TORTS

By G. GERALD KUNES*

INTRODUCTION

This year's survey in the tort field reflects the tremendous change which the Court of Appeals has undergone in the past two years. In 1961, you will recall that we had a two-division Court of Appeals, with the first division having three judges, and the second division having four judges. Later that year, two other judges were added, and three divisions of three judges each was formed. The tremendous advantage of this addition is shown by the greater number of tort cases reported in this survey, in comparison to previous years.

We will all miss Judge Townsend's crystal clear opinions, and his loss to the Court of Appeals will be sorely felt. However, by reading the cases covered in this survey period, it has become apparent that the six men appointed by Governor Vandiver are also eminently competent jurists.

It should also be noted that with Chief Judge Felton, Presiding Judge Carlisle and Presiding Judge Nichols, these six new judges have added a balance to the Court of Appeals which will greatly benefit the ends of justice in the state of Georgia. All of the judges have written splendid opinions during this survey period; however, it has become apparent that a new legal star has risen on the judicial horizon.

Judge Eberhardt is an humble man, and we would certainly not wish to embarrass him with praise. However, his foresighted opinion in *Moore v. Atlanta Transit*[1] was a long stride in the search for justice. His decisions can be easily identified by the footnotes which seem ever present to provide a clear understanding of the cause *sub judice*.[2]

The Bar of Georgia should certainly be indebted to Governor Vandiver for the superb appointments, who, together with the Presiding Judges of the Court of Appeals, make up a bench second to none. These men wrote the decisions in 82 out of the 86 cases covered in this tort survey about to be discussed. Based on the decisions they have written in this year's tort survey, their future influence on tort law in Georgia should be remarkable.

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1. 105 Ga. App. 70, 123 S.E.2d 693 (1961).
2. American Broadcasting-Paramount Theatres, Inc. v. Simpson, 106 Ga. App. 230, 126 S.E.2d 873 (1962).

As was written by Cardozo,[3] "It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins."

STATUTES

The only new statute enacted in the 1962 Session of the General Assembly relieves from civil liability any person who renders emergency care at the scene of an emergency, when such care or services are rendered without charge and in good faith.[4]

MALPRACTICE

There were only two malpractice cases reported during the time covered by this survey.

In the case of *Emory University v. Donald Lee Porter*,[5] the Court of Appeals reversed the overruling on an oral motion to dismiss the petition in the nature of a general demurrer in the absence of an allegation that the physician who allegedly controlled an incubator, which caused the injury, was an employee of the hospital or that the hospital had furnished a defective device for use of the patient. The case is one of first impression in Georgia, and holds that "it [hospital] is not required to furnish the latest or best appliances, or to incorporate in existing equipment the latest inventions or improvements, even though such devices may make the equipment safer for use."[6]

In *Summerour v. Lee*,[7] a dentist brought suit against his patient to recover for services rendered. Defendant pleaded total failure of consideration and filed a cross-action for malpractice. The trial court directed a verdict for the dentist and the appellate court held that since defendant failed to introduce expert testimony in support of the cross-action, where the result of medical treatment is so pronounced that the lack of ordinary skill and diligence is evident, this fact may be testified to by anyone competent to testify, and this is the only exception to the general rule requiring expert testimony against physicians and surgeons.

CARRIERS

A petition was held sufficient which alleged that a passenger was injured by a crowd of passengers entering the bus under the direction

3. CARDOZO, NATURE OF THE JUDICIAL PROCESS (1921).
4. Ga. Laws 1962, p. 534.
5. 103 Ga. App. 752, 120 S.E.2d 668 (1961).
6. *Id.* at 755, 120 S.E.2d at 670.
7. 104 Ga. App. 73, 121 S.E.2d 80 (1961).

of an employee agent of the defendant. In *Metropolitan Transit System, Inc. v. Burton,*[8] Judge Felton based his dissent in the case on construing the petition to the effect that the plaintiff was outside of the bus when the injury occurred. The majority opinion was predicated upon the fact that the plaintiff entered the bus by ascending the steps of such bus, and was on the premises controlled by the defendant.

In *Columbus Transportation Company v. Curry*[9] the Court of Appeals held that carriers are chargeable with a greater degree of responsibility to exercise proper care and diligence in keeping premises safe where passengers are to be discharged.

The most outstanding case in this field is that of *Moore v. Atlanta Transit System, Inc.,*[10] where Judge Eberhardt, in a landmark decision, wrote into Georgia law an exception to the hearsay rule. The case held that where there were no eye witnesses to the event, the declarations of a decedent to whomsoever made are admissible in evidence for the jury, under appropriate instructions to determine their weight and credibility.

SLIP AND FALL

In *Webb v. Wright,*[11] where a general contractor employed a sub-contractor and relinquished the right to control the time or manner of executing the work, but retaining the right to approve the finished product, and a suit was brought against both contractors, the prime contractor was relieved from torts committed by the sub-contractor on the basis that there was no master and servant relationship existing. The sub-contractor was also relieved because the suit was brought in the county of the residence of the prime contractor and the sub-contractor was a resident of another county. It is to be noted that under the factual situation in this case, plaintiff fell the day following the installation of the steps. Had the work been completed, GA. CODE ANN. §105-502 (1956 Rev.), would undoubtedly have brought about a different result as against the prime contractor on the basis of para. 6 of said code section.

One of the few questionable decisions covered by the survey involved the case of *Carmichael v. Timothy,*[12] wherein the plaintiff tripped over a 6-inch log used as a divider in defendant's parking lot during the night time and while on defendant's premises as an invitee. The court, in reversing the judgment of the trial court, relied on two

8. 103 Ga. App. 688, 120 S.E.2d 663 (1961).
9. 104 Ga. App. 700, 122 S.E.2d 584 (1961).
10. 105 Ga. App. 70, 123 S.E.2d 693 (1961).
11. 103 Ga. App. 776, 120 S.E.2d 806 (1961).
12. 104 Ga. App. 16, 120 S.E.2d 814 (1961).

similar cases, for purposes herein referred to as the *Ely* and *McHugh* cases[13] those cases also involving parking lot dividers of either 4x4 timbers or cement. The rationale of the parking lot cases has been based on the fact that the dividers could be seen by the exercise of ordinary care. See in this connection also *McMullen v. Droger Company*.[14]

In the *Carmichael* case, the court used this language: "Since it has been held that the existence of dividers in parking lots is not negligence in daylight, it would be ridiculous to hold it to be negligence to have them present at night."[15] In this case, defendant was charged with failure to warn of existence and presence of said log; in failing to illuminate said log; in failing to paint said log white (it being alleged that it was creosoted and located on black asphalt type pavement); and in insufficiently lighting the parking area. Under such circumstances, if the defendant was in fact guilty of any of the alleged acts of negligence, he could have foreseen by the exercise of ordinary care, that by placing raised impediments on the flat surface of a paved parking lot which was to be used by patrons at night, that such impediments could not be seen by the patrons at night in the exercise of ordinary care, and the defendant should have been liable.

In the case of *Taylor v. Boyce*,[16] the Court of Appeals held that a tenant who knew that a back porch was unsafe and who later went into that particular area and fell after having warned the landlord that this portion of the porch needed repairs was barred from recovery for failure to exercise ordinary care for his own safety.

In *Wasserman v. Southland Investment Corporation*,[17] the Court of Appeals reversed the granting of a summary judgment in favor of the landlord when a tenant fell on icy steps leading from her apartment to a parking lot under facts that an employee of the defendant had undertaken to remove the ice from steps by using hot water, but such attempts were ineffective, and merely added to the icy condition of the steps, on the ground that the evidence presented jury issues as to the negligence, if any, of the landlord, and as to contributory negligence, if any, of the tenant who had previously known of the icy condition of the steps.

In *Redding v. Sinclair Refining Company*,[18] the Court of Appeals reversed the dismissing of the petition where gasoline filling station

13. Ely v. Barbizon Towers, Inc., 101 Ga. App. 872, 115 S.E.2d 616 (1960); McHugh v. Trust Company of Georgia, 102 Ga. App. 412, 116 S.E.2d 512 (1960).
14. 84 Ga. App. 195, 65 S.E.2d 420 (1951).
15. 104 Ga. App. 16, 18, 120 S.E.2d 814, 816 (1961).
16. 105 Ga. App. 434, 124 S.E.2d 647 (1961).
17. 105 Ga. App. 420, 124 S.E.2d 674 (1961).
18. 105 Ga. App. 375, 124 S.E.2d 688 (1961).

managers placed a sign on a sidewalk in violation of city ordinances, and against lessee of station oil company, whose agents allegedly supervised the placing of the sign and held that whether or not the plaintiff was guilty of contributory negligence was a question for the jury.

An outstanding decision was written by Judge Bell in the case of *Cox v. DeJarnette*,[19] which was a case against the trustees of a church wherein the petition alleged that the church was a charitable institution, but that the trustees had a "non-charitable asset" which was an owner's public liability policy insuring defendant trustees from bodily injury liability to third persons for which the insured trustees should become legally obligated to pay to third persons, arising out of the ownership, maintenance, or use of the church premises. The court in this case gives a splendid history of the doctrine of charitable immunities and then in a landmark decision, held that:

> Where the governing authority of a charitable institution deems it to be in keeping with the benefit purpose of the charity to expend and to deplete its strictly charitable assets to the extent necessary to make payments upon the premises of a liability policy, this depletion of charitable assets should not be negated through the extension of immunity to the face amount of the policy.[20]

The Court of Appeals held that landlords, in the absence of contractual or statutory obligations, are not required to illuminate a stairway in *Schneider v. Monnes*.[21] When in a negligence action it is alleged that the defendant created a condition on its premises dangerous to invitees, it is not necessary to allege other facts to show actual or constructive knowledge of the condition.[22] If the opposite party is specifically called "for cross-examination," the trial court in its discretion may allow counsel for the party so called to cross-examine.[23] An invitee cannot maintain a cause of action based solely upon constructive notice which did not allege what particular length of time the bottle had been on the stairway before plaintiff's fall.[24] An action was denied against a defendant motorist who allegedly knocked down a pole in an automobile parking lot creating a hole into which plaintiff fell, on the ground that motorist was not negligent in failing to give warning of defective condition.[25]

19. 104 Ga. App. 664, 123 S.E.2d 16 (1961).
20. *Id.* at 672, 123 S.E.2d at 22.
21. 103 Ga. App. 487, 119 S.E.2d 801 (1961).
22. Lam Amusement Company v. Waddell, 105 Ga. App. 27, 123 S.E.2d 319 (1961).
23. Norman v. Norman, 103 Ga. App. 626, 120 S.E.2d 42 (1961).
24. Watson v. C&S Bank, 103 Ga. App. 535, 120 S.E.2d 62 (1961).
25. Cook v. Parrish, 105 Ga. App. 95, 123 S.E.2d 409 (1961).

Even though marbles had been picked up off of defendant's floor, and handed to defendant's employee, and plaintiff fell 100 feet away from said point on a marble, the court held that the defendant had no actual or constructive knowledge of the condition in the store.[26]

Where a plaintiff pleads notice in the alternative and later in the petition alleges certain employees of the defendant to have had actual knowledge of the condition, but failed to allege facts or circumstances as to how long they may have had such knowledge, the trial court erred in refusing to overrule a general demurrer.[27] A petition was insufficient to state a cause of action for negligence where it did not contain any allegations of facts that would authorize a finding that defendant had notice for sufficient length of time to impute knowledge, and to correct the condition.[28]

In an enlightened decision by Judge Bell, the Court of Appeals reversed the sustaining of the general demurrer to the petition of the plaintiff who fell down a flight of stairs due to a loose and defective tread on the top step of a stairway even though the stairway was dark where the plaintiff could not discover the defect by an ordinary examination. She would not be guilty of contributory negligence in attempting to travel over the dangerous area.[29]

And finally, a pragmatic decision by Judge Townsend held that where the plaintiff went on defendant's premises with a customer to inspect the paint job performed on customer's car, that plaintiff was an invitee and not a licensee because plaintiff and customer were specifically invited to descend the stair to the basement for the purpose of inspecting the work done.[30]

PRODUCTS LIABILITY

There were four outstanding cases of interest in the products field. In the case of *Capital Automobile Company v. Shinall*,[31] it was held that failure to warn of attendant dangers involved in starting an automobile by placing a metal shaft of a screw driver in contact with the electric terminals of the starter gives rise to a cause of action, even though instructions were given voluntarily and no privity of contract exists. The decision, written by Judge Felton, is another opinion loaded with legal logic. The circumstances alleged in this case which give

26. Danmon v. Rich's, 103 Ga. App. 818, 120 S.E.2d 659 (1961).
27. Setzers Super Stores of Georgia, Inc. v. Higgins, 104 Ga. App. 116, 121 S.E.2d 305 (1961).
28. Home Federal Savings and Loan Association v. Hulsey, 104 Ga. App. 123, 121 S.E.2d 311 (1961).
29. Barrow v. James, 104 Ga. App. 345, 121 S.E.2d 700 (1961).
30. Etheridge Motors, Inc. v. Haynie, 103 Ga. App. 676, 120 S.E.2d 317 (1961).
31. 103 Ga. App. 659, 120 S.E.2d 351 (1961).

rise to the duty to warn for instructions actually given voluntarily and without any duty to do so, are that the plaintiff was a prospect for the purchase of a new Cadillac, and that the probability was that the correcting of the defect in the starter to the plaintiff's automobile was a step toward satisfying the plaintiff, either generally or in order to sell him another automobile. In this case the plaintiff was a doctor who had trouble starting his Cadillac automobile, and some of defendant's employees showed the plaintiff how it could be done with a screwdriver in the event it would not start normally. The doctor followed the instructions, and being unskilled in starting automobiles in this manner, was severely shocked when he placed the metal shaft of the screwdriver in contact with the electric terminals of the starter in accordance with instructions given by employees of the dealer. This decision should put another nail in the coffin of the privity requirement in products liability cases.

In *Brock v. Simpson*,[32] it was held that a retailer who vends a manufactured sealed product is required to exercise ordinary care to discover imperfections. However, he is not chargeable with negligence where "kerosene oil or some other deleterous substance" is the alleged defect and was not reasonably observable.

The case of *Revlon, Inc., v. Murdock*,[33] involves the construction of a statute. This is the sole cause of the iniquity in the decision. In construing GA. CODE ANN. §96-307 (1958 Rev.), the court held that the statute, being strictly construed, does not give a consumer a cause of action unless the consumer was also the purchaser. Judge Jordan pointed out that this case does not follow the line of cases allowing recovery where there is no privity nor where the product is inherently dangerous. In the case *sub judice* the manufacturer bottled nail polish which exploded while plaintiff was shaking it in the course of her employment as a beautician. The difficulty with GA. CODE ANN. §96-307 (1958 Rev.) lies in the wording "ultimate consumer", which ordinarily would be broad enough to include any user of the product whether a purchaser or otherwise. However, following the use of such term is the language "who, however, must exercise caution when purchasing to detect defects." Perhaps the Legislature will see fit to correct the effect of this statute.

In *Elrod v. King*,[34] it was held that where a latent defect is discovered in a manufactured item by an intervening party who is under a duty to repair or warn and damages result to a third party purchaser,

32. 103 Ga. App. 800, 120 S.E.2d 885 (1961).
33. 103 Ga. App. 842, 120 S.E.2d 912 (1961).
34. 105 Ga. App. 46, 123 S.E.2d 441 (1961).

the manufacturer will be insulated from paying damages, but the intervening party will be liable.

NUISANCES

In *Floyd v. City of Albany*,[35] it was held that a public nuisance maintained on the streets of a city with knowledge of the city gives rise to an action for damages against the city, even though the nuisance (weighing scales) was placed upon the street by a third person. It was pointed out that contributory negligence is a defense to an action based on a public nuisance. Another interesting point in this case, in discussing a covenant not to sue, held that the covenant will prevent the charge that plaintiff was paid money by another joint tort-feasor if money was not paid on behalf of remaining defendant.

In *City Council of Augusta v. Thorp*,[36] it was held that if through a city's improper planning and maintenance of drainage systems a nuisance is created thereby, the city will be liable to the landowner if flooding results. The fact that the nuisance was actually constructed by a co-defendant will not relieve the municipality if it participated in planning and then accepted the finished construction which constituted the continuing nuisance. Another interesting sidelight in this case held that even though no direct evidence on a certain point is adduced, a charge on a given subject is not error "if there be something from which a legitimate process of reasoning can be carried on in respect to it."

In the case of *Griffith v. Newman*,[37] the Supreme Court defined a nuisance *per accidens* (by reason of circumstances and surroundings) and held that if such exists it is grounds for an injunction against a proposed lawful business if the petition alleges that anticipated injury is reasonably certain.

Judge Carlisle wrote, in *Southeastern Liquid Fertilizer Company v. Chapman*,[38] that a single occurrence of an obnoxious act is not sufficient to create a nuisance, and apprehension of future injury from the nuisance, which the complaint anticipates, is not sufficient to authorize abatement of the nuisance.

OWNERS AND OCCUPIERS OF LAND

In *Hillinghorst v. Heart of Atlanta Motel, Inc.*,[39] it was held that an innkeeper has the duty to inspect and is liable for such injuries caused by defects as would be disclosed by reasonable inspection.

35. 105 Ga. App. 31, 123 S.E.2d 446 (1961).
36. 103 Ga. App. 431, 119 S.E.2d 595 (1961).
37. 217 Ga. 533, 123 S.E.2d 723 (1961).
38. 103 Ga. App. 773, 120 S.E.2d 651 (1961).
39. 104 Ga. App. 731, 122 S.E.2d 751 (1961).

Brand v. Pope,[40] denied a cause of action for injuries arising out of running into and breaking a glass door between two rooms where it was not alleged that there was any defect in the construction of the door, nor that the premises were less safe than those provided by ordinarily prudent owners and occupiers of land.

It was held in *Tatum v. Clemones*,[41] that where a plaintiff enters into an area of known potential dangers, he cannot recover from the owner or occupier of land for injuries resulting from his presence in said area.

In *Bush v. City of Gainesville*,[42] it was held that a city will not be relieved from liability for defects in streets which, in the exercise of ordinary and reasonable diligence, should have been discovered and remedied, even though some other governmental agency (State Highway Department) had charge of construction thereon.

In *Clayton County v. Billups Eastern Petroleum Company*,[43] the Court of Appeals, in an opinion written by Judge Bell, held that where a public highway is converted to a limited access highway, the impairment of ingress and egress to abutting property owners will give rise to a cause of action even though a service road was provided whereby the property could be reached indirectly.

In another property damage case, it was held not error to deny a motion for a judgment n. o. v. where an engineer could, by the exercise of due care, have observed cows on the track ahead in time to give sufficient warning.[44]

In *Lee v. Creaty*,[45] Judge Nichols held that a defendant cannot complain if the verdict against him is less than the amount authorized by the evidence.

An interesting case was that of *Ed Smith & Sons, Inc., v. Mathis*,[46] which held that where a contractor retains the right to direct work done by a sub-contractor and its employees, such prime contractor will be liable for damages for torts of the servants of the sub-contractor.

A decision by Judge Bell, *Barrow v. Georgia Lightweight Aggregate Company*[47] held that recovery can be had for personal injuries resulting from a trespass. Briefly, the facts were that the defendant

40. 103 Ga. App. 489, 119 S.E.2d 723 (1961).
41. 105 Ga. App. 221, 124 S.E.2d 425 (1961).
42. 105 Ga. App. 381, 124 S.E.2d 667 (1961). The rule in this case has since been revised by GA. CODE ANN. §95-1741 (1958 Rev.), expressly relieving municipalities from defects resulting from failure of the State Highway Board to maintain portions of the state aid system of roads lying within municipalities.
43. 104 Ga. App. 778, 123 S.E.2d 187 (1961).
44. Western & Atlantic Railroad Company v. Treadway, 103 Ga. App. 511, 119 S.E.2d 716 (1961).
45. 104 Ga. App. 429, 121 S.E.2d 841 (1961).
46. 103 Ga. App. 661, 120 S.E.2d 646 (1961).
47. 103 Ga. App. 704, 120 S.E.2d 636 (1961).

set off explosions on land adjacent to the plaintiff's land, causing the casting of rocks, the cracking of walls, ceilings and the foundation of the house occupied by the plaintiff. This case held that the tortfeasor may be held liable for damage to property and person, including mental and physical injury of the owner and his family. The case also held that where, over a period of years, the shaking and vibrating of plaintiff and his house is a private nuisance, in a trespass action plaintiff was not required to make repairs before bringing action. However, if he had made repairs, he would be required to allege the date made and the name of repairer. The case also held that the plaintiff need not allege information which is peculiarly within defendant's knowledge and held that if the defendant continued to set off allegedly trespassing explosions after notice of injury to plaintiff, exemplary damages could be justified. Another interesting facet of this case held that a ruling on demurrer to pleadings entered at previous term may not be revoked at subsequent term. And finally, that contributory negligence is no defense to a wilful tort.

In *Wright v. Legg*,[48] it was held that where a petition for personal injury seeks money damages and plaintiff attempts to amend the petition to meet an equitable defense, the petition becomes subject to a general demurrer and should be dismissed.

Fraud and Deceit

In this field, the case of *Kelly v. Georgia Casualty & Surety Company*[49] almost deceived the writer. In the first appearance of this case, the Court of Appeals reversed the judgment of the lower court and held that the petition alleging that the agent represented to owners that he would insure property immediately but failing to disclose that agent knew at the time that the insurance company would not issue a fire policy failed to state a cause of action against the agent for fraud and deceit. The Supreme Court, on certiorari, reversed the Court of Appeals and held, in a decision by Justice Mobley, that where a defendant insurance agent represents to an applicant for in-

48. 103 Ga. App., 474, 119 S.E.2d 592 (1961). This case is more in the field of practice and procedure. The action involved a release. An action to set aside and avoid a release for damage is an equitable proceeding and must pray to set aside the release before or at the time of filing of the suit for damages, otherwise the release stands and the plaintiff is not entitled to recover of the defendant.

49. It was first reported in the Court of Appeals [104 Ga. App. 167, 121 S.E.2d 313 (1961)] after the Supreme Court refused to answer certified questions of the Court of Appeals [216 Ga. 834, 120 S.E.2d 329 (1961)]. The case next appeared in the Supreme Court of Georgia [217 Ga. 449, 122 S.E.2d 731 (1961)] under the name of Clark v. Kelly, and then again it appeared in the Court of Appeals as Kelly v. Ga. Casualty & Surety Co. [105 Ga. App. 104, 123 S.E.2d 711 (1961)].

surance that he will insure against a certain hazard and then represents that he has insured against the hazard when in fact no such insurance has been secured, and the applicant for insurance subsequently suffers damage, an action for fraud and deceit will lie. Later, in the same case, the Court of Appeals relieved the principal of liability because the action was one for fraud and deceit and not on the contract.[50]

AUTOMOBILE GUEST CASES

In the case of *Bennett v. George*,[51] the Court of Appeals held that instructions stating that a bicycle passenger must exercise due care for own safety, and cannot close his eyes to known or obvious dangers and treat himself as dead freight, was error justifying the grant of new trial absent evidence that the passenger had so closed his eyes or treated himself as dead freight.

Burdette v. O'Neal[52] held that evidence including testimony that over passenger's objections, defendant proceeded to "floorboard" his vehicle until he reached a curve in the road where he lost control due to excessive speed, was sufficient to present a jury question as to gross negligence of defendant.

In *Wood v. Olson*[53] the Court of Appeals held that the petitions were sufficient to state a cause of action for gross negligence where automobile guest passengers brought actions against the owner of the automobile and the driver for injuries sustained by the passengers when the automobile ran off the highway and struck a culvert.

Judge Bell's decision in *Hamby v. Hamby*[54] held that since the applicable Ohio Statute had been expressly pleaded, but decisions of the Supreme Court of Ohio had not, the Georgia Court of Appeals could, on prior appeal, only construe the pleaded statute in accordance with Georgia law, and that its holding that petition was not subject to general demurrer had only become the law of the case as to the sufficiency of the petition to set forth a cause of action under

50. 105 Ga. App. 104, 123 S.E.2d 711 (1961). This is a questionable decision. Had the agent exceeded his authority by not issuing a binder? The principal is bound for neglect and fraud of his agent [GA. CODE ANN. §4-311 (1962 Rev.)]. In Seabrook v. The Underwriters Agency, 43 Ga. 583 (1871), the Supreme Court held that an insurance company was bound by neglect of its agent in failing to insure cotton as instructed by owner, where owner was justified in believing such insurance had been effected. In Commercial City Bank v. Mitchell, 25 Ga. App. 837, 105 S.E. 57 (1920) the Court of Appeals held that in an action based on deceit of agent in procuring contract, principal and agent will be joined.
51. 105 Ga. App. 527, 125 S.E.2d 122 (1961).
52. 103 Ga. App. 734, 120 S.E.2d 334 (1961).
53. 104 Ga. App. 321, 121 S.E.2d 677 (1961).
54. 103 Ga. App. 836, 121 S.E.2d 169 (1961).

Georgia law, and was not decisive that proof of facts alleged would entitle plaintiff to recover under the applicable Ohio statute as construed by Ohio Supreme Court decisions which first came into the case at trial.

In the case of *City of Buford v. Hosch*[55] it was held that an action lay against a city for injuries sustained by guest when his host's automobile, from which the guests had been thrown, was struck by another automobile, allegedly because a police vehicle blocked the roadway, and the guest was struck by the host's automobile. The trial court overruled a motion for judgment non obstante veredicto for the guest and the defendants brought error. The Court of Appeals, Nichols, J., held that all of the defendants were joint tort-feasors and the release of the host by the guest released the other defendants. Judgment was reversed with direction.

In *White v. Borders*[56] the Court of Appeals reversed the trial court and held that plaintiff, who alleged paying passenger status in automobile and driver's gross negligence, could prevail on proof of gross negligence alone, without proof of passenger status.

In *Youmans v. Barry*[57] the Court of Appeals, Felton, C. J., held that a passenger who was riding with motorist to attend motorist's wedding was an invitee rather than a guest, and that motorist owed passenger duty to exercise ordinary care.

Walden v. Coleman[58] was an action by wife to recover damages for loss of consortium of her husband who died only 2 1/4 hours after receiving tortious injuries. The trial court sustained defendant's general demurrer and the wife brought error. The Court of Appeals, Jordan, J., held that the wife had a cause of action for loss of consortium and that the amount of damages, if any, to which the wife was entitled was for the jury under all facts and circumstances and judgment was reversed.

Jacobs v. Felmet[59] held that a host who had no knowledge or notice of any defect in his brakes until they suddenly failed while he was driving at 15 miles per hour, was guilty of neither ordinary nor gross negligence, nor was second motorist guilty of negligence when shown only to have been driving in a proper lane within the ordinance regulating speed.

In reversing the trial court in *Owens v. White*,[60] the Court of Appeals held that where the plaintiff and his wife agreed to pay for

55. 104 Ga. App. 615, 122 S.E.2d 287 (1961).
56. 104 Ga. App. 746, 123 S.E.2d 170 (1961).
57. 104 Ga. App. 762, 123 S.E.2d 159 (1961).
58. 105 Ga. App. 242, 124 S.E.2d 313 (1961).
59. 105 Ga. App. 234, 124 S.E.2d 307 (1961).
60. 103 Ga. App. 459, 119 S.E.2d 581 (1961).

gasoline, oil and tire repairs on a trip in an automobile, which was furnished by the defendants, the defendant driver was required to exercise ordinary care for the safety of the plaintiff, and an instruction submitting the question whether plaintiff occupied status of invitee, who could recover only for gross negligence, was error.

The Court of Appeals held, in *Wright v. Lail*,[61] *inter alia*, that a petition averring that plaintiff entered and rode in defendant's automobile in an effort to help defendant in locating rattle, that plaintiff put his feet on ground, attempting to leave the automobile after it stopped, but that defendant allowed his foot to slip off brake pedal and into accelerator causing automobile to lurch forward and injure plaintiff stated a cause of action in alleging failure to exercise ordinary care.

Salley v. Hogan[62] held that the trial court properly overruled the defendant's motion for judgment notwithstanding the verdict even though there was a variance between the plaintiff's allegations and his proof with respect to a contract for transportation, where the discrepancy was such as to authorize an amendment to conform to the evidence which was introduced without objection and without dispute, and where the evidence did not demand a verdict for the defendant.

A summary judgment was affirmed when Judge Frankum held that a father, who allowed his son to borrow his automobile because of defective condition of the son's automobile, but who had permitted the son to drive the automobile only half dozen times on special occasions, was not liable, under family purpose doctrine, for injuries sustained by guest passenger when the automobile, driven by the son overturned.[63]

In reversing the trial court in the case of *Fowler, next friend v. Glover*,[64] Judge Nichols held that an invitee in an automobile may recover in an action for personal injuries, even though his testimony is vague, contradictory or equivocal if there is enough other testimony (evidence?) to establish his case. The plaintiff was a passenger on a motorcycle and was injured when the vehicle upon which he was riding collided with the rear of an automobile driven by a nonresident co-defendant. The plaintiff testified that he did not see the driver of the motorcycle doing anything wrong and did not see the front vehicle operated by the nonresident defendant which pulled out in front of the motorcycle. The trial court granted nonsuits to both de-

61. 105 Ga. App. 261, 124 S.E.2d 487 (1961).
62. 104 Ga. App. 876, 123 S.E.2d 313 (1961).
63. Marques v. Ross, 105 Ga. App. 133, 123 S.E.2d 412 (1961).
64. 105 Ga. App. 216, 123 S.E.2d 903 (1961).

fendants and the Court of Appeals reversed the judgment and held a jury question was presented as to whether motorcycle driver, who did not apply his brakes or attempt to pass co-defendant's automobile which he struck in the rear, was negligent as to control. While the motorcycle driver would not be required to exercise the same accuracy of judgment in an emergency not created by his own negligence, yet whether he did exercise ordinary care for plaintiff's safety after emergency became apparent was a question for the jury.

In *Ogletree v. Kirven*,[65] Judge Carlisle held that a person riding on a running board of a car is a guest and if sufficient allegations of negligence are contained in the petition, the case is one for jury to decide.

Railroad - Automobile Cases

Georgia, Ashburn, Sylvester & Camilla Railway Company v. Rutherford[66] was an action by an automobile passenger for injuries suffered in a collision with a train at a railroad crossing at night. The trial court overruled the railroad's motion for a new trial, and the railroad brought error. The Court of Appeals held that an instruction authorizing the jury to find the railroad negligent if the train engineer failed to ring a bell as the train approached the crossing "as required by law" was improper where the crossing was not within the corporate limits of a town, city, or village.

Affirming the trial court in the case of *Southern Railway Company v. Johnson*,[67] Judge Felton held that under the allegations of the petition and the evidence, the jury could find that, if the agent of the railroad motioned motorist to cross the tracks, motorist was not barred from recovery by what they might have found was contributory negligence in not looking out for rolling cars and if an emergency was found by the jury to have been caused by the railroad's negligence, they could have found that such negligence caused motorist's injuries in his effort to escape consequences of the emergency.

In *Atlantic Coastline Railroad Company v. Paulk*,[68] the Court of Appeals held that a charge that proof of injury inflicted by running of locomotives or cars should be prima facie evidence of want of reasonable skill and care on the part of the railroad was error where the railroad introduced evidence tending to rebut alleged negligence and introduced material facts concerning the collision.

Judge Townsend held, in *Atlantic Coastline Railroad Company v.*

65. 104 Ga. App. 433, 121 S.E.2d 845 (1961).
66. 104 Ga. App. 41, 121 S.E.2d 150 (1961).
67. 105 Ga. App. 556, 125 S.E.2d 80 (1961).
68. 104 Ga. App. 316, 121 S.E.2d 688 (1961).

McDonald,[69] that a witness shown to be familiar with facts and testifying to facts on which he bases his opinion may state facts by way of conclusion where they are not the ultimate facts to be decided.

AUTOMOBILE CASES

In *Atlanta Metallic Casket Company v. Hollingsworth*,[70] the Court of Appeals held that where there is undisputed evidence of a fact, it is not error for the court so to instruct the jury.

Judge Jordan held, in *Carr v. John J. Woodside Storage Company, Inc.*,[71] that a charge on wilful and wanton negligence is not applicable unless defendant's conduct evinced a wilful intention to inflict injury or was so reckless or so charged with indifference to consequences as to justify finding wantonness equivalent in spirit to actual intent. The Supreme Court granted certiorari, reversed the Court of Appeals, and held[72] that the superior court erred in refusing to give the plaintiff's requested instruction that if the jury found from the evidence that the truck driver was guilty of wilful and wanton negligence and that such wilful and wanton negligence resulted in the death of the plaintiff's son, the fact that the plaintiff's son was negligent would not defeat a recovery by the plaintiff.

In *Kahle v. Browning*,[73] the Court of Appeals held that ordinarily questions of diligence and negligence, including contributory negligence and proximate cause, are for the jury and the Court of Appeals will decline to solve such questions on demurrer except when they appear palpably clear, plain and indisputable.

The Court of Appeals held, in *Newsome v. Dunn*,[74] that a plaintiff has a right to amend his petition after evidence has closed and the court's charge has been delivered, provided amendment is germane to the cause of action and submits issue supported either directly or inferentially by the evidence.[75]

In *Williams v. Vinson*,[76] the Court of Appeals held that the failure to instruct that the plaintiff was under a duty to exercise ordinary care and diligence for her own safety and to charge with respect to the doctrine of comparative negligence, was not error where the evidence demanded a finding that the plaintiff was not guilty of any contributory negligence.

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69. 103 Ga. App. 328, 119 S.E.2d 356 (1961).
70. 104 Ga. App. 154, 121 S.E.2d 388 (1961).
71. 103 Ga. App. 854, 120 S.E.2d 907 (1961).
72. 217 Ga. 438, 123 S.E.2d 261 (1961).
73. 103 Ga. App. 436, 120 S.E.2d 24 (1961).
74. 103 Ga. App. 656, 120 S.E.2d 205 (1961).
75. GA. CODE ANN. §81-1301 (1956 Rev.).
76. 104 Ga. App. 686, 123 S.E.2d 281 (1961).

Judge Bell's decision, in the cases of *Hines v. Bell* and *Hines v. Milam*,[77] held that an automobile owner could not be held liable for alleged negligence of a non-agent driver on an allegation that owner had constructive knowledge of driver's incompetence.

Vaughn v. Butler,[78] reversing a judgment non obstante verdicto, held that permission by owner that another might drive an automobile may be express or implied.

In *McDougal v. Johnson*,[79] reversing the trial court, Judge Eberhardt held that evidence was sufficient to take to the jury the question of causation and negligence with respect to driver of automobile which collided with the rear of preceding automobile after preceding automobile had collided head-on with the approaching automobile.

The Court of Appeals reversed the trial court in the case of *Williams v. Slusser*[80] and held that the credibility of the testimony of the defendant and his witness that the plaintiff's on-coming tractor-trailer truck was two feet over center line, that the defendant drove his automobile off the hard surface of the road onto the shoulder and lost control, and that the automobile then crossed the center line of the road and collided with the truck, was for the jury and the trial judge should not have directed a verdict against the defendant's cross-petition.

In *Carroll v. Johnson*[81] the Court of Appeals held that a petition by motorist colliding head-on with defendant's approaching truck which was attempting to pass co-defendants' tractor-trailer contained allegations of negligence sufficient to enable petition to withstand a general demurrer.

The Court of Appeals affirmed the trial court in *G. & R. Waterproofing Company v. Brogdon*,[82] and held that the petitions alleging that the defendant driving an oncoming truck at the intersection drove it to the left across the center lane and brought it to a stop in the automobilist's traffic lane and that the automobilist unsuccessfully swerved to avoid striking the truck did not show on their faces that the truck driver's alleged negligence did not combine naturally with alleged negligence of the automobilist, and general demurrers were properly overruled.

In *Etheridge v. Hooper*,[83] it was held that the standard of care,

77. 104 Ga. App. 76, 120 S.E.2d 892 (1961).
78. 103 Ga. App. 884, 121 S.E.2d 72 (1961).
79. 104 Ga. App. 233, 121 S.E.2d 417 (1961).
80. 104 Ga. App. 412, 121 S.E.2d 796 (1961).
81. 105 Ga. App. 541, 125 S.E.2d 91 (1961).
82. 104 Ga. App. 112, 121 S.E.2d 77 (1961).
83. 104 Ga. App. 227, 121 S.E.2d 323 (1961).

which ought to have been applied to a nine-year-old plaintiff at the time of accident, was a matter for the jury to determine.

The Court of Appeals held, in *Williams v. Young*,[84] that evidence which is only indirectly relevant to the issue on trial, but which tends somewhat to illustrate it and to aid the jury in arriving at the truth of the matter, should be admitted.

Moorman v. Williams[85] held that the plaintiff in a wrongful death action was barred by decedent's negligence.

Murdock v. Ledbetter Johnson Company,[86] a decision by Judge Bell, affirmed the trial court and held that the fact that the contractor had charge of resurfacing a highway under a contract with State Highway Board did not impose a duty upon contractor to post warning signs of a dead-end intersection, a condition in existence prior to the time when contractor embarked upon its work.

In the case of *Davidson v. Standford*,[87] the Court of Appeals held that where the question of jurisdiction is not raised prior to verdict and judgment, it is waived, even though evidence at the trial may show the venue of the action was improper.

Individual Tort Cases

In *Curl v. Cherry*,[88] reversing the trial court, Judge Eberhardt held that defendant was not liable for alleged negligence in furnishing to his son a dart with which son negligently injured plaintiff, who, as trespasser or bare licensee, entered room in defendant's house wherein the son was throwing darts.

The Court of Appeals held, in *Thomas v. Williams*,[89] that a city is not liable for tortious conduct of its police officers in the discharge of their duties, and that petition sufficiently stated a cause of action against a police officer for death of prisoner from exposure to fire and smoke in cell and sufficiently stated a cause of action against another defendant who interfered and prevented other persons from removing the prisoner from the cell.

Bray v. Westinghouse Electric Corporation[90] was an employees' injury action against his employer. The superior court dismissed the action and error was brought. Felton, C. J., held that negative adjudication of the employer's liability by the Court of Appeals in a prior action by the employee's wife for loss of consortium, though not an

84. 105 Ga. App. 391, 124 S.E.2d 795 (1961).
85. 103 Ga. App. 726, 120 S.E.2d 312 (1961).
86. 105 Ga. App. 551, 125 S.E.2d 99 (1961).
87. 105 Ga. App. 742, 125 S.E.2d 720 (1962).
88. 105 Ga. App. 239, 124 S.E.2d 289 (1961).
89. 105 Ga. App. 321, 124 S.E.2d 409 (1961).
90. 103 Ga. App. 783, 120 S.E.2d 628 (1961).

estoppel by judgment as to the instant action, in view of the disparity of parties, constituted a binding precedent and was controlling in view of substantially similar allegations of the petitions.

The case of *Hipp v. Hospital Authority of the City of Marietta*[91] which was an action to recover damages resulting from molestation of a nine-year-old patient at the defendant hospital the trial court dismissed the petition. Nichols, J., reversing, held that where hospital employed an orderly who had been convicted as a "peeping tom", and it was alleged that there was no investigation as to the moral character and background of such orderly and he molested a minor child who was a paying patient in the hospital, a jury question as to the hospital's liability was presented.

In an action against an eight-year-old boy and his parents for injuries allegedly sustained by the plaintiff when she was hit in the eye by a pellet which he fired from an air rifle, Jordan, J., held that the petition was sufficient against the child and his father, but pleaded no cause against the mother.[92]

In *McDonough Construction Company v. Benefield,*[93] an action by employee of subcontractor against general contractor for injuries sustained when rolling scaffold on which he was working rolled into a depression and tipped over, the Court of Appeals held that an absence of allegation that slant or incline in floor was proximate cause or a contributing proximate cause of the rolling of a scaffold rendered the petition demurrable when the petition could be construed also as alleging that the cause of scaffold's rolling was one with which the general contractor was not chargeable, and reversed judgment.

In an action by a minor girl for a third degree burn allegedly received while she was riding on an amusement device when she was pinned to the metal side of the device which had become heated by friction, against the owner of the device and a corporation to which the control of the device was allegedly subject, the trial court entered judgment on a directed verdict for the defendant, the plaintiff bringing error. The Court of Appeals reversed the trial court and held that the doctrine of res ipsa loquitur was applicable and the question of the defendants' negligence was for the jury.[94]

In *Shaw v. Thomas,*[95] the Court of Appeals, speaking through Judge

91. 104 Ga. App. 348, 121 S.E.2d 657 (1961).
92. Faith v. Massengill, 104 Ga. App. 348, 121 S.E.2d 657 (1961).
93. 104 Ga. App. 367, 121 S.E.2d 665 (1961).
94. Harrison v. Southeastern Fair, 104 Ga. App. 596, 122 S.E.2d 330 (1961).
95. 105 Ga. App. 12, 123 S.E.2d 327 (1961).

Eberhardt, reversed the trial court and held that the plaintiff golfer who was out of range of apparent danger from the defendant's drive on an adjoining fairway, assumed the risk of being struck by a hooked ball hit by the defendant. The Supreme Court on certiorari, in an opinion by Justice Candler,[96] held that the petition averring that defendant, who was an inexpert player, shot ball with great force, and saw, or in the exercise of ordinary care should have seen, that the ball had hooked and was proceeding toward plaintiff in time to have warned him, but failed to do so with result that ball, after one bounce, struck plaintiff in left eye severely injuring him, pleaded a cause of action. Judgment of Court of Appeals reversed.

96. 217 Ga. 688, 124 S.E.2d 396 (1962).