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Business Associations

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I. INTRODUCTION

This Article surveys noteworthy cases in the area of corporate, limited liability company, partnership, agency, and joint venture law decided between June 1, 2010 and May 31, 2011, by the Georgia Supreme Court, the Georgia Court of Appeals, the United States Court of Appeals for the Eleventh Circuit, and the United States District Courts located in Georgia.[1] In addition, this Article provides an overview of important enactments during the 2011 session of the Georgia General Assembly to the Official Code of Georgia Annotated (O.C.G.A.) with respect to banking, finance, contracts, corporation, partnership, and business associations statutes.

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1. For an analysis of Georgia business associations law during the prior survey period, see Paul A. Quirós et al., *Business Associations, Annual Survey of Georgia Law*, 62 MERCER L. REV. 41 (2010).

II. CORPORATIONS

A. *Issues of First Impression*

1. Court of Appeals Holds that a Dissolved Corporation Could Not Initiate a Negligence Action After Expiration of Statutory Period for Asserting Claims. In *GC Quality Lubricants, Inc. v. Doherty, Duggan & Rouse Insurors,*[2] the Georgia Court of Appeals examined an issue of first impression in Georgia–whether a dissolved corporation may initiate a negligence action after the expiration of the statutory period for asserting the claims of a dissolved corporation.[3] On February 11, 2005, GC Quality Lubricants, Inc. (GC) claimed an electrical storm damaged its office equipment. On July 9, 2005, the Georgia Secretary of State (the secretary) administratively dissolved GC because GC had failed to pay its annual fees. On February 15, 2008, GC filed suit against Doherty, Duggan & Rouse Insurors and Georgia Power Company (the defendants). GC asserted that it was a Georgia corporation and alleged that the defendants were liable for the damaged office equipment. Almost four years after its dissolution, on April 28, 2009, the secretary granted GC's application for reinstatement of the dissolved corporation.[4]

In March 2008, the defendants filed a motion for summary judgment based on O.C.G.A. § 14-2-1410,[5] the two-year survival statute that allows a dissolved corporation to assert claims.[6] The defendants argued that the two years for GC to assert a claim had expired on July 9, 2007, two years after the secretary dissolved GC on July 9, 2005.[7] In its response to the motion, GC argued that the language of O.C.G.A. § 14-2-1422(d)[8] controlled; thus, GC's lawsuit was validly filed due to the secretary's reinstatement.[9] Pursuant to O.C.G.A. § 14-2-1422(d), "[w]hen the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the

2. 304 Ga. App. 767, 697 S.E.2d 871 (2010).
3. *Id.* at 769, 697 S.E.2d at 872.
4. *Id.* at 767-68, 697 S.E.2d at 871-72.
5. O.C.G.A. § 14-2-1410 (2003).
6. *GC Quality Lubricants,* 304 Ga. App. at 768, 697 S.E.2d at 872; *see also* O.C.G.A. § 14-2-1410.
7. *GC Quality Lubricants,* 304 Ga. App. at 768, 697 S.E.2d at 872.
8. O.C.G.A. § 14-2-1422(d) (2003 & Supp. 2011).
9. *GC Quality Lubricants,* 304 Ga. App. at 768, 697 S.E.2d at 872.

corporation resumes carrying on its business as if the administrative dissolution had never occurred."[10]

In relying on O.C.G.A. § 14-2-1410, the trial court granted the defendants' motion for summary judgment because a lawsuit filed by a corporation while it is administratively dissolved must be within two years of dissolution to be valid.[11] Further, the trial court found that the four-year statute of limitation for the property damage claims had expired on February 11, 2009, before GC was reinstated or filed a valid lawsuit.[12] In rejecting GC's interpretation of O.C.G.A. § 14-2-1422(d), the trial court noted such an understanding of that statute would render the two-year survival statute, O.C.G.A. § 14-2-1410, meaningless.[13]

In affirming the trial court's decision, the court of appeals stated the issue on appeal was whether a lawsuit for which a corporation lacked capacity to file at the time of its filing was rendered valid by the secretary's reinstatement of that corporation.[14] The court of appeals determined the lawsuit was a legal nullity since GC lacked capacity to bring the action after the running of the two-year survival statute.[15] Thus, "there was no lawsuit to validate, amend, or revise" upon GC's reinstatement in April 2009.[16] Further, the court of appeals stated that the running of the four-year statute of limitation before GC obtained reinstatement resulted in GC's failure to bring a valid lawsuit for the property damage claims.[17] The court of appeals stated that holding otherwise would improperly extend the four-year statute of limitation.[18]

The decision in *GC Quality Lubricants* is important because it serves as a reminder to Georgia corporations and the counsel that serve them of the importance of both maintaining the corporation's status with the secretary as well as keeping track of the statutes of limitations for potential claims.

2. Court of Appeals Opines that Statute Permitting a Corporation to Limit Minority Shareholders' Right of Inspection Abrogates Any Common Law Right of Inspection. In *Mannato v.*

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10. O.C.G.A. § 14-2-1422(d).
11. *GC Quality Lubricants,* 304 Ga. App. at 768, 697 S.E.2d at 872; *see also* O.C.G.A. § 14-2-1410.
12. *GC Quality Lubricants*, 304 Ga. App. at 768, 697 S.E.2d at 872.
13. *Id.*
14. *Id.* at 769, 697 S.E.2d at 872.
15. *Id.* at 770, 697 S.E.2d at 873.
16. *Id.*
17. *Id.*
18. *Id.*

SunTrust Banks, Inc.,[19] the court of appeals, in another case of first impression, ruled that a Georgia statute permitting corporations to limit shareholder access to its corporate records replaced any common law right a shareholder had to inspect corporate records.[20] In March of 2008, Edward Mannato asked SunTrust Banks, Inc. (SunTrust) to take legal action against its officers and directors for breach of fiduciary duty in connection with the housing market collapse. In a written response to Mannato, SunTrust's board of directors denied the request. SunTrust informed Mannato that, following an independent investigation by a special committee and independent counsel, it determined Mannato's claims had no factual basis, and litigation against its officers and directors would not be in the best interest of SunTrust.[21]

Mannato then attempted to use his position as a shareholder of SunTrust to inspect and copy SunTrust's books and records.[22] Because Mannato's shares of SunTrust's totaled less than two percent, SunTrust's counsel refused the demand pursuant to O.C.G.A. § 14-2-1602(e)[23] and SunTrust's own bylaws.[24] In an effort to enjoin SunTrust from continuing its refusal to allow him access, Mannato filed a complaint in equity. SunTrust moved to have the complaint dismissed because only a shareholder owning more than two percent of SunTrust's shares was permitted access to its books and records.[25] In granting SunTrust's motion to dismiss, the trial court concluded that "[O.C.G.A.] § 14-2-1602(e) permits corporations to limit the right to inspect certain corporate records and books to shareholders owning more than two percent of the corporation's outstanding shares."[26]

On appeal, Mannato argued that the enactment of O.C.G.A. § 14-2-1602(e) did not abrogate the Georgia common law right of all shareholders to inspect corporate books and records.[27] After reviewing documentation from the legislative session in which O.C.G.A. § 14-2-1602(e) was passed, the court of appeals disagreed with Mannato, determining that "the General Assembly intended to supersede any common law rights of

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19. 308 Ga. App. 691, 708 S.E.2d 611 (2011).
20. *Id.* at 693, 708 S.E.2d at 612-13; *see also* O.C.G.A. § 14-2-1602(e) (2003 & Supp. 2011).
21. *Mannato*, 308 Ga. App. at 691, 708 S.E.2d at 612.
22. *Id.* at 691-92, 708 S.E.2d at 612.
23. O.C.G.A. § 14-2-1602(e) (Supp. 2011).
24. *Mannato*, 308 Ga. App. at 692, 708 S.E.2d at 612.
25. *Id.*
26. *Id.*
27. *Id.*

inspection with the passage of [the statute]."[28] Holding otherwise, the court concluded, would render O.C.G.A. § 14-2-1602(e) meaningless.[29]

B. Shareholder Rights

1. A Shareholder May Only Bring a Direct Action Against Shareholders Instead of a Derivative Action Against a Closely Held Corporation in the Case of a Special Injury or When the Reasons for Bringing a Derivative Action Do Not Apply. In *Barnett v. Fullard*,[30] the court of appeals held that a shareholder lacked standing to bring his claims in a direct action against individual shareholders, instead of a derivative action against the corporation.[31] Stephen Barnett, a minority shareholder in Earthwise Industries, Inc. (Earthwise), a closely held Georgia corporation, brought suit against Earthwise and its three corporate directors–Andrew Fullard, Adena Fullard, and Jane Hix (collectively, Fullard)–who also comprised the majority shareholders of Earthwise. Subsequently, Barnett voluntarily dismissed Earthwise as a defendant and pursued his lawsuit against Fullard.[32] Barnett alleged that Fullard

> refus[ed Barnett's] demand to inspect corporate records[,] . . . misappropriated corporate assets for [defendants'] personal use and for a rival business solely controlled by one of the defendants[,] . . . inappropriately altered the corporate books and records to disguise the misappropriations[,] and . . . failed to account for corporate income attributed to [Barnett] in corporate tax filings or distribute the income to [Barnett].[33]

Fullard filed a motion to dismiss based on a failure to state a claim, arguing that a direct action against the individuals was inappropriate. Agreeing with Fullard, the trial court granted Fullard's motion and

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28. *Id.* at 693, 708 S.E.2d at 612-13. Documentation of that legislative session showed that proponents of O.C.G.A. § 14-2-1602(e) sought to prevent "harassment of corporations by shareholders who own relatively small interests" in the hopes of keeping Georgia a "probusiness state." *Id.* at 693, 708 S.E.2d at 612 (internal quotation marks omitted); K. Barfield, Recent Development, *Corporations, Partnerships, and Associations*, 5 GA. ST. U. L. REV. 285, 298-300 (1988).

29. *Mannato*, 308 Ga. App. at 693, 708 S.E.2d at 613.

30. 306 Ga. App. 148, 701 S.E.2d 608 (2010).

31. *Id.* at 148, 701 S.E.2d at 610. However, the court of appeals held that a direct action could be pursued against shareholder defendants when those defendants fail to account for and pay corporate income. *Id.*

32. *Id.* at 149, 701 S.E.2d at 610.

33. *Id.*

dismissed Barnett's complaint.[34] The court of appeals, in affirming the trial court's ruling on every claim except one,[35] determined that Barnett should have brought all such claims in a derivative action against the corporation, not in a direct action against the defendants as individuals.[36]

A shareholder has standing to bring a direct action only if the shareholder can allege either "a special injury separate and distinct from that suffered by other shareholders"[37] or that the reasons for requiring a derivative action are inapplicable.[38] Because Barnett failed to allege a special injury separate and distinct from other shareholders, the court looked closely at whether the general rule requiring a derivative suit applied in this situation.[39] The general reasons for requiring derivative suits are as follows:

> (1) to prevent multiple suits by shareholders; (2) to protect corporate creditors by ensuring that the recovery goes to the corporation; (3) to protect the interest of all the shareholders by ensuring that the recovery goes to the corporation, rather than allowing recovery by one or a few shareholders to the prejudice of others; and (4) to adequately compensate injured shareholders by increasing their share values.[40]

The court of appeals noted that because this suit did not include all of the Earthwise shareholders, a possibility of multiple lawsuits existed with a possible prejudice to the nonparty shareholders.[41] The closely held corporation exception[42] to derivative lawsuits was therefore inapplicable in this case, and the court of appeals affirmed the trial court's dismissal of the remaining claims.[43]

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34. *Id.* at 149, 701 S.E.2d at 610-11.

35. *See id.* at 154, 701 S.E.2d at 614. The court of appeals determined that Barnett alleged a "special injury" as to that claim and, thus, had standing to bring that claim in a direct action. *Id.*

36. *Id.* at 150-54, 701 S.E.2d at 611-13.

37. Rosenfeld v. Rosenfeld, 286 Ga. App. 61, 64, 648 S.E.2d 399, 403 (2007) (quoting Stoker v. Bellemeade, LLC, 272 Ga. App. 817, 822, 615 S.E.2d 1, 7 (2005)).

38. *Id.* (quoting Sw. Health & Wellness, LLC v. Work, 282 Ga. App. 619, 626, 639 S.E.2d 570, 577 (2006)).

39. *Barnett*, 306 Ga. App. at 152-53, 701 S.E.2d at 612-13.

40. Sw. Health & Wellness, LLC v. Work, 282 Ga. App. 619, 626, 639 S.E.2d 570, 577 (2006).

41. *Barnett*, 306 Ga. App. at 153, 701 S.E.2d at 613.

42. This exception applies when the corporation is closely held and the reasons for requiring a derivative action do not apply. *Id.* (quoting *Sw. Health*, 282 Ga. App. at 626, 639 S.E.2d at 577).

43. *Id.* at 153-54, 701 S.E.2d at 613.

2. Georgia Court of Appeals Determined Oral Agreement Between Parties Constituted a Waiver of Contradictory Buyout Provisions in Shareholder Agreement. In *Ansley v. Ansley*,[44] the court of appeals ruled against the administrator of a shareholder's estate seeking to enforce the provisions of a shareholders agreement between the deceased and two other shareholders.[45] In so ruling, the court determined that a trier of fact could have found the oral agreement between the shareholders, including the deceased, constituted a waiver of the deceased shareholder's right to the buyout provision of the written shareholders agreement.[46]

In 1992, Jeffrey, Michelle, and Kevin Ansley (the Ansleys) acquired Ansley & Sutton Construction Company, Inc. (A&S), each becoming one-third shareholders. The same day, the Ansleys and A&S entered into an addendum (the 1992 Shareholders Agreement) to the shareholders agreement signed by A&S and its two original shareholders in 1987 (the 1987 Shareholders Agreement).[47] Under the 1992 Shareholders Agreement, the three shareholders agreed to be bound by the terms of the 1987 Shareholders Agreement, which contained a buyout provision for the stock of a deceased shareholder.[48] In 1994, one of the shareholders, Jeffrey, executed a will bequeathing his shares in A&S to the other two shareholders, both of whom expressed their desire to execute wills with a similar provision, although only Michelle did so. In January 2008, the three shareholders all signed minutes to express their desire that A&S remain viable. To ensure the company's viability, the Ansleys agreed to update their wills by December 2008 to provide that no spouse or child would possess an interest in A&S (the 2008 Shareholders Agreement). However, Kevin died in August 2008 without a will.[49]

The administrator sued A&S and the other two shareholders for failing to adhere to the buyout provisions of the 1987 Shareholders Agreement, as adopted by the 1992 Shareholders Agreement.[50] A&S, Jeffrey, and Michelle claimed that the 1992 Shareholders Agreement was no longer valid, relying on O.C.G.A. § 14-2-732(b)(3),[51] "which provides that an agreement authorized by that [c]ode section is valid for

44. 307 Ga. App. 388, 705 S.E.2d 289 (2010).
45. *Id.* at 388, 705 S.E.2d at 291.
46. *Id.* at 393, 705 S.E.2d at 294.
47. *Id.* at 389, 705 S.E.2d at 291-92.
48. *Id.*
49. *Id.* at 389-90, 705 S.E.2d at 292.
50. *Id.* at 390, 705 S.E.2d at 292.
51. O.C.G.A. § 14-2-732(b)(3) (2003).

no more than [twenty] years."[52] Further, they alleged that because the original shareholders agreement adopted in 1987 was silent as to its expiration, its terms, as adopted by the 1992 Shareholders Agreement, expired in 2007.[53] The court of appeals disagreed, refusing to alter the 1987 agreement by adding a material term when the agreement was later adopted by different parties.[54]

However, the court of appeals did rule in the defendants' favor in asserting that the oral agreement to make a will could not fall within the parol evidence rule because it was independent of and distinct from the written 2008 Shareholders Agreement.[55] Further, the court of appeals asserted that sufficient evidence existed to establish that, instead of following the buyout provisions of the 1992 Shareholders Agreement, all of the current shareholders intended to devise their shares.[56] Thus, it was possible for a trier of fact to conclude that Kevin waived his rights to the buyout provisions under the 1992 Shareholders Agreement when assenting to the oral agreement to devise his shares in a different manner.[57]

This case stands as a reminder of the importance of reviewing and updating shareholders agreements, especially when time has passed and new agreements have been reached by the shareholders that may be contrary to the signed agreements. Additionally, the twenty-year term of a shareholder agreement, as set forth in O.C.G.A. § 14-2-732(b)(3), should be managed by the clients and counsel appropriately.

3. Georgia Court of Appeals Determines a Professional Corporation Must Follow Statutory Provisions Regarding Making a Valid Offer of Payment for Redemption of Shares. In *Rakusin v. Radiology Associates, P.C.*,[58] the court of appeals overturned the trial court's grant of partial summary judgment to the defendant based on its finding that there was no valid offer of payment for a deceased shareholder's shares.[59] The plaintiff, Lee A. Rakusin, was "the personal representative and execut[or] of the estate of her late husband," an employee and stockholder of the defendant, Radiology

52. *Ansley*, 307 Ga. App. at 390, 705 S.E.2d at 292; *see also* O.C.G.A. § 14-2-732(b)(3).
53. *Ansley*, 307 Ga. App. at 390-91, 705 S.E.2d at 292.
54. *Id.* at 391, 705 S.E.2d at 292-93.
55. *Id.* at 392, 705 S.E.2d at 294.
56. *Id.* at 393, 705 S.E.2d at 294.
57. *Id.* "Waiver of a contract right may result from a party's conduct showing his election between two inconsistent rights." Kusuma v. Metametrix, Inc., 191 Ga. App. 255, 257, 381 S.E.2d 322, 324 (1989) (citation omitted) (internal quotation marks omitted).
58. 305 Ga. App. 175, 699 S.E.2d 384 (2010).
59. *Id.* at 175, 699 S.E.2d at 385.

Associates of Atlanta, P.C. (Radiology Associates).[60] The record established that "[t]he decedent's shares were not subject to any article of incorporation, bylaw provision, or contractual agreement providing for the redemption . . . of [those] shares . . . ."[61] Thus, O.C.G.A. § 14-7-5(c)[62] of the Georgia Professional Corporation Act[63] applied, which states that if the corporation and executor of the shareholder's estate have failed to reach an agreement "on the terms of valuation and payment for the decedent's shares, 'the fair value of the . . . shares shall be determined and paid'" as if O.C.G.A. § 14-2-1327[64] (dissenters' rights) applies.[65] The dissenters rights' sections provide for the start of the valuation process upon a professional corporation making an offer of payment.[66]

At issue in *Rakusin* was whether Radiology Associates' offer of payment was validly made.[67] Radiology Associates sent the executor two checks dated February 28, 2007, one noted as "1500 Shares of RAA Stock Repurchase," and the other noted as "Accounts Receivable Buy-Out."[68] The executor did not cash either check.[69] In a letter sent on August 15, 2007 (the August 15 letter), by the attorney for Radiology Associates to the executor's attorney, Radiology Associates stated that the two checks sent to the executor amounted to the fair value of her late husband's shares in Radiology Associates and that she "had the right to respond by making a demand for payment under [O.C.G.A.] § 14-2-1327."[70] The attorney for Radiology Associates enclosed a copy of the dissenters' rights provision of the Georgia Business Corporation Code with the August 15 letter.[71] The executor's attorney responded with a letter on September 25, 2008 (the September 25 letter), in which the executor estimated a higher fair value of the decedent's shares and demanded payment of that amount.[72] The letter further claimed that Radiology Associates failed to comply with the provisions in O.C.G.A.

60. *Id.*
61. *Id.* at 176, 699 S.E.2d at 386.
62. O.C.G.A. § 14-7-5(c) (2003).
63. O.C.G.A. tit. 14, ch. 7 (2003 & Supp. 2011).
64. O.C.G.A. § 14-2-1327 (2003).
65. *Rakusin*, 305 Ga. App. at 176, 699 S.E.2d at 386 (alteration in original); *see also* O.C.G.A. § 14-7-5(c).
66. *Rakusin*, 305 Ga. App. at 176, 699 S.E.2d at 386; *see also* O.C.G.A. §§ 14-2-1325, 1327 (2003).
67. *See Rakusin*, 305 Ga. App. at 175, 699 S.E.2d at 385.
68. *Id.* at 176, 699 S.E.2d at 386 (internal quotation marks omitted).
69. *Id.* at 177, 699 S.E.2d at 386.
70. *Id.*
71. *Id.*
72. *Id.*

§ 14-2-1325[73] and that the executor was making a timely demand for payment.[74] Radiology Associates' attorney denied this claim, maintaining that the demand for payment was not timely and was not a fair value estimate of the decedent's shares.[75] Radiology Associates then commenced this action to determine the value of the shares, asserting that "the execut[or]'s failure to respond to [Radiology Associates'] offer within the 30-day statutory deadline barred [the executor's] claims for payment in excess of the amount [Radiology Associates] had offered."[76]

The executor argued, and the court of appeals agreed, that the checks sent by Radiology Associates in February 2007 did not constitute a valid offer of payment because O.C.G.A. § 14-2-1325(b) clearly states that "an offer of payment 'must be accompanied by' certain information and documents."[77] Therefore, Radiology Associates' sending of the two checks in February 2007 without the required documentation (until the August 15 letter) did not meet the statutory requirements for a valid offer of payment under the plain language of O.C.G.A. § 14-2-1325(b).[78] The court of appeals declined to accept Radiology Associates' argument that a substantial compliance standard should apply to O.C.G.A. § 14-2-1325 because the requirements of the statute are such that the failure to adhere to them (that is, failure to include certain information and documents) invalidates the offer of payment.[79] The court also rejected Radiology Associates' argument that the August 15 letter constituted a valid offer of payment because that letter did not contain an offer but merely referenced the checks sent in February 2007.[80] The court decided the August 15 letter was nothing more than a late attempt by Radiology Associates to supply the information required at the time Radiology Associates sent the two checks.[81] Thus, Radiology Associates' failure to comply with O.C.G.A. § 14-2-1325 freed the executor from being bound by the thirty-day statutory demand period.[82] Therefore, her demand for payment in the September 25 letter was not untimely.[83]

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73. O.C.G.A. § 14-2-1325 (2003).
74. *Rakusin*, 305 Ga. App. at 177, 699 S.E.2d at 386.
75. *Id.* at 177, 699 S.E.2d at 386-87.
76. *Id.* at 177, 699 S.E.2d at 387.
77. *Id.* at 178, 699 S.E.2d at 387; *see also* O.C.G.A. § 14-2-1325(b).
78. *Rakusin*, 305 Ga. App. at 178, 699 S.E.2d at 387.
79. *Id.* at 180-81, 699 S.E.2d at 389.
80. *Id.* at 181, 699 S.E.2d at 389.
81. *Id.*
82. *Id.*
83. *Id.*

C. Corporate Formalities

1. Piercing the Corporate Veil. In its denial of summary judgment for the defendants in *Guarantee Insurance Co. v. Merchants Employer Benefits, Inc.*,[84] the United States District Court for the Middle District of Georgia determined that genuine issues of material fact existed as to whether Jimmy Selph, the sole owner of Merchants Employer Benefits, Inc. (Merchants), used Merchants as an alter ego without due regard for its separate corporate identity.[85]

A plaintiff seeking to pierce the corporate veil under Georgia law must show three things:

> [(1)] that the stockholders' disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; [(2)] that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and [(3) that] to adhere to the doctrine of the corporate entity would promote injustice or protect fraud.[86]

The district court determined the evidence submitted by the plaintiff, Guarantee Insurance Company (Guarantee), in support of its piercing claim, was sufficient to create a genuine issue of material fact.[87] Further, a reasonable jury could find that Selph used Merchants, along with the other corporations he solely owned, for his own personal affairs, often using money from one corporation as reimbursement for expenses or repayment of loans to the other corporations.[88] Selph also used the premium payments from clients of Merchants to finance a new business.[89] All of these factors led the district court to deny Merchants's and Selph's motions for summary judgment, concluding that a jury could determine that Selph ignored the Merchants's separate corporate identity, using it instead "as an instrumentality to transact his own affairs, in such a way as to defeat justice or evade contractual responsibilities."[90]

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84. No. 5:07-cv-307(CAR), 2010 WL 3937325 (M.D. Ga. Sept. 30, 2010).
85. *Id.* at *1, *11.
86. Derbyshire v. United Builders Supplies, Inc., 194 Ga. App. 840, 844, 392 S.E.2d 37, 40 (1990) (quoting TransAmerican Commc'ns v. Nolle, 134 Ga. App. 457, 460, 214 S.E.2d 717, 719 (1975)).
87. *Guarantee Ins. Co.*, 2010 WL 3937325, at *10.
88. *Id.* at *11.
89. *Id.*
90. *Id.* Despite losing their motions for summary judgment on the piercing claim, Merchants and Selph were granted summary judgment on Guarantee's responsible

2. The Georgia Court of Appeals Ruled that the Parent Company Was Not Liable for Its Subsidiaries' Alleged Negligence. The importance of adhering to corporate formalities in order to preserve the separate identities of corporations was apparent in *Ramcke v. Georgia Power Co.*,[91] in which the court of appeals affirmed the superior court's decision to grant a directed verdict in favor of the defendants, Georgia Power, Southern Company Services, Inc., and Southern Company.[92] The plaintiff, Edna Ramcke, alleged all three defendants were liable for the death of Robert Podorsky, who died after being struck by a piece of equipment while working on a project site owned by Georgia Power.[93]

Georgia Power, a subsidiary of Southern Company that owned the premises where the accident occurred, entered into an independent contractor relationship with the company that operated the equipment. Another subsidiary of Southern Company, Southern Company Services, designed the project and drafted the contract between the independent contractor and Georgia Power.[94] Ramcke brought a premises liability claim against all three defendants, alleging that all three occupied the project premises as part of "a joint venture, or as . . . agents of one another, to enforce the contract" with the independent contractor.[95]

The trial court determined, and the court of appeals affirmed, that there was no evidence that Southern Company, the parent company of the other two defendants, owned or occupied the project premises and that it was not liable for alleged negligent actions on the premises taken by its corporate subsidiaries.[96] The court of appeals, like the trial courts, also determined there was no evidence that Southern Company exercised any control over work on the project.[97] Furthermore, because Georgia Power and Southern Company Services, Inc. were subsidiaries with legal identities separate from their parent corporation, the court of

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corporate officer claim. *Id.* at *12. Guarantee sought to impose personal liability on Selph as the corporate officer responsible for Merchants's breach of contract with Guarantee. *Id.* The district court ruled, however, that "[t]he 'responsible corporate officer' theory is applied only in tort cases," where a corporation's officer who personally takes part in a tort committed by the corporation may be held personally liable. *Id.* Thus, the court was not inclined to broaden the application of the theory to breach of contract cases. *See id.*

91. 306 Ga. App. 736, 703 S.E.2d 13 (2010).
92. *Id.* at 736, 703 S.E.2d at 14-15.
93. *Id.* at 736, 703 S.E.2d at 14.
94. *Id.* at 737, 703 S.E.2d at 15.
95. *Id.*
96. *Id.* at 738, 703 S.E.2d at 16.
97. *Id.*

appeals held that Southern Company was not liable for their alleged negligence.[98] Southern Company could, however, be liable for the negligence of its subsidiaries under a theory of "(1) piercing the corporate veil; (2) apparent or ostensible agency; or (3) joint venture," but because the plaintiff asserted no evidence to support a piercing, agency, or joint venture claim, the court of appeals determined the trial court did not err in directing a verdict in its favor.[99]

III. LIMITED LIABILITY COMPANIES

A. *Merger Clause in Operating Agreement Bars Member from Bringing Tort Claims Regarding Negotiations of Operating Agreement Provisions*

In *Giacomantonio v. Romagnoli*,[100] the court of appeals held that the involuntary withdrawal provisions in a limited liability company's operating agreements were enforceable against a member, and the presence of a merger clause in the agreements barred the member from bringing tort claims against the other members for precontract discussions of the provisions in the operating agreement.[101] The court found the undisputed record revealed that while going through a divorce in 2003, Mirko di Giacomantonio, one of the owners of three separate companies with Sandro Romagnoli and Irven Penn, sold his interest in two of the companies to Romagnoli and Penn to prevent his wife from obtaining an ownership interest in those two companies. In the settlement agreement between Giacomantonio and his wife made as part of the divorce, Giacomantonio agreed that if he should acquire an ownership interest in the two companies within three years of the final judgment and decree of divorce (February 28, 2005), his wife would be entitled to half of that interest.[102]

In 2007, Giacomantonio, Romagnoli, and Penn restructured the ownership of the three companies such that all three men became part-owners and each became a part-owner of three new limited liability companies (LLCs), each subject to a separate operating agreement

98. *Id.*

99. *Id.* at 739, 703 S.E.2d at 16 (quoting Matson v. Noble Inv. Grp., LLC, 288 Ga. App. 650, 658, 655 S.E.2d 275, 282 (2007)). The court of appeals also upheld the trial court's directed verdict in favor of Georgia Power and Southern Company Services on the premises liability claim. *Id.* at 739-40, 703 S.E.2d at 16-17.

100. 306 Ga. App. 26, 701 S.E.2d 510 (2010).

101. *Id.* at 26, 32, 701 S.E.2d at 512, 515-16.

102. *Id.* at 27-28, 701 S.E.2d at 512-13.

executed by all three men.[103] The operating agreements provided that "a member could be involuntarily withdrawn from the LLC" upon the entering of a final divorce decree that required the owner to transfer an ownership interest in the LLC to his spouse.[104] The operating agreements also contained merger clauses, "which provided that the agreement[s] 'constitute[d] the complete . . . agreement among the members' and . . . 'supersede[d] all prior . . . statement[s] . . . .'"[105]

A few months after signing the operating agreements, Romagnoli and Penn notified Giacomantonio that his divorce decree from 2005 (which required providing his ex-wife an interest in any ownership acquired within three years of the final divorce decree) triggered the involuntary withdrawal provisions in the operating agreements because the divorce decree entitled his wife to an ownership interest in the two companies he sold prior to the divorce. Giacomantonio then filed suit against Romagnoli and Penn, alleging that the two men had committed fraud and breach of fiduciary duty by misrepresenting the provisions of the operating agreements to him.[106] The trial court ruled in favor of Romagnoli and Penn, and the court of appeals affirmed.[107]

The court of appeals found the operating agreements valid and enforceable, barring Giacomantonio's tort claims because the operating agreements contained merger clauses.[108] The court referenced *Ekeledo v. Amporful*,[109] in which the Georgia Supreme Court asserted that a party's claim of fraud will fail when that party affirms a contract with a merger clause and retains the benefits because "[that party] is estopped from asserting that [it] relied upon the other party's misrepresentation[s]" when entering the contract.[110] This bars all tort claims based upon the alleged precontract misrepresentations, "including claims for breach of fiduciary duty."[111] Giacomantonio's election to affirm the operating agreements and all of the benefits thereof also affirmed the merger clauses contained in the agreements, barring him from asserting any tort claims for any precontract representations that contradicted the provisions in the operating agreement.[112]

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103. *Id.* at 28, 701 S.E.2d at 513.
104. *Id.*
105. *Id.* (second and third alteration in original).
106. *Id.* at 29, 701 S.E.2d at 513.
107. *Id.* at 35, 701 S.E.2d at 516.
108. *Id.* at 31-32, 701 S.E.2d at 515-16.
109. 281 Ga. 817, 642 S.E.2d 20 (2007).
110. *Giacomantonio*, 306 Ga. App. at 31, 701 S.E.2d at 515 (third alteration in original) (quoting *Ekeledo*, 281 Ga. at 819, 642 S.E.2d at 22).
111. *Id.* at 32, 701 S.E.2d at 515.
112. *Id.* at 32, 701 S.E.2d at 515-16.

B. Georgia Court of Appeals Holds that Dissolution of a Limited Liability Company is Proper Where the Members Are Unable to Operate the Business in Conformity with the Company's Operating Agreement

In *Simmons Family Properties, LLLP v. Shelton*,[113] the court of appeals affirmed the judgment of the trial court granting the plaintiffs' petition to dissolve DDE Properties, LLC (DDE).[114] DDE was formed in 2005 by Donnie Shelton, Edward G. Johnson, and Simmons Family Properties, LLLP (SFP) and governed by an operating agreement that granted each owner an equal one-third interest in DDE.[115] In 2008, Shelton and Johnson filed a petition to dissolve DDE pursuant to O.C.G.A. § 14-11-603,[116] which provides that the court may grant a member's application to dissolve a company "whenever it is not reasonably practicable to carry on the company's business in conformity with the articles of organization or a written operating agreement."[117] Shelton and Johnson alleged that because the sole manager of SFP, Danny Simmons, never called an annual meeting, as required by DDE's operating agreement, and failed to attend the special meeting called by Johnson and Shelton to achieve a quorum, "it was not reasonably practicable to carry on [DDE's] business."[118] SFP opposed the petition for dissolution and filed a motion to compel arbitration to handle the dissolution issue pursuant to DDE's operating agreement.[119]

The trial court rejected the motion to compel arbitration, and the court of appeals affirmed.[120] The court of appeals ruled that, although the operating agreement contained an arbitration provision for disputes "aris[ing] out of, in connection with[,] or relat[ing] to the terms of the operating agreement[,]" it did not apply in this petition because Johnson and Shelton pursued a different means of obtaining dissolution (via O.C.G.A. § 14-11-603), rather than the method discussed in the operating agreement.[121] Thus, the arbitration provision did not apply, and the court could determine the petition for dissolution.[122]

113. 307 Ga. App. 361, 705 S.E.2d 258 (2010).
114. *Id.* at 361, 705 S.E.2d at 259.
115. *Id.*
116. O.C.G.A. § 14-11-603 (2003 & Supp. 2011).
117. *Simmons Family Props.*, 307 Ga. App. at 361-62, 705 S.E.2d at 259; *see also* O.C.G.A. § 14-11-603.
118. *Simmons Family Props.*, 307 Ga. App. at 362, 705 S.E.2d at 259.
119. *Id.*
120. *Id.*
121. *Id.* at 363-64, 705 S.E.2d at 260.
122. *Id.* at 364, 705 S.E.2d at 260.

In affirming the trial court's decision to grant the petition for dissolution, the court of appeals rejected SFP's argument that the lack of meetings constituted merely a technical violation of the operating agreement and did not prevent the company from carrying on its business.[123] Because annual meetings are the opportunity for members to have their voices heard and contribute to the direction of the company, the lack of meetings constituted "more than a formality" and contributed to the current deadlock among the members of DDE.[124] As a result, the trial court determined, and the court of appeals affirmed, that it was "not reasonably practicable for DDE to carry on business in conformity with the operating agreement" and, therefore, granted the petition to dissolve DDE.[125]

IV. PARTNERSHIPS

A. Foreign Limited Liability Partnership Must Qualify to Do Business in Georgia in Order to Bring a Suit in Georgia Courts

In *Westmoreland v. Jordan Partners, LLLP,*[126] the court of appeals held that a foreign limited liability partnership could not maintain its action because it failed to obtain a certificate of authority to transact business in Georgia.[127] Jordan Partners LLLP (Jordan Partners), an Arizona limited liability limited partnership, brought an action against Michael Westmoreland for installing utility lines across the property of Jordan Partners without its permission. The trial court ruled in Jordan Partners favor.[128] Westmoreland argued that its motion to dismiss should have been granted because Jordan Partners was a foreign limited liability partnership not authorized to transact business in Georgia and, thus, could not maintain this suit.[129]

The court of appeals agreed with Westmoreland and reversed the trial court's decision.[130] Pursuant to O.C.G.A. § 14-8-54(a)[131] "[a] foreign limited liability partnership transacting business in [Georgia] may not maintain an action, suit, or proceeding in a [Georgia] court . . . until it is authorized to transact business in [Georgia]" by obtaining a certificate

123. *Id.* at 364-65, 705 S.E.2d at 260-61.
124. *Id.* at 365, 705 S.E.2d at 261 (internal quotation marks omitted).
125. *Id.*
126. 306 Ga. App. 575, 703 S.E.2d 39 (2010).
127. *Id.* at 575-76, 703 S.E.2d at 40-41; *see also* O.C.G.A. § 14-8-54(a) (2003).
128. *Westmoreland*, 306 Ga. App. at 575, 703 S.E.2d at 40.
129. *Id.*
130. *Id.*
131. O.C.G.A. § 14-8-54(a) (2003).

of authority.[132] The trial court relied on *Health Horizons, Inc. v. State Farm Mutual Automobile Insurance Co.*[133] as authority for denying Westmoreland's motion to dismiss.[134] In *Health Horizons*, the court of appeals did not grant a motion to dismiss because although a foreign corporation had failed to obtain a certificate of authority at the time it filed the complaint, it had obtained a certificate by the time the motion to dismiss was filed.[135] However, in *Westmoreland*, Jordan Partners still did not have a certificate of authority at the time the motion to dismiss was filed.[136] Jordan Partners argued that because it was not "transacting business" in Georgia, it did not need to obtain a certificate of authority.[137] The trial court disagreed, finding that Jordan Partners was transacting business; however, the court did not grant the motion to dismiss.[138] The court of appeals reversed, holding that, while the trial court was correct in determining Jordan Partners was transacting business in Georgia, it erred in disregarding the statute by denying Westmoreland's motion to dismiss.[139]

B. A Court Will Not Grant a Petition for Dissolution of a Limited Partnership Simply Because the Petitioner Cannot Obtain Management Control of the Partnership from the Other Partners

In *Valone v. Valone*,[140] the United States District Court for the Northern District of Georgia granted the defendant's motion to dismiss plaintiff's petition for dissolution.[141] The plaintiff, Thomas Valone (Thomas), sought the dissolution of Bomeg Limited Partnership (Bomeg), of which he was a general partner, along with his two siblings and the two trusts established by his parents for which his siblings were the trustees (the siblings and trusts together constituting the defendants in this case). Each trust held a forty-nine percent interest in Bomeg, and the three siblings each held a two-thirds of one percent interest. Thomas petitioned the district court to dissolve Bomeg under Georgia law because Bomeg had not made an annual profit distribution since 2004, but Thomas continued to incur tax liability with no hope of

132. *Westmoreland*, 306 Ga. App. at 575, 703 S.E.2d at 40; *see also* O.C.G.A. § 14-8-54(a).
133. 239 Ga. App. 440, 521 S.E.2d 383 (1999).
134. *Westmoreland*, 306 Ga. App. at 575, 703 S.E.2d at 40.
135. *Health Horizons*, 239 Ga. App. at 443, 521 S.E.2d at 386.
136. *Westmoreland*, 306 Ga. App. at 575, 703 S.E.2d at 40.
137. *Id.* (internal quotations omitted).
138. *Id.*
139. *Id.* at 575-76, 703 S.E.2d at 40-41.
140. No. 10-CV-0617-RWS, 2010 WL 4437076 (N.D. Ga. Nov. 1, 2010).
141. *Id.* at *5.

receiving distributions from Bomeg due to the defendants' control of the partnership.[142]

The test for dissolution of a limited partnership under Georgia law is whether "it is 'not reasonably practicable to carry on the business in conformity with the partnership agreement.'"[143] No Georgia court had ever interpreted that language, which is identical to that found in section 802 of the Revised Uniform Limited Partnership Act (RULPA);[144] therefore, the district court reviewed how other RULPA jurisdictions interpreted such language to ensure uniformity among states that have adopted RULPA.[145] The court noted that other RULPA jurisdictions have found the relevant inquiry in a dissolution action to be whether a for-profit business is capable of operating at a profit, considering tension among the partners as one part of the analysis.[146] Bomeg's business was the "acquisition, retention[,] and disposition of any type of property for business or investment purposes," so the relevant inquiry in this case was whether Thomas provided a sufficient factual basis for the district court to conclude that Bomeg could not possibly continue to accomplish that purpose.[147]

The district court determined that the evidence in the record led to the opposite conclusion, as Bomeg's business appeared to be doing quite well and the tension among the partners was not causing any breakdown in the operation of the business.[148] The inability of Thomas to exercise managerial control did not merit dissolution of the partnership, and because Thomas "has not pointed to any facts showing that the conflict among the parties would impact Bomeg's ability to continue operating at a profit, [Thomas] fail[ed] to state a cause of action for dissolution under Georgia law."[149] The district court granted the defendants' motion to dismiss.[150]

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142. *Id.* at *1.
143. *Id.* at *2; O.C.G.A. § 14-9-802(1) (2003).
144. REVISED UNIF. LTD. P'SHIP ACT § 802, 6B U.L.A. 328 (2008).
145. *Valone*, 2010 WL 4437076, at *2.
146. *Id.* at *1-2.
147. *Id.* at *4.
148. *Id.*
149. *Id.*
150. *Id.* at *5.

V. AGENCY

A. *A Note and Security Deed are Not Enforceable Against a Church That Did Not Authorize the Transaction Even Though the Church Enjoyed the Benefits of the Loan*

In *Macedonia Baptist Church of Atlanta v. LIB Properties, Ltd.*,[151] the Georgia Court of Appeals overturned the trial court's ruling regarding whether a security deed and loan note executed by a church member were valid and enforceable against the church.[152] In this case, Macedonia Baptist Church of Atlanta (MBCA) brought suit against LIB Properties, Ltd. (LIB), Macedonia Baptist Church of Atlanta, Inc. (MBCA, Inc.), and church members Scottie L. Cousins and Alan Moon. MBCA claimed that Cousins and Moon incorporated MBCA, Inc. without authority and that Cousins signed documents as president of MBCA, Inc. by which the corporation gave LIB a loan note for $202,500 and a security deed over real property owned by MBCA. LIB filed a counterclaim against MBCA seeking a declaratory judgment validating the note and the security deed.[153]

In January 2007, the church pastor authorized Cousins, a mortgage broker and employee of the church, to seek and obtain offers for a new mortgage loan for the church, thereby giving Cousins access to church financial records for such purpose. That same month, Cousins contacted LIB for a loan, representing that he was acting on behalf of the church as pastor and as president of MBCA, Inc., which he incorporated earlier that month as a new corporation. The church previously used the name MBCA, Inc. for its nonprofit corporation, which was administratively dissolved in 2005 for failure to pay its annual fees.[154] LIB made the loan to MBCA, Inc. in March 2007 based on loan documents, note, and security deed "signed by Cousins as the president of . . . MBCA, Inc."[155] LIB entered into the transaction with Cousins and MBCA, Inc. despite the fact that a title search of the property securing the note revealed no deed transferring the property from the previously dissolved MBCA, Inc. to the new MBCA, Inc. entering into the transaction.[156] LIB concluded that the "[dissolved] MBCA, Inc. and the [n]ew MBCA, Inc. were one and

151. 307 Ga. App. 760, 707 S.E.2d 380 (2011).
152. *Id.* at 760, 707 S.E.2d at 381.
153. *Id.* at 760-61, 707 S.E.2d at 381.
154. *Id.* at 761, 707 S.E.2d at 381.
155. *Id.* at 762, 707 S.E.2d at 382.
156. *Id.*

the same corporation," despite the fact that the corporations had different officers and a different address.[157]

LIB contended that MBCA was bound by the note and security deed "because (1) it authorized its agent, Cousins, to enter into the loan transaction on its behalf, or (2) it subsequently ratified the loan transaction made on its behalf by its agent, Cousins, who acted without authority."[158] The court of appeals rejected LIB's first argument because, while there was evidence that MBCA authorized Cousins to pursue offers for a mortgage loan, "there [was] no evidence that MBCA . . . authorized Cousins to enter into a loan transaction on its behalf."[159] Additionally, Cousins did not enter into the loan transaction on behalf of MBCA but on behalf of MBCA, Inc., and no evidence showed that MBCA authorized Cousins to incorporate MBCA, Inc. or represent that it controlled the church and its property.[160]

Regarding the second argument, the court noted ratification may only occur if the act was done on behalf of the person adopting it and attempting to ratify it.[161] Because Cousins was not acting on behalf of MBCA, but rather in his capacity as president of MBCA, Inc., ratification by MBCA was not possible.[162] Even though MBCA accepted the benefits of the loan by using the proceeds to pay off a previous mortgage and overdue property taxes, it was not bound by the note or the security deed.[163] Therefore, the court of appeals overturned the decision of the trial court by determining that MBCA was not "bound under principles of agency or ratification to the terms of the . . . note and security deed."[164]

B. A Hospital is Not Responsible for the Negligence of a Doctor Without Control of the Time, Manner, and Method of the Doctor's Work

In *Pendley v. Southern Regional Health System, Inc.*,[165] a mother sued a hospital for medical malpractice that resulted in the death of her son.[166] At issue in the case was whether the treating physician was an employee of the hospital, as a hospital can only be held liable for the

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157. *Id.*
158. *Id.* at 763, 707 S.E.2d at 382.
159. *Id.*
160. *Id.* at 763, 707 S.E.2d at 383.
161. *Id.* at 763-64, 707 S.E.2d at 383.
162. *Id.* at 764, 707 S.E.2d at 383.
163. *Id.*
164. *Id.*
165. 307 Ga. App. 82, 704 S.E.2d 198 (2010).
166. *Id.* at 82-83, 704 S.E.2d at 199-200.

acts of a doctor when it is shown that the doctor is an employee, not an independent contractor, of the hospital.[167]

The court of appeals applied the factors discussed in *Cooper v. Binion*,[168] because the cause of action arose prior to February 16, 2005 (the legislature enacted a new code provision to cover these kinds of causes of action that arose after that date),[169] to determine whether the treating physician was an employee of Southern Regional Health System, Inc. (Southern Regional).[170] Although the treating physician used the hospital's dictation equipment and was required to be at the hospital at the time the son was admitted, this was not enough evidence to overcome Southern Regional's motion for summary judgment because it did not create an issue of fact as to whether the hospital controlled the time, manner, or method of the physician's work.[171]

The mother also argued that the treating physician was an apparent or ostensible agent of Southern Regional, which exists when a person represents that another person is their agent and causes a third party to justifiably rely on the care or skill of that apparent agent.[172] In such a scenario, that person is liable to the third party for any harm caused by the apparent agent as if the apparent agent were the actual agent.[173] In *Pendley*, there was nothing in the record to indicate that the treating physician indicated to the mother or son that he was an employee of the hospital.[174] Also, the hospital utilized waiver forms (which the mother signed on behalf of the son) with conspicuous disclaimers that made clear that many of the doctors at the hospital

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167. *Id.* at 85, 704 S.E.2d at 201 (quoting Cooper v. Binion, 266 Ga. App. 709, 710, 598 S.E.2d 6, 8 (2004), *superceded by statute*, O.C.G.A. § 51-2-5.1(f)-(g) (Supp. 2011), *as recognized in*, Blackmon v. Tenet Healthsystem Spalding, 288 Ga. App. 137, 139 n.7, 653 S.E.2d 333, 338 n.7 (2007), *rev'd on other grounds*, 284 Ga. 369, 667 S.E.2d 348 (2008)).

168. 266 Ga. App. 709, 598 S.E.2d 6 (2004).

169. *See* O.C.G.A. § 51-2-5.1 (f)-(g) (Supp. 2011).

170. *Pendley*, 307 Ga. App. at 85, 704 S.E.2d at 201.

> These factors are: (a) The right to direct the physician's work step-by-step[;] . . . (b) Contracts to perform a service rather than accomplish a task[;] . . . (c) The right of the hospital to inspect the physician's work[;] . . . (d) The supplier of the equipment[;] . . . (e) The nature or skill of the physician's work[;] . . . (f) The hospital's right to control the physician's time[;] . . . (g) The method of payment[;] (h) [The r]ight to choose which patients to treat[;] . . . (i) Physician spends all working hours at hospital[;] . . . (j) The method of billing the patients[; and] . . . (k) Payments for medical malpractice insurance.

Id. (alterations in original) (quoting *Cooper*, 266 Ga. App. at 710-13, 598 S.E.2d at 9-11).

171. *Id.* at 86-87, 704 S.E.2d at 201-02.

172. *Id.* at 87, 704 S.E.2d at 202 (quoting *Cooper*, 266 Ga. App. at 714, 598 S.E.2d at 11).

173. *Id.* (quoting *Cooper*, 266 Ga. App. at 714, 598 S.E.2d at 11).

174. *Id.* at 87, 704 S.E.2d at 202-03.

were independent contractors and, therefore, not agents of the hospital.[175] Taking both of these pieces of evidence together, the court of appeals determined that the trial court's grant of summary judgment on this issue was appropriate.[176]

VI. LEGISLATION

During the 2011 session of the Georgia General Assembly, a number of revisions were made to the O.C.G.A., including revisions to Title 7 with respect to dissolution of financial institutions and licensing requirements for mortgage lenders and brokers,[177] Title 13 with respect to restrictive covenants in contracts,[178] and Title 14 with respect to application fees for reinstatement of corporations and limited liability companies and "the execution of instruments by corporations conveying . . . real property [interests] or releasing security agreements."[179]

Title 7 was amended to (1) "provide the Department of Banking and Finance the power to require dissolution of a financial institution" in certain situations, (2) revise definitions, (3) provide an effective date for licensing of mortgage lenders and mortgage brokers, and (4) provide for the administration of a nation-wide system for licensing mortgage lenders and mortgage brokers.[180]

With respect to Title 14, Senate Bill 64 increased the fee for an application for reinstatement relating to business corporations,[181] nonprofit corporations,[182] and limited liability companies.[183] It also relaxed the requirement for a corporate seal execution of instruments conveying real property interests or releasing security agreements.[184]

In arguably the most significant event of the legislative session in terms of contract law, Title 13 was amended in an important way by providing for the enforcement of contracts restricting or prohibiting competition in certain commercial agreements and allowing certain other

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175. *Id.* at 84, 87-88, 704 S.E.2d at 200, 203.
176. *Id.*
177. Ga. H.R. Bill 239, Reg. Sess. (2011) (codified in scattered sections of O.C.G.A. tit. 7, ch. 1 (Supp. 2011)).
178. Ga. H.R. Bill 30, Reg. Sess. (2011) (codified in scattered sections of O.C.G.A. tit. 13, ch. 8 (Supp. 2011)).
179. Ga. S. Bill 64, pmbl., Reg. Sess. (2011) (codified in scattered chapters of O.C.G.A. tit. 14 (Supp. 2011)).
180. Ga. H.R. Bill 239, pmbl.
181. Ga. S. Bill 64 § 1 (codified at O.C.G.A. § 14-2-122(12) (Supp. 2011)).
182. *Id.* § 3 (codified at O.C.G.A. § 14-3-122(11) (Supp. 2011)).
183. *Id.* § 8 (codified at O.C.G.A. § 14-11-1101(16) (Supp. 2011)).
184. *Id.* § 5 (codified at O.C.G.A. § 14-5-7(a) (Supp. 2011)).

restrictive covenants in contract.[185] The purpose behind this change was to supersede the outdated procedure of allowing the courts, through case law rather than statute, to determine a constitutionally enforceable "restraint of trade," which could increase the attraction of new business to Georgia.[186]

This new law[187] allows courts to "blue pencil" or modify a restrictive covenant they deem to be overbroad or unreasonable, instead of deeming the entire covenant unenforceable.[188] The new law also provides guidance regarding the scope of restrictive covenants that will be deemed enforceable.[189] Instead of being tied to the physical location where an employee worked, a noncompete provision may now extend to the area where the employer does business (so long as such area is reasonable) or may list specific competitors of an employer for whom the employee cannot provide services.[190] The law also provides that instead of or in addition to a noncompete provision, an employer may utilize a customer nonsolicitation provision, which provides that a former employee is prohibited from soliciting business on behalf of a competitor from customers of the former employer "with whom the employee had material contact . . . ."[191] Regarding time limitations, the new law provides a rebuttable presumption that a two-year limitation for noncompete and nonsolicit provisions in an employment agreement will be reasonable.[192] Further, nondisclosure provisions seeking to prevent the disclosure of an employer's confidential information or trade secrets need not have a time limitation and may continue so long as the information in question remains confidential.[193] Finally, the new law applies only to employees with sensitive business information that

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185. Ga. H.R. Bill 30 § 4 (codified at O.C.G.A. §§ 13-8-50 to -59 (Supp. 2011)).

186. *See id.* §§ 2, 4.

187. During the 2010 legislative session, the General Assembly enacted House Resolution 178, the constitutional amendment necessary for the statutory language of the bill. Ga. H.R. Res. 178, Reg. Sess., 2010 Ga. Laws 1260. Georgia voters ratified the constitutional amendment on November 2, 2010. Ga. H.R. Bill 30 § 1. Several questions emerged about the validity of House Resolution 178, so House Bill 30 was introduced to reenact the substantive provisions of House Resolution 178 and put to rest all questions of its validity. *Id.*

188. *Id.* § 4 (codified at O.C.G.A. § 13-8-54(b) (Supp. 2011)). Although House Bill 30 was enacted, in part, to remove confusion regarding the effective date of House Bill 173, there remains considerable debate regarding whether the law became effective on November 3, 2010, January 1, 2011, or May 11, 2011.

189. *Id.* (codified at O.C.G.A. § 13-8-53 (Supp. 2011)).

190. *Id.* (codified at O.C.G.A. § 13-8-56(2) (Supp. 2011)).

191. *Id.* (codified at O.C.G.A. § 13-8-53(b) (Supp. 2011)).

192. *Id.* (codified at O.C.G.A. § 13-8-57(a)-(b) (Supp. 2011)).

193. *Id.* (codified at O.C.G.A. § 13-8-53(e) (Supp. 2011)).

warrants protection, so employees without access to such information are not subject to restrictive covenants governed by the new law.[194]

194. *Id.* (codified at O.C.G.A. § 13-8-51(5)(B) (Supp. 2011)).