Trial Practice and Procedure

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The majority of a trial lawyer's work is completed before the jury is placed in the box. The extent of trial preparation is the only means by which one can arguably predict success. The authors of this Article hope that the reader will view the law of trial practice and procedure as modern day weaponry in the war to preserve justice. To paraphrase Mark Twain, it is a worthy thing to fight one's own fight; it is another sight finer to fight for another man's.¹

II. PERSONAL JURISDICTION

A. Long Arm Statute

Georgia's long arm statute² provides a basis for the exercise of personal jurisdiction by Georgia courts over nonresidents of Georgia. The statute's five subsections broadly describe four different types of claims plaintiffs may assert against nonresidents when using the long arm statute to establish personal jurisdiction.³ Subsection one, for example, generally encom-
passes contract cases while subsections two and three obviously deal with tort cases. The statute's preamble superimposes the requirement that, regardless of the nature of a plaintiff's claim, the defendant's contacts with Georgia be related to the claim the plaintiff has asserted.

The court of appeals has observed that "appellate court precedent reflects a certain lack of uniformity of language in establishing parameters for a 'minimum contacts' analytical model." This lack of uniformity of language in the cases, particularly in tort and contract cases, feeds upon itself in each new decision and continues to breed uncertainty both for the courts and for the parties who litigate these cases.

Two cases reported during the survey period illustrate our courts' valiant attempts to unify the jurisdictional analysis, but with mixed results. Showa Denko K.K. v. Pangle is representative of cases in which the courts have interpreted the long arm statute's subsections to require types of contacts between defendants and this state rather than to describe types of claims that plaintiffs may assert under the statute. The jurisdictional analysis employed in Showa Denko K.K. has two parts. First, the court determines whether the types of contacts the defendants have had with Georgia fit within the definition of "transacting business" or "committing a tort" under the long arm statute. Not every defendant in contract cases has automatically "transacted business," nor has every

\[
\text{same manner as if he were a resident of the state, if in person or through an agent, he:}
\]

(1) Transacts any business within this state;
(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;
(3) Commits a tortious injury in this state caused by an act or omission outside of this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
(4) Owns, uses, or possesses any real property situated within this state; or
(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

*Id*. § 9-10-91.
4. *Id*. § 9-10-91(1)-(3).
5. *Id*. § 9-10-91.
9. *Id*. at 245, 414 S.E.2d at 658.
defendant in tort cases automatically “committed a tort,” within the meaning of the long arm statute. If the court determines that the defendants’ contacts with Georgia constitute “transacting business” or “committing a tort,” then the court secondly determines whether haling the defendants into the Georgia courts would violate their due process rights.\(^1\)

*Klein v. Allstate Insurance Co.*\(^1\) illustrates a different type of analysis in which the court interprets the long arm statute’s subsections as describing the types of claims plaintiffs may assert rather than describing the types of contacts nonresident defendants must have with Georgia.\(^2\) Under the type of analysis employed in *Klein*, the court determines if a plaintiff’s claim is of the type that can be asserted under the statute,\(^3\) for example, whether the claim is in tort or contract. Then, the court leaps directly into minimum contacts analysis, because, after all, “our long arm statute ‘confers jurisdiction over nonresidents to the maximum extent permitted by due process.’”\(^4\)

Despite this pronouncement, in a case like *Showa Denko K.K.* with two-tiered analysis, the long arm statute could form an impediment to jurisdiction as much as a basis for jurisdiction. In a case with analysis like *Klein*, on the other hand, the statute is no impediment, provided plaintiff’s claim is of the type that can be asserted under the statute, and due process analysis provides the only criteria for resolving the jurisdictional issues.

One explanation for the confusion about how to analyze these jurisdictional cases is that one of the “torts” subsections, subsection three, unlike

\(^1\) *Id.* at 246-47, 414 S.E.2d at 660. The courts employ a three part test, which serves as an “analytical tool” in addressing due process issues. Each of the three elements of the test must be satisfied to subject a nonresident to personal jurisdiction in an action in Georgia. To satisfy due process: (1) the nonresident must purposely avail himself of the benefits of Georgia law; (2) the plaintiff’s claim must relate to the defendant’s contacts with Georgia; and, (3) the defendant’s contacts with Georgia must be such that it is reasonable to subject the defendant to personal jurisdiction in Georgia. *Beasley v. Beasley*, 260 Ga. 419, 421, 396 S.E.2d 222, 224 (1990). *See also Straus v. Straus*, 260 Ga. 327, 393 S.E.2d 248 (1990); *Smith v. Smith*, 254 Ga. 450, 330 S.E.2d 706 (1985). The court has used the third requirement, satisfying traditional notions of fairness, to inject analysis of competing interests of varying forums in determining whether due process rights of an individual defendant are satisfied. *See, e.g., Beasley*, 260 Ga. 419, 422-23, 396 S.E.2d 222, 223.

\(^2\) *Id.* at 188, 413 S.E.2d at 777.

\(^3\) *Id.* at 189-90, 413 S.E.2d at 779.

the other subsections, actually lists specific types of contacts nonresident defendants must have with Georgia. Given the statute’s superimposed requirement that the defendant’s contacts with Georgia must relate to the plaintiff’s claim, one could argue convincingly that any nonresident defendant who has maintained the requisite contacts with Georgia would lose automatically if the defendant claimed that due process precluded his being subject to personal jurisdiction in Georgia.

The best way to remove the clouds of uncertainty that permeate issues of personal jurisdiction over nonresidents would be to repeal the long arm statute. The General Assembly should replace the long arm statute by enacting a new statute that would empower Georgia courts with personal jurisdiction over nonresidents in all claims in which subject matter jurisdiction exists, to the maximum extent permissible without violating the defendant’s due process rights.

B. Child Custody and Modification

One of the long arm statute’s five subsections provides a basis for personal jurisdiction over nonresident defendants in certain types of domestic relations actions. In fact, the supreme court has dubbed subsection five of the statute “Georgia’s Domestic Relations Long Arm Statute.”

15. O.C.G.A. § 9-10-91(3). The history of the two “torts” subsections of the long arm statute is very revealing and goes a long way in explaining the present confusion regarding the statute. Prior to the enactment of subsection three, the court of appeals in two earlier decisions, O’Neal Steel, Inc. v. Smith, 120 Ga. App. 106, 169 S.E.2d 827 (1969) and Castleberry v. Gold Agency, Inc., 124 Ga. App. 694, 185 S.E.2d 557 (1971) held that subsection two (formerly subsection (b)) conferred personal jurisdiction over nonresident defendants only if the nonresidents committed a tortious act or omission inside the State of Georgia. The General Assembly in 1970 enacted subsection three, in response to these decisions, with the intent of conferring jurisdiction over defendants whose out-of-state acts injured persons in Georgia. Before subsection three’s effective date, however, the supreme court had rendered a decision concerning subsection two in Coe & Payne Co. v. Wood-Mosaic, 230 Ga. 58, 195 S.E.2d 399 (1973), and had adopted the “Illinois Rule” favoring maximum coverage consistent with due process requirements. The result has been that subsection three, originally enacted to expand jurisdiction, ultimately has had the effect of restricting jurisdiction, in light of the adoption by the court in Coe & Payne Co. of the “Illinois Rule” with regard to subsection two.

16. 202 Ga. App. at 188, 413 S.E.2d at 777. If the three requirements for subjecting a nonresident defendant to personal jurisdiction in Georgia that are employed under due process analysis seem familiar, it is because the long arm statute itself imposes the first two requirements. O.C.G.A. § 9-10-91.


Kemp v. Sharp illustrates that only certain types of domestic relations claims, those actions involving alimony, child support, and division of marital property, fall within the long arm statute's purview. Because of the very special nature of child custody claims, the court held that the long arm statute does not provide a basis for jurisdiction over nonresident custodial parents in actions to modify custody or visitation. Instead, under the widely adopted Uniform Child Custody Jurisdiction Act ("UCCJA"), only courts in those states where the children reside may entertain claims concerning custody and visitation. Thus, in Kemp, plaintiff-father could not maintain his action to modify visitation against defendant-mother, the custodial parent who lived in Texas with the child who was the subject of the action.

The mother in Kemp even sought and received increased child support from plaintiff-father by way of a counterclaim she asserted against the father. Normally, assertion of a counterclaim constitutes a waiver by the defendant of jurisdictional and venue defenses to the plaintiff's claim, but not in this case. The court was unwilling to create a 'loophole' in the rule that "the UCCJA operates to withhold from the courts personal jurisdiction over the custodial parent when the action concerns child custody and the home state of the child is in another jurisdiction." The court reasoned that:

[t]o hold that the custodial parent, by asserting a non-custody-related claim against the non-custodial parent in the only jurisdiction appropriate for asserting that claim, waived the benefits of the UCCJA would defeat the purpose of the Act. If that were so, a non-custodial parent of a non-resident child could thwart the UCCJA by merely withholding support until the custodial parent brought an action for enforcement of the support obligation, and then insisting on litigating custody matters in the improper jurisdiction on the ground that the custodial parent had waived the jurisdictional defense by bringing a claim for support.

20. Id. at 600, 409 S.E.2d at 205 (citing O.C.G.A. § 9-10-91(5)).
21. Id., 409 S.E.2d at 204.
23. 261 Ga. at 600-02, 409 S.E.2d at 205-06.
24. Id., 409 S.E.2d at 204.
25. Id.
26. Id.
27. Id. at 601, 409 S.E.2d at 206.
28. Id. at 602, 409 S.E.2d at 206 (footnote omitted).
III. SERVICE OF PROCESS

A. Due Diligence—Trial Courts’ Discretion

Official Code of Georgia Annotated ("O.C.G.A.") section 9-11-4 contains the Civil Practice Act’s rules concerning service of process. Appellate decisions concerning the propriety of service most frequently involve cases in which there has been no service, or defective service, before the applicable statutes of limitations have run on plaintiffs’ claims.

Judicially created rules for resolving cases in which plaintiffs obtained service after the statutes of limitations had expired are typically recited in the cases with string citations. Whether a plaintiff (that is, a plaintiff’s lawyer) is diligent in perfecting service after the statute of limitations expires, to toll the statute’s running, is a question of fact and the appellate courts generally defer to the trial courts’ findings. This appellate deference, however, is not without limits, as revealed in two cases reported during the survey period.

In Bennett v. Matt Gay Chevrolet Oldsmobile, Inc., plaintiff provided the sheriff’s office with defendant’s correct address on the day plaintiff timely filed the complaint. However, the sheriff’s department did not perfect service until thirteen days after plaintiff filed the complaint, which was several days after the statute ran. Acknowledging that it was “not aware of any procedure by which a plaintiff may compel a sheriff to

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30. Id.
32. "Where an action is filed within the applicable limitation period but is not served upon the defendant within five days thereafter [as allowed under the statute] or within the limitation period, the plaintiff must establish that he acted in a reasonable and diligent manner in attempting to insure that proper service was effected as quickly as possible; and if he is guilty of laches in this regard, service will not relate back to the time of the filing of the complaint for the purpose of tolling the statute of limitation. The plaintiff has the burden of showing that due diligence was exercised. Ordinarily, ‘[t]he determination of whether the plaintiff was guilty of laches in failing to exercise due diligence in perfecting service after the running of the statute of limitation is a matter within the trial court’s discretion and will not be disturbed on appeal absent abuse.’” Dunson v. Golden, 199 Ga. App. 513, 405 S.E.2d 332 (1991) (quoting Shears v. Harris, 196 Ga. App. 61-62, 395 S.E.2d 300 (1990)); see also Nee v. Dixon, 199 Ga. App. 729, 405 S.E.2d 766 (1991).
33. Dunson, 199 Ga. App. at 514, 405 S.E.2d at 333.
36. Id. at 350, 408 S.E.2d at 113. This was a renewal complaint, which plaintiff filed under the authority of O.C.G.A. § 9-2-61.
serve properly filed process papers,” the court held as a matter of law that plaintiff "initially" complied with the statute’s service requirements by providing the sheriff’s department with defendant’s correct address when plaintiff timely filed the complaint. Therefore, the lower court abused its discretion in concluding that plaintiff was not diligent and that the statute had expired without timely service.

The court in Bennett did not speculate how long a plaintiff might wait for the serving officials to discharge their duties; a few days was acceptable. The court distinguished earlier cases in which trial courts had concluded properly that plaintiffs were not diligent in perfecting service to toll the running of the statutes upon the basis that, in those cases, the plaintiffs did not know the defendants’ correct addresses and were not diligent in locating and serving them. Plaintiff in Bennett had the proper address, gave it to the sheriff’s department, and thereby initially complied with service requirements.

Prudence would dictate further action by plaintiffs when a sheriff’s department delays service. One option for a plaintiff’s attorney under those circumstances would be to move the court to appoint a special process server and, if possible, to have the court recite in its order that the plaintiff had diligently attempted to obtain service through the designated serving officials, but without success, through no fault of the plaintiff.

Slater v. Blount is the other survey period case that illustrates the limits of appellate deference to trial courts’ findings of fact concerning issues of plaintiffs’ diligence in obtaining service. The chronology of events in Slater is rather involved, but the court made a noteworthy ruling upon the issue of whether the trial court properly exercised its discretion. The trial court erred, the court of appeals found, by charging plaintiff with laches based upon the entire length of time between when the statute of limitations expired and when plaintiff served defendant without taking into account that for most of this period, the trial court had not ruled that plaintiff’s initial service attempt was invalid. This was improper. The focus of the inquiry regarding plaintiff’s diligence should

37. 299 Ga. App. at 350 n.2, 408 S.E.2d at 113 n.2.
38. Id. at 350, 408 S.E.2d at 113.
39. Id., 408 S.E.2d at 113-14.
40. Id.
41. Id., 408 S.E.2d at 114.
42. Id., 408 S.E.2d at 113.
43. O.C.G.A. § 9-11-4(c) (Supp. 1992) allows for the appointment of a special process server under certain circumstances.
45. Id. at 473, 408 S.E.2d at 436.
begin from the entry of "the order finding that the prior service was ineffective . . . ".

B. Raising Late Service as a Defense

O.C.G.A. section 9-11-12(b)(5) requires defendants to raise the defense of "insufficiency of service of process" either in their answers or in motions filed contemporaneously with or prior to the filing of the answers. Defendants waive this defense by failing to raise it.

Does the defense of "insufficiency of service of process" encompass only the method of service, or does it also encompass a defense of no service at all? Two cases reported during the survey period draw a distinction between these two potential defenses. In both cases, plaintiffs ultimately obtained service, and apparently they served defendants properly. The problem was that in neither case did plaintiffs serve defendants within the statute of limitations. Defendants did not raise insufficiency of service as a defense in their original answers or in any contemporaneously filed motions. Instead, both defendants later moved to dismiss because the statute of limitations had run before plaintiffs served them, and the trial courts granted the motions.

In affirming the trial courts' rulings, the court of appeals held defendants did not waive the defense of insufficiency of service of process because plaintiffs properly served them in each case. The court held, in effect, that a defense of no service is not equivalent to a defense of insufficiency of service. For this reason, O.C.G.A. section 9-11-12(b) apparently does not require defendants, at the risk of waiver, to raise a defense concerning service when they file answers to lawsuits with which they have not yet been served.

If the issue of service is one that should be formed and resolved early in litigation, as the drafters of the Civil Practice Act obviously intended, then these rulings frustrate this goal of the Act. However, the rulings are entirely consistent with the theory stated in both cases that plaintiffs'
ultimate responsibility is to insure they achieve service. Prudent plaintiffs should never assume they effected service simply because defendants have answered their lawsuits. Rather, they should independently verify both the fact and sufficiency of service even if defendants' answers raise no defenses regarding service.

C. Proof of Service

Typically, the serving officials send executed entry of service forms to plaintiffs' attorneys. These forms reflect whether and how service was made. An executed return of service form, which states the serving officials perfected service, usually provides the attorneys with independent verification and proof of service. While the entry of service form is strong evidence of service, it is not conclusive and defendants may impeach that evidence by clear and convincing proof of its inaccuracy. 

Webb v. Tatum provides a rare example of a situation in which a defendant defeated this strong evidence and secured a dismissal of plaintiff's complaint on the grounds of insufficiency of service of process.

The entry of service form at issue in Webb reflected that the serving official left the process with defendant's brother at defendant's residence. O.C.G.A. section 9-11-4(d)(7) allows for service by "leaving copies thereof at [defendant's] dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." Affidavits from defendant and his brother established, to the court's satisfaction, that defendant never had resided at the address listed on the return, and the attempted service was therefore insufficient.

The lesson here is that any time a return reflects service on anyone other than the defendant, further investigation concerning the circumstances of service is in order. Even further investigation ultimately may provide no guarantee of successful service. In Webb plaintiffs did attempt a second service and did not find defendant.

55. See generally GREGORY, supra note 49, at § 3-6(B)(8).
57. Id. at 89, 413 S.E.2d 263 (1991).
58. Id. at 89, 413 S.E.2d at 263.
59. Id. at 90, 413 S.E.2d at 263.
61. Id.
63. Id. at 90, 413 S.E.2d at 263.
D. Service on Nonresidents

The Civil Practice Act's service statute does not always provide the only, or even the correct, methods of service available to plaintiffs. For example, in serving nonresidents in personal injury claims arising from vehicular collisions in Georgia, plaintiffs may serve defendants and subject them to personal jurisdiction in Georgia under the long arm statute, the Nonresident Motorist Act, or both. These methods of service are discrete; therefore, plaintiffs should take care to comply precisely with the requirements of each method of service. In addition, these alternative methods for serving nonresidents only apply to nonresidents, and not to Georgia residents, as two survey period cases make clear.

Plaintiff in Fisher v. Musik alleged that defendant was a nonresident who was subject to jurisdiction in Georgia under the long arm statute. Plaintiff served defendant, in compliance with that statute, through a Florida deputy. Defendant denied he was a nonresident, but claimed he was instead a resident of Pike County, Georgia, not Bibb County, where plaintiff had filed suit. Months after the Bibb County court transferred the case to Pike County, where venue was proper, defendant moved to dismiss on the basis of insufficiency of service of process. The trial court granted defendant's motion because O.C.G.A. section 9-11-4 and not the service provisions of the long arm statute prescribe the proper method of service upon Georgia residents such as defendant. In light of the decision in Fisher, plaintiffs would be well advised to perfect service under both sections 9-11-4 and 9-10-91, if there exists any question of defendant's residency. This is particularly so if a trial court makes a ruling of the issue of residency.

The time at which a defendant's residency is established also can be crucial. In Bailey v. Hall, the court held that under the Nonresident Motorist Act, a defendant must have been a nonresident at the time of the automobile collision giving rise to the suit, and could not have resided in Georgia at the time of the wreck and then moved out of state before plaintiff filed suit. As the court in Bailey noted, the time of establishing

65. Id. § 9-10-91.
66. Id. § 0-12-1(a) (1991).
69. Id. at 861, 412 S.E.2d at 549.
70. Id. at 861-62, 412 S.E.2d at 548-49.
71. Id. at 862, 412 S.E.2d at 549.
73. Id. at 603, 405 S.E.2d at 581.
residency under the long arm statute, on the other hand, is determined at
the time of service, even if defendant previously resided in Georgia.\textsuperscript{74}

IV. Parties

Defendants who assert counterclaims and wish to join additional de-
fendants, other than the original plaintiff, look to O.C.G.A. section 9-11-
13(h)\textsuperscript{75} for relief and guidance. Section 9-11-13(h) provides: "When the
presence of parties other than those to the original action is required for
the granting of complete relief in the determination of a counterclaim
... the court shall order them to be brought in as defendants as pro-
vided in this chapter, if jurisdiction of them can be obtained."\textsuperscript{76}

\textit{McCabe v. Lundell},\textsuperscript{77} a full panel decision with two concurring opin-
ions, provides some guidance concerning the operation of section 9-11-
13(b). The court in \textit{McCabe} was concerned, among other things, with the
meaning of the word "jurisdiction" in section 9-11-13(h).\textsuperscript{78} Plaintiff in
\textit{McCabe} was an Alabama resident; his attorney was a Georgia resident
who did not reside in Cobb County where plaintiff filed suit. Defendant
moved the trial court, pursuant to O.C.G.A. section 9-11-13(h), to join
plaintiff's attorney as a defendant-in-counterclaim in defendant's coun-
terclaim against plaintiff. The trial court's denial of this motion to join
the attorney, which also included a request to disqualify the attorney,
formed the basis of defendant's appeal.\textsuperscript{79}

The majority noted the interplay of O.C.G.A. section 9-11-13(h) with
O.C.G.A. section 9-11-19(a) in addressing motions to join defendants-in-
counterclaim.\textsuperscript{80} Section 9-11-19(a) authorizes the joinder of a "person who
is subject to service of process."\textsuperscript{81} That section goes on to provide that the
joined party may be dismissed if venue is improper.\textsuperscript{82}

The majority drew a distinction between obtaining personal jurisdiction
over the defendant-in-counterclaim and obtaining venue for that counter-
claim.\textsuperscript{83} The fact that venue for the proposed defendant-in-counterclaim
would not be proper did not preclude joinder of the defendant-in-counter-
claim, provided that defendant could be subjected to personal jurisdic-

\textsuperscript{74} Id.
\textsuperscript{75} O.C.G.A. § 9-11-13(h) (1982).
\textsuperscript{76} Id.
\textsuperscript{78} Id. at 639, 405 S.E.2d at 694.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 639-40, 405 S.E.2d at 694 (citing O.C.G.A. §§ 9-11-13(h), -19(a) (1982)).
\textsuperscript{81} O.C.G.A. § 9-11-19(a) (1982).
\textsuperscript{82} Id.
\textsuperscript{83} 199 Ga. App. at 639-40, 405 S.E.2d at 695.
The procedure to follow in these circumstances would be to join the defendant-in-counterclaim, subject to that defendant-in-counterclaim's right to transfer to the appropriate venue.\textsuperscript{88} The definition of "jurisdiction" in O.C.G.A. section 9-11-13(h), therefore, did not encompass the requirement of venue.

Having concluded that improper venue was no bar to joinder of the defendant-in-counterclaim, the court concluded that the trial court's ruling denying joinder of this particular defendant-in-counterclaim was correct because joinder of this alleged joint tortfeasor was merely "desirable" and not "required" to grant defendant complete relief.\textsuperscript{88}

Judge Sognier, along with Judges McMurray and Birdsong, disagreed with the majority's definition of "jurisdiction."\textsuperscript{89} They would have defined "jurisdiction" in section 9-11-13(h) to encompass the requirement of proper venue so that unless venue could be proper in a claim against a proposed defendant-in-counterclaim, the court should deny a motion to join that proposed defendant-in-counterclaim. Because plaintiff's attorney in McCabe, the proposed defendant-in-counterclaim, did not reside in Cobb County, the trial court correctly refused to join him, according to the first concurring opinion.\textsuperscript{88} The concurring judges also further opined that no "joint tortfeasor" venue existed in this case because plaintiff was not a resident of Georgia and was not subject to the joint tortfeasor provision regarding venue.\textsuperscript{89}

In her concurring opinion, Judge Beasley agreed with the majority that improper venue was no bar to joinder.\textsuperscript{89} According to Judge Beasley, however, the important consideration in determining whether to allow joinder is the goal of providing the aggrieved party with complete relief.\textsuperscript{81}

\begin{flushleft}
84. \textit{Id.} at 639, 405 S.E.2d at 695.
85. \textit{Id.} at 640, 405 S.E.2d at 695.
86. \textit{Id.} at 641, 405 S.E.2d at 695.
87. \textit{Id.} at 641-43, 405 S.E.2d at 696-97 (Sognier, J., concurring).
88. \textit{Id.} at 643, 405 S.E.2d at 696 (Sognier, J., concurring).
89. \textit{Id.} In cases in which defendant joint tortfeasors reside in different Georgia counties, venue for a suit against them lies in any county in which one of them resides. \textit{Ga. Const.} art. VI, § 2, para. 4. The concurring judges also said, in effect, that although the nonresident plaintiff filed suit in Cobb County, he did not "reside" there for purposes of establishing "joint tortfeasor" venue there over the proposed defendant-in-counterclaim, who did reside in Georgia, but not in Cobb County. \textit{McCabe}, 199 Ga. App. at 642, 405 S.E.2d at 696-97 (Sognier, J., concurring). This contention was based upon recent precedent which held that nonresident defendants who are subject to jurisdiction under the long arm statute do not "reside" in the Georgia county in which they are subject to venue under the long arm statute for purposes of establishing "joint tortfeasor" venue over a resident co-defendant. \textit{See} Weitzel \textit{v. Griffin \\& Assoc.}, 192 Ga. App. 89, 383 S.E.2d 653 (1989); \textit{Goodman v. Vilston}, Inc., 197 Ga. App. 718, 399 S.E.2d 241 (1990).
90. 199 Ga. App. at 643-44, 405 S.E.2d at 697 (Beasley, J., concurring).
91. \textit{Id.} at 643, 405 S.E.2d at 697 (Beasley, J., concurring).
\end{flushleft}
ing this goal, not a determination of whether joinder was "required" should be the focus of the court's inquiry. Under the standard Judge Beasley proposed, if a party seeks joinder of an additional party, a trial court apparently should not exercise any discretion in determining whether joinder was merely "desirable," as opposed to "required." Instead courts should grant joinder liberally to promote judicial economy.

V. Discovery

A. Scope of Discovery

O.C.G.A. section 9-11-26(b) defines the broad scope of discovery: the information sought must only appear "reasonably calculated to lead to the discovery of admissible evidence." Two survey period cases of great interest to litigants centered on this question of discoverability.

Worldly Circumstances. Holman v. Burgess concerned the discoverability of information about a party's financial circumstances. Normally, such information would not be relevant in the trial of a damages case, but when punitive damages are at issue, the worldly circumstances of the wrongdoer are relevant and may be admissible. The rationale is that in order to penalize or deter a wrongdoer by imposing punitive damages, the finder of fact must know something of the wrongdoer's worldly circumstances to determine the appropriate amount of such an award. A relatively small award would be a mere slap on the wrist to a rich wrongdoer.

The court in Holman ruled that, given the potential admissibility of evidence concerning defendant's worldly circumstances in punitive damages cases, "evidence of the defendant's financial condition 'may' be discoverable by the plaintiff in cases where punitive damages are sought."

The court weighed defendant's privacy rights and rights to be free from abusive and unduly burdensome requests against plaintiff's rights to discovery. To strike an appropriate balance between these competing interests, the court held that parties seeking this type of discovery must make a prima facie showing of their entitlement to an award of punitive dam-

92. Id.
93. Id. at 643-44, 405 S.E.2d at 697 (Beasley, J., concurring).
94. Id.
96. Id. § 9-11-26(b)(1).
98. Id. at 62, 404 S.E.2d at 146.
99. Id.
100. Id. at 63, 404 S.E.2d at 147.
ages.\textsuperscript{101} In determining whether a party is entitled to discovery concerning the opposing party's worldly circumstances, trial courts should require an "evidentiary showing (by affidavit, discovery responses, or otherwise)."\textsuperscript{102}

Given the longstanding appellate deference to trial courts in the conduct of discovery, any appellate scrutiny of lower court rulings on these issues is likely to be limited.\textsuperscript{103} Parties seeking discovery of such financial information would be well advised to make an appropriate showing of entitlement to punitive damages in light of existing precedent regarding the availability of such damages, and in light of the facts of their particular cases.

**Medical Records.** A personal injury plaintiff's medical history is always of keen interest to defense counsel. The imagination of some defense counsel in seeking medical information regarding plaintiffs is not limited even by the set of medical providers a plaintiff may have consulted in his or her lifetime. *Farrell v. Dunn*\textsuperscript{104} was a car wreck case entirely unrelated to plaintiff's job. Nonetheless, defendant served a Rule 34\textsuperscript{105} request for documents upon the State Board of Workers' Compensation essentially requesting all documents in the Board's possession regarding "any and all" workers' compensation claims plaintiff may have filed.\textsuperscript{106}

The court in *Farrell* upheld the trial court's denial of defendant's motion to compel discovery, characterizing defendant's request as a "fishing expedition."\textsuperscript{107} The court ruled that "[t]he Board is not a general repository of discoverable material for defendants in civil actions, and access to the Board's records is properly limited to those parties who have a specific interest in the workers' compensation claim in connection with which the records are maintained by the Board."\textsuperscript{108} As the court noted, defendants in *Farrell* had the option of deposing or serving interrogatories upon plaintiff and then of seeking additional discovery directly from plaintiff's medical providers. This was the proper procedure.\textsuperscript{109}

\textsuperscript{101} Id.
\textsuperscript{102} Id. at 64, 404 S.E.2d at 147.
\textsuperscript{103} See generally GREGORY, supra note 49, at § 5-1(A).
\textsuperscript{105} O.C.G.A. § 9-11-34 (1982).
\textsuperscript{106} 199 Ga. App. at 631, 309 S.E.2d at 731.
\textsuperscript{107} Id. at 632, 405 S.E.2d at 732.
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 631-32, 405 S.E.2d at 732.
B. Depositions

In Warehouse Home Furnishings Distributors, Inc. v. Davenport, the supreme court granted a writ of certiorari to the court of appeals "to address whether a non-resident who files a lawsuit in Georgia may be compelled to give a deposition in Georgia." The supreme court previously ruled that the geographic limitations relating to subpoenaing deposition witnesses contained in Rule 45 applied to nonresident plaintiffs whom Georgia defendants wished to depose in the Georgia counties where plaintiffs had filed suit. The result of this earlier decision was to absolve nonresident plaintiffs who chose Georgia as the forum for litigating their claims from having to come to Georgia to give their depositions.

The court in Warehouse Home Furnishings reversed its course and held that the geographic restrictions of Rule 45 only apply to nonparty witnesses. Parties who are subject to notice to take depositions under Rule 30 cannot rely upon Rule 45. Whether a witness subject to notice must give a deposition in the jurisdiction where the case is pending is a matter within a trial court's discretion. Parties who wish to avoid traveling to the county where suit is pending should seek a protective order pursuant to Rule 26.

With the issue thus framed, trial courts make their ruling, bearing in mind the admonition that "ordinarily one who chooses the forum should be required to make himself available for examination in that forum."

111. Id. at 853, 413 S.E.2d at 195.

A person who is to give a deposition may be required to attend an examination:
(1) In the county wherein he resides or is employed or transacts his business in person; (2) In any county in which he is served with a subpoena while therein; or (3) At any place which is not more than thirty miles from the county seat of the county wherein the witness resides, is employed, or transacts his business in person.

Id.

114. 261 Ga. at 853-54, 413 S.E.2d at 196.
116. 261 Ga. at 854, 413 S.E.2d at 196.
117. Id., 413 S.E.2d at 195-96.
118. Id. at 853, 413 S.E.2d at 195 (citing Reams v. Composite State Bd. of Medical Examiners, 233 Ga. 742, 213 S.E.2d 640 (1975)).
C. Sanctions

The supreme court in Schrembs v. Atlanta Classic Cars, Inc.\textsuperscript{119} addressed whether a trial court had appropriately imposed sanctions for a party's failure to comply with an order compelling discovery.\textsuperscript{120} The issue in Schrembs was whether, before imposing sanctions, a trial court must conduct a hearing to determine if a party's failure to comply with an order compelling discovery was willful.\textsuperscript{121} A finding of willfulness is a prerequisite to the imposition of sanctions including the "death penalty" sanction of dismissal or of striking an answer.\textsuperscript{122}

Schrembs concerned a suit on a returned check. Defendant objected to, but never answered plaintiff's single interrogatory to provide defendant's social security number, even after the trial court conducted a hearing on plaintiff's motion to compel discovery.\textsuperscript{123} The supreme court held that the trial court was not required to conduct a hearing to determine whether defendant's failure to make discovery was willful.\textsuperscript{124} The record justified the trial court's finding of willfulness.\textsuperscript{125} The simple nature of the discovery request itself justified the trial court's finding of willfulness.\textsuperscript{126} Litigants should take notice that failure to comply with orders compelling discovery can prove fatal. While a different set of facts, involving complicated discovery requests, might have produced a different result in Schrembs, or might produce a different result in a later case, totally failing to comply with an order compelling discovery obviously is not a risk worth running.

VI. Pretrial Orders

Pretrial orders supersede the pleadings and form the issues for trial.\textsuperscript{127} As Carder v. Racine Enterprises, Inc.\textsuperscript{128} illustrates, the parties, that is, their attorneys, must participate in the preparation of the pretrial order, and failure to participate may result in an imposition of sanctions.\textsuperscript{129} The trial court in Carder even prevented defendants from contesting the issue

\textsuperscript{120} Id. at 182, 402 S.E.2d at 723.
\textsuperscript{121} Id.
\textsuperscript{123} 261 Ga. at 182, 402 S.E.2d at 723.
\textsuperscript{124} Id. at 182-83, 402 S.E.2d at 724.
\textsuperscript{125} Id. at 183, 402 S.E.2d at 724.
\textsuperscript{126} Id.
\textsuperscript{127} O.C.G.A. § 9-11-16 (1982).
\textsuperscript{129} Id. at 142, 401 S.E.2d at 688.
of liability at trial, based upon defendant's failure to participate in the
preparation of the pretrial order.\textsuperscript{180}

The supreme court addressed the discretion of trial courts in cases like
Carder in which parties failed to cooperate in preparing the pretrial or-
der.\textsuperscript{131} Although the court did not hold that the sanction imposed in
Carder was an abuse of discretion per se, the court did find the sanction
too severe in this case.\textsuperscript{132} Imposition of this sanction, which was
equivalent to ordering a default, had the effect of penalizing defendants
for the conduct of their attorneys.\textsuperscript{133} The court suggested, but did not
mandate, the use by trial courts of other sanctions such as contempt or
penalties under O.C.G.A. section 9-15-14\textsuperscript{134} for a party's failure to cooper-
ate in pretrial proceedings.\textsuperscript{135}

\section*{VII. Suits Against "Professionals"}

\subsection*{A. The "Professional" Requirement}

Since the enactment of O.C.G.A. section 9-11-9.1\textsuperscript{136} Georgia's trial and
appellate courts have struggled to articulate a clear definition of "profes-
sional."\textsuperscript{137} Cases reported during the survey period, which concerned the
affidavit requirements of O.C.G.A. section 9-11-9.1, demonstrate that the
definition of "professional" is best understood in terms of what does not
constitute a profession within the meaning of the statute. In \textit{Gillis v. Goode}\textsuperscript{138}
plaintiff sued two defendants, a physician and a radiological
physicist, for "medical malpractice and negligence."\textsuperscript{139} Plaintiff alleged
that she sustained injuries as a result of the physician's and radiologist's
performance of radiological treatment.\textsuperscript{140} In an attempt to comply with

\textsuperscript{130.} \textit{Id.} at 143, 401 S.E.2d 689.
\textsuperscript{131.} \textit{Id.} at 143-44, 401 S.E.2d at 689.
\textsuperscript{132.} \textit{Id.}
\textsuperscript{133.} \textit{Id.}
\textsuperscript{135.} 261 Ga. at 143-44, 401 S.E.2d at 689.
\textsuperscript{136.} O.C.G.A. § 9-11-9.1(a) (1992). This section provides the following:
[I]n any action for damages alleging professional malpractice, the plaintiff shall be
required to file with the complaint an affidavit of an expert competent to testify,
which affidavit shall set forth specifically at least one negligent act or omission
claimed to exist and the factual basis for each such claim.
\textit{Id.}
\textsuperscript{137.} Webster’s Ninth New Collegiate Dictionary defines profession as “a calling requir-
ing specialized knowledge and often long and intensive academic preparation.” Merriam-
\textsuperscript{139.} \textit{Id.} at 117, 414 S.E.2d at 197.
\textsuperscript{140.} \textit{Id.}
O.C.G.A. section 9-11-9.1, plaintiff attached an expert affidavit to her complaint addressing only the negligence of the physician and not of the radiological physicist.\textsuperscript{141}

Defendant physicist had an undergraduate degree in physics and math and a masters degree in physics, but was not required to be licensed by any state or federal examining board. He was associated with defendant physician at the time of plaintiff's injuries, and his duties included calibrating and performing quality control services on the cobalt machine that delivered radiation treatment to plaintiff.\textsuperscript{142}

The trial court granted defendant physicist's motion to dismiss for failure to attach an affidavit alleging the physicist's negligence, reasoning that the physicist had engaged in the practice of medicine as defined in the statute\textsuperscript{143} and concluding that plaintiff should have filed an affidavit pertaining to defendant physicist.\textsuperscript{144} In affirming the trial court, the court of appeals never discussed whether defendant physicist practiced medicine, but held the affidavit was necessary because the physicist was a "professional" as a matter of law.\textsuperscript{145}

The supreme court granted certiorari and for the first time clearly set out the meaning of "professional" under O.C.G.A. section 9-11-9.1.\textsuperscript{146} In reversing the court of appeals, the supreme court began its analysis by noting that the Code defines the term "professional" in only three sections: O.C.G.A. sections 14-7-2(2),\textsuperscript{147} 14-10-2(2),\textsuperscript{148} and 43-1-24.\textsuperscript{149} The

\begin{itemize}
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id. at 117-18, 414 S.E.2d at 198.
\item \textsuperscript{143} O.C.G.A. § 43-34-20(3) (1982). This section states the following:
\begin{quote}
"[T]o practice medicine" means to hold one's self out to the public as being engaged in the diagnosis or the treatment of disease, defects, or injuries of human beings; or the suggestion, recommendation, or prescribing of any form of treatment for the intended palliation, relief, or cure of any physical, mental, or functional ailment or defect of any person with the intention of receiving therefore, either directly or indirectly, any fee, gift, or compensation whatsoever . . . .
\end{quote}
\item \textsuperscript{144} 262 Ga. at 117, 414 S.E.2d at 197-98.
\item \textsuperscript{146} 262 Ga. at 117-18, 414 S.E.2d at 197-98.
\item \textsuperscript{147} O.C.G.A. § 14-7-2(2) (1982). This section states the following:
\begin{quote}
"[P]rofession" means the profession of certified public accountantancy, architecture, chiropractic, dentistry, professional engineering, land surveying, law, psychology, medicine and surgery, optometry, osteopathy, podiatry, veterinary medicine, registered professional nursing, or harbor piloting.
\end{quote}
\item \textsuperscript{148} Id. § 14-10-2(2). This section states the following:
\begin{quote}
"Professional service" means the personal services rendered by attorneys at law and any type of professional service which may be legally performed only pursuant to a license from a state examining board pursuant to Title 43, for example,
\end{quote}
\end{itemize}
court then invoked the judicial presumption that the General Assembly knew of these definitions when it enacted O.C.G.A. section 9-11-9.1, and, therefore, must have intended that they apply to the affidavit requirement. Accordingly, the affidavit requirements set out in O.C.G.A. section 9-11-9.1 only apply to the professions recognized in O.C.G.A. sections 14-7-2(2), 14-10-2(2), and 43-1-24.

B. Failure to Attach Affidavit

Unless specific factual circumstances exist, O.C.G.A. section 9-11-9.1 mandates that a plaintiff file an expert’s affidavit contemporaneously with his or her complaint for professional negligence. A professional negligence complaint lacking an affidavit is not subject to a motion to dismiss if the statute of limitations will run within ten days of filing the complaint and the plaintiff alleges that the affidavit could not be prepared as a result of the time limitations. However, within forty-five days of filing the original complaint, the plaintiff is then required to supplement his or her pleadings with an expert’s affidavit.

Thompson v. Long was a medical malpractice case in which plaintiff filed a pro se complaint for damages on the day on which the statute of limitations would have expired. She alleged in her complaint that an affidavit was attached to the suit; however, no affidavit was attached to the

the personal services rendered by certified public accountants, chiropractors, dentists, osteopaths, physicians and surgeons, and podiatrists (chiroprodists).

Id.

149. Id. § 43-1-24. This section states the following:
Any person licensed by a state examining board and who practices a “profession” as defined in Chapter 7 of Title 14, the “Georgia Professional Corporation Act,” or who renders “professional services,” as defined in Chapter 10 of Title 14, the “Professional Association Act,” whether such person is practicing or rendering services as a proprietorship, partnership, professional corporation, professional association, or other corporation...

Id.

150. 262 Ga. at 118, 414 S.E.2d at 198.
151. Id.
152. O.C.G.A. § 9-11-9.1(b) (1992). This section provides that:
[t]he contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after a hearing and for good cause extend such time as it shall determine justice requires.

Id.

153. Id.
154. Id.
complaint, and plaintiff did not have an affidavit when she filed the complaint. Furthermore, plaintiff failed to plead, and thereby failed to invoke, the protection of O.C.G.A. section 9-11-9.1(b). She did, however, file an expert affidavit within forty-five days of filing the original complaint. The trial court granted defendant's motion to dismiss, reasoning that plaintiff was not entitled to the extended time period for filing an affidavit because she did not plead the forty-five day extension in her complaint.156 According to the trial court, plaintiff's failure to specifically ask for protection in her complaint meant that the issue was governed by O.C.G.A. section 9-11-9.1(e),157 and the failure to attach the affidavit was, under these circumstances, a nonamendable defect.158

The court of appeals reversed the trial court and held that plaintiff could amend her complaint to invoke the protection of subsection (b), even though she did not allege that she was relying on that particular subsection when she filed her complaint.159 Because defendant was no worse off than if plaintiff had inserted the language of O.C.G.A. section 9-11-9.1(b) in her complaint, a dismissal of plaintiff's complaint would result in placing formal requirements of pleadings above the legislative purpose of allowing a plaintiff to supplement pleadings with an expert affidavit when the statute of limitations is about to expire.160 Although the opinion is clear about the policy considerations relative to the late filing of an affidavit, it is unclear whether the court would choose to place substance over formality if the plaintiff was represented by counsel. This issue would not present itself if counsel would cite O.C.G.A. section 9-11-9.1(b) in his complaint should he find himself filing a complaint against a professional within ten days of the running of the statute of limitations.

Austin v. Greenberg Farrow Architects161 illustrates that plaintiffs' counsel may not cure the failure to attach an expert affidavit by dismissing the original complaint and refiling pursuant to the renewal stat-

156. Id. at 481, 411 S.E.2d at 323.
157. O.C.G.A. § 9-11-9.1(e) (1992). This section states the following:
    [e]xcept as allowed under subsection (b) of this Code section, if a plaintiff fails to file an affidavit as required by this Code section contemporaneously with a complaint alleging professional malpractice and the defendant raises the failure to file such an affidavit in its initial responsive pleading, such complaint is subject to dismissal for failure to state a claim and cannot be cured by amendment pursuant to Code Section 9-11-15 unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake.
158. 201 Ga. App. at 481, 411 S.E.2d at 323.
159. Id.
160. Id. at 482, 411 S.E.2d at 324.
In *Austin* plaintiffs filed their professional malpractice complaint three days before the expiration of the statute of limitations. Plaintiffs did not file an expert affidavit contemporaneously with the complaint or forty-five days after filing. Defendants raised the failure to provide an expert affidavit defect in their initial responsive pleadings, and apparently before the trial court ruled on the defect, plaintiffs voluntarily dismissed their complaint. Thereafter, on March 6, 1990, and within six months after the voluntary dismissal, plaintiffs filed their renewed complaint and attached two expert affidavits dated March 2, 1990 and March 6, 1990. Defendants again raised the affidavit defect in their responsive pleadings and filed motions to dismiss, arguing that plaintiffs were not permitted to take advantage of the renewal statute because plaintiffs failed to file the expert affidavits with their original complaint. The trial court agreed with defendants and granted defendants' motion for summary judgment. On appeal plaintiffs argued that the second complaint properly renewed the prior complaint because the renewed complaint met the affidavit requirements of O.C.G.A. section 9-11-9.1. The court of appeals affirmed and held that plaintiffs were not entitled to the protection of the renewal statute to prevent the running of the statute of limitations.

After plaintiffs in *Austin* filed their original complaint, the legislature amended O.C.G.A. section 9-11-9.1 to preclude a plaintiff from taking advantage of the renewal statute after the expiration of the statute of limitations if the expert affidavit was not filed with the complaint, and if defendant raised this defect in the initial responsive pleadings, "unless a court determines that the plaintiff had the requisite affidavit available prior to filing the complaint and the failure to file the affidavit was the result of a mistake." Amendment of the statute after plaintiffs filed their original complaint was of no consequence according to the court, since the original intent of the statute had not changed with the more

162. *Id.* The renewal statute, O.C.G.A. § 9-2-61(a) (1992), states the following:

When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or, if permitted by the federal rules of civil procedure, in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, subject to the requirement of payment of costs in the original action as required by subsection (d) of Code Section 9-11-41; provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once.

*Id.* at 448-49, 411 S.E.2d at 346-47.

163. *Id.* at 450, 411 S.E.2d at 347.

164. *Id.* at 449, 411 S.E.2d at 347 (quoting O.C.G.A. § 9-11-9.1(f) (1992)).
specific amendment—that plaintiffs’ complaint should be dismissed for failure to attach an expert affidavit unless such affidavit had been in plaintiffs’ possession and plaintiffs failed, by negligence or mistake, to file the affidavit with the complaint. Clearly now a plaintiff may not renew his professional negligence complaint after the expiration of the statute of limitations if he had not obtained an expert affidavit when he filed the original complaint.

VIII. Amendments

A plaintiff may seek leave to change or add parties to a lawsuit after the expiration of the statute of limitations. The amendment relates back to the date of the original complaint if the claim in the amended complaint arises out of the same conduct set out in the original complaint, if there exists an identity between the old and the new parties so that the relation back will not surprise the defendant thereby causing prejudice, and if there was no excused delay prejudicial to the defendant.

Morris v. Chewning concerned the trial court’s denial of plaintiff’s motion to amend her complaint to add additional plaintiffs. Plaintiff in Morris sued a doctor and hospital for negligence in causing the death of her daughter; however, plaintiff sued only in her capacity as temporary administratrix of the child’s estate. Thirteen months after filing the original complaint and after the statute of limitations expired, plaintiff sought leave to amend her complaint in order to add as plaintiffs her husband and herself in their individual capacities to recover for the full value of the daughter’s life. Plaintiff’s original complaint prayed for “a judg-

166. Id.
167. O.C.G.A. § 9-11-15(c) (1982). This section states that:
[w]henever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or a current set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back to the date of the original pleadings if the foregoing provisions are satisfied, and if within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

170. Id. at 658, 411 S.E.2d 891.
171. See O.C.G.A. §§ 51-4-4 and 19-7-1(c)(2)(a) (1982).
ment against [defendants] in an amount to exceed $10,000, and all damages allowed by Georgia Law.\textsuperscript{172}

In reversing the trial court's denial of plaintiff's motion to amend, the court of appeals reasoned that "[a]lthough . . . the original ad damnum clause . . . did not expressly pray for damages for the full value of the decedent's life,"\textsuperscript{173} the original complaint gave defendants adequate notice of the claim and specified which conduct plaintiff considered to be tortious.\textsuperscript{174} Therefore, the court concluded that allowing the amendment to relate back to the date of the original filing would not deprive defendants of any protection afforded by the statute of limitations.\textsuperscript{175}

IX. Voluntary Dismissal and Renewal of Actions

Pursuant to O.C.G.A. section 9-2-61,\textsuperscript{176} a party may voluntarily dismiss his complaint and file a renewal action within six months of the dismissal, even if the statute of limitations has subsequently expired.\textsuperscript{177} May a party file a renewal action within six months of the voluntary dismissal and after the expiration of the statute of limitations expires if factual questions exist concerning whether service of process was accomplished in the original complaint? According to Fine v. Higgins Foundry & Co.,\textsuperscript{178} a plaintiff may voluntarily dismiss his original complaint and refile a renewal action after the statute of limitations has expired, although he may have failed to perfect service in the original complaint.\textsuperscript{179}

In Fine plaintiff filed his complaint for personal injuries two days before the statute of limitations expired; however, he did not accomplish service of process until approximately six months later. In his original answer, defendant failed to raise the affirmative defenses of statute of limitations and laches. On the date of trial, defendant amended his answer and pleaded these affirmative defenses. Plaintiff apparently felt these defenses were meritorious, and he filed a voluntary dismissal that same day before any ruling came from the bench. Within six months of

\textsuperscript{172} 201 Ga. App. at 658, 411 S.E.2d at 892.
\textsuperscript{173} Id. at 659, 411 S.E.2d at 893.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} O.C.G.A. § 9-2-61 (1982). This section states the following:
[j]f a plaintiff discontinues or dismisses his case and recommences the same within six months, the renewed case shall stand upon the same footing, as to limitation, with the original case. However, this privilege of dismissal and renewal shall be exercised only once under this Code section.
\textsuperscript{177} Id.
\textsuperscript{179} Id. at 276, 410 S.E.2d at 823.
filing his voluntary dismissal, plaintiff filed a renewal action, but this time promptly served the defendant. When defendant answered the renewed complaint, he raised the affirmative defenses of laches and the statute of limitations against the first action. The trial court granted defendant's motion to dismiss based solely upon the defenses raised in the renewal action.\textsuperscript{180}

On appeal the court stated that resolution of this issue lies in "whether the original action was void or merely voidable."\textsuperscript{181} According to the court of appeals, whether the original action was void or voidable depends upon the trial court's action or inaction.\textsuperscript{182} If the trial court had entered an order dismissing plaintiff's original complaint based upon these defenses, the original action would be considered void since a dismissal of this type is in the discretion of the trial court.\textsuperscript{183}

However, when the plaintiff dismisses his complaint prior to the entry of an order based on laches and the statute of limitations, the original complaint is considered only voidable.\textsuperscript{184} Although plaintiff perfected service of the first complaint late in \textit{Fine}, the defenses asserted in the renewal action could not bar plaintiff's renewed complaint inasmuch as plaintiff promptly effected service in the renewal action.\textsuperscript{185} Since plaintiff's first suit was valid, albeit voidable, he had the right to dismiss and refile under O.C.G.A. section 9-2-61.\textsuperscript{186} Belated or delayed service after the expiration of the statute of limitations may constitute laches and warrant the trial court's dismissal of the action.

Because such a dismissal is in the discretion of the trial court, until and unless the trial court enters an order dismissing that action it is merely voidable rather than void. \textsuperscript{187} Service thus related back to the date of filing, thereby preventing the suit from being barred by the statute of limitation.

Counsel for plaintiff should carefully consider the tactical decision to voluntarily dismiss their client's complaint if they have delayed in perfecting service after the statute of limitations has expired. If plaintiff's counsel voluntarily dismisses, refiles within six months, and promptly accomplishes service, the defenses of statute of limitations and laches should not be issues.

\textsuperscript{180.} \textit{Id.}
\textsuperscript{181.} \textit{Id.}
\textsuperscript{182.} \textit{Id.}
\textsuperscript{183.} \textit{Id.}
\textsuperscript{184.} \textit{Id.}
\textsuperscript{185.} \textit{Id.} at 277, 410 S.E.2d at 823.
\textsuperscript{186.} \textit{Id.} at 276, 410 S.E.2d at 823.
\textsuperscript{187.} \textit{Id.}