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I. INTRODUCTION

The old saying, "appellate judges spend all of their time looking for error, while trial judges spend all of theirs seeking the truth" has no justice to it, however accurate its literal description of the litigation process.1 It is correct, however, that before the search for truth can begin at the appellate level, the supreme court or court of appeals must look for any error concerning the timeliness of the appeal. The practicing attorney, therefore, must know whether an order or judgment is appealable; and if so, when, where, and how should it be appealed?

The Appellate Practice Act of 1965,2 together with important amendments in 1966, 1968, 1975, 1979, and 1984,3 made a comprehensive revi-

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1. The Honorable Harold G. Clarke, Chief Justice of the Supreme Court of Georgia, quoted this amusing aphorism in his address at the Atlanta Bar Association’s Bench and Bar Reception (May 10, 1990).
sion of appellate practice and procedure in Georgia. The Act drew on prior Georgia statutes and then-existing appellate provisions of the Federal Rules of Civil Procedure. Its features were, in turn, thoughtfully considered when the Civil Practice Act of 1966, adapted from the Federal Rules, was enacted in the following year. Today, an understanding of the significant differences between Georgia’s post-judgment and appellate practice and their federal counterpart is one of the basic tools of any Georgia attorney.

Such an understanding is not easy to come by, even more than twenty-five years after the enactment of these statutes. Although the Georgia appellate courts have resolved some of the analytical pitfalls and practical problems in post-judgment and appellate practice, that body of law is far from comprehensive. The statutes and decisions pose significant dangers, some evident and others unforeseeable, for Georgia attorneys who must decide when, where, and how to file a notice or application for appeal. This Article will examine the provisions governing the entry of judgments and final orders, resetting post-judgment motions and their effect on the time for the notice or application for appeal, and direct, interlocutory, and discretionary appeals. Further, this Article will propose amendments to the appropriate Georgia statutes, including the Appellate and Civil Practice Acts, to clarify the rules of appeal and to reduce the risk that a notice or application for appeal will be found untimely.

II. THE MEANING OF “FINAL JUDGMENT” AND “ENTRY OF JUDGMENT”

A. The “Final Judgment” Rule

Section 5-6-34(a)(1) of the Appellate Practice Act provides that “[a]ppeals may be taken to the Supreme Court and the court of appeals from . . . [a]ll final judgments, that is to say, where the case is no longer

35, -38(a), and 9-11-56(h) (1982 & Supp. 1992)). Amendments to the discretionary application procedure in 1986 and 1988 are discussed infra text accompanying notes 66-81.


5. In particular, rules 6(b) and 73(a) of the Federal Rules, which were incorporated into rule 4(a) of the Federal Rules of Appellate Procedure in 1967. See Advisory Committee Note, 43 F.R.D. 61 (1968).


7. The similar issues arising in superior court review of decisions of the inferior courts and in special statutory proceedings are beyond the scope of this Article.
pending in the court below . . . "8 The Civil Practice Act implicitly refers to this provision in section 9-11-54(a), by stating that "'[t]he term 'judgment' . . . includes a decree and any order from which an appeal lies"9 and further specifies that "all judgments shall be signed by the judge and filed with the clerk."10

Section 9-11-54(b) provides, and section 5-6-34(a)(1)'s requirement that the action be "no longer pending"11 means, that in cases concerning multiple claims or parties, an order disposing of fewer than all claims or parties is not final for purposes of appeal.12 This principle has four exceptions. First, the trial judge may direct the entry of a final judgment upon an express determination of finality under section 9-11-54(b) of the Civil Practice Act.13 Second, the trial judge may certify the order for interlocutory review under section 5-6-34(b) of the Appellate Practice Act.14 Third, an order entered under section 5-6-34(a)(2) through (a)(9) is final without regard to the pendency of other claims or the presence of other parties.15

Fourth, section 9-11-56(h) provides that "[a]n order granting summary judgment on any issue or as to any party shall be subject to review by appeal."16 That subsection also provides that "[a]n order denying summary judgment shall be subject to review by direct appeal in accordance with subsection (b) of Code Section 5-6-34."17 Like an interlocutory certification that must be taken within ten days,18 an appeal under section 9-11-56(h) must be taken within thirty days of the entry of the order granting summary judgment or must await the entry of final judgment.19 A

9. Id. § 9-11-54(a) (1982).
10. Id.
11. Id. § 5-6-34(a)(1).
14. O.C.G.A. § 5-6-34(b) (1982).
19. Olympic Dev. Group v. American Druggists' Ins. Co., 175 Ga. App. 425, 425, 333 S.E.2d 622, 624 (1985). It is particularly important to recognize that when the grant of summary judgment is made final by certification under O.C.G.A. § 9-11-54(b) (1982), the appel-
grant of summary judgment in a case covered by the discretionary appeal provisions of section 5-6-35(a) requires an application for appeal despite section 9-11-56(h). As with a direct appeal, a motion for rehearing does not reset the time for a section 9-11-56(h) appeal.

B. The "Entry of Judgment" Rule

The entry of an appealable decision or order sets the appellate timetable in motion, and it is here—at the very beginning of the appellate process—that statutory definitions begin to pose problems for the practitioner. In *Turner v. Harper*, the supreme court observed that "the filing with the clerk of a judgment, signed by the judge, constitutes the 'entry' of the judgment within the meaning of the Appellate Practice Act." This must be distinguished from the federal practice, which defines the entry of judgment as its physical inscription on the clerk’s docket sheet chronologically and indicating the date of the notation.

The "filing as entry" language can cause confusion, as illustrated in *Storch v. Hayes Microcomputer Products, Inc.* and *Gates Rental, Inc. v. Perry*. In *Gates Rental*, the jury returned a verdict on Saturday, August 15, 1981, and the deputy clerk prepared a judgment and stamped it "Filed in Open Court" on the same day. The clerk received the judgment and stamped it "Filed in Office" on Monday, August 17, 1981. The court of appeals held that a motion for new trial filed thirty-one days after August 15 was untimely, reasoning that the judgment had been "filed with the clerk" on August 15, and that "[n]either the place of filing nor the deputy status of the clerk is crucial."

In *Storch* the jury returned a verdict after-hours on April 24, 1986. The trial judge prepared a judgment on the verdict, stamped the judgment "Filed in Open Court," and signed it. Thereafter, the clerk of the state...
court received the judgment and stamped it “Filed in Office” on May 2, 1986. Appellant filed the notice of appeal on May 30, 1986, within thirty days after receipt in the clerk’s office, but more than thirty days after entry in open court. The court of appeals held that the notice was untimely, reasoning that under section 9-11-5(e), the filing of papers with the judge was intended to have the same effect as filing with the clerk. The court concluded that “the filing of the judgment in open court with the trial judge was the entry of judgment within the meaning of OCGA § 5-6-31.”

C. Clear and Unambiguous Practice Under the “Filing as Entry” Provision

The “filing as entry” rule requires that the attorney pay careful attention to post-trial events and circumstances in the trial court: simply put, the first date stamp, whether signed by the judge or signed by the clerk, controls the initial setting of the time for appeal. The trial courts and clerks could greatly assist practicing attorneys by attention to two practical suggestions here.

First, the same-day transmission of final orders and judgments would eliminate any ambiguity in the filing date of the final order or judgment since, under the present system in most courts, the clerk’s office would stamp the document “Filed” on the same day. Second, any problems from delayed filing with the clerk could be resolved through a “one-stamp” rather than a “two-stamp” approach to the trial judge’s filing of documents, or the clerk’s filing of a document elsewhere than in open court. Under section 9-11-5(e) as applied in Storch, the date filed with the trial judge or deputy clerk would control, whereas the later physical receipt of the document in the clerk’s office would be undefined, and presumably without effect, under both practice acts.

32. Such a set of stamps, with appropriately sized typefaces, might look something like this:
III. Appeals from Simple Judgments and Interlocutory Applications for Appeal

Section 5-6-48(b)(1) of the Appellate Practice Act\textsuperscript{33} provides that a timely notice of appeal is, in the supreme court's words, an "absolute requirement" for the exercise of appellate jurisdiction.\textsuperscript{34} Section 5-6-38(a) provides that when no resetting post-judgment motions have been filed, "[a] notice of appeal shall be filed within 30 days after entry of the appealable decision or judgment complained of . . . ."\textsuperscript{35} The same language governs both appeals from simple judgments and appeals after the disposition of post-judgment motions, but is subject to different interpretations in the two contexts.

A. Appeals from Simple Judgments

The supreme court originally gave a literal interpretation to the requirement that a notice of appeal be filed within thirty days after entry of the final judgment. In \textit{Gibson v. Hodges},\textsuperscript{36} the court held that a notice of appeal filed after entry of an order complained of, but prior to the entry of judgment on that order, was untimely and subject to dismissal.\textsuperscript{37} The court abandoned that strict rule in \textit{Gillen v. Bostick},\textsuperscript{38} when it held that a

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\textsuperscript{33} O.C.G.A. § 5-6-48(b)(1) (1982).


\textsuperscript{38} 234 Ga. 308, 215 S.E.2d 676 (1975).
notice of appeal filed in the "temporal trap" between entry of a dispositive order and entry of a final judgment was timely.40

The Gillen rule appears to have some inherent limits. These arise from the necessity of some dispositive order (by the trial judge) or event (for example, a jury verdict) before an appeal will be considered timely.41 The only other requirement appearing so far is that a final judgment must be entered at some point if the appeal from the earlier order is to be effective.42

The supreme court also has held that a party who mislabels the order or judgment appealed from will not have a timely appeal dismissed so long as no prejudice results from the mistake.43 In Steele v. Cincinnati Insurance Co.,44 the appeal was taken from "the order of this [the trial] court . . . granting defendant's motion for a directed verdict," and not from the final judgment.45 The supreme court held that the appellant's error, having "misnamed the action appealed from and labeled it an order instead of a judgment entered on the order," rendered the notice of appeal technically defective but did not justify dismissal of the appeal.46

An order clarifying or correcting the judgment may be a final, appealable decision in its own right. In West v. Nodvin,47 the court of appeals held that a corrective order under the section 9-11-60(g) order "constituted a final order which is directly appealable."48

Factors other than statutory construction clearly have played a role in the Georgia courts' decisions on the timing of a notice of criminal appeal. In Oller v. State,49 the court of appeals held that a late-filing defendant had "substantially complied" with the timeliness requirement of section

39. Robert W. Beynart, Esquire, of Atlanta, Georgia, coined the terminology used herein to describe the rules of the decisions in Gillen and Steele.


45. 252 Ga. at 59, 311 S.E.2d at 470.


48. Id. at 94, 397 S.E.2d at 584.

5-6-38(a) and affirmed the grant of an out-of-time appeal. On the facts, the court in *Oiler* had available an alternative holding, as in *Storch v. Hayes Microcomputers, Inc.*, that defendant's earlier filing of a letter with the trial judge constituted the filing required by section 5-6-38(a). Instead, the majority reasoned that defendant's right to the effective assistance of counsel would have required the timely appointment of an appellate attorney. Whether this constitutional right required the judicial creation of an exception for out-of-time appeals, however, is open to question.

### B. Interlocutory Applications for Appeal

The General Assembly amended the Appellate Practice Act in 1968 to provide for interlocutory appeals "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 interlocutory appeal provision was changed in 1975 to give the appellate courts discretion to permit or refuse an interlocutory appeal, to require the filing of an application for interlocutory appeal within ten days of the entry of the trial court's certification, and to establish a procedure for the application and a response. If the court permits the interlocutory appeal, the applicant must file a subsequent notice of appeal within ten days after issuance of the order granting review.

The differences between a section 9-11-54(b) determination and a section 5-6-34(b) certification are significant. An order rendered final under section 9-11-54(b) must dispose of the claim or party that it covers. An order certified under section 5-6-34(b) may dispose of less than a complete claim; for example, the issue of liability only. A section 9-11-54(b)
determination that should have been entered by the trial court as a section 5-6-34(b) certification may be treated as properly certified under the latter section, in which case the ten-day timeframe may not apply.\textsuperscript{48} When a court certifies a nonfinal order or judgment under section 5-6-34(b), the appellant should not treat it as a section 9-11-54(b) determination even if it disposes of a claim or party.\textsuperscript{48}

Once the party ascertains the trial court’s treatment and the proper characterization of the order, the timetable for an appeal becomes important. A section 9-11-54(b) determination is a final judgment appealable under section 5-6-34(a)(1) or section 5-6-35(a) within thirty days.\textsuperscript{44} A section 5-6-34(b) certification requires that an application for leave to file an appeal be filed within ten days.\textsuperscript{48} Georgia courts can certify an order under section 5-6-34(b) within ten days of entry but otherwise cannot certify an order by an out-of-time amendment to provide for immediate review.\textsuperscript{46}

IV. THE DISCRETIONARY APPLICATION PROVISIONS

A. The Scope of the Statute

The enactment of the Discretionary Appeals amendments in 1979,\textsuperscript{67} adding present section 5-6-35 to the Appellate Practice Act, freed the Georgia courts from direct appeals in certain administrative or lower-court reviews\textsuperscript{68} and domestic relations cases.\textsuperscript{69} The General Assembly broadened

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\textsuperscript{52} Summer Tree Club Apartments Assocs. v. Graves Constr. Co., 140 Ga. App. 214, 230 S.E.2d 503 (1976). A mistake on this point is not fatal because the failure to take an interlocutory appeal does not preclude a later appeal from the final judgment. Turner v. Harper, 231 Ga. 175, 200 S.E.2d 748 (1973); Goolsby v. Allstate Ins. Co., 130 Ga. App. 881, 204 S.E.2d 789 (1974). It can, however, be difficult to explain to the trial judge who certified the order or the client who must then await an appeal from the final judgment.

\textsuperscript{53} Turner v. Harper, 231 Ga. 175, 200 S.E.2d 748 (1973); Goolsby v. Allstate Ins. Co., 130 Ga. App. 881, 204 S.E.2d 789 (1974). It can, however, be difficult to explain to the trial judge who certified the order or the client who must then await an appeal from the final judgment.


section 5-6-35 in 1984, 1986, and 1988 to include applications for appeal from a variety of minor civil and criminal cases,"6 probation revocations,7 temporary restraining orders,8 and orders on certain post-judgment motions.7 The orders on motions include denial of an extraordinary motion for new trial,4 denial of a section 9-11-60(d) motion to set aside,7 and denial of the section 9-11-60(e) complaint in equity to set aside available prior to 1986,7 and awards of attorney fees and expenses of litigation under section 9-15-14.77

The parties now take appeals from those proceedings and motions by discretionary application for leave to appeal; direct appeals are dismissed if the party should have used the discretionary application procedure.7 Under Citizens & Southern National Bank v. Rayle,9 appellate review of any motion or proceeding covered by that section is obtained through an application for appeal "whether the judgment be final, interlocutory or summary."86 Some attorneys manage any uncertainty as to the application of section 5-6-34 or 5-6-35 by the timely filing of both a notice of appeal and an interlocutory or, in the alternative, discretionary application, together with any second notice required under section 5-6-34(b) or 5-6-35(g)88 if the court grants the application. An interlocutory appeal in

72. Id. § 5-6-35(a)(9).
76. 1966 Ga. Laws 609 (codified at O.C.G.A. § 9-11-60(e) (1982)). Now that the complaint in equity has been abolished as a means of collateral attack on a judgment, 1986 Ga. Laws 294 (codified at O.C.G.A. § 9-11-60(e) (1982 & Supp. 1992)), it will eventually be appropriate to amend section 5-6-35(a)(8) to delete the reference to appeals in such cases.
a case listed in section 5-6-35(a) must comply with both section 5-6-35 and section 5-6-34(b).  

B. The Deficiencies in the Statutory Coverage

The provisions of section 5-6-35(a) must be read carefully, because no provision is certain to apply and because more than one may apply to a particular case. Several of the provisions for minor civil cases are either incomplete, ambiguous, variable in their application to a given type of case, or some combination thereof.

Garnishment and Attachment Cases. Subsection (a)(4) requires a discretionary application in garnishment and attachment cases, but excludes appeals concerning attachment against “fraudulent debtors” covered by section 5-6-34(a)(5). Since subsection (a)(1) covers orders “granting or refusing” attachment, the subsection presumably covers cases in which fraud is alleged, not merely when it is proven.

Judgments for $10,000 or Less. Subsection (a)(6) is reasonably specific, requiring a discretionary application in “all actions for damages in which the judgment is $10,000.00 or less,” but the section does not address the issues of including interest, costs, or other nonprincipal amounts. In Todd v. City of Brunswick and Brown v. Associates Financial Services Corp., the court of appeals initially held that subsection (a)(6) “requires that an application for discretionary review be filed when the amount placed in controversy by the claimant (plaintiff, coun-

82. See infra text accompanying notes 147-60.
84. Id. § 5-6-35(a)(4).
In Castleberry’s Food Co. v. Smith, No. A92A1486 (Ga. App. Oct. 6, 1992), the court of appeals held that “for establishing jurisdiction pursuant to OCGA § 5-6-35(a)(6), a judgment is comprised of principal, plus costs, plus interest at the legal rate accrued from the date of the filing of the judgment until the date of the filing of the notice of appeal.” Id. This new rule of law clarifies the costs issue, but its net effect is to complicate the jurisdictional issue by depending upon the expression and computation of interest under a judgment. Since the issue was not presented, the decision does not resolve the classification of attorney fees and expenses under O.C.G.A. §§ 9-11-37 and 9-15-14 (1982).
terclaimant or cross-claimant) is $2,500 [now $10,000] or less. The holding in Brown produced two vigorous dissents, one pointing out that the holding "does not follow the language of the statute" and the other observing that "we are dealing with what is and not with what we think it ought to be."

The supreme court affirmed the judgment in Todd, but for different reasons. The court held that subsection (a)(6) "relates to the final result of an action for damages"; "[a] judgment is not relief sought in a complaint or counterclaim." The court established the rule "that O.C.G.A. § 5-6-35(a)(6) sets out the proper method of appeal from monetary judgments ranging from one cent to $2,500 [now $10,000]." The supreme court reversed Brown, holding that "[b]y its own terms O.C.G.A. § 5-635(a)(6) applies when there is an action for damages and the result is a judgment of $2,500 [now $10,000] or less." The court then held that a direct appeal was proper because the appeal concerned a writ of possession and remanded the case to the court of appeals for review of the money judgment.

Rent of $2500 or Less Due Under Warrant. Subsection (a)(3) requires a discretionary application in "[a]ppeals from cases involving distress or dispossessory warrants in which the only issue to be resolved is the amount of rent due and such amount is $2,500.00 or less." The subsection (a)(3) "rent-warrants" and subsection (a)(6) "small case" thresholds were originally the same, namely, $2500 or less. With the 1991 amendment raising the subsection (a)(6) threshold to $10,000, a rent-warrant case may escape the application requirement of subsection (a)(3), only to fall within subsection (a)(6) if it includes a judgment for $10,000

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88. 175 Ga. App. at 553, 554-55, 333 S.E.2d at 889, 890-91 (emphasis added) (giving the statute "that construction which is most equitable and just"). But see O.C.G.A. § 23-1-6 (1982) ("equity follows the law where the rule of law is applicable and follows the analogy of the law where no rule is directly applicable"); see also Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981).
89. 175 Ga. App. at 556, 560, 333 S.E.2d at 891, 894 (Dean, P.J. & Beasley, J., dissenting).
91. Id. at 448, 339 S.E.2d at 589.
92. Id.
95. 255 Ga. at 457, 339 S.E.2d at 591.
97. O.C.G.A. § 5-6-35(a)(3).
or less. This divagation underscores the attorney's need to review a judgment for coverage by the discretionary appeal provisions under each and every subsection of section 5-6-35(a) before settling on a notice of appeal or application—or both—as the vehicle for appeal.

Of particular interest to attorneys who frequently resort to the dispossessory and distress procedure (and perhaps of more urgent interest to those who do so infrequently) is that the threshold amount under subsection (a)(3) is the rent due, which does not expressly include any aspect of the judgment "for any other claim relating to the dispute." A substantive amendment to the dispossessory statute in 1988, to include "[a]ll rent and utility payments . . . due," was not reflected in subsection (a)(3).

Strict compliance with the rent due provision would require the judgment to specify the various components of the award, perhaps on special interrogatories or verdict forms completed by the jury, before the proper appellate procedure could be identified. This is a terrible amount of trouble for the appeal of a minor case, but the real estate attorney's problems are only beginning.

The language of subsection (a)(3), "the amount of rent due," is arguably broader than that of subsection (a)(6), "the judgment." This suggests a possible reading that a claim of more than $2500 brings the case within the statute. On the other hand, the grammatical sense of the sentence, "the only issue . . . is the amount of rent due and such amount is $2,500.00 or less," suggests an amount determined by the court, not claimed. The court of appeals opinions in Mack v. Third Bedford-Pines Apartments, Ltd. are ambiguous in this regard, and neither the majority opinion nor the special concurrence provides a complete solution to the questions raised by the fact patterns the opinions recite.

The appellate courts need to decide, at a minimum, whether subsection (a)(3) will be governed by the amount in controversy or the amount stated in a judgment. If it is the latter, additional questions will arise. Will the courts interpret literally the "rents due" language, and, if so, how will the courts handle nonspecific judgments? Alternatively, if the courts include all amounts recovered under the dispossessory or distress statute, how will they account for different practices in the drafting of judgments? The courts may wish to establish a bright-line test that will apply to the face of the initial pleading (or, preferably, the judgment as

98. Id. §§ 44-7-55(a), -77(a) (1982).
100. O.C.G.A. § 5-6-35(a)(3) (1982).
101. Id. § 5-6-35(a)(6).
102. Id. § 5-6-35(a)(3) (Supp. 1992).
under subsection (a)(6)) and may wish to reject arguments based upon an after-the-fact reading of the record. The General Assembly may wish to assist the courts by providing a statutory solution.

The Inclusion of Costs: Herein of Attorney Fees. The question of including costs or attorney fees and expenses when calculating the amount of the claim or judgment under section 5-6-35(a)(3) and (6) must be addressed in light of three factors. The first is the proper characterization of attorney fees as "damages, costs, fees or expenses" under section 13-6-11; section 9-11-37(a)(4), (b), (c), or (d)(1); section 9-15-14; and sections 51-7-80 to -85. The second is the general language of subsections (a)(3) and (a)(6), which does not specifically address costs, attorney fees, or expenses. The third is the language of section 9-15-11 providing for inclusion of costs in the judgment and section 9-11-58(b) requiring the immediate entry of judgment without delay for the taxing of costs.

A claim for attorney fees and expenses of litigation under section 13-6-11 is a substantive claim like other elements of damages. In MTW Investment Co. v. Vanguard Properties Financial Corp., the court of appeals held that an appeal from the award of $500 in attorney fees under section 13-6-11 must be taken by application under section 5-6-35(a)(6). The court reasoned that "[o]ur review of the cases involving such awards for bad faith convinces us that they are within the category of 'damages' ... requiring an application to appeal in all actions in which the judgment is $2,500 [now $10,000] or less." Similarly, the court held in Ostrom v. Kapetanakos that a direct appeal could be taken when the general damages of $1500 and attorney fees of $1370 totalled $2870, and subsection (a)(6) was inapplicable by its express terms.

The statutes do not describe attorney fees awarded for a motion to compel discovery or a discovery response that is not "substantially justified" under section 9-11-37(a)(4), (b), (c), or (d)(1) as an independent claim or as costs to be taxed. The court of appeals may have treated

105. Id. § 9-11-37(a)(4), (b), (c), or (d)(1) (1982).
106. Id. § 9-15-14.
108. Id. §§ 9-15-11, 9-11-58(b); see supra note 85.
111. 179 Ga. App. at 405, 346 S.E.2d at 576-77.
114. Id. at 729, 365 S.E.2d at 850.
discovery-related fees as costs in *American Express Co. v. Baker,* in
suggesting that the award of such fees was an interlocutory order and
concerned an "award of attorney fees and costs." The court further ob-
erved that the award could have been made final by certification under
section 5-6-34(b), but the trial court properly treated it as a final judg-
ment because of the trial court's order that the judgment "may be en-
forceable by any [post [j]udgment collection methods, including but not
limited to garnishment, attachment and execution." "

Attorney fees and expenses of litigation for frivolous claims and de-
fenses under section 9-15-14 are "awarded" or "assessed" by the trial
judge "by an order of court which shall constitute and be enforceable as a
money judgment." A section 9-15-14 award generally must be taken up
through an application under section 5-6-35(a)(10). In limited circum-
stances, some appellate decisions have permitted the review of an award
as a "tag-along" appeal under section 5-6-34(d) in the main direct
appeal.

Section 9-11-58(b) provides that "[t]he entry of the judgment shall not
be delayed for the taxing of costs." Since section 9-15-14 is codified
among the provisions on "Court and Litigation Costs" and is captioned
"Litigation costs and attorney's fees," it would seem such court-awarded
fees could be treated as costs for all purposes. The court may also treat
court-awarded fees as part of the judgment under section 9-15-11, which
provides that "[w]hen a case is disposed of, the costs, including fees of
witnesses, shall be included in the judgment against the party voluntari-
ly dismissing, being involuntarily dismissed, or cast in the action." That
does not necessarily mean, however, that the court should treat
those costs as a part of the judgment for purposes of the application of
the discretionary appeals provision.

117. Id. at 23-24, 383 S.E.2d at 579.
118. Id. at 23, 383 S.E.2d at 579. The "judgment" contained no language satisfying the
first prong of the two-part requirement of "an express determination that there is no just
reason for delay" and "an express direction for the entry of judgment" under O.C.G.A. § 9-
121. *But see infra* note 199 and text accompanying notes 161-201.
28 (1990), the court observed that "[a]lthough Deljou's motion for attorneys' fees [under
section 9-15-14] was pending, the trial court entered judgment for Deljou, but did not make
the findings necessary under O.C.G.A. § 9-11-54(b) for a final judgment." Id. at 505, 391
S.E.2d at 28. The court may have been referring to the need for a final judgment ending the
Official Code of Georgia Annotated ("O.C.G.A.") sections 51-7-80 to 51-7-85 provide for recovery of attorney fees in an action to redress abusive litigation. The provision entitled "Measure of Damages" makes reference to damages as including "costs and expenses of litigation and reasonable attorney's fees" incurred in the underlying, terminated action. That section also provides for costs, expenses of litigation, and reasonable attorney fees in the abusive litigation action. It appears that the court should treat costs and fees incurred in the underlying action as part of the judgment under section 5-6-35(a)(6), while costs and fees in the abusive litigation action itself suffer from the same ambiguity as section 9-15-14 fees.

The Treatment of a Defense Judgment. In Brown v. Associates Financial Services Corp., the supreme court explained that application of section 5-6-35(a)(6) to all cases in which the judgment is for $2500 (now $10,000) or less is based on the General Assembly's intent "to remove the right of direct appeal when a claimant prevails but a fact finder has determined that the damage suffered is not substantial." The court held that "[a] direct appeal is available in those cases where the injury is great but the party seeking compensation loses on liability, and the party seeking substantial damages gets no judgment." The appellate courts have consistently held, after Brown, that a "defense judgment" on a claim, counter-claim, or cross-claim is directly appealable so long as it is final under section 5-6-34(a)(1). A defense judgment may be subject to the discretionary appeals provisions under another subsection of section 5-6-35(a). In Motor Finance Co. v. Davis, action since there had been an opposing claim, but the opinion can equally be read as suggesting that the pending fee claim necessitated a section 9-11-54(b) determination.

126. Id. § 51-7-83(b).
127. Id. § 51-7-83(a).
129. Id. at 457, 339 S.E.2d at 590.
130. Id., 339 S.E.2d at 591; see Bales v. Shelton, 260 Ga. 335, 336 n.1, 391 S.E.2d 394, 395 n.1 (1989) ("One cent was chosen rather than zero because a 'take-nothing' verdict often reflects the jury's decision on liability issues rather than a determination that the damage involved was low.").

The "defense judgment" rule will permit direct appeals, despite subsection (a)(6), even in cases in which the original claim was $10,000 or less, when a judgment is entered for the defendant. The appellate courts thus will receive small-case appeals as well as those cases in which "the injury is great" and the plaintiff seeks "substantial damages." The court held that "[a] direct appeal is available in those cases where the injury is great but the party seeking compensation loses on liability, and the party seeking substantial damages gets no judgment." The appellate courts have consistently held, after Brown, that a "defense judgment" on a claim, counter-claim, or cross-claim is directly appealable so long as it is final under section 5-6-34(a)(1). A defense judgment may be subject to the discretionary appeals provisions under another subsection of section 5-6-35(a). In Motor Finance Co. v. Davis, action since there had been an opposing claim, but the opinion can equally be read as suggesting that the pending fee claim necessitated a section 9-11-54(b) determination.

the court of appeals denied a motion to dismiss based on subsection (a)(6), but later dismissed the appeal from a defense judgment because the case had begun in the magistrate's court and, under section 5-6-35(a)(2), was appealable only by application.\textsuperscript{133}

Whether a defense verdict will permit a direct appeal in a real estate case despite section 5-6-35(a)(3) may be open to question after the court of appeals interpretation of subsection (a)(3) in \textit{Mack v. Third Bedford-Pines Apartments, Ltd.}\textsuperscript{134} If the decision in \textit{Mack} means that discretionary appeal coverage under subsection (a)(3) should be determined from the allegations of the complaint, a defense verdict in which the complaint seeks $2500 or less may still have to be taken up by a discretionary application. This counsels, if nothing else, that the appellate courts should read the decision in \textit{Mack} more narrowly and that the "defense verdict" exception should apply to both subsections (a)(3) and (a)(6).

\textbf{The Setting-Off of Defenses, Counter-Claims, and Cross-Claims.} The issue of setoffs can arise in many different ways, some affecting the judgment itself and some only the verdict, when defenses, counter-claims, and cross-claims are concerned. In \textit{Barikos v. Vansli},\textsuperscript{138} the court of appeals held that the amount of the judgment in an automobile accident case was $2500 or less because the parties had stipulated that any verdict would be reduced by no-fault payments of $5000, and the jury returned a verdict of $5800.\textsuperscript{139} The rule in \textit{Barikos} would have been relatively simple to administer because the face of such a judgment would reflect the verdict.

In \textit{Bales v. Shelton},\textsuperscript{137} the supreme court held that a no-fault setoff should not be deducted to determine whether a discretionary application is required.\textsuperscript{138} The court further distinguished between "collateral source" setoffs, which are not deductible, and reductions in damages that do not

\begin{itemize}
\item \textsuperscript{133} Id. at 291-92, 372 S.E.2d at 675.
\item \textsuperscript{134} 193 Ga. App. 838, 839, 389 S.E.2d 404, 404 (1989); see supra text accompanying notes 100-03.
\item \textsuperscript{136} 177 Ga. App. at 884, 341 S.E.2d at 513.
\item \textsuperscript{137} 260 Ga. 335, 391 S.E.2d 394 (1990).
\item \textsuperscript{138} Id. at 336, 391 S.E.2d at 395. The decision in \textit{Bales} did not apply to any direct appellant who filed a direct appeal in reliance on \textit{Barikos} and prior to \textit{Bales}. Lee v. Britt, 260 Ga. 757, 400 S.E.2d 5 (1991), rev'd 196 Ga. App. 152, 395 S.E.2d 347 (1990). The supreme court has, however, dismissed appeals upon changing a rule of appellate procedure, even when the appellant clearly and undisputably relied on an earlier rule of law. See Scruggs v. Georgia Dep't of Human Resources, 261 Ga. 587, 408 S.E.2d 103 (1991) (appellant's reliance on Strauss v. Strauss, 260 Ga. 327, 393 S.E.2d 248 (1990), decided only one year earlier, proved fatal to the appeal).
arise from a collateral source, which are deductible. The court reasoned:

The purpose of the statute is to limit appeals in those cases where a jury has decided that the damage involved was less than $2,500 [now $10,000]. In a tort action, set-offs to the judgment that arise from some collateral source—such as prior payments, or pre-existing debts—do not help to ascertain the price tag for the injury involved in the action. Therefore, such set-offs should not be considered when deciding whether an application for appeal is necessary.

The court added in a footnote that “[r]eductions in the damages arising from comparative negligence, failure to mitigate, etc. are not set-offs that arise from a collateral source.”

The holding in Bales is a principled one, but it may prove difficult to manage in practice. The jury’s verdict and the judgment will reflect reductions in damages due to partial affirmative defenses, or same-transaction setoffs. In tort cases in which the court asks the jury to determine whether collateral source payments or other collateral basis setoffs should be deducted from the award, however, a special interrogatory or verdict form will have to be used to ascertain the pre-setoff amount of the jury’s determination.

The appellate courts will have to address other jurisdictional questions under the Bales analysis, such as whether common law recoupments, set-offs, or counterclaims have a collateral basis and, thus, are not to be included in the judgment amount, or whether they are same-transaction amounts that should be netted out in the calculation. The distinction between setoff and recoupment under O.C.G.A. sections 13-7-1 to 13-7-14 is not likely to provide as clear an answer as the practitioner might reasonably demand of the Appellate Practice Act. The “same transaction or occurrence” test for compulsory counter-claims and cross-claims

139. 260 Ga. at 336, 391 S.E.2d at 395.
140. Id.
141. Id. at 336 n.2, 391 S.E.2d at 395 n.2. Since “collateral source” is all but a term of art under the Tort Reform Act, O.C.G.A. § 51-12-1(b) (1982 & Supp. 1992); see Denton v. Conway S. Express, Inc., 261 Ga. 41, 402 S.E.2d 269 (1991), the two types of setoffs will be referred to here as “collateral basis” and “same-transaction” setoffs.
143. O.C.G.A. §§ 13-7-1 to -14 (1982).
under the Civil Practice Act likewise may have too little predictive certainty to be useful. 145

A partial answer to the above problems is that the appellate courts can take the “true value” of the case into account in deciding whether to grant the appeal and determining whether the would-be appellant raises any meritorious or important issue. 146 The first issue, however, is whether the appeal satisfies the legislative classification. The second issue is whether practitioners can use the Appellate Practice Act to predict the results of their actions. Whether the court can administer the statute (which, clearly, it can) is a tertiary concern. The practical difficulties in determining the true value through jury interrogatories and verdict forms will remain in many cases. The potential for confusion will be significant in personal injury as well as commercial litigation, and the need for some process by which the courts can avoid the dismissal of appeals because of an attorney’s failure to navigate these shoals with prescience will be essential. It may be that some means of reciprocal treatment of appeals and applications would provide the best answer.

C. Problems with Interlocutory-Discretionary Appeals

Section 5-6-35(b) specifically governs appeals from interlocutory orders in cases covered under subsection (a)(1) through (11): “[I]f the order or judgment [being appealed] is interlocutory, the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory review.” 147 The statute does not explain how the attorney determines at an interlocutory stage whether a case will fall within subsection (a)(3) or (a)(6). Under these subsections, a verdict or final judgment may be required before it is clear whether the case or the appeal involves $2500 or less or $10,000 or less, respectively. 148 The statute does not place


147. O.C.G.A. § 5-6-35(b) (1982).

148. An interlocutory-discretionary appeal from a subsection (a)(6) case may exist only when a nonfinal judgment has been entered, since that subsection requires a judgment for $10,000 or less. O.C.G.A. § 5-6-35(a)(6) (1982 & Supp. 1992). It may be, contrariwise, that an interlocutory appeal in a real estate case “in which the only issue to be resolved” is rent of $2500 or less, may exist not only when there is a nonfinal judgment, but also when other non-final orders are entered and certified. See O.C.G.A. § 5-6-35(a)(3).
any specific requirements on the taking of an interlocutory appeal other than that quoted above.

In Scruggs v. Georgia Department of Human Resources, the supreme court held, despite the lack of a specific requirement in section 5-6-35(b) for the trial court's certificate, that the requirements of section 5-6-34(b) must be satisfied when the court takes an interlocutory appeal in a case subject to the discretionary appeal provisions. The supreme court had held a year earlier in Straus v. Straus that a trial court certificate was not required, and the court of appeals had rendered apparently conflicting decisions.

There can be no doubt that the insistence upon the trial court's certificate of immediate review is a good idea. As the concurring opinion in Scruggs pointed out, however, the language of section 5-6-35(b) is more liberal than that of section 5-6-34(b). Unlike section 5-6-34(b), section 5-6-35(b) does not require the trial court's certificate and makes no reference to section 5-6-34(b) at all. The concurring opinion further observed that the court did not address whether the application for an interlocutory-discretionary application should be filed within ten days as provided in section 5-6-34(b) or thirty days as provided in section 5-6-35(d).

The analytical concerns raised by Scruggs go deeper than an inconsistency with the statutory language. Both the supreme court and the court of appeals have held that an appellant governed by section 5-6-35 may not, when a resetting post-trial motion has been filed, take advantage of the tag-along provision of section 5-6-34(d), which on its face permits review of any other nonfinal order in the case without regard to that order's appealability. The courts thus require appellants to comply with the jurisdictional burdens of section 5-6-34, while denying them its jurisdictional benefits.

150. Id. at 589, 408 S.E.2d at 104.
153. 261 Ga. 589, 408 S.E.2d at 104.
155. 261 Ga. at 590, 408 S.E.2d at 104-05.
The difference in *Strauss* and *Scruggs* may be summed up as a fundamental shift in appellate policy from an originally broad, inclusive approach to appeals, reflected in sections 5-6-30¹⁵⁷ and 5-6-34(d),¹⁵⁸ to a more recent narrowing of appellate jurisdiction, manifest in section 5-6-35.¹⁵⁹ This shift presents a puzzle for appellate practitioners, particularly since it occurred without a complete rethinking of the Appellate Practice Act. The incompleteness of section 5-6-35 and its lack of coordination with the remainder of the Act make the puzzle difficult. The puzzle is made insoluble, it is respectfully submitted, by the courts' engraving of jurisdictional prerequisites upon statutory language that does not expressly give jurisdictional significance to the appellate pleading in question.¹⁶⁰

The depth of these policy concerns raises serious questions whether the entire Appellate Practice Act should be reviewed, a debate be held on the nature and scope of appellate review and the organization of the Georgia appellate courts, and appropriate legislation developed. Neither the courts nor the practicing bar has explicitly called for such a process, and to do so is beyond both the scope and the intent of this Article. But, at least, the amendment of section 5-6-35(b) to refine the interlocutory-discretionary appeal procedure should be high on the General Assembly’s list of priorities, to require the trial court’s certificate, and otherwise to harmonize that section with the remainder of the appellate procedure.

D. Problems with “Tag-Along” Discretionary Appeals

**The Decision in Kalb and Its Background.** The consideration of problems with applying section 5-6-35 to tag-along appeals, governed in a direct appeal by section 5-6-34(d) (formerly subsection (c)), begins with an analysis of appeals from grants of summary judgment under section 9-11-56(h) and cross-appeals from denials of summary judgment. The supreme

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¹⁵⁷. O.C.G.A. § 5-6-30 (1982) (“this article shall be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case or refusal to consider any points raised therein, except as may be specifically referred to in this article”).

¹⁵⁸. Id. § 5-6-34(d) (quoted infra text accompanying note 171); see Nodvin v. West, 204 Ga. App. 280, 419 S.E.2d 120 (1992).


¹⁶⁰. The court in *Scruggs* could, for example, have required a trial court’s certificate as a nonjurisdictional component of an interlocutory-discretionary appeal under section 5-6-35(h), to be submitted either with the application or, if omitted there, as part of a supplemental record handled, for example, by means of a motion to dismiss or an order to show cause. That method would not have involved an inconsistent interpretation of the statute, would have met the salutary policy of involving the trial court in the interlocutory appeal, and would have treated only those requirements disclosed on the face of the statute as jurisdictional.
court held in Marietta Yamaha, Inc. v. Thomas and Thomas v. McGee that a party could not cross-appeal the denial of a motion for summary judgment when another party filed a section 9-11-56(h) appeal, but the court must review the denial under the interlocutory appeal provisions of section 5-6-34(b). The court of appeals issued conflicting rulings on the issue, holding in Garrett v. Heisler that a cross-appeal under section 9-11-56(h) was permissible, and requiring, in Jack V. Heard Contractors v. A.L. Adams Construction Co., a section 5-6-34(b) certification.

In Marathon U.S. Realities, Inc. v. Kalb, the supreme court overruled Marietta Yamaha and McGee, based upon its earlier decision in Executive Jet Sales, Inc. v. Jet America, Inc. The court held in Executive Jet that the denial of a motion to dismiss may be cross-appealed when another party has appealed from a final judgment certified under section 9-11-54(b). The court based the holding upon present section 5-6-34(d):

Where an appeal is taken under any provision of subsection, (a), (b), or (c) of this Code section, all judgments, rulings, or orders rendered in the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law...
The court held in *Kalb* that the same principle permits a cross-appeal in a section 9-11-56(h) appeal.¹⁷²

**The Decision in Klem.** In *Southeast Ceramics, Inc. v. Klem*,¹⁷³ the supreme court again held that the denial of a summary judgment may be “appealed without application when it is tied to the appeal of an appealable order or judgment.”¹⁷⁴ That case dealt with the same party’s section 9-11-56(h) appeal from a grant of summary judgment.¹⁷⁵ The court reasoned that *Executive Jet* and *Kalb* “struck a blow for the principle of judicial economy,”¹⁷⁶ and that the court “frown[s] upon the practice of appellate review by installment and seek[s] to encourage appellate determination of issues in a case in the fewest possible appellate procedures.”¹⁷⁷ The court also relied upon section 5-6-34(d), as it had done in *Executive Jet*.¹⁷⁸

The supreme court extended the *Klem* holding to applications for discretionary appeal from a simple judgment in *Brown v. Associates Financial Services Corp.*¹⁷⁹ The court held that appellant “had a right to direct appeal from the judgment on writ of possession,” because a writ of possession is “a special statutory proceeding which the legislature could have added to the list of discretionary appeals but did not.”¹⁸⁰ The court further concluded that the court of appeals had jurisdiction over the appeal from dismissal of a counter-claim concerning less than $2500 because under *Klem* and section 5-6-34(d), “he could then appeal all other orders and judgments including the dismissal of his counterclaim.”¹⁸¹ To the same effect is the supreme court’s decision in *Haggard v. Board of Regents of the University System of Georgia*,¹⁸² in which the court held that “a judgment awarding attorney fees and costs of litigation pursuant to O.C.G.A. § 9-15-14 may be reviewed on direct appeal, when it is appealed as part of a judgment that is directly appealable.”¹⁸³ The court in *Hag-

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¹⁷². 227 Ga. at 262-63, 229 S.E.2d at 755.
¹⁷⁴. Id. at 295, 271 S.E.2d at 200.
¹⁷⁵. Id.
¹⁷⁶. Id.
¹⁷⁷. Id.
¹⁷⁸. Id.
¹⁸⁰. Id. at 458, 339 S.E.2d at 591.
gard distinguished an independent appeal of the attorney fees issue, which requires an application under section 5-6-35(a).184

The Decisions in Yancey. In State Farm Mutual Automobile Insurance Co. v. Yancey,185 both the court of appeals and the supreme court addressed the need for a discretionary application when an order subject to section 5-6-35 is appealed together with a dispositive order on a resetting post-judgment motion and a judgment directly appealable under section 5-6-34(a). The supreme court granted certiorari in Yancey to determine whether the \textit{Klem} rule, permitting the appeal of an order subject to section 5-6-34(b) as part of a direct appeal under section 5-6-34(a), applied when the appeal concerned a motion to set aside subject to section 5-6-35(a).186 The court stated the issue as "whether the [discretionary] application procedure can be circumvented by filing a direct appeal of the denial of the motion for new trial that includes the denial of the motion to set aside,"187 and held that a discretionary application was required.188 The court did not overrule or address the decision in Haggard, which held that on a direct appeal from a simple judgment under section 5-6-34(a) issues otherwise cognizable only under section 5-6-35(a) may be raised without a discretionary application.189

The supreme court has reaffirmed the \textit{Klem} and \textit{Haggard} rules in two decisions rendered after Yancey. In McClure \textit{v. Gower},190 following \textit{Klem}, the court held that when one party perfects a direct appeal from a simple judgment, the other party may file a cross-appeal on a money judgment of $2500 or less without filing a discretionary application.191 In \textit{Stancil v. Gwinnett County},192 following \textit{Haggard}, the court held that a party who perfects a direct appeal from a simple judgment need not file an application for appeal from an order awarding attorney fees.193

Discussion of the Decisions in \textit{Kalb}, \textit{Klem}, and \textit{Yancey}. If a legislative intent regarding any special status or exclusivity of the discretionary appeals procedure can be discerned in the texts of the several scattered enactments relating to appellate practice between 1965 and

184. 257 Ga. at 527, 360 S.E.2d at 568.
186. 258 Ga. at 802, 375 S.E.2d at 40.
187. \textit{Id}.
188. \textit{Id}.
191. \textit{Id} at 680, 385 S.E.2d at 274.
1987, the evidence for it is inconclusive. Section 5-6-35 does provide, as 
the supreme court has observed, that "[a]ppeals in the following cases shall be taken as provided in this Code section,"\(^{194}\) while the direct ap-
peals procedure provides that "[a]ppeals may be taken . . . from the fol-
lowing judgments and rulings . . . ."\(^{198}\) The Appellate Practice Act also 
provides, however, that "this article shall be liberally construed so as to 
bring about a decision on the merits of every case appealed,"\(^{196}\) and that 
when a direct appeal is properly before the appellate court, other deci-
sions of the trial court "shall be reviewed."\(^{197}\) These conflicting impera-
tives, to the extent that they can be reconciled, should have been resolved 
in Yancey in favor of the latter, declared intent of the Appellate Practice 
Act\(^{198}\) to secure a determination on the merits of the case, including those 
aspects of the case otherwise subject to the discretionary appeals procedure.

The process begun in Kalb and Klem, and most recently appearing in 
Yancey, Stancil, and McClure, can and should result in a workable set of 
principles: the most critical and immediate need, whether met by legisla-
tive action or judicial decisions, is that the courts dismiss as few appeals 
as is consistent with the proper interpretation of the direct, interlocutory, 
and discretionary appeal provisions.\(^{199}\) In the long term, the General As-
sembly needs to provide a solution to the Gordian knot presented by 
these decisions, although even then this area is likely to remain difficult 
to unravel. Among other things, the two appellate courts may wish to 
have the power to treat a direct appeal under section 5-6-34(a) as a dis-
cretionary application under section 5-6-35, and vice versa,\(^{200}\) just as the

\(^{194}\) O.C.G.A. § 5-6-35(a) (Supp. 1992) (emphasis added).
\(^{195}\) Id. § 5-6-34(a) (1982) (emphasis added).
\(^{196}\) Id. § 5-6-30 (emphasis added).
\(^{197}\) Id. § 5-6-34(c); see, e.g., id. § 5-6-35(a).
\(^{198}\) See Smith v. Cofer, 243 Ga. 530, 255 S.E.2d 49 (1979); see also Erwin v. Moore, 15 
Ga. 361 (1854); Roberts v. State, 4 Ga. App. 207, 60 S.E. 1082 (1908).
\(^{199}\) The supreme court's direction in Yancey is unclear, and several possibilities appear. 
The court may overrule either Yancey on the one hand or the conflicting decisions on the 
other. Otherwise, Haggard and Stancil will apply to a combined appeal from a simple judg-
ment, Klem and McClure to a cross-appeal, and the contrary rule of Yancey when a reset-
ting post-judgment motion has been filed, with its effect uncertain on a cross-appeal when 
another party has filed the resetting motion. None of this procedure is set out with any 
specificity, still less with any clarity, in the statute, nor, at this point, in the courts' 
decisions.
\(^{200}\) See Akins v. Life Investors Ins. Co. of America, 197 Ga. App. 574, 399 S.E.2d 584 
court conviction properly treated as cert. petition).
General Assembly has liberalized appellate procedure to permit the transfer of an appeal filed in the wrong Georgia appellate court. 201

V. THE "RESETTING" POST-JUDGMENT MOTIONS

A. Identifying the Resetting Motions

It is useful to consider the provisions of section 5-6-38(a) in their entirety when addressing the effect of post-judgment motions on the time for appeal:

A notice of appeal shall be filed within 30 days after entry of the appealable decision or judgment complained of; but when a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the notice shall be filed within 30 days after entry of the order granting, overruling, or otherwise finally disposing of the motion. 202

Although many decisions refer to a tolling effect, the motions listed in section 5-6-38(a) actually cause the thirty-day period to begin running anew, so the term "resetting" is more accurate and, therefore, preferable.

Not all post-judgment motions are resetting motions, as the language of section 5-6-38(a) makes clear. 203 Further, the court will treat a motion according to its substance, not its form or caption. 204 Thus a motion styled as one for a new trial will not reset the time when that motion is not the proper vehicle for addressing the trial court's earlier action. 205 A motion for reconsideration of an earlier order is not one of the motions listed, and has no effect on the time for appeal. 206 Likewise, a motion to vacate, modify, or amend a prior order has no effect on the time. 207 An extraordinary motion for new trial has no effect on the timing of an ap-

202. O.C.G.A. § 5-6-38(a) (1982); see also id. § 5-6-35(d).
203. Attorneys accustomed to federal practice will find the rule 52(b) motion for additional findings is available under section 9-11-52(c) but does not reset the time, and the rule 59 motion to alter or amend the judgment does not exist as such, in Georgia practice.
peal from the original judgment when it is filed more than thirty days after the entry of judgment.  

**B. The Timing of a Resetting Motion**

A resetting motion must be timely to have any effect on the running of the time for appeal. A motion in arrest of judgment in a criminal case must be filed within the term the court entered the judgment. The supreme court held in *Johnson v. State* that a purported motion for new trial not filed within thirty days as required by section 5-5-40 was void and, therefore, did not affect the time for appeal. Of particular importance in civil cases for addressing timeliness of the motion is section 9-11-52(b) of the Civil Practice Act, which provides that a motion for amended or additional findings must be made within twenty days after entry of judgment, and when accompanied by a motion for new trial, “both motions shall be made within 20 days after entry of judgment.”

Post-judgment motions that have been amended, or filed in the alternative, also bear special scrutiny. For example, parties frequently file a motion for judgment notwithstanding the verdict (“JNOV”) or, in the alternative, a new trial. A party may amend a motion for new trial to add additional grounds under section 5-5-40(b), but may not amend more than thirty days after the entry of judgment to add a motion for JNOV under section 9-11-50(b). Such an untimely amendment does not affect the time for appeal. The case can be anticipated, however, and indeed has occurred, in which the trial court rules on the two motions or two aspects of the same motion separately and creates uncertainty about when a party should file the notice of appeal.

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213. Id. § 9-11-52(c).
214. Id. § 9-11-50(b).
215. Id. § 5-5-40(b) (1982).
Georgia courts have more strictly construed the timing of a post-judgment motion than that of the notice of appeal, resulting in an anomaly in the textual interpretation of the Appellate Practice Act. Section 5-5-40, governing motions for new trial, provides that: "All motions for new trial, except in extraordinary cases, shall be made within 30 days of the entry of the judgment on the verdict or entry of the judgment where the case was tried without a jury."\textsuperscript{219} In Moore v. Moore,\textsuperscript{220} the supreme court held that a prematurely filed motion for new trial is void, and thus neither properly before the trial court nor effective to reset the time for appeal.\textsuperscript{221} The court of appeals similarly refused to extend Gillen to permit a premature motion for new trial, in Deroller v. Powell.\textsuperscript{222}

These holdings concern a problematic construction of the statute because the language of section 5-5-40, requiring a motion for new trial "within 30 days of" the entry of judgment, is broader than the language of section 5-6-38(a), interpreted as permitting a premature notice "within 30 days after."\textsuperscript{223} Contrary to Gillen, the court did not apply the principle of liberal construction at all in Moore or Deroller when it would have been consistent with the broader language. The reasons for this, whether a matter of policy or of statutory construction, are not addressed by those or any similar decisions.\textsuperscript{224}

C. The Reason Behind the Resetting Rule

The decisions in civil cases disclose three primary concerns that have shaped the Georgia courts' thinking about the timing of appeals after post-judgment motions: the first, philosophical; the second, theoretical; and the third, entirely practical. The courts have discussed these concerns most fully in connection with the motion for new trial, probably because that motion, unlike the motion for JNOV, raises matters peculiarly within the trial court's discretion. Since all three motions reset the time under section 5-6-38(a), however, the resulting policies affect all three alike.

\begin{itemize}
\item \textsuperscript{219} O.C.G.A. § 5-5-40(a) (1982) (as amended).
\item \textsuperscript{220} 229 Ga. 600, 193 S.E.2d 608 (1972).
\item \textsuperscript{221} Id. at 601, 193 S.E.2d at 609.
\item \textsuperscript{222} 144 Ga. App. 585, 586-87, 241 S.E.2d 469, 471 (1978); accord Wall v. C & S Bank, 153 Ga. App. 29, 264 S.E.2d 523 (1980), aff'd, 247 Ga. 216, 274 S.E.2d 486 (1981), overruled by McKeever v. State, 189 Ga. App. 445, 375 S.E.2d 899 (1988). Wall was unusual in that although the premature motion did not reset the time, no judgment was entered until after the appeal had been filed, so the case fell within the Gillen rule on premature notices of appeal.
\item \textsuperscript{223} Gillen v. Bostick, 234 Ga. 308, 311, 215 S.E.2d 676, 678 (1975).
\item \textsuperscript{224} One reason for requiring post-judgment rather than post-trial motions is that such a rule eliminates the question whether a later-entered judgment is an implicit denial of the motion.
\end{itemize}
The first concern arises generally from the Georgia trial courts’ historical role with respect to judgments, and more specifically from the nature of the motions for new trial and for JNOV. The Georgia appellate courts traditionally have afforded considerable deference to the trial court’s control and review of its own judgments during the post-trial stages of a case. As a matter of Georgia common law, which in this respect is unaffected by the Civil Practice Act, the trial court is afforded plenary control over its nonjury judgments during a term of court, and may modify, amend, or vacate them in the exercise of its informed discretion. This plenary control has been described as a duty of the trial court that exists “apart from and independent of” appellate review. By statute the trial court may grant a new trial on its own motion within thirty days of the entry of judgment. This authority is found under section 5-5-40(h) and the statutory provision that “[the superior . . . courts shall have power to correct errors and grant new trials in cases or collateral issues . . . in such manner and under such rules as they may establish according to law and the usages and customs of courts.”

As when the trial judge acts sua sponte to reopen a judgment or to set aside a jury verdict, the motion for a new trial invokes “the mind and conscience” of the court to see that justice is done and fairness observed. The motion for new trial was originally an extension of the trial court’s power to act within the term of court, to permit a ruling in vacuo on a timely motion. The modern provisions of section 5-5-40(a) extend the time for filing the motion to thirty days, to prevent the losing party’s “being deprived of his right to file a motion for new trial by an adjournment of the term of court.”

231. Id. § 5-5-1(a); see GA. CONST. art. VI, § 1, para. 4. This authority did not exist at common law. Hulsey v. Sears, Roebuck & Co., 138 Ga. App. 523, 525, 226 S.E.2d 791, 792 (1976); see McDonald v. Wimpy, 203 Ga. 498, 46 S.E.2d 906 (1948).
The provisions of the Civil Practice Act relating to the motion to set aside a judgment have been a source of some confusion regarding the time for taking an appeal. Section 9-11-60(d) provides that “[a] motion to set aside must be predicated upon some nonamendable defect which does appear upon the face of the record or pleadings, unless the defect involves a jurisdictional error . . . .” Clearly the motion must be in substance one attacking a nonamendable or jurisdictional defect, and a motion to reconsider styled as one to set aside is insufficient. Problems arise with the use of the term “‘discretionary’ motion to set aside” to describe a motion for reconsideration, which is likely to confuse at least one litigant before its meaning is either clarified or, preferably, its use abandoned. Beyond that, the Georgia courts have been inconsistent in their approach
to the effect of a rule 9-11-60(d) motion to set aside on the time for appeal.

The supreme court held in *Johnson v. Barnes* that a motion to set aside is "at least one motion not enumerated in [O.C.G.A. § 5-6-38(a)] which is itself, when overruled, appealable . . . ." The decision does not specify under which provision of section 5-6-34(a) such an appeal lies; presumably it is a final order, in that after disposition of the motion "the case is no longer pending in the court below." From the authorities cited in *Johnson* it is clear the court treated the denial of a motion to set aside as directly appealable. Some of the court's discussion, however, has led some litigants, as well as some court of appeals decisions, to conclude that a motion to set aside does affect the running of the time for appeal from the original judgment.

Most court of appeals decisions have treated the appeal from an order denying a motion to set aside as directly appealable. In *Dutton v. Dykes*, for example, the court observed, citing *Johnson*, that "[a]lthough the denial of a motion to set aside is final and appealable . . . such a motion is not one which will automatically extend the time for filing notice of appeal on the underlying judgment." Recent decisions such as *Law Offices of Johnston & Robinson v. Fortson* have stated to the contrary that a motion to set aside will extend the time for appeal from the underlying judgment. The courts probably grounded these latter holdings in the theory that all direct appeals, ultimately, are appeals bearing on the final judgment, but they had the untoward effect of suggesting that some motions other than those listed in section 5-6-38(a) can affect the time for appeal. That approach, as sound as its major premise may be, finds no support in the statute because a motion to set

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243. Id. at 503-04, 229 S.E.2d at 72.
245. Id. at 49, 283 S.E.2d at 29.
251. 175 Ga. App. at 707, 334 S.E.2d at 35.
aside is not enumerated as resetting, extending, or otherwise affecting the time for appeal from a final judgment.

**VI. Principles of Timing After Post-Judgment Motions**

A myriad of circumstances affect the transfer of jurisdiction accomplished by the filing of a notice of appeal: (1) the time of filing the notice; (2) the status of the trial court's final orders; (3) the posture of other parties and claims; (4) the presence or later filing of any post-judgment motions; (5) the nature of those motions; and (6) any combinations in which multiple motions may be pending. The result of applying a simple statute to these varying circumstances is an area of law that is increasingly complex and arcane. Despite the courts' considerable efforts, the statute remains in need of remedial legislation to correct theoretical and practical problems with the statute's application.

**A. The Resetting of Time by Order or Withdrawal of Motion**

Section 5-6-38(a) resets the time for appeal upon "the entry of the order granting, overruling, or otherwise finally disposing of the motion." In a perfect world, the process would work as it did in *Ailion v. Wade,* in which appellants filed a written request for an order permitting withdrawal of their motion for new trial and then filed a notice of appeal within thirty days after entry of that order. The court of appeals applied section 5-6-38(a) as it was written to the order "otherwise finally disposing" of the motion and held that the appeal was timely.

Little difficulty arises when a post-judgment motion is simply granted or denied, but suppose the motion is simply withdrawn? The statutory language seemingly contemplates an order of court, since "otherwise disposing" modifies "order" and does not appear to leave room for another means of disposition. But it does not require an order. The supreme court has not faced this issue, and the court of appeals has rendered decisions that, although certainly defensible individually, proceed from contrary first principles and lead to contrary results.

In *Allen v. Rome Kraft Co.*, the court of appeals observed that "the effect of the filing of the motion [for new trial] is to toll the time for filing the appeal . . . until the motion for new trial is overruled (unless appel-

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255. Id. at 154, 378 S.E.2d at 509.

lant should elect to abandon or dismiss the motion)." The court did not expressly indicate whether an appeal filed after withdrawal and more than thirty days after judgment would be timely, and the reference to an appellant who had abandoned or dismissed the motion is arguably ambiguous.

The decision in Golden v. Credico, Inc. suggests that a withdrawal resets the time for appeal, although the court decided the case on another ground. The decision states that "[a] motion for new trial can be disposed of in four ways: (1) overruled, (2) granted, (3) dismissed, or (4) withdrawn by movant. The words 'otherwise finally disposed of' can mean only a dismissal or a withdrawal of the motion." The majority held that a letter from the trial judge to the movant physically returning a motion for new trial and stating that it was "no good," which letter was subsequently date-stamped and filed with the clerk, was not an order "otherwise finally disposing" of the motion and that the notice of appeal was premature and subject to dismissal.

It would be reasonable to anticipate, perhaps after Allen and certainly after Golden, a later holding that a prior withdrawal of the post-judgment motion triggers the resetting provision of section 5-6-38(a) and that a notice of appeal filed within thirty days thereafter would be timely. In Golden the court expressly stated that it was outlining the means by which a motion may be "otherwise finally disposed of," and that those means included "a dismissal or a withdrawal." As a practical matter, the use of a simple withdrawal is a predictable and salutary response for an attorney who does not want to trouble the trial court for a dispositive order permitting withdrawal. Permitting such a withdrawal would eliminate a potential source of delay and expense in the appellate process. It is nevertheless true that one must defend the dicta in these cases on policy grounds, since the statutory language provides no explicit support.

Section 5-6-38(a) arguably resets the time for appeal only when the proper combination of certain post-judgment motions and a dispositive order occurs. The court of appeals so held in Taylor v. State, applying the literal language of section 5-6-38(a) to a criminal case in which the defendant voluntarily withdrew his motion for new trial. The court dis-

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257. Id. at 718, 152 S.E.2d at 620.
258. Id.
260. Id. at 701, 185 S.E.2d at 597.
261. Id.
262. Id. The dissent argued that the trial judge's letter was an order in substance if not in form, and should have been treated as a dispositive order under O.C.G.A. § 5-6-38(a) (1982 & Supp. 1992). 124 Ga. App. at 701-02, 185 S.E.2d at 580.
263. 124 Ga. App. at 701, 185 S.E.2d at 579 (emphasis added).
missed the appeal, stating that "[a]s defendant voluntarily abandoned his motion for new trial and there is no order of the court disposing of the motion nor any order granting an extension of time or a delayed appeal, there is no extension beyond the 30 days permitted after entry of the judgment." 265

The court's retroactive elimination of seventy-one days from defendant's timetable brings to mind the ten days lost to sixteenth-century Europeans caught in the time warp of the Gregorian calendar, and it probably was just as dismaying to those affected by it. 266 Certainly, like that earlier return to the natural order of things, the decision is supportable by reference to the literal language of section 5-6-38(a), and it has some attraction as a matter of policy since it would prevent one party from filing a motion for new trial in order to buy time for an appeal. The decision is not, however, consistent with the policy-oriented dicta in Allen and Golden, nor can it be satisfactorily reconciled with the result and analysis of the later decision in Booker v. Amdur. 267

In Booker the court of appeals addressed the case in which the movant who withdraws the motion for new trial is not the appellant, but is another party to the action. 268 The court applied the dicta in Golden to hold that "the withdrawal or dismissal of the motion for new trial by the party who filed it is considered a disposition of the motion pursuant to O.C.G.A. § 5-6-38(a), so as to commence the running of the 30-day period for filing an appeal." 269 Since the appellant did not file a new notice of appeal as contemplated by that section, the court dismissed the earlier appeal. 270

The inconsistent treatment of appeals after withdrawn motions occurs because the decisions in Booker and Golden are based on a policy analysis while the decision in Taylor relies on the language of the statute. In procedural terms, Booker and Golden require only a filing and a disposition (order or withdrawal), whereas Taylor requires a filing and a dispositional order. The decision in Booker offers a more satisfactory procedure, if only because it is grounded in the earlier principles of Allen and Golden.

265. Id. at 745, 327 S.E.2d at 880.
266. In 1582, Pope Gregory XIII ordained the ten-day period from March 11 to March 21, 1582, be dropped from the calendar in order to restore the vernal equinox to March 21, from which it had been displaced by an error in the Julian calendar. See Columbia Encyclopedia 127 (Concise ed. 1983); Webster's Third New International Dictionary 998 (Unabr. ed. 1961). It surely is an accident that the date of the judgment in Taylor, March 15, fell within the ten lost days (albeit some 400 years later).
268. Id. at 276, 367 S.E.2d at 94. The author was one of the counsel of record for the plaintiffs-appellees in the case.
270. 186 Ga. App. at 276, 367 S.E.2d at 95.
and covers a procedural situation that is likely to occur and indeed should be encouraged. Ultimately, whether either decision is right or wrong, the practical and analytical problems they raise highlight the need for a statutory amendment to cover the case in which a post-judgment motion is withdrawn.

B. The Resetting of Time After an Interlocutory Appeal

The Crumbley Decision. An interesting case concerning section 9-11-54(b)'s multi-party finality and section 5-6-38(a)'s final disposition of a post-judgment motion is Crumbley v. Wyant.\textsuperscript{271} Prior to a direct appeal from final judgment, the defendant hospital obtained interlocutory review of the grant of a new trial, which was reversed. The question of the time for appeal arose after remand when plaintiffs-appellants took a direct appeal from the final judgment on the adverse jury verdict.\textsuperscript{272} The court of appeals held that the notice in the later appeal was timely, because it was not until the supreme court had denied an application for writ of certiorari that "there was a final concurrence of a judgment in favor of both appellees and a denial of appellants' motion for a new trial as against both appellees."\textsuperscript{273}

What the court of appeals meant by a "final concurrence" is not entirely clear, since no such event is defined by the statute. If the court intended "final concurrence" to refer to the state of affairs existing at the moment of the supreme court's decision, then Crumbley is a decision of some importance and potential danger. The better interpretation of the "final concurrence" language may be that the court intended it as a shorthand description of several events in the appellate process, prescribed by statute, that must occur before an appellate decision has any practical significance for the parties.

After Crumbley, the appellate practitioner should be aware of three possible "triggering events" in the unlikely event of an immediate appeal after remand from an interlocutory appeal: (1) the possible but unlikely rule that the date of the appellate ruling controls; (2) the more likely rule that the filing of the remittitur with the clerk of the trial court controls; and (3) the preferable rule that the trial court's entry of a judgment after remand controls.\textsuperscript{274}

\textsuperscript{272} 183 Ga. App. at 803, 360 S.E.2d at 277.
\textsuperscript{273} Id. at 806, 360 S.E.2d at 280.
\textsuperscript{274} The applicable principles, at least in part, are contained in these cases and statutes: Chambers v. State, 262 Ga. 200, 415 S.E.2d 643 (1992); Huff v. McLarty, 241 Ga. 442, 246 S.E.2d 302 (1978); Hagan v. Robert & Co. Assocs., 222 Ga. 469, 150 S.E.2d 663 (1966); Lyon v. Lyon, 103 Ga. 747, 30 S.E. 575 (1898); Brown v. Wilson, 59 Ga. 605 (1877); State v. Stew-
Unfortunately, when parties take interlocutory appeals in multiple-party cases, the potential for uncertainty is simply enormous. It is not hard to imagine a multi-defendant, civil fraud or racketeering case in which the court grants section 9-11-54(b) judgments to some defendants, an interlocutory appeal under section 5-6-34(b) to others, and denies a motion for new trial or JNOV for those defendants, but grants the motions of others who settle during the pendency of the interlocutory appeal, to complicate the procedural posture almost beyond recognition. The best response for the would-be appellant is to watch the running of time very closely to see that remittiturs, judgments, notices, applications, and the like are properly entered and, in general, to prepare for the worst.

C. The Requirement of Filing the Notice of Appeal Within Thirty Days After the Dispositive Order on a Post-Judgment Motion

The provision of section 5-6-38(a) that a notice of appeal after a post-judgment motion must be filed “within 30 days after the entry of the order . . . finally disposing of the motion” is grammatically identical to the provision that a notice of appeal from a simple judgment must be filed “within 30 days after entry of the appealable decision or judgment complained of . . . .” The courts have interpreted the two provisions differently, however, and a further differentiation has appeared in the post-judgment-motion context between civil cases, in which the appellate courts have required the filing of a new notice after disposition of a post-judgment-motion, and criminal cases, in which the courts have applied a variant of the Gillen premature notice rule and did not require a new notice. The direction of the decisions is not entirely clear, and although the courts’ efforts to fashion a workable set of rules has been largely successful, the costs in dismissed appeals have been significant. A statutory amendment that reflects on its face what the courts are doing and, to some extent, what they should be doing, would greatly assist practicing attorneys in filing a timely notice of appeal.

The Rule in Civil Cases. Historically, the courts have treated a notice of appeal filed in a civil case during the pendency of a post-judgment motion listed in section 5-6-38(a) as premature and subject to dismissal. In Smith v. Smith, appellant filed a notice of appeal before the trial court ruled on the motion for new trial. The court of appeals held that “[a]n appeal from the judgment on the verdict brought while the case is

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275. O.C.G.A. § 5-6-38(a) (1982).
pending on motion for new trial is premature and will be dismissed."

The court decided Smith at a time when Gibson v. Hodges, which prevented a premature notice of appeal from a simple judgment, was still good law. Although Gillen later permitted a premature notice, that decision does not appear to have affected the contrary rule in the post-judgment-motion context.

The Georgia courts have adopted a special, nonstatutory procedure that allows the trial court to rule on a post-judgment motion filed after a notice of appeal has, in theory, divested the trial court of its jurisdiction over the case. In Housing Authority of Atlanta v. Geter, plaintiff appealed, and defendant later filed a timely cross-appeal and motion for new trial. The court of appeals affirmed the judgment, but the trial court granted a new trial after receiving the remittitur. The supreme court affirmed the court of appeals grant of a writ of prohibition, holding that "[t]he fact that the case has made its way through the appeal processes of the court of appeals has effectively cut off the Housing Authority's right to pursue its motion for a new trial."

The supreme court then prescribed a procedure for future cases intended to protect "[t]he right of the trial court to correct its own errors . . . ." Upon the filing of a notice of appeal, the movant may preserve the trial court's jurisdiction over a subsequent motion for new trial by moving in the appellate court for a stay of the direct appeal. The supreme court held that the divestiture of jurisdiction "does not become effective during the period in which a motion for new trial may be filed," namely, during the first thirty days following the entry of the original judgment. The same rule applies when the trial court grants a new trial on its own motion under section 5-5-40(h), since the trial court.

277. Id. at 30, 195 S.E.2d at 270.
279. See supra text accompanying notes 36-46.
280. The court in Gillen expressly overruled four prior decisions and "other cases with similar holdings." 234 Ga. at 310, 215 S.E.2d at 678. The overruling language is vague, but there is no indication that it was intended to sweep more broadly than the case of an appeal from a simple judgment.
282. Id. at 196-97, 312 S.E.2d at 310-11.
283. Id. at 197, 312 S.E.2d at 310.
284. Id., 312 S.E.2d at 311. The court of appeals has consistently held that the question of appellate jurisdiction is to be decided by the appellate court, not by the trial court, for most purposes. Williams v. Natalie Townhouses of Inman Park Condominium Ass'n, 182 Ga. App. 815, 357 S.E.2d 156 (1987).
285. 252 Ga. at 197, 312 S.E.2d at 311.
286. O.C.G.A. § 5-5-40(a) (1982); see id. § 5-6-39(b).
may do so "even though a notice of appeal has been filed." If a subsequent resetting motion is filed along with a motion for stay in the appellate court, "the effectiveness of the divestiture of jurisdiction is then delayed until the motion for new trial is ruled upon and a notice of appeal to the ruling has been filed or the period for appealing the ruling has expired." The court reasoned that the requirement of a new notice of appeal would serve "to protect the integrity of the trial courts in their efforts to do substantial justice and discourage races to the courthouse for the purpose of playing legal slapjack with notices and motions."

The court of appeals decision in Rich v. Georgia Farm Bureau Mutual Insurance Co. is to the same effect. The court in Rich relied on Geter and its own intervening decision in Atkinson v. State to hold, when the trial court had not ruled on a motion for new trial filed after the notice of appeal, that "we have jurisdiction over appellant's direct appeal from the judgment entered by the trial court because no motion for a stay of the direct appeal has been filed." Thus, the motion for stay has become an essential part of post-judgment practice in the trial court when a resetting post-judgment motion is filed after the filing of a notice of appeal.

The Geter stay procedure works reasonably well so long as a motion for stay is actually filed in the appellate court. However, whether from the movant's being indifferent to an appellate stay or unaware of its availability, a motion for stay is not always filed. It may be that an express statutory provision for the motion to stay, perhaps as a component of the procedures for the three resetting motions, would heighten the practicing bar's awareness of the procedure and increase its frequency of use.

Filing the notice of appeal and either the post-judgment motion or the dispositive order on the same day presents special questions. In Strauss v. Peachtree Associates, Ltd., the court of appeals held that when the notice of appeal and the post-judgment motion are filed on the same day, the notice of appeal is premature and subject to dismissal. On the other

287. 252 Ga. at 197, 312 S.E.2d at 311.
288. Id. (emphasis added).
289. Id. (emphasis added). The dissent would have given effect to the trial court's jurisdiction over a subsequently filed motion for new trial, as against the notice of appeal, so long as the motion was timely. Id. at 198, 312 S.E.2d at 311 (Weltner, J., dissenting).
293. The attorney in the trial court may need to explain this procedure to the trial court, whose response otherwise is likely to be that the notice of appeal divests it of jurisdiction. See Watkins v. M & M Clays, Inc., 199 Ga. App. 54, 404 S.E.2d 141 (1991).
295. Id. at 536, 275 S.E.2d at 90.
hand, in *Jim Walter Homes, Inc. v. Strickland*, the court held that a notice of appeal is timely when it is filed on the same day as the entry of the trial court's dispositive order on a post-judgment motion. The difference between these cases can be readily explained, since the motion begins the trial court's post-judgment work and should not be superseded by a notice, whereas the order completes that work and there is nothing prohibiting the filing of the notice on the same day.

The Rule in Criminal Cases. The first decision under the Appellate Practice Act on appeals in connection with post-judgment motions was the criminal case of *Kurtz v. State*. In *Kurtz* defendant filed both a notice of appeal and a motion for new trial on the same day, and the court of appeals held the notice of appeal premature and subject to dismissal. In *State v. Rimes*, a 1986 decision, the court of appeals held that a notice of appeal filed by the state during the pendency of a motion for new trial was "premature and . . . of no effect," and "[t]he subsequent denial of the motion for new trial does not perfect the defective notice of appeal." Less than a week later, in *Boothe v. State*, the court reaffirmed the rule that a criminal defendant's premature notice of appeal will be dismissed, when it is filed while a resetting motion is pending.

All of this changed only a few weeks later when the court evaluated a notice of appeal filed during the pendency of a post-judgment motion in *LeGallienne v. State*. The court held that the criminal defendant's notice of appeal was timely, relying upon the rule of *Gillen v. Bostick* that a notice of appeal is timely when filed between the entry of a dispositive order and the entry of judgment on that order.

The court of appeals followed *LeGallienne* in 1987 with the en banc decisions of *Sharp v. State* and *Eller v. State*. In *Sharp* the en banc court held it had jurisdiction over a notice of appeal from the oral denial

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297. *Id.* at 307-08, 363 S.E.2d at 835.
299. *Id.* at 665, 155 S.E.2d at 735. The court considered adopting a presumption that the notice of appeal had been filed first, but rejected that alternative. *Id.* at 665-66, 155 S.E.2d at 736.
301. *Id.* at 872, 341 S.E.2d at 711.
303. *Id.* at 22, 342 S.E.2d at 10.
of an extraordinary motion for new trial, later denied by written order. The court indicated that it would follow Gillen in this context “reluctantly because the procedure followed was erroneous and not in accordance with statutory command.” The court of appeals belief that it was compelled by Gillen to approve a premature notice of appeal in the post-judgment motion context, and its holdings in LeGallienne and Eller, were ratified by the supreme court in Stewart v. State, at least as to resetting motions in criminal cases.

In Jinks v. State, the court of appeals held that the trial court loses jurisdiction over a criminal case when a notice of appeal is filed. After the supreme court established the motion for stay procedure in Geter, the court of appeals held in Atkinson v. State that it would not remand the case to the trial court for decision of a motion for new trial filed by defendant after his notice of appeal. The court observed that it had “no hesitancy in holding that there has been a waiver of whatever right appellant may otherwise have had to delay this court’s resolution of the instant appeal” because the defendant “filed no motion for a stay . . . .” The court stated more broadly, however, that Geter was distinguishable on the facts because the losing party in that case had filed the motion, not the party appealing. Put another way, Geter was an “other-party” appeal, whereas Atkinson was a “same-party” appeal.

The court in Atkinson did not flatly refuse to apply Geter to its facts, so the appellate courts should be free to hold, in an appropriate case, that the decision in Geter applies in the same-party context. Even if the court of appeals was correct that:

[i]t should be readily apparent that the application of the Geter procedure in a case wherein the same party has filed both the original notice of appeal and the subsequent motion for new trial has the potential for

309. 183 Ga. App. at 642, 360 S.E.2d at 52.
310. Id. at 641, 360 S.E.2d at 51. The decision does not so indicate, but this probably was a discretionary application and appeal under section 5-6-35(a)(7). O.C.G.A. § 5-6-35(a)(7) (1982 & Supp. 1992). This application of Gillen was arguably correct. Among the eleven types of cases in which a discretionary application is required, only four concern nonresetting post-judgment proceedings. See O.C.G.A. § 5-6-35(a)(5), (7), (8), (10) (1982 & Supp. 1992).
312. Id. at 211 n.1, 356 S.E.2d at 515 n.1.
314. Id. at 841-42, 296 S.E.2d at 624.
316. Id. at 261, 316 S.E.2d at 594.
317. Id. at 262, 316 S.E.2d at 594.
318. Id.
319. See supra text accompanying notes 281-93.
encouraging that very "legal slapjack with notices and motions" that the supreme court has condemned,\textsuperscript{320}

the appellate courts' best defense to such a tactic is to apply a rule of waiver, as the court in \textit{Atkinson} did,\textsuperscript{321} that the failure to file a motion for stay precludes any remand of the case. It is not necessary to go further to hold or suggest the \textit{Geter} rule applies only to the situation in which the movant and the appellant are two different parties, which is inconsistent with the statute, not grounded in any useful principle of appellate procedure, and too strict to serve as an effective rule of law. Most importantly, there is much to be said for the appellant who reviews the record in a timely manner, realizes that a post-judgment motion may resolve the error more effectively than an appeal, and then files and pursues motions for post-judgment relief and for a stay accordingly.

Comparing the decision in \textit{Atkinson} to \textit{Taylor v. State},\textsuperscript{322} in which the court of appeals dismissed the appeal as untimely, may be useful.\textsuperscript{323} The court in \textit{Atkinson}, faced with defendant's argument that the case should be returned so the trial court could rule on his motion for new trial, roundly criticized defendant for attempting to delay the judicial process through not disposing of a motion for new trial, "which he apparently never diligently pursued below . . . ."\textsuperscript{324}

The defendant in \textit{Taylor} certainly could not be accused of trying to delay the process, and could have been congratulated for disposing of a post-trial motion without even speaking to the busy trial judge, when he withdrew his motion for new trial so he could proceed on appeal, or so he thought, under the theory of \textit{Allen} and \textit{Golden}.\textsuperscript{325} Both parties violated the rules laid down in their cases and the statute, but whereas the defendant in \textit{Atkinson} received a sort of consolation prize for his dilatory conduct, an appeal affirming his conviction,\textsuperscript{326} the defendant in \textit{Taylor} received neither the motion for new trial that he had taken pains to withdraw nor the appeal he had hoped to further by withdrawal.\textsuperscript{327} It would prove too much to suggest the decision in \textit{Taylor} was wrong simply because it was inconsistent with \textit{Atkinson}, but the different treatment accorded to expeditious practice and dilatory practice, as the court in \textit{Atkinson} described it, underscores the necessity for either judicial or legislative attention to this area.

\begin{enumerate}
\item \textit{Atkinson}, \textit{Taylor v. State}, \textit{Allen}, and \textit{Golden}.\textsuperscript{328} Both parties violated the rules laid down in their cases and the statute, but whereas the defendant in \textit{Atkinson} received a sort of consolation prize for his dilatory conduct, an appeal affirming his conviction,\textsuperscript{329} the defendant in \textit{Taylor} received neither the motion for new trial that he had taken pains to withdraw nor the appeal he had hoped to further by withdrawal.\textsuperscript{330} It would prove too much to suggest the decision in \textit{Taylor} was wrong simply because it was inconsistent with \textit{Atkinson}, but the different treatment accorded to expeditious practice and dilatory practice, as the court in \textit{Atkinson} described it, underscores the necessity for either judicial or legislative attention to this area.

\textsuperscript{320} 170 Ga. App. at 261-62, 316 S.E.2d at 594.
\textsuperscript{321} Id. at 262, 316 S.E.2d at 594.
\textsuperscript{323} Id. at 745, 327 S.E.2d at 860.
\textsuperscript{324} 170 Ga. App. at 262, 316 S.E.2d at 594.
\textsuperscript{325} See supra text accompanying notes 256-63.
\textsuperscript{326} 170 Ga. App. at 264, 316 S.E.2d at 596.
\textsuperscript{327} 173 Ga. App. at 745, 327 S.E.2d at 860.
In *Boothe v. State*, the court held that when a notice of appeal and a motion for new trial were filed on the same day, the notice of appeal, filed before the motion had been disposed of, was untimely. As part of the court of appeals' changed position on premature notices in the criminal post-judgment context, the court overruled *Boothe* in *Eller v. State*, in which the notice was filed one day before the dispositive order on a motion for new trial. The court relied on *Gillen, Steele, and LeGalienne* to hold that a premature notice of criminal appeal filed prior to a dispository post-judgment order is timely.

The court's overruling of *Boothe* establishes different rules for civil and criminal cases for a premature notice of appeal filed on the same day as a post-judgment resetting motion. Under *Eller*, the premature notice of appeal in a criminal case is timely even when filed on the same day as a post-trial motion. In civil cases, the opposite rule obtains under the same statute.

The Direction of the Premature Judgment Rule in Civil Cases, in Light of the Criminal Decisions. The effect of the courts' extension of *Gillen* to appeals after post-judgment motions in criminal cases remains uncertain. From the perspective of a civil practitioner, it would be better to resolve such disagreements within the framework of criminal constitutional analysis than to adopt rules for appellate jurisdiction and timeliness that differ in civil and criminal cases. The contemporaneous decisions in the civil cases suggest that the premature notice after a post-judgment motion may remain a creature of criminal law and will not exist in civil appellate cases.

VII. Conclusion

"Though this be method, yet there is madness in 't."

A. The State of the Appellate Practice Act

The first and ultimate purpose of any law of appellate procedure is to provide clear answers to two questions. First, when should an appeal be

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329. Id. at 22, 342 S.E.2d at 10.
330. See supra notes 298-312 and accompanying text.
332. Id. at 724, 360 S.E.2d at 54. The decision in *Eller* did not expressly overrule *Kurtz v. State*, 115 Ga. App. 665, 155 S.E.2d 735 (1967), but there can be no doubt that *Kurtz* is dead.
334. See supra notes 294-96 and accompanying text.
335. WILLIAM SHAKESPEARE, HAMLET act 2 (with apologies).
filed from an order or judgment? And second, where and how must I file it? The complexity of post-trial and post-judgment procedure also requires that the Act plainly spell out each step of the process: “this has happened, what should I do?” and “I have [my opponent or co-party has] done that, what will happen?” For all its success in individual cases, which is indeed considerable, the Georgia courts’ approach to the timing of notices and applications for appeal, both before and after post-judgment motions, has produced a maddening array of procedural interpretations for statutory provisions that have proven too simple for the complex circumstances they must govern. For now the answer to these basic and important questions of appellate procedure is, “it depends.”

Many of the Georgia courts’ decisions appropriately reflect considerable dissatisfaction with having been required to interpret statutory language primarily by reference to the underlying policies and only secondarily by the express provisions of the Act or the consistent application of similar language. This is not to criticize the courts’ approach or the statute itself, since it has become apparent only years after the enactment of the Act that the limitations of the statutory language would compromise the latter, preferable mode of interpretation. The end result, nonetheless, is that both courts and attorneys are now required to read scores of decisions, some of them in conflict and some adumbrating the possibility of change, for guidance. Even if the appellate waters be less “murky” now, they are much deeper than before, and the attorney must “tread warily” out of vital necessity.

It may be asked whether the Georgia appellate courts have taken upon themselves, in the area of post-judgment and appellate practice, a judicial role that is largely uncharacteristic of their decisions in other areas. The Georgia courts have been conservative in the creation of new rules of law, for example, by refusing to create a common-law cause of action for strict products liability, refusing to extend the UCC warranty claim to wrongful death cases, and generally refusing to create new causes of action

336. See generally O.C.G.A. § 1-3-1(a), (b) (1982).
337. The court of appeals has observed that when the statutory language is “plain, unambiguous and positive,” the courts will construe it to mean what it declares. Bailey v. Bonaparte, 125 Ga. App. 512, 513, 188 S.E.2d 119, 120 (1972) (citing Sirota v. Kay Homes, Inc., 208 Ga. 113, 65 S.E.2d 597 (1951)).
not recognized at common law, all in deference to the General Assembly's role in such matters.

The acceptance of jurisdiction over an untimely appeal has as much to do with the creation of an appellate cause of action as it does with pure statutory interpretation. Although the courts are a co-equal branch of government, it has been recognized that the right of appeal is subject to conditions imposed by the General Assembly, one of which is the timeliness of the notice of appeal. Certainly the courts are best able to design an effective system of post-judgment and appellate procedure, and the value of those efforts is manifest in their decisions on issues of appellate procedure. It remains true that since these improvements have not been channeled through the legislative process, Georgia has a "nonstatutory" statute that may work well but does not mean what it says. The Georgia Appellate and Civil Practice Acts therefore would be immeasurably improved by amendments to codify the best features of the Georgia decisions and general principles of appellate practice.

B. Practical Suggestions for Attorneys, Trial Courts and Clerks' Offices, and Appellate Courts

Suggestions for Attorneys. For all the success of the Georgia court's decisions on appellate practice and procedure, the statutes and judicial decisions require extreme caution by attorneys in the post-trial, post-judgment, and appellate stages of a case. This section of the Conclusion will discuss an approach to appellate practice that should reduce, although it probably cannot eliminate, the possibility of mistakes that would be fatal to the appeal.

The first rule of post-judgment and appellate practice is the attorney should always review the pleadings, orders, and judgments in the clerk's record on a case. The attorney is the one person responsible for the timely filing of any motion, notice of appeal, or application, and must make his or her own determination about the method and timeliness of filing. Asking the clerk's office for guidance is not fair to the deputy clerk...

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343. See Boston & Gunby v. Cummins, 16 Ga. 102 (1854) ("It is exceptions engrafted on Statutes, by the Courts, that give rise to the uncertainty of the law"). The description of the Georgia "non-statutory" statute was coined in R. Perry Sentell, Jr., Statutes of Non-Statutory Origin, 14 GA. L. REV. 239 (1980).
and puts the attorney in an untenable position, even in the rare and unlikely case in which any error can be corrected. 344

The second rule is that the attorney should plan both trial and appellate court filings with the clerk's record in one hand and the statute and rules of court in the other, to determine whether and when the court has entered a final order or judgment. The order or judgment must be written to start the time for appeal, and an oral ruling from the bench does not affect the time. A post-judgment motion, as its name suggests, should not be filed prior to the entry of judgment. The decision in Taylor 345 counsels that a movant who wants to appeal should not simply withdraw the motion; conversely, the other parties to the case should treat the withdrawal as a final disposition under the decisions in Allen, Golden, and Booker. 346 A party should not file a notice of appeal or application while such a motion is pending, and should file a second notice of appeal after the entry of a dispositive order on a resetting motion (or any motion that is arguably a resetting motion). In criminal cases, the notice or application may be filed earlier.

The third rule is that the attorney should watch the passage of time in the trial court very carefully. In all cases, the party should file the motion, notice of appeal, or application at least within the proper time after the entry of judgment. An extension of time for a final appeal may make the post-judgment process flow more smoothly. The thirty-day period for filing the notice of appeal runs whether or not the party has actual knowledge or notice that a final judgment has been entered. 347 Therefore, the best practice is to check the record in all pending cases every two weeks, or even every week if the attorney is expecting to take an interlocutory appeal and needs to obtain a certification within ten days of the entry of an order. 348

344. The attorney should be particularly careful, prior to filing and entry, to review proposed orders and judgments not only "for form" but also for their significance as markers of the appellate timetable, and to obtain date-stamped copies of all documents. Despite the collegial practice enjoyed by most Georgia attorneys, one's adversary has no incentive to leave shiny pebbles in the appellate path, and probably will not leave even bread crumbs if that can be avoided.

345. See supra text accompanying notes 264-67, 322-27.

346. See supra text accompanying notes 256-63 and 268-70.


348. Unless the secretary or paralegal assigned this task is trained and authorized to draw legal conclusions from court papers, the attorney may wish to have copies of any documents prepared and brought to him or her for review.
The fourth rule of practice is that the attorney should determine whether another party has filed a post-judgment motion or a notice of appeal, should determine from the substance of any motion whether it is a resetting motion, and should be aware that a document filed with the judge or the clerk may not make its way to the clerk's civil action file on the day of filing. Consequently, when filing a motion in a civil case, the attorney may need to determine a day or two later whether a notice had been filed prior to the day of that filing, which would require the Geter motion for stay procedure be followed. This process will also include examination of the terms of any consolidation order to determine whether the Klem rule is applicable, and of any certification order to determine whether it is made under section 5-6-34(b) or 9-11-54(b). The attorney's ability to file a timely post-judgment motion or notice, which is essential, largely depends upon how well the attorney has read and understood the parties' filings and the court's orders as contained in the clerk's record.

The fifth rule of practice is that the attorney should communicate with the clerk of the trial court and the clerk of the appellate court as necessary to ensure that the preparation and transmittal of the record on appeal occurs in a timely and efficient manner. The attorney should provide written communications or confirm them in writing for the record, and should follow up on the required filings. This is required both to perfect an appeal and to satisfy the Geter motion for stay procedure, and is advisable whenever the clerk or the court reporter is engaged in the preparation of the clerk's record or transcript. A post-judgment movant may need to call the clerk's attention to the continued pendency of an earlier-filed motion, for example, to prevent transmittal once the clerk prepares the record. If a notice of appeal is clearly and certainly untimely, the appellant may wish to withdraw it, if only for the convenience of the clerk's office.

The sixth rule of practice is that the attorney desiring to appeal should file a notice or application, and perhaps several notices or applications, to ensure the timeliness of the appeal when in doubt about the resetting effect of a post-judgment motion. Similarly, when there is any doubt

349. See supra text accompanying notes 281-93.
350. See supra text accompanying notes 173-84.
352. See supra text accompanying notes 281-93.
353. See Shirley v. State, 188 Ga. App. 357, 373 S.E.2d 257 (1988). For example, in the Superior Court of Fulton County the appeals clerk's practice is to begin preparing the record when a notice is filed, even though a post-judgment motion is pending. Telephone interview with Susan Buchanan, Deputy Clerk, Superior Court of Fulton County (Sept. 4, 1990).
about whether a direct appeal, an interlocutory appeal, a discretionary appeal or an interlocutory-discretionary appeal is called for, the attorney should file a “notice of appeal and/or, in the alternative, application for interlocutory and/or discretionary appeal” (with a second notice of appeal, if the appellate court grants the application). If the order can in any manner be deemed interlocutory, the trial court should be asked to certify it for appeal and the application and notice should be filed within the shorter time frames of section 5-6-34(b). Under the present statute, a motion to extend time probably is not available for a discretionary application or the related notice, and almost certainly is not available for an interlocutory appeal.

Suggestions for Trial Courts and Clerks' Offices. The trial courts and clerks' offices potentially have an equally important role in creating a clear record from which the practicing bar may determine the time for filing post-judgment motions and notices of appeal. Their doing so in every case and in a consistent manner could help ease the burden on the appeals clerks and the appellate courts caused by inappropriately filed notices of appeal.

The first suggestion is that the trial courts enter every order with full awareness of the status of the case and the postures of all parties and motions, consulting with the parties as need be and time permits, and that the courts enter a document expressly captioned “Final Judgment” or “Final Judgment as to Defendant ABC Under Section 9-11-54(b)” when the intent is to make a final disposition of any case or claim, or as to any party. The courts should clearly distinguish between a section 9-11-54(b) final determination, which requires specific findings and has a thirty day timetable, and a section 5-6-34(b) certification, which requires different findings and has a ten day timetable. Similarly, the courts' labeling a final disposition of a resetting post-trial motion as “Dispositive Order on Plaintiff XYZ's Motion for New Trial Under O.C.G.A. § 5-6-38(a)” would indicate to the parties that an event affecting the time for appeal has occurred. A consistent and uniform practice would simplify the post-judgment practice for the trial and appellate courts, their clerks, and the parties.

The second suggestion is that the trial courts and clerks enter final judgments by filing them on the same day they are signed and file documents received from the parties on the same day they are received. To the extent that this cannot be done, the use of filing stamps reflecting only a single date of filing, with the notation “received” for whatever

other dates are needed for internal management purposes, would provide all concerned with an unambiguous record.

Suggestions for Appellate Courts. The Georgia appellate courts may wish to consider the following specific points about the case law that has developed under the Appellate Practice Act since 1965. First, the courts may wish to address expressly whether the Stewart rule on premature notices of criminal appeal after disposition of post-judgment motions will be extended to civil cases, despite Smith and Glenridge Unit Owners. The hope is respectfully expressed that these rules will not be extended, but be limited to the criminal context in which they are better supported by the policies underlying direct criminal appeals.

Second, the appellate courts may wish to clarify the meaning of those decisions that do not track the language of the Appellate and Civil Practice Acts with respect to the setting and running of the time for appeal. Using such terminology as a "resetting" motion and expressly abandoning such terminology as "tolling" or "extending" the time for appeal and "discretionary motions to set aside" in favor of more accurate terminology, would assist in that process.

Third, the appellate courts may wish to address the problems raised by the decisions in Kalb, Klem, Haggard, and Yancey, and to consider whether Yancey should be overruled. If different rules are to obtain in the simple judgment and post-judgment motion contexts, it may be that the analytical bases for those differences could be explained more fully to provide better roadmaps for practicing attorneys.

Fourth, the courts may wish to consider whether a sanction other than dismissal of the appeal could be developed for the movant-appellant in a case like Taylor v. State, to prevent the dilatory filing of a post-judgment motion in civil or criminal cases. Along with that issue the courts could address whether the holding in Taylor should be overruled, if only for the sake of consistency. This would permit the simple withdrawal of a post-judgment motion to reset the time for appeal in a criminal case or a "same-party" civil case just as in the case in which the movant and appellant are different parties.

Fifth, the courts may wish to clarify the meaning of the decision in Crumbley v. Wyant, regarding the finality of orders in the trial court after remittitur from an interlocutory appeal.

356. See supra note 32 and text accompanying notes 31-32.
357. See supra notes 194-201 and accompanying text.
358. See supra text accompanying 264-67 and 322-27.
360. See supra text accompanying notes 271-74.
Sixth, the courts may wish to consider whether the motion for stay called for by the Geter motion-for-stay procedure should be filed in the trial court as well as the appellate court, so the trial court clerk's office will be alerted in the same manner as the clerk of the appellate court.

Seventh, the appellate courts may wish to consider establishing court rules and a regular practice for an appellate motions docket to handle motions to dismiss appeals and other procedural motions, particularly if the General Assembly adopts the Geter motion-for-stay procedure as a permanent component of the Georgia practice. It is very expensive for the parties and time-consuming for the courts to brief and hear cases on the merits that should be dismissed for procedural reasons. Presently the parties have no choice but to file the required briefs if the courts will not hear motions sooner than the submission of the entire case for decision. A preliminary determination is effectively required under Geter and Rich, and under the discretionary appeals statute, a general screening procedure could be handled from the substantive appellate docket. Although the preliminary disposition of procedural motions may appear to be more time-consuming, it actually may save time and resources for all concerned.

Finally, in the legislative arena, the courts' advice and direction are needed to determine what form any amendments to sections 5-6-34 and 5-6-35, as well as other sections of the Appellate Practice Act, should take. The author respectfully expresses the hope that the courts will embrace the study and proposal of amending legislation as part of the same process as the judicial decisions by which needed solutions to appellate problems have been sought.

361. See supra text accompanying notes 281-93.