Torts

by Phillip Comer Griffeth* and Cash V. Morris**

This Article surveys recent developments in Georgia tort law between June 1, 2012 and May 31, 2013.[1] Throughout this survey period, our appellate courts provided clear recitations of existing tort law, clarified the application and meaning of statutes and existing lines of cases, and recognized liability and defenses in cases of first impression.

I. NEGLIGENCE

In *Kesterson v. Jarrett*,[2] the Georgia Supreme Court reversed the Georgia Court of Appeals, which had affirmed a jury verdict in favor of the defendant medical providers when the State Court of Clarke County limited a severely injured plaintiff's presence at trial.[3] In the underlying case, the plaintiffs[4] alleged that Kyla Kesterson's medical providers were negligent in her delivery, causing injury, and as a result she was

> unable to control her movements and [was] confined to a special wheelchair, [had] a feeding tube inserted into her stomach, her airway

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1. For an analysis of Georgia tort law during the prior survey period, see Phillip Comer Griffeth & Cash V. Morris, *Torts, Annual Survey of Georgia Law*, 64 MERCER L. REV. 287 (2012).

2. 291 Ga. 380, 728 S.E.2d 557 (2012).

3. *Id.* at 381, 728 S.E.2d at 559; *see also* Kesterson v. Jarrett, 307 Ga. App. 244, 704 S.E.2d 878 (2010). For a discussion of the 2010 opinion, see Phillip Comer Griffeth & Cash V. Morris, *Torts, Annual Survey of Georgia Law*, 63 MERCER L. REV. 343, 344-45 (2011).

4. This included the injured minor, Kyla Kesterson, and her parents, Catherine and Ross. *Kesterson*, 307 Ga. App. at 244, 704 S.E.2d at 880.

> [had to] be suctioned several times a day, [had] bladder and bowel dysfunction, [suffered] frequent seizures, [had] severely limited cognitive function, and she [could not] speak.[5]

On motion by the defendants at trial, the court bifurcated the case into a liability and damages phase, limiting Kyla's presence in the liability phase to voir dire and to when her presence was "essential and relevant to witness testimony related to medical conditions affecting said child [that] resulted from alleged negligent acts by one or more [d]efendants," with the court reserving the right to remove her if her actions were distracting, disruptive, or potentially prejudicial to one or more of the defendants.[6]

In a case of first impression, the court of appeals[7] held that a party's right to attend all stages of that party's trial is not absolute, noting there is "no Georgia case law expounding upon the constitutional or statutory source of a civil party's qualified right to be present during trial."[8] However, the court found guidance in *Helminski v. Ayerst Laboratories*,[9] wherein the United States Court of Appeals for the Sixth Circuit ruled that under the Fifth Amendment to the United States Constitution's due process clause,[10] a constitutional right exists to be present at trial.[11] Following *Helminski*, the court of appeals adopted a five-part test[12] that, when met, allows a trial court to exclude a plaintiff because "[her] presence is not truly an exercise of . . . her right to be present, because the plaintiff is incapable of making such a conscious choice [but rather] functions almost as an exhibit, as a piece of evidence."[13]

Finding no precedent or logic for the discretionary exclusion of a party based on that party's competence, the supreme court, relying on case law[14] and Georgia's long-held, "deeply rooted" constitutional provision

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5. *Id.* at 245, 704 S.E.2d at 880.

6. *Id.* at 247, 704 S.E.2d at 881-82.

7. Judge Ellington wrote the opinion with Judge Doyle concurring and Presiding Judge Andrews concurring in judgment only. *Id.* at 253, 704 S.E.2d at 886.

8. *Id.* at 248, 704 S.E.2d at 882-83.

9. 766 F.2d 208 (6th Cir. 1985).

10. U.S. CONST. amend. V.

11. *Helminski*, 766 F.2d at 213-14.

12. The test bore on the nature of the plaintiff's injuries; whether the defendants' liability stemmed from causing the injuries; bias the jury might have for the plaintiff because of the severity of the injuries; and the plaintiff's ability to understand and participate in the trial. *Kesterson*, 307 Ga. App. at 250, 704 S.E.2d at 884.

13. *Id.*

14. *See* Smith v. Baptiste, 287 Ga. 23, 24-25, 694 S.E.2d 83, 85 (2010); Hampton v. State, 282 Ga. 490, 491-92, 651 S.E.2d 698, 700-01 (2007); Tift v. Jones, 52 Ga. 538, 542 (1874); Wade v. State, 12 Ga. 25, 29 (1852).

for self-representation in both civil and criminal cases,[15] rejected the court of appeals adoption of the *Helminski* balancing test and acknowledged the right of civil litigants to be present throughout the trial of their cases, regardless of competency or injury.[16] Beautifully put, the court stated:

> Under the law of the land and the ambit of our Constitution, a person does not sacrifice her "right to prosecute . . . in person . . . that person's own cause in . . . the courts of this state" just because she is unattractive, or disfigured, or handicapped—even to a much greater extent than Kyla. The risk of inappropriate sympathy can and must be addressed through the many other remedies discussed above.[17]

Moreover, the court held that as the "real party in interest," there is a personal element to being present as it is "the *party's* life that will be directly affected by the outcome of the case."[18] Acknowledging the potential for prejudice,[19] the court provided numerous accepted methods that exist to remedy the potential for prejudice and bias including: (1) venue change; (2) questions and challenges in voir dire; (3) exclusion of prejudicial evidence; (4) restrictions on opening statements and closing arguments; and, most importantly, (5) jury instructions.[20] The court made clear, however, that it was not curtailing a trial court's discretion to remove parties, recognizing that the trial court could "control the courtroom and ensure the orderly and dignified adjudication of cases."[21]

II. INTENTIONAL TORTS

Although Georgia is home to the seminal case of *Pavesich v. New England Life Insurance Co.*,[22] one of the first cases in our union recognizing an individual's right of privacy and publicity,[23] there has been no codification of the right of publicity and many questions have remained regarding pursuing an action for an alleged violation. For this very reason, pursuant to section 15-2-9 of the Official Code of Georgia

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15. *Kesterson*, 291 Ga. at 384, 728 S.E.2d at 561 (citing GA. CONST. art. I, § 1, pt. XII).
16. *Id.* at 393-94, 728 S.E.2d at 567.
17. *Id.* at 390, 728 S.E.2d at 565.
18. *Id.* at 392, 728 S.E.2d at 566.
19. The court noted that the potential effects of prejudice and bias are present in all cases and must be dealt with by the trial court. *Id.* at 386-87, 728 S.E.2d at 563.
20. *Id.* at 386-88, 728 S.E.2d at 563.
21. *Id.* at 395, 728 S.E.2d at 568.
22. 122 Ga. 190, 50 S.E. 68 (1905).
23. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:17 (2d ed. 2003).

Annotated (O.C.G.A.),[24] a certified question was presented to the Georgia Supreme Court by the United States District Court for the Northern District of Georgia in *Bullard v. MRA Holding, LLC*,[25] pertaining to choice of law, the elements of a plaintiff's right of publicity claim, and the associated damages.[26] The plaintiff in *Bullard* alleged that in 2000, when she was fourteen years old, she purposefully exposed her breasts to two unknown men in a parking lot in Panama City, Florida, who were videotaping her. She subsequently filed suit for the humiliation and injury to her feelings and reputation by the unauthorized use by the defendant, MRA Holding, LLC (MRA), of the footage in its *College Girls Gone Wild* video series and placement of her image on the video box that was marketed and sold nationwide. On the video box displaying her image, the defendant placed the words "Get Educated!" to block out Bullard's otherwise exposed breasts.[27]

Applying Georgia conflict of laws rules[28] and the doctrine of *lex loci delicti* in tort cases, the court held that substantive Georgia law governed the right of publicity because the image, although recorded in Florida, was distributed nationwide, and, thus, the plaintiff would have suffered the injury in Georgia where she lived and attended school.[29] Focusing on the plaintiff's misappropriation of likeness claim,[30] one of the four disparate invasion of privacy torts in Georgia,[31] the court held that the elements were: "[1] the appropriation of another's name and likeness, whether such likeness be a photograph or [other reproduction of the person's likeness]; [2] without consent; [3] for the financial gain

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24. O.C.G.A. § 15-2-9 (2012).

25. 292 Ga. 748, 740 S.E.2d 622 (2013).

26. *Id.* at 749-50, 740 S.E.2d at 624-25.

27. *Id.* at 748-49, 740 S.E.2d at 624.

28. *Id.* at 750, 740 S.E.2d at 625 (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (holding that federal courts apply the conflict of laws rules of forum states in which they sit)).

29. *Id.* at 750-51, 740 S.E.2d at 625.

> The place where the tort was committed, or, "the *locus delicti*, is the place where the injury sustained was suffered rather than the place where the act was committed, or, as it is sometimes more generally put, it is the place where the last event necessary to make an actor liable for an alleged tort takes place."

Id. (quoting Risdon Enters., Inc. v. Colemill Enters., Inc., 172 Ga. App. 902, 903, 324 S.E.2d 738, 740 (1984) (emphasis added)).

30. Misappropriation of image or likeness is a particular violation of individuals' control over their images, often referred to as the right of publicity. Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 250 Ga. 135, 140, 296 S.E.2d 697, 701 (1982).

31. *Bullard*, 292 Ga. at 751, 740 S.E.2d at 626.

of the appropriator."[32] The court further held that the cause of action is equally available to private citizens as well as entertainers.[33] Focusing primarily on the lack of consent and the use of the words "Get Educated!" (which could be perceived as an endorsement by Bullard to purchase the video), the court reasoned that Bullard had stated a claim that "[her] image was arguably used without her consent to endorse an MRA product for MRA's own commercial gain."[34] Most interestingly, the court held that the plaintiff's damages were "limited to the actual damages Bullard incurred from [the defendant's] appropriation of her image," requiring her to "show that the use of her image actually added value to MRA's advertising efforts that otherwise would not have existed without the use of her image."[35]

III. PREMISES LIABILITY

During this survey period, the court of appeals continued its analysis from a line of cases holding that "[p]roof of a fall, without more, does not create liability on the part of a proprietor or landowner."[36] In a case in which the plaintiff "admitted that she did not know what caused her to fall" and could not "prove that she lacked equal knowledge of the hazard,"[37] the court held that she "had actual knowledge of the floor's condition at the time of her fall," and because the restaurant had a "reasonable cleaning [and] inspection procedure, no constructive knowledge of the floor's condition" could be imputed to the defendant.[38] Likewise, in *Anderson v. Canup*,[39] the court affirmed summary judgment for the defendant when the plaintiff testified in her deposition, "I do not remember what happened" and "I'm not sure," and no other evidence in the record demonstrated the cause of her fall.[40] The court

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32. *Id.* at 752, 740 S.E.2d at 626 (textual alteration in original) (quoting *Martin Luther King, Jr.*, 250 Ga. at 143, 296 S.E.2d at 703).

33. *Id.*

34. *Id.*

35. *Id.* at 754-55, 740 S.E.2d at 628 ("While it may be difficult for Bullard to prove how much the use of her specific image versus other images on the cover of the video added value to MRA's advertising efforts, assuming that she could show such added value from the use of her image, she would be entitled to recover damages.").

36. El Ranchero Mexican Rest., No. 10, Inc. v. Hiner, 316 Ga. App. 115, 117, 728 S.E.2d 761, 763 (2012) (quoting Pinckney v. Covington Athletic Club & Fitness Ctr., 288 Ga. App. 891, 893, 655 S.E.2d 650, 652-53 (2007)).

37. *Id.* at 117, 728 S.E.2d at 763.

38. *Id.* at 118-19, 728 S.E.2d at 764.

39. 317 Ga. App. 558, 731 S.E.2d 786 (2012).

40. *Id.* at 559-60, 731 S.E.2d at 787-88 (relying also on Willingham Loan & Realty Co. v. Washington, 311 Ga. App. 535, 716 S.E.2d 585 (2011), discussed in last year's survey); *see also* Griffeth & Morris, *supra* note 1, at 293 nn.44-46.

of appeals also continued to follow the standard outlined by the Georgia Supreme Court in *Robinson v. Kroger Co.*,[41] which often results in summary judgment for the premises owner.[42] However, a few opinions from this survey period quoted some plaintiff-friendly language from *Robinson*.

In *Samuels v. CBOCS, Inc.*,[43] the court of appeals reversed a grant of summary judgment for a defendant when the plaintiff slipped and fell on a "piece of wood approximately four inches long and one-half inch in diameter"[44] (likened to a "Lincoln Log"[45]), while leaving a Cracker Barrel restaurant in Perry, Georgia.[46] The court relied on the "reasonable minds can differ" language from *Robinson* to rule that because the plaintiff introduced sufficient evidence to show that the defendant "failed to follow its established inspection schedule,"[47] an inference was raised that the defendant had constructive knowledge of the object and there was a question of fact whether the object could have been seen by the plaintiff on reasonable inspection.[48] Similarly, in *Ramotar v. Kroger Co.*,[49] Judge Barnes joined with two of the same judges who decided *Samuels* to reverse a grant of summary judgment for a defendant when

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41. 268 Ga. 735, 748-49, 493 S.E.2d 403, 414 (1997) (discussed in Griffeth & Morris, *supra* note 1, at 294 nn.52-57).

42. *See, e.g.*, Courter v. Pilot Travel Ctrs., LLC, 317 Ga. App. 229, 231, 730 S.E.2d 493, 495 (2012) (holding that the plaintiff's admissions of awareness of the particular risk could not show the defendant's "superior knowledge" of the hazard); Kouche v. Farr, 317 Ga. App. 277, 279, 730 S.E.2d 45, 47 (2012) (holding that an invitee who slipped on a driveway had "equal knowledge of the perilous icy conditions").

43. 319 Ga. App. 421, 742 S.E.2d 141 (2012).

44. *Id.* at 422, 742 S.E.2d at 142.

45. *Id.* at 422 n.1, 742 S.E.2d at 142 n.1.

46. *Id.* at 421, 742 S.E.2d at 142.

47. *Id.* at 424, 742 S.E.2d at 143.

48. *Id.* The court distinguished

> *Brown v. Host/Taco Joint Venture*, [305 Ga. App. 248, 251, 699 S.E.2d 439, 443 (2010)] ([the] plaintiff admitted that grease spot on floor was not easily visible and therefore failed to establish that [the] defendant could have easily seen and removed grease prior to fall) [discussed in Griffeth & Morris, *supra* note 3, at 349-50 nn.55-58]; *Chastain v. Cf Georgia North Dekalb L.P.*, [256 Ga. App. 802, 802-04, 569 S.E.2d 914, 915-17 (2002)] (no evidence reasonable inspection would have discovered a "two and a half foot line of dribbled water" where [the] plaintiff testified that the water was not "easily visible"); *Lindsey v. Georgia Building Authority*, [235 Ga. App. 718, 720, 509 S.E.2d 749, 750-51 (1998)] (no inference of constructive knowledge where [the] plaintiff testified that single raised brick on the edge of the landing "was extremely difficult to see"); [and] *Rodriquez v. City of Augusta*, [222 Ga. App. 383, 384, 474 S.E.2d 278, 279 (1996)] ([the] plaintiff admitted that dangerous substance was not visible to the eye).

Samuels, 319 Ga. App. at 424, 742 S.E.2d at 143.

49. 322 Ga. App. 28, 743 S.E.2d 591 (2013).

the plaintiff slipped on a puddle of oil at a store in Loganville, Georgia.[50]

> [T]he evidence raised a factual question regarding whether store employees were in the immediate area of the oil puddle and could have easily seen it. Moreover, a factual question remain[ed] regarding whether the oil remained on the floor long enough that Kroger's employees should have discovered and removed it during a reasonable inspection. Notably, the evidence showed that Kroger had no set policy regarding regular inspections, and the store's employees had no specific time periods during which they regularly inspected the store aisles or swept [the] floors. Additionally, no evidence showed that any Kroger employee inspected or checked aisle five for at least [forty-five] minutes prior to Mr. Ramotar's fall.[51]

Cases often turn on the deposition testimony and affidavits obtained by the parties prior to summary judgment. For example, in *Hayward v. Kroger Co.*,[52] summary judgment for the store was affirmed when Kroger relied on deposition testimony of its store manager, as well as an affidavit from an assistant manager, to show Kroger's wet-floor policies and procedures on the date in question.[53] The plaintiff sought to introduce affidavits from an expert witness "in risk management for grocery stores generally," which the State Court of Gwinnett County refused to consider.[54] However, in *Parker v. All American Quality Foods, Inc.*,[55] the court of appeals reversed summary judgment for the store when the plaintiff "did not fall at the entrance of the store, and instead . . . 'retriev[ed] a shopping cart and walk[ed] past six checkout

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50. *Id.* at 28-31, 743 S.E.2d at 592, 594.

51. *Id.* at 31, 743 S.E.2d at 594. *Contra* H.J. Wings & Things v. Goodman, 320 Ga. App. 54, 56, 739 S.E.2d 64, 67 (2013) (reversing a denial of summary judgment for the premises owner on interlocutory appeal, determining the plaintiff did not show "the existence of a hazardous condition that caused her to fall"). Interestingly, the court in *H.J. Wings & Things* qualified in a footnote that although the plaintiff sought to rely on two depositions to show a hazardous condition, the deposition transcripts were not included in the appellate record. 320 Ga. App. at 57 n.2, 739 S.E.2d at 68 n.2.

52. 317 Ga. App. 795, 733 S.E.2d 7 (2012).

53. *Id.* at 795-96, 733 S.E.2d at 9-10.

54. *Id.* at 797, 733 S.E.2d at 10. The court also construed the "rule of self-contradictory testimony," see *Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27, 28, 343 S.E.2d 680, 682 (1986), against the plaintiff to "discount her later testimony to the effect that she did not know that the floor was wet as she entered the store." *Hayward*, 317 Ga. App. at 799, 733 S.E.2d at 11. But see *Bradley v. Winn-Dixie Stores, Inc.*, 314 Ga. App. 556, 724 S.E.2d 855 (2012), discussed in last year's survey, Griffeth & Morris, *supra* note 1, at 292-93 nn.41-43, which concerned an erroneous application of the *Prophecy Corp.* rule.

55. 318 Ga. App. 689, 734 S.E.2d 510 (2012).

stations' before falling."[56] A jury question existed because the store manager's deposition testimony was inconsistent and the plaintiff "and his companion both testified that signs were not posted and a mop had to be brought from the back of the store."[57]

The availability of video evidence continues to make a significant difference in a case's outcome, but the appellate courts usually defer to the trial court's findings on spoliation of evidence. In *Kroger Co. v. Walters*,[58] the court of appeals reversed a $2.3 million verdict for the plaintiff[59] for a slip and fall on a piece of banana, holding that the State Court of Gwinnett County abused its discretion in excluding testimony of the meat department manager, employed with the store for twenty-five years, who allegedly re-aimed the security camera at issue in the spoliation sanction; however, the court affirmed the trial court's finding of spoliation and its remedy of striking the defendant's answer, remanding the case for a new trial on the issues of causation, the claim for fees under O.C.G.A. § 13-6-11,[60] and damages.[61] The same panel of the court of appeals affirmed a jury verdict for the defendant when the plaintiff claimed error in the trial court's denial of a motion for sanctions based on the alleged spoliation of video evidence.[62] In *Powers v. Southern Family Markets of Eastman, LLC*,[63] the court of appeals rejected the plaintiff's contention "that [the store manager]'s actions in completing [an] incident report, taking pictures, and drawing a diagram of the incident scene immediately after the accident demonstrate[d] that [the store] was anticipating litigation."[64] Practitioners should take note that the store did not receive a spoliation notice from the plaintiff's attorney until approximately three months after the incident.[65]

In *Landings Ass'n v. Williams*,[66] the Georgia Supreme Court reversed the holding of the court of appeals discussed in this survey two years ago,[67] determining the record showed that the plaintiff "had equal

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56. *Id.* at 691, 734 S.E.2d at 512 (alteration in original) (quoting the trial court).

57. *Id.* at 692, 734 S.E.2d at 513.

58. 319 Ga. App. 52, 735 S.E.2d 99 (2012).

59. *See* Griffeth & Morris, *supra* note 1, at 293 n.49 (discussing, in last year's survey, the lower court's verdict).

60. O.C.G.A. § 13-6-11 (2010).

61. *Walters*, 319 Ga. App. at 59-61, 735 S.E.2d at 105-07.

62. Powers v. S. Family Mkts. of Eastman, LLC, 320 Ga. App. 478, 478, 740 S.E.2d 214, 216 (2013).

63. 320 Ga. App. 478, 740 S.E.2d 214 (2013).

64. *Id.* at 480, 740 S.E.2d at 217.

65. *Id.* at 479, 740 S.E.2d at 216.

66. 291 Ga. 397, 728 S.E.2d 577 (2012).

67. *See* Griffeth & Morris, *supra* note 3, at 349.

knowledge of the threat of alligators within the community."[68] Justice Melton wrote the majority opinion for the supreme court,[69] while Justices Carley, Hunstein, and Benham filed a dissent, citing a federal case from Alabama.[70] In a relatively short opinion, the court noted that the decedent was "aware that wild alligators were present around [t]he Landings and in the lagoons. Therefore, she had knowledge equal to [that of] [t]he Landings entities about the presence of alligators in the community."[71] Further, she "either knowingly assumed the risks of walking in areas inhabited by wild alligators or failed to exercise ordinary care by doing so."[72]

When the case returned to the court of appeals,[73] the entire court issued a somewhat fractured ruling reversing the State Court of Chatham County.[74] The court necessarily vacated its decision,[75] making the supreme court's judgment the judgment of the court of appeals, but reaffirmed its holdings in Divisions 2, 3, and 4 of its previous opinion.[76] Thus,

> [w]here there is evidence from which a jury could find that the defendant should have anticipated the presence of the wild animal and that it was reasonably foreseeable that its presence would render the premises unsafe for visitors, the defendant will not be entitled to judgment as a matter of law purely on the basis of the doctrine of animals *ferae naturae*.[77]

The plaintiff's complaint did not adequately state a claim for nuisance, and it remains to be seen whether the trial court will consider the depositions of certain experts, as that division of the court's previous opinion was not vacated.[78]

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68. 291 Ga. at 397, 728 S.E.2d at 579.

69. *Id.* at 397, 400, 728 S.E.2d at 579, 580.

70. *Id.* at 401 n.4, 402, 728 S.E.2d at 581 n.4, 581-82 (Benham, J., dissenting) (citing George v. United States, 735 F. Supp. 1524, 1535 (M.D. Ala. 1990) to support the proposition that "[the] appellant knew there were alligators in a recreational swimming pond did not mean [the] appellant was aware of the eleven-foot alligator that attacked him").

71. *Id.* at 399, 728 S.E.2d at 580 (majority opinion).

72. *Id.*

73. Landings Ass'n v. Williams, 318 Ga. App. 760, 736 S.E.2d 140 (2012).

74. *Id.* at 762, 736 S.E.2d at 142.

75. *See* Landings Ass'n v. Williams, 309 Ga. App. 321, 711 S.E.2d 294 (2011), *vacated*, 318 Ga. App. 760, 736 S.E.2d 140 (2012).

76. *Landings Ass'n*, 318 Ga. App. at 761-62, 736 S.E.2d at 141-42.

77. *Id.* at 761, 736 S.E.2d at 141 (emphasis added for style).

78. *Id.* at 761-62, 736 S.E.2d at 141.

Chief Judge Ellington wrote the court of appeals opinion with Judges Barnes, Phipps, and Miller concurring.[79] Judges Doyle, Andrews, and McFadden concurred specially.[80] Judge Andrews "disagree[d] with the . . . majority opinion to the extent . . . Division 2 of [the] prior decision . . . establishes the binding law of the case or law of the State of Georgia regarding . . . the doctrine of animals *ferae naturae*."[81] Judge McFadden "agree[d] with Judge Andrews that Division 2 . . . [was rendered] dicta. But, as [he had] concurred fully in [the] prior majority opinion and as the Supreme Court did not address the analysis in Division 2 . . . [he] continue[d] to agree with that analysis."[82] Thus, practitioners dealing with future wild animal attacks may not have seen the end of the court's application of this doctrine.

IV. MEDICAL MALPRACTICE

In the medical malpractice arena, the appellate courts continue to provide guidance where practitioners may perceive ambiguity in statutory construction and in application.[83] In *Dailey v. Abdul-Samed*,[84] the court of appeals held that merely being in the emergency room awaiting a transfer to a receiving hospital for hand surgery, following an initial consultation, does not automatically invoke O.C.G.A. § 51-1-29.5(c)'s[85] application of the heightened clear and convincing standard of proof for the plaintiff, and the lowered gross negligence standard of care for the defendants.[86] Interestingly, this opinion was written by Presiding Judge Miller, with Judge Branch concurring in judgment only,[87] and Judge Ray specially concurring to state that he disagreed

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79. *Id.* at 760, 762, 736 S.E.2d at 140, 142.

80. *Id.* at 762, 736 S.E.2d at 142.

81. *Id.* at 763, 736 S.E.2d at 142 (Andrews, J., concurring specially) (emphasis added for style).

82. *Id.* (McFadden, J., concurring specially).

83. *See, e.g.*, Aguilar v. Children's Healthcare of Atlanta, Inc., 320 Ga. App. 663, 663-64, 739 S.E.2d 392, 393-94 (2013) (noting that internal medicine and pediatric residency rotations through emergency departments for four of the last five years were not "engaged in the active practice of emergency pediatric medicine" for medical malpractice complaint affidavit qualification); Bacon Cnty. Hosp. & Health Sys. v. Whitley, 319 Ga. App. 545, 550, 737 S.E.2d 328, 332 (2013) (holding that a chiropractor is not in the same profession as a physical therapist and therefore not qualified to give expert testimony or an affidavit regarding alleged negligence); Postell v. Hankla, 317 Ga. App. 86, 87, 89, 728 S.E.2d 886, 888-89 (2012) (holding that the defense's expert medical doctor who did not teach midwives was not competent to testify as to a midwife's standard of care).

84. 319 Ga. App. 380, 736 S.E.2d 142 (2012).

85. O.C.G.A. § 51-1-29.5(c) (2000 & Supp. 2013).

86. *Dailey*, 319 Ga. App. at 386, 736 S.E.2d at 146.

87. *Id.*

that any question of fact remained as to the application of O.C.G.A. § 51-1-29.5(c).[88]

Regarding the statute of limitations for foreign objects left in a patient's body,[89] *Norred v. Teaver*[90] provides practitioners with a bright-line rule, pursuant to O.C.G.A. § 9-3-72. Overruling a prior line of cases that required an unintentional leaving behind of a foreign object, the court held that, pursuant to the plain language of the statute, "the limitation period begins to run upon the discovery of an object not originating in the person's body that is caused or allowed to remain in the body," regardless of whether the object was left intentionally or unintentionally.[91]

V. CONCLUSION

As suggested in this survey two years ago,[92] the effects of legislative "tort reform" continue to surface in the opinions of our appellate courts.[93] However, the most interesting cases are those that address issues of first impression. Divisions among the different panels of the court of appeals continue to evolve, even outside of the civil context,[94] and will perhaps become even more interesting as the newest members of the courts author more opinions.

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88. *Id.* at 386, 736 S.E.2d at 147 (Ray, J., concurring specially).

89. O.C.G.A. § 9-3-72 (2007).

90. 320 Ga. App. 508, 740 S.E.2d 251 (2013).

91. *Id.* at 512-13, 740 S.E.2d at 253-54. For a thorough review of the five-year medical malpractice statute of repose under O.C.G.A. § 9-3-71, see *Macfarlan v. Atlanta Gastroenterology Associates, Inc.*, 317 Ga. App. 887, 891, 732 S.E.2d 292, 296 (2012).

92. *See* Griffeth & Morris, *supra* note 3, at 358.

93. *See, e.g.*, Hickory Lake, L.P. v. A. W., 320 Ga. App. 389, 739 S.E.2d 836 (2013); Six Flags Over Ga. II, L.P. v. Martin, 320 Ga. App. 52, 743 S.E.2d 25 (2013); Accor N. Am., Inc. v. Todd, 318 Ga. App. 317, 733 S.E.2d 846 (2012) (all interpreting Couch v. Red Roof Inns, Inc., 291 Ga. 359, 729 S.E.2d 378 (2012)).

Of particular note, the decision in *Six Flags Over Georgia II, L.P.* reversed the State Court of Cobb County's granting of the plaintiff's motion in limine to prevent the defendants from seeking an apportionment of the damages. 320 Ga. App. at 52, 743 S.E.2d at 25. However, in a subsequent verdict for the plaintiff, the Cobb County jury apportioned 92% of the $35 million award to Six Flags Over Georgia. Katheryn Hayes Tucker, *Six Flags Hit Hard By Verdict*, FULTON CNTY. DAILY REPORT, Nov. 28, 2013, at 1. The four attackers, who were employees at Six Flags, received the remaining eight percent. *Id.*

94. *See* Alyson M. Palmer, *4-3 Splits On Police Stops Spur Calls For Review*, FULTON CNTY. DAILY REPORT, Aug. 8, 2013, at 1.

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