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Business Associations

by Stuart E. Walker*

I. INTRODUCTION

This Article surveys a handful of noteworthy cases involving corporations and limited liability companies decided by the Georgia Supreme Court and the Georgia Court of Appeals between June 1, 2018 and May 31, 2019.¹

II. ISSUES OF FIRST IMPRESSION

A. Georgia's apportionment statute applies to tort suits seeking economic damages for injury to intangible property interests, but the statute does not apply when two or more tortfeasors act negligently by engaging in "traditional concerted action."

The Georgia Supreme Court's decision in *Federal Deposit Insurance Corporation v. Loudermilk*² brought answers to two previously unresolved questions of Georgia law. First, the court held that Georgia's

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1. For an analysis of business associations law during the prior survey period, see Stuart E. Walker, *Business Associations, Annual Survey of Georgia Law*, 70 MERCER L. REV. 19 (2018), which includes a discussion of one significant case that fell within this year's date range but that was discussed in last year's survey article, *Colonial Oil Industries, Inc. v. Lynchar, Inc.*, 303 Ga. 839, 815 S.E.2d 917 (2018). See also Walker, *supra* note 1, at 19 n.1.

2. 305 Ga. 558, 826 S.E.2d 116 (2019) (hereinafter *Loudermilk II*). The name of this case will be familiar to most readers because the same litigation made an earlier appearance before the supreme court five years ago. In that first appeal (which came before the supreme court on a question of unresolved Georgia law certified by the United States District Court for the Northern District of Georgia), the supreme court addressed the application of Georgia's business judgment rule. See *FDIC v. Loudermilk (Loudermilk I)*, 295 Ga. 579, 761 S.E.2d 332 (2014).

apportionment statute, O.C.G.A. § 51-12-33,³ does apply to torts suits seeking damages to compensate for purely pecuniary losses because those kinds of losses constitute “injuries” to “property” under the statute.⁴ Second, the court held that O.C.G.A. § 51-12-33 does not apply when two or more tortfeasors act negligently by engaging in “traditional concerted action, as it was understood at common law,”⁵ because in those circumstances the acts of each tortfeasor are imputed to the other as a matter of law, each is jointly and severally liable for any resulting damages, and the “fault” of each is indivisible (which is why the resulting damages are not apportionable).⁶

The Federal Deposit Insurance Corporation (FDIC), as receiver of Buckhead Community Bank, alleged that nine former bank officers and directors acted negligently and grossly negligently when they approved ten commercial real estate loans causing losses totaling approximately \$22 million and ultimately contributing to the bank’s failure and takeover by the Georgia Department of Banking and Finance.⁷ The case against the officers and directors proceeded to trial based on the FDIC’s theory that the defendants had breached their duties to the bank in ways not immunized by Georgia’s business judgment rule, as elaborated by the supreme court when the case was first before it.⁸ The jury in the federal trial determined that some of the defendants negligently approved four of the ten loans at issue and, as a result, entered judgment in favor of the FDIC in the amount of nearly \$5 million. It was from that judgment that the defendants appealed to the United States Court of Appeals for the Eleventh Circuit, setting the stage for this year’s decision.⁹

The case came before the court on three certified questions of unresolved Georgia law:

1. Does Georgia’s apportionment statute, OCGA § 51-12-33, apply to tort claims for purely pecuniary losses against bank directors and officers?
2. Did Georgia’s apportionment statute, OCGA § 51-12-33, abrogate Georgia’s common-law rule imposing joint and several liability on tortfeasors who act in concert?

3. O.C.G.A. § 51-12-33 (2019).

4. *Loudermilk II*, 305 Ga. at 560, 826 S.E.2d at 119.

5. *Id.* at 576, 826 S.E.2d at 129.

6. *Id.* at 575, 826 S.E.2d at 128–29.

7. *Id.* at 558–59, 826 S.E.2d at 117–18.

8. *See Loudermilk I*, 295 Ga. at 579–86, 761 S.E.2d at 334–39.

9. *Loudermilk II*, 305 Ga. at 559, 826 S.E.2d at 118.

3. In a negligence action premised upon the negligence of individual board members in their decision-making process, is a decision of a bank's board of directors a "concerted action" such that the board members should be held jointly and severally liable for negligence?¹⁰

Both before and during trial, the defendants asked the trial court to instruct the jury to apportion the damages (if any) among the defendants according to each defendant's proportion of fault. The trial court denied the defendants' requests. Following the return of the jury's \$5 million verdict, the trial court entered a joint and several judgment in that amount against the liable defendants.¹¹

On appeal to the Eleventh Circuit, the defendants argued that the trial court erred by refusing to require the jury to apportion the damages among the defendants according to each defendant's proportion of fault. The defendants argued that apportionment was required because the FDIC's suit to recover for pecuniary harm was, in effect, a suit for "injury to . . . property" under O.C.G.A. § 51-12-33(b). The FDIC advanced two counterarguments. First, the FDIC argued that the apportionment statute applies (in the property context) only to suits seeking damages for injury to *tangible* property. Second, the FDIC argued that even if the statute could be applied to suits seeking damages for injury to intangible property, the statute could not be applied where two or more tortfeasors engage in concerted action—which, if proven, would render each tortfeasor legally responsible for the acts of the others and would result in joint and several liability for all tortfeasors—because the enactment of O.C.G.A. § 51-12-33 did not displace Georgia's common law rule of joint and several liability for concerted-action torts.¹² Unable to answer these questions under existing Georgia law, the Eleventh Circuit certified them to the Georgia Supreme Court for resolution.¹³

1. The language in O.C.G.A. § 51-12-33(b) referring to "an action [] brought . . . for injury to . . . property" encompasses economic injuries to intangible property interests—e.g., pecuniary harm to a business.

In rejecting the FDIC's argument that (in the property context) the apportionment statute applies only when injuries are suffered to tangible property, the court resorted to the plain meaning canon, with

10. *Id.* at 560, 826 S.E.2d at 119.

11. *Id.* at 559, 826 S.E.2d at 118.

12. *Id.* at 559–60, 826 S.E.2d at 118.

13. *Id.* at 560, 826 S.E.2d at 118–19.

the additional recognition that words used in a legal context should be interpreted in light of their “usual and customary meaning” in the law.¹⁴ The court first observed that the word “property” is not defined in Title 51 of Georgia’s Official Code (which includes the apportionment statute) but is defined in Title 1 of the Code to “include[] real and personal property.”¹⁵ Next, citing *Black’s Law Dictionary*, the court noted that the concept of personal property has been traditionally understood in the law to encompass both tangible items and intangible interests.¹⁶

The court made short work of the FDIC’s cramped conception of personal property (as excluding intangible property rights), which was based principally on a selective reading of Blackstone’s eighteenth-century commentaries and an out-of-context spin on a nearly sixty-year-old decision of the court of appeals.¹⁷ The court then emphasized that a broad understanding of personal property is consistent with supreme court’s own precedents dating to 1910, 1915, 1917, and 1966 and that, as a policy matter, the expansive interpretation “makes good sense” in the context of a statute whose apportionment regime was meant to be “comprehensive” rather than partial.¹⁸

2. The enactment of O.C.G.A. § 51-12-33 did not displace the common law tort rule making those who commit torts by concerted action jointly and severally liable for the damages resulting from their “fault,” which is indivisible as a matter of law.¹⁹

Because the court concluded that the apportionment statute can be applied to actions seeking to recover for injury to intangible property interests, the court had to address the FDIC’s alternative argument that the apportionment statute displaced the common law rule imposing joint and several liability on tortfeasors who engage in concerted action.²⁰

14. *Id.* at 562, 826 S.E.2d at 120.

15. *Id.* at 562–63, 826 S.E.2d at 120 (quoting O.C.G.A. § 1-3-3(16) (2019)).

16. *Id.* at 563, 826 S.E.2d at 120.

17. *Id.* at 564–66, 826 S.E.2d at 121–23 (discussing the FDIC’s misplaced reliance on *Atlanta v. J.J. Black & Co.*, 110 Ga. App. 667, 139 S.E.2d 515 (1964)).

18. *Id.* at 566–68, 826 S.E.2d at 123–24.

19. *Id.* at 569, 826 S.E.2d at 124.

20. *Id.*

The court began by tracing the principle of “concerted action” to its origins in the criminal law and its later migration into civil tort law.²¹ At common law, the acts of each person who engaged in conduct in a concerted manner (namely, as part of a common enterprise) were imputed by law to all other persons who engaged in conduct in furtherance of the common enterprise.²² This “theory of mutual agency,” according to the court, was the legal foundation for regarding “the act of one [a]s the act of all.”²³ The court observed that “the invocation of concerted action at common law paved for plaintiffs a direct path to joint and several liability for an entire group of wrongdoers.”²⁴ The court noted, however, that starting with a court of appeals decision issued in 1974,²⁵ the joint and several liability rule in Georgia began to be applied beyond the confines of mere concerted action.²⁶ Courts began applying the rule whenever the actions of more than one tortfeasor combined to produce a “single, indivisible injury,” even if the tortfeasors acted independently and not as part of a common enterprise.²⁷

The FDIC argued that the apportionment statute should not be applied to the conduct of the defendants for either of two reasons: (1) because the defendants “engaged in concerted action,” the joint and several liability for which “survived enactment of the apportionment statute,” or (2) because the defendants’ conduct combined to produce a “single, indivisible injury.”²⁸

The court rejected the FDIC’s “indivisible injury” argument, holding that the apportionment statute itself makes “fault” (not injury) the touchstone for determining divisibility.²⁹ Relying on its earlier precedent,³⁰ the court explained that while an injury may be indivisible, the damages flowing from that injury may still be capable of being apportioned according to the degree of fault of each tortfeasor whose conduct contributed to the injury.³¹ The apportionment statute makes one inquiry decisive: whether the tortfeasors’ “fault is capable of

21. *Id.*

22. *Id.* at 569, 826 S.E.2d at 125.

23. *Id.* at 569–70, 826 S.E.2d at 125.

24. *Id.* at 570, 826 S.E.2d at 125.

25. *Gilson v. Mitchell*, 131 Ga. App. 321, 205 S.E.2d 421 (1974).

26. *Loudermilk II*, 305 Ga. at 571–72, 826 S.E.2d at 126.

27. *Id.* (emphasis omitted).

28. *Id.*

29. *Id.* at 571–72, 826 S.E.2d at 126 (noting that “O.C.G.A. § 51-12-33(b) reveals a different analytical touchstone for damages analysis: whether fault is divisible.”).

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

31. *Loudermilk II*, 305 Ga. at 571–72, 826 S.E.2d at 126.

division.”³² The divisibility of fault is paramount because “[i]f fault is indivisible, then the trier of fact cannot carry out the statute’s directive of awarding damages ‘according to the percentage of fault of each person’ and the apportionment statute does not govern how damages are awarded.”³³

The court determined that the apportionment statute did not abrogate the common law rule of joint and several liability for torts committed by concerted action because “true concerted action” rests on the notion that each tortfeasor is “equally liable” for the full amount of the damages and that “the act of one is the act of all.”³⁴ The court therefore held:

[W]here the fault of one person is legally imputed to another person who is part of the same joint enterprise, we cannot say that there is a legal means of dividing fault “among the persons who are liable.” See O.C.G.A. § 51-12-33(b). Under these circumstances, we hold that concerted action does survive the apportionment statute and damages (if any) will be awarded jointly and severally.³⁵

The court declined to address the third certified question—whether a decision of a bank’s board of directors amounts to “concerted action” among the defendant board members for purposes of applying Georgia’s common law rule of joint and several liability—because its resolution entailed a fact-intensive review of the voluminous trial record that the court preferred for the Eleventh Circuit to undertake.³⁶

B. A decedent shareholder’s personal representative is entitled to inspect the records of a corporation in which the decedent owned shares at the time of his death.

In *Regal Nissan, Inc. v. Scott*,³⁷ the court of appeals held as a matter of first impression that the personal representative of a decedent shareholder’s estate is statutorily entitled under Georgia law to inspect

32. *Id.* at 572, 826 S.E.2d at 126.

33. *Id.*

34. *Id.* at 572, 826 S.E.2d at 127.

35. *Id.* at 573, 826 S.E.2d at 127.

36. *Id.* at 576, 826 S.E.2d at 129. On July 22, 2019, the Eleventh Circuit issued an opinion in the underlying appeal, affirming the joint and several judgment against the defendants and holding that “it would have been impossible for the jury to divide fault among the liable directors. Therefore, Georgia’s apportionment statute did not apply in this case, and the jury instructions neither misstated Georgia law nor misled the jury.” *FDIC v. Loudermilk*, 930 F.3d 1280, 1286, 1290 (11th Cir. 2019) (“Here, the evidence showed that it’s impossible to divide fault among the liable directors.”).

37. 348 Ga. App. 91, 821 S.E.2d 561 (2018).

the records of a corporation in which the decedent owned shares at the time of his death.³⁸

Andrew Scott, a shareholder of Regal Nissan, Inc. (Regal), entered into an agreement with Regal and Regal's other shareholders under which Regal (or, if Regal declined, the remaining shareholders) had a right to purchase any shareholder's shares of Regal stock "upon the appointment of a receiver, trustee, or other personal representative" on behalf of the shareholder.³⁹ The agreement also contained a standard successors-and-assigns provision: the agreement "shall be binding upon and inure to the benefit of the successors, assigns, personal Representatives, heirs and legatees of the respective parties hereto."⁴⁰

When Scott later died, his wife Stacey was appointed to serve as the administrator of his estate, and the probate court, under O.C.G.A. § 53-12-261,⁴¹ conferred on Stacey all the powers of a trustee.⁴² Stacey, through counsel, sent Regal a written request to inspect the Regal's corporate records, invoking O.C.G.A. § 14-2-1602(b),⁴³ under which

[a] shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of [certain specified corporate records] if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy.⁴⁴

In response to Stacey's request, Regal sent her a notice that Regal intended to exercise its right to redeem all the shares of Regal stock that Scott owned at his death. Stacey sent a second written request to inspect Regal's corporate records, which Regal denied on the ground that Stacey was not a shareholder and thus lacked the right to inspect the records under O.C.G.A. § 14-2-1602(b).⁴⁵

Invoking the judicial process under O.C.G.A. § 14-2-1604,⁴⁶ Stacey petitioned the trial court to enter an order permitting her to inspect Regal's corporate records. In response, Regal moved the trial court to compel arbitration under the agreement and to stay the proceeding initiated by Stacey. After a hearing on the pending motions, the trial

38. *Id.* at 91, 821 S.E.2d at 562.

39. *Id.*

40. *Id.*

41. O.C.G.A. § 53-12-261 (2019).

42. *Regal Nissan*, 348 Ga. App. at 91, 821 S.E.2d at 562.

43. O.C.G.A. § 14-2-1602(b) (2019).

44. *Id.*; *Regal Nissan*, 348 Ga. App. at 91, 821 S.E.2d at 562.

45. *Regal Nissan*, 348 Ga. App. at 91, 821 S.E.2d at 562.

46. O.C.G.A. § 14-2-1604 (2019).

court concluded that Stacey, as the administrator of Scott's estate, was entitled to inspect Regal's corporate records. The trial court denied Regal's motion to compel arbitration and motion to stay the proceeding.⁴⁷

On appeal, Regal argued that Stacey, as administrator of Scott's estate, was not permitted to inspect Regal's corporate records under O.C.G.A. § 14-2-1602 because that right belongs only to a "shareholder" and an administrator of an estate is not a "shareholder" under the Georgia Business Corporation Code,⁴⁸ which defines "shareholder" to mean (1) "the person in whose name shares are registered in the records of a corporation" or (2) "the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation."⁴⁹ Under its record-inspection provisions, the Business Corporation Code also defines "shareholder" to include "a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf."⁵⁰ Stacey did not claim shareholder status under any of these three definitions, and on appeal the court acknowledged that none of these definitions applied.⁵¹

Rather than feeling straightjacketed by the language of the statutory definitions, however, the court examined what happened to Scott's stock upon his death and what powers were conferred on Stacey as the administrator of Scott's estate.⁵² The court found it important (1) that Scott's shares of Regal stock "vested" in Stacey, as administrator of Scott's estate, by operation of law upon her appointment;⁵³ (2) that Stacey, as administrator of Scott's estate, was authorized by law to "possess and administer" Scott's whole estate (including his shares of Regal stock);⁵⁴ and (3) that Stacey (by virtue of the trustee powers conferred on her by the probate court) was authorized to "vote" Scott's

47. *Regal Nissan*, 348 Ga. App. at 92, 821 S.E.2d at 562. The court of appeals affirmed the denial of the arbitration motions for reasons I will not discuss here. *Id.*

48. O.C.G.A. §§ 14-2-101–14-2-1703 (2019).

49. *Regal Nissan*, 348 Ga. App. at 92, 821 S.E.2d at 562 (quoting O.C.G.A. § 14-2-140(27) (2019)).

50. O.C.G.A. § 14-2-1602(g) (2019) ("For purposes of this Code section, 'shareholder' includes a beneficial owner whose shares are held in a voting trust or by a nominee on his behalf.").

51. *Regal Nissan*, 348 Ga. App. at 93, 821 S.E.2d at 562.

52. *Id.* at 94, 821 S.E.2d at 564.

53. See O.C.G.A. § 53-2-7(b) (2019).

54. See O.C.G.A. § 53-7-2 (2019).

shares of Regal stock and “to exercise all options, rights, and privileges to convert” the stock.⁵⁵

The court set for itself the task of construing the meaning of “shareholder” in the Business Corporation Code in a “sensible and intelligent” manner in light of the existence of the “statutes governing the transfer of stock ownership to a shareholder’s estate.”⁵⁶ The court sought to harmonize the various provisions so as not to “render[] any part of the statutes meaningless.”⁵⁷ The court concluded that “in her capacity as administrator [of Scott’s estate], Stacey took Andrew’s place as a shareholder of Regal stock, with all the powers associated with that position.”⁵⁸ That conclusion led the court to hold as a matter of first impression—and as an application of the “sensible and intelligent” interpretive principle—that the statutory powers of a decedent shareholder’s personal representative “encompass the right to inspect [a corporation’s] corporate books even though the Estate itself is not listed on the corporation’s records as a shareholder.”⁵⁹

III. OTHER NOTEWORTHY CASES

A. Shareholder “derivative” actions versus shareholder “direct” actions.

During this survey period, as in past periods, the court of appeals issued decisions discussing the circumstances under which certain tort claims by shareholders must be brought “derivatively” (in the corporation’s name and for the corporation’s benefit) and when, instead, those claims may be brought “directly” (in the shareholder’s name and for the shareholder’s benefit).⁶⁰ In one case the court emphasized that the derivative-versus-direct question involves a threshold question of

55. *Regal Nissan*, 348 Ga. App. at 94–95, 821 S.E.2d at 564; see O.C.G.A. § 53-12-261(b)(13), (15) (2019).

56. *Regal Nissan*, 348 Ga. App. at 94, 821 S.E.2d at 564.

57. *Id.*

58. *Id.*

59. *Id.* The court rejected as meritless (indeed it was frivolous) Regal’s argument that Stacey was additionally barred from inspecting the corporate records identified in O.C.G.A. § 14-2-1602(a) (2019) because “Stacey’s request for inspection was not made in good faith and . . . failed to specify with reasonable particularity how the requested records [we]re relevant to her purpose.” *Id.* at 95, 821 S.E.2d at 564. The court rightly confirmed that to inspect the records identified in O.C.G.A. § 14-2-1602(a) the shareholder need give only a timely written notice “without any additional requirements.” *Id.* at 96, 821 S.E.2d at 565. On the other hand, a shareholder must provide a justification for his request only when seeking the records identified in O.C.G.A. § 14-2-1602(c) (2019), which the trial court did not order to be turned over for inspection in this case. *Id.*

60. See *I.A. Grp., Ltd. Co. v. RMNANDCO, Inc. (I.A. Grp. II)*, 346 Ga. App. 396, 816 S.E.2d 359 (2018); *Patel v. 2602 Deerfield, LLC*, 347 Ga. App. 880, 819 S.E.2d 527 (2018).

capacity to sue—and thus standing—which, like other standing questions, constitutes a defense to suit that if not timely asserted will be waived.⁶¹ In another case the court held that claims brought by a shareholder directly, in the shareholder's own name, should instead have been brought derivatively in the name of the corporation.⁶² Each case is discussed in turn.

1. The capacity in which certain business torts must be brought—derivatively on the corporation's behalf or directly on a shareholder's behalf—presents a threshold question of standing that is waived if not timely asserted.

In *I.A. Group, Ltd. Co. v. RMNANDCO, Inc.*,⁶³ the court of appeals held that the defendants had waived their standing defense that the plaintiff's tort claims should have been brought in a derivative action rather than in a direct action by waiting to raise the defense for the first time during an appeal from an adverse judgment.⁶⁴

In 2010, RMNANDCO, Inc., a shareholder in I.A. Group, Ltd. Co., filed suit against I.A. Group, Ltd. Co., the remainder of its shareholders (CX5 Capital Corporation and Stephen Fitch), and Christopher T. Collins for breach of fiduciary duty, fraud, and for violations of Georgia's RICO Act.⁶⁵ As a consequence of various discovery abuses by the defendants, the trial court struck the defendants' answers, counterclaims, and third-party complaints and then entered a default judgment establishing the defendants' liability to RMNANDCO, Inc. on all counts in the complaint, leaving only the question of damages for jury resolution.⁶⁶ Following a jury trial on damages, the jury entered a verdict in an amount of \$2.5 million against the defendants jointly and severally.⁶⁷

Two of the four defendants (I.A. Group, Ltd. Co. and Fitch) appealed the jury verdict, arguing, among other things, that they were entitled to a new trial because the trial court erred in instructing the jury that the damages should be assessed jointly and severally against all four defendants rather than apportioned among them according to the

61. *I.A. Grp. II*, 346 Ga. App. 396, 816 S.E.2d 359.

62. *Patel*, 347 Ga. App. 880, 819 S.E.2d 527.

63. 346 Ga. App. 396, 816 S.E.2d 359.

64. *Id.* at 402, 816 S.E.2d at 365.

65. *I.A. Grp., Ltd. Co. v. RMNANDCO, Inc. (I.A. Grp. I)*, 336 Ga. App. 461, 461 n.1, 784 S.E.2d 823, 824 n.1 (2016).

66. *I.A. Group II*, 346 Ga. App. at 396–97, 816 S.E.2d at 361–62.

67. *Id.* The jury also awarded other damages not relevant here.

relative fault of each.⁶⁸ The court of appeals agreed that the trial court erred in this respect, reversed the judgment, and remanded for a new trial on damages.⁶⁹ On remand to the trial court, two important events occurred. First, the defendants moved for summary judgment on the ground that the claims alleged by RMNANDCO, Inc. should have been brought derivatively in the name of, and for the benefit of, I.A. Group, Ltd. Co. itself (rather than directly by RMNANDCO, Inc., a single shareholder of I.A. Group, Ltd. Co.). The defendants had never raised the derivative-versus-direct issue at any previous time during the years-long litigation. Second, RMNANDCO, Inc. moved the trial court to reinstate the \$2.5 million judgment, asking that the new trial focus exclusively on apportioning that amount rather than having a new trial on both the amount of damages and the apportionment of any new damages award. The trial court denied the defendants' motion for summary judgment but granted RMNANDCO, Inc.'s motion to reinstate the \$2.5 million judgment and scheduled a second trial solely on the question of apportionment. The trial court then issued a certificate of immediate review, and the defendants sought and were granted permission to file an interlocutory appeal.⁷⁰

On appeal, the court affirmed the denial of the defendants' motion for summary judgment on the derivative-versus-direct question.⁷¹ The court began by highlighting that “[w]hether a shareholder plaintiff is authorized to bring a direct action is, of course, a matter of standing.”⁷² The court then noted that “the failure to assert a plaintiff’s alleged lack of standing prior to the entry of judgment results in the waiver of such a defense.”⁷³ The court explained why a standing defense should be raised at the earliest possible time during litigation: standing presents “a threshold question [] generally collateral to the real issues,” and the “timely assertion of a standing defense is necessary to prevent” the needless expenditure of resources by courts, litigants, and lawyers, which are resources that are wasted “if [a] plaintiff had no capacity to

68. *Id.* at 397, 816 S.E.2d at 362.

69. *Id.*

70. *Id.* at 397–98, 816 S.E.2d at 362–63.

71. *Id.* at 405, 816 S.E.2d at 368. The court of appeals reversed the trial court’s decision to reinstate the \$2.5 million judgment and remanded for a new trial both as to the amount of damages and as to the apportionment of those damages among the four defendants. *Id.* But this aspect of the appeal—an interesting one involving the law-of-the-case doctrine—is beyond the scope of this Article.

72. *Id.* at 398, 816 S.E.2d at 363.

73. *Id.* at 399, 816 S.E.2d at 363.

pursue [his] claim.”⁷⁴ Early assertion of the defense is also necessary to “prevent surprise and to give the opposing party fair notice of what he must meet as a defense.”⁷⁵ If not timely asserted, the standing defense is deemed waived because “[t]he object of lawsuits is to resolve merits of disputes, not to engage in a meaningless frustration of them.”⁷⁶

None of the defendants’ responsive pleadings (even putting to the side the fact that their pleadings were stricken as a consequence of their discovery abuses) asserted that RMNANDCO, Inc.’s claims were required to be pursued derivatively rather than directly, and while the amended answer of one defendant asserted that RMNANDCO, Inc. lacked standing, the answer did not specify any basis for that generic assertion. Nor did the defendants assert in their motions to vacate the default judgment against them that RMNANDCO, Inc. was required to pursue its claims derivatively rather than directly. Instead, this issue was raised for the first time in the appeal briefs of the two defendants (I.A. Group, Ltd. Co. and Fitch) who appealed from the first damages trial.⁷⁷ This post-judgment assertion of a threshold issue (unrelated to the underlying merits) came too late and thus, held the court, resulted in a waiver of the standing defense.⁷⁸

2. A shareholder pursuing claims against corporate officers for breach of fiduciary duty, breach of the duty of loyalty, and fraud was not entitled to bring those claims directly, in its own name, but instead was required to pursue them in a derivative action in the name of the corporation.

In *Patel v. 2602 Deerfield, LLC*,⁷⁹ the court of appeals held once again that certain tort claims against corporate officers for corporate mismanagement must be brought in the corporation’s name for the corporation’s benefit rather than in the shareholder’s name for the shareholder’s benefit.⁸⁰

Southeastern Hospitality Management, Inc. (Southeastern) bought a piece of commercial real property on which was located a distressed

74. *Id.* (quoting *Lewis v. Van Anda*, 282 Ga. 763, 765, 653 S.E.2d 708, 711 (2007) (punctuation omitted)).

75. *Id.* (quoting *Early v. MiMedx Grp., Inc.*, 330 Ga. App. 652, 655, 768 S.E.2d 823, 826 (2015)).

76. *Id.* (quoting *Lewis*, 282 Ga. at 765, 653 S.E.2d 708).

77. *Id.* at 400, 816 S.E.2d at 364.

78. *Id.* at 399, 816 S.E.2d at 364.

79. 347 Ga. App. 880, 819 S.E.2d 527 (2018).

80. *Id.* at 887–88, 819 S.E.2d at 534.

hotel, and Southeastern's shareholders planned to maximize the value of the real property (and therefore the value of Southeastern) either by reopening the closed hotel or by finding other commercial tenants for the property. Southeastern was owned by the following shareholders: 2602 Deerfield, LLC (Deerfield), Milan Patel, Umang Patel, and six other persons.⁸¹ Milan and Umang Patel were the sole officers of Southeastern, and in their capacity as officers they "handled [Southeastern's] day-to-day operations."⁸²

After briefly reopening the hotel in the spring of 2011, Milan and Umang (Southeastern's officers) recommended to the members of Deerfield (who were, through Deerfield, indirect owners of Southeastern) that Southeastern sell the property to a company called South Georgia Partners, LLC (SGP).⁸³ Umang told the members of Deerfield that SGP was owned by "a group of doctors from Columbus, Georgia," but that was not true.⁸⁴ In fact, Umang had organized SGP and was initially its sole member, although he later transferred two-thirds of his membership interest in SGP to Milan, making Umang and Milan the sole members of SGP. Their association with SGP was never disclosed.⁸⁵

After Southeastern agreed to sell the property to SGP (based on false information supplied by Milan), Milan signed on Southeastern's behalf a thirty-year lease agreement with an Olive Garden restaurant, and at the closing of the sale of the property to SGP—at which Milan and Umang were acting for Southeastern and SGP on both sides of the sales transaction—Southeastern assigned its interest in the Olive Garden lease agreement to SGP. SGP paid \$1.55 million for the property in 2012, although there was evidence that its value at that time was \$3.5 million.⁸⁶

In 2015, Deerfield sued (among other defendants) Milan and Umang for breach of fiduciary duty, breach of the duty of loyalty, and fraud (among other claims).⁸⁷ Deerfield alleged that Milan and Umang "failed

81. *Id.* at 881, 819 S.E.2d at 530.

82. *Id.* at 880–81, 819 S.E.2d at 529–30.

83. *Id.* at 881, 819 S.E.2d at 530.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 882, 819 S.E.2d at 530. Deerfield's two members (Rajendra Patel and Savan Patel) also joined as plaintiffs to the suit, and SGP and another entity were also named as defendants (and additional claims were alleged against those defendants). The claims that Rajendra and Savan asserted against Milan and Umang were rejected by the trial court (and not challenged on appeal) because Rajendra and Savan were not themselves

to inform [it] of and made affirmative misrepresentations regarding the Olive Garden lease and their [Milan's and Umang's] interest in SGP prior to the sale of the property."⁸⁸

The defendants moved for summary judgment, arguing that Deerfield's claims were "impermissible direct claims" and that the claims were instead required to have been pursued in Southeastern's name for Southeastern's benefit.⁸⁹ The trial court denied the motion for summary judgment on that ground but issued a certificate of immediate review, allowing the defendants to seek and get permission to pursue an interlocutory appeal.⁹⁰

The court began by noting the "general rule [] that allegations of misappropriation of corporate assets and breach of fiduciary duty can only be pursued in a shareholder derivative suit brought on behalf of the corporation, because the injury is to the corporation and its shareholders collectively."⁹¹ And the court stressed (as it has time and again through the years) that it is not the labels affixed to the plaintiff's claims that control the outcome of the standing inquiry but rather the "nature of the wrong alleged."⁹² The court then recapped the three recognized exceptions to the general rule, under which a shareholder is authorized to pursue such claims in a "direct action" (brought by the shareholder in the shareholder's name) against corporate fiduciaries: first, the shareholder may allege a harm that is "separate and distinct" from any harm suffered by other shareholders; second, the shareholder may allege "a wrong involving a contractual right . . . which exists independently of any right of the corporation;" or third, the shareholder of a "closely held" corporation may allege "circumstances show[ing] that the reasons for the general rule requiring a derivative suit do not apply."⁹³

shareholders of Southeastern (their indirect interest in Southeastern was owned by Deerfield). *Id.* at 883, 819 S.E.2d at 531.

88. *Id.* at 882, 819 S.E.2d at 530.

89. *Id.* at 883, 819 S.E.2d at 531.

90. *Id.*

91. *Id.* at 884, 819 S.E.2d at 532.

92. *Id.*

93. *Id.* at 885, 819 S.E.2d at 532.

The reasons for ordinarily requiring derivative actions are: (1) to prevent multiple suits by shareholders; (2) to protect corporate creditors by ensuring that the recovery goes to the corporation; (3) to protect the interest of all the shareholders by ensuring that the recovery goes to the corporation, rather than allowing recovery by one or a few shareholders to the prejudice of others; and (4) to adequately compensate injured shareholders by increasing their share values.

In denying summary judgment to Milan and Umang and finding that Deerfield was entitled to bring a direct action, the trial court made three determinations.⁹⁴ First, the trial court determined that a genuine dispute of material fact existed about whether Deerfield had pleaded a “special injury” to itself (thereby entitling Deerfield to maintain a direct action) because Milan made “the allegedly fraudulent misstatements or omissions of material fact . . . only to Deerfield’s [members] . . . and not to any of the other shareholders of Southeastern.”⁹⁵ Second, the trial court determined that Milan and Umang had failed to show that the reasons for a derivative action were present, in that Southeastern’s other shareholders (nonparties to the litigation) “suggested, in their depositions, that they would not pursue a lawsuit against the defendants.”⁹⁶ Third, the trial court determined that Deerfield was seeking only its pro rata share (50%) of the damages and that “other nonparty shareholders are free to bring their own direct claims if they so choose.”⁹⁷

The court of appeals rejected each of the trial court’s legal conclusions.⁹⁸ The court first disagreed that “any of the claims alleged a special injury to Deerfield separate and distinct from that suffered by the other nonparty shareholders.”⁹⁹ The evidence established, for example, that Milan and Umang failed to disclose the Olive Garden lease and their interests in SGP to other nonparty shareholders of Southeastern.¹⁰⁰ The court next pointed out that any injury suffered by Deerfield because of the sale of Southeastern’s property for less than one-half of its value (\$1.55 million vs. \$3.5 million) was an injury that harmed Southeastern itself, thereby harming all of Southeastern’s shareholders indirectly.¹⁰¹ The court thus concluded that Deerfield could not avail itself of the “special injury” exception to the derivative action rule, meaning that Deerfield could pursue a direct action only if it could establish that the policy reasons for the derivative action rule did not apply.¹⁰²

Id. at 885, 819 S.E.2d at 532–33 (citing *Southland Propane, Inc. v. McWhorter*, 312 Ga. App. 812, 816–17, 720 S.E.2d 270, 275 (2011)).

94. *Patel*, 347 Ga. App. at 885–86, 819 S.E.2d at 533.

95. *Id.* at 885, 819 S.E.2d at 533.

96. *Id.*

97. *Id.* at 886, 819 S.E.2d at 533.

98. *Id.* at 888, 819 S.E.2d at 534–35.

99. *Id.* at 886, 819 S.E.2d at 533.

100. *Id.*

101. *Id.*

102. *Id.* at 886, 819 S.E.2d at 533–34.

The evidence showed that some of the nonparty shareholders of Southeastern had not ruled out the possibility of bringing their own actions against Milan and Umang, thus presenting “a *risk* that any one of them could file another action asserting the same claims at issue in this case.”¹⁰³ The court noted that permitting Deerfield and other nonparty shareholders to bring separate direct actions would invite a multiplicity of suits, which undermines one of the policies justifying the derivative action rule.¹⁰⁴ The court also emphasized the possibility of prejudice that might result to nonparty shareholders in the event that Deerfield recovered damages for Milan’s and Umang’s tortious conduct that were not shared pro rata with the nonparty shareholders.¹⁰⁵ And the court noted that “if the possibility of prejudice to other interested parties, such as creditors or other shareholders exists, a direct recovery should not be allowed.”¹⁰⁶ The evidence before the trial court did not establish that the nonparty shareholders of Southeastern had consented to a recovery by Deerfield alone.¹⁰⁷

Because it concluded, first, that Deerfield had failed to allege a “special injury” to itself that was not shared by other Southeastern shareholders and, second, that Deerfield could not show that the reasons for the derivative action rule were inapplicable, the court reversed the trial court’s denial of summary judgment and held that Southeastern’s claims could not be asserted directly.¹⁰⁸

B. A court-appointed “auditor” who lacks the powers traditionally associated with a “receiver” does not become a receiver simply because the trial court labels him one, and his appointment need not be justified by a “clear and urgent” need.

In *A&M Hospitalities, LLC v. Alimchandani*,¹⁰⁹ the court of appeals affirmed a trial court’s appointment of what the judge labeled a “limited receiver,” which the court appointed without requiring the moving party to show that there was a “clear and urgent” need for doing so.¹¹⁰ The court affirmed the appointment after concluding that the person appointed by the trial court was more akin to an “auditor” (not a

103. *Id.* at 887, 819 S.E.2d at 534.

104. *Id.* (See *Barnett v. Fullard*, 306 Ga. App. 148, 153–54, 701 S.E.2d 608, 613 (2010)).

105. *Id.* at 887, 819 S.E.2d at 534.

106. *Id.*

107. *Id.*

108. *Id.* at 888, 819 S.E.2d at 535.

109. 828 S.E.2d 615 (Ga. Ct. App. 2019).

110. *Id.* at 618–19.

receiver) because of the limited powers conferred on him by the appointment order.¹¹¹ In so holding, the court employed a functional approach to the characterization of the appointment and not one controlled by mere labels.¹¹²

In 1998, Prenita Alimchandani and Jane Motley organized a Georgia limited liability company called A&M Hospitalities, LLC (A&M) to develop and operate a hotel. Jane initially owned a 75% membership interest in A&M, and Alimchandani owned a 25% membership interest. In 2006, Jane transferred one-half of her 75% membership interest in A&M to her husband, David Motley. The Motleys thereafter conveyed their 75% membership interest in A&M to JDS&J Enterprises, LP, a limited partnership consisting of the Motleys and their children, and Jane and David appointed themselves to serve as co-managers of A&M. The business relations between the Motleys and Alimchandani degraded over the years.¹¹³

In 2017, Alimchandani sued the Motleys and A&M, alleging a host of claims, all of which centered on Alimchandani's allegation that the Motleys, from 2008 to 2014, had engaged in a campaign "to freeze [Alimchandani] out of A&M and to transfer business away from A&M to other companies owned by the Motleys and in which Alimchandani did not have an ownership interest."¹¹⁴ Alimchandani moved the trial court to appoint a receiver for A&M and for associated injunctive relief, alleging that she would suffer irreparable harm if A&M was not placed in a receivership. The defendants moved to dismiss the lawsuit for lack of subject matter jurisdiction and also moved to stay the proceedings and compel arbitration.¹¹⁵

The trial court held a hearing on the pending motions and made a finding that "I do not think that the business is in such imminent peril that the appointment of a receiver is warranted."¹¹⁶ The trial court, however, expressed its intention to enter an order "permit[ting] [Alimchandani] and an accountant/accounting team to conduct a full audit of [A&M]" and authorizing the accountant or accountants "to inspect all records pertaining to the businesses as contemplated under O.C.G.A. § 14-11-313."¹¹⁷ The trial court instructed Alimchandani's counsel to draft an order reflecting the court's ruling on the motion for

111. *Id.* at 619.

112. *Id.*

113. *Id.* at 616.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* (citing O.C.G.A. § 14-11-313 (2019)).

the appointment of a receiver and to submit the draft order to the defendants' counsel for approval.¹¹⁸ Disagreements over the language and scope of the proposed order immediately ensued, and counsel on both sides drafted and submitted competing proposed orders to the trial court.¹¹⁹ The main objection leveled by the defendants' counsel was that Alimchandani's proposed order "amounted to the appointment of an actual receiver" and exceeded the scope of what the trial court said it intended to do.¹²⁰

After reviewing the parties' proposals, the trial court eventually entered a written order appointing what it termed a "limited receiver" and denying the defendants' motion to dismiss and motions to stay the proceeding and compel arbitration.¹²¹ The order entered by the trial court:

appointed an attorney to serve as a "receiver" "for the purposes of audit and discovery;"

ordered that the attorney "shall have full and complete access, at any time, to all real property, personal property, assets, books, records, documents, and accounts" of A&M;

ordered that the attorney be "authorized and directed to retain an accountant, accounting team, and/or legal representatives for the purposes of conducting an audit and inspection" of A&M;

ordered that A&M "shall not transfer, sell or encumber any real property;" "change membership interests or transfer, sell or encumber shares or other interests;" or "transfer assets with a value equal to or greater than \$10,000 [outside the ordinary course of business]" without the attorney's consent;

ordered that the attorney "shall attempt to not disturb the ordinary business of the Company, if reasonably possible;" and

ordered that "[t]he day to day operations of the Company shall remain the responsibility of the duly elected managers of the Company."¹²²

The defendants directly appealed from the trial court's order.¹²³

118. *Id.*

119. *Id.* at 616–17.

120. *Id.* at 617.

121. *Id.*

122. *Id.* at 617 n.1.

On appeal, the defendants argued that the trial court abused its discretion in appointing a “limited receiver” because Alimchandani had not established that there was a “clear and urgent” need for doing so.¹²⁴ The court of appeals affirmed the order, however, because in reviewing the substance of the powers conferred on the attorney appointed to investigate A&M’s affairs, the court concluded that the trial court had in fact appointed merely an “auditor,” rendering inapplicable the more stringent requirements that would have applied to the appointment of a receiver.¹²⁵

Georgia law authorizes trial courts to appoint three classes of persons to aid the courts in resolving disputed matters related to pending litigation: auditors,¹²⁶ receivers,¹²⁷ and special masters.¹²⁸ The duties of each are prescribed by the statutory provisions or court rule authorizing their appointment and by the terms of the trial court’s appointment order.

By statute, an auditor may be appointed in “matters of account” for the purpose of “investigat[ing] the matters of account and report[ing] the result to the court.”¹²⁹ An auditor is generally permitted to “hear motions,” “pass upon all questions of law and fact,” “subpoena and swear witnesses,” and “compel the production of papers.”¹³⁰ Auditors may be appointed “[i]n all cases . . . if the case shall require it.”¹³¹ The statutory provisions make clear that the function of an auditor is to investigate and gather information, not to take possession or control of property. Nothing in the statutory scheme governing the appointment of auditors appears to guide or otherwise constrain the exercise of the trial court’s discretion concerning whether one should be appointed in the first place.

By statute, a receiver may be appointed in four circumstances: (1) “[w]hen any fund or property is in litigation and the rights of either or both parties cannot otherwise be fully protected;”¹³² (2) “when there is a

123. *Id.* The court permitted the direct appeal under O.C.G.A. § 5-6-34(a)(3) (2019), which has been construed as granting jurisdiction over appeals from “order[s] appointing an auditor to conduct an accounting.” *Id.* at 619 n.3.

124. *Id.* at 618.

125. *Id.* at 620.

126. O.C.G.A. §§ 9-7-1–9-7-23 (2019).

127. O.C.G.A. §§ 9-8-1–9-8-14 (2019).

128. GA. UNIF. SUPER. CT. 46 (2019). The use of special masters is not addressed in this Article.

129. O.C.G.A. § 9-7-3 (2019).

130. O.C.G.A. § 9-7-6 (2019).

131. O.C.G.A. § 9-7-3.

132. O.C.G.A. § 9-8-1 (2019).

fund or property having no one to manage it;”¹³³ (3) “to take possession of and protect trust or joint property and funds whenever the danger of destruction and loss shall require such interference;”¹³⁴ and (4) “to take possession of and hold . . . any assets charged with the payment of debts where there is manifest danger of loss, destruction, or material injury to those interested.”¹³⁵ The common thread is that receivers are appointed to take possession and control of property and may, in addition, oversee the disposition of such property. While trial courts have discretion to set “[t]he terms on which a receiver is appointed,”¹³⁶ in all cases the baseline presumption is against the appointment of a receiver in the first place: “The power of appointing receivers should be prudently and cautiously exercised and except in clear and urgent cases should not be resorted to.”¹³⁷

At the outset, the court of appeals noted that the trial court did not cite any statutory authority for the appointment of the “special receiver” and further noted that “the term ‘limited receiver’ is not defined by rule or statute.”¹³⁸ The court, therefore, adopted a functional approach to determine how best to characterize the appointment order: “[W]e will look to the practical effect of the trial court’s order, rather than the specific label used by the court, to determine what the trial court actually did and whether it abused its discretion.”¹³⁹

The appointment order under review made clear that its scope was limited to authorizing the “audit and discovery” of information related to A&M.¹⁴⁰ The order did not vest control or possession of any property in the appointed attorney.¹⁴¹ As the court explained, “the clear majority of the order’s provisions . . . are solely related to allowing [the attorney] to inspect and audit A&M.”¹⁴² It did not matter to the court’s analysis that certain actions with respect to A&M’s assets could not be taken without the consent of the attorney, because the attorney’s opportunity to give (or refuse) consent “[did] not give [the attorney] actual or constructive guardianship of A&M.”¹⁴³ The court instead viewed the

133. *Id.*

134. O.C.G.A. § 9-8-2 (2019).

135. O.C.G.A. § 9-8-3 (2019).

136. *Id.*

137. O.C.G.A. § 9-8-4 (2019).

138. *A&M Hospitalitys*, 828 S.E.2d at 618.

139. *Id.*

140. *Id.* at 617.

141. “[N]othing in the order vests Cohilas with guardianship, ownership, custody, or possession of A&M or its assets.” *Id.* at 619.

142. *Id.*

143. *Id.*

consent provisions as “mechanisms put in place to ensure that no major changes [] would have a significant impact on A&M’s accounting profile [] during the audit without the auditor’s knowledge.”¹⁴⁴

The court concluded:

There is simply nothing in the trial court’s order that grants [the attorney] any authority or powers that are particular to, or characteristic of, a receiver . . . [and] [a]s a result, despite the fact that the trial court referred to [the attorney] as a “limited receiver,” the trial court was not required to find that the case presented a clear and urgent need for a receivership before appointing [him].¹⁴⁵

C. Under O.C.G.A. § 14-2-1510(c),¹⁴⁶ a foreign corporation that lacks a registered agent in the State of Georgia is served with process on the date that it “receives” the summons and complaint, sent by the plaintiff by means of a commercial package-delivery firm, even if the package containing the summons and complaint is misdirected and takes several months to reach the foreign corporation.

In *Turfstore.Com, Inc. v. Hall*,¹⁴⁷ the court of appeals held that a foreign corporation lacking a registered agent in Georgia was served with process under O.C.G.A. § 14-2-1510(c) on the date that the foreign corporation “received” the summons and complaint, which had been dispatched by a commercial package-delivery firm, even though the package was misdirected and took several months to reach the foreign corporation.¹⁴⁸

Turfstore.Com, Inc. (Turfstore) is a Delaware corporation that maintains no registered agent in the State of Georgia (or so the court assumed for purposes of resolving the appeal). Turfstore was a tenant under two commercial leases, and the landlords under those leases were Shelley Hall (as personal representative of John Wayne Hall) and Wilma Jean Erwin. After Turfstore sent a notice to Hall and Erwin that it would be terminating the leases as of June 30, 2017, a dispute arose concerning the leases, and Turfstore vacated the properties and stopped paying rent.¹⁴⁹

In September 2017, Hall and Erwin sued Turfstore for breaching the lease agreements and sought \$1.8 million in damages. Hall and Erwin

144. *Id.*

145. *Id.*

146. O.C.G.A. § 14-2-1510(c) (2019).

147. 348 Ga. App. 398, 823 S.E.2d 81 (2019).

148. *Id.* at 398, 823 S.E.2d at 82.

149. *Id.* at 398–99, 823 S.E.2d at 82.

alleged in their complaint that they would serve the summons and a copy of the complaint on Turfstore under O.C.G.A. § 14-2-1510(b)¹⁵⁰ because Turfstore was a foreign corporation and did not maintain a registered agent in Georgia who could receive service of process on Turfstore's behalf.¹⁵¹

Hall and Erwin attempted to serve Turfstore by “statutory overnight delivery,” as authorized by O.C.G.A. § 14-2-1510(b), and did so by engaging the commercial package-delivery firm United Parcel Service (UPS) to deliver the summons and a copy of the complaint to Turfstore at the principal office address on file with the Georgia Secretary of State, which happened to be the vacant property that Turfstore formerly occupied.¹⁵²

Because Turfstore no longer maintained a presence at the leased premises, UPS was unable to deliver the summons and the complaint to Turfstore at the designated address, and UPS instead delivered the package to an unrelated competitor of Turfstore named TurfNation at another address. The package was received by UPS on September 15, 2017, and delivered to TurfNation four days later on September 19. TurfNation forwarded the package to Turfstore, and Turfstore received it on January 4, 2018.¹⁵³

Meanwhile, on January 3, 2018, Hall and Erwin moved the trial court to enter a default judgment against Turfstore for failing to answer or otherwise respond to the lawsuit. Hall and Erwin argued that they perfected service on Turfstore on September 15, the day that UPS received the package containing the summons and complaint. On January 11—just a week after it received the package containing the summons and complaint—Turfstore filed a verified answer to the complaint and a brief in opposition to the motion for default judgment.

150. O.C.G.A. § 14-2-1510(b) (2019).

151. *Turfstore.Com*, 348 Ga. App. at 399, 823 S.E.2d at 82.

152. *Id.* Under Georgia law:

[w]henver any . . . statute . . . of this state . . . provides that a notice may be given by “statutory overnight delivery,” it shall be sufficient compliance if: (1) Such notice is delivered through the United States Postal Service or through a commercial firm which is regularly engaged in the business of document delivery or document and package delivery; (2) The terms of the sender’s engagement of the services of the United States Postal Service or commercial firm call for the document to be delivered not later than the next business day following the day on which it is received for delivery by the United States Postal Service or the commercial firm; and (3) The sender receives from the United States Postal Service or the commercial firm a receipt acknowledging receipt of the document which receipt is signed by the addressee or an agent of the addressee.

O.C.G.A. § 9-10-12(b) (2019).

153. *Turfstore.Com*, 348 Ga. App. at 399, 823 S.E.2d at 82.

Nevertheless, the trial court entered a default judgment against Turfstore, finding that Turfstore failed to answer or otherwise respond to the lawsuit within forty-five days of being served with the summons and complaint (although the trial court did not identify the date that it believed service was effected). Turfstore directly appealed from the entry of the default judgment against it.¹⁵⁴

On appeal, Turfstore argued that the suit never went into default in the first place because Turfstore filed an answer to the complaint seven days after being served.¹⁵⁵ The court agreed and reversed the default judgment.¹⁵⁶

When a defendant is served with process under O.C.G.A. § 14-2-1510(b), the rules for determining what date service is perfected are contained in subsection (c) of that statute, which provides:

Service is perfected under subsection (b) of this Code section at the earliest of: (1) The date the foreign corporation receives the mail; (2) The date shown on the return receipt, if signed on behalf of the foreign corporation; or (3) Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed.¹⁵⁷

The record did not contain any evidence of a “return receipt” and no evidence that the TurfNation employee who received the UPS package on September 19 was acting “on behalf of” Turfstore under O.C.G.A. § 14-2-1510(c)(2).¹⁵⁸ And UPS, a commercial package-delivery firm, is not the “United States mail” under O.C.G.A. § 14-2-1510(c)(3).¹⁵⁹ By process of elimination, then, the date of service was the “date [Turfstore] receive[d] the mail” under O.C.G.A. § 14-2-1510(c)(1).¹⁶⁰ It was undisputed that Turfstore first “receive[d]” the package containing the summons and complaint on January 4, 2018.¹⁶¹ Because Turfstore filed its answer to the complaint seven days after it was served, “the case never went into default and the trial court was not authorized to enter a default judgment.”¹⁶²

154. *Id.* at 399–400, 823 S.E.2d at 82–83.

155. *Id.* at 400, 823 S.E.2d at 83.

156. *Id.* at 401, 823 S.E.2d at 84.

157. O.C.G.A. § 14-2-1510(c).

158. *Turfstore.Com*, 348 Ga. App. at 401, 823 S.E.2d at 84.

159. *Id.* at 402, 823 S.E.2d at 84.

160. *Id.* at 401, 823 S.E.2d at 84.

161. *Id.*

162. *Id.* at 402, 823 S.E.2d at 84.

