

# Mercer Law Review

---

Volume 27  
Number 1 *Annual Survey of Georgia Law*

Article 2

---

12-1975

## Appellate Practice and Procedure

Tommy Day Wilcox

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/jour\\_mlr](https://digitalcommons.law.mercer.edu/jour_mlr)

---

### Recommended Citation

Wilcox, Tommy Day (1975) "Appellate Practice and Procedure," *Mercer Law Review*: Vol. 27 : No. 1 , Article 2.

Available at: [https://digitalcommons.law.mercer.edu/jour\\_mlr/vol27/iss1/2](https://digitalcommons.law.mercer.edu/jour_mlr/vol27/iss1/2)

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

# APPELLATE PRACTICE AND PROCEDURE

By TOMMY DAY WILCOX\*

The major contribution to the field of Appellate Practice and Procedure during the survey period was through legislative enactment. The legislature completely revised the procedure for seeking a review of an interlocutory order not otherwise appealable as a final judgment. There were a number of important cases of general interest involving appellate procedure during the period, and a few of these cases substantially changed the appellate courts' interpretation of the Appellate Practice Act.

## I. INTERLOCUTORY APPEALS AND CERTIFICATES OF IMMEDIATE REVIEW

The Appellate Practice Act of 1965<sup>1</sup> comprehensively and exhaustively revised appellate and other post-trial procedures in Georgia.<sup>2</sup> One of the new innovations provided under the Act was the procedure for seeking a review of an interlocutory order. Briefly, an aggrieved party could seek a review of a lower court's decision, not otherwise appealable as a final decision, by applying to the decision-maker for a certificate of immediate review within ten days of the entry of the ruling. Experience proved that the application was granted in most instances thereby greatly increasing the number of cases for review on the already crowded appellate court dockets. To remedy this easy accessibility of appellate review, the legislature passed House Bill No. 13 during the recent session as an amendment<sup>3</sup> to the Appellate Practice Act.

In outline form, the new procedure<sup>4</sup> requires that:

---

\*Associate of James & Shipp, Macon, Georgia. Mercer University (A.B., 1965; J.D., 1973).  
Member of the State Bar of Georgia.

1. Ga. Laws, 1965, p.18.
2. See Leverett, *The Appellate Procedure Act of 1965*, 1 GA. ST. B.J. 451 (1965).
3. Ga. Laws, 1975, p. 757.
4. The amendment provides:

(A) Where the trial judge in rendering an order, decision or judgment not otherwise subject to direct appeal, certifies within ten (10) days of entry thereof that such order, decision or judgment is of such importance to the case that immediate review should be had, the Supreme Court or Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from such order, decision or judgment, if application is made thereto within ten (10) days after such certificate is granted.

(B) Such applications shall be in the nature of a petition and shall set forth the need for such an appeal and the issue or issues involved therein. The applicant may, at his election, include copies of such parts of the record as he deems appropriate, but no certification of such copies by the clerk of the trial court shall be necessary. Such application shall be filed with the Clerk of the Supreme Court or Court of Appeals and a copy of such application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties in the case in the manner prescribed by section 18 of this Act, except that such service shall be perfected at or before the filing of the application. Said oppos-

(1) Within ten days of the entry of the interlocutory order, the applicant must obtain a certificate of immediate review from the trial judge;

(2) Within ten days after such certificate is granted, the applicant must file a petition for permission to appeal in the proper appellate court. The petition is filed directly in the appellate court and not through the clerk of the trial court;

(3) Within ten days after the application is filed, the opposing party may file a response in the appellate court;

(4) Within fifteen days after the response is filed, or, if there is no response, within twenty-five days after the petition is filed, the appellate court shall issue an order granting or denying the petition;

(5) If the petition is granted, a notice of appeal may be filed with the clerk of the trial court within ten days after the granting order is issued and the appeal proceeds as before; and

(6) Denial of the petition is a temporary conclusion of the matter; if there is a later appeal from the final judgment, the interlocutory order may be enumerative as error.<sup>5</sup>

The procedure for seeking an appeal following the denial of a motion for summary judgment was also amended to provide that the procedure outlined above shall be followed if a party desires a review of the trial court's judgment. One suspects that petitions under this new rule will get close scrutiny on the appellate court level and grants will be issued sparingly. Moreover, trial judges may become less likely to grant the initial application in the absence of more compelling circumstances than have been required in the past.

The new procedure will not have any effect on the primary stumbling block in this area of the practice, however, in that numerous cases continue

---

ing party or parties shall have ten (10) days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The Supreme Court or Court of Appeals shall issue an order granting or denying such an appeal within fifteen (15) days of the date on which the response of the opposing party or parties is filed with such court or within twenty-five (25) days of the date on which the application was filed in the event that no response is filed. Within ten (10) days after an order is issued granting such appeal, the applicant, to secure a review of the issues, may file a notice of appeal as provided in section 4 of this Act. Such notice of appeal shall act as a supersedeas as provided in section 8 of this Act and the procedure thereafter shall be the same as in an appeal from a final judgment. *Id.* at 758.

5. Reference here is made to an outline of the statute prepared by the Honorable Morgan Thomas, Clerk, Court of Appeals of Georgia, that appeared in one of Mr. Thomas' notes in June, 1975. In his note Mr. Thomas also made the following observation: "The petition should be prepared in accordance with current rules for the physical preparation of motions; and, as to filing date, postmarks probably will not count."

to be dismissed on appeal for lack of the initial application for a certificate of immediate review. One of the errors complained of in *Padgett v. Cowart*<sup>6</sup> was the trial court's failure to grant appellant's motion to dismiss a complaint for failure to state a claim. The order denying such a motion is not appealable absent a certificate of immediate review. The second question raised on appeal in this case had been rendered moot and, therefore, the appeal was dismissed.

Where a notice of appeal is filed from a judgment and there is a motion for new trial pending, the appellate court will not entertain the matter unless a certificate of immediate review is granted. And, as the appellant in *Home Insurance Co. v. Ft. Valley Mills, Inc.*<sup>7</sup> discovered, the appeal is not perfected by the subsequent overruling of the motion for a new trial where the initial notice of appeal is unaccompanied by a proper certificate. This rule will be applied in criminal cases as well as civil cases,<sup>8</sup> for until the motion for new trial is disposed of, the appeal is unseasonable.

In two very brief opinions, the higher courts continued to hold that where a defendant's counterclaim is still pending, an appeal from the granting of a judgment on the pleadings for the defendant will not be heard<sup>9</sup> and the denial of a motion to intervene in a case pending in the trial court will not be considered where there is no certificate.<sup>10</sup> Neither of the foregoing is a final judgment and any appeal will be dismissed as a premature attempt to seek appellate relief.

The case of *Myers v. Mobile America Corp.*<sup>11</sup> involved multiple parties; the defendants initiated a cross-claim against plaintiff and three others as joint tortfeasors after the commencement of the action and a motion was granted, dismissing the three additional parties because of lack of venue. The defendants sought to appeal this order but the order is not appealable without a certificate of review because it

“does not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. . . .”<sup>12</sup>

Citing the cases of *Turner v. Harper*<sup>13</sup> and *Bonzheim v. Bonzheim*,<sup>14</sup> the court of appeals in *Laurens County v. Dixon*,<sup>15</sup> concluded that while the certificate of review must be obtained within ten days from the entry of

---

6. 232 Ga. 633, 208 S.E.2d 455 (1974).

7. 132 Ga. App. 15, 207 S.E.2d 590 (1974).

8. See *Taylor v. State*, 134 Ga. App. 9, 213 S.E.2d 162 (1975).

9. *Branan & Schmitz Realty, Inc. v. Ellis*, 133 Ga. App. 224, 211 S.E.2d 173 (1974).

10. *Henderson v. Atlanta Transit Sys., Inc.*, 233 Ga. 82, 210 S.E.2d 4 (1974).

11. 132 Ga. App. 331, 208 S.E.2d 169 (1974).

12. *Id.* at 332, 208 S.E.2d at 169.

13. 231 Ga. 175, 200 S.E.2d 748 (1973).

14. 227 Ga. 478, 181 S.E.2d 363 (1971).

15. 133 Ga. App. 727, 213 S.E.2d 26 (1975).

the judgment complained of, where the certificate is dated and entered prior to the entry of the judgment sought to be appealed, the appeal will be dismissed. Here, the judgment was dated May 16, 1974, but not entered until May 24, 1974 and the certificate was dated and entered on May 22, 1974. The appellant in *Townsend v. Orkin Exterminating Co.*<sup>16</sup> met a similar fate. A certificate was granted after the trial court denied a motion for summary judgment. The notice of appeal referred to an order and judgment entered on November 2, 1973. However, the record on appeal did not contain an indication of a filing date for the judgment; and after inquiry, the clerk responded that the order had never been filed with him. Since the order had only been signed but not entered, the appeal was dismissed even though a certificate of immediate review had been obtained by the appellant.

The appellants in *Unigard Mutual Insurance Co. v. Carroll*<sup>17</sup> and *Von Waldner v. Baldwin/Cheshire, Inc.*<sup>18</sup> failed because of the late filing of the certificate of immediate review rather than a premature filing. It is clear that in civil cases where review of an interlocutory appeal is sought, the appellate courts require an exact adherence to the rules of procedure. Since any error complained of in the interlocutory order may later be brought to the appellate court's attention on review of the final order, the exactness required here may be justified. Suffice it to say, this is the rationale applied by the appellate courts.

The applicability of the statute requiring a certificate, in a majority of the cases reviewed, was brought to the appellate court's attention by the appellee through a timely filed motion to dismiss. At least in one instance, though, the court of appeals continued to assert its well-founded authority to take notice of its own lack of jurisdiction and in *Termplan, Inc. v. Haynes*,<sup>19</sup> dismissed an appeal without a motion by the appellee.

## II. TIMELINESS

The *Bonzheim* rule that a judgment cannot be considered appealable until it is actually entered,<sup>20</sup> was limited somewhat during the recent survey period. The Supreme Court of Georgia, in reversing an earlier decision by the court of appeals, concluded that in a criminal case the rule propounded in *Bonzheim* is not always applicable.<sup>21</sup> The court of appeals<sup>22</sup> had determined that where an appeal was filed on August 20, 1973, and the order and the judgment appealed from were both entered on August 21, 1973, the appeal must be dismissed. This narrow construction of the proce-

---

16. 131 Ga. App. 824, 207 S.E.2d 230 (1974).

17. 131 Ga. App. 699, 206 S.E.2d 603 (1974).

18. 133 Ga. App. 23, 209 S.E.2d 715 (1974).

19. 133 Ga. App. 562, 211 S.E.2d 611 (1974).

20. *Bonzheim v. Bonzheim*, 227 Ga. 478, 181 S.E.2d 363 (1971).

21. *Cunningham v. State*, 232 Ga. 416, 207 S.E.2d 48 (1974).

22. *Cunningham v. State*, 131 Ga. App. 133, 205 S.E.2d 899 (1974).

dural requirements resulted in the denial of due process and equal protection in the higher court's opinion and therefore the appeal should not have been dismissed by the middle bench.<sup>23</sup> In another criminal case, *Holloway v. Hopper*,<sup>24</sup> the supreme court allowed an out-of-time appeal citing their recent decision in *Thornton v. Ault*.<sup>25</sup> The defendant had been represented by appointed counsel at the trial and no appeal had been filed. The importance of the decision and the colloquy at the habeas corpus hearing that led to the judgment is not that the court allowed the out-of-time appeal but that such a remedy is available. Otherwise, appointed counsel in general would best be advised to consider that appeal is automatic following conviction, and proceed to file the necessary notice. It may be that even though this extraordinary remedy is available, appointed counsel should consider an appeal mandatory because the alternative increasingly seems to be an appearance at a habeas corpus hearing citing counsel as incompetent.

The timely filing of a notice of appeal in accordance with section five of the Appellate Practice Act, which provides that such notice shall be filed within thirty days after entry of an appealable decision or judgment,<sup>26</sup> must be complied with as a prerequisite to the appellate court's consideration of the case on its merits. Section five provides further that when a motion for new trial, or a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the notice shall be filed within thirty days after the entry of the order granting, overruling, or otherwise disposing of the motion.<sup>27</sup> In *Clements v. Jones*,<sup>28</sup> a summary judgment was rendered in favor of the defendant upon his traverse of service and an order entered dismissing the complaint on August 24, 1973. Subsequently, a motion to perfect service was filed on October 12, 1973, which was overruled. An appeal from the later order was dismissed in that the order entered on August 24, 1973, was a final order disposing of the entire case, and the filing of the appeal was untimely because a motion to perfect service does not extend the time for filing the notice of appeal. There were other instances where motions, other than those cited above, were held not to extend the time for filing.<sup>29</sup>

Under the Appellate Practice Act, appeals may be taken "from all judgments or orders granting or refusing to grant application for . . . manda-

---

23. 232 Ga. at 417, 207 S.E.2d at 49.

24. 233 Ga. 615, 212 S.E.2d 795 (1975).

25. 233 Ga. 172, 210 S.E.2d 683 (1974).

26. GA. CODE ANN. §6-803 (Rev. 1975).

27. *Id.*

28. 133 Ga. App. 11, 209 S.E.2d 707 (1974).

29. See *Taylor v. City of Columbus*, 228 Ga. 493, 186 S.E.2d 539 (1971) (motion to amend); *Fastenberg v. Associated Distrib., Inc.*, 134 Ga. App. 213, 213 S.E.2d 898 (1975) (motion for reconsideration); *Lynn v. Wagstaff Motor Co.*, 131 Ga. App. 556, 206 S.E.2d 539 (1974) (motion to set aside judgment); *Bernath Barrel & Drum Co. v. Ostrum Boiler Serv., Inc.*, 131 Ga. App. 140, 205 S.E.2d 459 (1974) (modification of order and judgment).

mus or other extraordinary remedy. . . ."<sup>30</sup> The Supreme Court of Georgia in *Thibadeau v. Henley*,<sup>31</sup> held that an application for leave to file quo warranto, inquiring into the rights of a party to hold office, is extraordinary. Thus, where an order is entered denying a party's application for leave to file quo warranto, he must file a notice of appeal within thirty days after entry of this appealable judgment.

### III. TRANSCRIPT

The case of *Garrett v. Heaton*<sup>32</sup> was submitted to the court of appeals after the trial judge denied a motion for summary judgment but granted a certificate of immediate review. The trial judge's order showed that he considered the entire record in the case, including certain depositions relied upon by both parties at the trial level. On appeal, the appellant requested that the clerk omit from the record some of the depositions relied on in the trial court. The court of appeals affirmed the lower court concluding:

The appellant has the duty to demonstrate error on appeal and without the entire evidence considered on the motion for summary judgment, we must assume that the evidence authorized the judgment of the trial court. *Cason v. Upton County Board of Health*, 227 Ga. 451, 453(2) (181 S.E.2d 487).<sup>33</sup>

Later in the session the court of appeals was confronted with an appeal from the granting of a motion for summary judgment where on appeal, the appellant directed the clerk of the trial court not to transmit to the appellate court a considerable portion of the deposition of a witness that had been considered below. Relying on the *Cason* and *Garrett* decisions, the court of appeals again affirmed the trial court's ruling.<sup>34</sup> However, here, the supreme court granted a writ of certiorari to the court of appeals and reversed that court's judgment.<sup>35</sup> *Cason* and *Garrett* were distinguished from the case on appeal in that they were concerned with interlocutory appeals and "subsequent appeals could still be taken after the rendition of final judgments."<sup>36</sup> The case at bar was on appeal following the granting of a motion for summary judgment and therefore was a final judgment. The supreme court took the position that if the record before the appellate court is insufficient to pass upon the merits, the court should require the record to be supplemented if the necessary additions are available in the trial court. This is an enlightened approach and should also be followed

---

30. GA. CODE ANN. §6-701(a)(3) (Rev. 1975).

31. 233 Ga. 884, 213 S.E.2d 657 (1975).

32. 131 Ga. App. 155, 205 S.E.2d 718 (1974).

33. *Id.*

34. *Interstate Fin. Corp. v. Appel*, 132 Ga. App. 477, 208 S.E.2d 336 (1974).

35. *Interstate Fin. Corp. v. Appel*, 233 Ga. 649, 212 S.E.2d 821 (1975).

36. *Id.* at 651, 212 S.E.2d at 823.

in cases like *Cason* and *Garrett* involving interlocutory appeals.

It is clear that under the Appellate Practice Act the reviewing court has the authority to require that additional parts of the record be sent up, or require that a complete transcript be prepared and sent up once the appeal is perfected.<sup>37</sup> Perhaps, in the future, the appellate courts will be more liberal in exercising this authority.

The Appellate Practice Act was amended in 1968<sup>38</sup> to provide the trial court with the authority to dismiss an appeal where, after the notice is filed and thirty days have expired, no transcript has been filed, or, in the alternative, an extension of time for filing has not been obtained. The case of *Fahrig v. Garrett*,<sup>39</sup> decided in 1968, has become the judicial standard for this proposition and has been cited on numerous occasions where the appellant's tardy filing of a transcript resulted in his appeal being dismissed. The *Fahrig* decision and the late filing of the transcript were highlighted in two decisions during the survey period. First, in *Blackstone v. State*,<sup>40</sup> the transcript was filed 98 days late and no request for extension appeared in the record. However, on the day the transcript was filed, the trial judge entered an order permitting the defendant to file the transcript *nunc pro tunc*. The state moved to dismiss the appeal and its motion was denied. The court of appeals reversed the lower court's decision citing the rule laid down by the supreme court in *Fahrig*.

A later decision, *Southeastern Plumbing Supply Co. v. Lee*,<sup>41</sup> also concerned questions relating to the dismissal of an appeal for the late filing of a transcript of proceedings in the trial court. Here, the late filing issue was not raised in the trial court but the appellee filed a motion to dismiss the appeal in the court of appeals and that court certified five questions to the supreme court relating to the dismissal issue. The questions propounded centered on a consideration of rule 11(c) of the Supreme Court of Georgia and the Court of Appeals of Georgia, and the rule's conflict, if any, with the *Fahrig* decision. Rule 11(c) became effective in March, 1972, and reads as follows:

Appellee shall be deemed to have waived any failure of the appellant to comply with the provisions of the appellate practice act relating to the filing of the transcript of the evidence and proceedings for transmission of the record to this court unless objection thereto was made and ruled upon in the trial court prior to transmittal.<sup>42</sup>

The issue before the court was whether an appellate court could, on its own motion, dismiss an appeal where no transcript was filed even though

---

37. See GA. CODE ANN. §6-809(b) (Rev. 1975).

38. Ga. Laws, 1968, p. 1072.

39. 224 Ga. 817, 165 S.E.2d 126 (1968).

40. 131 Ga. App. 666, 206 S.E.2d 553 (1974).

41. 232 Ga. 626, 208 S.E.2d 449 (1974).

42. GA. CODE ANN. §24-3611 and §24-4511 (Rev. 1971).

the issue was not raised in the trial court.<sup>43</sup> The supreme court ruled that the appellate courts of this state are bound by rule 11(c) and therefore an appellate court cannot, on its own motion, dismiss an appeal based on lack of transcript unless the dismissal issue shall have first been raised and ruled upon in the trial court.<sup>44</sup> The non-filing of a transcript is a fact question and should be determined by the trial court in the highest court's best judgment.

During the recent session, the Supreme Court of Georgia determined that payment for the preparation of a transcript by the official court reporter is an *expense of appeal*, and therefore not recoverable as a *cost of appeal*.<sup>45</sup> This determination overruled the court of appeal's decision of *Barnett v. Thomas*.<sup>46</sup> In *Brand v. Montega Corp.*<sup>47</sup> the supreme court went further and held that a pauper's affidavit in a civil case does not relieve appellant of the cost of having the transcript prepared even though the appellee, and not the appellant, designated that the entire record should be sent up on appeal. Later, the middle bench, relying on these two decisions, affirmed a lower court ruling on appeal citing the lack of a transcript where the only excuse appellant could muster was that she was unable to pay the cost for the transcript and that she had previously filed a pauper's affidavit.<sup>48</sup>

#### IV. MISCELLANY

The case of *Giordano v. Stubbs*<sup>49</sup> that appeared in last year's Survey has been overruled by *Summer-Minter & Associates, Inc. v. Giordano*.<sup>50</sup> The question presented in the *Giordano* decisions was whether, after an appellate court has reversed a trial court's denial of a defendant's motion for summary judgment, but before the remittitur becomes the judgment of the trial court, the plaintiff can amend his complaint by alleging a new theory of recovery. In a well written opinion by Justice Ingram, the supreme court has now ruled that the plaintiff may not amend.

The prosecution filed its first appeal under the newly enacted proviso<sup>51</sup> of the Appellate Practice Act allowing such appeals only to find that the order appealed from was "not one of the instances in which the state is granted the right of appeal in criminal cases under the provisions of §6-

---

43. In *Fahrig* the supreme court dismissed the appeal on its own motion. 224 Ga. at 818, 165 S.E.2d at 127.

44. *Southeastern Plumbing Supply Co. v. Lee*, 232 Ga. 626, 627, 208 S.E.2d 449, 450 (1974).

45. *Stone Mountain Mem. Ass'n v. Stone Mountain Scenic R.R.*, 232 Ga. 92, 205 S.E.2d 293 (1974).

46. 129 Ga. App. 583, 200 S.E.2d 327 (1973).

47. 233 Ga. 32, 209 S.E.2d 581 (1974).

48. *Jackson v. Young*, 134 Ga. App. 368, 214 S.E.2d 380 (1975).

49. 129 Ga. App. 283, 199 S.E.2d 322 (1973).

50. 231 Ga. 601, 203 S.E.2d 173 (1974).

51. Ga. Laws, 1973, pp. 297-98.

1001(a). . . ."<sup>52</sup> The state filed a motion for execution of sentence after the convicted defendant filed a motion for new trial and supersedeas was granted. The state's motion was overruled and appeal was pursued with the foregoing noted results. It appears the appellate courts intend to give the statute<sup>53</sup> a strict reading and will require the prosecution to stay within the literal bounds of the statute when seeking review.

Finally, the most unusual happening on the appellate level this past year may have been the appearance of the president of a corporation in the court of appeals to argue a case for the corporation even though he was not an attorney-at-law and the corporation was owned by two stockholders, himself and one other person.<sup>54</sup> The presiding judge, on a ruling from the bench, allowed the president of the corporation the opportunity to present his case. In a special concurrence, while recognizing the right of an individual to appear pro se, Judge Evans objected strenuously to this procedure. The judge addressed his remarks to the potential problems such an appearance might engender, and an analysis of his opinion suggests that his is a better reasoned conclusion. Interestingly, the Supreme Court of the United States held during this past term that a defendant in a state or federal criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to so proceed.<sup>55</sup> Support for this proposition is found in the sixth amendment and in the English and colonial jurisprudence from which the sixth amendment emerged.

---

52. *State v. Holloman*, 132 Ga. App. 304, 305, 208 S.E.2d 167, 168 (1974).

53. GA. CODE ANN. §6-1001 (Rev. 1975).

54. *Strother Managers, Inc. v. Servicemaster PBM, Inc.*, 132 Ga. App. 1, 207 S.E.2d 564 (1974).

55. *Faretta v. California*, \_\_\_ U.S. \_\_\_, 95 S.Ct. 2525 (1975).

