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Torts

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Torts

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The Georgia Supreme Court's torts decisions of the June 1, 2020, through May 31, 2021, survey period ran the gamut.[1] Dog bite liability? Check. Proximate cause? Check. Negligent misrepresentation by a sperm bank? Alas, check. And apportionment of fault? Check, check, check.

Two themes emerge from the cases of the past term. First, in the apportionment setting, one sees the court's commitment to textualism and its readiness to interpret Georgia's apportionment statutes as abrogating longstanding common-law doctrines. Second—and, not surprisingly, this is most apparent in the court's business torts jurisprudence—one sees a deference to business interests: this is a business-friendly court. Of course, many cases fall outside either of these themes.

But enough summary. Let's dive in.

I. APPORTIONMENT CASES

In its 2020–2021 term, the Georgia Supreme Court continued to wrestle with questions regarding apportionment of damages. In its three major apportionment cases, the court also proved willing to interpret Georgia's apportionment statutes broadly and to find the statute abrogates many well-established common-law doctrines recognized in Georgia's decisional law.

A. Apportionment in Strict Products Liability Cases: Johns v. Suzuki Motor of America, Inc.

In the first of the three apportionment cases, the Georgia Supreme Court held in *Johns v. Suzuki Motor of America, Inc*,[2] that the plain

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1. For an analysis of last year's torts law during the prior Survey period, *see* Jarome E. Gautreaux, *Torts*, 72 MERCER L. REV. 299 (2020).

2. 310 Ga. 159, 850 S.E.2d 59 (2020).

language of Official Code of Georgia Annotated section 51-12-33(a)[3] requires apportionment of damages in strict products liability cases.[4] In other words, principles of comparative fault apply to products liability actions: under O.C.G.A. § 51-12-33, juries must apportion fault between defendants whose products are defective and plaintiffs whose fault contributed to their injuries.[5]

In *Johns*, the plaintiff suffered serious injuries when the front brake on his Suzuki motorcycle suddenly failed.[6] He sued the manufacturer and its American distributor[7] alleging both a design defect and negligence.[8] Specifically, he alleged that a defect in the front master brake cylinder resulted in a misdirected flow of brake fluid that ultimately caused the motorcycle's sudden brake failure. However, the plaintiff also admitted that he had never changed the brake fluid in the motorcycle, despite his having owned it for eight years and despite instructions in the owner's manual to replace the brake fluid every two years.[9]

The jury agreed the brakes were defective but also found the plaintiff 49% at fault. Accordingly, the trial court reduced his recovery. The plaintiff appealed on the ground that because his claim was based on strict products liability, damages should not have been reduced based on apportionment of fault under O.C.G.A. § 51-12-33. The court of appeals affirmed the trial court's ruling on apportionment, and the plaintiff appealed.[10]

In affirming the decision of the court of appeals, the Georgia Supreme Court relied on a plain meaning interpretation of Georgia's apportionment statute.[11] O.C.G.A. § 51-12-33(a), which was enacted in 2005, provides that:

> Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the

3. O.C.G.A. § 51-12-33(a) (2005).

4. *Johns*, 310 Ga. at 159, 850 S.E.2d at 60.

5. O.C.G.A. § 51-12-33.

6. *Id.* at 159, 850 S.E.2d at 60–61.

7. His wife brought a separate claim for loss of consortium. *Id.* at 159, 850 S.E.2d at 61. However, that claim is not relevant here.

8. The negligence claims were not relevant to the court's holding. Additionally, the parties raised various other arguments, none of which were relevant to the court's ruling on apportionment. *Id.* at 161, 850 S.E.2d at 62 n.2 (describing other claims and arguments).

9. *Id.* at 161, 850 S.E.2d at 61.

10. *Id.* at 161, 850 S.E.2d at 61–62.

11. *Id.* at 161, 850 S.E.2d at 61–62.

> percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.[12]

The core of the court's reasoning was simple. A products liability action is necessarily one for "injury to person," and the apportionment statute does not limit the kinds of actions to which it applies.[13] Although the court had once referred to the statute as "codifying the doctrine of comparative negligence," nothing in the statute limits its application to classic negligence cases.[14] Accordingly, the court concluded that a "strict products liability claim falls comfortably within the statute's textual ambit."[15]

In so ruling, the supreme court held that Georgia's broad apportionment statute supplants both prior state decisional law and a longstanding common law rule barring use of a plaintiff's negligence as a defense in a products liability action.[16] Within Georgia, a long line of court of appeals and supreme court precedent—including some precedent post-dating an earlier iteration of Georgia's apportionment statute—held that strict products liability claims are not subject to apportionment based on a plaintiff's potential fault.[17] However, the court disregarded these cases because: (i) they pre-dated the current apportionment statute;[18] (ii) the current apportionment statute under which the cases were decided is materially different from Georgia's prior apportionment statute;[19] and (iii) decisions post-dating either iteration of the apportionment statute generally had not considered the effect of the statute.[20]

Similarly, although the Georgia Supreme Court acknowledged the longstanding common law rule that a plaintiff's negligence cannot be a defense in a products liability case,[21] it held the statute abrogated the

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12. O.C.G.A. § 51-12-33(a) (2021).

13. *Johns,* 310 Ga. at 166–67, 850 S.E.2d at 65.

14. *Id.* at 162, 850 S.E.2d at 62 (quoting Zaldivar v. Prickett, 279 Ga. 589, 589, 774 S.E.2d 688, 693 (2015)).

15. *Id.* at 162, 850 S.E.2d at 62.

16. *Id.* at 163–64, 850 S.E.2d at 63–64.

17. *Id.* at 163, 850 S.E.2d at 63.

18. *Id.* at 164, 850 S.E.2d 63–64.

19. *Id.* at 165, 850 S.E.2d at 64 n.6.

20. *Id.* at 166, 850 S.E.2d at 64–65 (discussing Hernandez v. Crown Equip. Co., 649 Fed. App'x. 726 (11th Cir. 2016)).

21. *Id.* at 163, 850 S.E.2d at 63 (citing Georgia cases relying on the Restatement rule that contributory negligence is not a defense to strict products liability).

common law rule.[22] The court also observed that products liability law initially developed when most jurisdictions still recognized the doctrine of contributory negligence, under which a plaintiff's negligence, however slight, would have been a total bar to recovery.[23] Barring products liability defendants from asserting a plaintiff's negligence makes far more sense in the contributory negligence setting than in the comparative negligence setting. And as the court pointed out, the drafters of the Third Restatement recognized that "a strong majority of jurisdictions apply the comparative responsibility doctrine to products liability actions."[24]

The ruling in *Johns* was no surprise. The supreme court had already interpreted the apportionment statute broadly and in derogation of a common law rule by allowing for apportionment in cases involving intentional torts.[25] Litigants should continue to expect broad interpretations of O.C.G.A. § 51-12-33.

B. Apportionment and Notice of Non-Party Defendants in Respondeat Superior Actions: Atlanta Women's Specialists, LLC v. Trabue

In the second case construing O.C.G.A. § 51-12-33, the court in *Atlanta Women's Specialists, LLC v. Trabue*[26] held that Georgia's apportionment statute requires a defendant to file notice of non-party fault when the defendant "wants to reduce a potential damages award against him by having the jury apportion damages between him and his defendant employer based on an assessment of the fault of a nonparty co-employee."[27]

This consolidated case involved medical malpractice.[28] The plaintiff sued Atlanta Women's Specialists (AWS) as well as a physician who was an AWS employee (the defendant physician). The plaintiff did not allege independent negligence by AWS but did allege negligence by the defendant physician and a non-party physician also employed by AWS. The plaintiff sought recovery against AWS on the basis of vicarious liability. At the close of evidence, defense counsel, who represented both

22. *Id.* at 164-65, 850 S.E.2d at 63–64. "There is no question that statutes can displace decisional law." *Id.*

23. *Id.* at 170, 850 S.E.2d at 67 n.9.

24. *Id.* at 170, 850 S.E.2d at 67 n.9 (quoting RESTATEMENT (THIRD) OF TORTS § 17 cmt. a.).

25. *See* Couch v. Red Roof Inns, Inc., 291 Ga. 359, 729 S.E.2d 378 (2012).

26. 310 Ga. 331, 850 S.E.2d 748 (2020).

27. *Id.* at 339, 850 S.E.2d at 755. The court also ruled on a procedural issue not directly relevant to the development of tort law in Georgia. *Id.* at 332–33, 850 S.E.2d at 751–52.

28. *Id.* at 331–32, 850 S.E.2d at 751.

AWS and the defendant physician, asked the trial court to apportion damages between the defendant physician and AWS based on the percentages of fault of the defendant physician and the non-party physician. The trial court refused, finding that the defendants had not provided advance notice, as required by O.C.G.A. § 51-12-33(d),[29] of their contention that the non-party physician was wholly or partially at fault. However, after the verdict, the trial court granted the defendants' motion for a new trial on the apportionment issue, accepting the defendants' contention that the trial court should have required the jury to assess the relative percentages of fault of the defendant physician and the non-party physician. The Georgia Court of Appeals reversed the trial court's ruling on apportionment, finding, *inter alia*, that the apportionment statute required the defendants to provide advance notice of non-party fault in vicarious liability cases.[30]

The Georgia Supreme Court agreed with the court of appeals and relied closely on the text of the apportionment statute. It first noted that the statute distinguishes between liability and fault and that a non-party can be at fault but cannot be liable.[31] It next determined that O.C.G.A. § 51-12-33(b) did not apply.[32] That section, which requires fault-based apportionment among liable parties, did not apply because it does not concern non-parties like the non-party physician.[33] Instead, subsection (d), which concerns allocation of non-party fault, would apply.[34] Because the defendant physician wished to have the jury apportion fault between himself and the non-party physician, subsection (d)'s notice provisions would apply before the jury would be permitted to apportion fault.[35] The defendant physician had not provided notice that the non-party physician was at fault, so he was not entitled to have the jury apportion fault between himself and the non-party physician (liability for which ultimately would pass on to AWS).[36]

In dissent, Justice Bethel agreed that, absent notice, the jury could not apportion fault between the defendant physician and the non-party

29. O.C.G.A § 51-12-33(d) (2005).

30. *Id.* at 333, 850 S.E.2d at 752 (describing ruling by Georgia Court of Appeals).

31. *Id.* at 339–40, 850 S.E.2d at 755–56.

32. *Id.* at 339, 850 S.E.2d at 755.

33. *Id.* at 340, 850 S.E.2d at 756.

34. *Id.* at 341, 850 S.E.2d at 756.

35. *Id.* at 343, 850 S.E.2d at 758.

36. *Id.* at 342, 850 S.E.2d at 758. Because vicarious liability (of whichever physician) was the sole ground for AWS's liability, the court first assumed without deciding that imputed negligence based on *respondeat superior* was subject "to fault-based apportionment . . . when the negligent acts of more than one employee are at issue." *Id.* at 342, 850 S.E.2d at 757 n.6.

physician.[37] However, the dissent noted that AWS was a named party and that the non-party physician's fault was imputed to AWS under the doctrine of *respondeat superior*.[38] Differently put, Justice Bethel determined that AWS was itself at fault through the fault of the non-party physician and that, therefore, the jury could apportion fault between AWS and the defendant physician.[39] Finally, Justice Bethel determined there was no statutory prohibition on apportioning fault between AWS and the defendant physician.[40]

C. Apportionment and Georgia's Respondeat Superior Rule: Quynn v. Hulsey

Finally, in *Quynn v. Hulsey*,[41] the Georgia Supreme Court found that O.C.G.A. § 51-12-33 abrogated Georgia's common law *Respondeat Superior* Rule.[42] As with the other apportionment cases, the decision rested largely on a textual analysis of the statute, and especially of the statutory term "fault."[43]

In *Quynn*, a wrongful death and personal injury case, the plaintiff's decedent was struck and killed by a truck owned by a corporation and driven by an employee of the corporation. The administrator of the decedent's estate sued the driver and the corporation, asserting that the corporation was liable for its employee's tort under the doctrine of *respondeat superior* and that the corporation was independently liable under theories of negligent entrustment, hiring, training, and supervision. The trial court granted the corporation summary judgment on the plaintiff's independent negligence claims (entrustment, hiring, etc.) and a claim for punitive damages. After trial, the jury found the employee and corporation 50% at fault and the decedent 50% at fault, which meant the plaintiff recovered nothing.[44]

On appeal, the plaintiff-appellant argued that O.C.G.A. § 51-12-33 requires the finder of fact to consider the fault of the employee and the fault of the corporation separately and that, therefore, the trial court erred in granting summary judgment for the corporation on the independent negligence claims (entrustment, hiring, supervision, etc.).

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37. *Id.* at 342–43, 850 S.E.2d at 757-58 (Bethel, J., dissenting).

38. *Id.* at 343–44, 850 S.E.2d at 758.

39. *Id.* at 344, 850 S.E.2d at 758.

40. *Id.* at 344, 850 S.E.2d at 758.

41. 310 Ga. 473, 850 S.E.2d 725 (2020).

42. *Id.* at 473, 850 S.E.2d at 727.

43. *Id.* at 475–78, 850 S.E.2d at 728–30 (analyzing statutory term "fault").

44. *Id.* at 473–74, 850 S.E.2d at 727 (citing O.C.G.A § 51-12-33(g) (2021) (denying plaintiff any recovery when plaintiff is at least 50% at fault)).

Relying on Georgia's *Respondeat Superior* Rule, the court of appeals rejected the plaintiff's argument.[45]

Thus, the entire issue before the Georgia Supreme Court concerned whether the *Respondeat Superior* Rule could be reconciled with the language of the apportionment statute.[46] The court of appeals held that the two could be reconciled, but the Georgia Supreme Court disagreed and held that the *Respondeat Superior* Rule, a doctrine in Georgia decisional law, was abrogated by O.C.G.A. § 51-12-33.[47]

Understanding the court's ruling requires familiarity with the *Respondeat Superior* Rule. The doctrine of *respondeat superior* is familiar to every first-year law student: an employer can be liable for the negligence of an employee acting within the scope of employment. For example, Domino's would be liable for damages from an accident caused by a negligent delivery person while delivering pizzas. However, many plaintiffs injured by the actions of a company's employee seek recovery from the company based not only on *respondeat superior*, which requires proof of the employee's negligence while working, but also on the company's own independent negligence. For example, Domino's may have been negligent in hiring or training its drivers. The company might be liable under either legal theory—*respondeat superior* or independent negligence—but in either case, the company would be responsible for the plaintiff's damages only once.

Georgia's *Respondeat Superior* Rule applies to situations in which a plaintiff seeks recovery against a company under theories of *respondeat superior* and of independent negligence.[48] The doctrine provides that:

> [I]f a defendant employer concedes that it will be vicariously liable under the doctrine of respondeat superior if its employee is found negligent, the employer is entitled to summary judgment on the plaintiff's claims for negligent entrustment, hiring, training, supervision, and retention, unless the plaintiff has also brought a valid claim for punitive damages against the employer for its own independent negligence.[49]

Articulated frequently by the Georgia Court of Appeals but never formally adopted by the Georgia Supreme Court, the *Respondeat Superior* Rule is designed to avoid prejudice to the employer in the eyes

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45. *Id.* at 474, 850 S.E.2d at 727.

46. *Id.* at 474, 850 S.E.2d at 727.

47. *Id.* at 482, 850 S.E.2d at 732–33.

48. *Id.* at 474, 850 S.E.2d at 727.

49. *Id.* at 474, 850 S.E.2d at 727–28 (quoting Hosp. Auth. of Valdosta v. Fender, 342 Ga. App. 13, 21, 802 S.E.2d 346, 354 (2017)).

of the jury because "the employer would be liable for the employee's negligence under *respondeat superior*, allowing claims for negligent entrustment, hiring, [training] and retention would not entitle the plaintiff to a greater recovery, but would merely serve to prejudice the employer."[50] Notably, this rationale does not speak directly to the merits of an independent negligence claim. In *Quynn*, the trial court relied on the *Respondeat Superior* Rule: (i) in its grant of summary judgment to the defendant; and (ii) in its refusal to allow the jury to separate the fault of the employee from any independent fault of the company.[51]

In determining whether the *Respondeat Superior* Rule was consistent with the apportionment statute, the Georgia Supreme Court turned to the language of the statute.[52] It focused specifically on the requirement that a jury apportioned damages among persons who are liable "according to the percentage of their fault," with fault referring to a "breach of a legal duty that the defendant owes . . . that is a proximate cause of [the plaintiff's] injury."[53] It then reasoned that claims for negligent hiring, entrustment, etc. are based on alleged employer fault, and fault that is distinct from the employee's negligence.[54] The court therefore concluded that the apportionment statute requires consideration of this distinct fault.[55] Because the *Respondeat Superior* Rule would preclude the consideration of the employer's independent negligence in the apportionment of fault, the rule is "inconsistent with the plain language of the apportionment statute" and therefore abrogated by the statute.[56]

By so holding, the court rejected several arguments raised by the company and by the dissenting justice.[57] Among other things, the majority[58] held that:

> (1) Evidence of an employer's independent fault is not automatically inflammatory or unfairly prejudicial in cases in which the employer

50. *Id.* at 474, 850 S.E.2d at 728 (quoting MasTec North Am. v. Wilson, 325 Ga. App. 865, 865, 755 S.E.2d 257, 259 (2014)).

51. *Id.* at 474, 850 S.E.2d at 727.

52. *Id.* at 481, 850 S.E.2d at 732.

53. *Id.* at 476–77, 850 S.E.2d at 728–29 (citing O.C.G.A. § 51-12-33(b)).

54. *Id.* at 477, 850 S.E.2d at 729.

55. *Id.* at 477, 850 S.E.2d at 729.

56. *Id.* at 477, 850 S.E.2d at 729.

57. *Id.* at 481-82, 850 S.E.2d at 731-32.

58. *Id.* at 485–86, 850 S.E.2d at 734–35. In my opinion, the strongest point in the dissent is that other jurisdictions have consistently shown that if you are imputing employee's fault to the employer, then you are counting fault twice in imputing fault for independent negligence. *Id.*

> concedes that it will be vicariously liable if its employee was negligent;[59]
>
> (2) A claim that an employer was negligent is divisible from a claim that an employee acting in the scope of employment was negligent and, therefore, both claims are "capable of being assigned percentages of fault:" "The evidence required to prove the employer was negligent would not be the same as the evidence required to prove that the employee was negligent, and so the claims are not duplicative to that extent."[60] Here, the court clarified the meaning and scope of *FDIC v. Loudermilk*.[61] Although the dissent relied on *Loudermilk* to show the employer's and employee's negligence were indivisible,[62] the supreme court held that *Loudermilk* supports the notion that § 51-12-33 "shifted the paradigm from damages analysis based on injury to damages analysis based on fault, requiring damages to be apportioned in cases where separate negligent acts by separate persons combined to cause a single injury."[63]
>
> (3) The state legislature need not have expressed any direct intention to abrogate the *Respondeat Superior* Rule. Although § 51-12-33(e) required express statutory abrogation of any "defenses or immunities which currently exist," the court concluded that (a) the *Respondeat Superior* Rule is not a defense or immunity, because it does not allow an employer to avoid liability; and (b) the current existence in the common law of a rule never adopted by the Georgia Supreme Court is doubtful.[64]

As was true in the other apportionment cases, the court relied almost solely on a plain meaning analysis of the statute and demonstrated a strong readiness to find the statute abrogated longstanding common-law doctrines. The court's conclusions in *Quynn* and *Trabue* may be more plaintiff-friendly than in *Johns*; the common thread is the court's broad reading of the apportionment statute.

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59. *Id.* at 478, 850 S.E.2d at 730 ("The evidence of the employer's fault is neither irrelevant nor required to be excluded in all cases as unfairly prejudicial.").

60. *Id.* at 479, 850 S.E.2d at 730.

61. *Id.* at 480, 850 S.E.2d at 731 (citing *Loudermilk*, 305 Ga. 588, 826 S.E.2d 116 (2019)).

62. *Id.* at 484, 850 S.E.2d at 734 (McMillian, J., dissenting).

63. *Id.* at 482, 850 S.E.2d at 732 n.7.

64. *Id.* at 481, 850 S.E.2d at 731–32.

II. BUSINESS TORTS

Many cases sit at the intersection of tort and contract law, and business torts frequently fall into this category. This year, business torts played only a minor role in the Georgia Supreme Court's jurisprudence.[65]

In *Global Payments, Inc. v. InComm Financial Services, Inc.*,[66] the Georgia Supreme Court clarified the scope of the negligent misrepresentation tort in the credit and debit card processing setting.[67] The plaintiff was an issuer of pre-paid debit and credit cards (Vanilla Visa), and the defendant was a financial data payment processor. Financial data payment processing companies provide merchants with technology that allows them to accept card payments and communicate with card networks and issuers. In this particular case, thieves purchased Vanilla Visa cards, made purchases with the cards, then initiated counterfeit electronic reversal transactions (requests for refunds). These reversal transactions were at different merchants from those where the initial purchases took place. Ultimately, the plaintiff lost more than $1,500,000 from this scheme.[68]

The defendant financial data services processor was not part of the thieves' fraudulent scheme, but the plaintiff sued the defendant on a theory of negligent misrepresentation. Specifically, the plaintiff alleged that the defendant should have known that the reversal transactions were invalid because, to put it simply, the numbers transmitted as part of the reversal transactions did not match the numbers submitted regarding the original purchases.[69]

The Georgia Supreme Court held that the plaintiff did not state a claim for negligent misrepresentation under these circumstances, as the basis for the ruling was simple: the defendant made no false representation as required by the tort.[70] Its network accurately communicated data and numbers, and it did not change that data in any

65. A third case, Geico Indemnity Co. v. Whiteside, 311 Ga. 346, 857 S.E.2d 657 (2021), sat at the intersection of tort and contract law. In *Whiteside*, the Georgia Supreme Court answered three certified questions posed by the United States Court of Appeals for the Eleventh Circuit. *Id.* All of the questions concerned, directly or indirectly, the parameters of Georgia's tort claim for bad faith refusal to settle. *Id.* In my view, the court's analysis of the three questions was highly dependent on the specific facts of the certified case, so *Whiteside*'s value as part of a survey is quite limited.

66. 308 Ga. 842, 843 S.E.2d 821 (2020).

67. *Id*. at 842, 843 S.E.2d 822.

68. *Id.* at 843, 843 S.E.2d at 823.

69. *Id.* at 842–44, 843 S.E.2d at 822–23.

70. *Id*. at 845–46, 843 S.E.2d at 824.

way.[71] Under such circumstances, there was no misrepresentation.[72] According to the court, a financial data services processor would only detect the thieves' activity by comparing the numbers from the original transactions with those from the reverse transactions, but the court determined that the plaintiff did not assert the defendant had any common law or statutory duty to undertake such a comparison.[73] The accurate transmission of numbers—even if an examination of those numbers would show theft—did not constitute misrepresentation.[74] One questions the future of claims like that raised by the plaintiff: surely the thieves' conduct would be foreseeable to financial data service processors, and surely technology allows for the creation of safeguards against such thefts. Perhaps negligent misrepresentation is the wrong claim, but one should expect additional claims in the future.

A second case, *Bowden v. The Medical Center, Inc.*,[75] concerned claims of both negligent misrepresentation and fraud.[76] In *Bowden*, the Georgia Supreme Court clarified that a hospital cannot be liable for fraud or negligent misrepresentation merely because it relies on its "chargemaster rate" in perfecting hospital liens.[77] This is so even if (a) most patients pay considerably less than the chargemaster rate, and (b) the chargemaster rate ultimately is found to be unreasonable.[78] The court's conclusion was based on its reading of O.C.G.A. § 44-14-470[79] and § 44-14-471,[80] which concern the procedures for perfecting hospital liens.[81] This ruling provides significant protection to hospitals and far less to consumers.

III. TORTS GRAB BAG

Finally, the court decided a handful of cases that lack subject matter companions in the 2020–2021 term.

71. *Id.* at 845, 843 S.E.2d at 824.

72. *Id.* at 845, 843 S.E.2d at 824.

73. *Id.* at 846, 843 S.E.2d at 824–25.

74. *Id.* at 846, 843 S.E.2d at 825.

75. 309 Ga. 188, 845 S.E.2d 555 (2020).

76. *Id.* at 188–89, 845 S.E.2d at 557. The case also raised questions about class certification and a claim under Georgia's RICO statute, but those issues are beyond the scope of the torts update. *Id.* at 189, 845 S.E.2d at 557.

77. *Id.* at 201–02, 845 S.E.2d at 565.

78. *Id.* at 201, 845 S.E.2d at 565.

79. O.C.G.A. § 44-14-470 (2021).

80. O.C.G.A. § 44-14-471 (2021).

81. *Bowden*, 309 Ga. at 200–02, 845 S.E.2d at 564–65.

A. Scienter and Dog Bite Cases: S&S Towing & Recovery, Ltd. v. Charnota

The Georgia Supreme Court in *S & S Towing & Recovery, Ltd. v. Charnota*[82] assessed a question of constitutional law: whether Georgia's dog bite statute violates the Fourteenth Amendment's procedural due process protections by creating an irrebuttable presumption that certain unrestrained dogs are vicious.[83] However, in answering the constitutional question, the Georgia Supreme Court clarified the ambit of § 51-2-7,[84] Georgia's "dog bite" liability statute.[85]

In *S & S Towing*, the plaintiff was walking his leashed dog when another dog, which belonged to the defendant, attacked the plaintiff and his dog seriously injuring the plaintiff and killing his dog. At the time of the attack, the defendant's dog had escaped from the defendant's property and, in violation of the county code, was not on a leash or otherwise restrained. The plaintiff sued, claiming, *inter alia*, that the defendant was liable under Georgia's civil dog bite statute.[86]

The dog bite statute, O.C.G.A. § 51-2-7, provides that:

> A person who owns or keeps a vicious or dangerous animal of any kind and who, by careless management or by allowing the animal to go at liberty, causes injury to another person who does not provoke the injury by his own act may be liable in damages to the person so injured. *In proving vicious propensity, it shall be sufficient to show that the animal was required to be at heel or on a leash by an ordinance . . . and the said animal was at the time of the occurrence not at heel or on a leash.*[87]

It was undisputed that, at the time of the incident, the defendant's dog was not at heel or on a leash as required by county statute. The defendant argued that the second sentence of O.C.G.A. § 51-2-7 created an irrebuttable presumption of viciousness and argued that such an irrebuttable presumption violated the defendant's right to procedural due process.[88]

In deciding the constitutional issue, the court clarified the meaning and scope of the dog bite statute.[89] Tracing the history of the statute, the

82. 309 Ga. 117, 844 S.E.2d 730 (2020).
83. *Id.* at 118, 844 S.E.2d at 732.
84. O.C.G.A. § 51-2-7 (2021).
85. *S & S Towing,* 309 Ga. at 117, 845 S.E.2d at 731.
86. *Id.* at 117–18, 844 S.E.2d at 732.
87. O.C.G.A. § 51-2-7 (emphasis added).
88. *Id.* at 117–19, 844 S.E.2d at 732–34.
89. *Id.* at 117, 844 S.E.2d at 731.

court noted that its first sentence had existed in various forms since 1863 and that the statute codified the old common law rule regarding dog bites.[90] The common law rule required the plaintiff to show "not only that an animal was vicious or dangerous, but also that the owner knew this fact."[91] The *scienter* requirement—meaning the requirement that the owner knew of the animal's vicious propensities—was considered the gist of the action.[92] Moreover, although the statute does not refer directly to *scienter,* the court has consistently interpreted the statute to require the owner's knowledge.[93]

The second sentence of the statute was added in 1985.[94] The court read that sentence as abrogating or narrowing the common law rule in one respect: the second sentence "displaces the common law presumption that a dog is a harmless species and instead defines such restrained animals as 'vicious.'"[95] However, this limited displacement of the common law rule did not extend to the *scienter* requirement.[96] In other words, a plaintiff must still prove *scienter* as regards a dog's vicious propensities. The court held that a plaintiff may prove *scienter* either "by showing that the owner had knowledge of the animal's vicious propensity as defined by the common law [sentence one of the statute] or by showing that the owner knew that the dog was unrestrained at the time of the injury [sentence two of the statute]."[97] Moreover, the plaintiff must prove all other elements of the statute.[98]

Upon clarifying that the second sentence of the statute does not eliminate the common law *scienter* requirement, the court concluded the statute did not violate procedural due process.[99] The court held that, at most, the second sentence created a rebuttable presumption that still allowed an owner to prove he was unaware his dog was unrestrained or unleashed in violation of local law.[100] The court further concluded that the legislature had a rational basis for creating an additional means for

90. *Id.* at 120–21, 844 S.E.2d at 734.

91. *Id.* at 121, 844 S.E.2d at 734.

92. *Id.* at 121, 844 S.E.2d at 734.

93. *Id.* at 121, 844 S.E.2d at 734 ("[A]lthough . . . [the dog bite statute does not refer to] the owner's knowledge of the animal's vicious or dangerous nature, we have nevertheless concluded that *scienter* was carried over from the common law as an essential element of a claim . . . ."). *Id.* at 121, 844 S.E.2d at 734.

94. *Id.* at 121, 844 S.E.2d at 734.

95. *Id.* at 121–22, 844 S.E.2d at 734.

96. *Id.* at 122, 844 S.E.2d at 734–35.

97. *Id.* at 122, 844 S.E.2d at 734–35.

98. *Id.* at 122, 844 S.E.2d at 735.

99. *Id.* at 122, 844 S.E.2d at 735.

100. *Id.* at 122–23, 844 S.E.2d at 735

proving viciousness.[101] Accordingly, the court held the statute constitutional.[102] Notably, in so doing the court either overruled or limited a series of Georgia Court of Appeals cases suggesting an owner's knowledge was irrelevant when a plaintiff could prove a dog was unlawfully unleashed or not at heel at the time of the incident.[103]

B. Life Itself Is Never an Injury?: Norman v. Xytex Corporation

What happens when a sperm donor isn't the person you thought he was and the sperm bank either knew or should have known it? In *Norman v. Xytex Corp.*,[104] the Georgia Supreme Court clarified its refusal to allow actions for wrongful birth: while claims "arising from the very existence of the child are barred, . . . claims arising from specific impairments caused or exacerbated by [a defendant's] alleged wrongs may proceed."[105]

Norman's facts should give pause to any sperm bank patron. The plaintiffs purchased sperm from the defendant, a sperm bank. The sperm donor was held out by the sperm bank as one of its best donors, a Ph.D. candidate with a 160 IQ and no criminal or mental health history. The defendant further represented that it carefully screened donors; confirmed the accuracy of donors' information; required donors to provide medical updates; and informed purchasers of any new and medically significant information.[106]

According to the plaintiff's allegations, the defendant performed very little screening on the sperm donor and even encouraged him to exaggerate his education and IQ. As it turned out, the donor in question had no higher education degrees, a substantial arrest record, a history of hospitalization for mental illness, and diagnoses of psychotic schizophrenia and narcissistic personality disorder.[107]

Sadly, the plaintiffs' child conceived with the purchased sperm suffered from several physical and mental conditions, including an inheritable blood disorder. He suffered from suicidal and homicidal ideation that required extended hospitalization, regular therapy, and several medications, including anti-psychotic medications.[108]

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101. *Id.* at 123, 844 S.E.2d at 735–36.
102. *Id.* at 123–24, 844 S.E.2d at 736.
103. *Id.* at 123, 844 S.E.2d at 735 n.6.
104. 310 Ga. 127, 848 S.E.2d at 835 (2020).
105. *Id.* at 128, 848 S.E.2d at 837.
106. *Id.* at 128, 848 S.E.2d at 837.
107. *Id.* at 128–29, 844 S.E.2d at 837–38.
108. *Id.* at 129, 844 S.E.2d at 838.

Upon learning through internet searches about the real attributes of the sperm donor in question, the plaintiffs brought suit on a variety of theories sounding in both tort and contract. The defendant argued the plaintiffs' claims were essentially "wrongful birth" claims barred under Georgia common law as violative of the public policy. With one exception, the trial court agreed, finding that the claims were for "wrongful birth camouflaged as some other tort."[109] Relying on the Georgia Supreme Court's opinions in *Etkind v. Suarez*,[110] and *Atlanta Obstetrics & Gynecology Group v. Abelson*,[111] the Georgia Court of Appeals agreed with the trial court and affirmed the dismissal of the plaintiff's claims.[112]

The Georgia Supreme Court held that the court of appeals read *Abelson* too broadly.[113] The court agreed with the core principle of *Abelson*: namely, damages that categorize life as the injury are not cognizable.[114] Therefore, to the extent the plaintiffs' claims "depended on life as an injury," the claims were properly dismissed.[115]

However, the court also turned to a line of cases recognizing that some injuries that predate a child's birth[116]—even a child's conception[117]—are compensable, because they do not depend on characterizing the child's life as an injury. It then determined that some of the plaintiffs' damages did not necessarily rely on the characterization of life itself as the legal injury.[118] For example, the defendant's alleged failure to update the plaintiffs on medically significant information concerning the sperm donor may have exacerbated pain and other symptoms suffered by the child; indeed, some of these symptoms might have been mitigated had the plaintiffs known the truth about the donor's medical history.[119] Similarly, some of the defendant's misrepresentations may have lead the plaintiffs to pay more for the sperm than it was really worth.[120]

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109. *Id*. at 129–30, 848 S.E.2d at 838.

110. 271 Ga. 352, 519 S.E.2d 210 (1999).

111. 260 Ga. 711, 398 S.E.2d 577 (1990).

112. *Norman*, 310 Ga. at 129–30, 848 S.E.2d at 838 (describing ruling of court of appeals).

113. *Id.* at 138, 848 S.E.2d at 844.

114. *Id*. at 132–33, 848 S.E.2d at 840.

115. *Id*. at 133, 848 S.E.2d at 841.

116. *Id*. at 135, 848 S.E.2d at 842 (citing cases allowing causes of action for prenatal injuries).

117. *Id*. at 134–35, 848 S.E.2d at 841–42 (citing McAuley v. Wills, 251 Ga. 3, 303 S.E.2d 258 (1983) (recognizing duty of care owed to unconceived child)).

118. *Id*. at 135, 848 S.E.2d at 842.

119. *Id*. at 136–37, 848 S.E.2d at 843.

120. *Id*. at 137–38, 848 S.E.2d at 843–44. The fact that the court was willing to say this is somewhat astonishing, given its prior claim that life is never an injury. The child, who

One can only speculate about why the court granted review in *Norman*. A broad interpretation of the bar on actions for wrongful birth and the claim that life is never a legal injury provides far too much protection for negligent and even reckless actors in the sperm bank business. In addition to the goal of compensating plaintiffs for injuries, tort law aims to shape behavior and, like the criminal law, to deter bad behavior. The court's thread-the-needle ruling in *Norman* may have the practical effect of encouraging due care by sperm banks.

C. Premises Liability and the Duty to Protect Apartment Complex Visitors from Third-Party Criminal Attacks: Cham v. ECI Management Corporation

The premises liability issue in *Cham v. ECI Management Corporation*,[121] appears fact-driven and simple: was there evidence presented that would justify a jury instruction on the duty owed by a landowner to licensees?[122] Although three justices dissented, the Georgia Supreme Court's answer to the fact-specific question was simple: in the case in question, there was evidence from which a jury could conclude the entrant to land was a licensee, so a jury instruction was appropriate.[123] For those beyond the immediate parties to the litigation, however, the principal value of the case lies in its clarification of the differing roles played by § 44-7-15[124] and § 51-3-1.[125]

Cham is a wrongful death case. The decedent was the victim of a third-party criminal attack in the parking lot of an apartment complex. His surviving spouse and the administrator of his estate sued the owner and manager of the apartment complex, alleging negligence in failing to safeguard the parking lot against criminal activity. The decedent was living with a woman in the apartment complex but was not a signatory to the lease. At the close of evidence at trial, the trial court instructed the jury on the different duties possessors of land owe to invitees, licensees, and trespassers. The plaintiff objected, arguing that the decedent was either an invitee or a trespasser and that there was no evidence he was a licensee. Ultimately, the jury ruled for the defendants. On appeal, the

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will probably read the opinion someday, will hear from the court that although his life isn't an injury, his parents overpaid for the sperm with which he was conceived. Yikes.

121. 311 Ga. 170, 856 S.E.2d 267 (2021).

122. *Id.* at 170, 856 S.E.2d at 269.

123. *Id.* at 182–83, 856 S.E.2d at 277.

124. O.C.G.A. § 44-7-15 (2021).

125. O.C.G.A. § 51-3-1 (2021).

court of appeals held the instruction on the duty owed to licensees was warranted by the evidence.[126]

The Georgia Supreme Court agreed that the instruction was warranted by the evidence, but its reasoning is far more significant than was its ultimate conclusion.[127] First, the court drew a clear line between a landlord's liability under § 44-7-14[128] and § 51-3-1.[129] O.C.G.A. § 44-7-14 governs a landlord's liability for injuries that take place in a tenant's premises, providing:

> Having fully parted with possession and the right of possession, the landlord is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; provided, however, the landlord is responsible for damages arising from defective construction or for damages arising from the failure to keep the premises in repair.[130]

In contrast, O.C.G.A. §§ 51-3-1 to 51-3-3, which provide the general rules regarding a landowner's liability to invitees, licensees, and trespassers, apply when a visitor's injury takes place in a common area—say, a parking lot—where the landlord retains possession and control of the land.[131]

The court next clarified the decisional law within the state.[132] It ultimately concluded that for injuries within a tenant's premises (O.C.G.A. § 44-7-14), any visitor present by the tenant's express or implied invitation is owed the same duty the tenant is owed: in short, the duty owed to a tenant's visitor to the leasehold is derivative of the duty owed to the tenant.[133] In contrast, for injuries that take place in common areas (O.C.G.A. §§ 51-3-1 to 51-3-3), the tenant's visitor does not step into the tenant's shoes; rather, the landlord's duty derives from the relationship between the visitor and the landlord.[134] That relationship may be invitee (mutual purpose achieved), licensee (permission but no mutual benefit), or trespasser.[135] The court's conclusion about the jury charge in the case at hand followed naturally from this distinction:

126. *Id.* at 171–73, 856 S.E.2d at 269–71 (describing ruling of court of appeals).
127. *Id.* at 184, 856 S.E.2d at 278–79.
128. O.C.G.A. § 44-7-14 (2021).
129. *Cham,* 311 Ga at 177, 856 S.E.2d at 274 (citing O.C.G.A. § 51-3-1 (2021)).
130. O.C.G.A. § 44-7-14.
131. *Cham,* 311 Ga. at 176, 856 S.E.2d at 273.
132. *Id.* at 177–79, 856 S.E.2d at 273–75.
133. *Id.* at 178, 856 S.E.2d at 274.
134. *Id.* at 179–80, 856 S.E.2d at 275.
135. *Id.* at 173–74, 856 S.E.2d at 271–272.

because there was at least some evidence the decedent was there with the landlord's implicit permission, a jury instruction on the duty owed licensees was necessarily appropriate.[136]

In a dissent joined by two other justices, Justice Peterson asserted that if the tenant had authority from the landlord to host her guest, then the guest was an invitee on common areas; if the tenant had no such authority, the guest was a trespasser.[137] Landlords naturally benefit from allowing tenants to host guests: restrictions on having guests will cause potential renters to "pass the property by and rent from a different landlord who offers more freedom," which ultimately could reduce the amount the landlord can receive in rent.[138] Given that, "a landlord who allows a renter to host guests in the rented property generally stands to benefit financially from that arrangement," and accordingly, such guests are invitees both in the leased premises and in the common areas of the apartment complex.[139] If a landlord does not permit tenants to host guests, then guests are necessarily trespassers, at least absent explicit permission from the landlord. The dissent determined there was no evidence of such permission here, so the jury instruction on licensees was inappropriate.[140]

Who has the better argument? First, for those who are critical of the distinctions in legal duties owed invitees and licensees, *Cham* serves as Exhibit A: why should the decedent be entitled to less protection merely because he may have been allowed on the premises without any direct benefit to the landlord? Second, the dissent's point is powerful: landlords have an economic interest in allowing tenants to have guests. Given that guests must typically enter common areas before they arrive at a tenant's apartment, it makes little sense to say the landlord is not benefited by a guest's entrance to or use of a common area. The dissent is correct.

D. Proximate Cause and "Color of Employment": Johnson v. Avis Rent A Car System, LLC

No torts update could be complete without a riff on proximate cause, so last, but definitely not least, there's *Johnson v. Avis Rent A Car System, LLC*,[141] which played a starring role in the 2021 Intrastate Moot

136. *Id.* at 183–84, 856 S.E.2d at 277–79.
137. *Id.* at 185–86, 856 S.E.2d at 279–80 (Peterson, J., dissenting).
138. *Id.* at 185, 856 S.E.2d at 279.
139. *Id.*
140. *Id.* at 186, 856 S.E.2d at 279.
141. 311 Ga. 588, 858 S.E.2d 23 (2021).

Court Competition among Georgia law schools.[142] This case reaffirmed Georgia's pinched interpretation of proximate cause doctrine as applied to accidents caused by car thieves and clarified its unusual doctrine regarding acts done under color of employment.[143]

In *Johnson*, an employee of a rental car company stole a car after hours and, a few hours later, got into a high-speed chase with law enforcement and ultimately crashed into a wall. The plaintiffs in *Johnson* and its companion case were sitting on the wall and were seriously injured in the crash. They sued Avis and several related actors, including the specific rental location's operator, for direct negligence regarding policies and practices that enhanced the risk of theft as well as for negligent hiring and entrustment. As to the direct negligence claim, the defendants asserted that the employee's conduct was an independent intervening cause that severed the chain of proximate cause and therefore shielded the defendants from liability for the plaintiffs' injuries. As to the negligent hiring and entrustment claims asserted by one of the plaintiffs, the defendants argued that, at the time of the accident, the employee was not acting under color of employment as required for recovery. The trial court rejected these arguments, but the Georgia Court of Appeals agreed with the defendants.[144] The Georgia Supreme Court agreed to review the case and ultimately affirmed the decisions of the court of appeals.[145]

Courts throughout the country disagree about whether vehicle owners can be liable when the owners are negligent in securing their cars (say, by leaving keys in the ignition) and car thieves subsequently cause accidents. For example, courts in Tennessee have held that the juries may consider whether a car thief's erratic driving, and subsequent accident was reasonably foreseeable to an owner who negligently failed to secure her automobile.[146] Courts ruling in that manner have recognized that proximate cause and the foreseeability of intervening acts are typically jury questions, so the courts are unwilling to rule that the theft, poor driving, and accident are unforeseeable as a matter of law.

As *Johnson* demonstrates, Georgia courts have consistently fallen on the other side of the doctrinal divide. In Georgia, a vehicle owner is virtually never liable when a thief steals the car, drives badly, and causes

142. *Id.* at 589, 858 S.E.2d at 27. Shout out to Mercer Law student and Law Review Student Writing Editor, Douglas E. Comin, winner of Best Oralist in the 2021 Intrastate Moot Court Competition.

143. Smith v. Avis Rent A Car System, LLC was the companion case. *Id.* at 588, 858 S.E.2d at 23.

144. *Id.* at 588–93, 858 S.E.2d at 26–30 (describing rulings by court of appeals).

145. *Id.* at 589, 858 S.E.2d at 27.

146. McClenahan v. Cooley, 806 S.W.2d 767 (Tenn. 1991).

an accident. This is true regardless of how careless the owner was in securing the vehicle: keys in the car, ignition running, you name it. Both the Georgia Court of Appeals and Georgia Supreme Court find the intervening acts unforeseeable as a matter of law.[147]

Johnson does not represent a deviation from that trend. To be foreseeable, an act or consequence must be more than merely possible: it must be probable.[148] In *Johnson*, the supreme court concluded that even assuming the theft itself was foreseeable, the thief's erratic driving and willingness to flee from law enforcement was not foreseeable.[149] The plaintiffs had pointed to only a very few high-speed chases based on car thefts from Avis facilities nationwide and none from the facility in question.[150] Absent more specific evidence about the likelihood of a high-speed chase, the court considered the intervening behavior unforeseeable as a matter of law.[151] However, the court clarified that a reasonably foreseeable consequence need not be the usual result of the negligent act at issue, but simply a probable result.[152]

The court also held that the employee did not act under color of employment, and that, therefore, the trial court should have directed a verdict for the defendants on the plaintiffs' claims for negligent hiring and entrustment.[153] The color of employment doctrine is distinct from the more familiar "scope of employment" doctrine in *respondeat superior* cases.[154] When employees are acting within the scope of employment, employers are vicariously liable for employees' actions.[155] However, most intentional torts and most reckless behavior—car theft and reckless driving of a stolen car—necessarily fall outside the scope of employment.[156] So the question in many Georgia negligent hiring and entrustment cases, especially ones in which the employee engages in criminal conduct that an employer should have anticipated, is whether the defendant acted under color of employment.[157] If he did not, the employer cannot be liable.[158]

147. *Johnson,* 311 Ga. at 592, 858 S.E.2d at 29.
148. *Id.* at 592, 858 S.E.2d at 29.
149. *Id.* at 593–95, 858 S.E.2d at 30–31.
150. *Id.* at 595–97, 858 S.E.2d at 31–32.
151. *Id.* at 596–97, 858 S.E.2d at 31–32.
152. *Id.* at 597, 858 S.E.2d at 32 n. 14.
153. *Id.* at 601, 858 S.E.2d at 35.
154. *Id.* at 598, 858 S.E.2d at 33.
155. *Id.* at 599, 858 S.E.2d at 33.
156. *Id.* at 600–01, 858 S.E.2d at 35.
157. *Id.* at 599–600, 858 S.E.2d at 34.
158. *Id.*

The *Johnson* court clarified the scope of this doctrine, which had never been carefully defined.[159] First, it noted that the doctrine exists to shield employers from general liability for employees' tortious conduct. An employee's tortious behavior that is outside the scope of employment may nonetheless fall under color of employment if (a) the employee's tortious behavior is directed at someone who has a business or special relationship with the employer and the tort arises out of that relationship;[160] or (b) the employee commits the tortious acts "in a form that purports they are done by reason of his employment duties or by virtue of his employment."[161] Here, the court held that the employee did not act under color of employment: the employer had no relationship whatsoever with the plaintiff and the theft was not connected to the employee's job duties or accomplished by virtue of his employment relationship.[162] Accordingly, the court affirmed the ruling by the court of appeals that the defendants were entitled to a directed verdict on any negligent hiring and entrustment claims.[163]

What to make of this opinion? As to the proximate cause issue, Justice Ellington's dissent gets the last word. After distinguishing existing Georgia law but also calling prior precedent into question, Justice Ellington stated simply: "Our courts must do more than pay lip service to the principle that proximate cause is 'generally' or 'ordinarily' for the jury while in practice making it commonplace to take the question of proximate cause away from a jury."[164] Amen.

As to the color of employment, I question the need for the doctrine at all. To put it colloquially, this doctrine is a Georgia thing: very few (if any) other jurisdictions even recognize the concept as a part of claims for negligent hiring and retention. The court has articulated that the doctrine is a policy-based limitation on an employer's liability for an employee's tortious behavior. But why is this necessary, given the doctrine of proximate cause? Proximate cause already acts to shield defendants from liability for consequences that are remote or unforeseeable, and I cannot see any additional service this strange color

159. *Id.* at 598, 858 S.E.2d at 33.

160. *Id.* at 598–99, 858 S.E.2d at 33.

161. *Id.* at 599, 858 S.E.2d at 33–34. The supreme court rejected the suggestion that the thief could not have been acting under color of employment given the fact he was acting against the employer's interest. *Id.* at 601, 858 S.E.2d at 35. As the supreme court recognized, "in nearly every case of negligent hiring and retention, it is likely the case that the tortfeasor employee has not acted in the employer's interest by committing a tort that leads to the employer being sued." *Id.*

162. *Id.* at 601, 858 S.E.2d at 35.

163. *Id.*

164. *Id.* at 601–06, 858 S.E.2d at 35–38.

of employment doctrine does in the truth and the justice-seeking universes. Rather than clarifying and applying the doctrine, the Georgia Supreme Court should have jettisoned it.

IV. THE COVID-19 IMMUNITY STATUTE

The jurisprudence of the Georgia Supreme Court is the overwhelming focus of this update, but no survey of the 2020–2021 term would be complete without a nod to Georgia's COVID-19 Pandemic Business Safety Act.[165] If businesses post certain notices, then patrons to those businesses are presumed to have assumed the risk of exposure to COVID-19.[166] The Act will largely exempt businesses from negligence claims related to COVID-19, but not from claims of gross negligence, recklessness, or intentional conduct.[167] Even absent this legislation, a COVID-related negligence claim against a business would have faced substantial barriers, the most notable being proof of causation. That fact makes the breadth of the legislation all the more remarkable.

V. CONCLUSION

What do the next years hold for tort law in Georgia? If the 2020–2021 term is any indication, the court will continue to wrestle with issues of apportionment. In Georgia and elsewhere, courts and legislative bodies will wrestle with how tort law should apply to injuries caused by self-driving cars and other new technologies: with the advent of artificial intelligence, tort law approaches a new frontier.

165. O.C.G.A. §§ 51-16-1 to 51-16-4 (2021).
166. O.C.G.A. § 51-16-3.
167. *Id.*