TORTS – RECENT DEVELOPMENTS – 2018

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This paper will address recent cases of interest in the area of torts. It includes cases in most of the areas of tort law, including medical malpractice, and defenses such as immunity.

1. IMPACT RULE

Georgia's impact rule has required a physical injury, except in the limited circumstance of a parent who suffers emotional distress from witnessing his or her child's suffering. *Lee v. State Farm Mut. Ins. Co*., 272 Ga. 583 (2000). In *Malibu Boats v. Batcheldor*, 2018 Ga. App. Lexis 568 (Case No. A18A0881, Court of Appeals, October 10, 2018), plaintiffs sought to expand the impact rule in the context of siblings who witnessed the death and suffering of another sibling in a boating incident. The Court of Appeals rejected this attempted broadening of the impact rule, and limited the impact rule to the scope delineated in the *Lee* case.

2. FOOD POISONING

The Georgia Supreme Court clarified the burden on non-movants facing summary judgment motions in food poisoning cases in *Patterson v. Kevon*, 304 Ga. 232 (2018). The facts arise from food alleged to contain pathogens and to be undercooked that plaintiffs consumed at a wedding reception. The problem is the one faced in many such cases – which food caused the problems that began a few days later? In this case, the caterer, Big Kev's, produced testimony that they had safe food-handling procedures and that other guests did not become ill. Plaintiffs produced evidence that some other guests did in fact become ill, and the plaintiffs tested positive for salmonella.

The Court reviewed many past decisions of the Court of Appeals, and pointed out that there is no special legal proof requirement that applies to food poisoning cases at the summary judgment stage. Instead, like other negligence cases, food poisoning cases require adequate proof, even if circumstantial, to get

past summary judgment. Thus, simply saying "I ate food, and later got sick" still likely does not suffice, but neither would a plaintiff to be required to definitely disprove every other possible cause of the maladies she suffered. The probabilities must tilt toward the defendant's food as a cause.

3. PREMISES LIABILITY

Many practitioners may have been surprised at how what appeared to be an ordinary negligence case of tripping over a concrete wheel stop morphed into a case requiring expert design testimony in *Bartenfeld v. Chick-Fil-A*, 346 Ga. App. 759 (2018)(cert applied for). In that case, a patron of Chick-Fil-A was walking back to her vehicle when she tripped over a concrete wheel stop. Claims of negligence based on the design of the wheel-stops were brought, along with ordinary negligence claims. The Court rejected both claims, and granted summary judgment to the defendants because there was no expert testimony that the wheel-stop was a hazardous condition. The open question is whether this sort of requirement of expert testimony will become a much broader requirement in premises liability cases.

4. MEDICAL NEGLIGENCE

The Supreme Court affirmed the Court of Appeals in a medical malpractice case in Tenet *Health System GB, Inc. v. Thomas*. 304 Ga. 86 (2018). In that case, the patient suffered quadriplegia after a c-collar was removed while her neck was fractured. Suit was filed prior to expiration of the Statute of Limitations, and then amended after the passing of the Statute of Limtiations to add claims based on the nurse's removal of the c-collar. Even though a new legal theory of imputed simple negligence was asserted in the amended complaint, and new persons were alleged to be negligent, the Court held that the claims related back to the date of filing of the original complaint under OCGA 9-11-15.

There always seem to be cases involving expert affidavits in medical malpractice cases, and this year is no different. In *Holmes v. Lyons*, 346 Ga. App. 99 (2018)(cert applied for), the adequacy of an expert's affidavit in a gynecological surgery case was at issue. The main claim in that case was that the surgeon had physical disabilities that prevented him from doing the surgery properly, resulting in a ureteral injury. There was nothing in the affidavit that specifically detailed exactly how the damage was done during the surgery, but instead alleged that the surgery was botched due to the surgeon's physical difficulties. The Court held that the affidavit was adequate, especially considering the appropriate standard requiring drawing all inferences in favor of the adequacy of the affidavit.

5. IMMUNITY

The Georgia courts decided a large number of cases involving various types of immunity over the past year or so.

a. State Immunity

In *Georgia Department of Administrative Services v. McCoy*,[1] the Court of Appeals considered whether the General Liability Agreement ("GLA") of the State Liability Trust Fund provides coverage for acts of malicious prosecution committed by employees of the Department of Family and Children Services (DFCS).

The plaintiff, McCoy, had obtained a large judgment against an employee of DFCS, based on malicious prosecution claims. McCoy then sought to obtain coverage for the judgment from DOAS under the terms of the GLA.

The Court of Appeals, in its majority opinion, held that there was no coverage for the claims of malicious prosecution under the GLA. To reach this conclusion,

[1] 340 Ga. App. 877, 798 S.E.2d 687 (2017)

the Court reasoned that, first, there were no claims that the torts were committed in the scope of the defendant's employment with the State. This was also admitted at oral argument.[2]

Then the Court held that the GLA was clear in providing no coverage for acts taken outside by State employees the scope of employment.[3] The Court rejected the argument by the plaintiff-appellee that there was an ambiguity in the GLA that should have been read in her favor.[4] Two Judges dissented, concluding that the GLA was ambiguous and should have provided coverage.[5]

One of the frequently litigated exceptions to state immunity concerns the negligent design exception found in the GTCA. [6] In *Department of Transportation v. Balamo,*[7] the Court of Appeals again addressed a case involving this exception for a roadway that allowed rainwater to accumulate and contribute to an auto wreck.

The main problem, according to the Court, was that there was no evidence from the plaintiff's expert that the design standards in effect at the time of the design of the roadway were violated, and further, the expert characterized the problem as a maintenance problem rather than a design issue.[8] In such circumstances, the state was immune.

b. County Immunity

A fairly common situation was presented in *Davis v. Morrison*,[9] which involved the adequacy of an ante litem notice. The facts were straightforward. Motorist was

[2] *Id*. at 882, 798 S.E.2d at 692.
[3] *Id*.
[4] *Id*. at 883, 798 S.E.2d at 693.
[5] *Id*. at 694-95, 798 S.E.2d at 886-87.
[6] OCGA 50-21-24(10).
[7] 343 Ga. App. 169, 806 S.E.2d 622 (2017).
[8] *Id*. at 173-74, 806 S.E>2d at 626.
[9] 344 Ga. App. 527, 810 S.E.2d 649 (2018).

hurt in an auto wreck with a sheriff's deputy, which the motorist alleged was caused by the deputy's negligence. The motorist served an ante litem notice on the county, but did not serve one on the Sheriff.

The trial court granted summary judgment to the deputy and the Sheriff, and the Court of Appeals affirmed. First, the Court reasoned that the claims against the deputy were barred by OCGA 36-92-3(a), because under that statutory subsection, the Sheriff's Office is a local government entity and its employees are entitled to the protection of the prohibition on naming local government employees as defendants.[10] Further, the Court held that any claim against the Sheriff in his official capacity were barred because the Sheriff was not provided with an ante litem notice.[11]

Whether an ante litem notice is sufficient if presented to a county attorney employed by the county in-house, as opposed to an attorney privately employed but appointed as the county attorney, was resolved in *Croy v. Whitfield County*.[12] After an auto wreck, a suit was brought against Whitfield County. The ante litem notice was served on the county attorney, who was not a county employee but was appointed as the county attorney.[13]

The Supreme Court held that this notice was sufficient. The Supreme Court rejected the distinction drawn by the Court of Appeals, at least for ante litem notices, between in-house county attorneys and those appointed as county attorneys but privately employed.[14]

c. Municipality Immunity

[10] *Id*. at 531, 810 S.E.2d at 652.
[11] *Id*. at 531-32, 810 S.E.2d at 653
[12] 301 Ga. 380, 801 S.E.2d 892 (2017).
[13] *Id*. at 380, 801 S.E.2d at 893.
[14] *Id*.

The requirements of ante litem notices to municipalities continue to be the subject of appellate court scrutiny. In *Williams v. City of Atlanta*,[15] the Court of Appeals held that a pedestrian's ante litem notice was insufficient and thus affirmed the grant of summary judgment to the City.

The pedestrian alleged that he fell into an uncovered water meter hole, and was injured. He sent an ante litem notice specifying an address, which later turned out to not have a water meter.[16] Also, in the litigation, the address of the incident was different than the address specified in the ante litem notice, and the two locations were approximately .3 miles apart.[17] The Court focused on the fact that the incorrect address did not provide sufficient information for the City to have conducted an investigation into the claims.[18]

d. School District Immunity

One of the most difficult-to-apply and litigated distinctions in immunity cases is the distinction between ministerial and discretionary functions. This seems particularly true in cases involving school districts. In *Barnett v. Caldwell*,[19] a student died after he was injured when he and another student engaged in horseplay when a teacher left the classroom. Suit was brought against the teacher, who argued that she was protected by immunity because her action of leaving the classroom was a discretionary action.[20]

The school handbook required that all students be supervised at all times but did not further explain exactly what constituted "supervision." There was testimony that supervision included having an ability to see the students, which the

[15] 342 Ga. App. 470, 803 S.E.2d 614 (2017).
[16] Id. at 471, 803 S.E.2d at 615.
[17] Id.
[18] *Id*. at 473, 803 S.E.2d at 616.
[19] 302 Ga. 845, 809 S.E.2d 813 (2018).
[20] 302 Ga at 847, 809 S.E.2d at 815-16.

teacher could not do when she left the room. Nonetheless, the Supreme Court held that this policy of constant supervision gave the teacher discretion, even discretion to simply leave the room, and thus she was entitled to immunity.[21]

6. Defamation

The Georgia courts issued several opinions in defamation cases recently. In *Smith v. DiFrancesco*,[22] a physician brought a defamation claim against another physician based on a letter sent to patients that included this phrase "… since [plaintiff] last had the ability to practice medicine…"[23]

The trial court granted summary judgment, concluding that the statement was not libel per se, which, unlike libel per quod, requires no extrinsic facts to establish its defamatory meaning.[24] The defendant argued that this phrase could have meant that plaintiff had simply lost the ability to practice medicine with the company he had left.[25]

The Court rejected the defendant's argument and held that this statement was libel per se, and further held that the statement was not privileged. The main issue regarding privilege was whether the statement was made in good faith, and the Court found that this should have been left for the jury to determine, particularly since the plaintiff had never lost his license or his ability to practice medicine.[26]

The difficulty of succeeding in claims brought by public figures for defamation was illustrated in *Ladner v. New World Communs. of Atlanta*,[27] Ladner was a police officer for the city of Holly Springs, Georgia.[28] He completed an

[21] *Id*. at 851, 809 S.E.2d at 818.
[22] 341 Ga. App. 786, 802 S.E.2d 69 (2017).
[23] *Id*. at 787, 802 S.E.2d at 71
[24] *Id*. at 788, 802 S.E.2d at 72
[25] *Id*. at 790, 802 S.E.2d at 74.
[26] *Id*.
[27] 343 Ga. App. 449. 806 S.E.2d 905 (2017).
[28] *Id*. at 449, 806 S.E.2d at 908.

application to participate in an event for wounded veterans in Midland, Texas, which included a parade in which Ladner and his wife participated by riding on one of the floats.[29] The float was involved in a collision with a train, and Ladner's wife was seriously injured.[30]

There were further reports in the news media about Ladner's wife's recovery, and some of those reports mentioned that Ladner had received a Purple Heart. Later, family members contacted the press and told them that Ladner had not received a Purple Heart.[31] An Atlanta news station did several reports, relying on military documents that did not indicate Ladner had received a Purple Heart.[32]

Ladner brought a defamation action, and the news station sought summary judgment on the grounds that Ladner was a public figure and there was no showing of actual malice of the reporter.[33] Summary judgment was granted and the Court of Appeals affirmed.

The Court focused on the public interest in the various events in the case, from the initial trip to Midland, Texas, to the accident and the Ladner's medical needs and fundraising on their behalf.[34] These various activities and the public interest in them supported a finding that Ladner was a public figure.

The Court also held that there was no showing of actual malice, based in large part on the reporter's many investigative activities, including obtaining documents and statements from several people about Ladner's military service.[35]

7. Wrongful Death

[29] *Id* at 450, 806 S.E.2d at 909.
[30] *Id*.
[31] *Id*. at 451, 806 S.E.2d at 909.
[32] *Id*. at 451-52, 806 S.E.2d at 910.
[33] *Id*.
[34] *Id* at 455-56, 806 S.E.2d at 912-13.
[35] *Id*. at 458-59, 806 S.E.2d at 914-915.

The issue of causation and intervening acts was addressed by the Georgia Supreme Court in *Jordan v. Everson*,[36] a case involving the death of a man released from the hospital after being admitted because he was hearing voices and hallucinating.[37]

The patient was discharged, and his parents decided to take him to Duke University Hospital. During the trip to Duke, he jumped from the vehicle and ran down the highway, where he was struck by a vehicle and killed.[38]

Suit was brought against the emergency room physician, who sought summary judgment on the grounds that there was not a sufficient causal link between his alleged misconduct and the death.[39]

The Court held that an intervening act does not need to be "wrongful or negligent" in order to break the causal chain between the original tortfeasor's acts and the result; instead, the act must merely be either reasonably foreseeable or triggered by the defendant's conduct.[40] The Supreme Court thus reversed the Court of Appeals on this point, since the Court of Appeals had concluded that the intervening act must be wrongful or negligent to break the causal chain.

The Georgia Supreme Court addressed wrongful death damages in *Bibbs v. Toyota Motor Corp*., 304 Ga. 68 (2018). In that case, the injured person's guardian settled her very serious personal injury claim, and then 20 years later she died. The settlement documents expressly stated that any wrongful death claims were not released by the release in the personal injury case. After a very long and thorough analysis, the Court concluded that in this case the only type of damages that plaintiff would be permitted to recover would be the damages for the

[36] 302 Ga. 364, 806 S.E.2d 533 (2017)
[37] *Id*. at 364, 806 S.E.2d at 534.
[38] *Id*.
[39] *Id*.
[40] *Id*. at 365, 806 S.E.2d at 534.

intangible value of the decedent’s death , even though she had been in a coma for 20 years at the time of her death.