LITIGATING AGAINST GOVERNMENT ENTITIES IN GEORGIA

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INTRODUCTION

In a legal dispute between a private litigant and a Georgia government entity, the law most clearly discriminates in favor of the government. That there are sound policy reasons for the discrimination is little consolation for the frustrated attorney representing the private litigant. This paper is intended to minimize that frustration by providing a 10,000 foot overview of the procedural challenges that frequently arise in disputes against state and local governments.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

A party aggrieved by a government entity's decision must raise all issues before that agency and exhaust available administrative remedies before seeking any judicial review of the agency's decision.[1] Though this requirement arises from the separation of powers doctrine, it has a practical benefit because "resort to the administrative process will permit the agency to apply its expertise, protect the agency's autonomy, allow a more efficient resolution, and result in the uniform application of matters within the agency's jurisdiction."[2]

There are some exceptions to the exhaustion requirement. For example, a plaintiff cannot be forced to pursue a futile administrative remedy[3] or if the defect urged goes to the power of the agency to take the action that is being challenged.[4] A plaintiff need not exhaust state remedies before bringing a federal civil rights claim under 42 U.S.C. § 1983 unless the claim is for denial

[1] OCGA § 50-13-19(a). *Brogdon v. State Board of Veterinary Medicine*, 244 Ga. 780, 781, 262 S.E.2d 56 (1979).

[2] *Id*. at 67.

[3] *WMM Properties v. Cobb County*, 255 Ga. 436, 440 339 S.E.2d 252 (1986) ("Exhaustion of administrative remedies is futile only where further administrative review "would result in a decision on the same issue by the same body...."); *accord Glynn County Bd. of Educ. v. Lane*, 261 Ga. 544, 546, 407 S.E.2d 754 (1991) ("It is unreasonable to require of appellees the futile act of participating in a hearing before that body on the question of its own conduct").

[4] *Id*.

of procedural due process,[5] in which case the state must be given an opportunity to cure the constitutional defect in a post-deprivation hearing.[6]

The nature of the administrative remedy is usually a quasi-judicial review of the decision or action being challenged by the plaintiff. Because the executive and judicial branches are co-equal, judicial review of an administrative decision is extremely deferential.[7] Under the Georgia Administrative Procedure Act, for example, a court may only reverse or modify an agency decision if:

> [S]ubstantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[8]

OPEN RECORDS REQUESTS

All state and local government entities in Georgia are subject to the Georgia Open Records Act and Open Meetings Act,[9] which give litigants powerful and cost effective tools for quickly gathering evidence. Unless exempted by statute, all documents, emails, maps, tapes, photographs, etc., in the possession of a government entity are presumed to be public.[10] The

[5] *See Bd. of Regents v. Tomanio*, 446 U.S. 478, 491 (1980) ("[t]his Court has not interpreted § 1983 to require a litigant to pursue state judicial remedies prior to the commencement of an action under this section").

[6] *See Flint Electric Membership Corp. v. Whitworth*, 68 F.3d 1309, 1314, *on rehearing at* 77 F.3d 1321 (11th Cir. 1996).

[7] *Pruitt Corp. v. Georgia Dept. of Community Health*, 284 Ga. 158, 159, 664 S.E.2d 223 (2008).

[8] O.C.G.A. § 50-13-19(h).

[9] O.C.G.A. § 50-18-70, *et seq.* (Open Records Act) and § 50-14-1, *et seq.* (Open Meetings Act).

[10] O.C.G.A. § 50-18-70(b).

statutory exemptions from disclosure, codified at O.C.G.A. § 50-18-72, are narrowly construed in favor of openness.[11]

An open records request may be made orally or in writing.[12] Upon receipt of such a request, the public officer "shall have a reasonable amount of time not to exceed three days" to determine whether the records are subject to disclosure.[13] If responsive documents exist, but are not available within three days, the public officer shall provide a written description of the documents and a timetable for making them available.[14] Also within three days, the public officer "shall specify in writing the specific legal authority exempting such record or records from disclosure, by Code section, subsection, and paragraph."[15]

The rights available in discovery and the public's rights under the Open Records Act are "separate and distinct, and nothing . . . should be read to require conflation of the two."[16] Thus, private parties have at least two ways of obtaining information in a dispute with the government.

ANTE-LITEM NOTICES

Before bringing suit against a state or local government entity, a plaintiff must generally present a written *ante litem* notice to "allow governments the opportunity to investigate potential claims, ascertain the evidence, and avoid unnecessary litigation."[17] The *ante litem* requirement

[11] *Hardaway Co. v. Rives*, 262 Ga. 631, 422 S.E.2d 854 (1992).

[12] *Howard v. Sumter Free Press, Inc.*, 272 Ga. 521, 531 S.E.2d 698 (2000).

[13] O.C.G.A. § 50-18-70(f).

[14] *Id*.

[15] O.C.G.A. § 50-15-72(h).

[16] *Millar v. Fayette County Sheriff's Dept.*, 241 Ga. App. 659 , 527 S.E.2d 270 (1999).

[17] *City of Columbus v. Barngrover*, 250 Ga. App. 589, 596, 552 S.E.2d 536 (2001) (footnote omitted).

does not apply to claims brought under 42 U.S.C. § 1983 and claims seeking purely equitable relief.[18]

I. Notice to the State

O.C.G.A. § 50-21-26(a)(1) of the Georgia Tort Claims Act requires the written notice be provided to the state "within twelve months of the date the loss was discovered or should have been discovered." The notice should be sent by certified mail, statutory overnight delivery, or personally delivered with a receipt obtained from the Risk Management Division of the Department of Administrative Services.[19]

A plaintiff may not file a lawsuit until either the Department of Administrative Services has denied the claim or more than ninety days has passed since notice was given.[20] Failure to give the notice is jurisdictional and will result in dismissal.[21]

II. Notice to Counties and Municipalities

Separate statutes govern *ante litem* requirements for counties and cities. Under O.C.G.A. § 36-11-1, "All claims against counties must be presented within 12 months after they accrue or become payable or the same are barred." Under O.C.G.A. § 36-33-5, a plaintiff must provide written notice of a claim against a municipality within six months of its accrual. Georgia courts interpret these statutes similarly to require substantial compliance such that "the notice must provide enough information to enable the [municipality or county] to conduct an investigation

[18] *Armour v. Davidson*, 203 Ga. App. 12, 416 SE2d 92 (1992) (Section 1983 trumps state law *ante litem* requirement); *Dover v. City of Jackson*, 246 Ga. App. 524, 526, 541 S.E.2d 92 (2000) (holding that O.C.G.A. § 36-33-5 does not apply to claims for equitable relief).

[19] O.C.G.A. § 50-21-26(a)(2).

[20] O.C.G.A. § 50-21-26(b).

[21] *See Dempsey v. Bd. of Regents of the Univ. System of Georgia*, 256 Ga. App. 291, 568 S.E.2d 154 (2002).

into the alleged injuries and determine if the claim should be settled without litigation."[22] The Georgia Tort Claims Act, by contrast, requires strict compliance with state *ante litem* requirements.[23]

IMMUNITIES

I. Sovereign Immunity

Sovereign immunity generally shields state and local governmental entities from claims for damages. State law sovereign immunity does not apply to actions brought under 42 U.S.C. § 1983 or actions seeking purely equitable relief.[24] The extent and type of immunity available depends on whether the entity being sued is protected by constitutional or legislative immunity.

A. State

The Georgia Constitution grants the state and all its departments and agencies sovereign immunity for all claims except those based on a written contract and those for which immunity was waived by the Georgia Tort Claims Act.[25] O.C.G.A. § 50-21-23 waives immunity for the torts of state officers and employees acting within the scope of their employment, but then O.C.G.A. § 50-21-24 excepts from state liability certain enumerated categories of claims ranging from assault, battery and false imprisonment to claims based upon licensing decisions.

B. Counties

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[22] *City of Columbus v. Barngrover*, 250 Ga. App. 589, 596, 552 S.E.2d 536 (2001) (footnote omitted). *Cf. Davis v. City of Forsyth*, 275 Ga. App. 747, 621 S.E.2d 495 (2005) (A*nte litem* notice describing history of sewage back ups and asserting claims for property damage and lost rental income, did not preserve plaintiffs' claims for personal injuries).

[23] *See Cummings v. Georgia Dept. of Juvenile Justice*, 282 Ga. 822, 653 S.E.2d 729 (2007).

[24] *Davis v. City of Roswell*, 250 Ga. 8, 9, 295 S.E.2d 317 (1982) (where a federal right of action is asserted, it is controlled by federal law; accordingly, "the supremacy clause of the Constitution prevents us from construing the federal rule to permit a state immunity defense"); *IBM v. Ga. Dep't of Admin. Servs.*, 265 Ga. 215, 453 S.E.2d 706 (1995) (no sovereign immunity from an injunction) (citing *Chilivis v. National Distributing Co.*, 239 Ga. 651, 654 , 238 S.E.2d 431 (1977).

[25] Ga. Const. of 1983, Art. I, Sec. II, Par. IX; O.C.G.A. §§ 50-21-20, *et seq.*

The Georgia Supreme Court has held that constitutional grant of immunity to "the state or any of its departments and agencies" also includes counties,[26] but it does not include cities.[27] Thus, like the state, counties may also be liable for claims based upon a written contract.[28] Because the Georgia Tort Claims Act only applies to the state and state agencies, and not counties or cities, counties have broader immunity in Georgia than the state itself.[29] Nevertheless, the Constitution authorizes the General Assembly to legislatively "waive the immunity of counties, municipalities, and school districts by law."[30] The General Assembly exercised that right by enacting O.C.G.A. § 33-24-51, which waives sovereign immunity for claims against counties and cities arising from the negligent use of a motor vehicle but only to the extent there is insurance coverage for the loss. Counties and cities are not required to purchase liability insurance.[31]

Nuisance law provides another possible avenue for piercing a county's sovereign immunity. Because a county has no immunity for violating a state constitutional right,[32] it may be liable where it "causes, creates, or maintains a nuisance which amounts to an inverse condemnation."[33] An inverse condemnation requires a showing that some element of private property was taken for a public purpose.[34]

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[26] *Toombs County v. O'Neal*, 254 Ga. 390, 391, 330 S.E.2d 95 (1985).

[27] *City of Thomaston v. Bridges*, 264 Ga. 4 , 439 s.E.2d 906 (1994).

[28] Ga. Const. of 1983, Art. I, Sec. II, Par. IX.

[29] O.C.G.A. § 50-21-22(5).

[30] Ga. Const. of 1983, Art. IX, Sec. II, Par. IX.

[31] O.C.G.A. § 33-24-51(a).

[32] *Middlebrooks v. Bibb County*, 261 Ga. App. 382 , 582 S.E.2d 539 (2003).

[33] *Fielder v. Rice Constr. Co.*, 239 Ga. App. 362, 364, 522 S.E.2d 13 (1999).

[34] *State Bd. of Educ. v. Drury*, 263 Ga. 429, 431, 437 S.E.2d 290 (1993).

C. Municipalities

In addition to the waiver of immunity for certain automobile related claims, the General Assembly has also waived municipalities' immunity for claims arising from "neglect to perform or improper or unskillful performance of their ministerial duties."[35] Municipalities retain immunity for claims arising from the performance of their governmental functions.[36] Thus, a city is entitled to immunity when performing traditional governmental functions, such as providing sewer service, collecting trash, police protection, etc., it has immunity,[37] but that immunity is stripped when the city engages in a proprietary or ministerial function, such as providing water or operating a transit system.[38]

While the Constitution mandates that the immunity of the state and county can only be waived by legislative enactment, it does not provide the same protection to municipalities.[39] To that end, Georgia courts have held that cities are not immune from claims based upon a written contract.[40] Nuisance plaintiffs in Georgia have had more success against municipalities than counties. A municipality "may be liable for damages it causes to a third party from the creation or maintenance of a nuisance,"[41] which is an easier standard to satisfy than the inverse condemnation standard applicable to claims against counties. Georgia courts have held that the following factors must be present in order to show the operation of a nuisance by a municipality:

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[35] O.C.G.A. § 36-33-1(b).

[36] *Id*.

[37] *See Weaver v. City of Statesboro*, 288 Ga. App. 32, 34-35, 653 S.E.2d 765 (2007).

[38] *See City Council of Augusta v. Lee*, 153 Ga. App. 94, 96, 264 S.E.2d 683 (1980).

[39] Ga. Const. of 1983, Art. IX, Sec. II, Par. IX; *see also Toombs County v. O'Neal*, 254 Ga. 390, 391, 330 S.E.2d 95 (1985).

[40] *Precise v. Rossville*, 261 Ga. 210, 403 S.E.2d 47 (1991).

[41] *Hibbs v. City of Riverdale*, 267 Ga. 337, 478 S.E.2d 121 (1996).

> (1) The defect or degree of misfeasance must be to such a degree as would exceed the concept of mere negligence. (A single isolated act of negligence is not sufficient to show such a negligent trespass as would constitute nuisance.);
>
> (2) The act must be of some duration and the maintenance of the act or defect must be continuous of regularly repetitious; and
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> (3) Failure of the municipality to act within a reasonable time after knowledge of the defect or dangerous condition. The latter factor requires either knowledge of notice of the dangerous condition. (Punctuation and citations omitted)[42]

II. Official Immunity

The Georgia Constitution provides official immunity to state and county officers and employees from claims against them in their individual – as opposed to official – capacities.[43] They are immune from claims arising from the performance of their discretionary functions unless they act with actual malice or actual intent to cause injury.[44] Although Art. I, Sec. II, Para. IX does not apply to municipalities,[45] the General Assembly has given municipal officers similar protection: "Members of the council and other officers of a municipal corporation shall be personally liable to one who sustains special damages as the result of any official act of such officers if done oppressively, maliciously, corruptly, or without authority of law."[46]

A. Discretionary vs. Ministerial Functions

Whether a government employee's action is ministerial or discretionary is based on the facts of each particular case.[47] Such a determination "depends on the character of the specific actions complained of, not the general nature of the job, and is to be made on a case-by-case

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[42] *Earnheart v. Scott*, 213 Ga. App. 188, 189, 444 S.E.2d 128 (1994).

[43] Ga. Const. of 1983, Art. I, Sec. II, Par. IX(d).

[44] *Id*.

[45] *City of Thomaston v. Bridges*, 264 Ga. 4 , 439 S.E.2d 906 (1994).

[46] O.C.G.A. § 36-33-4.

[47] *Woodard v. Laurens County*, 265 Ga. 404, 407, 456 S.E.2d 581 (1995).

basis."[48] A discretionary function requires a government official to exercise his judgment.[49] Georgia courts have determined a wide variety of actions to be discretionary governmental functions including: the cleaning of streets[50]; the installation and maintenance of traffic lights;[51] the maintenance of a fire department;[52] the construction and maintenance of a sewer and drainage system;[53] and the collection and transportation of garbage by city employees.[54]

On the other hand, a "ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or approved to exist, and requiring merely the execution of a specific duty."[55] Examples of ministerial conduct include: a police officer's routine patrol (as opposed to an emergency response);[56] providing adequate medical attention to inmates (as opposed to determining what medical treatment to provide);[57] and a supervisor's responsibility to train employees according to official guidelines and to enforce mandatory policies and procedures.[58]

B. Actual Malice

The Georgia Supreme Court has interpreted "actual malice," as used in the context of official immunity, to require a "deliberate intention to do wrong," and denotes "express malice or

[48] *Wright v. Ashe*, 220 Ga. App. 91, 93, 469 S.E.2d 268 (1996).

[49] *Stone v. Taylor*, 233 Ga. App. 886, 506 S.E.2d 161 (1998).

[50] *See Cason v. Columbus*, 148 Ga. App. 208, 250 S.E.2d 836 (1978).

[51] S*ee Bowen v. Little*, 139 Ga. App. 176, 228 S.E.2d 159 (1976).

[52] S*ee Banks v. City of Albany*, 83 Ga. App. 640, 64 S.E.2d 93 (1951).

[53] S*ee City of Rome v. Turk*, 235 Ga. App. 223, 219 S.E.2d 97 (1975).

[54] *See Boone v. City of Columbus*, 87 Ga. App. 701, 75 S.E.2d 338 (1953).

[55] *Clive*, *supra*, 280 Ga. App. 836, 635 S.E.2d 188 (2006) (*citing Standard v. Hobbs*, 263 Ga. App. 873; 589 S.E.2d 634 (2003)).

[56] *McLemore*, *supra*, 212 Ga. App. 865, 443 S.E.2d 505 (1994)

[57] *Howard v. City of Columbus*, 239 Ga. App. 399, 411, 521 S.E.2d 51 (1999).

[58] *Id*.

malice in fact."[59] "Such act may be accomplished with or without ill-will and whether or not injury was intended."[60] In *Adams v. Hazelwood*, the Georgia Supreme Court found no actual malice where a high school coach ordered a student athlete to cut weeds with scissors as punishment.[61] The Court held: "[a]ctual malice required more than harboring bad feelings about another. While ill-will may be an element of actual malice in factual situations, its presence alone cannot pierce official immunity; rather, ill-will must also be combined with the intent to do something wrongful or illegal."[62] A public officer's subjective mental state is irrelevant unless it prompts him to "intend a legally unjustifiable action."[63]

C. Actual Intent to Cause Injury

Actual malice and actual intent to cause injury are not synonymous.[64] An "actual intent to cause injury" requires more than the intent to do the act that caused the harm; rather, it means an actual intent to harm the injured person.[65] For example, a person acts in self-defense cannot be said to act with the intent to harm someone: "an injurious work-related act committed by an officer, but justified by self-defense, comes within the scope of official immunity."[66]

III. Qualified Immunity

Because the states, their agencies, and their employees in their official capacities are protected by the Eleventh Amendment immunity and therefore not deemed "a person" under 42 U.S.C. § 1983, Section 1983 is only available against counties, municipalities, and public

[59] *Adams v. Hazelwood*, 271 Ga. 414, 415, 520 S.E.2d 896 (1999) (*quoting Merrow v. Hawkins*, 266 Ga. 390, 391-392, 467 S.E.2d 336 (1996) (internal quotations omitted).

[60] *Id*. at 416.

[61] *Id*.

[62] *Id*. at 415.

[63] *Id*.

[64] *Kidd v. Coates*, 271 Ga. 33, 518 S.E.2d 124 (1999).

[65] *Id*.

[66] *Id*. at 34.

officials acting in their individual capacities.[67] Although Section 1983 is silent with respect to immunities, the Supreme Court has held "Congress did not intend § 1983 to abrogate immunities well grounded in history and reason."[68] To that end, public officials sued in their individual capacity under Section 1983 may be entitled to qualified immunity.

In order to benefit from qualified immunity, a defendant must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.[69] The Courts have interpreted discretion broadly, "instead of focusing on whether the acts in question involved the exercise of actual discretion, we assess whether they are of a type that fell within the employee's job responsibilities . . . . "[W]e look to the general nature of the defendant's action, temporarily putting aside the fact that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances."[70] This is much broader than the Georgia courts' formulation of discretion for official immunity purposes. [71]

If the defendant is able to establish discretionary authority, the burden then shifts to the plaintiff to prove: (a) a violation of his federal constitutional rights; and (b) the federal constitutional right was "clearly established" under precedents of the U.S. Supreme Court, the Eleventh Circuit or the Georgia Supreme Court[72] "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand

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[67] *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 522, 109 S. Ct. 2304, 105 L. Ed.2d 45 (1989)

[68] *Buckley v. Fitzsimmons*, 509 U.S. 259, 268, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) (internal quotations omitted).

[69] *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002).

[70] *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265-66 (11th Cir. 2004).

[71] Cf. *Howard v. City of Columbus*, 239 Ga. App. 399, 411, 521 S.E.2d 51 (1999) (Discretion defined by policies and procedures).

[72] *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1281 (11th Cir. 1998).

that what he is doing violates that right."[73] The salient question is whether the defendant had "fair warning" that his conduct was unconstitutional.[74]

AVAILABLE RELIEF

In addition to damages, plaintiffs litigating against government frequently seek injunctive and mandamus relief. An injunction restrains performance while a mandamus compels performance. In either case, plaintiffs need to be aware of O.C.G.A. § 9-10-2, which requires that five days advance written notice of an injunction or mandamus hearing be given to the Attorney General in an action against the State of Georgia.

A. Injunction

Georgia courts will grant a preliminary injunction to maintain the status quo pending a final decision on the merits if the equities weigh in favor of the party seeking the injunction and there is no adequate remedy at law.[75] As a part of the balancing of the equities, the court may consider the plaintiff's likelihood of success on the merits.[76] The standard for a permanent injunction is the same, except that the plaintiff must prevail on the merits.[77]

A federal court, on the other hand, will apply a more rigid test requiring a showing of: (1) substantial likelihood of success on the merits; (2) that the movant will suffer irreparable injury unless injunction issues; (3) threatened injury to the movant outweighs possible injury injunction may cause the opposing party; and (4) an injunction will not disserve the public interest.[78] The

[73] *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed 2d 666 (2002).

[74] *Id*.

[75] *See Garden Hills Civic Assoc. v. MARTA*, 273 Ga. 280, 281, 539 S.E.2d 811 (2000).

[76] *Id*.

[77] *See Bale v. Todd*, 123 Ga. 99, 103, 50 S.E. 990 (1905).

[78] *See Bank of America, N.A. v. Sorrell*, 248 F. Supp.2d 1196 (N.D. Ga. 2002).

standard for permanent injunction is essentially the same as for a preliminary injunction except the plaintiff must show actual success on the merits instead of a likelihood of success.[79]

B. Mandamus

Mandamus is appropriate if the plaintiff has no adequate remedy at law, and has demonstrated a clear legal right to the relief requested or that the defendant public official has committed a gross abuse of discretion.[80] Because "[m]andamus is the remedy for inaction of a public official, . . . [it] is not the proper remedy to compel the undoing of acts already done or the correction of wrongs already perpetrated, and . . . this is so, even though the action taken was clearly illegal."[81]

A plaintiff must first exhaust all administrative remedies before seeking mandamus relief.[82] The proper party to a mandamus action is the public official, not the governmental entity itself.[83]

CONCLUSION

Although government entities typically enjoy more resources and more protections in the law than private parties, litigating against a government entity is not always a hopeless endeavor. In most cases, an attorney with a good working knowledge of the procedures outlined in this paper will be equipped to fight the government on a nearly level playing field.

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[79] *See Siegel v. Lepore*, 234 F.3d 1163, 1213 (11th Cir. 2000).

[80] *Voyles v. McKinney*, 283 Ga. 169, 169-70, 657 S.E.2d 193 (2008).

[81] *Hilton Constr. Co. v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 266 S.E.2d 157 (1980).

[82] *O'Callahan v. Aikens*, 218 Ga. 46, 126 S.E.2d 212 (1962).

[83] *Crow v. McCallum*, 215 Ga. 692, 693, 113 S.E.2d 203 (1960).