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Trial Practice and Procedure

by **C. Frederick Overby***
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I. INTRODUCTION

The most notable and far-reaching judicial activity during this survey period dealt with the summary judgment standard applied in tort cases. Other noteworthy developments occurred in the areas of venue, renewal of actions, collateral estoppel, and bifurcation of trials in cases involving punitive damages. Only minimal legislation was enacted in the area of trial practice and procedure during the survey period. This Article focuses on the most notable decisions rendered by the judiciary and the most significant legislation touching upon trial practice and procedure in Georgia state courts.

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II. CASE LAW

A. *The Summary Judgment Standard*

Perhaps the single most important development during the survey period was when the supreme court reviewed the unique summary judgment standard that the court of appeals had been applying in “slip and fall” cases—a standard which made successful pursuit of such a case about as likely as meaningful campaign finance reform.¹ The landmark decision was *Robinson v. Kroger Co.*,² a garden-variety tort case in which the plaintiff slipped on a foreign substance in a supermarket and injured her knee.³

Before the supreme court granted certiorari in *Robinson*, any observer of Georgia jurisprudence could predict with certainty a swift and decisive victory for the supermarket. In a string of cases purportedly relying on *Alterman Foods, Inc. v. Ligon*,⁴ the supreme court’s last pronouncement on the subject in 1980, the court of appeals created a summary judgment standard for “slip and fall” cases that turned the ordinary burdens of proof and production applicable to all other tort cases on their heads.⁵ Plaintiffs were forced to prove, as part of their prima facie case, the defendant’s “superior knowledge” of the hazard involved.⁶ “Superior knowledge” required the plaintiffs to prove they exercised due care for their own safety.⁷ However, in other words, not only did “slip and fall” plaintiffs necessarily need to prove the negligence of the defendants, but they also had to affirmatively disprove their own contributory negligence and assumption of the risk.⁸ Failure to carry either burden barred

1. As the supreme court succinctly put it, “[T]he pendulum made a dramatic swing in the other direction as it became the rare case which escaped summary adjudication.” *Robinson v. Kroger Co.*, 268 Ga. 735, 736, 493 S.E.2d 403, 406 (1997).

2. 268 Ga. 735, 493 S.E.2d 403 (1997).

3. *Id.* at 735, 493 S.E.2d at 405.

4. 246 Ga. 620, 272 S.E.2d 327 (1980).

5. See generally *Piggly Wiggly Southern, Inc. v. James*, 225 Ga. App. 846, 846-47, 485 S.E.2d 223, 223-25 (1997); *Nails v. Food Lion, Inc.*, 221 Ga. App. 405, 406, 471 S.E.2d 327, 329 (1996) (plaintiff’s “failure to watch where she was walking forecloses her recovery”); *Baker v. Winn Dixie Stores, Inc.*, 219 Ga. App. 513, 465 S.E.2d 710 (1995); *Boykin v. North*, 218 Ga. App. 435, 461 S.E.2d 598 (1995); *Smith v. Wal-Mart Stores, Inc.*, 199 Ga. App. 808, 810, 406 S.E.2d 234, 236 (1991) (plaintiff’s failure to look at floor coupled with admission that plaintiff would have observed hazard had plaintiff been looking held sufficient to establish lack of care for own safety as matter of law).

6. *Moore v. Winn-Dixie Stores, Inc.*, 214 Ga. App. 157, 159-60, 447 S.E.2d 122, 124 (1994).

7. 268 Ga. at 736, 493 S.E.2d at 406.

8. *Id.* at 738, 493 S.E.2d at 407.

recovery completely.⁹ However, in all other tort cases, the burden is on the defendants to prove the plaintiffs' contributory negligence and assumption of the risk as affirmative defenses. The jury may also consider the comparative negligence of the respective parties.¹⁰

One might ask, as the supreme court ultimately did when granting certiorari, how one proves with affirmative evidence that one was not negligent?¹¹ The task proved so hard that questions of negligence and contributory negligence, long reserved for jury determination in all but the clearest cases, became decisions for the courts in almost every "slip and fall" case.¹²

Indeed, Mrs. Robinson could not show she had been watching the floor continuously as she placed each footfall—a standard arguably proper for tightrope walkers but not even advisable for negotiators of supermarket aisles—so the trial court dismissed her case.¹³ The court of appeals affirmed summary judgment.¹⁴ The case might have ended at this point, but plaintiff's counsel filed as a matter of course a petition for certiorari, asking the supreme court to revisit the issue of the proper summary judgment standard to apply in "slip and fall" cases. The supreme court granted certiorari to address this issue.¹⁵

In division 1 of its opinion, a unanimous supreme court reversed summary judgment.¹⁶ The court expressly disapproved of "the appellate decisions which hold as a matter of law that an invitee's failure to see before falling the hazard which caused the invitee to fall constitutes a failure to exercise ordinary care."¹⁷ The court condemned the decision to dismiss plaintiff's case based on an admission that "she failed to look at the location where she subsequently placed her foot."¹⁸

The high court reasoned that the court of appeals decisions wrongly made summary adjudication of negligence issues the norm in "slip and

9. *Id.* at 748-49, 493 S.E.2d at 414.

10. THOMAS F. GREEN, JR., *GEORGIA LAW OF EVIDENCE* 19 (4th ed. 1994) (citing *Stewart v. Mynatt*, 135 Ga. 637, 70 S.E. 325 (1911)) (burden of proof of affirmative defenses, including contributory negligence, on defendant). See *Whatley v. Henry*, 65 Ga. App. 668, 674, 16 S.E.2d 214, 220 (1941) (defining comparative negligence). See also O.C.G.A. § 46-8-291 (1992) (comparative negligence allowed in railroad cases).

11. 268 Ga. at 735, 493 S.E.2d at 405.

12. *Id.* at 739, 493 S.E.2d at 408 (citing *Ellington v. Tolar Const. Co.*, 237 Ga. 235, 237, 227 S.E.2d 336, 338 (1976)).

13. *Id.* at 743, 493 S.E.2d at 410.

14. *Id.* at 735, 493 S.E.2d at 405.

15. *Id.*

16. *Id.* at 743, 493 S.E.2d at 411.

17. *Id.*, 493 S.E.2d at 410.

18. *Id.*

fall" cases, rather than the exception.¹⁹ Also, the unique "slip and fall" standard elevated the plaintiff's duty to exercise care to paramount importance such that a finding of any knowledge, rather than superior knowledge, on the part of the plaintiff constituted a complete bar to a jury determination.²⁰ Finally, the "slip and fall" standard inexplicably transformed the "plain view" doctrine into a bar to recovery any time the plaintiff could have discovered any hazard, no matter how small or inconspicuous, if the plaintiff had inspected the placement of each footfall.²¹

In division 2 of the opinion, in somewhat of an advisory opinion, six of the seven Justices addressed two recurring "slip and fall" subjects which were not technically at issue in *Robinson*: the "distraction doctrine" and the parties' respective burdens of proof.²² This Article will only explore the supreme court's exposition on the proper burdens of proof because that part of the court's opinion will change "slip and fall" practice and procedure drastically by bringing it back in line with the procedures followed in all other tort cases.

Oddly enough, it was not *Alterman Foods* alone that saddled "slip and fall" plaintiffs with the typically insurmountable burden of proving their own nonnegligence at the summary judgment stage. When *Alterman Foods* was decided, the defendant had the burden at the summary judgment stage of coming forward with affirmative evidence refuting at least one element of the plaintiff's prima facie case.²³ So, practically speaking, the defendant was necessarily required to produce evidence of the plaintiff's negligence before the plaintiff's burden of demonstrating nonnegligence arose.

When the supreme court decided *Lau's Corp. v. Haskins*,²⁴ the confluence of *Lau's* with *Alterman Foods* led to the unique "slip and fall" standard overruled by the supreme court in *Robinson*.²⁵ For the first time, after *Lau's*, a defendant who does not have the burden of proof on an issue was allowed to obtain summary judgment by merely pointing to a lack of evidence possessed by the plaintiff in support of at least one element of his prima facie case.²⁶ Synergistically, these two cases

19. *Id.* at 739, 493 S.E.2d at 408.

20. *Id.*

21. *Id.* at 742-43, 493 S.E.2d at 409-10.

22. *Id.* at 743-49, 493 S.E.2d at 411-14.

23. *Id.* at 747, 493 S.E.2d at 413 (citing *Hilsman v. Kroger Co.*, 187 Ga. App. 570, 572, 370 S.E.2d 755, 757 (1988) (Sognier, J., concurring specially)).

24. 261 Ga. 491, 405 S.E.2d 474 (1991).

25. 268 Ga. at 735, 493 S.E.2d at 405.

26. *Id.* at 747, 493 S.E.2d at 413.

forced "slip and fall" plaintiffs to prove their lack of negligence to the trial court or lose the right to a jury determination of negligence issues.

In *Robinson*, the supreme court elected to modify *Alterman Foods* in order to correct this misapplication of the summary judgment burden in "slip and fall" cases.²⁷ Now the defendant again has the burden of coming forward with evidence of the plaintiff's lack of due care before any duty of showing care is triggered on the part of the plaintiff.²⁸ The supreme court went on to

remind members of the judiciary that the "routine" issues of premises liability, i.e., the negligence of the defendant and the plaintiff, and the plaintiff's lack of ordinary care for personal safety are generally not susceptible of summary adjudication, and that summary judgment is granted only when the evidence is plain, palpable, and undisputed.²⁹

The decision in *Robinson* was foreshadowed by a full panel debate of the proper summary judgment standard by the court of appeals in the case of *Bruno's Food Stores, Inc. v. Taylor*.³⁰ In *Bruno's*, plaintiff slipped on a wet floor at a supermarket allegedly because of an independent floor cleaning company's failure to remove the water from the floor and failure to place warning signs.³¹ The case involved a multitude of oft-encountered "slip and fall" issues, but its pertinence to the trial practice and procedure survey stems from the lively debate between the majority and special concurrence over the proper summary judgment standard to apply to "slip and fall" cases.³² The disagreement between esteemed members of the court of appeals, after years and scores of "slip and fall" precedent, highlighted the need for supreme court review of the summary judgment standard in "slip and fall" cases.

The majority in *Bruno's*, constrained by the *Alterman Foods* and *Lau's* standard, struggled mightily to shape its analysis in a more even-handed way than in past opinions. The end result denied summary judgment based on a finding of "active negligence" by the supermarket and the court's refusal to draw a "negative inference" against plaintiff at the summary judgment stage.³³

The finding of "active negligence" was significant because it ostensibly removed *Bruno's* from the "static condition" analysis utilized in "slip and

27. *Id.*

28. *Id.* at 747-48, 493 S.E.2d at 413-14.

29. *Id.* at 748, 493 S.E.2d at 414.

30. 228 Ga. App. 439, 491 S.E.2d 881 (1997).

31. *Id.* at 439, 491 S.E.2d at 884.

32. *Id.*, 491 S.E.2d at 881.

33. *Id.* at 448, 491 S.E.2d at 890.

fall" cases and transformed it into an ordinary negligence action.³⁴ In ordinary negligence actions, the defendants, not the plaintiffs, carry the burden of proof with respect to whether the plaintiffs exercised ordinary care for their own safety.³⁵ Comparative negligence also applies so that the jury still decides the issue even if the plaintiff was negligent to some degree as a matter of law.³⁶

The majority could have easily ended its analysis by holding that because defendant, who had the burden of proving plaintiff's negligence in "active negligence" cases, had come forward with no positive proof of negligence by plaintiff, summary judgment was inappropriate. After all, it is settled doctrine that questions of negligence are left for the jury in all but plain, palpable, and undisputed cases.³⁷ Instead, the majority expounded for several more pages, holding summary judgment cannot be based upon a "negative inference" against the nonmovant.³⁸

While this principle seems clear from a wealth of precedent, notwithstanding the disagreement of the special concurrence, it is no profound revelation.³⁹ When nonmovants carry the burden of proof, the only question at summary judgment is whether the nonmovant has offered any evidence in support of each element of the claim.⁴⁰ Inferences which negate an element of the nonmovant's prima facie case are meaningless. If the nonmovants present any evidence, or evidence which allows an inference, in support of their claim, then summary judgment is inappropriate no matter what negative inferences might also be drawn. If nonmovants present no evidence in support of their claim,

34. *Id.* at 443, 491 S.E.2d at 887.

35. THOMAS F. GREEN, JR., *GEORGIA LAW OF EVIDENCE* 19 (4th ed. 1994). The majority alluded to the fact that the issue of the plaintiff's negligence was an affirmative defense with respect to which the defendant properly carries the burden of proof. Yet, inexplicably, the court failed to make this dispositive point. *See* 228 Ga. App. at 447 n.5, 491 S.E.2d at 889 n.5.

36. *See* *Bruno's Food Stores, Inc. v. Taylor*, 228 Ga. App. at 447 n.5, 491 S.E.2d at 889 n.5.

37. *Thompson v. Crownover*, 259 Ga. 126, 129, 381 S.E.2d 283, 286 (1989); *Ellington v. Tolar Constr. Co.*, 237 Ga. 235, 237, 227 S.E.2d 336, 338 (1976); *Wynne v. Southern Bell Tel. & Tel. Co.*, 159 Ga. 623, 626, 126 S.E. 388, 389 (1925); *Service Merchandise, Inc. v. Jackson*, 221 Ga. App. 897, 898-99, 473 S.E.2d 209, 211 (1996); *Pique v. Lee*, 218 Ga. App. 357, 359, 461 S.E.2d 302, 304 (1995).

38. 228 Ga. App. at 446-48, 491 S.E.2d at 888-90.

39. *Id.* at 451, 491 S.E.2d at 892 (Birdsong, concurring specially). As pointed out (and apparently unheeded) by the special concurrence, the United States Supreme Court has held that "if the trial court is presented with a choice of inferences to be drawn from the facts [then] all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Id.* (citing *United States v. Diebold*, 369 U.S. 654, 655 (1962)).

40. *Lau's Corp. v. Haskins*, 261 Ga. 491, 495, 405 S.E.2d 474, 478 (1991).

then summary judgment is appropriate, not because of any negative inference, but because of the nonmovants' inability to offer any evidence in support of their claim.⁴¹

B. Venue

As usual; this year produced several decisions that elucidated Georgia's venue rules. One notable case was *Ford v. Uniroyal Goodrich Tire Co.*⁴² *Ford* initially involved three defendants: one corporate resident of Fulton County, one corporate resident of Clayton County, and a foreign partnership that was not a resident of any Georgia county but consisted of two partners, one of whom was a resident of Fulton County.⁴³ Suit was brought in Fulton County, with venue based on the presence of the Fulton County corporate defendant.⁴⁴

After plaintiffs settled with the Fulton County corporate defendant, which was then dismissed from the lawsuit, only the nonresident defendants remained.⁴⁵ The question became whether the Fulton County residence of one partner in a foreign partnership allowed venue in Fulton County pursuant to the general rule that allows a partnership to be sued in any county where one of its partners resides.⁴⁶ The court of appeals said no: "The plain language of the Long Arm Statute shows that the status of the defendant partnership, not the status of the individual partners, determines both residency and venue."⁴⁷

The glaring omission from the analysis is that the court stated no reason for limiting venue to those choices set forth in the Long Arm Statute. The mere fact that defendant was a nonresident did not require application of the Long Arm Statute if other means of serving defendant existed. For instance, the Nonresident Motorist Act⁴⁸ allows service of nonresident drivers in situations where the Long Arm Statute would also apply, and under that scheme, a plaintiff is given a whole different set of venue choices.⁴⁹ A nonresident defendant temporarily sojourning in Georgia can be served where he or she is found, and venue will lie in the county where service was perfected, notwithstanding the applicabili-

41. *Id.*

42. 231 Ga. App. 11, 497 S.E.2d 596 (1998).

43. *Id.* at 12-13, 497 S.E.2d at 597-98.

44. See GA. CONST. art. VI, § 2, para. 4.

45. 231 Ga. App. at 12, 497 S.E.2d at 598.

46. *Id.* at 13, 497 S.E.2d at 598.

47. *Id.*

48. O.C.G.A. § 40-12-1 to -8 (1997 & Supp. 1998).

49. See *id.* § 40-12-3 (1997).

ty of the Long Arm Statute.⁵⁰ Nothing contained within the Long Arm Statute suggests its exclusivity, either as to service or venue.⁵¹

In *Ford*, defendant partnership was brought into the lawsuit by the trial court, and apparently, service was perfected under the Long Arm Statute.⁵² The holding of the court of appeals at least suggests that if the practitioner obtains service based on the Long Arm Statute, that scheme's venue choices are exclusive.⁵³ When serving a nonresident defendant, the wise practitioner would be well advised to serve the defendants with process in as many legal ways as possible. This way, one secures maximum flexibility in venue choices.

In *Georgia Department of Transportation v. Evans*,⁵⁴ the supreme court affirmed a court of appeals decision analyzed in last year's survey article.⁵⁵ The supreme court construed the exclusive venue provisions set forth in the Georgia Tort Claims Act⁵⁶ and held venue in a wrongful death action was indeed proper in the county where the plaintiff expired, regardless of where the tort occurred.⁵⁷ Such county constitutes "the county wherein the loss occurred."⁵⁸

The DOT argued that because the collision, injuries, pain and suffering, and eventual death of plaintiff occurred in various counties, the cause of action must be split and filed in several counties unless "loss" is defined as where the "occurrence" took place.⁵⁹ In important dicta, the court made short work of this argument, stating nothing in the Tort Claims Act venue provision "precludes the plaintiff's election of venue among the locations of loss."⁶⁰

In *Barnett v. Quinn*,⁶¹ the court of appeals made it clear that if plaintiff settles with the only resident defendant and wishes to retain venue by means of a consent judgment, plaintiff should do so before dismissing the resident defendant.⁶² Plaintiff's dismissal of the local defendant without first obtaining a consent judgment caused venue to

50. *Id.* § 9-10-33 (1982).

51. *Id.* § 9-10-91 to -93 (1982 & Supp. 1998).

52. *Ford v. Uniroyal Goodrich Tire Co.*, 231 Ga. App. 11, 12, 497 S.E.2d 596, 598 (1998).

53. *Id.* at 13-14, 497 S.E.2d at 598-99.

54. 269 Ga. 400, 499 S.E.2d 321 (1998).

55. *Id.* at 401, 499 S.E.2d at 323.

56. O.C.G.A. § 50-21-28 (1998).

57. 269 Ga. at 400-01, 499 S.E.2d at 321-22.

58. *Id.* at 400, 499 S.E.2d at 321.

59. *Id.* at 400-01, 499 S.E.2d at 321-22.

60. *Id.* at 401, 499 S.E.2d at 323.

61. 227 Ga. App. 172, 489 S.E.2d 68 (1997).

62. *Id.* at 174-75, 489 S.E.2d at 70.

vanish.⁶³ The case was properly transferred to a county where proper venue existed, and the case could not be transferred back to the original county once a consent judgment was obtained from the settling defendant because no provision allows transfer from a county where venue is proper.⁶⁴

Finally, in *Airgrowers, Inc. v. Tomlinson*,⁶⁵ the court of appeals upheld the principle of vanishing venue in the context of a cross-claim.⁶⁶ The court reasoned that when the main claim against the only resident defendant has been dismissed, even by consent judgment, in order to adjudicate a cross-claim, an independent basis for venue must exist.⁶⁷

C. *The Renewal Statute and Statute of Limitations*

Once more, appellate decisions addressing Georgia's Renewal Statute⁶⁸ and Georgia's various statutes of limitations abound. In *Milburn v. Nationwide Insurance Co.*,⁶⁹ the court of appeals gavelled and the court of appeals tooketh away. The court ruled the suit was renewable but disallowed renewal due to plaintiff's lack of diligence.⁷⁰ *Milburn* involved a renewal action naming the actual tortfeasor. The initial, dismissed action named a "John Doe" defendant instead.⁷¹ In division 1, subsection (a), the court determined that the naming of a "John Doe" defendant in place of the actual tortfeasor, who was never served in the initial action, did not render the initial action void, but merely voidable.⁷² In division 1(b), the court ruled the "John Doe" defendant from the first suit and the named defendant from the second suit were "in substance identical."⁷³ Thus, the Renewal Statute could be applied to allow a second suit to be filed against the tortfeasor within six months after the dismissal of the initial action, even though the statute of limitations had run.⁷⁴

63. *Id.* "The venerable principle of vanishing venue was well established at the turn of the century." *Id.* at 174, 489 S.E.2d at 70. These authors hope that the venerable principle will not make it to the turn of the next one.

64. *Id.* at 175, 489 S.E.2d at 70-71.

65. 230 Ga. App. 415, 496 S.E.2d 528 (1998).

66. *Id.* at 416-17, 496 S.E.2d at 529-30.

67. *Id.* at 417, 496 S.E.2d at 530.

68. O.C.G.A. § 9-2-61 (1982 & Supp. 1998).

69. 228 Ga. App. 398, 491 S.E.2d 848 (1997).

70. *Id.* at 402-03, 491 S.E.2d at 852-53.

71. *Id.* at 398, 491 S.E.2d at 849-50.

72. *Id.* at 399-400, 491 S.E.2d at 850.

73. *Id.* at 400, 491 S.E.2d at 851.

74. *Id.*

At this point in the opinion, plaintiff's chances looked promising. However, division 1(c) dictated a different result. For in division 1(c), the court held that to renew successfully a dismissed "John Doe" action against the actual tortfeasor, the plaintiff must meet the requirements of O.C.G.A. section 9-11-15(c) for relation-back of amendments to pleadings.⁷⁵ In other words, the tortfeasor must: "(1) ha[ve] received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) kn[o]w or should have known that, but for the mistaken identity, the action would have been brought against him."⁷⁶ Because plaintiff failed to plead even these necessary facts, the lawsuit was not saved by the Renewal Statute.⁷⁷

This holding finds no support in any reading of O.C.G.A. section 9-11-15(c), which only purports to address relation-back of pleadings in a single case, as opposed to relation-back of an entire renewed lawsuit to a previous action. Also, it will only be the rarest of circumstances when a plaintiff who does not know the identity of the tortfeasor will ever meet the relation-back test of O.C.G.A. section 9-11-15(c).

One of the cases cited by the court, *Brer Rabbit Mobile Home Sales v. Perry*,⁷⁸ applied O.C.G.A. section 9-11-15(c) to renewal actions, but that case did not analyze the language of the rule at all.⁷⁹ The court merely cited a case that applied O.C.G.A. section 9-11-15(c) in its intended context to the addition of a party by an amended complaint, rather than a renewed action.⁸⁰

The court of appeals reached a similar holding concerning relation-back of an amended complaint "substituting" a known defendant when the original complaint named a "John Doe" defendant in the case of *Bishop v. Farhat*.⁸¹ In *Bishop* the court of appeals ruled again that the proper test was contained in O.C.G.A. section 9-11-15(c).⁸² The plaintiff is allowed to amend the complaint substituting the named defendant as a matter of right at any time before the entry of the pretrial order.⁸³

75. *Id.* at 401, 491 S.E.2d at 851.

76. *Id.*

77. *Id.* at 403, 491 S.E.2d at 852.

78. 132 Ga. App. 128, 207 S.E.2d 578 (1974).

79. *Id.* at 129, 207 S.E.2d at 579.

80. *Id.* (citing *Sims v. American Cas. Co.*, 131 Ga. App. 461, 482, 206 S.E.2d 121, 135 (1974)).

81. 227 Ga. App. 201, 489 S.E.2d 323 (1997).

82. *Id.* at 202, 489 S.E.2d 326. The court rejected the trial court's application of O.C.G.A. section 9-11-21, which allows the addition of parties "by order of the court." *Id.*

83. *Id.*

Upon motion for summary judgment, the trial court simply determines whether the requisites for relation-back exist.⁸⁴

More significant, perhaps, was the court's unflinching reliance upon a continuing tort theory to toll the statute of limitations in failure to warn cases.⁸⁵ In *Bishop* plaintiff, a nurse, developed an allergy to latex gloves.⁸⁶ The court ruled that the statute of limitations was tolled until the injured plaintiff discovered the defendant's failure to warn, which, in the context of this case, was when the cause of plaintiff's problems was discovered.⁸⁷

In *Walker v. Melton*,⁸⁸ the court also allowed the extension of the applicable two year statute of limitations in a misdiagnosis case.⁸⁹ The court made it clear, however, that its holding was strictly limited to situations where the misdiagnosis caused a new and distinct injury that occurred subsequent to the misdiagnosis.⁹⁰ To bar such a claim, the court opined, would run afoul of supreme court precedent holding that barring a cause of action based on the statute of limitations before the injury has accrued and, thus, before a cause of action yet exists, violates equal protection.⁹¹

The court seemingly merged the reasoning of *Bishop* and *Walker* in a medical malpractice case based on the failure to warn of the problems associated with a certain type of temporomandibular joint implants.⁹² The court could have cited the tolling principle applied to failure to warn cases set forth in *Bishop* and held the statute of limitations suspended until plaintiff discovered the cause of her injury. Apparently, the court thought such a holding would have conflicted with established precedent that holds "[t]he limitation period 'begins to run on the date on which an injury arising from an act of malpractice occurs and physically manifests itself, rather than when the plaintiff discovers the causal relationship between the injury and the defendant's breach of duty.'"⁹³

84. *Id.*

85. *Id.* at 203, 489 S.E.2d at 327.

86. *Id.* at 201, 489 S.E.2d at 325.

87. *Id.* at 205, 489 S.E.2d at 327. The court held that plaintiff's earlier belief that her problems were caused by the powder on the gloves—as opposed to the latex—did not begin accrual of the period of limitations. *Id.* “[A] jury question exist[ed] as to when [the plaintiff] associated her problems with ‘latex allergy.’” *Id.*

88. 227 Ga. App. 149, 151, 489 S.E.2d 63, 65 (1997).

89. *Id.*

90. *Id.* at 151, 489 S.E.2d at 64-65.

91. *Id.*, 489 S.E.2d at 65 (citing *Shessel v. Stroup*, 253 Ga. 56, 58-60, 316 S.E.2d 155, 157-59 (1984) and *Clark v. Singer*, 250 Ga. 470, 472, 298 S.E.2d 484, 486 (1983)).

92. *Screven v. Drs. Gruskin & Lucas, P.C.*, 227 Ga. App. 756, 490 S.E.2d 422 (1997).

93. *Id.* at 758, 490 S.E.2d at 424 (quoting *Oxley v. Kilpatrick*, 225 Ga. App. 838, 839-40, 486 S.E.2d 44, 45-46 (1997)).

Instead, the court of appeals professed an analysis similar to that employed in *Walker*, holding "to the extent that [the plaintiff] can show an injury arising from the delay in notifying her, such as that it is now inoperable, she presents an issue for a jury."⁹⁴ In other words, as in *Walker*, the plaintiff must show a new and distinct injury that occurred subsequent to and as a result of the malpractice—the failure to warn.⁹⁵ The court never actually analyzed whether plaintiff proved such an injury; the court seemed to base its determination of when the statute of limitations began running entirely upon the time plaintiff discovered the causal connection between the injury and the defendant's conduct.⁹⁶

In another renewal case, *United States Fidelity & Guaranty Co. v. Reid*,⁹⁷ the supreme court determined that plaintiff's failure to serve his uninsured motorist carrier in the initial suit did not preclude valid service of the carrier in a renewed action from relating back.⁹⁸

In two interesting cases with which any trial practitioner ought to be familiar, the court of appeals created a judicial obstacle course for any plaintiff who has difficulty serving a defendant within the statute of limitations. In the first case, *Black v. Knight*,⁹⁹ the court ruled that a suit that was dismissed with prejudice by the trial court for failure to exercise due diligence in obtaining timely service of process was void and, therefore, not subject to renewal.¹⁰⁰ The same court held in a separate case, *Allen v. Kahn*,¹⁰¹ that a suit voluntarily dismissed before the trial court could rule on plaintiff's due diligence in perfecting service can be renewed because such a suit is voidable, not void.¹⁰²

The difference between the two cases is that once service has been perfected, the suit is voidable and not void until the trial court rules upon the defendant's motion to dismiss. The moral is to dismiss and refile, if at all possible, before the court has a chance to rule on the due diligence issue.

Finally, the court of appeals held in *Robinson v. Stokes*¹⁰³ that a compulsory counterclaim, if voluntarily dismissed in the original action, cannot be renewed because of the bar of *res judicata*.¹⁰⁴

94. *Id.* at 759, 490 S.E.2d at 425.

95. *Id.*

96. *Id.*

97. 268 Ga. 432, 491 S.E.2d 51 (1997).

98. *Id.* at 434, 491 S.E.2d at 52.

99. 231 Ga. App. 820, 499 S.E.2d 69 (1998).

100. *Id.* at 820, 499 S.E.2d at 70.

101. 231 Ga. App. 438, 499 S.E.2d 164 (1998).

102. *Id.* at 439-40, 499 S.E.2d at 166.

103. 229 Ga. App. 25, 493 S.E.2d 5 (1997).

104. *Id.* at 27, 493 S.E.2d at 7.

D. Collateral Estoppel

In a rare attempt to settle between two diametrically opposed lines of cases, a full panel opinion of the court of appeals finally decided in *Wickliffe v. Wickliffe Co.*¹⁰⁵ that mutuality of estoppel is required before relitigation of an issue can be barred by collateral estoppel.¹⁰⁶ In other words, a party is not bound by a prior judicial determination of an issue unless the opposite party could also have been bound by the determination.¹⁰⁷

For several years now, whether or not collateral estoppel requires mutuality has depended entirely upon which panel of the court of appeals heard the case.¹⁰⁸ The full panel decision in *Wickliffe* expressly overruled the line of cases that adopted the modern view, while calling for the supreme court to adopt the modern view for reasons of judicial economy.¹⁰⁹

E. Confidentiality Settlement Agreements and Orders

The court of appeals expressly placed the truth-seeking function of the courts and the discovery process above the confidentiality concerns of private litigants in previously settled suits. The case was *Barger v. Garden Way, Inc.*,¹¹⁰ a product liability action involving an allegedly defective chipper/shredder.

In discovery, plaintiff sought to identify other victims of the allegedly defective chipper/shredder. Plaintiff requested that defendant produce "statements . . . by other persons injured by the product . . . ; and [for

105. 227 Ga. App. 432, 489 S.E.2d 153 (1997).

106. *Id.* at 434-35, 489 S.E.2d at 156.

107. *Id.* The court expressed its view that the supreme court ought to adopt the "modern view" which does not require mutuality for collateral estoppel to apply. *Id.* at 434-35, 489 S.E.2d at 156. It seems questionable, however, whether or not the supreme court has such power because identity of parties is a requirement expressed specifically by the statute which codifies collateral estoppel. See O.C.G.A. § 9-12-40 (1993).

108. For the line of cases adopting the "modern view" that mutuality of estoppel is not required, see *Ervin v. Swift Adhesives*, 208 Ga. App. 265, 266, 430 S.E.2d 133, 134 (1993); *Wilson v. Malcolm T. Gilliland, Inc.*, 198 Ga. App. 616, 618-19, 402 S.E.2d 291, 293 (1991); *Winters v. Pund*, 179 Ga. App. 349, 352-53, 352 S.E.2d 124, 126-27 (1986); *Watts v. Lippitt*, 171 Ga. App. 578, 579, 320 S.E.2d 581, 582-83 (1984). For the line of cases continuing to apply the mutuality requirement, see *Toporek v. Zepp*, 224 Ga. App. 26, 28, 479 S.E.2d 759, 760 (1996); *Miller v. Steelmaster Material Handling Corp.*, 223 Ga. App. 532, 535, 478 S.E.2d 601, 603-04 (1996); *Miller v. Charles*, 211 Ga. App. 386, 387, 439 S.E.2d 88, 88-89 (1993); *Stiltjes v. Ridco Exterminating Co.*, 197 Ga. App. 852, 852, 399 S.E.2d 708, 709 (1990).

109. 227 Ga. App. at 434-35, 489 S.E.2d at 155-56.

110. 231 Ga. App. 723, 499 S.E.2d 737 (1998).

defendant to] allow disclosure of relevant information by persons otherwise prohibited from making disclosures [allegedly] due to the existence of confidentiality orders or agreements."¹¹¹ Defendant opposed disclosure of any such testimony because of the alleged right to silence for which defendant had previously bought and paid.¹¹²

Citing Georgia's statute that prevents contracts based on illegal consideration, such as contracts which violate the public policy of Georgia, the court held that the discovery must be permitted.¹¹³ Contracts which purport to prevent a witness from testifying in response to a subpoena, subsequent court order, or notice of deposition violate two specific statutory declarations of Georgia public policy: (1) "The object of all legal investigation is the discovery of the truth. The rules of evidence are framed with a view to this prominent end, seeking always for pure sources and the highest evidence";¹¹⁴ and (2) "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action"¹¹⁵ The court held that an implicit term in any confidentiality agreement or order is that a party to the agreement may nevertheless testify or otherwise comply with a subpoena, court order, or applicable law.¹¹⁶

This ruling fundamentally makes good sense because parties ought not be allowed to contract away their legal obligations, frustrating the legal rights of those persons seeking subsequent redress.

F. Collateral Source Evidence

In yet another decision concerning whether or not trial courts should qualify jurors with respect to interested liability insurers, the court of appeals in *Dalton v. Vo*¹¹⁷ again responded affirmatively.¹¹⁸ It makes no difference if the insurer is a mutual or a stock company.¹¹⁹

Two matters of interest should be noted from the opinion. First, the court rejected defendant's post-trial argument that if asked, the jurors would testify as to a lack of knowledge of any financial interest in the case.¹²⁰ The rejection of this argument comes as no surprise because defendant apparently offered no supporting evidence. The court's

111. *Id.* at 724, 499 S.E.2d at 740.

112. *Id.*

113. 231 Ga. App. at 724-25, 499 S.E.2d at 740-41 (citing O.C.G.A. § 13-3-45 (1982)).

114. O.C.G.A. § 24-1-2 (1995).

115. *Id.* § 9-11-26(b)(1) (1993).

116. 231 Ga. App. at 725-26, 499 S.E.2d at 741.

117. 230 Ga. App. 413, 414, 497 S.E.2d 245, 246 (1998).

118. *Id.* at 414, 497 S.E.2d at 247.

119. *Id.* at 413, 497 S.E.2d at 247.

120. *Id.* at 413-14, 497 S.E.2d at 246-47.

citation of O.C.G.A. section 9-10-9, which allows affidavits that uphold but do not impeach the verdict to be considered, is curious because any such affidavit would indeed uphold the verdict rendered in the case.¹²¹

The second point of interest in the opinion is the continuing debate among members of the court of appeals over whether or not the jury pool should be qualified with respect to the specific insurers or merely asked if they know of any financial interest they have in the case. Chief Judge Andrews endorsed the latter view in footnote two of his opinion,¹²² a view apparently shared by Judges Johnson¹²³ and Beasley.¹²⁴ Presiding Judge Pope and Judge Blackburn concurred specially to make known their support of the former approach.¹²⁵

Judge Pope made the practical suggestion that the trial court avoid any prejudice to the defendant by giving a specific limiting instruction that the existence or lack of insurance in a given case is immaterial and not to be considered in reaching a decision.¹²⁶ This suggestion seems to strike the better balance between the plaintiff's absolute right to an impartial jury pool and the defendant's right not to have the existence of insurance prejudice the determination of the case. After all, "[a]ny juror who doesn't know that there is liability insurance in the case [of a motor vehicle collision] by this time should probably be excused by virtue of the fact that he or she is an idiot."¹²⁷

In *Goss Brothers Trucking v. Ashley*,¹²⁸ the court of appeals held that a lawyer's leading question containing the amount of insurance coverage available required a mistrial.¹²⁹ It made no difference that the question was never answered and that the trial court gave a strong curative instruction.¹³⁰

121. *Id.* at 414 n.1, 497 S.E.2d at 247 n.1.

122. *Id.* at 414 n.2, 497 S.E.2d at 247 n.2.

123. *Byrd v. Daus*, 218 Ga. App. 145, 460 S.E.2d 819 (1995).

124. *Franklin v. Tackett*, 209 Ga. App. 448, 433 S.E.2d 710 (1993).

125. 230 Ga. App. at 414-15, 497 S.E.2d at 247 (Pope, P.J., concurring specially).

126. *Id.* at 415, 497 S.E.2d at 247.

127. *Young v. Carter*, 121 Ga. App. 191, 193, 173 S.E.2d 259, 261 (1970) (Hall, J., concurring).

128. 228 Ga. App. 354, 492 S.E.2d 7 (1997).

129. *Id.* at 355, 492 S.E.2d at 8. The existence of insurance was properly before the jury, as the insurer was a party to the action under O.C.G.A. § 46-7-12(e) (1992 & Supp. 1998), Georgia's Direct Action Statute. *Id.* at 354-55, 492 S.E.2d at 9. Under the statute, in certain cases involving motor common and contract carriers, the liability insurer can be joined as a party-defendant in the lawsuit. Under such circumstances, no evidence of the amount of insurance available may be introduced. See *Carolina Cas. Ins. Co. v. Davalos*, 246 Ga. 746, 747, 272 S.E.2d 702, 703 (1980).

130. 228 Ga. App. at 356-57, 492 S.E.2d at 9-10.

A strong dissent cautioned that requiring an automatic mistrial if insurance was mentioned completely divests the trial court of its much-needed discretion.¹³¹ "Such an approach invites the possibility of abuse, where a savvy attorney who perceives the case is proceeding poorly could strategically elect to ask the forbidden question to trigger an automatic mistrial."¹³²

G. Personal Jurisdiction

The only decision of note in the area of personal jurisdiction was *Goldstein v. Goldstein*.¹³³ This domestic action involved a custody dispute over the couple's minor child.¹³⁴ Primary physical custody was previously granted to the father by the Superior Court of Cobb County.¹³⁵ The mother abducted the child from school and took him to her native Switzerland where she obtained a temporary ex parte custody order from the Swiss court.¹³⁶

The father brought two actions in Cobb County Superior Court, one seeking to have the mother held in contempt and the other seeking exclusive custody.¹³⁷ The mother contested personal jurisdiction but nonetheless filed her own action in Cobb County Superior Court seeking a modification of the initial custody order based on domestication of the temporary Swiss order.¹³⁸

The trial court consolidated the actions and ruled in favor of the father.¹³⁹ On appeal, the court of appeals held that by seeking affirmative relief in the Cobb County Superior Court, the mother submitted herself to personal jurisdiction to the full extent "sufficient to answer all the ends of justice respecting the suit originally instituted . . ."¹⁴⁰ Because each of the actions involved the same issue, custody of the couple's minor child, the superior court was authorized to exercise personal jurisdiction over Mrs. Goldstein.¹⁴¹

131. *Id.* at 359, 492 S.E.2d at 11-12 (Banke, J., dissenting).

132. *Id.*, 492 S.E.2d at 12.

133. 229 Ga. App. 862, 494 S.E.2d 745 (1997).

134. *Id.* at 862, 494 S.E.2d at 746.

135. *Id.*

136. *Id.* at 862 & n.2, 494 S.E.2d at 746-47 & n.2.

137. *Id.* at 862-63, 494 S.E.2d at 747.

138. *Id.* at 863-64, 494 S.E.2d at 747-48.

139. *Id.* at 863, 494 S.E.2d at 747.

140. *Id.* at 864, 494 S.E.2d at 748.

141. *Id.* at 864-65, 494 S.E.2d at 748.

H. Parties

In *Tri-County Investment Group v. Southern States, Inc.*,¹⁴² the court of appeals reaffirmed the venerable principle that in an action for continuing nuisance, each continuance of the nuisance—be it from migration of pollution, for example—constitutes a new tort from which the statute of limitations runs.¹⁴³ The court also made it clear that a real-party-in-interest objection is not a matter for summary judgment; it is a matter in abatement that does not warrant dismissal until after a reasonable time for the real party to be joined or substituted.¹⁴⁴

The aspect of the case most interesting to this survey Article, and the most utterly confusing, stems from its seeming extension of O.C.G.A. section 9-11-15(c) without citation.¹⁴⁵ Section 9-11-15(c) allows relation-back of amendments adding or substituting defendants under certain circumstances, but the court extended the relation-back principle to apply to the addition of a plaintiff.¹⁴⁶

The court held that a partnership, which was the real-party-in-interest to a 1995 lawsuit filed erroneously by a related corporation, should have been added to the suit upon plaintiff corporation's motion, if addition was possible.¹⁴⁷ The court then held that if adding the partnership was possible and had been done, an identical 1997 lawsuit filed by the partnership would necessarily be dismissed because of the pendency of the prior 1995 action.¹⁴⁸

I. Requests for Admissions

The supreme court made it clear in *G. H. Bass & Co. v. Fulton County Board of Tax Assessors*¹⁴⁹ that requests for admissions "are not objectionable 'even if they require opinions or conclusions of law, as long as the legal conclusions relate to the facts of the case.'"¹⁵⁰ The court relied upon interpretations of the federal rule of civil procedure

142. 231 Ga. App. 632, 500 S.E.2d 22 (1998).

143. *Id.* at 635-36, 500 S.E.2d at 25.

144. *Id.* at 636, 500 S.E.2d at 26.

145. See O.C.G.A. § 9-11-15(c) (1993).

146. *Id.*

147. 231 Ga. App. at 637, 500 S.E.2d at 27.

148. See O.C.G.A. § 9-2-5(a) (1982).

149. 268 Ga. 327, 486 S.E.2d 810 (1997).

150. *Id.* at 328, 486 S.E.2d at 811 (citing FED. R. CIV. P. 36).

authorizing requests for admission,¹⁵¹ which is identical to the Georgia rule.¹⁵²

J. Discovery Sanctions

In *South Georgia Medical Center v. Washington*,¹⁵³ the supreme court finally answered a question the court of appeals could not seem to agree upon: can a party claim the benefit of discovery sanctions imposed against the opposing party for failure to respond to a deposition notice issued by a co-party?¹⁵⁴ The supreme court said yes,¹⁵⁵ after a full panel of the court of appeals said no,¹⁵⁶ after a single panel of the court of appeals had said yes,¹⁵⁷ and after the trial court said yes.¹⁵⁸ The court justified its decision based on

the economic realities of the practice of law, the scheduling of depositions, and the difficulties inherent in both . . . [I]n cases involving multiple parties, depositions will frequently be attended by all parties and their counsel. The scheduling of such deposition involves a tremendous amount of communication, coordination, and planning. When the deponent fails to appear, it is irrefutable that all parties, not just the noticing party, suffer inconvenience and lost preparation time.¹⁵⁹

The trial court answered the issue correctly originally and dismissed plaintiff's complaint against both parties.¹⁶⁰ On the first appeal, the panel of the court of appeals agreed but remanded the case because the trial court erred by not considering plaintiff's response to the nonnoticing party's motion for sanctions.¹⁶¹

After the trial court considered plaintiff's response and again dismissed the complaint, the full panel of the court of appeals reversed, holding that a party cannot benefit from sanctions imposed because of failure to attend a deposition noticed by another party.¹⁶² Writing for

151. FED. R. CIV. P. 36.

152. O.C.G.A. § 9-11-36 (1993).

153. 269 Ga. 366, 497 S.E.2d 793 (1998).

154. *Id.* at 366-67, 497 S.E.2d at 794.

155. *Id.* at 368, 497 S.E.2d at 795.

156. *See* *Washington v. South Ga. Med. Ctr.*, 226 Ga. App. 554, 487 S.E.2d 125 (1997).

157. *See* *Washington v. South Ga. Med. Ctr.*, 221 Ga. App. 640, 472 S.E.2d 328 (1996).

158. *Id.*

159. 269 Ga. at 368, 497 S.E.2d at 795 (quoting *Washington v. South Ga. Med. Ctr.*, 226 Ga. App. 554, 558, 487 S.E.2d 125, 128 (1997)).

160. *Id.* at 366, 497 S.E.2d at 794.

161. 221 Ga. App. at 641-42, 472 S.E.2d at 329-30.

162. *See* *Washington*, 226 Ga. App. at 555-56, 487 S.E.2d at 126-27.

the court of appeals, Judge Andrews justified ignoring the prior single-panel decision by characterizing it as mere dicta.¹⁶³

The supreme court disagreed across the board, holding that the single-panel decision affirming the trial court on this issue was not dicta because it was a necessary part of the ultimate determination of the appeal; otherwise reversal, not remand, would have been required.¹⁶⁴ Accordingly, the decision constituted the law of the case.¹⁶⁵

Ironically, during the survey period, the court of appeals reaffirmed the long-standing principle that one party cannot claim the benefit of sanctions assessed against the opposing party based on failure to respond to written discovery propounded by a co-party.¹⁶⁶ Given "the economics of the practice of law," one can hardly understand the distinction drawn between deposition notices and written discovery. After all, co-parties rely on all written discovery responses in a case, not just those they propounded. When attending a deposition noticed by another party, co-parties often prepare utilizing documents obtained as a result of other parties' written discovery.

K. Pretrial Order

In *Georgia Department of Human Resources v. Phillips*,¹⁶⁷ plaintiffs stipulated in the pretrial order that damages would be capped at \$1 million per plaintiff, or \$2 million total.¹⁶⁸ After the jury returned a verdict for both plaintiffs in the amount of \$3.5 million, plaintiffs' counsel decided to rethink his stipulation, and the trial court entered judgment for the full amount of the verdict.¹⁶⁹

The supreme court reversed the trial court, holding that the pretrial order controls unless amended or modified, which was not done in this case at or before trial.¹⁷⁰ It is now crystal clear that Georgia trial courts have no discretion to amend or modify a pretrial order after the trial has concluded.¹⁷¹

163. *Id.* at 555, 487 S.E.2d at 126.

164. 269 Ga. at 368, 497 S.E.2d at 795.

165. *Id.*

166. *West v. Equifax Credit Info. Serv.*, 230 Ga. App. 41, 42, 495 S.E.2d 300, 302 (1997).

167. 268 Ga. 316, 486 S.E.2d 851 (1997).

168. *Id.* at 316, 486 S.E.2d at 853-54.

169. *Id.*, 486 S.E.2d at 854.

170. *Id.* at 318-19, 486 S.E.2d 855.

171. *Id.* at 319, 486 S.E.2d at 855.

L. Bifurcation or Trifurcation in Punitive Damages Cases

Since Georgia's punitive damages statute passed the General Assembly in 1987, a debate has raged in the bar and bench.¹⁷² The question: should tort trials involving punitive damages and similar act evidence be bifurcated (separated into two phases)¹⁷³ or trifurcated (three phases)?¹⁷⁴ That such trial must at least be bifurcated is mandated by the punitive damages statute, which requires separation of the determination of liability for punitive damages from determination of the amount of punitive damages.¹⁷⁵

The perceived need to separate issues springs from the desire to avoid prejudicing defendants in the determination of liability and the amount of compensatory damages without prejudicing plaintiffs in the determination of liability and the amount of punitive damages.¹⁷⁶ The belief is that, in a DUI civil trial for instance, evidence of prior DUIs is irrelevant and highly prejudicial to the determination of liability for causing the collision.¹⁷⁷ Evidence of prior DUIs, however, is highly probative of the need for punitive damages.¹⁷⁸

The groundwork for the debate was actually laid two years before Georgia's punitive damages statute was enacted, when the supreme court decided *Moore v. Thompson*.¹⁷⁹ In *Moore*, the supreme court held that "the trial judge should exercise his discretion under O.C.G.A. section 9-11-42(b) to try the issue of punitive damages separately in a bifurcated procedure or in a separate trial."¹⁸⁰ Then, when the punitive damages statute passed, a different bifurcation procedure was required, separating the trial of liability and the amount of punitive damages.¹⁸¹

172. O.C.G.A. § 51-12-5.1 (Supp. 1998).

173. See *City of Monroe v. Jordan*, 201 Ga. App. 332, 334, 411 S.E.2d 511, 514 (1991) (similar act evidence properly considered in first phase on issue of liability for punitive damages).

174. See *Hanie v. Barnett*, 213 Ga. App. 158, 159, 444 S.E.2d 336, 337 (1994) (severance of professional negligence trial into three phases: liability for and amount of compensatory damages in phase one; liability for punitive damages in phase two; and amount of punitive damages in phase three).

175. O.C.G.A. § 51-12-5.1(d) (Supp. 1998).

176. See *Webster v. Boyett*, 269 Ga. 191, 193-94, 496 S.E.2d 459, 461-62 (1998).

177. *Id.* at 193, 496 S.E.2d at 461.

178. See *Moore v. Thompson*, 255 Ga. 236, 237-38, 336 S.E.2d 749, 751 (1985).

179. 255 Ga. 236, 336 S.E.2d 749 (1985).

180. *Id.* at 238, 336 S.E.2d at 751.

181. O.C.G.A. § 51-12-5.1(d) (Supp. 1998).

Thus, in order to satisfy the legislature and the supreme court's "suggestion" in *Moore*, trial courts at times resorted to a trifurcated procedure, with liability and the amount of compensatory damages first, liability for punitive damages second, and the amount of punitive damages third.

In *Webster v. Boyett*,¹⁸² the supreme court revisited the issue for the first time since *Moore* and the subsequent enactment of the punitive damages statute.¹⁸³ The court held that trifurcation was not required, and the proper procedure to be employed should be left to the discretion of the trial court on a case-by-case basis.¹⁸⁴ Citing a host of reasons not to trifurcate, the court held "[i]t is the rare case where, due to the complexity of the issues or evidence, the trial court should divide the trial into three separate phases."¹⁸⁵

Under the court's reasoning, trifurcation would never be warranted in cases in which the similar act evidence is relevant to the determination of liability for compensatory damages.¹⁸⁶ For instance, in a product liability action, prior similar incidents often demonstrate notice and/or proof of the defect.¹⁸⁷ When allowed for such purposes, no need exists to conduct more than the mandatory two phases required by the punitive damages statute.¹⁸⁸

M. Notice to Produce Evidence

Two survey cases, *Gaffron v. MARTA*¹⁸⁹ and *Peacock v. HCP III Eastman, Inc.*,¹⁹⁰ clarified that a notice to produce evidence at trial pursuant to O.C.G.A. section 24-10-26 is enforceable notwithstanding the expiration of the discovery period.¹⁹¹ Nonetheless, the court of appeals will seem to apply the same discovery-type analysis to the determination of whether to compel compliance.¹⁹²

182. 269 Ga. 191, 496 S.E.2d 459 (1998).

183. *Id.*

184. *Id.* at 195, 496 S.E.2d at 463.

185. *Id.* at 196, 496 S.E.2d at 463-64.

186. *Id.* at 196-97, 496 S.E.2d at 463-64.

187. *See Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 543-44, 436 S.E.2d 635, 639-40 (1993).

188. *Id.*

189. 229 Ga. App. 426, 494 S.E.2d 54 (1997).

190. 230 Ga. App. 726, 497 S.E.2d 253 (1998).

191. *See Gaffron*, 229 Ga. App. at 433, 494 S.E.2d at 60. *See also* 230 Ga. App. at 726, 497 S.E.2d at 253.

192. 230 Ga. App. at 727-28, 497 S.E.2d at 254-55.

III. LEGISLATION

Legislation passed during the survey period which requires notification of nonparties when their medical records are requested in connection with a civil action.¹⁹³ The General Assembly enacted a summary procedure for disposal of frivolous litigation against members of the judiciary relating to their official duties which allows recovery of attorney fees.¹⁹⁴ Additionally, legislation passed which allows judges to award attorney fees even in dismissed actions involving the exercise of the right of free speech and the right to petition the government for redress of grievances.¹⁹⁵

New legislation allows service of process on an uninsured motorist carrier outside the normal statute of limitations in the event facts give rise to the belief that the tortfeasor is uninsured or underinsured after the action has been commenced.¹⁹⁶ At such point, the plaintiff is given ninety days to perfect service on the insurer.¹⁹⁷

In wrongful death cases, legislation was passed making the distribution of proceeds recovered in wrongful death actions consistent with the laws of intestate succession.¹⁹⁸

There was also quite a bit of additional proposed legislation which would have impacted upon the area of trial practice and procedure that did not pass one or both houses during the most recent session of the Georgia General Assembly.

IV. CONCLUSION

This survey is not intended to be exhaustive and addresses only the more notable decisions and enactments. The authors hope this analysis provides some insight into these recent developments in the law.

193. O.C.G.A. § 9-11-34 (Supp. 1998).

194. *Id.* § 9-15-15.

195. *Id.* § 9-11-11.1(f).

196. *Id.* § 33-7-11(d).

197. *Id.*

198. *Id.* § 51-4-2.