You Better Rip this Out and Put it in Your Torts Notebook

Tortious Misconduct: A narrow exception to the general rule of corporate immunity from liability for slander committed by employees

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This article is an update of an earlier article authored solely by Christopher C. Edwards and published in The Verdict, April 1989, republished with the express permission of The Verdict. Christopher C. Edwards is Chief Superior Court Judge of the Griffin Judicial Circuit Superior Court. Erich Schultheiss is a 3L at Georgia State University College of Law and a 2013 Summer Law Intern with Chief Judge Edwards.

So you think you know Georgia torts? How about a tort called "tortious misconduct"? Never heard of it? That's because tortious misconduct is not taught in law school [1] and is not codified. You will not find tortious misconduct indexed in Georgia's leading treatise on torts.[2]

HISTORY AND DEFINITION OF THE TORT

Tortious misconduct is a virtually unknown narrow exception to the general rule of corporate immunity from liability for words or conduct committed by business employees against business invitees and even customers on the phone.[3] Georgia's appellate courts have "inelegantly and inexactly"[4] or "blithely"[5] termed the tort "tortious misconduct" (herein "the tort").

Business invitors, including corporations, have a public duty of ordinary care to protect their business invitees from abusive, insulting, or opprobrious language or conduct perpetrated by business employees. The tort is not premised upon *respondeat superior*,[6] but upon the omission of the business/owner to protect invitees from "abusive language which amounts to slander" committed by the business employees.[7]

> ...(T)he plaintiff's cause rests not on slander but on the theory that a business invitor owes a public duty to protect its invitees from abusive language and conduct...the misconduct may involve elements of slander but the gist of the right of recovery...is based on the right of the invitee to be protected from any tortious misconduct on the part of the corporation from its agents and employees acting within the scope of their duties about their master's business.[8]

The words spoken need be neither slanderous nor intentional infliction of emotional distress, but may be merely "opprobrious and frightening."[9] Unlike slander, the words spoken need not be published and heard by a third party, but need only be spoken from the employee directly to the customer.[10]

The duty of extraordinary care owed by common carriers to protect passengers is the historic precursor of the current standard of mere ordinary care owed by business invitors to business invitees.[11]

> We do not, of course, wish to be understood as dealing with the present action as though it were an attempt to sue the company for slander committed by its agents. On the contrary, we merely mean to hold that a carrier is liable in damages for failure to protect a passenger from abusive language which amounts to slander – not as to perpetrator of the outrage itself.[12]

The rule of common carrier liability was extended by the Supreme Court of Georgia to protect business invitees of merchants.

> It appears that the rule was formulated by the Supreme Court and followed and extended with alacrity...in order to except business invitees from the seemingly harsh rule that "a corporation is not liable for damages resulting from speaking false, malicious, and defamatory words by one of its agents, even where in uttering such words the speaker was acting for the benefit of the corporation and within the scope of his agency, unless it affirmatively appears that the agent was directed or authorized by the corporation to speak the words in question."[13]

Words amounting to slander are but one element of the tort. The action also requires proof of the business invitor-invitee relationship[14], and proof that the offending words were uttered by a servant or employee in the course of business. Acts constituting intentional infliction of emotional distress, assault, battery, false arrest and false imprisonment are often involved.

> Through this exception (to the general rule of corporate immunity from slander claims) business invitees by virtue of their relationship are accorded a remedy against the invitor for the latter's breach of its duty in failing to accord the invitee on its premises immunity from opprobrious, insulting and abusive words from its agents and servants employed to deal with the customer-invitees. The breach of this duty occurs the instant those types of words expressing slanderous statements which tend to humiliate, mortify, or wound the feelings of the customer are uttered by the company's agents or servants and the liability arises by the company's act of omission to fulfill its duty.[15]

The invitor's omission to protect the customer need not occur on the business premises.[16] The tort's application has also been extended to allow liability for tortious misconduct without the invitee's physical presence at the place of business if a reasonable relationship to the business exists in the transaction. For example, repeated, threatening, profane and abusive telephone calls from a finance company to its customer have been held to create an actionable claim for tortious misconduct.[17]

"The business invitor's public duty of ordinary care to protect the invitee, and not respondeat superior, is the basis of the business invitor liability."

THE STATUTORY "REASONABLE BELIEF" DEFENSE IN SHOPLIFTING CASES

Claims for accusatory slanderous statements alleging shoplifting have been held to be restricted by a statute enacted to create a defense to false arrest and false imprisonment claims in shoplifting cases.[18] In such cases, the merchant or employee need only prove that he "reasonably believed" the person was engaged in shoplifting to avoid liability for the tort. Although the statute mentions only false arrests and false imprisonment claims, the case law extends the statutory defense to tortious misconduct claims.[19] However, this extension is only applicable when the conduct that is the basis for the tortious misconduct claim arises out of a reasonable belief that the customer is shoplifting. In other words, the statute cannot be applied if the belief is unreasonable or the defendant's conduct is a reaction to something other than shoplifting. To apply the bar in these circumstances would be "an overbroad reading of the statute as well as the cases which have construed it."[20] The "reasonable belief" may be premised solely upon the activation of an anti-shoplifting device.[21] A police officer's opinion, based on hearsay, that probable cause existed to accuse or detain the plaintiff is not admissible as evidence of the employee's "reasonable belief," nor may such an opinion by a police officer authorize a directed verdict.[22]

PLEADING AND PRACTICE

Despite the advent of notice pleading, tortious misconduct should be pleaded with great care and specificity due to the bench and bar's unfamiliarity with the tort.

> A cause of action is alleged by a petition which asserts that the plaintiff while an invitee on the premises of another for the purpose of transacting business was subjected to opprobrious, insulting, and abusive words amounting to slander by a clerk employed to deal with the business invitee.[23]

Inadequate pleading of all the tort's elements may cause the claim to be summarily adjudicated based on the general rule of corporate immunity for slander.[24] All the elements of tortious misconduct, as listed below, should be pleaded with supporting factual allegations. Likewise, proof at trial of all the tort's elements is required.

The allegations of a complaint for tortious misconduct should include the following:

1. Description of status of parties as business invitor and invitee.
2. Defendant's public duty to protect plaintiff from offensive, insulting, opprobrious, abusive, false, malicious, defamatory, humiliating, mortifying, or threatening (as appropriate) words or conduct of its agent/employee.
3. Defendant's employment or agency relationship to perpetrator of wrongful conduct.
4. Employee/perpetrator's pursuit of defendant's business purposes within the scope of employment at time and place of acts.
5. Breach of public duty owed to plaintiff by defendant business invitor to protect plaintiff from said tortious misconduct.
6. Specific description of employee/perpetrator's acts, including a) time and place; b) acts were willful and malicious; c) intention to injure, shock, frighten, and to inflict emotional distress upon plaintiff; d) list the torts thereby committed[25] (e.g. slander, assault, batter, false arrest, false imprisonment.)
7. Cause of action is for tortious misconduct under Zayre v. Sharpton, 110 Ga. App. 587, 589, 139 S.E. 2d. 339 (1964) (cert. den.) and Fountain v. World Finance Corp., 144 Ga. App. 10, 240 S.E. 2d. 558 (1977) (cert. den.) Cite cases in pleadings to preclude assertion of corporate immunity for slander.
8. Allege that breach of public duty proximately caused certain damages to plaintiff.
9. Describe damage to plaintiff. If there is no special damage, at a minimum, allege injury to peace, happiness, injured feelings, and humiliation. See 10 below.
10. Review of the opinions cited herein shows that general and punitive damages are typically claimed. If punitive damages are claimed, an OCGA 51-12-5.1 basis for punitive damages must be alleged and proved. See 6(b) and (c) above. Special damages may also be pleaded. Alternatively, if general, special, or punitive are unavailable, damages may be asserted under OCGA 51-12-6 which provides for injuries that are solely attributable to the "peace, happiness, or feelings" of the plaintiff.
11. Optional allegations include:
    a) Conspiracy allegations.[26]
    b) Negligent hiring allegations. "Thus where an invitor's servant is the actual wrongdoer, the invitor cannot escape liability by having delegated its duty to a servant proving unworthy of the trust, for then the company is liable for the act of omission in properly performing its duty."[27]

SUGGESTED JURY CHARGE

A suggested jury charge is below:

The plaintiff asserts a claim for money damages against defendant for "tortious misconduct." Tortious misconduct is defined as follows: I charge you that a business owner owes a public legal duty of ordinary care which may not be delegated, to protect and immunize his invitees, or customers, from abusive, insulting, and opprobrious words or conduct committed by the employee or agent of the business invitor while such an employee or agent is acting within the context of a business relationship between the business invitor and the invitee or customer, whether such words or conduct occur on or off the business premises. Whether or not the plaintiff has proved tortious misconduct by a preponderance of the evidence is a matter solely for you, the jury, to decide. Zayre of Atlanta v. Sharpton, 110 Ga. App. 587, 590, 139 S.E. 2d. 339 (1964); Fountain v. World Finance Corp., 144 Ga. App. 10, 240 S.E. 2d. 588 (1977) [In addition, pattern jury charges on ordinary care, proximate cause, and other alleged torts should be given. Remember, not only words but conduct can be tortious misconduct.]

[1] Six of Georgia's 1L tort professors graciously responded to Mr. Schultheiss's July 2014 inquiry and relayed that "tortious misconduct" is not taught in their torts classes.
[2] Charles R. Adams III, *Georgia Law of Torts* §28:9, 28:6, 4:5(d)(3) (2013).
[3] Swift, *supra*; Behre v. National Cash Register, 100 Ga, 213, 27 S.E. 986 (1896).
[4] Swift, *supra*, at 572.11
[5] Zayre of Atlanta v. Sharpton, 110 Ga. App. 587, 589, 139 S.E. 2d. 339 (1964)
[6] *Ibid*. at 590.
[7] Cole v. Atlanta and West Point R. Co., 102 Ga. 474, 31 S.E. 107 (1897).
[8] Swift v. S.S. Kresge Company, Inc., 159 Ga, App. 571, 572, 284 S.E. 2d 74 (1981), citing Southern Grocery Stores Inc. v. Keys, 70 Ga. App. 473, 477, 28 S.E. 2d 581 (1944).
[9] Fountain v. World Finance Corp., 144 Ga. App. 10, 240 S.E. 2d 558 (1977)
[10] *Ibid*. at 12. *See also* Davis v. Rich's Department Store, Inc., 248 Ga. App. 116, 119, 545 S.E. 2d. 661 (2001) (holding that only "personal" contact between a customer and merchant can support the claim and where a third party commits the conduct that is the basis for the tort, even if it was at the request of the merchant, the plaintiff cannot succeed).
[11] *Ibid* at 588-89, citing Cole v. Atlanta and West Point R. Co., 102 Ga. 474, 31 S.E. 107, and Moore v. Smith, 6 Ga. App. 649, 65 S.E. 712 (1909).
[12] *Ibid*. at 479.
[13] Zayre, *supra* at 590, citing Behre, *supra*.
[14] The relationship must be one which "inures to the benefit" to both the plaintiff and defendant. Todd v. Byrd, 283 Ga. App. 37, 640 S.E. 2d. 652 (2006). *See also* Carter v. Willowrun Condominium Ass'n, Inc., 179 Ga. App. 257, 345 S.E. 2d 924 (1986) (holding that a landlord/tenant relationship is not one that satisfies the business invitor/invitee relationship).
[15] *Ibid*. at 590.
[16] *But see* Greenfield v. Colonial Stores, Inc., 110 Ga. App. 572, 139 S.E. 2d 403 (1964). Despite the court's unfavorable ruling for the plaintiff because the actions occurred off of the merchant's premises, more recent case law shows the dissent's opinion is correct. Where the tortious actions arise out of a business transaction and the employees are acting within the scope of their employment, the merchant can still be held liable even though the actions occurred off of the premises.
[17] Fountain, *supra*. *See also* Colonial Stores v. Sasser, 79 Ga, App. 604, 54 S.E. 2d. 719 (1949).
[18] O.C.G.A. 51-7-60.
[19] Swift, *supra*.
[20] Simmons v. Kroger Co., 218 Ga. App. 721, 723, 463 S.E. 2d. 159 (1995)
[21] O.C.G.A. 51-7-61.
[22] Tomblin v. S.S. Kresge Co., 132 Ga. App. 212, 207 S.E. 2d. 693 (1974).
[23] Zayre, *supra* at 587.
[24] *See* e.g., Gerald v. Ameron Automotive Centers, 145 Ga. App. 200, 243 S.E. 2d. 565 (1978) (cert. den.)
[25] The safer practice is to plead and prove all elements of the underlying torts. Some cases such as Fountain, *supra*, at 12, clearly state that the offensive conduct need not have all the elements of an underlying tort (i.e. no publication required for a slander-type claim). Other cases, such as Jordan v J.C. Penny Co., 114 Ga. App. 822, 152 S.E. 2d. 786 (1966), and Sowell v. Douglas County Electric Membership Corporation, 150 Ga. App. 520, 258 S.E. 2d. 149 (1979) require pleading and proof of a definite underlying tort. The distinction in such rulings is that tortious misconduct claims are more liberally allowed when the perpetrator/employee acted maliciously as shown by "...threatening, profane, abusive, and disrespectful language" Sowell, *supra*, at 521 citing Fountain, *supra*.
[26] Lanham v. Keys, 31 Ga. App. 635, 121 S.E. 856 (1935)
[27] Zayre, *supra* at 590. Zayre at 590, affords "immunity" from tortious misconduct to business invitees.

Tortious Misconduct under Georgia Law

Cases constituting tortious misconduct

CASE	LOCATION	FACTS	HOLDING AND COMMENTS
Cole v. Atlanta & West Point R. Co., 102 Ga. 474, 31 S.E. 107 (1897)	On the defendant's train	The plaintiff passenger was "publicly denounced in coarse and brutal language" by the defendant's employees.	Trial court's dismissal of the petition was reversed. The petition stated a cause of action authorizing jury trial.
Lemaster v. Millers, 33 Ga. App. 451, 126 S.E. 875 (1925)	Defendant's department store	In a loud and angry voice which could be heard by other customers, defendant's employee falsely accused the plaintiff of having an item belonging to the store in her handbag.	Trial court's dismissal of the petition was reversed. The petition stated a cause of action authorizing jury trial.
Southern Grocery Stores v. Keys, 70 Ga. App. 473, 28 S.E. 2d 581 (1944)	Defendant's grocery store	Plaintiff had a bag from another store with purchases in it that were also sold at the store she was currently in. When checking out, the cashier falsely accused her of stealing the item in front of a line of customers.	Trial court's dismissal of the petition was reversed. The petition stated a cause of action authorizing jury trial.
Colonial Stores v. Sasser, 79 Ga, App. 604, 54 S.E. 2d. 719 (1949)	Outside defendant's store on street	Plaintiff suspected of shoplifting was patted down after exiting store by store manager. Manager refused demand for apology stating a pat down was store policy.	The court held that despite the fact that the conduct occurred outside of the defendant's premises, the employee was still acting within the scope of his employment and therefore, facts still sustain a claim for tortious misconduct.
Zayre of Atlanta, Inc. v. Sharpton, 110 Ga. App. 587, 139 S.E. 2d 339 (1964)	Defendant's department store	Plaintiff exited dressing room, wearing her own dress, when a store employee very loudly accused plaintiff of stealing the dress she was wearing.	Trial court affirmed in denying dismissal of the petition. The petition stated a cause of action authorizing jury trial.
Tomblin v. S.S. Kresge Co., 132 Ga. App. 212, 207 S.E. 2d. 693 (1974)	Defendant's Department Store	Employee of the store accused the plaintiff of stealing a pin and had her arrested for shoplifting. She was tried and acquitted.	Statutory shoplifting defense case. Court reverses and remands to determine whether defendant had reasonable belief plaintiff was shoplifting. Opinion implies that these facts may constitute tortious misconduct if claim was not barred by statutory shoplifting defense.

Fountain v. World Finance Corp., 144 Ga. App. 10, 240 S.E. 2d. 588 (1977)	On the telephone	Finance company employee on debt collection call threatened to take her child's social security payments, used profanity, and called plaintiff "vile" names.	Trial court's summary judgment for defendant was reversed. The petition stated a cause of action authorizing jury trial provided the required element of a business invitor-invitee relationship was proved.
Adams v. Trust Co. Bank, 145 Ga. App. 702, 244 S.E. 2d 651 (1978)	At defendant's bank	The plaintiff's bank account was wrongly frozen by defendant. Upon inquiring within the bank, a security guard "abused him verbally and assaulted him."	Trial court's summary judgment in favor of defendant was reversed. The complaint stated a cause of action authorizing jury trial.
Revco Discount Drug Centers of Georgia, Inc. v. Famble, 173 Ga. App. 330, 326 S.E. 2d 532 (1985)	At the defendant's drugstore	Defendant's employee loudly and angrily accused the plaintiff of stealing batteries within earshot of two customers, the pharmacist, and the cashier.	Jury verdict for plaintiff affirmed.
Simmons v. Kroger Co., 218 Ga. App. 721, 463 S.E. 2d. 159 (1995)	At defendant's grocery store	Plaintiff falsely accused of shoplifting by eating candy without paying for it, threatened with arrest, escorted to manager's office, but not prosecuted.	Trial court's summary judgment in favor of defendant was reversed. The complaint stated a cause of action authorizing jury trial.

Cases not constituting tortious misconduct

CASE	LOCATION	FACTS	HOLDING AND COMMENTS
Greenfield v. Colonial Stores, Inc., 110 Ga. App. 572, 139 S.E. 2d 403 (1964)	At a completely different store near defendant's store	Plaintiff purchased items from Defendant's store and then left and went to another store to continue his shopping. Upon arriving at the other store, two agents of defendant's arrived behind him, pulling both his arms behind his back and exclaiming loudly for other customers to hear that he stole meat from them and demanded he give it back.	The majority held that this did not support a claim for tortious misconduct because the acts occurred on premises that were not owned by defendant. However, the dissent asserted that this should be enough to support a claim for tortious misconduct because the act was "so integrally a part of the transaction of the company's business as to grow logically and inescapably out of it." Recent case law suggests that the dissent was correct – if they are acting in their capacity as employees, it shouldn't matter if it occurred off the premises. *See* Colonial Stores, *infra* and Fountain, *infra*.

Jordan v. J.C. Penny Co., 114 Ga. App. 822, 152 S.E. 2d 786 (1966)	At defendant's department store	Defendant demanded, in presence of a number of other customers, that plaintiff surrender her credit card because she had filed bankruptcy. It was later discovered that a woman with the same name that lived near to plaintiff was actually the one that filed bankruptcy. The defendant eventually mailed plaintiff a letter of apology.	The court held that this does not amount to tortious misconduct because there was nothing in the record indicating that the words spoken by defendant's employees were abusive or opprobrious. The defendant could deny credit to anyone at any time. Note this is a 1966 case.
City Stores Co. v. Henderson, 116 Ga. App. 114, 156 S.E. 2d 818 (1967)	At defendant's retail store	When plaintiff tried to use her credit card, the cashier demanded surrender of the card due to an overdue account. A number of other customers heard the accusation.	The court held that this evidence does not support a claim for tortious misconduct for two reasons: First, plaintiff did have an overdue account, hence the cashier was authorized to take the credit card. Second, there is nothing alleged in the complaint about the clerk telling her this in a loud, boisterous, angry, or otherwise hurtful manner.
Gerald v. Ameron Automotive Centers, 145 Ga. App. 200, 243 S.E. 2d 565 (1978)	At defendant's retail store	Plaintiff worked at defendant's store and on his day off, bought hubcaps from the store. Later, the regional manager claimed that he never paid for them and stole them from the store.	"No pleadings or action below by the plaintiff gave even the faintest notice that he was relying in any way on any cause of action other than slander." Plaintiff may have had an actionable claim for tortious misconduct, but since there was no pleading alleging the elements of tortious misconduct, <u>Behre</u> barred the stated cause of action for slander against the corporation.
Sowell v. Douglas County Electric Membership Corporation, 150 Ga. App. 520, 258 S.E. 2d. 149 (1979)	At plaintiff's house	After defendant electrical company discovered that plaintiff tampered with his meter on two occasions, they shut off his electricity and told him to pay the charges associated with tampering or go without electricity.	The court held that the defendant merely acted within the contract between the two parties and that these actions were acceptable.
Hav Swift v. S.S. Kresge Co., Inc., 159 Ga. App. 571, 284 S.E. 2d 74 (1981)	At defendant's retail store	Plaintiff was called a "thief" and was arrested for shoplifting. Shoplifting charge was dismissed.	Court held that defendant's words and actions were immunized by the statutory shoplifting defense.
Carter v. Willowrun Condominium Ass'n, Inc., 179 Ga. App. 257,	In a letter	Defendant landlord wrote a letter to plaintiff accusing plaintiffs of breaking rules of	The Court held that the plaintiffs were not business invitees of the defendant named in the suit. The landlord-tenant

345 S.E. 2d 924 (1986)		their lease.	relationship does not qualify as a business invitor-invitee relationship.
Doe v. Village of St. Joseph, Inc., 202 Ga. App. 614, 415 S.E. 2d 56 (1992)	At defendant's boarding school	Parent of 13-year-old girl attending boarding school sue boarding school for teacher's alleged sexual conduct with girl.	The Court held that the theory of tortious misconduct requires two elements absent here: First, the public duty to protect invitees from tortious misconduct applies only in context of "mercantile establishments [that exist] for the purpose of selling goods;" and second, that the offending employee of the defendant was acting in the scope employment duties. Therefore, even if the allegations were true, the plaintiff cannot recover under the theory of tortious misconduct.
Fly v. Kroger Co., 209 Ga. App. 75, 432 S.E. 2d 664 (1993)	At defendant's grocery store	Plaintiff purchased meat that was on sale from the store where she worked. The next day she was called into a grievance meeting where employer accused her of improperly reducing the price of the meat she had purchased.	The mixed factual status of plaintiff in her conduct as employee alleged marking down the meat and as invitee in buying the meat contributed to the court holding that the employer's conduct in meeting behind closed doors did not constitute opprobrious or abusive conduct of an invitee.
Taylor v. Super Discount Market, 212 Ga. App. 155, 441 S.E. 2d. 483 (1994)	At defendant's grocery store	The cashier, believing that plaintiff was attempting to use counterfeit money, seized plaintiff's money and subsequently gave it to a security guard who then called the police. The police quickly determined the money was authentic legal tender.	Since the store employee immediately turned over the money to a proper authority and there were no abusive words or conduct. The court held no tortious misconduct occurred.
Mitchell v. Lowe's Home Centers, Inc., 234 Ga. App. 339, 506 S.E. 2d 381 (1998)	At defendant's retail store	Defendant's employees accused plaintiff of unauthorized use of a credit card and called her identification "bogus." Plaintiff was using her mother's account with authority, but plaintiff was mistaken about credit account number, thus arousing suspicion.	Defendant's conduct held to be reasonable under the circumstance, hence no tortious misconduct occurred.
Davis v. Rich's Department Store, Inc., 248 Ga. App. 116, 545 S.E. 2d. 661 (2001)	Over the telephone	Plaintiff's identity was stolen. Fraudster obtains Rich's credit card in plaintiff's name. Rich's takes collection action. Plaintiff explains that identity was	Plaintiff never truly had any business invitor-invitee relationship with Rich's. Therefore, an essential element of tortious misconduct is absent.

		stolen, but plaintiff takes no action as requested by Rich's to demonstrate that identity was stolen. Rich's persists in collection through collection agency.	
Wolter v. Wal-Mart Stores, Inc., 253 Ga. App. 524, 559 S.E. 2d. 483 (2002)	At defendant's department store	Plaintiff has more than one credit card and reports one stolen. Bank mistakenly reports another of plaintiff's card's to also be stolen. Plaintiff attempts to use the card that should not have been reported stolen at Walmart. Walmart supervisor sa id "take that card. He's using a stolen card" and took the card.	Court affirms summary judgment for defendant holding that defendant had a legitimate reason for believing the card was stolen and the defendant's conduct was not abusive or opprobrious.
Todd v. Byrd, 283 Ga. App. 37, 640 S.E. 2d. 652 (2006).	At defendant's retail store	The plaintiff was accused of stealing and was arrested.	Defendant wins because plaintiff was in the store merely to go to the bathroom. Therefore, she does not qualify for business invitee—invitor relationship.
Kirkland v. Earth Fare, 289 Ga. App. 819, 658 S.E. 2d 433 (2008).	At defendant's grocery store	An employee of the defendant accused the plaintiff of sexually harassing female employees of the store and stimulating himself in the men's restroom.	Since the accusations were not in front of any customers and since he was able to continue with his business "unmolested" after the incident, the court ruled that the conduct was not abusive or opprobrious. However, earlier cases hold no publication of the words amounting to slander are required. *See* Fountain v. World Finance Corp., 144 Ga. App. 10, 240 S.E. 2d. 588 (1977).