102 Ga. App. 518, 116 S.E.2d 885 (1960).

Assumption of risk is matter of knowledge of danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be. Roberts v.

King, 102 Ga. App. 518, 116 S.E.2d 885 (1960).

Plaintiff must make free and informed choice to assume risk. — The doctrine of the assumption of the risk of danger applies only when the plaintiff, with a full appreciation of the danger involved and without restriction from the plaintiff's freedom of choice either by the circumstances or by coercion, deliberately chooses an obviously perilous course of conduct so that it can be said as a matter of law that the plaintiff has assumed all risk of injury. Myers v. Boleman, 151 Ga. App. 506, 260 S.E.2d 359 (1979).

Consent not possible when danger not appreciated. — When the plaintiff was ordered to render services on the day in question, and was made conscious of the fact that the air in the store had become hot and polluted by dust, but did not have knowledge of a danger, the act of the plaintiff in obeying the order of the master did not amount to a consent to be injured. Simowitz v. Register, 60 Ga. App. 180, 3 S.E.2d 231 (1939).

In a tort action filed by a nine-year-old child's parent, as next friend, the appeals court declined to assume that merely because the child assented to the requests of adults, the child consented to the treatment the adults imposed. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

When one assumes risk of willful and wanton misconduct and is injured or killed thereby, a cause of action for such injury or death is barred. The true defense in these cases is the doctrine of assumption of the risks. This doctrine has sometimes been mistakenly referred to as contributory negligence. In the cases in which this has been done the term contributory negligence truly means assumption of risk or consent to the injury for the reason that in such cases the so-called contributory negligence would not necessarily have barred the action when willful and wanton misconduct was involved, whereas the assumption of risk doctrine would have. Roberts v. King, 102 Ga. App. 518, 116 S.E.2d 885 (1960).

When one assumes the risk of the willful and wanton misconduct of another a recovery on the basis of such misconduct is precluded and the law will not undertake to divide the wantonness into degrees or fractions of degrees to ascertain whether the death or injury resulting was fully realized and appreciated by the one so assuming the risks. The law will hold such a one to have assumed whatever risks develop in the process of the activity engaged in. Roberts v. King, 102 Ga. App. 518, 116 S.E.2d 885 (1960).

Consent may bar recovery even when defendant acts wantonly. — Even when the defendant's act is such by reason of its wantonness or otherwise as to cut off the defense of contributory negligence, the plaintiff cannot recover, if it appears that the plaintiff consented to the injury. Roberts v. King, 102 Ga. App. 518, 116 S.E.2d 885 (1960).

Minor capable of consenting. — Defendant's allegation that the 15-year-old plaintiff consented to and was the instigator of sexual acts was relevant and admissible in an action brought by the plaintiff. McNamee v. A.J.W., 238 Ga. App. 534, 519 S.E.2d 298 (1999).

Minor incapable of consenting. — Summary judgment was properly denied on a parent's claim of intentional infliction of emotional distress, false arrest, false imprisonment, and invasion of privacy arising out of an accusation by store employees that the parent's nine-year-old child stole from the store because the child was below the age of 13, the age of criminal responsibility under O.C.G.A. § 16-3-1, and was legally incapable of giving consent to their actions under O.C.G.A. §§ 51-11-2 and 51-11-6. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Child's consent expressed through parent. — A minor child of tender years riding at the invitation of the driver and owner of an automobile, with the express consent and acceptance of the child's mother, even though, on account of the child's tender years, incapable of itself giving consent or accepting the invitation, is a guest of the driver thereof within the rule rendering the driver liable to such

guest only for gross negligence. Chancey v. Cobb, 102 Ga. App. 636, 117 S.E.2d 189 (1960).

Patient's consent to touch. — Patient authorized psychiatrist's physical contact as part of the patient's treatment. Harris v. Leader, 231 Ga. App. 709, 499 S.E.2d 374 (1998).

Summary judgment was properly granted dismissing a patient's suit alleging that a chiropractor committed battery against the patient during chiropractic treatment because the evidence showed that the patient consented to the adjustment; while the patient contended that the chiropractor's touching exceeded the scope of consent, the patient had not pointed to any evidence that the chiropractor performed a procedure other than an adjustment that day. Prince v. Esposito, 278 Ga. App. 310, 628 S.E.2d 601 (2006).

Security guard assumed risk of injury when guard deliberately tried to stop fight. — Evidence clearly and palpably showed that the security guard was injured when the guard attempted to break up the fight between the patient and the nurse. The security guard deliberately entered the fight and assumed the risk of injury by voluntarily confronting those who had begun the fight; thus, the security guard assumed the risk. Carter v. Scott, 320 Ga. App. 404, 750 S.E.2d 679 (2013).

Evidence did not support a patient's contention that a chiropractor obtained the patient's consent fraudulently by misrepresenting the effects of long-term chiropractic care as the patient was treated by the chiropractor for 12 years without significant problems and was pain-free when the patient took advantage of the free adjustment; the chiropractor had no duty to disclose negative information about a prior battery claim to patients. Prince v. Esposito, 278 Ga. App. 310, 628 S.E.2d 601 (2006).

Consent not fraudulently obtained. — Female restaurant employee, who fell for a telephone prank and allowed a male supervisor to strip-search her for evidence of a coin purse theft, was not entitled to recover on any of the state law tort claims brought against the supervisor and the restaurant-employer because the employee consented to the search; further, there was no evidence that the supervisor thwarted the employee's capacity to consent or obtained consent by fraud within the meaning of O.C.G.A. § 51-11-2. Fogal v. Coastal Rest. Mgmt., Inc., 452 F. Supp. 2d 1286 (S.D. Ga. 2004).

Evidence did not support a patient's contention that a chiropractor obtained the patient's consent fraudulently by misrepresenting the effects of long-term chiropractic care as the patient was treated by the chiropractor for 12 years without significant problems and was pain-free when the patient took advantage of the free adjustment; the chiropractor had no duty to disclose negative information about a prior battery claim to patients. Prince v. Esposito, 278 Ga. App. 310, 628 S.E.2d 601 (2006).

Withdrawal of consent. — Evidence did not support a patient's contention that questions of fact remained regarding whether the patient withdrew the consent given to a chiropractor during an adjustment since the patient did not ask the chiropractor to stop the adjustment or otherwise speak to the chiropractor during the treatment; the fact that the patient gasped or expelled air when the chiropractor pushed down on the lower back could not reasonably be considered a withdrawal of consent. Prince v. Esposito, 278 Ga. App. 310, 628 S.E.2d 601 (2006).

Jury instructions. — When the defendant pled that the grade of a street had been changed with the consent of the plaintiff, in the absence of an appropriate written request, the court was not required to charge this section. Mayor of Americus v. Phillips, 13 Ga. App. 321, 79 S.E. 36 (1913).

Summary judgment improper because there was issue of fact as to assumption of risk. — Trial court erred in granting a police officer and a city summary judgment, on the ground that the officer was performing a discretionary duty and the city was protected by sovereign immunity, in an arrestee's action to recover damages for injuries sustained when the officer ran over the arrestee's foot with a patrol car during the arrest. A jury would be authorized to find that the

officer did not act intentionally, but rather, negligently came too close to the arrestee with the car for the purposes that the officer was trying to achieve and used poor judgment under the circumstances; there was an issue of fact on whether the arrestee assumed the risk of injury because it was not beyond dispute that the arrestee was aware of the actual risk of being hit by the officer or that the arrestee had subjective knowledge that the arrestee was at risk of being hit from behind by a police car being driven by a trained officer when the arrestee had not threatened the officer with deadly force. Davis v. Batchelor, 300 Ga. App. 662, 686 S.E.2d 314 (2009).

Cited in Adair v. Southern Mut. Ins. Co., 107 Ga. 297, 33 S.E. 78 (1899); Coweta County v. Central of Ga. Ry., 4 Ga. App. 94, 60 S.E. 1018 (1908); Wood v. Morris, 109 Ga. App. 148, 135 S.E.2d 484 (1964); King v. Mention, 116 Ga. App. 209, 156 S.E.2d 488 (1967); Wittke v. Horne's Enters., Inc., 118 Ga. App. 211, 162 S.E.2d 898 (1968); Kendrick v. State, 123 Ga. App. 785, 182 S.E.2d 525 (1971); Pritchard v. Neal, 139 Ga. App. 512, 229 S.E.2d 18 (1976); Watts v. Six Flags Over Ga., Inc., 140 Ga. App. 106, 230 S.E.2d 34 (1976); Crowley v. Ford Motor Credit Co., 168 Ga. App. 162, 308 S.E.2d 417 (1983); J.H. Harvey Co. v. Speight, 178 Ga. App. 812, 344 S.E.2d 701 (1986); Worsham v. United States, 828 F.2d 1525 (11th Cir. 1987); Bendiburg v. Dempsey, 707 F. Supp. 1318 (N.D. Ga. 1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 53.

C.J.S. — 86 C.J.S., Torts, §§ 14, 15.

ALR. — Contributory negligence or assumption of risk as defense in action against physician or surgeon for malpractice, 50 ALR2d 1043.

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron, 8 ALR3d 1393.

Liability of owner or operator of trampoline center for injury to or death of spectator or patron, 8 ALR3d 1427.

Tort liability of public schools and institutions of higher learning for accident occurring during school athletic events, 35 ALR3d 725.

Liability for injury or death in shooting contest or target practice, 49 ALR3d 762.

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron, 54 ALR5th 513.

Construction and application of contact sports exception to negligence, 75 A.L.R.6th 109.

51-11-3. Extenuation and mitigation of damages.

Circumstances not amounting to justification may be pleaded in extenuation and mitigation of damages. (Orig. Code 1863, § 2984; Code 1868, § 2997; Code 1873, § 3052; Code 1882, § 3052; Civil Code 1895, § 3892; Civil Code 1910, § 4489; Code 1933, § 105-1802.)

JUDICIAL DECISIONS

This section applies when matter pled is not sufficient justification. Conley v. Arnold, 93 Ga. 823, 20 S.E. 762 (1894).

Conduct not amounting to justification for assault and battery may be pled and proved in extenuation and mitigation of damages. Robinson v. De Vaughn, 59 Ga. App. 37, 200 S.E. 213 (1938); Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237 (1947).

When there has been a breach of a duty giving rise to a cause of action, and the injured party claims punitive damages, all the surrounding circumstances accompanying the breach of duty may be given in

evidence to the jury. Smith v. Davis, 76 Ga. App. 154, 45 S.E.2d 237 (1947).

Opprobrious words as mitigation of assault. — Whether opprobrious words are sufficient to justify an assault or are to be the basis of a mitigation of damages is a question for the jury. Thompson v. Shelverton, 131 Ga. 714, 63 S.E. 220 (1908).

Jury to consider testimony in mitigation of damages. — When the defendant has introduced testimony tending to sustain a plea of justification, though it fails to make it out, the jury may take such testimony into consideration in mitigation of damages. Ransone v. Christian, 49 Ga. 491 (1873); Henderson v. Fox, 80 Ga. 479, 6 S.E. 164 (1888); Ivester v. Coe, 33 Ga. App. 620, 127 S.E. 790 (1925); Hutcheson v. Browning, 34 Ga. App. 276, 129 S.E. 125 (1925).

Cited in McDaniel v. Atlanta Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939); Southeastern Greyhound Lines v. Hancock, 71 Ga. App. 471, 31 S.E.2d 59 (1944); Smith v. Cole, 96 Ga. App. 300, 99 S.E.2d 907 (1957); Pennsylvania Thresherman & Farmers Mut. Cas. Ins. Co. v. Gardner, 107 Ga. App. 472, 130 S.E.2d 507 (1963); Shepard v. Morrison, 121 Ga. App. 762, 175 S.E.2d 407 (1970); Johnson v. Jackson, 140 Ga. App. 252, 230 S.E.2d 756 (1976); Baker v. Wilson, 143 Ga. App. 488, 238 S.E.2d 587 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 49 et seq.

C.J.S. — 25 C.J.S., Damages, § 184 et seq.

ALR. — Duty to mitigate damages, 81 ALR 282.

Presumption and burden of proof regarding mitigation of damages, 134 ALR 242.

Pleading last clear chance doctrine, 25 ALR2d 254.

Pleading matter in mitigation of damages in tort action other than libel and slander, 75 ALR2d 473.

Nonuse of seat belts as failure to mitigate damages, 80 ALR3d 1025.

Assault: Criminal liability as barring or mitigating recovery of punitive damages, 98 ALR3d 870.

51-11-4. Arbitrament and award.

Arbitrament and award constitute a good defense to a tort action, and the rules applied to this defense in a contract action apply equally to tort actions. (Orig. Code 1863, § 2994; Code 1868, § 3007; Code 1873, § 3062; Code 1882, § 3062; Civil Code 1895, § 3902; Civil Code 1910, § 4499; Code 1933, § 105-1804.)

51-11-5. Former recovery and pendency of another action.

Former recovery and the pendency of another action are good defenses in tort actions and are subject to the same rules as when applied to contracts. (Orig. Code 1863, § 2995; Code 1868, § 3008; Code 1873, § 3063; Code 1882, § 3063; Civil Code 1895, § 3903; Civil Code 1910, § 4500; Code 1933, § 105-1805.)

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Law enunciated at former Code 1933, § 110-501 (see now O.C.G.A. §§ 9-2-44 and 9-12-40), relative to res judicata effect of former judgments, applied to torts. Owens v. Williams, 87 Ga. App. 238, 73 S.E.2d 512 (1952).

Causes of action in two suits must be identical in order for doctrine of res judicata to bar second action. Forrester v. Southern Ry., 268 F. Supp. 194 (N.D. Ga. 1967).

Res judicata and estoppel by judgment can only be set up in subsequent suit between same parties or their privies. Owens v. Williams, 87 Ga. App. 238, 73 S.E.2d 512 (1952).

Before a judgment in a former action could operate as a bar to a subsequent action involving the same subject matter, it must appear that the former action was between the same parties, or their privies. Since the plaintiff's wife, who was still in life, was a party to the former action, but was not a party to the present one, and the plaintiff was not a party to the former action, they were not privies, within the meaning of former Code 1933, § 110-501 (see now O.C.G.A. § 9-12-40), and the judgment in the former action was not a bar. Russ Transp., Inc. v. Jones, 104 Ga. App. 612, 122 S.E.2d 282 (1961).

A judgment sustaining a general demurrer (now motion to dismiss) to a petition brought to recover damages caused by the alleged negligence of the defendant will bar a second suit by the same plaintiff against the same defendant for the same alleged cause of action, though the grounds of negligence upon which the second petition is based may be different from those embraced in the first. Owens v. Williams, 87 Ga. App. 238, 73 S.E.2d 512 (1952).

In order for the doctrine of collateral estoppel to be applied, the parties to the two suits must be identical or "privity" must exist with a former party so as to provide for mutuality of application of the former suit. Forrester v. Southern Ry., 268 F. Supp. 194 (N.D. Ga. 1967).

In order for relitigation of particular question to be estopped by former judgment, question must have been "necessary" to former judgment and it must have been one of the "ultimate" questions or facts in issue, as opposed to a supporting evidentiary or "mediate" question. Forrester v. Southern Ry., 268 F. Supp. 194 (N.D. Ga. 1967).

Dismissal on motion may amount to res judicata. — If a petition is dismissed on general demurrer (now motion to dismiss) which extends to the merits of the case by charging that the petition fails to allege a cause of action, the judgment of dismissal, unexcepted to, will be conclusive between the parties in a subsequent suit based on the same cause of action. Owens v. Williams, 87 Ga. App. 238, 73 S.E.2d 512 (1952).

Question of res judicata must be raised by plea to that effect and cannot be raised by demurrer (now motion to dismiss) when the facts do not appear in the petition. Owens v. Williams, 87 Ga. App. 238, 73 S.E.2d 512 (1952).

Cited in Gilmer v. Porterfield, 233 Ga. 671, 212 S.E.2d 842 (1975).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 49 et seq.

ALR. — Judgment on claim as bar to action to recover amount of payment which was not litigated in previous action, 13 ALR 1151.

Judgment against or settlement by person responsible for a personal injury as affecting his liability on account of improper medical or surgical treatment of injured person, 29 ALR 1313.

Judgment for or against master in action for servant's tort as bar to action against servant, 31 ALR 194.

Conclusiveness, as to negligence or contributory negligence, of judgment in death action, in subsequent action between defendant in the death action and statutory beneficiary of that action, as affected by objection by lack of identity of parties, 125 ALR 908.

Application of rule against splitting

cause of action, or of doctrine of res judicata, to item of single cause of action omitted from issues through ignorance, mistake, or fraud, 142 ALR 905.

Judgment in action growing out of accident as res judicata, as to negligence or contributory negligence, in later action growing out of same accident by or against one not a party to earlier action, 23 ALR2d 710.

Admissibility of evidence of unperformed compromise agreement, 26 ALR2d 858.

Liability insurer's settlement of claim against insured as bar to insured's tort action against person receiving settlement, 32 ALR2d 937.

Right to jury trial on issue of validity of release, 43 ALR2d 786.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 ALR2d 801.

Judgment in spouse's action for personal injuries as binding, as regards loss of consortium and similar resulting damage, upon other spouse not a party to the action, 12 ALR3d 933.

Judgment in action against seller or supplier of product as res judicata in action against manufacturer for injury from defective product, or vice versa, 34 ALR3d 518.

Judgment against parents in action for loss of minor's services as precluding minor's action for personal injuries, 41 ALR3d 536.

Validity and effect of "Mary Carter" or similar agreement setting maximum liability of one cotortfeasor and providing for reduction or extinguishment thereof relative to recovery against nonagreeing cotortfeasor, 22 ALR5th 483.

51-11-6. Infancy.

Infancy is no defense to a tort action so long as the defendant has reached the age of discretion and accountability prescribed by Code Section 16-3-1 for criminal offenses. (Orig. Code 1863, § 2996; Code 1868, § 3009; Code 1873, § 3064; Code 1882, § 3064; Civil Code 1895, § 3904; Civil Code 1910, § 4501; Code 1933, § 105-1806.)

Law reviews. — For article surveying torts law, see 34 Mercer L. Rev. 271 (1982). For article, "Defending the Lawsuit: A First-Round Checklist," see 22 Ga. St. B. J. 24 (1985).

For comment criticizing Hatch v. O'Neill, 231 Ga. 446, 202 S.E.2d 44 (1973), holding individual under age of criminal responsibility not civilly liable for willful torts, see 26 Mercer L. Rev. 367 (1974).

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This section refers to liability of infant for the infant's torts, and not to the proper manner of bringing suit against the infant therefor. Maryland Cas. Co. v. Lanham, 124 Ga. 859, 53 S.E. 395 (1906); Miller v. Luckey, 132 Ga. 581, 64 S.E. 658 (1909).

This section determines policy of this state as to torts of minors under age of criminal responsibility, and it is immaterial what the rule is in other jurisdictions, or what the rule was at common law. Hatch v. O'Neill, 231 Ga. 446, 202 S.E.2d 44 (1973).

This section reflects the General Assembly's determination that infants under the age of 13 are not liable in tort for their actions. While the wisdom of this determination may be debatable, it does not violate equal protection. Barrett v. Carter, 248 Ga. 389, 283 S.E.2d 609 (1981); Horton v. Hinely, 261 Ga. 863, 413 S.E.2d 199 (1992).

Question of immunity of infant who is under age of criminal responsibility is reasonable subject for regulation by legislative branch of government, and it is not a denial of due process of law to provide that no cause of action exists for torts committed by infants of

such age. Hatch v. O'Neill, 231 Ga. 446, 202 S.E.2d 44 (1973).

This section positively provides that those over age of discretion and accountability for criminal offenses may not use infancy as a defense. However, as to those under such age, the section, by its very nature, just as unequivocally provides that infancy is a defense. Brady v. Lewless, 124 Ga. App. 858, 186 S.E.2d 310 (1971).

Former Code 1933, § 105-1806 (see now O.C.G.A. § 51-11-6) meant that a minor under the age of 13 was immune from suit for tort, and was distinguished from the rule in former Code 1933, § 105-204 (see now O.C.G.A. § 51-1-5) as to the negligence of a child in an action for damages because of injuries to the child. Hatch v. O'Neill, 231 Ga. 446, 202 S.E.2d 44 (1973).

An infant under the age of criminal responsibility is immune from suit for tort. Bartoletti v. Kushner, 140 Ga. App. 468, 231 S.E.2d 358 (1976), cert. dismissed, 238 Ga. 688, 235 S.E.2d 8 (1977).

This section provides immunity from suit for tort to a minor under the age of 13. Barrett v. Carter, 248 Ga. 389, 283 S.E.2d 609 (1981).

Child is responsible for its torts under same rules applicable to commission of crime. Brady v. Lewless, 124 Ga. App. 858, 186 S.E.2d 310 (1971).

If infant chooses to sue, the infant in effect gives up or waives protection and subjects oneself to the rule as laid down in the cases under former Code 1933, § 105-204 (see now O.C.G.A. § 51-1-5). Brady v. Lewless, 124 Ga. App. 858, 186 S.E.2d 310 (1971).

The rule is quite different when the negligence of a child relates to action in which the child is the plaintiff, or in which the child's parents are litigating because of injuries to the minor child. In that situation, most of the cases provide that the child cannot be accounted negligent if the child is six years of age or less; and in one case, Harris v. Combs, 96 Ga. App. 638, 643, 101 S.E.2d 144, (1957), it was held that a child seven years of age was too young to be negligent. But if the action is brought against the child, the child may plead the child's infancy as an absolute defense, provided the child was less than 13 years of age at the time of the alleged tort. Brady v. Lewless, 124 Ga. App. 858, 186 S.E.2d 310 (1971).

While a defendant under 13 is protected by O.C.G.A. § 51-11-7, the plaintiff under 13 is not allowed to ignore the plaintiff's lack of due care and recover damages from a defendant whose negligence is less than that of the plaintiff. Barrett v. Carter, 248 Ga. 389, 283 S.E.2d 609 (1981).

Defendant child being six years of age at time of alleged tort is, as matter of law, not liable therefor even though willful. Scarboro v. Lauk, 133 Ga. App. 359, 210 S.E.2d 848 (1974).

Consent not possible when danger not appreciated. — In a tort action filed by a nine-year-old child's parent, as next friend, the appeals court declined to assume that merely because the child assented to the requests of adults, the child consented to the treatment the adults imposed. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Cited in Central R.R. v. Brinson, 70 Ga. 207 (1883); Elder v. Woodruff Hdwe. & Mfg. Co., 9 Ga. App. 484, 71 S.E. 806 (1911); Landers v. Medford, 108 Ga. App. 525, 133 S.E.2d 403 (1963); Soles v. Beasley, 234 Ga. 622, 216 S.E.2d 864 (1975); Soles v. Beasley, 137 Ga. App. 280, 223 S.E.2d 477 (1976); Hill v. Morrison, 160 Ga. App. 151, 286 S.E.2d 467 (1981); Townsend v. Moore, 165 Ga. App. 606, 302 S.E.2d 398 (1983); Green v. Gaydon, 174 Ga. App. 796, 331 S.E.2d 106 (1985); Spivey v. Sellers, 185 Ga. App. 241, 363 S.E.2d 856 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 49 et seq.

C.J.S. — 43 C.J.S., Infants, §§ 220 et seq., 295 et seq.

51-11-7. Effect of plaintiff's failure to avoid consequences of defendant's negligence.

If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained. (Orig. Code 1863, § 2914; Code 1868, § 2921; Code 1873, § 2972; Code 1882, § 2972; Civil Code 1895, § 3830; Civil Code 1910, § 4426; Code 1933, § 105-603.)

Cross references. — Effect of contributory negligence of railroad employee on liability of employer for injury or death of employee, § 34-7-42.

Law reviews. — For article, "Comparative Negligence in Georgia," see 8 Ga. B. J. 51 (1945). For article discussing defenses to action for wrongful death in Georgia, see 22 Ga. B. J. 459 (1960). For article discussing products liability and plaintiff's fault under the Uniform Comparative Fault Act, see 29 Mercer L. Rev. 373 (1978). For article discussing plaintiff conduct and the emerging doctrine of comparative causation of torts, see 29 Mercer L. Rev. 403 (1978). For article, "'Pure' vs. 'Modified' Comparative Fault: Notes on the Debate," see 34 Emory L.J. 65 (1985). For article, "Reappraising the Jury's Role as Finder of Fact," see 20 Ga. L. Rev. 123 (1985). For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991). For article, "Sexual Harassment Claims Under Georgia Law," see 6 Ga. St. B. J. 16 (2000).

For note discussing last clear chance doctrine in Georgia, see 13 Ga. B. J. 104 (1950). For note, "Plaintiff's Last Clear Chance and Comparative Negligence in Georgia," see 6 Ga. St. B. J. 47 (1969).

For comment criticizing weaknesses in Georgia comparative negligence doctrine, in light of Jones v. Yuma Motor Freight Term., 45 Cal. App. 2d 497, 114 P.2d 438 (1941), see 4 Ga. B. J. 68 (1941). For comment criticizing Thomas v. Shaw, 217 Ga. 688, 124 S.E.2d 396 (1962), as to assumption of risk on a golf course, see 14 Mercer L. Rev. 295 (1962). For comment on Waulker Hauling Co. v. Johnson, 110 Ga. App. 620, 139 S.E.2d 496 (1964) and the doctrine of rescue, see 16 Mercer L. Rev. 363 (1964). For comment discussing comparative negligence and the retention of the last clear chance doctrine, see 1 Ga. St. B. J. 501 (1965). For comment discussing Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967), as to plaintiff's failure to use a seat belt as constituting contributory or comparative negligence in automobile injury cases, see 2 Ga. L. Rev. 110 (1967). For comment discussing Brown v. Kendrick, 192 So. 2d 49 (Fla. 1966), and suggesting contributory negligence ramifications of failure of guest passengers to use seatbelts in Georgia, see 18 Mercer L. Rev. 511 (1967). For comment discussing Georgia's comparative negligence laws in light of Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), see 19 Mercer L. Rev. 486 (1968). For comment on Stukes v. Trowell, 119 Ga. App. 651, 168 S.E.2d 616 (1969), as to jury question of assumption of risk by a guest in an automobile the driver of which has been drinking, see 22 Mercer L. Rev. 487 (1971). For comment discussing Georgia law as to a defendant's right to bring in any party responsible to him for damages sought by the plaintiff, and comparing the approach of Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), see 24 Mercer L. Rev. 697 (1973). For comment, "Treatment of Guest Passengers: Georgia Maintains Its Minority Rule," see 31 Mercer L. Rev. 1061 (1980). For comment, "Proposed Solutions to an 'Obvious' Problem in Georgia Products Liability Law," see 35 Mercer L. Rev. 915 (1984).

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General Consideration

1. In General

This section applies to suits for personal injuries and for damages to property. Savannah, F. & W. Ry. v. Stewart, 71 Ga. 427 (1883); Miller v. Smythe, 95 Ga. 288, 22 S.E. 532 (1895); Mansfield v. Richardson, 118 Ga. 250, 45 S.E. 269 (1903); Wilson v. Central of Ga. Ry., 132 Ga. 215, 63 S.E. 1121 (1909).

This section applies only when there is a negligent plaintiff. Atlantic Coast Line R.R. v. Coxwell, 93 Ga. App. 159, 91 S.E.2d 135 (1955).

Contributory and comparative negligence apply to professional negligence and negligent misrepresentation claims. — See Prime Retail Dev., Inc. v. Marbury Eng'g Co., 270 Ga. App. 548, 608 S.E.2d 534 (2004).

Plaintiff cannot recover if the plaintiff's negligence is the proximate cause of the plaintiff's injuries. Willis v. Jones, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

"Avoid" construed. — The word "avoid" in this section has a broad and comprehensive meaning. Mansfield v. Richardson, 118 Ga. 250, 45 S.E. 269 (1903).

"Other cases" construed. — "Other cases," as used in this section, are manifestly those in which the plaintiff could not by the exercise of ordinary care have avoided the consequences of the defendant's negligence; in cases of that kind, both parties being at fault and the damages are apportioned. Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941).

Equal knowledge rule. — The "equal knowledge rule" is the practical application of a rule that a knowledgeable plaintiff cannot recover damages if by ordinary care the plaintiff could have avoided the consequences of the defendant's negligence. Clark v. Carla Gay Dress Co., 178 Ga. App. 157, 342 S.E.2d 468 (1986).

The superior/equal knowledge rule is applicable when the proprietor allows a dangerous condition to exist, including cases when the alleged dangerous condition is one created by the activities of third persons, so long as the condition is one which the invitee can expect equally with the host, or come to know of, and therefore must anticipate the danger. In other words, the condition even if created by third parties must be such that the invitee can indeed have equal knowledge and either assumes the risk or can avoid the danger with ordinary care. Clark v. Carla Gay Dress Co., 178 Ga. App. 157, 342 S.E.2d 468 (1986); O'Steen v. Rheem Mfg. Co., 194 Ga. App. 240, 390 S.E.2d 248 (1990).

Distraction theory. — The fact that the plaintiff, a patron at a show, was distracted by the plaintiff's children at the time the plaintiff slipped on a discarded bag on the stairs did not excuse the plaintiff's lack of ordinary care after it was

established that the plaintiff knew of the condition of the steps which the plaintiff had used prior to the plaintiff's fall. Batten v. J.H. Harvey Co., 223 Ga. App. 262, 477 S.E.2d 400 (1996).

Cited in Southwestern R.R. v. Johnson, 60 Ga. 667 (1878); Berry v. Northeastern R.R., 72 Ga. 137 (1883); Smith v. Central R.R. & Banking Co., 82 Ga. 801, 10 S.E. 111 (1889); Seats v. Georgia M. & G.R.R., 86 Ga. 811, 13 S.E. 88 (1891); Southern Ry. v. Blake, 101 Ga. 217, 29 S.E. 288 (1897); Western & Atl. R.R. v. Rogers, 104 Ga. 224, 30 S.E. 804 (1898); Western & Atl. R.R. v. Burnham, 123 Ga. 28, 50 S.E. 984 (1905); Seaboard Air-Line Ry. v. Bostock, 1 Ga. App. 189, 58 S.E. 136 (1907); Southern Ry. v. Wallis, 133 Ga. 553, 66 S.E. 370 (1909); Central of Ga. Ry. v. Brown, 138 Ga. 107, 74 S.E. 839 (1912); Alabama Great S.R.R. v. Brown, 138 Ga. 328, 75 S.E. 330 (1912); Atlantic Coast Line R.R. v. Canty, 12 Ga. App. 411, 77 S.E. 659 (1913); Collum v. Georgia Ry. & Elec. Co., 140 Ga. 573, 79 S.E. 475 (1913); Rome Ry. & Light Co. v. Barna, 16 Ga. App. 1, 84 S.E. 209 (1915); Southern Cotton Oil Co. v. Caleb, 143 Ga. 585, 85 S.E. 707 (1915); Georgia S. & Fla. Ry. v. Thornton, 144 Ga. 481, 87 S.E. 388 (1915); Central of Ga. Ry. v. Tapley, 145 Ga. 792, 89 S.E. 841 (1916); Louisville & Nashville R.R. v. Faust, 30 Ga. App. 310, 117 S.E. 761 (1923); Peeples v. Louisville & Nashville R.R., 37 Ga. App. 87, 139 S.E. 85 (1927); Mills v. Barker, 38 Ga. App. 734, 145 S.E. 502 (1928); Parker v. Miller, 41 Ga. App. 560, 153 S.E. 619 (1930); Central of Ga. Ry. v. Leonard, 49 Ga. App. 689, 176 S.E. 137 (1934); Southern Ry. v. Jett, 49 Ga. App. 638, 176 S.E. 700 (1934); Cowan v. Georgia R.R. & Banking Co., 52 Ga. App. 677, 184 S.E. 635 (1936); Abelman v. Ormond, 53 Ga. App. 753, 187 S.E. 393 (1936); Hunt v. Pollard, 55 Ga. App. 423, 190 S.E. 71 (1937); Vaissiere v. J.B. Pound Hotel Co., 184 Ga. 72, 190 S.E. 354 (1937); Georgia R.R. & Banking Co. v. Sewell, 57 Ga. App. 674, 196 S.E. 140 (1938); Pollard v. Boatwright, 57 Ga. App. 565, 196 S.E. 215 (1938); Davis v. Williams, 58 Ga. App. 274, 198 S.E. 357 (1938); Wallace v. Howard, 58 Ga. App. 428, 198 S.E. 812 (1938); Oast v. Mopper, 58 Ga. App. 506, 199 S.E. 249 (1938); Thompson v. Powell, 60 Ga. App. 796, 5 S.E.2d 260 (1939); Gazaway v. Nicholson, 61 Ga. App. 3, 5 S.E.2d 391 (1939); Coble v. Georgia Motor Express, 62 Ga. App. 566, 8 S.E.2d 724 (1940); Benton Rapid Express, Inc. v. Sammons, 63 Ga. App. 23, 10 S.E.2d 290 (1940); Georgia Power Co. v. Weaver, 68 Ga. 652, 23 S.E.2d 730 (1942); Lord v. Southern Ry., 70 Ga. App. 273, 28 S.E.2d 299 (1943); Georgia Stages, Inc. v. Pitman, 71 Ga. App. 671, 31 S.E.2d 887 (1944); Sprague v. Atlanta Biltmore Hotel Co., 71 Ga. App. 849, 32 S.E.2d 534 (1944); Southern Ry. v. Watson, 74 Ga. App. 317, 39 S.E.2d 707 (1946); Porter v. Southern Ry., 74 Ga. App. 546, 40 S.E.2d 438 (1946); Atlanta Gas Light Co. v. Johnson, 76 Ga. App. 413, 46 S.E.2d 191 (1948); Nabors v. Atlanta Biltmore Corp., 77 Ga. App. 730, 49 S.E.2d 688 (1948); Baggett v. Jackson, 79 Ga. App. 460, 54 S.E.2d 146 (1949); Martin v. Waltman, 82 Ga. App. 375, 61 S.E.2d 214 (1950); Hogan v. Williams, 193 F.2d 220 (5th Cir. 1951); Hubert v. Knox Corp., 86 Ga. App. 449, 71 S.E.2d 770 (1952); L.R. Sams Co. v. Waters, 87 Ga. App. 501, 74 S.E.2d 386 (1953); State Constr. Co. v. Johnson, 88 Ga. App. 651, 77 S.E.2d 240 (1953); Metropolitan Life Ins. Co. v. Talbot, 205 F.2d 529 (5th Cir. 1953); United States v. Gallops, 207 F.2d 48 (5th Cir. 1953); White v. Thacker, 89 Ga. App. 656, 80 S.E.2d 699 (1954); Sheetz v. Welch, 89 Ga. App. 749, 81 S.E.2d 319 (1954); Central of Ga. Ry. v. Gibson, 90 Ga. App. 512, 83 S.E.2d 271 (1954); United States v. Adams, 212 F.2d 912 (5th Cir. 1954); Pickering v. Wagnon, 91 Ga. App. 610, 86 S.E.2d 621 (1955); James v. Smith, 92 Ga. App. 131, 88 S.E.2d 179 (1955); Stephens v. Tatum, 92 Ga. App. 256, 88 S.E.2d 456 (1955); Motor Convoy, Inc. v. Moore, 92 Ga. App. 551, 88 S.E.2d 727 (1955); White v. City of Manchester, 92 Ga. App. 642, 89 S.E.2d 581 (1955); State Park Marina v. Muller, 92 Ga. App. 689, 89 S.E.2d 826 (1955); Atlantic Coast Line R.R. v. Kammerer, 239 F.2d 115 (5th Cir. 1956); Padgett v. Central of Ga. Ry., 95 Ga. App. 96, 96 S.E.2d 658 (1957); Buchanan v. Atlanta Newspaper, Inc., 95 Ga. App. 428, 98 S.E.2d 96 (1957); Thomson Pipe Line Co. v. Davis, 96 Ga. App. 372, 100 S.E.2d 114 (1957); F.E. Fortenberry & Sons v. Malmberg, 97 Ga. App. 162, 102 S.E.2d

General Consideration (Cont'd)
1. In General (Cont'd)

667 (1958); Brock v. Avery Co., 99 Ga. App. 881, 110 S.E.2d 122 (1959); Allen v. Gornto, 100 Ga. App. 744, 112 S.E.2d 368 (1959); Noland v. England, 101 Ga. App. 306, 113 S.E.2d 649 (1960); Andrews Taxi & U-Drive It Co. v. McEver, 101 Ga. App. 383, 114 S.E.2d 145 (1960); Moorman v. Williams, 103 Ga. App. 726, 120 S.E.2d 312 (1961); Myrick v. Sievers, 104 Ga. App. 95, 121 S.E.2d 185 (1961); Ferguson v. Gurley, 105 Ga. App. 575, 125 S.E.2d 218 (1962); Davis v. Harrell Concrete Prods., Inc., 105 Ga. App. 785, 125 S.E.2d 699 (1962); Beadles v. Smith, 106 Ga. App. 31, 126 S.E.2d 250 (1962); Law v. McIntyre, 106 Ga. App. 723, 127 S.E.2d 925 (1962); Central of Ga. Ry. v. Brower, 218 Ga. 525, 128 S.E.2d 926 (1962); 670 New Street, Inc. v. Smith, 107 Ga. App. 539, 130 S.E.2d 773 (1963); Moran v. Moody, 108 Ga. App. 350, 133 S.E.2d 98 (1963); Jackson v. Southern Ry., 317 F.2d 532 (5th Cir. 1963); B.C. Truck Lines v. Pilot Freight Carriers, Inc., 225 F. Supp. 1 (N.D. Ga. 1963); Farr v. Collins, 109 Ga. App. 37, 135 S.E.2d 65 (1964); Bell v. Camp, 109 Ga. App. 221, 135 S.E.2d 914 (1964); Wilbanks v. Carter, 110 Ga. App. 644, 139 S.E.2d 435 (1964); S & A Corp. v. Berger Co., 111 Ga. App. 39, 140 S.E.2d 509 (1965); Johnson v. Thompson, 111 Ga. App. 654, 143 S.E.2d 51 (1965); Hillhouse v. C.W. Matthews Contracting Co., 112 Ga. App. 73, 143 S.E.2d 686 (1965); Darlington Corp. v. Finch, 113 Ga. App. 825, 149 S.E.2d 861 (1966); Rainey v. Housing Auth., 114 Ga. App. 333, 151 S.E.2d 534 (1966); King v. Mention, 116 Ga. App. 209, 156 S.E.2d 488 (1967); Jacobs Pharmacy Co. v. Gipson, 116 Ga. App. 760, 159 S.E.2d 171 (1967); Wade v. Roberts, 118 Ga. App. 284, 163 S.E.2d 343 (1968); Seagraves v. Abco Mfg. Co., 118 Ga. App. 414, 164 S.E.2d 242 (1968); Jones v. Cloud, 119 Ga. App. 697, 168 S.E.2d 598 (1969); Gross v. Southern Ry., 414 F.2d 292 (5th Cir. 1969); Webb v. Standard Oil Co., 414 F.2d 320 (5th Cir. 1969); Hartz v. United States, 415 F.2d 259 (5th Cir. 1969); Hodge v. United States, 310 F. Supp. 1090 (M.D. Ga. 1969); Lambert v. Ford Motor Co., 46 F.R.D. 46 (N.D. Ga. 1969); Seaboard Coast Line R.R. v. Clark, 122 Ga. App. 237, 176 S.E.2d 596 (1970); Wright v. Dilbeck, 122 Ga. App. 214, 176 S.E.2d 715 (1970); Harris v. Hub Motor Co., 124 Ga. App. 490, 184 S.E.2d 199 (1971); Morris v. Affleck, 437 F.2d 82 (5th Cir. 1971); Lanier v. Zayre of Ga., Inc., 125 Ga. App. 739, 188 S.E.2d 885 (1972); Seaboard Coast Line R.R. v. Mitcham, 127 Ga. App. 102, 192 S.E.2d 549 (1972); Chaffin v. Atlanta Coca-Cola Bottling Co., 127 Ga. App. 619, 194 S.E.2d 513 (1972); Cagle v. Atchley, 127 Ga. App. 668, 194 S.E.2d 598 (1972); Kirkland v. Moore, 128 Ga. App. 34, 195 S.E.2d 667 (1973); Southern States, Inc. v. Thomason, 128 Ga. App. 667, 197 S.E.2d 429 (1973); Jones v. Petroleum Carrier Corp., 483 F.2d 1369 (5th Cir. 1973); Simmons v. Classic City Beverages, Inc., 136 Ga. App. 150, 220 S.E.2d 734 (1975); Queen v. Bair, 137 Ga. App. 30, 223 S.E.2d 8 (1975); Mealey v. Slaton Mach. Sales, Inc., 508 F.2d 87 (5th Cir. 1975); Wallace v. Ener, 521 F.2d 215 (5th Cir. 1975); Ford Motor Co. v. Lee, 137 Ga. App. 486, 224 S.E.2d 168 (1976); White v. Seaboard C.L.R.R., 139 Ga. App. 833, 229 S.E.2d 775 (1976); Bickford v. Nolen, 142 Ga. App. 256, 235 S.E.2d 743 (1977); Lawhorn v. Gulf Oil Corp., 145 Ga. App. 80, 243 S.E.2d 253 (1978); Hill v. Copeland, 148 Ga. App. 232, 250 S.E.2d 822 (1978); Georgia Farmers' Mkt. Auth. v. Dabbs, 150 Ga. App. 15, 256 S.E.2d 613 (1979); Georgia Power Co. v. Purser, 152 Ga. App. 181, 262 S.E.2d 473 (1979); Walt Disney Prods., Inc. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981); Findley v. McDaniel, 158 Ga. App. 445, 280 S.E.2d 858 (1981); Holmes v. Worthey, 159 Ga. App. 262, 282 S.E.2d 919 (1981); McCoy v. Hankins, 159 Ga. App. 569, 284 S.E.2d 71 (1981); Gilbert v. Mayor of Athens, 655 F.2d 73 (5th Cir. 1981); Central of Ga. R.R. v. Wooten, 163 Ga. App. 622, 295 S.E.2d 369 (1982); Soucy v. Alexander, 172 Ga. App. 501, 323 S.E.2d 662 (1984); Sims Crane Serv., Inc. v. Ideal Steel Prods., Inc., 750 F.2d 884 (11th Cir. 1985); General Tel. Co. v. Hiers, 179 Ga. App. 105, 345 S.E.2d 652 (1986); Fuller v. Krystal Co., 179 Ga. App. 725, 347 S.E.2d 693 (1986); Hester v. Baker, 180 Ga. App. 627, 349 S.E.2d 834 (1986); McKinney & Co. v. Lawson, 257 Ga. 222, 357 S.E.2d 786 (1987); Glenn

McClendon Trucking Co. v. Williams, 183 Ga. App. 506, 359 S.E.2d 351 (1987); Ellerbee v. Interstate Contract Carrier Corp., 183 Ga. App. 828, 360 S.E.2d 280 (1987); Branton v. Draper Corp., 185 Ga. App. 820, 366 S.E.2d 206 (1988); George v. Brandychase Ltd. Partnership, 841 F.2d 1094 (11th Cir. 1988); Harvey Freeman & Sons v. Stanley, 189 Ga. App. 256, 375 S.E.2d 261 (1988); Morris v. Barnet, 191 Ga. App. 382, 381 S.E.2d 597 (1989); Smith v. Wal-Mart Stores, Inc., 199 Ga. App. 808, 406 S.E.2d 234 (1991); Zumbado v. Lincoln Property Co., 209 Ga. App. 163, 433 S.E.2d 301 (1993); Gaydos v. Grupe Real Estate Investors, 211 Ga. App. 811, 440 S.E.2d 545 (1994); Turner v. Sumter Self Storage Co., 215 Ga. App. 92, 449 S.E.2d 618 (1994); Ingram v. Toccoa Triple Cinema, Inc., 222 Ga. App. 409, 474 S.E.2d 293 (1996); Roberts v. Dove, 234 Ga. App. 853, 508 S.E.2d 213 (1998); Baker v. Harcon, Inc., 303 Ga. App. 749, 694 S.E.2d 673 (2010).

2. Comparative Negligence Rule

This section represents change from common law contributory negligence rule, and the law which obtains in this state is the comparative negligence doctrine. Ohio S. Express Co. v. Beeler, 110 Ga. App. 867, 140 S.E.2d 235 (1965).

Plaintiff's duty to protect oneself. — Georgia at an early time abandoned the common law rule that if a plaintiff was negligent at all the plaintiff was barred from recovery, for the common law rule Georgia substituted the comparative negligence rule, which changed the plaintiff's duty to protect the plaintiff's own safety from an absolute duty to the duty to exercise ordinary care. Under the "avoidance of consequences" rule, the plaintiff is not required to exercise more than ordinary care to avoid the consequences of the defendant's negligence. Underwood v. Atlanta & W. Point R.R., 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

Doctrine of contributory negligence as that term is used in common law is not law of Georgia; the doctrine which does obtain is that of comparative negligence. Ware v. Alston, 112 Ga. App. 627, 145 S.E.2d 721 (1965).

The doctrine of contributory negligence under the common law and that doctrine as modified by the rule of the last clear chance under the common law have no place in the rule of comparative negligence and apportionment of damages. Smith v. AMOCO, 77 Ga. App. 463, 49 S.E.2d 90 (1948), overruled on other grounds, Union Camp Corp. v. Helmy, 258 Ga. 263, 367 S.E.2d 796 (1988).

Doctrine which prevails in this state is more accurately designated as comparative negligence, rather than that of contributory negligence. Georgia Power Co. v. Maxwell, 52 Ga. App. 430, 183 S.E. 654 (1936).

Common law rule on contributory negligence. — Under the common-law doctrine of contributory negligence which now prevails in most jurisdictions but which has been changed by statute in this state, if the negligence of the plaintiff, no matter how small, contributed to the injury sustained by the plaintiff, the plaintiff could not recover of the defendants; this doctrine did not diminish the damages but precluded a recovery. The doctrine which prevails in this state, by reason of the statutes, is more accurately and properly designated as that of comparative negligence rather than that of contributory negligence. Rogers v. McKinley, 48 Ga. App. 262, 172 S.E. 662 (1934); Georgia Power Co. v. Maxwell, 52 Ga. App. 430, 183 S.E. 654 (1936).

Comparative negligence. — The concluding sentence of this section has reference alone to that class of cases in which the plaintiff could not by the exercise of ordinary care have avoided the consequences to the plaintiff caused by the defendant's negligence. Southern Ry. v. Watson, 104 Ga. 243, 30 S.E. 818 (1898).

Comparative negligence rule stated. — Under the rule of comparative negligence, failure to exercise ordinary care on the part of the person injured before the negligence complained of is apparent or should have been reasonably apprehended will not preclude a recovery, but will authorize the jury to diminish the damages in proportion to the fault attributable to the person injured. Moore v. Sears, Roebuck & Co., 48 Ga. App. 185, 172 S.E. 680 (1934).

General Consideration (Cont'd)
2. Comparative Negligence
Rule (Cont'd)

When evidence is of such nature as to authorize a finding that, while the defendant was negligent as charged, the plaintiff's injury was caused by the concurrent negligence of the plaintiff and the defendant, and the plaintiff's own negligence, not amounting to a total lack of ordinary care, was less than the negligence of the defendant, the jury will be unrestrained in comparing the negligence of the parties. Moore v. Sears, Roebuck & Co., 48 Ga. App. 185, 172 S.E. 680 (1934).

If the plaintiff could not have avoided the injury to the plaintiff caused by the defendants' negligence by the exercise of due care, then, if the plaintiff's negligence was less than that of the defendant, the plaintiff would be entitled to recover, but the amount of the verdict in the plaintiff's favor should be diminished in proportion to the amount of fault attributable to the plaintiff. Rogers v. McKinley, 48 Ga. App. 262, 172 S.E. 662 (1934).

The comparative negligence rule in force in this state is that when there is negligence by both parties which is concurrent and contributes to the injury sued for, a recovery by the plaintiff is not barred, but the plaintiff's damages shall be diminished by an amount proportioned to the amount of fault attributable to the plaintiff, provided that the plaintiff's fault is less than the defendants, and that, by the exercise of ordinary care, the plaintiff could not have avoided the consequences of the defendants' negligence after it became apparent or in the exercise of ordinary care should have been discovered by the plaintiff. Rogers v. McKinley, 48 Ga. App. 262, 172 S.E. 662 (1934); Georgia Power Co. v. Maxwell, 52 Ga. App. 430, 183 S.E. 654 (1936).

The comparative negligence rule does not defeat recovery by a negligent plaintiff unless it is made to appear that the plaintiff's negligence was the sole, or within the rule of the last clear chance doctrine, legal, proximate cause of the injury. United States v. Fleming, 115 F.2d 314 (5th Cir. 1940).

The comparative negligence rule in general provides for the reduction of the plaintiff's recovery when the plaintiff's negligence is a contributing cause. It abolishes the common law rule that contributory negligence is a bar to recovery and substitutes for it the comparative negligence rule that it is a ground for diminution of damages. United States v. Fleming, 115 F.2d 314 (5th Cir. 1940).

Under the rule of comparative negligence and apportionment of damages the plaintiff may recover, even though the plaintiff contributed in some way to the injury sustained, provided the plaintiff's negligence is less than that of the defendant, and the plaintiff could not, by the exercise of ordinary care, have avoided the negligence of the defendant; in such a case the damages will be apportioned. Southern Stages, Inc. v. Clements, 71 Ga. App. 169, 30 S.E.2d 429 (1944).

The doctrine of comparative negligence grants the jury the right to apportion the damages in the event they should determine under all the facts that the defendants were more negligent than the plaintiff, and to refuse a verdict favorable to the plaintiff in the event they should find that the negligence of the plaintiff was equal to or greater than that of the defendants. Lanier v. Turner, 73 Ga. App. 749, 38 S.E.2d 55 (1946).

If the plaintiff and the defendant were both negligent, the former can recover, unless the plaintiff's negligence was equal to or greater than the negligence of the defendant, except that this rule is further qualified by the provisions of this section, which provide that if the plaintiff, by ordinary care, could have avoided the consequences to oneself caused by the defendant's negligence, the plaintiff is not in such event entitled to recover. Atlantic Coast Line R.R. v. Mitchell, 157 F.2d 880 (5th Cir. 1946).

The true comparative negligence rule is that if a plaintiff and defendant are both guilty of negligence which concurs proximately to bring about an injury to a plaintiff, if the defendant's negligence is sufficient to predicate an action on ordinary negligence, and if the plaintiff is negligent and such negligence is not equal to or greater than that of the defendant, the plaintiff would still be entitled to recover,

provided the plaintiff could not have avoided the consequences of the defendant's negligence by the exercise of ordinary care after it was actually discovered or should have been discovered by the exercise of ordinary care. Willis v. Jones, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

As to a plaintiff, who is in some degree negligent personally, such negligence will not preclude, but will diminish recovery; but negligence in avoiding the perilous situation created by the defendant after it is or should have been plain to the plaintiff will render the plaintiff the sole author of the plaintiff's misfortune and thus preclude recovery. Atlantic Coast Line R.R. v. Coxwell, 93 Ga. App. 159, 91 S.E.2d 135 (1955).

This section is the source of the Georgia contributory comparative negligence concept under which a negligent plaintiff may recover unless the plaintiff's negligence is equal to (or greater than) that of the defendant, although damages will be reduced in proportion to the amount of negligence attributable to the plaintiff. Williams v. United States, 379 F.2d 719 (5th Cir. 1967).

Comparative negligence doctrine denies any recovery if the plaintiff's negligence equals or exceeds the defendant's negligence. Damages are proportionately reduced when the latter's fault exceeds that of the plaintiff. Thus, if each party is 50 percent at fault, there can be no recovery. But should the plaintiff's negligence be 49 percent, the plaintiff is entitled to recover 51 percent of the plaintiff's damages. Southern Ry. v. Brunswick Pulp & Paper Co., 376 F. Supp. 96 (S.D. Ga. 1974).

Even though one party is negligent, if it is lesser than the other party, there may be a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the other party. Allen v. State, 150 Ga. App. 109, 257 S.E.2d 5 (1979).

The doctrine of comparative negligence goes to the right of recovery as well as to the amount of damages. Whitby v. Maloy, 150 Ga. App. 575, 258 S.E.2d 181 (1979).

Georgia permits the comparison of any negligence on the part of the plaintiff to that of the defendant, and while both the negligence of the plaintiff and the defendant in any such comparison must be the proximate cause of the injury to the plaintiff, if the negligence of the plaintiff is equal to or greater than that of the defendant, the plaintiff may not recover from the defendant. Walton v. United States, 484 F. Supp. 568 (S.D. Ga. 1980).

If the tort-feasor is liable to the plaintiff for the wrongful death of the decedent, and if some negligence on the part of the decedent contributed to the decedent's injury, so long as the decedent's negligence was less than that of the tort-feasor, the decedent's negligence would not prevent a recovery for the decedent's wrongful death. Harden v. United States, 485 F. Supp. 380 (S.D. Ga. 1980), aff'd, 688 F.2d 1025 (5th Cir. 1982).

Concurrent contributory negligence of plaintiff is not bar, but is only ground to reduce recovery. Southern Ry. v. Wilbanks, 67 F.2d 424 (5th Cir. 1933), cert. denied, 291 U.S. 678, 54 S. Ct. 530, 78 L. Ed. 1066 (1934).

Contributory negligence will not always defeat recovery, but may only reduce it. Dixie Ohio Express Co. v. Lowery, 115 F.2d 56 (5th Cir. 1940).

This section makes the contributory negligence of a plaintiff proper to be considered, when pleaded, not in bar as at common law, but in reduction of damages in proportion to the amount of default attributable to the plaintiff. McCord v. Atlantic Coast Line R.R., 185 F.2d 603 (5th Cir. 1950).

Consistent with "equal/superior knowledge" rule. — The law of comparative negligence (this section) is consistent with the "equal/superior knowledge" rule, when the plaintiff, who personally has the duty of ordinary care, cannot recover if the plaintiff's knowledge of the danger was equal to or greater than that of the proprietor of the premises. Colbert v. Piggly Wiggly S., 175 Ga. App. 44, 332 S.E.2d 304 (1985).

A plaintiff's negligence is to be compared to the aggregate negligence of all joint tortfeasors in determining the plaintiff's right of recovery. Unless the plaintiff's negligence is equal to or greater than the aggregate negligence of all the defendants, the plaintiff may recover. Therefore, a plaintiff whose comparative

General Consideration (Cont'd)
2. Comparative Negligence
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fault exceeds that of one defendant but does not exceed that of another defendant is entitled to a judgment against both defendants, assuming of course, that the rule of joint-and-several liability among joint tortfeasors is applicable in the case. Union Camp Corp. v. Helmy, 258 Ga. 263, 367 S.E.2d 796 (1988).

Possible impairment of plaintiff due to alcohol consumption does not demand a finding of contributory negligence. N.L. Indus., Inc. v. Madison, 176 Ga. App. 451, 336 S.E.2d 574 (1985).

3. Avoidance Doctrine

Contributory negligence. — A recovery is defeated only when the plaintiff's contributory conduct amounts to failure to exercise ordinary care. Rollestone v. Cassierer & Co., 3 Ga. App. 161, 59 S.E. 442 (1907).

Closely allied to doctrine of contributory negligence is rule of "avoidable consequences," which denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff. Osburn v. Pilgrim, 246 Ga. 688, 273 S.E.2d 118 (1980).

This section is generally known as the avoidance doctrine. Parham v. Roach, 131 Ga. App. 728, 206 S.E.2d 686 (1974).

Avoidance doctrine stated. — When by the exercise of ordinary care the deceased could have avoided the consequence to the deceased caused by the defendant's negligence, a nonsuit was properly ordered. Atlantic Coast Line R.R. v. Anderson, 35 Ga. App. 292, 133 S.E. 63 (1926); Little v. Rome Ry. & Light Co., 35 Ga. App. 482, 133 S.E. 643 (1926).

This section applies when the plaintiff fails to exercise ordinary care to avoid the consequences of the defendant's negligence after the plaintiff could have become aware of it by the exercise of ordinary care as when the plaintiff actually knows of the defendant's negligence. Jones v. Alred, 41 Ga. App. 472, 153 S.E. 444 (1930).

The complainant is not entitled to recovery if by the exercise of ordinary care on the complainant's own part the complainant could have avoided the consequences of the defendant's negligence after it should have become known. Donaldson v. Central of Ga. Ry., 43 Ga. App. 480, 159 S.E. 738 (1931).

If a person is in a place of danger the person is under the duty not only to exercise ordinary care to avoid personal injury from dangers known to the person to exist, but the person is also bound to use that degree of care and caution which an ordinarily prudent person would exercise under similar circumstances to discover approaching danger and thereafter avoid the danger. Central of Ga. Ry. v. Dumas, 44 Ga. App. 152, 160 S.E. 814 (1931).

It is not sufficient to prevent a recovery that the plaintiff may have been lacking in ordinary care and diligence to avoid the injury, but it must appear that by the use of such ordinary care and diligence the plaintiff would have avoided the injury. Cooper v. Georgia Power Co., 44 Ga. App. 581, 162 S.E. 302 (1932).

Only when the injured party fails to exercise ordinary care to escape the consequences of negligence is a recovery entirely defeated. Weinstein v. Powell, 61 F.2d 411 (5th Cir. 1932).

The failure to exercise ordinary care to escape the consequences of the defendant's negligence which is a bar arises in situations in which the defendant's negligence exists first and is apparent or may readily be known, and the plaintiff, by the exercise of ordinary care, can escape its consequences but does not. It is the doctrine of "the last clear chance" applied to the plaintiff instead of to the defendant. Southern Ry. v. Wilbanks, 67 F.2d 424 (5th Cir. 1933), cert. denied, 291 U.S. 678, 54 S. Ct. 530, 78 L. Ed. 1066 (1934).

If the plaintiff, by the exercise of due care, could have avoided the consequences to the plaintiff caused by the negligence on the part of the defendants, when that negligence became apparent to the plaintiff, or when by the exercise of that due care upon the plaintiff's part should have become aware of it, the plaintiff is not entitled to recover. Rogers v. McKinley, 48 Ga. App. 262, 172 S.E. 662 (1934).

Contributory negligence on a plaintiff's

part may serve to diminish the amount the plaintiff may be entitled to recover against a defendant, but the plaintiff's right to recover is not entirely defeated unless it appears that the plaintiff could by the use of ordinary care have avoided the consequences of the defendant's negligence. Lewis v. Powell, 51 Ga. App. 129, 179 S.E. 865 (1935).

The plaintiff can never recover in an action for personal injuries, no matter what the negligence of the defendant may be, short of actual wantonness, when the proof shows the plaintiff could by ordinary care, after the negligence of the defendant began or was existing, have avoided the consequences to the plaintiff of that negligence; the law of contributory negligence is applicable only when both parties are at fault and when the plaintiff could not by ordinary care have avoided the injury which the defendant's negligence produced. Pollard v. Kent, 59 Ga. App. 118, 200 S.E. 542 (1938).

When the petition, itself, alleges negligence on the plaintiff's part without which the injury would not have occurred, although the defendant may also have been negligent, in such a case this section applies, it being apparent that except for the negligence of the plaintiff the defendant's negligence would not have caused the injury. Goodman v. Fayette County, 61 Ga. App. 741, 7 S.E.2d 327 (1940).

A plaintiff cannot recover when the plaintiff fails, by the exercise of ordinary care, to avoid the consequences to the plaintiff of the defendant's negligence. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

When an injury is the result of the plaintiff's own negligence, or when the plaintiff fails to exercise proper care for the plaintiff's own safety on discovering the negligence of the defendant, or when by the exercise of ordinary care the plaintiff could have apprehended the defendant's negligence, the plaintiff cannot recover; but even though the plaintiff was negligent in some manner, when the defendant's negligence caused the injury and was of a greater degree than the plaintiff's, still the plaintiff could recover, although the plaintiff's recovery would be diminished in proportion that the plaintiff's negligence compared with the negligence of the defendant. McDowall Transp., Inc. v. Gault, 80 Ga. App. 445, 56 S.E.2d 161 (1949).

A plaintiff is not entitled to recover if the plaintiff's injuries were caused by the plaintiff's own negligence or if by the exercise of ordinary care the plaintiff could have discovered the defendant's negligence and could have avoided the consequences thereof. Anderson v. Southern Ry., 88 Ga. App. 195, 76 S.E.2d 528 (1953).

The plaintiff in order to recover must have exercised ordinary care to avoid the consequences of negligence either actually discovered or which in the exercise of ordinary care might have been discovered. City of Commerce v. Bradford, 94 Ga. App. 284, 94 S.E.2d 160 (1956).

When the allegations of the petition showed that the plaintiff, with knowledge of the prior acts complained of, had full opportunity to avoid and escape the consequences thereof, the plaintiff was not entitled to recover though the defendant may have been in some respects negligent. Central of Ga. Ry. v. Roberts, 213 Ga. 135, 97 S.E.2d 149 (1957).

The defendant's negligence, the consequence of which the plaintiff could shun by the use of ordinary care, goes for nothing. Brown v. Atlanta Gas Light Co., 96 Ga. App. 771, 101 S.E.2d 603 (1957).

Ordinary care must be used both to apprehend and to avoid the consequences of another's negligence. Everett v. Clegg, 97 Ga. App. 387, 103 S.E.2d 432 (1958).

In this state, negligence of the plaintiff must be equal to or greater than that of the defendant to defeat recovery, except that lack of ordinary care in discovering and avoiding the negligence of the defendant after such negligence is or should have been known will defeat recovery regardless of its ratio to the defendant's negligence. Harmon v. Southwell, 98 Ga. App. 261, 105 S.E.2d 596 (1958).

The plaintiff would not be entitled to recover if the plaintiff could have avoided the injury by the use of ordinary care. City of Bainbridge v. Youngblood, 102 Ga. App. 195, 115 S.E.2d 696 (1960).

One who knows of another's negligence must take the actions of a reasonably

General Consideration (Cont'd)
3. Avoidance Doctrine (Cont'd)

prudent person to avoid the consequences or injury to oneself from the other's negligence. Redding v. Morris, 105 Ga. App. 152, 123 S.E.2d 714 (1961).

Negligence of the plaintiff concurring with that of the defendant as proximate cause of injury will diminish but not bar recovery, except in those cases when the plaintiff, knowing of the defendant's negligence, is thereafter negligent in failing to exercise ordinary care to avoid it; or when, although the plaintiff does not actually know of and avoid it, the failure to discover is itself negligence because the danger is in fact so apparent that a person in the exercise of ordinary care for the plaintiff's own safety, though under no duty to anticipate such negligence, would nevertheless have become aware of it; and, thirdly, the plaintiff will be barred if the plaintiff's negligence is the sole proximate cause of the plaintiff's injury. Wright v. Concrete Co., 107 Ga. App. 190, 129 S.E.2d 351 (1962).

There is no liability if the plaintiff, by the exercise of that degree of care which the law required of the plaintiff, could have avoided the consequences of any negligence of which the defendant may have been guilty. YMCA v. Bailey, 112 Ga. App. 684, 146 S.E.2d 324 (1965), cert. denied, 385 U.S. 868, 87 S. Ct. 131, 17 L. Ed. 2d 95 (1966).

The doctrine of comparative negligence is not applicable when, after the negligence of the defendant is actually apparent, the consequences of such negligence could have been avoided by ordinary care on the part of the plaintiff. Atlantic Coast Line R.R. v. Street, 116 Ga. App. 465, 157 S.E.2d 793 (1967).

When the proximate cause of the injury is referable to the conduct of the injured party after knowledge of the risk of injury, rather than to the defendant who first created the risk, the plaintiff cannot recover for injuries. Atlantic Coast Line R.R. v. Street, 116 Ga. App. 465, 157 S.E.2d 793 (1967).

A negligent plaintiff is completely barred from recovery from a negligent defendant if the plaintiff was in a position of danger because of the plaintiff's own failure to exercise ordinary care for the plaintiff's own safety, if the plaintiff failed to exercise ordinary care to avoid the consequences of the defendant's negligence after it was known or reasonably apprehensible to the plaintiff (the last clear chance applied to the plaintiff), or if the plaintiff's own contributory negligence was equal to or greater than that of the defendant. Seaboard Coast Line R.R. v. Daugherty, 118 Ga. App. 518, 164 S.E.2d 269 (1968), cert. denied, 397 U.S. 939, 90 S. Ct. 950, 25 L. Ed. 2d 120 (1970).

Plaintiff has a duty to exercise ordinary care to avoid the consequences of any negligence by the defendants when such is apparent or in the exercise of ordinary care should have become apparent to the plaintiff. Smith v. Poteet, 127 Ga. App. 735, 195 S.E.2d 213 (1972).

By allowing a breach of duty to occur and contributing to the potential for injury, a plaintiff cannot recover for the negligence of another. Walton v. United States, 484 F. Supp. 568 (S.D. Ga. 1980).

When evidence showed an employee for defendant gas station saw a woman and her attacker with no car or gas container fighting by a gas pump, and the employee then activated the pump for the attacker which allowed the woman to be sprayed with gas and set on fire, the district court's denial of the station's motion for judgment as a matter of law was proper, and because the evidence showed that the woman had previously calmed the attacker down, the jury could have reasonably found, under O.C.G.A. § 51-11-7, the woman was 25 percent negligent but that by ordinary care could not have avoided the consequences of the employee's negligent act of authorizing the pump to be used. Currie v. Chevron U.S.A., Inc., 266 Fed. Appx. 857 (11th Cir. 2008) (Unpublished).

Defendant is not relieved of liability unless plaintiff's negligence proximately caused injury. — It is not sufficient to relieve the defendant of liability that the negligence of the decedent contributed to cause the injury complained of, unless such negligence of the decedent amounts to a proximate cause of the injury. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

If the decedent could not have avoided the injury caused by the defendant's negligence by the exercise of ordinary care, the defendant would not be relieved of the defendant's liability because the negligence of the decedent contributed in some way to the injury sustained. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

Defendant liable for willful injuries despite plaintiff's failure to use due care. — The rule that one guilty of lack of ordinary care cannot recover for injuries sustained by the negligence of another does not extend to those cases when the acts of the party inflicting the injuries are willful and wanton. Humphries v. Southern Ry., 51 Ga. App. 585, 181 S.E. 135 (1935).

Since there was ample evidence to support willful negligence, under such circumstances the failure of the plaintiff to exercise ordinary care would not prevent recovery. Chitwood v. Stoner, 60 Ga. App. 599, 4 S.E.2d 605 (1939).

When the petition avers that the defendant's acts were "willful and malicious," the mere failure of the plaintiff in the exercise of ordinary care will not defeat a recovery. Southern Grocery Stores, Inc. v. Herring, 63 Ga. App. 267, 11 S.E.2d 57 (1940).

Even when the plaintiff by the exercise of ordinary care could have avoided the consequences to the plaintiff caused by the defendant's negligence, the plaintiff may still under Georgia law recover if the negligence of the defendant is so gross as to amount to wanton and willful negligence. Stanaland v. Atlantic Coast Line R.R., 192 F.2d 432 (5th Cir. 1951).

It is incumbent upon plaintiff to use degree of care necessary under circumstances to avoid personal injury. Griner v. Groover, 97 Ga. App. 753, 104 S.E.2d 504 (1958).

The question is not whether the plaintiff might on inspection have ascertained the defect but whether the plaintiff knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care and diligence for the plaintiff's own safety. Scott Dev. Co. v. Munn, 116 Ga. App. 525, 157 S.E.2d 821 (1967).

The test is whether the danger was so obvious and patent that any person injured by going in its vicinity must be held to be so lacking in ordinary care to avoid the known negligence of the defendant as not to be entitled to recover. BLI Constr. Co. v. Debari, 135 Ga. App. 299, 217 S.E.2d 426 (1975).

Failure of the plaintiff to exercise ordinary care for the plaintiff's own safety which will bar the plaintiff from recovery may consist in negligence proximately causing the plaintiff's injury, or negligence in failing to avoid the consequences of the defendant's negligence after it becomes known to the plaintiff, or failure to exercise that degree of care generally which the ordinarily prudent person would show and which, had the plaintiff been in the exercise of such care, would have revealed the defendant's negligence to the plaintiff in time to avoid it even though the plaintiff had no reason to anticipate that such negligence existed. Otherwise, ordinary negligence of the defendant will not preclude recovery, but will diminish the damages. Crim v. Grantham, 139 Ga. App. 680, 229 S.E.2d 150 (1976).

There is a presumption in a medical malpractice case that the physician performed in an ordinarily skillful manner so that the burden is upon the plaintiff to show a want of care or skill; a veteran whose leg was amputated after the veteran failed to comply with a Veterans Administration (VA) treatment plan for the veteran's diabetes and related foot ulcer failed to show that VA personnel breached the standard of care set out in O.C.G.A. § 51-1-27 and that the amputation would have been unnecessary if another treatment plan had been used. Moreover, the VA's evidence plainly established that the veteran's negligence in failing to comply with the veteran's treatment plan exceeded the negligence, if any, by VA personnel, so the veteran could not recover under O.C.G.A. § 51-11-7. Kimbrough v. United States Gov't, No. 1:07-CV-1517-RWS, 2008 U.S. Dist. LEXIS 77793 (N.D. Ga. Oct. 2, 2008).

One who recklessly tests observed and clearly obvious peril is guilty of lack of ordinary care, and one's own negligence, notwithstanding any accom-

General Consideration (Cont'd)
3. Avoidance Doctrine (Cont'd)

panying negligence by another, may under the particular facts be deemed the proximate cause of one's injury. In plain and palpable cases, it will be so held as a matter of law; otherwise questions as to such negligence, as well as other questions of negligence by the parties, and as to the proximate cause of the injury, present issues for the jury. Laseter v. Clark, 54 Ga. App. 669, 189 S.E. 265 (1936); Brooks v. Douglas, 154 Ga. App. 54, 267 S.E.2d 495 (1980).

One who knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such risk in and of itself amounts to a failure to exercise ordinary care and diligence for one's own safety, cannot hold another liable for damages resulting from an injury thus occasioned, although the same may be in part attributable to the latter's negligence. Culbreath v. Kutz Co., 37 Ga. App. 425, 140 S.E. 419 (1927); Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933); Georgia Power Co. v. Puckett, 50 Ga. App. 720, 179 S.E. 284, rev'd on other grounds, 181 Ga. 386, 182 S.E. 384 (1935); Collett v. Atlanta, B. & C.R.R., 51 Ga. App. 637, 181 S.E. 207 (1935); Lassiter v. Poss, 85 Ga. App. 785, 70 S.E.2d 411 (1952); Beasley v. Elder, 88 Ga. App. 419, 76 S.E.2d 849 (1953).

One who recklessly tests an observed and clearly obvious danger may under the particular facts be held to have failed to exercise that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances and is guilty of contributory negligence, which will be deemed the proximate cause of one's resulting injury and in the absence of willful or wanton misconduct by the defendant will preclude one's recovery. Laseter v. Clark, 54 Ga. App. 669, 189 S.E. 265 (1936); Atlantic Coast Line R.R. v. Street, 116 Ga. App. 465, 157 S.E.2d 793 (1967).

A person cannot undertake to do an obviously dangerous thing, even though directed to do so by another under whom the person is working, without assuming the risks incident thereto and without personally being guilty of such a lack of due care for the person's own safety as to bar the person from recovery if the person is injured in carrying out such directions. Fricks v. Knox Corp., 84 Ga. App. 5, 65 S.E.2d 423 (1951).

Generally, a person is not excused from the consequences of one's own acts in exposing oneself to the danger so apparent that a reasonable person should have seen and recognized the danger. Atlantic Coast Line R.R. v. Street, 116 Ga. App. 465, 157 S.E.2d 793 (1967).

When a person knowingly and voluntarily puts oneself in a place of immediate and obvious peril or exposure to injury, without some reason of necessity or propriety in so doing, and injury happens to the person in consequence of the person being in that place, the person is not allowed to recover, notwithstanding the party may negligently injure the person. In all other cases, the comparative negligence rule applies. Henry Grady Hotel Corp. v. Watts, 119 Ga. App. 251, 167 S.E.2d 205 (1969), overruled on other grounds, Vinson v. Howe Bldrs. Ass'n of Atlanta, 233 Ga. 948, 213 S.E.2d 890 (1975).

Duty resting upon person to avoid consequences of another's negligence after it becomes apparent is not absolute, but is only a duty to exercise ordinary care to prevent the consequences of such negligence. Warren County v. Battle, 48 Ga. App. 240, 172 S.E. 673 (1934); Brooks v. Wofford, 88 Ga. App. 731, 77 S.E.2d 563 (1953).

Duty arises when danger is apparent. — No duty to exercise ordinary care arises until the negligence of the defendant becomes apparent, or the ordinary person would apprehend the danger's existence. Western Atl. R.R. v. Ferguson, 113 Ga. 708, 39 S.E. 306, 54 L.R.A. 802 (1901); Augusta-Aiken Ry. & Elec. Corp. v. Jones, 15 Ga. App. 93, 82 S.E. 665 (1914).

The duty to avoid negligence does not arise until after the negligence to be avoided has become apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167

S.E. 773 (1932); Brown v. Mayor of Athens, 47 Ga. App. 820, 171 S.E. 730 (1933); Lewis v. Powell, 51 Ga. App. 129, 179 S.E. 865 (1935); Bach v. Bragg Bros. & Blackwell, 54 Ga. App. 574, 186 S.E. 711 (1936); Stanaland v. Atlantic Coast Line R.R., 192 F.2d 432 (5th Cir. 1951); Lawrence v. Hayes, 92 Ga. App. 778, 90 S.E.2d 102 (1955); Petroleum Carrier Corp. v. Jones, 127 Ga. App. 676, 194 S.E.2d 670 (1972); Brooks v. Ralston Purina Co., 155 Ga. App. 164, 270 S.E.2d 347 (1980).

The rule in this section applies only when the defendant's negligence became apparent to the person injured, or when, by the exercise of ordinary care, the defendant could have become aware of it, and the defendant thereafter failed to exercise ordinary and reasonable diligence to avoid the consequences of the defendant's negligence. Taylor v. Morgan, 54 Ga. App. 426, 188 S.E. 44 (1936); Atlantic Coast Line R.R. v. Mitchell, 157 F.2d 880 (5th Cir. 1946).

A person cannot be charged with the duty of using any degree of care and diligence to avoid the negligence of a wrongdoer until one has reason to apprehend the existence of such negligence. Southern Bell Tel. & Tel. Co. v. Bailey, 81 Ga. App. 20, 57 S.E.2d 837 (1950).

When the danger is apparent or is reasonably to be apprehended, the rule requiring the plaintiff to avoid the consequences of the defendant's negligence applies. Fricks v. Knox Corp., 84 Ga. App. 5, 65 S.E.2d 423 (1951); Myers v. Pearce, 102 Ga. App. 235, 115 S.E.2d 842 (1960); Bailey v. Wohl Shoe Co., 128 Ga. App. 372, 196 S.E.2d 677 (1973).

Rule applies to negligence which plaintiff should discover through due care. — The rule that in order for the plaintiff to recover the plaintiff must have exercised ordinary care to avoid the consequences to the plaintiff caused by the defendant's negligence is not limited to the negligence of the defendant which may have been actually discovered, but extends also to the negligence which might have been discovered by the exercise of ordinary care on the plaintiff's part. Georgia Power Co. v. Maxwell, 52 Ga. App. 430, 183 S.E. 654 (1936); Sumner v. Thomas, 72 Ga. App. 351, 33 S.E.2d 825 (1945); Lanier v. Turner, 73 Ga. App. 749, 38 S.E.2d 55 (1946).

Emergency situation created by defendant may lessen plaintiff's duty of care. — When one is confronted with a sudden emergency, without sufficient time to determine with certainty the best course to pursue, one is not held to the same accuracy of judgment as would be required of one if one had time for deliberation. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932).

Persons confronted by a dangerous situation, or by an emergency or other circumstances likely to impair judgment and ordinary discretion, are not held to the same quantum of care as they would otherwise. Chitwood v. Stoner, 60 Ga. App. 599, 4 S.E.2d 605 (1939).

A defendant whose negligence has created an emergency cannot always avoid liability therefor on the ground that the plaintiff could have avoided the consequences of such negligence by acting as an ordinarily prudent person would act under ordinary circumstances. Chitwood v. Stoner, 60 Ga. App. 599, 4 S.E.2d 605 (1939).

Although plaintiff will assume risk when danger obvious. — An emergency created by the negligence of the defendant may well be sufficient to reduce the quantum of care which an ordinary person would exercise under the circumstances, but when the peril is so obvious that even the circumstances it must be apprehended and the risk is then knowingly and voluntarily assumed, the assumption of risk doctrine rather than that of comparative negligence must control. Atlantic Coast Line R.R. v. Street, 116 Ga. App. 465, 157 S.E.2d 793 (1967).

Determining whether risk obvious. — In considering whether a risk is "obvious," the court must take into account not only the consequences of the act, but the fact as it appeared to the actor at the time. Lassiter v. Poss, 85 Ga. App. 785, 70 S.E.2d 411 (1952).

In the absence of anything to the contrary, every adult is presumed to possess such ordinary intelligence, judgment, and discretion as will enable one to appreciate an obvious danger. Union Carbide Corp. v. Holton, 136 Ga. App. 726, 222 S.E.2d 105 (1975).

General Consideration (Cont'd)
3. Avoidance Doctrine (Cont'd)

At some point, danger and likelihood of self-injury become so obvious that actual knowledge by the plaintiff is unnecessary. Union Carbide Corp. v. Holton, 136 Ga. App. 726, 222 S.E.2d 105 (1975).

Mere knowledge of danger without full appreciation of risk involved is not sufficient to preclude the plaintiff from recovery, even though there may be added to the knowledge of danger a comprehension of some risk. Scott v. Rich's, Inc., 47 Ga. App. 548, 171 S.E. 201 (1933).

Jury may consider emergency nature in assessing plaintiff's actions. — The fact that a person is confronted with an emergency does not relieve such person from the exercise of ordinary care to avoid personal injury; but the emergency created, if it be such as is likely to impair the judgment, may be considered by the jury in determining what is ordinary care under the circumstances. Chitwood v. Stoner, 60 Ga. App. 599, 4 S.E.2d 605 (1939).

Some negligence before duty arises will not necessarily preclude recovery. — The mere fact that the plaintiff might have been guilty of ordinary negligence before the duty arose to discover and avoid the defendant's negligence would not in and of itself preclude a recovery by the plaintiff. Willis v. Jones, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

The law is that ordinary negligence of the plaintiff will not bar recovery when it precedes any duty on the plaintiff's part to discover and avoid the negligence of the defendant. Underwood v. Atlanta & W. Point R.R., 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

May authorize jury to reduce damages based on fault attributable to injured. — Failure to exercise ordinary care on the part of the person injured before the negligence complained of is apparent or should have been reasonably apprehended will not preclude a recovery, but will authorize the jury to diminish the damages in proportion to the fault attributable to the person injured. Warren County v. Battle, 48 Ga. App. 240, 172 S.E. 673 (1934).

If negligence of parties is equal, the plaintiff cannot recover on the plaintiff's main petition nor could the defendant prevail on the cross-action. Maner v. Dykes, 55 Ga. App. 436, 190 S.E. 189 (1937).

Knowledge of a puddle of water surrounded by ice, coupled with knowledge of the generally prevailing weather conditions, is knowledge of a probable danger of encountering additional ice under the surface of the water and a danger of slipping when walking thereon. Bloch v. Herman's Sporting Goods, Inc., 208 Ga. App. 280, 430 S.E.2d 86 (1993).

4. Assumption of Risk and Last Clear Chance

Assumption of risk defense. — Georgia courts have treated the traditional torts principle of assumption of risk not as a separate defense barring recovery, but as an instance of the plaintiff's lack of ordinary care. To establish the defense of assumption or risk, it must appear that the plaintiff not only had knowledge of the condition or defect complained of, but also that the plaintiff knew or should have known of the danger involved in encountering the condition or continuing the course of action which resulted in the injury. Mitchell v. Young Ref. Corp., 517 F.2d 1036 (5th Cir. 1975); Brandvain v. Ridgeview Inst., Inc., 188 Ga. App. 106, 372 S.E.2d 265 (1988), aff'd, 259 Ga. 376, 382 F.2d 597 (1989).

Assumption of risk means that the plaintiff, in advance, has given the plaintiff's consent to relieve the defendant of an obligation of conduct toward the plaintiff, and to take the plaintiff's chances of injury from a known risk arising from what the defendant is to do or leave undone. Osburn v. Pilgrim, 246 Ga. 688, 273 S.E.2d 118 (1980).

Willful and wanton conduct. — Assumption of the risk is not a valid defense and is not a bar in claims arising from willful and wanton conduct. McEachern v. Muldovan, 234 Ga. App. 152, 505 S.E.2d 495 (1998).

Failure to tell doctor of allergic reaction to drugs was not an indication

that the patient fully appreciated all risk of injury that could flow from such lack of disclosure so as to warrant a charge on assumption of risk. Haynes v. Hoffman, 164 Ga. App. 236, 296 S.E.2d 216 (1982), overruled on other grounds, Smith v. Finch, 285 Ga. 709, 681 S.E.2d 147 (2009).

Assumption of risk that horse would become "spooked." — When the appellant testified that the procedure being used to catch a calf when the appellant's injury occurred was "an acceptable practice," that horse the appellant was riding was trained for purpose of moving cows, that the appellant had used the horse for that purpose for approximately ten years, and after the appellant further testified that the appellant knew the appellant's father was on foot in an attempt to assist the appellant in catching the calf, and that the appellant knew a horse may become "spooked" when seeing someone through the corner of its eye, the appellant assumed the risk that the appellant's horse would likely become "spooked" when approached suddenly by the appellee and was not entitled to recover for injuries sustained when thrown from the horse. Hollingsworth v. Hollingsworth, 165 Ga. App. 319, 301 S.E.2d 56 (1983).

Elements of last clear chance doctrine. — The plaintiff must show as a matter of law each of the elements of the doctrine of last clear chance in order to have it apply. The first essential element is that the plaintiff, by the plaintiff's own negligence, must have put oneself in a position of peril from which one could not extricate oneself (but the defendant presumably could extricate the plaintiff). The second essential element is that the defendant must have knowledge and appreciation of the injured person's peril in time to avoid the injury. Shuman v. Mashburn, 137 Ga. App. 231, 223 S.E.2d 268 (1976).

The last clear chance doctrine can be invoked only when the defendant knows of the plaintiff's perilous situation, and realizes, or has reason to realize, the plaintiff's helpless condition. This doctrine contains two elements: the plaintiff must have put oneself in a position of peril from which the plaintiff could not extricate oneself, and the defendant must have knowledge and appreciation of the injured party's peril in time to avoid the injury. Smith v. Mobley, 185 Ga. App. 462, 364 S.E.2d 597 (1987), cert. denied, 185 Ga. App. 910, 364 S.E.2d 597 (1988).

Defendant liable if defendant had last clear chance to avoid injury. — If both the plaintiff and defendant are negligent, the latter can be found solely liable for all the damage if the defendant had a last clear chance to avoid the injury and did not exercise ordinary care. Southern Ry. v. Brunswick Pulp & Paper Co., 376 F. Supp. 96 (S.D. Ga. 1974).

Scope and function of doctrine of last clear chance is limited; it has no function to perform unless the injured person was personally chargeable with negligence which, apart from the doctrine, would preclude recovery. In guest cases wherein the negligence of the host is not imputable under the theory of joint adventure or some other theory of law, and when the guest plaintiff personally is guilty of no negligence, the mere fact that the host was grossly negligent cannot operate to invoke the last clear chance doctrine, the injured person personally not being chargeable with contributing to the plaintiff's injuries. Georgia Power Co. v. Blum, 80 Ga. App. 618, 57 S.E.2d 18 (1949).

The doctrine of last clear chance is applicable only when the defendant's failure to avoid the consequences was the last negligent act, and hence the proximate cause of the injury, or conversely, that the doctrine is not applicable if the plaintiff's own act was the final negligence before the accident. Shuman v. Mashburn, 137 Ga. App. 231, 223 S.E.2d 268 (1976).

Last clear chance doctrine cannot be applied when the plaintiff is guilty of no negligence. Atlantic Coast Line R.R. v. Coxwell, 93 Ga. App. 159, 91 S.E.2d 135 (1955).

Doctrine inapplicable when plaintiff unaware of defendant's negligence. — The doctrine of last clear chance is inapplicable when the alleged negligence of the defendant was its failure to control the misuse of its amusement ride, and this negligence was not known to the plaintiff, who was injured in a fall from the ride. Fraley ex rel. Fraley v. Lake Winnepesaukah, Inc., 631 F. Supp. 160 (N.D. Ga. 1986).

General Consideration (Cont'd)
4. Assumption of Risk and Last Clear Chance (Cont'd)

Doctrine inapplicable to patient who could not leave hospital. — When a patient was being held by a hospital pursuant to a certificate signed by a physician and could not leave the hospital, the hospital and physician could not legally be relieved of their duty to the patient, and therefore assumption of the risk was not applicable. Brandvain v. Ridgeview Inst., Inc., 188 Ga. App. 106, 372 S.E.2d 265 (1988), aff'd, 259 Ga. 376, 382 S.E.2d 597 (1989).

Gasoline tanker driver did not voluntarily assume risk. — Summary judgment was improperly granted to the corporation that owned the gas station and the gas station manager because the tanker driver, the corporation, and the manager all knew that the placement of the tanks at the gas station presented a potential hazard because, while sticking the tanks, it put tanker drivers into the flow of traffic pulling in and out of the parking area where the tanks were located; the tanker driver had voiced displeasure that the corporation's policy of sticking the tanks subjected the tanker driver to risk; and the tanker driver did not voluntarily assume the risk of the traffic flow as the tanker driver was presented with the untenable choice of risking the traffic flow or risk losing the tanker driver's job. Travis v. Quiktrip Corporation, 339 Ga. App. 551, 794 S.E.2d 195 (2016).

5. Pleading and Practice

Plaintiff not obliged to plead due care or lack of contributory negligence. — When a petition alleges negligence against the defendant as the proximate cause of an alleged injury, the petition need not negate contributory negligence on the part of the plaintiff. Southern Stages, Inc. v. Clements, 71 Ga. App. 169, 30 S.E.2d 429 (1944).

In a suit for a personal injury brought by a person other than an employee of a railroad company, it has not been held necessary in this state for the plaintiff to allege negatively that the plaintiff did not personally cause the injury by the plaintiff's own negligence, or why the plaintiff could not by the use of ordinary care have avoided the alleged injury. Smith v. Swann, 73 Ga. App. 144, 35 S.E.2d 787 (1945).

Plaintiff is not obliged to allege facts showing that the plaintiff exercised due care for the plaintiff's own safety, or that the injury was not the result of the plaintiff's own negligence. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946); McDowall Transp., Inc. v. Gault, 80 Ga. App. 445, 56 S.E.2d 161 (1949).

If plaintiff pleads lack of contributory negligence, denial of such allegations will raise issue of such negligence. Blanton v. Doughty, 107 Ga. App. 91, 129 S.E.2d 376 (1962).

No cause of action stated when petitions showed plaintiff's failure to avoid injury. — When the petitions affirmatively showed that by the exercise of ordinary care the plaintiffs' deceased child could have avoided the consequences of the alleged negligence of the defendant after it became apparent to the child, or in the exercise of ordinary care should have become apparent to the child, the petitions failed to state causes of action. Atlanta Gas Light Co. v. Brown, 94 Ga. App. 351, 94 S.E.2d 612 (1956).

When the petition affirmatively revealed that the deceased failed to exercise ordinary care to avoid the consequence of the defendant's negligence after the same could have been discovered by the exercise of ordinary care upon the deceased's part, it set forth no cause of action. Brown v. Atlanta Gas Light Co., 96 Ga. App. 771, 101 S.E.2d 603 (1957).

Unless allegations of petition affirmatively show that the plaintiff did not exercise ordinary care, then the petition is good against a general demurrer (now motion to dismiss). Bray v. Barrett, 84 Ga. App. 114, 65 S.E.2d 612 (1951).

Defendant may raise contributory negligence in responsive pleadings. — Under the defendant's general denial of all allegations in the plaintiff's petition, it was permissible for the defendant to allege the complete defense that if the plaintiff did not exercise ordinary care to avoid

the consequences to the plaintiff caused by the defendant's negligence, the plaintiff would not recover; and, thus, if there was any evidence in the case to support this defense, it was an issue raised both by the pleadings and the evidence. Donahoo v. Goldin, 61 Ga. App. 841, 7 S.E.2d 820 (1940).

Consideration of evidence in conjunction with motion to dismiss. — General allegations that a person could not have avoided the consequences of another's negligence by the exercise of ordinary care after it was or should have been discovered must yield, on demurrer (now motion to dismiss), to the particular facts shown when inferences from the facts are necessarily to be drawn contradictory of the conclusions. Sheppard v. Georgia Power Co., 66 Ga. App. 620, 18 S.E.2d 686 (1942).

Respective burdens of proof. — A plea of contributory negligence wherein the defendant admits negligence on the defendant's part, but contends that the negligence of the defendant was not greater than that of the plaintiffs, usually, under the law prevailing in this state, shifts the burden from the plaintiffs to the defendant to prove such affirmative defenses; but the absence of such a plea does not eliminate the burden which rests upon the plaintiffs to prove by a preponderance of the testimony that the negligence of the defendant was the sole proximate cause of the homicide, without any mixture of negligence on the part of the deceased or that even if the deceased was negligent, the plaintiffs' negligence was less than that of the defendant. Huell v. Southeastern Stages, Inc., 78 Ga. App. 311, 50 S.E.2d 745 (1948).

Burden of proof in comparative negligence defense. — While comparative negligence is available as an affirmative defense, the burden of proving it remains with the party relying upon it and not upon the party making the original negligence claim to disprove it. Glenridge Unit Owners Ass'n v. Felton, 183 Ga. App. 858, 360 S.E.2d 418 (1987).

6. Jury Instructions

Charge of section. — It is proper to give in charge the principle contained in this section, on request, although the plaintiff in the plaintiff's pleadings sought to recover full damages for the injuries alleged to have been sustained. Hill v. Callahan, 82 Ga. 109, 8 S.E. 730 (1889); Hilton & Dodge Lumber Co. v. Ingram, 135 Ga. 696, 70 S.E. 234 (1911).

It is error for trial court to instruct jury on comparative negligence when there is no evidence of such negligence on the part of the plaintiff, even though the issue of negligence may have been raised in the defendant's pleadings. Gardner v. Morrison, 427 F.2d 654 (5th Cir. 1970).

Jury instruction when no evidence of plaintiff's negligence. — It was error to charge the jury that there could be no recovery if the plaintiffs were as negligent as the defendants when there was no evidence authorizing a finding that the plaintiffs' deceased guest was in any way negligent. Granger v. National Convoy & Trucking Co., 62 Ga. 294, 7 S.E.2d 915 (1940).

When there is no evidence to show that one party could in fact have discovered and avoided the negligence of the other, an instruction on this section is inappropriate and should not be given. Elsberry v. Lewis, 140 Ga. App. 324, 231 S.E.2d 789 (1976); Moore v. Price, 158 Ga. App. 566, 281 S.E.2d 269 (1981).

Not error to fail to charge on comparative negligence when no evidence of such. — The trial court does not err in failing to charge the principle of law contained in this section since there is no evidence from which it could be inferred that the negligence of the defendants was apparent to the plaintiff, or should have been reasonably apprehended by the plaintiff, until it was too late to avoid such negligence. Lawrence v. Hayes, 92 Ga. App. 778, 90 S.E.2d 102 (1955).

It is not error to fail to charge the jury on comparative negligence or plaintiff's failure to avoid the consequences of the defendant's negligence when these issues are not supported by any evidence. Lee v. Pierce, 144 Ga. App. 755, 242 S.E.2d 294 (1978).

Comparative negligence not pled as defense. — When the doctrine of comparative negligence is not raised by the peti-

General Consideration (Cont'd)
6. Jury Instructions (Cont'd)

tion, it is not error, in the absence of a timely written request, for the court to fail to instruct the jury on the doctrine of comparative negligence. Georgia Power Co. v. Holmes, 175 Ga. 487, 165 S.E. 284 (1932).

When the plaintiff in the petition seeks to recover the full amount of damage from alleged negligence by the defendant and the defendant does not plead the defense of comparative negligence, it is not error, in the absence of timely written request, for the court to fail to instruct the jury on the doctrine of comparative negligence, even though such a charge might be proper under the evidence. McCrackin v. McKinney, 52 Ga. App. 519, 183 S.E. 831 (1936).

When the issue of comparative negligence is not raised by the pleadings, and when further there is no written request for the instruction, failure to charge the rule of comparative negligence is not ground for a new trial even though it might have been authorized under the evidence. City of Commerce v. Bradford, 94 Ga. App. 284, 94 S.E.2d 160 (1956).

When the issue of avoidance or of comparative negligence is not raised by the defendant's answer or plea there is no error in failing to charge on these items, absent a timely written request. Davis v. Hammock, 123 Ga. App. 33, 179 S.E.2d 283 (1970).

Charge not requested. — Failure to charge when not requested is not ground for a new trial. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S.E. 110 (1906).

Not error to fail to charge precise language when principle made clear. — It was not error for the court, in giving in charge this rule as contained in the section, to fail to give in charge in connection therewith the language immediately following, contained in the same section, that "in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained," when the court elsewhere in the charge instructed the jury that if the negligence of the defendants exceeded the negligence of the plaintiff, the plaintiff could recover, but that the damages recoverable must be diminished in proportion to the amount of negligence attributable to the plaintiff. Gossett v. Kraft Phenix Cheese Corp., 58 Ga. App. 265, 198 S.E. 298 (1938).

Not error to omit specific charge on avoidance when principles given elsewhere in charge. — It was not error for the court, in charging the law of comparative negligence, to fail in connection therewith to charge the jury that if the plaintiff failed to exercise ordinary care and this was the cause of the injury, or if the plaintiff by the exercise of ordinary care could have avoided the consequences of the defendant's negligence, there could be no recovery, since the court elsewhere gives these principles of law in charge. Southern Grocery Stores, Inc. v. Cain, 50 Ga. App. 629, 179 S.E. 128 (1935).

Judge must charge comparative negligence principles when pleadings and facts raise issue. — When the pleadings and the evidence make an issue as to the plaintiff's diligence and the defendant's negligence, it is error for the court to omit an instruction to the jury embodying the principle expressed in the code section, even in the absence of any request to do so. Georgia Ry. & Power Co. v. McElroy, 36 Ga. App. 143, 136 S.E. 85 (1926).

When the pleadings and the evidence raise the issue of whether the plaintiff by the exercise of ordinary care could have avoided the consequences of the defendant's negligence, it is the duty of the trial judge to give this principle in a charge to the jury without request and, when there is a general denial by the defendant of a paragraph of the plaintiff's petition alleging that the plaintiff was in the exercise of ordinary care or when such defense is expressly pled, and the evidence of the plaintiff or the defendant or both together reasonably raised such issue, it is error requiring the grant of a new trial for the trial judge to fail to give this principle in a charge to the jury. Black & White Cab Co. v. Smith, 48 Ga. App. 566, 173 S.E. 206 (1934).

When the law of contributory negligence was injected into the case by both the pleadings and the evidence, it was

error for the court to fail, even without request, to charge the principle of law embodied in this section. Pollard v. Watkins, 51 Ga. App. 762, 181 S.E. 798 (1935).

It is quite proper when the facts authorize it for a court to instruct the jury that the plaintiff cannot recover if the plaintiff's negligence is equal to or greater than the defendant's negligence. Yellow Cab Co. v. Adams, 71 Ga. App. 404, 31 S.E.2d 195 (1944).

When evidence would have authorized a finding that the plaintiff could have avoided the alleged negligence of the railroad company by the exercise of ordinary care, it was error for the court to refuse to give a charge on request that if the plaintiff, by the exercise of ordinary care, could have avoided the consequence to the plaintiff caused by the defendant's negligence, the plaintiff would not be entitled to recover. Atlantic Coast Line R.R. v. Green, 84 Ga. App. 674, 67 S.E.2d 184 (1951).

It is error, even in the absence of request, to omit to charge on the law of comparative negligence only if both the pleadings and proof in the case present an issue was to whether the plaintiff's recovery should be reduced according to the rule embodied in this section. City of Commerce v. Bradford, 94 Ga. App. 284, 94 S.E.2d 160 (1956).

When there is evidence from which the jury could infer that the negligence of the defendant in turning left across an intersection in front of the plaintiff was apparent to the plaintiff, or should have been reasonably apprehended by the plaintiff in approaching the intersection, the court should give a written request that even though the defendant may be negligent as charged, the plaintiff cannot recover as a matter of law if the plaintiff could have avoided the consequences thereof by the exercise of ordinary care and diligence. Currey v. Claxton, 123 Ga. App. 681, 182 S.E.2d 136 (1971).

When the pleadings and the evidence make an issue as to the plaintiff's diligence and the defendant's negligence, it was error for the court to omit an instruction to the jury embodying the principle expressed in this section, even in the absence of any request to do so. Lee v. Pierce, 144 Ga. App. 755, 242 S.E.2d 294 (1978).

It is reversible error to refuse a request on the doctrine of avoidance when the issue is raised by the evidence and there is a timely request for the charge. Kroger Co. v. Roadrunner Transp., Inc., 634 F.2d 228 (5th Cir. 1981).

It is quite proper when the facts authorize it for a court to instruct the jury that the plaintiff cannot recover if the plaintiff, by the exercise of ordinary care, could have avoided the consequence caused by the defendant's negligence. Brown v. Williams, 191 Ga. App. 147, 381 S.E.2d 308 (1989).

In a medical malpractice action, when part of the defense was that the injuries for which the plaintiff sought recovery were attributable to the plaintiff's negligence in failing to submit to recommended treatment, a charge on the contributory-negligence rule was appropriate and, as there was evidence that the injuries were also the product of the defendant's negligence, a charge on comparative-negligence and its "equal to or greater than" bar was also warranted. Whelan v. Moone, 242 Ga. App. 795, 531 S.E.2d 727 (2000).

Rule as to contributory negligence and diminution of damages confused. — An instruction to the jury, in which the rule expressed in the section, which precludes a recovery when the plaintiff has failed to exercise ordinary care, is confused with the rule as to comparative negligence and diminution or apportionment of damages, is erroneous. Brown v. Meikleham, 34 Ga. App. 207, 128 S.E. 918 (1925).

It is error to charge "avoidance of consequences" rule in immediate connection with "apportionment of damages" rule in such manner as to qualify the former by the latter, and without making the proper explanation as to the class of cases to which this latter charge is applicable. Underwood v. Atlanta & W. Point R.R., 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

Cases to which the apportionment rule is applicable are cases when, by ordinary care, the plaintiff could not have avoided

General Consideration (Cont'd)
6. Jury Instructions (Cont'd)

the consequences of the defendant's negligence. In order to avoid confusion in the application of these complex rules, the court should charge them to the jury separately. Underwood v. Atlanta & W. Point R.R., 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

When evidence authorized jury to find both parties negligent, it was not error for court to charge principle of apportionment of damages, notwithstanding that the defensive pleadings failed to allege the principle of what is generally known in this state as contributory negligence. Huell v. Southeastern Stages, Inc., 78 Ga. App. 311, 50 S.E.2d 745 (1948).

Failure to charge section not error as to plaintiff. — While a failure to charge the defense stated in this section may constitute reversible error, a failure so to charge could not be accounted as harmful error as against the plaintiff against whom such defense in favor of the defendant is directed. Donaldson v. Central of Ga. Ry., 43 Ga. App. 480, 159 S.E. 738 (1931).

Evidence clearly shows plaintiff not guilty of negligence. — When the evidence clearly showed that the plaintiff was not guilty of negligence, and since the court elsewhere in the charge had set out in contentions of the parties, the charge on the exercise of ordinary care by the plaintiff had the effect of stressing the contention of the defendant that the injuries were sustained because of the negligence of the plaintiff, and was grounds for a new trial. Groover v. Cudahy Packing Co., 61 Ga. App. 707, 7 S.E.2d 287 (1940).

Slight evidence of comparative negligence authorizes jury charge. — The amount of evidence which makes a comparative negligence charge appropriate, and thus renders it error to refuse a timely request, need not be great; it is sufficient if there is slight evidence from which inferences of negligence can be drawn by the jury. Davis v. Hammock, 123 Ga. App. 33, 179 S.E.2d 283 (1970).

Error to charge plaintiff's recovery barred if care not exercised before duty to discover defendant's negligence arose. — The court erred in charging the jury that under the comparative negligence rule and doctrine the plaintiff would be barred from recovery if the plaintiff was guilty of a failure to exercise ordinary care before the plaintiff's duty to discover and avoid the negligence of the defendant arose. Willis v. Jones, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

Charge on avoidance doctrine may omit reference doctrine to when plaintiff's duty arose. — A charge on the avoidance doctrine in the language of this section is a complete and correct principle of law, though it does not specifically instruct the jury that the plaintiff's duty to use ordinary care to avoid the consequence of the defendant's negligence does not arise until that negligence is apparent or the circumstances are such that a reasonably prudent person would apprehend the defendant's negligence. Mitchell v. Gay, 111 Ga. App. 867, 143 S.E.2d 568 (1965).

It is not incumbent on court, absent timely written request, to charge that burden of proving contributory negligence rested upon the defendant since contributory negligence by the plaintiff may appear as well from evidence of the plaintiff as that of the defendant, and since it is only when the defendant's negligence has been made to appear by proof that the burden shifts to the defendant to show the plaintiff's negligence, if it relies upon this defense. Whitman v. Burden, 155 Ga. App. 67, 270 S.E.2d 235 (1980).

Not harmful error to fail to charge on burden of proof. — Trial court did not commit harmful error under O.C.G.A. § 5-5-24(c) in failing to charge the jury that an engineering firm had the burden of proof as to its affirmative defenses of contributory and comparative negligence; any error did not result in a gross injustice, such as to raise a question as to whether a developer was deprived of a fair trial. Prime Retail Dev., Inc. v. Marbury Eng'g Co., 270 Ga. App. 548, 608 S.E.2d 534 (2004).

Better practice is to give distinctness to this section by direct charge on it. Chitwood v. Stoner, 60 Ga. App. 599, 4 S.E.2d 605 (1939).

A charge embodying, substantially, the language of the section was not erroneous as impressing the jury that the plaintiff was under a duty to avoid the consequences of the defendant's negligence, though such negligence was not known or apparent to the plaintiff, or was reasonably to be apprehended by the plaintiff, and that if the plaintiff did not avoid it the plaintiff could not recover. Howard v. Georgia Ry. & Power Co., 35 Ga. App. 273, 133 S.E. 57 (1926); Central of Ga. Ry. v. Barnett, 35 Ga. App. 528, 134 S.E. 126 (1926).

To charge express language of this section is not expression that defendant was negligent. Olliff v. Howard, 33 Ga. App. 778, 127 S.E. 821 (1925).

It is not error to charge jury that want of ordinary care by the plaintiff would bar recovery. Hexter v. Burgess, 52 Ga. App. 819, 184 S.E. 769 (1936).

Charge that the plaintiff could recover when the plaintiff's negligence exceeded the defendant's erroneous. — Charge that the plaintiff could recover if both the plaintiff and the defendant were negligent, although the plaintiff's negligence exceeded that of the defendant, was erroneous. Georgia Power Co. v. Maxwell, 52 Ga. App. 430, 183 S.E. 654 (1936).

Charge that the plaintiff must be free from negligence improper. — It is improper to instruct the jury that the plaintiff must have been free from negligence before it can recover. Lime-Cola Bottling Co. v. Atlanta & W. Point R.R., 34 Ga. App. 103, 128 S.E. 226 (1925).

Failure to instruct on comparative negligence without request not reversible error. — Trial court's failure to instruct the jury without request on the doctrine of comparative negligence did not constitute a gross miscarriage of justice requiring a new trial. King v. Communications, Inc., 166 Ga. App. 35, 303 S.E.2d 143 (1983).

"Erroneous" charge harmless when movant awarded damages. — When the plaintiff enumerates as error the giving of a jury charge on the avoidance doctrine, but the jury had returned a verdict which awarded damages to the plaintiff, it is clear that it did not apply this doctrine, and even if erroneous, the giving of the charge was harmless. Wood v. Food Giant, Inc., 183 Ga. App. 604, 359 S.E.2d 410, cert. denied, 183 Ga. App. 907, 359 S.E.2d 410 (1987).

Jury charge proper. — In a slip and fall case, the trial court did not err in providing the pattern instructions on avoidance of consequences, superior knowledge, equal negligence, and comparative negligence. Walker v. Bruno's, Inc., 228 Ga. App. 589, 492 S.E.2d 336 (1997).

7. Jury Questions

Contributory comparative negligence presents jury question. — Questions as to diligence and negligence, including contributory negligence, and what negligence constitutes the proximate cause of the injury complained of, are questions peculiarly for the jury, except when the solution of the question appears to be palpably clear, plain, and indisputable. Southern Cotton-Oil Co. v. Gladman, 1 Ga. App. 259, 58 S.E. 249 (1907); Columbus Power Co. v. Puckett, 24 Ga. App. 390, 100 S.E. 800 (1919); Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932); Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1953); Eubanks v. Mullis, 51 Ga. App. 728, 181 S.E. 604 (1935); Minnick v. Jackson, 64 Ga. App. 554, 13 S.E.2d 891 (1941); Lanier v. Turner, 73 Ga. App. 749, 38 S.E.2d 55 (1946); Atlantic Coast Line R.R. v. Coxwell, 93 Ga. App. 159, 91 S.E.2d 135 (1955); Blanton v. Doughty, 107 Ga. App. 91, 129 S.E.2d 376 (1962); United Car & Truck Leasing, Inc. v. Roberts, 150 Ga. App. 369, 257 S.E.2d 905 (1979); Myers v. Boleman, 151 Ga. App. 506, 260 S.E.2d 359 (1979).

Failure to read warning was jury question. — Jury question was raised as to whether an injured party would have seen, and could have read, a warning of the dangers in improperly filling a container with gasoline if the party had exercised ordinary care for the party's own safety; the injured party was not contributorily negligent as a matter of law as the party did not drench oneself with gasoline and as it was not shown that the party filled containers with gasoline routinely, had been to the gasoline station before, or was aware of the dangers in-

General Consideration (Cont'd)
7. Jury Questions (Cont'd)

volved in filling such containers without putting the container on the ground. Camden Oil Co. v. Jackson, 270 Ga. App. 837, 609 S.E.2d 356 (2004).

Court may decline negligence issues if evidence clear. — Questions of diligence or negligence are peculiarly matters for the jury, and a court ought not to take the place of the jury in solving them. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932).

When, in an action for personal injury, the case turns upon the question whether the party injured could, by the exercise of ordinary care, have avoided the injury, and the evidence does not show such conduct on the party's part as to amount to negligence per se, the question as to the exercise of ordinary care is for the jury. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932); Eubanks v. Mullis, 51 Ga. App. 728, 181 S.E. 604 (1935).

Even when from the plaintiff's testimony it is a doubtful question whether the plaintiff could or could not have avoided the injury to the plaiintiff by ordinary care, the case should be submitted to a jury, and the granting of a nonsuit is improper. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932).

It is still in most cases a question of fact whether, taking into account all the circumstances, including the knowledge and appreciation as well as every other material condition, the plaintiff is guilty of such negligence as to preclude recovery. Scott v. Rich's, Inc., 47 Ga. App. 548, 171 S.E. 201 (1933).

The question as to whether or not a plaintiff under a given set of circumstances could or could not have avoided the consequences of a defendant's negligence is ordinarily a question for the jury. Such a question will not be solved on demurrer (now motion to dismiss), except in plain and indisputable cases. Lewis v. Powell, 51 Ga. App. 129, 179 S.E. 865 (1935).

If there is any evidence that the plaintiff has not exercised due care under the circumstances, and the pleadings authorize it, the issue should be submitted to the jury. Dixon v. Merry Bros. Brick & Tile Co., 56 Ga. App. 626, 193 S.E. 599 (1937).

The question of whose negligence and what negligence is the proximate cause of an injury, and the degree of negligence as between the parties, is generally a jury question, under the whole evidence, to be determined by the jury under proper instructions from the court. Southern Stages, Inc. v. Clements, 71 Ga. App. 169, 30 S.E.2d 429 (1944).

When the petition did not show facts which demanded the finding that the plaintiff's conduct was such as to make it impossible for the defendant to avoid injuring the plaintiff by the exercise of ordinary care, the questions involved should be submitted to a jury. Ivey v. Symms, 87 Ga. App. 211, 73 S.E.2d 333 (1952).

Questions as to diligence and negligence, including concurrent negligence, are for the jury when the minds of reasonable men might disagree as to whether or not the negligence charged is a concurring proximate cause of the injury. Atlantic Coast Line R.R. v. Coxwell, 93 Ga. App. 159, 91 S.E.2d 135 (1955).

Whether the plaintiff failed to show care for the plaintiff's own safety is ordinarily a jury question. Powell v. Barker, 96 Ga. App. 592, 101 S.E.2d 113 (1957).

The question of comparative negligence on the part of the parties is exclusively a jury question and not a question that may be determined by the court as a matter of law. Southern Ry. v. Haynes, 293 F.2d 291 (5th Cir. 1961).

Jury must decide whether by the exercise of ordinary care the plaintiff could have avoided the consequences of defendant's negligence. Underwood v. Atlanta & W. Point R.R., 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

Whether the plaintiff has used ordinary care is a jury question except in clear and palpable cases, to be decided from their observation, their common sense, and their common knowledge and experience. Henry Grady Hotel Corp. v. Watts, 119 Ga. App. 251, 167 S.E.2d 205 (1969), overruled on other grounds, Vinson v. Howe Bldrs. Ass'n of Atlanta, 233 Ga. 948, 213 S.E.2d 890 (1975).

As a general proposition, issues of negligence, contributory negligence, and lack of ordinary care for one's own safety are not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner. Manheim Servs. Corp. v. Connell, 153 Ga. App. 533, 265 S.E.2d 862 (1980).

Whether a plaintiff failed to exercise ordinary care to avoid the negligence of the defendant as required by this section is usually a jury question. Johnson v. UPS, 616 F.2d 161 (5th Cir. 1980).

The court of appeals erred in holding that only the factfinder could determine the plaintiff's negligence, when the undisputed evidence showed that the injured plaintiff knew the walkway to the plaintiff's basement was slippery due to sewage overflow, but attempted to traverse the walkway in spite of the plaintiff's knowledge of such condition (reversing Girone v. City of Winder, 215 Ga. App. 822, 452 S.E.2d 794 (1994)). City of Winder v. Girone, 265 Ga. 723, 462 S.E.2d 704 (1995).

While the issue of the plaintiff's exercise of due diligence for the plaintiff's own safety ordinarily is reserved for the jury, it may be summarily adjudicated when the plaintiff's knowledge of the risk is clear and palpable. Lowery's Tavern, Inc. v. Dudukovich, 234 Ga. App. 687, 507 S.E.2d 851 (1998).

Questions of negligence, proximate cause, foreseeability, and intervening causation are all questions of fact under Georgia law. Morgan v. Westinghouse Elec. Corp., 579 F. Supp. 867 (N.D. Ga. 1984), aff'd, 752 F.2d 648 (11th Cir. 1985).

Sole proximate cause was jury question. — Jury question was raised as to whether an injured party's failure to exercise care for the party's safety in improperly filling a container with gasoline was the sole proximate cause of the injuries to defeat a negligence per se claim based on an oil company's violations of the Georgia Fire Safety Commission; the injured party did not so plainly and palpably fail to exercise ordinary care for the party's own safety as to require summary judgment for the oil company. Camden Oil Co. v. Jackson, 270 Ga. App. 837, 609 S.E.2d 356 (2004).

Whether plaintiff failed to avoid consequences not issue in law. — Ordinarily the facts upon which the plaintiff is barred from recovery — that the plaintiff failed to avoid the consequences of the defendant's negligence which the plaintiff reasonably could have apprehended, or that the plaintiff voluntarily encountered a known danger — cannot be decided by the court as issues of law. Chotas v. J.P. Allen & Co., 113 Ga. App. 731, 149 S.E.2d 527 (1966).

Court may decide negligence issues if evidence clear. — Ordinarily, the question of negligence is one for the jury, but when the allegations of the petition clearly disclose that the plaintiff by the exercise of ordinary care could have avoided the consequences of the defendant's negligence, the petition is subject to general demurrer (now motion to dismiss). Sheppard v. Georgia Power Co., 66 Ga. App. 620, 18 S.E.2d 686 (1942).

The petition will not be dismissed on demurrer (now motion to dismiss) unless in construing the petition most strongly against the plaintiff it should appear that the plaintiff could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. Southern Stages, Inc. v. Clements, 71 Ga. App. 169, 30 S.E.2d 429 (1944).

Although generally questions of ordinary care are for the jury to determine, when the defective conditions are obvious under ordinary circumstances, if ordinary care is employed in using the senses and when such conditions are so obviously dangerous that no one of ordinary prudence while in the exercise of ordinary care would use the floor, the courts will resolve the issue against a plaintiff on demurrer (now motion to dismiss). Macon Academy Music Co. v. Carter, 78 Ga. App. 37, 50 S.E.2d 626 (1948).

While questions of negligence, comparative negligence, and proximate cause are ordinarily questions for a jury, if a petition shows on the petition's face that the plaintiff's own negligence proximately caused the plaintiff's injuries, the case will be resolved in favor of the defendant on demurrer (now motion to dismiss). Anderson v. Southern Ry., 88 Ga. App. 195, 76 S.E.2d 528 (1953).

General Consideration (Cont'd)
7. Jury Questions (Cont'd)

A trial court can conclude as a matter of law that the facts do or do not show negligence on the part of the defendant or the plaintiff only when the evidence is plain, palpable, and indisputable. Manheim Servs. Corp. v. Connell, 153 Ga. App. 533, 265 S.E.2d 862 (1980).

Contributory negligence charge not required. — As there was no evidence that the injured dock worker was negligent for misinterpreting the employer's crane operator's signals, a charge on contributory negligence was not required. Georgia Ports Auth. v. Hutchinson, 209 Ga. App. 726, 434 S.E.2d 791 (1993).

Review of written environmental report amounted to negligence is jury question. — Trial court properly instructed a jury on contributory and comparative negligence as to whether a developer's closing on a property without examining a written environmental report amounted to negligence as that issue was a jury question. Prime Retail Dev., Inc. v. Marbury Eng'g Co., 270 Ga. App. 548, 608 S.E.2d 534 (2004).

Applicability to Specific Cases

1. Motor Vehicles

Plaintiff's recovery barred when the plaintiff's negligence proximately caused injury. — One operating an automobile in a city street where the presence of obstructions is reasonably to be expected cannot properly assume that there is no obstruction ahead, and one is guilty of a lack of ordinary care if one proceeds along the street without looking for obstructions ahead, or if one drives the machine at such a rate of speed that it cannot be stopped within the distance that objects ahead of it can be seen, and cannot recover for injuries that would not have been sustained but for one's failure to exercise ordinary care to discover and avoid an obstruction ahead in the path of one's automobile. Western Union Tel. Co. v. Stephenson, 36 F.2d 47 (5th Cir. 1929).

When the plaintiff was traveling at 25 miles an hour over unfamiliar streets at night during a rainstorm and unable to see more than 8 feet in front of the car, he could not recover from city for injuries suffered when he collided with a center support of a railroad underpass, said injuries being the result of his own negligence. Burd v. City of Atlanta, 52 Ga. App. 681, 184 S.E. 412 (1936).

Plaintiff, in passing stopped automobile at a speed of 35 to 40 miles an hour, without taking the plaintiff's vision from such automobile to ascertain or attempt to ascertain that the way ahead was clear and safe for passing, was not in the exercise of ordinary care and such negligence proximately caused the plaintiff's injuries; the fact that the plaintiff was unfamiliar with the road and did not know for what reason the automobile had stopped did not relieve the plaintiff of the duty of using ordinary care in ascertaining or attempting to ascertain whether it was safe to pass it. Anderson v. Southern Ry., 88 Ga. App. 195, 76 S.E.2d 528 (1953).

If the defendant driver's directing the plaintiff to go behind an automobile and push the automobile out of the highway, and the line of on-coming heavy traffic was so obviously dangerous as to constitute the defendant's action in doing so gross and wanton negligence, then the danger must necessarily have been equally obvious to the plaintiff; and as the defendant host driver had no power of compulsion over the plaintiff guest, the assumption of the risk by the plaintiff must be assumed, and consequently the trial court did not err in sustaining the demurrer (now motion to dismiss) to the petition and in dismissing the case. Beasley v. Elder, 88 Ga. App. 419, 76 S.E.2d 849 (1953).

Plaintiffs' child was the author of the child's own misfortune in ploughing headlong at an unabated speed into a clearly visible obstruction in the street, when in the exercise of ordinary prudence the child could have avoided the obstruction by stopping the vehicle or by turning aside to avoid striking the obstruction. Atlanta Gas Light Co. v. Brown, 94 Ga. App. 351, 94 S.E.2d 612 (1956), later appeal, 96 Ga. App. 771, 101 S.E.2d 603 (1957).

Plaintiff's negligence not bar if all reasonable care taken. — When the plaintiff does everything which the plain-

tiff can reasonably have been expected to do under the circumstances to prevent injuries, and since had the plaintiff left the plaintiff's car at night on a public highway the plaintiff would have submitted oneself and the plaintiff's children to greater danger than would have been prevalent had the plaintiff remained in the car, the plaintiff is not barred from recovery by the plaintiff's own negligence. Bell v. Proctor, 92 Ga. App. 759, 90 S.E.2d 84 (1955), rev'd on other grounds, 212 Ga. 325, 92 S.E.2d 514 (1956).

Danger must be absolutely clear to render plaintiff's act negligent in law. — In order for a court to rule as a matter of law that the plaintiff's alleged contributory negligence is the proximate cause of a collision, the observed approaching danger must be so near or rapid in approach as to render the act of the plaintiff a manifestly foolhardy act, such as would not be undertaken by an ordinarily prudent person. Brooks v. Douglas, 154 Ga. App. 54, 267 S.E.2d 495 (1980).

Riding in cargo area of truck not negligence in law. — It cannot be said that everyone who rides in the cargo area of a pickup truck is guilty of such lack of ordinary care for one's own safety that one would be barred from recovery as a matter of law. Day v. Phillips, 107 Ga. App. 824, 131 S.E.2d 778 (1963).

Using highway with known defects may constitute negligence as matter of law. — When a defect or dangerous excavation exists in a highway and is known to one who elects to use such highway, such election, even if justified by the dictates of ordinary prudence, must as a matter of law entail the consequences of a want of ordinary care and prudence. Lacy v. City of Atlanta, 110 Ga. App. 814, 140 S.E.2d 144 (1964).

Highway danger must be obvious. — A traveler on the public highway, exercising due care, although the traveler knows there is some danger in driving over a defective bridge, may recover for injuries thus sustained, unless the danger is obviously of such a character that driving over the bridge, in and of itself, amounts to a want of ordinary care. Warren County v. Battle, 48 Ga. App. 240, 172 S.E. 673 (1934).

Question of contributory negligence in use of public highway with knowledge of dangerous condition therein or at side thereof is particularly one for determination of jury under appropriate instructions as to the applicable law by the trial judge. The mere fact that the pile of sand, or other material placed in or upon the edge of the highway in question by the defendant contractor, could have been seen by the plaintiff would not, as a matter of law, bar the plaintiff from recovering from the defendant. Williams v. Evans, 50 Ga. App. 496, 178 S.E. 460 (1935).

Error to charge jury on contributory negligence when no evidence of such. — When the plaintiff was injured in a collision between the automobile operated by the plaintiff's husband in which the plaintiff was traveling as a guest and an automobile operated by the defendant, it was error for the court to charge the jury that if the plaintiff could have prevented the plaintiff's injury by the exercise of ordinary care the plaintiff could not recover as there was no evidence to authorize a finding that the defendant had been in any way negligent. Wade v. Drinkard, 76 Ga. App. 159, 45 S.E.2d 231 (1947).

If guest in car is so heedless of one's own safety that the guest fails to exercise ordinary care, such will prevent recovery for injuries. Bell v. Proctor, 92 Ga. App. 759, 90 S.E.2d 84 (1955), rev'd on other grounds, 212 Ga. 325, 92 S.E.2d 514 (1956).

Mere knowledge of driver's drinking not negligence in law. — Mere knowledge on the part of a passenger that the driver is under the influence of intoxicating beverages is not, as a matter of law, knowledge that such person is so much under the influence of intoxicants as not to be able to drive safely or with ordinary efficiency so as to make the passenger guilty of such lack of ordinary care for the passenger's own safety, or assumption of risk, as will bar a recovery against the driver for injuries occasioned by the driver's gross negligence. In such case, the negligence of the driver and that of the guest may be compared. Petroleum Carrier Corp. v. Jones, 127 Ga. App. 676, 194 S.E.2d 670 (1972).

Applicability to Specific Cases (Cont'd)
1. Motor Vehicles (Cont'd)

Knowledge of driver's drinking cannot be assumed. — The mere fact that, in an action by a guest against the host-driver of an automobile in which the plaintiff was riding, it is alleged that the host was driving the automobile under the influence of intoxicating liquors does not require the conclusion that the plaintiff knew of such intoxication at the time the plaintiff entered the automobile or in time to have avoided any injury resulting from such negligence. Stephenson v. Whiten, 91 Ga. App. 110, 85 S.E.2d 165 (1954).

When the plaintiff was a guest passenger, there was no duty resting upon the plaintiff to do any act regarding operation of third party defendant's car or otherwise take any affirmative action, and nothing in the record showed any negligence on the plaintiff's part; any charge relating to negligence on the part of the plaintiff was unwarranted. Wallace v. Yarbrough, 155 Ga. App. 184, 270 S.E.2d 357 (1980).

When the pedestrian recklessly exposes oneself to danger and such action or omission proximately contributes to the pedestrian's injury, the pedestrian cannot recover for any mere negligence of the driver, but may still recover when the acts of the driver are malicious, willful, or intentional. Elrod v. Anchor Duck Mill, 50 Ga. App. 531, 179 S.E. 188 (1935).

Pedestrian, when lawfully using public highways, is not bound to be continually looking and listening to ascertain if automobiles are approaching, under the penalty that if the pedestrian fails to do so and is injured, it must be conclusively presumed that the pedestrian was negligent. Eubanks v. Mullis, 51 Ga. App. 728, 181 S.E. 604 (1935).

A streetcar passenger on alighting from the car is not necessarily bound, as a matter of law, to look out for any automobile being driven in violation of a statute as to passing a streetcar which has stopped for the purpose of receiving or discharging passengers. Hexter v. Burgess, 52 Ga. App. 819, 184 S.E. 769 (1936).

It cannot be affirmed as a fixed rule that one crossing a street or highway diagonally must turn and look back, as whether one should do so depends on the circumstances of the particular case; one must be alert, but when one must look depends on the law of the road, the current of traffic, means of observation, the local conditions, the position and direction of moving vehicles, and other factors. Wright v. Bales, 62 Ga. App. 328, 7 S.E.2d 765 (1940).

The failure of a pedestrian in crossing a street and before passing over the center thereof to look to the pedestrian's right for a truck approaching from the pedestrian's right and moving along the left side of the street relative to the direction in which the truck was traveling was not contributory negligence as a matter of law. Wright v. Bales, 62 Ga. App. 328, 7 S.E.2d 765 (1940).

Pedestrian not negligent in using defective sidewalk when danger not comprehended. — A pedestrian using a sidewalk which a municipal corporation is negligent in maintaining in a condition unsafe for travel is not, as a matter of law, guilty of negligence barring a recovery in failing to observe the condition in the sidewalk although it may be patent and could be observed by the pedestrian if the pedestrian would look, when it does not appear that by looking the pedestrian would have a full appreciation of the danger and risk involved in using the sidewalk. Lacy v. City of Atlanta, 110 Ga. App. 814, 140 S.E.2d 144 (1964).

Whether pedestrian is negligent is jury question. — When a pedestrian, after passing between two parked automobiles looked to the pedestrian's left for traffic, but instantly and before the pedestrian had time to look to the pedestrian's right was struck and injured by an automobile being driven on the left side of the street, that is "astraddle" and to the left of the center of that street, and when the pedestrian could have seen the automobile had the pedestrian had time to look to the pedestrian's right, and the driver of the automobile could have seen the pedestrian had the pedestrian been looking, and since the street to the right of the driver of the automobile at this point was clear and could have been used by that

automobile at the time of the accident, it was a question for a jury to determine whose negligence was responsible for the injury; and it was error to grant a nonsuit. Eubanks v. Mullis, 51 Ga. App. 728, 181 S.E. 604 (1935).

Whether a pedestrian, who in crossing a street and before reaching the center thereof was hit by an automobile being driven on the left-hand side of the street or road relative to the direction in which the automobile was traveling, was negligent in not looking to the pedestrian's right for the automobile approaching in that direction was a jury question. Wright v. Bales, 62 Ga. App. 328, 7 S.E.2d 765 (1940).

Jury instructions on negligence of plaintiff-passenger. — Several portions of the trial court's charge to the jury, which presented a negligence issue concerning the plaintiff-passenger of a motorcycle driver without its headlight on, were authorized only if there was evidence of the plaintiff's negligence sufficient to bar the plaintiff from recovering in the action for damages arising from a motor vehicle collision; the question is whether there is any evidence that the plaintiff had actual knowledge of some hazard to which the plaintiff was being exposed by the manner in which the driver of the motorcycle was operating that vehicle and whether this knowledge was coupled with the opportunity to take appropriate action to avoid personal injury or to warn the host driver of the hazard. Exum v. Long, 157 Ga. App. 592, 278 S.E.2d 13 (1981).

Lighting defect irrelevant when driver saw vehicle. — If driver actually saw the truck, stopped the driver's vehicle, and then struck the truck while attempting to pass it, the presence or absence of any lighting fixture or warning feature on the rear of the truck would not be a causal factor in the plaintiff's injuries. Lewis v. Atlanta Cas. Co., 179 Ga. App. 185, 345 S.E.2d 858 (1986).

Driving at speed excessive for limited vision. — It is not necessarily such a lack of ordinary care on the plaintiff's part as will defeat a recovery for the operator of a properly equipped automobile to drive it in the night at such a rate of speed that the plaintiff cannot stop it within the limit of the plaintiff's vision ahead. McDowall Transp., Inc. v. Gault, 80 Ga. App. 445, 56 S.E.2d 161 (1949).

Inability to stop in sufficient time. — The mere fact that a plaintiff driving a properly equipped automobile at 35 miles an hour is unable to stop when the weather was inclement, over a wet pavement which was nearly the color of the body of the truck, which had been brought almost to a stop in the highway, at night without any taillight burning, does not necessarily and as a matter of law establish negligence upon the party of the plaintiff, for the question still remains whether the plaintiff's conduct, in view of all the attendant circumstances and conditions, measures up to that of the ordinarily prudent person which is the standard required by law in this state. Bach v. Bragg Bros. & Blackwell, 54 Ga. App. 574, 186 S.E. 711 (1936).

Failure to allow for lack of visibility. — When there was evidence from which it could be inferred that the plaintiff-driver was familiar with the lack of visibility at the intersection yet took no precautionary measures, such as significantly reducing the plaintiff's speed, to allow for such lack of visibility, the trial court did not err in charging the jury on the doctrine of avoidable consequences. Stroud v. Woodruff, 183 Ga. App. 628, 359 S.E.2d 680 (1987).

Decedent's contributory negligence barred recovery as a matter of law in a widower's wrongful death suit based on a vehicular collision because the decedent failed to avoid the consequences of the defendants' alleged negligence in obstructing the view of a certain left-hand turn with a stalled loader onto a state route familiar to the decedent. Weston v. Dun Transp. & Stringer, Inc., 304 Ga. App. 84, 695 S.E.2d 279 (2010).

Intoxicated unlicensed driver could not recover from intoxicated passenger who was seated in the rear of the automobile at the time of the accident since the driver had the last opportunity to avoid the effect of alcohol and the driver's incompetence, notwithstanding any negligence in the passenger's failure to seize control of the vehicle. Spivey v. Sellers, 185 Ga. App. 241, 363 S.E.2d 856 (1987).

Applicability to Specific Cases (Cont'd)

2. Railroads

No person can recover damages from railroad company for injuries if injuries are caused by one's own negligence or when by the exercise of ordinary care one could have avoided the consequences caused by the company's negligence. Coleman v. Western & Atl. R.R., 48 Ga. App. 343, 172 S.E. 577 (1933).

Person going upon railroad track unaware of approach of train is not thereby, as a matter of law, guilty of negligence barring a recovery. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

The attempt of a plaintiff who was not aware of the approach of the train to cross the railroad tracks at this crossing cannot, as a matter of law, be said to constitute such negligence upon the plaintiff's part as would bar a recovery. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

Crossing of streetcar track. — It would not be contributory negligence for a plaintiff to attempt to cross a streetcar track if the plaintiff did not see the streetcar approaching, and by the exercise of ordinary care could not have seen it. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932).

All that is required of person about to cross ahead of observed railroad car is that person exercise reasonable care. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932).

Failure to stop and look not lack of due care as matter of law. — It cannot be said, as a matter of law, that the failure on the part of a person approaching and entering into a railroad crossing, and unaware of the approach of a train, to stop, look, and listen renders the person guilty of the lack of ordinary care. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932); Pollard v. Cartwright, 60 Ga. App. 630, 4 S.E.2d 693 (1939); Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

It is not, as a matter of law, negligence proximately causing an injury for a person injured at a public railroad crossing by an approaching train to proceed across the railroad track at the crossing without observing the approaching train, although had the plaintiff looked the plaintiff could have seen the train approaching in time to have avoided the injury. Pollard v. Harris, 51 Ga. App. 898, 181 S.E. 593 (1935).

When the evidence is sufficient to authorize an inference that the train was being operated negligently as respects the safety of persons upon the crossing, notwithstanding the person injured may have gone upon the crossing ahead of the approaching train without looking and without seeing the train, and could have seen the train had the person looked, the inference is not demanded, as a matter of law, that the injury was proximately caused by the negligence of the person injured, but the evidence was sufficient to authorize the inference that the injury was proximately caused by the negligence of the defendant, or by the negligence of both by an application of the rule of comparative negligence. Pollard v. Harris, 51 Ga. App. 898, 181 S.E. 593 (1935).

No lack of due care as matter of law when decedent made reasonable check. — Since the deceased made a reasonable effort to ascertain whether or not the deceased could safely cross the railroad track, a court cannot say, as a matter of law, that the deceased was not in the exercise of due care in undertaking to cross the track under the circumstances alleged. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

When because of the vibration of the car in operation and the running of the motor the deceased did not hear the whistle of the approaching train and could not have heard it in the exercise of ordinary care, and when after bringing the deceased's car to a halt about 20 feet from the track the deceased looked westerly for approaching trains and did not see the train or its headlight, the deceased's vision being partially obscured by a water tank of the defendant, and further obstructed and obscured by the rainy and misty atmosphere and the cloudiness of the windows of the deceased's car, the deceased was not as a matter of law guilty of contributory negligence barring recovery. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

Recovery barred when the plaintiff's contributory negligence proximately caused injury. — When there was evidence that the plaintiff proceeded across a track at a crossing, in the wake of a train which had just passed, when, at the time, the plaintiff's vision along a parallel track upon which a train of the defendant was approaching was obscured by the train which had just passed, and that for this reason the plaintiff could see along this track only a distance of 20 feet, that the plaintiff proceeded upon the track on which the approaching train was coming, and was hit by the train and injured, the evidence was sufficient to authorize the inference that the plaintiff, in crossing the railroad tracks, was not in the exercise of ordinary care, and in so doing was guilty of such negligence as proximately caused the injuries or contributed thereto. Central of Ga. Ry. v. Cooley, 44 Ga. App. 118, 160 S.E. 812 (1931).

A street railway company is not liable in damages to the plaintiff because of a collision between a streetcar and the plaintiff's automobile at a crossing that is brought about solely by the plaintiff's mistaken judgment that the plaintiff had ample time to drive the plaintiff's automobile across the defendant's railway tracks ahead of the on-coming streetcar. Kirk v. Savannah Elec. & Power Co., 50 Ga. App. 468, 178 S.E. 470 (1935).

When the plaintiff can see smoke emitted from the locomotive that completely obscures the highway when the plaintiff drives into it, being unable to see what is ahead of the plaintiff, and hits a parked truck, the plaintiff takes the chance of there being some hidden obstruction or danger within the smoke, and therefore proceeds at the plaintiff's peril, and has no right to recover from either defendant. Reid v. Southern Ry., 52 Ga. App. 508, 183 S.E. 849 (1936).

A driver of an automobile who knows that the driver is approaching a railroad crossing in the nighttime and fails to reduce the speed of the driver's car so that it may be stopped within the range of the driver's lights when the driver discovers that a train of cars is stopped or passing over such crossing is guilty of such a lack of ordinary care as will prevent a recovery from the railroad. Pollard v. Clifton, 62 Ga. App. 573, 9 S.E.2d 782 (1940).

Although a railroad company may have been negligent in bringing about a plaintiff's death, when such negligence was not wanton and willful, and when it appears that the deceased was not exercising ordinary care for the deceased's own safety and could have avoided the consequences of the defendant's negligence by the exercise of such care, the deceased's widow may not recover. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

One who recklessly tests an observed and clearly obvious danger, such as attempting to beat a near and rapidly approaching railroad train or street car over a crossing, or to pass an intersecting highway in front of a near and speeding automobile having the right-of-way, notwithstanding one's own honest but mistaken judgment that one has ample time to get across, may under the particular facts be held to have failed to exercise that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances and may be held to be guilty of contributory negligence, which will be deemed the proximate cause of one's resulting injury, and which will, in the absence of willful or wanton misconduct by the defendant, preclude recovery. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

One who deliberately goes upon a railroad track in front of an approaching train thinking that one can cross before the train reaches the person and miscalculating its speed because the person is in front of it, cannot recover for injuries resulting from being run down by the train, although the company's servants may also have been negligent in running at a high rate of speed at that point, and also in failing to check the speed of the train at a public road which crossed the track between the place where the train was when first seen by the plaintiff and the point at which the injury occurred. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

The widow of one who goes upon a railroad track, fully aware of an approaching train after having heard the whistle and having seen the headlight of the

Applicability to Specific Cases (Cont'd)
2. Railroads (Cont'd)

train, and who miscalculated its speed and distance from the crossing because of the darkness and mist of a rainy night, cannot recover for death resulting from being struck by the train, although the company's servants may have been negligent, if the company's negligence was not willful or wanton. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

The petition by a widow against a railroad company seeking damages for the tortious death of her husband, in a collision of a truck driven by her husband and an engine of the railroad, when her husband saw the engine and slowed the truck and attempted to go around it, was subject to general demurrer (now motion to dismiss) because it showed that her husband could have avoided whatever negligence the railroad was guilty of by the exercise of ordinary care. Atlantic Coast Line R.R. v. Dolan, 84 Ga. App. 734, 67 S.E.2d 243 (1951).

If a plaintiff voluntarily places oneself upon a railroad track almost immediately in front of a rapidly moving train, with knowledge of the danger, thinking one has time to get across before the train reaches one, and one miscalculates, one's own negligence must be taken as the sole proximate cause of one's misfortune. Hoover v. Seaboard Air Line R.R., 107 Ga. App. 342, 130 S.E.2d 247 (1963).

Jumping from moving train. — Plaintiff's injuries were solely caused by the plaintiff's own decision to jump from a train after helping a passenger on board, and a car attendant's actions did not constitute an inducement to the plaintiff to attempt to leave the train while in motion, since the attendant exercised no control over the movement or management of the train, and the attendant specifically advised the plaintiff to remain on the train until the train stopped at the next station. Giargiari v. National R.R. Passenger Corp., 185 Ga. App. 723, 365 S.E.2d 875 (1988).

No recovery by representative when decedent would be barred. — If a deceased person could not have recovered for injuries had the deceased survived the collision, because the deceased was lacking in ordinary care in undertaking to cross the railroad tracks, the deceased's widow cannot recover for the deceased's death. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

Plaintiff's contributory negligence presents jury question. — In an action against a railroad company for injuries received by a person lawfully upon a railroad crossing, the question of what such person must or must not do, in order to free oneself of guilt of lack of ordinary care constituting the proximate cause of one's injury, is a question for the jury. Porter v. Southern Ry., 73 Ga. App. 718, 37 S.E.2d 831 (1946).

3. Applicability of O.C.G.A. § 46-8-291

Both former Code 1933, §§ 94-703 and 105-603 (see now O.C.G.A. §§ 46-8-291 and 51-11-7) were applicable in suit against railroad and constitute separate defenses. Underwood v. Atlanta & W. Point R.R., 105 Ga. App. 340, 124 S.E.2d 758, aff'd in part and rev'd in part, 218 Ga. 193, 126 S.E.2d 785 (1962).

Common law rule distinguished. — The common-law rule that if the injury to or death of a person resulted from any negligence attributable to the person, regardless of the degree, there could be no recovery and no apportionment of damages was changed in this state by former Code 1933, §§ 94-703 and 105-603 (see now O.C.G.A. §§ 46-8-291 and 51-11-7). Southland Butane Gas Co. v. Blackwell, 211 Ga. 665, 88 S.E.2d 6 (1955). But see Garrett v. NationsBank, 228 Ga. App. 114, 491 S.E.2d 158 (1997).

Former Code 1933, §§ 94-703 and 105-603 (see now O.C.G.A. §§ 46-8-291 and 51-11-7) when read together, introduce variation from common law in one respect only. The statute's declare first that a plaintiff shall not recover when the accident was caused by the plaintiff's own negligence, and the statute's further declare that even if the defendant was negligent in such a way as to cause the injury, the plaintiff shall not recover if, with the defendant's negligence as an existing condition of the situation, the plaintiff could have avoided its conse-

quences by ordinary care; these rules are the same as those established at the common law. However, these sections provided that when the negligence of both parties was concurrent and contributed to the injury, then the plaintiff shall not, as at common law, be barred entirely, but may recover damages reduced below full compensation for the injury by an amount proportioned to the amount of the default attributable to the plaintiff. Atlantic Coast Line R.R. v. Mitchell, 157 F.2d 880 (5th Cir. 1946).

Former Code 1933, §§ 94-703 and 105-603 (see now O.C.G.A. §§ 46-8-291 and 51-11-7) have been applied to all kinds of negligence except when a special statute governs. Willis v. Jones, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

Former Code 1933, §§ 94-703 and 105-603 (see now O.C.G.A. §§ 46-8-291 and 51-11-7) were in pari materia and must be construed with reference to each other. Georgia Power Co. v. Gillespie, 48 Ga. App. 688, 173 S.E. 755 (1934).

Distinctions. — The defense stated in former Code 1933, § 94-703 (see now O.C.G.A. § 46-8-291) to the effect that a plaintiff cannot recover for injuries caused by the plaintiff's consent or due to the plaintiff's own negligence is separate and distinct from the additional limitation or qualification of the right to recover stated in former Code 1933, § 105-603 (see now O.C.G.A. § 51-11-7), which provided that, notwithstanding the perilous situation might have been brought about in whole or in the greater part by the negligent acts of the defendant, it is nevertheless incumbent upon the injured party to exercise the care of an ordinarily prudent person to ascertain the defendant's negligence and thereafter to avoid its consequences. Donaldson v. Central of Ga. Ry., 43 Ga. App. 480, 159 S.E. 738 (1931).

Former Code 1933, §§ 94-703 and 105-603 (see now O.C.G.A. §§ 46-8-291 and 51-11-7) were not identical and should not be confused. Former Code 1933, § 94-703 provided that no recovery from a railroad company can be had when an injury has been occasioned by the plaintiff's own negligence (lack of ordinary care), while former Code 1933, § 105-603 forbid a recovery when the plaintiff by ordinary care could have avoided the consequences caused by the defendant's negligence. Georgia Power Co. v. Holmes, 175 Ga. 487, 165 S.E. 284 (1932).

Rule of law under former Code 1933, § 105-603 (see now O.C.G.A. § 51-11-7) gave the defendant a complete and perfect defense that was in no wise limited by the comparative negligence rule embodied in former Code 1933, § 94-703 (see now O.C.G.A. § 46-8-291). Pollard v. Kent, 59 Ga. App. 118, 200 S.E. 542 (1938).

Under former Code 1933, §§ 94-703 and 105-603 (see now O.C.G.A. §§ 46-8-291 and 51-11-7), there can be no recovery of damages when the injured party has failed to use ordinary care to prevent an injury to oneself, unless the injury be willfully and wantonly inflicted upon the injured party. Southland Butane Gas Co. v. Blackwell, 211 Ga. 665, 88 S.E.2d 6 (1955). But see Garrett v. NationsBank, 228 Ga. App. 114, 491 S.E.2d 158 (1997).

There were only two exceptions in former Code 1933, §§ 94-703 and 105-603 (see now O.C.G.A. §§ 46-8-291 and 51-11-7), as applied by the courts to the right of recovery by a plaintiff who has been guilty of negligence concurring with that of the defendant to cause an injury; one is that a plaintiff may not recover if the plaintiff could have avoided the negligence of the defendant by exercise of ordinary care, and the other is that a plaintiff cannot recover if the plaintiff's negligence is equal to or greater than that of the defendant. Willis v. Jones, 89 Ga. App. 824, 81 S.E.2d 517 (1954).

Jury instructions. — Former Code 1933, § 105-603 (see now O.C.G.A. § 51-11-7) and the latter part of former Code 1933, § 94-703 (see now O.C.G.A. § 46-8-291) should not be given in immediate connection with each other without making the proper explanation as to the class of cases to which the latter section was applicable. Americus, P. & L.R.R. v. Luckie, 87 Ga. 6, 13 S.E. 105 (1891); Macon, D. & S.R.R. v. Moore, 99 Ga. 229, 25 S.E. 460 (1896); Livsey v. Georgia Ry. & Elec. Co., 19 Ga. App. 687, 91 S.E. 1074 (1917).

When contributory negligence was in

Applicability to Specific Cases (Cont'd)
3. Applicability of O.C.G.A. § 46-8-291 (Cont'd)

issue and the court charges the jury as to recovery of diminished damages, as embraced in former Code 1933, § 94-703 (see now O.C.G.A. § 46-8-291), it was error not to qualify such doctrine by charging the jury that, as provided in former Code 1933, § 105-603 (see now O.C.G.A. § 51-11-7), the plaintiff cannot recover if the plaintiff could, by the exercise of ordinary care, have avoided the consequences to the plaintiff caused by the defendant's negligence; but when the court, in stating to the jury a number of contingencies in which the plaintiff could not recover, instructed the jury that if the negligence of the plaintiff was equal to or greater than that of the defendant the plaintiff could not recover, the charge was not error, because if the plaintiff's negligence was equal to or greater than that of the defendant, the defendant would not be liable, and the qualification was unnecessary. Berry v. Jowers, 59 Ga. App. 24, 200 S.E. 195 (1938).

It was not error as tending to confuse the jury for the court to charge, in immediate connection with each other, former Code 1933, § 105-603 (see now O.C.G.A. § 51-11-7), the principle of law that if a person injured by the alleged negligence of a defendant railroad company could have avoided the consequences of the defendant's negligence, if any, after it arose or was impending, or in the exercise of ordinary care should have known of such negligence, such person could not recover, and former Code 1933, § 94-703 and 105-603 (see now O.C.G.A. § 46-8-291), that no person shall recover damages from a railroad company for an injury to oneself or one's property when the injury was done by one's own consent or is caused by one's own negligence; each was a separate and distinct proposition of law, and neither one modifies or qualifies the other. Southern Ry. v. Lee, 59 Ga. App. 316, 200 S.E. 569 (1938).

The court, in charging that if the person injured could have avoided the consequences of the defendant's negligence there could be no recovery, and that the exercise of ordinary care was a question of fact for the jury, and in charging immediately thereafter that no person can recover damages from a railroad company for injuries done by one's own consent or caused by one's own negligence, and that if the complainant and agent of the company are both at fault the former may recover but the damages shall be diminished by the jury in proportion to the amount of default attributable to the agent, charged three separate, distinct, and independent propositions of law, no one of which, as given in the charge, was modified or qualified by the other. Southern Ry. v. Lee, 59 Ga. App. 316, 200 S.E. 569 (1938).

Charge that if complainant and agents of the defendant railroad company were both at fault the former could recover, but the damages should be diminished by the jury in proportion to the amount of default attributable to the agent, was not subject to the objection that it was given in direct connection with the charge that if the plaintiff, by the exercise of ordinary care, could have avoided the consequences of the defendant's negligence the plaintiff could not recover, and that no person can recover from a railroad company for an injury done by the plaintiff's own consent or caused by the plaintiff's own negligence, so that it misled the jury into the belief that the plaintiff might recover reduced damages even though the person injured failed to exercise ordinary care for the person's own protection or failed to exercise ordinary care to avoid the consequences to oneself of the defendant's negligence. The last two propositions of law were not given in connection with each other, but were given separately, each being a separate and distinct proposition of law, and neither one modifying or qualifying the other. Southern Ry. v. Lee, 59 Ga. App. 316, 200 S.E. 569 (1938).

4. Landlord-Tenant

Tenant may continue use of premises after notice to landlord of defects if use not negligent. — Even after notice of defects given to the landlord the tenant is entitled to continue in the use of the premises without losing the tenant's right

of redress for any damage sustained, provided the conduct of the tenant in so doing is not such as to preclude the tenant from recovering; and the tenant will not be so precluded unless by the exercise of ordinary care the tenant could have avoided the consequences of the defendant's negligence. Mathis v. Gazan, 51 Ga. App. 805, 181 S.E. 503 (1935).

Continued use if danger not apparent. — Even after the tenant may have notice of defects in the premises, the tenant may yet continue to use the premises, including the part of the premises which are defective, if the tenant does not know they are dangerous or has no reasonable ground to suspect such to be the fact; use of the premises could not be legally considered negligent. Mathis v. Gazan, 51 Ga. App. 805, 181 S.E. 503 (1935).

Tenant's recovery barred when continued use negligent. — When rented premises become out of repair, it is the duty of the tenant to notify the landlord thereof and to abstain from the use of that part of the premises the use of which is attended with danger. It is the tenant's duty to use ordinary care, and if by the use of such care the consequences of the defendant's negligence could have been avoided, the tenant cannot recover of the landlord for injuries caused by the failure of the landlord to repair such defect in the premises. Yancey v. Peters, 49 Ga. App. 128, 174 S.E. 182 (1934).

Allegations on the part of a tenant in an action against the landlord for failing to repair the premises that the tenant continued to use when the tenant knew the premises were dangerous convicted the tenant of the failure to exercise ordinary care to avoid the negligence of the landlord. It thus precluded the tenant, under the law, from recovery under the allegations of the petition. Bixby v. Sinclair Ref. Co., 74 Ga. App. 626, 40 S.E.2d 677 (1946).

In suit by a tenant against a landlord for personal injuries resulting from the defective condition of the premises, when injury resulted to the plaintiff's spouse as a result of defects in a part of the premises which the spouse continued to use after knowledge that it was in a weak and unsafe condition, the failure on the spouse's part to exercise ordinary care for the spouse's own safety by refraining from the use of such portion of the premises and thus avoiding the consequences caused by the defendant's negligence would be held to be the sole proximate cause of the injuries received. Harris v. Edge, 92 Ga. App. 827, 90 S.E.2d 47 (1955); Taylor v. Boyce, 105 Ga. App. 434, 124 S.E.2d 647 (1962).

Owner did not have superior knowledge of danger. — Trial court did not err in granting co-owners' motions for summary judgment in a wrongful death action filed by a decedent's mother and sister because the co-owners did not have superior knowledge of the danger posed by the retaining wall from which the decedent fell, and the decedent had actual knowledge of the hazard; the fact that an owner was negligent per se in failing to comply with a building code does not impose liability when the owner lacks superior knowledge of the hazard. Barnes v. Morganton Baptist Ass'n, 306 Ga. App. 755, 703 S.E.2d 359 (2010).

5. Miscellaneous

Adult servant may assume risks in course of employment. — An adult servant of ordinary intelligence will be held to be affected with knowledge of a manifest risk, or danger incident to the doing of a particular thing in the operation of a machine, during employment, although the servant may be inexperienced as to such operation and though the master may have failed to instruct the servant in respect thereto. Union Carbide Corp. v. Holton, 136 Ga. App. 726, 222 S.E.2d 105 (1975).

Failure of store proprietor to assist customer. — Even though the grocery store manager may have breached a duty to help the plaintiff call police to report a theft committed against the plaintiff in the store, the plaintiff was not entitled to recover since pay phones were available to the plaintiff to report the crime and by the exercise of ordinary care the plaintiff could have easily have prevented all harm to the plaintiff. Winn-Dixie Stores, Inc. v. Nichols, 205 Ga. App. 308, 422 S.E.2d 209 (1992).

Air conditioning unit extending from building. — Maintenance of an air

Applicability to Specific Cases (Cont'd)
5. Miscellaneous (Cont'd)

conditioning unit which extends approximately 2 feet from the side of a building, even at head level, does not constitute negligence on the part of the defendant. The presence of such equipment on the side of the building can easily be anticipated and the plaintiff did not exercise ordinary care for the plaintiff's own safety in walking hurriedly, head down, less than 2 feet from the side of the building. Bonner v. Barnes, 103 Ga. App. 364, 119 S.E.2d 138 (1961).

Awareness of possible oil deposits on the center of the garage floor did not necessarily constitute constructive knowledge of possible oil deposits on the peripheral areas of the garage floor to preclude the plaintiff from recovering for the plaintiff's injuries resulting from a slip on a peripheral deposit. Willis v. Neal, 179 Ga. App. 732, 347 S.E.2d 700 (1986).

Gasoline pumps. — Customer who stood holding a gushing gasoline pump over the customer's head for three to five minutes failed to exercise ordinary care for the customer's own safety since the customer could have stepped away from the flowing gasoline. Quiktrip Corp. v. Fesenko, 228 Ga. App. 287, 491 S.E.2d 504 (1997).

Parking lots. — Whether the plaintiff maintained a reasonable lookout for the plaintiff's safety in crossing a restaurant parking lot, whether the plaintiff had greater or equal knowledge of the specific undulation in the pavement which constituted the hazard in this case, and whether the plaintiff exercised ordinary care for the plaintiff's own safety, were questions of fact to be resolved at trial. Jackson v. Waffle House, Inc., 245 Ga. App. 371, 537 S.E.2d 188 (2000).

In an action by a patron of a fast food restaurant, who fell over a raised curb while walking in the pitch dark of the restaurant's unlit parking lot and who was distracted by cars using the drive-through lane that the patron was crossing, the restaurant owner's action in failing to turn on the parking lot lights and the distractions created by the vehicles in the drive-through lane create material issues of fact as to whether the plaintiff exercised ordinary care for the plaintiff's own safety. Hamilton v. Kentucky Fried Chicken of Valdosta, Inc., 248 Ga. App. 245, 545 S.E.2d 375 (2001).

Bailee's duty to exercise due care in use of defective bailed property. — If a bailee knows of a defect in the thing bailed, or in the exercise of ordinary care ought to discover it, yet the bailee uses the thing and injury results on account of the defect, the bailee will be held to have waived the bailee's right to claim damages since by the exercise of ordinary care the bailee could have avoided the consequences of the bailor's neglect, but what amount of care the bailee ought to use to discover the defect is a question of fact for the jury. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

Comparative negligence rule not applicable in suit for destruction of bailed property. — In a suit by a bailor against the bailee for the negligent destruction of the bailed property, the provision of this section relating to the exercise of ordinary care by the plaintiff was not applicable, and the trial judge erred in giving a charge under this section to the jury. Richter Bros. v. Atlantic Co., 59 Ga. App. 137, 200 S.E. 462 (1938), later appeal, 65 Ga. App. 605, 16 S.E.2d 259 (1941).

Child's capacity for contributory negligence. — Due care in a child of tender years is such care as the child's capacity, mental and physical, fits the child for exercising in the actual circumstances of the occasion and situation under investigation. Rogers v. McKinley, 48 Ga. App. 262, 172 S.E. 662 (1934).

A child six or less cannot be guilty of contributory negligence. Red Top Cab Co. v. Cochran, 100 Ga. App. 707, 112 S.E.2d 229 (1959).

A young person of 15 or older is presumptively chargeable with diligence for the person's own safety when the peril is palpable and manifest. Beck v. Wade, 100 Ga. App. 79, 110 S.E.2d 43 (1959).

A one-year-old child cannot be contributorily negligent or charged with failure to exercise ordinary care as to the child's own safety. Reed v. Dixon, 153 Ga. App. 604, 266 S.E.2d 286 (1980).

While a defendant under 13 is protected by O.C.G.A. § 51-11-6, the plaintiff under 13 is not allowed to ignore the plaintiff's lack of due care and recover damages from a defendant whose negligence is less than that of the plaintiff. Barrett v. Carter, 248 Ga. 389, 283 S.E.2d 609 (1981).

Furnishing alcohol to minor. — Restaurant employee was cited for a liquor license violation. As the employee's failure to appear in court as commanded by the citation was an obviously risky act, which led to the employee's arrest, and there was no showing that the restaurant's or supervisor's acts were wilful and wanton, recovery on the negligence claim against the restaurant and employee was barred by the employee's own negligence pursuant to O.C.G.A. § 51-11-7. Weaver v. Pizza Hut of Am., Inc., 298 Ga. App. 645, 680 S.E.2d 668 (2009), cert. denied, No. S09C1834, 2009 Ga. LEXIS 806 (Ga. 2009).

Defective stairway. — While the plaintiff in descending the defendant's steps may have been looking at the steps and picking the plaintiff's way down as alleged in the petition, yet since the plaintiff did not know the actual condition of the steps as the plaintiff alleges, it cannot be said as a matter of law that the plaintiff was under the circumstances guilty of negligence in using the steps and that this negligence barred recovery. Scott v. Rich's, Inc., 47 Ga. App. 548, 171 S.E. 201 (1933).

Defective walkway. — Since the plaintiff, injured while using a defective walkway, was not put on notice either at the time or on a previous crossing that a plank was defective because the plank was not firmly embedded in the soil, and the defendant city in replacing the plank did know was defective and accordingly should have known that if not firmly embedded would roll with the weight of a pedestrian, the defendant was not entitled to a directed verdict on the theory that the plaintiff failed to exercise ordinary care for the plaintiff's own safety. City of Commerce v. Bradford, 94 Ga. App. 284, 94 S.E.2d 160 (1956).

Elevator accident. — Since the plaintiff was familiar with the surroundings and familiar with the elevator and knew there was a door on the opposite side of the elevator, the plaintiff having just come out of that door, and knew anyone could enter that door on the opposite side and move the elevator, and the plaintiff became engaged in conversation and neglected to notice the elevator, by the exercise of ordinary care the plaintiff could have avoided the injuries. Peniston v. Newnan Hosp., 40 Ga. App. 367, 149 S.E. 715 (1929).

When the plaintiff sought to recover damages for injuries caused to the plaintiff from stepping into an elevator shaft at night, and while it was alleged that the approach to the shaft was dimly lighted and that by reason of an optical illusion the plaintiff thought the elevator was in place, and without trying to ascertain whether it was in fact in place or not opened the door and stepped into the elevator shaft and fell down into the basement, the plaintiff, having operated the elevator for the plaintiff's own convenience at night and knowing that it was customary for other tenants in this building of the defendant to use the same elevator at night, was unable to maintain an action against the defendant for the plaintiff's injuries. Macon Sav. Bank v. Geoghegan, 48 Ga. App. 1, 171 S.E. 853 (1933).

Metal strip projecting from floor. — Petition in an action for damages when properly construed disclosed that, as a matter of law and fact, the plaintiff (employee of a tenant of defendant) could have avoided the consequences to the plaintiff of the defendant's alleged negligence in maintaining in the doorway, leading from the hall to the office in which the plaintiff worked, a metal strip or threshold which projected one-fourth of an inch above the floor, over which the plaintiff alleged the plaintiff tripped and sustained the described injuries. Brim v. Healey Real Estate & Imp. Co., 56 Ga. App. 483, 193 S.E. 84 (1937).

Obstruction in highway. — A person injured by reason of an obstruction and an excavation in a public highway is not as a matter of law precluded from recovery, on the ground of failure to exercise ordinary care for the person's own safety, because of having previous knowledge that the highway was under repair and knowledge of

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5. Miscellaneous (Cont'd)

the presence and location of the obstruction and excavation, where the highway was left open to the public for travel. Williams v. Evans, 50 Ga. App. 496, 178 S.E. 460 (1935).

When the plaintiff had no knowledge of the existence of a peril, the plaintiff had a right to assume that the contractors working on the public road would themselves exercise due care, and whether or not the plaintiff exercised the care required of the plaintiff under the circumstances to avoid injury was a jury question. Powell v. Barker, 96 Ga. App. 592, 101 S.E.2d 113 (1957).

Parent may acquiesce in minor's assumption of risk. — When the parent knew that the minor child was working in a hazardous situation for several years prior to the injury causing death and received at least part of the child's wages, the parent could not recover damages as the parent impliedly consented to the employment. Folds v. Penn, 51 Ga. App. 682, 181 S.E. 308 (1935).

If the parent acquiesces in the minor child's change of employment, with knowledge of the kind of work that the child is doing, the parent impliedly consents to the employment and is charged with having consented to the risk naturally incident thereto. Folds v. Penn, 51 Ga. App. 682, 181 S.E. 308 (1935).

Pathway known to be slick. — Plaintiff, who saw and knew that sprinklers were throwing water upon and around the pathway where the plaintiff walked and who showed no reason why the plaintiff should not have seen and avoided the slick manhole cover which caused the plaintiff's fall, was not in the exercise of due care for the plaintiff's own safety and, therefore, could not recover. Bowman v. Richardson, 176 Ga. App. 864, 338 S.E.2d 297 (1985).

Plaintiff's continued use of defective chicken feed. — After the defendant discovered that chicken feed was bad and thereafter failed to take any measures to remove the feed from the defendant's flocks but continued to accept four more loads of the same feed and continued to feed it to the chickens even though the defendant had reason to believe that the feed was in fact bad, there was evidence to support the charge on comparative negligence to the jury. Brooks v. Ralston Purina Co., 155 Ga. App. 164, 270 S.E.2d 347 (1980).

Plaintiff's familiarity with premises. — One who is familiar with the premises cannot rely for recovery upon the negligence of the defendant in failing to correct a patent defect when such party had equal means with the defendant of discovering it or equal knowledge of its existence. McKnight v. Guffin, 118 Ga. App. 168, 162 S.E.2d 743 (1968).

Public warehouseman's failure to store. — When the evidence was overwhelming that a public warehouseman failed to maintain and store sufficient pecan inventory as collateral and when there was sufficient evidence from which a jury could conclude that any attempt by the receipt holders to redeem the warehouse receipts would have been futile because the pecans designated as collateral were already damaged, and the remaining pecans did not belong to the warehouseman, there were genuine issues of material fact in dispute. Planters & Citizens Bank v. Pennsylvania Millers Mut. Ins. Co., 786 F. Supp. 991 (S.D. Ga. 1992), aff'd, 992 F.2d 328 (11th Cir. 1993).

Warehouse manager injured in gap between trailer and loading dock. — A trial court erred by granting summary judgment to a driver, an employer, and a package delivery system corporation in a negligence action brought by a warehouse manager who was injured after the manager's foot slipped through an eight inch gap between a trailer and the bumpers of a loading dock as issues of material fact existed for a jury to determine as to whether the injured manager could have avoided the injury or whether the manager's actions in failing to see a gap between the trailer and the bumpers while carrying boxes was reasonable and in the ordinary course of business. McCray v. FedEx Ground Package Sys., 291 Ga. App. 317, 661 S.E.2d 691 (2008), cert. denied, 2008 Ga. LEXIS 664 (Ga. 2008).

Scaffolding and improper use by plaintiff. — It could not be said as a

matter of law that when the decedent used a scaffold furnished by the defendant to the decedent's employer, this constituted the taking of a risk of physical injury, the danger of which was so obvious that it amounted to a lack of ordinary care and diligence for the decedent's own safety. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

It could not be said as a matter of law that the act of the decedent in going at or near the end of the scaffold to do some work, when there was another on the scaffold to prevent it from tilting and to balance it, constituted such a lack of ordinary care and voluntary risk as would in and of itself amount to a failure to use ordinary care. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

Evidence as to a custom and practice of persons using a swinging scaffold to go beyond the ratchets towards the end thereof to work, when another is on the scaffold with such person, was admissible to show whether or not the decedent was guilty of lack of ordinary care in working near or at the end of the scaffold. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

Failure to use safety equipment. — Plaintiff's failure to use a respirator the plaintiff had the foresight to bring on the plaintiff's own for purposes of working around turpentine sulfate amounted to a failure to exercise ordinary care to avoid the consequences of the risk posed by the turpentine. Grant v. Georgia Pac. Corp., 239 Ga. App. 748, 521 S.E.2d 868 (1999).

Spectator's assumption of risk. — When a person wishing to witness a professional baseball game purchases a ticket and chooses or accepts a seat in a portion of the grandstand which is unprotected, the person voluntarily assumes the risk inherent in such a position, the person being presumed to know there is a likelihood of wild balls being thrown or batted into the grandstand thus unprotected, and when during the warm-up preliminary to playing such a professional baseball game a wild ball is thrown into that portion of the grandstand occupied by such spectator and the spectator is injured, the spectator cannot recover. Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949).

Telephone wire stretched across floor. — Plaintiff was not entitled to recover from the telephone company for injuries received when the plaintiff tripped over a telephone cord running from a junction box on the wall to a telephone which was located on a table adjacent to a doorway in the plaintiff's home, where the telephone had been installed at the plaintiff's request some 20 years prior to the incident, and evidence showed that the plaintiff was aware of the danger involved in allowing the telephone cord to remain on the floor in front of the doorway, and by use of ordinary care could have avoided the consequences caused by the negligence, if any, of the company. Shamis v. Southern Bell Tel. & Tel. Co., 155 Ga. App. 513, 271 S.E.2d 658 (1980).

Unlighted construction area. — Ditches opened near a dwelling house in the process of construction to accommodate water pipes, sewer lines, gas pipes, and for similar purposes do not constitute unusual hazards, nor do planks loosely or insecurely placed across the ditches for the use of workers engaged in building, and if failure of the contractor to furnish lights to reveal such hazards amounts to a failure on the contractor's part to exercise ordinary care to prevent injury to the subcontractor, the latter was equally negligent in going on and over the premises where it was to be reasonably expected perils and pitfalls incident to building activities exist and are concealed by the darkness. Braun v. Wright, 100 Ga. App. 295, 111 S.E.2d 100 (1959).

Firearms. — Assumption of risk did not apply to an action for intentional tort and willful and wanton conduct when: (1) the deceased loaded a pistol, pointed the pistol at the defendant's head, and pulled the trigger; (2) the deceased then gave the pistol to the defendant, who may or may not have seen the deceased load the pistol; (3) the defendant then pointed the gun at the deceased's head and pulled the trigger; (4) the deceased told the defendant to do it again; and (5) the defendant pulled the trigger again and the gun fired and killed the deceased. McEachern v. Muldovan, 234 Ga. App. 152, 505 S.E.2d 495 (1998).

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Suicide. — The fact that the patient's suicide was volitional did not make it a rational act, nor did that alone relieve the hospital and physician of their duty to the patient. Brandvain v. Ridgeview Inst., Inc., 188 Ga. App. 106, 372 S.E.2d 265 (1988), aff'd, 259 Ga. 376, 382 S.E.2d 597 (1989).

Customer failed to exercise ordinary care for own safety. — Trial court did not err in granting a lessee's motion for summary judgment in a customer's premises liability action under O.C.G.A. § 51-3-1 to recover damages for injuries the customer sustained when the customer fell down stairs in a shop because the customer failed to exercise ordinary care for the customer's own safety pursuant to O.C.G.A. § 51-11-7; despite the customer's inability to see beyond the merchandise, the customer continued to move in that direction, and the customer's attempt to walk between or over the thick clutter of merchandise, when there was not an aisle or clear area of floor visible, constituted a voluntary departure from the route designated and maintained by the lessee for the customers' safety and convenience and imposed a heightened duty of care for the lessee's own safety. Bartlett v. McDonough Bedding Co., 313 Ga. App. 657, 722 S.E.2d 380 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 57B Am. Jur. 2d, Negligence, §§ 797 et seq., 823 et seq., 940.

C.J.S. — 65 C.J.S., Negligence, § 253 et seq.

ALR. — Failure to stop, look, and listen at railroad crossing as negligence per se, 1 ALR 203; 2 ALR 767; 41 ALR 405.

High-heeled shoes or character of apparel, as affecting contributory negligence of woman, 2 ALR 1049.

Crossing street elsewhere than at regular crossing as contributory negligence precluding recovery for injury from defect or obstruction, 3 ALR 1113.

Contributory negligence of one injured by striking object temporarily deposited in street, 9 ALR 479.

Duty of pedestrian before crossing street to look for vehicles approaching on intersecting street, 9 ALR 1248; 44 ALR 1299.

Contributory negligence in falling on slippery walk, 13 ALR 73.

Contributory negligence in disregarding or failing to await complete operation of safety gates or other safety appliance at crossing or draw, 13 ALR 942.

Driving automobile across track in front of street car that has stopped to take on or let off passengers as negligence or contributory negligence, 14 ALR 811.

Personal care required of one riding in automobile driven by another as affecting his right to recover against third person, 22 ALR 1294; 41 ALR 767; 47 ALR 293; 63 ALR 1432; 90 ALR 984.

Contributory negligence of elevator passenger permitting part of body to project beyond car, 23 ALR 45.

Contributory negligence or assumption of risk in disobeying rules or directions of master under counter directions by superior, 23 ALR 315.

Contributory negligence of custodian of child as affecting right of parent to recover for its death or injury, 23 ALR 655.

Failure to extinguish fire on adjoining property as contributory negligence precluding recovery for damage by fire spreading to plaintiff's property, 27 ALR 285.

Contributory negligence in stepping into roadway where view is obscured by smoke, 28 ALR 1279.

Civil liability growing out of mutual combat, 30 ALR 199; 47 ALR 1092.

Intoxication as affecting contributory negligence of one killed or injured at a railroad crossing, 36 ALR 336.

Contributory negligence as defense to an action for death on waters within jurisdiction of admiralty, 50 ALR 455.

Contributory negligence of passenger in standing near door of car, 50 ALR 1365.

Reliance on dealer's or manufacturer's assurance that article is not dangerous as affecting question of contributory negligence, 55 ALR 1047.

What amounts to gross or wanton negligence in driving an automobile precluding the defense of contributory negligence, 72 ALR 1357; 92 ALR 1367; 119 ALR 654.

Assumption of risk of overstrain consequent upon failure of other employee to lift his share, 74 ALR 157.

Excessive speed of automobile as affecting question whether excavation or other defect in highway is the proximate cause of accident, 82 ALR 294.

Civil rights and liabilities as affected by failure to comply with regulations as to registration of automobile or motorcycle or licensing of operator, 87 ALR 1469; 111 ALR 1258; 163 ALR 1375.

Applicability of state statutes and rules of law as affecting construction and application of provisions of Federal Employers' Liability Act relating to contributory negligence, assumption of risk, and comparative negligence, 89 ALR 693.

Doctrine of last clear chance, 92 ALR 47; 119 ALR 1041; 171 ALR 365.

Construction and effect of comparative negligence rule where there are more than one defendant, or where negligence of nonparties contributes to the injury, 92 ALR 691.

Contributory negligence of pedestrian at street crossing as affected by statute or ordinance, 96 ALR 786.

Pleading want of contributory negligence as waiver of right to presumption of freedom from negligence, 96 ALR 1116.

Sufficiency of instruction on contributory negligence as respects the element of proximate cause, 102 ALR 411.

Liability for injury to pedestrian who suddenly darts or steps into path of automobile, 113 ALR 528.

Admissibility on issue of negligence or contributory negligence of statements warning one of danger, 125 ALR 645.

Conclusiveness, as to negligence or contributory negligence, of judgment in death action, in subsequent action between defendant in the death action and statutory beneficiary of that action, as affected by objection of lack of identity of parties, 125 ALR 908.

Assumption of risk or contributory negligence in riding in defective automobile, 138 ALR 838.

Liability for injury to pedestrian due to condition of street or highway as affected by his blindness or other physical disability, 141 ALR 721.

Statute abolishing or modifying contributory negligence rule in certain class of cases or situations, as denial of equal protection of the laws, 142 ALR 631.

Contributory negligence as defense to action based on violation of statute or ordinance as to condition of premises of seller of intoxicating liquor, 144 ALR 827.

Failure to look for or discover automobile approaching on wrong side of road as negligence or contributory negligence, 145 ALR 536.

Statute which places burden of proof as to contributory negligence on defendant or creates a presumption against contributory negligence as applicable to actions by one person consequential damages resulting from injury to another, 147 ALR 726.

Liability for injury to spectator at indoor athletic game or contest due to hazard incident thereto, 149 ALR 1174.

What conduct on part of railroad, in connection with crossing accident, amounts to wantonness, wilfullness, or the like, precluding defense of contributory negligence, 151 ALR 9.

Negligence and contributory negligence in respect of delivery of petroleum products, 151 ALR 1261.

Contributory negligence of one attempting to cross in front of an observed approaching train, as affected by increase of its speed, 154 ALR 512.

Failure of guest to leave automobile because of host's misconduct or negligence as contributory negligence or assumption of risk constituting defense to automobile guest's action again owner or driver, 154 ALR 924.

Passenger's protrusion of part of body beyond, or his riding outside, body of motorbus as contributory negligence, 157 ALR 1212.

Liability for death of, or injury to, one seeking to rescue another, 158 ALR 189.

Entering dark place on unfamiliar premises as contributory negligence, 163 ALR 587.

Negligence of automobile passenger as to lookout or other precaution as affecting question of negligence or contributory negligence of driver, 165 ALR 596.

Contributory negligence as defense to cause of action based upon violation of statute, 171 ALR 894; 10 ALR2d 853.

Custom or practice of drivers of motor vehicles as affecting question of negligence, 172 ALR 1141; 77 ALR2d 1327.

Contributory negligence as defense to action by state, United States, municipality, or other governmental unit, 1 ALR2d 827.

Liability for injury to or death of participant in game or contest, 7 ALR2d 704.

Contributory negligence of driver of motor vehicle as imputable to owner under statute making owner responsible for negligence of driver, 11 ALR2d 143.

Failure to obtain occupational or business license or permit as defense to tort action, 13 ALR2d 157.

Defenses of fellow servant and assumption of risk in actions involving injury or death of member of airplane crew, ground crew, or mechanic, 13 ALR2d 1137.

Guest's knowledge that automobile driver has been drinking as precluding recovery, under guest statutes or equivalent common-law rule, 15 ALR2d 1165.

Failure of occupants of motor vehicle stalled on railroad crossing to get out and move to place of safety as contributory negligence, 21 ALR2d 742.

Pleading last clear chance doctrine, 25 ALR2d 254.

Intoxication of person injured or killed as affecting applicability of last clear chance doctrine, 26 ALR2d 308.

Sudden or unsignaled stop or slowing of motor vehicle as negligence, 29 ALR2d 5.

Contributory negligence of physically handicapped or intoxicated person in boarding or alighting from standing train or car, 30 ALR2d 334.

Attempt to board moving car or train as contributory negligence or assumption of risk, 31 ALR2d 931.

Availability of last clear chance doctrine to defendant, 32 ALR2d 543.

Adult's intentional bodily contact with electrified wire as contributory negligence, 34 ALR2d 98.

Contributory negligence of one stepping or falling into shaft of nonautomatic elevator, 34 ALR2d 1336.

Extension of hand, arm, or other portion of body from motor vehicle as contributory negligence, 40 ALR2d 233.

Liability of one negligently causing fire for personal injuries sustained in attempt to control fire or to save life or property, 42 ALR2d 494.

Overcrowding motor vehicle or riding in unusual position thereon as affecting liability for injury or damage, 44 ALR2d 238.

Duty and liability of municipality as regards barriers for protection of adult pedestrians who may unintentionally deviate from street or highway into marginal or external hazards, 44 ALR2d 633.

Contributory negligence, assumption of risk, or related defenses as available in action based on automobile guest statute or similar common law rule, 44 ALR2d 1342.

Contributory negligence or assumption of risk as defense in action against physician or surgeon for malpractice, 50 ALR2d 1043.

Contributory negligence or assumption of risk of passenger leaving seat before conveyance stops, 52 ALR2d 585.

Contributory negligence of one jumping from moving motor vehicle, 52 ALR2d 1433.

Contributory negligence of one standing in highway to attempt to warn approaching motorists of dangerous situation, 53 ALR2d 1002.

Contributory negligence of railroad employee in jumping from moving train or car to avoid collision or other injury, 58 ALR2d 1232.

Liability as between participants for accident arising from private automobile or other vehicle racing on public street or highway, 59 ALR2d 481.

Contributory negligence of adult struck by train while walking or standing beside railroad track, 63 ALR2d 1226.

Duty and standard of care, with respect to contributory negligence, of person with physical handicap, such as impaired vision or hearing, approaching railroad crossing, 65 ALR2d 703.

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Intoxication, unconsciousness, or mental incompetency of person as affecting his status as guest within automobile guest statute or similar common-law rule, 66 ALR2d 1319.

Application of last clear chance doctrine to cases involving collision between train and motor vehicle at railroad crossing, 70 ALR2d 9.

Contributory negligence or assumption of risk as defense to action for damages from nuisance — modern views, 73 ALR2d 1378.

Momentary forgetfulness of danger as contributory negligence, 74 ALR2d 950.

Interference with airplane pilot or controls as negligence or contributory negligence, 75 ALR2d 858.

Instructions on sudden emergency in motor vehicle cases, 80 ALR2d 5.

Contributory negligence, in motor vehicle accident case, of pedestrian under physical disability, 83 ALR2d 769.

Contributory negligence, assumption of risk, or the like, on part of passenger or guest in motor vehicle engaging in racing or similar contests, 84 ALR2d 448.

Liability of owner, lessee, or operator for injury or death on or near loop-o-plane, ferris wheel, miniature car, or similar rides, 86 ALR2d 350.

Liability for injury or death of child in refrigerator, 86 ALR2d 709.

Payee's prior negligence facilitating forging of indorsement as precluding recovery from banking paying check, 87 ALR2d 638.

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Liability of pedestrian to another pedestrian injured as result of collision between them on sidewalk, 88 ALR2d 1143.

Contributory negligence of mentally incompetent or mentally or emotionally disturbed person, 91 ALR2d 392.

Last clear chance in actions by motor vehicle passenger against host-driver, 95 ALR2d 617.

Liability of owner or operator of automobile for injury to one assisting in extricating or starting his stalled or ditched car, 3 ALR3d 780.

Contributory negligence or assumption of risk as defense to action for personal injury, death, or property damage resulting from alleged breach of implied warranty, 4 ALR3d 501.

Rescue doctrine: negligence and contributory negligence in suit by rescuer against rescued person, 4 ALR3d 558.

Comparative negligence rule where misconduct of three or more persons is involved, 8 ALR3d 722.

Applicability of last clear chance doctrine to collisions between motor vehicles crossing at intersection, 20 ALR3d 124.

Applicability of last clear chance doctrine to intersectional collision between motor vehicles meeting from opposite directions, 20 ALR3d 287.

Contributory negligence of spouse or child as bar to recovery of collateral damages suffered by other spouse or parent, 21 ALR3d 469.

Premises liability: proceeding in the dark as contributory negligence, 22 ALR3d 286.

Premises liability: proceeding in the dark along outside path or walkway as contributory negligence, 22 ALR3d 599.

Premises liability: proceeding in the dark on outside steps or stairs as contributory negligence, 23 ALR3d 365.

Premises liability: proceeding in the dark across exterior premises as contributory negligence, 23 ALR3d 441.

Premises liability: proceeding in the dark along inside hall or passageway as contributory negligence, 24 ALR3d 388.

Premises liability: proceeding in the dark on inside steps or stairs as contributory negligence, 25 ALR3d 446.

Contributory negligence or assumption of risk of one injured by firearm or air gun discharged by another, 25 ALR3d 518.

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Applicability of last clear chance doctrine to collision between moving and stalled, parked, or standing motor vehicle, 34 ALR3d 570.

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Pilot's contributory negligence or assumption of risk as defense in action for his injuries or death resulting from airplane accident, 35 ALR3d 614.

Tort liability of public schools and institutions of higher learning for accident occurring during school athletic events, 35 ALR3d 725.

Tort liability of public schools and institutions of higher learning for accidents associated with chemistry experiments, shopwork, and manual or vocational training, 35 ALR3d 758.

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Tort liability of public schools and institutions of higher learning for accidents occurring during use of premises and equipment for other than school purposes, 37 ALR3d 712.

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Contributory negligence as defense to action for injury or damage caused by accidental starting up of parked motor vehicle, 43 ALR3d 930.

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Imputation of contributory negligence of servant or agent to master or principal, in action by master or principal against another servant or agent for negligence in connection with his duties, 57 ALR3d 1226.

Liability or recovery in automobile negligence action as affected by absence on insufficiency of lights on parked or standing motor vehicle, 61 ALR3d 13.

Permitting child to walk to school unattended as contributory negligence of parents in action for injury to or death of child, 62 ALR3d 541.

Liability or recovery in automobile negligence action arising out of collision or upset as affected by operation of vehicle without front lights, or with improper front lights, 62 ALR3d 560.

Liability or recovery of automobile negligence action arising out of collision or upset as affected by operation of vehicle without or with improper taillights or rear reflectors, 62 ALR3d 771.

Liability or recovery in automobile negligence action arising out of collision or upset as affected by operation of vehicle without, or with improper, clearance, load, or similar auxiliary lights, 62 ALR3d 844.

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Liability to spectator at baseball game who is hit by ball or injured as a result of other hazards of game, 91 ALR3d 24.

Automobile occupant's failure to use seat belt as contributory negligence, 92 ALR3d 9.

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Medical malpractice: patient's failure to return, as directed, for examination or

treatment as contributory negligence, 100 ALR3d 723.

Motor vehicle passenger's contributory negligence or assumption of risk where accident resulted from driver's drowsiness, physical defect, or illness, 1 ALR4th 556.

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Liability for injury incurred in operation of power golf cart, 66 ALR4th 622.

Comparative fault: calculation of net recovery by applying percentage of plaintiff's fault before or after subtracting amount of settlement by less than all joint tort-feasors, 71 ALR4th 1108.

Products liability: contributory negligence or assumption of risk as defense in negligence action based on failure to provide safety device for product causing injury, 75 ALR4th 443.

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Rescue doctrine: applicability and application of comparative negligence principles, 75 ALR4th 875.

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Intentional provocation, contributory or comparative negligence, or assumption of risk as defense to action for injury by dog, 11 ALR5th 127.

Applicability of comparative negligence principles to intentional torts, 18 ALR5th 525.

Liability for injury to customer or patron from amusement device maintained by store or shopping center for use of customers, 40 ALR5th 807.

Failure to use or misuse of automobile child safety seat or restraint system as affecting recovery for personal injury or death, 46 ALR5th 557.

Comparative negligence of driver as defense to enhanced injury, crashworthiness, or second collision claim, 69 ALR5th 625.

Comparative negligence, contributory negligence, and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow, 83 ALR5th 589.

Liability to spectator at baseball game who is hit by ball or injured as result of other hazards of game — failure to provide or maintain sufficient screening, 82 A.L.R.6th 417.

51-11-8. Liability of person employed by compressed gas dealer who provides assistance upon request of law enforcement agency.

(a) Any person employed by a licensed compressed gas dealer who provides assistance upon request of any law enforcement agency, fire department, rescue or emergency squad, or any governmental agency in the event of an accident or other emergency involving the use, handling, transportation, transmission, or storage of liquefied petroleum gas, when the reasonably apparent circumstances require prompt decisions and actions, shall not be liable for any civil damages resulting from any act of commission or omission on his part in the course of his rendering such assistance unless such acts or omissions amount to willful or wanton negligence or intentional wrongdoing. Nothing in this Code section shall be deemed or construed to relieve any person from liability for civil damages: (1) where the accident or emergency referred to in this subsection involved his own facilities or equipment or (2) resulting from any act of commission or omission on his part in the course of providing care or assistance in the normal and ordinary course of conducting his own business or profession, nor shall this Code section be construed to relieve from liability for civil damages any other tort-feasor not referred to in this Code section.

(b) Nothing in subsection (a) of this Code section applies to the rendering of such care, assistance, or advice where the same is rendered for remuneration beyond reimbursement for out-of-pocket expenses in connection therewith, or with the expectation of such remuneration, from the recipient or recipients of such care, assistance, or advice or someone on his or their behalf.

(c) Subsection (a) of this Code section shall not preclude liability for civil damages as the result of gross negligence or intentional misconduct. Reckless, willful, or wanton misconduct shall constitute gross negligence. (Code 1933, § 105-1807, enacted by Ga. L. 1982, p. 2211, § 1; Code 1981, § 51-11-8, enacted by Ga. L. 1982, p. 2211, § 2; Ga. L. 1983, p. 3, § 40.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, in the second sentence of subsection (a) "in this subsection" was substituted for "above".

RESEARCH REFERENCES

ALR. — Construction and application of "Good Samaritan" statutes, 68 ALR4th 294.

51-11-9. Immunity from civil liability for threat or use of force in defense of habitation.

A person who is justified in threatening or using force against another under the provisions of Code Section 16-3-21, relating to the use of force in defense of self or others, Code Section 16-3-23, relating to the use of force in defense of a habitation, or Code Section 16-3-24, relating to the use of force in defense of property other than a habitation, has no duty to retreat from the use of such force and shall not be held liable to the person against whom the use of force was justified or to any person acting as an accomplice or assistant to such person in any civil action brought as a result of the threat or use of such force. (Code 1981, § 51-11-9, enacted by Ga. L. 1986, p. 515, § 1; Ga. L. 2006, p. 477, § 3/SB 396.)

51-11-10. Property owner selling timber not liable for trespass or conversion of property caused by third party; establishment of property boundaries.

There shall be a rebuttable presumption that a property owner selling timber from his or her land and acting in good faith shall not be liable to adjoining landowners for any trespass or conversion of property caused by a third party timber harvester who is not subject to the control and direction of the property owner selling timber if, prior to the harvesting of such timber:

(1) A land surveyor possessing a certificate of registration issued by the State Board of Registration for Professional Engineers and Land Surveyors has surveyed the property from which the timber is to be harvested and plainly established and clearly marked the metes and bounds of the property such that a reasonable person would know or should have known of the existence of such markings when harvesting the timber and has provided a copy of that survey to the third-party timber harvester;

(2) The boundaries of the property from which timber is sold have been completely and accurately indicated using physical markers that are clearly visible such that a reasonable person would know or should have known of the existence of such physical markers; or

(3) The property owner has obtained a document indicating where the boundaries are and signed by adjoining landowners indicating that they agree on the location of such boundaries and has provided a copy of such document to the third-party timber harvester; provided, however, that such document shall only create a presumption in favor of the property owner with regard to those landowners who have signed such document. (Code 1981, § 51-11-10, enacted by Ga. L. 2014, p. 695, § 6/HB 790.)

Cross references. — Accrual of action for loss of timber, § 9-3-32.

ARTICLE 2

SATISFACTION

RESEARCH REFERENCES

ALR. — Comparative fault: calculation of net recovery by applying percentage of plaintiff's fault before or after subtracting amount of settlement by less than all joint tort-feasors, 71 ALR4th 1108.

51-11-20. Satisfaction and settlement of tort authorized; what agreements allowed where tort constitutes crime.

(a) If a tort does not amount to a crime, the person injured may consent to a satisfaction and settlement thereof.

(b)(1) If a tort amounts to a crime, the person injured may agree upon and receive compensation for the personal injury.

(2) However, any attempt to satisfy the public offense or to suppress a prosecution therefor is illegal and will vitiate the entire agreement, except in those cases for which the law expressly allows such a settlement. Such an attempt to satisfy or to suppress prosecution of a public offense which amounts to a felony is itself an offense under this Code; and, even if executed, an agreement to this effect shall be no defense to an action for the tort. If the offense does not amount to a felony and the agreement is fully executed, such agreement shall constitute satisfaction for the private tort. (Orig. Code 1863, §§ 2986, 2987; Code 1868, §§ 2999, 3000; Code 1873, §§ 3054, 3055; Code 1882, §§ 3054, 3055; Civil Code 1895, §§ 3894, 3895; Civil Code 1910, §§ 4491, 4492; Code 1933, §§ 105-1901, 105-1902.)

Cross references. — Penalty for compounding a crime, § 16-10-90.

JUDICIAL DECISIONS

When each of two persons relinquishes claim against other mutual accord and satisfaction is effected regardless of respective amounts involved, and this bars any further recourse on the part of either as to such claims. Reese v. Brown, 93 Ga. App. 10, 90 S.E.2d 683 (1955).

Accord without satisfaction is no bar; it is only complete when all is done that was to be done in satisfaction. Campbell Coal Co. v. Pano, 51 Ga. App. 232, 180 S.E. 139 (1935).

Willingness or readiness to pay or perform is not equivalent of performance or payment, and is therefore not satisfaction; nothing short of actual performance or payment, meaning perfor-

mance or payment accepted, will suffice. Campbell Coal Co. v. Pano, 51 Ga. App. 232, 180 S.E. 139 (1935).

Release of one joint tort-feasor releases all. Rowland v. Lewis, 109 Ga. App. 755, 137 S.E.2d 387 (1964).

The release of one joint tort-feasor automatically, by operation of law, operates to release them all, regardless of intent. Henslee v. Houston, 566 F.2d 475 (5th Cir. 1978).

Release extinguishes claim. — There can be but one satisfaction of the same damage or injury; and if, instead of merely dismissing one's suit against one of two defendants sued jointly, the plaintiff proceeds, for a consideration, to fully settle and satisfy the plaintiff's claim against one, he cannot by the terms of such accord and satisfaction, when the injury or damage complained of is the same, limit the release to the defendant thus dealt with, but in such case the claim itself becomes extinguished. Moore v. Smith, 78 Ga. App. 49, 50 S.E.2d 219 (1948); Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

There may be but one compensation for single injury. Rowland v. Lewis, 109 Ga. App. 755, 137 S.E.2d 387 (1964).

Settlement for personal injury will bar property claims in most cases. — A single wrongful or negligent act which injures both one's person and one's property gives one but a single cause of action, in the absence of a waiver by the defendant to the bringing of separate suits for the injuries to one's person and to one's property, and a settlement of the personal damage will bar an action for damage on account of injuries to the property when the property and personal damages are the result of a single wrongful or negligent act. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

A single negligent act which injures both one's person and one's property gives rise to but a single cause of action, and the injured person may not by settlement extinguish a part of the cause of action and then proceed with the remainder. Gregory v. Schnurstein, 94 Ga. App. 330, 94 S.E.2d 514 (1956).

Full compensation bars further claims. — It is a well-settled doctrine of the law that complete satisfaction for an injury received from one person in consideration of one's release operates to discharge all who are liable therefor, whether they be joint or several wrongdoers. Edmondson v. Hancock, 40 Ga. App. 587, 151 S.E. 114 (1929).

When automobile owner has been fully compensated for damage to the owner's automobile by payment by the owner's insured of damages less the deductible amount, and by payment by other party to the collision of the deductible amount, an automobile owner has no cause of action against the other party and may not maintain suit in the owner's name for use of the owner and the owner's insurer, as subrogee. King v. Prince, 89 Ga. App. 588, 80 S.E.2d 222 (1954).

Release for full settlement includes claims for injury resulting from improper treatment. — A release, executed and delivered to the employer by an injured employee in consideration of the payment of a certain sum, acknowledging full satisfaction of all claims arising from the accident in question, covered and included a claim for injurious results alleged to have been caused by malpractice of a physician who was employed at the time of the injury to treat the employee. Edmondson v. Hancock, 40 Ga. App. 587, 151 S.E. 114 (1929).

There is decided difference between consequence of accord and satisfaction, and that of mere covenant not to sue one of the defendants. Moore v. Smith, 78 Ga. App. 49, 50 S.E.2d 219 (1948).

Covenant not to sue does not release other defendants. — The release from liability, for a consideration, of one of two defendants sued jointly released the other, for there can be but one satisfaction of the same claim for damage or injury; but when the clear intendment of the agreement between the plaintiff and the dismissed defendant is but a covenant not to sue and not an accord and satisfaction of the claim itself, the other defendant is not released. Moore v. Smith, 78 Ga. App. 49, 50 S.E.2d 219 (1948).

Fraud in procurement of release will render it voidable. Henslee v. Houston, 566 F.2d 475 (5th Cir. 1978).

Avoiding release fraudulently obtained. — One seeking to avoid the ef-

fects of a release and a plea of accord and satisfaction based thereon on the ground of fraud must show either a rescission and tender back to the other party of the fruits of that contract before commencing the suit, or an excuse for the failure to so rescind and tender back such fruits; this case is distinguishable from those cases wherein the allegations or facts show that the payment made to the plaintiff under the purported agreement was in fact made in satisfaction of another and entirely distinct obligation which was owing the plaintiff by the defendant and was in no way connected with the occurrence complained of in the petition. Drew v. Lyle, 88 Ga. App. 121, 76 S.E.2d 142 (1953).

Parol evidence is not admissible to vary terms of release. Maxey v. Hospital Auth., 245 Ga. 480, 265 S.E.2d 779 (1980), overruled on other grounds, Williams v. Physicians & Surgeons Community Hosp., 249 Ga. 480, 292 S.E.2d 705 (1982).

When it is sought to set aside a written instrument which is a full contract of release from all further claims, and not merely a receipt, a parol evidence is not admissible to vary or alter its terms. Henslee v. Houston, 566 F.2d 475 (5th Cir. 1978).

Third parties cannot dispose of chose in action belonging exclusively to another without one's consent prior to the disposition or one's ratification of the act thereafter. Rowland v. Lewis, 109 Ga. App. 755, 137 S.E.2d 387 (1964).

Release of servant releases master. — When the liability, if any, of the master to a third person is purely derivative and dependent entirely upon the principle of respondeat superior, and although not technically a joint tort-feasor, the master may be sued alone or jointly with the servant but a judgment in favor of the servant on the merits (and by analogy, a release of the servant from liability) will bar an action against the master, when the injury and damage are the same. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

When in an action for damages growing out of a collision between the truck of the plaintiffs, driven by their servant, and the truck of the defendants, driven by their servant, which resulted in certain property damage to the plaintiffs' truck and certain personal injuries to the defendants' servant, the plaintiffs and the defendants' servant enter into an agreement, whereby the defendants' servant for and in consideration of the payment of a certain sum by the plaintiffs, releases the plaintiffs from all claims, anticipated and unanticipated, growing out of the collision, the release constitutes a settlement of the plaintiffs' claims against the servant, and a settlement of the plaintiffs' claims against the servant necessarily constitutes a release of the defendants as there can be only one satisfaction of the same injuries. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

Settlement by employer not necessarily bar to action by employee. — The mere fact that an employer chose to make a settlement and obtained a release of all claims purporting to release both the employer and employee, following a motor vehicle collision, will not bar the employee from the employee's own right of action. Rowland v. Lewis, 109 Ga. App. 755, 137 S.E.2d 387 (1964).

Alleged payment of money by the plaintiff demanded for the plaintiff's release from illegal imprisonment, did not amount to accord and satisfaction or bar the plaintiff from maintaining an action for false imprisonment or for slander. Duchess Chenilles, Inc. v. Masters, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

Release may be given to discharge claim of fraud. Henslee v. Houston, 566 F.2d 475 (5th Cir. 1978).

Failure to prosecute not criminal compounding when not consideration for civil settlement. — When property was damaged in the commission of a felony, and the owner accepted promissory notes in settlement of the damage and thereby released the one suspected of the crime from any civil liability for damage done, and no settlement of the criminal offense was attempted, although afterwards the owner failed to institute a criminal prosecution against the offender, but, since the failure to prosecute was not a part of the consideration, the transaction did not amount to a compounding of a

crime, but amounted only to a satisfaction of the civil wrong which grew out of the perpetration of the criminal act. Hill v. Jones, 40 Ga. App. 289, 149 S.E. 323 (1929).

Instruments given to prevent prosecution. — A note given to prevent the prosecution of an agent who fails to account for funds the agent has collected is void even in the hands of a bona fide purchaser for value. Godwin v. Crowell, 56 Ga. 566 (1876); Wheaton v. Ansley, 71 Ga. 35 (1883); Jones v. Dannenberg Co., 112 Ga. 426, 37 S.E. 729, 52 L.R.A. 271 (1900).

Deed given to secure release of embezzler is void. Southern Express Co. v. Duffey, 48 Ga. 358 (1873).

Amount equal to compensation immaterial. — It makes no difference that the amount received or agreed to be paid is not more than a fair competition for the injury, if the settlement of the felony forms any part of the agreement. Chandler v. Johnson, 39 Ga. 85 (1869).

Equitable estoppel not allowed. — A prosecutor who received a deed of property under an agreement to compound a felony can not invoke the aid of an equitable estoppel against the true owner, who was not a party to the deed. Deen v. Williams, 128 Ga. 265, 57 S.E. 427 (1907); Cromer v. Evett, 11 Ga. App. 654, 75 S.E. 1056 (1912).

Recovery of property transferred to suppress prosecution. — A wife may recover her property, given by her husband, without her consent, to suppress a criminal prosecution. Harris v. Webb & Rutledge, 101 Ga. 84, 28 S.E. 620 (1897).

Once indictment occurs, O.C.G.A. § 17-8-2 (presentment of indictment to jury) applies, and the defendant and victim may not settle the offense between themselves without approval of the court. Pratt v. State, 167 Ga. App. 819, 307 S.E.2d 714 (1983).

Cited in Shepard v. Morrison, 121 Ga. App. 762, 175 S.E.2d 407 (1970); Solleck v. Laseter, 126 Ga. App. 137, 190 S.E.2d 148 (1972); Smith v. Hornbuckle, 140 Ga. App. 871, 232 S.E.2d 149 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Accord and Satisfaction, § 6.

C.J.S. — 1 C.J.S., Accord and Satisfaction, § 8.

ALR. — Avoidance of release of claims for personal injuries on ground of mistake or fraud relative to the extent or nature of injuries, 48 ALR 1462; 71 ALR2d 82.

What amounts to settlement of action within contractual provision in relation to compensation of attorney, 55 ALR 428.

Employment or reinstatement as consideration for release of claim for injuries, 58 ALR 1312.

Release of one tort-feasor as affecting liability of others, 66 ALR 206; 104 ALR 846; 124 ALR 1298; 148 ALR 1270.

Retention of consideration paid under release in settlement of claim as ratification, 76 ALR 344.

Rule that release of one tort-feasor releases others, as applicable to cause of action which is punitive rather than compensatory in its nature, 85 ALR 1164.

Representation by insurer's agent as to nonliability as fraud avoiding release, 96 ALR 1001.

Jurisdiction of court of law to avoid or reform release of claim for personal injuries on ground of mutual mistake, 96 ALR 1144.

Release or compromise by parent of cause of action for injuries to child as affecting right of child, 103 ALR 500.

Amount paid by one alleged joint tort-feasor in consideration of covenant not to sue (or a release not effectively a full release of the other joint tort-feasor), as pro tanto satisfaction of damages recoverable against other joint tort-feasor, 104 ALR 931.

Rule that release of one joint tort-feasor releases other as applicable in case of anticipatory release prior to accident or injury, 112 ALR 78.

Release by insured after accident or disability which ultimately results in his death as affecting right of beneficiary in respect of indemnity under accident policy or life policy with accident or disability feature, 115 ALR 425.

Agreement with one tort-feasor that any judgment that may be recovered will

not be enforced against him, as affecting liability of cotort-feasor, 160 ALR 870.

Payment of, or proceeding to collect, judgment against one tort-feasor as release of others, 166 ALR 1099.

Release as covering claims of which releasor was ignorant, 171 ALR 184.

Discretion of court to vacate its approval of settlement or release in respect of personal injury to minor, 8 ALR2d 460.

Release of one of joint and several defalcating tortfeasors as releasing insurer which was surety on fidelity bond of each, 35 ALR2d 1122.

Collision insurance: insured's release of tortfeasor before settlement by insurer as releasing insurer from liability, 38 ALR2d 1095.

Rights and remedies of insurer paying loss as against insured who has released or settled with third person responsible for loss, 51 ALR2d 697.

Interest on consideration returned or tendered as condition of setting aside release or compromise, 53 ALR2d 749.

Right of action for fraud, duress, or the like, causing instant plaintiff to release or compromise a cause of action against third person, 58 ALR2d 500.

Avoidance of release of claims for personal injuries on ground of fraud or mistake as to the extent or nature of injuries, 71 ALR2d 82.

Settlement with or release of person directly liable for injury or death as releasing liability under civil damage act, 78 ALR2d 998.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 ALR2d 533.

Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 ALR3d 456.

Release of one responsible for injury as affecting liability of physician or surgeon for negligent treatment of injury, 39 ALR3d 260.

Construction and effect of statute authorizing dismissal of criminal action upon settlement of civil liability growing out of act charged, 42 ALR3d 315.

Validity of release from civil liability where release is executed by person while incarcerated, 86 ALR3d 1230.

Modern status of rules as to avoidance of release of personal injury claim on ground of mistake as to nature and extent of injuries, 13 ALR4th 686.

Prospective juror's connection with defendant's insurance company as ground for challenge for cause, 9 ALR5th 102.

Validity and effect of "Mary Carter" or similar agreement setting maximum liability of one cotortfeasor and providing for reduction or extinguishment thereof relative to recovery against nonagreeing cotortfeasor, 22 ALR5th 483.

51-11-21. Tender of damages in tort action; effect of continuing tender.

A person committing a tort may, before or after an action is brought, tender to the person injured such an amount of damages as in his judgment will cover the injury; and, if the same shall be rejected, he may deposit the amount in the office of the clerk of the superior court of the county of his residence as a continuing tender; and, if the jury trying the cause shall give no more damages than the amount tendered, the plaintiff shall recover no costs accruing subsequently to the time of the tender. (Laws 1767, Cobb's 1851 Digest, p. 562; Code 1863, § 2988; Code 1868, § 3001; Code 1873, § 3056; Code 1882, § 3056; Civil Code 1895, § 3896; Civil Code 1910, § 4493; Code 1933, § 105-1903.)

JUDICIAL DECISIONS

Purpose. — The privilege of tendering given by this section is not granted as a resource to shun or stop interest but to avoid cost. Western & A.R.R. v. Young, 81 Ga. 397, 7 S.E. 912, 12 Am. St. R. 320 (1888).

Refers to plea of tender. — The right and privilege given to the defendant by the provisions of the section contemplates and has reference to a plea of tender filed in response to the plaintiff's suit, and not to a mere oral offer or proposal to settle the suit by a future delivery of the property involved. Downs Motor Co. v. Colbert, 34 Ga. App. 542, 130 S.E. 592 (1925).

Evidence of tender. — That a party furnished money to one's attorney with which to tender payment is no proof that either one or one's attorney made the tender as required. Hudson v. Goff, 77 Ga. 281, 3 S.E. 152 (1886).

Cited in Georgia R.R. & Banking Co. v. Monroe, 49 Ga. 373 (1873).

RESEARCH REFERENCES

ALR. — Right to withdraw tender after money deposited or paid in court to keep tender good, 73 ALR 1281.

CHAPTER 12

DAMAGES

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Cross references. — Persons who may be parties to actions for tort, § 9-2-21.

JUDICIAL DECISIONS

Abolition of collateral source rule applies prospectively only. Powell v. Stephens, 258 Ga. 149, 368 S.E.2d 518 (1988).

Cited in Padilla v. Spectorman, 159 Ga. App. 12, 282 S.E.2d 659 (1981).

RESEARCH REFERENCES

Am. Jur. Trials. — Tactics and Strategy of Pleading, 3 Am. Jur. Trials 681.

Trial Brief, 5 Am. Jur. Trials 89.

Showing Pain and Suffering, 5 Am. Jur. Trials 921.

Presenting Plaintiff's Medical Proof — Common Injuries and Conditions, 6 Am. Jur. Trials 1.

Minimizing Personal Injury Damages, 6 Am. Jur. Trials 501.

Predicting Personal Injury Verdicts and Damages, 6 Am. Jur. Trials 963.

Special Verdicts, 6 Am. Jur. Trials 1043.

Determining the Medical and Emotional Bases for Damages, 23 Am. Jur. Trials 479.

Trial Court Restrictions on Evidence of Defendant's Wealth, 30 Am. Jur. Trials 711.

Defense Use of Economist, 31 Am. Jur. Trials 287.

Cost Recovery Litigation: Abatement of Asbestos Contamination, 40 Am. Jur. Trials 317.

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Presentation and Proof of Damages in Personal Injury Litigation, 59 Am. Jur. Trials 395.

Obtaining Damages in Federal Court for State and Local Police Misconduct, 62 Am. Jur. Trials 547.

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Sexual Harassment Damages and Remedies, 73 Am. Jur. Trials 1.

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Snack Food Product Liability, 76 Am. Jur. Trials 341.

Using Taxation of Costs to Collect Some Litigation Expenses and Maximize Client Recovery, 84 Am. Jur. Trials 367.

Residential Mold as a Toxic Tort Under Homeowner's Policy, 85 Am. Jur. Trials 41.

Podiatry Malpractice Litigation, 85 Am. Jur. Trials 189.

Landlord's Recovery of Rent After Abandonment or Surrender of Leased Premises, 86 Am. Jur. Trials 1.

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Hair Transplant Malpractice Litigation, 90 Am. Jur. Trials 99.

Damages Provision Affecting Remedies for Purchaser's Default on Real Estate Contract, 91 Am. Jur. Trials 333.

Litigating Toxic Mold Cases, 92 Am. Jur. Trials 113.

Defending the Workers' Compensation Claim in the Trucking Industry, 99 Am. Jur. Trials 1.

Oncology Malpractice Litigation, 100 Am. Jur. Trials 1.

ALR. — Propriety of taking income tax into consideration in fixing damages in personal injury or death action, 16 ALR4th 589.

Excessiveness or adequacy of damages awarded for injuries causing particular diseases or conditions, 16 ALR4th 736.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sensory or speech organs and systems, 16 ALR4th 1127.

Insurer's tort liability for consequential or punitive damages for wrongful failure or refusal to defend insured, 20 ALR4th 23.

Legal malpractice: defendant's right to contribution or indemnity from original tortfeasor, 20 ALR4th 338.

Effect of anticipated inflation on dam-

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Liability of religious association for damages for intentionally tortious conduct in recruitment, indoctrination, or related activity, 40 ALR4th 1062.

Tort liability for infliction of venereal disease, 40 ALR4th 1089.

Future disease or condition, or anxiety relating thereto, as element of recovery, 50 ALR4th 13.

Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 ALR4th 530.

Newspaper's liability to reader-investor for negligent but nondefamatory misstatement of financial news, 56 ALR4th 1162.

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Consequential loss of profits from injury to property as element of damages in products liability, 89 ALR4th 11.

Collateral source rule: admissibility of evidence of availability to plaintiff of free public special education on issue of amount of damages recoverable from defendant, 41 ALR5th 771.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx § 688) or doctrine of unseaworthiness — modern cases, 96 ALR Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS § 51 et seq.) — modern cases, 97 ALR Fed. 189.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For comment, "Having an Affair May Shorten Your Life: The Ashley Madison Suicides," see 33 Georgia St. U.L. Rev. 455 (2017).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Discount Rate for Future Damages, 8 POF2d 1.

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Death of Person Not in Labor Force, 14 POF2d 311.

Losses in Cases of Disability, 15 POF2d 311.

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Establishing an Adequate Foundation for Proof of Medical Expenses, 23 POF2d 243.

Loss of Prospective Inheritance, 24 POF2d 211.

Period of Economic Loss in Death and Personal Injury Cases, 38 POF2d 195.

Recovery for Severe Burn Injuries, 1 POF3d 197.

Damages for Future Medical Needs of an Injured Child, 4 POF3d 645.

Intangible Damages for Injury to Elderly Person, 5 POF3d 323.

Rehabilitation and Life Care Needs After a Traumatic Brain Injury, 9 POF3d 1.

Psychological Effects of Physical Disfigurement, 9 POF3d 307.

Wife's Damages for Loss of Consortium, 10 POF3d 97.

Traumatic Aggravation of Preexisting Mental Disorder, 12 POF3d 323.

Damages for Loss of Chance of Cure, 12 POF3d 621.

Damages for Sexual Assault, 15 POF3d 259.

Wrongful Death of Fetus, 19 POF3d 107.

Proof of Damages for Decedent's Pain and Suffering, 24 POF3d 337.

Toxic Torts: Proof of Medical Monitoring Damages for Exposure to Toxic Substances, 25 POF3d 313.

Loss of Consortium in Parent-Child Relationship, 27 POF2d 393.

Proof of Lost Earning Capacity, 29 POF3d 259.

Liability of Ski Area Operator for Skiing Accident, 45 POF3d 115.

Liability of Skier for Collision with Another Skier, 46 POF3d 1.

Liability of an Owner or Operator of a Self-Service Filling Station for Injury or

Death of a Business Invitee on the Premises, 46 POF3d 161.

Proof of Liability for Food Poisoning, 47 POF3d 47.

Damages for Loss of Enjoyment of Life, 49 POF3d 339.

Proof of Failure to Diagnose Diabetes or Complications of Diabetes, 51 POF3d 1.

Medical Malpractice in Tonsillectomies, 57 POF3d 381.

Proof that a Teacher's License was Improperly Revoked: Teacher's Damages and Emotional Stress Award, 66 POF3d 541.

Proof of Paralysis, 67 POF3d 1.

Sexual Organ Injuries: Male Genitalia, 70 POF3d 229.

Traumatic Brain Injuries, 72 POF3d 363.

Proof of Injury Resulting from Prescription Medication Rezulin, 74 POF3d 141.

Proof of Claims Arising from Exposure to Latex Products, 78 POF3d 259.

Proof of Liability for Failure of Emergency Medical Equipment, 80 POF3d 1.

Lightning or Electrical Storm Causing Injury or Death to Employee, 81 POF3d 1.

Proof of Injury Resulting from Liposuction Surgery, 82 POF3d 1.

ALR. — Action by or on behalf of minor child, or presumed minor child, for loss of parental consortium — impact of other legal concepts and theories of recovery, 6 A.L.R.7th 4.

Action by or on behalf of minor child, or presumed minor child, for loss of parental consortium — proof, evidentiary considerations, limits of recovery, parties, 5 A.L.R.7th 4.

Action by or on behalf of minor child, or presumed minor child, for loss of parental consortium — general considerations, 4 A.L.R.7th 1.

51-12-1. Types of damages; evidence admissible in actions involving special damages.

(a) Damages may be either general or special, direct or consequential.

(b) In any civil action, whether in tort or in contract, for the recovery of damages arising from a tortious injury in which special damages are sought to be recovered or evidence of same is otherwise introduced by the plaintiff, evidence of all compensation, indemnity, insurance (other than life insurance), wage loss replacement, income replacement, or disability benefits or payments available to the injured party from any and all governmental or private sources and the cost of providing and the extent of such available benefits or payments shall be admissible for consideration by the trier of fact. The trier of fact, in its discretion, may consider such available benefits or payments and the cost thereof but shall not be directed to reduce an award of damages accordingly. (Orig. Code 1863, § 3001; Code 1868, § 3014; Code 1873, § 3069; Code 1882, § 3069; Civil Code 1895, § 3909; Civil Code 1910, § 4506; Code 1933, § 105-2005; Ga. L. 1987, p. 915, § 3.)

Law reviews. — For article, "Georgia's New Collateral Source Rule," see 39 Mercer L. Rev. 1 (1987). For article, "Recovery of Lost Profit Damages for Business Interruption or Destruction," see 28 Ga. St. B. J. 63 (1991). For annual survey on law of evidence, see 43 Mercer L. Rev. 257 (1991). For article, "The Georgia Jury and Negligence: The View From the (Federal) Bench," see 27 Ga. L. Rev. 59 (1992).

For note, "The Collateral Source Rule in Georgia: A New Method of Equal Protec-

tion Analysis Brings a Return to the Old Common Law Rule," see 8 Ga. St. U.L. Rev. 835 (1992).

JUDICIAL DECISIONS

Analysis

General Consideration
Evidence in Special Damages Cases

General Consideration

General damages are those which law presumes to flow from a tortious act, and may be awarded without proof of any specific amount, to compensate the plaintiff for the injury done the plaintiff. Alexander v. Holmes, 85 Ga. App. 124, 68 S.E.2d 242 (1951); Avery v. K.I., Ltd., 158 Ga. App. 640, 281 S.E.2d 366 (1981).

Provisions of this section are not applicable to case of slander when the plaintiff is only seeking general damages which the law presumes flows from a slanderous per se utterance. Ingram v. Kendrick, 48 Ga. App. 278, 172 S.E. 815 (1934).

The collateral source rule, which was abolished by the 1987 amendment of O.C.G.A. § 51-12-1, merely prevented the receipt of benefits or mitigation of loss from sources other than the defendant from operating to diminish the plaintiff's recovery of damages. Orndorff v. Brown, 197 Ga. App. 591, 399 S.E.2d 77 (1990).

Cited in Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Porter v. Bland, 105 Ga. App. 703, 125 S.E.2d 713 (1962); Town Fin. Corp. v. Hughes, 134 Ga. App. 337, 214 S.E.2d 387 (1975); Anthony v. Anthony, 143 Ga. App. 691, 240 S.E.2d 167 (1977); Edwards v. Wilson, 185 Ga. App. 514, 364 S.E.2d 642 (1988); Powers v. Jones, 185 Ga. App. 859, 366 S.E.2d 234 (1988); Thomas v. Clark, 188 Ga. App. 606, 373 S.E.2d 668 (1988); Wilhelm v. Atlanta Gas Light Co., 190 Ga. App. 869, 380 S.E.2d 276 (1989); Mallory v. Daniel Lumber Co., 191 Ga. App. 234, 381 S.E.2d 406 (1989); Malloy v. Elmore, 191 Ga. App. 564, 382 S.E.2d 395 (1989); DeKalb County v. Orwig, 196 Ga. App. 255, 395 S.E.2d 824 (1990); Candler Hosp. v. Dent, 228 Ga. App. 421, 491 S.E.2d 868 (1997).

Evidence in Special Damages Cases

Subsection (b) unconstitutional. — Subsection (b) of O.C.G.A. § 51-12-1 violates Ga. Const. 1983, Art. I, Sec. I, Para. II, which mandates that the paramount duty of government is the protection of person and property and that the protection shall be impartial and complete, and it is therefore void. Denton v. Con-Way S. Express, Inc., 261 Ga. 41, 402 S.E.2d 269 (1991).

In negligence action brought by bicyclist against insureds and their insurance carrier for injuries incurred when allegedly struck by the insured's vehicle, the trial court erred by denying the insured's motion to bifurcate claims for trial of negligence claim and bicyclist's claim for benefits under former no fault insurance statute based on the applicability of subsection (b) of O.C.G.A. § 51-12-1 which was held unconstitutional. Cincinnati Ins. Co. v. Reybitz, 205 Ga. App. 174, 421 S.E.2d 767 (1992).

Subsection (b) objections not waived. — Plaintiffs were not precluded from raising an objection to an unconstitutional charge because the plaintiffs, themselves, had introduced evidence of collateral source payments to support the plaintiffs' claim that the plaintiffs' damages were substantial since the plaintiffs had the right to introduce evidence of insurance payments to prove the plaintiffs' damages, or for any other reason, regardless of the existence or constitutionality of subsection (b) of O.C.G.A. § 51-12-1. Tyler v. Roberts, 204 Ga. App. 380, 419 S.E.2d 103, cert. denied, 204 Ga. App. 922, 419 S.E.2d 103 (1992).

Subsection (b) not applied retroactively. — Subsection (b) of O.C.G.A. § 51-12-1 works a substantive change in the law governing collateral benefits.

There is no express or clear intention of the legislature to give the statute retroactive effect. Therefore, the subsection shall be given prospective effect only. Polito v. Holland, 258 Ga. 54, 365 S.E.2d 273 (1988).

When the cause of action accrued before July 1, 1987, subsection (b) of O.C.G.A. § 51-12-1 is inapplicable as the subsection has been construed as substantive and should be given prospective effect only. A.H. Friedman, Inc. v. Augusta Burglar Alarm Co., 186 Ga. App. 769, 368 S.E.2d 534 (1988); Whelchel v. Thomas Ford Tractor, Inc., 190 Ga. App. 156, 378 S.E.2d 510 (1989).

Subsection (b) of O.C.G.A. § 51-12-1 shall be given prospective effect only and does not apply when the cause of action arose prior to the effective date of the statute (July 1, 1987), even when the case is tried subsequent to the statute's effective date. Quality Rental Co. v. Grier, 187 Ga. App. 5, 369 S.E.2d 276 (1988).

The trial court erred in ruling that evidence of collateral payments would be admissible since the cause of action arose prior to July 1, 1987, the date that subsection (b) of O.C.G.A. § 51-12-1 became effective. Bryan v. King, 187 Ga. App. 7, 369 S.E.2d 278 (1988).

Subsection (b) of O.C.G.A. § 51-12-1, added in 1987 and allowing the consideration of collateral source insurance benefits, has prospective application only. Le Twigge, Ltd. v. Wammock & Co., 187 Ga. App. 446, 370 S.E.2d 631 (1988).

Subsection (b) of O.C.G.A. § 51-12-1 is to be given prospective effect only; therefore, the subsection is inapplicable to an action which arose and was filed prior to July 1, 1987, the effective date of the statute. Ray v. Anderson, 189 Ga. App. 80, 374 S.E.2d 819 (1988).

In an action for damages for injuries sustained in an accident which occurred prior to the effective date of O.C.G.A. § 51-12-1, it was permissible to cross-examine the plaintiff on the availability of insurance benefits to test the plaintiff's averment that the plaintiff did not undergo a CAT scan because the plaintiff was unable to pay for the physician's services. Bridges v. Schier, 195 Ga. App. 583, 394 S.E.2d 408 (1990).

Subsection (b) of O.C.G.A. § 51-12-1 was a substantive change in the law and cannot be applied retroactively. Steverson v. Eason, 194 Ga. App. 273, 390 S.E.2d 424 (1990).

The collateral source rule of subsection (b) of O.C.G.A. § 51-12-1, which became effective July 1, 1987, cannot be given retroactive effect and operates prospectively only. United States Indus., Inc. v. Austin, 197 Ga. App. 74, 397 S.E.2d 469 (1990).

Jury charge based on subsection (b) is improper. — A jury charge, based on the unconstitutional provisions of subsection (b) of O.C.G.A. § 51-12-1 authorized the jury to calculate the amount of damages awarded in its verdict on the "inherently prejudicial" evidence of collateral source benefits, and thus was a charge which would have been likely to influence unduly the jury and deprive the plaintiff of a fair trial. Anepohl v. Ferber, 202 Ga. App. 552, 415 S.E.2d 9, cert. denied, 202 Ga. App. 906, 415 S.E.2d 9 (1992).

Plaintiff may voluntarily abandon claim. — The choice to abandon a claim for medical damages, which the plaintiff was not precluded from recovering by the statutory change in the collateral source rule, as the plaintiff's accident took place in 1985, prior to the effective date of subsection (b) of O.C.G.A. § 51-12-1, and provided no basis for reversal of the court's erroneous refusal to disallow collateral source evidence. Kelley v. Harris, 187 Ga. App. 215, 369 S.E.2d 534 (1988).

Subsection (b) applicable to property injury. — Subsection (b) of O.C.G.A. § 51-12-1, which in effect negates the operation of the "collateral source" rule in Georgia, makes no distinction between personal injury and injury to property, but employs the inclusive term "tortious injury" without any qualification, and does not apply to personal injury only. A.H. Friedman, Inc. v. Augusta Burglar Alarm Co., 186 Ga. App. 769, 368 S.E.2d 534 (1988).

Subsection (b) not applicable to contract cases. — The collateral source rule of subsection (b) of O.C.G.A. § 51-12-1 is not applicable in contract cases because collateral source evidence

Evidence in Special Damages Cases (Cont'd)

can be admitted if it is relevant to demonstrate the extent that the plaintiff's actual loss was caused by the breach. It follows that, in an action brought by a discharged employee seeking to recover for breach of an employment contract, the measure of damages is the actual loss from the breach of contract, and in estimating the amount all facts down to the time of trial may be considered. Amalgamated Transit Union Local 1324 v. Roberts, 263 Ga. 405, 434 S.E.2d 450 (1993).

Door not open for admission of collateral source evidence. — Plaintiff did not open the door for admission of collateral source evidence when the plaintiff injected at trial issues related to the financial hardship the plaintiff suffered as a result of the accident, and the plaintiff's explanation that a gap in treatment by one of the plaintiff's physicians was due to the plaintiff's inability to continue to pay for the medical treatment. Hayes v. Gary Burnett Trucking, Inc., 203 Ga. App. 693, 417 S.E.2d 676, cert. denied, 203 Ga. App. 906, 417 S.E.2d 721 (1992).

Ability to pay for medical treatment. — When plaintiff opens the door and testifies that lack of insurance or financial hardship prevented the plaintiff from seeking medical treatment, the defendant is allowed to cross-examine the plaintiff on this point in a narrow, limited manner. Moore v. Mellars, 208 Ga. App. 69, 430 S.E.2d 179 (1993).

In a wrongful death action, evidence as to the availability of collateral insurance benefits to an individual, who died as the result of an automobile accident, to pay marked bills, was relevant and admissible to impeach testimony prosecuted by the plaintiffs as to the individual's inability to afford the extensive medical treatment the individual would need as the result of the individual's injuries. Patterson v. Lauderback, 211 Ga. App. 891, 440 S.E.2d 673 (1994).

Receipt of no-fault benefits. — The trier of fact has no discretion as to whether an award of damages will be reduced based upon the plaintiff's receipt of no-fault benefits for economic damages because the plaintiff is precluded from recovering those damages. Thus, evidence of the plaintiff's receipt of no-fault benefits is not admissible as evidence of the plaintiff's receipt of payment from a collateral source. Bonds v. Burch, 196 Ga. App. 125, 395 S.E.2d 379 (1990).

Trial court, which had not followed the "approved" procedure for trying a no-fault tort action, correctly wrote off $2,500 in no-fault benefits as the amount of economic damages which were nonrecoverable under former § 33-34-9(b), since the jury had awarded economic damages unreduced by receipt of payment from any collateral source whatsoever. Bonds v. Burch, 196 Ga. App. 125, 395 S.E.2d 379 (1990).

No setoff when there is absolute promise to pay any liability. — The fact that the plaintiffs had other benefits or insurance "available" would be admissible for the factfinders' consideration as to damages, but one who is bound by an absolute promise to pay any liability is not entitled to a setoff by O.C.G.A. § 51-12-1. J.C. Penney Cas. Ins. Co. v. Woodard, 190 Ga. App. 727, 380 S.E.2d 282 (1989).

Assumption of proper charge. — The trial court's denial of the plaintiff's motion for a new trial was correct since the plaintiff did not designate as part of the record that portion of the transcript containing the charge to the jury. Therefore, it is assumed that the trial court gave a proper charge on consideration of collateral source evidence. Willard v. Wilburn, 203 Ga. App. 393, 416 S.E.2d 798, cert. denied, 203 Ga. App. 908, 416 S.E.2d 798 (1992).

Retroactive application of *Denton.* — The holding in *Denton v. Conway S. Express,* 261 Ga. 41, 402 S.E.2d 269 (1991), which declared subsection (b) of O.C.G.A. § 51-12-1 unconstitutional, should have been applied retroactively to a motion for a new trial in an action pending when Denton was decided. McDonald v. Simmons, 207 Ga. App. 692, 428 S.E.2d 690 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, §§ 1 et seq., 18.

C.J.S. — 25 C.J.S., Damages, § 2.

ALR. — Separate trial of issues of liability and damages in tort, 85 ALR2d 9.

Validity and construction of state statute abrogating collateral source rules as to medical malpractice actions, 74 ALR4th 32.

51-12-2. General and special damages distinguished; when recovered.

(a) General damages are those which the law presumes to flow from any tortious act; they may be recovered without proof of any amount.

(b) Special damages are those which actually flow from a tortious act; they must be proved in order to be recovered. (Orig. Code 1863, § 3002; Code 1868, § 3015; Code 1873, § 3070; Code 1882, § 3070; Civil Code 1895, § 3910; Civil Code 1910, § 4507; Code 1933, § 105-2006.)

Law reviews. — For note criticizing Georgia's adherence to the special damages requirement for actions of malicious use of legal process absent plaintiff's arrest or the attachment of property, see 13 Mercer L. Rev. 396 (1962).

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General damages are those which law presumes to flow from tortious act, and may be awarded without proof of any specific amount, to compensate the plaintiff for the injury done. Alexander v. Holmes, 85 Ga. App. 124, 68 S.E.2d 242 (1951); Georgia Power Co. v. Womble, 150 Ga. App. 28, 256 S.E.2d 640 (1979); Callahan v. Panfel, 195 Ga. App. 891, 395 S.E.2d 80 (1990).

Petition setting forth alleged torts, and claiming damages generally in named amount, states cause of action for recovery of general damages, nominal damages, and punitive damages, as the evidence might show; and is not subject to dismissal as claiming no recoverable damages. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943).

Damages construed as general when not otherwise stated. — A plea which alleges no special damages is to be construed as one which claims general damages only. Atlanta Glass Co. v. Noizet, 88 Ga. 43, 13 S.E. 833 (1891).

If the pleadings are not expressly limited, a petition setting forth a tort, and claiming unspecified damages in a stated amount, will be construed as seeking general damages, so as to authorize their recovery; and even though the injury be slight and no actual damage be shown, at least nominal damages would be recoverable. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943).

Damages governed by specific state or federal law. — Award for general damages under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is limited to those damages that can be measured by actual injury suffered, and the general provisions of subsection (a) of O.C.G.A. § 51-12-2 are not applicable. Regency Nissan, Inc. v. Taylor, 194 Ga. App. 645, 391 S.E.2d 467 (1990).

Damages under Fair Business Practices Act. — An award for general damages under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is limited to those damages that can be measured by an actual injury suffered, and the general provisions of O.C.G.A. § 51-12-2 are not applicable; furthermore, claims under the Act for equitable relief, exemplary damages, treble damages, and attorney's fees are dependent on actual injury

or damage resulting from a violation of the Act. Tiismann v. Linda Martin Homes Corp., 279 Ga. 137, 610 S.E.2d 68 (2005).

Punitive damages are general damages. — Punitive damages are included in the genus general damages. Atlantic Coast Line R.R. v. Thomas, 14 Ga. App. 619, 82 S.E. 299 (1914).

Bodily pain and suffering inferred from personal injury. — Bodily pain and suffering are inferred from personal injury, and loss of time from the disabling effect thereof. County of Bibb v. Ham, 110 Ga. 340, 35 S.E. 656 (1900).

Duty of jury in assessing general damages. — The jury, in giving general damages, must observe the cardinal rule of law, which is that damages are given only as compensation for the injury done. Batson v. Higginbothem, 7 Ga. App. 835, 68 S.E. 455 (1910).

Special damages are sustained when there is loss of money, or some other material temporal advantage capable of being assessed in monetary value. Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985, 94 S. Ct. 1580, 39 L. Ed. 2d 882 (1974).

Requirement of special damages is satisfied if the plaintiff knows the flow of the plaintiff's business as a whole is diminished, and it is impossible to point to any specific customers, or orders which have been lost. Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985, 94 S. Ct. 1580, 39 L. Ed. 2d 882 (1974).

If only special or punitive damages are expressly pled and prayed, recovery is limited to damages thus sought. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943).

Mere failure of the petition to allege facts showing the correct measure of damages does not render petition bad as against general demurrer (now motion to dismiss) when the petition otherwise sets out a cause of action. When it appears from the allegations of the petition that the plaintiff is entitled to recover, and the amount of the plaintiff's damage is alleged, the petition is good as against general demurrer (now motion to dismiss). Horwitz v. Teague, 77 Ga. App. 386, 48 S.E.2d 697 (1948).

Extent of proof of special damages. — The proof of special damage must be sufficient to enable the jury to estimate the amount thereof, with reasonable certainty. The exact figures need not be submitted. National Refrigerator & Butchers Supply Co. v. Parmalee, 9 Ga. App. 725, 72 S.E. 191 (1911).

Cost of vehicle repairs. — Even when a plaintiff seeks recovery for the cost of repairs of a vehicle only and does not also seek recovery for loss of use and diminution in value, the plaintiff must prove the fair market value of the vehicle immediately prior to the collision since the cost of repairs cannot exceed such a value. Canal Ins. Co. v. Tullis, 237 Ga. App. 515, 515 S.E.2d 649 (1999).

Physicians' bills are special damages. — Physicians' bills, expenses of nursing, and the like are ranked as special damages, and can not be recovered without any special averment in regard to them. Central Ga. Power Co. v. Fincher, 141 Ga. 191, 80 S.E. 645 (1913).

Damages in legal malpractice. — Following a finding of legal malpractice, property owners were entitled to special damages under O.C.G.A. § 51-12-2(a) for legal fees and general damages under § 51-12-2(b) based on damage to the owner's business, the anguish of the owner's spouse, and interference with the quiet enjoyment of the owners' property that flowed directly and foreseeably from the attorneys' malpractice. The owner's initial visit to the attorneys was a plea to protect the owners from the consequences of a levy and sale of an interest in the owners' residence, and the sale was exactly what the attorneys failed to prevent. Pullen v. Cornelison (In re Pullen), No. 07-6220, 2010 Bankr. LEXIS 5106 (Bankr. N.D. Ga. Aug. 4, 2010).

Contract actions. — Even though the statutory definitions of general and special damages refer to tortious acts, general and special damages also may be recovered in contract actions if the damages are not remote or consequential and arose naturally and according to the usual course of things from the breach. Bill Parker & Assocs. v. Rahr, 216 Ga. App. 838, 456 S.E.2d 221 (1995).

Lost profits are recoverable as damages if such are shown with reason-

able certainty. DeVane v. Smith, 154 Ga. App. 442, 268 S.E.2d 711 (1980).

Establishment of provable estimated net loss. — In order to make out right to damages for lost profits, parties are obligated to establish with reasonable certitude their provable estimated net loss of profits by showing the factors giving rise to the provable estimated gross revenues less the provable estimated expenses. Bennett v. Smith, 245 Ga. 725, 267 S.E.2d 19 (1980).

Slander and libel actions. — Special damages must be alleged and proved in slander and libel cases, unless the words are actionable per se. Windsor & Jowers v. Oliver, 41 Ga. 538 (1871); Ransone v. Christian, 56 Ga. 351 (1876).

Defamation impacting hiring. — Since the plaintiff remained employed and received all raises due the plaintiff, when the plaintiff offered no evidence that the plaintiff's failure to receive a part-time job for which the plaintiff applied was the result of the plaintiff's alleged defamation, and the plaintiff's voluntary act of hiring an attorney when the plaintiff was a witness before a personnel review board did not actually flow from the defendants' allegedly tortious acts, the plaintiff showed no special damages. Meyer v. Ledford, 170 Ga. App. 245, 316 S.E.2d 804 (1984).

General damages for slander may be recovered under O.C.G.A. § 51-12-2(a) when a defendant has intentionally and wantonly injured the plaintiff's reputation through slander without proof of any amount; when an injured party claimed that the slander concerned the injured party's profession, damage was inferred under O.C.G.A. § 51-5-4(b). Galardi v. Steele-Inman, 259 Ga. App. 249, 576 S.E.2d 555 (2002).

Slander of title action. — Trial court did not err by granting summary judgment to the defendants on the plaintiff's claim of slander of title alleging that the estate suffered special damages by the loss in value of the slandered property because the plaintiff failed to raise an issue of fact regarding special damages as the plaintiff did not bring forth any facts regarding the value of the property at any time between April 2009, the date the forged assignment was recorded, to March 2011, the date of the Supreme Court's decision quieting title to the property; and the plaintiff did not show how the value of the property during that period suffered from the fact that the forged assignment was recorded. Veatch v. Aurora Loan Servs., LLC, 331 Ga. App. 597, 771 S.E.2d 241 (2015).

Special damage from a nuisance. — When special damages arising from a nuisance occur, the allegations should be sufficiently specific to authorize the defendant of the items thereof. Exley v. Southern Cotton Oil Co., 151 F. 101 (S.D. Ga. 1907).

Damages for nuisance and negligence. — Fact that the jury chose to allocate certain amounts of the special damages proven by the testimony between nuisance and negligence claims was not reversible error because the testimony established damages to the property, including diminished value and costs to protect the property, and that total amount was not reflected in the jury's nuisance award; under O.C.G.A. § 51-12-2(a), the jury was authorized to award additional general damages based on the parties' negligence within its enlightened conscience and based on the testimony presented at trial. Ingles Mkts., Inc. v. Kempler, 317 Ga. App. 190, 730 S.E.2d 444 (2012).

Nominal damages when land overflowed. — When water from a mill dam overflows another's land, nominal damages are recoverable when special damages are not alleged. Ellington v. Bennett, 59 Ga. 286 (1877).

Nominal damages not proper when only special damages sought. — When a suit is for special damages alone, which are not recoverable, a recovery of nominal damages will not be granted. Sparks Milling Co. v. Western Union Tel. Co., 9 Ga. App. 728, 72 S.E. 179 (1911).

Judge must instruct jury on estimating damages when several elements claimed. — When several different elements of damage are claimed, it is error requiring the grant of a new trial for the judge to fail in the judge's charge to the jury to give the jury any rule for estimating the damages claimed; and this

is true notwithstanding no written request for such charge is made by the defendant. Southeastern Greyhound Lines v. Hancock, 71 Ga. App. 471, 31 S.E.2d 59 (1944).

Award excessive. — Trial court erred when the court denied a bank's motion for a new trial in a fraud case because the amount of damages awarded was excessive in that the evidence adduced at trial did not authorize the jury's award of $100,000 against the bank because the suing construction company alleged and proved only economic harm in an amount substantially less than that award, namely $9,400 via a materialman's lien, and renovation expenses in the amount of $23,000. Further, the jury's award of an additional $55,000 against the bank as punitive damages was erroneous since there was no charge on punitive damages, let alone proper guidance on the clear and convincing evidence required; the verdict form did not pose the question of punitive damages except by quotation of O.C.G.A. § 51-12-5.1(f), which required the jury to find specific intent to cause harm before the jury could award punitive damages in excess of $250,000; and the proceedings were not properly bifurcated. First Southern Bank v. C & F Servs., 290 Ga. App. 304, 659 S.E.2d 707 (2008).

Court has no duty to instruct on special damages absent request. — The law allowing special damages as actually flowed from the act, but which must be proved in order to be recovered, does not embody a substantial, vital, and controlling issue presented by pleadings and evidence, and the court has no duty to so instruct in the absence of a special request. Homasote Co. v. Stanley, 104 Ga. App. 636, 122 S.E.2d 523 (1961).

If special damages are not asked for, it is error to charge latter part of this section. Sammons v. Wilson, 20 Ga. App. 241, 92 S.E. 950 (1917).

Negligent false imprisonment. — For a discussion of the nature of damages sustained by a person who suffers a false imprisonment through the negligence of another, see Baggett v. National Bank & Trust Co., 174 Ga. App. 346, 330 S.E.2d 108 (1985).

Award in nuisance suit not excessive. — In a nuisance suit brought by a property owner against the City of Atlanta, which involved the city failing to properly maintain a storm pipe that traversed and served the property owner's land and resulted in extensive flooding of the land and the home, the trial court properly awarded compensatory damages in the amount of $300,000 and that amount was not excessive, as a matter of law, as there was evidence that the property owner suffered special damages in the amount of $203,376, including loss of personal property, diminution in the value of the property, and rental expenses incurred when the property owner was forced to move from the home. There was also sufficient evidence to support an award of damages for personal injuries and damages for annoyance and discomfort based on the property owner spending over seven years battling sinkholes in the yard and flooding in the home, the home being infested with rats, insects, and mold, and the property owner's physician testifying that the property owner smelled of mold and suffered from mold-induced migraines. City of Atlanta v. Hofrichter, 291 Ga. App. 883, 663 S.E.2d 379 (2008).

Damages on fraud claim. — In a breach of contract and fraud action, the appellate court refused to disturb the jury's verdict awarding the lessor general damages because such damages were available on a fraud claim and there simply was no basis to overturn the verdict. Goody Prods. v. Dev. Auth. of Manchester, 320 Ga. App. 530, 740 S.E.2d 261 (2013).

Cited in Bass v. Postal Telegraph-Cable Co., 127 Ga. 423, 56 S.E. 465, 12 L.R.A. (n.s.) 489 (1907); Coleman v. Dublin Coca-Cola Bottling Co., 47 Ga. App. 369, 170 S.E. 549 (1933); Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939); Smith v. Fischer, 59 Ga. App. 791, 1 S.E.2d 684 (1939); First Bancredit Corp. v. J.G. McKenzie Lumber Co., 65 Ga. App. 595, 16 S.E.2d 191 (1941); Gloss v. Jacobs, 86 Ga. App. 161, 71 S.E.2d 253 (1952); Colgate-Palmolive Co. v. Tullos, 219 F.2d 617 (5th Cir. 1955); Weimer v. Cauble, 214 Ga. 634, 106 S.E.2d 781 (1959); Henderson v. Stewart, 102 Ga. App. 533, 117 S.E.2d 176 (1960); Porter v. Bland, 105 Ga. App. 703, 125 S.E.2d 713

(1962); Studdard v. Evans, 108 Ga. App. 819, 135 S.E.2d 60 (1964); Town Fin. Corp. v. Hughes, 134 Ga. App. 337, 214 S.E.2d 387 (1975); Leggett v. Benton Bros. Drayage & Storage Co., 138 Ga. App. 761, 227 S.E.2d 397 (1976); Bradley v. Godwin, 152 Ga. App. 782, 264 S.E.2d 262 (1979); Taylor v. Greiner, 156 Ga. App. 663, 275 S.E.2d 737 (1980); Keasler v. Cedar Bluff Bank, 162 Ga. App. 57, 290 S.E.2d 150 (1982); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982); Getz Servs., Inc. v. Perloe, 173 Ga. App. 532, 327 S.E.2d 761 (1985); Bell v. King, Phipps & Assocs., 176 Ga. App. 702, 337 S.E.2d 364 (1985); Stepperson, Inc. v. Long, 256 Ga. 838, 353 S.E.2d 461 (1987); Associated Health Sys. v. Jones, 185 Ga. App. 798, 366 S.E.2d 147 (1988); Daniels v. Johnson, 191 Ga. App. 70, 381 S.E.2d 87 (1989); Sykes v. Sin, 229 Ga. App. 155, 493 S.E.2d 571 (1997); Cavin v. Brown, 246 Ga. App. 40, 538 S.E.2d 802 (2000); Edel v. Southtowne Motors of Newnan II, Inc., 338 Ga. App. 376, 789 S.E.2d 224 (2016).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 18.

C.J.S. — 25 C.J.S., Damages, § 2.

ALR. — Necessity and manner, in personal injury or death action, of pleading special damages in the nature of medical, nursing, and hospital expenses, 98 ALR2d 746.

What constitutes special damages in action for slander of title, 4 ALR4th 532.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sexual organs and processes, 13 ALR4th 183.

Excessiveness or adequacy of damages awarded for injuries to legs and feet, 13 ALR4th 212.

Excessiveness or adequacy of damages awarded for injuries to head or brain, or for mental or nervous disorders, 14 ALR4th 328.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, circulatory, digestive, and glandular systems, 14 ALR4th 539.

Excessiveness or adequacy of damages awarded for injuries to back, neck, or spine, 15 ALR4th 294.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, respiratory system, 15 ALR4th 519.

Excessiveness or adequacy of damages awarded for injuries to head or brain, 50 ALR5th 1.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system, 51 ALR5th 467.

51-12-3. Direct and consequential damages distinguished.

(a) Direct damages are those which follow immediately upon the doing of a tortious act.

(b) Consequential damages are those which are the necessary and connected effect of a tortious act, even though they are to some extent dependent upon other circumstances. (Orig. Code 1863, § 3003; Code 1868, § 3016; Code 1873, § 3071; Code 1882, § 3071; Civil Code 1895, § 3911; Civil Code 1910, § 4508; Code 1933, § 105-2007.)

Law reviews. — For article, "Jury Instructions and Proximate Cause: An Uncertain Trumpet in Georgia," see 27 Ga. St. B. J. 60 (1990).

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Former Code 1933, §§ 105-2007, 105-2008, and 105-2009 (see now O.C.G.A. § 51-12-3, 51-12-8, and 51-12-9) must be construed together. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Words "proximate," "immediate," and "direct" are frequently used as synonymous. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

In tort actions, consequential damages which are necessary and connected effect of tortious act, and which are its legal and natural result, may be recovered, though contingent to some extent. Kroger Co. v. Perpall, 105 Ga. App. 682, 125 S.E.2d 511 (1962).

After a homeowner sued the realtor for alleged fraud and malpractice in the sale of the homeowner's condominium after the homeowner had sued the buyers on their note to the homeowner, the absence of a finding of bad faith on the part of the buyers in not paying their note did not preclude a finding that the plaintiff was entitled to attorneys fees and expenses of litigation when such costs were actual damages proximately caused by the realtors' malpractice and fraud. Marcoux v. Fields, 195 Ga. App. 573, 394 S.E.2d 361 (1990).

Particular consequences of act need not be foreseeable. — In order that a party be made liable for negligence, it is not necessary that the party should have contemplated or even been able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff, but it is sufficient, if, by exercise of reasonable care, the defendant might have foreseen that some injury would result from the defendant's act or omission, or that consequences of a generally injurious nature might have been expected. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

It is not necessary that an original wrongdoer anticipate or foresee the details of a possible injury that may result from the wrongdoer's negligence, but it is sufficient if the wrongdoer should anticipate from the nature and character of the negligent act committed by the wrongdoer that injury might result as a natural and reasonable consequence of the wrongdoer's negligence. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

In tort actions, recovery may be had for loss of profits, provided their loss is proximate result of defendant's wrong and they can be shown with reasonable certainty. The profits recoverable in such cases are limited to probable, as distinguished from possible benefits, and they must be such as would be expected to follow naturally the wrongful act and be certain both in their nature and the cause from which they proceed. Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949).

General rule is that expected profits of commercial business are too uncertain, speculative, and remote to permit a recovery for their loss. Georgia Grain Growers Ass'n v. Craven, 95 Ga. App. 741, 98 S.E.2d 633 (1957).

Failure to prove out-of-pocket economic damages. — Because franchisees failed to prove out-of-pocket economic damages as a result of alleged misrepresentations in offering materials regarding the franchise's projected cash flow, the franchisor's motions for directed verdict and j.n.o.v. on claims for negligent misrepresentation and negligence under O.C.G.A. § 51-1-6 should have been granted. Legacy Academy, Inc. v. Doles-Smith Enters., 337 Ga. App. 575, 789 S.E.2d 194 (2016).

In a dispute between a franchisor of daycare businesses and the franchisee, the trial court erred by denying the franchisor's motion for directed verdict on the franchisee's claims for negligent misrepresentation and negligence under O.C.G.A. § 51-1-6 because the franchisee failed to prove that the franchisee suffered any out-of-pocket economic damages as a result of the alleged misrepresentations, which was an essential element to such claims. Legacy Academy, Inc. v. Doles-Smith Enters., 337 Ga. App. 575, 789 S.E.2d 194 (2016).

Speculative lost profits not recoverable. — The profits of a commercial business are dependent on so many hazards and chances that unless the anticipated profits are capable of ascertainment, and the loss of them traceable directly to the defendant's wrongful act, they are too speculative to afford a basis for the computation of damages. Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949); Georgia Grain Growers Ass'n v. Craven, 95 Ga. App. 741, 98 S.E.2d 633 (1957).

When the plaintiff seeks, as damages, the loss of expected profits and additional expenses incurred during the time that the plaintiff was away from the plaintiff's candy manufacturing business, while recuperating from the effects of the plaintiff's alleged injuries, and when it appears that the plant would probably have remained open and that production would have continued if the plaintiff's foreman had not also been absent on account of drunkenness, the alleged damages are remote, speculative, contingent, and uncertain. Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949).

Tortfeasor liable for consequential damages caused by foreseeable intervening act. — The rule that an intervening act may break the causal connection between an original act of negligence and injury to another is not applicable if the nature of such intervening act was such that it could have reasonably been anticipated or foreseen by the original wrongdoer. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

While the general rule is that if, subsequent to an original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote, still if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act. Blakely v. Johnson, 220 Ga. 572, 140 S.E.2d 857 (1965).

There may be more than one proximate cause of injury, and the proximate cause of an injury may be two separate and distinct acts of negligence acting concurrently. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Proof of physical injury lacking. — In a negligence action stemming from an auto accident between a driver and a farmer's cow, the trial court properly granted summary judgment on the driver's claim for consequential damages, which was sought for a "ruined vacation," as the driver failed to show any evidence of a physical injury which was a necessary element on a claim premised on ordinary negligence. Hoeflick v. Bradley, 282 Ga. App. 123, 637 S.E.2d 832 (2006).

Damages for joint acts of negligence. — When two concurrent acts of negligence operate in bringing about an injury, the person injured may recover from either or both of the persons responsible. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Concurrent acts of negligence. — The mere fact that the injury would not have been sustained had only one of the acts of negligence occurred will not of itself operate to define and limit the other act as constituting the proximate cause, for if all acts of negligence contributed directly and concurrently in bringing about the injury, the acts together constitute the proximate cause. Adams v. Jackson, 45 Ga. App. 860, 166 S.E. 258 (1932); Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Damages resulting from necessary and required medical treatment of physical injury are element of damage recoverable as proximately resulting from the negligence of the tort-feasor whose negligence caused the injury. Gillis v. Atlantic Coast Line R.R., 52 Ga. App. 806, 184 S.E. 791 (1936).

Diminution in capacity to earn money is separate element of damages. — While a diminution in one's capacity to labor may be recoverable as an element of pain and suffering, a diminu-

tion in one's capacity to earn money is a separate and distinct element of damages involving numerous considerations, among these considerations are earnings before the injury, earnings after the injury, probability of increased or decreased earnings in the future (considering the capacity of the party), the effect of sickness and old age, and others. Porter v. Bland, 105 Ga. App. 703, 125 S.E.2d 713 (1962).

When damage claimed is solely to building or structure, and not to land, measure of damages is cost of restoration. Georgia-Carolina Brick & Tile Co. v. Brown, 153 Ga. App. 747, 266 S.E.2d 531 (1980).

Evidence sufficient to permit jury to find amount of damages. — On the trial of a suit to recover damages alleged to have been sustained by the plaintiff's automobile as a result of a collision with the defendant's automobile, since there was evidence of the value of the automobile at the time of the collision and evidence that the automobile before the collision was in good running condition and that after the collision the automobile had not been "any good," and there was evidence in detail as to the damage done to the automobile and its condition after the collision and the nature and the cost of the repairs necessitated by the damage and which was made upon the automobile, the evidence was sufficient to authorize an inference as to the amount of depreciation in the value of the automobile as a result of the damages sustained. Atlanta Furn. Co. v. Walker, 51 Ga. App. 781, 181 S.E. 498 (1935).

When there appears from the evidence the length of time which the plaintiff was deprived of the use of the automobile by reason of the time required in making the repairs which were necessitated by the damage to the automobile, the evidence is sufficient to authorize the jury to find the reasonable value of the automobile for use during the period of the plaintiff's deprivation of its use as a result of the damage. Atlanta Furn. Co. v. Walker, 51 Ga. App. 781, 181 S.E. 498 (1935).

Consequential damages for outstanding vehicle loan amount. — Trial court properly granted summary judgment to a driver on the owner's claim to recover the loan deficiency on the owner's wrecked vehicle as consequential damages because the owner had already been compensated for the fair market value of the wrecked vehicle and, pursuant to O.C.G.A. §§ 51-12-3(b), 51-12-8, and 51-12-9, the owner's outstanding vehicle loan amount was not the legal and natural consequence of the collision. McIntire v. Perkins, 317 Ga. App. 181, 729 S.E.2d 529 (2012), cert. denied, No. S12C1976, 2013 Ga. LEXIS 37 (Ga. 2013).

Whether damages proximately resulted from defendant's negligence is jury question. — Whether injuries sued for by a plaintiff, and the damage resulting therefrom were proximately caused by the negligence of the defendant, either solely or concurrently with the negligence of other parties, is a question for the jury under the general rules of law applicable to the case. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Jury generally determines amount of damages to personal property. — While the difference between the market value of personal property before and its market value after, it has been damaged as a result of the tortious act of another person is recoverable as an element of damage, this difference, which is represented in the depreciation in the value of the property as a result of the damage, when the damage is not in excess of the value with interest of the property before it was damaged, may be determined by a jury when there is evidence as to the nature of the property and its condition prior to the damage and also its value, and the nature, character, and the amount of the damage. Atlanta Furn. Co. v. Walker, 51 Ga. App. 781, 181 S.E. 498 (1935).

Charge on preexisting conditions proper since defendant liable only for proximate consequences. — Court did not err in charging on the issue of a preexisting disability since the plaintiff had been in the hospital previously and had a heart problem; the tort-feasor is liable only for the proximate consequences of the tortfeasor's wrongful act. Garner v. Driver, 155 Ga. App. 322, 270 S.E.2d 863 (1980).

Cited in Lawrence v. Atlanta Gas Light Co., 49 Ga. App. 444, 176 S.E. 75 (1934);

Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Crandall v. Sammons, 62 Ga. App. 1, 7 S.E.2d 575 (1940); Georgia Power Co. v. Pittman, 92 Ga. App. 673, 89 S.E.2d 577 (1955); Dukes v. Pure Oil Co., 112 Ga. App. 111, 143 S.E.2d 769 (1965); Douglas v. Smith, 578 F.2d 1169 (5th Cir. 1978); Sam Finley, Inc. v. Barnes, 156 Ga. App. 802, 275 S.E.2d 380 (1980); Hill Aircraft & Leasing Corp. v. Tyler, 161 Ga. App. 267, 291 S.E.2d 6 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 22 et seq.

C.J.S. — 25 C.J.S., Damages, § 2.

ALR. — Shortening of plaintiff's life expectancy as result of injury as element of damages recoverable by person injured, 97 ALR 823; 131 ALR 1351; 1 ALR3d 801.

Action by one person for consequential damages on account of injury to another as one for bodily or personal injury within statute of limitations, 108 ALR 525.

Right of parent to recover for consequential damages to himself on account of injury to child as affected by his appearance as next friend, guardian, or guardian ad litem in an action to recover for injury to child, or by verdict or judgment in such action, 116 ALR 1087.

Measure of damages for wrongful removal of earth, sand, or gravel from land, 1 ALR3d 801.

Absolute liability for blasting operations as extending to injury or damage not directly caused by debris or concussion from explosion, 56 ALR3d 1017.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, sexual organs and processes, 13 ALR4th 183.

Excessiveness or adequacy of damages awarded for injuries to legs and feet, 13 ALR4th 212.

Excessiveness or adequacy of damages awarded for injuries to head or brain, or for mental or nervous disorders, 14 ALR4th 328.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, circulatory, digestive, and glandular systems, 14 ALR4th 539.

Excessiveness or adequacy of damages awarded for injuries to back, neck, or spine, 15 ALR4th 294.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, respiratory system, 15 ALR4th 519.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering, 55 ALR4th 186.

Recovery of anticipated lost profits of new business: post-1965 cases, 55 ALR4th 507.

Excessiveness or adequacy of damages awarded for injuries to head or brain, 50 ALR5th 1.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system, 51 ALR5th 467.

51-12-4. Damages given as compensation for injury; measure of damages generally; nominal damages.

Damages are given as compensation for injury; generally, such compensation is the measure of damages where an injury is of a character capable of being estimated in money. If an injury is small or the mitigating circumstances are strong, nominal damages only are given. (Orig. Code 1863, § 2997; Code 1868, § 3010; Code 1873, § 3065; Code 1882, § 3065; Civil Code 1895, § 3905; Civil Code 1910, § 4502; Code 1933, § 105-2001.)

Law reviews. — For article, "The Torok Tort: Recovery for Abusive Litigation," see 23 Ga. St. B. J. 84 (1987). For article, "Pre-Impact Pain and Suffering,"

see 26 Ga. St. B. J. 60 (1989). For article, "The Discount Rate in Georgia Personal Injury and Wrongful Death Damage Calculations," see 13 Ga. St. U.L. Rev. 431 (1997). For annual survey of product liability law, see 58 Mercer L. Rev. 313 (2006). For article, "The Experiential Future of the Law," see 60 Emory L.J. 585 (2011).

For comment on Burnett v. Western & A.R.R., 79 Ga. App. 530, 54 S.E.2d 357 (1949), see 12 Ga. B. J. 211 (1949). For comment on Padgett v. Williams, 82 Ga. App. 509, 61 S.E.2d 676 (1950), see 13 Ga. B. J. 339 (1951).

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General Consideration

Former Code 1933, §§ 105-2001, 105-2002, and 105-2003 (see now O.C.G.A. §§ 51-12-4, 51-12-5, and 51-12-6) must be construed in pari materia. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135, modified, 234 Ga. 540, 216 S.E.2d 776 (1974).

Rule stated applies to actions in contract equally as those in tort. — In every case of breach of contract the other party has a right to recover at least nominal damages, which will carry the costs. The rule does not apply "where only special and punitive damages are sued for," and when such damages are not recoverable. Bendle v. Ortho Mattress, Inc., 133 Ga. App. 575, 211 S.E.2d 618 (1974).

This section concerns general compensatory damages. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135, modified, 234 Ga. 540, 216 S.E.2d 776 (1974).

Components of general compensatory damages. — In tort cases, general compensatory damages may be compensation for: (1) physical pain arising from a physical injury; and (2) physical and mental pain arising from a physical injury. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135, modified, 234 Ga. 540, 216 S.E.2d 776 (1974).

General damages are those which law presumes to flow from tortious act and may be awarded without proof of any specific amount to compensate the plaintiff for the injury done. Alexander v. Holmes, 85 Ga. App. 124, 68 S.E.2d 242 (1951).

Rationale of damages is to compensate plaintiff and not to unreasonably burden the defendant beyond the point of compensating the plaintiff. Mercer v. J & M Transp. Co., 103 Ga. App. 141, 118 S.E.2d 716 (1961); Atlanta Recycled Fiber Co. v. Tri-Cities Steel Co., 152 Ga. App. 259, 262 S.E.2d 554 (1979).

Nominal damages permitted when no particular loss demonstrated. — The law infers some damage from the invasion of a property right and if no evidence is given of any particular amount of loss, declares the right by awarding what it terms nominal damages. Georgia Power Co. v. Womble, 150 Ga. App. 28, 256 S.E.2d 640 (1979); Avery v. K.I., Ltd., 158 Ga. App. 640, 281 S.E.2d 366 (1981); Callahan v. Panfel, 195 Ga. App. 891, 395 S.E.2d 80 (1990).

When there is fraud or breach of a legal or private duty accompanied by any damage, the law gives a right to recover damages, even only nominal damages, as compensation. Holmes v. Drucker, 201 Ga. App. 687, 411 S.E.2d 728 (1991).

In an action for damages resulting from a law firm's representation of a client in an uncontested divorce action, the client's allegations that the client's marital status

was changed without the client's knowledge, without proper representation and under terms the client had not agreed to, was sufficient to state a cause of action against the firm for at least nominal damages. Peters v. Hyatt Legal Servs., 211 Ga. App. 587, 440 S.E.2d 222 (1993).

No new trial to present question of nominal damages. — A new trial will not be ordered simply to allow the plaintiff to present a question for the jury as to nominal damages. Hodsdon v. Whitworth, 173 Ga. App. 863, 328 S.E.2d 753 (1985); Cox v. Cantrell, 181 Ga. App. 722, 353 S.E.2d 582 (1987).

Damages to third person. — This section permits the recovery of damages sustained by the plaintiff, but not by a third person. Hence, a sender of a message cannot recover damages that have resulted to the receiver of the message. Bass v. Postal Telegraph-Cable Co., 127 Ga. 423, 56 S.E. 465, 12 L.R.A. (n.s.) 489 (1907).

Injured party cannot be placed in better position than party would have been in if contract had not been breached. Lastinger v. City of Adel, 69 Ga. App. 535, 26 S.E.2d 158 (1943).

Although one be damaged by joint act of two persons, there is but one injury; and, if that is satisfied, the party injured is placed in as near the party's normal condition as the law can place the party and there can be no double recovery of amount of damage which one has sustained. Edmondson v. Hancock, 40 Ga. App. 587, 151 S.E. 114 (1929); Caplan v. Caplan, 62 Ga. App. 577, 9 S.E.2d 96 (1940).

No person is entitled to recover full compensation more than once for same injury. Hall v. Helms, 150 Ga. App. 257, 257 S.E.2d 349 (1979).

Plaintiff is entitled to only one satisfaction; and if the manner of releasing one involves satisfaction in whole or in part of the claim, it will enure to the discharge, pro tanto, of all who are liable. Caplan v. Caplan, 62 Ga. App. 577, 9 S.E.2d 96 (1940).

There can be no double recovery of the amount of damage which one has sustained; it would be as reasonable to ask to recover from one defendant twice the amount of the damage sustained, as it is to ask from each of two defendants payment of the full amount of such damage even when the cause of action is good against both. Caplan v. Caplan, 62 Ga. App. 577, 9 S.E.2d 96 (1940).

A person may have but one satisfaction for the person's injuries, whether to the person's body or to property. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Hill, 113 Ga. App. 283, 148 S.E.2d 83 (1966).

Full satisfaction extinguishes claim. — There can be but one satisfaction of the same damage or injury, and if, instead of merely dismissing the plaintiff's suit against one of two defendants, sued jointly, the plaintiff proceeds, for a consideration, to fully settle and satisfy the plaintiff's claim against one, the plaintiff cannot by the terms of such accord and satisfaction, when injury or damage complained of is the same, limit the release to the defendant thus dealt with, but in such a case the claim itself becomes extinguished. Edmondson v. Hancock, 40 Ga. App. 587, 151 S.E. 114 (1929); Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

Tort-feasor cannot diminish amount of liability by attempting to introduce payments made to plaintiff by third party. Garrison v. Rich's, 154 Ga. App. 663, 269 S.E.2d 513 (1980).

Damages recoverable when injury permanent. — In an action for a personal injury of a permanent character, when the plaintiff is entitled to recover full damages under this section, one element, is a fair and reasonable compensation for a loss of what the plaintiff would otherwise have earned in the plaintiff's trade or profession. As to the element of damages which includes pain and suffering, a reasonable sum is recoverable, to be determined by the jury. Western & A.R.R. v. Drysdale, 51 Ga. 644 (1874); Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S.E. 110 (1906).

Permanent diminution of capacity to labor is element of damages for consideration of jury in determining the amount of recovery, along with evidence as to pain, suffering, disfigurement, or the like, although no pecuniary value is proved by the evidence. Langran v.

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Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).

The fact of impairment or loss of ability to work, with or without pecuniary compensation, may be considered by the jury in determining the amount to be allowed for pain and suffering, and no evidence as to earnings is necessary in such calculation, the only standard of measurement being the enlightened conscience of impartial jurors. Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).

The loss or material impairment of any power or faculty is matter for compensation, irrespective of any fruits, pecuniary or otherwise, which the exercise of the power or faculty might produce, and irrespective, also, of any conscious pain or suffering which the loss or impairment might occasion. Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).

Every person is entitled to retain and enjoy each and every power of body and mind with which he or she has been endowed, and no one, without being answerable in damages, can wrongfully deprive another, by a physical injury, of any such power or faculty, or materially impair the power or faculty; such deprivation or impairment can be classed with pain and suffering. Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).

As element of pain and suffering, the plaintiff may recover for mental pain and suffering and for shame and mortification as the result of disfigurement or mutilation inflicted as a result of the tortious injury perpetrated by the defendant. Fields v. Jackson, 102 Ga. App. 117, 115 S.E.2d 877 (1960).

Damages for pain and suffering not permitted in death claim. — The element of pain and suffering, for which the only measure of damages is the enlightened conscience of impartial jurors, is not present in a death claim. Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357 (1949).

Damages for intentional infliction of mental suffering permitted without physical harm. — Under Georgia law, damages for mental suffering and emotional anguish can be recovered, when there is an intentional infliction of mental distress, without a showing of contemporaneous physical harm. Carrigan v. Central Adjustment Bureau, Inc., 502 F. Supp. 468 (N.D. Ga. 1980).

When mere negligence is not relied on, but the conduct complained of is malicious, willful, or wanton, mental pain and suffering may be recovered without the attendant circumstances otherwise required. Kuhr Bros. v. Spahos, 89 Ga. App. 885, 81 S.E.2d 491 (1954), overruled on other grounds, Whiten v. Orr Constr. Co., 109 Ga. App. 267, 136 S.E.2d 136 (1964).

Damages permitted for negligent infliction if physical injury present. — When there is a physical injury or pecuniary loss, compensatory damages include recovery for accompanying "mental pain and suffering" even though the tortious conduct complained of is merely negligent. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

When mere negligence is relied on, before damages for mental pain and suffering are allowable, there must also be an actual physical injury to the person, or a pecuniary loss resulting from an injury to the person which is not physical; such an injury to a person's reputation, or the mental pain and suffering must cause a physical injury to the person. Kuhr Bros. v. Spahos, 89 Ga. App. 885, 81 S.E.2d 491 (1954), overruled on other grounds, Whiten v. Orr Constr. Co., 109 Ga. App. 267, 136 S.E.2d 136 (1964).

Minor as well as adult may recover for pain and suffering. Kite v. Brooks, 51 Ga. App. 531, 181 S.E. 107 (1935).

Guide for jury in determining compensation for mental and physical pain and suffering is enlightened conscience of impartial jurors, acting under the sanctity of their oath to compensate the plaintiff with fairness to the defendant. Shepherd Constr. Co. v. Vaughn, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

Law fixes no measure for pain and suffering except enlightened conscience of impartial jurors. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Damages for mere fright are not recoverable, but damages may be recov-

ered when there is some physical injury attending the cause of the fright, or, in the absence of physical injury, when the fright is of such character as to produce some physical or mental impairment directly and naturally resulting from the wrongful act. Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935).

Mere wrongful acts of negligence will authorize recovery when the resulting fright, shock, or mental suffering is attended with actual immediate physical injury, or when, from the nature of the fright or mental suffering, there naturally follows as a direct consequence physical or mental impairment. Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935).

Even in the absence of willfulness or wantonness, the mere wrongful act of an agent will authorize a recovery when the resulting fright, shock, or mental suffering is attended with actual immediate physical injury, or when from the nature of the fright or mental suffering there naturally follows, as a direct consequence, physical or mental impairment; and in either of such events the fright or mental suffering can itself be considered, together with the accompanying physical injury or such resulting physical or mental impairment, as an element of damage. Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933).

Claim for loss of consortium does not include lost wages, medical expenses, or loss of earning capacity. Branton v. Draper Corp., 185 Ga. App. 820, 366 S.E.2d 206 (1988).

If only special or punitive damages are expressly pled and prayed, recovery is limited to damages thus sought. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943).

Relief granted as deserved even if not specifically requested. — The final judgment shall grant the relief to which the party in whose favor it is granted is entitled, even if the party has not demanded such relief in the party's pleadings. Jacksonville Blow Pipe Co. v. Trammell Hardwood Flooring Co., 170 F. Supp. 537 (N.D. Ga. 1958), aff'd, 264 F.2d 717 (5th Cir. 1959).

Petition setting forth alleged torts, and claiming damages generally in named amount, states cause of action for recovery of general damages, nominal damages and punitive damages, as the evidence might show; and is not subject to dismissal as claiming no recoverable damages. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943).

If the pleadings are not expressly limited, a petition setting forth a tort, and claiming unspecified damages in a stated amount, will be construed as seeking general damages, so as to authorize their recovery; and even though the injury be slight and no actual damage be shown, at least nominal damages would be recoverable. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943).

Award precluded by notice of appeal. — Award of damages under O.C.G.A. § 51-12-4 required reversal because a timely notice of appeal was filed which divested the trial court of jurisdiction to make such an award. Hall v. Hidy, 263 Ga. 422, 435 S.E.2d 215 (1993).

Cited in East Tenn., Va. & Ga. Ry. v. Fleetwood, 90 Ga. 23, 15 S.E. 778 (1892); O'Neill Mfg. Co. v. Pruitt, 110 Ga. 577, 36 S.E. 59 (1900); Southern Ry. v. Clariday, 124 Ga. 958, 53 S.E. 461 (1906); Mason v. Nashville, C. & St. L. Ry., 135 Ga. 741, 70 S.E. 225, 33 L.R.A. (n.s.) 280 (1911); Hughes v. Bivins, 31 Ga. App. 198, 121 S.E. 590 (1923); Endsley v. Georgia Ry. & Power Co., 37 Ga. App. 439, 140 S.E. 386 (1927); Atlanta & W. Point R.R. v. Smith, 38 Ga. App. 20, 142 S.E. 308, cert. denied, 38 Ga. App. 816 (1928); Clay v. Brown, 38 Ga. App. 157, 142 S.E. 911 (1928); Lawrence v. Atlanta Gas Light Co., 49 Ga. App. 444, 176 S.E. 75 (1934); Barnes v. Kittrell, 55 Ga. App. 319, 190 S.E. 39 (1937); Lloyd Adams, Inc. v. Liberty Mut. Ins. Co., 190 Ga. 633, 10 S.E.2d 46 (1940); Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758 (1942); Kelly v. Adams, 84 Ga. App. 450, 66 S.E.2d 144 (1951); Sharpe v. Frost, 94 Ga. App. 444, 95 S.E.2d 309 (1956); Morgan v. Mull, 101 Ga. App. 36, 112 S.E.2d 661 (1960); Porter v. Bland, 105 Ga. App. 703, 125 S.E.2d 713 (1962); Hightower v. Landrum, 109 Ga. App. 510, 136 S.E.2d 425 (1964); Lee v. Morrison, 138 Ga. App. 332, 226 S.E.2d 124 (1976); Moritz v. Sunbeam Appliance Serv. Co., 146 Ga. App. 49, 245 S.E.2d 362

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(1978); Bradley v. Godwin, 152 Ga. App. 782, 264 S.E.2d 262 (1979); Cole v. Klassic Kuts & Kurls, Inc., 169 Ga. App. 54, 311 S.E.2d 847 (1983); Yost v. Torok, 256 Ga. 92, 344 S.E.2d 414 (1986); Kesler v. Veal, 182 Ga. App. 444, 356 S.E.2d 254 (1987); Whitehead v. Cuffie, 185 Ga. App. 351, 364 S.E.2d 87 (1987); Ferguson v. City of Doraville, 186 Ga. App. 430, 367 S.E.2d 551 (1988); Metropolitan Atlanta Rapid Transit Auth. v. Partridge, 187 Ga. App. 637, 371 S.E.2d 185 (1988); Bond v. Davis, 194 Ga. App. 379, 390 S.E.2d 627 (1990); Fabe v. Floyd, 199 Ga. App. 322, 405 S.E.2d 265 (1991); MacDonald v. United States, 900 F. Supp. 483 (M.D. Ga. 1995); MTW Inv. Co. v. Alcovy Properties, Inc., 228 Ga. App. 206, 491 S.E.2d 460 (1997); United States Fid. & Guar. Co. v. Paul Assocs., 230 Ga. App. 243, 496 S.E.2d 283 (1998); Conner v. Hart, 252 Ga. App. 92, 555 S.E.2d 783 (2001); Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004).

Measure of Damages Applicable to Specific Cases

Actual damage to overflowed land. — The measure of damages for any illegal overflow of lands is the actual damages coming to the land by such illegal overflow. Phinizy v. City Council, 47 Ga. 260 (1872).

Amount of repair bill is proper evidence to be considered in arriving at the difference between the market value of the article before and after the damage. Hill v. Kirk, 78 Ga. App. 310, 50 S.E.2d 785 (1948).

Conduct of plaintiff prior to assault and battery may be considered by jury as extenuation and mitigation in fixing the amount of damages in the verdict. Robinson v. De Vaughn, 59 Ga. App. 37, 200 S.E. 213 (1938).

Damages for trespass. — In an action of trespass, if the plaintiff makes out a case for recovery except the proving of actual damages, the plaintiff will be entitled to nominal damages. Pausch v. Guerrard, 67 Ga. 319 (1881).

Damages in deceit. — In an action of deceit, the damages that may be recovered is the difference between the value of the property received and the value of the property if the misrepresentations were true. Denham v. Kirkpatrick, 64 Ga. 71 (1879).

Deviation of telegraph company from terms of message. — The measure of damages when a receiver is injured because a telegraph company incorrectly reports the state of the market on a particular article is the difference between the actual state of the market and the terms of the message. Hollis v. Western Union Tel. Co., 91 Ga. 801, 18 S.E. 287 (1893); Western Union Tel. Co. v. Truitt, 5 Ga. App. 809, 63 S.E. 934 (1909).

Fair market value. — The actual loss of the plaintiff, if attributable to the conduct of the defendant, is the fair market value of that which the plaintiff paid for and did not receive. Brown v. Royal Wood, Inc., 119 Ga. App. 564, 168 S.E.2d 211 (1969).

For fencing, injured or destroyed, recovery should be measured by cost of restoring and making condition as good as that in which was when injured or destroyed. Hall v. Chastain, 246 Ga. 782, 273 S.E.2d 12 (1980).

Invasion of property rights. — Nominal damages can be recovered when one's property rights have been invaded, if special damage is not proved. Baston v. Higginbothem, 7 Ga. App. 835, 68 S.E. 455 (1910).

Measure of damages in actions for injuries to real property is the difference in value before and after the injury to the premises, and the only exception is when there is a more definite, equitable, and accurate way by which the damage may be determined. Mercer v. J & M Transp. Co., 103 Ga. App. 141, 118 S.E.2d 716 (1961).

Measure of damages for injury to timber is difference in value immediately before and immediately after such injury, and a charge which substantially so informs the jury is sufficient. Morgan v. Black, 86 Ga. App. 775, 72 S.E.2d 558 (1952).

Measure of damages is difference between market value of vehicle before and after damage. Hill v. Kirk, 78 Ga. App. 310, 50 S.E.2d 785 (1948).

Motor vehicle damage. — The measure of damages in an action to recover for

injuries to a motor vehicle caused by a collision or other negligence of a defendant is the difference between the value of the vehicle before and after the collision or other negligence, but when the owner has had the vehicle repaired, that loss can be established by showing the reasonable value of labor and material used for the repairs, and the value of any depreciation (permanent impairment) after the vehicle was repaired, provided the aggregate of these amounts does not exceed the value of the vehicle before the injury. Perkins v. Augspurger, 184 Ga. App. 522, 362 S.E.2d 88, cert. denied, 184 Ga. App. 910, 362 S.E.2d 88 (1987).

Mitigating circumstances not found. — In an action for damages sustained after the plaintiff's automobile was struck in the rear by the defendant's truck, the following facts — it was dark and raining on the night of the accident, the streets were wet, the truck was loaded with equipment with a trailer in tow, a sudden action by a third party created an emergency — did not constitute mitigating circumstances, for the truck's driver was responsible for exercising ordinary care (O.C.G.A. § 40-6-180) and, while following another vehicle, was required to keep a proper lookout (O.C.G.A. § 40-6-49). U-Haul Co. v. Ford, 171 Ga. App. 744, 320 S.E.2d 868 (1984).

Necessary expense in restoring utility pole is proper measure of damages for its wrongful destruction. Horton v. Georgia Power Co., 149 Ga. App. 328, 254 S.E.2d 479 (1979).

Replacement cost was not proper measure of damages for destruction of old house which could not be repaired, when complete restoration to the condition it was in just before being damaged would cost almost twice as much as the house would then be worth to its owner. Mercer v. J & M Transp. Co., 103 Ga. App. 141, 118 S.E.2d 716 (1961).

In personal injury suit, court did not err in admitting in evidence Carlisle Mortality and Annuity Tables, or in submitting to the jury the question of fact whether under the evidence the plaintiff's injuries had permanently impaired the plaintiff's earning capacity. Atlanta & W. Point R.R. v. Hemmings, 66 Ga. App. 881, 19 S.E.2d 787 (1942).

There need be no direct or express evidence of value of the plaintiff's wife's services, but, in calculating the reasonable value of such services as have been lost, the jury may take into consideration the nature of the services and all the circumstances of the case. Shepherd Constr. Co. v. Vaughn, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

Loss of use of cable. — Telecommunications carrier could not recover loss of use damages absent some showing of monetary loss apart from the cost of repair because although the carrier suffered a loss of use of its cable, it did not show sufficient proof of loss of use damages; the proper measure of loss of use damages was not the theoretical rental value of a fiber-optic cable in a market that does not exist. MCI Communs. Servs. v. CMES, Inc., 291 Ga. 461, 728 S.E.2d 649 (2012).

Telecommunications carrier was not entitled to loss of use damages measured by the hypothetical cost to rent a replacement system when the carrier suffered no actual loss of use damages and did not need to rent a replacement system because the carrier was able to reroute calls within the existing redundant cable system the carrier necessarily installed in order to operate the carrier's business. MCI Communs. Servs. v. CMES, Inc., 291 Ga. 461, 728 S.E.2d 649 (2012).

Collateral Source Rule

Scope of collateral source rule. — "Collateral source rule" refers generally to tort cases in which the plaintiff may receive benefits from collateral sources, e.g., insurance, the plaintiff's employer, or other source, which lessens the plaintiff's financial loss but will not diminish the damages otherwise recoverable from the wrongdoer. Ideal Pool Corp. v. Champion, 157 Ga. App. 380, 277 S.E.2d 753 (1981); Sheppard v. Tribble Heating & Air Conditioning, Inc., 163 Ga. App. 732, 294 S.E.2d 572 (1982); Rabun v. Kimberly-Clark Corp., 678 F.2d 1053 (11th Cir. 1982); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982), aff'd, 729 F.2d 1466 (11th Cir.), cert. denied, 469 U.S. 857, 105 S. Ct. 185, 83 L. Ed. 2d 119 (1984).

Collateral Source Rule (Cont'd)

Collateral source rule does not apply when evidence introduced arose in connection with different incident. Garrison v. Rich's, 154 Ga. App. 663, 269 S.E.2d 513 (1980).

Profits

In tort action, damages for loss of profits and for injury to or interruption of business, will be allowed only when they can be established with reasonable certainty and are the proximate result of the wrong complained of. No recovery can be had for such losses if the losses are uncertain, conjectural, or speculative. Jacksonville Blow Pipe Co. v. Trammell Hardwood Flooring Co., 170 F. Supp. 537 (N.D. Ga. 1958), aff'd, 264 F.2d 717 (5th Cir. 1959).

Generally, expected profits of a business are too uncertain, speculative, and remote to permit recovery for their loss. However, when the party's business is forced to close, or is interrupted, loss of profits may be proved and, though not recoverable as such, they may be considered in estimating the extent of party's injury. Jacksonville Blow Pipe Co. v. Trammell Hardwood Flooring Co., 170 F. Supp. 537 (N.D. Ga. 1958), aff'd, 264 F.2d 717 (5th Cir. 1959).

Prospective profits are necessarily somewhat uncertain and problematical, but when damages are definitely attributable to the wrong of the defendant and are only uncertain as to amount, the prospective profits will not be denied even though they are difficult of ascertainment. Jacksonville Blow Pipe Co. v. Trammell Hardwood Flooring Co., 170 F. Supp. 537 (N.D. Ga. 1958), aff'd, 264 F.2d 717 (5th Cir. 1959).

Proof of future profits by evidence of past profits in an established business gives reasonable basis for a conclusion. Jacksonville Blow Pipe Co. v. Trammell Hardwood Flooring Co., 170 F. Supp. 537 (N.D. Ga. 1958), aff'd, 264 F.2d 717 (5th Cir. 1959).

The general rule is that the expected profits of a commercial business which are too uncertain and speculative to afford a basis for compensation cannot be considered. However, an exception to this rule is that when the type of business and history of profits make the calculation of profits reasonably ascertainable, evidence of lost profits may be considered. Claxton Poultry Co. v. City of Claxton, 155 Ga. App. 308, 271 S.E.2d 227 (1980).

Allegations of lost profits too speculative. — Allegations that the plaintiff, as a result of the plaintiff's injuries, was unable to do any work for a period of approximately six months, that the plaintiff was a building contractor and that during that period the plaintiff could have constructed three or four houses for a profit therefrom of $6,000.00 or more were too vague and indefinite as a basis for the recovery of damages and the lost profits too speculative to recover as an item of damages. Atlanta-Asheville Motor Express v. Dooley, 78 Ga. App. 265, 50 S.E.2d 822 (1948).

Evidence

In proving compensatory damages, certainty in fact of damage is essential, certainty as to the amount goes no further than to require a basis for a reasoned conclusion; the injured party is not to be barred from a fair recovery by impossible requirements. Jacksonville Blow Pipe Co. v. Trammell Hardwood Flooring Co., 170 F. Supp. 537 (N.D. Ga. 1958), aff'd, 264 F.2d 717 (5th Cir. 1959).

There must be sufficient evidence from which damage can be estimated, and this must include some facts and circumstances from which the jury may arrive at a just amount of monetary compensation, whether by proof of the value of the property before the damage and facts showing the value after the loss, or at least the extent of the loss and its consequent effect upon the value. Morgan v. Black, 86 Ga. App. 775, 72 S.E.2d 558 (1952).

Evidence of plaintiff's appearance inadmissible when not tied to injury. — It was not error for the court to refuse to admit testimony of a witness as to whether the plaintiff looked older after the accident, when there was no effort to show that such a result was due to the accident or that the plaintiff was also of the opinion that the plaintiff looked older due to the injuries; such a fact would not

be an element of pain and suffering unless the injury caused it and unless the plaintiff was conscious of it to the extent that it contributed to the plaintiff's pain and suffering. Richardson v. Coker, 78 Ga. App. 209, 50 S.E.2d 781 (1948).

No evidence of earnings necessary for damages for loss of work ability. — As for the plaintiff's pain and suffering and loss of ability to work, it is the fact of impairment or loss of ability to work, with or without compensation, that is to be considered by the jury in determining the amount to be allowed for pain and suffering, and no evidence as to earnings is necessary in such calculation, the only standard of measurement being the enlightened conscience of impartial jurors. Shepherd Constr. Co. v. Vaughn, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

Evidence sufficient to support verdict. — Since the amount of damages for pain and suffering are determinable by the enlightened consciences of impartial jurors, it cannot be said as a matter of law that a verdict of $1,500.00 was excessive or the result of bias and prejudice, since there was evidence to authorize the inference that the plaintiff's injuries consisted of bruises upon the plaintiff's body and caused the plaintiff to suffer great pain, as a result of which the plaintiff was confined to the plaintiff's home for about six weeks and it was necessary for the plaintiff to be waited on, lifted into and out of bed, and caused the plaintiff to lose the use of the plaintiff's arm so that the plaintiff could not raise the plaintiff's hand to her shoulder, that the plaintiff's injuries were permanent and that the plaintiff, at the plaintiff's age, which was 62 years, would continue to suffer pain as long as the plaintiff lived. Rentz v. Collins, 51 Ga. App. 782, 181 S.E. 678 (1935).

Evidence sufficient to prove damages as compensation for injury. See State Farm Mut. Auto. Ins. Co. v. Chastain, 167 Ga. App. 822, 307 S.E.2d 717 (1983).

Jury Instructions

Court must instruct jury on various elements of damages claimed. — When several different elements of damage are claimed, it is error requiring the grant of a new trial for the judge to fail in the judge's charge to the jury to give them any rule for estimating the damages claimed; and this is true notwithstanding no written request for such charge is made by the defendant. Southeastern Greyhound Lines v. Hancock, 71 Ga. App. 471, 31 S.E.2d 59 (1944).

Charge regarding permanent damages for lost earning capacity erroneous when evidence lacking. — When there was no evidence from which the jury could arrive at an estimate as to the plaintiff's alleged decreased capacity to earn money, the court erred in charging the jury as to the right of the plaintiff to recover permanent damages because of decreased earnings. Berry v. Jowers, 59 Ga. App. 24, 200 S.E. 195 (1938).

In a suit for damages on account of personal injuries resulting from a tort, when the petition alleges that the ability of the plaintiff to earn money has been decreased, it is error for the judge to charge the jury on this element of damages, unless there is some evidence upon which the jury can base with reasonable certainty a finding as to the amount of such damages. Atlanta & W. Point R.R. v. Hemmings, 66 Ga. App. 881, 19 S.E.2d 787 (1942).

Permanent damage charge proper when evidence authorizes the charge. — The testimony of the plaintiff, at the trial more than 20 months after the accident, that the plaintiff received permanent injuries and that the plaintiff's back still suffered from the injuries authorized the charge as to compensation for future pain and suffering. Moffett v. McCurry, 84 Ga. App. 853, 67 S.E.2d 807 (1951).

Charge was proper to show that measure of damages for injury to automobile is difference between market value before accident and afterwards, and that the amount expended for repairs is an item or circumstance which the jury might consider in determining the damages. Moffett v. McCurry, 84 Ga. App. 853, 67 S.E.2d 807 (1951).

Section charged without explanation proper in absence of request. — A charge which contained the general rule as to the measure of damages, when there

Jury Instructions (Cont'd)

was no request to charge more fully on the subject, is sufficient. Seaboard Air-Line Ry. v. Bishop, 132 Ga. 37, 63 S.E. 785 (1909); City of Atlanta v. Whitley, 24 Ga. App. 411, 101 S.E. 2 (1919).

Statement concerning choice of forum improper in charge. — When an action was brought in this state for injuries in another state, it was error to charge that the choice of bringing the action away from home was a circumstance to be considered by the jury. Mason v. Nashville, C. & St. L. Ry., 135 Ga. 741, 70 S.E. 225, 33 L.R.A. (n.s.) 280 (1911).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 15 et seq.

C.J.S. — 25 C.J.S., Damages, §§ 3 et seq., 25 et seq.

ALR. — Measure of damages for destruction of or injury to commercial vehicle, 4 ALR 1350; 169 ALR 1074.

Cost of building or repairs thereto as necessary or proper element in fixing damages for its destruction or injury, 7 ALR 277.

Measure of damages for loss of earning capacity of person engaged in business for himself, 9 ALR 510; 27 ALR 430; 63 ALR 142; 122 ALR 297.

Evidence of intemperate habits on question of damages from death or personal injuries, 9 ALR 1405.

Compensation from other source as precluding or reducing recovery against one responsible for personal injury or death, 18 ALR 678; 95 ALR 575.

Damages for wrongful death of spouse as affected by personal relations of the spouses, or the marital misconduct of either spouse, 18 ALR 1409; 90 ALR 920.

Right to recover for mental pain and anguish alone, apart from other damages, 23 ALR 361; 44 ALR 428; 56 ALR 657.

Damages recoverable by conditional vendee against third person as affected by credit on contract of insurance carried by vendor, 32 ALR 632.

Measure of damages for destruction of or damage to automobile other than commercial vehicle, 32 ALR 711; 78 ALR 917; 169 ALR 1100.

Right of landowner to recover for personal injuries incidental to trespass on his land, 32 ALR 921.

Allowance as damages for conversion of commodities or chattels of fluctuating value, of increase in market value after the time of conversion, 40 ALR 1282; 87 ALR 817.

Applicability of "contemplation of parties" rule in tort action, 48 ALR 318.

Excessive or inadequate damages for personal injuries resulting in death, 48 ALR 817; 49 ALR3d 934.

Pain incident to surgical operation or medical treatment as an element of damages for personal injuries, 51 ALR 1122.

Pecuniary value of services rendered by deceased without legal obligation as element of damages for his death, 53 ALR 1102.

Injury to credit as element of damages for wrongful attachment, 54 ALR 451.

Measure of damages for failure, delay, or mistake in transmitting or delivering telegram in cipher, 55 ALR 1146.

Damages recoverable by owner or occupier of surface on account of subsidence due to mining operations, 56 ALR 310.

Right of one liable for death or injury to have damages awarded in judgment against him paid over to physician or nurse for medical attention given to injured or deceased person, 66 ALR 711.

Necessity of alleging permanency of injury in order to recover damages as for a permanent injury, 68 ALR 490.

Damages for wrongful removal or destruction of fixtures, 69 ALR 914.

"Sentimental" losses, including mental anguish, loss of society, and loss of marital, filial, or parental care and guidance, as elements of damages in action for wrongful death, 74 ALR 11.

Distinction between uncertainty as to whether substantial damages resulted and uncertainty as to amount, 78 ALR 858.

Duty to mitigate damages, 81 ALR 282.

Net benefit or advantage in respect of particular item of damage from personal injury or death as reducing recovery on account of another and distinct item, 82 ALR 1423.

Instruction regarding measurement of damages for pain and suffering, 85 ALR 1010.

Shortening of plaintiff's life expectancy as result of injury as element of damages recoverable by person injured, 97 ALR 823; 131 ALR 1351.

Excessiveness of verdict in action by person injured for injuries not resulting in death (for years 1926 to 1935), 102 ALR 1125; 16 ALR2d 3.

Rate of discount to be considered in computing present value of future earnings or benefits lost on account of death or personal injury, 105 ALR 234.

Damage incident to travel on detour as part of recovery for wrongfully preventing or impeding use of highway, 106 ALR 1305.

Amount recoverable from one liable for damage to building as affected by building regulations applicable to restoration or repair of damaged buildings, 107 ALR 1122.

Determination of quantum of damages for injury to property recoverable against defendant whose wrong concurred with act of God, 112 ALR 1084.

Necessity of expert evidence to warrant submission to jury of issue as to permanency of injury or as to future pain and suffering, or to sustain award of damages on that basis, 115 ALR 1149.

Libel or slander: propriety, where actual damages are not shown, of instructions on compensatory damages which do not embody jury's right to award small or nominal damages, 122 ALR 853.

Measure of damages for injury to land caused by obstruction of highway, 128 ALR 780.

Presumption and burden of proof regarding mitigation of damages, 134 ALR 242.

Amount of recovery in tort action against servant or other person who was the active tort-feasor as limit of amount recoverable against one responsible only derivatively, 141 ALR 1168.

Damages on account of loss of earnings or impairment of earning capacity due to wife's personal injury as recoverable by her or by her husband, 151 ALR 479.

Condition and measure of damages in tort action for fraud inducing loan, 162 ALR 698.

Measure of damages for death in action for benefit of decedent's estate, 163 ALR 253.

Division among beneficiaries of amount awarded by jury or received in settlement upon account of wrongful death, 171 ALR 204.

Measure of damages for injury to or destruction of growing crop, 175 ALR 159.

Credit for upkeep or other expense in computing damages for use or detention of property in replevin, 7 ALR2d 933.

Damages for diminution of value of use of the property as recoverable for a permanent nuisance affecting real property, 10 ALR2d 669.

Loss of profits of a business in which plaintiff is interested as a factor in determining damages in action for personal injuries, 12 ALR2d 288.

Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death, 12 ALR2d 611; 21 ALR4th 21.

Measure of damages for conversion or loss of, or damage to, personal property having no market value, 12 ALR2d 902.

Validity, construction, and application of statute limiting damages recoverable for defamation, 13 ALR2d 277.

Proof of prospective earning capacity of student or trainee, or of its loss, in action for personal injury or death, 15 ALR2d 418.

Effect of board or lodging furnished to injured person in connection with hospital or nursing care on damages recoverable in personal injury action, 18 ALR2d 659.

Recovery by contractor or artisan, suing for breach of warranty, of damages for loss of good will occasioned by use in his business of unfit materials, 28 ALR2d 591.

Measure of damages for tenant's failure to surrender possession of rented premises, 32 ALR2d 582.

Expense incurred by injured party in remedying temporary nuisance or in preventing injury as element of damages recoverable, 41 ALR2d 1064.

Measure and elements of damages recoverable for attorney's negligence with respect to maintenance or prosecution of litigation or appeal, 45 ALR2d 62.

Receipt of compensation from consumption of accumulated employment leave,

vacation time, sick leave allowance, or the like, as affecting recovery against tort-feasor, 52 ALR2d 1451.

Cross-examination of plaintiff in personal injury action as to his previous injuries, physical condition, claims, or actions, 69 ALR2d 593.

Recovery of nominal damages in a wrongful death action, 69 ALR2d 628.

Measure of evicted tenant's recovery for improvements made by him on premises for lease uses, 71 ALR2d 1104.

Measure of damages for destruction of or injury to airplane, 73 ALR2d 719.

Pleading matter in mitigation of damages in tort action other than libel and slander, 75 ALR2d 473.

Collateral source rule: receipt of public or private pension as affecting recovery against a tortfeasor, 75 ALR2d 885.

Measure and elements of damages, in action other than one against a carrier, for conversion, injury, loss, or destruction of livestock, 79 ALR2d 677.

Pension, retirement income, social security payments, and the like, of deceased, as affecting recovery in wrongful death action, 81 ALR2d 949.

Admissibility of evidence of plaintiff's or decedent's drawing from partnership or other business as evidence of earning capacity, in action for personal injury or death, 82 ALR2d 679.

What law governs the distribution, apportionment, or disposition of damages recovered for wrongful death, 92 ALR2d 1129.

Conflict of laws as to measure or amount of damages in death actions, 92 ALR2d 1180.

Recovery of prejudgment interest on wrongful death damages, 96 ALR2d 1104.

Measure of damages where vendor, after execution of contract of sale but before conveyance of property, removes part of property contracted for, 97 ALR2d 1220.

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51-12-5. Additional damages for aggravating circumstances.

(a) In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.

(b) This Code section shall apply only to causes of action for torts arising before July 1, 1987. (Orig. Code 1863, § 2998; Code 1868, § 3011; Code 1873, § 3066; Code 1882, § 3066; Civil Code 1895, § 3906; Civil Code 1910, § 4503; Code 1933, § 105-2002; Ga. L. 1987, p. 915, § 4.)

Cross references. — Punitive damages, § 51-12-5.1.

Law reviews. — For article surveying torts law, see 34 Mercer L. Rev. 271 (1982). For article, "Punitive Damages — Their Permissible Scope," see 19 Ga. St. B. J. 118 (1983). For article discussing damages in an excess liability action, "The Liability Insurance Policy — Above and Beyond Coverage: Extra-Contractual Rights and Duties," see 22 Ga. State Bar J. 137 (1986). For article, "The Torok Tort: Recovery for Abusive Litigation," see 23 Ga. St. B. J. 84 (1987). For annual survey of the law of evidence, see 38 Mercer L. Rev. 215 (1986). For article, "Nonjudicial Foreclosures in Georgia Revisited," see 24 Ga. St. B. J. 43 (1987). For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991).

For note, "Allowance of Punitive Damages in Products Liability Claims," see 6 Ga. L. Rev. 613 (1972).

For comment on Atlanta Journal Co. v. Doyal, 31 Ga. App. 592, 60 S.E.2d 802 (1950), see 13 Ga. B. J. 234 (1950). For comment discussing admissibility of evidence of malice not previously pleaded, in light of Van Gundy v. Wilson, 84 Ga. App. 429, 66 S.E.2d 93 (1951), see 14 Ga. B. J. 358 (1952). For comment on Aderhold v. Zimmer, 86 Ga. App. 204, 71 S.E.2d 270 (1952), see 15 Ga. B. J. 355 (1953). For comment, "Are Excessive Punitive Damages Unconstitutional in Georgia?: This Question and More in Colonial Pipeline Co. v. Brown," see 6 Ga. St. U.L. Rev. 85 (1989).

JUDICIAL DECISIONS

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O.C.G.A. §§ 51-12-5, 51-12-5.1, and 51-12-6 must be construed together. Mallard v. Jenkins, 186 Ga. App. 167, 366 S.E.2d 775, cert. denied, 186 Ga. App. 918, 366 S.E.2d 775 (1988).

Constitutional limitation on amount of punitive damages. — The excessive fines clause of Ga. Const. 1983, Art. I, Sec. I, Para. XVII applies to the imposition of punitive damages in civil cases. Colonial Pipeline Co. v. Brown, 258 Ga. 115, 365 S.E.2d 827, appeal dismissed, 488 U.S. 805, 109 S. Ct. 36, 102 L. Ed. 2d 15 (1988).

Upon determination of the constitutional limit on a particular award, the district court may strike the unconstitutional excess from a jury's punitive damage award and enter judgment for that amount as a matter of law. Johansen v. Combustion Eng'g., Inc., 170 F.3d 1320 (11th Cir. 1999), cert. denied, 528 U.S. 931, 120 S. Ct. 329, 145 L. Ed. 2d 256 (1999).

Punitive damages serve purpose of punishing the defendant, of teaching the defendant not to do an act again, and of deterring others from following the defendant's example. Dyer v. Merry Shipping Co., 650 F.2d 622 (5th Cir. 1981), overruled on other grounds, Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995).

Under O.C.G.A. § 51-12-5, punishing the defendant is not a proper ground upon which to base an award of additional damages; deterring the defendant from similar future conduct is, however. Salsbury Labs., Inc. v. Merieux Labs., Inc., 908 F.2d 706 (11th Cir. 1990).

Despite the misnomer "punitive" damages, the purpose of O.C.G.A. § 51-12-5 is to deter the defendant from similar conduct in the future, rather than to punish the defendant. WMH, Inc. v. Thomas, 260 Ga. 654, 398 S.E.2d 196 (1990).

In Georgia, the purpose of punitive damages is to deter the repetition of reprehensible conduct by the defendant or others. Hospital Auth. v. Jones, 261 Ga. 613, 409 S.E.2d 501 (1991), cert. denied, 502 U.S. 1096, 112 S. Ct. 1175, 117 L. Ed. 2d 420 (1992).

Punitive damages may be awarded in suit based in tort. Pelletier v. Schultz, 157 Ga. App. 64, 276 S.E.2d 118 (1981).

General Consideration (Cont'd)

By its express term, O.C.G.A. § 51-12-5 applies only to tort actions and when the action of the plaintiff in this case was one to cancel a deed (on the ground that the deed was a forgery) there could be no recovery of such damages under that section. Roberts v. Scott, 212 Ga. 87, 90 S.E.2d 413 (1955).

This section is comprehensive in its terms and embraces every tort of every character and description, committed by every kind of wrong-doer, and visits upon the offender exemplary damages, or damages to compensate for wounded feelings. Investment Sec. Corp. v. Cole, 57 Ga. App. 97, 194 S.E. 411 (1937), aff'd, 186 Ga. 809, 199 S.E. 126 (1938).

Cause of action prior to July 1, 1987. — Since the cause of action arose prior to July 1, 1987, the correct standard for awarding punitive damages was that found in O.C.G.A. § 51-12-5, rather than O.C.G.A. § 51-12-5.1 which allows punitive damages to be recovered when there is evidence of aggravating circumstances in either the act or the intention. Carter v. Myers, 204 Ga. App. 498, 419 S.E.2d 747 (1992).

Cause of action arising prior to effective date of § 51-12-5.1. — In an action for misappropriating trade secrets, the case is one to protect property and is not a continuing tort. Therefore, since the cause of action arose prior to July 1, 1987, O.C.G.A. § 51-12-5, rather than O.C.G.A. § 51-12-5.1, applied. Salsbury Labs., Inc. v. Merieux Labs., Inc., 908 F.2d 706 (11th Cir. 1990).

Damages are allowable either to deter wrongdoer or to compensate for wounded feelings, but not both. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

Not applicable to actions in equity. — When the plaintiffs do not seek compensatory damages, but only equitable relief, an award of punitive damages, under O.C.G.A. § 51-12-5, is without any foundation and cannot be made. Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982).

An award of exemplary damages cannot stand since compensatory damages were not awarded pursuant to one count of the complaint although a money judgment was entered on a second count, if the sole recovery on the first count was in equity and the trial court specifically instructed the jury that the plaintiff's prayer for exemplary damages was based exclusively on the first count, and not on the second. Artis v. Crenshaw, 256 Ga. 488, 350 S.E.2d 247 (1986).

Former Code 1933, §§ 105-2001, 105-2002, and 105-2003 (see now O.C.G.A. §§ 51-12-4, 51-12-5, and 51-12-6) must be construed in pari materia. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135, modified, 234 Ga. 540, 216 S.E.2d 776 (1974).

Although this section does not speak of "punitive damages," additional damages allowed are what would commonly be called "punitive" in that such damages are in addition to compensatory damages and in that the award is based not on the extent of the plaintiff's injury but in the aggravated nature of the defendant's conduct. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975); Woodbury v. Whitmire, 246 Ga. 349, 271 S.E.2d 491 (1980).

Exemplary damages. — Though sometimes referred to as "punitive damages," the additional damages authorized in some cases by this section are in this state regarded as exemplary damages. Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937).

"Wounded feelings" construed. — The "wounded feelings" referred to in this section are not the same in nature as ordinary mental pain and suffering resulting from a physical injury; they relate to the self respect, sensibilities or pride of a person. Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937).

Mental pain and suffering, such as result from a physical injury, and wounded feelings may arise from the same wrong; and wounded feelings may be of even longer duration than the mental pain and suffering which result from a physical injury. Interstate Life & Accident Co. v. Brewer, 56 Ga. App. 599, 193 S.E. 458 (1937).

Punitive damages are not supportable when the tort is not proved. As-

sociated Software Consultants Org., Inc. v. Wysocki, 177 Ga. App. 135, 338 S.E.2d 679 (1985); Clarke v. Cox, 197 Ga. App. 83, 397 S.E.2d 598 (1990).

In an attorney negligence case, the district court's interlocutory ruling excluding the clients' expert was case-dispositive as the crux of the clients' unjust enrichment and breach of fiduciary duty claims was the law firm's failure to meet the standard of care imposed by the attorney-client relationship; both the breach of fiduciary duty and unjust enrichment counts incorporated the allegations of legal malpractice without adding any independent factual allegations, and the latter count expressly alleged that the law firm was unjustly enriched by receiving compensation for defective, unskillful, and harmful legal advice. Additionally, the clients' O.C.G.A. § 13-6-11 attorney's fee claim and O.C.G.A. § 51-12-5.1 punitive damages claim were not supportable without an award of relief on an underlying claim; thus, the clients' claims, as pled, all required proof of attorney malpractice, and the interlocutory ruling excluding the clients' expert's testimony was case-dispositive. OFS Fitel, LLC v. Epstein, 549 F.3d 1344 (11th Cir. 2008).

Actual damages prerequisite to punitive damages. — Since the jury did not return any actual damages award, the trial court did not err in striking an award for punitive damage. Kelley v. Austell Bldg. Supply, Inc., 164 Ga. App. 322, 297 S.E.2d 292 (1982).

Punitive damages may properly be based upon aggravated tort involving only property rights. Bowen v. Waters, 170 Ga. App. 65, 316 S.E.2d 497 (1984), aff'd, 175 Ga. App. 884, 334 S.E.2d 910 (1985).

Punitive damages constitute no part of a property right, since they are awarded either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff. Hubbard v. Ruff, 97 Ga. App. 251, 103 S.E.2d 134 (1958).

Punitive damages were not assignable as a property right under former Code 1933, § 85-1805 (see now O.C.G.A. § 44-12-24). Maryland Cas. Co. v. Brown, 321 F. Supp. 309 (N.D. Ga. 1971).

The right to bring an action is property, whether actual or compensatory damages are involved, but the right to punitive damages is not property. Maryland Cas. Co. v. Brown, 321 F. Supp. 309 (N.D. Ga. 1971).

Subrogee has no right to recover exemplary damages in addition to compensatory damages. Maryland Cas. Co. v. Brown, 321 F. Supp. 309 (N.D. Ga. 1971).

Fact that damages are accumulated or enhanced does not in itself render the damages penal. Aretz v. United States, 456 F. Supp. 397 (S.D. Ga. 1978), aff'd, 660 F.2d 531 (5th Cir. 1981).

Mere negligence, although gross, will not alone authorize recovery of punitive damages. BLI Constr. Co. v. Debari, 135 Ga. App. 299, 217 S.E.2d 426 (1975); Alliance Transp., Inc. v. Mayer, 165 Ga. App. 344, 301 S.E.2d 290 (1983); Stolle Corp. v. McMahon, 195 Ga. App. 270, 393 S.E.2d 52 (1990); Evans v. Willis, 212 Ga. App. 335, 441 S.E.2d 770 (1994).

If a tort is committed through mistake, ignorance, or mere negligence, the damages are limited to the actual injury received for vindictive or punitive damages are recoverable only when a defendant acts maliciously, willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. Molton v. Commercial Credit Corp., 127 Ga. App. 390, 193 S.E.2d 629 (1972).

Great repetition of merely negligent torts may warrant the recovery of damages to deter the wrongdoer from continuing to harass and annoy plaintiff and destroying plaintiff's property. Collins v. Baker, 51 Ga. App. 669, 181 S.E. 425 (1935).

"Personal tort" need not be committed by wrongdoer before additional damages can be awarded when there are aggravating circumstances either in the act or in the intention. Atlantic Co. v. Farris, 62 Ga. App. 212, 8 S.E.2d 665 (1940); T.G. & Y. Stores Co. v. Waters, 175 Ga. App. 884, 334 S.E.2d 910 (1985).

Wrongful act does not authorize punitive damages when done in good faith. — An act of a person, although without legal right or authority, upon the person or property of another, which causes damage, when done in good faith

General Consideration (Cont'd)

and without willfulness or malice, or such gross neglect as to indicate a wanton disregard for the rights of another will not authorize the infliction of punitive damages. Dalon Contracting Co. v. Artman, 101 Ga. App. 828, 115 S.E.2d 377 (1960).

Actual fraud, which requires a showing of willful misconduct, will support an award of punitive damages. Trailmobile, Inc. v. Barton Envtl., Inc., 167 Ga. App. 1, 306 S.E.2d 1 (1983).

Evidence of motive. — When punitive damages are claimed by virtue of this section, motive becomes material. Miley v. State, 118 Ga. 274, 45 S.E. 245 (1903); Louisville & Nashville R.R. v. Earl, 139 Ga. 456, 77 S.E. 638 (1913).

Claim for punitive damages alone will not lie under this section. Beverly v. Observer Publishing Co., 88 Ga. App. 490, 77 S.E.2d 80 (1953); Haugabrook v. Taylor, 225 Ga. 317, 168 S.E.2d 162 (1969); Queen v. Harrell, 131 Ga. App. 666, 206 S.E.2d 578 (1974).

Proper construction of this section is that punitive damages may be awarded as damages additional to such as may be primarily recovered in a pending tort action. There must be a right under the pleadings and evidence to recover general, nominal or special damages. Otherwise, punitive damages could not and would not be additional. Beverly v. Observer Publishing Co., 88 Ga. App. 490, 77 S.E.2d 80 (1953); Goodwin v. Candace, Inc., 92 Ga. App. 438, 88 S.E.2d 723 (1955).

When no use of action for the recovery of general, special or nominal damages is set forth in the plaintiff's petition, there can be no recovery of additional damages. Goodwin v. Candace, Inc., 92 Ga. App. 438, 88 S.E.2d 723 (1955).

This section refers to punitive damages as "additional" damages, indicating that it is only when the jury returns a verdict for actual damages that punitive damages may be found. Piedmont Cotton Mills, Inc. v. General Whse. No. Two, Inc., 222 Ga. 164, 149 S.E.2d 72 (1966).

When the special damages claimed are not recoverable, the prayer for punitive damages cannot be sustained. Georgia Educ. Auth. v. Davis, 227 Ga. 36, 178 S.E.2d 853 (1970).

There can be no recovery of exemplary damages under this section unless there is a recovery of compensatory damages. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135 (1974), modified, 234 Ga. 540, 216 S.E.2d 776 (1975).

Punitive damages are not recoverable when there is no entitlement to compensatory damages. Motor Fin. Co. v. Harris, 150 Ga. App. 762, 258 S.E.2d 628 (1979).

Even though aggravating circumstances may exist, it is improper to award punitive damages unless general damages have also been awarded. For exemplary damages are "additional damages" and a claim for them will not lie when general damages are not recovered. Mayfield v. Ideal Enters., Inc., 157 Ga. App. 266, 277 S.E.2d 62 (1981).

Award of punitive damages and attorney fees, in absence of any finding of actual damages, is improper as a matter of law. Daiss v. Woodbury, 163 Ga. App. 88, 293 S.E.2d 876 (1982).

When there was no award of compensatory damages, the verdict awarding "punitive" damages could not stand. Sheppard v. Tribble Heating & Air Conditioning, Inc., 163 Ga. App. 732, 294 S.E.2d 572 (1982).

Plaintiff is not entitled under former Code 1933, §§ 105-2002 and 105-2003 (see now O.C.G.A. §§ 51-12-5 and 51-12-6) to double finding of damages for wounded feelings, nor can the jury assess damages for the double purpose of punishment and prevention, or damages for humiliation and mortification and also damages to punish and deter from repeating the trespass or wrong. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939); Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975); Alford v. Oliver, 169 Ga. App. 865, 315 S.E.2d 299 (1984).

An award of exemplary damages to deter the wrongdoer and exemplary damages as compensation for the wounded feelings of the plaintiff double exemplary damages and is not allowable. John Deere Plow Co. v. Head, 68 Ga. App. 502, 23 S.E.2d 523 (1942).

Jury cannot assess damages for the double purpose of punishment and

prevention. Johnson v. Morris, 158 Ga. 403, 123 S.E. 707 (1924); Metro Chrysler-Plymouth, Inc. v. Pearce, 121 Ga. App. 835, 175 S.E.2d 910 (1970).

Jury is not authorized to assess damages as a punishment for the wrong done. The jury can only award such additional damages to deter the wrongdoer from repeating the trespass or injury, or as compensation for the wounded feelings of the injured party. Metro Chrysler-Plymouth, Inc. v. Pearce, 121 Ga. App. 835, 175 S.E.2d 910 (1970).

A plaintiff cannot recover compensatory damages for injury to peace, feelings and happiness (mental pain and suffering alone arising out of a willful tort) and exemplary damages for "wounded feelings." This would amount to a recovery of "double damages" which is not allowed. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135 (1974), modified, 234 Ga. 540, 216 S.E.2d 776 (1975).

These additional exemplary damages may be awarded for either of the two purposes mentioned in this section but not for both, for this section is phrased in the alternative. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135 (1974), modified, 234 Ga. 540, 216 S.E.2d 776 (1975).

When damages were recovered under former Code 1933, § 105-2003 (see now O.C.G.A. § 51-12-6), any additional recovery under former Code 1933, § 105-2002 (see now O.C.G.A. § 51-12-5) would be a double recovery. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

When the only injury is to the peace, feelings, or happiness, the award of exemplary (punitive) damages in addition to damages for mental anguish amounts to a double recovery and is unauthorized. Greenwood Cem. v. Travelers Indem. Co., 238 Ga. 313, 232 S.E.2d 910 (1977).

Damages awarded under former Code 1933, §§ 105-2002 and 105-2003 (see now O.C.G.A. §§ 51-12-5 and 51-12-6) constituted prohibited double recovery. Gibson's Prods., Inc. v. Edwards, 146 Ga. App. 678, 247 S.E.2d 183 (1978).

Although this section does not speak of punitive damages, the additional damages allowed are what would commonly be called punitive and such damages are allowable either to deter the wrongdoer or to compensate for wounded feelings, but not both. Suber v. Fountain, 151 Ga. App. 283, 259 S.E.2d 685 (1979).

Under this section, damages are allowable either to deter the wrongdoer or to compensate for wounded feelings but not both. Whitmire v. Woodbury, 154 Ga. App. 159, 267 S.E.2d 783, rev'd on other grounds, 246 Ga. 349, 271 S.E.2d 491 (1980).

No damages are allowable under both former Code 1933, §§ 105-2002 and 105-2003 (see now O.C.G.A. §§ 51-12-5 and 51-12-6), inasmuch as any additional recovery under former Code 1933, § 105-2002 when damages were allowable under former Code 1933, § 105-2003 would be a double recovery, even though the trial court endeavored to carefully leave out the language of former Code 1933, § 105-2002. Simmons v. Edge, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

Damages to deter wrongdoer may be recovered in addition to general damages for mental suffering. — Additional damages which would deter a wrongdoer from repeating the trespass and which would be compensation for the wounded feelings of the plaintiff are recoverable in addition to general damages for mental and physical pain and suffering, and a charge authorizing a jury to assess damages of the first character is not subject to the objection that, by reason of the court having charged that there could be a recovery for damages of the second character, the charge authorized a recovery for double damages for the same injury. Battle v. Kilcrease, 54 Ga. App. 808, 189 S.E. 573 (1936).

Evidence of pain and suffering not germane when punitive damages not sought. — Since the plaintiff did not seek compensatory damages for mental anguish or punitive damages for wounded feelings, evidence of the plaintiff's personal and mental pain and suffering was not germane to the question of whether there were "aggravating circumstances, in either the act or the intention" of the defendant, and its admission was reversible error. Shadowood Assocs. v. Kirk, 170 Ga. App. 209, 316 S.E.2d 487 (1984).

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Damages awarded plaintiff for purpose of deterring wrongdoer from similar trespass are not compensatory damages for wounded feelings, but merely damages awarded the plaintiff to protect the plaintiff from a future similar injury on the part of the defendant. Franklin v. Evans, 55 Ga. App. 177, 189 S.E. 722 (1937); Garner v. Mears, 97 Ga. App. 506, 103 S.E.2d 610 (1958).

When the basis of punitive damages awarded under O.C.G.A. § 51-12-5 was to deter the wrongdoer and not as compensation for wounded feelings, the award is not measured as a compensation but is fixed in an amount necessary to deter future acts. Smith v. Miliken, 247 Ga. 369, 276 S.E.2d 35 (1981).

Insurance coverage for punitive damages is not against public policy. Federal Ins. Co. v. National Distrib. Co., 203 Ga. App. 763, 417 S.E.2d 671, cert. denied, 203 Ga. App. 906, 417 S.E.2d 671 (1992).

Burden of proof. — The onus is on the plaintiff to prove aggravating circumstances. Grier v. Ward, 23 Ga. 145 (1857); Savannah, F. & W. Ry. v. Stewart, 71 Ga. 427 (1883); Western & Atl. R.R. v. Turner, 72 Ga. 292, 53 Am. R. 842 (1884).

Evidence of worldly circumstances was not admissible on issue of punitive damages under former Code 1933, § 105-2002 (see now O.C.G.A. § 51-12-5) (as distinguished from vindictive damages under former Code 1933, § 105-2003 (see now O.C.G.A. § 51-12-6). Bob Maddox Dodge, Inc. v. McKie, 155 Ga. App. 263, 270 S.E.2d 690 (1980).

Discovery of defendant's worldly circumstances. — In an action under O.C.G.A. § 51-1-18(a) by a parent for furnishing alcoholic beverages to his or her underage child without the parent's consent and, when the parent has prayed for general and special damages, and the parent has not yet made an election to forego all other damages in favor of O.C.G.A. § 51-12-6 damages, the trial court is correct in denying the parent's motion to compel discovery of defendant's worldly circumstances. If, however, the parent timely amends the parent's complaint to abandon all claims except one for § 51-12-6 damages, the parent will be entitled to discover the defendant's worldly circumstances. Stepperson, Inc. v. Long, 256 Ga. 838, 353 S.E.2d 461 (1987) (decided prior to 1987 amendment of § 51-12-6).

Cited in Lamb v. McAfee, 26 Ga. App. 3, 105 S.E. 250 (1920); Georgia Ry. & Power Co. v. Turner, 33 Ga. App. 101, 125 S.E. 598 (1924); Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758 (1942); Anderson v. Buice, 69 Ga. App. 265, 25 S.E.2d 96 (1943); Grant v. Hart, 197 Ga. 662, 30 S.E.2d 271 (1944); Harrison v. Lovett, 198 Ga. 466, 31 S.E.2d 799 (1944); DeBardelaben v. Coleman, 74 Ga. App. 261, 39 S.E.2d 589 (1946); Foster v. Sikes, 202 Ga. 122, 42 S.E.2d 441 (1947); Phillips v. Smith, 76 Ga. App. 705, 47 S.E.2d 156 (1948); Meadows v. Vaughan, 81 Ga. App. 45, 57 S.E.2d 689 (1950); C.G. Aycock Realty Co. v. Burrowes, 81 Ga. App. 560, 59 S.E.2d 406 (1950); Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950); American Thread Co. v. Rochester, 82 Ga. App. 873, 62 S.E.2d 602 (1950); Kelly v. Adams, 84 Ga. App. 450, 66 S.E.2d 144 (1951); Lankford v. Dockery, 85 Ga. App. 86, 67 S.E.2d 800 (1951); Freeman v. Busch Jewelry Co., 98 F. Supp. 963 (N.D. Ga. 1951); Aderhold v. Zimmer, 86 Ga. App. 204, 71 S.E.2d 270 (1952); Darden v. McMillian, 93 Ga. App. 892, 93 S.E.2d 169 (1956); Nichols v. Williams Pontiac, Inc., 95 Ga. App. 752, 98 S.E.2d 659 (1957); Allstadt v. Johnson, 97 Ga. App. 584, 103 S.E.2d 683 (1958); Hancock v. Moriarity, 215 Ga. 274, 110 S.E.2d 403 (1959); Haggard v. Shaw, 100 Ga. App. 813, 112 S.E.2d 286 (1959); Sudderth v. National Lead Co., 272 F.2d 259 (5th Cir. 1959); Dodd v. Slater, 101 Ga. App. 362, 114 S.E.2d 170 (1960); Cook v. Robinson, 216 Ga. 328, 116 S.E.2d 742 (1960); Gwinnett County v. Archer, 102 Ga. App. 821, 118 S.E.2d 102 (1960); Barrow v. Georgia Lightweight Aggregate Co., 103 Ga. App. 704, 120 S.E.2d 636 (1961); Wright v. Lester, 105 Ga. App. 107, 123 S.E.2d 672 (1961); United States ex rel. Dixie Plumbing Supply Co. v. Taylor, 293 F.2d 717 (5th Cir. 1961); Jones v. Hudgins, 218 Ga. 43, 126 S.E.2d 414 (1962); Studdard v. Evans, 108 Ga. App. 819, 135 S.E.2d 60 (1964); King v. Baker,

109 Ga. App. 235, 136 S.E.2d 8 (1964); Butts v. Curtis Publishing Co., 225 F. Supp. 916 (N.D. Ga. 1964); NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816 (1965); Jackson v. Hatch, 115 Ga. App. 623, 155 S.E.2d 676 (1967); Ford Motor Credit Co. v. Hitchcock, 116 Ga. App. 563, 158 S.E.2d 468 (1967); Siler v. Gunn, 117 Ga. App. 325, 160 S.E.2d 427 (1968); Wilson v. McLendon, 225 Ga. 119, 166 S.E.2d 345 (1969); Whisenhunt v. Allen Parker Co., 119 Ga. App. 813, 168 S.E.2d 827 (1969); Jones v. Spindel, 122 Ga. App. 390, 177 S.E.2d 187 (1970); Jones v. Spindel, 128 Ga. App. 88, 196 S.E.2d 22 (1973); Central Chevrolet, Inc. v. Campbell, 129 Ga. App. 30, 198 S.E.2d 362 (1973); Johnson v. Cleveland, 131 Ga. App. 560, 206 S.E.2d 704 (1974); F.N. Roberts Corp. v. Southern Bell Tel. & Tel. Co., 132 Ga. App. 800, 209 S.E.2d 138 (1974); Sheet Metal Workers Int'l Ass'n v. Carter, 133 Ga. App. 872, 212 S.E.2d 645 (1975); Wilson v. Strange, 235 Ga. 156, 219 S.E.2d 88 (1975); Vineyard Village-Georgia, Inc. v. Crum, 136 Ga. App. 335, 221 S.E.2d 208 (1975); Pilkenton v. Eubanks, 139 Ga. App. 673, 229 S.E.2d 146 (1976); Delta Air Lines v. Isaacs, 141 Ga. App. 209, 233 S.E.2d 212 (1977); Brown v. Techdata Corp., 238 Ga. 622, 234 S.E.2d 787 (1977); Sturdivant v. Allstate Ins. Co., 143 Ga. App. 19, 237 S.E.2d 408 (1977); Clark v. Aenchbacher, 143 Ga. App. 282, 238 S.E.2d 442 (1977); Griffin v. Wittfeld, 143 Ga. App. 485, 238 S.E.2d 589 (1977); Rodrigue v. Mendenhall, 145 Ga. App. 666, 244 S.E.2d 598 (1978); Wilkinson v. Davis, 148 Ga. App. 696, 252 S.E.2d 201 (1979); Felton v. Mercer, 149 Ga. App. 358, 254 S.E.2d 398 (1979); United States Shoe Corp. v. Jones, 149 Ga. App. 595, 255 S.E.2d 73 (1979); Calloway v. Rossman, 150 Ga. App. 381, 257 S.E.2d 913 (1979); Aquafine Corp. v. Fendig Outdoor Adv. Co., 155 Ga. App. 661, 272 S.E.2d 526 (1980); Riggs v. Peach State Ford Truck Sales, Inc., 503 F. Supp. 190 (N.D. Ga. 1980); Alewine v. City Council, 505 F. Supp. 880 (S.D. Ga. 1981); Travelers Ins. Co. v. King, 160 Ga. App. 473, 287 S.E.2d 381 (1981); Atlanta Limousine Airport Servs., Inc. v. Rinker, 160 Ga. App. 494, 287 S.E.2d 395 (1981); Jones v. Miles, 656 F.2d 103 (5th Cir. 1981); Field Developers, Inc. v. Johnson, 160 Ga. App. 180, 289 S.E.2d 321 (1981); Colonial Stores, Inc. v. Fishel, 160 Ga. App. 739, 288 S.E.2d 21 (1981); Jones v. Alexander, 163 Ga. App. 278, 293 S.E.2d 537 (1982); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982); Budres v. Farmer, 17 Bankr. 111 (Bankr. N.D. Ga. 1981); Charter Mtg. Co. v. Ahouse, 165 Ga. App. 497, 300 S.E.2d 328 (1983); McCall v. Allstate Ins. Co., 251 Ga. 869, 310 S.E.2d 513 (1984); Slutzky v. Warbington, 171 Ga. App. 621, 320 S.E.2d 623 (1984); Dempsey Bros. Dairies v. Blalock, 173 Ga. App. 7, 325 S.E.2d 410 (1984); Spano v. Swoger, 173 Ga. App. 269, 325 S.E.2d 890 (1985); Getz Servs., Inc. v. Perloe, 173 Ga. App. 532, 327 S.E.2d 761 (1985); Mr. Transmission, Inc. v. Thompson, 173 Ga. App. 773, 328 S.E.2d 397 (1985); Munford, Inc. v. Anglin, 174 Ga. App. 290, 329 S.E.2d 526 (1985); Donson Nursing Facilities v. Dixon, 176 Ga. App. 700, 337 S.E.2d 351 (1985); Yost v. Torok, 256 Ga. 92, 344 S.E.2d 414 (1986); Pope v. Propst, 179 Ga. App. 211, 345 S.E.2d 880 (1986); Henderson v. Glen Oak, Inc., 256 Ga. 619, 351 S.E.2d 640 (1987); National Gypsum Co. v. Wammock, 256 Ga. 803, 353 S.E.2d 809 (1987); Kesler v. Veal, 182 Ga. App. 444, 356 S.E.2d 254 (1987); Gallaher v. Teeple, 183 Ga. App. 31, 357 S.E.2d 808 (1987); Lamb v. R.L. Mathis Certified Dairy Co., 183 Ga. App. 455, 359 S.E.2d 214 (1987); Wammock v. Celotex Corp., 826 F.2d 990 (11th Cir. 1987); Wammock v. Celotex Corp., 835 F.2d 818 (11th Cir. 1988); Associated Health Sys. v. Jones, 185 Ga. App. 798, 366 S.E.2d 147 (1988); Stover v. Atchley, 189 Ga. App. 56, 374 S.E.2d 775 (1988); Insurance Co. of N. Am. v. Smith, 189 Ga. App. 353, 375 S.E.2d 866 (1988); Dyches Constr. Co. v. Strauss, 192 Ga. App. 454, 385 S.E.2d 316 (1989); Intown Enters., Inc. v. Barnes, 721 F. Supp. 1263 (N.D. Ga. 1989); Getz Exterminators of Ga., Inc. v. Towe, 193 Ga. App. 268, 387 S.E.2d 338 (1989); Petrolane Gas Serv., Inc. v. Eusery, 193 Ga. App. 860, 389 S.E.2d 355 (1989); Borg-Warner Acceptance Corp. v. Boat Trading, Inc., 194 Ga. App. 63, 389 S.E.2d 555 (1989); Gaither v. Barclaysmerican/Financial of Ga., Inc., 194 Ga. App. 188, 390 S.E.2d 97 (1990); Simon v. Shearson Lehman Bros., 895 F.2d 1304 (11th Cir.

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1990); Lamb v. Georgia-Pacific Corp., 194 Ga. App. 848, 392 S.E.2d 307 (1990); John D. Robinson Corp. v. Southern Marine & Indus. Supply Co., 196 Ga. App. 402, 395 S.E.2d 837 (1990); Collins v. State Farm Mut. Auto. Ins. Co., 197 Ga. App. 309, 398 S.E.2d 207 (1990); Read v. Benedict, 200 Ga. App. 4, 406 S.E.2d 488 (1991); Bruno v. Evans, 200 Ga. App. 437, 408 S.E.2d 458 (1991); Shepherd Constr. Co. v. Jarrett, 202 Ga. App. 152, 413 S.E.2d 742 (1991); Trust Co. Bank v. Stubbs, 203 Ga. App. 557, 417 S.E.2d 373 (1992); Shaw v. Ruiz, 207 Ga. App. 299, 428 S.E.2d 98 (1993); Macon Tel. Publishing Co. v. Tatum, 208 Ga. App. 111, 430 S.E.2d 18 (1993); ITT Corp. v. Xylem Group, LLC, No. 1:11-cv-03669-WSD, 2013 U.S. Dist. LEXIS 109381 (N.D. Ga. Aug. 5, 2013).

Aggravating Circumstances

In order to bring this section into operation, there must be a tort when there are aggravating circumstances, either in the act or the intention. BLI Constr. Co. v. Debari, 135 Ga. App. 299, 217 S.E.2d 426 (1975).

Requirement of willful and intentional misconduct. — It is not essential to a recovery for punitive damages that the person inflicting the damage was guilty of willful and intentional misconduct, but sufficient that the act be done under such circumstances as evinces an entire want of care and a conscious indifference to consequences; such conduct may constitute "aggravating circumstances in the act," which would authorize a jury to give additional damages as provided in this section. Battle v. Kilcrease, 54 Ga. App. 808, 189 S.E. 573 (1936).

Entitlement to recover exemplary damages. — In order to show that the aggravating circumstances were of such a kind or character as to entitle the plaintiff to recover exemplary damages, it is essential to prove malice or lack of probable cause, or to show a willful or wanton trespass. Investment Sec. Corp. v. Cole, 57 Ga. App. 97, 194 S.E. 411 (1937), aff'd, 186 Ga. 809, 199 S.E. 126 (1938).

Aggravating circumstances resulting in punitive damages. — If there are aggravating circumstances, either in the actions or the intentions of the defendants, the jury may give additional damages called punitive, under this section. If aggravating circumstances are proved this character of damage may be given even when the actual injury is small. Sikes v. Foster, 74 Ga. App. 350, 39 S.E.2d 585 (1946), rev'd on other grounds, 202 Ga. 122, 42 S.E.2d 441 (1947).

Aggravating circumstances such as to authorize an award of additional damages are defined as meaning willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Dalon Contracting Co. v. Artman, 101 Ga. App. 828, 115 S.E.2d 377 (1960).

Gross negligence which disregards rights of others. — Additional damages to deter the wrongdoer from repeating the trespass may be awarded when there are aggravating circumstances either in the act or in the intention, and gross negligence amounting to that want of care which willfully disregards the rights of others will support the award. Black v. Georgia Power Co., 151 Ga. App. 727, 261 S.E.2d 461 (1979).

When a plaintiff pleads and proves actual pecuniary loss for which the plaintiff seeks compensatory damages, and the tort complained of is of such an aggravated nature to warrant a charge on punitive damages, it is permissible for the jury to award both compensatory damages for the injury done and additional or punitive damages to either compensate for wounded feelings or to deter the defendant from similar, wrongful conduct. Woodbury v. Whitmire, 246 Ga. 349, 271 S.E.2d 491 (1980).

Allegations of simple negligence, absent a showing of an aggravating circumstance, will not support a claim for exemplary damages. Ticor Constr. Co. v. Brown, 255 Ga. 547, 340 S.E.2d 923 (1986).

Aggravating circumstances must be sufficient to show willful misconduct, malice, fraud, oppression, or entire want of care evidencing conscious indifferences to consequences required by this section. Jackson v. Co-op Cab Co., 102

Ga. App. 688, 117 S.E.2d 627 (1960).

Aggravating circumstance must relate to the tort being sued on. McNorrill v. Candler Gen. Hosp., 188 Ga. App. 636, 373 S.E.2d 780 (1988).

When a patient's suit against a hospital was based on a physical injury sustained while the patient was in the emergency room, a hospital manager's alteration of an insurance report on the incident did not relate to the tort so as to support a claim for punitive damages under subsection (a) of O.C.G.A. § 51-12-5. McNorrill v. Candler Gen. Hosp., 188 Ga. App. 636, 373 S.E.2d 780, cert. denied, 188 Ga. App. 912, 373 S.E.2d 780 (1988).

Aggravating circumstances must be proved separate from the tort. — The aggravating circumstances necessary to support an award for punitive damages pursuant to O.C.G.A. § 51-12-5 must arise separately from the evidence proving each tort. Clarke v. Cox, 197 Ga. App. 83, 397 S.E.2d 598 (1990).

Malice or Ill Will

To authorize imposition of punitive or exemplary damages, there must be evidence of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Southern Ry. v. O'Bryan, 119 Ga. 147, 45 S.E. 1000 (1903); Collins v. Baker, 51 Ga. App. 669, 181 S.E. 425 (1935); Investment Sec. Corp. v. Cole, 186 Ga. 809, 199 S.E. 126 (1938); Rhodes v. Industrial Fin. Corp., 64 Ga. App. 549, 13 S.E.2d 883 (1941); Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943); Head v. John Deere Plow Co., 71 Ga. App. 276, 30 S.E.2d 662 (1944); Western Union Tel. Co. v. Nix, 73 Ga. App. 184, 36 S.E.2d 111 (1945); S.S. Kresge Co. v. Carty, 120 Ga. App. 170, 169 S.E.2d 735 (1969); Standard Oil Co. v. Mount Bethel United Methodist Church, 230 Ga. 341, 196 S.E.2d 869 (1973); BLI Constr. Co. v. Debari, 135 Ga. App. 299, 217 S.E.2d 426 (1975); Kaplan v. Sanders, 237 Ga. 132, 227 S.E.2d 38 (1976); Ray Jones, Inc. v. Cowan, 139 Ga. App. 811, 229 S.E.2d 669 (1976); Bonds v. Powl, 140 Ga. App. 140, 230 S.E.2d 133 (1976); Eckert v. Louisville & Nashville Ry., 142 Ga. App. 5, 234 S.E.2d 819 (1977); General Refractories Co. v. Rogers, 240 Ga. 228, 239 S.E.2d 795 (1977); Ballard v. Turner, 147 Ga. App. 584, 249 S.E.2d 637 (1978); Bracewell v. King, 147 Ga. App. 691, 250 S.E.2d 25 (1978); Aretz v. United States, 456 F. Supp. 397 (S.D. Ga. 1978), aff'd, 660 F.2d 531 (5th Cir. 1981); Gunthorpe v. Daniels, 150 Ga. App. 113, 257 S.E.2d 199 (1979); Suber v. Fountain, 151 Ga. App. 283, 259 S.E.2d 685 (1979); Georgia-Carolina Brick & Tile Co. v. Brown, 153 Ga. App. 747, 266 S.E.2d 531 (1980); Gordon v. Ogden, 154 Ga. App. 641, 269 S.E.2d 499 (1980); Morgan v. Hawkins, 155 Ga. App. 836, 273 S.E.2d 221 (1980); Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980); Jackson v. Willis, 2 Bankr. 566 (Bankr. M.D. Ga. 1980); Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981); Concrete Constr. Co. v. City of Atlanta, 176 Ga. App. 873, 339 S.E.2d 266 (1985); Rossville Apts. Co. v. Britton, 178 Ga. App. 194, 342 S.E.2d 504 (1986); Cullen v. Novak, 201 Ga. App. 459, 411 S.E.2d 331, cert. denied, 201 Ga. App. 903, 411 S.E.2d 331 (1991); Payne v. Carson, 215 Ga. App. 253, 450 S.E.2d 273 (1994).

Punitive damages may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. Dyer v. Merry Shipping Co., 650 F.2d 622 (5th Cir. 1981), overruled on other grounds, Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995).

To be entitled to punitive damages under O.C.G.A. § 51-12-5, the plaintiffs would have to show that the defendants' alleged misrepresentations or omissions constituted an intentional disregard of the rights of another, knowingly or willfully disregarding such rights. Duncan v. Poythress, 515 F. Supp. 327 (N.D. Ga.), aff'd, 657 F.2d 691 (5th Cir. 1981), cert. dismissed, 459 U.S. 1012, 103 S. Ct. 368, 74 L. Ed. 2d 504 (1982).

Neither direct personal contact nor specific malice between the defendant and the plaintiff is required to support a claim for additional damages under O.C.G.A. § 51-12-5. Bowen v. Waters, 170 Ga. App. 65, 316 S.E.2d 497 (1984), aff'd, 175 Ga. App. 884, 334 S.E.2d 910 (1985).

Evidence insufficient to show malice. — Evidence that a defendant was

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indifferent or unsympathetic to the plaintiff's plight was insufficient to show malice. Community Fed. Sav. & Loan Ass'n v. Foster Developers, Inc., 179 Ga. App. 861, 348 S.E.2d 326 (1986).

If person commits trespass with knowledge that the person is acting without right, exemplary or punitive damages may be awarded. Savannah Elec. & Power Co. v. Horton, 44 Ga. App. 578, 162 S.E. 299 (1932); Collins v. Baker, 51 Ga. App. 669, 181 S.E. 425 (1935); Dalon Contracting Co. v. Artman, 101 Ga. App. 828, 115 S.E.2d 377 (1960).

A willful or conscious or intentional disregard of the interest of the plaintiff is the equivalent of legal malice justifying punitive damages for trespass. Allison v. Hodo, 84 Ga. App. 790, 67 S.E.2d 606 (1951); Kolodkin v. Griffin, 87 Ga. App. 725, 75 S.E.2d 197 (1953).

A reckless, conscious or intentional disregard is equivalent to legal malice justifying punitive damages. Kolodkin v. Griffin, 87 Ga. App. 725, 75 S.E.2d 197 (1953).

Absent willful misconduct, malice, fraud, wantonness or oppression, there can be no recovery of punitive damages. Moon v. Georgia Power Co., 127 Ga. App. 524, 194 S.E.2d 348 (1972); Alliance Transp., Inc. v. Mayer, 165 Ga. App. 344, 301 S.E.2d 290 (1983).

Punitive damages may be awarded when there is evidence of willful misconduct of a defendant. Etheridge v. Kay, 153 Ga. App. 399, 265 S.E.2d 332 (1980).

Showing of ill-will, hatred, or vindictiveness not required. — The malice required for the recovery of exemplary damages need not amount to ill-will, hatred, or vindictiveness of purpose. It is sufficient if the defendant's acts were wanton or were done with a reckless disregard for or a conscious indifference to the rights of the plaintiff to use and enjoy the plaintiff's property. Bowen v. Waters, 170 Ga. App. 65, 316 S.E.2d 497 (1984), aff'd, 175 Ga. App. 884, 334 S.E.2d 910 (1985).

Pleadings

Punitive damages may be awarded when allegations of petition and evidence justify those damages even though there was no special prayer therefor. Davis v. Macon Tel. Publishing Co., 93 Ga. App. 633, 92 S.E.2d 619 (1956).

Requirements for punitive damages. — In order for the jury to assess punitive damages, it is not necessary that punitive damages shall be claimed as such and all that need be pled is to set forth a stated amount besides circumstances that may well be considered as an aggravation and constitute punitive damages. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943).

A petition setting forth alleged torts, and claiming damages generally in a named amount, states a cause of action for recovery of general damages, nominal damages and punitive damages, as the evidence might show; and is not subject to dismissal as claiming no recoverable damages. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943).

When general damages are prayed for and when the facts alleged would authorize the recovery of punitive damages the damages need not be claimed under that name. Bracewell v. King, 147 Ga. App. 691, 250 S.E.2d 25 (1978).

If only special or punitive damages are expressly pled and prayed, recovery is limited to damages thus sought. Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943).

When no general damages are prayed for, but only equitable relief, there is nothing to support award of aggravated damages. Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977).

Jury Charge

Court must instruct jury on various elements of damages claimed. — When several different elements of damage are claimed, it is error requiring the grant of a new trial for the judge to fail in the judge's charge to the jury to give the jury any rule for estimating the damages

claimed; and this is true notwithstanding no written request for such charge is made by the defendant. Southeastern Greyhound Lines v. Hancock, 71 Ga. App. 471, 31 S.E.2d 59 (1944).

Charge that punitive damages are given to deter wrong proper. — Charge that punitive damages are such as are given to deter future similar occurrences, and also as damages for the wrong committed under the peculiarly provoking circumstances, that is, provoking as far as the plaintiff might be concerned, is a substantial statement of the law as provided in this section. Battle v. Kilcrease, 54 Ga. App. 808, 189 S.E. 573 (1936).

Charge based upon this section should not be given when there is no allegation and no evidence of aggravating circumstances, and the suit is for compensatory damages only. Rozier v. Folsom, 53 Ga. App. 53, 185 S.E. 140 (1936).

When there is no evidence of aggravating circumstances in the act or intention, this section ought not be given in charge. Everett v. Culberson, 215 Ga. 577, 111 S.E.2d 367 (1959); Ray Jones, Inc. v. Cowan, 139 Ga. App. 811, 229 S.E.2d 669 (1976).

Error to charge section in suit based on simple negligence. — In a suit for personal injuries based on simple negligence in which compensatory damages only were sued for, it was error for the court to give in charge to the jury the provisions of former Code 1933, §§ 105-2002 and 105-2003 (see now O.C.G.A. §§ 51-12-5 and 51-12-6), relating to intentional injury, aggravating circumstances, and the worldly circumstances of the parties. Rozier v. Folsom, 53 Ga. App. 53, 185 S.E. 140 (1936).

It is error to charge language of both former Code 1933, §§ 105-2002 and 105-2003 (see now O.C.G.A. §§ 51-12-5 and 51-12-6), so as to permit double recovery. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939).

Instructions which permit recovery for wounded feelings under former Code 1933, §§ 105-2002 and 105-2003 (see now O.C.G.A. §§ 51-12-5 and 51-12-6) were improper and were cause for granting a new trial. Universal Credit Co. v. Starrett, 61 Ga. App. 132, 6 S.E.2d 80 (1939).

Charge instructing on punitive damages when the defendant's conduct was unintentional must contain language that the defendant's conduct was with a reckless disregard or conscious indifference to the right of the plaintiff. T.G. & Y. Stores Co. v. Waters, 175 Ga. App. 884, 334 S.E.2d 910 (1985).

Failure to object to charge constitutes waiver. — Failure to object that the trial court erred by charging the jury on damages pursuant to O.C.G.A. §§ 51-12-5 and 51-12-6 before the jury returned its verdict in an action for wrongful dispossession, trespass, conversion, and theft constituted a waiver of the right to raise the issue on appeal, and there was no substantial error which would require review under the exception set forth in O.C.G.A. § 5-5-24(c). Sanders v. Hughes, 183 Ga. App. 601, 359 S.E.2d 396, cert. denied, 183 Ga. App. 907, 359 S.E.2d 396 (1987).

Jury Determinations

This section expressly provides for punitive damages but under Georgia law, three things are left for the jury to determine: (1) when punitive damages shall be allowed; (2) the amount of such damages; and (3) the purpose of the award as either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff. Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965), aff'd, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

There is no maximum or minimum amount of punitive damages prescribed by the law, nor is it measured by earning capacity or expectancy of life. Southeastern Greyhound Lines v. Suits, 55 Ga. App. 371, 190 S.E. 417 (1937).

Only measure for punitive damages for wounded feelings is enlightened conscience of impartial jurors, and the court erred in failing to instruct the jury as to the measure of damages. Head v. John Deere Plow Co., 71 Ga. App. 276, 30 S.E.2d 662 (1944).

The measure of damages, when exemplary or punitive damages are recoverable, as prescribed by law, is to be fixed by

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the enlightened conscience of an impartial jury. Head v. John Deere Plow Co., 71 Ga. App. 276, 30 S.E.2d 662 (1944).

In an action for wounded feelings the measure of damages must be determined by the enlightened consciences of impartial jurors. Turner v. Joiner, 77 Ga. App. 603, 48 S.E.2d 907 (1948).

The law does not set any standard by which punitive damages can be measured except the enlightened consciences of impartial jurors. Kolodkin v. Griffin, 87 Ga. App. 725, 75 S.E.2d 197 (1953).

Questions concerning the amount of damages to be awarded as punitive damages, are for the enlightened conscience of the jury. Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 257 S.E.2d 264 (1979).

Punitive damages should have reasonable proportion to wounded feelings. — The rule which requires that the amount of punitive damages have some reasonable proportion to the extent of injury refers to those cases awarding exemplary damages for wounded feelings. King v. Towns, 102 Ga. App. 895, 118 S.E.2d 121 (1960); Smith v. Miliken, 247 Ga. 369, 276 S.E.2d 35 (1981).

It is question for jury to determine when such additional damages should be allowed, as well as the amount of such damages. Sikes v. Foster, 74 Ga. App. 350, 39 S.E.2d 585 (1946), rev'd on other grounds, 202 Ga. 122, 42 S.E.2d 441 (1947); Kolodkin v. Griffin, 87 Ga. App. 725, 75 S.E.2d 197 (1953); Townsend & Ghegan Enters. v. W.R. Bean & Son, 117 Ga. App. 109, 159 S.E.2d 776 (1968); Bonds v. Powl, 140 Ga. App. 140, 230 S.E.2d 133 (1976).

Question of punitive damages is one for jury. King v. Towns, 102 Ga. App. 895, 118 S.E.2d 121 (1960); Moon v. Georgia Power Co., 127 Ga. App. 524, 194 S.E.2d 348 (1972); Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980).

Whether the aggravating circumstances of the alleged tort warrant the award to the plaintiff of punitive damages is a question for the jury. Kelly v. Georgia Cas. & Sur. Co., 105 Ga. App. 104, 123 S.E.2d 711 (1961); Bonds v. Powl, 140 Ga. App. 140, 230 S.E.2d 133 (1976).

Punitive damages are only to be given if there be circumstances of aggravation. Whether there be such circumstances or not, is a question for the jury, and not the court. Townsend & Ghegan Enters. v. W.R. Bean & Son, 117 Ga. App. 109, 159 S.E.2d 776 (1968).

Whether an additional sum should be awarded the plaintiff, either as compensation for the plaintiff's wounded feelings, or to deter the wrongdoer from repeating the trespass, is solely a matter for jury consideration, not only as to the amount but as to the award itself. Bonds v. Powl, 140 Ga. App. 140, 230 S.E.2d 133 (1976).

The award of exemplary damages is an award in addition to such as may be primarily recovered in a tort action and is a matter of discretion for the jury. Maheia v. Weeks, 144 Ga. App. 199, 240 S.E.2d 752 (1977).

Ordinarily, the question of imposition of punitive damages is for the jury. However, the controlling question is whether there was any evidence to support such an award. Alliance Transp., Inc. v. Mayer, 165 Ga. App. 344, 301 S.E.2d 290 (1983).

Determination of the amount of actual or punitive damages necessary to deter recurrences of fraudulent conduct is rightfully a jury function and will only be disturbed if the determination is blatantly egregious. Mercer v. Woodard, 166 Ga. App. 119, 303 S.E.2d 475 (1983).

Exemplary damages lie within the conscience of jury. When the jury finds aggravating circumstances in the defendant's acts and intentions sufficiently repugnant to justify the award, the appellate court will be reluctant to interfere with the jury's sense of conscience in the plaintiff's behalf. Privitera v. Addison, 190 Ga. App. 102, 378 S.E.2d 312, cert. denied, 190 Ga. App. 102, 378 S.E.2d 312 (1989).

State law controls whether facts warrant submission to jury of the punitive damages question. Gower v. Cohn, 643 F.2d 1146 (5th Cir. 1981).

Jurors may weigh all facts and circumstances in determining whether to award punitive damages. King v. Towns, 102 Ga. App. 895, 118 S.E.2d 121 (1960).

This section does not allow jury to consider the defendant's financial

worth in computing damages. Hodges v. Youmans, 129 Ga. App. 481, 200 S.E.2d 157 (1973).

When motion for directed verdict granted. — The trial court should grant the defendant's motion for a directed verdict as to punitive damages when the plaintiffs do not set out a cause of action in tort. Glynn County Fed. Employees Credit Union v. Peagler, 256 Ga. 342, 348 S.E.2d 628 (1986).

Error for court to direct verdict against punitive damages when jury found for plaintiff on fraud issue. — When the trial court decides that there is an issue for the jury as to the defendant's fraud respecting one issue, and the jury decides for the plaintiff on this issue, it is error for the trial court to direct a verdict against the plaintiff as to punitive damages and attorney's fees. Champion v. Martin, 124 Ga. App. 275, 183 S.E.2d 571 (1971).

Applicability to Specific Cases

1. Automobiles

Automobile sale. — When fraud and deceit in sale of automobile is proved, aggravating circumstances may authorize imposition of punitive damages, and such circumstances may occur either in act or intention of wrongdoer. Hubacher v. Volkswagen Cent., Inc., 164 Ga. App. 791, 298 S.E.2d 533 (1982).

Conscious exclusion of safety devices from automobiles. — Evidence was sufficient to authorize the jury to find that the sum of $8 million was an amount necessary to deter an automobile manufacturer from repeating its conduct, that is, its conscious decision to defer implementation of safety devices in order to protect its profits. Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

Driving under the influence of alcohol so as to cause personal injuries to another is an aggravating circumstance in the act which would authorize the jury to give punitive damages to deter the wrongdoer from repeating the act. Therefore, evidence of a defendant's guilty pleas to driving under the influence of alcohol before and after the incident in issue is admissible on the question of punitive damages. Moore v. Thompson, 255 Ga. 236, 336 S.E.2d 749 (1985).

Driving vehicle with knowledge of possible loss of consciousness. — One who knowingly continues to drive a taxicab for long hours after being warned that one is subject to recurring attacks of loss of consciousness due to physical illness, as a result of which it is unsafe for the driver to drive an automobile, may be guilty of such want of care, evidencing conscious indifference to consequences, as to render the driver liable for punitive damages. Jackson v. Co-op Cab Co., 102 Ga. App. 688, 117 S.E.2d 627 (1960).

Fact that the defendant's car may have crossed centerline and struck the plaintiffs' vehicle would not, in the absence of aggravating circumstances, authorize the plaintiff to recover punitive damages. Currie v. Haney, 183 Ga. App. 506, 359 S.E.2d 350, cert. denied, 183 Ga. App. 905, 359 S.E.2d 350 (1987).

Hit and run driver. — Conduct of a hit and run driver in failing to stop and give the driver's name, etc., and render assistance to the person injured, when taken in connection with all the circumstances, may authorize finding of an entire want of care and conscious indifference to consequences, involving such "aggravating circumstances in the act" as would authorize a recovery by the person injured for punitive damages. Battle v. Kilcrease, 54 Ga. App. 808, 189 S.E. 573 (1936).

2. Employment

Damages allowed the plaintiff for injury to the plaintiff's earning capacity are compensatory and cannot be awarded as "additional damages" allowable under this section. Atlantic Coast Line R.R. v. Ansley, 84 Ga. App. 89, 65 S.E.2d 463 (1951).

Hiring of harassing supervisor. — Even if the companies should have known about the supervisor's reputation for sexual harassment, since there was no evidence of an entire want of care on their part which would raise the presumption of a conscious indifference to the consequences, imposition of punitive damages was not warranted. Troutman v. B.C.B.

Applicability to Specific Cases (Cont'd)
2. Employment (Cont'd)

Co., 209 Ga. App. 166, 433 S.E.2d 73 (1993).

No additional damages under Workers' Compensation Act. — Although the Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., does not bar an employee from bringing a claim for property damage against an employer, the employee may not recover additional damages for aggravated circumstances when the property damage arose out of the same incident in which the employee sustained personal injury compensable under the Workers' Compensation Act. Superb Carpet Mills, Inc. v. Thomason, 183 Ga. App. 554, 359 S.E.2d 370, cert. denied, 183 Ga. App. 907, 359 S.E.2d 370 (1987).

3. Property

Changing course of stream. — While the evidence showed that the defendant intentionally changed the course of the stream upon the defendant's land, thereby damaging the defendant's neighbor's land, the evidence was insufficient to show aggravating circumstances, either in the act or in the intention, so as to authorize punitive damages. Costley v. Long, 112 Ga. App. 758, 146 S.E.2d 153 (1965).

Conversion. — Punitive damages are appropriate for conversion as a tort. Privitera v. Addison, 190 Ga. App. 102, 378 S.E.2d 312, cert. denied, 190 Ga. App. 102, 378 S.E.2d 312 (1989).

Dirt swept onto adjoining property by natural drains. — The piling of dirt on the defendant's own property in carrying out a legitimate business activity, not abnormally dangerous when supervised under the authority of the law of this state, without more, would not support an allegation of conscious indifference when a portion is washed down natural drains onto another's property. General Refractories Co. v. Rogers, 240 Ga. 228, 239 S.E.2d 795 (1977).

Exemplary damages are recoverable in actions for conversion. Harrell v. Anderson, 294 F. Supp. 405 (S.D. Ga. 1968).

Intentional disregard for plaintiff's enjoyment of property. — The malice required for the recovery of exemplary damages need not amount to ill-will, hatred, or vindictiveness of purpose, but it would be sufficient if the defendants were guilty of wanton or conscious, reckless, or intentional disregard for the rights of the plaintiff in the free use and enjoyment of the plaintiff's land, in its natural state. Kolodkin v. Griffin, 87 Ga. App. 725, 75 S.E.2d 197 (1953).

Interference with access to highway. — One whose means of egress from and ingress to one's property abutting on a public highway is illegally and unnecessarily interfered with by the placing of obstructions in and the plowing up of the portion of such way lying in the highway by another, suffers a special injury and may maintain an action for damages therefore against the wrongdoer. Punitive damages may be recovered when the circumstances are such as to justify the allowance thereof. Barham v. Grant, 185 Ga. 601, 196 S.E. 43 (1937).

Damages for one whose means of egress from and ingress to one's property abutting on a public highway is illegally and unnecessarily interfered with may be the depreciation in market value, if the obstruction is a permanent one, or the damage to business and loss of profits. Punitive damages may be recovered when the circumstances are such as to justify the allowance thereof. Holland v. Shackleford, 220 Ga. 104, 137 S.E.2d 298 (1964).

One who enters upon and injures another's land is not, though a trespasser, liable for punitive damages, when acts were done in good faith and there was nothing in the manner of doing such acts to indicate an intention to wantonly disregard the rights of the true owner. Ray Jones, Inc. v. Cowan, 139 Ga. App. 811, 229 S.E.2d 669 (1976).

Recovery for trespass to personal property is limited to compensation (actual damages) in absence of aggravations, for which exemplary or punitive damages are allowed. The gist of such an action of trespass is the injury done to the possession of the property. Investment Sec. Corp. v. Cole, 57 Ga. App. 97, 194 S.E. 411 (1937), aff'd, 186 Ga. 809, 199 S.E. 126 (1938).

Even though a recovery for trespass may be had for actual damages, exemplary damages will usually not be allowed when the trespass was under a claim of right in good faith as under a mistake as to the ownership of the personalty taken under process, but may be awarded even in such a case if there are circumstances of aggravation. Investment Sec. Corp. v. Cole, 57 Ga. App. 97, 194 S.E. 411 (1937), aff'd, 186 Ga. 809, 199 S.E. 126 (1938).

In a suit for trespass to the plaintiff's personal property, since the evidence tends to show that prior to the levy the plaintiff warned the defendant not to deprive the plaintiff of the possession of the plaintiff's property by levying an attachment thereon which was sued out against an outsider but not the plaintiff, the malice required for the recovery of exemplary damages need not amount to ill will, hatred, or vindictiveness of purpose, it being sufficient if the defendant was guilty of a wanton or even a conscious or intentional disregard of the rights of another, as such disregard is equivalent to legal "malice," justifying punitive damages for trespass. Investment Sec. Corp. v. Cole, 57 Ga. App. 97, 194 S.E. 411 (1937), aff'd, 186 Ga. 809, 199 S.E. 126 (1938).

When the punitive damages at issue here are those growing out of the trespass action which was consolidated for jury trial with the condemnation proceedings in the superior court, the question of damages is one for the jury. Black v. Georgia Power Co., 151 Ga. App. 727, 261 S.E.2d 461 (1979).

Reduction of excessive award. — In a nuisance and trespass action against the owner of a former mining site alleging that acidic water had escaped from the site damaging streams that run through the plaintiffs' properties, an award of $15 million was constitutionally excessive and the district court correctly reduced the award to $4.35 million. Johansen v. Combustion Eng'g., Inc., 170 F.3d 1320 (11th Cir. 1999), cert. denied, 528 U.S. 931, 120 S. Ct. 329, 145 L. Ed. 2d 256 (1999).

Trespass. — In an action for trespass, after the defendant's motion to open its default had been denied and the case proceeded to trial on the issue of compensatory and punitive damages, the trial court correctly refused the defendant permission to question the plaintiff concerning whether the plaintiff knew that an easement had allegedly existed on the affected property and also correctly refused to permit the defendant to attempt to mitigate punitive damages by presenting evidence concerning the alleged existence of such an easement since, although such evidence might have affected the amount of punitive damages assessed, it also bore upon the right of recovery, which had already been established by the factum of the default. Krystal Co. v. Carter, 180 Ga. App. 667, 350 S.E.2d 306 (1986).

Wrongful prosecution for criminal damage to property. — Aggravating circumstances were properly found after the defendant brought criminal property damage charges against the plaintiff prior to verifying any such damage and the defendant's continued insistence upon those charges despite the apparent lack of damage. Branson v. Donaldson, 206 Ga. App. 723, 426 S.E.2d 218 (1992).

Transactions between mortgagor and mortgagee. — Mortgage companies were not liable for punitive damages to real estate investors whose credit scores allegedly were injured after the companies' failure to timely pay a tax bill triggered the filing of a county tax lien and after the companies erroneously reported having foreclosed a mortgage granted to the investors. The investors adduced no evidence from which a jury could construe that the companies' erroneous handling of these matters was willful or consciously indifferent to the investors' interests, and thus the investors did not satisfy the criteria for an award of punitive damages pursuant to O.C.G.A. § 51-12-5.1(b). Burch v. Chase Manhattan Mortg. Corp., No. 1:07-CV-0121-JOF, 2008 U.S. Dist. LEXIS 76595 (N.D. Ga. Sept. 15, 2008).

4. Sale of Goods

Punitive damages are authorized against manufacturer for each individual plaintiff who contracts asbestosis from exposure to the manufacturer's products. Wammock v. Celotex Corp., 826 F.2d 990 (11th Cir. 1987), but see,

Applicability to Specific Cases (Cont'd)
4. Sale of Goods (Cont'd)

Wammock v. Celotex Corp. v. 835 F.2d 818 (11th Cir. 1988).

Mistaken shipment followed by corrective action does not warrant punitive damages. — When the evidence shows merely that the plaintiff's property was mistakenly mingled with a shipment destined for another state and that when the mistake was discovered, the defendant took steps to return the property to Atlanta, the award of punitive damages will be stricken. Alliance Transp., Inc. v. Mayer, 165 Ga. App. 344, 301 S.E.2d 290 (1983).

Fraudulent sale of goods. — Under evidence showing the perpetuation of a fraudulent scheme which induced the plaintiff, who was illiterate, to purchase stainless steel cookware from the defendant at an amount in excess of its market value, the charge of this section was applicable. King v. Towns, 102 Ga. App. 895, 118 S.E.2d 121 (1960).

Penal damages not recoverable for U.C.C. claim. — When, at trial, during the precharge conference, the plaintiff elected to proceed on the theory of a violation of the U.C.C., O.C.G.A. §§ 11-9-504 through 11-9-507, choosing the damages provided by § 11-9-507 rather than the damages recoverable for conversion, as to the U.C.C. claim, penal damages are not recoverable. Malley Motors, Inc. v. Davis, 183 Ga. App. 599, 359 S.E.2d 394 (1987).

Violation of public duty by common carrier. — When the plaintiff had a contract with the defendant (a common carrier), which generated a relation attended with a public duty; and the petition, properly construed, set forth an action for violation of a public duty by the common carrier, the contract being relied on merely as inducement, punitive as well as actual damages are recoverable, when there is evidence to show aggravating circumstances in the act or the intention. Southeastern Greyhound Lines v. Suits, 55 Ga. App. 371, 190 S.E. 417 (1937).

5. Miscellaneous

Conduct occurring during litigation. — This is no provision for punitive damages arising because of conduct occurring during litigation. Citizens & S. Nat'l Bank v. Bougas, 245 Ga. 412, 265 S.E.2d 562 (1980).

Attorney fees and expenses of litigation are not punitive or vindictive damages. They are recoverable only in cases when other elements of damages are recoverable. Cleary v. Southern Motors of Savannah, Inc., 142 Ga. App. 163, 235 S.E.2d 623 (1977).

Attorney's fees were not usually allowed as an item of damages except in those cases permitted by statute. Such fees were not a part of punitive or vindictive damages, but stand alone and were regulated by former Code 1933, § 20-1404 (see now O.C.G.A. § 13-6-11). Dodd v. Slater, 101 Ga. App. 358, 114 S.E.2d 167 (1960).

Individual damage items, such as punitive damages awarded as additional damages or expenses of litigation, do not provide the requisite support for each other. They are recoverable only in cases when other elements of damages are recoverable. Cleary v. Southern Motors of Savannah, Inc., 142 Ga. App. 163, 235 S.E.2d 623 (1977).

Although punitives were not recoverable under O.C.G.A. § 51-12-5, there was some evidence of bad faith intention behind the developer-defendant's diversion of water-flow, sufficient to allow for recovery of attorney fees as expenses of litigation pursuant to O.C.G.A. § 13-6-11. Ross v. Hagler, 209 Ga. App. 201, 433 S.E.2d 124 (1993).

Apartment floor collapse. — In an action for injuries sustained when an apartment floor collapsed, the defendants argued that the mere breach of their duty to repair the apartment would not authorize punitive damages, but the evidence showed that the defendants had been aware for several years of serious problems with the plumbing, not only in the plaintiff's apartment, but in the three contiguous apartments, and the defendants had actually had to replace floors in contiguous apartments following accumulation of water, and were aware that another tenant had fallen through a bathroom floor because of similar leaks. This evidence was sufficient to authorize the

jury to find that the defendants' inaction evinced a reckless disregard for or a conscious indifference to consequences, thus constituting aggravating circumstances which permit the award of additional damages under the provisions of O.C.G.A. § 51-12-5, and there was no error in the trial court's charging the jury on these damages. Crow v. Evans, 183 Ga. App. 581, 359 S.E.2d 446 (1987).

Breach of contract or statutory violations. — Punitive damages are available not only in suits based on negligence but also increasingly in other types of cases, including those alleging breach of contract or statutory violations. Dyer v. Merry Shipping Co., 650 F.2d 622 (5th Cir. 1981), overruled on other grounds, Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995).

Conscious publication of erroneous advertisement in newspaper. — When a publisher, with full knowledge of an error in an ad and the ad's falsity and propensity for damage, makes a conscious decision to continue distribution of the false advertising with conscious indifference to the consequences that could befall the advertiser and without any attempt to minimize or diminish the possible adverse effect of its error, the standard for punitive damages is satisfied. Southern Bell Tel. & Tel. Co. v. Coastal Transmission Serv., Inc., 167 Ga. App. 611, 307 S.E.2d 83 (1983).

Taking trade secrets, marketing strategies, and customer lists. — In a misappropriation of trade secrets case, punitive damages may be awarded when the acts of the defendant are "calculated," "deliberate," "reprehensible," or committed with the knowledge that the acts are unlawful. Salsbury Labs., Inc. v. Merieux Labs., Inc., 735 F. Supp. 1555 (M.D. Ga. 1989), aff'd, 908 F.2d 706 (11th Cir. 1990).

When a former employee engaged in competition with a former employer in violation of an agreement not to compete, and took the company's marketing strategy manual with the employee when the employee left, there was evidence to indicate that the employee proceeded in wilful disregard of the rights of the employer, which constituted wilful and tortious misconduct authorizing the jury to award punitive damages. Annis v. Tomberlin & Shelnutt Assocs., 195 Ga. App. 27, 392 S.E.2d 717, cert. denied, 195 Ga. App. 27, 392 S.E.2d 717 (1990).

Damage to burial lot. — An action lies in favor of the owner of the fee in a burial lot or the owner of an easement of burial therein to recover for the actual damages to shrubbery and flowers on the lot and for punitive damages if there are aggravating circumstances. West View Corp. v. Alexander, 83 Ga. App. 810, 65 S.E.2d 38 (1951).

The placing of the signs and the posting of the notices on a cemetery lot which were not unsightly, nor of an offensive nature, and amounted to no more than a polite assertion of the rule in reference to work being done on the lot only by permission of the cemetery superintendent, did not amount to desecration of the burial place and were not such aggravating circumstances as would permit additional damages in an action by the owner of the cemetery lot against the cemetery company for the alleged tort of removing shrubs and flowers and leveling graves. Goodwin v. Candace, Inc., 92 Ga. App. 438, 88 S.E.2d 723 (1955).

Dog bites. — When the record discloses that the defendant knew the defendant's dog had a reputation in the community for biting people and the County Health Department had issued orders to quarantine the defendant's dog, but the defendant continued to allow the dog to roam at large, such evidence is sufficient to allow a jury to determine that aggravating circumstances existed and that exemplary damages are authorized. Parsons v. Ponder, 161 Ga. App. 723, 288 S.E.2d 751 (1982).

Fraud claim must be submitted to jury. — Since the plaintiffs had amended their complaint to include a claim for fraud, but it was not carried forward into the pretrial order, nor was the latter ever amended, and furthermore, the charge to the jury did not include the elements of fraud, there was no foundation for the imposition of punitive damages, and the charge that such damages could be awarded was erroneous as no tort theory was submitted to the jury. Malley Motors, Inc. v. Davis, 183 Ga. App. 599, 359 S.E.2d 394 (1987).

Applicability to Specific Cases (Cont'd)
5. Miscellaneous (Cont'd)

Malice, necessary to support award of punitive damages, is inferred by law from character of defamation when there is an absence of lawful excuse or the absence of a privilege. Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985, 94 S. Ct. 1580, 39 L. Ed. 2d 882 (1974).

Malicious prosecution. — In an action for malicious prosecution, the plaintiff is not restricted to actual damages but may recover such damages as are authorized under all the circumstances in the case. Melton v. LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

No double recovery in slander case. — In a slander case, when no special damages were prayed for, and former Code 1933, § 105-2003 (see now O.C.G.A. § 51-12-6) was charged, to charge that part of former Code 1933, § 105-2002 (see now O.C.G.A. § 51-12-5) which allowed, in a case when there are aggravating circumstances in the commission of the tort, either in the act or the intention, additional damages "as compensation for the wounded feelings of the plaintiff," was erroneous, as allowing double compensation for the same injury, though it was permissible to give that part of former Code 1933, § 105-2002 which allowed additional damages for the purpose of deterring the wrongdoer from a similar trespass. Franklin v. Evans, 55 Ga. App. 177, 189 S.E. 722 (1937).

Expulsion from association. — In action against individual members of unincorporated association for conspiracy to wrongfully expel the plaintiff, allegations of malice and bad faith were sufficient as a matter of pleading to authorize a claim for punitive damages. Walker v. Grand Int'l Bhd. of Locomotive Eng'rs, 186 Ga. 811, 199 S.E. 146 (1938).

Forbidding exercise of legal right. — Merely ordering the plaintiff not to do an act which the plaintiff has a legal right to do, without more, amounts to nothing, and proof of that fact neither serves as the basis of an action or as the aggravation of any tort a petition undertakes to allege. Goodwin v. Candace, Inc., 92 Ga. App. 438, 88 S.E.2d 723 (1955).

Perpetration of fraud is one specific reason for allowance of punitive damages. Champion v. Martin, 124 Ga. App. 275, 183 S.E.2d 571 (1971).

Punitive damages are permitted in Georgia cases involving fraud. Shingleton v. Armor Velvet Corp., 621 F.2d 180 (5th Cir. 1980).

Imposition of punitive damages in an action for fraudulent misrepresentation is a jury question. Shingleton v. Armor Velvet Corp., 621 F.2d 180 (5th Cir. 1980).

Insulting person in public. — Insulting words or abusive language used either publicly or privately to a person while under illegal restraint, by the person restraining the other, which wounds the feelings and sensibilities of the person held or which exposes one to mortification and embarrassment before the public, may be considered by a jury in aggravation of damages arising out of the illegal restraint of that person's liberty. Turney v. Rhodes, 42 Ga. App. 104, 155 S.E. 112 (1930).

Libel by corporation. — When a pending action against a constituent corporation is for alleged libel in which additional damages are sought to deter the wrongdoer from repeating the trespass, the constituent corporation having been, prior to the consolidation, engaged in the newspaper publishing business, and when the resulting corporation is created for the same purpose, the latter is the wrongdoer within the meaning of this section and is in a position to repeat the trespass. Atlanta Newspapers, Inc. v. Doyal, 84 Ga. App. 122, 65 S.E.2d 432 (1951).

Mere nonperformance of duty, even though it be one required by law, will not authorize recovery of punitive damages. Kaplan v. Sanders, 237 Ga. 132, 227 S.E.2d 38 (1976).

Negligent delivery. — Georgia rule will not hold a telegraph company liable for punitive damages for gross negligence in making a delivery of telegrams. Western Union Tel. Co. v. Nix, 73 Ga. App. 184, 36 S.E.2d 111 (1945).

Mere negligence on the part of the defendant in failing to discover the error made in delivering the plaintiff's photo-

graph for publication in the advertisement instead of that of the performer who was actually appearing, would not justify an award, for mere negligence can never amount to such aggravating circumstances. Cabaniss v. Hipsley, 114 Ga. App. 367, 151 S.E.2d 496 (1966).

Punitive damages are recoverable in trover action. Sisk v. Carney, 121 Ga. App. 560, 174 S.E.2d 456 (1970).

Destruction of bulldozer. — A $5,000,000 punitive damages award to the owner of a bulldozer which was destroyed when it hit an improperly marked underground petroleum pipeline was excessive, since: (1) any negligence present was passive; (2) there was no bodily injury to the plaintiff and the award did not bear a rational relationship to the actual damages award; and (3) there was no rational relationship between the offense and the punishment in that the punitive damage award was 100 times the property damage award. Colonial Pipeline Co. v. Brown, 258 Ga. 115, 365 S.E.2d 827, appeal dismissed, 488 U.S. 805, 109 S. Ct. 36, 102 L. Ed. 2d 15 (1988).

Wrongful attachment. — When the attorney knew, or had reasonable grounds for believing, that property attached and afterwards sold under the attachment after judgment in the case against the debtor, did not belong to the debtor, but the debtor's wife, the attorney was chargeable with notice of the wife's title, and notice to the attorney would be notice to the attorney's client, the defendant company; in such case the client may be liable in an action by the wife against the client for the actual damages sustained by her as a consequence of the levy and subsequent sale and may be subject also to exemplary or punitive damages, if, either in the act or the intention, the tort was attended with circumstances of aggravation. Atlantic Co. v. Farris, 62 Ga. App. 212, 8 S.E.2d 665 (1940).

It was not harmful error in a suit for malicious trespass (by virtue of a levy under an execution against another) in charging to the jury the language of former Code 1933, § 105-808 (see now O.C.G.A. § 51-7-47) that "the recovery shall not be confined to the actual damage but shall be regulated by the circumstances of each case," although that section relates to cases of malicious prosecution, since the rule as there generally stated is substantially similar to that of former Code 1933, § 105-2002 (see now O.C.G.A. § 51-12-5), relating to exemplary damages in cases of aggravating circumstances, which was applicable to the case, and which the judge also charged. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939).

Attachment in good faith. — If the defendant caused the seizure of the plaintiff's property, honestly believing that it belonged to the defendant in attachment, and there was nothing in the manner of the seizure to indicate a wanton disregard of the rights of the true owner, any recovery by the plaintiff as such owner should be limited to actual damages. Investment Sec. Corp. v. Cole, 186 Ga. 809, 199 S.E. 126 (1938).

Wrongful death. — Punitive damages are not available in a wrongful death action. Truelove v. Wilson, 159 Ga. App. 906, 285 S.E.2d 556 (1981).

Section applies to survival actions only and not to wrongful death actions. Berman v. United States, 572 F. Supp. 1486 (N.D. Ga. 1983).

Wrongful dispossession of tenant. — The wrong complained of (knowingly, wrongfully dispossessing a tenant) being a willful and malicious tort, punitive damages for humiliation and embarrassment as a result of the alleged tortious acts are recoverable. Yopp v. Johnson, 51 Ga. App. 925, 181 S.E. 596 (1935).

Court was authorized to find that removing the plaintiff's furniture into the yard instead of into some protective place of storage aggravated the wrongful ouster, regardless of the manner in which the furniture was removed, and was authorized to award additional damages either to deter the wrongdoer or as compensation for the plaintiff's wounded feelings. Allison v. Hodo, 84 Ga. App. 790, 67 S.E.2d 606 (1951).

Jury is authorized to infer that the tortious acts of the landlord, in causing the tenant's eviction and the damage to the tenant's property, were attended with aggravating circumstances, and is authorized to find a sum in punitive damages,

Applicability to Specific Cases (Cont'd)
5. Miscellaneous (Cont'd)

or damages for compensation for the wounded feelings of the tenant, when the landlord, on the night the tenant discovered the trespass and found the tenant's furniture moved out of the tenant's dwelling and exposed to the elements, slammed the door in the tenant's face, refusing to discuss the matter with the tenant or make any effort to protect the tenant's property from further damage. Johnson v. Howard, 92 Ga. App. 96, 88 S.E.2d 217 (1955).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, §§ 659 et seq., 806, 807.

C.J.S. — 25 C.J.S., Damages, § 182 et seq.

ALR. — Punitive or exemplary damages for assault, 16 ALR 771; 123 ALR 1115.

Liability of druggist for punitive damages, 31 ALR 1362.

Actual damages as a necessary predicate of punitive or exemplary damages, 33 ALR 384; 17 ALR2d 527.

Liability of officer for exemplary or punitive damages in action for false imprisonment, 49 ALR 1386.

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Liability for punitive or exemplary damages or statutory penalty of one intentionally or negligently starting fire which caused an injury to person or property, 104 ALR 412.

Failure to stop or other conduct after automobile accident as supporting claim for exemplary damages, 156 ALR 1115.

Punitive or exemplary damages in action in tort based on fraudulent sale, 165 ALR 614.

Punitive damages for wrongful ejection or rejection of guest from hotel or restaurant, 14 ALR2d 715.

Civil liability for insulting or abusive language not amounting to defamation, 15 ALR2d 108.

Recovery by contractor or artisan, suing for breach of warranty, of damage for loss of good will occasioned by use in his business of unfit materials, 28 ALR2d 591.

Punitive or exemplary damages for conversion of personalty by one other than chattel mortgagee or conditional seller, 54 ALR2d 1361.

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Spouse's or parent's right to recover punitive damages in connection with recovery of damages for medical expenses or loss of services or consortium arising from personal injury to other spouse or to child, 25 ALR3d 1416.

Attorneys' fees or other expenses of litigation as element in measuring exemplary or punitive damages, 30 ALR3d 1443.

Punitive damages in actions based on nuisance, 31 ALR3d 1346.

Allowance of punitive damages for invasion of common-law rights in literary property, 40 ALR3d 248.

Damages for wrongful termination of automobile dealership contracts, 54 ALR3d 324.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment, 61 ALR3d 984.

Recoverability of punitive damages in action by insured against liability insurer for failure to settle claim against insured, 85 ALR3d 1211.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for malicious prosecution, 94 ALR3d 791.

Assault: criminal liability as barring or mitigating recovery of punitive damages, 98 ALR3d 870.

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Sufficiency of showing of actual damages to support award of punitive damages — modern cases, 40 ALR4th 11.

Discovery of defendant's sales, earnings, or profits on issue of punitive damages in tort action, 54 ALR4th 998.

Punitive damages as within coverage of uninsured or underinsured motorist insurance, 54 ALR4th 1186.

Punitive damages: power of equity court to award, 58 ALR4th 844.

Standard of proof as to conduct underlying punitive damage awards — modern status, 58 ALR4th 878.

Plaintiff's rights to punitive or multiple damages when cause of action renders both available, 2 ALR5th 449.

Right to prejudgment interest on punitive or multiple damages awards, 9 ALR5th 63.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 ALR5th 195.

Intoxication of automobile driver as basis for awarding punitive damages, 33 ALR5th 303.

Allowance of punitive damages in medical malpractice action, 35 ALR5th 145.

Damages for wrongful termination of franchise other than automobile dealership contracts, 40 ALR5th 57.

Products liability: cement and concrete, 60 ALR5th 413.

51-12-5.1. Punitive damages.

(a) As used in this Code section, the term "punitive damages" is synonymous with the terms "vindictive damages," "exemplary damages," and other descriptions of additional damages awarded because of aggravating circumstances in order to penalize, punish, or deter a defendant.

(b) Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.

(c) Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize, or deter a defendant.

(d)(1) An award of punitive damages must be specifically prayed for in a complaint. In any case in which punitive damages are claimed, the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings.

(2) If it is found that punitive damages are to be awarded, the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case. It shall then be the duty of the trier of fact to set the amount to be awarded according to subsection (e), (f), or (g) of this Code section, as applicable.

(e)(1) In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.

(2) Seventy-five percent of any amounts awarded under this subsection as punitive damages, less a proportionate part of the costs of litigation, including reasonable attorney's fees, all as determined by the trial judge, shall be paid into the treasury of the state through the Office of the State Treasurer. Upon issuance of judgment in such a case, the state shall have all rights due a judgment creditor until such judgment is satisfied and shall stand on equal footing with the plaintiff of the original case in securing a recovery after payment to the plaintiff of damages awarded other than as punitive damages. A

judgment debtor may remit the state's proportional share of punitive damages to the clerk of the court in which the judgment was rendered. It shall be the duty of the clerk to pay over such amounts to the Office of the State Treasurer within 60 days of receipt from the judgment debtor. This paragraph shall not be construed as making the state a party at interest and the sole right of the state is to the proceeds as provided in this paragraph.

(f) In a tort case in which the cause of action does not arise from product liability, if it is found that the defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired, there shall be no limitation regarding the amount which may be awarded as punitive damages against an active tort-feasor but such damages shall not be the liability of any defendant other than an active tort-feasor.

(g) For any tort action not provided for by subsection (e) or (f) of this Code section in which the trier of fact has determined that punitive damages are to be awarded, the amount which may be awarded in the case shall be limited to a maximum of $250,000.00.

(h) This Code section shall apply only to causes of action arising on or after April 14, 1997. (Code 1981, § 51-12-5.1, enacted by Ga. L. 1987, p. 915, § 5; Ga. L. 1993, p. 1402, § 18; Ga. L. 1997, p. 837, § 1; Ga. L. 2010, p. 863, § 2/SB 296.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1997, in subsection (f), "tort-feasor" was substituted for "tortfeasor" in two places and "judgment" was substituted for "judgement" near the middle and "April 14, 1997" was substituted for "the effective date of this subsection" at the end of subsection (h).

Law reviews. — For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991). For article, "The Case for Allowing Punitive Damages in Georgia Wrongful Death Actions: The Need to Remove an Unjust Anomaly in Georgia Law," see 45 Mercer L. Rev. 1 (1993). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 63 (1997). For annual survey article on tort law, see 50 Mercer L. Rev. 335 (1998). For annual survey article discussing tort law, see 51 Mercer L. Rev. 461 (1999). For article, "Premises Liability for Criminal Attacks: Same Crimes, New Law," see 5 Ga. St. B .J. 54 (1999). For article, "Insurance," see 53 Mercer L. Rev. 281 (2001). For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004). For annual survey of law of torts, see 56 Mercer L. Rev. 433 (2004). For survey article on labor and employment law, see 60 Mercer L. Rev. 217 (2008). For survey article on tort law, see 60 Mercer L. Rev. 375 (2008). For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009). For article, "Practice Point: Right of Publicity: A Practitioner's Enigma," see 17 J. Intell. Prop. L. 351 (2010). For article, "The Experiential Future of the Law," see 60 Emory L. J. 585 (2011). For article, "An Insurer's Duty to Settle: The Law in Georgia," see 22 Ga. St. Bar J. 19 (Aug. 2016).

For note, "Mack Trucks, Inc. v. Conkle: The Georgia Supreme Court Tells the Legislature to Keep On Truckin' When Appro-

priating Punitive Damage Awards to the State Treasury," see 45 Mercer L. Rev. 1439 (1994).

For comment, "Are Excessive Punitive Damages Unconstitutional in Georgia?: This Question and More in Colonial Pipeline Co. v. Brown," see 6 Ga. St. U.L. Rev. 85 (1989). For comment, "Statutory Punitive Damage Caps and the Profit Motive: An Economic Perspective," see 40 Emory L.J. 303 (1991).

JUDICIAL DECISIONS

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General Consideration

Constitutionality. — The one-award provision dealing with product liability punitive damages as set forth in the second sentence of paragraph (e)(1) of O.C.G.A. § 15-12-5.1 is unconstitutional, null, and void in that it violates the equal protection and due process clauses of the Georgia and federal constitutions. McBride v. GMC, 737 F. Supp. 1563 (M.D. Ga. 1990).

Paragraph (e)(2) of O.C.G.A. § 15-12-5.1 violates Ga. Const. 1983, Art. III, Sec. V, Par. III because it contains matter different from that expressed in the title of the Tort Reform Act and contains subject matter different from other subject matter in the body of the act. McBride v. GMC, 737 F. Supp. 1563 (M.D. Ga. 1990).

Paragraph (e)(2) of O.C.G.A. § 15-12-5.1 violates the due process and equal protection clauses of the Georgia and federal constitutions, the excessive fines provisions of the Eighth Amendment to the United States Constitution and Ga. Const. 1983, Art. I, Sec. I, Par. XVII, and the double jeopardy provision of the Fifth Amendment to the United States Constitution. McBride v. GMC, 737 F. Supp. 1563 (M.D. Ga. 1990).

Paragraph (e)(2) of O.C.G.A. § 15-12-5.1, requiring that 75 percent of punitive damages awarded in a product liability action be paid into the state treasury, does not violate the equal protection clauses of the United States and Georgia Constitutions. State v. Moseley, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994); Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 436 S.E.2d 635 (1993).

Paragraph (e)(2) of O.C.G.A. § 15-12-5.1, requiring that 75 percent of punitive damages awarded in a product liability action be paid into the state treasury, does not constitute a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution. State v. Moseley, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994); Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 436 S.E.2d 635 (1993).

Punitive damages award did not violate the Due Process Clause of the Fourteenth Amendment because the district court's findings of fact and conclusions regarding the defendant's degree of reprehensibility were supported by the evidence and were therefore not clearly erroneous because there was evidence from which a jury could have concluded that the defendant acted with a bad state of mind, and the facts and circumstances of the defendant's misconduct and the potential harm to the plaintiffs justified the 7:1 ratio. E. Prop. Dev. LLC v. Gill, 2014 U.S. App. LEXIS 4205 (11th Cir. Mar. 6, 2014) (Unpublished).

Subject matter not different from title. — Because the trial court erroneously concluded that the purpose of O.C.G.A. § 51-12-5.1 is revenue raising, it

erred in holding that the statute violates Ga. Const. 1983, Art. III, Sec. V, Par. III, providing that no bill shall contain subject matter different from that expressed in the title. State v. Moseley, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994); Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 436 S.E.2d 635 (1993).

Paragraph (e)(2) of O.C.G.A. § 51-12-5.1, requiring that 75 percent of punitive damages awarded in a product liability action be paid into the state treasury, does not violate Ga. Const. 1983, Art. I, Sec. I, Par. XII. State v. Moseley, 263 Ga. 680, 436 S.E.2d 632 (1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2101, 128 L. Ed. 2d 663 (1994).

Amount in controversy for diversity jurisdiction. — In a class action, the plaintiffs' punitive damages demand could be aggregated for purposes of the amount in controversy requirement for diversity jurisdiction. Turpeau v. Fidelity Fin. Servs., Inc., 936 F. Supp. 975 (N.D. Ga. 1996), aff'd, 112 F.3d 1173 (11th Cir. 1997).

Severability of unconstitutional provisions. — With the second sentence of paragraph (e)(1) and all of paragraph (e)(2) of O.C.G.A. § 51-12-5.1 declared unconstitutional, null, and void, the remaining portions of the Tort Reform Act can stand with the unconstitutional provisions stricken. McBride v. GMC, 737 F. Supp. 1563 (M.D. Ga. 1990).

Due process guideposts for punitive damages are based on the principle that a person receive fair notice not only of the conduct that will subject the person to punishment, but also of the severity of the penalty that a state may impose; O.C.G.A. § 51-12-5.1(f) informs the public that the $250,000 cap on punitive damages in Georgia does not apply to torts when the defendant acted or failed to act while under the influence of alcohol, drugs, or other judgment altering substances. Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742 (2003), cert. denied, 543 U.S. 820, 125 S. Ct. 59, 160 L. Ed. 2d 29 (2004).

Punitive damages recoverable from 1987 through 1997. — Despite the language used by the legislature in its amendment of subsection (h) of O.C.G.A. § 51-12-5.1 on April 14, 1997, substituting "the effective date of this subsection" for "July 1, 1987" in subsection (h), punitive damages were still recoverable in Georgia during the period of July 1, 1987 through April 14, 1997. K-Mart Corp. v. Hackett, 237 Ga. App. 127, 514 S.E.2d 884 (1999).

Construction of subsection (g). — Clause in subsection (g) of O.C.G.A. § 51-12-5.1, "the amount which may be awarded in the case shall be limited to a maximum of $250,000.00," means that $250,000 is the maximum amount of money that the finder of fact may award to any one plaintiff as punitive damages — regardless of the number of defendants and regardless of the number of theories of recovery "arising out of the same transaction, occurrence, or series of transactions or occurrences." Bagley v. Shortt, 261 Ga. 762, 410 S.E.2d 738 (1991).

The phrase in subsection (g) of O.C.G.A. § 51-12-5.1, "the amount which may be awarded in the case shall be limited to a maximum of $250,000.00," means that the most money that the finder of fact may award as punitive damages — in toto, to some or to all the parties in the case; and against whomever they may be awarded — is $250,000. Bagley v. Shortt, 261 Ga. 762, 410 S.E.2d 738 (1991).

When punitive damages awarded. — Under O.C.G.A. § 51-12-5.1(b), punitive damages may be awarded only when it is established by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences. That Code section further limits punitive damages to a maximum of $250,000 for any tort action, unless the trier of fact finds that the defendant acted, or failed to act, with the specific intent to cause harm. A finding of specific intent to cause harm pursuant to O.C.G.A. § 51-12-5.1(f) is inherent in the essential elements of such an intentional fraud. Golden Atlanta Site Dev., Inc. v. Tilson, 299 Ga. App. 646, 683 S.E.2d 166 (2009).

Reapportionment of total award required. — Trial court did not err by entering a judgment awarding punitive

General Consideration (Cont'd)

damages against the defendant since clear and convincing evidence established that the defendant, along with others, conspired to defraud the plaintiff and the defendant received the most amount of money fraudulently. However, the award against the defendant in the amount of $250,000 individually required reduction as O.C.G.A. § 51-12-5.1(g) limited the total punitive damages award to $250,000 for any tort; therefore, reapportionment of the punitive damages award was required among the three defendants against whom such awards were found using the same ratio that had been devised by the jury in the jury's original apportionment of punitive damages. Surles v. Cornell Corr. of Cal., Inc., 290 Ga. App. 260, 659 S.E.2d 683 (2008).

O.C.G.A. §§ 51-12-5, 51-12-5.1, and 51-12-6 must be construed together. Mallard v. Jenkins, 186 Ga. App. 167, 366 S.E.2d 775, cert. denied, 186 Ga. App. 918, 366 S.E.2d 775 (1988).

Proportionality of damages. — The concept of proportionality as a legal limitation on the amount of punitive damages applies, in Georgia, only when such damages are given to compensate for wounded feelings. A deterrence award is based on factors, for the most part, unrelated to the injury to any particular victim, and is limited only by the collective conscience of the jury. Oglethorpe Power Corp. v. Sheriff, 210 Ga. App. 299, 436 S.E.2d 14 (1993).

Punitive damages may not be recovered when there is no entitlement to compensatory damages. Since a homeowner had settled the homeowner's property damage claim arising from an incident when a truck struck the homeowner's house, and was not allowed to recover under the bodily injury provision of the policy because the homeowner was not injured in and did not witness the incident, summary judgment for an insurance company in its declaratory judgment action addressing its liability on the homeowner's punitive damage claim was affirmed. Flynn v. Allstate Ins. Co., 268 Ga. App. 222, 601 S.E.2d 739 (2004).

Because punitive damages awarded by a state court could have been based on grounds other than fraud, a finding of fraud was not essential to the ultimate judgment for collateral estoppel purposes in a nondischargeability proceeding in bankruptcy court. An award of damages for fraud did not give rise to an inference of a finding of fraud because punitive or exemplary damages for fraud could not be recovered if there was no entitlement to compensatory damages for fraud, and the state court did not award any fraud damages. Allen v. Morrow (In re Morrow), 508 B.R. 514 (Bankr. N.D. Ga. 2014).

Punitive damages not excluded by insurance policy as in excess of actual damages. — In an insurance dispute, the insurer's claim that punitive damages were excluded from coverage as multiplied portions of damages in excess of actual damages, failed even though O.C.G.A. § 51-12-5.1 defined them as "additional damages"; plausible interpretation was that it meant to exclude statutory multiple damages available in certain actions, which, while punitive in nature, were not traditional "punitive damages." Evanston Ins. Co. v. Mellors, No. CV413-136, 2015 U.S. Dist. LEXIS 132780 (S.D. Ga. Sept. 28, 2015).

Punitive damages not recoverable when underlying tort failed. — Bidding insurer's claim for punitive damages against a consultant and a consulting firm failed as the insurer could not recover on the insurer's underlying tort claims. Benefit Support, Inc. v. Hall County, 281 Ga. App. 825, 637 S.E.2d 763 (2006), cert. denied, No. S07C0306, 2007 Ga. LEXIS 214 (Ga. 2007).

Trial court did not err in granting a car dealer summary judgment against a customer's fraud claim, as: (1) the customer's contention that the dealer knew of the alleged defects in a car sold to the customer at the time of the sale was specifically negated by affidavits submitted by the dealer's service and maintenance employees; and (2) even if the dealer knew of the car's defectiveness after the sale, this knowledge did not amount to either knowledge, or a reckless disregard of the car's defectiveness, at the time of the sale; hence, as a result, the trial court did not err in granting the dealer's motion for summary judgment on the customer's

claims for attorney fees under O.C.G.A. § 13-6-11, and punitive damages pursuant to O.C.G.A. § 51-12-5.1. Morris v. Pugmire Lincoln Mercury, Inc., 283 Ga. App. 238, 641 S.E.2d 222 (2007).

When a client in a legal malpractice action failed to demonstrate that genuine issues of fact existed as to whether the attorney had proximately caused the client any damages, the trial court did not err in granting the attorney summary judgment on the client's claims for punitive damages and for attorney fees under O.C.G.A. §§ 13-6-11 and 51-12-5.1. Amstead v. McFarland, 287 Ga. App. 135, 650 S.E.2d 737 (2007), cert. denied, 2007 Ga. LEXIS 769 (Ga. 2007).

Because a customer had not shown that a restaurant was liable on the customer's tort claims, it was proper to grant summary judgment for the restaurant on the customer's claims for attorney fees and punitive damages under O.C.G.A. §§ 13-6-11 and 51-12-5.1. Dowdell v. Krystal Co., 291 Ga. App. 469, 662 S.E.2d 150 (2008), cert. denied, 2008 Ga. LEXIS 787 (Ga. 2008).

Proposed amended complaint's new claim for punitive damages, per O.C.G.A. § 51-12-5.1, would have been futile because the complaint made conclusory allegations with no factual basis. Because punitive damages are derivative of substantive tort claims, and thus can only be awarded as additional damages, and because the plaintiff had failed to allege a valid tort, let alone demonstrate that any of the plaintiff's claims were viable and could survive the defendant's motion to dismiss, the plaintiff's claim for punitive damages would have necessarily failed. Alhallaq v. Radha Soami Trading, LLC, No. 11-15554, 2012 U.S. App. LEXIS 11285 (11th Cir. June 5, 2012) (Unpublished).

Punitive damages claims were derivative of those underlying claims that would give rise to punitive damages under O.C.G.A. § 51-12-5.1; because the court had dismissed all of the plaintiff's claims for relief, the plaintiff's request for punitive damages necessarily failed. Warthen v. Litton Loan Servicing LP, No. 1:11-cv-02704-JEC, 2012 U.S. Dist. LEXIS 135748 (N.D. Ga. Mar. 23, 2012).

Because a trial court properly granted summary judgment to a restaurant on the negligence and gross negligence claims, the plaintiff's claim for punitive damages under O.C.G.A. § 51-12-5.1 also failed. Whitfield v. Tequila Mexican Rest. No. 1, Inc., 323 Ga. App. 801, 748 S.E.2d 281 (2013).

Under Georgia law, a plaintiff cannot recover punitive damages when the underlying tort claim fails. Johnson v. Johnson, 323 Ga. App. 836, 747 S.E.2d 518 (2013).

Punitive damages may be given even when recoverable, actual damages are small. McClure v. Gower, 259 Ga. 678, 385 S.E.2d 271 (1989); Tyler v. Lincoln, 272 Ga. 118, 527 S.E.2d 180 (2000).

Punitive damages in the amount of $1,500.00 were recoverable for tortious interference with contractual rights, even though the jury had returned a verdict of only $33.00 in actual damages. McClure v. Gower, 259 Ga. 678, 385 S.E.2d 271 (1989).

Insurance coverage for punitive damages. — Insurance coverage for punitive damages is not against public policy. Federal Ins. Co. v. National Distrib. Co., 203 Ga. App. 763, 417 S.E.2d 671, cert. denied, 203 Ga. App. 906, 417 S.E.2d 671 (1992).

Plaintiff failed to show viable claim. — Because the plaintiff failed to establish that the plaintiff had any viable claims against the defendant, the plaintiff could not recover punitive damages under O.C.G.A. § 51-12-5.1(b). Gordon v. Starwood Hotels & Resorts Worldwide, Inc., No. 1:09-CV-3493-CC, 2011 U.S. Dist. LEXIS 109644 (N.D. Ga. Sept. 26, 2011).

Punitive damages upheld in nuisance case. — In a nuisance case arising out of noise from a power plant that used gas-fired combustion turbine units, a punitive damages award of $250,000 was upheld, O.C.G.A. § 51-12-5.1(g), based on evidence that, despite assurances that the plant would be "as unobtrusive as possible," the plant's owners ignored noise issues that were common knowledge in the industry and failed to take timely action to ameliorate them. The same conduct

General Consideration (Cont'd)

supported an award of attorney's fees under O.C.G.A. § 13-6-11. Oglethorpe Power Corp. v. Estate of Forrister, 332 Ga. App. 693, 774 S.E.2d 755 (2015).

Cited in Wammock v. Celotex Corp., 826 F.2d 990 (11th Cir. 1987); Wammock v. Celotex Corp., 835 F.2d 818 (11th Cir. 1988); Stover v. Atchley, 189 Ga. App. 56, 374 S.E.2d 775 (1988); Salsbury Labs., Inc. v. Merieux Labs., Inc., 735 F. Supp. 1555 (M.D. Ga. 1989); Massey v. Kelly, Inc., 742 F. Supp. 1156 (N.D. Ga. 1990); Simpson v. Yonts, 197 Ga. App. 311, 398 S.E.2d 407 (1990); Great Am. Ins. Co. v. International Ins. Co., 753 F. Supp. 357 (M.D. Ga. 1990); Powell v. Ferreira, 198 Ga. App. 465, 402 S.E.2d 85 (1991); Hester Enters., Inc. v. Narvais, 198 Ga. App. 580, 402 S.E.2d 333 (1991); Chrysler Credit Corp. v. Brown, 198 Ga. App. 653, 402 S.E.2d 753 (1991); Pangle v. Gossett, 261 Ga. 307, 404 S.E.2d 561 (1991); Ivey v. Golden Key Realty, Inc., 200 Ga. App. 545, 408 S.E.2d 811 (1991); City of Monroe v. Jordan, 201 Ga. App. 332, 411 S.E.2d 511 (1991); Miles Rich Chrysler-Plymouth, Inc. v. Mass, 201 Ga. App. 693, 411 S.E.2d 901 (1991); Floyd v. First Union Nat'l Bank, 203 Ga. App. 788, 417 S.E.2d 725 (1992); Sparks v. Ellis, 205 Ga. App. 263, 421 S.E.2d 758 (1992); Carney v. JDN Constr. Co., 206 Ga. App. 785, 426 S.E.2d 611 (1992); Freeman v. United Cities Propane Gas of Ga., Inc., 807 F. Supp. 1533 (M.D. Ga. 1992); Peters v. Hyatt Legal Servs., 211 Ga. App. 587, 440 S.E.2d 222 (1993); Hudgins & Co. v. J & M Tank Lines, 215 Ga. App. 308, 450 S.E.2d 221 (1994); Bradford v. Xerox Corp., 216 Ga. App. 83, 453 S.E.2d 98 (1994); Lightning v. Roadway Express, Inc., 60 F.3d 1551 (11th Cir. 1995); Keith v. Beard, 219 Ga. App. 190, 464 S.E.2d 633 (1995); Peters v. Hyatt Legal Servs., 220 Ga. App. 398, 469 S.E.2d 481 (1996); Willis v. Brassell, 220 Ga. App. 348, 469 S.E.2d 733 (1996); First Union Nat'l Bank v. Cook, 223 Ga. App. 374, 477 S.E.2d 649 (1996); Cochran v. Lowe's Home Ctr., Inc., 226 Ga. App. 417, 487 S.E.2d 50 (1997); Roberts v. Forte Hotels, Inc., 227 Ga. App. 471, 489 S.E.2d 540 (1997); BBB Serv. Co. v. Glass, 228 Ga. App. 423, 491 S.E.2d 870 (1997); Smithson v. Parker, 242 Ga. App. 133, 528 S.E.2d 886 (2000); Artzner v. A & A Exterminators, Inc., 242 Ga. App. 766, 531 S.E.2d 200 (2000); Griffin v. Associated Payphone, 244 Ga. App. 183, 534 S.E.2d 540 (2000); Cavin v. Brown, 246 Ga. App. 40, 538 S.E.2d 802 (2000); Felker v. Chipley, 246 Ga. App. 296, 540 S.E.2d 285 (2000); Crosby v. Kendall, 247 Ga. App. 843, 545 S.E.2d 385 (2001); Tunsil v. Jackson, 248 Ga. App. 496, 546 S.E.2d 875 (2001); Wal-Mart Stores, Inc. v. Johnson, 249 Ga. App. 84, 547 S.E.2d 320 (2001); Ledee v. Devoe, 250 Ga. App. 15, 549 S.E.2d 167 (2001); Thomas v. Atlanta Cas. Co., 253 Ga. App. 199, 558 S.E.2d 432 (2001); Baker v. Campbell, 255 Ga. App. 523, 565 S.E.2d 855 (2002); Johnson v. First Union Nat'l Bank, 255 Ga. App. 819, 567 S.E.2d 44 (2002); Hubbard v. DOT, 256 Ga. App. 342, 568 S.E.2d 559 (2002); Demido v. Wilson, 261 Ga. App. 165, 582 S.E.2d 151 (2003); D. G. Jenkins Homes, Inc. v. Wood, 261 Ga. App. 322, 582 S.E.2d 478 (2003); Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004); Williams Gen. Corp. v. Stone, 279 Ga. 428, 614 S.E.2d 758 (2005); Aldworth Co. v. England, 281 Ga. 197, 637 S.E.2d 198 (2006); Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 645 S.E.2d 559 (2007); Imm v. Chaney, 287 Ga. App. 606, 651 S.E.2d 855 (2007); Ferman v. Bailey, 292 Ga. App. 288, 664 S.E.2d 285 (2008); Golden Atlanta Site Dev., Inc. v. R. Nahai & Sons, Inc., 299 Ga. App. 654, 683 S.E.2d 627 (2009); B-T Two, Inc. v. Bennett, 307 Ga. App. 649, 706 S.E.2d 87 (2011); Bedsole v. Action Outdoor Adver. JV, LLC, 325 Ga. App. 194, 750 S.E.2d 445 (2013); Doherty v. Brown, 339 Ga. App. 567, 794 S.E.2d 217 (2016).

Purpose

Adherence to environmental and safety regulations. — Punitive damages, the purpose of which is to "punish, penalize or deter," are, as a general rule, improper when a defendant has adhered to environmental and safety regulations. Stone Man, Inc. v. Green, 263 Ga. 470, 435 S.E.2d 205 (1993).

Special finding required. — When punitive damages are claimed, the trier of fact should first resolve from the evidence produced at trial whether an award of

punitive damages should be made, and that finding should be made specially through an appropriate form of verdict, along with the other required findings. Conseco Fin. Servicing Corp. v. Hill, 252 Ga. App. 774, 556 S.E.2d 468 (2001).

Evidentiary Standard

Something more than mere commission of a tort is necessary for the imposition of punitive damages. Negligence alone, even gross negligence, will not support an award of punitive damages. Lewis v. Suttles Truck Leasing, Inc., 869 F. Supp. 947 (S.D. Ga. 1994).

Negligence inadequate to support punitive damage award. — Finding that the defendants conducted property foreclosure in a careless and negligent manner was not sufficient to support a punitive damage award; negligence, even gross negligence, is inadequate to support a punitive damage award. Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257, cert. denied, 204 Ga. App. 922, 423 S.E.2d 257 (1992); Bartja v. National Union Fire Ins. Co., 218 Ga. App. 815, 463 S.E.2d 358 (1995).

In an action by a debtor against a creditor-bank for damages arising from the repossession of the debtor's car, even though the actions of an independent contractor hired to repossess the car may have verged on a breach of the peace and the bank may have been grossly negligent in failing to investigate the basis for the order to repossess, the conduct was not such as to warrant punitive damages. Fulton v. Anchor Sav. Bank, 215 Ga. App. 456, 452 S.E.2d 208 (1994).

In a medical malpractice action, it was not error to direct a verdict in favor of the defendant with respect to a claim for punitive damages since the evidence established mere professional negligence rather than clearly and convincingly evidencing an entire want of care. Roseberry v. Brooks, 218 Ga. App. 202, 461 S.E.2d 262 (1995).

When the plaintiff's claims against an employer for negligent entrustment, hiring, and retention were not supported by evidence which would raise the presumption of conscious indifference to consequences, the imposition of punitive damages was not warranted. Durben v. American Materials, Inc., 232 Ga. App. 750, 503 S.E.2d 618 (1998).

Trial court did not err in granting summary judgment to a bank and a credit union, on claims of conversion, civil conspiracy and for attorney fees and punitive damages as: (1) no probative evidence existed that the buyer received delivery of the check and, thus, it never became a holder of the instrument at issue or entitled to enforce it; (2) no evidence was presented that the bank and credit union acted in concert against the buyer; (3) no evidence of misconduct or bad faith on the part of the bank or the credit union was presented, and mere negligence was insufficient; but, the trial court properly found that a genuine issue of material fact existed as to whether the bank and the credit union were holders in due course and whether the check bore evidence of forgery or alteration so as to call into question its authenticity. Hartsock v. Rich's Emples. Credit Union, 279 Ga. App. 724, 632 S.E.2d 476 (2006).

Trial court did not err in granting partial summary judgment to an employer on a driver's negligent hiring claim because the driver failed to present any evidence in support of the driver's punitive damages claim that demonstrated the employer's independent negligence in the hiring, entrustment, supervision, or retention of an employee, who struck the driver's car while driving the employer's tractor-trailer; therefore, the negligent hiring claim was merely duplicative of the driver's negligence claim against the employee, for which the employer admitted responsibility under the doctrine of respondeat superior. Kelley v. Blue Line Carriers, LLC, 300 Ga. App. 577, 685 S.E.2d 479 (2009).

Punitive damages inappropriate for rape victim. — Defendant's failure to provide adequate locking mechanism on window through which the plaintiff's rapist gained access to her apartment does not show the requisite degree of willful misconduct, malice, wantonness, or oppression as to authorize the imposition of punitive damages under O.C.G.A. § 51-12-5.1. Walker v. Sturbridge Partners, Ltd., 221 Ga. App. 36, 470 S.E.2d 738 (1996).

Evidentiary Standard (Cont'd)

Culpable conduct required. — Under O.C.G.A. § 51-12-5.1, punitive damages cannot be imposed without a finding of some form of culpable conduct. Negligence, even gross negligence, is inadequate to support a punitive damage award. Troutman v. B.C.B. Co., 209 Ga. App. 166, 433 S.E.2d 73 (1993); Howard v. Alamo Corp., 216 Ga. App. 525, 455 S.E.2d 308 (1995); MDC Blackshear, L.L.C. v. Littell, 273 Ga. 169, 537 S.E.2d 356 (2000).

Bank's actions in adding third party to joint account without notifying original accountee and subsequently disbursing funds to this party rose potentially to the level of gross negligence, but fell short of the requisite intention required for punitive damages. Ralston v. Etowah Bank, 207 Ga. App. 775, 429 S.E.2d 102 (1993).

Because the issues of proximate cause under O.C.G.A. § 51-12-5.1(b) and intent were disputed and a customer failed to prove fraud, the trial court erred in finding as a fact that a drug substitution caused the customer's injuries; consequently, the trial court erred in denying the pharmacy's motion for summary judgment. Mableton Parkway CVS v. Salter, 273 Ga. App. 477, 615 S.E.2d 558 (2005).

Evidence supported a finding that the landowners' actions in trespassing on a corporation's dam and creating a nuisance in plugging the weakened dam were wilfully taken in bad faith; therefore, attorney fees and punitive damages were authorized. Bishop Eddie Long Ministries, Inc. v. Dillard, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

Allegations that a loan servicer foreclosed on a bankruptcy debtor's property despite agreeing not to do so, and then continued to solicit payments from the debtor as though no foreclosure occurred such that the debtor remained under the impression that the debtor still owned the property, were sufficient to state a claim for the type of wrongful conduct punitive damages were intended to address. Gordon v. Bank of Am., N.A. (In re Merriweather), No. 15-5096-BEM, 2015 Bankr. LEXIS 3664 (Bankr. N.D. Ga. Aug. 28, 2015).

Punitive damages claim failed because the corporation failed to proffer summary judgment evidence indicating the securities broker-dealer firm's alleged misconduct was spiteful, malicious, fraudulent, evil, conscious, or deliberate. Owens v. Stifel Nicolaus & Co., 650 Fed. Appx. 764 (11th Cir. 2016) (Unpublished).

Wanton conduct is that which is so reckless or so charged with indifference to the consequences as to be the equivalent in spirit to actual intent. Craig v. Holsey, 264 Ga. App. 344, 590 S.E.2d 742 (2003), cert. denied, 543 U.S. 820, 125 S. Ct. 59, 160 L. Ed. 2d 29 (2004).

A finding of no specific intent to cause harm under O.C.G.A. § 51-12-5.1(g) did not preclude a finding of liability under a non-physical injury negligent retention claim because there was no inconsistency between a finding of willful or wanton acts directed toward an employee along with a finding of no specific intent to cause harm in that the two inquiries were separate and distinct. Tomczyk v. Jocks & Jills Rests., LLC, 513 F. Supp. 2d 1351 (N.D. Ga. 2007).

Willful and intentional conduct not essential. — Recovery of punitive damages may be authorized when the circumstances of the tort show an entire want of care and an indifference to consequences; willful and intentional conduct is not essential. Brown v. StarMed Staffing, 227 Ga. App. 749, 490 S.E.2d 503 (1997).

Willful violation of trust. — In a trustee's suit against a company and the company's manager (defendants) for interfering with trust assets, the trial court erred by granting summary judgment to the defendants on the trustee's claim for punitive damages and litigation expenses because the trustee offered evidence that the defendants willfully violated the partnership agreement and divested the trust of a valuable asset, which raised material factual questions as to whether such conduct supported such damages. Schinazi v. Eden, 338 Ga. App. 793, 792 S.E.2d 94 (2016).

Clear and convincing evidence. — When there was evidence that for four years prior to the incident giving rise to the plaintiff's injuries, the defendant ignored or rejected advice from the defen-

dant's own engineering division regarding defects in frames on trucks and that the defendant failed to give notice to purchasers of the problems, a "conscious indifference to consequences" was shown sufficient to meet the "clear and convincing" standard of subsection (b) of O.C.G.A. § 51-12-5.1. Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 436 S.E.2d 635 (1993).

Jury instruction on clear and convincing evidence. — In view of repeated requests by the defendant and the jury's apparent confusion over the issue, the trial court erred by refusing to define for the jury the "clear and convincing evidence" standard of proof required for punitive damages. GMC v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (1994).

Leaving the scene of accident is intentional and culpable act. — Defendant's leaving the scene of a collision without even speaking to the other party, as mandated by statute, was an intentional and culpable act; such conduct demonstrated a conscious indifference to the consequences and an entire want of care as to the victim's well being permitting the jury to find that such conduct was of an aggravated and indifferent nature for purposes of imposing punitive damages. Langlois v. Wolford, 246 Ga. App. 209, 539 S.E.2d 565 (2000).

Punitive damage award for hair replacement customer. — Court did not abuse the court's discretion in denying the defendants' motion for a directed verdict on the issue of punitive damages in an action alleging that, contrary to their agreement, the defendants aired television commercials in Georgia that contained before-and-after pictures of a customer's hair replacement treatments because some clear and convincing evidence supported the jury's award of punitive damages pursuant to O.C.G.A. § 51-12-5.1(b). Zieve v. Hairston, 266 Ga. App. 753, 598 S.E.2d 25 (2004).

Tenant's claim for punitive damages. — In a tenant's action against the leasing agent of an apartment complex alleging that soot from an apartment heating system caused the tenant to suffer respiratory and lymph node problems, the agent's motion for a directed verdict was properly granted on the tenant's claim for punitive damages under O.C.G.A. § 51-12-5.1(b); the tenant failed to present clear and convincing evidence of a conscious indifference to consequences authorizing the imposition of punitive damages because it was not shown that the tenant knew or should have known that prolonged exposure to the soot would cause the personal injury for which the tenant sought recovery. Ambling Mgmt. Co. v. Purdy, 283 Ga. App. 21, 640 S.E.2d 620 (2006).

Insurer was entitled to summary judgment as to an insured's claim for punitive damages because the insured failed to adduce clear and convincing evidence, as required under O.C.G.A. § 51-12-5.1(b), that the insurer's actions in refusing to honor a settlement demand by an accident victim for the policy limit amounted to willful misconduct, fraud, malice, wantonness, oppression, or want of care when the insurer contended that the demand was not honored because the insurer was investigating whether the insured, who was not a named insured under the policy, was entitled to coverage as a permissive driver. Hulsey v. Travelers Indem. Co. of Am., 460 F. Supp. 2d 1332 (N.D. Ga. 2006).

No willful or wanton conduct in invasion of privacy claim. — In a case wherein the only tort that was properly submitted to the jury was the plaintiff's assertion of an invasion of privacy against the defendant, a psychiatrist, the trial court did not err by ruling that the evidence showed no willful or wanton conduct to support the plaintiff's claim for punitive damages and then granting a directed verdict on that claim in favor of the defendant because the plaintiff's claim presented no evidence, much less no clear and convincing evidence, that raised a question whether the defendant's actions in sending three letters to other treating physicians of the plaintiff warranted punitive damages. Haughton v. Canning, 287 Ga. App. 28, 650 S.E.2d 718 (2007), cert. denied, No. S07C1869, 2008 Ga. LEXIS 157 (Ga. 2008).

Punitive damages in limited liability company. — In an action involving the judicial dissolution of a limited liability company, because there was clear and

Evidentiary Standard (Cont'd)

convincing evidence that a member of the company's actions showed willful misconduct, malice, fraud, wantonness, or oppression, the evidence was sufficient to support an award of punitive damages. Moses v. Pennebaker, 312 Ga. App. 623, 719 S.E.2d 521 (2011).

Due to overwhelming evidence that the defendant publisher reasonably and honestly (albeit mistakenly) believed that the photographs were subject to the newsworthiness exception to the right of publicity, no reasonable jury could have found by clear and convincing evidence that punitive damages were warranted under O.C.G.A. § 51-12-5.1(b). The district court was instructed to vacate the jury's punitive damages award in the plaintiff mother's favor in the plaintiff's claim for violation of the deceased daughter's right of privacy for the publication of nude photos post mortem. Toffoloni v. LFP Publ'g Group, LLC, No. 11-12922, 2012 U.S. App. LEXIS 8810 (11th Cir. May 1, 2012), cert. denied, 133 S. Ct. 792, 184 L. Ed. 2d 582 (2012) (Unpublished).

District court did not err in allowing the jury's punitive damages award to stand because there was clear and convincing evidence that the defendant's misconduct showed the requisite bad state of mind under Georgia law because there was clear and convincing evidence from which a jury could have concluded that the defendant repeatedly acted with an intentional disregard for the plaintiffs' rights when the defendant, among other things, trespassed onto the plaintiffs' business premises, took over their operations, fired their employees, and sent letters to their tenants to redirect rent payments to the defendant's new bank account. E. Prop. Dev. LLC v. Gill, 558 Fed. Appx. 882 (11th Cir. Mar. 6, 2014) (Unpublished).

Actions sufficient to present jury question. — Restaurant cook's actions directed against the plaintiff customers, including the use of profanity and a racial epithet, calling the police, and having the plaintiffs removed from the restaurant, were the sort of willful misconduct that suffices to present a jury question on whether the plaintiffs were entitled to punitive damages. Middlebrooks v. Hillcrest Foods Inc., 256 F.3d 1241 (11th Cir. 2001).

Trial court properly denied an insurance management company and its president's motion for directed verdict, pursuant to O.C.G.A. § 9-11-50, in an action by a contractor who was forced to pay for a subcontractor's employee's injuries due to the failure of the subcontractor to have workers' compensation insurance as there was sufficient evidence of misrepresentations by the company and its president, and justifiable reliance by the contractor, to support the contractor's fraud and negligent misrepresentation claims; the company and the company's president had assured the contractor repeatedly that the subcontractor had adequate workers' compensation insurance for building purposes, although it did not, and based on the fraud by them, punitive damages pursuant to O.C.G.A. § 51-12-5.1(b) were properly presented to the jury for consideration. FitzSimons v. W. M. Collins Enters., Inc., 271 Ga. App. 854, 610 S.E.2d 654 (2005).

Because a corporation adduced evidence from which a jury could find that the competitor, the competitor's majority shareholder, and a newly formed company liable for procuring a breach of fiduciary duty, and because acting purposefully, with malice and the intent to injure, was an essential element of this tort, the defendants were not entitled to judgment as a matter of law on the corporation's malice claims seeking punitive damages and attorney fees. Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 633 S.E.2d 373 (2006).

Summary judgment was properly denied on punitive damages claims in a parent's action arising out of an accusation by store employees that the parent's child stole from the store because issues of fact existed as to whether the employees acted with a wanton disregard of the child's rights under O.C.G.A. § 51-12-5.1(b). Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

As there was evidence that a dentist failed to perform diagnostic procedures,

knew that dental implants inserted in a patient's mouth were not fitting properly, and yet used permanent cement to set them into position, the trial court erred in granting summary judgment to the dentist on the patient's claim for punitive damages of less than $250,000. Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209 (2009).

Partner, who sought punitive damages based upon another partner's actions, was not entitled to summary judgment because the evidence created a jury question over whether the investment bank partner acted with the specific intent to cause harm, and thus over whether the statutory cap should apply in the case. AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 707 S.E.2d 508 (2011).

Trial court did not err by denying a manager's motion for summary judgment as to the joint venturers' counterclaim for punitive damages because the venturers' breach of fiduciary duty claim survived and the venturers presented evidence from which a jury could properly conclude that an award of punitive damages was warranted based on whether the manager exercised good faith by depleting the business funds and suspending distributions. Maree v. ROMAR Joint Venture, 329 Ga. App. 282, 763 S.E.2d 899 (2014).

Threat of criminal prosecution sufficient. — A contractor's conduct in attempting to use the threat of criminal prosecution to pressure a client into paying a disputed bill met the standard for awarding the client punitive damages in the client's counterclaim for malicious prosecution. Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Purposeful action required in identity fraud cases. — Trial court properly granted summary judgment to the auto dealer, the mortgage broker, and the lender on the accused person's claim for punitive damages for repossessing the truck that had been fraudulently financed by another person in the accused person's name and then reporting that repossession to credit agencies that had the accused person's information before finally getting the repossession information deleted from the accused person's credit reports as the evidence did not show they purposefully acted to harm the accused person. Blakey v. Victory Equip. Sales, Inc., 259 Ga. App. 34, 576 S.E.2d 38 (2002).

Employer's conduct was proper response in employee's claim of sexual harrasment by a co-worker. — Evidence did not support a claim by an employee against an employer of intentional infliction of emotional distress due to a co-employee's acts of sexual harassment directed at the employee, as the employer's conduct in response to the harassment was neither extreme or outrageous, nor malicious, willful, or wanton, based on the same test used for determination of punitive damages under O.C.G.A. § 51-12-5.1; rather, the employer responded to the employee's indication of sexual harassment by putting a ban on communications between the employees and by ultimately terminating the co-employee for a failure to adhere to that ban. Travis Pruitt & Assocs., P.C. v. Hooper, 277 Ga. App. 1, 625 S.E.2d 445 (2005).

No proof of intent to cause harm. — As there was no evidence a dentist acted with the specific intent to cause harm to a patient, as required under O.C.G.A. § 51-12-5.1(f)-(g) to support a claim for unlimited punitive damages, the patient's claim for punitive damages exceeding $250,000 was properly dismissed. Tookes v. Murray, 297 Ga. App. 765, 678 S.E.2d 209 (2009).

Product Liability

Award not excessive. — In an action against a truck manufacturer, a punitive damages award of $2 million was not so excessive as to violate the due process clauses of the Georgia and United States Constitutions, the Eighth Amendment of the United States Constitution, and the excessive fines clause of Ga. Const., 1983, Art. I, Sec. I, Par. XVII. Mack Trucks, Inc. v. Conkle, 263 Ga. 539, 436 S.E.2d 635 (1993).

In an action against a manufacturer of a pickup truck whose side saddle fuel tank ruptured and burst into flames after a collision, an award of punitive damages of $101,000,000 was not unreasonable and rationally served the purpose of punishing

Product Liability (Cont'd)

and deterring, considering the public nature of the harm, the corporate defendant involved, and the protection afforded by the "one award" provision of paragraph (e)(1) of O.C.G.A. § 51-12-5.1. GMC v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (1994).

Punitive damages proper. — Award of punitive damages in a personal injury action arising from exposure to pesticides was proper because the evidence supported a finding that the extermination company displayed a conscious indifference to the possible infliction of personal injury on the company's customers as a result of their exposure to pesticides misapplied by extermination company technicians. Orkin Exterminating Co. v. Carder, 258 Ga. App. 796, 575 S.E.2d 664 (2002).

Trial court properly denied an automobile manufacturer's motion judgment notwithstanding the verdict on a grant of punitive damages, pursuant to O.C.G.A. § 51-12-5.1(b), in a products liability action; the evidence indicated that the manufacturer had been aware of faulty backseat latches for years prior to the accident, in which a latch failed and the seat flew forward, permanently paralyzing a child, and did nothing to remedy or warn customers of the problem. Ford Motor Co. v. Sasser, 274 Ga. App. 459, 618 S.E.2d 47 (2005).

Injury from construction boom. — Construction worker's O.C.G.A. § 51-12-5.1(b) punitive damages claim against a boom manufacturer and two rental companies failed because the worker's underlying products liability claims failed as there was no evidence that the manufacturer or the rental companies produced or placed into the stream of commerce the boom that injured the worker. McBride v. JLG Indus., No. 7:03-cv-118(HL), 2005 U.S. Dist. LEXIS 21713 (M.D. Ga. Sept. 20, 2005); Mosley v. JLG Indus., 2005 U.S. Dist. LEXIS 21782 (M.D. Ga. Sept. 20, 2005).

Other Cases

Summary judgment properly denied as to invasion of privacy claim. — Summary judgment motion filed by employer was properly denied on an intentional infliction of emotional distress claim brought under the doctrine of respondeat superior by a group of female employees, after the employer installed a video surveillance system in the women's restroom in response to rumored drug use, placed a manager in charge of the system, and asked the manager to monitor the activity of the employees; there was no evidence that the manager acted solely for personal sexual gratification. Johnson v. Allen, 272 Ga. App. 861, 613 S.E.2d 657 (2005).

Summary judgment was properly denied on arrestees' punitive damages claim, which arose from their allegations that the arrestees were transported to jail with their genitalia exposed; whether to award punitive damages was left to the factfinder. Mitchell v. Stewart, No. 14-13035, 2015 U.S. App. LEXIS 5753 (11th Cir. Apr. 9, 2015) (Unpublished).

Specific intent requirement. — Under subsection (f) of O.C.G.A. § 51-12-5.1, a jury on a claim for fraud was not required to make a separate finding that the defendant acted with specific intent to injure in order to authorize an award above $250,000; however, in future cases, a bright line rule is adopted requiring both a charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact in order to avoid the cap on punitive damages. McDaniel v. Elliott, 269 Ga. 262, 497 S.E.2d 786 (1998).

When an employer sought an award of punitive damages against an employee in an amount exceeding $250,000, there was a bright line rule requiring the employer to request both a charge on the employee's specific intent to cause harm and a separate finding of the employee's specific intent to cause harm by the trier of fact in order to avoid the $250,000 cap in O.C.G.A. § 51-12-5.1(g). Quay v. Heritage Fin., Inc., 274 Ga. App. 358, 617 S.E.2d 618 (2005).

Bright line rule regarding awarding punitive damages in excess of the cap in O.C.G.A. § 51-12-5.1(g) means that a failure to object to the absence or inadequacy of a specific intent charge or finding does not constitute a waiver of the error for the

purpose of appellate review, and because a claimant for punitive damages bears the burden of meeting the procedural requirements of O.C.G.A. § 51-12-5.1(g), a verdict for punitive damages in excess of $250,000 may not stand unless the record reflects both a request to charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact. Quay v. Heritage Fin., Inc., 274 Ga. App. 358, 617 S.E.2d 618 (2005).

In a "road rage" suit against a supplier and a carrier involving an assault by a truck driver, the evidence did not support an award of punitive damages over $250,000 under O.C.G.A. § 51-12-5.1(f); it had not been alleged that the supplier, which defaulted, acted with the specific intent to cause harm, and such intent was not established by a showing of conscious indifference on the carrier's part. Aldworth Co. v. England, 286 Ga. App. 1, 648 S.E.2d 198 (2007).

Trial court did not err in refusing to limit the punitive damages award to $250,000, the statutory cap set forth in O.C.G.A. § 51-12-5.1(f) and (g), in a corporation's action against a former president alleging breach of fiduciary duty and misappropriation of corporate opportunity because the following evidence supported the jury's finding of specific intent to harm: (1) an employee who worked for both the corporation and a business that was formed by the president and by the owner of the corporation's competitor testified that the president warned the employee and other employees not to reveal their involvement with the business because "it would only be a detriment to you"; (2) the owner of the corporate competitor testified that the president had stated that the president had permission to work on a second factoring company; and (3) the corporation's owner testified that the corporation had no knowledge of the president's involvement in a second factoring business. Brewer v. Insight Tech., Inc., 301 Ga. App. 694, 689 S.E.2d 330 (2009), cert. denied, No. S10C0678, 2010 Ga. LEXIS 455 (Ga. 2010).

Insufficient evidence for subsection (f) award. — Evidence that the truck driver continued on the highway driving erratically for several minutes before veering off the road to strike the plaintiff's vehicle and that the driver's employer utilized a "forced dispatch" system resulting in a significant number of safety regulation violations did not sufficiently demonstrate "specific intent to harm" for a punitive award under O.C.G.A. § 51-12-5.1. J.B. Hunt Transport, Inc. v. Bentley, 207 Ga. App. 250, 427 S.E.2d 499 (1992).

In an action arising from an accident allegedly caused when pegboard fell from a van, it was not shown that the store employee who tied the pegboard to the top of the van had an intent to cause specific harm as required for the payment of unlimited punitive damages. Bonard v. Lowe's Home Ctrs., Inc., 224 Ga. App. 85, 479 S.E.2d 784 (1996).

Since there was no evidence of any complaints to the developers while a subdivision was being built, or that the drainage system was designed with knowledge that it would increase the runoff of storm-water or sediment onto the plaintiffs' property, and since the developers complied with all requirements imposed by the county, the plaintiffs' failure to comply with the county's request that the plaintiffs provide documentation of their complaints, and the findings of various governmental agencies as to the plaintiffs' lack of damages, supported the granting of summary judgment to the developers as to the plaintiffs' claims for punitive damages and attorney fees. Tyler v. Lincoln, 236 Ga. App. 850, 513 S.E.2d 6 (1999).

No punitive damages for trespass without compensatory damages award. — Trial court erred in awarding a grandfather punitive damages against a grandson for trespass, as punitive damages could not be awarded absent a compensatory damages award, even though injunctive relief was granted. Martin v. Martin, 267 Ga. App. 596, 600 S.E.2d 682 (2004).

Damages properly denied; conscious indifference not proven. — Evidence of corporate trucking agency's knowledge of employee's less than stellar driving record and of limited experience credentials was insufficient to conclude that the agency was consciously indiffer-

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ent in hiring or retaining the employee. Hutcherson v. Progressive Corp., 984 F.2d 1152 (11th Cir. 1993).

Truck repairer was properly granted a directed verdict under O.C.G.A. § 9-11-50 with respect to a truck owner's request for punitive damages as the repairer's acts did not amount to willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care that would raise the presumption of conscious indifference to the consequences pursuant to O.C.G.A. § 51-12-5.1(b). Puckette v. John Bailey Pontiac-Buick-GMC Truck, Inc., 311 Ga. App. 138, 714 S.E.2d 750 (2011).

Claim for damages fails. — Since punitive damages could only be awarded as damages additional to other damages, and because the medical director did not establish any other claim for damages in the medical director's suit for damages for the disclosure of the fact that the medical director tested positive for an infectious disease, the medical director's claim for punitive damages had to fail. Nelson v. Glynn-Brunswick Hosp. Auth., 257 Ga. App. 571, 571 S.E.2d 557 (2002).

When no actual damages, no punitive damages. — Trial court erred in granting actual damages for orthodontic expenses, as well as punitive damages and attorney fees, to an ex-husband in a fraud claim against the ex-wife, arising from allegations that the ex-wife fraudulently misrepresented that the former husband had abandoned the ex-wife's daughters, which the ex-husband later adopted, as the divorce decree and the adoption order were presumptively valid and in full force and effect and, accordingly, the ex-husband could not recover for expenses that the ex-husband was legally obligated to pay; although the ex-wife failed to respond to the complaint, the trial court erred in granting the ex-husband a default judgment under O.C.G.A. § 9-11-55(a) because the relief was not available to him, and as there was no actual damages awarded, there could be no punitive damages under O.C.G.A. § 51-12-5.1(b) and no attorney fees. Grand v. Hope, 274 Ga. App. 626, 617 S.E.2d 593 (2005).

Insured could not sustain a claim that the parent insurance company interfered with a policy issued by its subsidiary and induced the subsidiary to breach the policy because the parent company could not be a stranger to the subsidiary's contractual relations; therefore, the insured's claims for tortious interference with contractual relations and punitive damages arising out of that alleged tortious interference were dismissed for failure to state a claim. Perry v. Unum Life Ins. Co. of Am., 353 F. Supp. 2d 1237 (N.D. Ga. 2005).

In an advertiser's suit alleging claims for fraud, breach of contract, gross negligence, and punitive damages in connection with a publisher and its sales agent's failure to ensure that the advertiser's business was listed in a telephone directory, the punitive damages claim failed under O.C.G.A. § 51-12-5.1 because the advertiser's underlying claims were dismissed on summary judgment. Integrated Pest Mgmt. Servs., LLC v. Bellsouth Adver. & Publ. Corp., No. 1:04-cv-2880-WSD, 2005 U.S. Dist. LEXIS 30000 (N.D. Ga. Nov. 16, 2005).

Because an executor's underlying claims of fraud, breach of fiduciary duty, and conversion against a brother and a wife were dismissed upon summary judgment, the executor's O.C.G.A. § 51-12-5.1(b) claim for punitive damages also had to be dismissed, as the executor no longer had any claims supporting actual damages. Rowland v. Rowland, 2005 U.S. Dist. LEXIS 30296 (N.D. Ga. Nov. 16, 2005).

Administrator's claim for punitive damages against an insurance company, which allegedly improperly denied insurance death benefits, was dismissed because Georgia law did not provide the administrator with a tort claim; since the administrator's tort claims were dismissed, the punitive damages claim under O.C.G.A. § 51-12-5.1 required dismissal. Garrett v. Unum Life Ins. Co. of Am., 427 F. Supp. 2d 1158 (M.D. Ga. 2005).

Punitive damages in medical malpractice claim. — In a medical malpractice action, an executrix failed to support a claim for punitive damages related to a claim of abandonment as the executor

failed to present any expert testimony that there was a reasonable degree of medical certainty the decedent would have survived, even if the doctor or another qualified surgeon had been at the hospital when the decedent began to bleed internally; thus, the trial court properly granted the doctor a directed verdict as to both claims. King v. Zakaria, 280 Ga. App. 570, 634 S.E.2d 444 (2006).

Punitive damages in consumer fraud cases. — Although punitive damages were available for fraud claims, because the court had dismissed the consumers' fraud claim for failure to plead fraud with sufficient particularity, there was no claim remaining in the case to support a claim for punitive damages under O.C.G.A. § 51-12-5.1(b); therefore, the claim for punitive damages was dismissed. Danielson v. DBM, Inc., 2006 U.S. Dist. LEXIS 52746 (N.D. Ga. July 31, 2006).

Penalty was assessed against two customers for bringing a frivolous appeal as their punitive damages claim based on a salesperson placing an acrylic riser back in its original position on a counter without a warning after the riser had fallen on a customer's toe was without a factual or legal support since placing the acrylic riser on the counter was not willful, malicious, or designed to cause injury to others, and no person was injured when the riser was placed back on the counter after the riser fell and struck the customer's toe. Kurtz v. Brown Shoe Co., 281 Ga. App. 706, 637 S.E.2d 111 (2006).

Physical injury required for punitive damages. — Because an employee chose to pursue punitive damages under O.C.G.A. § 51-12-5.1 rather than O.C.G.A. § 51-2-6, the employee was not entitled to punitive damages on a claim for negligent retention due to the fact that the jury specifically found that the employee had not suffered a physical injury. A finding of physical injury was required for punitive damages under O.C.G.A. § 51-12-5.1. Tomczyk v. Jocks & Jills Rests., LLC, 513 F. Supp. 2d 1351 (N.D. Ga. 2007).

Punitive damages in injury following boat fueling. — In a boat buyer's suit alleging negligence by the defendants, a marina, a boat yard, and the seller of the boat in connection with a fire that caused the buyer to sustain severe burns, the buyer's claims for punitive damages under O.C.G.A. § 51-12-5.1(b) failed since there was no evidence that the defendants acted with willful misconduct or recklessness in the installation of an alternator that may have been defective or in using an automated fuel pump to refuel the boat. Muhs v. River Rats, Inc., 586 F. Supp. 2d 1364 (S.D. Ga. 2008).

Employee acting without intentional disregard of others. — Employee, who cut a tree that fell on a landscaper's truck, was properly granted summary judgment as to the landscaper's claim for punitive damages. Because the employee, who had eight years' experience in removing trees, believed the tree could be cut so the tree would fall away from the road, and used an anchor rope to control the tree's descent, no rational fact finder could have found by clear and convincing evidence that the employee intentionally disregarded the rights of others. Wardlaw v. Ivey, 297 Ga. App. 240, 676 S.E.2d 858 (2009).

Punitive damages following auto accident. — Like the driver who was speeding on wet roads and had consumed alcohol before the crash, the evidence the executor adduced against the driver was that the driver drove at excessive speeds, carried a slightly overweight load, and drove despite knowing that the driver's blood sugar situation was not being properly controlled. Those facts did not form the basis of a pattern and policy of dangerous driving and were more akin to violating rules of the road; therefore, the court granted the driver, the trucking company, the corporation, and the insurance company's motion for summary judgment as to punitive damages under O.C.G.A. § 51-12-5.1(b). Lewis v. D. Hays Trucking, Inc., No. 1:08-cv-01904-JOF, 2010 U.S. Dist. LEXIS 28035 (N.D. Ga. Mar. 22, 2010).

After being granted summary judgment dismissing claims for breach of contract and breach of fiduciary duty, resulting in no actual damages being awarded, punitive damages were unavailable under O.C.G.A. § 51-12-5.1. Richards v. Platz,

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No. 1:10-cv-2262-TCB, 2013 U.S. Dist. LEXIS 13953 (N.D. Ga. Jan. 30, 2013).

No proof of entitlement to punitive damages. — Although the bank was liable for conversion to the client of an attorney who deposited a forged check to the attorney's trust account, the bank was not liable for punitive damages since there was no evidence of conduct by the bank sufficient to raise the presumption of conscious indifference to the consequences. Tifton Bank & Trust Co. v. Knight's Furn. Co., 215 Ga. App. 471, 452 S.E.2d 219 (1994).

There was insufficient evidence to support a finding that the defendant wilfully or with conscious indifference failed to abate the nuisance; therefore, there was no support for a claim of punitive damages. Tri-County Inv. Group v. Southern States, Inc., 231 Ga. App. 632, 500 S.E.2d 22 (1998).

Evidence that a cell phone company erroneously charged its customers taxes and delayed reimbursement for several months was insufficient to establish a material issue of fact as to the customers' entitlement to punitive damages. Taylor v. Powertel, Inc., 250 Ga. App. 356, 551 S.E.2d 765 (2001).

When injured parties sought punitive damages from a motorist who collided with their vehicle because the motorist was a minor whose license did not allow the minor to drive after 1:00 a.m., and the collision occurred after 1:00 a.m., the recovery of punitive damages was not allowed because the time at which the motorist was driving did not proximately cause the collision, and the minor's action was not part of a pattern or policy of dangerous driving, such as driving while intoxicated or excessive speeding, which could justify the imposition of punitive damages, under O.C.G.A. § 51-12-5.1(b). Brooks v. Gray, 262 Ga. App. 232, 585 S.E.2d 188 (2003).

Spouse of a decedent worker presented no evidence that the corporations engaged in the sort of conduct that would warrant an imposition of punitive damages because the spouse's suit was based on a simple negligence theory; because the spouse failed to satisfy the statutory requirements in O.C.G.A. § 51-12-5.1, the spouse's claim for punitive damages did not succeed. Clark v. Roberson Mgmt. Corp., No. 5:03CV274 (DF), 2005 U.S. Dist. LEXIS 46972 (M.D. Ga. Jan. 11, 2005).

Corporation, the employee, and the insurance company's motion for summary judgment on the punitive damages claim under O.C.G.A. § 51-12-5.1(b) was granted because: (1) the injured individual had not alleged any facts that show that the employee acted maliciously; and (2) the employee's speeding tickets were not such numerous and serious violations as to suggest that the collision resulted from a pattern or policy of dangerous driving. Ballard v. Keen Transp., Inc., No. 4:10-cv-54, 2011 U.S. Dist. LEXIS 5487 (S.D. Ga. Jan. 19, 2011).

Claim for punitive damages failed as evidence that the employer checked the driver's driving record before hiring the driver, reviewed the record during the first year of employment, required the driver to comply with driver training and safety rules, and the driver's most recent violation was over three years old failed to rise to the level of clear and convincing evidence demonstrating that the employer should have known that the driver was a habitually reckless or dangerous driver. MasTec N. Am., Inc. v. Wilson, 325 Ga. App. 863, 755 S.E.2d 257 (2014).

Damages properly awarded; conscious indifference proven. — In a malpractice action, evidence of the defendant dentist's extended treatment of the plaintiff during a time the dentist was impaired by the use of addictive drugs raised the presumption of conscious indifference to the consequences so as to justify a punitive damages award. Martin v. Williams, 215 Ga. App. 649, 451 S.E.2d 822 (1994).

There was no error in an award of punitive damages when the plaintiff's actions showed willful misconduct, fraud, wantonness, and an entire want of care, which raised the presumption of conscious indifference to the consequences of the defendant's conduct. Scriver v. Lister, 235 Ga. App. 487, 510 S.E.2d 59 (1998).

Evidence that the defendant refused to

maintain drainage control around the defendant's rails despite knowledge that the plaintiff's property flooded as a result authorized the finding that the defendant acted with conscious indifference to the plaintiff's plight. CSX Transp., Inc. v. West, 240 Ga. App. 209, 523 S.E.2d 63 (1999), overruled on other grounds by Monterrey Mexican Rest. of Wise, Inc. v. Leon, 282 Ga. App. 439, 638 S.E.2d 879 (2006).

Evidence supported a finding that the defendant company acted with reckless disregard of the plaintiff's welfare by allowing the plaintiff to sit in jail as a result of its failure to pay its own charges for false alarms. E-Z Serve Convenience Stores, Inc. v. Crowell, 244 Ga. App. 43, 535 S.E.2d 16 (2000).

Award of punitive damages under O.C.G.A. § 51-12-5.1(b) to the injured party in the trover action was supported by the evidence, after the bank wrongfully repossessed the injured party's trailer under the assumption that it was the injured party's son's, it failed to follow standard banking practice requiring that an attempt be made to identify the secured vehicle correctly before repossessing it, and the bank did not hold title to the trailer, but merely had a financing statement granting it a security interest in the injured party's son's equipment. Gateway Bank & Trust v. Timms, 259 Ga. App. 299, 577 S.E.2d 15 (2003).

When a construction company promised to remedy a problem with standing water in the backyard of a house it sold to a homeowner, which was a problem it had created when it removed soil from the yard, but, after two years, told the homeowner it had no intention of taking care of the problem, an award of punitive damages was proper, under O.C.G.A. § 51-12-5.1(b), as the evidence showed clearly and convincingly that the company refused to acknowledge the problem and the problem took a physical toll on the elderly homeowner. Bowen & Bowen Constr. Co. v. Fowler, 265 Ga. App. 274, 593 S.E.2d 668 (2004).

After a company established that a former agent of the company solicited the company's customers for a competing enterprise during the tenure of the agent's employment, such conduct demonstrated the type of willful misconduct contemplated by O.C.G.A. § 51-12-5.1(b) to warrant an award of punitive damages, but the award was limited to half of the amount awarded as damages since the agent's conduct did not appear to be calculated to harm the company and the agent's competing enterprise was not a robust operation and was suffering a loss of business as a result of the case. KEG Techs., Inc. v. Laimer, 436 F. Supp. 2d 1364 (N.D. Ga. 2006).

Award of punitive damages was authorized in a trespass action filed against owners of property by the holder of an easement over their property because the evidence authorized a finding that the owners participated in repeated trespasses to the holder's property; under O.C.G.A. § 51-12-5.1(b), punitive damages could be awarded in tort actions in which willful misconduct was proven by clear and convincing evidence, and because trespass was an intentional act, a willful repetition of trespass authorized the claim for punitive damages. Paine v. Nations, 283 Ga. App. 167, 641 S.E.2d 180 (2006).

Jury properly found that a corporation that manufactured carbon black and permitted its smokestacks to spew an oily substance onto adjacent properties over a course of years with notice but without effectively remedying the problem evinced a specific intent to cause harm, overcoming the punitive damage cap in O.C.G.A. § 51-12-5.1(f) and (g). Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302 (11th Cir. 2007).

In a "road rage" suit against a carrier involving an assault by a truck driver, limited punitive damages under O.C.G.A. § 51-12-5.1(b) were authorized against the carrier. A finding of conscious indifference was supported by evidence that the carrier violated federal regulations by not obtaining an address history for the driver, that the carrier knew the driver had been fired from the driver's last job after an accident, that the carrier knew that the driver had not disclosed numerous driving citations, and that the carrier had not investigated any of the infractions. Aldworth Co. v. England, 286 Ga. App. 1, 648 S.E.2d 198 (2007).

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Evidence supported an award of punitive damages under O.C.G.A. § 51-12-5.1(b) as it was undisputed that a developer trespassed on an owner's property, causing a continuing nuisance of run-off and erosion, that the developer knew of the problems the developer created, and that the developer showed a conscious indifference as the developer made no attempt to correct the problems. Wildcat Cliffs Builders, LLC v. Hagwood, 292 Ga. App. 244, 663 S.E.2d 818 (2008).

Damages properly denied; lack of clear and convincing evidence. — The trial court did not err in granting j.n.o.v. to the defense on the issue of punitive damages in an action arising from an incident in which a portion of needle broke off during a tonsillectomy and a portion of the needle lodged in a child's tonsil fossa since testimony by the child's mother that a nurse stated that the needle remaining in the child's throat was "microscopic" in size and that this occurrence was common was not clear and convincing, given that it was contradicted by the testimony of the nurse and the physician, as well as the physician's notes of the conversation. Kodadek v. Lieberman, 247 Ga. App. 606, 545 S.E.2d 25 (2001).

Employers or principals may be vicariously liable for punitive damages arising from the acts or omissions of their employees or agents if such tortious conduct is committed in the course of the employer's or principal's business, within the scope of the servant's or agent's employment, and is sufficient to authorize a recovery of punitive damages under O.C.G.A. § 51-12-5.1. Fowler v. Smith, 237 Ga. App. 841, 516 S.E.2d 845 (1999).

Evidence of employee's conviction could not be presented. — When an employer was liable under respondeat superior for the tort of its employee and punitive damages were sought, the employer had no right to present as mitigative evidence the conviction of its employee; a corporation had no right to present evidence of the conviction and fine of its employee who allegedly assaulted one of the corporation's customers. May v. Crane Bros., Inc., 276 Ga. 280, 576 S.E.2d 286 (2003).

RICO violation demonstrates "intent to cause harm." — Evidence sufficient to show a racketeer influenced and corrupt organization (RICO) violation necessarily also demonstrates the "intent to cause harm" that removes the cap to a punitive damage award. Speir v. Krieger, 235 Ga. App. 392, 509 S.E.2d 684 (1998).

Punitive damages based on intentional fraud uncapped. — Because a finding of specific "intent to cause harm" is inherent in the essential elements of an intent to defraud consumers, a punitive damage award based upon intentional fraud was not subject to the $250,000 cap of subsection (g) of O.C.G.A. § 51-12-5.1. Speir v. Krieger, 235 Ga. App. 392, 509 S.E.2d 684 (1998).

Fraud. — The nature of fraud is such that it includes within its elements the intent to commit harm to the victim under O.C.G.A. § 51-12-5.1(f), justifying punitive damages. Kent v. A.O. White, Jr., Consulting Eng'rs, P.C., 253 Ga. App. 492, 559 S.E.2d 731 (2002), overruled in part, Time Warner Entm't Co. v. Six Flags Over Ga., L.L.C., 254 Ga. App. 598, 563 S.E.2d 178 (2002), cert. denied, 538 U.S. 977, 123 S. Ct. 1783, 155 L. Ed. 2d 665 (2003).

A trial court erred in granting summary judgment to an auto dealership in a purchaser's suit asserting fraud and violations of Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., with regard to the purchase of a vehicle as genuine issues of material fact existed as to each element, including whether the purchaser was entitled to punitive damages under O.C.G.A. § 51-12-5.1(b) for the fraud. Johnson v. GAPVT Motors, Inc., 292 Ga. App. 79, 663 S.E.2d 779 (2008).

Personal representative's wrongful conveyance of the estate's primary asset, a house, to the personal representative was both a breach of fiduciary duty and fraud, entitling the beneficiary to punitive damages under O.C.G.A. § 51-12-5.1(b). In re Estate of Zeigler, 295 Ga. App. 156, 671 S.E.2d 218 (2008).

Insurance fraud. — When the court found that a Chapter 7 debtor, as owner of an insured, knowingly and intentionally submitted fraudulent claims to the insurer in the amount of $7,761, the insurer was entitled to punitive damages in the

amount of $25,000, payment of which would affect the insurer's lifestyle, yet the debtor should have a realistic chance of paying the amount over time. Cincinnati Ins. Co. v. Porter (In re Porter), No. 05-44583-PWB, 2007 Bankr. LEXIS 2185 (Bankr. N.D. Ga. May 23, 2007).

Uncapped punitive damages recoverable. — See Anderson v. Radisson Hotel Corp., 834 F. Supp. 1364 (S.D. Ga. 1993).

Financial resources of defendant. — Plaintiff was not entitled to discover information concerning the defendant's personal financial resources absent an evidentiary showing (by affidavit, discovery responses, or otherwise) that a factual basis existed for the plaintiff's punitive damage claim. Holman v. Burgess, 199 Ga. App. 61, 404 S.E.2d 144, cert. denied, 199 Ga. App. 906, 404 S.E.2d 144 (1991).

The clear language of O.C.G.A. § 51-12-5.1 indicates that the financial circumstances of a defendant are relevant to the issue of damages. Palmquist v. Piper Aircraft Corp., 757 F. Supp. 1411 (N.D. Ga. 1991).

For purposes of determining the amount of punitive damages, the trial court did not err in excluding evidence of the defendant's insurance policy that the plaintiff sought to introduce because the evidence was substantially prejudicial and, out of fairness to the plaintiff, the trial court also prevented the defendant from introducing evidence of the defendant's financial condition. Dagne v. Schroeder, 336 Ga. App. 36, 783 S.E.2d 426 (2016).

Dischargeability in bankruptcy. — Punitive damages can be excepted from discharge in bankruptcy, when the defendant's actions were intentional or deliberate, and were wrongful and without just cause or excessive. Fincher v. Holt, 173 Bankr. 806 (Bankr. M.D. Ga. 1994).

After a state court awarded a creditor punitive damages in the creditor's suit against the debtors for actions that showed "willful misconduct, malice, fraud, wantonness, oppression, or entire want of care," then even assuming arguendo that a finding that the debtors acted with an "entire want of care" would satisfy 11 U.S.C. § 523(a)(6), because the state court did not identify on which of the six disjunctive parts of O.C.G.A. § 51-12-5.1(b), or combinations thereof, that the court based the court's decision; thus, a bankruptcy court could not determine as a matter of law that the state court judgment satisfied the requirements of 11 U.S.C. § 523(a)(6). Jefferson v. Hedd-Williams (In re Hedd-Williams), No. 10-6091-JRS, 2011 Bankr. LEXIS 2297 (Bankr. N.D. Ga. Mar. 30, 2011).

Although a state court awarded punitive damages in a default judgment in favor of a creditor, the court's basis for the award was too vague and ambiguous to warrant a preclusive finding in a nondischargeability proceeding against the debtor as Georgia law contemplated an award of punitive damages for fraud but also permitted punitive damages in circumstances that did not rise to the level that would render the debt nondischargeable. Hit-Em-Hard Corp. v. Lewis (In re Lewis), No. 12-5577-PWB, 2016 Bankr. LEXIS 1161 (Bankr. N.D. Ga. Apr. 10, 2016).

Denial in bankruptcy nondischargeability matter. — Although bankruptcy court found the debtor civilly liable to a corporation for conversion and breach of fiduciary duty and to a shareholder for fraud, the court declined to award punitive damages under Georgia law, as finding the debt non-dischargeable was a significant deterrent in and of itself. The shareholder was entitled to an award of attorney's fees because the debtor acted in bad faith with respect to the debtor and caused the debtor unnecessary trouble and expenses, but the corporation was not awarded fees, as it failed on a substantial amount of its damage claims, and its claims were significantly overstated, which extended the litigation and thwarted any efforts at resolution that the debtor attempted. Hot Shot Kids Inc. v. Pervis (In re Pervis), 512 B.R. 348 (Bankr. N.D. Ga. 2014).

Proportionality of damages. — An award of punitive damages for intentional tortious conduct approximately only three times greater than the combined amount of direct damages and attorney fees when the plaintiff incurred the trauma and expense of litigation, including the incurring of a substantial charge for attorney fees,

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was not disproportionate. Oglethorpe Power Corp. v. Sheriff, 210 Ga. App. 299, 436 S.E.2d 14 (1993).

Denial of directed verdict on issue of punitive damages erroneous. — When there was evidence from the plaintiff that the plaintiff repeatedly pled with defendant's employees not to destroy the plaintiff's truck and that the employees proceeded to exercise little or no care to preserve the plaintiff's trailer during the employees' attempt to retrieve a forklift from the trailer, and the defendant put forth evidence that it operated its equipment in a normal manner and made a reasonable attempt to free the forklift from the trailer, the jury could have determined the plaintiff's testimony established by clear and convincing evidence that the defendant showed an entire want of care of the plaintiff's trailer and raised a presumption that the defendant was consciously indifferent to the consequences. Georgia Kraft Co. v. Faust, 200 Ga. App. 686, 409 S.E.2d 247 (1991).

Severance of issues. — In an action against a physician for medical malpractice, fraud, and loss of consortium, the trial court did not abuse the court's discretion in severing the issue of professional negligence from the trial of issues of liability for and amount of punitive damages. Hanie v. Barnett, 213 Ga. App. 158, 444 S.E.2d 336 (1994).

Applicable to electric membership corporation. — There is no public policy interest that would prevent the application of O.C.G.A. § 51-12-5.1 to an electric membership corporation. Walton Elec. Membership Corp. v. Snyder, 270 Ga. 62, 508 S.E.2d 167 (1998).

Action against hospital authority. — It is against Georgia public policy to allow an award of punitive damages in a medical malpractice action against a hospital authority created as a governmental entity under the Hospital Authorities Act, O.C.G.A. § 31-7-70 et seq. Hospital Auth. v. Martin, 210 Ga. App. 893, 438 S.E.2d 103 (1993), aff'd, 264 Ga. 626, 449 S.E.2d 827 (1994).

Not allowed for breach of contract. — Punitive damages are not available in actions for breach of contract. Trust Co. Bank v. Citizens & S. Trust Co., 260 Ga. 124, 390 S.E.2d 589 (1990).

Because a general contractor's action involved only contract claims, the contractor could not claim relief in the form of punitive damages under O.C.G.A. § 51-12-5.1. Apac-Southeast, Inc. v. Coastal Caisson Corp., 514 F. Supp. 2d 1373 (N.D. Ga. 2007).

Liability of power corporation. — Power corporation failed to show that it was a public service corporation and, accordingly, shielded from liability for punitive damages as a matter of law; an electrical membership, under the Georgia Electric Membership Corporation Act, O.C.G.A. § 46-3-170 et seq., is vested with the power to sue and be sued and is provided with no express statutory immunity from liability for punitive damages. Oglethorpe Power Corp. v. Sheriff, 210 Ga. App. 299, 436 S.E.2d 14 (1993).

Punitive damages are available in an action against a public utility corporation when there exists clear and convincing evidence from which a jury could find that the company's actions in committing the intentional tort showed one or more of the criteria for the award of punitive damages as stated in subsection (b) of O.C.G.A. § 51-12-5.1, particularly that entire want of care which would raise the presumption of conscious indifference to consequences. Rossee Oil Co. v. BellSouth Telecommunications, Inc., 212 Ga. App. 235, 441 S.E.2d 464 (1994).

A traffic violation, without more, simply does not rise to the level of wilfully illegal behavior contemplated by O.C.G.A. § 51-12-5.1. Lewis v. Suttles Truck Leasing, Inc., 869 F. Supp. 947 (S.D. Ga. 1994).

Failure to warn of obstruction in roadway. — Allegations that a corporation's employees had negligently, recklessly, wantonly, and with a conscious disregard for the consequences failed to warn a driver of an obstruction in the roadway that the employees had created, which were admitted by the corporation through its default, were sufficient to support punitive damages under O.C.G.A. § 51-12-5.1. COMCAST Corp. v. Warren, 286 Ga. App. 835, 650 S.E.2d 307 (2007), cert. denied, 2008 Ga. LEXIS 82 (Ga. 2008).

Uninsured motorist insurer not liable for punitive damages. — In an action against a tortfeasor's estate defended by the tortfeasor's uninsured motorist insurer, evidence of the tortfeasor's intoxication was admissible as relevant to the issues of causation and damages, even though punitive damages could not be sought against the insurer. Shelter Mut. Ins. Co. v. Bryant, 220 Ga. App. 526, 469 S.E.2d 792 (1996).

In a personal injury action arising from an automobile accident, the trial court did not abuse the court's discretion when it prohibited evidence of the defendant's prior conviction for drunk driving during the liability phase of a bifurcated trial, or when it refused to separate the issue of liability for punitive damages from the issue of compensatory damages. Webster v. Boyett, 269 Ga. 191, 496 S.E.2d 459 (1998), reversing Boyett v. Webster, 224 Ga. App. 843, 482 S.E.2d 377 (1997).

Talking on cell phone while driving. — Trial court erred in denying an employee driver's and the employer's motion for summary judgment on the issue of punitive damages because the employee was traveling approximately 48 — 51 miles per hour in a 45 miles per hour zone while talking on the employee's cell phone; this was insufficient under O.C.G.A. § 51-12-5.1(b). Archer Forestry, LLC v. Dolatowski, 331 Ga. App. 676, 771 S.E.2d 378 (2015).

Trial court did not err in denying the defendant's motion for directed verdict and judgment notwithstanding the verdict on punitive damages because, although the jury concluded that the defendant was not driving under the influence at the time of the collision, there were other grounds on which the jury could have awarded punitive damages as the trial court ruled that the defendant's erratic driving raised a jury question as to whether the defendant's actions showed wilful misconduct, malice, wantonness, or an entire want of care so as to raise a presumption of conscious indifference to the consequences. Dagne v. Schroeder, 336 Ga. App. 36, 783 S.E.2d 426 (2016).

In automobile collision cases, punitive damages may be awarded when it is proven by clear and convincing evidence that the defendant's act or omissions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care that would raise the presumption of conscious indifference to the consequences. Fowler v. Smith, 237 Ga. App. 841, 516 S.E.2d 845 (1999).

After the driver of the defendant company's truck was involved in an accident, the defendants' motion for summary judgment was improperly denied because the plaintiffs could not recover punitive damages against the defendant individual with an ownership interest in the company as the only active tortfeasor in the case was the driver. Corrugated Replacements, Inc. v. Johnson, 340 Ga. App. 364, 797 S.E.2d 238 (2017).

Punitive damages against automobile insurer. — Evidence that an insurer took the claimant's vehicle without the claimant's permission, demanded storage fees after wrongfully taking the vehicle from a location that was not charging storage, and the callous disregard of the claimant's rights as shown by an adjuster's letters and deposition testimony, was sufficient to present a jury question regarding punitive damages. Jerrell v. Classic Ins. Co., 246 Ga. App. 565, 541 S.E.2d 53 (2000).

Punitive damages of $1 million not excessive. — After a truck driver punched the plaintiff in the face during a road rage incident and the employer, by defaulting, admitted acting recklessly in allowing the truck driver to drive, a punitive damages award of $1 million, or 1.3 times compensatory damages, was not so excessive as to deny the employer due process; therefore, the employer was not entitled to a new trial. Aldworth Co. v. England, 276 Ga. App. 31, 622 S.E.2d 367 (2005), aff'd in part and rev'd in part, 281 Ga. 197, 637 S.E.2d 198, 2006 Ga. LEXIS 883 (2006).

Drunk driving supporting punitive damages. — Evidence that the defendant had a high level of intoxication only a short time after the collision gave rise to the reasonable inference that the defendant was also intoxicated at the time of the collision and, coupled with a past history of drinking and D.U.I., gave rise to the reasonable inference that the defen-

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dant had been drinking and driving when the collision occurred and that the defendant sought to conceal such conduct by flight; thus, driving under the influence was an aggravated conduct supporting punitive damages. Langlois v. Wolford, 246 Ga. App. 209, 539 S.E.2d 565 (2000).

Driving without license alone did not support punitive damages. — Trial court properly granted summary judgment for a motorist on an injured person's claim for punitive damages sought on the sole ground that the motorist was knowingly driving without a valid driver's license at the time of the accident; driving without a license was not the proximate cause of the accident and there was no pattern or policy of dangerous driving. Doctoroff v. Perez, 273 Ga. App. 560, 615 S.E.2d 623 (2005).

Employer not vicariously liable for punitive damages when employee drunk. — In a negligence action, a truck driver's employer could not be vicariously liable for punitive damages under O.C.G.A. § 51-12-5.1(f) as the truck driver acted under the influence of alcohol when the truck driver was involved in a collision with an automobile driver. Am. Material Servs. v. Giddens, 296 Ga. App. 643, 675 S.E.2d 540 (2009).

No punitive damages against server of alcohol. — Punitive damages are not authorized against a server of alcohol under O.C.G.A. § 51-12-5.1(f). O.C.G.A. § 51-12-5.1(f) provides that if the defendant acted or failed to act while under the influence of alcohol, there shall be no limitation regarding the amount which may be awarded as punitive damages against such an active tortfeasor; however, such damages shall not be the liability of any defendant other than an active tortfeasor; that is the defendant acting under the influence of alcohol. Capp v. Carlito's Mexican Bar & Grill #1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007), cert. denied, 2008 Ga. LEXIS 317 (Ga. 2008).

Arbitrator did not exceed authority by awarding punitive damages based on findings that the defendants violated express terms of a security agreement expressly prohibiting the sale, transfer, or disposal of the collateral without the prior written consent of the plaintiff. Faiyaz v. Dicus, 245 Ga. App. 55, 537 S.E.2d 203 (2000).

Reduction of award to authorized maximum. — Trial court correctly reduced an award to the maximum authorized by O.C.G.A. § 51-12-5.1(g) after a party failed to fulfill the requirements of the bright line rule requiring both a charge on specific intent to cause harm and a separate finding of specific intent to cause harm by the trier of fact. Scott v. Battle, 249 Ga. App. 618, 548 S.E.2d 124 (2001).

Tortfeasor should not profit from wrongdoer. — Trial court did not abuse the court's discretion in refusing to overrule the jury's award of punitive damages in its entirety since the award achieved the legitimate goal of depriving the tortfeasor of the wrongdoer's profitability. Scott v. Battle, 249 Ga. App. 618, 548 S.E.2d 124 (2001).

Breach of fiduciary duty and conversion claims. — In a beneficiary's suit against a trust's attorneys and trustee, the trial court erred in finding that attorney's fees under O.C.G.A. § 13-6-11 and punitive damages under O.C.G.A. § 51-12-5.1(b) were not available because the beneficiary's claims for breach of fiduciary duty, conversion, and wrongful eviction should have remained in the case. Kahn v. Britt, 330 Ga. App. 377, 765 S.E.2d 446 (2014).

Trusts. — In a breach of trust action, the trial court erred in denying the defendant brothers' motion to reduce damages with respect to the punitive damage award because the jury specifically found that the brothers did not act with the specific intent to cause harm to the sister; the judgment could be affirmed only on the condition that the sister agreed to strike therefrom the award of punitive damages in excess of $250,000. Sims v. Heath, 258 Ga. App. 681, 577 S.E.2d 789 (2002) (Unpublished).

In a trust beneficiary's claim against a co-trustee and attorneys for the trust for breach of fiduciary duty, conversion, and wrongful eviction and trespass, because issues of fact remained as to those claims,

the beneficiary's claims for bad faith expenses of litigation and punitive damages were not subject to summary judgment. Kahn v. Britt, 330 Ga. App. 377, 765 S.E.2d 446 (2014).

Willful, wrongful conversion of property. — Award of $50,000 in punitive damages for a lessee's willful conversion of a leased trailer was not excessive since clear and convincing evidence showed the lessee's willful misconduct in refusing to return the trailer, concealing it, and misrepresenting its location to the lessor. Lawrence v. Direct Mortg. Lenders Corp., 254 Ga. App. 672, 563 S.E.2d 533 (2002).

Building in violation of ordinance resulting in nuisance. — When the evidence showed that a homebuilder, with willful misconduct and indifference to the consequences, built a house too close to a homeowner's home, in violation of zoning laws, the evidence supported the jury's finding of a nuisance and the award of punitive damages. Segars v. Cleland, 255 Ga. App. 293, 564 S.E.2d 874 (2002).

Apartment owners. — In a wrongful death action against an apartment complex based on the strangulation of a tenant by a maintenance worker, a directed verdict on the issue of punitive damages was properly denied because there was sufficient clear and convincing evidence to create a jury issue on whether the complex displayed a conscious indifference to the possibility that an under-investigated employee was involved in a series of crimes that could foreseeably lead to violent results for one of its tenants. TGM Ashley Lakes, Inc. v. Jennings, 264 Ga. App. 456, 590 S.E.2d 807 (2003).

Punitive damages awarded in trespass case. — Jury was entitled to award a property owner compensatory and punitive damages pursuant to O.C.G.A. §§ 51-9-3 and 51-12-5.1 because a willful trespass occurred when a neighbor directed the construction of a sewer lateral across the owner's property to tie into the owner's sewer line when the neighbor knew that the neighbor had neither a written easement nor permission from the owner to do so. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Punitive damages denied in trespass case. — LLC that declared Chapter 11 bankruptcy committed trespass in violation of O.C.G.A. § 51-9-10 when the LLC interfered with a pilot's right to use an airport the LLC owned after the LLC gave the pilot permission to do so, but the pilot's right was limited to use of the taxiways and runway and the pilot violated O.C.G.A. § 51-9-10 by entering the airport for other purposes after being told not to do so; although the court awarded the LLC $100 for the pilot's trespass and the pilot $600 for the LLC's trespass, neither party showed that the opposing party committed a private nuisance in violation of Georgia law, and the court refused to award punitive damages under O.C.G.A. § 51-12-5.1 or attorney's fees under O.C.G.A. § 13-6-11 to either party. Flyboy Aviation Props., LLC v. Franck (In re Flyboy Aviation Props., LLC), 525 B.R. 510 (Bankr. N.D. Ga. 2015).

Outdoor fireplace and resultant smoke raises issues of punitive damages. — Trial court erred by granting neighbors' motion for summary judgment in property owners' action to recover damages arising from smoke emanating from the neighbors' outdoor fireplace because there was some evidence of acts by the neighbors that could allow a jury to consider a claim for punitive damages; the neighbors continued to use the fireplace after the owners notified the neighbors that the fireplace caused smoke to enter the owners' home, resulting in physical discomfort to the owners and interfering with the owners' use and enjoyment of the owners' home. Weller v. Blake, 315 Ga. App. 214, 726 S.E.2d 698 (2012).

Legal malpractice. — Trial court properly awarded partial summary judgment to an attorney because the damages flowing from the client's separate claim that the attorney fraudulently misrepresented the attorney's expertise or experience to induce employment were no different from the damages flowing from the client's claim of alleged legal malpractice against the attorney. Therefore, even if there had been evidence to support the allegation of fraud, there would have been no separate cause of action for fraud apart from the malpractice claim, but simply a claim for the award of punitive damages based on fraud as an aggravating circum-

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stance in the malpractice claim. Griffin v. Fowler, 260 Ga. App. 443, 579 S.E.2d 848 (2003).

When the plaintiff patient sued the defendant manufacturer of a surgically implanted medical device alleging design defects, breach of warranty, failure to warn of risks, and breach of contracts to pay for surgeries, the manufacturer's motion for summary judgment on the issue of the patient's ability to recover punitive damages under O.C.G.A. § 51-12-5.1 was denied because the patient testified that the manufacturer's misrepresentations that it would pay for the third surgery induced the patient to undergo additional surgery, and relying on the representations, the patient incurred additional medical expenses that the manufacturer refused to pay, which exposed the patient to financial ruin. Trickett v. Advanced Neuromodulation Sys., 542 F. Supp. 2d 1338 (S.D. Ga. 2008).

Trial court did not err in awarding summary judgment to an attorney and a law firm in a former client's legal malpractice action seeking punitive damages because there was no evidence from which a jury could properly conclude that an award of punitive damages was warranted; although the client pointed to evidence that the attorney could have breached the standard of care, that evidence did not show anything more than, at worst, gross negligence. Duncan v. Klein, 313 Ga. App. 15, 720 S.E.2d 341 (2011).

Financial records of law firm against which punitive damages sought. — When the trial court determined that jury issues remained as to a claim for punitive damages against a law firm, the trial court abused the court's discretion in denying production of any of the law firm's financial records until after the jury rendered the jury's verdict. Smith v. Morris, Manning & Martin, LLP, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

Insurer not obligated to defend its insured in action requesting punitive damages. — When an amended complaint sought punitive damages, describing acts and omissions as willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences and their effects, an insurer was not obligated to defend its insured in such action. Ga. Farm Bureau Mut. Ins. Co. v. Hall County, 262 Ga. App. 810, 586 S.E.2d 715 (2003).

Punitive damages proper against real estate broker. — When a business broker's client sought punitive damages against the broker for filing a lien against the client's business, which was based on a false document, sufficient evidence supported the jury's award of such damages, under O.C.G.A. § 51-12-5.1(b), as undisputed evidence showed the broker intentionally altered and then filed a sales agreement with a financing statement to falsely reflect that the broker was a party to the sales agreement. Bienert v. Dickerson, 276 Ga. App. 621, 624 S.E.2d 245 (2005).

Breach of fiduciary duty as executor of estate. — Beneficiaries of a will sued the decedent's grandchild for conversion of stock the beneficiaries alleged was intended to be part of the decedent's estate; as the jury found the stock was not a gift, the jury necessarily found that the stock was entrusted to the grandchild as a purported co-executor. The grandchild's breach of fiduciary duty supported an award of punitive damages to the beneficiaries under O.C.G.A. § 51-12-5.1(b). Bunch v. Byington, 292 Ga. App. 497, 664 S.E.2d 842 (2008).

Punitive damages to make plaintiff whole improper. — A customer sued a company for falsely reporting that the customer did not pay a bill, which damaged the customer's credit rating. As the trial court's written judgment contained no explicit findings that the company acted willfully, maliciously, or with conscious indifference — requirements for a punitive damage award under O.C.G.A. § 51-12-5.1(b) — and the trial court orally stated the court awarded punitive damages to make the customer whole, which was improper under § 51-12-5.1(c), that award could not stand. Infinite Energy, Inc. v. Cottrell, 295 Ga. App. 306, 671 S.E.2d 294 (2008).

Defamation and breach of fiduciary claims supported punitive damages. — In a suit brought by a golf course development company against two other members of a limited liability company and a housing authority, the trial court erred by dismissing the golf course development company's claim for punitive damages since the company's additional claims of breach of fiduciary duty and defamation supported such damages, and the company alleged that the other two members of the limited liability company behaved maliciously, in bad faith, and with reckless disregard for the legality of their actions when those entities negotiated the golf course development out of the project. Perry Golf Course Dev., LLC v. Hous. Auth., 294 Ga. App. 387, 670 S.E.2d 171 (2008).

Malicious prosecution. — A contractor using the threat of criminal prosecution in an attempt to pressure a property owner into paying a disputed bill, which resulted in the owner being arrested and jailed, supported an award of punitive damages under O.C.G.A. § 51-12-5.1(b). Gooch v. Tudor, 296 Ga. App. 414, 674 S.E.2d 331 (2009).

Punitive damages improper in investor's summary judgment against corporation. — Because a corporation, the corporation's chief executive officer, and the corporation's chief financial officer did not demonstrate that they were entitled to judgment as a matter of law on an inventor's claims for money had and received and for conversion, summary judgment dismissing the inventor's claims for punitive damages and litigation expenses based on those causes of action was improper. Fernandez v. WebSingularity, Inc., 299 Ga. App. 11, 681 S.E.2d 717 (2009).

Fact that a creditor won an award of punitive damages under O.C.G.A. § 51-12-5.1(f) afforded an insufficient basis for summary judgment on the creditor's claim that the obligation was nondischargeable in a Chapter 7 case because an "entire want of care," which was one possible basis for the judgment, was distinguishable from the "intent" or "willfulness" required to establish a right to nondischargeability under 11 U.S.C. § 523(a)(6). Terhune v. Houser (In re Houser), 458 B.R. 771 (Bankr. N.D. Ga. 2011).

Punitive damages for tortuous interference with resale of equipment. — Debtor established the debtor was entitled to damages for tortious interference with the debtor's resale of medical equipment from defendant manufacturers. Bad faith under O.C.G.A. § 13-6-11 required more than bad judgment or negligence, but the debtor established a dishonest purpose and a breach of a known duty under O.C.G.A. § 51-12-5.1(b). Bailey v. Hako-Med USA, Inc. (In re Bailey), No. 09-4002, 2010 Bankr. LEXIS 6300 (Bankr. S.D. Ga. Nov. 16, 2010).

Medical clinic with pattern of unsanitary conditions. — In a medical malpractice suit, the award of punitive damages to the plaintiffs was supported based on the evidence demonstrating that the clinic had a pattern of maintaining poor sanitary conditions and that the clinic failed to improve such conditions when presented with suggestions on how to do so, which was sufficient for the jury to have found, under the clear and convincing standard, that the defendants' negligence exhibited an entire want of care and a conscious indifference to consequences. Ga. Clinic, P.C. v. Stout, 323 Ga. App. 487, 747 S.E.2d 83 (2013).

Cell phone use. — After an employee collided with a vehicle while driving a tractor-trailer, the employee was not entitled to summary judgment on the punitive damages claim because, although the proper use of a cell phone while driving was permissible in Georgia, the court could not find as a matter of law that the plaintiffs could not prove aggravating circumstances that would warrant an award of punitive damages; whereas, the punitive damages claims against other defendants failed because the plaintiffs presented no evidence that these defendants actually knew about the nature of the employee's cell phone use. Little v. McClure, No. (MTT), 2014 U.S. Dist. LEXIS 120681 (M.D. Ga. Aug. 29, 2014).

Procedure

Multiple causes of action. — The trial court did not err in allowing a verdict for punitive damages under O.C.G.A.

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§ 51-12-5.1 to be considered by the jury when an award was made under O.C.G.A. § 51-12-6 for a claim in which the entire injury was to the peace, happiness, or feelings of the plaintiff since a number of distinct tortious acts and causes of action were pled separately, and while the award theoretically could have been based entirely on a claim of injury to the peace and feelings of the plaintiff, it was equally possible that the jury awarded compensatory damages and punitive damages on one of the plaintiff's other claims or on a combination of claims. Alternative Health Care Sys. v. McCown, 237 Ga. App. 355, 514 S.E.2d 691 (1999).

Because the appeals court found that other intentional tort claims survived summary judgment which would authorize the imposition of punitive damages if the jury were to find that a retailer and its employees acted with a wanton disregard of a nine-year-old child's rights, the trial court did not err by denying summary judgment on these grounds. Todd v. Byrd, 283 Ga. App. 37, 640 S.E.2d 652 (2006), overruled on other grounds, Ferrell v. Mikula, 295 Ga. App. 326, 672 S.E.2d. 7 (2008).

Conflict with federal rule for pleading. — Because O.C.G.A. § 51-12-5.1(d)(1) unavoidably conflicted with Fed. R. Civ. P. 54(c) on the procedural matter of whether the plaintiffs in a breach of contract suit that also alleged an independent tort, the unauthorized excavation and removal of dirt from another person's land, were required to plead punitive damages in the complaint, a federal district court sitting in diversity applied Rule 54(c) and held that punitive damages need not be specifically pled; therefore, the court denied the plaintiffs' motion to amend their complaint. Toler v. Engelhard Corp., No. 5:04-CV-45 (DF), 2006 U.S. Dist. LEXIS 65526 (M.D. Ga. Sept. 14, 2006).

Failure to object to absence of special interrogatory. — The defendant's failure to object after the entry of judgment amounted to a waiver of the special interrogatory to the jury mandated by paragraph (d)(1) of O.C.G.A. § 51-12-5.1. Kopp v. First Bank, 235 Ga. App. 520, 509 S.E.2d 384 (1998).

Bifurcated trial. — In an invasion of privacy case, even though the evidence was insufficient to support an award of punitive damages, the entire award (including general damages of $500,000) would not be vacated if the trial court held a bifurcated trial and the general damage award was identifiable and separable. Multimedia WMAZ, Inc. v. Kubach, 212 Ga. App. 707, 443 S.E.2d 491 (1994).

Trial court did not err in failing to bifurcate the proceeding as required by subsection (d) of O.C.G.A. § 51-12-5.1 after the defendant waived such an objection by acquiescing in the form of the verdict and failed to raise the issue at trial. Martin v. Williams, 215 Ga. App. 649, 451 S.E.2d 822 (1994).

In a suit brought by a biological father to recover one-half of the proceeds of a settlement of a wrongful death action arising out of the death of a son, which the father brought against that child's mother and others, the trial court abused the court's discretion in bifurcating the trial in the manner chosen since the trial court did not follow any of the procedures set forth in O.C.G.A. § 51-12-5.1, regarding punitive damages; secondly, the manner of bifurcation unfairly limited the father's right of cross-examination regarding post-death facts involving allegations by the father that the child's mother and the others took steps to conceal the recovery and to otherwise defraud the father. Bolden v. Ruppenthal, 286 Ga. App. 800, 650 S.E.2d 331 (2007), cert. denied, 2007 Ga. LEXIS 756 (Ga. 2007).

Severance required. — Statute required that issues of the liability for punitive damages and the amount of punitive damages be severed; thus, the trial court did not abuse the court's discretion in severing those issues in the customer and spouse's case against the pharmacist and pharmacy for dispensing the wrong drug to the customer. Moresi v. Evans, 257 Ga. App. 670, 572 S.E.2d 327 (2002).

Error to not allow closing argument in punitive damage phase. — Trial court committed reversible error in refusing to allow counsel to present closing argument to the jury at the phase of the trial in which the amount of the punitive-damage award was adjudicated,

since the right of the parties to be represented by counsel at all stages of a trial is a fundamental component of American jurisprudence. McClure v. Gower, 259 Ga. 678, 385 S.E.2d 271 (1989).

Error to allow defendant to make opening, closing arguments. — After evidence was introduced during the initial phase of the trial in defense of the plaintiff's claim for punitive damages, the trial court erred in permitting the defendant to make the opening and concluding argument in the punitive damages phase of the trial. Combustion Chems., Inc. v. Spires, 209 Ga. App. 240, 433 S.E.2d 60 (1993).

Instruction that 75 percent of award paid to state was harmful error. — Instructing the jury that the state would receive 75 percent of any punitive damages awarded created a substantial risk that the jury was improperly influenced by this consideration to adjust the jury's award of punitive damages in a manner which prejudiced the defendants; accordingly, the instruction was harmful error requiring reversal of the award of punitive damages. Uniroyal Goodrich Tire Co. v. Ford, 218 Ga. App. 248, 461 S.E.2d 877 (1995), aff'd, 276 Ga. 226, 476 S.E.2d 565 (1996).

Standard of proof of specific intent to harm. — Trial court did not err in instructing the jury that the jury was permitted to award unlimited damages if the jury found by a preponderance of the evidence that there was a specific intent to harm as the applicable statute did not mention a specific standard of proof and, thus, the common law burden of proof in cases involving punitive damages applied. Kothari v. Patel, 262 Ga. App. 168, 585 S.E.2d 97 (2003).

Trial court erred in awarding punitive damages in excess of $250,000 because the court's finding that the defendant intended to specifically harm the plaintiff was not supported by the record since the plaintiff did not exist at the time of the tortious actions and was created for the sole purpose of suing the defendants on the investors' behalf; thus, the defendants could not have specifically intended to harm the plaintiff. Ballistics Research, Inc. v. BRI Funding, LLC, 336 Ga. App. 77, 783 S.E.2d 678 (2016).

Instruction as to "clear and convincing evidence." — It was not error for the trial court to refuse a requested instruction which would inform the jury only that "clear and convincing evidence" is a greater standard of proof than the preponderance of the evidence standard. Such an instruction would not properly characterize "clear and convincing evidence" as being an intermediate standard of proof and would leave the jury without any guidance as to the extent to which the "clear and convincing evidence" standard was greater than the preponderance of the evidence standard. Clarke v. Cotton Clarke Communications, Inc., 207 Ga. App. 883, 429 S.E.2d 291 (1993), aff'd, 263 Ga. 861, 440 S.E.2d 165 (1994).

The trial court erred in failing to define the clear and convincing evidence standard required for punitive damages in the court's charge to the jury. Clarke v. Cotton, 263 Ga. 861, 440 S.E.2d 165 (1994).

Because an owner and the owner's agent did not object to the trial court's failure to give a certain jury instruction, because their liability had already been established as a matter of law by way of their default, and because they failed to show harm resulting from the trial court's failure to define the clear and convincing evidence standard in O.C.G.A. § 51-12-5.1(b), they failed to preserved their claims on appeal in accordance with O.C.G.A. § 5-5-24(a). Waller v. Rymer, 293 Ga. App. 833, 668 S.E.2d 470 (2008).

"Clear and convincing" evidence instruction required. — Even though sufficient evidence was presented to submit the question of punitive damages to the jury, the evidence was not overwhelming and the trial court erred in not providing the jury any guidance on the meaning of "clear and convincing" evidence. H & H Subs, Inc. v. Lim, 223 Ga. App. 656, 478 S.E.2d 632 (1996).

Instruction and finding on specific intent on conspiracy count. — The trial court did not err in failing to limit the amount of the punitive damages award to $250,000 because the jury was specifically instructed that for the plaintiff to recover damages on a conspiracy count the plaintiff must demonstrate that the defendant acted with the specific intent to drive the

Procedure (Cont'd)

plaintiff out of business and the jury's response on a special verdict form was tantamount to a finding that the defendant had acted with specific intent to cause harm to the plaintiff. Alta Anesthesia Assocs. of Ga., P.C. v. Gibbons, 245 Ga. App. 79, 537 S.E.2d 388 (2000).

Jury instructions on battery claim in error resulting in no punitive damages. — District court properly set aside a punitive damages award for an employee under a Georgia state law battery claim because, inter alia, compensatory or nominal damages had to be awarded before punitive damages could be awarded, and the employee invited error in the jury instructions since the employee did not object to the instructions as given with regard to damages for battery. Smith v. Metro. Sec. Servs., No. 12-12711, 2013 U.S. App. LEXIS 19240 (11th Cir. Sept. 18, 2013) (Unpublished).

An award of punitive damages could not be affirmed after the trial court declined to follow the procedures and standards required by O.C.G.A. § 51-12-5.1, awarded punitive damages to a party who did not pray for them, and gave an outdated charge on punitive damages. Drug Emporium, Inc. v. Peaks, 227 Ga. App. 121, 488 S.E.2d 500 (1997).

In an employer's suit against a former employee for breach of fiduciary duty, and other claims, the jury's award of $650,000 in punitive damages could not be affirmed because there was no evidence in the record that the employer sought a charge on specific intent to cause harm or that the jury made a separate finding of specific intent to cause harm, and, as a result, the statutory cap of such an award to $250,000 could not be exceeded. Quay v. Heritage Fin., Inc., 274 Ga. App. 358, 617 S.E.2d 618 (2005).

Denial of punitive damages award erroneous. — The trial court erred in concluding record did not warrant an award of punitive damages after the driver struck the defendant's vehicle twice and kept pushing the defendant down the road, causing the defendant's injury. Smith v. Tommy Roberts Trucking Co., 209 Ga. App. 826, 435 S.E.2d 54 (1993).

After the defendants constructed a drainage system, through a dry stream bed, which concentrated and directed water onto the plaintiff's property and they were on notice of a water discharge problem even before the stream bed was constructed, but never acted to abate it, this was sufficient evidence of "conscious indifference" to authorize a jury to award punitive damages and the trial court's grant of a motion for directed verdict on the issue of punitive damages was erroneous. Baumann v. Snider, 243 Ga. App. 526, 532 S.E.2d 468 (2000).

Nolo contendere plea as evidence. — O.C.G.A. § 17-7-95 prohibits use of a prior plea of nolo contendere as evidence relevant to the issue of punitive damages. Holt v. Grinnell, 212 Ga. App. 520, 441 S.E.2d 874 (1994).

In an action for injuries arising from an automobile accident, after the defendant pled guilty to driving under the influence of alcohol, evidence that the defendant had twice previously committed the offense of DUI was admissible for the purpose of determining punitive damages as long as there was no reference to prior pleas of nolo contendere, or to the disposition of DUI charges resulting from such pleas. Holt v. Grinnell, 212 Ga. App. 520, 441 S.E.2d 874 (1994).

Prejudicial evidence not admissible. — Even though evidence may have been relevant to the issue of punitive damages, the trial court did not abuse the court's discretion in excluding the evidence when its admission was potentially prejudicial. Goss v. Total Chipping, Inc., 220 Ga. App. 643, 469 S.E.2d 855 (1996).

Default judgment did not authorize punitive damages. — A default judgment on the issue of liability was not sufficient to authorize an award of punitive damages because no evidence on liability for punitive damages was presented at the hearing on damages. Drug Emporium, Inc. v. Peaks, 227 Ga. App. 121, 488 S.E.2d 500 (1997).

Trial court erred in various ways. — Trial court erred when the court denied a bank's motion for a new trial in a fraud case because the amount of damages awarded was excessive in that the evidence adduced at trial did not authorize

the jury's award of $100,000 against the bank because the suing construction company alleged and proved only economic harm in an amount substantially less than that award, namely $9,400 via a materialman's lien, and renovation expenses in the amount of $23,000. Further, the jury's award of an additional $55,000 against the bank as punitive damages was erroneous since there was no charge on punitive damages, let alone proper guidance on the clear and convincing evidence required; the verdict form did not pose the question of punitive damages except by quotation of O.C.G.A. § 51-12-5.1(f), which required the jury to find specific intent to cause harm before the jury could award punitive damages in excess of $250,000; and the proceedings were not properly bifurcated. First Southern Bank v. C & F Servs., 290 Ga. App. 304, 659 S.E.2d 707 (2008).

Summary judgment. — Plaintiff failed to raise a material issue of fact as to the availability of punitive damages after the vehicle manufacturer complied with applicable federal regulations and the defendant believed it was complying with regulatory agencies' requirements. Welch v. GMC, 949 F. Supp. 843 (N.D. Ga. 1996).

In an action for contamination of property, insofar as the plaintiffs could prove that contamination laid down continued to migrate and was not abated by the defendant after notice, it was error to grant summary judgment on the issue of punitive damages. Smith v. Branch, 226 Ga. App. 626, 487 S.E.2d 35 (1997).

Since there was evidence of an intentional and complete absence of security measures taken to protect customers in a grocery store parking lot, the trial court erred in granting the store summary judgment on the plaintiff's claim for punitive damages. Carlock v. Kmart Corp., 227 Ga. App. 356, 489 S.E.2d 99 (1997).

After the plaintiff tenant was beaten, robbed, and raped in her apartment by an intruder, fact issues precluded summary judgment on her claim for punitive damages because a jury could conclude that the defendant apartment owner was not providing any security for its residents, even though it had knowledge of a prior attack on the plaintiff. Doe v. Briargate Apts., Inc., 227 Ga. App. 408, 489 S.E.2d 170 (1997).

Summary judgment was precluded on the issue of punitive damages in a consumer's action against the manufacturer of lemon-scented bleach when the manufacturer added the lemon scent to mask the noxious odor of the bleach, although it was aware of the dangers of adding the scent, which enhanced the danger of the product to consumers, from which a jury could infer a conscious disregard for the safety of others. Zeigler v. Clowhite Co., 234 Ga. App. 627, 507 S.E.2d 182 (1998).

Summary judgment was precluded because the failure to provide a real security patrol for an apartment complex and to have a fenced and gated access gave rise to a jury issue as to an entire want of care, which gave rise to a presumption of a conscious indifference to the consequences for tenants. FPI Atlanta, L.P. v. Seaton, 240 Ga. App. 880, 524 S.E.2d 524 (1999).

Summary judgment in favor of the defendants was erroneous after the plaintiffs presented evidence of excessive stormwater runoff and sediment deposit, flooding of their property, and pollution of their ponds directly from defendant developer's subdivision and that they repeatedly asked the developers to correct the problems. Tyler v. Lincoln, 272 Ga. 118, 527 S.E.2d 180 (2000).

Because there was no error in the trial court's grant of summary judgment on the plaintiff's breach of fiduciary duty claim, likewise, summary judgment on the plaintiff's punitive damages claim was appropriate because that claim was dependent upon the merits of the breach of fiduciary duty claim. Nelson & Hill, P.A. v. Wood, 245 Ga. App. 60, 537 S.E.2d 670 (2000).

Evidence of circumstances of aggravation or outrage was sufficient to defeat a motion for summary judgment on punitive damages. Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC, 262 Ga. App. 457, 585 S.E.2d 643 (2003).

Absent a confidential relationship between a lienholder and a prospective buyer of a vehicle subject to a lien, and absent any duty on the lienholder to disclose any problems with the vehicle's title to the buyer, the lienholder was properly granted summary judgment on the buy-

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er's negligence, fraudulent concealment, and derivative claim for punitive damages. Lilliston v. Regions Bank, 288 Ga. App. 241, 653 S.E.2d 306 (2007), cert. denied, 2008 Ga. LEXIS 275 (Ga. 2008).

Copyright owner's claim for punitive damages for an unfair competition claim was not appropriate under O.C.G.A. § 51-12-5.1 because the record contained very little evidence of willful misconduct, malice, fraud, wantonness, oppression, or conscious indifference and further whether the customer's actions were willful, wanton, or malicious to sustain a claim for punitive damages was an issue for a jury and not for summary judgment. SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc., 455 F. Supp. 2d 1347 (N.D. Ga. 2006).

Wrongful foreclosure. — Fact questions regarding whether a mortgagee intended to cause harm when it initiated a foreclosure proceeding against mortgagors precluded summary judgment regarding whether any punitive damages that might be awarded to the mortgagors on their attempted wrongful foreclosure claim would be capped at $250,000 pursuant to O.C.G.A. § 51-12-5.1(g); the mortgagors alleged that the mortgagee acted with a conscious disregard of the consequences by initiating a foreclosure action even though the mortgagors' loan was not in default. Hauf v. HomEq Servicing Corp., No. 4:05-CV-109 (CDL), 2007 U.S. Dist. LEXIS 9439 (M.D. Ga. Feb. 9, 2007).

Issue was one for jury to resolve. — As claims survived upon reversal of a trial court's summary judgment rulings which authorized punitive damages in an unarmed visitor's multi-tort action, arising from having been shot by an off-duty police officer who was providing security services to the complex, the issue was properly one for the jury to resolve. Miller v. City Views at Rosa Burney Park GP, LLC, 323 Ga. App. 590, 746 S.E.2d 710 (2013).

Default judgment case. — Even if the trial court erred in awarding punitive damages in a default judgment case by not making a specific finding on a verdict form that punitive damages were authorized, the error was harmless; prior to awarding the punitive damages, the trial court conducted a separate hearing and received evidence on damages thereby satisfying statutory requirements. Hill v. Johnson, 210 Ga. App. 824, 437 S.E.2d 801 (1993).

In a medical malpractice case, when, because of default, a jury trial was held on the issue of damages only, including the issue of punitive damages, evidence of the doctor's conduct was both relevant and necessary to deter or punish that conduct. Daniel v. Causey, 220 Ga. App. 589, 469 S.E.2d 839 (1996).

Facts not warranting punitive damages. — In action against seller in connection with repossession of a vehicle which was the subject of an installment contract, the buyer was not entitled to punitive damages when the buyer's account was past due for three months, no claim for outstanding payments had been made against the buyer's disability insurer, and there was no evidence that the seller behaved maliciously or with conscious indifference to the consequences of the repossession. Hillman v. GMAC, 210 Ga. App. 837, 437 S.E.2d 803 (1993).

In an action by an automobile dealership franchisee against the franchisor for wrongful termination of the franchise agreement, the issue of punitive damages should not have been submitted to the jury under O.C.G.A. § 51-12-5.1 inasmuch as the franchisor had not been charged with a tort. Moore v. American Suzuki Motor Corp., 211 Ga. App. 337, 439 S.E.2d 43 (1993).

In a product liability action against a tire manufacturer, even though evidence showed continuing manufacturing and quality control problems which were known to the manufacturer and which resulted in higher than normal belt/tread separation problems, there was no clear and convincing evidence that the manufacturer engaged in wilful conduct by which the manufacturer knowingly placed the plaintiffs or others in danger. Uniroyal Goodrich Tire Co. v. Ford, 218 Ga. App. 248, 461 S.E.2d 877 (1995), aff'd, 276 Ga. 226, 476 S.E.2d 565 (1996).

When an auto insurer failed to notify the Division of Motor Vehicles that a stolen vehicle had been recovered prior to its

sale to a salvage company and a purchaser of the vehicle was later arrested while operating the vehicle and spent approximately eight hours in jail, the facts did not justify an award of punitive damages. Georgia Farm Bureau Mut. Ins. Co. v. Miller, 222 Ga. App. 95, 473 S.E.2d 189 (1996).

Punitive damages were not recoverable in the absence of evidence that a motor vehicle collision resulted from a pattern or policy of dangerous driving on the part of the defendant. Carter v. Spells, 229 Ga. App. 441, 494 S.E.2d 279 (1997).

In an action for negligence resulting in an automobile collision causing injuries, the trial court did not err in granting the defendant's motion for partial summary judgment on the issue of punitive damages since there was no evidence that the defendant caused the collision through a "pattern or policy of dangerous driving." Miller v. Crumbley, 249 Ga. App. 403, 548 S.E.2d 657 (2001).

Evidence of failure to comply with fire safety standards. — The rules and regulations of the Fire Safety Commissioner, having the force and effect of law, were applicable to the landlord of an apartment building, and the landlord's failure to comply with mandatory safety provisions of a fire or building exit code provided a clear and convincing evidentiary basis for an award of punitive damages. Windermere v. Bettes, 211 Ga. App. 177, 438 S.E.2d 406 (1993).

Review of evidence presented during punitive damages phase. — O.C.G.A. § 51-12-5.1 vests trial courts with discretion to control the litigants' presentation of evidence during the punitive damages phase of a trial in the same manner that evidentiary matters are regulated generally; thus, the decisions regarding such evidence would be reviewed only for an abuse of discretion. Softball Country Club - Atlanta v. Decatur Fed. Sav. & Loan Ass'n, 121 F.3d 649 (11th Cir. 1997).

Punitive damages claim required to be submitted to the jury. — Trial court erred in ruling that a camp's punitive damages issue could not be presented to the jury because the evidence presented a material question as to whether a marina's trespass and nuisance onto the camp's property was knowing, willful, and a conscious indifference to the property rights of the camp; thus, the issue regarding the camp's claim for punitive damages was required to be submitted to the jury. Camp Cherokee, Inc. v. Marina Lane, LLC, 316 Ga. App. 366, 729 S.E.2d 510 (2012).

Failure of court to make specific findings not reversible error. — Trial court's failure to make a specific finding through a special verdict form that punitive damages were awardable was not reversible error since the court set forth findings of fact and conclusions of law making it clear that the court deemed the defendant's actions constituted willful and malicious misconduct and the defendant failed to show any harm due to the deviation from the special verdict form. Wal-Mart Stores, Inc. v. Forkner, 221 Ga. App. 209, 471 S.E.2d 30 (1996).

Evidence relating to attorneys' fees and litigation expenses should have been excluded during the punitive damages phase of the trial. H & H Subs, Inc. v. Lim, 223 Ga. App. 656, 478 S.E.2d 632 (1996).

Injured party failed to show that the injured party was justified in seeking punitive damages or attorney fees from a welder based on a difficult welding job because the case did not involve special circumstances of aggravation or outrage; further, the injured party failed to show that there was information that led the injured party to believe that the injured party was entitled to punitive damages or attorney fees. Trotter v. Summerour, 273 Ga. App. 263, 614 S.E.2d 887 (2005).

Res judicata. — Punitive damages served a public interest and were intended to protect the general public, and when the state sought punitive damages in a prior suit it did so as parens patriae, representing the interests of all Georgia citizens, including an administrator of a decedent's estate; the state and the administrator were privies in that prior case, and, pursuant to res judicata, a release executed as part of a settlement of that prior case barred punitive damages in a later case brought by the administrator alleging the same products liability

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theory. Brown & Williamson Tobacco Corp. v. Gault, 280 Ga. 420, 627 S.E.2d 549 (2006).

Punitive damages even if breach of contract also present. — Whether the conversion was deemed to have occurred in Georgia (where the engines were built down) or, more plausibly, in Minnesota (where they were attached to the airframes), the jury, if the jury found the defendant's actions sufficiently willful and malicious, may award punitive damages; punitive damages were awarded because of tortious conduct, not because a plaintiff sustained a particular injury, and such an award was not precluded merely because a breach of contract was present. First Sec. Bank, N.A. v. Northwest Airlines, Inc., No. 95-12103-RGS, 2001 U.S. Dist. LEXIS 26601 (D. Mass. Jan. 3, 2001).

Jury, not judge, must determine both whether and in what amount to award punitive damages. — Tenant whose former landlord cashed a check for property taxes that the tenant mailed to the landlord by mistake was entitled to summary judgment on a claim for conversion and bad faith attorney's fees under O.C.G.A. § 13-6-11; however, under O.C.G.A. § 51-12-5.1(d), the question of whether punitive damages should be awarded and the amount thereof was for a jury. Covington Square Assocs., LLC v. Ingles Mkts., Inc., 300 Ga. App. 740, 686 S.E.2d 359 (2009), aff'd in part and rev'd in part, 287 Ga. 445, 696 S.E.2d 649 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, §§ 556 et seq, 747 et seq.

C.J.S. — 25A C.J.S., Damages, § 221 et seq.

ALR. — Liability of successor corporation for punitive damages for injury caused by predecessor's product, 55 ALR4th 166.

Credit life insurer's punitive damage liability for refusing payment, 55 ALR4th 246.

Punitive damages: power of equity court to award, 58 ALR4th 844.

Standard of proof as to conduct underlying punitive damage awards — modern status, 58 ALR4th 878.

Measure and elements of damages for pollution of well or spring, 76 ALR4th 629.

Punitive damages: relationship to defendant's wealth as factor in determining propriety of award, 87 ALR4th 141.

Plaintiff's rights to punitive or multiple damages when cause of action renders both available, 2 ALR5th 449.

Right to prejudgment interest on punitive or multiple damages awards, 9 ALR5th 63.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 ALR5th 195.

Validity, construction, and application of statutes requiring that percentage of punitive damages awards be paid directly to state or court-administered fund, 16 ALR5th 129.

Intoxication of automobile driver as basis for awarding punitive damages, 33 ALR5th 303.

Allowance of punitive damages in medical malpractice action, 35 ALR5th 145.

Availability and scope of punitive damages under state employment discrimination law, 81 ALR5th 367.

Validity of state statutory cap on punitive damages, 103 ALR5th 379.

Exemplary or punitive damages for pharmacist's wrongful conduct in preparing or dispensing medical prescription — Cases not under Consumer Product Safety Act (15 U.S.C.A. § 2072), 109 ALR5th 397.

Monetary remedies under § 23 of Consumer Product Safety Act (15 USCS § 2072), 87 ALR Fed. 587.

51-12-6. Damages for injury to peace, happiness, or feelings.

In a tort action in which the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed

except the enlightened consciences of impartial jurors. In such an action, punitive damages under Code Section 51-12-5 or Code Section 51-12-5.1 shall not be awarded. (Orig. Code 1863, § 2999; Code 1868, § 3012; Code 1873, § 3067; Code 1882, § 3067; Civil Code 1895, § 3907; Civil Code 1910, § 4504; Code 1933, § 105-2003; Ga. L. 1987, p. 915, § 6.)

Law reviews. — For article, "Pre-Impact Pain and Suffering," see 26 Ga. St. B. J. 60 (1989). For annual survey article discussing tort law, see 51 Mercer L. Rev. 461 (1999). For article, "Sexual Harassment Claims Under Georgia Law," see 6 Ga. St. B. J. 16 (2000).

JUDICIAL DECISIONS

Analysis

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General Consideration

Section does not violate equal protection clause. — This section, authorizing the jury to consider the "worldly circumstances of the parties" in tort actions where "the entire injury is to the peace, happiness, or feelings of the plaintiff," does not violate the equal protection clause of the United States Constitution. Wilson v. McLendon, 225 Ga. 119, 166 S.E.2d 345 (1969).

This section makes no visible and arbitrary classification of rich people on the one hand, and poor people on the other. It applies the same rule to rich and poor by permitting, as to each defendant, the defendant's worldly circumstances to be shown. This is a fair and equitable rule, as to damages assessed for the purpose of deterring gross misconduct, since the assessment of even a small amount of damages would be adequate punishment for a very poor man, whereas, it would require the assessment of a much larger sum to be any punishment for a very wealthy man. Wilson v. McLendon, 225 Ga. 119, 166 S.E.2d 345 (1969).

O.C.G.A. §§ 51-12-5, 51-12-5.1, and 51-12-6 must be construed together. Mallard v. Jenkins, 186 Ga. App. 167, 366 S.E.2d 775, cert. denied, 186 Ga. App. 918, 366 S.E.2d 775 (1988).

Former Code 1933, §§ 105-2001, 105-2002, and 105-2003 (see now O.C.G.A. §§ 51-12-4, 51-12-5, and 51-12-6) must be construed in pari materia. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135, modified, 234 Ga. 540, 216 S.E.2d 776 (1974); Mallard v. Jenkins, 186 Ga. App. 167, 366 S.E.2d 775, cert. denied, 186 Ga. App. 918, 366 S.E.2d 775 (1988).

In determining the damages allowable when a plaintiff's whole injury was to "peace, happiness, or feelings," former Code 1933, §§ 105-2001, 105-2002, and 105-2003 (see now O.C.G.A. §§ 51-12-4, 51-12-5, and 51-12-6) must be construed together. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

1987 amendment not applied retroactively. — O.C.G.A. § 51-12-6, as amended by the 1987 Tort Reform Act, applies only to causes of action arising on or after July 1, 1987. Mallard v. Jenkins, 186 Ga. App. 167, 366 S.E.2d 775, cert. denied, 186 Ga. App. 918, 366 S.E.2d 775 (1988).

Multiple causes of action. — The trial court did not err in allowing a verdict for punitive damages under O.C.G.A. § 51-12-5.1 to be considered by the jury when an award was made under O.C.G.A. § 51-12-6, since a number of distinct tortious acts and causes of action were

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pled separately, and while the award theoretically could have been based entirely on a claim of injury to the peace and feelings of the plaintiff, it was equally possible that the jury awarded compensatory damages and punitive damages on one of the plaintiff's other claims or on a combination of claims. Alternative Health Care Sys. v. McCown, 237 Ga. App. 355, 514 S.E.2d 691 (1999).

Award against governmental entity not against public policy. — An award of damages against a governmental entity under O.C.G.A. § 51-12-6, which is in part punitive and in part compensatory, does not violate public policy. Ralston v. City of Dahlonega, 236 Ga. App. 386, 512 S.E.2d 300 (1999).

This section prescribes special measure of recovery for cause of action which was disfavored at common law. That measure permits the jury to consider both circumstances relevant to compensation for the extent of the injury and circumstances relevant to deterrence of the wrongdoer. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

Impact rule. — Georgia follows the so-called "impact rule, " which requires that there must have been actual bodily contact with the plaintiff as a result of the defendant's conduct for a claim for emotional distress to lie. The impact which will support a claim for damages for emotional distress must result in a physical injury. Ford v. Whipple, 225 Ga. App. 276, 483 S.E.2d 591 (1997).

Georgia's current impact rule has three elements: (1) a physical impact to the plaintiff; (2) the physical impact causes physical injury to the plaintiff; and (3) the physical injury to the plaintiff causes the plaintiff 's mental suffering or emotional distress and the failure to satisfy all three elements has proven fatal to recovery; while the plaintiff did allege a physical impact from a bruised hand and a damaged fingernail as a result of the impact, the plaintiff did not claim that these physical injuries caused the plaintiff mental suffering or emotional distress; accordingly, the trial court erred in denying summary judgment to the defendants as to the plaintiff's mental distress claim. Wilson v. Allen, 272 Ga. App. 172, 612 S.E.2d 39 (2005).

This section may be invoked only when "the entire injury is to the peace, happiness, or feelings of the plaintiff." Hodges v. Youmans, 129 Ga. App. 481, 200 S.E.2d 157 (1973); Mallard v. Jenkins, 186 Ga. App. 167, 366 S.E.2d 775, cert. denied, 186 Ga. App. 918, 366 S.E.2d 775 (1988).

"Entire injury" means there is no injury to the "person or purse" in cases contemplated by this section, the tort being of such a nature as to give rise to mental pain and suffering only. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135, modified, 234 Ga. 540, 216 S.E.2d 776 (1974); Pilkenton v. Eubanks, 139 Ga. App. 673, 229 S.E.2d 146 (1976).

Legal wrongs impute damage. — Damages for mental pain and anguish are awardable for a violation of a legal right or duty which is an actionable wrong, for a legal wrong imputes damage. Waldrip v. Voyles, 201 Ga. App. 592, 411 S.E.2d 765 (1991).

Recovery for injury to peace, feelings or happiness includes recovery for "wounded feelings;" and the latter is recognized as an alternate form of "punitive damages." Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

In proper case, recovery for mental pain and anguish may be grafted upon recovery of actual or nominal damages. Stephens v. Waits, 53 Ga. App. 44, 184 S.E. 781 (1936).

Mental pain and anguish, to be basis of recovery of damages, must be consequences of violation of legal right or duty which is an actionable wrong; there may be damage to a person without legal wrong, but a legal wrong imputes damage. Stephens v. Waits, 53 Ga. App. 44, 184 S.E. 781 (1936).

Damages allowable are, at least in part, "punitive damages." Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

Section does not create cause of action. — The language of this statute does not say or imply that injury to the

peace, happiness, or feelings shall always be itself a tort, but rather the reverse. Grand Chapter, O.E.S. v. Wolfe, 172 Ga. 346, 157 S.E. 301 (1931).

In view of the fact that no description or designation is attempted of this class of torts, and in view of the general purposes of the Code, this section obviously does not mean to create new torts, or change the law of damages, but only to declare the preexisting law. Grand Chapter, O.E.S. v. Wolfe, 172 Ga. 346, 157 S.E. 301 (1931).

If no tort is committed, the fact that there are wounded feelings, humiliation, and fright will not give rise to a cause of action. Barry v. Baugh, 111 Ga. App. 813, 143 S.E.2d 489 (1965).

This section does not create a cause of action for injury to peace, feelings, or happiness but prescribes the measure of recovery when such a cause of action exists. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975); Sanders v. Brown, 178 Ga. App. 447, 343 S.E.2d 722 (1986); Reeves v. Edge, 225 Ga. App. 615, 484 S.E.2d 498 (1997).

Damages for mental pain and suffering are allowable. — Under Georgia law, pain and suffering includes mental suffering, but mental suffering is not a legal item of damages unless there has been physical suffering as well. Anxiety, shock, and worry are examples of what might be included under mental pain and suffering, and loss of capacity to work, labor, and enjoy life, separately from monetary earnings, may be considered as items causing mental suffering. MacDonald v. United States, 900 F. Supp. 483 (M.D. Ga. 1995).

Vindictive damages permitted only when defendant acts maliciously. — If a tort is committed through mistake, ignorance, or mere negligence, the damages are limited to the actual injury received, for vindictive or punitive damage are recoverable only when a defendant acts maliciously, willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. Molton v. Commercial Credit Corp., 127 Ga. App. 390, 193 S.E.2d 629 (1972).

In cases contemplated by this section, recovery is allowed only when there is a willful and intentional tort. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135, modified, 234 Ga. 540, 216 S.E.2d 776 (1974); Pilkenton v. Eubanks, 139 Ga. App. 673, 229 S.E.2d 146 (1976).

Damages to purse or person. — When damage is caused by acts which are wanton, willful, and voluntary, and the injury is not actual, so far as it affects purse or person, but the only natural effect is mental suffering and wounded feelings, a recovery may be had. Stephens v. Waits, 53 Ga. App. 44, 184 S.E. 781 (1936).

While for mere negligence one cannot recover damages for mental pain and anguish unless there has been damage to person or purse, for a wanton and willful tort or for a reckless disregard of the rights of others, equivalent to an intentional tort by the defendant, the injured party may recover for the mental pain and anguish suffered therefrom. Pollard v. Phelps, 56 Ga. App. 408, 193 S.E. 102 (1937); Lumley v. Pollard, 61 Ga. App. 681, 7 S.E.2d 308 (1940); Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135, modified, 234 Ga. 540, 216 S.E.2d 776 (1975); Posey v. Medical Center-West, Inc., 184 Ga. App. 404, 361 S.E.2d 505, cert. denied, 184 Ga. App. 910, 361 S.E.2d 505 (1987).

Recovery for wounded feelings. — If a tort is willfully committed, then under this section damages may be recovered for wounded feelings alone. Barry v. Baugh, 111 Ga. App. 813, 143 S.E.2d 489 (1965).

This section was intended to apply to cases when one party injured another from motive of malice. Greer v. State Farm Fire & Cas. Co., 139 Ga. App. 74, 227 S.E.2d 881 (1976).

When no physical injury is present, damages under O.C.G.A. § 51-12-6 are available only for willful torts. Wheat v. First Union Nat'l Bank, 196 Ga. App. 26, 395 S.E.2d 351 (1990).

Malicious arrest. — O.C.G.A. § 51-12-6 described the appropriate measure of damages for a claim of malicious

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arrest. Little v. Chesser, 256 Ga. App. 228, 568 S.E.2d 54 (2002).

Malicious conduct not directed at plaintiff. — Even malicious, wilful, or wanton conduct will not warrant a recovery for the infliction of emotional distress if the conduct was not directed toward the plaintiff. Ryckeley v. Callaway, 261 Ga. 828, 412 S.E.2d 826 (1992).

If mental pain and suffering is not accompanied by physical injury or pecuniary loss, recovery is allowed only if the conduct was malicious, willful, or wanton. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975); Hall County Mem. Park v. Baker, 145 Ga. App. 296, 243 S.E.2d 689 (1978); Sanders v. Brown, 178 Ga. App. 447, 343 S.E.2d 722 (1986).

Recovery for mental suffering caused by intentional wrong. — While mental suffering, unaccompanied by injury to purse or person, affords no basis for action predicated upon wrongful acts merely negligent, such damages may be recovered in those cases where the plaintiff has suffered at the hands of the defendant a wanton, voluntary, or intentional wrong the natural result of which is the causation of mental suffering and wounded feelings. Tuggle v. Wilson, 248 Ga. 335, 282 S.E.2d 110 (1981).

If damages for mental pain and suffering sought under O.C.G.A. § 51-12-6 are not accompanied by physical or pecuniary loss, recovery is allowed only if the conduct complained of was malicious, wilful, or wanton. Brunswick Gas & Fuel Co. v. Parrish, 179 Ga. App. 495, 347 S.E.2d 240 (1986).

When the complaint alleges an established tort—wrongful foreclosure—and seeks damages pursuant to O.C.G.A. § 51-12-6 for mental distress as a result of its intentional commission, established law in Georgia will allow the award of damages for such a claim. Clark v. West, 196 Ga. App. 456, 395 S.E.2d 884 (1990).

When damages are recovered under O.C.G.A. § 51-12-6, any additional recovery under O.C.G.A. § 51-12-5 would be double recovery. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975); Alford v. Oliver, 169 Ga. App. 865, 315 S.E.2d 299 (1984).

A plaintiff is not entitled under O.C.G.A. §§ 51-12-5 and 51-12-6 to a double finding of damages for wounded feelings, nor can the jury assess damages for the double purpose of punishment and prevention, or damages for humiliation and mortification and also damages to punish and deter the defendant from repeating the trespass or wrong. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939); Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

When general damages sued for include an injury to the peace, feelings, and happiness of the plaintiff, as provided under former Code 1933, § 105-2003 (see now O.C.G.A. § 51-12-6), no exemplary damages may be awarded on account of the wounded feelings of the plaintiff under former Code 1933, § 105-2002 (see now O.C.G.A. § 51-12-5), but exemplary damages under former Code 1933, § 105-2002, in order to deter the wrongdoer from repeating the trespass, may be recovered. Davis v. Macon Tel. Publishing Co., 93 Ga. App. 633, 92 S.E.2d 619 (1956).

A plaintiff cannot recover compensatory damages for injury to peace, feelings, and happiness (mental pain and suffering alone arising out of a willful tort) and exemplary damages for "wounded feelings." This would amount to a recovery of double damages which is not allowed. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135, modified, 234 Ga. 540, 216 S.E.2d 776 (1974).

When the only injury is to the peace, feelings, or happiness, the award of exemplary (punitive) damages in addition to an award of damages for mental anguish amounts to a double recovery and is unauthorized. Greenwood Cem. v. Travelers Indem. Co., 238 Ga. 313, 232 S.E.2d 910 (1977).

Damages awarded under both former Code 1933, §§ 105-2002 and 105-2003 (see now O.C.G.A. §§ 51-12-5 and 51-12-6) constitutes prohibited double recovery. Gibson's Prods., Inc. v. Edwards, 146 Ga. App. 678, 247 S.E.2d 183 (1978).

No damages were allowable under both former Code 1933, §§ 105-2002 and 105-2003 (see now O.C.G.A. §§ 51-12-5

and 51-12-6), inasmuch as any additional recovery under the former when damages were allowable under former § 105-2003 would be a double recovery, even though the trial court endeavored to carefully leave out the language of former § 105-2002 "as compensation for the wounded feelings of the plaintiff." Simmons v. Edge, 155 Ga. App. 6, 270 S.E.2d 457 (1980).

Although the plaintiff proved mental anguish damages under this Code section, the plaintiff was not entitled to an additional award of $40,000 in punitive damages because of the rule set forth in Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975). Waldrip v. Voyles, 201 Ga. App. 592, 411 S.E.2d 765 (1991).

Failure to object to charge constitutes waiver. — Failure to object that the trial court erred by charging the jury on damages pursuant to O.C.G.A. §§ 51-12-5 and 51-12-6 before the jury returned its verdict in an action for wrongful dispossession, trespass, conversion, and theft constituted a waiver of the right to raise the issue on appeal, and there was no substantial error which would require review under the exception set forth in O.C.G.A. § 5-5-24(c). Sanders v. Hughes, 183 Ga. App. 601, 359 S.E.2d 396, cert. denied, 183 Ga. App. 907, 359 S.E.2d 396 (1987).

Under this section, jury is permitted to consider worldly circumstances of parties. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

The jury is not restricted to consideration of circumstances relevant to compensation (i.e., the extent of the injury) but is entitled to consider as well circumstances relevant to deterrence (i.e., any aggravated aspects of the defendant's misconduct plus the defendant's "worldly circumstances"). Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

Proper measure of damages, as prescribed by this section, is limited only by enlightened conscience of impartial jurors. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Jury determines award. — The amount of an award for mental pain and suffering rests ordinarily in the sound and intelligent discretion of the jury. Georgia Power Co. v. Braswell, 48 Ga. App. 654, 173 S.E. 763 (1934).

In an action for wounded feelings, the measure of damages must be determined by the enlightened consciences of impartial jurors. Turner v. Joiner, 77 Ga. App. 603, 48 S.E.2d 907 (1948).

Questions concerning the amount of damages to be awarded for mental pain and suffering are for the enlightened conscience of the jury. Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 257 S.E.2d 264 (1979).

Award for future pain and suffering. — Since the plaintiff's pain and suffering will continue in the future, the plaintiff is entitled to damages for the future pain and suffering, the standard for such award being the enlightened conscience of the judge. Since the plaintiff is receiving an award for damages not yet suffered, the judge is to take that into consideration when arriving at an amount. MacDonald v. United States, 900 F. Supp. 483 (M.D. Ga. 1995).

Verdict will not be set aside as excessive by Court of Appeals unless it manifestly appears from record that it was result of prejudice, bias, corruption, or gross mistake. Holtsinger v. Scarborough, 71 Ga. App. 318, 30 S.E.2d 835 (1944).

The appellate court does not have as broad discretionary powers as are conferred on trial judges in setting aside verdicts as excessive; when a case comes before the appellate court, after the refusal of a new trial by the presiding judge, it comes not only with the presumption in favor of the verdict, but also stamped with the approval of the judge who tried the case, and when no prejudice or bias or corrupt means in reaching the verdict appear, such court is not authorized to set it aside as being excessive. Shepherd Constr. Co. v. Vaughn, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

In order to set a verdict aside as excessive the evidence must be shown to be so unreasonable as to show that it was the result of passion, prejudice, partiality, or undue bias on the part of the jury. Calloway v. Rossman, 150 Ga. App. 381,

General Consideration (Cont'd)

257 S.E.2d 913 (1979).

Verdict may not be set aside merely because judge might find differently. — When a jury's verdict as to damages may be larger than some of the individual members of the court would have found had they been on the jury trying the case, the court cannot set it aside for that reason. Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357 (1949).

Judge cannot order that verdict be written off. — The judge has no power to say that a verdict in a case should not exceed a specified sum, and to require the plaintiff to write off a portion of the damages, and thereupon refuse a new trial. Savannah, F. & W. Ry. v. Harper, 70 Ga. 119 (1883).

Mere fact that evidence would authorize larger verdict, nothing more appearing, is insufficient to authorize reversal of the judgment of the jury based thereon. Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 257 S.E.2d 264 (1979).

Cited in Thorpe v. Wray, 68 Ga. 359 (1882); Central R.R. v. Roach, 70 Ga. 434 (1883); Georgia R.R. v. Olds, 77 Ga. 673 (1886); Stovall v. Caverly, 139 Ga. 243, 77 S.E. 29 (1913); Pynetree Paper Co. v. Wood, 23 Ga. App. 604, 99 S.E. 222 (1919); Hotel Equip. Co. v. Liddell, 32 Ga. App. 590, 124 S.E. 92 (1924); Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936); Jackson v. Ely, 56 Ga. App. 763, 194 S.E. 40 (1937); Investment Sec. Corp. v. Cole, 57 Ga. App. 97, 194 S.E. 411 (1937); Morris v. Stanford, 58 Ga. App. 726, 199 S.E. 773 (1938); Atlantic Co. v. Farris, 62 Ga. App. 212, 8 S.E.2d 665 (1940); Barbre v. Scott, 75 Ga. App. 524, 43 S.E.2d 760 (1947); Phillips v. Smith, 76 Ga. App. 705, 47 S.E.2d 156 (1948); Georgia Automatic Gas Co. v. Fowler, 77 Ga. App. 675, 49 S.E.2d 550 (1948); Criswell Baking Co. v. Milligan, 77 Ga. App. 861, 50 S.E.2d 136 (1948); Kelly v. Adams, 84 Ga. App. 450, 66 S.E.2d 144 (1951); Sharpe v. Frost, 94 Ga. App. 444, 95 S.E.2d 309 (1956); Garner v. Mears, 97 Ga. App. 506, 103 S.E.2d 610 (1958); Haggard v. Shaw, 100 Ga. App. 813, 112 S.E.2d 286 (1959); Turpin v. North Am. Acceptance Corp., 119 Ga. App. 212, 166 S.E.2d 588 (1969); S.S. Kresge Co. v. Carty, 120 Ga. App. 170, 169 S.E.2d 735 (1969); Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973); Wilson v. Strange, 235 Ga. 156, 219 S.E.2d 88 (1975); Wright v. Thompson, 236 Ga. 655, 225 S.E.2d 226 (1976); Gaddy v. Gilbert, 140 Ga. App. 508, 231 S.E.2d 403 (1976); Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977); Spencer v. Moore Bus. Forms, Inc., 441 F. Supp. 60 (N.D. Ga. 1977); Stewart v. Williams, 243 Ga. 580, 255 S.E.2d 699 (1979); Wilkinson v. Davis, 148 Ga. App. 696, 252 S.E.2d 201 (1979); Davis v. Hospital Auth., 154 Ga. App. 654, 269 S.E.2d 867 (1980); Spencer v. Moore Bus. Forms, Inc., 87 F.R.D. 118 (N.D. Ga. 1980); Alewine v. City Council, 505 F. Supp. 880 (S.D. Ga. 1981); Duncan v. Poythress, 515 F. Supp. 327 (N.D. Ga. 1981); Sheppard v. Tribble Heating & Air Conditioning, Inc., 163 Ga. App. 732, 294 S.E.2d 572 (1982); Hayes v. Irwin, 541 F. Supp. 397 (N.D. Ga. 1982); Northside Motors, Inc. v. O'Berry, 167 Ga. App. 155, 305 S.E.2d 894 (1983); McCall v. Allstate Ins. Co., 251 Ga. 869, 310 S.E.2d 513 (1984); Troy v. Interfinancial, Inc., 171 Ga. App. 763, 320 S.E.2d 872 (1984); Anderson v. Housing Auth., 171 Ga. App. 841, 321 S.E.2d 378 (1984); Atlantic Zayre, Inc. v. Williams, 172 Ga. App. 43, 322 S.E.2d 83 (1984); Munford, Inc. v. Anglin, 174 Ga. App. 290, 329 S.E.2d 526 (1985); Kesler v. Veal, 182 Ga. App. 444, 356 S.E.2d 254 (1987); Carlin v. Fuller, 196 Ga. App. 54, 395 S.E.2d 247 (1990); Cassidy v. Wilson, 196 Ga. App. 6, 395 S.E.2d 291 (1990); Woodall v. Hayt, Hayt & Landau, 198 Ga. App. 624, 402 S.E.2d 359 (1991); Hudson v. State Farm Mut. Auto. Ins. Co., 201 Ga. App. 351, 411 S.E.2d 291 (1991); Macon Tel. Publishing Co. v. Tatum, 208 Ga. App. 111, 430 S.E.2d 18 (1993); H. J. Russell & Co. v. Jones, 250 Ga. App. 28, 550 S.E.2d 450 (2001); Middlebrooks v. Hillcrest Foods Inc., 256 F.3d 1241 (11th Cir. 2001); Barnett Bank v. Hazel, 251 Ga. App. 836, 555 S.E.2d 195 (2001); Land v. Boone, 265 Ga. App. 551, 594 S.E.2d 741 (2004); Kelley v. Cooper, 325 Ga. App. 145, 751 S.E.2d 889 (2013).

Evidentiary Principles

Test for recovery for purely mental injury is essentially same as test for

recovery of "punitive damages." Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

Evidence of parties' circumstances admissible. — In cases of willful torts when the entire injury is to the plaintiff's peace, feelings, or happiness (and thus is no injury to the person or purse), evidence of the worldly circumstances of the parties, which would not be relevant in the usual tort case, is admissible, as is other evidence referred to in this section. Blanchard v. Westview Cem., 133 Ga. App. 262, 211 S.E.2d 135, modified, 234 Ga. 540, 216 S.E.2d 776 (1974).

Direct evidence as to mental suffering is unnecessary in order that there may be an award therefor. Georgia Power Co. v. Braswell, 48 Ga. App. 654, 173 S.E. 763 (1934).

Evidence of defendant's present worth is relevant, but evidence of defendant's past and earnings is not. Williamson v. Weeks, 142 Ga. App. 149, 235 S.E.2d 587 (1977).

Evidence of worldly circumstances was not admissible on issue of punitive damages under former Code 1933, § 105-2002 (see now O.C.G.A. § 51-12-5) as distinguished from vindictive damages under former Code 1933, § 105-2003 (see now O.C.G.A. § 51-12-6). Bob Maddox Dodge, Inc. v. McKie, 155 Ga. App. 263, 270 S.E.2d 690 (1980).

Evidence of worldly circumstances is not admissible. — Certified question was answered in the negative because the plain and explicit terms of the revised statute did not provide for evidence of a defendant's worldly circumstances to be admitted in a case in which the only injury was to a plaintiff's peace, happiness, or feelings. Holland v. Caviness, 292 Ga. 332, 737 S.E.2d 669 (2013).

Interrogatories regarding defendant's wealth appropriate. — When a plaintiff elects to press at trial only a claim properly within this section, then properly drawn interrogatories searching into a defendant's wealth could be appropriate and the answers admissible. Hodges v. Youmans, 129 Ga. App. 481, 200 S.E.2d 157 (1973).

A tort victim can inquire into the defendant's worldly circumstances only when the entire injury is to peace, happiness, or feelings, and not when the victim has sustained other compensable injuries which the victim opts to forego. Brunswick Gas & Fuel Co. v. Parrish, 179 Ga. App. 495, 347 S.E.2d 240 (1986) (decided prior to 1987 amendment).

In an action under O.C.G.A. § 51-1-18(a) by a parent for furnishing alcoholic beverages to his or her underage child without the parent's consent, when the parent has prayed for general, special, and O.C.G.A. §§ 51-12-5 and 51-12-6 damages, and the parent has not yet made an election to forego all other damages in favor of § 51-12-6 damages, the trial court is correct in denying the parent's motion to compel discovery of the defendant's worldly circumstances. If, however, the parent timely amends the parent's complaint to abandon all claims except one for § 51-12-6 damages, the parent will be entitled to discover the defendant's worldly circumstances. Stepperson, Inc. v. Long, 256 Ga. 838, 353 S.E.2d 461 (1987) (decided prior to 1987 amendment).

Evidence of worldly circumstances is admissible only when a party seeks damages only for injury to peace, happiness, or feelings. Collins v. State Farm Mut. Auto. Ins. Co., 197 Ga. App. 309, 398 S.E.2d 207 (1990).

Procedure

Charge of section appropriate only when entire injury mental. — Charge of this section, with its reference to "worldly circumstances," except in a case when the entire injury is to the peace, happiness, or feelings of the plaintiff, is erroneous. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939).

Error to charge section without confining application to mental damages. — It is error, though not necessarily reversible error, for a court to charge a jury, without qualification, the provision of this section, without confining the application of this principle to the damage suffered by virtue of pain and suffering. Reese v. Haggard, 75 Ga. App. 654, 44 S.E.2d 290 (1947).

Procedure (Cont'd)

It is error to charge language of both former Code 1933, §§ 105-2002 and 105-2003 (see now O.C.G.A. §§ 51-12-5 and 51-12-6) so as to permit a double recovery. Baldwin v. Davis, 188 Ga. 587, 4 S.E.2d 458 (1939).

Instructions which permit recovery for wounded feelings under former Code 1933, §§ 105-2002 and 105-2003 (see now O.C.G.A. §§ 51-12-5 and 51-12-6) are improper and are cause for granting a new trial. Universal Credit Co. v. Starrett, 61 Ga. App. 132, 6 S.E.2d 80 (1939).

Pattern jury charge inaccurate. — Although the Suggested Pattern Jury Instructions, Vol. I: Civil Cases, § 66.600 still contains language referring to the "worldly circumstances of the parties" and "the amount of bad faith in the transaction," the jury should no longer be instructed using that language because it was deleted from O.C.G.A. § 51-12-6 in 1987. Pampattiwar v. Hinson, 326 Ga. App. 163, 756 S.E.2d 246 (2014).

Because an employee chose to pursue punitive damages under O.C.G.A. § 51-12-5.1 rather than O.C.G.A. § 51-2-6, the employee was not entitled to punitive damages on a claim for negligent retention due to the fact that the jury specifically found that the employee had not suffered a physical injury. A finding of physical injury was required for punitive damages under § 51-12-5.1. Tomczyk v. Jocks & Jills Rests., LLC, 513 F. Supp. 2d 1351 (N.D. Ga. 2007).

When one suffers pecuniary loss, the court is not authorized to charge this section and to do so is reversible error. Hall County Mem. Park v. Baker, 145 Ga. App. 296, 243 S.E.2d 689 (1978).

Failure to object to charge constitutes waiver. — Failure to object that the trial court erred by charging the jury on damages pursuant to O.C.G.A. §§ 51-12-5 and 51-12-6 before the jury returned the jury's verdict in an action for wrongful dispossession, trespass, conversion, and theft constituted a waiver of the right to raise the issue on appeal, and there was no substantial error which would require review under the exception set forth in § 5-5-24(c). Sanders v. Hughes, 183 Ga. App. 601, 359 S.E.2d 396, cert. denied, 183 Ga. App. 907, 359 S.E.2d 396 (1987).

Under this section, jury is permitted to consider worldly circumstances of parties. Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

The jury is not restricted to consideration of circumstances relevant to compensation (i.e., the extent of the injury) but is entitled to consider as well circumstances relevant to deterrence (i.e., any aggravated aspects of the defendant's misconduct plus the defendant's "worldly circumstances"). Westview Cem. v. Blanchard, 234 Ga. 540, 216 S.E.2d 776 (1975).

Proper measure of damages, as prescribed by this section, is limited only by enlightened conscience of impartial jurors. Atlanta Journal Co. v. Doyal, 82 Ga. App. 321, 60 S.E.2d 802 (1950).

Jury decision on damage award. — The amount of an award for mental pain and suffering rests ordinarily in the sound and intelligent discretion of the jury. Georgia Power Co. v. Braswell, 48 Ga. App. 654, 173 S.E. 763 (1934).

In an action for wounded feelings, the measure of damages must be determined by the enlightened consciences of impartial jurors. Turner v. Joiner, 77 Ga. App. 603, 48 S.E.2d 907 (1948).

Questions concerning the amount of damages to be awarded for mental pain and suffering are for the enlightened conscience of the jury. Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 257 S.E.2d 264 (1979).

Award for future pain and suffering. — Since the plaintiff's pain and suffering will continue in the future, the plaintiff is entitled to damages for the future pain and suffering, the standard for such award being the enlightened conscience of the judge. Since the plaintiff is receiving an award for damages not yet suffered, the judge is to take that into consideration when arriving at an amount. MacDonald v. United States, 900 F. Supp. 483 (M.D. Ga. 1995).

Verdict will not be set aside as excessive by Court of Appeals unless it manifestly appears from the record

that it was the result of prejudice, bias, corruption, or gross mistake. Holtsinger v. Scarborough, 71 Ga. App. 318, 30 S.E.2d 835 (1944).

The appellate court does not have as broad discretionary powers as are conferred on trial judges in setting aside verdicts as excessive; when a case comes before the appellate court, after the refusal of a new trial by the presiding judge, it comes not only with the presumption in favor of the verdict, but also stamped with the approval of the judge who tried the case, and when no prejudice or bias or corrupt means in reaching the verdict appear, such court is not authorized to set it aside as being excessive. Shepherd Constr. Co. v. Vaughn, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

In order to set a verdict aside as excessive the evidence must be shown to be so unreasonable as to show that it was the result of passion, prejudice, partiality, or undue bias on the part of the jury. Calloway v. Rossman, 150 Ga. App. 381, 257 S.E.2d 913 (1979).

Verdict may not be set aside merely because judge might find differently. — When a jury's verdict as to damages may be larger than some of the individual members of the court would have found had they been on the jury trying the case, the court cannot set it aside for that reason. Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357 (1949).

Judge cannot order that verdict be written off. — Under this section, the judge has no power to say that a verdict in a case should not exceed a specified sum, and to require the plaintiff to write off a portion of the damages, and thereupon refuse a new trial. Savannah, F. & W. Ry. v. Harper, 70 Ga. 119 (1883).

Mere fact that evidence would authorize a larger verdict, nothing more appearing, is insufficient to authorize reversal of the judgment of the jury based thereon. Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 257 S.E.2d 264 (1979).

A $100,000 verdict found not so inadequate as to indicate bias or prejudice. See Van Geter v. Housing Auth., 167 Ga. App. 432, 306 S.E.2d 707 (1983), aff'd, 252 Ga. 196, 312 S.E.2d 309 (1984).

Jurors are not bound to accept as correct opinion evidence concerning value of property, though uncontradicted, and by their verdict, they may fix either a lower or higher value upon the property than that stated in the opinion and estimates of the witnesses. Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 257 S.E.2d 264 (1979).

Attorney's fees and expenses of litigation are not punitive or vindictive damages. They are recoverable only in cases when other elements of damages are recoverable. Cleary v. Southern Motors of Savannah, Inc., 142 Ga. App. 163, 235 S.E.2d 623 (1977).

Attorney's fees were not usually allowed as an item of damages except in those cases permitted by statute. Such fees were not a part of punitive or vindictive damages, but stand alone and were regulated by former Code 1933, § 20-1404 (see now O.C.G.A. § 13-6-11). Dodd v. Slater, 101 Ga. App. 358, 114 S.E.2d 167 (1960).

Property Damage

No distinction between tort to individual or property. — This section, in allowing damages for wounded feelings, makes no distinction between personal injury and a tort to property. Brunswick Gas & Fuel Co. v. Parrish, 179 Ga. App. 495, 347 S.E.2d 240 (1986).

An action involving a tort to property can support a claim for wounded feelings under O.C.G.A. § 51-12-6. Brunswick Gas & Fuel Co. v. Parrish, 179 Ga. App. 495, 347 S.E.2d 240 (1986).

When injury complained of is only injury to property, there can be no recovery for mental suffering. Kuhr Bros. v. Spahos, 89 Ga. App. 885, 81 S.E.2d 491 (1954), overruled on other grounds, Whiten v. Orr Constr. Co., 109 Ga. App. 267, 136 S.E.2d 136 (1964).

Undue juror bias not shown. — In a trespassing case, damages awarded under O.C.G.A. § 51-12-6 did not show undue bias on the part of jurors because an owner did not seek the replacement value of trees that were improperly cut. Bullard v. Bouler, 272 Ga. App. 397, 612 S.E.2d 513 (2005).

Property Damage (Cont'd)

When only property damage is shown. — In a suit alleging a claim for injury to peace, happiness, and feelings after a creditor erroneously took the property of two non-debtors when the creditor executed a writ of possession of a debtor, because one of the non-debtors claimed that only furniture was damaged, the non-debtor failed to properly claim an injury to the non-debtor's peace, feelings, and happiness and, therefore, the creditor was entitled to summary judgment on that claim. Dierkes v. Crawford Orthodontic Care, P.C., 284 Ga. App. 96, 643 S.E.2d 364 (2007).

Applicability to Specific Cases

Damages not justified by "outrage" over concealing of witness. — Plaintiff's "outrage" and "anger" over the defendant's concealing of a witness from the plaintiff in a prior action did not justify an award of damages under O.C.G.A. § 51-12-6. Orkin Exterminating Co. v. Bowen, 172 Ga. App. 880, 324 S.E.2d 752 (1984).

Error to charge on mental damages in case involving illegal seizure of car. — In an action for damages on account of illegal seizure of an automobile under a claim of right, it was error for the court to give in charge to the jury the provisions of former Code 1933, § 105-2003 (O.C.G.A. § 51-12-6), as to damages in torts when the entire injury is to the peace, happiness, and feelings of the plaintiff. Universal Credit Co. v. Starrett, 61 Ga. App. 132, 6 S.E.2d 80 (1939).

False impersonation. — Petition alleging that the defendant company and named agents and servants thereof, falsely and fraudulently impersonated the plaintiff, invaded the plaintiff's right of privacy, the plaintiff's right to the exclusive use of the plaintiff's own name, represented the plaintiff as betraying confidence and giving secret and confidential prices to a competitor of those who gave the prices, caused the plaintiff's time and that of the plaintiff's employees to be consumed, subjected the plaintiff to embarrassment and chagrin, and caused the plaintiff to be held in contempt and ridicule by the plaintiff's business associates, all for the express purpose of advancing the interests of the defendant company, set out a cause of action. Goodyear Tire & Rubber Co. v. Vandergriff, 52 Ga. App. 662, 184 S.E. 452 (1936).

Fraud action. — Giving of an instruction based on the language of O.C.G.A. § 51-12-6 in an action for fraud was error because the measure of damages in such an action is the actual loss sustained as a result of the fraud. Kent v. White, 238 Ga. App. 792, 520 S.E.2d 481 (1999).

Fright as element of damage. — Fright is an element of damage only when accompanied by a physical injury, or when it directly produces some physical or mental impairment. Williamson v. Central of Ga. Ry., 127 Ga. 125, 56 S.E. 119 (1906).

Mental pain and suffering resulting from delay of message is not element of damage. Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S.E. 901, 30 Am. St. R. 183, 17 L.R.A. 430 (1892).

Trespass on burial plots. — In an action for the continuing trespass of burial plots, evidence was sufficient to support the jury's award of damages under O.C.G.A. § 51-12-6. Moody v. Dykes, 269 Ga. 217, 496 S.E.2d 907 (1998).

Because there were damages flowing from the interference with a property right, the heirs' action alleging that a property owner interfered with a family's easement across the owner's land to and from a cemetery and trespassed and created a continuing nuisance within the cemetery, did not fall under O.C.G.A. § 51-12-6; therefore, the heirs could plead a claim for punitive damages. Davis v. Overall, 301 Ga. App. 4, 686 S.E.2d 839 (2009).

Mutilation of corpse. — When recovery was sought for damages because of mutilation of the body of the deceased after death, in the absence of willfulness and wantonness in running over the body, no cause of action in this respect was set forth. Lumley v. Pollard, 61 Ga. App. 681, 7 S.E.2d 308 (1940).

Nervous shock and fright. — When the action was not for a mere negligent tort, but was for a positive and willful wrong, the plaintiff was able to recover for

nervous shock and fright, with or without resulting physical injury. Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933).

Parent's recovery for tort to child. — Parents of child who is negligently treated and diagnosed at a hospital cannot recover damages for their mental distress and their physical injury stemming from that distress unless they witness the commission of the negligent act. Posey v. Medical Center-West, Inc., 184 Ga. App. 404, 361 S.E.2d 505, cert. denied, 184 Ga. App. 910, 361 S.E.2d 505 (1987).

Provision of alcohol to a minor. — Trial court erred in granting summary judgment to a property owner and the party guests, as to a mother's claims that they provided alcohol to a minor, who later was killed in an auto accident, in violation of O.C.G.A. § 51-1-18(a), as there was a triable issue of fact when the evidence indicated that the owner allowed the guests to bring kegs of beer to the party, at which most of the other guests were minors, and that the guests knowingly allowed the deceased minor to drink beer from the kegs; the mother was not precluded from recovering damages under O.C.G.A. § 51-12-6, as there was a triable issue of fact as to whether these acts were intentional. Mowell v. Marks, 277 Ga. App. 524, 627 S.E.2d 141 (2006).

Slander action. — In an action for slander, when the entire damage sought to be recovered is for mental suffering and humiliation endured, the only measure for such damage is the enlightened conscience of fair and impartial jurors. Franklin v. Evans, 55 Ga. App. 177, 189 S.E. 722 (1937).

In a slander case, when no special damages were prayed for, and former Code 1933, § 105-2003 (see now O.C.G.A. § 51-12-6) was charged, to charge that part of former Code 1933, § 105-2002 (see now O.C.G.A. § 51-12-5) which allowed, in a case when there were aggravating circumstances in the commission of the tort, either in the act or the intention, additional damages "as compensation for the wounded feelings of the plaintiff," was erroneous, as allowing double compensation for the same injury, though it was permissible to give that part of former § 105-2002, which allowed additional damages for the purpose of deterring the wrongdoer from a similar trespass. Franklin v. Evans, 55 Ga. App. 177, 189 S.E. 722 (1937).

Fraud and libel. — In an attorney's claim for fraud against a client, arising out of the client's statement that the client's wife had not filed for divorce, leading the attorney to file an improper divorce claim in another court, the attorney could recover damages for wounded feelings under O.C.G.A. § 51-12-6 on the attorney's fraud claim. As to the attorney's claim for libel arising out of negative reviews the client posted online, § 51-12-6 did not contain a punitive award provision and, therefore, the attorney was not required to request retraction of the libelous statements in order to recover. Pampattiwar v. Hinson, 326 Ga. App. 163, 756 S.E.2d 246 (2014).

Abusive litigation prosecution. — Damages for wounded feelings are recoverable under O.C.G.A. § 51-12-6 in an abusive litigation prosecution, and such recovery may be based on the worldly circumstances of the parties. Vogtle v. Coleman, 188 Ga. App. 159, 372 S.E.2d 642 (1988), aff'd in part and rev'd in part on other grounds, 259 Ga. 115, 376 S.E.2d 861 (1989).

In an abusive litigation action under O.C.G.A. § 51-7-80 et seq., a plaintiff could not recover for damages to the plaintiff's peace, happiness, or feelings under O.C.G.A. § 51-12-6, as there was no allegation of a physical injury, and the plaintiff did not allege a willful tort; there was no support in the record that the assertion of the peer review privilege under O.C.G.A. § 31-7-133(a) constituted a willful tort. Freeman v. Wheeler, 277 Ga. App. 753, 627 S.E.2d 86 (2006).

Sorrow from miscarriage not element of damage. — In an action to recover for personal injuries to the plaintiff which resulted in a miscarriage, it is error to charge that sorrow resulting from the miscarriage is an element of damage. Augusta & S.R.R. v. Randall, 85 Ga. 297, 11 S.E. 706 (1890).

Use of profane language not sufficient to justify mental damages. — When the petition, stripped of the peti-

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tion's conclusions and confined to the actual facts alleged, merely charged the defendant with having used profane language in the presence of the plaintiff, a female, it therefore did not set out such a willful and intentional tort as would entitle the plaintiff to damages for fright, mental suffering, and wounded feelings. Kitchens v. Williams, 52 Ga. App. 422, 183 S.E. 345 (1936).

Impaired state of mind. — Recovery for wounded feelings was authorized after the plaintiff sustained an impaired state of mind and ability to find work in light of a felony charge pending against the plaintiff for over three years before it was ultimately dismissed for insufficient evidence to prosecute. Branson v. Donaldson, 206 Ga. App. 723, 426 S.E.2d 218 (1992).

Trespass and nuisance actions. — Instruction using language from O.C.G.A. § 51-12-6 in a trespass and nuisance action was not prejudicial since the measure of damages for discomfort, loss of peace of mind, unhappiness and annoyance of the plaintiff was for the enlightened conscience of the jury. Arvida/JMB Partners v. Hadaway, 227 Ga. App. 335, 489 S.E.2d 125 (1997).

Wrongful eviction of tenant. — In a suit by the tenant against the landlord, to recover damages for tortious eviction, when the evidence authorizes the jury to infer that the tortious act of the landlord in evicting the tenant was attended with aggravating circumstances, the jury is authorized to find a sum in punitive damages or damages for compensation for the wounded feelings of the tenant. Real Estate Loan Co. v. Pugh, 47 Ga. App. 443, 170 S.E. 698 (1933).

Apartment tenant could not recover for emotional distress absent impact or wilful or wanton conduct. — Apartment tenant was not entitled to recover damages for emotional distress from the landlord and management company based on their employees' conduct in giving the tenant's former boyfriend a key and the alarm code to the tenant's apartment because the tenant suffered no physical impact and there was no evidence that the defendants' conduct was malicious, wilful, or wanton. O.C.G.A. § 51-12-6 did not create a cause of action for emotional distress. Phillips v. Marquis at Mt. Zion-Morrow, LLC, 305 Ga. App. 74, 699 S.E.2d 58 (2010).

In an action arising from the unauthorized release of the plaintiff's psychiatric records by a hospital authority, the fact that the plaintiff suffered no physical injury and that the authority's actions were not willful, wanton, and malicious did not end the inquiry because the case was not defined solely by reference to O.C.G.A. § 51-12-6. Sletto v. Hospital Auth., 239 Ga. App. 203, 521 S.E.2d 199 (1999).

Error to instruct on punitive and vindictive damages. — In an action against a veterinarian for the loss of a cat who escaped while in the vet's care, the trial court erred in giving an instruction on punitive and vindictive damages when the plaintiff did not show any physical or pecuniary loss and did not present evidence that the defendant's acts were malicious, willful, or wanton. Carroll v. Rock, 220 Ga. App. 260, 469 S.E.2d 391 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, §§ 668-690.

C.J.S. — 25 C.J.S., Damages, § 114 et seq.

ALR. — Damages for mental anguish on account of mutilation of corpse, 12 ALR 342.

Right to recover for mental pain and anguish alone, apart from other damages, 44 ALR 428; 56 ALR 657.

Excessiveness of verdict in action by person injured for injuries not resulting in death, 46 ALR 1230; 102 ALR 1125; 16 ALR2d 3.

"Sentimental" losses, including mental anguish, loss of society, and loss of marital, filial, or parental care and guidance, as elements of damages in action for wrongful death, 74 ALR 11.

Recovery for illness, disease, or death

claimed to have resulted from worry or mental anguish following breach of contract or tort, 122 ALR 1486.

Mental distress from pregnant woman's apprehension or realization of injury to or loss of child, as element of damages in action for personal injury, 145 ALR 1104.

Excessiveness of damages in action by person injured for personal injuries not resulting in death (for years 1941 to 1950), 16 ALR2d 3.

Recovery by tenant of damages for physical injury or mental anguish occasioned by wrongful eviction, 17 ALR2d 936.

Recovery by contractor or artisan, suing for breach of warranty, of damages for loss of good will occasioned by use in his business of unfit materials, 28 ALR2d 591.

Recovery for mental shock or distress in connection with injury to or interference with tangible property, 28 ALR2d 1070.

Excessiveness or inadequacy of damages for false imprisonment or arrest, 35 ALR2d 273.

Excessiveness or inadequacy of damages for malicious prosecution, 35 ALR2d 308.

Right to recover damages in negligence for fear of injury to another, or shock or mental anguish at witnessing such injury, 29 ALR3d 1337.

Recovery of damages for emotional distress resulting from racial, ethnic, or religious abuse or discrimination, 40 ALR3d 1290.

Recovery for emotional distress or its physical consequences caused by attempts to collect debt owed by third party, 46 ALR3d 772.

Liability in damages for withholding corpse from relatives, 48 ALR3d 240.

Civil liability of undertaker in connection with embalming or preparation of body for burial, 48 ALR3d 261.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property, 61 ALR3d 922.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status, 61 ALR3d 944.

Recovery of damages for emotional distress, fright, and the like, resulting from blasting operations, 75 ALR3d 771.

Recovery for mental or emotional distress resulting from injury to, or death of, member of plaintiff's family arising from physician's or hospital's wrongful conduct, 77 ALR3d 447.

Liability of hospital or similar institution for giving erroneous notification of patient's death, 77 ALR3d 501.

Recovery under Civil Damage (Dram Shop) Act for intangibles such as mental anguish, embarrassment, loss of affection or companionship, or the like, 78 ALR3d 1199.

Recovery of damages for mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution, 83 ALR3d 598.

Recovery by debtor, under tort of intentional or reckless infliction of emotional distress, for damages resulting from debt collection methods, 87 ALR3d 201.

Relationship between victim and plaintiff-witness as affecting right to recover damages in negligence for shock or mental anguish at witnessing victim's injury or death, 94 ALR3d 486.

Immediacy of observation of injury as affecting right to recover damages for shock or mental anguish from witnessing injury to another, 5 ALR4th 833.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract or warranty in connection with construction of home or other building, 7 ALR4th 1178.

Liability for wrongful autopsy, 18 ALR4th 858.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 35 ALR4th 441.

Modern status of intentional infliction of mental distress as independent tort, 38 ALR4th 998.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 ALR4th 165.

Excessiveness or inadequacy of compensatory damages for defamation, 49 ALR4th 1158.

Future disease or condition, or anxiety relating thereto, as element of recovery, 50 ALR4th 13.

Excessiveness or inadequacy of compensatory damages for malicious prosecution, 50 ALR4th 843.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress, 52 ALR4th 853.

Recoverability of compensatory damages for mental anguish or emotional distress for breach of service contract, 54 ALR4th 901.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse, 61 ALR4th 309.

Excessiveness or adequacy of damages awarded parents' for noneconomic loss caused by personal injury or death of child, 61 ALR4th 413.

Recoverability of compensatory damages for mental anguish or emotional distress for tortiously causing another's birth, 74 ALR4th 798.

Liability for false obituary or news report of death, 85 ALR4th 813.

Plaintiff's rights to punitive or multiple damages when cause of action renders both available, 2 ALR5th 449.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 ALR5th 195.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress — ethnic, racial, or religious harassment or discrimination, 19 ALR6th 1.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress — sexual harassment, sexual discrimination, or accusations concerning sexual conduct or orientation, 20 ALR6th 1.

Pre-emption, by § 541(a) of Employee Retirement Income Security Act of 1974 (29 USCS § 1144(a)), of employee's state-law action for infliction of emotional distress, 102 ALR Fed. 205.

Pre-emption, by National Labor Relations Act (29 USCS § 151 et seq.), of employee's state-law action for infliction of emotional distress, 103 ALR Fed. 798.

Pre-emption, by Railway Labor Act (45 USCS § 151 et seq.), of employee's state-law action for infliction of emotional distress, 104 ALR Fed. 548.

51-12-7. Recovery of necessary expenses.

In all cases, necessary expenses consequent upon an injury are a legitimate item in the estimate of damages. (Orig. Code 1863, § 3000; Code 1868, § 3013; Code 1873, § 3068; Code 1882, § 3068; Civil Code 1895, § 3908; Civil Code 1910, § 4505; Code 1933, § 105-2004.)

Law reviews. — For article advocating that payment of attorney's fees be assigned to the losing party, see 18 Ga. B. J. 439 (1956).

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Section applicable only to tort actions. — No cause of action was set out in the paragraphs of the plaintiff's amendment, which sought a recovery of $500 as attorney's fees, under this section, which provides that necessary expenses consequent upon the injury done are legitimate items in the estimation of damages, because this section applies only in tort cases. Roberts v. Scott, 212 Ga. 87, 90 S.E.2d 413 (1955).

Attorney's fees. — In a suit for malicious prosecution, a charge that "reasonable counsel fees and expenses of defending the criminal case would be legitimate items on which damages could be awarded if the plaintiff is entitled to recover" was not erroneous. Sloan v. Glaze, 72 Ga. App. 415, 33 S.E.2d 846 (1945).

When the plaintiffs have only set out a complaint in equity, they are not entitled to an award of attorney fees under O.C.G.A. § 13-6-11 or O.C.G.A. § 51-12-7. Glynn County Fed. Employees Credit Union v. Peagler, 256 Ga. 342, 348 S.E.2d 628 (1986).

When a plaintiff's permissively joined actions against an insurance company to recover under a contract of insurance and against an insurance agent and agencies based on tort, breach of agency contract, and respondeat superior could have been brought separately, the action against the insurance company was an "underlying" action for purposes of the rule allowing recovery, as real damages, of attorney fees and expenses of litigation incurred as the result of a defendant's malfeasance or misfeasance. Atlanta Woman's Club, Inc. v. Washburne, 215 Ga. App. 201, 450 S.E.2d 239 (1994).

Although the second corporation argued that the company and the owners' attorneys' fees, related to prior litigation and amounting to $3.8 million, were not recoverable as damages, the company and the owners' attorneys' fees, like its other damages, were directly traceable to the second corporation's misconduct, and lawyers' fees incurred in a related action, but caused by a defendant's wrongdoing, could be taken into consideration by the jury in estimating damages. The company and the owners did not have to show bad faith or stubborn litigiousness to recover such fees and O.C.G.A. § 51-12-7 provided that in all cases, necessary expenses consequent upon the injury done were a legitimate item in the estimate of damages. Douglas Asphalt Co. v. Qore, Inc., No. CV206-229, 2010 U.S. Dist. LEXIS 50141 (S.D. Ga. May 20, 2010).

Costs of related litigation. — When a homeowner sued a realtor for alleged fraud and malpractice in the sale of the homeowner's condominium after the homeowner had sued the buyers on their note to the homeowner, these were separate causes of action against separate parties not in privity with each other, in separate counties, and the absence of a finding of bad faith on the part of the buyers in not paying their note did not preclude a finding that the plaintiff was entitled to attorney's fees and expenses of litigation when such costs were actual damages proximately caused by the realtors' malpractice and fraud. Marcoux v. Fields, 195 Ga. App. 573, 394 S.E.2d 361 (1990).

Expenses not recoverable in slander suit. — This section does not apply to a suit for slander. Sammons v. Wilson, 20 Ga. App. 241, 92 S.E. 950 (1917).

Expenses of injury in another state. — Expenses incurred because of an injury to one's wife in another state are recoverable, and may include the costs of subsistence. Nashville, C. & S.L. Ry. v. Hubble, 139 Ga. 300, 76 S.E. 1009 (1913).

Expenses of providing shelter. — When a contractor is wrongfully deprived of the contractor's shelters for the contractor's men, the expense of providing similar shelter can be recovered. Carlisle v. Callahan, 78 Ga. 320, 2 S.E. 751 (1886), overruled on other grounds, Thigpen v. Batts, 199 Ga. 161, 33 S.E.2d 424 (1945).

Jury may consider cost of replacement item in determining damages. — The amount expended for a replacement vehicle to perform the services usually performed by the damaged vehicle may be taken into consideration by the jury in determining what damages the plaintiff is entitled to for hire while rendered incapable of use or loss of use. Moffett v. McCurry, 84 Ga. App. 853, 67 S.E.2d 807 (1951).

Medical expenses. — Under this section, expenses for physician's bills, in order to furnish an element of recovery for an injury, must be shown to have been the result of the injury and rendered necessary by it. Georgia Ry. & Elec. Co. v. Gilleland, 133 Ga. 621, 66 S.E. 944 (1909).

The necessary and required hospital, medical, and other expenses consequent upon the negligence of another party are recoverable under this section. Old Dominion Freight Line v. Martin, 153 Ga. App. 135, 264 S.E.2d 585 (1980).

When no evidence is presented from which the jury can ascertain except by mere speculation and conjecture that the plaintiffs would ever have future medical expenses, a charge on this subject is erroneous. Wayco Enters., Inc. v. Crews, 155 Ga. App. 775, 272 S.E.2d 745 (1980).

When a physician testified that the plaintiff's neck pain was chronic, i.e., continuing, and was susceptible to reinjury, and that the physician would recommend surgery if the plaintiff failed to improve through physical therapy alone, the jury was not left to determine the need for future surgery based on conjecture and

speculation alone. Food Lion, Inc. v. Williams, 219 Ga. App. 352, 464 S.E.2d 913 (1995).

Future medical expenses. — Future medical expenses proximately caused by the defendant's negligence are a legitimate item of damages. In awarding damages for future medical expenses, the court must consider that it is making a present cash award for expenses to be incurred in the future. MacDonald v. United States, 900 F. Supp. 483 (M.D. Ga. 1995).

Award for future pain and suffering. — Since the plaintiff's pain and suffering will continue in the future, the plaintiff is entitled to damages for the future pain and suffering, the standard for such award being the enlightened conscience of the judge. Since the plaintiff is receiving an award for damages not yet suffered, the judge is to take that into consideration when arriving at an amount. MacDonald v. United States, 900 F. Supp. 483 (M.D. Ga. 1995).

Repairs to damaged automobile. — When an automobile is damaged in a collision, repairs incurred as a result thereof, not in excess of the original value of the machine, are recoverable. Savannah Elec. Co. v. Crawford, 130 Ga. 421, 60 S.E. 1056 (1908); Lamon v. Perry, 33 Ga. App. 248, 125 S.E. 907 (1924); Olliff v. Howard, 33 Ga. App. 778, 127 S.E. 821 (1925).

Recovery of married woman's expenses. — A married woman cannot recover expenses arising from a personal injury, unless separated from her husband. Wrightsville & Tennille R.R. v. Vaughan, 9 Ga. App. 371, 71 S.E. 691 (1911).

Value of lost use of vehicle. — The jury was authorized to find for the plaintiff, in addition to the difference in the market value of the vehicle before the injury and afterwards, the value of the lost use of the vehicle while it was being repaired, provided that the sum of both elements did not exceed the value of the automobile before the injury with interest thereon. Moffett v. McCurry, 84 Ga. App. 853, 67 S.E.2d 807 (1951).

Pleading of expenses. — The different items of expenses should be pled separately. Central Ga. Power Co. v. Fincher, 141 Ga. 191, 80 S.E. 645 (1913).

Trial court erred in dismissing a real property purchaser's claims of negligent misrepresentation and promissory estoppel under O.C.G.A. § 13-3-44 as there was no requirement that the real property purchase agreement be enforceable for those claims to be actionable, and the agreement was enforceable at the time that it was made, such that reliance could have been had thereon; damages were properly pled as recovery under promissory estoppel could have been had for damages that were equitable and necessary to prevent injustice, and as to negligent misrepresentation, necessary expenses consequent upon an injury were recoverable under O.C.G.A. § 51-12-7. Hendon Props. v. Cinema Dev., LLC, 275 Ga. App. 434, 620 S.E.2d 644 (2005).

Proof of expenses necessary. — Proof of the expenses growing out of damage received is always required to entitle a recovery therefor. Mayor of Savannah v. Waldner, 49 Ga. 316 (1873).

It is sufficient to show that the expenses have been incurred, even though the expenses are not paid. Murphey v. Northeastern Constr. Co., 31 Ga. App. 715, 121 S.E. 848 (1924); Allen v. Southern Ry., 33 Ga. App. 209, 126 S.E. 722 (1924).

Jury instructions. — Such a charge is proper, although there is no direct testimony that such expenses are reasonable. Georgia Ry. & Elec. Co. v. Tompkins, 138 Ga. 596, 75 S.E. 664 (1912).

A charge that the plaintiff was entitled to recover reasonable expenses incurred for medical attention on account of injuries was equivalent to a charge of this section. Orange Crush Bottling Co. v. Smith, 35 Ga. App. 92, 132 S.E. 259 (1926).

Cited in Anderson v. Hilton & Dodge Lumber Co., 121 Ga. 688, 49 S.E. 725 (1905); Lawrence v. Atlanta Gas Light Co., 49 Ga. App. 444, 176 S.E. 75 (1934); Atlanta, Birmingham & Coast R.R. v. Patterson, 73 Ga. App. 551, 37 S.E.2d 422 (1946); Copeland v. Carpenter, 206 Ga. 822, 59 S.E.2d 245 (1950); Porter v. Bland, 105 Ga. App. 703, 125 S.E.2d 713 (1962); Pennsylvania Thresherman & Farmers

Mut. Cas. Ins. Co. v. Gardner, 107 Ga. App. 472, 130 S.E.2d 507 (1963); Partain v. Maddox, 131 Ga. App. 778, 206 S.E.2d 618 (1974); Aretz v. United States, 456 F. Supp. 397 (S.D. Ga. 1978); Davis v. Hospital Auth., 154 Ga. App. 654, 269 S.E.2d 867 (1980); Sam Finley, Inc. v. Barnes, 156 Ga. App. 802, 275 S.E.2d 380 (1980); City of Atlanta v. State Farm Fire & Cas. Co., 160 Ga. App. 822, 287 S.E.2d 665 (1982); Ivey v. Golden Key Realty, Inc., 200 Ga. App. 545, 408 S.E.2d 811 (1991); Nash v. Studdard, 294 Ga. App. 845, 670 S.E.2d 508 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 133 et seq.

C.J.S. — 25 C.J.S., Damages, § 63 et seq.

ALR. — Recovery of expenses for car or storage of property pending action of detinue or replevin, 43 ALR 92.

Medical expense as item of damages in action for personal injury resulting in death, 54 ALR 1077.

Future pain and suffering as element of damages for physical injury, 81 ALR 423.

Determination of quantum of damages for injury to property recoverable against defendant whose wrong concurred with act of God, 112 ALR 1084.

Effect of board or lodging furnished to injured person in connection with hospital or nursing care on damages recoverable in personal injury action, 18 ALR2d 659.

Cost of hiring substitute or assistant during incapacity of injured party as item of damages in action for personal injury, 37 ALR2d 364.

Right of wife to recover in individual capacity for medical expenses of husband injured by third person's negligence, 42 ALR2d 843.

Right to recover as damages attorney's fees incurred in earlier litigation with a third person because of involvement therein through a tortious act of present adversary, 45 ALR2d 1183.

Requisite proof to permit recovery for future medical expenses as item of damages in personal injury action, 69 ALR2d 1261.

Measure of evicted tenant's recovery for improvements made by him on premises for lease uses, 71 ALR2d 1104.

Damages for personal injury or death as including value of care in nursing gratuitously rendered, 90 ALR2d 1323.

Necessity and sufficiency, in personal injury or death action, of evidence as to reasonableness of amount charged or paid for accrued medical, nursing, or hospital expenses, 12 ALR3d 1347.

Attorney's fees as element of damages in action for false imprisonment or arrest, or for malicious prosecution, 21 ALR3d 1068.

Medical expenses due to injury to wife as recoverable by her or by husband, 21 ALR3d 1113.

Necessity of expert evidence to warrant submission to jury of issue as to permanency of injury or as to future pain and suffering, or to sustain award of damages on that basis, 41 ALR3d 7.

Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice-versa, 73 ALR3d 515.

Bailee's liability for bailor's expense of recovering stolen object of bailment, 80 ALR3d 264.

Sufficiency of evidence to prove future medical expenses as result of injury to head or brain, 89 ALR3d 87.

Excessiveness or adequacy of damages awarded for injuries to head or brain, or for mental or nervous disorders, 14 ALR4th 328.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, circulatory, digestive, and glandular systems, 14 ALR4th 539.

Excessiveness or adequacy of damages awarded for injuries to back, neck, or spine, 15 ALR4th 294.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, respiratory system, 15 ALR4th 519.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering, 55 ALR4th 186.

Valuing damages in personal injury actions awarded for gratuitously rendered nursing and medical care, 49 ALR5th 685.

Excessiveness or adequacy of damages awarded for injuries to head or brain, 50 ALR5th 1.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system, 51 ALR5th 467.

51-12-8. When damage too remote for recovery generally.

If the damage incurred by the plaintiff is only the imaginary or possible result of a tortious act or if other and contingent circumstances preponderate in causing the injury, such damage is too remote to be the basis of recovery against the wrongdoer. (Orig. Code 1863, § 3004; Code 1868, § 3017; Code 1873, § 3072; Code 1882, § 3072; Civil Code 1895, § 3912; Civil Code 1910, § 4509; Code 1933, § 105-2008.)

Law reviews. — For article discussing plaintiff conduct and the emerging doctrine of comparative causation of torts, see 29 Mercer L. Rev. 403 (1978). For article, "Pre-Impact Pain and Suffering," see 26 Ga. St. B. J. 60 (1989). For article, "Jury Instructions and Proximate Cause: An Uncertain Trumpet in Georgia," see 27 Ga. St. B. J. 60 (1990).

For note discussing tavern keeper liability in Georgia for injury caused by a person to whom an intoxicant was sold, see 9 Ga. L. Rev. 239 (1974).

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General Consideration

Former Code 1933, §§ 105-2007, 105-2008, and 105-2009 (see now O.C.G.A. §§ 51-12-3, 51-12-8, and 51-12-9) must be construed together. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Damages which are uncertain, speculative, remote or conjectural are not recoverable. YMCA v. Bailey, 112 Ga. App. 684, 146 S.E.2d 324 (1965), cert. denied, 385 U.S. 868, 87 S. Ct. 131, 17 L. Ed. 2d 95 (1966).

Georgia law requires that injury be natural and probable consequence of negligence. Maddox Coffee Co. v. Collins, 46 Ga. App. 220, 167 S.E. 306 (1932); Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933); Douglas v. Smith, 578 F.2d 1169 (5th Cir. 1978).

Negligence, to be actionable, must be proximate cause or part of proximate cause of injury received. Lacy v. City of Atlanta, 110 Ga. App. 814, 140 S.E.2d 144 (1964).

Before any negligence, even if proven, can be actionable, that negligence must be the proximate cause of the injuries sued upon. St. Paul Fire & Marine Ins. Co. v. Davidson, 148 Ga. App. 82, 251 S.E.2d 32 (1978).

Damages growing out of breach of contract, in order to form basis of recovery, must be such as could be traced solely to breach, be capable of exact computation, must have arisen according to the usual course of things, and be such as the parties contemplated as a probable result of such breach. Lankford v. Trust Co. Bank, 141 Ga. App. 639, 234 S.E.2d 179 (1977).

If damages are traceable to an act of negligence, but are not its legal or material consequence, or if other and contingent circumstances preponderate largely in causing the injurious effect, such dam-

ages are too remote and contingent to be the basis of a recovery. Gulf Oil Corp. v. Stanfield, 213 Ga. 436, 99 S.E.2d 209 (1957).

It is not necessary that original wrongdoer anticipate or foresee details of possible injury that may result from the wrongdoer's negligence, but it is sufficient if the wrongdoer should anticipate from the nature and character of the negligent act committed by the wrongdoer that injury might result as a natural and reasonable consequence of the wrongdoer's negligence. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

In order that a party be made liable for negligence, it is not necessary that the party should have contemplated or even been able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff, but it is sufficient, if, by exercise of reasonable care, the defendant might have foreseen that some injury would result from the defendant's act or omission, or that consequences of a generally injurious nature might have been expected. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Words "proximate," "immediate," and "direct" are frequently used as synonymous. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Phrase "proximate cause" refers to efficient cause, and in this sense is sometimes referred to as the "immediate and direct" cause, as opposed to "remote." Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Efficient proximate or intervening cause is force or operating factor without which accident could not have happened and must be active, operative, and containing within itself the possibility of potentiality for harm. Cain v. Georgia Power Co., 53 Ga. App. 483, 186 S.E. 229 (1936).

In determining what constitutes proximate cause, each case must depend for solution upon its own particular facts. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933).

In order to establish proximate cause, it is necessary that there be a causal connection between negligent act and injury. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

There may be more than one proximate cause of injury, and the proximate cause of an injury may be two separate and distinct acts of negligence acting concurrently. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

When two concurrent acts of negligence operate in bringing about an injury the person injured may recover from either or both of the persons responsible. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933); Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

The mere fact that the injury would not have been sustained had only one of the acts of negligence occurred will not of itself operate to define and limit the other act as constituting the proximate cause, for, if both acts of negligence contributed directly and concurrently in bringing about the injury, they together will constitute the proximate cause. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933); Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949); Herren v. Abba Cab Co., 155 Ga. App. 443, 271 S.E.2d 11 (1980).

Now, if it appears that the injury resulted from a condition into which there entered both negligent and nonnegligent activities, and that according to the laws of human probability the injury would not have resulted but for the negligent activities, and that, when the negligent and nonnegligent activities united, the injury naturally followed, the law disregards the nonnegligent activities as causes, considers them as but a part of the normal environment, and considers the negligent actor as disturbing that normality, and therefore as being the juridic cause of the injury. Newill v. Atlanta Gas Light Co., 48 Ga. App. 226, 172 S.E. 232 (1933).

If first act clearly superseded second, former not proximate cause. — If two negligent acts are so related that the first would not probably have resulted in injury if the other had not occurred, and the latter amounts, to such a preponderating cause that it probably would have

General Consideration (Cont'd)

produced the injury even if the first negligence had not occurred, or if the author of the latter negligence, with the intermediate effects of the former negligence consciously before the author, is guilty of a new negligent act which preponderates in producing the injurious effect, we say that the first negligent cause is not the proximate cause, that the intervention of the latter negligence breaks the chain of causal connection so far as juridic purposes are concerned. Cain v. Georgia Power Co., 53 Ga. App. 483, 186 S.E. 229 (1936).

To relieve the defendant from liability when both the defendant and a third party were negligent, it must appear that the negligence of the third party intervened and superseded the defendant's negligence. Herren v. Abba Cab Co., 155 Ga. App. 443, 271 S.E.2d 11 (1980).

Question of proximate cause is one for jury except in palpably clear and indisputable cases. Crankshaw v. Piedmont Driving Club, Inc., 115 Ga. App. 820, 156 S.E.2d 208 (1967).

Questions as to diligence and negligence, including contributory negligence, and what negligence constitutes the proximate cause of the injury complained of, are questions peculiarly for the jury, except where the solution of the question appears to be palpably clear, plain, and indisputable. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932).

The determination of questions as to negligence lies peculiarly within the province of the jury and in the exercise of this function, the question as to what constitutes the proximate cause of an injury complained of may be directly involved as one of the essential elements and disputed issues in the ascertainment of what negligence, as well as whose negligence, the injury is properly attributable to. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933).

The determination of the proximate cause of an injury is for determination by the jury except in clear and unmistakable cases, and not for determination as a matter of law by the court. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

When the proximate cause of an injury depends upon a state of facts from which different minds might reasonably draw different inferences, it is a question for consideration by a jury. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

Except in plain and indisputable cases, what negligence as well as whose negligence constitutes the proximate cause of an injury is for determination by the jury under proper instructions from the court. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Whether injuries sued for by a plaintiff, and the damage resulting therefrom, when proximately caused by the negligence of the defendant, either solely or concurrently with the negligence of other parties, is a question for the jury under the general rules of law applicable to the case. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Ordinarily, the question of proximate cause is a question of fact properly for determination by the jury under appropriate instructions from the court as to the applicable principles of law. It is only in plain and indisputable cases that the court as a matter of law will undertake to determine it. Georgia Power Co. v. Womble, 150 Ga. App. 28, 256 S.E.2d 640 (1979).

Court may determine as matter of law only in clear cases. — Only when it clearly appears from the petition that the negligence charged was not the proximate and effective cause of the injury that the court may upon general demurrer (now motion to dismiss), as a matter of law, so determine. Maddox Coffee Co. v. Collins, 46 Ga. App. 220, 167 S.E. 306 (1932).

The court must assume the burden of deciding the question of proximate cause when a jury can draw but one reasonable conclusion if the facts alleged are proved, that conclusion being that the acts of the defendant were not the proximate cause of the injury. Crankshaw v. Piedmont Driving Club, Inc., 115 Ga. App. 820, 156 S.E.2d 208 (1967).

Charging jury on last clear chance doctrine. — The last clear chance doc-

trine is but a phase of proximate cause, and should, if desired to be given in charge, be specially requested. Wright v. Concrete Co., 107 Ga. App. 190, 129 S.E.2d 351 (1962).

Charge not in statutory language as requested. — Failure to give the defendant's written request to charge in the language of O.C.G.A. § 51-12-8 was not error since the trial court instructed the jury on the principles found in the statute although not in the exact language requested. Fidelity Nat'l Bank v. Kneller, 194 Ga. App. 55, 390 S.E.2d 55 (1989), cert. denied, 194 Ga. App. 55, 390 S.E.2d 55 (1990).

Cited in Harrison v. Constitution Publishing Co., 41 Ga. App. 102, 152 S.E. 131 (1930); Cochran v. Wadley S. Ry., 44 Ga. App. 208, 160 S.E. 706 (1931); Millirons v. Blue, 48 Ga. App. 483, 173 S.E. 443 (1934); Lawrence v. Atlanta Gas Light Co., 49 Ga. App. 444, 176 S.E. 75 (1934); Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 379, 28 S.E.2d 329 (1943); East Ala. Coach Lines v. Boyd, 80 Ga. App. 93, 55 S.E.2d 634 (1949); Eastern Fed. Corp. v. Avco-Embassy Pictures, Inc., 326 F. Supp. 1280 (N.D. Ga. 1970); Carr v. Jacuzzi Bros., 133 Ga. App. 70, 210 S.E.2d 16 (1974); Rhodes v. Levitz Furn. Co., 136 Ga. App. 514, 221 S.E.2d 687 (1975); Funding Sys. Leasing Corp. v. Pugh, 530 F.2d 91 (5th Cir. 1976); LDH Properties, Inc. v. Morgan Guar. Trust Co., 145 Ga. App. 132, 243 S.E.2d 278 (1978); Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979); Hill Aircraft & Leasing Corp. v. Tyler, 161 Ga. App. 267, 291 S.E.2d 6 (1982); Baranan v. Fulton County, 250 Ga. 531, 299 S.E.2d 722 (1983); Macon-Bibb County Hosp. Auth. v. Ross, 176 Ga. App. 221, 335 S.E.2d 633 (1985); Wanless v. Winner's Corp., 177 Ga. App. 783, 341 S.E.2d 250 (1986); Maryland Cas. Ins. Co. v. Welchel, 181 Ga. App. 224, 351 S.E.2d 645 (1986); Newman v. Collins, 186 Ga. App. 595, 367 S.E.2d 866 (1988); Williams v. Opriciu, 198 Ga. App. 663, 402 S.E.2d 744 (1991).

Applicability to Specific Cases

1. Lost Profits

Recovery may be had for loss of profits, provided their loss is proximate result of the defendant's wrong and the wrongs can be shown with reasonable certainty. The profits recoverable in such cases are limited to probable, as distinguished from possible benefits, and the profits must be such as would be expected to follow naturally the wrongful act and be certain both in their nature and the cause from which they proceed. Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949).

When the plaintiff seeks, as damages, the loss of expected profits and additional expenses incurred during the time that the plaintiff was away from the plaintiff's candy manufacturing business, while recuperating from the effects of the plaintiff's alleged injuries, and when it appears that the plant would probably have remained open and that production would have continued if the plaintiff's foreman had not also been absent on account of drunkenness, the alleged damages are remote, speculative, contingent, and uncertain. Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949).

Claim for damages by reason of loss of anticipated profits is too remote, conjectural, and speculative to afford basis for cause of action. Tovell v. Legum, 207 Ga. 193, 60 S.E.2d 339 (1950).

Anticipated profits. — The profits of a commercial business are dependent on so many hazards and chances that unless the anticipated profits are capable of ascertainment, and the loss of them traceable directly to the defendant's wrongful act, they are too speculative to afford a basis for the computation of damages. Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949); Georgia Grain Growers Ass'n v. Craven, 95 Ga. App. 741, 98 S.E.2d 633 (1957).

The general rule is that the expected

Applicability to Specific Cases (Cont'd)
1. Lost Profits (Cont'd)

profits of a commercial business are too uncertain, speculative, and remote to permit a recovery for their loss. Georgia Grain Growers Ass'n v. Craven, 95 Ga. App. 741, 98 S.E.2d 633 (1957); Roswell Apts., Inc. v. D.L. Stokes & Co., 105 Ga. App. 163, 123 S.E.2d 682 (1961).

2. Intervening Acts

Principle of remoteness is applicable to situations when intervening agency, such as negligence of another, preponderates in causing plaintiff's injury. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Foreseeable intervening act by third party. — The rule that an intervening act may break the causal connection between an original act of negligence and injury to another is not applicable if the nature of such intervening act was such that it could have reasonably been anticipated or foreseen by the original wrongdoer. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

While the general rule is that if, subsequent to an original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote, still if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act. Blakely v. Johnson, 220 Ga. 572, 140 S.E.2d 857 (1965); Brunswick Pulp & Paper Co. v. Dowling, 111 Ga. App. 123, 140 S.E.2d 912 (1965); Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980); Herren v. Abba Cab Co., 155 Ga. App. 443, 271 S.E.2d 11 (1980).

Third party's failure to guard against defendant's negligence not intervening cause. — The mere negligence of a third person in failing to guard against the defect or specific act or omission of the defendant which caused the injury will not constitute an intervening efficient act which will relieve the defendant from liability. But, when the evidence plainly and manifestly shows that the injury was caused by the intervening efficient act of the third person or the conjunctive acts or omissions of such person and the plaintiff, the defendant cannot be held responsible for having produced the injury, and the question is then one of law for determination by the court, and not one of fact for the jury. The liability of the defendant is limited to those consequences which it should reasonably have anticipated as the natural and probable result of its own act or omission. Georgia Power Co. v. Kinard, 47 Ga. App. 483, 170 S.E. 688 (1933).

The rule that an intervening and independent wrongful act of a third person producing the injury, and without which it would not have occurred, should be treated as the proximate cause, insulating and excluding the negligence of the defendant, would not apply if the defendant had reasonable grounds for apprehending that such wrongful act would be committed. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980); Decker v. Gibson Prods. Co., 679 F.2d 212 (11th Cir. 1982).

Intervening criminal act by third party. — In a suit for damages, when it appears upon the face of the plaintiff's petition that there intervened between the alleged negligence of the defendant and the damage sustained by the plaintiff the independent criminal act of a third person, which was the direct and proximate cause of the damage, the petition should be dismissed on general demurrer (now motion to dismiss), but this general rule does not if the defendant had reasonable grounds for apprehending that the criminal act would be committed. Gulf Oil Corp. v. Stanfield, 213 Ga. 436, 99 S.E.2d 209 (1957); Blakely v. Johnson, 220 Ga. 572, 140 S.E.2d 857 (1965).

3. Miscellaneous

No recovery for malpractice when no proof physician's acts proximately

caused additional suffering. — A plaintiff cannot recover for malpractice when there is not sufficient evidence that such physician's alleged failure to use the requisite degree of skill and diligence in treatment either proximately caused or contributed to cause the plaintiff additional suffering. Parrott v. Chatham County Hosp. Auth., 145 Ga. App. 113, 243 S.E.2d 269 (1978).

Proximate cause not shown. — Plaintiff failed to present any evidence of proximate causation, i.e., evidence within a reasonable degree of medical certainty that the decedent would have survived but for the defendant's alleged negligence, based on the physician's decision to transfer the decedent to another hospital. Anthony v. Chambless, 231 Ga. App. 657, 500 S.E.2d 402 (1998).

In an action based on a non-sterile needle strike injury, because the plaintiffs offered no evidence of actual exposure to HIV or AIDS or hepatitis, their recovery for fear and mental anguish was per se unreasonable as a matter of law. Russaw v. Martin, 221 Ga. App. 683, 472 S.E.2d 508 (1996).

Streetcar operator's last clear chance to avoid hitting car on tracks. — When, in order to avoid a street obstruction, a person traveling in an automobile along the street went upon the track in front of a streetcar which the person saw approaching and which was in about 50 yards of the person, and was injured by being run into by the streetcar before the person could get off the track, although in going upon the track the person may have been negligent in misjudging the speed at which the streetcar was being operated, the person's negligence in this respect did not as a matter of law constitute the proximate cause of the injury and bar a recovery by the person when the operator of the streetcar saw the person go upon the track when 50 yards away, and was aware of the person's dangerous situation upon the track, and could afterwards, in the exercise of ordinary care, have checked the speed of the streetcar, and thereby avoided the injury, but on the contrary, accelerated the speed of the car, was a new operator, and, at the time of the injury, was negligently operating the car. Georgia Power Co. v. Mendelson, 45 Ga. App. 82, 163 S.E. 243 (1932).

One who is unlawfully ejected from train may recover all damages which proximately flow from expulsion, excluding all damages which, although in some measure traceable to the wrongful act, are not its natural and provable consequence. Devero v. Atlantic Coast Line R.R., 51 Ga. App. 699, 181 S.E. 421 (1935).

A recovery for damage which, after an illegal ejection, is sustained because of any resulting peril or resulting exposure or from a necessary effort to reach a place of security, is proper; but not damage which arises from needless exposure or unnecessary effort; any consequential damages also must be lightened so far as may be done by the use of ordinary care and diligence. Devero v. Atlantic Coast Line R.R., 51 Ga. App. 699, 181 S.E. 421 (1935).

Truck, stationary at curb, though illegally parked, cannot be proximate cause of accident to child who ran from behind it in front of another automobile, but was only an obstruction to the vision, which imposed upon the child and the driver of the other automobile an added duty to exercise care. Cain v. Georgia Power Co., 53 Ga. App. 483, 186 S.E. 229 (1936).

Action of drunk front seat passenger. — There was no evidence that the driver could have anticipated the drunk front seat passenger's suicidal criminal act before the fatal collision. Brown v. Mobley, 227 Ga. App. 140, 488 S.E.2d 710 (1997).

Loan deficiencies following auto accident. — Trial court properly granted summary judgment to a driver on the owner's claim to recover the loan deficiency on the owner's wrecked vehicle as consequential damages because the owner had already been compensated for the fair market value of the wrecked vehicle and, pursuant to O.C.G.A. §§ 51-12-3(b), 51-12-8, and 51-12-9, the owner's outstanding vehicle loan amount was not the legal and natural consequence of the collision. McIntire v. Perkins, 317 Ga. App. 181, 729 S.E.2d 529 (2012), cert. denied, No. S12C1976, 2013 Ga. LEXIS 37 (Ga. 2013).

Applicability to Specific Cases (Cont'd)
3. Miscellaneous (Cont'd)

Single cause of injuries shown. — O.C.G.A. § 51-12-8 did not apply when the only evidence was that the plaintiff's injuries were received in the accident in which the defendant admitted the defendant was negligent. Richardson v. Downer, 232 Ga. App. 721, 502 S.E.2d 744 (1998).

Conduct of sheriff and the sheriff's deputies in transporting a felon was too remote to be the basis of recovery for the death of the plaintiff's husband, who was accidentally shot and killed by the felon using a gun wrested from a deputy during a successful escape attempt shortly before the shooting incident. Collie v. Hutson, 175 Ga. App. 672, 334 S.E.2d 13 (1985).

Mental anguish not resulting from shock or fright. — Since the owners of a restaurant suffered no physical impact or injury of any kind when bricks collapsed and caused damage to their restaurant, and it was clear from their testimony that their alleged mental anguish did not result from shock or fright at the trespass, but was a consequence of their worry and distress over the failure of their business and subsequent bankruptcy, damages traceable to the act, but which were not its legal and natural consequence, were too remote and contingent to be recovered. Broadfoot v. Aaron Rents, Inc., 200 Ga. App. 755, 409 S.E.2d 870 (1991).

Negligent infliction of emotional distress claim failed. — Noting that Georgia courts and O.C.G.A. § 51-12-8 appeared to have not adopted a theory of liability premised on the mere "increased risk" of suffering from a future disease or injury, the U.S. District Court for the Northern District of Georgia did not perceive the presence of subclinical effects from the workers' exposure to beryllium at the manufacturer employer's plant as a cognizable "injury" under Georgia law; thus, those workers who were alleged to have endured only such effects failed to cross the threshold hurdle the Georgia courts had erected for recovery for negligently inflicted emotional distress. Parker v. Brush Wellman, Inc., 377 F. Supp. 2d 1290 (N.D. Ga. 2005).

Damage to credit reputation too remote. — Plaintiff had no cognizable claim for damage to the plaintiff's credit reputation which could be attributed to the collapse of an adjacent building since there was evidence that the restaurant had been in financial trouble from the day the restaurant opened and had consistently lost money. Broadfoot v. Aaron Rents, Inc., 200 Ga. App. 755, 409 S.E.2d 870 (1991).

Potential contamination from sewer backup too speculative. — Appellate court affirmed a trial court's grant of partial summary judgment as it related to any claim by the property owner to recover for the cost of remediation of a potential contamination because the mere possibility or potential for bacterial contamination was insufficient to state a claim to damages for a continuing, abatable nuisance, but was reversed to the extent that the trial court granted summary judgment on any claim to recover for the remediation of any actual contamination found in the building. J. N. Legacy Group v. City of Dallas, 322 Ga. App. 475, 745 S.E.2d 721 (2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, §§ 312, 334.

C.J.S. — 25 C.J.S., Damages, § 36 et seq.

ALR. — Right of landowner to recover for personal injuries incidental to trespass on his land, 32 ALR 921.

Right of one who has acted for another to recover for damage to reputation or business in consequence of the latter's failure to keep his engagement with third persons, 42 ALR 1094.

Liability of carrier which negligently delays transportation or delivery for loss of or damage to goods from causes for which it is not otherwise responsible, 46 ALR 302.

Pain incident to surgical operation or medical treatment as an element of damages for personal injuries, 51 ALR 1122.

Liability of one who leaves building materials accessible to children for injury to third person by child's act, 62 ALR 833.

"Sentimental" losses, including mental anguish, loss of society, and loss of marital, filial, or parental care and guidance, as elements of damages in action for wrongful death, 74 ALR 11.

Intervening criminal act as breaking causal chain, 78 ALR 471.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from a middleman, 88 ALR 527; 105 ALR 1502; 111 ALR 1239; 140 ALR 191; 142 ALR 1490.

Liability of telegraph company for punitive damages for wrongful or negligent acts of employees as regards messages, 89 ALR 356.

Increase in insurance rates or loss of opportunity to obtain insurance in consequence of another's tort as ground of liability, 92 ALR 1205.

Inadequacy of appliance for purpose contemplated by safety appliance act as proximate cause of and ground of liability for injury to employee who was using it for another purpose, 96 ALR 1138.

Sufficiency of instruction on contributory negligence as respects the element of proximate cause, 102 ALR 411.

Measure of damages recoverable for loss of or failure to obtain employment for indefinite term, as result of telegraph company's breach of duty as to transmission or delivery of message, 103 ALR 546.

Defect in street or highway as proximate cause of injury immediately caused by collision between two vehicles, 104 ALR 1231.

Damage incident to travel on detour as part of recovery for wrongfully preventing or impeding use of highway, 106 ALR 1305.

Negligence in repairing or servicing automobile as proximate cause of subsequent injury or damage, 118 ALR 1129.

Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in value of property or its use, 142 ALR 1307.

Damages on account of loss of earnings or impairment of earning capacity due to wife's personal injury as recoverable by her or by her husband, 151 ALR 479.

Foreseeability as an element of negligence and proximate cause, 155 ALR 157; 100 ALR2d 942.

Loss of profits of a business in which plaintiff is interested as a factor in determining damages in action for personal injuries, 12 ALR2d 288.

Proximate cause in malpractice cases, 13 ALR2d 11.

Seller's or manufacturer's liability for injuries as affected by buyer's or user's allergy or unusual susceptibility to injury from article, 26 ALR2d 963.

Negligence causing dazed or stunned condition as proximate cause of injuries occasioned by such condition, 29 ALR2d 690.

Liability of storekeeper for injury of customer by another customer's use or handling of stock or equipment, 42 ALR2d 1103.

Liability of private person negligently causing malfunctioning, removal, or extinguishment of traffic signal or sign for subsequent motor vehicle accident, 64 ALR2d 1364.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in an action for personal injury or death, 81 ALR2d 733.

Obstruction of sidewalk as proximate cause of injury to pedestrian forced to go into street and there injured, 93 ALR2d 1187.

Right of tort-feasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment, 8 ALR3d 639.

Injury or disability resulting from medical treatment for accident as proximately caused by original accident within coverage of accident or disability insurance, 25 ALR3d 1386.

Proximate cause: liability of tort-feasor for injured person's subsequent injury or reinjury, 31 ALR3d 1000.

Products liability: alteration of product after it leaves hands of manufacturer or seller as affecting liability for product-caused harm, 41 ALR3d 1251.

Profits of business as factor in determining loss of earnings or earning capacity in action for personal injury or death, 45 ALR3d 345.

Absolute liability for blasting operations as extending to injury or damage not directly caused by debris or concussion from explosion, 56 ALR3d 1017.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property, 61 ALR3d 922.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status, 61 ALR3d 944.

Proof of causation of intoxication as a prerequisite to recovery under Civil Damage Act, 64 ALR3d 882.

Civil Damage Act: liability of one who furnishes liquor to another for consumption by third parties, for injury caused by consumer, 64 ALR3d 922.

Liability of one causing physical injuries as a result of which injured party attempts or commits suicide, 77 ALR3d 311.

Right of action at common law for damages sustained by plaintiff in consequence of sale of intoxicating liquor or habit-forming drugs to another, 97 ALR3d 528; 62 ALR4th 16.

Recovery of anticipated lost profits of new business: post-1965 cases, 55 ALR4th 507.

Social host's liability for injuries incurred by third parties as a result of intoxicated guest's negligence, 62 ALR4th 16.

Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment, 72 ALR4th 231.

Recovery for emotional distress based on fear of contracting HIV or AIDS, 59 ALR5th 535.

Recovery for exposure to beryllium, 16 ALR6th 143.

Validity, construction, and application of products liability statute precluding or limiting recovery where product has been altered or modified after leaving hands of manufacturer or seller, 13 A.L.R.7th 8.

51-12-9. How remoteness ascertained.

Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. However, damages traceable to the act, but which are not its legal and natural consequence, are too remote and contingent to be recovered. (Orig. Code 1863, § 3005; Code 1868, § 3018; Code 1873, § 3073; Code 1882, § 3073; Civil Code 1895, § 3913; Civil Code 1910, § 4510; Code 1933, § 105-2009.)

Law reviews. — For article discussing plaintiff conduct and the emerging doctrine of comparative causation of torts, see 29 Mercer L. Rev. 403 (1978). For article, "Jury Instructions and Proximate Cause: An Uncertain Trumpet in Georgia," see 27 Ga. St. B. J. 60 (1990).

For note discussing tavern keeper liability in Georgia for injury caused by a person to whom an intoxicant was sold, see 9 Ga. L. Rev. 239 (1974).

For comment on Robinson v. Pollard, 131 Ga. App. 105, 205 S.E.2d 86 (1974), holding owner of motor vehicle has no duty to third person injured by intermeddler, see 26 Mercer L. Rev. 373 (1974).

JUDICIAL DECISIONS

Analysis

General Consideration
Proximate Cause

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2. Intervening Acts
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Jury Instructions and Decisions

General Consideration

Former Code 1933, §§ 105-2007, 105-2008, and 105-2009 (see now O.C.G.A. §§ 51-12-3, 51-12-8, and 51-12-9) must be construed together. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Basic construction. — First sentence of this section is an application to the law of damages of the rule that a man intends the natural and probable consequences of one's act. The liability for all injury follows from the prime, leading cause. Rucker v. Athens Mfg. Co., 54 Ga. 84 (1875); Gaskins v. City of Atlanta, 73 Ga. 746 (1884); Reeves v. Maynard, 32 Ga. App. 380, 123 S.E. 181, cert. denied, 32 Ga. App. 807 (1924).

The second sentence of this section is the converse proposition of the first, namely, an intervening independent cause may cause the damage, and absolve the defendant from liability. Brimberry v. Savannah, Fla. & W. Ry., 78 Ga. 641, 3 S.E. 274 (1887).

An exception to former Code 1933, § 105-2009 (see now O.C.G.A. § 51-12-9) was created by former Code 1933, § 105-2010 (see now O.C.G.A. § 51-12-10), permitting the jury to consider remote damages when the breach of the contract, or the tort, is intentional and for the purpose of depriving the party injured of remote benefits. Spires v. Goldberg, 26 Ga. App. 530, 106 S.E. 585 (1921).

Georgia law requires that injury be natural and probable consequence of negligence. Maddox Coffee Co. v. Collins, 46 Ga. App. 220, 167 S.E. 306 (1932); Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933); Douglas v. Smith, 578 F.2d 1169 (5th Cir. 1978).

In tort actions consequential damages which are the necessary and connected effect of the tortious act, and which are the legal and natural result of the act, may be recovered, though contingent to some extent. Kroger Co. v. Perpall, 105 Ga. App. 682, 125 S.E.2d 511 (1962).

Damages growing out of breach of contract, in order to form basis of recovery, must be such as could be traced solely to breach, be capable of exact computation, must have arisen according to the usual course of things, and be such as the parties contemplated as a probable result of such breach. Lankford v. Trust Co. Bank, 141 Ga. App. 639, 234 S.E.2d 179 (1977).

Damages too remote when not legal result of act. — If damages are traceable to an act of negligence, but are not its legal or material consequence, or if other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote and contingent to be the basis of a recovery. Gulf Oil Corp. v. Stanfield, 213 Ga. 436, 99 S.E.2d 209 (1957).

Not essential that wrongdoer anticipate particular injury. — If the defendant should have foreseen that some injury would likely result from a defect of which the defendant had knowledge, or of which the defendant should have known, it is not essential to liability that the defendant should have anticipated the particular injury which did in fact result. Mathis v. Mathis, 42 Ga. App. 1, 155 S.E. 88 (1930).

It is not necessary to a defendant's liability, after the defendant's negligence has been established, to show, in addition thereto, that the consequences of the defendant's negligence could have been foreseen by the defendant; it is sufficient that the injuries are the natural, though not the necessary and inevitable result of the negligence fault — such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question. Watkins v. Jacobs Pharmacy Co., 48 Ga. App. 38, 171 S.E. 830 (1933).

A person charged with negligence is liable only for those injuries which a prudent man in the exercise of care could

General Consideration (Cont'd)

have reasonably foreseen or expected as the natural and probable consequence of the person's act or the person's omission of duty. Watkins v. Jacobs Pharmacy Co., 48 Ga. App. 38, 171 S.E. 830 (1933).

It is not necessary that an original wrongdoer anticipate or foresee the details of a possible injury that may result from the wrongdoer's negligence, but it is sufficient if the wrongdoer should anticipate from the nature and character of the negligent act committed by the wrongdoer that injury might result as a natural and reasonable consequence of the wrongdoer's negligence. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

In order that a party be made liable for negligence, it is not necessary that the party should have contemplated or even been able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff, but it is sufficient, if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from the defendant's act or omission, or that the consequences of a generally injurious nature might have been expected. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949); Corey v. Jones, 650 F.2d 803 (5th Cir. 1981).

To hold the defendant liable, it must be shown either that the act complained of was the sole occasion of injury, or that it put in operation other causal forces, such as were direct, natural, and probable consequences of the original act or that intervening agency could have reasonably been anticipated or foreseen by the defendant as the original wrongdoer. Kells v. Northside Realty Assocs., 156 Ga. App. 164, 274 S.E.2d 66 (1980).

Result intended by wrongdoer cannot be remote. Bankers Health & Life Ins. Co. v. Fryhofer, 114 Ga. App. 107, 150 S.E.2d 365 (1966).

Cited in Georgia R.R. v. Hayden, 71 Ga. 518, 51 Am. R. 274 (1883); Willingham v. Hooven, Owens, Rentschler & Co., 74 Ga. 233, 58 Am. R. 435 (1884); Stewart v. Lanier House Co., 75 Ga. 582 (1885); Western Union Tel. Co. v. Manson, 21 Ga. App. 737, 94 S.E. 1033 (1918); Hughes v. Bivins, 31 Ga. App. 198, 121 S.E. 590 (1923); Haas & Haas v. Marks, 158 Ga. 267, 123 S.E. 109 (1924); Rome Ry. & Light Co. v. King, 33 Ga. App. 383, 126 S.E. 294 (1925); Cochran v. Wadley S. Ry., 44 Ga. App. 208, 160 S.E. 706 (1931); Millirons v. Blue, 48 Ga. App. 483, 173 S.E. 443 (1934); Lawrence v. Atlanta Gas Light Co., 49 Ga. App. 444, 176 S.E. 75 (1934); Weathers Bros. Transf. Co. v. Jarrell, 72 Ga. App. 317, 33 S.E.2d 805 (1945); East Ala. Coach Lines v. Boyd, 80 Ga. App. 93, 55 S.E.2d 634 (1949); Freeman v. Busch Jewelry Co., 98 F. Supp. 963 (N.D. Ga. 1951); Georgia Power Co. v. Pittman, 92 Ga. App. 673, 89 S.E.2d 577 (1955); Dukes v. Pure Oil Co., 112 Ga. App. 111, 143 S.E.2d 769 (1965); Hodge v. Dixon, 119 Ga. App. 397, 167 S.E.2d 377 (1969); Millard v. AAA Electrical Contractors & Eng'rs, 119 Ga. App. 548, 167 S.E.2d 679 (1969); Carr v. Jacuzzi Bros., 133 Ga. App. 70, 210 S.E.2d 16 (1974); Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979); Sam Finley, Inc. v. Barnes, 156 Ga. App. 802, 275 S.E.2d 380 (1980); Club Mediterranee v. Stedry, 159 Ga. App. 53, 283 S.E.2d 30 (1981); Davis v. Cincinnati Ins. Co., 160 Ga. App. 813, 288 S.E.2d 233 (1982); Hill Aircraft & Leasing Corp. v. Tyler, 161 Ga. App. 267, 291 S.E.2d 6 (1982); Wanless v. Winner's Corp., 177 Ga. App. 783, 341 S.E.2d 250 (1986); All-Georgia Dev., Inc. v. Kadis, 178 Ga. App. 37, 341 S.E.2d 885 (1986); Newman v. Collins, 186 Ga. App. 595, 367 S.E.2d 866 (1988); Strickland v. DeKalb Hosp. Auth., 197 Ga. App. 63, 397 S.E.2d 576 (1990); Barber v. Collins, 201 Ga. App. 104, 410 S.E.2d 444 (1991); Construction Lender, Inc. v. Sutter, 228 Ga. App. 405, 491 S.E.2d 853 (1997); Tucker Fed. Savs. & Loan Ass'n v. Balogh, 228 Ga. App. 482, 491 S.E.2d 915 (1997).

Proximate Cause

Proximate cause is defined in this section. Union Carbide Corp. v. Holton, 136 Ga. App. 726, 222 S.E.2d 105 (1975).

Words "proximate," "immediate," and "direct" are frequently used as synonymous. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Phrase "proximate cause" refers to efficient cause, and in this sense is sometimes referred to as the "immediate and direct" cause, as opposed to "remote." Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Efficient, proximate, or intervening cause is force or operating factor without which accident could not have happened and must be active, operative, and containing within itself the possibility of potentiality for harm. Cain v. Georgia Power Co., 53 Ga. App. 483, 186 S.E. 229 (1936).

In determining what constitutes proximate cause, each case must depend for solution upon its own particular facts. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933).

Proof of causation. — To warrant a recovery in damages, the causal connection, between the negligence or wrong done and the physical injury suffered, must be proved by facts based upon direct testimony, or the opinion of experts, and must not depend upon conjecture or guesswork. Western Union Tel. Co. v. Ford, 10 Ga. App. 606, 74 S.E. 70 (1912).

In order to establish proximate cause, it is necessary that there be a causal connection between negligent act and injury. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

There may be more than one proximate cause of injury, and the proximate cause of an injury may be two separate and distinct acts of negligence acting concurrently. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

When two concurrent acts of negligence operate in bringing about an injury the person injured may recover from either or both of the persons responsible. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933); Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

The mere fact that the injury would not have been sustained had only one of the acts of negligence occurred will not of itself operate to define and limit the other act as constituting the proximate cause, for, if both acts of negligence contributed directly and concurrently in bringing about the injury, the acts together will constitute the proximate cause. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933); Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949); Herren v. Abba Cab Co., 155 Ga. App. 443, 271 S.E.2d 11 (1980); Corey v. Jones, 650 F.2d 803 (5th Cir. 1981).

Now, if it appears that the injury resulted from a condition into which there entered both negligent and nonnegligent activities, and that according to the laws of human probability the injury would not have resulted but for the negligent activities, and that, when the negligent and nonnegligent activities united, the injury naturally followed, the law disregards the nonnegligent activities as causes, considers them as but a part of the normal environment, and considers the negligent actor as disturbing that normality, and therefore as being the juridic cause of the injury. Newill v. Atlanta Gas Light Co., 48 Ga. App. 226, 172 S.E. 232 (1933).

If first act clearly supersedes second, former not proximate cause. — If two negligent acts are so related that the first would not probably have resulted in injury if the other had not occurred, and the latter amounts, to such a preponderating cause that it probably would have produced the injury even if the first negligence had not occurred, or if the author of the latter negligence, with the intermediate effects of the former negligence consciously before the author, is guilty of a new negligent act which preponderates in producing the injurious effect, we say that the first negligent cause is not the proximate cause, that the intervention of the latter negligence breaks the chain of causal connection so far as juridic purposes are concerned. Cain v. Georgia Power Co., 53 Ga. App. 483, 186 S.E. 229 (1936).

To relieve the defendant from liability when both the defendant and a third party were negligent, it must appear that the negligence of the third party intervened and superseded the defendant's negligence. Herren v. Abba Cab Co., 155

Proximate Cause (Cont'd)

Ga. App. 443, 271 S.E.2d 11 (1980).

Applicability to Specific Cases

1. Lost Profits

Recovery may be had for loss of profits, provided their loss is proximate result of the defendant's wrong and the loss can be shown with reasonable certainty. The profits recoverable in such cases are limited to probable, as distinguished from possible benefits, and the losses must be such as would be expected to follow naturally the wrongful act and be certain both in their nature and the cause from which the losses proceed. Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949).

When the plaintiff seeks, as damages, the loss of expected profits and additional expenses incurred during the time that the plaintiff was away from the plaintiff's candy manufacturing business, while recuperating from the effects of the plaintiff's alleged injuries, and when it appears that the plant would probably have remained open and that production would have continued if the plaintiff's foreman had not also been absent on account of drunkenness, the alleged damages are remote, speculative, contingent, and uncertain. Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949).

Claim for damages by reason of loss of anticipated profits is too remote, conjectural, and speculative to afford basis for cause of action. Tovell v. Legum, 207 Ga. 193, 60 S.E.2d 339 (1950).

Lost profits. — The profits of a commercial business are dependent on so many hazards and chances that unless the anticipated profits are capable of ascertainment, and the loss of the profits traceable directly to the defendant's wrongful act, the profits are too speculative to afford a basis for the computation of damages. Norris v. Pig'n Whistle Sandwich Shop, Inc., 79 Ga. App. 369, 53 S.E.2d 718 (1949); Georgia Grain Growers Ass'n v. Craven, 95 Ga. App. 741, 98 S.E.2d 633 (1957).

The general rule is that the expected profits of a commercial business are too uncertain, speculative, and remote to permit a recovery for their loss. Georgia Grain Growers Ass'n v. Craven, 95 Ga. App. 741, 98 S.E.2d 633 (1957); Roswell Apts., Inc. v. D.L. Stokes & Co., 105 Ga. App. 163, 123 S.E.2d 682 (1961).

Loss of prospective profits is ordinarily too remote for recovery. Slater v. Russell, 100 Ga. App. 563, 112 S.E.2d 178 (1959).

2. Intervening Acts

Intervening act may break causal chain. — There can be no proximate cause when there has intervened between the act of the defendant and the injury to the plaintiff, an independent, intervening, act of someone other than the defendant, which was not foreseeable by the defendant, was not triggered by the defendant's act, and which was sufficient of itself to cause the injury. Union Carbide Corp. v. Holton, 136 Ga. App. 726, 222 S.E.2d 105 (1975).

Principle of remoteness is applicable to situations when intervening agency, such as negligence of another, preponderates in causing plaintiff's injury. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980).

Foreseeable intervening act by third party. — The rule that an intervening act may break the causal connection between an original act of negligence and injury to another is not applicable if the nature of such intervening act was such that it could have reasonably been anticipated or foreseen by the original wrongdoer. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

While the general rule is that if, subsequently to an original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote, still if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not

broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act. Blakely v. Johnson, 220 Ga. 572, 140 S.E.2d 857 (1965); Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980); Herren v. Abba Cab Co., 155 Ga. App. 443, 271 S.E.2d 11 (1980).

Although ordinarily an intervening cause breaks the chain of causation, a defendant may still be liable if the probable consequences could have been reasonably anticipated. Douglas v. Smith, 578 F.2d 1169 (5th Cir. 1978).

The rule that an intervening and independent wrongful act of a third person producing the injury, and without which it would not have occurred, should be treated as the proximate cause, insulating and excluding the negligence of the defendant, would not apply if the defendant had reasonable grounds for apprehending that such wrongful act would be committed. Firestone Tire & Rubber Co. v. Pinyan, 155 Ga. App. 343, 270 S.E.2d 883 (1980); Decker v. Gibson Prods. Co., 679 F.2d 212 (11th Cir. 1982).

Third party's failure to guard against defendant's negligence not intervening cause. — The mere negligence of a third person in failing to guard against the defect or specific act or omission of the defendant which caused the injury will not constitute an intervening efficient act which will relieve the defendant from liability. But, when the evidence plainly and manifestly shows that the injury was caused by the intervening efficient act of the third person or the conjunctive acts or omissions of such person and the plaintiff, the defendant cannot be held responsible for having produced the injury, and the question is then one of law for determination by the court, and not one of fact for the jury. The liability of the defendant is limited to those consequences which it should reasonably have anticipated as the natural and probable result of its own act or omission. Georgia Power Co. v. Kinard, 47 Ga. App. 483, 170 S.E. 688 (1933).

Intervening criminal act by third party. — In a suit for damages, when it appears upon the face of the plaintiff's petition that there intervened between the alleged negligence of the defendant and the damage sustained by the plaintiff the independent criminal act of a third person, which was the direct and proximate cause of the damage, the petition should be dismissed on general demurrer (now motion to dismiss). Gulf Oil Corp. v. Stanfield, 213 Ga. 436, 99 S.E.2d 209 (1957); Blakely v. Johnson, 220 Ga. 572, 140 S.E.2d 857 (1965).

Acts of third persons in creating a nuisance. — A party is not guilty of an actionable nuisance when the injurious consequences were caused by the acts of others. Brimberry v. Savannah, Fla. & W. Ry, 78 Ga. 641, 3 S.E. 274 (1887).

Wind as intervening cause of fire. — Wind, unless extraordinary, is not to be regarded as an intervening proximate cause, after a railway company negligently allows fire to escape from its locomotive and it is communicated to adjacent property. East Tenn., Va. & Ga. Ry. v. Hesters, 90 Ga. 11, 15 S.E. 828 (1892); Albany & N. Ry. v. Wheeler, 6 Ga. App. 270, 64 S.E. 1114 (1909).

3. Miscellaneous

Injury resulting from police officer's high speed pursuit. — The rule formulated by the Court of Appeals in Mixon v. City of Warner Robins, 209 Ga. App. 414, 434 S.E.2d 71 (1993), is problematic in that there is no guidance as to how to establish what "threat to public safety" is "ordinarily incident to high speed police pursuits" so as to determine whether a plaintiff has shown a "higher threat" in a particular situation. Mixon v. City of Warner Robins, 264 Ga. 385, 444 S.E.2d 761 (1994), superseded by statute as stated in City of Winder v. McDougald, 276 Ga. 866, 583 S.E.2d 879 (2003). But see Pearson v. City of Atlanta, 231 Ga. App. 96, 499 S.E.2d 89 (1998), overruled on other grounds by Strength v. Lovett, 311 Ga. App. 35, 714 S.E.2d 723 (2011).

The fact that an officer was performing the officer's professional duty in pursuing a suspect did not preclude the imposition of liability; the decision to initiate or continue pursuit of a suspect could be negligent when heightened risk of injuries to third parties was unreasonable in relation to the interest in apprehending the sus-

Applicability to Specific Cases (Cont'd)
3. Miscellaneous (Cont'd)

pect, so that genuine issues of material fact existed as to the reasonableness of the officer's conduct. Mixon v. City of Warner Robins, 264 Ga. 385, 444 S.E.2d 761 (1994), superseded by statute as stated in City of Winder v. McDougald, 276 Ga. 866, 583 S.E.2d 879 (2003). But see Pearson v. City of Atlanta, 231 Ga. App. 96, 499 S.E.2d 89 (1998), overruled on other grounds by Strength v. Lovett, 311 Ga. App. 35, 714 S.E.2d 723 (2011).

A motorcycle police officer's high speed pursuit of a vehicle that had already been traveling at an excessive speed before the pursuit began does not constitute "proximate cause" of an accident that occurred between the speeding vehicle and another motorist. Sammor v. Mayor of Savannah, 176 Ga. App. 176, 335 S.E.2d 434 (1985).

Drunk front seat passenger. — There was no evidence that the driver could have anticipated the drunk front seat passenger's suicidal criminal act before the fatal collision. Brown v. Mobley, 227 Ga. App. 140, 488 S.E.2d 710 (1997).

Loan deficiencies following auto accident. — Trial court properly granted summary judgment to a driver on the owner's claim to recover the loan deficiency on the owner's wrecked vehicle as consequential damages because the owner had already been compensated for the fair market value of the wrecked vehicle and, pursuant to O.C.G.A. §§ 51-12-3(b), 51-12-8, and 51-12-9, the owner's outstanding vehicle loan amount was not the legal and natural consequence of the collision. McIntire v. Perkins, 317 Ga. App. 181, 729 S.E.2d 529 (2012), cert. denied, No. S12C1976, 2013 Ga. LEXIS 37 (Ga. 2013).

Conduct of sheriff and deputies in transporting a felon was too remote to be the basis of recovery for the death of the plaintiff's husband, who was accidentally shot and killed by the felon using a gun wrested from a deputy during a successful escape attempt shortly before the shooting incident. Collie v. Hutson, 175 Ga. App. 672, 334 S.E.2d 13 (1985).

Failure of telephone company to give service. — When death resulted to a person, because a physician was delayed, solely from the negligence of a telephone company to answer the call, an action for damages under this section may lie. Glawson v. Southern Bell Tel. & Tel. Co., 9 Ga. App. 450, 71 S.E. 747 (1911).

Injury to pride or manhood too remote. — Injury to the pride or manhood of the plaintiff is not the direct result of defendant's act or the basis of damages. Atlanta & R. Air Line R.R. v. Wood, 48 Ga. 565 (1873).

Liability for illegal sale of firearms. — When one has violated the penal statute, which forbids the sale of a pistol to a minor, and injury results therefrom, one should be held liable for the resulting damages. Spires v. Goldberg, 26 Ga. App. 530, 106 S.E. 585 (1921).

Liability of railroad to evicted passenger. — As a general rule under the provision of this section, an evicted passenger cannot recover for inconveniences, hardship, or injury to health originating after reaching the station to which the passenger is entitled to be carried, or needlessly caused by walking and exposure before reaching there. Georgia R.R. & Banking Co. v. Eskew, 86 Ga. 641, 12 S.E. 1061 (1891).

Railroad cannot be liable for damage that a passenger, who missed the passenger's stop, may have sustained while at a hotel, in consequence of any negligence on the part of the hotel's proprietor. Central of Ga. Ry. v. Price, 106 Ga. 176, 32 S.E. 77 (1898).

Mental and physical suffering when telegram delayed. — Mental and physical suffering resulting from a delay by a telegraph company to promptly forward a telegram are not items of damages. Seifert v. Western Union Tel. Co., 129 Ga. 181, 58 S.E. 699, 121 Am. St. R. 210, 11 L.R.A. (n.s.) 1149 (1907).

Mental anguish not resulting from shock or fright. — When the owners of a restaurant suffered no physical impact or injury of any kind when bricks collapsed and caused damage to their restaurant, and it was clear from their testimony that their alleged mental anguish did not result from shock or fright at the trespass,

but was a consequence of their worry and distress over the failure of their business and subsequent bankruptcy, damages traceable to the act, but which were not its legal and natural consequence, were too remote and contingent to be recovered. Broadfoot v. Aaron Rents, Inc., 200 Ga. App. 755, 409 S.E.2d 870 (1991).

Municipality not liable for collision in public street. — When the plaintiff, while riding a bicycle was injured by a collision with a horse and buggy, in a crowded street, the city is not liable to the plaintiff because of the city's failure to keep the streets unobstructed. Shaw v. Mayor of Macon, 6 Ga. App. 306, 64 S.E. 1102 (1909).

Nature of land as independent cause. — When the damage to the property of the plaintiff was produced by a natural slope of the land, the defendant cannot be held liable merely because the defendant constructed ditches. Brimberry v. Savannah, Fla. & W. Ry, 78 Ga. 641, 3 S.E. 274 (1887).

Possibility of promotion not element of damage. — The chances that the plaintiff has for promotion are not an item of damages under this section. Richmond & D.R.R. v. Allison, 86 Ga. 145, 12 S.E. 352, 11 L.R.A. 43 (1890).

Wrongful dishonor of check. — On motion for summary judgment, when a bank customer introduced proof that the payee of a wrongfully dishonored check would not have accepted any untimely tender of the amount owed after the first check was dishonored, the bank had the burden of establishing as a matter of law that the damages the customer suffered were not the result of the bank's wrongful dishonor of the check. Malak v. First Nat'l Bank, 195 Ga. App. 105, 393 S.E.2d 267 (1990).

Damage to credit reputation too remote. — Plaintiff had no cognizable claim for damage to the plaintiff's credit reputation which could be attributed to the collapse of an adjacent building since there was evidence that the restaurant had been in financial trouble from the day it opened and had consistently lost money. Broadfoot v. Aaron Rents, Inc., 200 Ga. App. 755, 409 S.E.2d 870 (1991).

Jury Instructions and Decisions

Improper charge of section. — It is error to charge that the plaintiff must show that the plaintiff's damage was the usual, direct, and necessary consequence of the wrongful act. Brown Store Co. v. Chattahoochee Lumber Co., 121 Ga. 809, 49 S.E. 839 (1905); Georgia Ry. & Power Co. v. Howell, 28 Ga. App. 798, 113 S.E. 101 (1922).

Question of proximate cause is one for jury except in palpably clear and indisputable cases. Crankshaw v. Piedmont Driving Club, Inc., 115 Ga. App. 820, 156 S.E.2d 208 (1967).

Diligence and negligence are jury questions. — Questions as to diligence and negligence, including contributory negligence, and what negligence constitutes the proximate cause of the injury complained of, are questions peculiarly for the jury, except when the solution of the question appears to be palpably clear, plain, and indisputable. Brown v. Savannah Elec. & Power Co., 46 Ga. App. 393, 167 S.E. 773 (1932).

The determination of questions as to negligence lies peculiarly within the province of the jury, and, in the exercise of this function, the question as to what constitutes the proximate cause of an injury complained of may be directly involved as one of the essential elements and disputed issues in the ascertainment of what negligence, as well as whose negligence, the injury is properly attributable to. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933).

The determination of the proximate cause of an injury is for determination by the jury except in clear and unmistakable cases, and not for determination as a matter of law by the court. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

When the proximate cause of an injury depends upon a state of facts from which different minds might reasonably draw different inferences, it is a question for consideration by a jury. Queen v. Patent Scaffolding Co., 46 Ga. App. 364, 167 S.E. 789 (1933).

Except in plain and indisputable cases, what negligence as well as whose negligence constitutes the proximate cause of

Jury Instructions and Decisions (Cont'd)

an injury is for determination by the jury under proper instructions from the court. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Whether injuries sued for by a plaintiff, and the damage resulting therefrom, were proximately caused by the negligence of the defendant, either solely or concurrently with the negligence of other parties, is a question for the jury under the general rules of law applicable to the case. Atlanta Gas Light Co. v. Mills, 78 Ga. App. 690, 51 S.E.2d 705 (1949).

Ordinarily the question of proximate cause is a question of fact properly for determination by the jury under appropriate instructions from the court as to the applicable principles of law. It is only in plain and indisputable cases that the court as a matter of law will undertake to determine it. Georgia Power Co. v. Womble, 150 Ga. App. 28, 256 S.E.2d 640 (1979).

When the evidence does not plainly, palpably and indisputably show a lack of proximate cause, the issue of proximate cause, as well as that of negligence, is for the jury. DeKalb County Hosp. Auth. v. Theofanidis, 157 Ga. App. 811, 278 S.E.2d 712 (1981).

Court may determine as matter of law only in clear cases. — Only when it clearly appears from the petition that the negligence charged was not the proximate and effective cause of the injury that the court may upon general demurrer (now motion to dismiss), as a matter of law, so determine. Maddox Coffee Co. v. Collins, 46 Ga. App. 220, 167 S.E. 306 (1932).

The court must assume the burden of deciding the question of proximate cause when a jury can draw but one reasonable conclusion if the facts alleged are proved, that conclusion being that the acts of the defendant were not the proximate cause of the injury. Crankshaw v. Piedmont Driving Club, Inc., 115 Ga. App. 820, 156 S.E.2d 208 (1967).

While the question of proximate cause is usually submitted to the jury as a question of fact, it may be decided as a matter of law when the evidence shows clearly and palpably that the jury could reasonably draw but one conclusion, that the defendant's acts were not the proximate cause of the injury. Union Carbide Corp. v. Holton, 136 Ga. App. 726, 222 S.E.2d 105 (1975); Kells v. Northside Realty Assocs., 156 Ga. App. 164, 274 S.E.2d 66 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 500.

C.J.S. — 25 C.J.S., Damages, § 36 et seq.

ALR. — Liability for loss of property left unprotected when owner was wrongfully arrested, 5 ALR 362.

Right of landowner to recover for personal injuries incidental to trespass on his land, 32 ALR 921.

Liability of carrier which negligently delays transportation or delivery for loss of or damage to goods from causes for which it is not otherwise responsible, 46 ALR 302.

Liability of one who leaves building materials accessible to children for injury to third person by child's act, 62 ALR 833.

Responsibility of negligent driver of automobile or his employer for damages immediately inflicted by another car, 62 ALR 1181.

Negligence causing accident or threatening property damage as proximate cause of injury sustained in an effort to recover the property or avoid damages, 64 ALR 515; 166 ALR 752.

Intervening criminal act as breaking causal chain, 78 ALR 471.

Injury as proximate cause of death where disease intervenes, 79 ALR 351.

Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from a middleman, 88 ALR 527; 105 ALR 1502; 111 ALR 1239; 140 ALR 191, 142 ALR 1490.

Inadequacy of appliance for purpose contemplated by safety appliance act as proximate cause of and ground of liability

for injury to employee who was using it for another purpose, 96 ALR 1138.

Sufficiency of instruction on contributory negligence as respects the element of proximate cause, 102 ALR 411.

Damage incident to travel on detour as part of recovery for wrongfully preventing or impeding use of highway, 106 ALR 1305.

Determination of quantum of damages for injury to property recoverable against defendant whose wrong concurred with act of God, 112 ALR 1084.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in action for personal injury or death, 130 ALR 164; 81 ALR2d 733.

Foreseeability as an element of negligence and proximate cause, 155 ALR 157; 100 ALR2d 942.

Ejection of passenger as ground of motorbus carrier's liability for subsequent injury or death, 165 ALR 545.

Liability of person furnishing, installing, or maintaining burglar alarm for loss from burglary, 165 ALR 1254.

Negligence causing automobile accident as proximate cause of injury or death resulting from acts done or attempted with reference to person or property involved, 166 ALR 752.

Loss of profits of a business in which plaintiff is interested as a factor in determining damages in action for personal injuries, 12 ALR2d 288.

Negligence causing dazed or stunned condition as proximate cause of injuries occasioned by such condition, 29 ALR2d 690.

Liability of private person negligently causing malfunctioning, removal, or extinguishment of traffic signal or sign for subsequent motor vehicle accident, 64 ALR2d 1364.

Admissibility, as against objection of remoteness, of evidence as to past earnings, upon issue as to amount of damages in action for personal injury or death, 81 ALR2d 733.

Obstruction of sidewalk as proximate cause of injury to pedestrian forced to go into street and there injured, 93 ALR2d 1187.

Foreseeability as an element of negligence and proximate cause, 100 ALR2d 942.

Right of tort-feasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment, 8 ALR3d 639.

Injury or disability resulting from medical treatment for accident as proximately caused by original accident within coverage of accident or disability insurance, 25 ALR3d 1386.

Proximate cause: liability of tort-feasor for injured person's subsequent injury or reinjury, 31 ALR3d 1000.

Products liability: alteration of product after it leaves hands of manufacturer or seller as affecting liability for product-caused harm, 41 ALR3d 1251.

Profits of business as factor in determining loss of earnings or earning capacity in action for personal injury or death, 45 ALR3d 345.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property, 61 ALR3d 922.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status, 61 ALR3d 944.

Proof of causation of intoxication as a prerequisite to recovery under Civil Damage Act, 64 ALR3d 882.

Civil Damage Act: liability of one who furnishes liquor to another for consumption by third parties, for injury caused by consumer, 64 ALR3d 922.

Liability of one causing physical injuries as a result of which injured party attempts or commits suicide, 77 ALR3d 311.

Liability, in motor vehicle-related cases, of governmental entity for injury or death resulting from failure to repair pothole in surface of highway or street, 98 ALR3d 101.

Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment, 72 ALR4th 231.

Rescue doctrine: liability of one who negligently causes motor vehicle accident

for injuries to person subsequently attempting to rescue persons or property, 73 ALR4th 737.

Validity, construction, and application of products liability statute precluding or limiting recovery where product has been altered or modified after leaving hands of manufacturer or seller, 13 A.L.R.7th 8.

51-12-10. Exception to rule against recovery of remote damages.

When a tort is committed, a contract is broken, or a duty is omitted with knowledge and for the purpose of depriving the plaintiff of certain contemplated benefits, the remote damages occasioned thereby become a proper subject for the consideration of the jury. (Orig. Code 1863, § 3006; Code 1868, § 3019; Code 1873, § 3074; Code 1882, § 3074; Civil Code 1895, § 3914; Civil Code 1910, § 4511; Code 1933, § 105-2010.)

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When remote damages recoverable. — Damages traceable to a tortious act, but not its legal or natural consequence, are too remote and contingent to be recoverable unless the original actor, whose act would not otherwise be the legal or natural cause of the damages, acts knowingly for the purpose of bringing about the injury. Hodge v. Dixon, 119 Ga. App. 397, 167 S.E.2d 377 (1969).

False messages sent by telegraph operator. — When a telegraph operator knowingly sends false, fraudulent, and fictitious messages, which are intended to and do deceive the addressee, liability for loss of profits is not too remote. Jenkins v. Cobb, 47 Ga. App. 456, 170 S.E. 698 (1933).

Illegal voting of stock. — When stockholders falsely and fraudulently vote stock that has been bought by the plaintiff, and defeat the plaintiff's election as president of the corporation, the plaintiff may recover any loss that the plaintiff has sustained. Witham v. Cohen, 100 Ga. 670, 28 S.E. 505 (1897).

Interference with attorney's contract. — Since an attorney's contract of employment, though contingent in nature, is a property right, when the plaintiff alleges a wrongful and willful invasion of that right by the defendant, the plaintiff is entitled to recover for it — at least nominal damages. This is true even if no special damages are proven. Bankers Health & Life Ins. Co. v. Fryhofer, 114 Ga. App. 107, 150 S.E.2d 365 (1966).

Right of beneficiary interfered with. — A beneficiary named by a member in a certificate issued by a benefit society may recover damages from a third person who fraudulently induces the member to change the certificate and name the third party as beneficiary. Mitchell v. Langley, 143 Ga. 827, 85 S.E. 1050 (1915).

Remote damages not allowed for bankruptcy trustee. — Bankruptcy trustee was not entitled to jury consideration of remote damages under O.C.G.A. § 51-12-10 since the trustee's claim was that the debtor's former attorney's violation of fiduciary duties owed to the debtor caused an excess judgment and the amount owed on the judgment because, even assuming that the attorneys knowingly violated fiduciary duties to the debtor, as alleged, there was no evidence that any violation was for the purpose of imposing an excess verdict on the debtor. Whiteside v. Decker, Hallman, Barber & Briggs, P.C., 310 Ga. App. 16, 712 S.E.2d 87 (2011).

Future profits must be provable. — O.C.G.A. § 51-12-10 does not authorize the recovery of anticipated future profits by a business that has not made any profits in the past; such damages cannot be recovered for the reason that the damages are not provable rather than that the defendant's act is too remote. Blue Ridge Mt. Fisheries, Inc. v. Department of Natural Resources, 217 Ga. App. 89, 456 S.E.2d 651 (1995).

Pleading of damages. — When damages are claimed, the facts must be alleged showing the special damage claimed. Montgomery v. Alexander Lumber Co., 140 Ga. 51, 78 S.E. 413 (1913).

Jury question. — When a bank customer proved that wrongful dishonor of a check created a default the customer could not cure, the customer's subsequent failures, primarily of omission, and other happenings would lessen the damages, but would not remove the bank's wrongful dishonor as a matter of law; that remains to be determined as a question of fact and is an issue for the jury. Malak v. First Nat'l Bank, 195 Ga. App. 105, 393 S.E.2d 267 (1990).

Cited in Georgia R.R. v. Hayden, 71 Ga. 518, 51 Am. R. 274 (1883); Savannah, Fla. & W. Ry. v. Pritchard, Matthews & Co., 77 Ga. 412, 1 S.E. 261, 4 Am. St. R. 92 (1886); Toccoa Falls Light & Power Co. v. Georgia Power Co., 53 Ga. App. 522, 186 S.E. 436 (1936); Slater v. Russell, 100 Ga. App. 563, 112 S.E.2d 178 (1959); Roswell Apts., Inc. v. D.L. Stokes & Co., 105 Ga. App. 163, 123 S.E.2d 682 (1961); Dukes v. Pure Oil Co., 112 Ga. App. 111, 143 S.E.2d 769 (1965); Maryland Cas. Ins. Co. v. Welchel, 181 Ga. App. 224, 351 S.E.2d 645 (1986); John D. Robinson Corp. v. Southern Marine & Indus. Supply Co., 196 Ga. App. 402, 395 S.E.2d 837 (1990).

RESEARCH REFERENCES

C.J.S. — 25 C.J.S., Damages, § 36 et seq.

ALR. — "Out of pocket" or "benefit of bargain" as proper rule of damages for fraudulent representations inducing, contract for the transfer of property, 13 ALR3d 875.

Tenant's right to damages for landlord's breach of tenant's option to purchase, 17 ALR3d 976.

Profits of business as factor in determining loss of earnings or earning capacity in action for personal injury or death, 45 ALR3d 345.

51-12-11. Mitigation of damages required; exception.

When a person is injured by the negligence of another, he must mitigate his damages as far as is practicable by the use of ordinary care and diligence. However, this duty to mitigate does not apply in cases of positive and continuous torts. (Civil Code 1895, § 3802; Civil Code 1910, § 4398; Code 1933, § 105-2014.)

History of Code section. — The language of this Code section is derived in part from the decisions in Athens Mfg. Co. v. Rucker, 80 Ga. 291, 4 S.E. 885 (1887); Satterfield v. Rowan, 83 Ga. 187, 9 S.E. 677 (1889); Western Union Tel. Co. v. Reid Bros., 83 Ga. 401, 10 S.E. 919 (1889); and Georgia R.R. & Banking Co. v. Eskew, 86 Ga. 641, 12 S.E. 1061 (1891).

Law reviews. — For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006).

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Failure to seek medical treatment. — By refusing to go to a hospital when the plaintiff was injured, the plaintiff failed to exercise the proper care to obtain treatment as it was the plaintiff's duty to do, and thus lessen the plaintiff's damages for pain and suffering. Rosenthal v. O'Neal, 108 Ga. App. 54, 132 S.E.2d 150 (1963).

Obligation to observe doctors' advice to lose weight. — In an action to recover for personal injuries allegedly resulting from an automobile accident, the

trial court did not err in charging the jury that the injured plaintiff is under a duty to lessen damages by following reasonable instructions and advice of the plaintiff's physicians insofar as is reasonably possible, when there was medical evidence to the effect that the plaintiff's back and leg pain was caused by the plaintiff's obesity, and the plaintiff admitted that almost every doctor who had treated the plaintiff for the pain had told the plaintiff that not much could be done for the plaintiff unless the plaintiff lost some weight. Butler v. Anderson, 163 Ga. App. 547, 295 S.E.2d 216 (1982).

Obligation to avoid damages resulting from attorney's mistake. — In a legal malpractice action, when it was shown that the client could have avoided damages resulting from the attorney's mistake, but did not do so, recovery was limited to those losses the client would have suffered had damages been properly mitigated. Crowley v. Trust Co. Bank, 219 Ga. App. 531, 466 S.E.2d 24 (1995).

Insurer's obligation to minimize loss. — A workers' compensation insurer claiming that the insurer issued a policy based on negligent misrepresentations by an agent and the insured that the insured qualified for coverage through the assigned risk pool had a duty to protect itself from additional damages once the misrepresentations were made and should have been discovered. It was the insurer's responsibility to limit further damages that proximately flowed from the original wrongful acts. United States Fid. & Guar. Co. v. Paul Assocs., 230 Ga. App. 243, 496 S.E.2d 283 (1998).

Failure to mitigate damages by beneficiaries of trust. — When a bank was liable to the beneficiaries of a trust for not investing the trust's assets in treasury bills, the beneficiaries had a duty to mitigate their damages, and their delay in notifying the bank that the trust's settlor had died, and in probating the estate, causing the trust to be liable for past due estate taxes, reduced the damages the beneficiaries were entitled to because the bank's breach was not a positive tort exempt from mitigation. Wachovia Bank of Ga., N.A. v. Namik, 275 Ga. App. 229, 620 S.E.2d 470 (2005).

No mitigation required in case of fraud. — In the case of fraud, a positive tort, it is not affirmatively required that the injured party mitigate in order to recover. Haley v. Oaks Apts., Ltd., 173 Ga. App. 44, 325 S.E.2d 602 (1984).

Cross examination allowed regarding financial ability to repair. — Since mitigation of damages is properly an issue in a claim for damages from tortious misconduct, questions elicited on cross examination concerning the buyer's financial ability to make necessary repairs to the buyer's house were properly allowed to impeach the earlier testimony, in which the buyer testified the buyer was financially unable to make the necessary repairs to the roof of the house to correct the alleged defect in the roof. Blaxton v. Clemens, 202 Ga. App. 668, 415 S.E.2d 304 (1992).

Reasonable efforts. — Fact that the plaintiffs were offered and could have recovered $2.1 million from the third-party companies in 2004 raised an issue of fact on mitigation, but did not entitle the defendants to summary judgment. Christenbury v. Locke Lord Bissell & Liddell, LLP, 2013 U.S. Dist. LEXIS 143648 (N.D. Ga. Aug. 22, 2013).

Jury instructions. — In a medical malpractice action, when part of the defense was that the injuries for which the plaintiff sought recovery were attributable to the plaintiff's negligence in failing to submit to recommended treatment, a charge on the contributory-negligence rule was appropriate and, as there was evidence that the injuries were also the product of the defendant's negligence, a charge on comparative-negligence and its "equal to or greater than" bar was also warranted. Whelan v. Moone, 242 Ga. App. 795, 531 S.E.2d 727 (2000).

In a couple's personal injury case, there was no evidence to justify a charge on mitigation of damages under O.C.G.A. § 51-12-11. There was no evidence that the couple did activities that aggravated their conditions, stopped treatment despite medical advice, failed to obtain treatment, or otherwise failed to exercise ordinary care and diligence. Ga. Farm Bureau Mut. Ins. Co. v. Turpin, 294 Ga. App. 63, 668 S.E.2d 518 (2008).

Jury question. — When a bank customer proved that wrongful dishonor of a check created a default the customer could not cure, the customer's subsequent failures, primarily of omission, and other happenings would lessen the damages, but would not remove the bank's wrongful dishonor as a matter of law; that remains to be determined as a question of fact and is an issue for the jury. Malak v. First Nat'l Bank, 195 Ga. App. 105, 393 S.E.2d 267 (1990).

Mitigation evidence relevant. — In a property owner's action for trespass and nuisance, the trial court did not err in denying the owner's motion in limine to exclude evidence suggesting that the owner should have built or re-built drains on the property because, at a minimum, the evidence the owner sought to exclude was relevant to the owner's claim of negligence in several ways, and any possible error admitting evidence of mitigation or decisions regarding the drains vis-a-vis the owner's claims of nuisance and trespass was self-induced. Bailey v. Annistown Rd. Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010).

Cited in Smith v. Hightower, 80 Ga. App. 293, 55 S.E.2d 872 (1949); Gleason v. Rhodes Ctr. Pharmacy, Inc., 94 Ga. App. 439, 95 S.E.2d 293 (1956); Glassman v. Phoenix Ins. Co., 117 Ga. App. 171, 160 S.E.2d 264 (1968); Jernigan v. Carmichael, 145 Ga. App. 560, 244 S.E.2d 92 (1978); Community Fed. Sav. & Loan Ass'n v. Foster Developers, Inc., 179 Ga. App. 861, 348 S.E.2d 326 (1986); Johnstone v. Malone Office Equip. Co., 192 Ga. App. 137, 384 S.E.2d 208 (1989); Walker v. Hurd, 195 Ga. App. 855, 394 S.E.2d 925 (1990).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, §§ 346-398, 508 et seq.

C.J.S. — 25 C.J.S., Damages, § 184 et seq.

ALR. — Duty to give bond and procure return of property in order to mitigate damages from its wrongful seizure under legal process, 33 ALR 1479.

Duty of one suing for damage to vehicle to minimize damages, 55 ALR2d 936.

Necessity and sufficiency, in personal injury or death action, of evidence as to reasonableness of amount charged or paid for accrued medical, nursing, or hospital expenses, 12 ALR3d 1347.

Anti-hitchhiking laws: their construction and effect in action for injury to hitchhiker, 46 ALR3d 964.

Duty of injured person to submit to surgery to minimize tort damages, 62 ALR3d 9.

Duty of injured person to submit to nonsurgical medical treatment to minimize tort damage, 62 ALR3d 70.

Failure to lose weight as basis for reduction of damages in personal injury action, 24 ALR5th 174.

Smoking as basis for reduction of damages in personal injury action, 25 ALR5th 343.

51-12-12. Court interference with jury verdict as to damages.

(a) The question of damages is ordinarily one for the jury; and the court should not interfere with the jury's verdict unless the damages awarded by the jury are clearly so inadequate or so excessive as to be inconsistent with the preponderance of the evidence in the case.

(b) If the jury's award of damages is clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence, the trial court may order a new trial as to damages only, as to any or all parties, or may condition the grant of such a new trial upon any party's refusal to accept an amount determined by the trial court.

(c) Only one grant of a new trial by the judge may be based upon the powers conferred by this Code section. The first grant of a new trial other than one ordered under this Code section and which order granting the new trial is not based on this Code section shall remain governed by Code Section 5-5-50. (Orig. Code 1863, § 2888; Code 1868, § 2896; Code 1873, § 2947; Code 1882, § 2947; Civil Code 1895, § 3803; Civil Code 1910, § 4399; Code 1933, § 105-2015; Ga. L. 1987, p. 915, § 7.)

History of Code section. — The language of this Code section is derived in part from the decision in Lang v. Hopkins, 10 Ga. 37 (1851).

Law reviews. — For article, "The Effect of the Mandated Discount Rate on the Value of Wrongful Death Awards in Georgia," see 52 Mercer L. Rev. 1147 (2001). For article, "Of Frivolous Litigation and Runaway Juries: A View from the Bench," see 41 Ga. L. Rev. 431 (2007).

For comment, "Are Excessive Punitive Damages Unconstitutional in Georgia?: This Question and More in Colonial Pipeline Co. v. Brown," see 6 Ga. St. U.L. Rev. 85 (1989).

JUDICIAL DECISIONS

Analysis

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General Consideration

Future mental suffering is compensable, and whether the effects of the injury are temporary or permanent remains a jury question. Valdosta Hous. Auth. v. Finnessee, 160 Ga. App. 552, 287 S.E.2d 569 (1981).

General damages are such as law presumes to flow from any tortious act, and may be recovered without proof of any amount and it is left with the enlightened conscience of fair and impartial jurors to say what amount would compensate the plaintiff for the injury inflicted. Ingram v. Kendrick, 48 Ga. App. 278, 172 S.E. 815 (1934).

When there is no direct proof of prejudice or bias on the part of a jury, an appellate court can set aside the verdict as excessive only when the amount, considered in connection with all the facts in evidence at trial, shakes the moral senses, i.e., the verdict must carry its death warrant on the verdict's face; however, such issues must be determined from the trial transcript, and when no transcript was either ordered or made for a trial in which a jury entered a judgment against a mortgage company, and the mortgage company made no attempt to have the trial court make a transcript or a reconstructed transcript of the proceedings approved by the trial judge, the appellate court assumed that the judgment was correct and supported by the evidence. Wells Fargo Home Mortg., Inc. v. Cook, 267 Ga. App. 368, 599 S.E.2d 319 (2004).

Damages are compensation for injury sustained, and burden of showing damages is on the complainant. Brooks v. Williams, 127 Ga. App. 311, 193 S.E.2d 231 (1972).

Jurors are not bound to accept as correct opinion evidence concerning value of property, though uncontradicted, and by the jurors' verdict, the jurors may fix either a lower or higher value upon the property than that stated in the opinion and estimates of the witnesses. Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 257 S.E.2d 264 (1979).

Value fixed by jury could be higher or lower than that of opinion of expert, provided the verdict is not palpably unreasonable under all the evidence. DOT v. Driggers, 150 Ga. App. 270, 257 S.E.2d 294 (1979).

Small award based on subjective pain upheld. — An award of $100.00 was proper because it was not flagrantly inadequate in light of the expert testimony regarding the subjective character of the alleged pain and suffering: to set aside such an award would have transgressed upon the providence of the jurors who determined the award based on the claimant's credibility and the expert evidence. Turpin v. Worley, 206 Ga. App. 341, 425 S.E.2d 895 (1992).

Verdict may be rendered for less than amount of plaintiff's proved medical expenses and be held not to be so inadequate as to require a new trial. Johnson v. Cook, 123 Ga. App. 302, 180 S.E.2d 591 (1971).

Trial court properly affirmed the jury's damages award in a medical malpractice suit when the patient's own expert testified that only the failure to diagnose an ankle fracture earlier violated the standard of care, but the expert declined to specify a date when that violation occurred; the expert also testified that the treatment recommended for a sprain could also work for a break or a fracture, and that the patient would have incurred some of the medical expenses for treatment of the injured ankle regardless of any malpractice. Kohl v. Tirado, 256 Ga. App. 681, 569 S.E.2d 576 (2002).

O.C.G.A. § 51-12-12 authorizes review of purportedly inadequate comparative negligence awards. Robinson v. Star Gas, Inc., 269 Ga. 102, 498 S.E.2d 524 (1998).

Excessive or inadequate verdict constitutes mistake of fact rather than of law. It addresses itself to the discretion of the trial judge who saw the witnesses and heard the testimony. The Court of Appeals is a court for the correction of errors of law only, and its jurisdiction is confined to the question of whether the trial court abused the court's discretion in overruling the motion for a new trial on this ground. Atlanta Transit Sys. v. Robinson, 134 Ga. App. 170, 213 S.E.2d 547 (1975); Seaboard Coast Line R.R. v. Towns, 156 Ga. App. 24, 274 S.E.2d 74 (1980).

There is presumption that verdict of jury is based upon fair consideration of all matters presented to it. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Presumptions are in favor of validity of verdict of jury, and the verdict should be construed so as to stand, if practicable. Johnson v. Cook, 123 Ga. App. 302, 180 S.E.2d 591 (1971).

Trial judge cannot reduce award. — O.C.G.A. § 51-12-12 does not authorize a trial judge to reduce a damage award and deny a motion for new trial. Spence v. Hilliard, 260 Ga. 107, 389 S.E.2d 753 (1990).

Even though the defendant did not appeal the trial court's order denying the defendant's motion for new trial or cross-appeal the order granting the reduction in the punitive damage award, because the issue of the grant of a new trial on damages was material to the propriety of the court's order reducing the damage award, the order reducing the damage award was vacated and the case remanded for reconsideration. Dunn v. Five Star Dodge-Jeep-Eagle-Mazda, Inc., 245 Ga. App. 378, 537 S.E.2d 782 (2000).

Excessive damages are such as to shock the moral sense to such an extent as to lead to the belief that the jury was actuated by undue or improper motives or influences. Candler v. Smith, 50 Ga. App. 667, 179 S.E. 395 (1935); Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).

An excessive verdict, such as would authorize the court to set aside the verdict of a jury, would have to be a verdict for a sum not authorized under the evidence or for such a large amount as would shock the moral sense to such an extent as to lead to the belief that the jury were actuated by undue or improper motives or influences. Sinclair v. Kelly, 50 Ga. App. 135, 177 S.E. 348 (1934).

Trial court properly denied a bank's motion for a new trial, pursuant to O.C.G.A. § 5-5-23, in a customer's slip and fall action wherein judgment was rendered in the customer's favor, since the bank argued that the amount awarded for the customer's pain and suffering was excessive under O.C.G.A. § 51-12-12(a), as the evidence did not support a finding that the damages awarded were so fla-

General Consideration (Cont'd)

grantly excessive or inadequate, in light of the evidence, as to create a clear implication of bias, prejudice, or gross mistake by the jurors. Patterson Bank v. Gunter, 263 Ga. App. 424, 588 S.E.2d 270 (2003).

Discretion of trial court. — Trial court properly concluded that in the absence of a timely filed pleading rejecting reduced damages award, it became the final judgment in the case accepted by the parties for the purpose of ending the litigation; the trial judge's actions determining that the jury award was excessive, calculating an appropriate damages award, and giving the parties the opportunity to accept or reject the trial court's award, were a proper exercise of discretion within the authority of O.C.G.A. § 51-12-12. Jacobsen v. Haldi, 210 Ga. App. 817, 437 S.E.2d 819 (1993).

Trial court did not err in the court's calculation of damages because the trial court, acting as finder of fact, issued an award well within the range of evidence and testimony presented at trial; that the amount the trial court awarded exceeded the amount of commissions paid to a former employee was irrelevant. Sitton v. Print Direction, Inc., 312 Ga. App. 365, 718 S.E.2d 532 (2011).

Prejudice must be clearly demonstrated. — The existence of prejudice or bias cannot rest upon suspicion. That the verdict was the result of prejudice and bias must be shown. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

Gross mistake or undue bias, unless directly shown, do not appear circumstantially except when there is no other reasonable hypothesis which will explain the amount of an award. Atlanta Veterans Transp., Inc. v. Cagle, 106 Ga. App. 551, 127 S.E.2d 702 (1962).

Smaller award permissible if evidence shows some fault on both sides. — When the evidence authorizes the jury to find that both parties are at fault, but the defendant slightly more so, so as to give the plaintiff a cause of action, a verdict for a small amount of damages is proper and should not be disturbed. Hunt v. Western & A.R.R., 49 Ga. App. 33, 174 S.E. 222 (1934); Jordan v. Ellis, 148 Ga. App. 286, 250 S.E.2d 859 (1978).

Inasmuch as the evidence authorized the jury to apply the rule of comparative negligence and the judge charged the jury in this respect, and an application of the law could, under a finding that the plaintiff was negligent almost to the same extent as the defendant, reduce the damages recoverable virtually to the point of extinction, there is no basis for the court to justify an inference of gross mistake or undue bias, and the verdict should not be disturbed for this reason. Baggett v. Jackson, 79 Ga. App. 460, 54 S.E.2d 146 (1949).

Under the comparative negligence rule, the jury may apportion damages as the jury determines within the jury's discretion to be proper when the evidence shows all parties' negligence contributed to the injuries, the plaintiff's to a lesser degree than the defendants'. Thus, when the evidence authorized the application of the comparative negligence rule, inadequacy of the verdict would not appear simply because the amount awarded a party is smaller than the amount sought. Jordan v. Ellis, 148 Ga. App. 286, 250 S.E.2d 859 (1978).

Damages awarded were not so inadequate as to justify the inference of gross mistake, undue bias, and prejudice on the part of the jury. Generally speaking, when comparative negligence is involved under the pleadings and the evidence, a verdict for damages for personal injuries cannot properly be set aside on the ground that the verdict is inadequate. Palo v. Meisenheimer, 199 Ga. App. 24, 403 S.E.2d 881 (1991). But see Robinson v. Star Gas, Inc., 269 Ga. 102, 498 S.E.2d 524 (1998). But see Head v. CSX Transp., Inc., 235 Ga. App. 469, 508 S.E.2d 760 (1998).

Diminutive award may show undue bias when defendant's liability clear. — When the jury by the jury's verdict has found that the defendant is legally liable to the plaintiff in tort, the diminutive damages awarded justify the inference of gross mistake or undue bias within the meaning of this section. Brewer v. Gittings, 102 Ga. App. 367, 116 S.E.2d 500 (1960).

Unauthorized charge may be harmless error. — An unauthorized charge on the measure of damages is held to be harmless when the actual award of damages does not exceed the amount which the jury would have been authorized to award under an authorized charge. Hall v. Chastain, 246 Ga. 782, 273 S.E.2d 12 (1980).

Only measuring stick for pain and suffering is the enlightened conscience of impartial jurors. Johnson v. Cook, 123 Ga. App. 302, 180 S.E.2d 591 (1971); Atlanta Transit Sys. v. Robinson, 134 Ga. App. 170, 213 S.E.2d 547 (1975).

Recovery for past and present, as well as future, pain and suffering is determined solely by the enlightened conscience of an impartial jury. Wayco Enters., Inc. v. Crews, 155 Ga. App. 775, 272 S.E.2d 745 (1980).

Punitive and mental damages present jury question. Questions concerning the amount of damages to be awarded for mental pain and suffering under former Code 1933, § 105-2003 (see now O.C.G.A. § 51-12-6), and as punitive damages under former Code 1933, § 105-2002 (see now O.C.G.A. § 51-12-5), were for the enlightened conscience of the jury. Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 257 S.E.2d 264 (1979).

Directed verdict permissible when no factual dispute. — When there is no dispute as to the facts, and they amount to a confession of liability as a matter of law, a directed verdict is warranted. Collins v. McGlamory, 152 Ga. App. 114, 262 S.E.2d 262 (1979).

Cited in Moore v. Sears, Roebuck & Co., 48 Ga. App. 185, 172 S.E. 680 (1934); Slaughter v. Atlanta Coca-Cola Bottling Co., 48 Ga. App. 327, 172 S.E. 723 (1934); Evans v. Caldwell, 52 Ga. App. 475, 184 S.E. 440 (1936); Jackson v. Ely, 56 Ga. App. 763, 194 S.E. 40 (1937); Morris v. Stanford, 58 Ga. App. 726, 199 S.E. 773 (1938); Henry Chanin Corp. v. Dumas, 65 Ga. App. 820, 16 S.E.2d 603 (1941); Head v. Georgia Power Co., 70 Ga. App. 32, 27 S.E.2d 339 (1943); Halliburton v. Collier, 75 Ga. App. 316, 43 S.E.2d 339 (1947); Georgia Automatic Gas Co. v. Fowler, 77 Ga. App. 675, 49 S.E.2d 550 (1948); Criswell Baking Co. v. Milligan, 77 Ga. App. 861, 50 S.E.2d 136 (1948); Atlanta & W. Point R.R. v. Gilbert, 82 Ga. App. 244, 60 S.E.2d 787 (1950); Russell v. Bass, 82 Ga. App. 659, 62 S.E.2d 456 (1950); Tifton Brick & Block Co. v. Meadow, 92 Ga. App. 328, 88 S.E.2d 569 (1955); Motor Convoy, Inc. v. Moore, 92 Ga. App. 551, 88 S.E.2d 727 (1955); Atlantic Coast Line R.R. v. Godard, 93 Ga. App. 671, 92 S.E.2d 626 (1956); Complete Auto Transit, Inc. v. Floyd, 249 F.2d 396 (5th Cir. 1957); Beecher v. Farley, 104 Ga. App. 785, 123 S.E.2d 184 (1961); Rosenthal v. O'Neal, 108 Ga. App. 54, 132 S.E.2d 150 (1963); Stynchcombe v. Gooding Amusement Co., 110 Ga. App. 864, 140 S.E.2d 232 (1965); NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816 (1965); Rackard v. Merritt, 114 Ga. App. 743, 152 S.E.2d 701 (1966); Kirkman v. Miller, 116 Ga. App. 78, 156 S.E.2d 558 (1967); Davis v. Camp Concrete Prods. Co., 122 Ga. App. 551, 177 S.E.2d 798 (1970); Seaboard Coast Line R.R. v. Wallace, 227 Ga. 363, 180 S.E.2d 743 (1971); Seaboard Coast Line R.R. v. Duncan, 123 Ga. App. 479, 181 S.E.2d 535 (1971); Garner v. Victory Express, Inc., 264 Ga. 171, 442 S.E.2d 455 (1994); Sharp v. Thomas, 125 Ga. App. 137, 186 S.E.2d 589 (1971); Smith v. Tri-State Culvert Mfg. Co., 126 Ga. App. 508, 191 S.E.2d 92 (1972); Cochran v. Lynch, 126 Ga. App. 866, 192 S.E.2d 165 (1972); Taylor v. Roberson, 127 Ga. App. 24, 192 S.E.2d 384 (1972); North Ga. Petro. Co. v. Lewis, 128 Ga. App. 653, 197 S.E.2d 437 (1973); West Ga. Pulpwood & Timber Co. v. Stephens, 128 Ga. App. 864, 198 S.E.2d 420 (1973); Crossley v. Collins, 128 Ga. App. 889, 198 S.E.2d 428 (1973); Drake v. Shurbutt, 129 Ga. App. 754, 201 S.E.2d 184 (1973); Kerr v. Mims, 130 Ga. App. 54, 202 S.E.2d 244 (1973); Fargason v. Pervis, 138 Ga. App. 686, 227 S.E.2d 464 (1976); Venable v. State Hwy. Dep't, 138 Ga. App. 788, 227 S.E.2d 509 (1976); Pilkenton v. Eubanks, 139 Ga. App. 673, 229 S.E.2d 146 (1976); Elsberry v. Lewis, 140 Ga. App. 324, 231 S.E.2d 789 (1976); Murray v. Toney, 141 Ga. App. 57, 232 S.E.2d 395 (1977); Southern Bell Tel. & Tel. Co. v. C & S Realty Co., 141 Ga. App. 216, 233 S.E.2d 9 (1977); Paschal v. Chester, 141 Ga. App. 172, 233 S.E.2d 30 (1977); E.H. Siler Realty & Bus. Broker, Inc. v. Darty, 143 Ga. App. 433,

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238 S.E.2d 766 (1977); Leigh v. Fears, 145 Ga. App. 644, 244 S.E.2d 616 (1978); Krystal Co. v. Butler, 149 Ga. App. 696, 256 S.E.2d 96 (1979); Atlanta Recycled Fiber Co. v. Tri-Cities Steel Co., 152 Ga. App. 259, 262 S.E.2d 554 (1979); Central of Ga. R.R. v. Howard, 161 Ga. App. 560, 288 S.E.2d 347 (1982); Hill v. Nelson, 676 F.2d 1371 (11th Cir. 1982); Reliance Ins. Co. v. Bridges, 168 Ga. App. 874, 311 S.E.2d 193 (1983); Ray v. Stinson, 172 Ga. App. 718, 324 S.E.2d 506 (1984); Bob Lairsey Ins. Agency v. Allen, 180 Ga. App. 11, 348 S.E.2d 658 (1986); Great Atl. & Pac. Tea Co. v. Turner, 180 Ga. App. 533, 349 S.E.2d 537 (1986); Davis v. Glaze, 182 Ga. App. 18, 354 S.E.2d 845 (1987); McKinney & Co. v. Lawson, 257 Ga. 222, 357 S.E.2d 786 (1987); Southeastern Ambulance Corp. v. Freeman, 185 Ga. App. 119, 363 S.E.2d 571 (1987); Simpson v. Reed, 186 Ga. App. 297, 367 S.E.2d 563 (1988); BWP, Inc. v. Woodson, 196 Ga. App. 768, 397 S.E.2d 43 (1990); Salvador v. Coppinger, 198 Ga. App. 386, 401 S.E.2d 590 (1991); Roboserve, Ltd. v. Tom's Foods, Inc., 931 F.2d 789 (11th Cir. 1991); Mansfield v. Pizza Hut of Am., Inc., 202 Ga. App. 601, 415 S.E.2d 51 (1992); Perryman v. Rosenbaum, 205 Ga. App. 784, 423 S.E.2d 673 (1993); Wood v. Browning-Ferris Indus. of Ga., Inc., 206 Ga. App. 707, 426 S.E.2d 186 (1992); Oglethorpe Power Corp. v. Sheriff, 210 Ga. App. 299, 436 S.E.2d 14 (1993); Grange Mut. Cas. Co. v. Williams, 220 Ga. App. 613, 469 S.E.2d 845 (1996); Southeastern Sec. Ins. Co. v. Hotle, 222 Ga. App. 161, 473 S.E.2d 256 (1996); Sykes v. Sin, 229 Ga. App. 155, 493 S.E.2d 571 (1997); Joiner v. Lane, 235 Ga. App. 121, 508 S.E.2d 203 (1998); K-Mart Corp. v. Lovett, 241 Ga. App. 26, 525 S.E.2d 751 (1999); Hammond v. Lee, 244 Ga. App. 865, 536 S.E.2d 231 (2000); Phillips v. Singleton, 245 Ga. App. 788, 539 S.E.2d 177 (2000); ARA Health Servs. v. Stitt, 250 Ga. App. 420, 551 S.E.2d 793 (2001); Wallace v. Stringer, 250 Ga. App. 850, 553 S.E.2d 166 (2001); Middlebrooks v. Hillcrest Foods Inc., 256 F.3d 1241 (11th Cir. 2001); Marzullo v. Jim Ellis Motors, Inc., 253 Ga. App. 706, 560 S.E.2d 309 (2002); McCormick v. Harris, 253 Ga. App. 417, 559 S.E.2d 158 (2002); Beam v. Kingsley, 255 Ga. App. 715, 566 S.E.2d 437 (2002); Mason v. Ford Motor Co., 307 F.3d 1271 (11th Cir. 2002); Chadwick v. Brazell, 331 Ga. App. 373, 771 S.E.2d 75 (2015).

Second Trials and Appeals

Direct appeal of a court's interference with jury verdict. — The proper procedure for a direct appeal of a court's interference with a jury verdict under subsection (b) of O.C.G.A. § 51-12-12 is to appeal within 30 days from the final resolution of the matter. Three Crowns Antiques, Ltd. v. Jerrell, 244 Ga. App. 456, 535 S.E.2d 827 (2000).

Conditional grant of motion for new trial. — The phrase "any party's refusal" refers to the party adversely affected by either the grant of a new trial or the modified damages award; therefore, a trial court may condition the granting of a new trial on the plaintiff's refusal to remit the portion of the jury award that the court determines is excessive. Lisle v. Willis, 265 Ga. 861, 463 S.E.2d 108 (1995).

Conditioning the grant of a new trial on the plaintiff's refusal to remit a portion of the jury award that the court determined was excessive did not violate the plaintiff's constitutional right to a jury trial. Lisle v. Willis, 265 Ga. 861, 463 S.E.2d 108 (1995).

New trial must encompass liability. — In a comparative negligence case, the trial court erred in limiting the grant of a new trial on the issue of damages only; the grant of a new trial in such a case must encompass issues of liability as well as damages. Head v. CSX Transp., Inc., 271 Ga. 670, 524 S.E.2d 215 (1999).

Setting aside verdict as excessive. — Verdict will not be set aside as excessive by the Court of Appeals unless it manifestly appears from the record that it was the result of prejudice, bias, corruption, or gross mistake. Holtsinger v. Scarborough, 71 Ga. App. 318, 30 S.E.2d 835 (1944).

Court did not abuse the court's discretion in denying the defendants' request to set aside an award of compensatory damages to a customer in an action alleging that, contrary to their agreement, the de-

fendants aired television commercials in Georgia that contained before-and-after pictures of the customer's hair replacement treatments because the award was not excessive under O.C.G.A. § 51-12-12(a). There was no evidence of flagrancy. Zieve v. Hairston, 266 Ga. App. 753, 598 S.E.2d 25 (2004).

If the award is not so flagrant as to "shock the conscience," it will not be disturbed on appeal. Stover v. Atchley, 189 Ga. App. 56, 374 S.E.2d 775 (1988), cert. denied, 189 Ga. App. 913, 374 S.E.2d 775 (1989).

When the amount of a verdict is attacked merely for excessiveness, and not for the inclusion of some calculable amount definitely ascertainable from the undisputed evidence, and the verdict has been approved by the trial court, it will not be set aside unless the amount is so excessive as to manifest undue bias or prejudice, gross mistake, or improper motive, on the part of the jury. Metropolitan Life Ins. Co. v. Lovett, 50 Ga. App. 763, 179 S.E. 253 (1935).

The verdict of a jury cannot be held to be excessive unless manifestly resulting from prejudice, bias, or other corrupt motive of the jury. Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).

In the absence of any showing that verdict in a personal injury case was the result of bias, prejudice, or mistake on the part of the jury, the appellate court will not hold as a matter of law that the verdict was excessive. Allyn & Bacon Book Publishing Co. v. Nicholson, 61 Ga. App. 672, 7 S.E.2d 316 (1940).

When the item of damage complained of in a motion for a new trial could only be measured by the enlightened conscience of intelligent jurors, and the amount assessed is substantial, the appellate court ought not to set aside the verdict of the jury on the ground of inadequacy simply because the damages are, in its opinion, inadequate, unless it clearly appears that the verdict is so small as to afford evidence of a gross mistake or undue bias. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

A verdict of a jury cannot be held to be excessive unless it be manifestly the result of prejudice or bias, or other corrupt motive. Saul Klenberg Co. v. Mrozinski, 78 Ga. App. 59, 50 S.E.2d 247 (1948).

The appellate court has no power to review the finding of the jury because the verdict is claimed to be excessive unless it is clear from the record that their finding was prejudiced or biased or was procured by corrupt means. Atlantic Coast Line R.R. v. Wells, 78 Ga. App. 859, 52 S.E.2d 496 (1949); Kell v. Hunter, 84 Ga. App. 792, 67 S.E.2d 597 (1951).

In the absence of a showing of prejudice, bias, or corrupt means, the verdict of a jury, supported by the evidence and approved by the trial judge who saw the witnesses testifying, will not be disturbed by the appellate court on the ground that the verdict is excessive. Kell v. Hunter, 84 Ga. App. 792, 67 S.E.2d 597 (1951).

The appellate court does not have as broad discretionary powers as are conferred on trial judges in setting aside verdicts as excessive; when a case comes before the appellate court, after the refusal of a new trial by the presiding judge, it comes not only with the presumption in favor of the verdict, but also stamped with the approval of the judge who tried the case, and when no prejudice or bias or corrupt means in reaching the verdict appear, such court is not authorized to set the verdict aside as being excessive. Shepherd Constr. Co. v. Vaughn, 88 Ga. App. 285, 76 S.E.2d 647 (1953).

Although a verdict may be "large and generous," when the evidence abundantly authorizes a finding for the plaintiff, the court does not feel authorized under the law to set the verdict aside on the sole ground that the verdict is excessive, there being nothing in the record to indicate prejudice or bias on the part of the jury, and the verdict having been approved by the trial judge. Fields v. Jackson, 102 Ga. App. 117, 115 S.E.2d 877 (1960).

Court of Appeals does not have the broad discretionary powers invested in trial courts to set aside verdicts, and when the trial court before whom the witnesses appeared had the opportunity of personally observing the witnesses, including the plaintiff on the stand, and has approved the verdict, the appellate court is without power to interfere unless it is clear from the record that the verdict of

Second Trials and Appeals (Cont'd)

the jury was prejudiced or biased or was procured by corrupt means. Kiker v. Davis, 103 Ga. App. 289, 118 S.E.2d 861 (1961).

When a case comes before the appeals court, after the refusal of a new trial by the presiding judge, it comes not only with the presumption in favor of the verdict, but also stamped with the approval of the judge who tried the case, and when no prejudice or bias or corrupt means in reaching the verdict appear, the appeals court is not authorized to set the verdict aside as being excessive. Jones v. Spindel, 128 Ga. App. 88, 196 S.E.2d 22 (1973), overruled on other grounds, Monumental Properties of Ga., Inc. v. Frontier Disposal, Inc., 159 Ga. App. 35, 282 S.E.2d 660 (1981).

In order to set a verdict aside as excessive the evidence must be shown to be so unreasonable as to show that it was the result of passion, prejudice, partiality or undue bias on the part of the jury. Calloway v. Rossman, 150 Ga. App. 381, 257 S.E.2d 913 (1979).

If the law authorized a recovery and there is evidence to support the verdict, and nothing in the record shows that it resulted from gross mistake, undue bias or prejudice, or from other corrupt motives, this court is not authorized to set it aside upon the ground that it is excessive. Suber v. Fountain, 151 Ga. App. 283, 259 S.E.2d 685 (1979).

To require second reversal, error in amount of verdict must appear clearly and without doubt. Jones v. Spindel, 128 Ga. App. 88, 196 S.E.2d 22 (1973), overruled on other grounds, Monumental Properties of Ga., Inc. v. Frontier Disposal, Inc., 159 Ga. App. 35, 282 S.E.2d 660 (1981).

When there has been a second trial of the issue upon substantially the same evidence, with a very similar result, the appeals court should be even less inclined to set aside the verdict on the ground that the verdict is excessive. Jones v. Spindel, 128 Ga. App. 88, 196 S.E.2d 22 (1973), overruled on other grounds, Monumental Properties of Ga., Inc. v. Frontier Disposal, Inc., 159 Ga. App. 35, 282 S.E.2d 660 (1981).

Verdict will not be disturbed by appellate court merely because it is large one. Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).

When although the amount of the verdict awarded might be said to be generous, there was nothing in the record to suggest that the jury was actuated by undue or improper motives or influences, under the law and the facts as to the injuries sustained by the plaintiff, the Court of Appeals was without authority to interfere, as to the amount awarded, with the jury's finding and the approval of the trial judge. Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).

While a jury's verdict as to damages may be larger than some of the individual members of the court would have found had the members been on the jury trying the case, the court cannot set the verdict aside for that reason. Western & Atl. R.R. v. Burnett, 79 Ga. App. 530, 54 S.E.2d 357 (1949).

Mere skimpiness in award of damages unattended by facts realistically demanding higher figure will not cause reversal. Brooks v. Williams, 127 Ga. App. 311, 193 S.E.2d 231 (1972).

Mere fact that evidence would authorize larger verdict is insufficient to authorize reversal of the judgment of the jury based thereon. Curl v. First Fed. Sav. & Loan Ass'n, 243 Ga. 842, 257 S.E.2d 264 (1979).

Appellate courts are not free to reweigh evidence and set aside jury verdict merely because jury could have drawn different inference or conclusion or because the appellate judges feel that their judgments are more reasonable. Atlantic Coast Line R.R. v. Wells, 78 Ga. App. 859, 52 S.E.2d 496 (1949).

Verdict not set aside if no prejudice shown unless flagrantly exorbitant. — Before the verdict will be set aside because it is excessive, when there is no direct proof of prejudice or bias, the amount thereof, when considered in connection with all the facts, must shock the moral sense, appear "exorbitant," "flagrantly outrageous," and "extravagant." St. Paul Fire & Marine Ins. Co. v. Dillingham, 112 Ga. App. 422, 145 S.E.2d 624 (1965); Redwing Carriers, Inc. v.

Knight, 243 Ga. App. 668, 239 S.E.2d 686 (1977), overruled on other grounds, Roebuck v. State, 277 Ga. 200, 586 S.E.2d 651 (2003); Central of Ga. R.R. v. Nash, 150 Ga. App. 68, 256 S.E.2d 619 (1979); Suber v. Fountain, 151 Ga. App. 283, 259 S.E.2d 685 (1979); Seaboard Coast Line R.R. v. Towns, 156 Ga. App. 24, 274 S.E.2d 74 (1980).

Objections to form of verdict did not preclude new trial. — Rule requiring objections to the form of a verdict did not preclude a new trial to a father in a medical malpractice action for the wrongful death of a child on general grounds. Roberts v. Aderhold, 273 Ga. App. 642, 615 S.E.2d 761 (2005).

Approval of verdict by trial judge is given great weight by appellate court in passing upon the excessiveness of a verdict. Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).

Cases of personal injuries and the like are interfered with by the Court of Appeals only when the verdicts are exorbitant or very inadequate. Langran v. Hodges, 60 Ga. App. 567, 4 S.E.2d 489 (1939).

When the trial judge refuses to order a new trial on the grounds of inadequate damages, if the trial court can conscientiously acquiesce in the verdict, though it may not exactly accord with the judge's best judgment or though some other finding might seem somewhat more satisfactory to the judge's mind, and if the judge's sense of justice is reasonably satisfied, the judge should, in the absence of some material error of law affecting the trial, approve it, and an appellate court will uphold the judge in so doing, and will not say that the judge abused the judge's discretion. Brown v. Service Coach Lines, 71 Ga. App. 437, 31 S.E.2d 236 (1944).

The court should not interfere unless the damages, when considered in connection with all the facts and circumstances, shock the moral sense, that is, appear exorbitant, flagrantly outrageous and extravagant. Jim Walter Corp. v. Ward, 150 Ga. App. 484, 258 S.E.2d 159 (1979).

If the award is not so flagrant as to "shock the conscience," it will not be disturbed on appeal. Stover v. Atchley, 189 Ga. App. 56, 374 S.E.2d 775 (1988), cert. denied, 189 Ga. App. 913, 374 S.E.2d 775 (1989).

Applicability to Specific Cases

Damages for physical injuries not excessive or inadequate. — In suit by husband to recover for the death of his wife, since there was no evidence other than the size of the verdict from which it could be inferred that the verdict as rendered for $35,000.00 was the result of gross mistake or undue prejudice or bias on the part of the jury, the appellate court could not conclude, as a matter of law, that the verdict rendered for the plaintiff was the result of gross mistake, undue bias and prejudice on the part of the jury. Blue's Truck Line v. Harwell, 59 Ga. App. 305, 200 S.E. 500 (1938).

When the verdict was based not alone on permanency of injury and time extent of disability, but also on pain and suffering from the injuries proved, and the measure of damages being the enlightened consciences of fair and impartial jurors, it could not be said, in the absence of bias on the part of the jury, that the verdict was excessive. Chitwood v. Stoner, 60 Ga. App. 599, 4 S.E.2d 605 (1939).

In the absence of plain proof that the verdict of the jury awarding the plaintiff $25.00 for injuries sustained in swallowing particles of glass as a result of drinking a soft drink was the result of prejudice or bias, the court of appeals would not interfere. Atlanta Coca-Cola Bottling Co. v. Childers, 63 Ga. App. 665, 11 S.E.2d 831 (1940).

After the plaintiff testified that the disfigurement of the plaintiff's face affected the plaintiff's capacity to obtain employment besides causing the plaintiff unending mortification as to the plaintiff's appearance, and there was further testimony as to the fracture of the left clavicle, which had to some extent diminished the plaintiff's capacity to work and might have a permanent result with regard to the free use of the arm, and the plaintiff endured much pain and suffering, both physical and mental, as the result of the plaintiff's injuries, it could not be held that the verdict was excessive, or was so excessive as to manifest bias and

Applicability to Specific Cases (Cont'd)

prejudice. Black & White Cab Co. v. Clark, 67 Ga. App. 170, 19 S.E.2d 570 (1942).

Recovery of $7,500.00 in damages when the plaintiff's head was severely injured, two ribs were broken, the plaintiff's left arm was broken, the plaintiff's right leg was injured, and the plaintiff was confined to the hospital and the plaintiff's bed for some two months, was not so excessive as to justify inference of gross mistake or undue bias. Callaway v. Fischer, 69 Ga. App. 251, 25 S.E.2d 131 (1943).

A verdict found by the jury, although it was in the exact sum claimed as special damages, could have included in the minds of the jury some amount for pain and suffering or general damages, and the court cannot say as a matter of law that the verdict was inadequate or so small as to justify an inference of gross mistake or undue bias. Pierson v. M. & M. Bus Co., 74 Ga. App. 537, 40 S.E.2d 561 (1946).

In the absence of any showing of actual bias or mistake, the Court of Appeals cannot say that the verdict for $17,000.00 returned by the jury and approved by the trial judge, is so excessive as a matter of law as to justify the inference of gross mistake or undue bias, notwithstanding the fact that the plaintiff's decedent lived only four days (but in great pain) following the accident. Hill v. Rosser, 102 Ga. App. 776, 117 S.E.2d 889 (1960).

When the evidence most favorable to the plaintiff shows painful and permanent injuries with loss of physical function, it cannot be said that the verdict is excessive as a matter of law. Central of Ga. R.R. v. Nash, 150 Ga. App. 68, 256 S.E.2d 619, cert. dismissed, 244 Ga. 495, 260 S.E.2d 909 (1979).

Given that the sole measure of damages for pain and suffering is the enlightened conscience of fair and impartial jurors, an award of $135,000 over proven medical expenses of $20,000 for a plaintiff in a truck accident case, whose injuries required plastic and arthoscopic surgery which left significant scars and whose physical activities were limited, was not excessive. J.B. Hunt Transp., Inc. v. Brown, 236 Ga. App. 634, 512 S.E.2d 34 (1999).

Appellate court declined to set aside the amount of the verdict for pain and suffering and wrongful death when a juvenile in a child care institution was accidentally electrocuted because $1,000,000 for pain and suffering and $2,000,000 for wrongful death were not excessive as a matter of law. Ga. Dep't of Human Res. v. Johnson, 264 Ga. App. 730, 592 S.E.2d 124 (2003).

Jury award of $1,250,000 in favor of the plaintiff injured in a traffic accident case was not excessive; the injured person suffered, inter alia, hip fracture, six months of immobility, blood clots, pulmonary embolus, and permanent injuries from the accident, and the need for future surgery was shown. AT Sys. Southeast, Inc. v. Carnes, 272 Ga. App. 671, 613 S.E.2d 150 (2005).

Trial court properly denied a mother's motion for a new trial after a verdict in favor of the parents in a medical malpractice action for the wrongful death of a child as the jury was authorized to find that even though a doctor was negligent, the mother's contributory negligence was equal to or greater than that of the doctor and thus defeated the right of recovery; the parents claimed that the child was stillborn due to the mother's gestational diabetes and the doctor claimed that the mother was negligent in failing to advise the doctor of a family history of diabetes and in failing to follow medical instructions. Roberts v. Aderhold, 273 Ga. App. 642, 615 S.E.2d 761 (2005).

In the car accident case, the appellate court refused to interfere, under O.C.G.A. § 51-12-12(a), with the jury's $7,000,000 verdict in favor of the injured party as it did not shock the conscience; the injured party, who suffered life-threatening injuries and spent months recovering, could not return to work and suffered constant pain. Arnsdorff v. Fortner, 276 Ga. App. 1, 622 S.E.2d 395 (2005).

Because a negligent motorist admitted that the motorist caused a collision and the only issue tried before a jury was whether the collision was the proximate cause of the injured driver's damages, the entry of a verdict for the defense was not a manifest injustice, gross mistake, or bias that required that a new trial be had pursuant to O.C.G.A. § 51-12-12(a), as

there was evidence that the injured driver had suffered other incidents that caused the driver similar back pain, as well as another prior collision, and that the driver had undergone chiropractic treatments for years; the lack of damages awarded was not so inadequate as to require that the appellate court overturn the trial court's judgment. Lindsey v. Turner, 279 Ga. App. 595, 631 S.E.2d 789 (2006).

Damages award was not excessive under O.C.G.A. § 51-12-12. The injured party proffered evidence that medical bills were over $600,000, that the party would require more surgery, and that the party would need to replace parts of a prosthetic leg, at a cost of $30,000, about every three years; the party also showed that the party was no longer able to enjoy many physical activities in which the party had previously engaged and that the prosthesis became painful to wear by the end of each day. Hart v. Shergold, 295 Ga. App. 94, 670 S.E.2d 895 (2008), cert. denied, No. S09C0582, 2009 Ga. LEXIS 230 (Ga. 2009).

Parent suing for wrongful death of child. — Trial court properly ordered a new trial limited to the issue of the father's damages in a medical malpractice action for the wrongful death of a child because the jury verdict "in favor of the plaintiffs," necessarily reflected either a jury finding that the mother's contributory negligence barred a recovery by the father, which was contrary to the law, or that the father was not injured by the child's death, which was contrary to the evidence. Roberts v. Aderhold, 273 Ga. App. 642, 615 S.E.2d 761 (2005).

Award of $1.00 for permanent injury to leg gives rise to inference of gross mistake or bias. Cothern v. Haygood, 147 Ga. App. 200, 248 S.E.2d 231 (1978).

Award of $10,000 to apartment tenant for rat-bite injury not excessive. — See Valdosta Hous. Auth. v. Finnessee, 160 Ga. App. 552, 287 S.E.2d 569 (1981).

Verdict of $275,000 for negligent poisoning of dairy herd not excessive. — See Moultrie Farm Center, Inc. v. Sparkman, 171 Ga. App. 736, 320 S.E.2d 863 (1984).

Verdict of $10,000 awarded to widow in wrongful death action based on death of her husband was not so grossly inadequate as to justify the inference of gross mistake or undue bias since the evidence authorized a charge on comparative negligence because of the decedent's excessive speed in traveling on the decedent's motorcycle. Kirkland v. Williams, 172 Ga. App. 595, 323 S.E.2d 891 (1984) (decided prior to 1987 amendment).

When only $10,000 awarded in wrongful death action, new trial not error. — When, in a wrongful death action, the defendant was given full and fair opportunity in the first trial to place before the jury issues concerning comparative negligence, which may or may not have affected the jury's award of only $10,000 damages, the trial court's grant of a new trial only on damages was not error. Williams v. Worsley, 235 Ga. App. 806, 510 S.E.2d 46 (1998).

Medical malpractice. — When a jury in a medical malpractice case awarded the parents of a deceased infant damages for the infant's pain and suffering and the medical expenses for the infant's hospital care, but awarded nothing on the parents' wrongful death claim, it was error to grant additur under O.C.G.A. § 51-12-12(b). Additur in such a case might be a substitution of the trial court's finding for the jury's finding. Columbus Reg'l Healthcare Sys. v. Henderson, 282 Ga. 598, 652 S.E.2d 522 (2007).

In a medical malpractice suit, the trial court did not abuse the court's discretion by denying the defendants' motion for a new trial or for a judgment notwithstanding the verdict because there was sufficient evidence presented at trial to prove negligent supervision, particularly the defendants collectively stipulating that the defendants' negligence and breaches in the standard of care in injecting the patient's knee directly and proximately caused the knee infection. Ga. Clinic, P.C. v. Stout, 323 Ga. App. 487, 747 S.E.2d 83 (2013).

Award of zero damages in products liability case. — In a products liability action initiated by the plaintiff after the plaintiff's newly developed, ready-to-drink tea product line spoiled on the grocery shelves, the evidence sup-

Applicability to Specific Cases (Cont'd)

ported a finding that the plaintiff's own negligence was greater than or equal to that of the defendant, and an award of zero damages was not so inadequate as to be inconsistent with the preponderance of the evidence. Shasta Bevs., Inc. v. Tetley USA, Inc., 248 Ga. App. 381, 546 S.E.2d 800 (2001).

Reduction of award by 90 percent. — The trial court did not manifestly abuse the court's discretion in denying a new trial on the ground that the verdict was excessive since the court exercised its authority under subsection (b) of O.C.G.A. § 51-12-12 and reduced the damages to only ten percent of those awarded by the jury, which constituted a conditional grant of the defendants' motion. Porter v. Tissenbaum, 247 Ga. App. 816, 545 S.E.2d 372 (2001).

Verdict of over $1,000,000 for physical injuries received by the plaintiff in an automobile accident was not excessive. Smith v. Crump, 223 Ga. App. 52, 476 S.E.2d 817 (1996).

Compensatory damages of $750,000 not excessive. — After a truck driver punched the plaintiff in the face during a road rage incident, an award of $750,000 in compensatory damages against the driver's employer was not so excessive as to entitle the employer to a new trial, as the employer, by defaulting, admitted the complaint's allegations that: (1) the employer knew the driver was incompetent to drive; (2) the employer acted recklessly in allowing the driver to drive; (2) the driver was acting within the scope of employment when the driver assaulted the plaintiff; and (4) the plaintiff suffered severe emotional distress due to the attack. Aldworth Co. v. England, 276 Ga. App. 31, 622 S.E.2d 367 (2005), aff'd in part and rev'd in part, 281 Ga. 197, 637 S.E.2d 198, 2006 Ga. LEXIS 883 (2006).

Punitive damages of $1 million not excessive. — After a truck driver punched the plaintiff in the face during a road rage incident and the employer, by defaulting, admitted acting recklessly in allowing the driver to drive, a punitive damages award of $1 million, or 1.3 times compensatory damages, was not so excessive as to deny the employer due process; therefore, the employer was not entitled to a new trial. Aldworth Co. v. England, 276 Ga. App. 31, 622 S.E.2d 367 (2005), aff'd in part and rev'd in part, 281 Ga. 197, 637 S.E.2d 198, 2006 Ga. LEXIS 883 (2006).

Punitive damage in trust action. — In a breach of trust action, the trial court erred in denying the defendant brothers' motion to reduce damages with respect to the punitive damage award because the jury specifically found that the brothers did not act with the specific intent to cause harm to the sister; the judgment could be affirmed only on the condition that the sister agreed to strike therefrom the award of punitive damages in excess of $250,000. Sims v. Heath, 258 Ga. App. 681, 577 S.E.2d 789 (2002) (Unpublished).

Awarding same general damages to victims injured in varying degrees. — Awarding same general damages to car crash passenger who sustained severe injuries as awarded to less seriously injured passenger does not alone warrant a new trial. Cullen v. Timm, 184 Ga. App. 80, 360 S.E.2d 745 (1987).

Jury confusion mandates new trial. — When injured guest passengers were not negligent and incurred special damages, a verdict in their favor but awarding zero damages was strongly against the weight of the evidence and, when considered along with the real probability that the jury was confused over issues related to other claims by other parties tried in the same case, a new trial was mandated. Moore v. TCI Cablevision of Ga., Inc., 235 Ga. App. 796, 510 S.E.2d 96 (1998).

Verdict reflected gross mistake by jury. — Trial court erred in denying a college's motion for a new trial because, after a student's expert testified that if the student returned to school after trial, the lost income, additional tuition, and attorney fees would be $103,377; the jury's verdict of $698,500 so greatly exceeded the student's possible damages that it could only reflect a gross mistake by the jury. Morehouse College, Inc. v. McGaha, 277 Ga. App. 529, 627 S.E.2d 39 (2005).

Increase in damage award in contracting claim. — Trial court did not err

by refusing to enter a judgment molding with a jury's verdict to correct an alleged illegality and inconsistency in the damages award because under O.C.G.A. § 9-12-7, the trial court had no authority to mold the verdict since an increase in damages was a matter of substance, not mere form; a plumbing contractor was not without a potential remedy if the contractor believed that the jury's verdict was incorrect because after the return of the verdict but before the dispersal of the jury, the plumbing contractor could have argued that the jury's damage award was illegal and internally inconsistent and could have requested the trial court to give additional instructions and permit the jury to consider the matter again, and alternatively, after the jury was dispersed, the plumbing contractor could have asked for a new trial on the issue of damages or to conditionally grant a new trial under the court's power of additur under O.C.G.A. § 51-12-12. Gill Plumbing Co. v. Jimenez, 310 Ga. App. 863, 714 S.E.2d 342 (2011), cert. denied, No. S11C1826, 2011 Ga. LEXIS 966 (Ga. 2011).

Award excessive. — Trial court erred when the court denied a bank's motion for a new trial in a fraud case because the amount of damages awarded was excessive in that the evidence adduced at trial did not authorize the jury's award of $100,000 against the bank because the suing construction company alleged and proved only economic harm in an amount substantially less than that award, namely $9,400 via a materialman's lien, and renovation expenses in the amount of $23,000. Further, the jury's award of an additional $55,000 against the bank as punitive damages was erroneous since there was no charge on punitive damages, let alone proper guidance on the clear and convincing evidence required; the verdict form did not pose the question of punitive damages except by quotation of O.C.G.A. § 51-12-5.1(f), which required the jury to find specific intent to cause harm before the jury could award punitive damages in excess of $250,000; and the proceedings were not properly bifurcated. First Southern Bank v. C & F Servs., 290 Ga. App. 304, 659 S.E.2d 707 (2008).

Applicability to FELA cases. — Because questions as to the proper measure of damages in Federal Employer's Liability Act, 45 U.S.C. § 51 et seq., cases are governed by general principles of law established by the federal courts, the revision of O.C.G.A. § 51-12-12 in 1987 did not modify the principles applicable to FELA cases. Central of Ga. R.R. v. Carter, 212 Ga. App. 528, 442 S.E.2d 269 (1994).

Fraud claims. — In a breach of contract and fraud action, the appellate court refused to disturb the jury's verdict awarding the lessor general damages because such damages were available on a fraud claim and there simply was no basis to overturn the verdict. Goody Prods. v. Dev. Auth. of Manchester, 320 Ga. App. 530, 740 S.E.2d 261 (2013).

Award to co-incorporator upheld. — Damages' award to the damaged co-incorporator was upheld as the jury could have reasonably concluded that had the corporation pursued a development of certain advertising signs, then the co-incorporator would have been entitled to have that profit. Multimedia Techs., Inc. v. Wilding, 262 Ga. App. 576, 586 S.E.2d 74 (2003).

Award of $22,000 in trespass case not excessive. — In a trespass counterclaim, a jury's award of $22,000 properly withstood motions for relief from the judgment because there was evidence to support the verdict and even if the award, which had not been specifically enumerated as general or nominal damages, was awarded as nominal damages, such damages could vary widely in Georgia and were not subject to being set aside based solely on the amount. Wright v. Wilcox, 262 Ga. App. 659, 586 S.E.2d 364 (2003).

Award of $60,000 not inadequate. — Jury award of approximately $60,000 in a slip and fall case, which was only approximately $7,000 more than the injured person's medical bills, was not so inadequate as to have warranted a new trial since there was evidence of comparative negligence, including evidence that the injured person's diabetic condition, combined with the injured person's failure to eat, made the injured person dizzy, weak, and faint while at the restaurant, and evidence that the injured person was in a hurry, that the injured person's shoes did not give sufficient traction, that the injured person had

Applicability to Specific Cases (Cont'd)

just entered the same door that the injured person later exited, and that the injured person noticed the walkway was wet upon entering the restaurant; a jury was also allowed to reduce a verdict if the damages resulted from a preexisting condition, and there was evidence of the injured person's preexisting injuries, including evidence that the injured person had experienced pain and difficulties in the injured person's hips, elbows, joints, and legs, had anxiety problems and depression, and had suffered from arthritis. Anderson v. L & R Smith, Inc., 265 Ga. App. 469, 594 S.E.2d 688 (2004).

Award of $100,000 for slander per se not excessive. — Pursuant to O.C.G.A. § 51-12-12, a trial court set aside as excessive a jury's award to a musician of $100,000 in general damages for slander per se committed by a radio personality. This was error since the evidence showed the radio broadcast falsely accusing the musician of murder damaged the musician's reputation and career, which was based on the musician's reputation as a positive role model for fathers. Riddle v. Golden Isles Broad., LLC, 292 Ga. App. 888, 666 S.E.2d 75 (2008).

Damages for breach of fiduciary duty. — General partner of a limited partnership that owned a shopping center, the partnership's president, and the shopping center managers' claim that the limited partners failed to support the damages awarded by a jury for breach of fiduciary duty in a derivative action was rejected as the claim was not raised below, the parties introduced expert testimony based upon an individual cash flow analysis that employed almost the same documentation, and the damages awarded by the jury for breach of fiduciary duty could be based on a cash flow analysis. T. C. Prop. Mgmt., Inc. v. Tsai, 267 Ga. App. 740, 600 S.E.2d 770 (2004).

It was not an abuse of discretion to deny a new trial motion brought by a trustee who was found to have breached the trustee's fiduciary duty to trust beneficiaries by making distributions to a co-trustee under a trust's encroachment provision, because the trustee breached the trustee's duty to protect the trust corpus as (1) the trustee inconsistently required the co-trustee to provide supporting evidence for corpus distributions and let the co-trustee exceed an allotted budget, and (2) the beneficiaries were damaged by the resulting reduction in trust corpus. Reliance Trust Co. v. Candler, 315 Ga. App. 495, 726 S.E.2d 636 (2012).

Damages awarded on one claim but not on another. — A jury's finding that damages should be awarded on one claim but not on another claim may be an inconsistent or contradictory verdict for which a trial court may use its traditional powers to grant a motion for new trial on liability and damages, but the verdict is not one reflecting "inadequate" damages for which the trial court may use its power to add to the verdict under O.C.G.A. § 51-12-12(b). Columbus Reg'l Healthcare Sys. v. Henderson, 282 Ga. 598, 652 S.E.2d 522 (2007).

Award not excessive in condemnation case. — Although the condemnee contended that the court erred in failing to apply O.C.G.A. § 51-12-12, § 51-12-12(b) provided that if the jury's award of damages was clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence, the trial court may order a new trial as to damages only. But in the instant case, the jury's award was well within the range of the undisputed and competent evidence before the jury; that claim of error was therefore without merit. RNW Family P'ship, Ltd. v. DOT, 307 Ga. App. 108, 704 S.E.2d 211 (2010).

Damage award upheld. — A damages award was upheld on appeal from a breach of contract action, despite the suing party's claim that the amount was inadequate, because the record showed that the jury was charged, without objection, as to both an issue of damages and on causation, including mitigation, and awarded only those damages it determined flowed directly from the breach. Gold Kist, Inc. v. Base Mfg., 289 Ga. App. 690, 658 S.E.2d 228 (2008).

In a truck driver's suit against a mechanic to recover for faulty repairs, the evidence presented at trial authorized the

jury's verdict awarding $200,000 in damages; therefore, the trial court did not abuse the court's discretion in denying the defendant's motion for new trial or for a remittitur under O.C.G.A. § 51-12-12(a). Because the plaintiff was unable to drive the plaintiff's own truck, the plaintiff spent thirty-two months unemployed, and an account summary provided by the employer was sufficient evidence from which the jury could determine lost wages. Smith v. Reddick, 319 Ga. App. 269, 735 S.E.2d 15 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, §§ 5, 802, 827 et seq.

C.J.S. — 25A C.J.S., Damages, § 457 et seq.

ALR. — Excessiveness of verdict in action by person injured for injuries not resulting in death, 46 ALR 1230; 102 ALR 1125; 16 ALR2d 3.

Power of court to reduce or increase verdict without giving party affected the option to submit to a new trial, 53 ALR 779; 95 ALR 1163.

Constitutionality, construction, and application of statute relating to excessiveness or inadequacy of damages as ground of reversal or new trial, 88 ALR 943.

Right of jury to allow substantial damages in action for death of minor child not gainfully employed, 149 ALR 234.

Duty to instruct, and effect of failure to instruct, jury as to reduction to present worth of damages for future loss on account of death or personal injuries, 154 ALR 796.

Excessiveness of damages in action by person injured for personal injuries not resulting in death (for years 1941 to 1950), 16 ALR2d 3.

Validity of verdict awarding plaintiff in personal injury action amount of medical expenses but failing to award damages for pain and suffering, 20 ALR2d 276.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages awarded, 29 ALR2d 1199.

Excessiveness or inadequacy of damages for false imprisonment or arrest, 35 ALR2d 273.

Excessiveness or inadequacy of damages for malicious prosecution, 35 ALR2d 308.

Verdict for money judgment which finds for party for ambiguous or no amount, 49 ALR2d 1328.

Court's power to increase amount of verdict or judgment over either party's refusal or failure to consent to addition, 56 ALR2d 213.

Verdict in excess of amount demanded as requiring new trial notwithstanding voluntary remittitur, 65 ALR2d 1331.

Quotient verdicts, 8 ALR3d 335.

Excessiveness or adequacy of damages awarded to injured person for injuries to arms, legs, feet, and hands, 11 ALR3d 9; 13 ALR4th 212; 12 ALR4th 96.

Excessiveness or adequacy of damages awarded to injured person for injuries to head or neck, 11 ALR3d 370; 14 ALR4th 328; 15 ALR4th 294; 16 ALR4th 1127; 14 ALR4th 328; 15 ALR4th 294; 16 ALR4th 1127.

Excessiveness or adequacy of damages awarded to injured person for injuries to organic systems and processes of body, 12 ALR3d 475; 14 ALR4th 539; 15 ALR4th 519; 16 ALR4th 1127.

Excessiveness or adequacy of damages awarded to injured person for injuries to trunk or torso, 12 ALR3d 2117.

Party's acceptance of remittitur in lower court as affecting his right to complain in appellate court as to amount of damages for personal injury, 16 ALR3d 1327.

Excessiveness and adequacy of damages for personal injuries resulting in death of minor, 49 ALR3d 934.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of retired persons, 52 ALR3d 1289.

Excessiveness or adequacy of damages awarded for injuries to arms and hands, 12 ALR4th 96.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 35 ALR4th 441.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of homemaker, 47 ALR4th 100.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in trades and manual occupations, 47 ALR4th 134.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 ALR4th 165.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of retired persons, 48 ALR4th 229.

Excessiveness and adequacy of damages for personal injuries resulting in death of minor, 49 ALR4th 1076.

Excessiveness or inadequacy of compensatory damages for malicious prosecution, 50 ALR4th 843.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering, 55 ALR4th 186.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages—modern cases, 5 ALR5th 875.

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases, 12 ALR5th 195.

Excessiveness or adequacy of damages awarded for injuries to head or brain, 50 ALR5th 1.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system. 51 ALR5th 467.

51-12-13. Reduction of expenses, wages, and other damages to present value.

(a) In determining the present value of future medical expenses, living expenses, lost wages, or other economic damages, the trier of fact may reduce the same to the present value based on a discount rate of 5 percent or any other discount rate as the trier of fact may deem appropriate.

(b) This Code section shall not be construed to provide for the introduction of evidence showing the cost of any specific private investment product, including, but not limited to, an annuity. (Ga. L. 1970, p. 168, § 2; Ga. L. 2013, p. 759, § 1/HB 94.)

Law reviews. — For article distinguishing loss of capacity to work with loss of earning capacity, see 23 Ga. B. J. 213 (1960). For article discussing the use of mortality tables in determining the value of life earnings of the deceased in wrongful death actions, with emphasis on the Carlisle table, see 9 Ga. St. B. J. 293 (1973). For article, "Problems in Calculating and Awarding Compensatory Damages for Wrongful Death Under the Federal Tort Claims Act," see 36 Emory L.J. 149 (1987). For article, "Damage Calibrations Under the Federal Tort Claims Act," see 25 Ga. St. B. J. 100 (1988). For article, "The Discount Rate in Georgia Personal Injury and Wrongful Death Damage Calculations," see 13 Ga. St. U.L. Rev. 431 (1997). For article, "Calculating Economic Damages in Georgia Personal Injury and Wrongful Death Cases," see 22 Ga. St. Bar. J. 18 (Feb. 2017).

JUDICIAL DECISIONS

Section inapplicable to condemnation actions. — O.C.G.A. § 51-12-13 applies to actions in tort, but not to the issue of just and adequate compensation in a condemnation action. Chouinard v. City of E. Point, 237 Ga. App. 266, 514 S.E.2d 220 (1999).

Evidence did not authorize award when evidence showed recent drop in earnings. — While a jury might be authorized to find that the decedent had a life expectancy of ten years longer than that set out in Carlisle's Mortality Table, the evidence did not authorize the finding

that the decedent's income or potential would average $6,600.00 per year during that life expectancy, where the evidence showed that the decedent's earnings had dropped in the last several years to $1,200 per year. Swift & Co. v. Lawson, 95 Ga. App. 35, 97 S.E.2d 168 (1957).

Admission of expert testimony deemed harmless error. — Admission of testimony of an annuity expert, in a medical malpractice action, to establish how the plaintiff might profitably invest the money the plaintiff had already received from a settlement with former co-defendants was harmless error since the jury found the defendant was not liable and the error did not affect the verdict. Barnes v. Wall, 201 Ga. App. 228, 411 S.E.2d 270 (1991).

Cited in Miller v. Tuten, 137 Ga. App. 188, 223 S.E.2d 237 (1976); Piggly-Wiggly S., Inc. v. Tucker, 139 Ga. App. 873, 229 S.E.2d 804 (1976); Williams v. Adams, 170 Ga. App. 35, 316 S.E.2d 1 (1984); Gusky v. Candler Gen. Hosp., 192 Ga. App. 521, 385 S.E.2d 698 (1989); Meader ex rel. Long v. United States, 881 F.2d 1056 (11th Cir. 1989); CSX Transp., Inc. v. Barnett, 199 Ga. App. 611, 405 S.E.2d 506 (1991); Childs v. United States, 923 F. Supp. 1570 (S.D. Ga. 1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am Jur. 2d, Damages, § 174 et seq.

ALR. — Duty to instruct, and effect of failure to instruct, jury as to reduction to present worth of damages for future loss on account of death or personal injury, 77 ALR 143.

Cost of annuity as a factor for consideration in fixing damages in personal injury or death action, 53 ALR2d 1454.

Admissibility in wrongful death action of testimony of actuary or mathematician for purpose of establishing present worth of pecuniary loss, 79 ALR2d 259.

Admissibility of testimony of actuary or mathematician as to present value of loss or impairment of injured person's general earning capacity, 79 ALR2d 275.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 ALR3d 88.

Excessiveness or adequacy of damages awarded for injuries to head or brain, or for mental or nervous disorders, 14 ALR4th 328.

Excessiveness or adequacy of damages awarded for injuries to, or conditions induced in, circulatory, digestive, and glandular systems, 14 ALR4th 539.

Excessiveness or adequacy of damages awarded for injuries to head or brain, 50 ALR5th 1.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system, 51 ALR5th 467.

51-12-14. Unliquidated Damages Interest Act; procedure for demand of unliquidated damages in tort actions; when interest may be recovered.

(a) Where a claimant has given written notice by registered or certified mail or statutory overnight delivery to a person against whom claim is made of a demand for an amount of unliquidated damages in a tort action and the person against whom such claim is made fails to pay such amount within 30 days from the mailing or delivering of the notice, the claimant shall be entitled to receive interest on the amount demanded if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the amount demanded. However, if, at any time after the 30 days and before the claimant has withdrawn his or her demand, the person against whom such claim is made gives written notice by registered or certified mail or statutory

overnight delivery of an offer to pay the amount of the claimant's demand plus interest under this Code section through the date such notice is given, and such offer is not accepted by the person making the demand for unliquidated damages within 30 days from the mailing or delivering of such notice by the person against whom such claim is made, the claimant shall not be entitled to receive interest on the amount of the demand after the thirtieth day following the date on which the notice of the offer is mailed or delivered even if, upon trial of the case in which the claim is made, the judgment is for an amount not less than the sum demanded pursuant to this Code section.

(b) Any written notice referred to in subsection (a) of this Code section shall specify that it is being given pursuant to this Code section.

(c) The interest provided for by this Code section shall be at an annual rate equal to the prime rate as published by the Board of Governors of the Federal Reserve System, as published in statistical release H. 15 or any publication that may supersede it, on the thirtieth day following the date of the mailing of the last written notice plus 3 percent, and shall begin to run from the thirtieth day following the date of the mailing or delivering of the written notice until the date of judgment. This subsection shall apply to all civil actions filed on or after July 1, 2003.

(d) Evidence or discussion of interest on liquidated damages, as well as evidence of the offer, shall not be submitted to the jury. Interest shall be made a part of the judgment upon presentation of evidence to the satisfaction of the court that this Code section has been complied with and that the verdict of the jury or the award by the judge trying the case without a jury is equal to or exceeds the amount claimed in the notice.

(e) This Code section shall be known and may be cited as the "Unliquidated Damages Interest Act." (Ga. L. 1968, p. 1156, § 1; Ga. L. 1975, p. 395, § 1; Ga. L. 1981, p. 681, § 1; Ga. L. 1991, p. 1394, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2003, p. 820, § 6.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2003, "July 1, 2003" was substituted for "the effective date of this subsection" at the end of subsection (c).

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2003, p. 820, § 9, not codified by the General Assembly, provides that this Act "shall apply to all civil actions filed on or after July 1, 2003."

Law reviews. — For survey of developments in the Georgia torts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 247 (1981). For article surveying recent developments in remedies in 1984-1985, see 37 Mercer L. Rev. 503 (1985). For annual survey of law of torts, see 56 Mercer L. Rev. 433 (2004). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005).

For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 28 (2003).

JUDICIAL DECISIONS

There is no requirement that judgment debtor be given actual and personal notice. Williams v. Runion, 173 Ga. App. 44, 325 S.E.2d 441 (1984).

Strict construction. — These provisions of O.C.G.A. § 51-12-14, setting forth the manner in which a plaintiff can recover prejudgment interest on unliquidated damages in a tort suit, are in derogation of common law and therefore must be strictly construed. Resnik v. Pittman, 203 Ga. App. 835, 418 S.E.2d 116 (1992).

Construction with O.C.G.A. § 7-4-12. — Trial court did not err in adding interest to the award before considering whether the judgment was greater than the demand for purposes of O.C.G.A. § 51-12-14, as § 51-12-14 had to be construed in pari materia with O.C.G.A. § 7-4-12; post-judgment interest continued to accrue under O.C.G.A. § 7-4-12 until the set-off became effective under O.C.G.A. § 9-13-75. Sec. Life Ins. Co. v. St. Paul Marine & Fire Ins. Co., 263 Ga. App. 525, 588 S.E.2d 319 (2003).

When statutory notice required under this section is not given, award of interest cannot stand. Georgia Ports Auth. v. Mitsubishi Int'l Corp., 156 Ga. App. 304, 274 S.E.2d 699 (1980).

After the plaintiff sent written notice for unliquidated damages to the claims manager at the defendant's insurance company and not to the defendant, this was insufficient to authorize an award of prejudgment interest and the trial court erred by entering judgment in favor of the plaintiff. Resnik v. Pittman, 203 Ga. App. 835, 418 S.E.2d 116 (1992).

Notice given by an employee who sued an employer and supervisors for malicious prosecution in an effort to be entitled to prejudgment interest did not comply with a strict construction of the applicable statute. Wolf Camera, Inc. v. Royter, 253 Ga. App. 254, 558 S.E.2d 797 (2002).

Notice to a party's lawyer constitutes notice to the party under O.C.G.A. § 51-12-14. Bennett v. Mullally, 263 Ga. App. 215, 587 S.E.2d 385 (2003).

Notice to defendant's insurer. — In an automobile accident case, after an agent of the insurance carrier controlling the defendant's defense instructed the plaintiff's attorney to direct future correspondence to the agent, the defendant was estopped from asserting that compliance with such instructions did not meet the notice requirements of O.C.G.A. § 51-12-14 since any such failure resulted from the conduct of those acting on the defendant's behalf. Hewett v. Carter, 215 Ga. App. 429, 450 S.E.2d 843 (1994).

Plaintiff's counsel's notice to the defendant by registered mail of the client's negligence claim and a separate settlement demand sent to the defendant's insurer did not comply with the requirements of O.C.G.A. § 51-12-14. Martin v. Williams, 215 Ga. App. 649, 451 S.E.2d 822 (1994).

Notice of claim not required before renewal action. — In a medical malpractice action, when the plaintiffs gave written notice of their claim for prejudgment interest prior to filing the original suit, they were not required to give notice again prior to filing a renewal action. Daniel v. Causey, 220 Ga. App. 589, 469 S.E.2d 839 (1996).

Notice of demand covering multiple claims. — Plaintiffs, husband and wife, were not entitled to prejudgment interest when the notice of demand made reference only to the husband's personal injury claim and did not include the wife's loss of consortium claim. American Golf Corp. v. Manley, 222 Ga. App. 7, 473 S.E.2d 161 (1996).

"Judgment" and "sum claimed" construed. — If subsection (a) of O.C.G.A. § 51-12-14 is to be read fairly and according to its most natural and obvious import, the terms "judgment" and "sum claimed" must be treated congruently. Bullman v. Tenneco Oil Co., 197 Ga. App. 408, 398 S.E.2d 311 (1990).

Judgment less than verdict. — If a judgment is less than the verdict due to setoffs for payments already received by victims from tortfeasors, O.C.G.A. § 51-12-14 should be construed to entitle a plaintiff to interest only if the amount of the post-setoff judgment is equal to or exceeds the amount of the settlement de-

mand. Restina v. Crawford, 205 Ga. App. 887, 424 S.E.2d 79 (1992).

The award of prejudgment interest was not authorized since the authorized verdict did not exceed the pretrial demand. Evans v. Willis, 212 Ga. App. 335, 441 S.E.2d 770 (1994).

Punitive damages not counted in assessing interest. — An award of punitive damages may not be counted in determining whether a judgment exceeded the amount of the plaintiff's demand for unliquidated damages for the purpose of assessing prejudgment interest. GMC v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (1994); Martin v. Williams, 215 Ga. App. 649, 451 S.E.2d 822 (1994); Peters v. Hyatt Legal Servs., 220 Ga. App. 398, 469 S.E.2d 481 (1996).

Interest on unliquidated damages may not be awarded by jury but must be awarded by trial court following compliance with notice procedures set forth in O.C.G.A. § 51-12-14. Covington v. Saxon, 163 Ga. App. 646, 295 S.E.2d 105 (1982).

Interest should not be included as part of damages by the finder of fact, whether designated eo nomine or not, since to do so would allow the recovery of double damages where interest is claimed under O.C.G.A. § 51-12-14. Barbush v. Oiler, 158 Ga. App. 625, 281 S.E.2d 359 (1981).

The jury may add to the value of property destroyed a sum equal to the interest on such value, but such sum must be found and returned as damages, not as interest. Barbush v. Oiler, 158 Ga. App. 625, 281 S.E.2d 359 (1981).

When the jury finds a specific amount and adds it to the damages in the tort action, and the court both allows this increase in the damages on the part of the fact finder plus interest on the sum claimed under O.C.G.A. § 51-12-14, the successful plaintiff would not only receive as damages the face amount of the plaintiff's claim, but in addition would receive a sum representing interest at 7 percent per annum from the date of loss to the date of judgment locked into the face amount of the judgment and an additional amount representing interest at 7 percent per annum from a date commencing 30 days from the plaintiff's date of notice of claim to the defendant and running also to the date of judgment. Barbush v. Oiler, 158 Ga. App. 625, 281 S.E.2d 359 (1981).

While jury may add a sum equal to interest on a loss as a part of total damages, in computing interest under O.C.G.A. § 51-12-14 the trial judge must consider only that part of the damages which constitute "principal" in the jury award. Williams v. Runion, 173 Ga. App. 54, 325 S.E.2d 441 (1984).

Court cannot add interest to judgment already entered. — A motion for interest, filed after expiration of the term during which a judgment had been entered, provided no vehicle for the court to add interest to the judgment already entered, when there had been no motion to set aside the judgment. Moore v. Thompson, 187 Ga. App. 672, 371 S.E.2d 111 (1988).

Prejudgment interest recoverable for liquidated amounts. — When the amount at issue is fixed and certain, and so liquidated, according to O.C.G.A. § 7-4-15, the recovery of prejudgment interest is appropriate. Buchanan v. Bowman, 820 F.2d 359 (11th Cir. 1987).

Entitlement to prejudgment interest. — Since the plaintiff had complied with the requirements of the Unliquidated Damages Interest Act, O.C.G.A. § 51-12-14, the plaintiff was entitled to prejudgment interest and the trial court abused the court's discretion by not exercising its inherent power to amend its judgment to add such interest upon motion of the plaintiff in the same term it was entered. Piggly Wiggly S., Inc. v. Snowden, 219 Ga. App. 148, 464 S.E.2d 220 (1995).

Since the decision of an arbitrator was never confirmed by the trial court and no judgment was ever entered thereon, the imposition of prejudgment interest was error as prejudgment interest never began to accrue. Kuhl v. Shepard, 226 Ga. App. 439, 487 S.E.2d 68 (1997).

Plaintiff welder and spouse were entitled to an award of prejudgment interest, in a negligence/loss of consortium action, under Georgia's Unliquidated Damages Interest Act, O.C.G.A. § 51-12-14, when their demand letter was addressed only to

defendant landowner's insurer but was also sent to the landowner, via certified mail. However, the judgment for the plaintiffs was reversed due to trial court error on a jury instruction. Long Leaf Indus., Inc. v. Mitchell, 252 Ga. App. 343, 556 S.E.2d 242 (2001).

The couple was entitled to prejudgment interest in a medical malpractice action as they made a single settlement demand to either defendant, despite sending two letters, and the payment of the settlement by either party would have ended the litigation. Kniphfer v. Mem'l Health Univ. Med. Ctr., Inc., 256 Ga. App. 874, 570 S.E.2d 16 (2002).

Trial court erred in awarding prejudgment interest to first injured party on first injured party's motion for that interest as the statute, which had to be strictly construed because it was in derogation of the common law, required that the judgment awarded be greater than the amount the party requested in settlement and that was not the situation for the first injured party. White v. Jensen, 257 Ga. App. 560, 571 S.E.2d 544 (2002).

Driver was properly required to pay interest during the two years between the first defense verdict and the trial court's ruling on the injured party's motion for a new trial because the delay was within the driver's control; acceptance of the offer to settle for $100,000 was always within the driver's control, and there was no error in the award of prejudgment interest. Bennett v. Mullally, 263 Ga. App. 215, 587 S.E.2d 385 (2003).

Trial court did not err in awarding pre-judgment interest under O.C.G.A. § 51-12-14 because there remained a balance on an attorney fees award under O.C.G.A. § 9-15-14, that survived the appeal and that was not paid by the insurer, and was no longer subsumed in a later judgment. To the extent that Restina v. Crawford, 205 Ga. App. 887 (1992) required that set-offs of prior settlements with other joint tortfeasors had to be considered in determining if the demand had been equaled or exceeded for the imposition of pre-judgment interest, such language is disapproved. Sec. Life Ins. Co. v. St. Paul Marine & Fire Ins. Co., 263 Ga. App. 525, 588 S.E.2d 319 (2003).

Appellate court's determination of the amount on which an award of prejudgment interest was to be based was error because that amount included a pretrial award of attorney fees for discovery misconduct, and pre- and post-judgment interest on that award, but the award had been vacated, and it was the law of the case that the amount of that award had to be retried, so the trial court could not, on remand, find that its attorney fees award was simply no longer subsumed in the jury's verdict. Sec. Life Ins. Co. of Am. v. St. Paul Fire & Marine Ins. Co., 278 Ga. 800, 606 S.E.2d 855 (2004).

Because a stockholder failed to comply with O.C.G.A. § 51-12-14, and prejudgment interest was not authorized by O.C.G.A. § 7-4-15, these awards entered in favor of the stockholder were reversed. Monterrey Mexican Rest. of Wise, Inc. v. Leon, 282 Ga. App. 439, 638 S.E.2d 879 (2006).

No authority to amend judgment to award pre-judgment interest after appeal filed. — In a negligence suit wherein a train patron was attacked and raped while exiting a train station, the trial court erred by amending its judgment and granting the train patron pre-judgment interest as the defending public transportation authority had already filed a notice of appeal, therefore, the trial court was without jurisdiction to amend its judgment to include the pre-judgment interest. MARTA v. Doe, 292 Ga. App. 532, 664 S.E.2d 893 (2008).

Prejudgment interest for federal claims. — Compliance with O.C.G.A. § 51-12-14 is not a prerequisite to an award of prejudgment interest if a claim is governed by federal law. Hardaway Constructors, Inc. v. Browning, 176 Ga. App. 530, 336 S.E.2d 579 (1985), cert. denied, 475 U.S. 1095, 106 S. Ct. 1491, 89 L. Ed. 2d 893 (1986).

Lump sum settlement offer on multiple claims. — Nothing in O.C.G.A. § 51-12-14 precludes a lump sum settlement offer on multiple claims, such as personal injury and loss of consortium claims. Grissett v. Wilson, 181 Ga. App. 727, 353 S.E.2d 621 (1987).

Effect of evidence of bad faith on entitlement to interest on

unliquidated damages. — When the original complaint contained a prayer for recovery of expenses of litigation and the evidence in support of the claim was the defendant's bad faith in the transaction, and since written notice in the form of a demand letter expressly offered to settle the entire score with all defendants for all damages, the amount of bad faith damages was correctly included in calculating the amount of the judgment for purposes of determining the plaintiffs' entitlement to interest on unliquidated damages. Windermere v. Bettes, 211 Ga. App. 177, 438 S.E.2d 406 (1993).

Effect of reversal of award of prejudgment interest. — After a trial court, upon remittitur, entered judgment as directed by the Court of Appeals, the trial court erred in then finding that the losing party's argument as to prejudgment interest was barred by res judicata, since the award to the plaintiff of prejudgment interest under O.C.G.A. § 51-12-14 was not clearly erroneous until the Court of Appeals had reversed the earlier judgment. City of Fairburn v. Cook, 195 Ga. App. 265, 393 S.E.2d 70, cert. denied, 195 Ga. App. 265, 393 S.E.2d 70 (1990).

Right to post-judgment interest. — Under O.C.G.A. § 7-4-12, interest on a judgment continues to accrue at the rate of 12 percent per annum until paid; such post-judgment interest is a damage that the plaintiffs recover against the defendants, and is included in calculating the recovery against it for purposes of O.C.G.A. § 51-12-14, because post-judgment interest at 12 percent is intended to deter post-judgment delay, motions, and appeals and to bring finality to judgments or the defendant pays the price of protracted post-judgment litigation. Sec. Life Ins. Co. v. St. Paul Marine & Fire Ins. Co., 263 Ga. App. 525, 588 S.E.2d 319 (2003).

Cited in George R. Hall, Inc. v. Superior Trucking Co., 532 F. Supp. 985 (N.D. Ga. 1982); White v. Cline, 174 Ga. App. 448, 330 S.E.2d 386 (1985); Hodges v. Effingham County Hosp. Auth., 182 Ga. App. 173, 355 S.E.2d 104 (1987); J.C. Penney Cas. Ins. Co. v. Woodard, 190 Ga. App. 727, 380 S.E.2d 282 (1989); Chapman v. Hepburn, 191 Ga. App. 909, 383 S.E.2d 352 (1989); Home Ins. Co. v. North River Ins. Co., 192 Ga. App. 551, 385 S.E.2d 736 (1989); Malta Constr. Co. v. Henningson, Durham & Richardson, Inc., 716 F. Supp. 1466 (N.D. Ga. 1989); Three Notch Elec. Membership Corp. v. Simpson, 208 Ga. App. 227, 430 S.E.2d 52 (1993).

ADVISORY OPINIONS OF THE STATE BAR

Notice to unrepresented party. — It is ethically permissible to send the notice required by O.C.G.A. § 51-12-14, to an unrepresented party. An attorney sending the required notice, however, must do so in such a manner as to inform the unrepresented opposing party that the notice is sent merely to establish a claim for interest, that it is not to be construed as legal advice, and that the attorney sending the notice represents the opposing interests in the dispute. 1988 Adv. Op. No. 88-3 (Nov. 29, 1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 22 Am. Jur. 2d, Damages, § 480 et seq.

C.J.S. — 25 C.J.S., Damages, § 93.

ALR. — Interest on damages for period before judgment for injury to, or detention, loss, or destruction of, property, 96 ALR 18; 36 ALR2d 337.

Interest on recovery for period before judgment in action for money loss caused by fraud or duress, 171 ALR 816.

Retrospective application and effect of statutory provision for interest or changed rate of interest, 4 ALR2d 932.

Conflict of laws as to interest recoverable as part of the damages in a tort action, 68 ALR2d 1337.

Recovery of prejudgment interest on wrongful death damages, 96 ALR2d 1104.

Date from which interest on judgment starts running, as affected by modification

of amount of judgment on appeal, 4 ALR3d 1221.

Allowance of prejudgment interest on builder's recovery in action for breach of construction contract, 60 ALR3d 487.

Liability of insurer for prejudgment interest in excess of policy limits for covered loss, 23 ALR5th 75.

Date on which postjudgment interest, under 28 USCS sec. 1961 (a), begins to accrue on federal court's award of attorneys' fees, 111 ALR Fed. 615.

ARTICLE 2

JOINT TORT-FEASORS

Law reviews. — For survey article on business associations law, see 59 Mercer L. Rev. 35 (2007). For article, "Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. § 51-12-33," see 64 Mercer L. Rev. 15 (2012).

51-12-30. Procurer of wrong as joint wrongdoer; how action brought against joint wrongdoer.

In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury. (Orig. Code 1863, § 2954; Code 1868, § 2961; Code 1873, § 3012; Code 1882, § 3012; Civil Code 1895, § 3873; Civil Code 1910, § 4469; Code 1933, § 105-1207.)

Cross references. — Cause of action for interference with enjoyment of property, § 51-9-1.

Law reviews. — For article, "The Business Tort — Interference with Contractual Relationships or Business Expectations," see 19 Ga. St. B. J. 66 (1982). For survey article on labor and employment law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003).

For comment discussing remedy in tort for malicious breach of contract in furtherance of conspiracy, in light of Cannister Can Co. v. National Can Corp., 96 F. Supp. 273 (D.C. Del. 1951), see 14 Ga. B. J. 269 (1951).

JUDICIAL DECISIONS

Analysis

General Consideration
Corporate Environment
Conspiracy
Pleadings and Practice

General Consideration

Basis of joint liability. — To render one person liable in trespass for the acts of others, it must appear either that they acted in concert, or that the act of the party sought to be charged ordinarily and naturally produced the acts of the others. Brooks v. Ashburn, 9 Ga. 297 (1851); Burns v. Horkan, 126 Ga. 161, 54 S.E. 946 (1906); Burch v. King, 14 Ga. App. 153, 80 S.E. 664 (1914); Ketchum v. Price, 31 Ga.

General Consideration (Cont'd)

App. 49, 119 S.E. 442 (1923).

Joint action may be maintained against party who did act and one who directed or assisted in its commission. Belt v. Western Union Tel. Co., 63 Ga. App. 469, 11 S.E.2d 509 (1940).

LLC formed by individuals alleged to have breached employment covenants. — An interlocutory injunction was properly entered against a limited liability company (LLC) formed by two individuals who left a beauty salon with which they had signed covenants not to compete and not to solicit customers and employees; the LLC was a proper party to the suit given the evidence that it had maliciously helped to bring about the two individuals' alleged breach of the covenants. Bijou Salon & Spa, LLC v. Kensington Enters., 283 Ga. App. 857, 643 S.E.2d 531 (2007).

One who procures or assists in commission of trespass is liable with actual perpetrator for damages which the owner of the property sustains thereby. Belt v. Western Union Tel. Co., 63 Ga. App. 469, 11 S.E.2d 509 (1940); Melton v. Helms, 83 Ga. App. 71, 62 S.E.2d 663 (1950); Kitchens v. Jefferson County, 85 Ga. App. 902, 70 S.E.2d 527 (1952); Irvin v. Oliver, 223 Ga. 193, 154 S.E.2d 217 (1967).

Term "malicious," used in this connection, is to be given liberal meaning. The act is malicious when the thing done is with the knowledge of the plaintiff's rights, and with the intent to interfere therewith. It is a wanton interference with another's contractual rights. Wrigley v. Nottingham, 111 Ga. App. 404, 141 S.E.2d 859, rev'd on other grounds, 221 Ga. 386, 144 S.E.2d 749 (1965); Architectural Mfg. Co. v. Airotec, Inc., 119 Ga. App. 245, 166 S.E.2d 744 (1969).

Term "maliciously" means any unauthorized interference without legal justification or excuse. Personal ill will or animosity is not essential. Luke v. DuPree, 158 Ga. 590, 124 S.E. 13 (1924); Rood v. Newman, 74 Ga. App. 686, 41 S.E.2d 183, later appeal, 75 Ga. App. 621, 44 S.E.2d 171 (1947); Baker v. AMOCO, 90 Ga. App. 662, 83 S.E.2d 826 (1954); Nager v. Lad'n Dad Slacks, 148 Ga. App. 401, 251 S.E.2d 330 (1978).

Word "procure" as here used does not require lending of assistance in actual perpetration of wrong "done by another"; but if one, acting only through advice, counsel, persuasion, or command, succeeds in procuring any person to commit an actionable wrong, the procurer becomes liable for the injury, either singly or jointly with the actual perpetrator and this is true, irrespective of whether there exists between the two joint wrongdoers any such relation as master and servant, or other relation giving to the one authority over the other. Lambert v. Cook, 25 Ga. App. 712, 104 S.E. 509 (1920); Goddard v. Selman, 56 Ga. App. 116, 192 S.E. 257 (1937), aff'd, 186 Ga. 103, 197 S.E. 250 (1938); Melton v. Helms, 83 Ga. App. 71, 62 S.E.2d 663 (1950).

Procurer of actionable wrong liable. — One who procures or assists in the commission of an actionable wrong is equally liable with the actual perpetrator for the damages. The word procure, as used in O.C.G.A. § 51-12-30, does not require the lending of assistance in the actual perpetration of the wrong done by another; but if one, acting only through advice, counsel, persuasion, or command, succeeds in procuring any person to commit an actionable wrong, the procurer becomes liable for the injury, either singly or jointly, with the actual perpetrator. White v. Shamrock Bldg. Sys., 294 Ga. App. 340, 669 S.E.2d 168 (2008).

Procurement and ratification distinguished. — It is one thing, to maliciously procure an injury to another, and an entirely different thing to indicate approval of what has already happened. Brigman v. Brenner, 206 Ga. 222, 56 S.E.2d 471 (1949).

Attorney liable for attachment of wrong property. — The wrongful attachment of property belonging to one person, as that of another's, caused by an attorney, will render both the attorney and the client liable as trespassers. Williams v. Inman, 1 Ga. App. 321, 57 S.E. 1009 (1907).

Interference with economic relationships. — The statute does not establish a cause of action for interference with economic relationships. Project Control Servs., Inc. v. Reynolds, 247 Ga. App. 889, 545 S.E.2d 593 (2001).

Cited in Funk v. Baldwin, 80 Ga. App. 177, 55 S.E.2d 733 (1949); Berger & Co. v. Gray, 97 Ga. App. 230, 102 S.E.2d 925 (1958); Rhine v. Sanders, 100 Ga. App. 68, 110 S.E.2d 128 (1959); Bromley v. Bromley, 106 Ga. App. 606, 127 S.E.2d 836 (1962); Studdard v. Evans, 108 Ga. App. 819, 135 S.E.2d 60 (1964); Nottingham v. Wrigley, 221 Ga. 386, 144 S.E.2d 749 (1965); Wilkinson v. Trust Co. of Ga. Assocs., 128 Ga. App. 473, 197 S.E.2d 146 (1973); City of Hawkinsville v. Wilson & Wilson, Inc., 231 Ga. 110, 200 S.E.2d 262 (1973); Lowe v. Royal Crown Cola Co., 132 Ga. App. 37, 207 S.E.2d 620 (1974); Brinkley & West, Inc. v. Foremost Ins. Co., 499 F.2d 928 (5th Cir. 1974); Fratelli Gardino v. Caribbean Lumber Co., 447 F. Supp. 1337 (S.D. Ga. 1978); Vest v. Waring, 565 F. Supp. 674 (N.D. Ga. 1983); Bendiburg v. Dempsey, 707 F. Supp. 1318 (N.D. Ga. 1989); Hays v. Paul, Hastings, Janofsky & Walker LLP, No. 1:06-CV-754-CAP, 2006 U.S. Dist. LEXIS 95849 (N.D. Ga. Sept. 14, 2006).

Corporate Environment

Parties to contract have property right therein and third parties have no right maliciously to interfere with this right; "maliciously" meaning "any unauthorized interference or any interference without legal justification or excuse." Wometco Theatres, Inc. v. United Artists Corp., 53 Ga. App. 509, 186 S.E. 572 (1935).

Parties to a contract have a property right therein, which a third person has no more right maliciously to deprive them of, or injure them in, than one would have to injure their property. Such an injury amounts to a tort for which the injured party may seek compensation by an action in tort for damages. Baker v. AMOCO, 90 Ga. App. 662, 83 S.E.2d 826 (1954); Nager v. Lad'n Dad Slacks, 148 Ga. App. 401, 251 S.E.2d 330 (1978).

It is actionable to maliciously or without justifiable cause induce one to break one's contract with another to the damage of the latter. Wometco Theatres, Inc. v. United Artists Corp., 53 Ga. App. 509, 186 S.E. 572 (1935); Baker v. AMOCO, 90 Ga. App. 662, 83 S.E.2d 826 (1954); Nager v. Lad'n Dad Slacks, 148 Ga. App. 401, 251 S.E.2d 330 (1978).

Tort liability for contract breach. — When a person not a party to a contract procures, without justification, its breach, one may be liable thereof in tort. Wometco Theatres, Inc. v. United Artists Corp., 53 Ga. App. 509, 186 S.E. 572 (1935).

The breach of a contract is unlawful. It is unlawful for others, without lawful excuse, to induce the maker of a contract to break it, or to aid one in its breach; and for the maker and others to combine to break it is a conspiracy, which entitles the other party to the contract to an action against the conspirators for any damage which one may sustain. Baker v. AMOCO, 90 Ga. App. 662, 83 S.E.2d 826 (1954).

If persuasion to break a contract is used for indirect purpose of injuring plaintiff, or of benefitting the defendant, it is a malicious act, and a wrongful act, and an actionable act if injury ensures from it. Wrigley v. Nottingham, 111 Ga. App. 404, 141 S.E.2d 859, rev'd on other grounds, 221 Ga. 386, 144 S.E.2d 749 (1965); Architectural Mfg. Co. v. Airotec, Inc., 119 Ga. App. 245, 166 S.E.2d 744 (1969).

Mere failure of party to contract to carry out its terms will not give rise to cause of action against it by third party who has contracted with the opposite party to such a contract, although in breaching the contract such person may be charged with notice that the opposite party will not be able to perform its contract with such third party. Wometco Theatres, Inc. v. United Artists Corp., 53 Ga. App. 509, 186 S.E. 572 (1935).

This section is not confined to contracts of employment alone, but extends to all contracts. Baker v. AMOCO, 90 Ga. App. 662, 83 S.E.2d 826 (1954).

Tortious interference with contract. — In an action by a real estate agent against a building owner for tortious interference with the agent's employment contract with a real estate broker, summary judgment in favor of the owner was proper because the owner was not a third-party stranger to the contract at issue and the business relationship giving rise to and underpinning the con-

Corporate Environment (Cont'd)

tract. Atlanta Mkt. Ctr. Mgt. Co. v. McLane, 269 Ga. 604, 503 S.E.2d 278 (1998), reversing McLane v. Atlanta Mkt. Ctr. Mgt. Co., 225 Ga. App. 818, 486 S.E.2d 30 (1997).

Under this section one who wrongfully procures discharge even of employee at will may be liable for damages if one acts maliciously and without cause. Elliott v. Delta Air Lines, 116 Ga. App. 36, 156 S.E.2d 656 (1967).

Malicious and intentional interference by a third party with employment relationships between others is tortious, even if the employment is terminable at will. Nager v. Lad'n Dad Slacks, 148 Ga. App. 401, 251 S.E.2d 330 (1978).

In consideration of willful and malicious procurement of breach of employment contract, there are two categories of cases: (1) when there is a definite term of employment and the corporation or employer by discharging an employee would be liable for the breach of the employment contract; (2) when, even though the contract is terminable at will, a party with no authority to discharge the employee, being activated by an unlawful scheme or purpose to injure and damage one, maliciously and unlawfully persuades the employer to breach the contract with the employee. McElroy v. Wilson, 143 Ga. App. 893, 240 S.E.2d 155 (1977), cert. denied, 435 U.S. 931, 98 S. Ct. 1506, 55 L. Ed. 2d 528 (1978).

Attracting large percentage of personnel away from plaintiff may be actionable. — Destruction or substantial injury by means of attracting away all or a large percentage of personnel upon whom the plaintiff must depend to function, especially if other circumstances such as the use of confidential information or misrepresentations as to the plaintiff's financial solvency are involved, is compensable, under this section, with lack of actual malice going merely to mitigation of damages. Architectural Mfg. Co. v. Airotec, Inc., 119 Ga. App. 245, 166 S.E.2d 744 (1969).

When an at-will relationship is not technically one of master and servant but of a manufacturer or distributor and sales representatives who are in fact independent contractors, interference with the employment is wrongful and malicious, if, by persuasion, practically the entire sales force of the plaintiff, upon which it depends for its livelihood, leaves the plaintiff en masse and joins a competing firm, a cause of action may exist under this section. Architectural Mfg. Co. v. Airotec, Inc., 119 Ga. App. 245, 166 S.E.2d 744 (1969).

Tort of interference with contractual relations does not lie when privilege exists, which exempts such competition for employees from that claim. Orkin Exterminating Co. v. Martin Co., 240 Ga. 662, 242 S.E.2d 135 (1978).

This section has no application in instances in which persons who allegedly procured employee's discharge had authority to discharge the employee. Rhodes v. Levitz Furn. Co., 136 Ga. App. 514, 221 S.E.2d 687 (1975).

Liability for discharge of employee. — An employment contract which is terminable at will gives the directors as alter egos of the corporation an absolute right to discharge the employee and no liability exists under this section for the procurement of the breach regardless of the motive. Campbell v. Carroll, 121 Ga. App. 497, 174 S.E.2d 375 (1970).

Interference with fiduciary relationship between corporation and officer. — A claim against a third party for tortious interference with the fiduciary relationship between a corporation and its officer is one for tortious interference with contractual rights, and states a claim under Georgia law sufficient to withstand summary judgment. Rome Indus., Inc. v. Jonsson, 202 Ga. App. 682, 415 S.E.2d 651, cert. denied, 202 Ga. App. 903, 415 S.E.2d 651 (1992).

Corporate officers may also be personally liable. — When the petition of a plaintiff against a nonresident corporation and a resident officer thereof, sets out a cause of action against both defendants, they are properly joined, and the action is not separable, since the fact that the individual resident defendant is an officer of the corporation does not exclude the individual from personal liability. Georgia-Carolina Brick & Tile Co. v. Merry Bros. Brick & Tile Co., 75 Ga. App.

637, 44 S.E.2d 63 (1947).

Corporate liability for violations by employed notaries public. — In response to certified questions from a federal action, and under the plain and unambiguous language of Georgia's notary statute, a corporation employing notaries public was not subject directly to O.C.G.A. § 45-17-11, and the corporation was not subject to vicarious liability for a violation thereof, although the corporation could still be held liable if the corporation procured or otherwise qualified as a party to or participant in such a violation by a notary pursuant to O.C.G.A. § 51-12-30; the question arose with respect to a mortgagee's charges that included substantial notary fees with respect to a refinancing transaction. Anthony v. Am. Gen. Fin. Servs., 287 Ga. 448, 697 S.E.2d 166 (2010).

Liability of lessee of convict detained after expiration of sentence. — A lessee of a convict who is detained after the expiration of one's sentence is a joint wrongdoer, if one knows these facts. Chattahoochee Brick Co. v. Goings, 135 Ga. 529, 69 S.E. 865, 1912A Ann. Cas. 263 (1910).

One who is sued in one's personal capacity, whether the alter ego, an officer or agent of a corporation, may not escape personal liability for one's tortious misconduct in damaging employees or third persons by hiding behind the corporate veil even in those situations where the corporation might also be a proper party to the action. Wrigley v. Nottingham, 111 Ga. App. 404, 141 S.E.2d 859, rev'd on other grounds, 221 Ga. 386, 144 S.E.2d 749 (1965).

Conspiracy

Conspiracy defined. — A conspiracy, upon which a civil action may be based is a combination between two or more persons, either to commit a tortious act, or do some lawful act by methods constituting a tort. Rood v. Newman, 75 Ga. App. 621, 44 S.E.2d 171 (1947).

Damage is gist of action in suit for conspiracy. — When civil liability for conspiracy is sought to be imposed, the conspiracy itself furnishes no cause of action; the gist of the action is the damage and not the conspiracy. Rood v. Newman, 74 Ga. App. 686, 41 S.E.2d 183, later appeal, 75 Ga. App. 621, 44 S.E.2d 171 (1947).

The gist of the action for malicious procurement of a breach of contract is not the conspiracy alleged, but the tort committed against the plaintiff and the damage thereby done wrongfully. McElroy v. Wilson, 143 Ga. App. 893, 240 S.E.2d 155 (1977), cert. denied, 435 U.S. 931, 98 S. Ct. 1506, 55 L. Ed. 2d 528 (1978).

Allegation of conspiracy to effect what one has legal right to accomplish is not actionable and there are no grounds to complain of the defendants' actions, as directors, in voting for the plaintiff's discharge employed on a contract which is terminated at will. Campbell v. Carroll, 121 Ga. App. 497, 174 S.E.2d 375 (1970).

Evidence sufficient to establish civil conspiracy. — Evidence that an appellant, with the support of the parties' lessor, began operating a business out of the lessor's store that competed with a business jointly owned by the appellant and the appellee, which also operated out of the store, was sufficient to establish that the appellant and lessor committed a civil conspiracy against the appellee in violation of O.C.G.A. § 51-12-30. Asgharneya v. Hadavi, 298 Ga. App. 693, 680 S.E.2d 866 (2009), overruled on other grounds, Jordan v. Moses, 291 Ga. 39, 727 S.E.2d 460 (2012).

Mere fact that conspiracy has been alleged does not require submission of question to jury. McCulley v. Dunson, 149 Ga. App. 551, 254 S.E.2d 877 (1979).

Not necessary to join all parties to conspiracy as defendants. — In action in tort against two defendants for maliciously conspiring to induce another to break a contract with the plaintiff to the plaintiff's damage, it is unnecessary to join with the named defendants other parties who may have participated in the conspiracy. Rood v. Newman, 74 Ga. App. 686, 41 S.E.2d 183, later appeal, 75 Ga. App. 621, 44 S.E.2d 171 (1947).

Pleadings and Practice

Joint tort-feasors may be sued separately, each being severally liable. Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S.E.2d 720 (1941).

In action for malicious prosecution injured party may recover severally or jointly against any or all tort-feasors conspiring to prosecute one maliciously and without probable cause. Price v. Cobb, 63 Ga. App. 694, 11 S.E.2d 822 (1940).

Joint tortfeasors on notice. — Because a corporation's complaint put the defendants on sufficient notice that the defendants were joint tortfeasors who acted in concert with the corporation's president in a breach of fiduciary duty, the corporation stated a viable claim under O.C.G.A. § 51-12-30; thus, summary judgment against the corporation was reversed. Insight Tech., Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 633 S.E.2d 373 (2006).

Absent allegations that the defendant hospital officials acted maliciously or with such recklessness as denoted a corrupt or malevolent disposition, or that the officials hired a substance abuse counselor with the intent to injure the plaintiff patients, the officials were not joint tortfeasors under O.C.G.A. § 51-12-30 along with the counselor with regard to the counselor's alleged sexual harassment of the patients. Doe v. Fulton-DeKalb Hosp. Auth., 628 F.3d 1325 (11th Cir. 2010).

Procurement must be clearly pled and proved. — A clear case must be shown that a wife procured her husband to commit an assault and battery on the person of another before she will be held liable for such tort of her husband. Brigman v. Brenner, 206 Ga. 222, 56 S.E.2d 471 (1949).

Petition, the allegations of which failed to show that defendant "maliciously" procured an assault upon the plaintiff by her husband, nor that she counseled or commanded the assault to be made, or aided or abetted her husband in the actual assault, was devoid of essential allegations to establish any civil liability on the part of the defendant under the law. Brigman v. Brenner, 206 Ga. 222, 56 S.E.2d 471 (1949).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 64 et seq.

C.J.S. — 86 C.J.S., Torts, § 39 et seq.

ALR. — Liability for procuring breach of contract, 84 ALR 43; 26 ALR2d 1227.

Liability for procuring breach of contract, 26 ALR2d 1227.

Civil liability of one instigating or inciting an assault or assault and battery notwithstanding primary or active participant therein has been absolved of liability, 72 ALR2d 1229.

Right of tortfeasor guilty of only ordinary negligence to be indemnified by one guilty of intentional wrongdoing, wanton misconduct, or gross negligence, 88 ALR2d 1355.

Liability of participant in unauthorized highway race for injury to third person directly caused by other racer, 13 ALR3d 431.

Liability of purchaser of real estate for interference with contract between vendor and other purchaser, 27 ALR3d 1227.

Liability of purchaser of real estate for interference with contract between vendor and real estate broker, 29 ALR3d 1229.

Liability of real-estate broker for interference with contract between vendor and other real-estate broker, 34 ALR3d 720.

Liability for interference with invalid or unenforceable contract, 96 ALR3d 1294.

Punitive damages for interference with contract or business relationship, 44 ALR4th 1078.

51-12-31. Recovery against joint trespassers.

Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover

damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally. (Orig. Code 1863, § 3007; Code 1868, § 3020; Code 1873, § 3075; Code 1882, § 3075; Civil Code 1895, § 3915; Civil Code 1910, § 4512; Code 1933, § 105-2011; Ga. L. 1987, p. 915, § 8; Ga. L. 1992, p. 6, § 51; Ga. L. 2005, p. 1, § 12/SB 3.)

Editor's notes. — Ga. L. 2005, p. 1, § 1/SB 3, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2005, p. 1, § 14/SB 3, not codified by the General Assembly, provides for severability.

Ga. L. 2005, p. 1, § 15(b)/SB 3, not codified by the General Assembly, provides that the amendment of this Code section by that Act shall apply only with respect to causes of action arising on or after February 16, 2005, and any prior causes of action shall continue to be governed by prior law.

Law reviews. — For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005).

For note, "The Effect (Or Noneffect) of the 2004 Amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 on Joint Liability in Georgia," see 44 Ga. L. Rev. 215 (2009).

For comment, "Where Do We Go From Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia," see 28 Ga. St. U.L. Rev. 1341 (2012).

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General Consideration

Joint tort-feasors are jointly and severally liable for the full amount of an injured party's damages, notwithstanding the absence of voluntary and intentional concert of action among them. Johnson v. Landing, 157 Ga. App. 313, 277 S.E.2d 307 (1981).

Rule of joint and several liability among joint tort-feasors can be disregarded, under O.C.G.A. §§ 51-12-31 and 51-12-33, with several separate judgments rendered in cases coming within

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the scope of these statutory provisions. Union Camp Corp. v. Helmy, 258 Ga. 263, 367 S.E.2d 796 (1988).

When concurrent causes operate directly in bringing about injury, there can be recovery against one or all the responsible parties. Adams v. Jackson, 45 Ga. App. 860, 166 S.E. 258 (1932); McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933); Gosser v. Diplomat Restaurant, Inc., 125 Ga. App. 620, 188 S.E.2d 412 (1972); Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

Persons guilty of separate acts of negligence which jointly and concurrently cooperate in causing an injury, are joint tort-feasors, and may be sued as such. City of Atlanta v. Harris, 52 Ga. App. 56, 182 S.E. 202 (1935); Reeves v. McHan, 78 Ga. App. 305, 50 S.E.2d 787 (1948).

Persons whose separate acts of negligence combine to produce single injury may be sued jointly although owing different duties toward the plaintiff. Gosser v. Diplomat Restaurant, Inc., 125 Ga. App. 620, 188 S.E.2d 412 (1972).

Injury resulting from both defendants. — If a foreign substance should have been discovered in the exercise of ordinary care by the retailer, but was not so discovered, then both the manufacturer who put the dangerous article upon the market and the retailer who sold it to the plaintiff would be liable for the consequent injuries as joint tort-feasors, as the injury could not have been inflicted except for the negligence of both defendants. Maddox Coffee Co. v. Collins, 46 Ga. App. 220, 167 S.E. 306 (1932).

If separate and independent acts of negligence of two or more persons or corporations combine naturally and directly to produce a single indivisible injury other than a nuisance, and if a rational basis does not exist for an apportionment of the resulting damages among the various causes, then the actors are joint tort-feasors. Johnson v. Landing, 157 Ga. App. 313, 277 S.E.2d 307 (1981).

Each tort-feasor liable for whole injury. — When one is injured by the concurring negligence of two tort-feasors, each is liable for the whole injury although the other defendant may have contributed thereto in greater degree. Aretz v. United States, 503 F. Supp. 260 (S.D. Ga. 1977), aff'd, 660 F.2d 531 (5th Cir. 1981).

There is no accounting of comparative negligence between two negligent parties causing the injury and either of them can be held liable for the entire damage even though one was more negligent than the other. Church's Fried Chicken, Inc. v. Lewis, 150 Ga. App. 154, 256 S.E.2d 916 (1979).

Parties need not act in concert if separate acts produce single injury. — Even though voluntary intentional concert is lacking, if the separate and independent acts of negligence of several combine naturally and directly to produce a single injury, they may be sued jointly, despite the fact that the injury might not have been sustained had only one of the acts of negligence occurred. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933).

Separate acts without concert may not produce joint liability. — When two or more persons or corporations, acting independently, without concert, plan, or other agreement, inflict a damage or cause an injury to another person, the persons inflicting the damage are not jointly liable therefor, but each is liable for one's proportion only of the damages; and in such a case a joint action against them cannot be maintained. McGinnis v. Shaw, 46 Ga. App. 248, 167 S.E. 533 (1933).

Mere fact that injury would not occur had only one act of negligence occurred will not of itself operate to define other act as constituting proximate cause, for if all acts of negligence contributed directly and concurrently in bringing about the injury, they together constitute the proximate cause. Adams v. Jackson, 45 Ga. App. 860, 166 S.E. 258 (1932); Gosser v. Diplomat Restaurant, Inc., 125 Ga. App. 620, 188 S.E.2d 412 (1972).

There can be only one recovery for damage by joint tort-feasors, and this applies even though the joint tort-feasors could not be joined in the same action.

Dixon v. Ross, 94 Ga. App. 187, 94 S.E.2d 86 (1956).

Privilege of joinder of defendants in joint tort-feasor case is procedural one for the benefit of the injured plaintiff alone. H.W. Brown Transp. Co. v. Edgeworth, 90 Ga. App. 728, 84 S.E.2d 103 (1954).

Privilege of the plaintiff to have claim against two defendant tort-feasors tried in one suit is for the benefit of the plaintiff, the plaintiff alone is aggrieved by the order sustaining the plea to the jurisdiction of one defendant and the plaintiff alone has the right of appeal from that order and judgment. H.W. Brown Transp. Co. v. Edgeworth, 90 Ga. App. 728, 84 S.E.2d 103 (1954).

Release of one defendant not release as to all. — Plaintiff may sue one or all joint tort-feasors, and when the plaintiff sues all the plaintiff may dismiss as to one defendant without affecting the plaintiff's rights as to the other defendant. City of Atlanta v. Harris, 52 Ga. App. 56, 182 S.E. 202 (1935); Reeves v. McHan, 78 Ga. App. 305, 50 S.E.2d 787 (1948).

Full settlement against one tort-feasor settles whole claim. — There can be but one satisfaction of the same damage or injury, and if the plaintiff proceeds, for a consideration, to fully settle and satisfy the plaintiff's claim against one joint tort-feasor, the plaintiff cannot by the terms of such accord and satisfaction, when the injury or damage complained of is the same, limit the release to the defendant thus dealt with, but in such a case the claim itself becomes extinguished. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

Joint verdict and judgment fixes joint liability as between defendants to bear common burden, and the basis of the right of contribution is this joint liability to bear the common burden. Southern Ry. v. City of Rome, 179 Ga. 449, 176 S.E. 7 (1934).

Plaintiff may choose to sue single tort-feasor when suit dismissed against other. — When a petition brought against two defendants as joint tort-feasors alleges acts of each defendant, which, if constituting negligence proximately causing the injury complained of, jointly and concurrently caused the injury, and the court sustains a general demurrer (now motion to dismiss) filed by one of the defendants, and overrules that filed by the other defendant, it is optional with the plaintiff whether one elects to proceed to trial against the defendant whose demurrer (now motion to dismiss) is overruled, or to stand upon the plaintiff's petition as charging the defendants as joint tort-feasors. Bleckley v. Western Carolina Tel. Co., 42 Ga. App. 110, 155 S.E. 83 (1930).

Joint trespass on timber. — In an action of trespass against joint trespassers under this section, for felling and carrying away trees, the damages to be recovered, will be, at least, equal to the value of the trees, as they lie felled. Smith v. Gonder, 22 Ga. 353 (1857).

Parties when property sold under invalid lien. — The purchaser of property sold under a lien which was not properly created, who has knowledge thereof, is a joint trespasser with the lienee. Mashburn & Co. v. Dannenberg Co., 117 Ga. 567, 44 S.E. 97 (1903).

Parties when levy on wrong property is made. — The plaintiff in execution, the attorney for the plaintiff in execution who orders the levy on property of the wrong person, and the officer who makes it, are all liable as trespassers under this section. McDougald v. Dougherty, 12 Ga. 613 (1853).

Contribution. — Insurer was entitled to add certain parties as defendants in its declaratory judgment suit against insureds and a landowner, who had filed an underlying property damage suit against the insureds, because those parties had been added by the landowner as defendants in the underlying suit; if those parties were not included in the insurer's declaratory judgment suit, they might be precluded from obtaining contribution from an uninsured joint tortfeasor in accordance with O.C.G.A. § 51-12-31. Owners Ins. Co. v. Bryant, No. 3:05-cv-48 (CAR), 2006 U.S. Dist. LEXIS 1685 (M.D. Ga. Jan. 9, 2006).

Cited in Graham v. Dahlonega Gold Mining Co., 71 Ga. 296 (1883); Cedartown Supply Co. v. Hooper, 13 Ga. App. 29, 78 S.E. 686 (1913); Chapman v.

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Lamar-Rankin Drug Co., 64 Ga. App. 493, 13 S.E.2d 734 (1941); Jacobs v. Rittenbaum, 193 Ga. 838, 20 S.E.2d 425 (1942); Minor v. Fincher, 206 Ga. 721, 58 S.E.2d 389 (1950); Southeastern Erection Co. v. Flagler Co., 108 Ga. App. 831, 134 S.E.2d 822 (1964); Gamble v. Reeves Transp. Co., 126 Ga. App. 161, 190 S.E.2d 95 (1972); Standard Oil Co. v. Mount Bethel United Methodist Church, 230 Ga. 341, 196 S.E.2d 869 (1973); Hodges v. Youmans, 129 Ga. App. 481, 200 S.E.2d 157 (1973); Gilson v. Mitchell, 131 Ga. App. 321, 205 S.E.2d 421 (1974); Chupp v. Henderson, 134 Ga. App. 808, 216 S.E.2d 366 (1975); Dodge Trucks, Inc. v. Wilson, 140 Ga. App. 743, 231 S.E.2d 818 (1976); Georgia Ports Auth. v. Hutchinson, 209 Ga. App. 726, 434 S.E.2d 791 (1993); Branch v. Alliance Syndicate, Inc., 220 Ga. App. 561, 469 S.E.2d 807 (1996); United States Fid. & Guar. Co. v. Paul Assocs., 230 Ga. App. 243, 496 S.E.2d 283 (1998); Furlong v. Dyal, 246 Ga. App. 122, 539 S.E.2d 836 (2000).

Master/Servant Relationship

Master and servant may be jointly sued for damages resulting solely from negligence of servant, in which case the liability of the master and of the servant is joint and several. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

Although the liability of the master and negligent servant is joint and several, the same principles apply to them in an action based solely on the negligence of the servant as would apply in actions against joint tort-feasors. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

Judgment in favor of servant bars action against master. — When the liability, if any, of the master to a third person is purely derivative and dependent entirely upon the principle of respondent superior, and although not technically a joint tort-feasor, the master may be sued alone or jointly with the servant but a judgment in favor of the servant on the merits (and by analogy, a release of the servant from liability) will bar an action against the master when injury and damage are the same. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

Release of servant releases master. — In an action for damages growing out of a collision between the truck of the plaintiffs, driven by their servant, and the truck of the defendants, driven by their servant, which resulted in certain property damage to the plaintiffs' truck and certain personal injuries to the defendants' servant, the plaintiffs and the defendants' servant enter into an agreement, whereby the defendants' servant for and in consideration of the payment of a certain sum by the plaintiffs, releases the plaintiffs from all claims, anticipated and unanticipated, growing out of the collision, the release constitutes a settlement of the plaintiffs' claims against the servant, and a settlement of the plaintiffs' claims against the servant necessarily constitutes a release of the defendants as there can be only one satisfaction of the same injuries. Giles v. Smith, 80 Ga. App. 540, 56 S.E.2d 860 (1949).

Jury

When action for damages is brought against two defendants jointly for trespass upon property, jury may return verdict against both for the greatest damage done by either. The jury may also return a verdict which specifies the particular damage to be recovered of each, and the verdict must in such case be entered severally. Daniel v. Robinson, 96 Ga. App. 342, 100 S.E.2d 94 (1957).

Jury may apportion damages only in cases of trespass to property. — This section, providing that the jury, in its verdict, may apportion the damages among joint trespassers is applicable only to trespasses against property, and has no application in an action for a personal tort. McCalla v. Shaw, 72 Ga. 458 (1884); Shermer v. Crowe, 53 Ga. App. 418, 186 S.E. 224 (1936); Gazaway v. Nicholson, 61 Ga. App. 3, 5 S.E.2d 391 (1939), aff'd, 190 Ga. 345, 9 S.E.2d 154 (1940); McCarthy v. Combs, 78 Ga. App. 426, 50 S.E.2d 805 (1948); Hightower v. Landrum, 109 Ga. App. 510, 136 S.E.2d 425 (1964).

Georgia follows the common-law rule against apportionment of damages among

joint and several tort-feasors, the language of Ga. L. 1966, p. 609, § 20 (see now O.C.G.A. § 9-11-20(a)) notwithstanding, except when, under the provisions of former Code 1933, § 105-2011 (see now O.C.G.A. § 51-12-31), the statute law sanctions such apportionment in cases involving trespasses to property. Craven v. Allen, 118 Ga. App. 462, 164 S.E.2d 358 (1968).

A verdict which apportioned damages equally between the defendants was proper as claim was for damages to property only. Jones v. Hutchins, 131 Ga. App. 808, 207 S.E.2d 224 (1974).

Defendants are not entitled to require damages to be apportioned by the verdict. Ivey v. Cowart, 124 Ga. 159, 52 S.E. 436, 110 Am. St. R. 160 (1905).

Jury instructions. — It was not error to refuse a request to charge the jury that when two or more persons acting independently cause an injury to another, the persons are not jointly liable, but each is liable for one's proportion only of the damages, because when the act of negligence alleged against the joint defendants was selling the same oil of a quality prohibited by law, there was no basis for the court, in instructing the jury, to distinguish or differentiate the negligence of one defendant from that of the other. General Oil Co. v. Crowe, 54 Ga. App. 139, 187 S.E. 221 (1936).

Whether one or both tort-feasors liable is jury question. — When an action for personal injuries was brought against a manufacturer of coffee by one alleging oneself to have been injured by eating a portion of coffee grounds prepared and sold by the defendant manufacturer and containing an injurious foreign substance, it was a question of fact, for the jury to determine, whether the manufacturer alone was responsible for the injury to the plaintiff, or whether the manufacturer was jointly responsible with the retailer therefor. Maddox Coffee Co. v. Collins, 46 Ga. App. 220, 167 S.E. 306 (1932).

RESEARCH REFERENCES

Am. Jur. 2d. — 74 Am. Jur. 2d, Torts, § 64 et seq.

C.J.S. — 86 C.J.S., Torts, § 39 et seq.

ALR. — May acts of independent tort-feasors, each of which alone causes or tends to produce some damage, be combined to create a joint liability?, 9 ALR 939; 35 ALR 409; 91 ALR 759.

Joint, or joint and several, liability of two or more persons guilty of similar acts of misconduct one of which alone caused the injury, 50 ALR 361.

Release of one tort-feasor as affecting liability of others, 50 ALR 1057; 66 ALR 206; 104 ALR 846; 124 ALR 1298; 148 ALR 1270.

Joint liability for injury to third person or damage to his property due to concurring negligence of drivers of automobiles, 62 ALR 1425.

Conflict of laws as to joinder of defendants, or as to the character of liability as joint or several, or joint and several, 77 ALR 1108.

Right of defendant in action for personal injury or death to bring in a joint tort-feasor not made a party by plaintiff, 78 ALR 580; 132 ALR 1424.

Constitutionality, construction, and effect of statutes relating to exceptions to rule denying contribution or indemnity between joint tort-feasors, 85 ALR 1091; 122 ALR 520; 141 ALR 1207.

Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendant as to the liability of both or the liability of one and nonliability of the other, 101 ALR 104; 142 ALR 727.

Negligence of third person, other than physician or surgeon, in caring for injured person or in failing to follow instructions in that regard as affecting damages recoverable against person causing injury, 101 ALR 559.

Right of jury to apportion or sever damages as between joint tort-feasors and effect of their attempt to do so, 108 ALR 792; 46 ALR2d 801.

Rule that release of one joint tort-feasor releases other as applicable in case of anticipatory release prior to accident or injury, 112 ALR 78.

Release of one of two or more persons who independent tortious acts combine to

produce an injury as releasing other or others, 134 ALR 1225.

Agreement with one tort-feasor that any judgment that may be recovered will not be enforced against him, as affecting liability of cotort-feasor, 160 ALR 870.

Liability of several persons guilty of acts one of which alone caused injury, in absence of showing as to whose act was the cause, 5 ALR2d 98.

Joint liability for slander, 26 ALR2d 1031.

Release of one joint tort-feasor as discharging liability of others: modern trends, 73 ALR2d 403; 6 ALR5th 883.

What law governs right to contribution or indemnity between tort-feasors, 95 ALR2d 1096.

Apportionment of damages involving successive impacts by different motor vehicles, 100 ALR2d 16.

Liability insurance policy as covering insured's obligation to indemnify, or make contributions to, cotort-feasor, 4 ALR3d 620.

Right of tort-feasor initially causing injury to recover indemnity or contribution from medical attendant causing new injury or aggravating injury in course of treatment, 8 ALR3d 639.

Comparative negligence rule where misconduct of three or more persons is involved, 8 ALR3d 722.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

Apportionment of punitive or exemplary damages as between joint tort-feasors, 20 ALR3d 666.

Voluntary payment into court of judgment against one joint tort-feasor as release of others, 40 ALR3d 1181.

Contribution or indemnity between joint tort-feasors on basis of relative fault, 53 ALR3d 184.

Right of tort-feasor initially causing injury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment, 72 ALR4th 231.

Validity and effect of "Mary Carter" or similar agreement setting maximum liability of one cotort-feasor and providing for reduction or extinguishment thereof relative to recovery against nonagreeing cotort-feasor, 22 ALR5th 483.

51-12-32. Right of contribution among joint trespassers; effect of settlement.

(a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

(b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.

(c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom. (Orig. Code 1863, § 3008; Code 1868, § 3021; Code 1873, § 3076; Code 1882, § 3076; Civil Code 1895, § 3916; Civil Code 1910, § 4513; Code 1933, § 105-2012; Ga. L.

1966, p. 433, § 1; Ga. L. 1972, p. 132, § 1; Ga. L. 1972, p. 134, § 1; Ga. L. 1987, p. 915, § 8.)

Cross references. — Third party practice, § 9-11-14 Control of education after payment by joint debtor, § 9-13-78.

Law reviews. — For annual survey of local government law, see 57 Mercer L. Rev. 289 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For annual survey on trial practice and procedure, see 65 Mercer L. Rev. 277 (2013).

For note discussing tort-feasor's ability to sue for contribution from joint tort-feasor absent any judgment compelling either to pay damages, see 5 Ga. St. B. J. 358 (1969). For note, "Contribution Among Joint Tortfeasors," see 12 Ga. L. Rev. 553 (1978). For note, "The Effect (Or Noneffect) of the 2004 Amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 on Joint Liability in Georgia," see 44 Ga. L. Rev. 215 (2009).

For comment discussing Georgia law as to a defendant's right to bring in any party responsible to him for damages sought by the plaintiff, and comparing the approach of Dole v. Dow Chem. Co., 30 N.Y. 2d 143, 282 N.E.2d 288, 331 N.Y.S. 2d 382 (1972), see 24 Mercer L. Rev. 697 (1973).

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For the history of this section, see Greyhound Lines v. Cobb County, 681 F.2d 1327 (11th Cir. 1982).

This section changed the common-law rule. Chattahoochee Brick Co. v. Braswell, 92 Ga. 631, 18 S.E. 1015 (1893).

Contribution between joint tort-feasors was not allowed at common law on the theory that the law would not aid those who were in pari delicto. Powell v. Barker, 96 Ga. App. 592, 101 S.E.2d 113 (1957).

Under Georgia law, tort-feasor is entitled to contribution from joint tort-feasor. Aretz v. United States, 456 F. Supp. 397 (S.D. Ga. 1978), aff'd, 660 F.2d 531 (5th Cir. 1981).

Under Georgia law contribution among tort-feasors may be enforced "just as if they had been jointly sued." McKee v. Southern Ry., 50 F.R.D. 502 (N.D. Ga. 1970).

O.C.G.A. § 51-12-32 generally permits contribution between defendant and nondefendant tort-feasors. Thus, a defendant need no longer be prejudiced by the absence of a joint tort-feasor. Banks v. City of Brunswick, 529 F. Supp. 695 (S.D. Ga. 1981), aff'd, 667 F.2d 97 (11th Cir. 1982).

Right of contribution from joint tort-feasor is substantive right. Register v. Stone's Indep. Oil Distribs., Inc., 227 Ga. 123, 179 S.E.2d 68 (1971); Hyde v. Klar, 168 Ga. App. 64, 308 S.E.2d 190 (1983).

Lessee's claim against lessor of vehicle. — Since the commercial lessor of a truck incurred no tort liability as a result of the motor vehicle accident at issue, the trial court correctly concluded that the lessee had no claim against the lessor for contribution and indemnity. Wausau Ins. Cos. v. Lightnin' Truck Rental, Inc., 194 Ga. App. 819, 392 S.E.2d 32 (1990).

Right of indemnity would not be lost or prejudiced by compromise and settlement. Auto-Owners Ins. Co. v. Anderson, 252 Ga. App. 361, 556 S.E.2d 456 (2001).

Right to contribution applicable despite settlement. — O.C.G.A. § 51-12-32 provides that the right of in-

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demnification is not lost or prejudiced by settlement or compromise of a claim. Randall v. Norton, 192 Ga. App. 734, 386 S.E.2d 518 (1989); United States Fid. & Guar. Co. v. Sayler Marine Corp., 196 Ga. App. 850, 397 S.E.2d 188 (1990).

By the enactment of O.C.G.A. § 51-12-32, the General Assembly has expressly permitted a party to compromise or settle a claim in lieu of a lawsuit or judgment against that party without prejudicing that party's right to seek indemnity from another. Ranger Constr. Co. v. Robertshaw Controls Co., 158 Ga. App. 179, 279 S.E.2d 477 (1981); United States Fid. & Guar. Co. v. Sayler Marine Corp., 196 Ga. App. 850, 397 S.E.2d 188 (1990).

O.C.G.A. § 51-12-32 prevents one defendant from losing one's potential right to contribution from another defendant or a third-party defendant just because one reaches a settlement with the plaintiff prior to judgment. Marchman & Son v. Nelson, 165 Ga. App. 684, 300 S.E.2d 315, rev'd on other grounds, 251 Ga. 475, 306 S.E.2d 290 (1983).

An indemnitee, after giving the indemnitor notice and an opportunity to defend, can settle a lawsuit and claim indemnity upon a showing that the decision to settle was reasonable. Southern Ry. v. Georgia Kraft Co., 823 F.2d 478 (11th Cir. 1987).

Contribution action not barred by voluntary payment. — Trial court erred by concluding as a matter of law that the insurers made a voluntary payment for mold and mildew damages not covered by the policies. The record failed to establish, as a matter of law, that the insurers' subrogation and assigned claims for contribution and indemnity were barred by voluntary payment. Zurich Am. Ins. Co. v. Heard, 321 Ga. App. 325, 740 S.E.2d 429 (2013).

Settlement without admission of liability. — When there has been a settlement by multiple defendants containing no admission of liability, a defendant seeking contribution from another party to the settlement must prove joint negligence. Suggs v. Hale, 278 Ga. App. 358, 629 S.E.2d 11 (2006).

Consent order to clean up toxic waste site analogous to settlement. — Company's entry into a consent order with the Department of Natural Resources to clean up a toxic waste site purchased by the company was analogous to a settlement agreement and, thus, constituted a legal burden sufficient to support a claim for indemnification and contribution against the seller of the property. Union Carbide Corp. v. Thiokol Corp., 890 F. Supp. 1035 (S.D. Ga. 1994).

Participation in declaratory judgment suit. — Insurer was entitled to add certain parties as defendants in its declaratory judgment suit against insureds and a landowner, who had filed an underlying property damage suit against the insureds, because those parties had been added by the landowner as defendants in the underlying suit; if those parties were not included in the insurer's declaratory judgment suit, they might be precluded from obtaining contribution from an uninsured joint tort-feasor in accordance with O.C.G.A. § 51-12-31. Owners Ins. Co. v. Bryant, No. 3:05-cv-48 (CAR), 2006 U.S. Dist. LEXIS 1685 (M.D. Ga. Jan. 9, 2006).

This section relates only to contribution among "joint trespassers," that is, joint tort-feasors. Central of Ga. Ry. v. Lester, 118 Ga. App. 794, 165 S.E.2d 587 (1968); O'Steen v. Lockheed Aircraft Corp., 294 F. Supp. 409 (N.D. Ga. 1968).

Under this section, right to contribution relates only to joint tort-feasors and when a proposed third-party defendant cannot be made liable as a joint tort-feasor, the third party complaint does not state a claim and should be struck. Southern Ry. v. Brewer, 122 Ga. App. 292, 276 S.E.2d 665 (1970).

The trial court properly dismissed a business' contribution action, filed pursuant to O.C.G.A. § 51-12-32, on subject matter jurisdiction grounds, as: (1) its finding that the business was the sole tort-feasor barred the action; (2) that finding was not void; (3) no appeal was taken from that finding; and (4) the suit amounted to an improper collateral attack on the default judgment entered against the business. State Auto Mut. Ins. Co. v. Relocation & Corporate Hous. Servs., 287 Ga. App. 575, 651 S.E.2d 829 (2007), cert.

denied, 2008 Ga. LEXIS 163 (Ga. 2008).

Defendants are joint tort-feasors when their separate and distinct acts of negligence concur to proximately produce an injury. Travelers Indem. Co. v. Liberty Loan Corp., 140 Ga. App. 458, 231 S.E.2d 399 (1976), cert. dismissed, 238 Ga. 667, 235 S.E.2d 39 (1977).

Action over lies when liability of tort-feasor compelled to pay damages is passive, consisting only of negative acts or omissions, e.g., in failing in one's duty to inspect or discover a defective condition, and when the proximate cause of the injury, with respect to another tort-feasor, is active, consisting of positive acts of negligence. Peacock Constr. Co. v. Montgomery Elevator Co., 121 Ga. App. 711, 175 S.E.2d 116 (1970).

Right of contribution extends equally to actions ex contractu and actions ex delicto, when all are equally bound to bear the common burden, and one has paid more than one's share. Southern Ry. v. City of Rome, 179 Ga. 449, 176 S.E. 7 (1934); Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

Action for contribution is now considered legal remedy and not suit in equity. Cumbie v. Cumbie, 146 Ga. App. 704, 247 S.E.2d 227 (1978).

Principle of contribution is equality in bearing common burden. Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

A joint verdict and judgment fixes a joint liability as between the defendants to bear the common burden, and the basis of the right of contribution is this joint liability to bear the common burden. Southern Ry. v. City of Rome, 179 Ga. 449, 176 S.E. 7 (1934).

Doctrine of contribution is not founded upon contract, but upon principles of equity, and assists in the fair and just division of losses, preventing unfairness and injustice. Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

The obligation of one joint tort-feasor to contribute one's share to the satisfaction of a judgment against one and others jointly liable is based upon the equitable principle that burdens equally imposed should be equally shared. The parties are in equity, and one of its maxims is that equality is equity. Williams Bros. Lumber Co. v. Anderson, 210 Ga. 198, 78 S.E.2d 612 (1953).

While doctrine of contribution originated in courts of equity, it was subsequently adopted by courts of law and is now universally applied therein. In order to make the doctrine consistent with the forms, theories, and practices of courts of law, the fiction of an implied contract by one obligor to contribute to another co-obligor who had been compelled to pay the whole obligation was adopted. Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

The right of contribution accruing upon payment by a joint tort-feasor of more than one's pro rata share of the judgment is not an ex delicto right, but an equitable one which courts of law have recognized and applied on the theory that there is an implied contract on the part of one judgment debtor to contribute to another who has paid more than one's share of the obligation. Powell v. Barker, 96 Ga. App. 592, 101 S.E.2d 113 (1957); Southern Ry. v. State Farm Mut. Auto. Ins. Co., 357 F. Supp. 810 (N.D. Ga. 1972), aff'd, 477 F.2d 49 (5th Cir. 1973).

Prior to 1966 amendment, a tort-feasor had no right of contribution against joint tort-feasor unless they were jointly sued; judgment was rendered against both of them, and the tort-feasor paid more than the tort-feasor's share of the joint judgment. Register v. Stone's Indep. Oil Distribs., Inc., 227 Ga. 123, 179 S.E.2d 68 (1971).

Enactment of subsection (c) and amendment of subsection (a) in 1972, changed law as to contribution and indemnity among joint tort-feasors. The amendment to subsection (a) removed, with respect to contribution, the previous existing requisite of suit or judgment. The enactment of subsection (c), with reference to the right of indemnity, likewise eliminated the necessity of suit or judgment. Southern Ry. v. A.O. Smith Corp., 134 Ga. App. 219, 213 S.E.2d 903 (1975).

The 1972 amendment to O.C.G.A. § 51-12-32 eliminated the rule that the codefendant in tort action is without

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standing to appeal grant of summary judgment to another codefendant against whom one asserts right of contribution. Merritt v. McCrary, 162 Ga. App. 825, 292 S.E.2d 920 (1982).

Dismissal with prejudice of underlying suit is not a bar to an action for contribution by one joint tort-feasor against another joint tort-feasor. Marchman & Sons v. Nelson, 251 Ga. 475, 306 S.E.2d 290 (1983).

Separate suit for contribution. — A claim for contribution may be brought as a separate independent suit after a judgment is entered in the underlying tort action, and it is not required that the party against whom contribution is sought was named in the original action. Krasaeath v. Parker, 212 Ga. App. 525, 441 S.E.2d 868 (1994).

A claim for contribution maintainable under a 20-year statute of limitations, based on an earlier medical malpractice action and alleging that x-ray studies were negligently interpreted by the defendant radiologist, was barred by the five-year statute of repose for medical malpractice cases. Krasaeath v. Parker, 212 Ga. App. 525, 441 S.E.2d 868 (1994).

Amendment to section operates prospectively. — A 1972 amendment of this section conferring the right of contribution without the necessity of judgment and allowing compromise and settlement of claims, affects substantive rights and therefore operates prospectively. United States Lines v. United States, 470 F.2d 487 (5th Cir. 1972).

In negligence case substantive rights of parties are fixed at time of injury or event on which liability depends. Southern Ry. v. A.O. Smith Corp., 134 Ga. App. 219, 213 S.E.2d 903 (1975).

The substantial rights of the parties in a negligence case, including the right to contribution between joint tort-feasors, become fixed at the time of injury or the event upon which liability depends. Byington v. Lee, 150 Ga. App. 393, 258 S.E.2d 6 (1979).

The statute of limitations on a claim for contribution based on tort does not start to run at the time of the commission of the tort, or of the resulting injury or damage, but from the time of the accrual of the cause of action for contribution. Evans v. Lukas, 140 Ga. App. 182, 230 S.E.2d 136 (1976).

The statute of limitations on contribution does not begin to run until judgment is entered against the third-party plaintiff or a compromise and settlement of the claim is made. Independent Mfg. Co. v. Automotive Prods., Inc., 141 Ga. App. 518, 233 S.E.2d 874 (1977).

Contribution among joint tort-feasors is enforceable when one has paid more than one's pro rata share of judgment. Southern Ry. v. State Farm Mut. Auto. Ins. Co., 357 F. Supp. 810 (N.D. Ga. 1972), aff'd, 477 F.2d 49 (5th Cir. 1973).

The general rule is that one who is compelled to pay or satisfy the whole or to bear more than one's just share of a common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

When any burden, from the relationship of the parties or in respect to property held by them, ought to be equally borne and each party is in aequali jure, contribution is due if one has been compelled to pay more than one's share. Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

The permission to have contribution when all are equally bound to bear the common burden, and one has paid more than one's share, is absolutely unrestricted. Horton v. Continental Cas. Co., 72 Ga. App. 594, 34 S.E.2d 605 (1945).

When one has paid more than one's share of the common burden which all are equally bound to bear, contribution can be enforced by one in an action at law or equity. The right of contribution exists in both ex contractu and ex delicto cases. Wages v. State Farm Mut. Auto. Ins. Co., 132 Ga. App. 79, 208 S.E.2d 1 (1974).

When there are two or more tort-feasors whose several acts of negligence combine to cause the injury complained of, the codefendant paying the entire claim is,

under this section, entitled to contribution from the joint tort-feasor. Travelers Indem. Co. v. Liberty Loan Corp., 140 Ga. App. 458, 231 S.E.2d 399 (1976), cert. dismissed, 238 Ga. 667, 235 S.E.2d 39 (1977).

In a contribution action the contribution plaintiff was entitled to contribution from the defendant, because the contribution plaintiff paid more than its pro rata share of a judgment while the defendant, a joint tort-feasor, paid less than the defendant's pro rata share; that the contribution plaintiff elected to go to trial rather than settle the underlying claim did not affect the contribution plaintiff 's right to contribution. Pilzer v. Va. Ins. Reciprocal, 272 Ga. App. 27, 611 S.E.2d 706 (2005).

Summary judgment for a company was affirmed as the company was entitled under O.C.G.A. § 51-12-32 to contribution from a professional corporation (PC) since the company and the PC were jointly and severally liable for a judgment entered for a patient and the pro rata share of each was 50 percent; the common burden that the parties were equally bound to bear was the amount of the post-verdict judgment. Campbell, Odom & Griffith, P.C. v. Doctors Co., 281 Ga. App. 684, 637 S.E.2d 108 (2006).

Actual assignment of judgment or having execution thereon under former Code 1933, § 39-608 (see now O.C.G.A. § 9-13-78) were not essential elements of cause of action for contribution. Powell v. Barker, 96 Ga. App. 592, 101 S.E.2d 113 (1957); Wages v. State Farm Mut. Auto. Ins. Co., 132 Ga. App. 79, 208 S.E.2d 1 (1974).

To enforce contribution claim, defendant who seeks contribution must show that its payment to plaintiff was made in good faith, without collusion or impropriety, must prove the reasonableness of its settlement and demonstrate its own liability to the plaintiff, and must bear the burden of proving that the plaintiff in the main action was free from contributory negligence, if that would have provided the third-party defendant with a defense in a direct suit against it by the plaintiff. Reynolds v. Southern Ry., 320 F. Supp. 1141 (N.D. Ga. 1969).

Under O.C.G.A. § 51-12-32(b), a defendant is entitled to contribution from a co-defendant when a judgment has been entered against both but paid by one in an amount exceeding that one's pro rata share. In a contribution claim brought by an insurer against a doctor based on a judgment entered against the doctor and the insurer's insured jointly, tort liability was established, so the doctor's liability depended not on proof of negligence, but on the existence of the judgment against the doctor and the payment by the insurer of more than its share. Va. Ins. Reciprocal v. Pilzer, 278 Ga. 190, 599 S.E.2d 182 (2004).

Even though right to contribution does not accrue until after judgment or compromise and settlement, third-party action for contribution can be maintained under Ga. L. 1969, p. 979, § 1 (see now O.C.G.A. § 9-11-14(a)). Evans v. Lukas, 140 Ga. App. 182, 230 S.E.2d 136 (1976).

Defendant cannot use contribution as means of establishing liability of third party in contravention of the rules of law which would prevail if the plaintiff had personally sued that third party. Georgia S. & Fla. Ry. v. Odom, 152 Ga. App. 664, 263 S.E.2d 469 (1979).

Doctrine of contribution can be applied against insurer of joint tort-feasor. Southern Ry. v. State Farm Mut. Auto. Ins. Co., 357 F. Supp. 810 (N.D. Ga. 1972), aff'd, 477 F.2d 49 (5th Cir. 1973).

Since one joint tort-feasor is entitled to contribution from another joint tort-feasor, it is only logical to extend the doctrine to allow contribution from the latter's insurer. Southern Ry. v. State Farm Mut. Auto. Ins. Co., 357 F. Supp. 810 (N.D. Ga. 1972), aff'd, 477 F.2d 49 (5th Cir. 1973).

Insurer of co-defendant has right to seek contribution from plaintiff's liability insurer which provides uninsured motorist coverage to an uninsured co-defendant. Wages v. State Farm Mut. Auto. Ins. Co., 132 Ga. App. 79, 208 S.E.2d 1 (1974).

An insured codefendant with sufficient liability insurance to satisfy judgments rendered in favor of the plaintiffs against an insured codefendant and an uninsured

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motorist is entitled to recover contribution and indemnification from the plaintiff's uninsured motorist carrier. Wages v. State Farm Mut. Auto. Ins. Co., 132 Ga. App. 79, 208 S.E.2d 1 (1974).

Payments to injured party from collateral source do not diminish liability of tort-feasor. Aretz v. United States, 456 F. Supp. 397 (S.D. Ga. 1978), aff'd, 660 F.2d 531 (5th Cir. 1981).

In order for one seeking indemnity to recover, one must allege and prove that one has sustained actual legal liability to the injured party. Reynolds v. Southern Ry., 320 F. Supp. 1141 (N.D. Ga. 1969).

Indemnitor or insurer of one joint tort-feasor, upon discharging common liability, ordinarily succeeds to right to recover contribution from other joint tort-feasors, or their indemnitors or insurers. Southern Ry. v. State Farm Mut. Auto. Ins. Co., 357 F. Supp. 810 (N.D. Ga. 1972), aff'd, 477 F.2d 49 (5th Cir. 1973).

When agreement does not show plainly that it was intended to indemnify indemnitee for the indemnitee's own negligence, the indemnitee cannot recover thereunder if the indemnitee's own negligence caused the loss. Southern Ry. v. Brunswick Pulp & Paper Co., 376 F. Supp. 96 (S.D. Ga. 1974).

Contract of indemnity will not be construed to indemnify indemnitee against losses resulting from the indemnitee's own negligent acts unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it. Southern Ry. v. Brunswick Pulp & Paper Co., 376 F. Supp. 96 (S.D. Ga. 1974).

One who seeks to absolve oneself from the consequences of one's own negligence may contract to do so in unequivocal terms. Such a result will not be read into the contract by implication. Southern Ry. v. Brunswick Pulp & Paper Co., 376 F. Supp. 96 (S.D. Ga. 1974).

Judgment debtors were equally liable for attorney fees. Gerschick v. Pounds, 262 Ga. App. 554, 586 S.E.2d 22 (2003), overruled on other grounds by VATACS Group, Inc. v. HomeSide Lending, Inc., 281 Ga. 50, 635 S.E.2d 758 (2006).

Official immunity meant no contribution or indemnity. — Although a tort-feasor was generally entitled to contribution or indemnity from a joint tort-feasor, the state port authority could not be held liable to the ship owner for contribution and indemnity because the state port authority was entitled to Eleventh Amendment immunity on the injured worker's maritime tort claim; since the state port authority could not be held liable on the underlying claim, the authority also could not be held liable for contribution or indemnity. Ga. Ports Auth. v. Andre Rickmers Schiffsbeteiligungsges mbH & Co. K.G., 262 Ga. App. 591, 585 S.E.2d 883 (2003).

Contribution claim against city barred by res judicata. — City, an engineering firm's alleged joint tort-feasor, had already been found not liable for a nuisance to condominium residents in their suit against the city and firm concerning a flooded sewer system designed by the firm. Therefore, the firm's subsequent suit against the city for contribution based on a nuisance theory was barred by res judicata. Greenhorne & O'Mara, Inc. v. City of Atlanta, 298 Ga. App. 261, 679 S.E.2d 818 (2009).

Party's failure to assert an available defense precluded contribution and indemnity claims. — Because a medical care provider failed to assert an available defense in the underlying action which would have absolved it from any liability and prevented a default judgment from being entered against it, the trial court did not err in entering summary judgment against it on its claims for contribution and indemnity. Emergency Professionals of Atlanta, P.C. v. Watson, 288 Ga. App. 473, 654 S.E.2d 434 (2007), cert. denied, 2008 Ga. LEXIS 407 (Ga. 2008).

Impleader properly denied. — Third-party complaint was properly dismissed on the basis that no claim for indemnity or contribution had been stated and the trial court properly denied the motion to add a third-party defendant because only the defendant rendered a legal opinion on the status of title to

property and was directly responsible to the client for the opinion and the attorney was in effect seeking impermissibly to tender a substitute defendant. Hines v. Holland, 334 Ga. App. 292, 779 S.E.2d 63 (2015).

Cited in Howell v. A. Shands & Co., 35 Ga. 66 (1866); Graham v. Dahlonega Gold Mining Co., 71 Ga. 296 (1883); Chapman v. Lamar-Rankin Drug Co., 64 Ga. App. 493, 13 S.E.2d 734 (1941); Southeastern Erection Co. v. Flagler Co., 108 Ga. App. 831, 134 S.E.2d 822 (1964); F.H. Ross & Co. v. White, 224 Ga. 324, 161 S.E.2d 857 (1968); Register v. Stone's Indep. Oil Distribs., 122 Ga. App. 335, 177 S.E.2d 92 (1970); Fenster v. Gulf States Ceramic, 124 Ga. App. 102, 182 S.E.2d 905 (1971); Gamble v. Reeves Transp. Co., 126 Ga. App. 161, 190 S.E.2d 95 (1972); Thigpen v. Koch, 126 Ga. App. 182, 190 S.E.2d 117 (1972); Finnocchio v. Lunsford, 129 Ga. App. 694, 201 S.E.2d 1 (1973); Louisville & Nashville R.R. v. Bush, 131 Ga. App. 405, 206 S.E.2d 58 (1974); McMichael v. Georgia Power Co., 133 Ga. App. 593, 211 S.E.2d 632 (1974); Southern Ry. v. Brunswick Pulp & Paper Co., 376 F. Supp. 96 (S.D. Ga. 1974); Dodge Trucks, Inc. v. Wilson, 140 Ga. App. 743, 231 S.E.2d 818 (1976); Wilson v. Dodge Trucks, Inc., 238 Ga. 636, 235 S.E.2d 142 (1977); Fuller v. Moister, 246 Ga. 397, 271 S.E.2d 622 (1980); Greyhound Lines v. Cobb County, 523 F. Supp. 422 (N.D. Ga. 1981); Marchman & Son v. Nelson, 169 Ga. App. 236, 313 S.E.2d 157 (1983); Superior Rigging & Erecting Co. v. Ralston Purina Co., 172 Ga. App. 79, 322 S.E.2d 95 (1984); Seaboard Coast Line R.R. v. Mobil Chem. Co., 172 Ga. App. 543, 323 S.E.2d 849 (1984); Crockett v. Uniroyal, Inc., 772 F.2d 1524 (11th Cir. 1985); Gay v. Piggly Wiggly S., Inc., 183 Ga. App. 175, 358 S.E.2d 468 (1987); Garbaccio v. Oglesby, 675 F. Supp. 1342 (M.D. Ga. 1987); Union Camp Corp. v. Helmy, 258 Ga. 263, 367 S.E.2d 796 (1988); Confetti Atlanta, Ltd. v. Gray, 195 Ga. App. 719, 394 S.E.2d 632 (1990); Wilson v. Norfolk S. Corp., 200 Ga. App. 523, 409 S.E.2d 84 (1991); In re Munford, Inc., 172 Bankr. 404 (Bankr. N.D. Ga. 1993); State Line Metals v. ALCOA, 216 Ga. App. 14, 453 S.E.2d 474 (1995); DeKalb County v. Lenowitz, 218 Ga. App. 884, 463 S.E.2d 539 (1995); Federal Paper Bd. Co. v. Harbert-Yeargin, Inc., 53 F. Supp. 2d 1361 (N.D. Ga. 1999); Federal Paper Bd. Co. v. Harbert-Yeargin, Inc., 92 F. Supp. 2d 1342 (N.D. Ga. 1998); Thyssen Elevator Co. v. Drayton-Bryan Co., 106 F. Supp. 2d 1355 (N.D. Ga. 2000); Auto-Owners Ins. Co. v. Anderson, 252 Ga. App. 361, 556 S.E.2d 456 (2001); JNJ Found. Specialists, Inc. v. D. R. Horton Inc., 311 Ga. App. 269, 717 S.E.2d 219 (2011).

Application to Corporations

No contribution among partners when partnership liability based solely on respondeat superior. — Since certain defendants were sued in their capacities as partners doing business under a trade name, for the negligence of one of the servants of the partnership while working for the partnership, neither of the defendants being charged with active negligence, and their negligence was derivative upon the basis of the negligence of the partnership servant, it would be unjust and inequitable to prorate the amount required to satisfy the judgment according to the number of members of the partnership. Williams Bros. Lumber Co. v. Anderson, 210 Ga. 198, 78 S.E.2d 612 (1953).

Joint and several judgment as liability of close corporation. — In a tort action, although shareholder in close corporation was "as much liable" as the corporation on the joint and several judgment, the corporation was "as much liable" as shareholder thereon, and it follows that the joint and several judgment would have bearing on the value of the corporation. Thus, that joint and several judgment would constitute a liability of the corporation in the full amount thereof, less the corporation's right to contribution, if any, against the shareholder. AAA Pest Control, Inc. v. Murray, 207 Ga. App. 631, 428 S.E.2d 657 (1993).

Application to janitorial company. — Pedestrian sued a property maintenance company for injuries allegedly suffered in a slip and fall on an icy sidewalk; the company filed an action for contribution and indemnity against a janitorial service. As the service had a contractual duty to a government agency to clear the

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sidewalk of ice, and the janitorial service's failure to perform this duty increased the risk that the pedestrian would be injured, the janitorial service was not entitled to summary judgment on the company's claims. Urban Servs. Group, Inc. v. Royal Group, Inc., 295 Ga. App. 350, 671 S.E.2d 838 (2008).

Application to Employment Situations

Employer is not joint tort-feasor for purposes of contribution under this section. Aretz v. United States, 456 F. Supp. 397 (S.D. Ga. 1978), aff'd, 660 F.2d 531 (5th Cir. 1981).

Payment of workers' compensation benefits. — Proposed third-party defendant cannot be made liable as a joint tort-feasor when it, as employer, has already paid workers' compensation to the plaintiffs. Central of Ga. Ry. v. Lester, 118 Ga. App. 794, 165 S.E.2d 587 (1968).

Nonnegligent employer is not "joint tort-feasor". — When the liability of the employer for the negligent acts of an employee rests only on the doctrine of respondeat superior, the nonnegligent employer is not a "joint tort-feasor" in the sense in which the phrase is ordinarily used. Travelers Indem. Co. v. Liberty Loan Corp., 140 Ga. App. 458, 231 S.E.2d 399 (1976), cert. dismissed, 238 Ga. 667, 235 S.E.2d 39 (1977).

Employers cannot be considered as joint tort-feasors with a third-party, whether or not the employer's negligence combined with that of a third party to produce the employee's injuries. Aretz v. United States, 456 F. Supp. 397 (S.D. Ga. 1978), aff'd, 660 F.2d 531 (5th Cir. 1981).

Insured defendant's coverage may inure to uninsured defendant's benefit under respondeat superior. — When the negligence of only one defendant causes the injury, and another is liable under principles of respondeat superior and such other in fact satisfies the entire claim, that other's applicable insurance inures to the wrongdoer, and accordingly one is neither "uninsured" for purposes of uninsured motorist insurance, nor is the employer entitled to collect indemnity from the insurer of the plaintiff. Travelers Indem. Co. v. Liberty Loan Corp., 140 Ga. App. 458, 231 S.E.2d 399 (1976), cert. dismissed, 238 Ga. 667, 235 S.E.2d 39 (1977).

Because employer cannot be joint tort-feasor, workers' compensation benefits are regarded as payments from collateral source, since the right of subrogation in the insurance carrier prevents a double recovery. Aretz v. United States, 456 F. Supp. 397 (S.D. Ga. 1978), aff'd, 660 F.2d 531 (5th Cir. 1981).

No indemnification available when party seeking indemnification failed to assert an available defense. — Lawn maintenance contractor was not entitled to recover contractual or common law indemnification against a subcontractor after the contractor paid a settlement to a person injured when the person stepped in a hole in a curb because the contractor went into default and failed to assert the defense that the contractor had no duty to maintain the curb. U.S. Lawns, Inc. v. Cutting Edge Landscaping, LLC, 311 Ga. App. 674, 716 S.E.2d 779 (2011).

Pleading and Practice

Filing cross-claims not required. — It is not requisite to a joint tort-feasor's right of contribution that one file cross-claims against another joint tort-feasor in an underlying suit; likewise, one's standing to appeal a judgment in a joint tort-feasor's favor does not depend on the filing of cross-claims. Johnson & Harber Constr. Co. v. Bing, 220 Ga. App. 179, 469 S.E.2d 697 (1996).

Effect of summary judgment. — Only if co-defendants are sued as joint tort-feasors does the grant of summary judgment as to one potentially affect the other's rights of contribution. Therefore, it is only in this situation that the co-defendant would be deemed a losing party and have standing to appeal the grant of summary judgment to another co-defendant. C.W. Matthews Contracting Co. v. Studard, 201 Ga. App. 741, 412 S.E.2d 539 (1991).

Applicable statute of limitations for plaintiff's cause of action against defendant has no bearing on defendant's third-party complaint for con-

tribution against an alleged joint tort-feasor. Evans v. Lukas, 140 Ga. App. 182, 230 S.E.2d 136 (1976).

Third-party complaint seeking contribution from one who is alleged to be joint tort-feasor is independent suit between third-party plaintiff and defendant in which the third-party defendant is secondarily liable to the third-party plaintiff rather than directly liable to the original plaintiff. Evans v. Lukas, 140 Ga. App. 182, 230 S.E.2d 136 (1976).

University was not precluded from seeking indemnification under O.C.G.A. § 51-12-32 for failure to assert valid defense to IRS determination that bonds were not tax exempt; at the motion to dismiss stage, neither complaint nor related documents contained facts establishing that bidding process met requirements of 26 C.F.R. § 1.148-5(d)(6)(iii). Corp. of Mercer Univ. v. JPMorgan Chase & Co., No. 5:07-CV-243(HL), 2008 U.S. Dist. LEXIS 23919 (M.D. Ga. Mar. 26, 2008).

Counterclaim for contribution as separate action. — A right to contribution is separate from the rights in the underlying tort action and may be brought as a separate action. Tenneco Oil Co. v. Templin, 201 Ga. App. 30, 410 S.E.2d 154 (1991).

A party who chooses not to assert his or her claim for contribution as a counterclaim is not barred from bringing a separate suit for contribution after a judgment has been entered in the original tort action. Tenneco Oil Co. v. Templin, 201 Ga. App. 30, 410 S.E.2d 154 (1991).

Cause of action for contribution or indemnity can be maintained without a prior judgment against the third-party plaintiff. Independent Mfg. Co. v. Automotive Prods., Inc., 141 Ga. App. 518, 233 S.E.2d 874 (1977).

Indemnity claim against broker for loss of tax-exempt status. — There was nothing in Georgia law that prevented the obligor of a bond issue from asserting an indemnity claim against a broker whose wrongful conduct caused the bonds to lose their tax-exempt status. Corp. of Mercer Univ. v. JPMorgan Chase & Co., No. 5:07-CV-243(HL), 2008 U.S. Dist. LEXIS 23919 (M.D. Ga. Mar. 26, 2008).

Statute of limitations. — Subcontractor's claim against a consultant for contribution was given by statute, O.C.G.A. § 51-12-32(a), and the subcontractor's claim for indemnity arose by operation of law. Therefore, the subcontractor's suit for contribution and indemnity against the consultant was a claim to enforce rights that accrued by operation of law or a statute and was subject to a 20-year statute of limitations under O.C.G.A. § 9-3-22. Saiia Constr., LLC v. Terracon Consultants, Inc., 310 Ga. App. 713, 714 S.E.2d 3 (2011).

Jury

Joint tort-feasor is not entitled to jury instruction that award should be reduced by amount of workers' compensation benefits. Aretz v. United States, 456 F. Supp. 397 (S.D. Ga. 1978), aff'd, 660 F.2d 531 (5th Cir. 1981).

Jury question. — In a direct action for contribution following the settlement of claims by some of the parties involved in the collapse of a balcony in a resort area, whether or not such an action could be maintained jointly against joint tort-feasors remained for determination by a jury as to whether or not the parties (the developer, the maintenance corporation, the builder, and the owner) were joint or several tort-feasors as to the cause of the balcony falling. Big Canoe Corp. v. Moore & Groover, Inc., 171 Ga. App. 654, 320 S.E.2d 564 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Indemnity, § 21. 74 Am. Jur. 2d, Torts, §§ 64 et seq.

Am. Jur. Pleading and Practice Forms. — 7A Am. Jur. Pleading and Practice Forms, Contribution, § 2.

C.J.S. — 17 C.J.S., Contracts, § 119. 86 C.J.S., Torts, § 39 et seq.

ALR. — Compensation from other source as precluding or reducing recovery against one responsible for personal injury or death, 18 ALR 678; 95 ALR 575.

Right of indemnitor of one joint tort-feasor to contribution by or indemnity against other joint tort-feasor or indemnitor of the latter, 75 ALR 1486; 171 ALR 271.

Right of defendant in action for personal injury or death to bring in a joint tort-feasor not made a party by plaintiff, 78 ALR 580; 132 ALR 1424.

Availability as setoff or counterclaim of claim in favor of one alone of several defendants, 81 ALR 781.

Constitutionality, construction, and effect of statutes relating to exceptions to rule denying contribution or indemnity between joint tort-feasors, 85 ALR 1091; 122 ALR 520; 141 ALR 1207.

Negligence of third person, other than physician or surgeon, in caring for injured person or in failing to follow instructions in that regard as affecting damages recoverable against person causing injury, 101 ALR 559.

Amount paid by one alleged joint tort-feasor in consideration of covenant not to sue (or a release not effectively a full release of the other joint tort-feasor), as pro tanto satisfaction of damages recoverable against other joint tort-feasor, 104 ALR 931.

Rights of coparties against whom judgment has been rendered to contribution or indemnity as affected by statute providing that under certain conditions judgment shall remain in effect for benefit of party who pays it, or more than his share thereof, 114 ALR 178.

Provision in judgment in action against one or more joint tort-feasors to effect that it shall be without prejudice to plaintiff's claim against another joint tort-feasor, or otherwise reserving rights against him, as affecting question of release of latter, 135 ALR 1498.

Contribution or indemnity between joint tort-feasors where injury to third person results from violation of a duty which one tort-feasor owes to other, 140 ALR 1306.

Statute providing for contribution between joint tort-feasors as applicable where liability of respective tort-feasors rests upon different legal foundations, 156 ALR 931.

Payment of, or proceeding to collect, judgment against one tort-feasor as release of others, 166 ALR 1099.

Contribution between joint tort-feasors as affected by settlement with one or both by person injured or damaged, 8 ALR2d 196.

Right of defendant in action for personal injury or death to bring in joint tort-feasor for purpose of asserting right of contribution, 11 ALR2d 228.

Right of tort-feasor to contribution where judgment creditor is spouse, parent, child, etc., of other tort-feasor against whom contribution is sought, 19 ALR2d 1003.

Rights of one entitled to contribution to recover interest, 27 ALR2d 1268.

Uniform Contribution Among Tortfeasors Act, 34 ALR2d 1107.

Collision insurance: insured's release of tort-feasor before settlement by insurer as releasing insurer from liability, 38 ALR2d 1095.

Right of motor vehicle owner liable to injured third person because of negligence of one permitted to drive, to indemnity from the latter or the latter's employer to whom vehicle was bailed, 43 ALR2d 879.

Contribution between negligent tort-feasors at common law, 60 ALR2d 1366.

Measure of contribution between tort-feasors against whom judgments in different amounts have been rendered, 72 ALR2d 1298.

Right of tort-feasor guilty of only ordinary negligence to be indemnified by one guilty of intentional wrongdoing, wanton misconduct, or gross negligence, 88 ALR2d 1355.

Claim for contribution or indemnification from another tort-feasor as within provisions of statute or ordinance requiring notice of claim against municipality, 93 ALR2d 1385.

What law governs right to contribution or indemnity between tort-feasors, 95 ALR2d 1096.

Liability insurance policy as covering insured's obligation to indemnify, or make contributions to, cotort-feasor, 4 ALR3d 620.

Right of tort-feasor initially causing injury to recover indemnity or contribution from medical attendant causing new in-

jury or aggravating injury in course of treatment, 8 ALR3d 639.

Financial worth of one or more of several joint defendants as proper matter for consideration in fixing punitive damages, 9 ALR3d 692.

Right of railroad, charged with liability for injury to or death of employee under Federal Employers' Liability Act, to claim indemnity or contribution from other tort-feasors, 19 ALR3d 928.

Judgment in action against codefendants for injury or death of person, or for damage to property, as res judicata in subsequent action between codefendants as to their liability inter se, 24 ALR3d 318.

Automobiles: right of third person to recover contribution from host driver for injuries or death of guest, where host is not liable to guest under guest statute, 26 ALR3d 1283.

Products liability: right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa, 28 ALR3d 943.

Tort-feasor's general release of cotort-feasor as affecting former's right to contribution against cotort-feasor, 34 ALR3d 1374.

Voluntary payment into court of judgment against one joint tort-feasor as release of others, 40 ALR3d 1181.

Contribution or indemnity between joint tort-feasors on basis of relative fault, 53 ALR3d 184.

Validity and effect of "loan receipt" agreement between injured party and one tort-feasor, for loan repayable to extent of injured party's recovery from a cotort-feasor, 62 ALR3d 1111.

Liability of subcontractor upon bond or other agreement indemnifying general contractor against liability for damage to person or property, 68 ALR3d 7.

Modern status of effect of state workmen's compensation act on right of third-person tort-feasor to contribution or indemnity from employer of injured or killed workman, 100 ALR3d 350.

Tenant's agreement to indemnify landlord against all claims as including losses resulting from landlord's negligence, 4 ALR4th 798.

Right of tort-feasor to contribution from joint tort-feasor who is spouse or otherwise in close familial relationship to injured party, 25 ALR4th 1120.

Liability for killing or injuring, by motor vehicle, livestock or fowl on highway, 55 ALR4th 822.

Right of tortfeasor initially causing injury to recover indemnity or contribution from medical attendant aggravating injury or causing new injury in course of treatment, 72 ALR4th 231.

Products liability: seller's right to indemnity from manufacturer, 79 ALR4th 278.

Release of one joint tortfeasor as discharging liability of others under Uniform Contribution Among Tortfeasors Act and other statutes expressly governing effect of release, 6 ALR5th 883.

Validity and effect of "Mary Carter" or similar agreement setting maximum liability of one cotortfeasor and providing for reduction or extinguishment thereof relative to recovery against nonagreeing cotortfeasor, 22 ALR5th 483.

51-12-33. Reduction and apportionment of award or bar of recovery according to percentage of fault of parties and nonparties.

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) 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. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section or any other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed. (Code 1981, § 51-12-33, enacted by Ga. L. 1987, p. 915, § 8; Ga. L. 2005, p. 1, § 12/SB 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2005, "or" was substituted for "and" near the beginning of subsection (g).

Editor's notes. — Ga. L. 2005, p. 1, § 1/SB 3, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a

crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2005, p. 1, § 14/SB 3, not codified by the General Assembly, provides for severability.

Ga. L. 2005, p. 1, § 15(b)/SB 3, not codified by the General Assembly, provides that the amendment of this Code section by that Act shall apply only with respect to causes of action arising on or after February 16, 2005, and any prior causes of action shall continue to be governed by prior law.

Law reviews. — For article, "Products Liability Law in Georgia Including Recent Developments," see 43 Mercer L. Rev. 27 (1991). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For survey article on evidence law, see 60 Mercer L. Rev. 135 (2008). For annual survey on trial practice and procedure, see 64 Mercer L. Rev. 305 (2012). For article, "Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. § 51-12-33," see 64 Mercer L. Rev. 15 (2012). For article, "The Seat-Belt Defense in Georgia," see 65 Mercer L. Rev. 19 (2013). For annual survey on construction law, see 65 Mercer L. Rev. 67 (2013). For annual survey on trial practice and procedure, see 65 Mercer L. Rev. 277 (2013). For annual survey on construction law, see 66 Mercer L. Rev. 27 (2014). For annual survey on insurance law, see 66 Mercer L. Rev. 93 (2014). For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014). For annual survey of tort law, see 68 Mercer L. Rev. 279 (2016).

For note, "The Effect (Or Noneffect) of the 2004 Amendments to O.C.G.A. §§ 51-12-31 and 51-12-33 on Joint Liability in Georgia," see 44 Ga. L. Rev. 215 (2009).

For comment, "Where Do We Go From Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia," see 28 Ga. St. U.L. Rev. 1341 (2012).

JUDICIAL DECISIONS

Applicability. — O.C.G.A. § 51-12-33 applies only to the plaintiff's negligence in concurrently causing the injury or damages by contributory negligence, assumption of risk, and comparative negligence; it does not apply to failure to mitigate damages or injury after the completion of the tort and injury or damages result. United States Fid. & Guar. Co. v. Paul Assocs., 230 Ga. App. 243, 496 S.E.2d 283 (1998).

Trial court erred by granting the parents of a businessman, shot and killed while a guest at a motel, partial summary judgment in the parents' wrongful death action and by holding that the apportionment of fault statute, O.C.G.A. § 51-12-33, did not apply because the statute applied since the actions of a criminal assailant were separate from the property owner and no respondent superior existed. Accor N. Am., Inc. v. Todd, 318 Ga. App. 317, 733 S.E.2d 846 (2012).

Third-party claims not cognizable under apportionment statute. — After a defendant moved for leave to file a third-party complaint, the good faith requirement of Fed. R. Civ. P. 16(b) was met,

but leave was denied under Fed. R. Civ. P. 14(a) since the defendant's third-party claims did not appear cognizable under Georgia law in light of Georgia's apportionment statute, O.C.G.A. § 51-12-33. Ga. Power Co. v. Sure Flow Equip., Inc., No. 1:13-CV-1375-AT, 2014 U.S. Dist. LEXIS 141911 (N.D. Ga. July 22, 2014).

O.C.G.A. § 51-12-33(c) requires the trier of fact in cases to which the statute applies to consider the fault of all persons or entities who contributed to the alleged injury or damages, which includes not only the plaintiff itself and the defendants with liability to the plaintiff, but also every other tortfeasor whose commission of a tort as against the plaintiff was a proximate cause of the plaintiff's injury, regardless of whether such tortfeasor would have actual liability in tort to the plaintiff. Alston & Bird LLP v. Hatcher Mgmt. Holdings, LLC, No. A15A1677, 2016 Ga. App. LEXIS 103 (Mar. 1, 2016).

Fault of all persons or entitites to be considered. — O.C.G.A. § 51-12-33(c) requires the trier of fact to consider the fault of all persons or entities who contributed to the alleged injury or damages, which includes not only the plaintiff personally and the defendants with liability to the plaintiff, but also every other tortfeasor whose commission of a tort as against the plaintiff was a proximate cause of the plaintiff's injury, regardless of whether such tortfeasor would have actual liability in tort to the plaintiff. Zaldivar v. Prickett, 297 Ga. 589, 774 S.E.2d 688 (2015).

Apportionment to nonparty. — O.C.G.A. § 51-12-33 requires the trier of fact to consider the "fault" of a nonparty only when the nonparty is shown to have committed a tort against the plaintiff that was a proximate cause of the plaintiff's injury. Zaldivar v. Prickett, 297 Ga. 589, 774 S.E.2d 688 (2015).

In the company's legal malpractice and breach of fiduciary duty suit against the firm, the trial court erred in striking the firm's apportionment notice, seeking to apportion fault among the company and multiple nonparties, because to the extent that the firm could prove that the nonparties identified in the apportionment notice breached a legal duty in tort that it owed the company, the breach of which was a proximate cause of the injury that the company sustained, the trier of fact could be permitted under O.C.G.A. § 51-12-33(c) to assign fault to the nonparties. Alston & Bird LLP v. Hatcher Mgmt. Holdings, LLC, 336 Ga. App. 527, 785 S.E.2d 541 (2016).

Rule of joint and several liability among joint tortfeasors can be disregarded, under O.C.G.A. §§ 51-12-31 and 51-12-33, with several separate judgments rendered in cases coming within the scope of these statutory provisions. Union Camp Corp. v. Helmy, 258 Ga. 263, 367 S.E.2d 796 (1988).

Interspousal tort immunity doctrine. — Application of the apportionment of damages pursuant to O.C.G.A. § 51-12-33 did not violate the interspousal tort immunity doctrine, O.C.G.A. § 19-3-8, because the trial court's holding that the jury should have been instructed to apportion the award of damages to a wife according to the jury's determination of the percentage of fault of her husband and a driver, if any, in no way requires the wife to file suit against her husband, but instead, precluded the wife from recovering from the driver that portion of her damages, if any, that a trier of fact concluded resulted from the negligence of her husband. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570 (2011).

Fault of tortfeasor considered despite meritorious defense. — As the Georgia Supreme Court has explained in Zaldivar, the apportionment statute, O.C.G.A. § 51-12-33(c), permits consideration, generally speaking, of the fault of a tortfeasor, notwithstanding that the tortfeasor may have a meritorious affirmative defense or claim of immunity against any liability to the plaintiff; the Supreme Court does not conclude that immune employers should be treated differently than other immune tortfeasors. Walker v. Tensor Mach., Ltd., 298 Ga. 297, 779 S.E.2d 651 (2015).

Georgia law does recognize first-party negligent entrustment as a tort, even if liability usually will be barred by the doctrine of comparative negligence; thus, to the extent that Ridgeway v. Whisman, 210 Ga. App. 169 (435 SE2d

624) (1993) or any other case that relied on Ridgeway, for instance, Hood v. Harmon, 315 Ga. App. 278, 279 (727 SE2d 143) (2012), suggests otherwise, those cases are disapproved. Zaldivar v. Prickett, 297 Ga. 589, 774 S.E.2d 688 (2015).

Notices of apportionment untimely. — Trial court properly struck a security system monitoring company's notices of apportionment in a customer's negligence action because the notices were filed in an untimely manner; strict compliance with the statutory time requirements was warranted, and the trial court was well within the court's right to set the trial date when the court did. Monitronics Int'l, Inc. v. Veasley, 323 Ga. App. 126, 746 S.E.2d 793 (2013).

Multiple parties required for instruction. — Trial court did not err in not instructing the jury on apportioning damages between defending parties as the patient's action in dismissing with prejudice a company doctor from the patient's medical malpractice suit meant such an instruction would have been inappropriate as the action was no longer against the multiple parties that statutory law required before such an instruction could be given. Schriever v. Maddox, 259 Ga. App. 558, 578 S.E.2d 210 (2003).

Trial court erred in ruling that damages could be apportioned against a third party as O.C.G.A. § 51-12-33(a) did not authorize a jury to apportion damages against a non-party. Fraker v. C.W. Matthews Contr. Co., 272 Ga. App. 807, 614 S.E.2d 94 (2005), aff'd, 2007 U.S. App. LEXIS 28793 (11th Cir. 2007).

Charge as to apportionment of burden of proof proper. — In a personal injury case, the defendant's apportionment claim was an affirmative defense, thus, the defendant had the burden of showing by a preponderance of the evidence that the nonparty tractor-trailer driver was negligent and that the driver's negligence proximately caused all or some portion of damages to the plaintiff, thus, the trial court committed no error in charging the jury to that effect. Brown v. Tucker, 337 Ga. App. 704, 788 S.E.2d 810 (2016).

Failure to submit apportionment to jury. — Trial court erred in denying the park's request to include some of the assailants on the verdict form for apportionment of fault. Six Flags Over Georgia II, L.P. v. Martin, 335 Ga. App. 350, 780 S.E.2d 796 (2015).

Reduction of damages award. — The 2005 amendment to O.C.G.A. § 51-12-33(a), providing that a judge shall reduce the amount of damages otherwise awarded to a plaintiff in proportion to his or her percentage of fault, shows legislative approval of a procedure under which the trial court reduces the jury's damage award in proportion to the degree of fault the jury attributes to the plaintiff. Turner v. New Horizons Cmty. Serv. Bd., 287 Ga. App. 329, 651 S.E.2d 473 (2007).

Delivery service's claim that an employee of a security company who was injured while inspecting one of the delivery service's trucks, and who filed a negligence action against the delivery service was also partially negligent for the injuries that the employee suffered, lacked merit in the context of the service's action, seeking indemnification from the security company, as there were no allegations of negligence against anyone other than the delivery service and the driver such that claims of comparative and contributory negligence under O.C.G.A. § 51-12-33 were unavailing. UPS v. Colt Sec. Agency, Inc., 296 Ga. App. 815, 676 S.E.2d 22 (2009).

Apportionment not permitted when entity is not party to action. — Trial court did not err in denying a motion for judgment notwithstanding the verdict after a jury awarded damages on an insurer's subrogation claim as there could be no apportionment of damages with a city, even if the city was deemed liable, because the city was not a party to the action pursuant to O.C.G.A. § 51-12-33. Universal Underwriters Group v. Southern Guar. Ins. Co., 297 Ga. App. 587, 677 S.E.2d 760 (2009).

Apportionment permitted when third party's fault at issue. — Third party's plea was admissible under former O.C.G.A. § 24-3-35(2) (see now O.C.G.A. § 24-8-804) as a third-party admission because the third party's fault had properly been made an issue under O.C.G.A. § 51-12-33. Woods v. Allied Van Lines,

Inc., 316 Ga. App. 548, 730 S.E.2d 35 (2012).

To the extent that the driver could prove that the truck driver's employer breached a legal duty in tort that it owed the truck driver, the breach of which is a proximate cause of the injury that the truck driver sustained, the trier of fact could be permitted under O.C.G.A. § 51-12-33(c) to assign "fault" to the employer. Zaldivar v. Prickett, 297 Ga. 589, 774 S.E.2d 688 (2015).

Apportionment requirement applies even if plaintiff is not at fault. — In applying O.C.G.A. § 51-12-33, the trier of fact must apportion the court's award of damages among the persons who are liable according to the percentage of fault of each person even if the plaintiff is not at fault for the injury or damages claimed. McReynolds v. Krebs, 290 Ga. 850, 725 S.E.2d 584 (2012).

Apportionment must be raised as issue before first day of trial. — In a wrongful death action, the trial court did not err in excluding the issue of apportionment from the jury's consideration because the defendant failed to comply with the notice requirements of the apportionment statute, O.C.G.A. § 51-12-33(d)(1), and did not raise the issue of apportionment until the first day of trial. Freese II, Inc. v. Mitchell, 318 Ga. App. 662, 734 S.E.2d 491 (2012).

Cause of action for apportionment not created. — Trial court did not err in dismissing the property owner's common-law indemnification and apportionment claims because the property owner's third-party complaint against the designers and builders was properly dismissed as the complaint sought payment from third-party defendants as joint tortfeasors and thus, common law indemnity principles did not apply, and O.C.G.A. § 51-12-33 did not create a cause of action for apportionment but abrogated such actions under common law. Dist. Owners Ass'n v. AMEC Envtl. & Infrastructure, Inc., 322 Ga. App. 713, 747 S.E.2d 10 (2013).

Exception to apportionment requirement. — O.C.G.A. § 51-12-33 required the apportionment of damages among multiple tortfeasors even if the plaintiff was not at fault. However, given that a vehicle manufacturer settled with the plaintiff before trial and that the other driver in the collision presented no evidence for apportionment, a trial court did not err by dismissing the driver's crossclaim for setoff and contribution. McReynolds v. Krebs, 307 Ga. App. 330, 705 S.E.2d 214 (2010), aff'd, 290 Ga. 850, 725 S.E.2d 584 (2012).

O.C.G.A. § 51-12-33 did not apply to a city's water customers claims that the city overcharged the customers for water and sewage service because the claims were not for injury to person or property. City of Atlanta v. Benator, 310 Ga. App. 597, 714 S.E.2d 109 (2011).

Injured person's father's employer bore no fault in an asbestos-related action for damages that could have been assessed to it as a nonparty under O.C.G.A. § 51-12-33 because it did not owe a duty of care to a third-party, non-employee who came into contact with its employee's asbestos-tainted work clothing at locations away from the workplace. Union Carbide Corp. v. Fields, 315 Ga. App. 554, 726 S.E.2d 521 (2012).

In a case in which an injured person alleged that the person was exposed to asbestos through the family's brake work on vehicles or parts manufactured by certain nonparties and by use of a joint compound product used in the construction of the person's family home, it was not error to grant summary judgment to the injured person on the defendant's nonparty defense under O.C.G.A. § 51-12-33 when the defendants failed to present evidence sufficient to create a triable issue of fact as to whether the nonparties contributed to the injuries or damages as was required to assess those entities' potential fault. Union Carbide Corp. v. Fields, 315 Ga. App. 554, 726 S.E.2d 521 (2012).

Apportioned damages not subject to any right of contribution. — In a personal injury action, the trial court and the court of appeals correctly construed O.C.G.A. § 51-12-33 to bar a motorist's cross-claims against a manufacturer for contribution and setoff. O.C.G.A § 51-12-33(b) flatly stated that apportioned damages shall not be subject to any

right of contribution. McReynolds v. Krebs, 290 Ga. 850, 725 S.E.2d 584 (2012).

Negligent hiring, retention, and training claims. — After an employee collided with a vehicle while driving a tractor-trailer, the employer was not entitled to summary judgment on the plaintiffs' claims of negligent hiring, training, and retention because the apportionment statute removed the rationale for granting summary judgment on negligent hiring, retention, and training claims purely based on the employer's admission of respondeat superior. Little v. McClure, No. (MTT), 2014 U.S. Dist. LEXIS 120681 (M.D. Ga. Aug. 29, 2014).

Burden is upon the defendant, but whether the defendant meets that burden given the evidence at trial is an issue that should be left to the jury. Alston & Bird LLP v. Hatcher Mgmt. Holdings, LLC, No. A15A1677, 2016 Ga. App. LEXIS 103 (Mar. 1, 2016).

Percentage of fault to non-party employer. — Court answered a certified question in the affirmative, namely, it held that O.C.G.A. § 51-12-33(c) allows the jury to assess a percentage of fault to the non-party employer of a plaintiff who sues a product manufacturer and seller for negligence in failing to warn about a product danger, even though the non-party employer had immunity under the Workers' Compensation Act, O.C.G.A. § 34-9-11. Walker v. Tensor Mach., Ltd., 298 Ga. 297, 779 S.E.2d 651 (2015).

Impleader properly denied. — Third-party complaint was properly dismissed on the basis that no claim for indemnity or contribution had been stated and the trial court properly denied the motion to add a third-party defendant because only the defendant rendered a legal opinion on the status of title to property and was directly responsible to the client for the opinion and the attorney was in effect seeking impermissibly to tender a substitute defendant. Hines v. Holland, 334 Ga. App. 292, 779 S.E.2d 63 (2015).

Asbestos exposure cases. — Sufficient evidence supported the verdict in favor of the plaintiff in an asbestos exposure case because the plaintiff worked at the defendant's plant for years, and the evidence was sufficient to show that asbestos-containing products were used, produced, or maintained at the plant in a manner which released airborne asbestos fibers, and that the plaintiff was at the plant in proximity to those asbestos fibers when those fibers were released. Scapa Dryer Fabrics, Inc. v. Knight, 332 Ga. App. 82, 770 S.E.2d 334 (2015), overruled on other grounds, 2016 Ga. LEXIS 445 (Ga. 2016).

Jury instructions. — Trial court erred by entering judgment on the jury's first verdict in a property owner's action for trespass and nuisance because the trial court had the authority and duty to instruct the jury to reconsider the verdict once a substantial error in the charge was discovered even though the owner had not objected to the trial court's actions, and the charges and the verdict form created substantial uncertainty about the meaning of the jury's initial decision; the initial failure to charge on O.C.G.A. § 51-12-33(g) was harmful because the jury's initial decision showed an intent to reduce the owner's award by only 50 percent, not 100 percent, but once the jury was fully instructed, the jury confirmed that intent in the second verdict, and the trial court was required to enter judgment in accordance with that intent. Bailey v. Annistown Rd. Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010).

Trial court erred by declining to charge the jury pursuant to O.C.G.A.§ 51-12-33 because the jury should have been instructed to apportion the award of damages to a wife according to the jury's determination of the percentage of fault of her husband and a driver, if any, and there was evidence from which the jury could have concluded that both the driver and the husband were negligent; the trier of fact is required to apportion an award of damages under O.C.G.A. § 51-12-33 even if the plaintiff bears no fault. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570 (2011).

Jury instructions provided pursuant to O.C.G.A. § 51-12-33 were not error in a wrongful death action since the particular language used was not challenged, the

evidence supported invocation of the instruction, and there was no showing that the particular allegations of the claim did not warrant use of that instruction. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 715 S.E.2d 728 (2011).

Because any error in charging the jury about apportionment had no effect on the outcome of the trial and could not have harmed a mother, the court of appeals need not consider whether instructing the jury on apportionment actually was error; the jury returned a verdict for the owner of an apartment complex, and there was no occasion for the jury to apportion damages. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135 (2011), cert. denied, No. S12C0436, 2012 Ga. LEXIS 270 (Ga. 2012).

Trial court erred in charging the jury with the pattern instruction on comparative negligence because the instruction was no longer an accurate statement of law since the statement did not require the jury to quantify the fault of the plaintiff as precisely as O.C.G.A. § 51-12-33(a), and the procedure established by the pattern charge left the parties to wonder whether the jury found comparative negligence at all and, if so, correctly reduced the damages to be awarded the plaintiff in proportion to the degree of his or her negligence; both the Suggested Pattern Jury Instructions, Vol. I: Civil Cases (4th ed.) § 60.141 and Underwood v. Atlanta & West Point R. R. Co., 105 Ga. App. at 340 (1962), the case on which the pattern charge is based, have been superseded by O.C.G.A. § 51-12-33(a), as amended in the Tort Reform Act of 2005. Specifically, the van driver was entitled to a correct charge on comparative negligence because a jury could properly conclude from the evidence that a car driver, who filed suit against the van driver, was driving too fast, that driving so fast was negligent, and that the negligence contributed to the collision. Clark v. Rush, 312 Ga. App. 333, 718 S.E.2d 555 (2011).

Trial court did not limit the jury's obligation to consider the fault of unnamed nonparties because a company provided notice that a nonparty was at fault for some damages to the owners' property, and pursuant to that notice, the trial court instructed the jury that it had to consider the liability of the nonparty when deliberating. Ingles Mkts., Inc. v. Kempler, 317 Ga. App. 190, 730 S.E.2d 444 (2012).

Trial court erred by granting summary judgment to the defendants in a wrongful death action upon concluding that the plaintiffs' decedent was 50 percent or more responsible for the decedent's own death because there was an issue of fact as to whether the decedent would have died but for the presence of the tractor-trailer illegally parked in the emergency lane. Reed v. Carolina Cas. Ins. Co., 327 Ga. App. 130, 755 S.E.2d 356 (2014).

Following a jury trial on the issue of unliquidated damages in an action involving, inter alia, breach of fiduciary duty and related business torts, the plaintiff was awarded $2.5 million jointly and severally against the defendants; however, because apportionment was mandated under O.C.G.A. § 51-12-33 as it did not omit from its purview either damages or the assessment of percentages of fault springing from a default judgment, and damages apportioned by the trier of fact as provided in that statute were the liability of each person against whom they were awarded, and were not a joint liability among the persons liable, the trial court erred in instructing the jury on joint and several liability, and the defendants were entitled to a new trial. I. A. Group, Ltd. Co. v. RMNANDCO, Inc., 336 Ga. App. 461, 784 S.E.2d 823 (2016).

Mitigation evidence relevant. — In a property owner's action for trespass and nuisance, the trial court did not err in denying the owner's motion in limine to exclude evidence suggesting that the owner should have built or re-built drains on the property because, at a minimum, the evidence the owner sought to exclude was relevant to the claim of negligence in several ways, and any possible error admitting evidence of mitigation or decisions regarding the drains vis-a-vis the owner's claims of nuisance and trespass was self-induced. Bailey v. Annistown Rd. Baptist Church, Inc., 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010).

Evidence of doctor's prior conduct not relevant. — In a wrongful death action, the trial court did not abuse the court's discretion by refusing the plaintiff's request to have evidence of the doctor's medical condition and history admitted because the trial court found that the evidence was not relevant without evidence of such condition and history existing on and during treatment of the plaintiff's decedent. Doherty v. Brown, 339 Ga. App. 567, 794 S.E.2d 217 (2016).

Waiver of constitutional challenge. — Constitutional challenges on appeal to O.C.G.A. § 51-12-33 were waived when there was no trial court ruling shown on the issue. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 715 S.E.2d 728 (2011).

Special verdict. — Tort Reform Act of 2005, O.C.G.A. § 51-12-33(a), does not explicitly state that the jury must return a special verdict identifying the percentage of fault attributable to the plaintiff, but that is implicit, given the explicit requirements that the jury determine the percentage of fault and that the judge reduce any damages award in proportion to the percentage determined by the jury; without a special verdict, the judge could not know the percentage by which the judge is to reduce the damages award. Clark v. Rush, 312 Ga. App. 333, 718 S.E.2d 555 (2011).

Cited in Pirkle v. Hawley, 199 Ga. App. 371, 405 S.E.2d 71 (1991); Mann v. Taser Int'l, Inc., 588 F.3d 1291 (11th Cir. 2009); Patterson v. Long, 321 Ga. App. 157, 741 S.E.2d 242 (2013).

RESEARCH REFERENCES

ALR. — Products liability: seller's right to indemnity from manufacturer, 79 ALR4th 278.

ARTICLE 3

DAMAGES FOR CONVERSION OF TIMBER

51-12-50. Measure of damages for converted timber; presumption.

(a) Except as provided in Code Section 51-12-51, when a plaintiff recovers for timber cut or cut and carried away, the measure of damages shall be:

(1) Treble the fair market value of the trees cut as they stood;

(2) Treble the diminished fair market value of any trees incidentally harmed;

(3) Costs of reasonable reforestation activities related to the plaintiff's injury; and

(4) Attorney fees and expenses of litigation.

(b) When the defendant is a willful trespasser, the plaintiff may also recover punitive damages.

(c) When the boundary lines of the property have been clearly and accurately marked, it shall be presumed that the defendant was a willful trespasser. (Civil Code 1895, § 3918; Civil Code 1910, § 4515; Code 1933, § 105-2013; Ga. L. 2014, p. 695, § 7/HB 790.)

History of Code section. — The language of this Code section is derived in part from the decision in Parker v. Waycross & Florida R.R., 81 Ga. 387, 8 S.E. 871 (1889).

Law reviews. — For comment on Rowland v. Gardner, 79 Ga. App. 153, 53 S.E.2d 198 (1949), see 12 Ga. B. J. 79 (1949).

JUDICIAL DECISIONS

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General Consideration

This section is applicable in trover action. Folds v. Reese, 140 Ga. App. 291, 231 S.E.2d 808 (1976).

This section applies to trover cases and paragraph (1) does not limit plaintiff to recovery of lesser measure of damage than that provided for in trover cases generally; accordingly, when willful trespass is shown a jury is authorized to find for the plaintiff the highest proven value between the time of the conversion and the trial when the action is in trover, for damages and amounts to an election for such a recovery. Rowland v. Gardner, 79 Ga. App. 153, 53 S.E.2d 198 (1949).

Section 105-2013 primarily relates only to trover suits, and until some other basis for recovery appears in the evidence, the plaintiff is entitled to recover at his election either the full value of the property at the date of the conversion or "the highest amount which he can prove between the time of the conversion and the trial." Rowland v. Gardner, 79 Ga. App. 153, 53 S.E.2d 198 (1949).

This section is not applicable to action of trespass to realty. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 S.E. 270 (1908); McConnell Bros. v. Slappey, 134 Ga. 95, 67 S.E. 440 (1910).

This section is not applicable for trespass quare clausum fregit. Folds v. Reese, 140 Ga. App. 291, 231 S.E.2d 808 (1976).

Whether in trover or trespass, measure of damages applicable thereto is fixed by this section. Minor v. Fincher, 206 Ga. 721, 58 S.E.2d 389 (1950).

Measure of damages for timber conversion. — In an action by the plaintiff for the recovery of timber cut from the plaintiff's lands and carried away, the measure of damage is the full value of the property at the time and place of demand or suit, without deduction for labor or expense, if the defendant is a willful trespasser; if the defendant is an unintentional or innocent trespasser, or innocent purchaser from such trespasser, it is the value at the time of conversion, less the value one or one's vendor added to the property. West Lumber Co. v. Castleberry, 76 Ga. App. 9, 45 S.E.2d 67 (1947).

When trees are wrongfully cut and manufactured into lumber and a trover action has been instituted by the owner for damages therefor in the amount of the value of the lumber or manufactured product and the case is in default, the defendant may only contest the amount of such damages, that is, the value of the lumber in question at the time and place of the demand or the filing of the suit, and one is not entitled to introduce evidence as to the value of the trees in question, while they were standing in the woods, or as to the stumpage value of these trees. Cooper v. Brock, 77 Ga. App. 152, 48 S.E.2d 156 (1948).

Damage rule not applicable when suit based on trespass to land. — When timber is wrongfully cut and carried away from land, and the owner sues upon the theory of a trespass to the realty, the measure of damage when not willfully done is the diminution, if any, in the market value of the real estate by reason of the cutting of the timber, when done willfully, exemplary, or punitive damages

in addition thereto; accordingly, it was erroneous to charge the jury, on the subject of damages, the provisions of this section. Holcombe v. Jones, 197 Ga. 825, 30 S.E.2d 903 (1944).

It was error to include the cost of clearing and replanting in addition to the market value as a measure of damages for the timber cut and carried away. Henderson v. Easters, 178 Ga. App. 867, 345 S.E.2d 42 (1986).

Punitive damages not permitted. — When an action has been instituted to recover the full value of timber cut from the plaintiff's premises, without deduction for the added value because of labor and expense incurred in its subsequent manufacture, a plaintiff is not entitled, in addition to such damages, to recover punitive damages and attorney's fees. Taylor v. Hammack, 61 Ga. App. 640, 7 S.E.2d 200 (1940).

While it is true enough that a trespasser who has innocently misjudged the strength of one's own title cannot exculpate oneself from the penalty of the actual damages merely because one thought one was right when one was in fact wrong, the maxim that everyone is presumed to know the law does not say or suggest that if one misjudges the law one necessarily does so willfully and in bad faith, and should be mulcted in punitive damages as for willful misconduct. Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758 (1942).

Former Code 1933, § 105-2013 (see now O.C.G.A. § 51-12-50) fixed special measure of damages in such actions for willful misconduct, which was exclusive and not inconsistent with former Code 1933, § 105-2002 (see now O.C.G.A. § 51-12-5). DeBardelaben v. Coleman, 74 Ga. App. 261, 39 S.E.2d 589 (1946); Sims v. Majors, 178 Ga. App. 679, 344 S.E.2d 501 (1986).

Willful trespass has been characterized as wanton trespass and as one made in bad faith. This cannot be true if the premises are honestly claimed in good faith. Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758 (1942).

"Willful" and "bad faith" have same meaning and effect insofar as "willful" is used in this section. Zugar v. Tennessee, A. & G. R. Co., 65 Ga. App. 658, 16 S.E.2d 149 (1941), rev'd on other grounds, 193 Ga. 386, 18 S.E.2d 758 (1942).

"Willful trespasser" can be defined in general terms as one who knows that one is wrong, while an "innocent trespasser" is one who believes that one is right. Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758 (1942).

Willful trespass in exercising rights of ownership. Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758 (1942).

Second paragraph authorizes recovery of actual damages when the defendant proves the defendant has acted in good faith. Yahoola River & Cane Creek Hydraulic Hose Mining Co. v. Irby, 40 Ga. 479 (1869); Shealy v. Wilder, 33 Ga. App. 745, 127 S.E. 805 (1925).

Cited in Singer v. Shellhouse, 175 Ga. 136, 165 S.E. 73 (1932); Lawson v. Branch, 191 Ga. 311, 12 S.E.2d 641 (1940); Swinson v. Jones, 74 Ga. App. 109, 38 S.E.2d 878 (1946); Neidlinger v. Mobley, 76 Ga. App. 595, 46 S.E.2d 747 (1948); Mooney v. Shelfer, 205 Ga. 766, 55 S.E.2d 212 (1949); Union Bag & Paper Corp. v. Mitchell, 177 F.2d 909 (5th Cir. 1949); Abernathy v. Rylee, 209 Ga. 317, 72 S.E.2d 300 (1952); Sudderth v. National Lead Co., 272 F.2d 259 (5th Cir. 1959); Jones v. Hudgins, 218 Ga. 43, 126 S.E.2d 414 (1962); Campion v. McLeod, 108 Ga. App. 261, 132 S.E.2d 848 (1963); King v. Baker, 109 Ga. App. 235, 136 S.E.2d 8 (1964); Newman Mfg. Co. v. Young, 109 Ga. App. 763, 137 S.E.2d 367 (1964); Walker v. Greene, 128 Ga. App. 794, 197 S.E.2d 867 (1973).

Pleading and Practice

Plaintiff not required to allege whether trespass willful. — In trover for timber cut from the plaintiff's land and carried away, the gist of the action is the wrongful conversion, and the plaintiff is not required to allege whether the trespass was willful or innocent; if the plaintiff alleges a willful trespass, the plaintiff's suit does not fail, if it develops that the trespass was inadvertent or in good faith, though this fact may give the defendant the right of setoff. Taylor v.

Pleading and Practice (Cont'd)

Hammack, 61 Ga. App. 640, 7 S.E.2d 200 (1940).

Burden on defendant to show good faith when taking established. — When a trespass and removal of timber are shown and a suit is instituted for the full manufactured value of the lumber, the burden is on the defendant, when a taking is shown, to establish that the taking was unintentional or in good faith, and also the value that has been added to the property by the expenditure of labor and money on it. Taylor v. Hammack, 61 Ga. App. 640, 7 S.E.2d 200 (1940); Coleman v. Garrison, 80 Ga. App. 328, 56 S.E.2d 144 (1949).

Upon proof of title in the plaintiff, conversion by the defendant and value as herein outlined, the burden of proof to show bad faith, or that the defendant was a willful trespasser, is not on the plaintiff, but is on the defendant to show that the defendant was an unintentional or innocent trespasser acting in good faith. West Lumber Co. v. Castleberry, 76 Ga. App. 9, 45 S.E.2d 67 (1947).

Evidence required to support recovery by plaintiff. — In order to entitle the plaintiff to recover in an action based on this section, evidence must be produced sufficient to authorize the jury to find: (a) that the plaintiff owned the land on which timber was growing; (b) that the defendant converted a specific quantity of this timber; and (c) what the full value thereof was at the time and place of demand or suit. West Lumber Co. v. Castleberry, 76 Ga. App. 9, 45 S.E.2d 67 (1947).

Burden is on plaintiff to show value of trees, as they lie felled. Smith v. Gonder, 22 Ga. 353 (1857).

Suit by plaintiff as trustee. — When one sues in trover for the cutting of timber as trustee for one's minor children and the defendant denies willful trespass and alleges that the defendant acted in good faith under a contract of purchase with the plaintiff, the defendant is not estopped to demand strict proof of the plaintiff's right to recover as trustee, in the event of a finding of willful trespass, by claiming to have acted in good faith under a contract. Moore v. Bowen, 73 Ga. App. 192, 35 S.E.2d 924 (1945).

Application

One evicted from land, claiming for improvements placed thereon, will not be entitled thereto unless one was bona fide occupant, and that to be such bona fide occupant it must appear that one not only believed one had good title, and made the improvements in good faith under that belief, but it must be further shown that one at the time had reasonable grounds to believe one's title good. If the title under which one claimed appeared upon its face to be defective upon a proper application of legal principles thereto, one could not be held to be acting in good faith. Zugar v. Tennessee, A. & G. R. Co., 65 Ga. App. 658, 16 S.E.2d 149 (1941), rev'd on other grounds, 193 Ga. 386, 18 S.E.2d 758 (1942).

Plaintiff cannot recover damages against defendant for willful trespass for trees that plaintiff cut or helped to cut personally. Davis v. Price, 72 Ga. App. 565, 34 S.E.2d 565 (1945).

Setoff for improvement of property. — Since the evidence of record was insufficient to enable the court to calculate what value, if any, an adverse possessor may have added to the property by removing timber, the judgment of the trial court was reversed, and the case was remanded for a reassessment of the damages owed by the possessor for the removal of the timber, to be calculated in accordance with paragraph (2) (now (a)(2) of O.C.G.A. § 51-12-50). Penn v. McElheney, 191 Ga. App. 465, 382 S.E.2d 185 (1989).

Even innocent trespasser is liable for stumpage value of timber unlawfully cut and removed by the trespasser. Pickron v. Garrett, 73 Ga. App. 61, 35 S.E.2d 540 (1945).

Setoff when purchaser of manufactured article is sued. — In an action by the owner of timber against a purchaser of an article manufactured therefrom, the latter may show that the possession is innocent and set off damages by an enhancement of value by one's labor, and if the trespass was innocent, one may set off the labor of the trespasser. Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 S.E. 270 (1908).

Evidence sufficient to prove conversion. — After the plaintiff introduces

uncontradicted testimony as to the estimated quantity of the timber received by the defendants, and as to the estimated highest market value thereof, in an action of trover for the conversion of lumber cut from timber wrongfully taken from the plaintiff's land, such evidence would be sufficient to authorize a verdict in some amount for the plaintiff, and when the undisputed evidence shows that the defendants received the lumber and exercised dominion over it in a manner inconsistent with the owner's rights, a conversion is shown although no demand and refusal are proved. Sullivan v. Dixon, 72 Ga. App. 507, 34 S.E.2d 318 (1945).

Verdict for the plaintiffs in suit for damages for cutting and conversion of timber and trespass, was authorized by the evidence. Porter v. Rucker, 88 Ga. App. 486, 76 S.E.2d 842 (1953).

Evidence that there were old fences on lines dividing parties' lands, the plaintiff's side of the lines was much larger than the timber owned by the defendant, and that a part of the timber was cut after the plaintiff had personally pointed out to the defendant the location of at least one of the lines, authorized a finding that the defendant committed a willful trespass so as to be liable, under paragraph (1) (now paragraph (a)(1)) of this section for the full value of the property at the time of the demand or suit, without deduction for the defendant's labor or expense. Manis v. Bing, 98 Ga. App. 232, 105 S.E.2d 463 (1958).

Finding of conversion unauthorized when no adequate evidence of property lines produced. — Since there was no competent evidence from which a dividing line between the adjacent landowners could be determined, a finding that defendant vendees of timber cut timber belonging to the plaintiff was unauthorized. Strother v. Myers, 89 Ga. App. 814, 81 S.E.2d 534 (1954).

Insufficient evidence for recovery. — As a neighbor was liable for a third party's cutting some, but not all, of the property owners' timber, and there was no evidence from which the trial court could determine the value of the converted timber attributable to the neighbor, it properly refused to award the owners any damages. Page v. Braddy, 255 Ga. App. 124, 564 S.E.2d 538 (2002).

Jury

Question as to whether trespass was willfully or innocently done is generally for jury to determine, except when the trespasser acts with such entire want of care and reckless indifference as would clearly amount to a disregard of the rights of the other party. Tennessee, Ala. & Ga. Ry. v. Zugar, 193 Ga. 386, 18 S.E.2d 758 (1942); Coleman v. Garrison, 80 Ga. App. 328, 56 S.E.2d 144 (1949).

Whether the defendant was a willful trespasser, or an unintentional or innocent trespasser, if either, may be a question for the jury. West Lumber Co. v. Castleberry, 76 Ga. App. 9, 45 S.E.2d 67 (1947).

Jury not bound to find willful trespass if evidence conflicting. — Under this section, it has been held that if the evidence is conflicting the jury is not bound to find that the trespass was willful. Smith v. Ingram, 135 Ga. 523, 68 S.E. 94 (1910).

Unnecessary instructions. — In an action based upon an alleged conversion of timber, the trial court charged that the defendants would be liable to the plaintiff if it was shown that they cut and removed the timber from the plaintiff's land, requested charges that under Georgia law the word "trespass" comprehends any misfeasance, transgression, or offense which damages another's health, reputation or property; that a wilful trespasser can be defined in general terms as one who knows that one is wrong, while an innocent trespasser is one who believes one is right; and that a wilful trespass may be characterized as a wanton trespass and as one made in bad faith, were unnecessary. Union Camp Corp. v. Guinn, 180 Ga. App. 391, 349 S.E.2d 221 (1986).

Verdict exonerating defendant who actually committed trespass while holding assistants liable null and void. — A verdict, exonerating the defendant in a trespass suit seeking damages for timber cut who actually committed the alleged trespass, and relieving the defendant of all liability, and assessing damages against the other defendants who

Jury (Cont'd)

participated in the alleged actual trespass only through the acts of the defendant relieved, is inconsistent and repugnant and must be set aside as null and void. Pickron v. Garrett, 73 Ga. App. 61, 35 S.E.2d 540 (1945).

Section charged in equitable proceeding. — This section should be charged in an equitable proceeding to recover the proceeds of timber that had been cut by the defendant, under a bona fide belief that the defendant owned the land upon which the timber was cut. Towson v. Horn, 160 Ga. 697, 128 S.E. 801 (1925).

When trespass is not denied, but is claimed to be unintentional, first two paragraphs should be given in charge. Crockett Bros. v. Sibley, 3 Ga. App. 554, 60 S.E. 326 (1908).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Logs and Timber, § 112 et seq.

Am. Jur. Pleading and Practice Forms. — 17 Am. Jur. Pleading and Practice Forms, Logs and Timber, § 50 et seq.

C.J.S. — 87 C.J.S., Trespass, §§ 140, 141.

ALR. — Allowance as damages for conversion of commodities or chattels of fluctuating value, of increase in market value after the time of conversion, 40 ALR 1282; 87 ALR 817.

Rights and remedies in case of encroachment of trees, shrubbery, or other vegetation across boundary line, 76 ALR 1111; 128 ALR 1221.

Liability of owner of standing timber or timber rights for damages to the owner of the land in connection with the cutting removal of the timber by the former or his servant, or by an independent contractor, 151 ALR 636.

Measure of damage for destruction of or injury to trees and shrubbery, 161 ALR 549; 69 ALR2d 1335.

Rights as between purchaser of timber and subsequent vendee of land, 18 ALR2d 1150.

Revocation of license to cut and remove timber as affecting rights in respect of timber cut but not removed, 26 ALR2d 1194.

Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street, 64 ALR2d 866.

Measure of damages for destruction of or injury to fruit, nut, or other productive trees, 90 ALR3d 800.

Measure of damages for injury to or destruction of shade or ornamental tree or shrub, 95 ALR3d 508.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 ALR4th 603.

51-12-51. Recovery by person holding security interest in land for conversion of timber; use of converted timber by owner.

(a) Every person, firm, or corporation who, without the written consent of the person holding legal title to land or to an interest in land as security for debt, as shown by the public records of the county where such land is located, buys, sells, cuts, removes, holds, disposes of, changes the form of, or otherwise converts to the use of himself, itself, or another any trees growing or grown on such land shall be liable to the holder of the legal title for such trees, in any form, bought, sold, cut, removed, held, disposed of, changed in form, or otherwise converted by him or it, or for the value of such trees, provided that recovery may not be for more than the unpaid portion of the secured indebtedness, interest thereon, and a reasonable attorney's fee. Recovery may be had

by action at law from one who purchases, without the consent of the holder of the legal title, such interest in the trees, mineral or other rights, or interest in the encumbered real estate, either jointly or severally, with the holder of the equitable title.

(b) The equitable owner of the land shall be allowed to use the timber for his own use, such as for firewood or other necessary uses of timber in and around his farm. (Ga. L. 1939, p. 340, § 1.)

Law reviews. — For article, "Timber Transactions in Georgia," see 19 Ga. B. J. 413 (1957).

JUDICIAL DECISIONS

Action for trespass for cutting timber under this section necessarily incidentally involves title because it involves the question of whether the entry was legal or illegal. Spillers v. Jordan, 96 Ga. App. 426, 100 S.E.2d 483 (1957).

Perfect legal title is not essential to right of recovery for trespass for cutting of timber on land; and the holder of written evidence of title which is color of title, who has actual possession of the land and the right of possession of the entire tract described in the written evidence of title (color of title), has a right to sue in trespass anyone who interferes with one's actual possession or one's right of possession by cutting timber thereon. Swinson v. Jones, 74 Ga. App. 109, 38 S.E.2d 878 (1946).

Prior to passage of this section, holder of security deed without more was not authorized to institute action for value of timber cut from land and was not entitled to recover on possession alone when the evidence did not show that the holder was in the actual possession of the portion of the land from which the timber was cut. Swinson v. Jones, 74 Ga. App. 109, 38 S.E.2d 878 (1946).

One who owns legal title to property under security deed is entitled to recover in action at law value of timber cut off land if it did not consent for the timber to be cut, regardless of whether the owner of the equity in the property sold the timber to the defendant and received payment therefor. Davis v. Rome Kraft Co., 96 Ga. App. 450, 100 S.E.2d 473 (1957), rev'd on other grounds, 213 Ga. 899, 102 S.E.2d 571 (1958).

The plaintiff's interest in the land as the holder of legal title under the installment contract at the time the timber was cut was sufficient to give it a cause of action after the plaintiff demonstrated that its interest in the property was recorded in the public records of the county where such land was located. Southern Land & Cattle Co. v. Simmons, 202 Ga. App. 734, 415 S.E.2d 329 (1992).

Proof of use to which trees were put is not an element. — When a person without authority removes another person's trees in order to improve the view, there is an unauthorized exercise of ownership rights over the trees; to what specific "use" the trees are put after the unauthorized removal does not impact on the fact that in removing the trees without authority the remover has converted them to the remover's own "uses." Thakkar v. St. Ives Country Club, 250 Ga. App. 893, 553 S.E.2d 181 (2001).

Under this section holder of security deed has valid cause of action against not only defendant who cut timber, but also against purchaser of timber. Sohr v. Carpenter, 156 Ga. App. 126, 274 S.E.2d 123 (1980).

Conveyance of title to given land neither passes title to timber cut nor assigns right to recover damages for the trespass resulting from its wrongful removal and conversion. Rome Kraft Co. v. Davis, 213 Ga. 899, 102 S.E.2d 571 (1958).

Vendee of land upon which trespass is committed while it is property of the vendor has no right of action against the trespasser for damages thus

occasioned, which are recoverable by the vendor. Rome Kraft Co. v. Davis, 213 Ga. 899, 102 S.E.2d 571 (1958).

Written consent required. — Borrower's contention that bank's chief executive officer granted verbal consent for the sale of timber from land on which bank held a security interest did not satisfy O.C.G.A. § 51-12-51 which clearly and unambiguously requires written consent. Martin v. Fairburn Banking Co., 218 Ga. App. 803, 463 S.E.2d 507 (1995).

In an action for timber conversion, the trial court erred when the court denied the plaintiff's motion in limine to exclude parol evidence concerning the plaintiff's alleged consent to the timber company's cutting and other topics because O.C.G.A. § 51-12-51(a) clearly and unambiguously required written consent and any verbal consent to cut timber on the property was inadequate; parol evidence regarding an understanding to cut timber at or even after the closing was inadmissible as it could be taken to contradict the plain terms of the loan documents, which barred cutting without written consent; and the jury apparently considered the parol evidence in the course of reaching the jury's verdict for the timber company. AgSouth Farm Credit, ACA v. Gowen Timber Co., 336 Ga. App. 581, 784 S.E.2d 913 (2016).

Sufficiency of pleadings. — A petition which shows that the plaintiff held a duly recorded security deed to land from which the defendant lumber company cut, removed and converted to its own use pine timber amounting to approximately 150,000 board feet, of the value of $1,900.00; that this was done by the defendant without the consent of the plaintiff, written or otherwise; and that the balance due on the indebtedness secured by the security deed was $2,710.45, which was some $800.00 more than the alleged value of the timber cut and removed from the land by the defendant, set out a good and valid cause of action pursuant to this section for the value of the timber in question. Cordele Sash, Door & Lumber Co. v. Prudential Ins. Co., 86 Ga. App. 738, 72 S.E.2d 497 (1952).

In an action for trespass and damage to trees, evidence that a power corporation exceeded a condemnation order by cutting trees outside the right-of-way was sufficient to support a jury finding of bad faith and the award of attorney fees. Oglethorpe Power Corp. v. Sheriff, 210 Ga. App. 299, 436 S.E.2d 14 (1993).

Bank that held security interest could not be forced to accept money satisfaction of its interest. — Question was whether the court could or should permit debtor to sell the timber and keep the proceeds over the objection of a bank, which held a security interest in the timber. Debtor could not withhold even part of the proceeds from the timber sale to pay administrative expenses and comply with O.C.G.A. § 51-12-51(a), and thus, Georgia law did not authorize the debtor to sell the timber as required by 11 U.S.C. § 363(f)(1); furthermore, the bank could not be forced to accept a money satisfaction of its interest in the timber because another means of relief existed, an injunction. Walton v. Gillikin (In re Gillikin), No. 09-60178, 2011 Bankr. LEXIS 5341 (Bankr. S.D. Ga. Nov. 21, 2011).

Attorney fees. — Because O.C.G.A. § 13-1-11 did not authorize the recovery of attorney's fees in any tort claim and the timber company that did the cutting was not a party to and did not sign either the deed to secure debt, the original promissory note, or any of the subsequent loan agreements, the trial court erred when the court instructed the jury as to the provisions for attorney fees under § 13-1-11, but not when the court instructed the jury to consider whether to award the plaintiff reasonable attorney fees, to which the plaintiff was entitled under the timber conversion statute, O.C.G.A. § 51-12-51(a). AgSouth Farm Credit, ACA v. Gowen Timber Co., 336 Ga. App. 581, 784 S.E.2d 913 (2016).

Cited in Swinson v. Jones, 72 Ga. App. 147, 33 S.E.2d 376 (1945); Henderson v. Easters, 178 Ga. App. 867, 345 S.E.2d 42 (1986); Ward v. Coastal Lumber Co., 196 Ga. App. 249, 395 S.E.2d 601 (1990); Coker v. Culter, 208 Ga. App. 651, 431 S.E.2d 443 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Logs and Timber, § 113 et seq.

C.J.S. — 87 C.J.S., Trespass, §§ 140, 141.

ALR. — Liability of owner of standing timber or timber rights for damages to the owner of the land in connection with the cutting removal of the timber by the former or his servant, or by an independent contractor, 151 ALR 636.

Rights and remedies in case of encroachment of trees, shrubbery, or other vegetation across boundary line, 76 ALR 1111; 128 ALR 1221.

Measure of damage for destruction of or injury to trees and shrubbery, 161 ALR 549; 69 ALR2d 1335.

Rights as between purchaser of timber and subsequent vendee of land, 18 ALR2d 1150.

Revocation of license to cut and remove timber as affecting rights in respect of timber cut but not removed, 26 ALR2d 1194.

Liability of public utility to abutting owner for destruction or injury of trees in or near highway or street, 64 ALR2d 866.

Measure of damages for destruction of or injury to fruit, nut, or other productive trees, 90 ALR3d 800.

Measures of damages for injury to or destruction of shade or ornamental tree or shrub, 95 ALR3d 508.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 ALR4th 603.

ARTICLE 4

DAMAGES IN TORT ACTIONS

Effective date. — This article became effective July 1, 1999, except Code Sections 51-12-73, 51-12-74, and 51-12-75, which become effective when funds are appropriated.

Law reviews. — For note on 1999 enactment of this article, see 16 Ga. St. U.L. Rev. 277 (1999).

51-12-70. Definitions.

As used in this article, the term:

(1) "Attorney General" means the Attorney General or his or her designee.

(2) "Annuity issuer" means an insurer that has issued an insurance contract used to fund periodic payments under a structured settlement.

(3) "Applicable law" means:

(A) The federal laws of the United States;

(B) The laws of this state, including principles of equity applied in the courts of this state; and

(C) The laws of any other jurisdiction:

(i) Which is the domicile of the payee or any other interested party;

(ii) Under whose laws a structured settlement agreement was approved by a court or responsible administrative authority; or

(iii) In whose courts a settled claim was pending when the parties entered into a structured settlement agreement.

(4) "Discounted present value" means the fair present value of future payments, as determined by discounting such payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service.

(5) "Interested parties" means, with respect to any structured settlement agreement, the payee, any beneficiary designated under the annuity contract to receive payments following the payee's death, the annuity issuer, the structured settlement obligor, and any other party that has continuing rights or obligations under such structured settlement.

(6) "Payee" means an individual who is receiving tax-free damage payments under a structured settlement and proposes to make a transfer of payment rights thereunder.

(7) "Qualified assignment agreement" means an agreement providing for a qualified assignment within the meaning of Section 130 of the United States Internal Revenue Code, United States Code Title 26.

(8) "Settled claim" means the original tort claim or workers' compensation claim resolved by a structured settlement.

(9) "Structured settlement" means an arrangement for periodic payment of damages for personal injuries established by settlement or judgment in resolution of a tort claim or for periodic payments in settlement of a workers' compensation claim.

(10) "Structured settlement agreement" means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement, including the rights of the payee to receive periodic payments.

(11) "Structured settlement obligor" means, with respect to any structured settlement, the party that has the continuing periodic payment obligation to the payee under a structured settlement agreement or a qualified assignment agreement.

(12) "Structured settlement payment rights" means rights to receive periodic payments (including lump sum payments) under a structured settlement, whether from the settlement obligor or the annuity issuer, where:

(A) The payee or any other interested party is domiciled in this state;

(B) The structured settlement agreement was approved by a court or responsible administrative authority in this state; or

(C) The settled claim was pending before the courts of this state when the parties entered into the structured settlement agreement.

(13) "Terms of the structured settlement" includes, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement, and any order or approval of any court or responsible administrative authority or other government authority authorizing or approving such structured settlement.

(14) "Transfer" means any sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance made by a payee for consideration, but does not include:

(A) Any transaction which is expressly provided for in the structured settlement agreement and is executed within 30 days after execution of the structured settlement agreement; or

(B) Any testamentary disposition by the payee.

(15) "Transfer agreement" means the agreement providing for the transfer of structured settlement payment rights from a payee to a transferee. (Code 1981, § 51-12-70, enacted by Ga. L. 1999, p. 853, § 1; Ga. L. 2015, p. 1088, § 46/SB 148.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of paragraph (1) for the former provisions, which read: "'Administrator' means the administrator of the 'Fair Business Practices Act of 1975' appointed pursuant to subsection (a) of Code Section 10-1-395 or his or her designee."

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, clauses (A) and (B) of paragraph (14) were set out as subparagraphs and capitalization was revised in both subparagraphs.

RESEARCH REFERENCES

Am. Jur. 2d. — 15B Am. Jur. 2d, Compromise and Settlement, § 1 et seq.

C.J.S. — 15A C.J.S., Compromise and Settlement, § 1 et seq.

ALR. — Construction and application of state structured settlement protection acts, 27 ALR6th 323.

51-12-71. Prerequisites for transfer of structured settlement payment rights.

(a) No direct or indirect transfer of structured settlement payment rights shall be effective and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order by a court of competent jurisdiction or order of any government authority vested by law with exclusive jurisdiction over the settled claim resolved by the structured settlement based on express findings by the court or government authority that:

(1) The transfer complies with the requirements of this article and does not contravene any federal or state statute or the order of any court or any responsible administrative authority;

(2) The transfer is in the best interest of the payee taking into account the welfare and support of the payee's dependents;

(3) Not less than ten days prior to the date on which the transfer agreement is executed in writing, the transferee has provided to the payee an informational pamphlet relating to transfers of structured settlements as provided for in subsection (b) of Code Section 51-12-73, when available, and a separate disclosure statement in bold type, no smaller than 14 points, setting forth:

(A) The amounts and due dates of the structured settlement payments to be transferred;

(B) The aggregate amount of such payments;

(C) The discounted present value of such payments, together with the discount rate used in determining such discounted present value;

(D) The gross amount payable to the payee in exchange for such payments;

(E) An itemized listing of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, administrative fees, legal fees, notary fees and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount otherwise payable to the payee;

(F) The net amount payable to the payee after deduction of all commissions, fees, costs, expenses, and charges described in subparagraph (E) of this paragraph;

(G) The quotient (expressed as a percentage) obtained by dividing the net payment amount by the discounted present value of the payments; and

(H) The amount of any penalty and the aggregate amount of any liquidated damages (inclusive of penalties) payable by the payee in the event of any breach of the transfer agreement by the payee; and

(4) The transferee has given written notice of the transferee's name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of the notice with the court.

(b) At least 20 days before the hearing which is scheduled on an application for authorizing a transfer of structured settlement payment rights under this Code section, the transferee shall file with the court and deliver to all interested parties a notice of the proposed transfer and the application for its authorization. The notice shall include the following:

(1) A copy of the transferee's application to the court;

(2) A copy of the transfer agreement;

(3) A copy of the disclosure statement required under paragraph (3) of subsection (a) of this Code section;

(4) Notification that an interested party may support, oppose, or otherwise respond to the transferee's application, either in person or through counsel, by participating in the hearing or by submitting written comments to the court; and

(5) A rule nisi containing notification of the time and place of the hearing and notification of the manner in and the time by which any written response to the application must be filed in order to be considered by the court. A written response shall be filed within 15 days after service of the transferee's notice.

(c) Delivery of notice as required by subsection (b) of this Code section may be made as provided in Code Section 9-11-4 or by registered or certified mail, return receipt requested. Notice by registered or certified mail is effective upon the date of delivery as shown on the return receipt. If notice by registered or certified mail is refused or returned undelivered, notice shall be delivered as provided in Code Section 9-11-4.

(d) The venue for any application brought under this Code section shall be in the county in which any transferee or transferor resides or in any county in which any of the transferees or transferors have consented to venue. (Code 1981, § 51-12-71, enacted by Ga. L. 1999, p. 853, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2003, p. 820, § 7; Ga. L. 2015, p. 1088, § 46/SB 148.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2003, p. 820, § 9, not codified by the General Assembly, provides that this Act "shall be applicable to all civil actions filed on or after July 1, 2003."

Ga. L. 2015, p. 1088, § 46/SB 148, effective July 1, 2015, reenacted this Code section without change.

Law reviews. — For annual survey of law of torts, see 56 Mercer L. Rev. 433 (2004).

For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 28 (2003).

51-12-72. Written transfer agreement required.

(a) Any transfer agreement of structured settlement payment rights must, in addition to the other requirements of this article, be executed in writing and filed as provided in Code Section 51-12-71. The transfer agreement shall not be so executed until after the expiration of the ten-day period provided for in paragraph (3) of subsection (a) of Code Section 51-12-71.

(b) No payee shall incur any obligation of any type with respect to a proposed transfer of structured settlement payment rights prior to the execution in writing of the transfer agreement.

(c) Any payee who executes in writing a transfer agreement shall have the right to rescind the transfer at any time within the next 21 days following the written execution of the transfer agreement or at the hearing provided for in subsection (b) of Code Section 51-12-71, whichever event occurs last. The transferee shall furnish to the payee at the time of execution of the transfer agreement a notice to the payee allowing the payee 21 days to cancel the transfer. This right to cancel shall not limit or otherwise affect the payee's right to cancel pursuant to any other provision of applicable law. The notice shall serve as the cover sheet to the transfer documents. It shall be on a separate sheet of paper with no other written or pictorial material, in at least ten-point bold type, double spaced, and shall read substantially as follows:

"NOTICE OF CANCELLATION RIGHTS:

Please read this form completely and carefully. It contains valuable cancellation rights.

You may cancel this transaction at any time prior to 5:00 P.M. of the twenty-first day following receipt of this notice or at the hearing on the application for authorization of a transfer of structured settlement payment rights, whichever event occurs last.

This cancellation right cannot be waived in any manner.

To cancel, sign this form, and mail or deliver it to the address below by 5:00 P.M. of (the twenty-first day following the transaction). It is best to mail it by certified mail or statutory overnight delivery, return

receipt requested, and to keep a photocopy of the signed form and your post office receipt.

_____

Address to which cancellation is to be returned.

_____

I (we) hereby cancel this transaction.

_____

Payee's Signature

_____

Date

(Code 1981, § 51-12-72, enacted by Ga. L. 1999, p. 853, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 4, § 51; Ga. L. 2003, p. 140, § 51; Ga. L. 2003, p. 820, § 8; Ga. L. 2015, p. 1088, § 46/SB 148.)

The 2015 amendment, effective July 1, 2015, revised the form in subsection (c).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2003, "of subsection (a)" was inserted following "(3)" in the last sentence of subsection (a).

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2003, p. 820, § 9, not codified by the General Assembly, provides that this Act "shall be applicable to all civil actions filed on or after July 1, 2003."

Law reviews. — For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 28 (2003).

51-12-73. (For effective date, see note.) Powers and duties of the Attorney General.

(a) The Attorney General is authorized to promulgate, adopt, and issue rules, regulations, and orders necessary or convenient to carry out the provisions and purposes of this article. Any such rules of a substantive nature shall be promulgated only when it is determined by the Attorney General, in the reasonable exercise of his or her discretion and on the basis of his or her expertise and the facts, submissions, evidence, and all information before him or her, that such rules are needed to prohibit or control acts or practices which create the probability of actual injury to payees.

(b) The Attorney General shall prepare a pamphlet containing information designed to help payees evaluate proposed transfers of structured settlements and shall distribute such pamphlets free of charge, except that persons engaged in the business of purchasing structured settlement payment rights may be charged a reasonable fee for such pamphlets. (Code 1981, § 51-12-73, enacted by Ga. L. 1999, p. 853, § 1; Ga. L. 2015, p. 1088, § 46/SB 148.)

Delayed effective date. — This Code section, as set out above, becomes effective only when funds are specifically appropriated for the purposes of this Act in an appropriations Act making specific reference to this Act and shall become effective when funds so appropriated become available for expenditure. No such specific appropriation was made in 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, or 2017 sessions of the General Assembly.

The 2015 amendment, effective July 1, 2015, substituted "Attorney General" for "administrator" twice in subsection (a) and once in subsection (b).

51-12-74. (For effective date, see note.) Actions and proceedings of Attorney General.

(a) Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," shall apply to all actions and proceedings of an administrative nature taken by the Attorney General pursuant to this article, except where the Attorney General is acting under Part 2 of Article 15 of Chapter 1 of Title 10, the "Fair Business Practices Act of 1975." A violation of this article shall also be considered a violation of Part 2 of Article 15 of Chapter 1 of Title 10, the "Fair Business Practices Act of 1975."

(b) In addition to any other proceedings authorized by this article, the Attorney General may bring a civil action in the superior courts to enjoin any violation or threatened violation of any provision of this article or any rule, regulation, or order issued by the Attorney General pursuant to this article. (Code 1981, § 51-12-74, enacted by Ga. L. 1999, p. 853, § 1; Ga. L. 2015, p. 1088, § 46/SB 148.)

Delayed effective date. — This Code section, as set out above, becomes effective only when funds are specifically appropriated for the purposes of this Act in an appropriations Act making specific reference to this Act and shall become effective when funds so appropriated become available for expenditure. No such specific appropriation was made in the 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, or 2017 sessions of the General Assembly.

The 2015 amendment, effective July 1, 2015, substituted "Attorney General" for "administrator" twice in subsection (a) and twice in subsection (b).

51-12-75. (For effective date, see note.) Issuance of administrative order; administrative review; final order; penalty.

(a) In order to enforce this article or any orders, rules, and regulations promulgated pursuant thereto, the Attorney General may issue an administrative order imposing a penalty not to exceed $1,000.00 for each violation, whenever he or she determines, after a hearing, that any person has violated any provisions of this article or any rules, regulations, or orders promulgated under this article.

(b) The hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases under

Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by a final order or action of the Attorney General shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." All penalties recovered as provided in this Code section shall be paid into the state treasury.

(c) The Attorney General may file, in the superior court of the county in which the person under an order resides, or if the person is a corporation, in the superior court of the county in which the corporation under an order maintains its principal place of business, or in the superior court of the county in which the violation occurred, a certified copy of the final order of the Attorney General unappealed from or of a final order of the Attorney General affirmed upon appeal. Thereupon, the court shall render judgment in accordance therewith and shall notify the parties. Such judgment shall have the same effect and proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by such court.

(d) The penalty prescribed in this Code section shall be concurrent, alternative, and cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the Attorney General with respect to any violation of this article and any order, rules, or regulations promulgated pursuant thereto. (Code 1981, § 51-12-75, enacted by Ga. L. 1999, p. 853, § 1; Ga. L. 2015, p. 1088, § 46/SB 148.)

Delayed effective date. — This Code section, as set out above, becomes effective only when funds are specifically appropriated for the purposes of this Act in an appropriations Act making specific reference to this Act and shall become effective when funds so appropriated become available for expenditure. No such specific appropriation was made in the 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, or 2017 sessions of the General Assembly.

The 2015 amendment, effective July 1, 2015, substituted "Attorney General" for "administrator" throughout this Code section.

51-12-76. Provisions unwaivable; no penalty or forfeiture.

(a) The provisions of this article may not be waived.

(b) No payee who proposes to make a transfer of structured settlement payment rights shall incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee based on:

(1) Any failure of such transfer to satisfy the conditions of this article; or

(2) Any failure by the payee to execute the transfer agreement or any cancellation by the payee within the time prescribed in Code Section 51-12-72. (Code 1981, § 51-12-76, enacted by Ga. L. 1999, p. 853, § 1; Ga. L. 2015, p. 1088, § 46/SB 148.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, a colon was added at the end of the introductory paragraph of subsection (b).

Editor's notes. — Ga. L. 2015, p. 1088, § 46/SB 148, effective July 1, 2015, reenacted this Code section without change.

51-12-77. Construction in accordance with other laws.

Nothing contained in this article shall be construed to authorize any transfer of structured settlement payment rights in contravention of applicable law or to give effect to any transfer of structured settlement payment rights that is invalid under applicable law. (Code 1981, § 51-12-77, enacted by Ga. L. 1999, p. 853, § 1; Ga. L. 2015, p. 1088, § 46/SB 148.)

Editor's notes. — Ga. L. 2015, p. 1088, § 46/SB 148, effective July 1, 2015, reenacted this Code section without change.

CHAPTER 13

RECOVERY IN MEDICAL MALPRACTICE ACTIONS

Sec.
51-13-1. Definitions; maximum liability; allowance for periodic payments.

Editor's notes. — Ga. L. 2005, p. 1, § 1/SB 3, not codified by the General Assembly, provides that: "The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act."

Ga. L. 2005, p. 1, § 15(b)/SB 3, not codified by the General Assembly, provides that this chapter shall apply only with respect to causes of action arising on or after February 16, 2005, and any prior causes of action shall continue to be governed by prior law.

Administrative rules and regulations. — Judicial review, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Community Health Certificate of Need Appeal Panel, Administration, § 274-1-.20.

51-13-1. Definitions; maximum liability; allowance for periodic payments.

(a) As used in this Code section, the term:

(1) "Claimant" means a person, including a decedent's estate, who seeks or has sought recovery of damages in a medical malpractice action. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

(2) "Health care provider" means any person licensed under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of such health care providers.

(3) "Medical facility" means any institution or medical facility licensed under Chapter 7 of Title 31 or any combination thereof under common ownership, operation, or control.

(4) "Noneconomic damages" means damages for physical and emotional pain, discomfort, anxiety, hardship, distress, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, injury to reputation, and all other nonpecuniary losses of any kind or nature. This term does not include past or future:

(A) Medical expenses, including rehabilitation and therapy;

(B) Wages or earnings capacity;

(C) Income;

(D) Funeral and burial expenses;

(E) The value of services performed by the injured in the absence of the injury or death including those domestic and other necessary services performed without compensation; or

(F) Other monetary expenses.

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

(c) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against a single medical facility, inclusive of all persons and entities for which vicarious liability theories may apply, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00, regardless of the number of separate causes of action on which the claim is based.

(d) In any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against more than one medical facility, inclusive of all persons and entities for which vicarious liability theories may apply, the total amount recoverable by a claimant for noneconomic damages in such action shall be limited to an amount not to exceed $350,000.00 from any single medical facility and $700,000.00 from all medical facilities, regardless of the number of defendant medical facilities against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(e) In applying subsections (b), (c), and (d) of this Code section, the aggregate amount of noneconomic damages recoverable under such subsections shall in no event exceed $1,050,000.00.

(f) In any medical malpractice action, if an award of future damages equaling or exceeding $350,000.00 is made against any party in the action, the trial court shall, upon the request of any party, issue an order providing that such damages be paid by periodic payments. Such periodic payments shall be funded through an annuity policy with the premium for such annuity equal to the amount of the award for future damages. (Code 1981, § 51-13-1, enacted by Ga. L. 2005, p. 1, § 13/SB 3.)

Editor's notes. — Ga. L. 2005 p. 1, § 14/SB 3, not codified by the General Assembly, provides for severability.

Law reviews. — For article on 2005 enactment of this Code section, see 22 Ga. St. U.L. Rev. 221 (2005). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005). For article, "Of Frivolous Litigation and Runaway Juries: A View from the Bench," see 41 Ga. L. Rev. 431 (2007). For annual survey of law on torts, see 62 Mercer L. Rev. 317 (2010). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For article, "Caps Off to Juries: Noneconomic Damage Caps in Medical Malpractice Cases Ruled Unconstitutional," see 62 Mercer L. Rev. 1315 (2011). For article, "Calculating Economic Damages in Georgia Personal Injury and Wrongful Death Cases," see 22 Ga. St. Bar. J. 18 (Feb. 2017).

For comment, "Where Do We Go From Here? The Future of Caps on Noneconomic Medical Malpractice Damages in Georgia," see 28 Ga. St. U.L. Rev. 1341 (2012).

JUDICIAL DECISIONS

Constitutionality. — Statutory limitation of awards of noneconomic damages in medical malpractice cases to a predetermined amount was unconstitutional because it violated the right to a jury trial guaranteed by Ga. Const. 1983, Art. 1, Sec. 1, Para. 11(a), and the statute was wholly void and of no force and effect from the date of the statute's enactment. Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 691 S.E.2d 218 (2010).

RESEARCH REFERENCES

ALR. — Medical malpractice in diagnosis and treatment of cancer of male reproductive system, 96 A.L.R.6th 503.

Medical malpractice in diagnosis and treatment of colorectal cancer, 95 A.L.R.6th 541.

Medical malpractice in diagnosis and treatment of lung cancer, 94 A.L.R.6th 431.

Medical malpractice in diagnosis and treatment of cancer of female reproductive system, 93 A.L.R.6th 123.

Medical malpractice in diagnosis and treatment of breast cancer, 92 A.L.R.6th 379.

CHAPTER 14

ASBESTOS AND SILICA CLAIMS

Sec.
51-14-1. Legislative findings and purpose.
51-14-2. Applicability.
51-14-3. Definitions.
51-14-4. Prima-facie evidence of physical impairment a prerequisite of asbestos or silica claims.
51-14-5. When limitations period begins to run.
51-14-6. Dismissal for failure to establish prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim; procedure; evidentiary requirements.
51-14-7. Sworn information form providing required information; failure to state a claim; class actions barred.
51-14-8. Limitations on discovery; satisfaction of medical criteria necessary to establish prima-facie evidence of medical impairment; admissibility of expert reports.
51-14-9. Who may bring a claim; claims in multiple jurisdictions.
51-14-10. Venue.
51-14-11. Consolidation of claims.
51-14-12. Application of chapter dependent upon date claim accrues.
51-14-13. Severability.

Editor's notes. — Ga. L. 2007, p. 4, § 1/SB 182, effective May 1, 2007, repealed the Code sections at this chapter and enacted the current chapter. The former chapter consisted of Code Sections 51-14-1 through 51-14-10, relating to asbestos claims and silica claims, and was based on Ga. L. 2005, p. 145, § 1/HB 416 and Ga. L. 2006, p. 72, § 51/SB 465.

Ga. L. 2007, p. 4, § 3/SB 182, not codified by the General Assembly, provides for additional severability.

Ga. L. 2007, p. 4, § 4/SB 182, not codified by the General Assembly, provides that this chapter shall apply to certain accrued or future accruing asbestos claims or silica claims in which trial has not commenced as of May 1, 2007, in accordance with its terms.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Asbestosis, 45 POF2d 1.

51-14-1. Legislative findings and purpose.

(a) The General Assembly finds that:

(1) Asbestos is a mineral that was widely used prior to the 1980s for insulation, fire-proofing, and other purposes;

(2) Many American workers and others were exposed to asbestos, especially during and after World War II, at shipyards and other sites, prior to the advent of regulation by the United States Occupational Safety and Health Administration in the early 1970s;

(3) Exposure to asbestos is associated with various types of cancer, including mesothelioma, as well as nonmalignant conditions such as asbestosis and diffuse pleural thickening;

(4) Diseases caused by asbestos exposure often have long latency periods;

(5) Silica is a naturally occurring mineral and is the second most common constituent of the earth's crust. Crystalline silica in the form of quartz is present in sand, gravel, soil, and rocks;

(6) Silica related illnesses, including silicosis, can develop from the inhalation of respirable silica dust. Silicosis was widely recognized as an occupational disease many years ago;

(7) Concerns about statutes of limitations may prompt unimpaired asbestos and silica claimants to bring lawsuits to protect their ability to recover for their potentially progressive occupational disease;

(8) It is proper for the General Assembly to support and protect the Georgia courts from the massive litigation expense and the crowding of trial dockets caused by asbestos and silica litigation;

(9) The cost of compensating exposed individuals who are not sick and legal costs spent on their claims jeopardize recoveries both now and in the future by people with cancer or other serious asbestos related injuries; threaten the savings, retirement benefits, and jobs of current and retired employees of the defendants; and adversely affect the communities in which the defendants operate;

(10) In February, 2003, the American Bar Association Commission on Asbestos Litigation, with input from ten of the nation's most prominent physicians in the area of pulmonary function, adopted the "ABA Standard For Non-Malignant Asbestos-Related Disease Claims," which sets forth medical criteria for demonstrating asbestos related impairment that provide the underlying framework for the criteria set forth in this chapter and in similar legislation adopted in several other states;

(11) Ohio, Florida, Texas, Kansas, South Carolina, and Tennessee have enacted legislation similar to this chapter that, among other things, sets medical criteria governing asbestos or silica claims or both, tolls statutes of limitations, and requires persons alleging nonmalignant disease claims to demonstrate physical impairment as a prerequisite to filing or maintaining such claims; and

(12) Sound public policy requires deferring the claims of persons exposed to asbestos or silica and who are not presently impaired in order to give priority to those cases that involve claims of actual and current conditions of impairment; preserve compensation for people

with cancer and other serious injuries; and safeguard the jobs, benefits, and savings of workers.

(b) It is the purpose of this chapter to:

(1) Give priority to claimants who can demonstrate actual physical harm or illness caused by asbestos or silica;

(2) Preserve the rights of claimants to pursue asbestos or silica claims if an exposed person becomes sick in the future;

(3) Enhance the ability of the courts to supervise and control asbestos litigation and silica litigation; and

(4) Conserve resources to allow compensation of claimants who have cancer and others who are impaired as a result of exposure to asbestos or silica while securing the right to similar compensation for those who may suffer physical impairment in the future. (Code 1981, § 51-14-1, enacted by Ga. L. 2007, p. 4, § 1/SB 182; Ga. L. 2017, p. 774, § 51/HB 323.)

The 2017 amendment, effective May 9, 2017, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraphs (a)(1) and (a)(2).

Law reviews. — For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. Ch. 14, T. 51, are included in the annotations for this Code section.

Construction. — Superior and state courts did not err in entering nearly identical orders which held that because O.C.G.A. § 51-14-1 et seq. required asbestos plaintiffs to provide proof that exposure to asbestos was a substantial contributing factor in their medical condition, it unconstitutionally affected an employee's substantive rights by establishing a new element which did not exist when the original cause of action accrued and, hence, could not be applied retrospectively; moreover, because these requirements and limitations were the heart of the statute, their severance would result in a statute that failed to correspond to the main legislative purpose, or give effect to that purpose. DaimlerChrysler v. Ferrante, 281 Ga. 273, 637 S.E.2d 659 (2006) (decided under former O.C.G.A. Ch. 14, T. 51).

Expert's opinion on causation properly excluded. — Opinion of the plaintiff's expert, a pathologist, failed the first element of Daubert because the expert relied on the theory that any exposure to the asbestos in the defendant's product would contribute to the development of mesothelioma, yet the expert testified that the theory was essentially untestable and had not been tested. Thus, the expert's testimony was properly excluded under former O.C.G.A. § 24-9-67.1(b)(2) (see now O.C.G.A. § 24-7-702) since the testimony was not the product of reliable principles and methods. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011).

RESEARCH REFERENCES

ALR. — Retroactive application of state statutes concerning asbestos liability, 41 ALR6th 445.

51-14-2. Applicability.

This chapter applies to any claim defined in this chapter as an asbestos claim or as a silica claim. (Code 1981, § 51-14-2, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. Ch. 14, T. 51, are included in the annotations for this Code section.

Construction. — Superior and state courts did not err in entering nearly identical orders which held that because O.C.G.A. § 51-14-1 et seq. required asbestos plaintiffs to provide proof that exposure to asbestos was a substantial contributing factor in their medical condition, it unconstitutionally affected an employee's substantive rights by establishing a new element which did not exist when the original cause of action accrued and, hence, could not be applied retrospectively; moreover, because these requirements and limitations were the heart of the statute, their severance would result in a statute that failed to correspond to the main legislative purpose, or give effect to that purpose. DaimlerChrysler v. Ferrante, 281 Ga. 273, 637 S.E.2d 659 (2006) (decided under former O.C.G.A. Ch. 14, T. 51).

51-14-3. Definitions.

As used in this chapter, the term:

(1) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered, including but not limited to all minerals defined as asbestos in 29 C.F.R. 1910.

(2)(A) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, loss of consortium, or other relief arising out of, based on, or in any way related to the health effects of exposure to asbestos, including, but not limited to:

(i) Any claim, to the extent recognized by applicable state law now or in the future, for:

(I) Personal injury or death;

(II) Mental or emotional injury;

(III) Risk or fear of disease or other injury;

(IV) The costs of medical monitoring or surveillance; or

(V) Damage or loss caused by the installation, presence, or removal of asbestos; and

(ii) Any claim made by or on behalf of an exposed person or based on that exposed person's exposure to asbestos, including a representative, spouse, parent, child, or other relative of the exposed person.

(B) "Asbestos claim" shall not mean a claim brought under:

(i) A workers' compensation law administered by this state to provide benefits, funded by a responsible employer or its insurance carrier, for occupational diseases or injuries or for disability or death caused by occupational diseases or injuries;

(ii) The Act of April 22, 1908, known as the Federal Employers' Liability Act, 45 U.S.C. Section 51, et seq.;

(iii) The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901-944, 948-950; or

(iv) The Federal Employees Compensation Act, 5 U.S.C. Chapter 81.

(3) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos.

(4) "Board certified internist" means a qualified physician licensed to practice medicine who is currently certified by the American Board of Internal Medicine.

(5) "Board certified occupational medicine physician" means a qualified physician licensed to practice medicine who is currently certified in the subspecialty of occupational medicine by the American Board of Preventive Medicine.

(6) "Board certified oncologist" means a qualified physician licensed to practice medicine who is currently certified in the subspecialty of medical oncology by the American Board of Internal Medicine.

(7) "Board certified pathologist" means a qualified physician licensed to practice medicine who holds primary certification in anatomic pathology or combined anatomic or clinical pathology from the American Board of Pathology and whose professional practice is principally in the field of pathology and involves regular evaluation of pathology materials obtained from surgical or post-mortem specimens.

(8) "Board certified pulmonologist" means a qualified physician licensed to practice medicine who is currently certified in the subspe-

cialty of pulmonary medicine by the American Board of Internal Medicine.

(9) "Certified B-reader" means a qualified physician who has successfully passed the B-reader certification examination for X-ray interpretation sponsored by the National Institute for Occupational Safety and Health and whose certification was current at the time of any readings required by this chapter.

(10) "Chest X-rays" means films taken in two views (PA and Lateral) for reading in accordance with the radiological standards established by the International Labor Office, as interpreted by a certified B-reader.

(11) "Claimant" means a party seeking recovery of damages for an asbestos claim or silica claim, including the exposed person, any other plaintiff making a claim as a result of the exposed person's exposure to asbestos or silica, counterclaimant, cross-claimant, or third-party plaintiff. If a claim is brought through or on behalf of an estate, the term includes the claimant's decedent; if a claim is brought through or on behalf of a minor or incompetent, the term includes the claimant's parent or guardian.

(12) "Exposed person" means any person whose exposure to asbestos or silica is the basis for an asbestos claim or a silica claim.

(13) "FEV-1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(14) "FVC" means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration.

(15) "ILO system" means the radiological ratings of the International Labor Office set forth in *Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses*, revised edition, as amended from time to time by the International Labor Office.

(16) "Lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended from time to time by the American Medical Association.

(17) In the context of an asbestos claim, "prima-facie evidence of physical impairment" means:

(A) For an asbestos claim that accrued before April 12, 2005:

(i) For an asbestos claim alleging mesothelioma: that a claimant alleges mesothelioma caused by exposure to asbestos, and no further prima-facie evidence of physical impairment shall be required;

(ii) For an asbestos claim alleging cancer other than mesothelioma: that a physician licensed to practice medicine (who need not be a "qualified physician" as defined in this Code section) has signed a medical report certifying to a reasonable degree of medical probability that the exposed person's exposure to asbestos was a contributing factor to the diagnosed cancer other than mesothelioma and attaching whatever evidence the physician relied upon in determining that the exposed person has or had an asbestos related cancer; and

(iii) For an asbestos claim alleging nonmalignant injury: that a physician licensed to practice medicine (who need not be a "qualified physician" as defined in this Code section) has signed a medical report certifying to a reasonable degree of medical probability that the exposed person's exposure to asbestos was a contributing factor to the diagnosed nonmalignant asbestos injury and attaching whatever evidence the physician relied upon in determining that the exposed person has or had a nonmalignant asbestos injury;

(B) For an asbestos claim that accrued on or after May 1, 2007:

(i) For an asbestos claim alleging mesothelioma: that a claimant alleges mesothelioma caused by exposure to asbestos, and no further prima-facie evidence of physical impairment shall be required;

(ii) For an asbestos claim alleging cancer other than mesothelioma: that a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist has signed a medical report certifying to a reasonable degree of medical probability that the exposed person has or had a cancer other than mesothelioma; that the cancer is a primary cancer; that exposure to asbestos was a substantial contributing factor to the diagnosed cancer; and that other potential causes (such as smoking) were not the sole or most likely cause of the injury at issue;

(iii) For an asbestos claim alleging nonmalignant injury: that a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist has signed a medical report stating that the exposed person suffers or suffered from a nonmalignant asbestos injury and:

(I) Verifying that the doctor signing the medical report or a medical professional or professionals employed by and under the direct supervision and control of that doctor has taken histories as defined below or, alternatively, confirming that the signing doctor is relying on such histories taken or obtained by another physician or physicians who actually treated the exposed person or who had a doctor-patient relationship with the exposed person or by a medical professional or professionals employed by and under the direct supervision and control of such other physician or physicians, with such histories to consist of the following:

(a) A detailed occupational and exposure history from the exposed person or, if the exposed person is deceased or incapable of providing such history, from the person or persons most knowledgeable about the exposures that form the basis for the asbestos claim. The history shall include all of the exposed person's principal employments and his or her exposures to airborne contaminants that can cause pulmonary impairment, including, but not limited to, asbestos, silica, and other disease-causing dusts, and the nature, duration, and level of any such exposure; and

(b) A detailed medical and smoking history from the exposed person or, if the exposed person is deceased or incapable of providing such history, from the person or persons most knowledgeable about the exposed person's medical and smoking history, or the exposed person's medical records, or both, that includes a thorough review of the exposed person's past and present medical problems and their most probable cause;

(II) Setting out the details of the exposed person's occupational, medical, and smoking histories and verifying that at least 15 years have elapsed between the exposed person's first exposure to asbestos and the time of diagnosis;

(III) Verifying that the exposed person has:

(a) An ILO quality 1 chest X-ray taken in accordance with all applicable state and federal regulatory standards, and that the X-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 1/1 or higher or bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; provided, however, that in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available; or

(b) Pathological asbestosis graded 1(B) or higher under the criteria published in the Asbestos-Associated Diseases, Special Issue of the *Archives of Pathological and Laboratory Medicine*, Volume 106, Number 11, Appendix 3, as amended from time to time;

(IV) Verifying that the exposed person has pulmonary impairment related to asbestos as demonstrated by pulmonary function testing, performed using equipment, methods of calibration, and techniques that meet the criteria incorporated in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, and reported as set forth in 20 C.F.R. 404, Subpt. P. App 1, Part (A) Section 3.00 (E) and (F), as amended from time to time by the American Medical Association, and the interpretative standards of the American Thoracic Society, *Lung Function Testing: Selection of Reference Values and Interpretive Strategies*, 144 Am. Rev. Resp. Dis. 1202-1218 (1991), as amended from time to time by the American Thoracic Society, that shows:

(a) Forced vital capacity below the lower limit of normal and FEV1/FVC ratio, using actual values, at or above the lower limit of normal; or

(b) Total lung capacity, by plethysmography or timed gas dilution, below the lower limit of normal,

except that this subdivision (17)(B)(iii)(IV) shall not apply if the medical report includes the pathological evidence set forth in clause (17)(B)(iii)(III)(b) of this Code section;

(V)(a) Exception to pulmonary function test requirement in subdivision (17)(B)(iii)(IV) of this Code section: If the doctor signing the medical report states in the medical report that the exposed person's medical condition or process prevents the pulmonary function test described in subdivision (17)(B)(iii)(IV) of this Code section from being performed or makes the results of such test an unreliable indicator of physical impairment, a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist (none of whom need be a "qualified physician" as defined in this Code section), independent from the physician signing the report required in this subdivision, must provide a report which states to a reasonable degree of medical probability that the exposed person has or had a nonmalignant asbestos related condition causing physical impairment equivalent to that required in subdivision

(17)(B)(iii)(IV) of this Code section and states the reasons why the pulmonary function test could not be performed or would be an unreliable indicator of physical impairment.

(b) Exception to X-ray requirement in clause (17)(B)(iii)(III)(a) of this Code section: Alternatively and not to be used in conjunction with clause (17)(B)(iii)(V)(a) of this Code section, if the doctor signing the medical report states in the medical report that the exposed person's medical condition or process prevents a physician from being able to diagnose or evaluate that exposed person sufficiently to make a determination as to whether that exposed person meets the requirements of clause (17)(B)(iii)(III)(a) of this Code section, the claimant may serve on each defendant a report by a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist (none of whom need be a "qualified physician" as defined in this Code section) that:

(1) Verifies that the physician has or had a doctor patient relationship with the exposed person;

(2) Verifies that the exposed person has or had asbestos related pulmonary impairment as demonstrated by pulmonary function testing showing:

(A) Forced vital capacity below the lower limit of normal and total lung capacity, by plethysmography, below the lower limit of normal; or

(B) Forced vital capacity below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; and

(3) Verifies that the exposed person has a chest X-ray and computed tomography scan or high resolution computed tomography scan read by the physician or a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, board certified oncologist, or board certified radiologist (none of whom need be a "qualified physician" as defined in this Code section) showing either bilateral pleural disease or bilateral parenchymal disease diagnosed and reported as being a consequence of asbestos exposure; and

(VI) Verifies that the doctor signing the medical report has concluded to a reasonable degree of medical probability that

exposure to asbestos was a substantial contributing factor to the exposed person's physical impairment.

Copies of the B-reading, the pulmonary function tests, including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation, and reporting standards set forth in this paragraph (17), the medical report (in the form of an affidavit as required by subparagraph (A) of paragraph (2) of Code Section 51-14-6), and all other required reports shall be submitted as required by this chapter. All such reports, as well as all other evidence used to establish prima-facie evidence of physical impairment, must comply, to the extent applicable, with the technical recommendations for examinations, testing procedures, quality assurance, quality controls, and equipment in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended from time to time by the American Medical Association, and the most current version of the Official Statements of the American Thoracic Society regarding lung function testing. Testing performed in a hospital or other medical facility that is fully licensed and accredited by all appropriate regulatory bodies in the state in which the facility is located is presumed to meet the requirements of this chapter. This presumption may be rebutted by evidence demonstrating that the accreditation or licensing of the hospital or other medical facility has lapsed or by providing specific facts demonstrating that the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment have not been followed. All such reports, as well as all other evidence used to establish prima-facie evidence of physical impairment, must not be obtained through testing or examinations that violate any applicable law, regulation, licensing requirement, or medical code of practice and must not be obtained under the condition that the exposed person retain legal services in exchange for the examination, testing, or screening. Failure to attach the required reports or demonstration by any party that the reports do not satisfy the standards set forth in this paragraph (17) shall result in the dismissal of the asbestos claim, without prejudice, upon motion of any party.

(18) In the context of a silica claim, "prima-facie evidence of physical impairment" means:

(A) For a silica claim that accrued before April 12, 2005, that a physician licensed to practice medicine (who need not be a "qualified physician" as defined in this Code section) has signed a medical report certifying to a reasonable degree of medical probability that the exposed person's exposure to silica was a contributing factor to the claimed injury and attached whatever evidence the physician

relied upon in determining that the exposed person has or had a silica related injury; and

(B) For a silica claim that accrued on or after May 1, 2007:

(i) A medical report asserting that the exposed person has or had a silica related lung cancer and:

(I) Certifying to a reasonable degree of medical probability that the cancer is a primary lung cancer; and

(II) Signed by a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist stating to a reasonable degree of medical probability that exposure to silica was a substantial contributing factor to the lung cancer with underlying silicosis demonstrated by an X-ray that has been read by a certified B-reader according to the ILO system of classification as showing bilateral nodular opacities (p, q, or r) occurring primarily in the upper lung fields, graded 1/1 or higher, and that the lung cancer was not more probably the sole result of causes other than the silica exposure revealed by the exposed person's occupational, silica exposure, medical, and smoking histories;

(ii) A medical report asserting that the exposed person has or had silica related progressive massive fibrosis or acute silicoproteinosis, or silicosis complicated by documented tuberculosis, signed by a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist; or

(iii) A medical report signed by a board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist stating that the exposed person suffers from other stages of nonmalignant disease related to silicosis other than those set forth in divisions (i) and (ii) of this subparagraph, and:

(I) Verifying that the doctor signing the medical report or a medical professional or professionals employed by and under the direct supervision and control of that doctor has taken histories as defined below or, alternatively, confirming that the signing doctor is relying on such histories taken or obtained by another physician or physicians who actually treated the exposed person or who had a doctor-patient relationship with the exposed person or by a medical professional or professionals employed by and under the direct supervision and control of such other physician or physicians, with such histories to consist of the following:

(a) A detailed occupational and exposure history from the exposed person or, if the exposed person is deceased or incapable of providing such history, from the person or persons most knowledgeable about the exposures that form the basis for the silica claim. The history shall include all of the exposed person's principal employments and his or her exposures to airborne contaminants that can cause pulmonary impairment, including, but not limited to, asbestos, silica, and other disease-causing dusts, and the nature, duration, and level of any such exposure; and

(b) A detailed medical and smoking history from the exposed person or, if the exposed person is deceased or incapable of providing such history, from the person or persons most knowledgeable about the exposed person's medical and smoking history, or the exposed person's medical records, or both, that includes a thorough review of the exposed person's past and present medical problems and their most probable cause;

(II) Setting out the details of the exposed person's occupational, medical, and smoking histories and verifying a sufficient latency period for the applicable stage of silicosis;

(III) Verifying that the exposed person has at least Class 2 or higher impairment due to silicosis, as set forth in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended from time to time by the American Medical Association and:

(a) Has an ILO quality 1 chest X-ray taken in accordance with all applicable state and federal regulatory standards, and that the X-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral nodular opacities (p, q, or r) occurring primarily in the upper lung fields, graded 1/1 or higher; provided, however, that in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available; or

(b) Has pathological demonstration of classic silicotic nodules exceeding 1 centimeter in diameter as set forth in 112 *Archives of Pathological & Laboratory Medicine* 7 (July 1988), as amended from time to time; and

(IV) Verifying that the doctor signing the medical report has concluded to a reasonable degree of medical probability that the exposure to silica was a substantial contributing factor to the exposed person's physical impairment.

Copies of the B-reading, the pulmonary function tests, including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation, and reporting standards set forth in this paragraph (18), and the medical report (in the form of an affidavit as required by subparagraph (A) of paragraph (2) of Code Section 51-14-6), and all other required reports shall be submitted as required by this chapter. All such reports, as well as all other evidence used to establish prima-facie evidence of physical impairment, must comply, to the extent applicable, with the technical recommendations for examinations, testing procedures, quality assurance, quality controls, and equipment in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, fifth edition, as amended from time to time by the American Medical Association, and the most current version of the Official Statements of the American Thoracic Society regarding lung function testing. Testing performed in a hospital or other medical facility that is fully licensed and accredited by all appropriate regulatory bodies in the state in which the facility is located is presumed to meet the requirements of this chapter. This presumption may be rebutted by evidence demonstrating that the accreditation or licensing of the hospital or other medical facility has lapsed or by providing specific facts demonstrating that the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment have not been followed. All such reports, as well as all other evidence used to establish prima-facie evidence of physical impairment, must not be obtained through testing or examinations that violate any applicable law, regulation, licensing requirement, or medical code of practice, and must not be obtained under the condition that the exposed person retain legal services in exchange for the examination, testing, or screening. Failure to attach the required reports or demonstration by any party that the reports do not satisfy the standards set forth in this paragraph (18) shall result in the dismissal of the silica claim, without prejudice, upon motion of any party.

(19) "Qualified physician" means a medical doctor, who:

(A) Spends no more than 35 percent of his or her professional practice time in providing consulting or expert services in connection with actual or potential civil actions, and whose medical group, professional corporation, clinic, or other affiliated group earns not more than 50 percent of its revenues from providing such services; provided, however, that the trial court, in its discretion, may allow a physician who meets the other requirements of this chapter but does not meet the time and revenue requirements of this subparagraph to submit a report required by this chapter if the trial court first makes an evidentiary finding (after all parties have had a

reasonable opportunity to present evidence) that it would be manifestly unjust not to allow the physician at issue to submit the report and makes specific and detailed findings, setting forth the bases therefor, that the physician's opinions appear to be reliable medical opinions in that they are supported by documented, reliable medical evidence that was obtained through testing or examinations that comply with and do not violate any applicable law, regulation, licensing requirement, or medical code of practice and that the opinions are not the product of bias or the result of financial influence due to his or her role as a paid expert. The cost of retaining another physician who is qualified pursuant to this subparagraph for the purpose of submitting a report required by this chapter may not be considered in determining manifest injustice, but the availability or unavailability of other physicians who meet the time and revenue requirements of this subparagraph shall be considered as a relevant factor; and

(B) Does not require as a condition of diagnosing, examining, testing, screening, or treating the exposed person that legal services be retained by the exposed person or any other person pursuing an asbestos or silica claim based on the exposed person's exposure to asbestos or silica.

The board certified internist, board certified pulmonologist, board certified pathologist, board certified occupational medicine physician, or board certified oncologist who submits a report under this chapter may be an expert witness retained by counsel for the exposed person or claimant, so long as the physician otherwise meets the requirements of this chapter and any other applicable Code sections governing the qualifications of expert witnesses.

(20) "Silica" means a group of naturally occurring crystalline forms of silicon dioxide, including, but not limited to, quartz and silica sand, whether in the form of respirable free silica or any quartz-containing or crystalline silica-containing dust, in the form of a quartz-containing by-product or crystalline silica-containing by-product, or dust released from individual or commercial use, release, or disturbance of silica sand, silicon dioxide, or crystalline-silica containing media, consumables, or materials.

(21)(A) "Silica claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, loss of consortium, or other relief arising out of, based on, or in any way related to the health effects of exposure to silica, including, but not limited to:

(i) Any claim, to the extent recognized by applicable state law now or in the future, for:

(I) Personal injury or death;

(II) Mental or emotional injury;

(III) Risk or fear of disease or other injury; or

(IV) The costs of medical monitoring or surveillance; and

(ii) Any claim made by or on behalf of an exposed person or based on that exposed person's exposure to silica, including a representative, spouse, parent, child, or other relative of the exposed person.

(B) "Silica claim" shall not mean a claim brought under:

(i) A workers' compensation law administered by this state to provide benefits, funded by a responsible employer or its insurance carrier, for occupational diseases or injuries or for disability or death caused by occupational diseases or injuries;

(ii) The Act of April 22, 1908, known as the Federal Employers' Liability Act, 45 U.S.C. Section 51, et seq.;

(iii) The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901-944, 948-950; or

(iv) The Federal Employees Compensation Act, 5 U.S.C. Chapter 81.

(22) "Silicosis" means nodular interstitial fibrosis of the lung produced by inhalation of silica.

(23) "Substantial contributing factor" means that exposure to asbestos or silica took place on a regular basis over an extended period of time and in close proximity to the exposed person and was a factor without which the physical impairment in question would not have occurred.

(24) "Total lung capacity" means the volume of gas contained in the lungs at the end of a maximal inspiration. (Code 1981, § 51-14-3, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2007, "subparagraph" was substituted for "paragraph" in division (18)(B)(iii).

JUDICIAL DECISIONS

Cited in Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011).

RESEARCH REFERENCES

ALR. — Retroactive application of state statutes concerning asbestos liability, 41 ALR6th 445.

51-14-4. Prima-facie evidence of physical impairment a prerequisite of asbestos or silica claims.

(a) Prima-facie evidence of physical impairment of the exposed person as defined in paragraph (17) or (18) of Code Section 51-14-3 shall be an essential element of an asbestos claim or silica claim.

(b) In order to bring or maintain an asbestos claim or silica claim, the claimant shall submit prima-facie evidence of physical impairment in accordance with the requirements of this chapter. (Code 1981, § 51-14-4, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

JUDICIAL DECISIONS

Editor's note. — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. Ch. 14, T. 51, are included in the annotations for this Code section.

Construction. — Superior and state courts did not err in entering nearly identical orders which held that because O.C.G.A. § 51-14-1 et seq. required asbestos plaintiffs to provide proof that exposure to asbestos was a substantial contributing factor in their medical condition, it unconstitutionally affected an employee's substantive rights by establishing a new element which did not exist when the original cause of action accrued and, hence, could not be applied retrospectively; moreover, because these requirements and limitations were the heart of the statute, their severance would result in a statute that failed to correspond to the main legislative purpose, or give effect to that purpose. DaimlerChrysler v. Ferrante, 281 Ga. 273, 637 S.E.2d 659 (2006) (decided under former O.C.G.A. Ch. 14, T. 51).

Cited in Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011).

51-14-5. When limitations period begins to run.

Notwithstanding any other provision of law, with respect to any asbestos claim or silica claim not barred as of May 1, 2007, the limitations period shall not begin to run until the exposed person, or any plaintiff making an asbestos claim or silica claim based on the exposed person's exposure to asbestos or silica, obtains, or through the exercise of reasonable diligence should have obtained, prima-facie evidence of physical impairment, as defined in paragraph (17) or (18) of Code Section 51-14-3. (Code 1981, § 51-14-5, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-6. Dismissal for failure to establish prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim; procedure; evidentiary requirements.

Subject to the provisions of Code Section 51-14-12:

(1) Any asbestos claim or silica claim pending in this state on May 1, 2007, shall be dismissed within 180 days after May 1, 2007, without prejudice unless:

(A) All parties stipulate by no less than 60 days prior to the commencement of trial that the plaintiff has established prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim; or

(B) The trial court in which the complaint was initially filed issues an order that the plaintiff has established prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim. Such an order shall be issued only if the following conditions and procedures are met:

(i) By no less than 60 days prior to the commencement of trial, the plaintiff files with the trial court and serves on each defendant named in the complaint or on counsel designated by each defendant the medical documentation necessary to establish prima-facie evidence of physical impairment;

(ii) Within 30 days of service of plaintiff's documentation establishing prima-facie evidence of physical impairment, any defendant may file an opposition with the trial court challenging plaintiff's prima-facie evidence of physical impairment. To the extent any such opposition is based upon the medical opinion of a licensed physician, that physician shall be a qualified physician, as that term is defined in subparagraph (A) of paragraph (19) of Code Section 51-14-3, and shall be either a board certified internist, a board certified pathologist, a board certified pulmonologist, a board certified occupational medicine physician, a board certified oncologist, or a certified B-reader. Defendant's opposition shall be filed with the trial court and served on plaintiff's counsel and each defendant;

(iii) If a defendant does not file an opposition within the time permitted, the trial court shall determine if the plaintiff has established prima-facie evidence of physical impairment in a timely manner based on the papers and documentation submitted to the trial court;

(iv) If a defendant files an objection, then within ten days of service of defendant's opposition, the plaintiff may file a reply

with the trial court. The reply must be served on each defendant; and

(v) The trial court shall determine if the plaintiff has established prima-facie evidence of physical impairment in a timely manner based on the papers and documentation submitted to the trial court. A hearing will be conducted only if the trial court so orders on its own motion or if, in the exercise of discretion, the trial court grants a party's request for a hearing. No testimony shall be taken at the hearing. A decision of the trial court not to grant a request for a hearing may not be appealed and does not constitute reversible error. If the trial court determines that the plaintiff has failed to establish prima-facie evidence of physical impairment, it shall dismiss the plaintiff's complaint without prejudice;

In the event a trial is scheduled to commence in less than 60 days after May 1, 2007, a trial court can shorten the deadlines contained in this paragraph as necessary in order to make a determination regarding the prima-facie evidence of physical impairment before trial commences; and

(2)(A) The plaintiff in any asbestos claim or silica claim filed in this state on or after May 1, 2007, shall file together with the complaint a medical report (which shall be in the form of an affidavit) and accompanying documentation setting forth the medical findings necessary to establish prima-facie evidence of physical impairment as provided in paragraph (17) or (18) of Code Section 51-14-3. In addition, the plaintiff's complaint shall allege with specificity that the plaintiff satisfies the prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim.

(B) Within 90 days of service of plaintiff's complaint, any defendant may file an opposition with the trial court challenging plaintiff's prima-facie evidence of physical impairment. To the extent any such opposition is based upon the medical opinion of a licensed physician, that physician shall be a qualified physician, as that term is defined in subparagraph (A) of paragraph (19) of Code Section 51-14-3, and shall be either a board certified internist, a board certified pathologist, a board certified pulmonologist, a board certified occupational medicine physician, a board certified oncologist, or a certified B-reader. Defendant's opposition shall be filed with the trial court and served on plaintiff's counsel and each defendant.

(C) If the defendant does not file an opposition challenging plaintiff's prima-facie evidence of physical impairment within the time permitted, the trial court shall determine if the plaintiff has

established prima-facie evidence of physical impairment based on the papers and documentation submitted to the trial court. The trial court's decision shall be made in a timely manner.

(D) If the defendant files an objection, the plaintiff may file a reply with the trial court within ten days of service of defendant's opposition. The reply must be served on each defendant.

(E) The trial court shall determine if the plaintiff has established prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim in a timely manner based on the papers and documentation submitted to the trial court. A hearing will be conducted only if the trial court so orders on its own motion, or if, in the exercise of discretion, the trial court grants a party's request for a hearing. No testimony shall be taken at the hearing. A decision of the trial court not to grant a request for a hearing may not be appealed and does not constitute reversible error. If the trial court determines that the plaintiff has failed to establish prima-facie evidence of physical impairment, it shall dismiss the plaintiff's complaint without prejudice. (Code 1981, § 51-14-6, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-7. Sworn information form providing required information; failure to state a claim; class actions barred.

(a) All asbestos claims and silica claims filed in this state on or after May 1, 2007, shall include with the complaint a sworn information form containing the following information:

(1) The exposed person's name, address, date of birth, social security number, and marital status;

(2) If the exposed person alleges exposure to asbestos or silica through the testimony of another person or other than by direct or bystander exposure to a product or products, the name, address, date of birth, social security number, and marital status for each person by which claimant alleges exposure, hereafter the "index person," and the claimant's relationship to each such person;

(3) The specific location of each alleged exposure;

(4) The specific asbestos-containing product or silica-containing product to which the exposed person was exposed and the manufacturer of each product;

(5) The beginning and ending dates of each alleged exposure as to each asbestos-containing product or silica-containing product for each location at which exposure allegedly took place for plaintiff and for each index person;

(6) The occupation and name of employer of the exposed person at the time of each alleged exposure;

(7) The specific condition related to asbestos or silica claimed to exist;

(8) Any supporting documentation of the condition claimed to exist; and

(9) The identity of any bankruptcy trust to which a claim has been submitted concerning any asbestos or silica injury of the exposed person, attaching any claim form or other information submitted to such trust or trusts with respect to the exposed person. Plaintiff must also identify any bankruptcy trust that the plaintiff believes is or may be liable for all or part of the injury at issue, even if a claim has not been submitted to that trust at the time the complaint is filed.

(b) If a plaintiff filing an asbestos claim or silica claim fails to file with the complaint a sworn information form or files a sworn information form that is allegedly defective or incomplete, and one or more defendants allege, with specificity, by motion to dismiss filed on or before the close of discovery, that said sworn information form is missing, defective, or incomplete, the plaintiff's complaint shall be dismissed without prejudice for failure to state a claim, except that the plaintiff may file the sworn information form or cure the alleged defect or omission any time between service of the motion to dismiss and 30 days after any order of dismissal identifying the defective or missing item or items. The trial court may, in the exercise of its discretion, extend the time for filing the missing information as it shall determine justice requires.

(c) All asbestos claims and silica claims along with sworn information forms must be individually filed in separate civil actions except that claims relating to the exposure to asbestos or silica for the same exposed person whose alleged injury is the basis for the civil action may be joined in a single action. Otherwise, no claims on behalf of a group or class of persons shall be joined in single civil action. (Code 1981, § 51-14-7, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-8. Limitations on discovery; satisfaction of medical criteria necessary to establish prima-facie evidence of medical impairment; admissibility of expert reports.

(a) Until such time as the trial court enters an order determining that the plaintiff has established prima-facie evidence of physical impairment, no asbestos claim or silica claim shall be subject to discovery, except discovery related to establishing or challenging the prima-facie evidence of physical impairment or by order of the trial court upon motion of one of the parties and for good cause shown.

(b) The medical criteria set forth in this chapter to establish prima-facie evidence of physical impairment are solely for the purpose of determining whether a claim meets the criteria to proceed in court. The fact that a plaintiff satisfies the criteria necessary to establish prima-facie evidence of physical impairment for an asbestos claim or silica claim shall not be construed as an admission or determination that the exposed person in fact has a condition related to exposure to asbestos or silica and shall not be cited, referred to, or otherwise used at trial.

(c) Unless stipulated to by the parties, an expert report submitted for the purpose of establishing or challenging prima-facie evidence of physical impairment is inadmissible for any other purpose. (Code 1981, § 51-14-8, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-9. Who may bring a claim; claims in multiple jurisdictions.

(a) Notwithstanding Code Section 1-2-6 or 1-2-10, a civil action alleging an asbestos claim or silica claim may only be brought or maintained in the courts of Georgia if the plaintiff, whether a citizen of Georgia or a citizen of some other state, is a resident of Georgia at the time of filing the action or the exposure to asbestos or silica on which the claim is based occurred in Georgia; provided, however, nothing contained in this chapter shall preclude a nonresident of Georgia who currently has a case pending in this state that was filed before April 12, 2005, from maintaining that asbestos claim or silica claim if that nonresident can establish prima-facie evidence of physical impairment with respect to an asbestos claim or silica claim as provided in paragraph (17) or (18) of Code Section 51-14-3. Civil actions alleging an asbestos claim or silica claim filed on or after May 1, 2007, must comply with the forum provisions set forth in this Code section. Civil actions alleging an asbestos claim or silica claim filed on or after April 12, 2005, and before May 1, 2007, must comply with the forum provisions of Code Section 51-14-8, as enacted on April 12, 2005, by 2005 Act No. 29 (Ga. L. 2005, p. 145) as they existed prior to May 1, 2007.

(b) The trial court, on motion of a defendant, shall dismiss each asbestos claim or silica claim that is subject to this chapter against the defendant unless the plaintiff files a written statement with the trial court electing to abate the plaintiff's claim against the defendant for a period of 180 days from the date the trial court disposes of the defendant's motions in order to afford the plaintiff an opportunity to file a new action on the claims in another state of the United States.

(c)(1) A trial court may not abate or dismiss a claim under this Code section until the defendant files with the trial court or with the clerk

of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, the defendant waives the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed or the period of abatement ends. The fact that a claim subject to this Code section was barred by the statute of limitations in all other states of the United States at the time it was filed in this state shall not prevent the claim from being dismissed pursuant to this Code section and such claim shall be dismissed even if it cannot be filed in another state. The trial court may not abate or dismiss a claim under this Code section until the defendant files with the trial court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff in another state of the United States, the plaintiff may elect that the plaintiff and the defendant may rely on responses to discovery already provided under Georgia law, plus any additional discovery that may be conducted under the rules of civil procedure in another state, or use responses to discovery already provided and conduct additional discovery as permitted under the rules of civil procedure in such other state.

(2) If less than all of the defendants agree to provide the stipulations set forth in paragraph (1) of this subsection, then the court shall dismiss the claims against those defendants who so stipulate.

(d) To comply with this Code section in relation to an action that involves both claims that arose in this state and claims that arose outside this state, a trial court shall consider each claim individually and shall sever from the action the claims that are subject to this Code section.

(e) If a plaintiff alleges that the exposed person was exposed to asbestos or silica while located in more than one jurisdiction, the trial court shall determine, for purposes of this Code section, which of the jurisdictions is the most appropriate forum for the claim, considering the relative amounts and lengths of the exposed person's exposure to asbestos or silica in each jurisdiction. (Code 1981, § 51-14-9, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2007, "cannot" was substituted for "can not" in the second sentence of paragraph (c)(1).

51-14-10. Venue.

Notwithstanding any other provision of law, an asbestos claim or silica claim that meets the requirements of this chapter permitting a

claim to be filed in this state may only be filed in the county where the plaintiff resides or a county in which the exposure to asbestos or silica on which the claim is based occurred. If a plaintiff alleges that an exposed person was exposed to asbestos or silica while located in more than one county, the trial court shall determine which of the counties is the most appropriate forum for the claim, considering the relative amounts and lengths of the exposed person's exposure to asbestos or silica in each of those counties. (Code 1981, § 51-14-10, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-11. Consolidation of claims.

A trial court may consolidate for trial any number and type of asbestos claims or silica claims with the consent of all the parties. In the absence of such consent, the trial court may consolidate for trial only asbestos claims or silica claims relating to the same exposed person and members of his or her household. (Code 1981, § 51-14-11, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-12. Application of chapter dependent upon date claim accrues.

(a) Asbestos claims and silica claims that accrued before April 12, 2005, or that will accrue on or after May 1, 2007, shall be governed by this chapter, as it exists on May 1, 2007. Asbestos claims and silica claims that accrued on or after April 12, 2005, and before May 1, 2007, shall be governed by Chapter 14 of Title 51, as enacted on April 12, 2005, by 2005 Act No. 29 (Ga. L. 2005, p. 145).

(b) Notwithstanding the foregoing, all asbestos claims and silica claims filed on or after April 12, 2005, and before May 1, 2007, shall be subject to and comply with the provisions of Code Sections 51-14-6, 51-14-7, 51-14-8, 51-14-9, and 51-14-10, as enacted on April 12, 2005, by 2005 Act No. 29 (Ga. L. 2005, p. 145). All asbestos claims and silica claims filed on or after May 1, 2007, shall be subject to and comply with Code Sections 51-14-7, 51-14-8, 51-14-9, 51-14-10, and 51-14-11, as they exist on May 1, 2007. (Code 1981, § 51-14-12, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

51-14-13. Severability.

In the event any part, portion, section, subsection, paragraph, sentence, clause, phrase, or word of this chapter shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other parts, portions, sections, subsections, paragraphs, sentences, clauses, phrases, or words of this chapter which

shall remain of full force and effect as if the part, portion, section, subsection, paragraph, sentence, clause, phrase, or word so declared or adjudged invalid or unconstitutional were not originally a part hereof. For example, if a court determines that a particular word renders any portion or application of this chapter unconstitutional, in that event, the court shall strike that word and apply this chapter as if it were enacted without that word. The General Assembly declares that it would have passed the remaining parts of this chapter if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional. The General Assembly does not intend for this chapter to make any substantive change in the law governing claims that accrued before April 12, 2005, and has only included procedural provisions that govern where such claims can be filed and what early reports must be filed in such cases. This chapter shall be interpreted consistently with the General Assembly's intention not to make any substantive changes in the law applicable to cases that accrued before April 12, 2005. The General Assembly expressly declares its intent that Code Section 51-14-9 remain in full force and effect if any other part or parts of this chapter shall be declared or adjudged invalid or unconstitutional. The General Assembly further expressly declares its intent that, in the event any part, portion, section, subsection, paragraph, sentence, clause, phrase, or word of this chapter shall be declared or adjudged invalid or unconstitutional as applied to asbestos claims or silica claims that accrued before April 12, 2005, such adjudication shall in no manner affect the applicability of any part, portion, section, subsection, paragraph, sentence, clause, phrase, or word of this chapter to asbestos claims or silica claims that accrued or may accrue on or after May 1, 2007. (Code 1981, § 51-14-13, enacted by Ga. L. 2007, p. 4, § 1/SB 182.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2007, this Code section, originally designated as Code Section 54-14-13, was redesignated as Code Section 51-14-13.

CHAPTER 15

ASBESTOS CLAIMS

Sec.		Sec.	
51-15-1.	Legislative findings; limitations on liabilities.	51-15-5.	Fair market value determinations; gross assets determination.
51-15-2.	Definitions.	51-15-6.	Market value; prime rate; adjustment.
51-15-3.	Domestic or foreign corporation as successor; exemption from limitations.	51-15-7.	Liberal interpretation to accomplish remedial purposes.
51-15-4.	Determination of liability and limitation on liability.	51-15-8.	Severability.

Editor's notes. — Ga. L. 2007, p. 4, § 3/SB 182, not codified by the General Assembly, provides for additional severability.

Ga. L. 2007, p. 4, § 4/SB 182, not codified by the General Assembly, provides that this chapter shall become effective May 1, 2007, and shall apply to asbestos claims that accrued or may accrue on or after that date.

51-15-1. Legislative findings; limitations on liabilities.

The General Assembly finds that the number of asbestos related claims has increased significantly in recent years and threatens the continued viability of a number of uniquely situated companies that have not ever manufactured, sold, or distributed asbestos or asbestos products and are argued to be liable only as successor corporations. This liability has created an overpowering public necessity to provide an immediate, clarifying, and remedial legislative solution. The General Assembly intends that the cumulative recovery by all asbestos claimants from innocent successors be limited, and intends to simply clarify and fix the form of asbestos claimants' remedies without impairing their substantive rights and finds that there are no alternative means to meet this public necessity. The General Assembly finds that Pennsylvania, Ohio, Texas, Mississippi, Florida, and South Carolina have enacted legislation similar to this chapter that, among other things, provides limitations of liabilities for asbestos claims for innocent successors. The General Assembly finds the public interest as a whole is best served by providing relief to these innocent successors so that they may remain viable and continue to contribute to this state. The General Assembly further finds that Georgia's successor liability statutes were never intended or contemplated to impose liability on successors in the situation covered by this chapter. (Code 1981, § 51-15-1, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

Law reviews. — For survey article on product liability law, see 59 Mercer L. Rev. 331 (2007).

51-15-2. Definitions.

As used in this chapter, the term:

(1)(A) "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, loss of consortium, or other relief arising out of, based on, or in any way related to the health effects of exposure to asbestos, including, but not limited to:

(i) Any claim, to the extent recognized by applicable state law now or in the future, for:

(I) Personal injury or death;

(II) Mental or emotional injury;

(III) Risk or fear of disease or other injury;

(IV) The costs of medical monitoring or surveillance; or

(V) Damage or loss caused by the installation, presence, or removal of asbestos; and

(ii) Any claim made by or on behalf of an exposed person or based on that exposed person's exposure to asbestos, including a representative, spouse, parent, child, or other relative of the exposed person.

(B) "Asbestos claim" shall not mean a claim brought under:

(i) A workers' compensation law administered by this state to provide benefits, funded by a responsible employer or its insurance carrier, for occupational diseases or injuries or for disability or death caused by occupational diseases or injuries;

(ii) The Act of April 22, 1908, known as the Federal Employers' Liability Act, 45 U.S.C. Section 51, et seq.;

(iii) The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901-944, 948-950; or

(iv) The Federal Employees Compensation Act, 5 U.S.C. Chapter 81.

(2) "Corporation" means a corporation for profit, including a domestic corporation organized under the laws of this state or a foreign corporation organized under laws other than the laws of this state.

(3) "Successor" means a corporation that assumes or incurs, or has assumed or incurred, successor asbestos related liabilities.

(4) "Successor asbestos related liabilities" means any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, which are related in any way to asbestos claims and were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation, or the plan of merger or consolidation related to the merger or consolidation, with or into another corporation, or which are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation. The term includes liabilities that, after the time of the merger or consolidation for which the fair market value of total gross assets is determined under Code Section 51-15-4, were or are paid or otherwise discharged, or committed to be paid or otherwise discharged, by or on behalf of the corporation, or by a successor of the corporation, or by or on behalf of a transferor, in connection with settlements, judgments, or other discharges in this state or another jurisdiction.

(5) "Transferor" means a corporation from which successor asbestos related liabilities are or were assumed or incurred. (Code 1981, § 51-15-2, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2007, subparagraphs (1)(C) and (1)(D) were redesignated as divisions (1)(B)(iii) and (1)(B)(iv), respectively.

51-15-3. Domestic or foreign corporation as successor; exemption from limitations.

(a) The limitations contained in Code Section 51-15-4 apply to a domestic or foreign corporation that is a successor and became a successor before January 1, 1972, or is any of that successor corporation's successor corporation.

(b) The limitations contained in Code Section 51-15-4 do not apply to:

(1) Any claim against a corporation that does not constitute a successor asbestos related liability;

(2) An insurance corporation;

(3) Any obligations under the federal National Labor Relations Act or under any collective bargaining agreement; or

(4) A successor that, after a merger or consolidation, continued in the business of mining asbestos, in the business of selling or distributing asbestos fibers, or in the business of manufacturing, distributing, removing, or installing asbestos-containing products that were the same or substantially the same as those products previously

manufactured, distributed, removed, or installed by the transferor. (Code 1981, § 51-15-3, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

51-15-4. Determination of liability and limitation on liability.

(a) Except as further limited in subsection (b) of this Code section, the cumulative successor asbestos related liabilities of a corporation are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. The corporation does not have any responsibility for successor asbestos related liabilities in excess of this limitation.

(b) If the transferor had assumed or incurred successor asbestos related liabilities in connection with a prior merger or consolidation with a prior transferor, the fair market value of the total assets of the prior transferor, determined as of the time of the earlier merger or consolidation, shall be substituted for the limitation set forth in subsection (a) of this Code section for the purpose of determining the limitation of liability of a corporation. (Code 1981, § 51-15-4, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

51-15-5. Fair market value determinations; gross assets determination.

(a) A corporation may establish the fair market value of total gross assets for the purpose of the limitations under Code Section 51-15-4 through any method reasonable under the circumstances, including:

(1) By reference to the going concern value of the assets or to the purchase price attributable to or paid for the assets in an arm's length transaction; or

(2) In the absence of other readily available information from which fair market value can be determined, by reference to the value of the assets recorded on a balance sheet.

(b) Total gross assets include intangible assets.

(c) Total gross assets include the aggregate coverage under any applicable third-party liability insurance that was issued to the transferor whose assets are being valued for purposes of this Code section, which insurance has been collected or is collectable to cover successor asbestos related liabilities except compensation for liabilities arising from workers' exposure to asbestos solely during the course of their employment by the transferor. For purposes of this subsection, a settlement with an insurance company shall fix what amount of coverage was collectable. (Code 1981, § 51-15-5, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

51-15-6. Market value; prime rate; adjustment.

(a) Except as provided in subsections (b), (c), and (d) of this Code section, the fair market value of total gross assets at the time of a merger or consolidation shall increase annually at a rate equal to the sum of:

(1) The prime rate as published by the Board of Governors of the Federal Reserve System, as published in statistical release H.15 or any publication that may supersede it, for each calendar year since the merger or consolidation; and

(2) One percent.

(b) The rate provided in subsection (a) of this Code section shall not be compounded.

(c) The adjustment of fair market value of total gross assets shall continue as provided under subsection (a) of this Code section until the date the adjusted value is first exceeded by the cumulative amounts of successor asbestos related liabilities paid or committed to be paid by or on behalf of the corporation or a predecessor, or by or on behalf of a transferor, after the time of the merger or consolidation for which the fair market value of total gross assets is determined.

(d) No adjustment of the fair market value of total gross assets shall be applied to any liability insurance otherwise included in the definition of total gross assets by subsection (c) of Code Section 51-15-5. (Code 1981, § 51-15-6, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

51-15-7. Liberal interpretation to accomplish remedial purposes.

The courts in this state shall apply, to the fullest extent permissible under the United States Constitution, this state's substantive law, including the limitation under this chapter, to the issue of successor asbestos related liabilities. This chapter shall be construed liberally to accomplish its remedial purposes. (Code 1981, § 51-15-7, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)

51-15-8. Severability.

If any part, portion, section, subsection, paragraph, sentence, clause, phrase, or word of this chapter, or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect the other parts, portions, sections, subsections, paragraphs, sentences, clauses, phrases, or words or applications of this chapter that can be given effect without the invalid part, portion, section, subsection, paragraph, sen-

tence, clause, phrase, or word or application, and to this end the parts, portions, sections, subsections, paragraphs, sentences, clauses, phrases, and words of this chapter are declared severable. (Code 1981, § 51-15-8, enacted by Ga. L. 2007, p. 4, § 2/SB 182.)