SECOND DIVISION
DOYLE, P. J.,
DAVIS and WHITAKER, JJ.

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November 3, 2026

In the Court of Appeals of Georgia

A26A1353, A26A1354, A26A1355. MELGAR et al. v. SMRE Roswell SPE, LLC; and vice versa.

DAVIS, Judge.

These companion cases arise from three orders from the Gwinnett County Superior Court granting in part and denying in part a motion for summary judgment filed by SMRE Roswell SPE, LLC ("SMRE") on a civil complaint filed by Mario Melgar, Marco Villeda, and Carla Herrera ("plaintiffs") following an incident at the Roswell Creek Apartment complex owned by SMRE. In Case No. A26A1353, the plaintiffs argue that the trial court erred by granting summary judgment on (1) their assault and battery claim; (2) their trespass claim; (3) their premises liability claim; (4) their breach of contract claim; and (5) their punitive damages claim and Herrera's

attorney fees claim. In Case Nos. A26A1354 and A26A1355, SMRE argues that the trial court erred by denying summary judgment on the plaintiffs' false imprisonment claim. For the reasons that follow, in Case No. A26A1353, we reverse the trial court's order granting summary judgment on the assault claim as to Melgar, but affirm as to Villeda and Herrera; and we affirm the trial court's order on the battery claim as to all plaintiffs. We also affirm the trial court's order granting summary judgment on the trespass claim as to all plaintiffs and the negligence as a result of breach of contract claim as to all plaintiffs. And we reverse the trial court's grant of summary judgment on the premises liability claim as to Melgar and Villeda and remand with direction. We affirm the premises liability claim as to Herrera. We also reverse the trial court's grant of summary judgment claim as to Melgar's punitive damages and attorney fees claims; we affirm the trial court's grant of summary judgment as to Villeda's punitive damages and attorney fees claims and Herrera's punitive damages and attorney fees claims. In Case Nos. A26A1354 and A26A1355, we affirm the trial court's order denying SMRE's motion for summary judgment on Melgar and Villeda's false imprisonment claim.

> Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.

> In reviewing the grant or denial of a motion for summary judgment, we apply a de novo standard of review, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant.

Self v. Local Mech. Networking, Inc., 369 Ga. App. 153, 153 (892 SE2d 578) (2023).

So viewed, the record shows that Detective Charles Craig, an officer with the City of Roswell Police Department, began working as a part-time security officer for Roswell Creek Apartments in May of 2021. The arrangements for Craig's employment with the apartment complex were made with the manager of the complex, Darlene Maisonete. Maisonete instructed Craig that they were looking into "having more of a police presence" at the complex and to have "a contact ... if they have any issues on the property." Maisonete specifically asked Craig to check on the building that was vacant to make sure there was no one in there who was not supposed to be in there. In early June of 2022, Craig received a list of the apartments that were supposed to be vacant. Craig had no set hours to work at the apartment complex, but was limited to working 30 hours per month. He reported those hours by submitting a spreadsheet via email to Maisonete and received a paycheck from SMRE. Craig testified that "it varied" whether he would do his apartment complex work at the

same time he was on-duty as a police officer but that he did not recall that the Roswell Police Department had any policy against doing so.

Around 9:30 or 10:00PM on the night of June 22, 2022, Craig was on duty as a City of Roswell Police Officer. He received "shift pass down notes"[1] that indicated there had been two incidents listed as burglaries of unoccupied residences at the Roswell Creek apartment complex. Craig went to the complex to patrol the area and, using the list provided to him by Maisonete, determined unit 809C, the unit listed in the shift pass down notes, was a vacant unit. Because there were signs that there may have been people living inside, Craig used his radio to call for backup, requesting additional officers to assist.[2] Three additional officers responded to assist Craig. The officers first entered apartment 809C and observed items that indicated people were living in the apartment, but they did not find anyone inside. Then they went to a unit in building 807, which also should have been vacant because the entire building was

[1] According to Craig, every incident occurring in a 12-hour shift that is assigned a case number is sent to all the Roswell Police Officers so that every officer knows what has transpired in previous shifts.

[2] It was not unusual for Craig to call for backup assistance from other officers while he was working at the apartment complex if there was an incident that required it.

condemned. Finally, the officers went to apartment 805C, which Craig mistakenly believed was still part of the 807 condemned building and, thus, he presumed it should have been vacant.

Craig and the other officers were all uniformed and had their service weapons with them as they approached apartment 805C that night. Craig testified that the Roswell Police Department Glock handguns had flashlights on them, and he believed the officer in front was using the flashlight on his gun when clearing the buildings. When asked if he drew his gun that night, Craig responded, "I don't recall. Yes, I have [sic] because when we cleared the other buildings. I would've had my gun drawn when we cleared the vacant building. I would've had my – for building clearing, I would've had my gun drawn."

Craig testified that he stayed five or ten feet behind the other officers as they went in to clear the unit, but he did not enter the apartment. Upon entering the apartment, the other officers encountered Melgar, removed him from the building, and placed him in handcuffs. One of the officers noticed the air conditioner was running, the lights were on, and there was furniture inside the unit, and he suggested Craig double-check the list to make sure this unit was supposed to be vacant. Craig

recalled that one of the other officers asked him, "what we were out there for." He checked the list, saw that apartment 805C was rented to Carla Herrera, but still told the other officers that the apartment was on the vacant list. Rather than admitting 805C was not on the vacant list, Craig pretended to make a phone call to the property manager. While Craig was on the pretend phone call, Marco Villeda, a second resident of the apartment, arrived home, and the other officers detained him as well. Ultimately, Craig directed the residents to be released and informed the residents they had been removed because of incorrect information on a vacant apartment list.[3]

Following the incident, Craig submitted an invoice to Maisonete and was paid for working at the apartment complex on June 22, 2022, from 9:30PM to 11:00PM, during the time the incident occurred. Craig also spoke with Maisonete the next day to tell her the complex needed to repair the side of apartment 805C because it looked like there had been a forced entry. Shortly thereafter, Craig went on vacation, and while he was away, he was notified that the Roswell Police Department was conducting an internal investigation into the incident. Craig resigned from the Roswell

[3] Neither Melgar nor Villeda spoke English, and none of the officers on the scene spoke Spanish; the officers used Language Line, a telephone interpreter service, to convey this information to Melgar and Villeda.

Police Department in lieu of termination. Although he was not terminated from his part-time work at the apartment complex, Craig believed that because he was no longer a law enforcement officer he could no longer remain employed with the apartment complex.

Melgar, Villeda, and Herrera filed a complaint against SMRE as owners of the apartment complex alleging the following claims: (1) assault and battery; (2) false imprisonment; (3) trespass; (4) negligence arising from breach of contract; and (5) premises liability under OCGA § 51-3-1.[4] They also requested punitive damages and attorney fees. SMRE moved for summary judgment and following a hearing,[5] the trial court entered an order denying the motion in part and granting it in part. Specifically, the trial court granted summary judgment as to the assault and battery, trespass, and premises liability claims. As to the false imprisonment claim, the trial court denied summary judgment as to Melgar and Villeda but granted it as to Herrera. The trial court found that the negligence arising from breach of contract was not part of the

[4] The complaint also named Charles Craig, John Does 1-5, and Corporations A-E as additional defendants. The parties entered a consent order dismissing the claims against Craig with prejudice.

[5] The transcript from this hearing is not in the record before us.

motion for summary judgment and did not rule on that claim. The trial court also denied summary judgment as to the attorney fees and punitive damages claims. Both parties filed motions for reconsideration. On November 26, 2025, the trial court entered an order denying SMRE's motion for reconsideration of the false imprisonment claim and denying the plaintiffs' motion for reconsideration of the assault and battery claims. The trial court, however, also granted summary judgment on the negligence arising from breach of contract claim,[6] and on the attorney fees as to Herrera only, and granted summary judgment on all plaintiffs' claims for punitive damages. Both parties appealed the trial court's orders.[7]

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[6] The trial court's order on reconsideration explicitly granted SMRE's motion for summary judgment on the negligence arising from breach of contract claim as to Melgar and Villeda, but did not mention Herrera. On December 9, 2025, the trial court entered an amended order clarifying that summary judgment was also granted on this claim as to Herrera.

[7] SMRE initially filed an application for interlocutory appeal of the trial court's order. At the same time, the plaintiffs filed a notice of appeal of the trial court's orders, SMRE filed a cross appeal from the plaintiffs' notice of appeal, and we ultimately granted SMRE's application for interlocutory appeal. Thus, SMRE filed identical briefs in A26A1354 and A26A1355.

1. In the plaintiffs' first enumeration of error, they argue that the trial court erred in granting summary judgment and determining that no genuine issue of material fact exists on SMRE's liability on their assault and battery claims. We agree in part and reverse the grant of summary judgment on the assault claim as to Melgar, but affirm as to the remaining plaintiffs. We affirm the grant of summary judgment on the battery claim as to all plaintiffs.

Prior to addressing Plaintiffs' claims for assault and battery it is important to recognize the distinction between the two claims. "Any violent injury or illegal attempt to commit a physical injury upon a person is a tort for which damages may be recovered." OCGA § 51-1-14. Although both assault and battery are defined in OCGA § 51-1-14, they are recognized as two separate torts. "An assault may be committed without actually touching, or striking, or doing bodily harm, to the person of another." *Wallace v. Stringer*, 250 Ga. App. 850, 853(1)(a) (553 SE2d 166) (2001) (quotation marks omitted). While assault does not require any physical contact, battery does require the alleged victim suffer a physical injury. OCGA § 51-1-13 ("A physical injury done to another shall give a right of action to the injured party, whatever may be the

intention of the person causing the injury, unless he is justified under some rule of law.").

Before we address the claims of assault and battery, we must determine whether SMRE can be liable in tort for the alleged acts committed by Craig and the other officers. To hold SMRE liable for the alleged tortious conduct, the plaintiffs must show that Craig was acting as an agent of SMRE. "For the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation or privity to the negligent person as to create the relation of principal and agent." OCGA § 51-2-1(a). A company can be vicariously liable for the actions of its employees or agents. See *Campbell v. Savannah Motors, Inc.*, 311 Ga. App. 460, 461-62(2) (716 SE2d 534) (2011) (summary judgment on vicarious liability of employer was not appropriate where there was some evidence that its employee committed a negligent act). There is sufficient evidence for a jury to conclude that Craig was acting as an agent for SMRE and SMRE may be vicariously liable for any torts committed by Craig.

The next question is whether SMRE can be liable for the acts committed by the other officers. As an initial matter, the plaintiffs argue that SMRE can be liable for

assault and battery based on the actions of the other police officers who they allege were acting under Craig's "direction." We disagree. There is no evidence that either Craig or anyone else with SMRE had any authority to direct the other officers' actions or control the manner in which they performed their police functions. The mere fact that Craig called in the other officers for backup and then provided information does not mean that he "directed" their subsequent actions or converted their lawful police duties into actions attributable to SMRE. See *Reeves v. Higbee KYG, LP*, A26A1174, slip op. at*2 (Ga. App. Oct. 2, 2026) (2026 WL 2968014) (reporting information without directions or instructions not enough to find that a person directed police action); *Touchton v. Bramble*, 284 Ga. App. 164, 166(1)(a) (643 SE2d 541) (2007) (bringing matters to an officer's attention without providing direction, guidelines, or instruction not enough to find that a person directed police action).

Having addressed the potential vicarious liability for the alleged assault and battery, we now address the claims as they relate to each plaintiff. We begin with the allegations of battery. Here, the evidence shows that while Craig did not enter the plaintiffs' apartment, other officers did, they announced their presence, called Melgar out, and placed him in handcuffs. Thus, the only alleged touching occurred by the

other officers, who were not agents or employees of SMRE, when they handcuffed Melgar. The record is not clear whether Villeda was handcuffed or merely instructed to wait near Melgar when he arrived on the scene, but it is clear that Craig did not handcuff him. And it is undisputed that Herrera was not present when this incident occurred. Accordingly, summary judgment was appropriate on the battery claim as to all plaintiffs.

The trial court also granted summary judgment on the assault claim as to all plaintiffs, finding that the facts could not support an assault claim because Craig's deposition revealed that he did not threaten any of the plaintiffs and that Craig's gun was not drawn when Melgar was removed from his apartment. We disagree that the evidence demands a finding of summary judgment in favor of SMRE on the assault claim as to Melgar. In viewing the evidence in the light most favorable to the plaintiffs, Craig's testimony about whether he had his gun drawn does not demand the inference that his gun was not drawn when Melgar was removed from the apartment. In his deposition, when asked if he drew his gun that night, Craig responded, "I don't recall. Yes, I have [sic] because when we cleared the other buildings. I would've had my gun drawn when we cleared the vacant building. *I would've had my – for building clearing,*

I would've had my gun drawn." Although SMRE argues that these statements clearly demonstrate that Craig's gun was drawn only at the vacant apartments, we disagree. The record shows that when officers entered the plaintiffs' apartment, they believed they were at a vacant building and were there to engage in "building clearing." Craig testified, "I was still thinking we were at 807 [the abandoned building] ... nobody should've been in that apartment at all." And, "for building clearing, I would've had my gun drawn." Because the evidence and all inferences therefrom must be viewed in the light most favorable to the plaintiffs as the nonmovants, the evidence does not demand a finding that Craig's gun was not drawn when Melgar was removed from the apartment. See *Giddens v. Med. Ctr. of Cent. Ga.*, 353 Ga. App. 594, 600(2) (839 SE2d 31) (2020) ("[I]n summary judgment proceedings, the court cannot weigh the evidence or determine its credibility. Where the facts as testified to by the parties create a conflict in the evidence as to a material issue, summary judgment is precluded.").

Further, whether Craig's firearm was drawn or not is not dispositive of the issue of whether an assault occurred. "An assault occurs when all the apparent circumstances, reasonably viewed, are such as to lead a person reasonably to

apprehend a violent injury from the unlawful act of another...The test as to whether an assault and battery has occurred is what would be offensive to an ordinary person not unduly sensitive as to his dignity." *Everett v. Goodloe*, 268 Ga. App. 536, 543(2)(a) (602 SE2d 284) (2004). To constitute an assault, it is only necessary to show an intention to commit an injury, coupled with an apparent ability to do so. *Wallace*, 250 Ga. App. at 853(1)(a). The test is whether Melgar reasonably apprehended a violent injury from Craig which is possible even without Craig having his gun drawn. See id. (allegations of assault survived summary judgment where a store manager shouted and threatened to drag the plaintiff to the back of the store, coupled with her apparent ability to do so). "We cannot say as a matter of law that [Melgar] was not the victim of an assault. This is a matter for a jury to determine." Id.

SMRE argues the assault and battery claims fail because Craig was performing an exclusively police function at the time of the incident rather than acting as their agent. We are not persuaded by this argument. Although Craig was on duty as a Roswell Police Officer on the night of the incident, he also submitted a time-sheet to Maisonete and was paid for working during the hours the incident occurred which was the typical manner in which Craig performed his duties for the apartment complex.

Thus, a genuine issue of material fact exists as to whether Craig was acting as an agent for SMRE at the time of the alleged tortious acts. See *Ambling Mgmt. Co., LLC v. Miller*, 295 Ga. 758, 761-62(2) (764 SE2d 127) (2014) (The proper focus of analysis is to determine in what capacity the officer was acting at the time the tort arose and this is generally a question for the jury.)[8] However, we affirm the grant of summary judgment to SMRE as to any claims involving the other officers having concluded that they were not acting at the direction of Craig, and thus their actions cannot be imputed to SMRE.

2. The plaintiffs' second enumeration of error alleges the trial court erred by granting summary judgment to SMRE on Count 3, the trespass claim. We disagree.

Georgia's civil trespass statute provides that "the right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie." OCGA § 51-9-1. "Under Georgia law, a trespasser is one who, though peacefully or by mistake, wrongfully enters upon property owned or occupied by another." *Woodstone Townhouses, LLC. v. S. Fiber Worx, LLC*, 358 Ga. App. 516, 521-22(1) (855 SE2d 719)

[8] We address this argument in more detail in SMRE's cross appeal, Case No. A26A1354, and interlocutory appeal, Case No. 1355, below.

(2021). The essential element of a trespass is entry onto the property of another. *Miller v. Smith & Smith Land Surveyors, P.C.*, 194 Ga. App. 474, 474 (391 SE2d 20) (1990) (no trespass of any kind occurred where all actions complained of took place on a public road).

Here, the record is clear that Craig did not enter the plaintiffs' apartment. He testified in his deposition that he "never saw the inside of the apartment," and stated in his affidavit that he did not enter apartment 805C at any time that evening. And the three other police officers who were assisting Craig that evening were not agents of SMRE.[9] It is undisputed that the reason officers entered the plaintiffs' apartment was because Craig believed they were still at building 807, the vacant building, rather than building 805 and not because of any instruction from SMRE. Thus, assuming without deciding that Craig was acting as an agent of SMRE that evening, the record shows that Craig did not enter apartment 805C and that the other officers' actions cannot be imputed to SMRE.[10]

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[9] We previously concluded in Division 1 that the other officers were not acting at the direction of Craig, and thus, their actions cannot be imputed to SMRE.

[10] The plaintiffs' argument that SMRE can be liable for trespass based on OCGA § 44-7-50 is unavailing because it applies to demands for possession by a landlord, which does not apply here. Further, the plaintiffs did not raise this theory

Accordingly, we affirm the trial court's order granting summary judgment to SMRE on Count 3, trespass.

3. The plaintiffs also argue the trial court erred in granting summary judgment on their premises liability claim. For the reasons that follow, we reverse the trial court's grant of summary judgment on Count 5 as to Melgar and Villeda and remand the case for further proceedings consistent with this opinion. We affirm the trial court's grant of summary judgment as to Herrera, because it is undisputed that she was not present on the premises when any tort allegedly was committed.

> The concept of premises liability imposes upon the proprietor a duty to exercise ordinary care in keeping his premises safe for invitees. This concept focuses on different inquiries depending on whether the injury arises (a) from pre-existing conditions or (b) from active negligence, i.e., from the proprietor's acts or omissions occurring at the time the plaintiff was on the premises. In the former, the inquiry is whether the proprietor had superior knowledge of the defect or dangerous condition; in the latter, the inquiry is whether the proprietor could reasonably foresee that his actions or inactions would cause injury to the plaintiff. If a third party's misconduct causes injury to a plaintiff while on the premises, the former concept applies, and the inquiry is whether the proprietor had superior knowledge of the danger that a third party would so act.

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of liability below and cannot raise it for the first time on appeal. See *Burke Moore Law Group, LLP v. Drew Eckl & Farnham, LLP,* 374 Ga App. 810, 820(3)(b) (914 SE2d 333) (2025) ("As a court of review, this Court is for the correction of errors of law made by the trial courts...when the trial court has not ruled on an issue, we will not address it.") (quotation modified).

Brownlee v. Winn-Dixie Atlanta, Inc., 240 Ga. App. 368, 369(2) (523 SE2d 596) (1999).

> Georgia law distinguishes between negligence cases where a condition on the premises causes injury to someone and those where an employee's active negligence causes injury to someone. Liability is determined under the framework of premises liability only if an injury is caused by a condition of the premises over which the premises owner/occupier has some degree of control, such as a static condition or passive defect. If an injury is caused by the active negligence of an owner/occupier's employee, however, ordinary negligence principles apply.

Byrom v. Douglas Hosp. Inc., 338 Ga. App. 768, 771(2) (792 SE2d 404) (2016).

The plaintiffs' complaint alleges SMRE, as the owner of the premises, had a duty to keep the plaintiffs safe from the actions of their agent, Craig. The plaintiffs allege that SMRE's management employed Craig – and the other officers at Craig's direction – to clear squatters from vacant apartments. And they allege that the officers forcibly removed Melgar from the apartment, despite indications that the apartment was rented and not vacant. Further, they allege that even after recognizing that the apartment was rented, the officers illegally continued to detain Melgar and also detained Vidella when he arrived.

Because the plaintiffs' claims arise from the actions of an employee,[11] rather than a static condition or passive defect of the property, this claim presents a question of active negligence.

> Claims of active negligence require the same proof as other simple negligence claims: (1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risk of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and, (4) some loss or damage flowing to the plaintiff.

Byrom, 338 Ga. App. at 772(2). Thus, the proper inquiry is whether Craig and SMRE could reasonably foresee that Craig's actions would cause injury to the plaintiffs. See id. Although the plaintiffs styled this premises liability claim as a static condition of the premises, SMRE correctly argued to the trial court that this claim should be analyzed under the principles of active negligence. Nevertheless, the trial court analyzed the claim as if it involved a static condition of the premises, i.e. the dangerousness of the premises. In doing so, the trial court found that SMRE was attempting to provide greater safety and there was no evidence that SMRE condoned or directed reckless or unlawful behavior by Craig. In granting summary judgment

[11] We note that the plaintiffs allege that Craig was an "employee or independent contractor" of SMRE. The parties did not develop any arguments below as to Craig's actual status. The issue of Craig's employment status can be addressed on remand.

under this framework, the trial court did not consider whether SMRE could reasonably foresee that Craig's actions or inactions would cause injury to the plaintiffs as is required for a premises liability claim based on the active negligence of an employee. See *Brownlee*, 240 Ga. App. at 369(2). Because the trial court conducted an incorrect analysis on this claim, we reverse the grant of summary judgment to SMRE on Count 5 as to Melgar and Villeda and remand for the trial court to consider whether SMRE can be liable for any alleged active negligence. We affirm the grant of summary judgment as to Herrera because there is no dispute that she was not present on the premises.

4. The plaintiffs also argue the trial court erred by granting summary judgment to SMRE on Count 4, the negligence arising from breach of contract. We conclude that the trial court did not err by granting summary judgment on this claim.

The plaintiffs argue SMRE owed a duty to Melgar, Villeda, and Herrera under the lease agreement signed by Herrera. And in granting summary judgment to SMRE, the trial court found that SMRE owed no duty to Melgar and Villeda because they did not sign the lease agreement.

Although it is not clear from the plaintiffs' briefs, what they appear to allege is that SMRE breached the general agreement concerning leased property – "the right to simply possess and enjoy the use of such real estate." OCGA § 44-7-1(a). But a party who is not listed on the lease agreement as a resident, tenant, or occupant lacks standing to bring an action for breach of the lease agreement. *Owens v. Larry Franklin Prop., Inc.*, 363 Ga. App. 362, 365-66(2) (870 SE2d 218) (2022).

The plaintiffs' reliance on *Univ. Apt. v. Uhler*, 84 Ga. App. 720, 722 (67 SE2d 201) (1951), is misplaced. *Uhler* does stand for the premise that an unauthorized intrusion by the landlord can be a breach of the landlord's duty and that duty extends to the tenant's family and guests. Id. However, the duty addressed in *Uhler* did not arise out of the lease agreement, but arose "independently of the contract." Id. at 722. Specifically, the duty referenced in *Uhler* is the duty codified in Georgia's civil trespass statute, OCGA § 51-9-1, discussed above in Division 2.

Because Melgar and Villeda were not parties to the lease agreement, they lack standing to bring an action against SMRE for breach of the agreement. *Owens*, 363 Ga. App. at 365-66. Thus, we affirm the trial court's order granting SMRE's motion for summary judgment on Count 4, breach of the lease agreement, as to Melgar and

Villeda. We also affirm the trial court's order granting summary judgment to SMRE on Count 4 as to Herrera because Herrera was not present on the night of the incident, and there are no allegations that she suffered any injury as a result of her guests, Melgar and Villeda, being removed from the apartment and detained.

5. Finally, the plaintiffs argue the trial court erred by granting summary judgement to SMRE as to all punitive damages claims and as to Herrera's attorney fees claim. The trial court granted summary judgment to SMRE on the punitive damages claim because the only tort that survived summary judgment was the false imprisonment claim as to Melgar and Villeda. But, having reversed the trial court's grant of summary judgment on the assault claim as to Melgar, we also reverse the trial court's grant of summary judgment on the punitive damages claim as to Melgar. See OCGA § 51-12-5.1; see also *Woodstone Townhouses, LLC,* 358 Ga. App. at 524-25 ("whether the tort was sufficiently aggravating to authorize punitive damages is generally a jury question").

However, we affirm the trial court's grant of summary judgment as to Villeda's punitive damages claim. Because we affirmed the trial court's denial of summary judgment on Villeda's underlying claim of false imprisonment and we reversed and

remanded the trial court's grant of summary judgment on his active negligence premises liability claim, summary judgment is proper on his claim for punitive damages because neither of the remaining underlying claims can support an award for punitive damages. OCGA § 51-12-2.1(b) ("Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that the entire want of care which would raise the presumption of conscious indifference to consequences."). "False imprisonment has been categorized as a tort where the entire injury is to the peace, happiness, or feelings of the plaintiff," and punitive damages shall not be awarded in such a case. *Carnegay v. Walmart Stores, Inc.*, 370 Ga. App. 688, 696(3) (898 SE2d 871) (2024); OCGA § 51-12-6. And, "[n]egligence, even gross negligence, is inadequate to support a punitive damage award." Georgia Farm Bureau Mut. Ins. Co. v. Miller, 222 Ga. App. 95, 96(1)(b) (473 SE2d 189) (1996).

We also affirm the trial court's grant of summary judgment as to Herrera's derivative punitive damages and attorney fees claims because we affirmed the grant of summary judgment as to her underlying claims. See OCGA § 51-12-5.1; see also

OCGA § 13-6-11. Further, we affirm the trial court's denial of summary judgment on Melgar and Villeda's attorney fees claims because their underlying claims that survive summary judgment are claims for which they may seek attorney fees. See OCGA § 13-6-11.

In summary, in Case No. A26A1353 we reverse the trial court's grant of summary judgment on the assault claim as to Melgar; we affirm the trial court's grant of summary judgment on the trespass; we affirm the trial court's grant of summary judgment on the negligence from breach of contract claim; we reverse the trial court's grant of summary judgment on the premises liability claim as to Melgar and Villeda and remand the case for further proceedings, but affirm as to Herrera. We also reverse the trial court's grant of summary judgment as to Melgar's punitive damages claims; we affirm the trial court's grant of summary judgment as to Villeda's punitive damages claim and Herrera's punitive damages and attorney fees claims.

Case Nos. A26A1354 and A26A1355

6. In its cross appeal and interlocutory appeal, SMRE argues the trial court erred by denying summary judgment on Count 2, false imprisonment. SMRE contends the evidence demands a finding that Craig was performing exclusively police

functions at the time of the incident and was not acting as SMRE's agent. We disagree.

Our courts have developed a well-established framework for determining whether a police officer working as a private security officer was performing exclusively police functions, exclusively private security functions, or a hybrid of both. See *Ambling Mgmt. Co., LLC*, 295 Ga. at 761-62(2); accord *Carnegay*, 353 Ga. App. at 659. "We consider the police officer's capacity at the time the tort arose, recognizing that the capacity can change during the events, and that this is generally a factual question for the jury." *Carnegay*, 353 Ga. App. at 659.

"The mere fact that a [] company pays for the services of a certain police officer, who does nothing but perform the duties of a police officer proper, does not make the company liable." *Pounds v. Central of Georgia Ry. Co.*, 142 Ga. 415, 415 (83 SE2d 96) (1914).

> The company may become liable for his torts by directing them, even though he be a public officer. Or he may have the functions of a public official, and also certain things that he does for the company for its benefit, for the position of exercising functions for the public and the company, in which case, where he is in the discharge of duties for the company, and the tort is committed under such circumstances as to not justify it, the company is liable. But if he commits a tort merely as a

> police officer, the company would not be liable, unless it was done at the direction of the company.
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> Id.

Here, Craig was on duty as a Roswell Police Officer on the night of the incident but SMRE also paid him for working at the apartment complex on the day of the incident, and for the same time frame in which the incident occurred. The record shows that as part of his duties for SMRE, Craig was instructed to check on vacant units in the apartment complex, and he had a list provided by Masionete to assist him with that task. His job duties with SMRE stated that if he encountered something while on patrol, he was to take whatever police actions were necessary. Viewing the evidence in the light most favorable to the nonmovants, this evidence could authorize a jury to find that Craig was acting in a dual capacity on the night in question and that at the time of the alleged torts, he was acting, not as a public servant in his role as a City of Roswell Police Officer, but instead, was acting for the benefit of SMRE by following Maisonete's direction to make sure no one was in any vacant apartments who should not be there. Thus, there is some dispute as to whether Craig was acting solely as a police officer or whether he was acting as SMRE's agent at the time of the alleged torts. See *Am. Multi-Cinema, Inc., v. Walker*, 270 Ga. App. 314, 315(1)(a) (605

SE2d 850) (2004) (jury was authorized to find off-duty police officer confronted individual to enforce a company policy rather than to perform a police duty).

Nevertheless, SMRE argues that public policy considerations weigh in favor of finding that Craig was performing exclusively police functions at the time of the incident. We are not persuaded by this argument.

SMRE argues that a fact-specific standard which determines whether an officer is acting as a public official or an agent of a business that is too relaxed threatens this public interest. SMRE further suggests that holding private businesses vicariously liable for a police officer's exercise of his government conferred police powers is conceptually inconsistent and contrary to the public policy of encouraging private businesses to hire off-duty police officers to provide security. But we have consistently applied a fact-specific analysis in these situations and "it is well settled that there are three potential capacities in which an off-duty police officer may be acting: (1) as an agent of the private employer; (2) as a public officer; or (3) in a dual capacity." *Carnegay*, 353 Ga. App. at 659.[12] The argument that a police officer always carries a

[12] SMRE's reliance on *Sims v. State*, 335 Ga. App. 625, 627 n.2 (782 SE2d 687) (2014) is misplaced. *Sims* does not stand for the proposition that any police officer who is employed by a private business for security is always acting exclusively as a police officer and not an agent of the private business.

duty to enforce the law and maintain the peace is precisely the reason why there must be a fact-specific inquiry into the officer's conduct to determine whether he was acting as an agent of the company or in his capacity as a public servant at the time of the tortious act. See *Carnegy*, 353 Ga. App. at 659. And here the facts simply do not demand a finding that Craig was acting solely in his capacity as a police officer at the time of the alleged torts. See *Self*, 369 Ga. App. at 153 (summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law). Accordingly, we affirm the trial court's denial of summary judgment to SMRE on Count 2, false imprisonment.

Judgment affirmed in Case Nos. A26A1354 and A26A1355. Whitaker, J., concurs. Doyle, P. J. dissents. Judgment affirmed in part and reversed in part and case remanded with direction in Case No. A26A1353. Whitaker J., concurs. Doyle, P. J., concurs in part and dissents in part.

In the Court of Appeals of Georgia

A26A1353, A26A1354, A26A1355. MELGAR et al. v. SMRE ROSWELL SPE LLC, and vice versa.

DOYLE, Presiding Judge, dissenting in part.

I believe that the undisputed record shows that Officer Charles Craig was not acting as an agent of SMRE Roswell SPE LLC ("SMRE"), so it cannot be held vicariously liable for torts Craig allegedly committed. Therefore, I respectfully dissent in part.[1]

[1] To the extent that the majority's opinion and analysis result in the grant of summary judgment to SMRE, I concur.

[I]n cases involving off-duty police officers working for private employers, the employer escapes liability if the officer was performing police duties which the employer did not direct when the cause of action arose. We consider the police officer's capacity at the time the tort arose, recognizing that the capacity can change during the events, and that this is generally a factual question for the jury. And it is well settled that there are three potential capacities in which an off-duty police officer may be acting: (1) as an agent of the private employer; (2) as a public officer; or (3) in a dual capacity. The first and the third categories implicate questions of vicarious liability.

We have explained:

If a man is a policeman, and he has no duties to discharge except police duties proper for the public, — if he is acting as a public policeman and nothing else, — the mere fact that the company pays for his services does not make him the agent of the company. The company may become liable for his torts by directing them, even though he be a public officer. He may occupy a dual position of exercising functions for the public and the company; in which case, where he is in the discharge of duties for the company, and the tort is committed under such circumstances as not to justify it, the company is liable. But, if he commits a tort merely as a police officer, the company would not be liable, unless it was done at the direction of the company. The mere fact that a company pays for the services of a certain police officer, who does nothing but perform the duties of a police officer proper, does not make the company liable.

Carnegay v. WalMart Stores, Inc., 353 Ga. App. 656, 659 (839 SE2d 176) (2020) (cleaned up).

Typically, liability of a private employer for the conduct of a police officer occurs when off-duty officers are providing police presence at the private employer's place of business. In most cases, while working a shift for the private employer and off-duty from a public job, the officer encounters someone they believe to be committing a crime resulting in the commission of a tort by the officer (assault, battery, false imprisonment, and even murder) during an attempted arrest. See, e.g., *Ambling Mgmt. Co., LLC v. Miller*, 295 Ga. 758, 761–62(2) (764 SE2d 127) (2014); *Carnegay*, 353 Ga. App. at 660–61(1)(b); compare *Paradise Ent. Group, Inc. v. Favors*, 363 Ga. App. 636, 637, 643–44(2) (871 SE2d 916) (2022) (holding that a business was not liable for conduct of on-duty police officer with no private employee relationship because a shooting was not reasonably foreseeable, and there was no evidence the business asked, directed, or encouraged the officer to shoot the appellee). The question then becomes whether, while working for the private employer, the officer stepped back

into his public officer shoes at the time that the torts occurred such that the private employer is no longer liable. Because those scenarios are often fact intensive, a jury generally determines in what capacity the officer was acting at the time the tort arose. See *Reeves v. Higbee KYG, LP*, ___ Ga. App. ___ (2026), A26A1174, slip op. at 5 (Ga. App. Oct. 2, 2026). "But when the evidence even when viewed in the light most favorable to the plaintiff, shows without dispute that an officer was performing police duties which the employer did not direct, the trial court does not err by granting summary judgment to the employer." Id. at 5–6; See *Agnes Scott College, Inc. v. Hartley*, 346 Ga. App. 841, 844(3)(a) (816 SE2d 689) (2018) (explaining that the "proper focus of analysis is to determine in what capacity [the officer] was acting at the time the tort arose") (quotation marks omitted).

Here, unlike most cases that involve off-duty police, Craig began the evening clocking into work for the Roswell Police Department (as did his fellow officers whom he later called for back-up). Thus, there is no dispute that he was on-duty with the police department, so the question becomes whether he at some point transitioned into a "dual capacity." The record is clear that the answer is no.

After reviewing shift pass down notes indicating that there had been two suspected burglaries at the apartment complex, Craig went there to follow up. Craig testified that he was using his professional judgment as a police officer during the time period in question, and the only reason he went to the property was because of the shift pass down notes. Craig checked on unit 809C, which should have been unoccupied, and upon discovering evidence of unpermitted occupancy, called into the police radio for backup from other on-duty officers, none of whom had a relationship with SMRE. These officers and Craig continued to inspect the property,[2] and decided to investigate the apartment in question after observing that plywood covering the window had been forced inward into the apartment, the metal frame around the window was bent, and the front door was open. Craig testified that he believed Melgar was trespassing so he handcuffed Melgar and detained him "for the investigation, and for officer safety." During his time on the property, Craig wore an activated body camera and was in police uniform.

[2] Craig described the apartment listed in the shift down notes (809) as having signs of somebody being there and the abandoned building (807) as completely destroyed inside.

On the other hand, there is no evidence that, at the time of these events, SMRE was present, directed, or controlled Craig's conduct in carrying out his duties while he was on shift with the police department. Further, it is undisputed that SMRE was not aware that Craig was on site at the time nor did it request any particular course of action during police response to the complex. Compare *Ambling Mgmt. Co., LLC*, 295 Ga. at 760–61(1), 765(3) (holding that a jury question existed as to the officer's role in part because the officer "approached [the plaintiff's] car to discuss with him [the apartment complex's] policy of keeping the handicap spaces clear," and the defendant had directed the officers to make more arrests); *Carnegay*, 353 Ga. App. at 661(1)(b) (addressing a false imprisonment claim and holding that fact questions precluded the grant of summary judgment to defendant WalMart because there was testimony from the officer that he reported to WalMart's on-site loss prevention employees, and it was up to WalMart's loss-prevention staff to decide whether he should approach a potential shoplifting suspect such as the plaintiff). Instead, Craig testified that if he had decided to arrest Melgar and Villeda, he would have contacted his supervising officer at the Roswell Police department for further guidance on how to proceed. Although there is evidence that Craig billed the apartment complex for time when he

was on duty with the police department, the undisputed record shows that Maisonette was his only contact at SMRE, and she did not provide him with any written work responsibilities. She orally instructed him only to be a presence, drive around the complex, and let her know of any problems. She did not provide any instructions about arresting or detaining anyone, and she was not aware of Craig's presence at the complex on the night in question and did not provide him any direction as to how to handle the situation.

Appellants make much of Craig's use of a detailed rent roll identifying vacant apartments provided to him by SMRE upon his request earlier that June. Craig testified that he asked Maisonette to provide him the rent roll, which she did without direction, he left the rent roll in his patrol car, and he had not used it before that evening. More importantly, Craig did not use the detailed rent roll when deciding whether to enter their apartment; rather, after Melgar was handcuffed and Villeda appeared on the scene, Craig went to his patrol vehicle to get the list to double check what it said about the apartment's occupancy. It was at this point that he recognized

his mistake[3] and began to engage in conduct intending to cover it up. At a later date, he also submitted an invoice to SMRE for 1.5 hours of work.

But the subsequent use of the rent roll to check his mistake and the decision to double-bill for the time worked (both of which occurred after the alleged assault and false imprisonment) does not change the nature of the capacity in which Craig was working at the time the torts alleged in this case arose. "[T]he mere fact that a company pays for the services of a certain police officer, who does nothing but perform the duties of a police officer proper, does not make the company liable." *Carnegay*, 353 Ga. App. at 659 (quoting *Hyatt Corp. v. Cook*, 242 Ga. App. 542, 544–45 (529 SE2d 633) (2000)). See also *Pounds v. Cent. of Ga. Ry. Co.,* 142 Ga. 415, 418 (83 SE 96) (1914) (holding that a railroad was not liable for a shooting death caused by an on-duty officer ordered to patrol a railroad by his sergeant, another city police officer). Craig was on-duty for the police department acting on shift notes and following up on reported burglaries. Craig's conduct and decisions were based on his observations upon investigating the scene, not based on any direction from SMRE, which gave him

[3] Craig testified that at the time he mistakenly thought that the Appellants' apartment (that had a bent window frame, open door, and other issues evincing a break-in) was part of the abandoned building (807). It was not until after he checked the rent roll that he fully realized his mistake.

no instructions about detaining or arresting anyone either that evening or previously. See *Reeves*, slip op. at *6 (holding that, despite reporting the suspect's description and location to the off-duty officer, there was no evidence the store provided directions or instructions on how to handle the suspect, or provided the officers with "any relevant policies, practices, training, goals, objectives, or expectations."). See also *Paradise*, 363 Ga. App. at 644. Accordingly, the trial court erred by holding that a fact question existed as to whether SMRE was vicariously liable for any of Craig's actions during his investigation of the apartment complex while on duty as a police officer at the time of the alleged torts.