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Insurance

by Bradley S. Wolff*
Stephen Schatz**
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I. INTRODUCTION

In property insurance cases,¹ there were two Georgia Supreme Court decisions with the potential for significant impact.² The court held that insurance companies are liable for diminution in value of real property under commercial and homeowners insurance policies, extending the reasoning in *State Farm Mutual Automobile Insurance Co. v. Mabry*³ beyond motor vehicles for the first time.⁴ Answering a certified question, the supreme court also held a one-year suit limitation in a homeowners insurance policy is enforceable for losses not caused by fire,

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1. For an analysis of Georgia insurance law during the prior survey period, see Stephen M. Schatz, et al., *Insurance, Annual Survey of Georgia Law*, 63 MERCER L. REV. 165 (2011).

2. *Royal Capital Dev. LLC v. Maryland Cas. Co.*, 291 Ga. 262, 728 S.E.2d 234 (2012); *White v. State Farm Fire & Cas. Co.*, 291 Ga. 306, 728 S.E.2d 685 (2012).

3. 274 Ga. 498, 556 S.E.2d 114 (2001). For a discussion of the decision in *Mabry*, see Bradley S. Wolff, et al., *Insurance, Annual Survey of Georgia Law*, 54 MERCER L. REV. 341, 342-46 (2002).

4. *Royal Capital Dev.*, 291 Ga. at 267, 728 S.E.2d at 238.

despite an insurance commissioner-issued regulation that would prohibit any limitation shorter than two years.⁵

Despite an insurer's plea that it faced irreconcilable conflicting obligations, the Georgia Court of Appeals held that an insurer faced with a time limit, policy-limit demand, and a hospital lien cannot escape liability to the hospital by paying its policy limits to the injured party, but an insurer might create a "safe harbor" from bad-faith liability where the claimant unreasonably refuses to assure the satisfaction of the lien, and the insurer satisfies the lien and pays any remaining proceeds to the claimant.⁶

In a case now pending before the supreme court, the court of appeals held that when a property owner and construction companies enter into a contract requiring each construction contractor and subcontractor to obtain liability insurance and other insurance coverage for the construction project to be provided by the owner for the benefit of all participants in the project, the owner and contractors can all be held liable for the damages caused to a construction worker, injured on the job, by a subcontractor who failed to procure the required liability insurance.⁷

An insurance carrier's attempt to deny coverage based on a defense not articulated in its reservation-of-rights letter was rejected by the supreme court, despite the carrier's inclusion of a "catch-all" clause.⁸ The court held that insurers may not both deny a claim on stated grounds and reserve the right to add other policy defenses later.⁹ Insureds who failed to cooperate with their insurer's investigation of claims or defense of suits and to provide timely notice to their carriers generally fared poorly in a number of cases decided during the survey period.

In the automobile insurance arena, the court of appeals considered several fact patterns presenting a question of whether injuries arose out of the "use" of an automobile.¹⁰ An insured who had rejected umbrella-policy uninsured motorist (UM) coverage in writing was allowed to recover UM benefits because his insurer required the UM coverage of any underlying policy be equal to the liability limits before it would

5. *White*, 291 Ga. at 309, 728 S.E.2d at 687-88.

6. *Southern Gen. Ins. Co. v. Wellstar Health Sys., Inc.*, 315 Ga. App. 26, 34, 726 S.E.2d 488, 495 (2012).

7. *Estate of Pitts v. City of Atlanta*, 312 Ga. App. 599, 607-08, 719 S.E.2d 7, 14-15 (2012).

8. *Hoover v. Maxum Indemnity Co.*, 291 Ga. 402, 405, 730 S.E.2d 413, 417 (2012).

9. *Id.* at 405, 730 S.E.2d at 417.

10. *See, e.g., State Farm Mut. Auto Ins. Co. v. Myers*, 316 Ga. App. 152, 728 S.E.2d 787 (2012); *Dunn-Craft v. State Farm Mut. Auto. Ins. Co.*, 314 Ga. App. 620, 724 S.E.2d 903 (2012); *Mough v. Progressive Max Ins. Co.*, 314 Ga. App. 380, 724 S.E.2d 414 (2012).

allow UM coverage in an umbrella policy, which was held to be an impermissible condition prior to the 2009 statutory amendment that made umbrella UM coverage optional.¹¹ When several eyewitnesses to a fatal incident presented different versions of what occurred in a no-contact “John Doe” case, the plaintiff failed to satisfy the statutory corroboration requirement.¹² And where a known tortfeasor could not be found and publication service was accomplished, a voluntary dismissal of the lawsuit in which the UM carrier was served led to the plaintiff’s inability to bring a renewal action after the expiration of the statute of limitations because she could no longer obtain a judgment against the tortfeasor due to the absence of personal service in the original action.¹³

II. FIRST-PARTY PROPERTY INSURANCE

A. *Recovery for Diminution in Value*

In 2001, the Georgia Supreme Court held in *State Farm Mutual Automobile Insurance Co. v. Mabry*¹⁴ that an automobile insurance policy covers not only the cost to repair the damaged vehicle but also the diminution in value of the repaired vehicle.¹⁵ In 2012, the supreme court extended that interpretation to damage to real property under commercial and homeowners policies in *Royal Capital Development, LLC v. Maryland Casualty Co.*¹⁶ The court held that its ruling in *Mabry* “is not limited by the type of property insured, but rather speaks generally to the measure of damages an insurer is obligated to pay.”¹⁷

11. Ga. Farm Bureau Mut. Ins. Co. v. North, 311 Ga. App. 281, 284-86, 714 S.E.2d 428, 431-32 (2011).

12. Bituminous Ins. Co. v. Coker, 314 Ga. App. 30, 34-35, 722 S.E.2d 879, 883 (2012).

13. Durrain v. State Farm Fire & Cas. Co., 312 Ga. App. 49, 50-51, 717 S.E.2d 554, 555-56 (2011).

14. 274 Ga. 498, 556 S.E.2d 114 (2001). For a discussion of the decision in *Mabry*, see Bradley S. Wolff, et al., *Insurance, Annual Survey of Georgia Law*, 54 MERCER L. REV. 341, 342-46 (2002).

15. *Mabry*, 274 Ga. at 508, 556 S.E.2d at 122.

16. 291 Ga. 262, 266-67, 728 S.E.2d 234, 237-38 (2012). The court answered a certified question presented by the Eleventh Circuit in *Royal Capital Development, LLC v. Maryland Casualty Co.*, 659 F.3d 1050 (11th Cir. 2012). The United States District Court for the Northern District of Georgia had previously held that diminution-of-value damages were not available under the policy insuring real property, deciding to extend *Mabry* because it dealt exclusively with a consumer automobile policy. *Royal Cap. Dev. LLC v. Maryland Cas. Co.*, No. 1:10-CV-1275-RLV, 2010 U.S. Dist. LEXIS 133911, at *7-8 (N.D. Ga. Dec. 2, 2010). For a discussion of the district court’s ruling, see Schatz, *supra* note 1, at 177.

17. *Royal Capital Dev.*, 291 Ga. at 263, 728 S.E.2d at 235.

In reaching its decision, the court adhered to the principle that damages should be measured in a manner that makes the insured whole—that is, to place the insured in the same position it would have been in had the injury never occurred.¹⁸ When damage to real property occurs, the policy promises to pay for the insured's loss, which includes loss of both utility of the property and its value.¹⁹ "Although unusual, it may sometimes be appropriate, in order to make [an] injured party whole," to award both cost of repairs and diminution of value for damaged property.²⁰

How this decision will affect the insurance industry remains to be seen. The insured will have the burden of proof to show that repairs to its real property create a "stigma" that entitles it to diminution in value.²¹ Real estate appraisers likely will need to satisfy such burden of proof. As acknowledged by the court, diminution of value to property is "unusual."²² For example, if an insurer pays to replace a roof due to hail damage, the new roof is an improvement to property that does not create a stigma necessitating an additional payment of diminution in value.

The court also acknowledged that its decision is based upon its interpretation of the policy language; whether diminution of value is recoverable "depends on the specific language of the contract itself."²³ Because the court did not cite to any public policy rationale, property insurers may begin to find ways to prevent coverage for diminution of value—both through the policy definition of loss and through a specific exclusion.

B. Suit Limitation Provision

In *White v. State Farm Fire & Casualty Co.*,²⁴ the supreme court answered a certified question from the United States Court of Appeals for the Eleventh Circuit,²⁵ holding that a one-year suit limitation provision in a homeowners insurance policy is enforceable for claims not involving a fire loss.²⁶ State Farm's policy contained a provision requiring its insured to file a lawsuit "within one year of the date of loss

18. *Id.* at 264, 728 S.E.2d at 236.

19. *Id.* at 267, 728 S.E.2d at 237-38.

20. *Id.* at 265, 728 S.E.2d at 236 (quoting *John Thurmond & Assoc. v. Kennedy*, 284 Ga. 469, 472 n.2, 668 S.E.2d 666, 669 n.2 (2008)).

21. *Id.* at 264, 728 S.E.2d at 236.

22. *Id.* at 265, 728 S.E.2d at 236.

23. *Id.* at 267, 728 S.E.2d at 238.

24. 291 Ga. 306, 728 S.E.2d 685 (2012).

25. *White v. State Farm Fire & Cas. Co.*, 664 F.3d 860, 865 (11th Cir. 2011).

26. *White*, 291 Ga. at 309, 728 S.E.2d at 687-88.

or damage.²⁷ After the insured made a claim for a theft loss, State Farm denied the claim, and the insured filed suit against State Farm more than one year after the date of loss.²⁸ In 2006, the Insurance Commissioner issued a regulation that forbade any property insurance policy covering loss or damage to real or personal property from requiring a suit to be filed against the insurer within a time less favorable to the insured than specified in the Standard Fire Policy.²⁹ The Standard Fire Policy only requires a lawsuit to be brought within two years of the date of loss.³⁰ The court held that the Insurance Commissioner did not have the authority to enact the regulation with respect to non-fire losses.³¹ Therefore, the one-year suit limitation provision in State Farm's policy was enforceable on the insured's theft claim, and the insured's lawsuit was barred because he failed to file suit within the requisite one year.³² Based upon this decision, the Insurance Commissioner's regulation will remain enforceable for fire losses, but not for other property losses; that is, the two-year suit limitation provision will only apply to fire claims.³³

During the survey period (and before *White* was decided), the Eleventh Circuit also addressed a suit-limitation provision in *Jenkins v. Allstate Property & Casualty Insurance Co.*³⁴ Allstate's policy contained a provision requiring its insured to file a lawsuit "within one year after the inception of loss or damage."³⁵ After the insured made a claim for fire and subsequent theft, Allstate denied the claim, and the insured filed suit against Allstate more than two years after the losses. Both parties conceded that the one-year suit limitation provision was invalid because it conflicted with state law at the time of the losses. The insured contended that since the limitation provision was void, there should be no contractual limitation period; consequently, the six-year statute of limitations for breach of simple contract should apply.³⁶ Allstate's policy, though, contained a conformity provision, which stated that "[w]hen the policy provisions conflict with the statutes of the state in

27. *Id.* at 306-07, 728 S.E.2d at 686.

28. *Id.* at 307, 728 S.E.2d at 686.

29. *Id.*; see also Ga. R. & Regs., 120-2-20-.02 (2012).

30. *White*, 291 Ga. at 307, 728 S.E.2d at 686; see also Ga. R. & Regs., 120-2-19-.01 (2012).

31. *White*, 291 Ga. at 309, 728 S.E.2d at 687.

32. *Id.* at 309, 728 S.E.2d at 687-88.

33. *Id.*

34. 448 F. App'x 977 (11th Cir. 2011). For a discussion of the district court's decision, see Schatz, *supra* note 1, at 176-77.

35. *Jenkins*, 448 F. App'x at 978.

36. *Id.* at 977-79.

which the residence premises is located, the provisions are amended to conform to such statutes.³⁷ In rejecting the insured's argument, the court held that the conformity provision amended the policy's one-year suit limitation provision to include the two-year suit limitation provision set forth in the Standard Fire Policy.³⁸

C. Subrogation

In *Georgia Casualty & Surety Co. v. Woodcraft by MacDonald, Inc.*,³⁹ the Georgia Court of Appeals held that a commercial property insurer's right to subrogation does not deprive the insured of its right to recovery under the full-compensation or made-whole doctrine.⁴⁰ The insurer exhausted its limits under a commercial property policy in paying the insureds for a loss arising out of an explosion to the insureds' building. The insurer then asserted a subrogation lawsuit against the tortfeasor. The insurance company subsequently reached a settlement in principle with the tortfeasor, in which it agreed that the insureds could continue to pursue their claims against the tortfeasor. The insureds filed suit against the insurer for breach of the insurance contract for failing to make them whole prior to settling its subrogation claim with the tortfeasor.⁴¹ The insureds contended the settlement impaired or impeded their ability to pursue the tortfeasor because they could not afford to litigate their claims on their own.⁴² The court concluded that Georgia's public policy does not require that an insurer must first be certain that its insureds are made whole before settling its subrogation claim.⁴³

[T]o bar subrogation in this case [where the insureds simply determined they could not afford to litigate against the tortfeasor] would defeat one of the equitable purposes of subrogation: to deter wrongdoing by placing the ultimate responsibility for paying an obligation on the person who in equity and good conscience ought to pay for it.⁴⁴

37. *Id.* at 978.

38. *Id.* at 979.

39. 315 Ga. App. 331, 726 S.E.2d 793 (2012).

40. *Id.* at 341-42, 726 S.E.2d at 799-800.

41. *Id.* at 332-34, 726 S.E.2d at 794-95.

42. *Id.* at 339-40, 726 S.E.2d at 799.

43. *Id.* at 340-41, 726 S.E.2d at 799.

44. *Id.* at 341, 726 S.E.2d at 800 (quoting *Landrum v. State Farm Fire & Cas. Co.*, 241 Ga. App. 787, 789, 527 S.E.2d 637, 639 (2000) (alteration in original)).

III. EXTRACONTRACTUAL LIABILITY

In *Southern General Insurance Co. v. Wellstar Health System*,⁴⁵ a panel of the Georgia Court of Appeals considered a liability carrier's plea that it was impermissibly being called upon to pay sums in excess of its policy limits.⁴⁶ Southern General Insurance Company (Southern General) received time-limit demands from both Gray (the injured party) and Wellstar (the hospital lienholder). Gray's attorney refused Southern General's overture of including an indemnification agreement against the hospital lien. Ultimately, Southern General paid Gray, not Wellstar. Wellstar then sued on its \$22,047.50 lien.⁴⁷ In an extended discussion, the panel concluded that

it is possible for an insurance company to create a "safe harbor" from liability under *Holt* and its progeny when (1) the insurer promptly acts to settle a case involving clear liability and special damages in excess of the applicable policy limits, and (2) the *sole* reason for the parties' inability to reach a settlement is the plaintiff's unreasonable refusal to assure the satisfaction of any outstanding hospital liens.⁴⁸

Additionally, the court cautioned, should a plaintiff's attorney be recalcitrant and refuse to give such an assurance, "the insurer would be free (at that point) to simply verify the validity of any liens, make payment directly to the hospital, and then disburse any remaining funds to the plaintiff."⁴⁹ This panel's opinion and discussion of the creation of a "safe harbor" is welcomed in an area where carriers seemingly are in a "Catch-22" situation in handling competing time-limit demands from multiple limits claimants. While this area drew legislative interest in this past session, the interest did not yield a legislative solution.⁵⁰ This is an area in need of definitive reconciliation by the Georgia Supreme Court, the General Assembly, or both.

A sharply contested case concerning the cause of a leak that damaged "Liquidity," a fifty-eight-foot yacht, gave rise to an opinion defining the difference between a disagreement and a bad-faith denial of an insurance claim in *Matrix Transport Resources, LLC v. Standard Fire Insurance Co.*⁵¹ The property insurer was successful in trimming the

45. 315 Ga. App. 26, 726 S.E.2d 488 (2012).

46. *Id.* at 26, 726 S.E.2d at 489.

47. *Id.* at 27-28, 726 S.E.2d at 490-91.

48. *Id.* at 31, 726 S.E.2d at 493.

49. *Id.* at 32, 726 S.E.2d at 493.

50. Ga. H.R. Bill 960, Reg. Sess. (2012) (unenacted).

51. No. CV409-140, 2012 WL 1865410 (S.D. Ga. Feb. 23, 2012).

extracontractual from the ultimate coverage *vel non* contest.⁵² The United States District Court for the Southern District of Georgia considered and then rejected a claim of “negligent adjustment,” holding that, absent a special duty arising in tort (such as a liability carrier’s fiduciary duty to settle in appropriate circumstances), mere breach of contract does not also give rise to a claim in tort.⁵³ When considering section 33-4-6 of the Official Code of Georgia Annotated (O.C.G.A.) (statutory bad faith),⁵⁴ the court found both a reasonable question of law and a reasonable question of fact sufficient to dispose of the bad-faith claim as a matter of law.⁵⁵ As an independent basis for its finding, the court noted that an insurer’s reliance on the advice of independent evaluators “whose information is *not patently erroneous*” was also grounds for denial of bad faith.⁵⁶ This opinion summarizes the distinction between a bad-faith denial, which will be discussed elsewhere, and a bona fide disagreement amongst the insurer and the insured on a relevant issue that does not warrant a bad faith penalty.

IV. MISCELLANEOUS POLICY TERMS, EXCLUSIONS, AND CONDITIONS

A. OCIP Policy

An Owner’s Controlled Insurance Program (OCIP) was given broad application in *Estate of Mack Pitts v. City of Atlanta*.⁵⁷ Pitts was killed by a vehicle driven by an employee of A&G Trucking, Inc., a subcontractor on the City of Atlanta (the City)’s construction project at Atlanta Hartsfield-Jackson International Airport. The City entered into a contract with a joint venture for the management of the project, with the City’s OCIP being made a part of that contract. The OCIP required the contractor and all subcontractors to (as is pertinent here) procure bodily injury insurance in the amount of \$10 million per person. A&G Trucking did not, and a sizeable judgment was procured. Pitts’s Estate (the Estate) then sued the City and multiple contractors, wherein it argued that workers on-site, as well as the companies involved, were participants entitled to be benefited by the OCIP insurance coverage

52. *Id.* at *9.

53. *Id.* at *2; *see also* *Tate v. Aetna Cas. & Sur. Co.*, 149 Ga. App. 123, 124, 253 S.E.2d 775, 777 (1979); *Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.*, 136 F. Supp. 2d 1340, 1355-56 (N.D. Ga. 2001).

54. O.C.G.A. § 33-4-6 (2000 & Supp. 2012).

55. *Matrix Transport Resources*, 2012 WL 1865410, at *4.

56. *Id.* at *5 (quoting *Haezebrouck v. State Farm Mut. Auto. Ins. Co.*, 216 Ga. App. 809, 812, 455 S.E.2d 842, 845 (1995)).

57. 312 Ga. App. 599, 605, 719 S.E.2d 7, 13 (2011), *reconsideration denied, cert. granted.*

clause.⁵⁸ The Estate also dodged the “exclusive remedy provision” by claiming its cause of action against the City and the various construction companies was not based in tort for bodily injury but in contract for failure to procure the required insurance.⁵⁹ The opinion adds significant exposure for failure to procure liability insurance required by contract. Hence, this case should be watched carefully in the supreme court this upcoming year.

B. Disclaimer and Reservation of Rights

Reservation-of-rights letters are often form documents, and therefore they miss the mark in terms of real communication. In *Hoover v. Maxum Indemnity Co.*,⁶⁰ an insurer’s ex post facto attempt to engraft “late notice breach of condition” to a coverage disclaimer and declaratory judgment proceeding was rejected.⁶¹ The supreme court discussed the mechanism of a reservation of rights and criticized the insurer’s attempt to rely on catch-all clauses in an attempt to dragnet additional bases of non-coverage developed after the coverage position was established by disclaimer.⁶² The court reversed the court of appeals, holding that a carrier cannot both deny a claim and then reserve its rights to other policy defenses later on.⁶³ If a carrier declines coverage, it does so on the basis it articulates in its disclaimer, and in this instance, the disclaimer did not include the late notice defense to coverage.

Similarly, in *Illinois Union Insurance Co. v. NRI Construction, Inc.*,⁶⁴ Judge Forrester first essayed national law on the point and then predicted that Georgia would adopt the majority position, which permits an insurer to recoup defense costs after a successful declaratory judgment of noncoverage so long as the reservation-of-rights letter expressly put the insured on notice of the reserved-right-to-recoup defense expense in the event of a declaration of noncoverage.⁶⁵ These opinions suggest more care should be given to communications concerning coverage, that denial thereof should only be made in certain circumstances, and that if a disclaimer is made, it should be complete. Additionally, reservation-of-rights letters, in conjunction with the preferred approach of undertaking the insured’s defense, must explicitly

58. *Id.* at 599-602, 719 S.E.2d at 9-11.

59. *Id.* at 602, 719 S.E.2d at 11.

60. 291 Ga. 402, 703 S.E.2d 413 (2012).

61. *Id.* at 403, 730 S.E.2d at 415.

62. *Id.* at 404-06, 730 S.E.2d at 416-17.

63. *Id.* at 405-06, 730 S.E.2d at 416-17.

64. 846 F. Supp. 2d 1366 (N.D. Ga. 2012).

65. *Id.* at 1377.

and exhaustively set forth the policy provisions in question and the terms of the reservation such that an insured can make an intelligent decision regarding accepting a conditional defense.⁶⁶

C. Duty to Provide Timely Notice

This year brought a substantial number of opinions concerning “late notice” to insurance carriers, with most being resolved as a matter of law in favor of the carriers.⁶⁷ *State Farm Fire & Casualty Co. v. Le-Blanc*⁶⁸ was typical, involving five defendants insured under several State Farm policies who had received presuit demands and were served on December 7, 2007. Defensive pleadings were filed and a defense position undertaken without carrier involvement. It was not until May 2008 that the insureds bothered to notify their insurance agent of the pendency of these claims and suits.⁶⁹ The court noted that notification delays of as little as three months, and often less than one year, had been held to be unreasonable as a matter of law.⁷⁰ The court must look to the reason given by the insured for a delay in notifying, and here, it was “confusion about whether there would be any coverage.”⁷¹ That, as a matter of law, is an insufficient excuse for delay.⁷²

D. Duty to Cooperate

The “cooperation clause” in a standard insurance policy was dealt with on several occasions, and in each instance, the carrier prevailed. *State Farm & Casualty Co. v. King Sports, Inc.*⁷³ involved an extremely well-documented factual pattern of noncooperation ultimately justifying summary judgment for failure to cooperate against King Sports.⁷⁴ In a fact-intensive discussion, the United States District Court for the Northern District of Georgia held that the insured failed to have any

66. *Id.* at 1373.

67. See *OneBeacon Am. Ins. Co. v. Catholic Diocese of Savannah*, No. 11-14557, 2012 WL 1939104 (11th Cir. May 30, 2012); *American Ins. Co. v. Evercare Co.*, 430 F. App'x 795 (11th Cir. 2011); *Illinois Union Ins. Co. v. NRI Constr., Inc.*, 846 F. Supp. 2d 1366 (N.D. Ga. 2012); *Scottsdale Ins. Co. v. No Punches Pulled Sec., LLC*, No. 1:09-CV-2165-TWT, 2011 WL 3687570 (N.D. Ga. Aug. 22, 2011); *Hoover v. Maxum Indem. Co.*, 310 Ga. App. 291, 712 S.E.2d 661 (2011), *overruled by Hoover v. Maxum Indem. Co.*, 291 Ga. 402, 730 S.E.2d 413 (2012).

68. 2012 WL 692665 (M.D. Ga. 2012).

69. *Id.* at *3.

70. *Id.*

71. *Id.* at *4.

72. *Id.*

73. 827 F. Supp. 2d 1364 (N.D. Ga. 2011).

74. See *id.*

“substantive” communications with defense counsel—just being available to communicate was insufficient.⁷⁵ The court determined King Sports’s noncooperation to be willful and fraudulent in that it unilaterally entered into a settlement agreement with the opposing party and failed to cooperate with defense counsel throughout.⁷⁶ State Farm demonstrated its good faith and diligence in multiple attempts to communicate in person, by telephone, by correspondence, and by e-mail to secure the cooperation and assistance of the insured, being rebuffed in each instance.⁷⁷

Likewise, a jury verdict in favor of the insurer for failure of the insured to cooperate was affirmed by the Georgia Court of Appeals in *Vaughan v. ACCC Insurance Co.*⁷⁸ As in *King Sports*, despite the insurer’s repeated attempts to communicate—by correspondence and otherwise—to secure the cooperation and substantive assistance of the insured, the insured’s stonewalling led to withdrawal of coverage and of the defense counsel.⁷⁹ The court found unavailing the insured’s claim that it promised to cooperate because that was not credible in light of the insured’s steadfast failure to cooperate up until the point of attorney withdrawal.⁸⁰

In *Lucas v. State Farm Fire & Casualty Co.*,⁸¹ State Farm’s homeowners policy contained conditions requiring the insured to provide records and documents requested by the company and to submit to an examination under oath. After the insured made a claim for a fire loss, State Farm sent at least seventeen letters to the insured or his attorney outlining these duties and requesting that the insured comply. While the insured provided some of the documents requested, he did not submit to an examination under oath before he filed suit.⁸² The United States District Court for the Middle District of Georgia held that whether the insured had provided all material documents requested was a question of fact preventing summary judgment.⁸³ However, the court granted summary judgment on the basis that the insured breached the policy condition of giving his examination under oath.⁸⁴ This was true even though the insured requested his examination under oath be

75. *Id.* at 1373-74.

76. *Id.* at 1375.

77. *Id.* at 1375-76.

78. 314 Ga. App. 741, 747, 725 S.E.2d 855, 861 (2012).

79. *Id.* at 743-44, 725 S.E.2d at 858-59.

80. *Id.* at 744, 725 S.E.2d at 859.

81. 2012 U.S. Dist. LEXIS 43666 (M.D. Ga. Mar. 29, 2012).

82. *Id.* at *4, *6.

83. *Id.* at *17-18.

84. *Id.* at *21.

rescheduled two days before the two-year suit limitation period expired.⁸⁵ Moreover, the court held that the insured's proffered excuse that he did not submit to an examination under oath because he suffered from mental disabilities was insufficient as a matter of law.⁸⁶ An important factor for the court, in so ruling, was that the insured did not notify State Farm that he suffered from any mental illness before filing suit.⁸⁷ These opinions, taken together, suggest that where a carrier demonstrates repeated efforts to secure cooperation, and these are rebuffed or ignored by the insured, the cooperation clause can and will be enforced to avoid coverage.

E. Childcare Exclusion

Finding no ambiguity in an undefined term of "occasional," the court of appeals enforced the Childcare Exclusion in *State Farm Fire & Casualty Co. v. Bauman*.⁸⁸ The Baumans' child sustained a serious injury while under the care of the insured, Van de Veire. The record established that the Baumans paid Van de Veire \$65 per week for childcare for four days per week, three hours per day, and had done so for more than six months.⁸⁹ The relevant Childcare Exclusion had a savings clause, which provided that it did "not apply to the occasional childcare services provided by any insured."⁹⁰ Faced with an undefined term "occasional," the court of appeals concluded that the question of ambiguity was a question of law for the court and that four days per week for months was "most of the time"—not occasional as a matter of law.⁹¹ The efficacy of the modern Childcare Exclusion was further reinforced in Georgia by this decision.

V. DISABILITY, LIFE, & HEALTH INSURANCE

The distinction between disability caused by "injury" and disability caused by "sickness" was the subject of several opinions this year. Generally, benefits for disabilities caused or contributed to by sickness terminate at age sixty-five; whereas, disability caused exclusively by injury may extend for life.

85. *Id.* at *23.

86. *Id.* at *25.

87. *Id.* at *28.

88. 313 Ga. App. 771, 774, 723 S.E.2d 1, 3-4 (2012).

89. *Id.* at 771-72, 723 S.E.2d at 2.

90. *Id.* at 773, 723 S.E.2d at 3.

91. *Id.* at 774, 723 S.E.2d at 3-4.

In *Saye v. Provident Life & Accident Insurance Co.*,⁹² the carrier successfully managed its alleged bad-faith exposure through bifurcation of a jury trial, although it was tripped-up by a hearsay objection in the final analysis.⁹³ The insured surgeon suffered from Dupuytren's contracture, which ultimately caused bilateral basal osteoarthritis that precluded him from performing surgery. Consequently, he sought disability benefits for a disability caused by sickness, which terminated after age sixty-five. When he was advised of this limitation, he then complained that the repetitive use of handheld surgical devices actually caused his injury. In the trial court's bifurcated trial, the carrier prevailed with the jury finding that his disability was caused by sickness.⁹⁴ The Georgia Court of Appeals rejected the insured's claim that O.C.G.A. § 33-4-6 precluded bifurcation of the breach of the insurance contract from the statutory bad-faith claim, despite the statute's provision for a "single action."⁹⁵ The majority held that bifurcation in the O.C.G.A. § 33-4-6 context is still discretionary with the trial court and was warranted here.⁹⁶ However, in an extended discussion on the inapplicability of the business records exception to hearsay, the court reversed and remanded the case.⁹⁷ The mere record of a telephone conversation does not constitute a business record under Georgia case law or O.C.G.A. § 24-3-14(b).⁹⁸ In this particular instance, the claims adjuster making the entry did not testify regarding the claimant's alleged statement.⁹⁹ The majority rejected the argument that there was no showing of harm from a single document that would warrant a new trial.¹⁰⁰ The dissent noted that this one-word confirmation within the record was merely cumulative and harmless given the substantial evidence to the same effect from other legitimate sources properly received at trial.¹⁰¹

In *Laun v. AXA Equitable Life Insurance Co.*,¹⁰² another surgeon was diagnosed in 2003 with bilateral basal osteoarthritis of the thumbs.¹⁰³ He underwent surgery in 2004 and was collecting Sickness Total

92. 311 Ga. App. 74, 714 S.E.2d 614 (2011), *cert. denied*.

93. *See id.*

94. *Id.* at 75, 714 S.E.2d at 617.

95. *Id.* at 76, 714 S.E.2d at 617; *see also* O.C.G.A. § 33-4-6.

96. *Saye*, 311 Ga. App. at 76, 714 S.E.2d at 617-18.

97. *Id.* at 79, 714 S.E.2d at 619-20.

98. *Id.* at 78, 714 S.E.2d at 619; O.C.G.A. § 24-3-14(b) (2010).

99. *Saye*, 311 Ga. App. at 77, 714 S.E.2d at 618.

100. *Id.* at 79, 714 S.E.2d at 620.

101. *Id.* at 80, 714 S.E.2d at 620 (Andrews, J., dissenting).

102. 311 Ga. App. 646, 716 S.E.2d 760 (2011).

103. *Id.* at 646, 716 S.E.2d at 762.

Disability benefits when he fell and sprained his right wrist.¹⁰⁴ Accident Total Disability provided lifetime benefits, whereas Sickness Total Disability provided benefits through age sixty-five only.¹⁰⁵ Laun unsuccessfully argued for lifetime benefits.¹⁰⁶ The court found no ambiguity in the terms of the policy.¹⁰⁷ Although the wrist injury was greater in terms of causing the surgeon's disability than the thumb injury (wrist: 23%; thumbs: 7%), the court rejected the surgeon's argument as a distinction without a difference under the policy because the wrist injury occurred subsequent to the thumb injury; thus, the disability was caused by the thumb injury for determining when benefits terminated according to the policy.¹⁰⁸ Taken together, these opinions suggest that we should read disability policies a bit closer and be mindful of the distinction in terms of payout between sickness and accident disabilities, as the benefits vary greatly.

In the related area of successive disability, the carrier again prevailed as a matter of law in *Burnett v. Combined Insurance of America*.¹⁰⁹ A 2007 fall from a truck initiated the plaintiff's disability claim, which was followed by a fall from a stepladder in 2009 while the plaintiff-claimant was still receiving disability benefits from the first fall. While a policy could have been written differently, this one required successive periods of disability, not just one continued disability period contributed to by two injuries.¹¹⁰ The United States District Court for the Middle District of Georgia, being unable to find any applicable Georgia authority, surveyed national precedent.¹¹¹ The court ultimately concluded that in order to have a successive disability period, the first period of disability must have been concluded.¹¹² That did not occur here; therefore, benefits terminated at age sixty-five, as opposed to being continued for the life of the disabled.¹¹³

In *Lawson v. Life of the South Insurance Co.*,¹¹⁴ the United States Court of Appeals for the Eleventh Circuit refused a credit life insurer's attempt to transfer the underlying loan agreement's arbitration clause into a credit life insurance policy to avoid a nationwide consumer class

104. *Id.* at 646-47, 716 S.E.2d at 762.

105. *Id.* at 646, 716 S.E.2d at 761-62.

106. *Id.* at 647-48, 716 S.E.2d at 762.

107. *Id.* at 649, 716 S.E.2d at 763.

108. *Id.*

109. No. 5:10-CV-338, 2011 WL 6012523 (M.D. Ga. Dec. 1, 2011).

110. *Id.* at *1.

111. *Id.* at *3-4.

112. *Id.* at *4.

113. *Id.*

114. 648 F.3d 1166 (11th Cir. 2011).

action lawsuit against it.¹¹⁵ The insurance policy did not contain an arbitration clause.¹¹⁶ Despite making reference in their complaint to the loan agreement, which did contain such an arbitration clause, the claimants did not sue upon the terms of the loan agreement.¹¹⁷ Since the loan agreement did not show an entitlement in or intention to benefit the credit life carrier, the credit life carrier was not a third-party beneficiary.¹¹⁸ Additionally, since the claimant did not seek a benefit tied directly to the underlying loan agreement, Georgia case law concerning the use of equitable estoppel to draw in to the credit life policy, the arbitration provision was rejected.¹¹⁹ The court noted that a mere “but-for” relationship between the existence of a loan agreement that happened to create the need for the credit life policy in and of itself was insufficient to engraft upon the credit life contract the arbitration clause not otherwise existing.¹²⁰ Indeed, such a clause was prohibited by state law.¹²¹ This is yet another loss for the credit life industry that has been successfully pursued for failure to return premiums for policies that are prematurely terminated due to disposal of the underlying automobile.¹²²

In *Flynt v. Life of the South Insurance Co.*,¹²³ another life insurer was predictably unsuccessful in trying to engraft a two-year period of incontestability upon *each* of its one-year annual group policies, which, if successful, would have made the two-year incontestability clause always inoperative.¹²⁴ The deceased obtained promissory notes in August and December 2003 and again in December 2004. On each occasion, a group life policy was secured through Life of the South Insurance Company (Life of the South). In 2006, Life of the South revised its policy and certificate form to provide a statement that the insured had not been diagnosed with diabetes, which this deceased had been diagnosed with ten years earlier.¹²⁵ First, the carrier claimed

115. *Id.* at 1175.

116. *Id.* at 1169.

117. *Id.* at 1172.

118. *Id.*

119. *Id.*

120. *Id.* at 1174.

121. *Id.* at 1169 n.1; *see also* O.C.G.A. § 9-9-2(c)(3) (2007 & Supp. 2012).

122. *See, e.g.*, *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 374-75, 634 S.E.2d 123, 126-27 (2006) (affirming that under O.C.G.A. § 33-31-9(c), the insured’s filing suit against the insurer for a refund of an unearned credit life premium provides sufficient notice to the insurer, thereby bypassing the requirement of giving pre-suit notice of an early loan payoff).

123. 312 Ga. App. 430, 718 S.E.2d 343 (2011), *cert. denied*.

124. *Id.* at 436-37, 718 S.E.2d at 348-49.

125. *Id.* at 431-33, 718 S.E.2d at 345-46.

that the two-year incontestability clause ran with the issuance of each annual group policy certificate.¹²⁶ The court held that terms of its own policy carved out the incontestability clause from the annual contract.¹²⁷ Next, the court ruled that the carrier's claim that the two-year period ran anew with each annual group certificate would have the effect of neutralizing the incontestability clause and hence was ambiguous and would be strictly construed against the carrier.¹²⁸ The carrier's sole victory was avoidance of bad faith and attorney fees under O.C.G.A. § 33-4-6.¹²⁹

In *McCrary v. Middle Georgia Management Services, Inc.*,¹³⁰ an innocent beneficiary was entitled to retain proceeds of a life insurance policy despite a well-documented claim that payments for the policy had been made with embezzled funds.¹³¹ In 2008, Middle Georgia Management Services (MGM) learned from an audit that approximately \$2 million of loans were fictitious and that its employee Morris was probably responsible. Morris brought up this subject with management visiting the office and asked to be excused to make a phone call. She left, only to kill herself. MGM sought the proceeds of the life insurance policy.¹³² This beneficiary was innocent and, under existing statutory and case law, was entitled to receive the funds from the policy even if the policy was procured with embezzled funds.¹³³ The court stressed that O.C.G.A. § 33-25-11(c)¹³⁴ only carves out an exception to this general rule entitling an innocent beneficiary to the proceeds to the extent of the cash surrender value of the life insurance policy.¹³⁵ Here, there was none because the life policy was a term life insurance policy.¹³⁶ The court rebuffed the counterclaim against MGM for wrongful death of Morris, which was articulated under O.C.G.A. § 34-2-10¹³⁷ (duty to provide a safe workplace) and negligence—for MGM's alleged failure to make some effort to save Morris from her intent to commit suicide.¹³⁸ The court rejected the "safe workplace"

126. *Id.* at 435-36, 718 S.E.2d at 348.

127. *Id.* at 436, 718 S.E.2d at 348.

128. *Id.* at 436-37, 718 S.E.2d at 348-49.

129. *Id.* at 438-39, 718 S.E.2d at 349-50; *see also* O.C.G.A. § 33-4-6.

130. 315 Ga. App. 247, 726 S.E.2d 740 (2012).

131. *Id.* at 251, 726 S.E.2d at 743.

132. *Id.* at 247-49, 726 S.E.2d at 741-42.

133. *Id.* at 250-51, 726 S.E.2d at 742-43.

134. O.C.G.A. § 33-25-11(c) (Supp. 2012).

135. *McCrary*, 315 Ga. App. at 251, 726 S.E.2d at 743.

136. *Id.*

137. O.C.G.A. § 34-2-10 (2008).

138. *McCrary*, 351 Ga. App. at 252-55, 726 S.E.2d at 743-45.

argument, finding no allegation that Morris's physical safety was threatened in the investigation.¹³⁹ The court also ruled there was no negligence because MGM did nothing to create the conditions for Morris's suicide.¹⁴⁰

Lastly, a carrier finally was able to prevail in *Boross v. Liberty Life Insurance Co.*,¹⁴¹ probably because of clear documentation that the insured's beneficiary was well aware of the impropriety of the attempted reinstatement.¹⁴² Here, there was a history of a failure to timely pay on a loan that included a mortgage life insurance. A series of communications culminated in Boross sending a check to Liberty after the death of his father. The insurance company received and accepted the funds for the past-due premiums for a three-week period.¹⁴³ The United States District Court for the Southern District of Georgia, following *Rutland v. State Farm Mutual Automobile Insurance Co.*,¹⁴⁴ found that an insurance company does not impermissibly retain a payment when it refunds late payments within a reasonable period of time.¹⁴⁵ Six weeks was not unreasonable in *Rutland* as the carrier needed time to determine the impropriety of the tender.¹⁴⁶ Hence, a three-week delay was not unreasonable as a matter of law.¹⁴⁷

VI. AUTOMOBILE INSURANCE

A. Arising Out of the "Use" of a Motor Vehicle

Several cases decided during the survey period, involving both uninsured motorist (UM) and liability coverage, address whether the injuries arose out of the "use" of a motor vehicle.¹⁴⁸ The issue arising from these cases was the following: When the driver of an insured motor vehicle, who is neither the owner nor a relative of the owner of the vehicle, stops and gets out of the vehicle to see about an injured animal on the side of the road and is struck by another vehicle while doing so,

139. *Id.* at 253, 726 S.E.2d at 744.

140. *Id.* at 255-56, 726 S.E.2d at 746.

141. No. 4:10-CV-144, 2011 WL 4102524 (S.D. Ga. Sept. 14, 2011).

142. *Id.* at *4-5.

143. *Id.* at *2-3.

144. 426 F. App'x 771 (2011).

145. *Boross*, 2011 WL 4102524, at *4.

146. *Rutland*, 426 F. App'x at 774.

147. *Boross*, 2011 WL 4102524, at *4-5.

148. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Myers*, 316 Ga. App. 152, 728 S.E.2d 787 (2012); *Dunn-Craft v. State Farm Mut. Auto. Ins. Co.*, 314 Ga. App. 620, 724 S.E.2d 903 (2012); *Mough v. Progressive Max Ins. Co.*, 314 Ga. App. 380, 724 S.E.2d 414 (2012).

do the driver's injuries arise out of the use of the insured vehicle so that the driver would be entitled to UM benefits?

In *Dunn-Craft v. State Farm Mutual Insurance Co.*,¹⁴⁹ the Georgia Court of Appeals affirmed the trial court's ruling on summary judgment and held that a question of fact existed as to whether the insured vehicle was involved so that the driver was an insured.¹⁵⁰ However, where an insured was involved in an incident with another motorist on the roadway and followed the other driver home, where he was shot and killed by the other driver's father, the Georgia Court of Appeals affirmed a summary judgment in favor of the deceased's UM carrier on a wrongful death claim in *Mough v. Progressive Max Insurance Co.*¹⁵¹ The court held that although the use of the other driver's vehicle was clearly involved in the incident, that use was too remote from the shooting by her father, who was never in the vehicle, to fall within the coverage of a UM policy.¹⁵² Additionally, where the vehicle at issue was a pot-hole patcher used on the roadway twenty-four hours before the plaintiff lost control of her vehicle when it ran into loose gravel left on the road by the county "pot-patcher," the use of the pot-patcher was held to be too remote to impose liability against the county under a waiver of sovereign immunity for injuries arising from the use of a motor vehicle.¹⁵³

In *State Farm v. Myers*,¹⁵⁴ the guardian of a disabled ward sued the driver of a car used to transport the ward, claiming the ward was sexually abused in the back seat of the vehicle. The driver's insurer filed a separate action seeking a declaratory judgment, arguing it had no duty to defend or indemnify the driver.¹⁵⁵ The court of appeals reversed the trial court's summary judgment for the guardian, holding that the sexual battery in the back seat of a car did not causally arise out of the use of the car and that the car was "only tangentially

149. 314 Ga. App. 620, 724 S.E.2d 903 (2012).

150. *Id.* at 622, 724 S.E.2d at 906. The primary issue in the case was whether the plaintiff driver, who was listed as a driver on her boyfriend's insurance policies, was entitled to stack the coverage limits of his several policies. The court held that a person listed as a driver is not the insured, and since the plaintiff was neither the insured nor a resident relative of the insured, she was not entitled to stack policies for additional benefits. *Id.*

151. 314 Ga. App. 380, 383, 724 S.E.2d 414, 417 (2012).

152. *Id.*

153. *See* Bd. of Comm'rs of Putnam Cnty. v. Barefoot, 313 Ga. App. 406, 409, 721 S.E.2d 612, 615-16 (2011).

154. 316 Ga. App. 152, 728 S.E.2d 787 (2012).

155. *Id.* at 152, 728 S.E.2d at 788.

connected” to the alleged injuries as “the situs of the attack”; thus, the insurer was relieved of providing coverage for the claim.¹⁵⁶

B. Uninsured Motorist Coverage

1. Another Twist on *Abrohams*. Pursuant to the court of appeals’s decision in *Abrohams v. Atlantic Mutual Insurance Agency*,¹⁵⁷ umbrella and excess liability policies issued before 2009 that provided coverage for the use of motor vehicles were deemed to include UM coverage equal to the liability limits, unless the insured affirmatively chose a different coverage limit or effectively rejected such UM coverage.¹⁵⁸ In *Georgia Farm Bureau Mutual Insurance Co. v. North*,¹⁵⁹ the insurer offered UM coverage in its umbrella policy which was issued in 2003.¹⁶⁰ The application, which allowed the insured to choose to include UM coverage, provided that in order to qualify for umbrella UM, the insured’s underlying policy must have UM limits equal to the liability limits for bodily injury and property damage.¹⁶¹ North, the insured, had five liability policies, each with UM limits less than the liability limits.¹⁶² The insured checked the “NO” box on the umbrella application, rejecting UM coverage.¹⁶³

After a collision in 2007, North and his wife brought suit against the driver of the other vehicle and sought UM benefits from Georgia Farm Bureau Mutual Insurance (Georgia Farm Bureau) for the limit of each of his primary policies plus \$1 million under the umbrella policy. The insureds filed a motion for partial summary judgment on the issue of entitlement to UM benefits under the umbrella policy, despite the written rejection of such coverage, and the trial court ruled in the

156. *Id.* at 155, 728 S.E.2d at 789; *but see* *Hays v. Ga. Farm Bureau Mut. Ins. Co.*, 314 Ga. App. 110, 722 S.E.2d 923 (2012). Where the insured’s use of his pickup truck to lift a portable toilet into a deer stand by pulling a rope attached to the toilet through a pulley attached to the deer stand was “use” of the motor vehicle as matter of law, it precluded coverage under the insured’s homeowners policy for liability to the man injured when this operation caused the deer stand—and the man standing on it—to fall twenty feet to the ground. *Id.* at 114-15, 722 S.E.2d at 917-28.

157. 282 Ga. App. 176, 638 S.E.2d 330 (2006); *see also* O.C.G.A. § 33-7-11 (2000 & Supp. 2012). The statute was amended, effective January 1, 2009, to exclude umbrella or excess policies from the mandatory requirement that insurers offer UM coverage equal to the liability limit in all policies of motor vehicle insurance.

158. *Abrohams*, 282 Ga. App. at 181, 638 S.E.2d at 334.

159. 311 Ga. App. 281, 714 S.E.2d 428 (2011).

160. *Id.* at 282, 714 S.E.2d at 430.

161. *Id.* at 281-82 & n.1, 714 S.E.2d at 430 & n.1.

162. *Id.* at 286 n.3, 714 S.E.2d at 432 n.3.

163. *Id.* at 283, 714 S.E.2d at 430.

insureds' favor.¹⁶⁴ The court of appeals agreed with the Norths that the requirement imposed by the policy application, that an insured only qualified for umbrella UM coverage if the underlying liability policy provided UM benefits equal to the liability limits, was an impermissible condition not authorized by O.C.G.A. § 33-7-11(a).¹⁶⁵ Accordingly, the court held that Georgia Farm Bureau failed to properly make UM coverage available to the insured in the umbrella policy and that his rejection of such coverage was ineffective, entitling him to UM coverage up to the umbrella policy limit of \$1 million.¹⁶⁶

2. Eyewitness Testimony in a No-contact Case. When there is no contact between the insured vehicle and a vehicle operated by an alleged unknown tortfeasor, O.C.G.A. § 33-7-11(b)(2) provides that the vehicle operated by the unknown person will be deemed to be uninsured "if the description by the claimant of how the [accident] occurred is corroborated by an eyewitness to the occurrence other than the claimant."¹⁶⁷ This eyewitness corroboration must confirm the claimant's version of the existence of the "phantom" vehicle and its causation of the occurrence.¹⁶⁸ In *Bituminous Insurance Co. v. Coker*,¹⁶⁹ the court of appeals held that when several eyewitnesses testified to the existence of an unknown vehicle and its presence at the scene, but the eyewitness accounts conflict with each other and are inconsistent with the plaintiff's account, the evidence is then insufficient to establish the plaintiff's statutory burden, and the insurer is entitled to judgment as a matter of law.¹⁷⁰ Because the statute was to be applied literally, the court also held that non-eyewitness evidence, or the combination of eyewitness testimony and circumstantial evidence, was not corroboration by an eyewitness as required to support the plaintiff's claim.¹⁷¹

3. No Renewal Action After Publication Service. A combination of jurisdictional and procedural rules doomed an insured's attempt to recover UM benefits from State Farm when she attempted to renew a voluntarily dismissed lawsuit without first having personally served the tortfeasor, even though she obtained publication service on the tortfeasor

164. *Id.* at 281, 714 S.E.2d at 429-30.

165. *Id.* at 285-86, 714 S.E.2d at 432.

166. *Id.* at 286, 714 S.E.2d at 432.

167. O.C.G.A. § 33-7-11(b)(2).

168. *Hohman v. State Farm Ins. Co.*, 283 Ga. App. 430, 431, 641 S.E.2d 650, 651 (2007).

169. 314 Ga. App. 30, 722 S.E.2d 879 (2012).

170. *Id.*

171. *Id.* at 35, 722 S.E.2d at 883.

and personal service on the UM insurer.¹⁷² The rule established in several prior decisions is that a judgment against a tortfeasor is a condition precedent to recovery from a UM carrier.¹⁷³ Thus, if a tortfeasor is sued and dismissed from the suit without judgment being entered, no recovery may be had from the UM carrier.¹⁷⁴ When an insured is unable to locate a known tortfeasor, publication service may be effected to satisfy the condition by obtaining at least a nominal judgment.¹⁷⁵ Publication service, however, does not confer personal jurisdiction upon the tortfeasor.¹⁷⁶ A plaintiff may dismiss a lawsuit and renew it by refile within the original statute of limitations period or "within six months after the discontinuance or dismissal, whichever is later."¹⁷⁷ However, only a valid lawsuit can be renewed, and a complaint that has never been personally served on the tortfeasor is void and incapable of renewal.¹⁷⁸

In *Durrah v. State Farm Fire & Casualty*,¹⁷⁹ the plaintiff timely filed her lawsuit against the alleged tortfeasor, Hernandez, and served her UM carrier, State Farm. Durrah was unable to locate Hernandez, but she obtained an order permitting publication service and had that service effected. State Farm was personally served. Durrah voluntarily dismissed the lawsuit and refiled it within six months, but after the statute of limitations had run. State Farm was again personally served with the renewal action, but Hernandez was not served. Both Hernandez and State Farm filed motions to dismiss: Hernandez because she had not been served with the original suit, and State Farm because the plaintiff could no longer satisfy the condition precedent to recovery by obtaining a judgment against Hernandez. The trial court granted both motions.¹⁸⁰ The court of appeals affirmed the dismissals, holding that the lack of personal service on Hernandez in the original action prior to dismissal rendered it void as against her and incapable of renewal, and the plaintiff's inability to obtain a judgment against Hernandez precluded her from satisfying the condition precedent to recovery of UM benefits from State Farm.¹⁸¹ The court also rejected the plaintiff's

172. See *Durrah v. State Farm Fire & Cas. Co.*, 312 Ga. App. 49, 50-51, 717 S.E.2d 554, 556 (2011).

173. *Moss v. Cincinnati Ins. Co.*, 154 Ga. App. 165, 166, 268 S.E.2d 676, 678 (1980).

174. *Cohen v. Allstate Ins. Co.*, 277 Ga. App. 437, 440, 626 S.E.2d 628, 631-32 (2006).

175. *Costello v. Bothers*, 278 Ga. App. 750, 752, 629 S.E.2d 599, 602 (2006).

176. *Id.*

177. O.C.G.A. § 9-2-61(a) (2007).

178. *Costello*, 278 Ga. App. at 752, 629 S.E.2d at 602.

179. 312 Ga. App. 49, 717 S.E.2d 554 (2011).

180. *Id.* at 49-50, 717 S.E.2d at 555.

181. *Id.* at 50-51, 717 S.E.2d at 556.

argument that a 2006 amendment to O.C.G.A. § 33-7-11 did away with the necessity of obtaining a judgment against a tortfeasor as a condition precedent to the recovery of UM benefits.¹⁸²

182. *Id.* at 52-53, 717 S.E.2d at 557.