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Appellate Practice and Procedure

by Roland F. L. Hall*

I. INTRODUCTION

This Article surveys decisions addressing appellate law and procedure handed down by the Georgia appellate courts between June 1, 2005 and May 31, 2006. The cases discussed fall within three categories: (1) appellate jurisdiction; (2) preserving the record; and (3) miscellaneous cases of interest.

II. APPELLATE JURISDICTION

A. *Discretionary v. Direct Appeals*

Several cases during the survey period dealt with the sometimes difficult determination of whether discretionary or direct appeal procedures should be used. In *Ladzinske v. Allen*,[1] the plaintiff—the owner of property across the street from a school—brought suit against the defendants—the school, DeKalb County, and related entities—for mandamus, injunctive and declaratory relief, and damages after the school obtained a building permit from DeKalb County for construction of a new building on its property. After the trial court dismissed the plaintiff's claims for mandamus and declaratory relief on the basis of failure to exhaust administrative remedies, the plaintiff filed a notice of direct appeal to the Georgia Supreme Court.[2] The defendants moved to dismiss the appeal, contending that the plaintiff was required to follow the discretionary appeal procedures pursuant to section 5-6-35(a)(1) of

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1. 280 Ga. 264, 626 S.E.2d 83 (2006).
2. *Id.* at 264, 626 S.E.2d at 84.

the Official Code of Georgia Annotated ("O.C.G.A."),[3] which provides that all appeals from decisions of the superior courts reviewing decisions of state and local agencies must be brought to the supreme court using the discretionary appeal procedures.[4] The supreme court noted that because the intent of O.C.G.A. section 5-6-35(a)(1) was to give the appellate courts discretion not to accept an appeal where two tribunals had already adjudicated the case (typically the superior court and the agency), if a plaintiff was not entitled to become a party to the administrative proceeding, and thus did not have the opportunity to obtain review from both tribunals, the plaintiff would not be required to follow the discretionary appeal procedures.[5] The plaintiff argued, and the supreme court agreed, that the plaintiff was not entitled to become a party to the administrative proceeding at which the building permit was granted.[6] However, because the plaintiff did have the right to appeal the issuance of the permit but had failed to do so, the supreme court held that the plaintiff was required to use the discretionary appeal procedure and was not entitled to file a direct appeal.[7] The supreme court reached this decision even though the superior court dismissed the plaintiff's appeal on the basis of failure to exhaust administrative remedies, rather than ruling on the merits of the plaintiff's claims.[8] The supreme court noted that even though it could be argued that two tribunals had not adjudicated the case, the absence of the second review on the merits resulted from the plaintiff's decision not to engage in the administrative process.[9] Because the plaintiff failed to use the discretionary appeal procedure, the supreme court dismissed the appeal.[10]

Using both the discretionary and the direct appeal procedures does not necessarily ensure success. In *Walker v. Estate of Mays*,[11] the appellants, a former wife and her children, brought suit against the estate of

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3. O.C.G.A. § 5-6-35(a)(1) (1995).
4. *Ladzinske*, 280 Ga. at 265, 626 S.E.2d at 84-85.
5. *Id.*, 626 S.E.2d at 85.
6. *Id.* The facts of this case are thus distinguishable from those of *Best Tobacco, Inc. v. Department of Revenue*, 269 Ga. App. 484, 604 S.E.2d 578 (2004), in which the plaintiff had the right to initiate an administrative proceeding and engage in the administrative process but failed to do so. *Id.* at 485-86, 604 S.E.2d at 579-80. However, the result was the same. *See* Roland F. L. Hall, *Appellate Practice and Procedure*, 57 MERCER L. REV. 35, 36-37 (2005).
7. *Ladzinske*, 280 Ga. at 266-67, 626 S.E.2d at 85-86.
8. *Id.* at 266, 626 S.E.2d at 86.
9. *Id.*
10. *Id.* at 267, 626 S.E.2d at 86.
11. 279 Ga. 652, 619 S.E.2d 679 (2005).

the former husband, seeking damages for the former husband's alleged failure to comply with the requirement in the divorce settlement agreement that he maintain a life insurance policy naming the wife and children as beneficiaries. After the trial court granted summary judgment to the estate, the appellants filed an application for discretionary appeal and a notice of direct appeal with the Georgia Court of Appeals. The court of appeals denied the application for discretionary appeal and granted the estate's motion to dismiss the direct appeal on the basis that the denial of the application for discretionary appeal was res judicata.[12] The Georgia Supreme Court granted the appellants' petitions for certiorari as to the denial of the application and dismissal of the direct appeal and stated that the primary issue on appeal was whether the appellants were required to comply with the discretionary appeal requirements.[13] The supreme court initially noted that although the appellants had characterized their claim as an action for breach of contract, the settlement agreement at issue was incorporated into the final divorce decree, and thus, whatever claim the appellants had was founded on the final decree and not on the agreement.[14] On the basis of O.C.G.A. section 5-6-35(a)(2),[15] which provides that appeals in "domestic relations cases" must be brought by application for discretionary appeal, the supreme court held that the case concerned domestic relations and that any appeal had to comply with the discretionary appeal procedures.[16]

The appellants contended that on at least one prior occasion the supreme court had transferred a similar case to the court of appeals and required the court of appeals to adjudicate the case on the merits, even though the appellants in that case had filed a direct appeal rather than a discretionary appeal.[17] The supreme court held that although the court of appeals, in the decision cited by the appellants, did in fact indicate that it had been instructed to adjudicate the case on the merits, the observation of the court of appeals was in error because the transfer order would not have precluded the court of appeals from dismissing the case if it was a discretionary appeal subject to O.C.G.A. section 5-6-35(a)(2).[18] Instead, the case had been transferred simply because the

12. *Id.* at 652, 619 S.E.2d at 680.
13. *Id.* at 652-53, 619 S.E.2d at 680.
14. *Id.* at 653, 619 S.E.2d at 680.
15. O.C.G.A. § 5-6-35(a)(2).
16. *Walker*, 279 Ga. at 653, 619 S.E.2d at 680-81.
17. *Id.* at 654, 619 S.E.2d at 681 (citing Crotty v. Crotty, 219 Ga. App. 404, 409-10, 465 S.E.2d 517, 519 (1995)).
18. *Id.*

supreme court had determined that it did not have jurisdiction over the particular case.[19] As the supreme court noted, although all domestic relations cases fall within the scope of O.C.G.A. section 5-6-35(a)(2), the supreme court only has jurisdiction over domestic relations cases concerning divorce and alimony.[20] Because the appellants' case was a domestic relations case and the subject matter of the appellants' case did not concern divorce or alimony, the appeal was subject to the discretionary appeal requirements and did not fall within the supreme court's jurisdiction.[21] The supreme court expressly disapproved any prior appellate decisions authorizing a direct appeal in such circumstances.[22]

B. Standing

Several decisions during the survey period dealt with complex issues of standing and the right to appellate review. In *In the Interest of L.W.*,[23] the juvenile court terminated the mother's parental rights and declined to place the children with their maternal grandmother. During the termination proceedings, the grandmother filed a petition requesting that the children be placed with her. The grandmother sought and was refused an opportunity to participate in the termination hearing and was ultimately found to be an unsuitable placement for the children.[24] The grandmother appealed, based in part upon the juvenile court's termination of the parental rights of the mother.[25] As noted by the Georgia Court of Appeals, although O.C.G.A. section 15-11-103(a)(1)[26] requires the juvenile court to attempt to place the child with the grandmother after the mother's rights are terminated, placement with a relative is not automatic.[27] Further, before placing the child, the juvenile court is required to find that the grandmother meets certain qualifications and that placement with the grandmother is in the best interest of the child.[28] On the basis of the limited nature of the grandmother's rights, the court of appeals held that because the grandmother did not have sufficient rights with regard to the child to be considered a party

19. *Id.*
20. *Id.* (citing GA. CONST. art. VI, § 6, para. 3(6)).
21. *Id.* at 655, 619 S.E.2d at 681-82.
22. *Id.*, 619 S.E.2d at 681.
23. 276 Ga. App. 197, 622 S.E.2d 860 (2005).
24. *Id.* at 204, 622 S.E.2d at 867.
25. *Id.* at 201, 622 S.E.2d at 865.
26. O.C.G.A. § 15-11-103(a)(1) (2005).
27. *L.W.*, 276 Ga. App. at 201, 622 S.E.2d at 865.
28. *Id.* at 201-02, 622 S.E.2d at 865.

"aggrieved" by the orders terminating parental rights,[29] the grandmother had no right to appeal from those orders.[30]

In *Couch v. Parker*,[31] the appellees owned residential property adjoining a disposal facility owned by the appellants.[32] The appellant, Carol Couch, the Director of the Environmental Protection Division ("EPD") of the Department of Resources, acting under the authority of the Georgia Hazardous Site Response Act,[33] caused the EPD to enter into discussions with the owners of the facility and subsequently issue consent orders that gave the facility's owners the opportunity to perform voluntary corrective action.[34] The appellees, claiming that they were adversely affected by the consent orders, requested a hearing before an administrative law judge ("ALJ") who concluded that the appellees lacked standing to challenge the adequacy of the consent order.[35] The ALJ based this conclusion on O.C.G.A. section 12-2-2(c)(3)(B),[36] which provides that persons are not considered adversely affected by an order of the Director of the EPD until the Director seeks to enforce the order.[37] Under the ALJ's ruling, the appellees were limited to challenging the enforceability of the orders as entered (at such time as the orders were enforced by the EPD) and could not challenge the adequacy of the orders.[38]

The appellees sought judicial review of the ALJ's ruling from the superior court, which concluded that O.C.G.A. section 12-2-2(c)(3)(B) unconstitutionally violated both the appellees' right of access to the court and their due process rights.[39] The supreme court granted the separate applications for discretionary appeal filed by the Director of the EPD and the facility owners and consolidated the two cases for decision.[40] After quickly disposing of the appellees' arguments regarding the constitutional right of access to the courts,[41] the supreme court went on to address

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29. A party is considered to be "aggrieved" by an order or judgment if the order or judgment "'operates on his rights of property, or bears directly upon his interest.'" *Id.* (citation omitted).
30. *Id.* at 201, 622 S.E.2d at 865.
31. 280 Ga. 580, 630 S.E.2d 364 (2006).
32. *Id.* at 580, 630 S.E.2d at 365.
33. O.C.G.A. §§ 12-8-90 to -97 (2006).
34. *Couch*, 280 Ga. at 580-81, 630 S.E.2d at 365.
35. *Id.* at 581, 630 S.E.2d at 365.
36. O.C.G.A. § 12-2-2(c)(3)(B) (2006).
37. *Couch*, 280 Ga. at 581, 630 S.E.2d at 365.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 581-83, 630 S.E.2d at 365-66. The supreme court had previously held that the Georgia Constitution does not provide any express constitutional right of access to the

the appellees' argument that the limitations on standing imposed by O.C.G.A. section 12-2-2(c)(3)(B) deprived them of the opportunity to compel the EPD to consider requiring the facility owners to take additional remedial measures to remedy the contamination of the appellees' property.[42] Although the appellees were entitled to comment on the proposed terms of the consent orders and suggest additions or deletions, the appellees also sought the opportunity to obtain administrative review once the consent orders were issued.[43] The supreme court held that the flaw in the appellees' argument was that the legislative intent behind O.C.G.A. section 12-2-2(c)(3)(B) was in fact to prevent such attacks on the adequacy of the EPD's consent orders and in doing so, to avoid delays caused by administrative review and to enable faster completion of the remedial measures required by the consent order.[44] Accordingly, the supreme court held that the superior court's reversal of the ALJ's order was in error.[45]

In *Georgia Department of Corrections v. Chatham County*,[46] Chatham County (the "County") brought suit against the State of Georgia, the Georgia Department of Corrections ("DOC"), and the State Board of Pardons and Paroles ("BPP") to recover costs incurred by the County for temporarily housing certain state inmates. The trial court dismissed all of the County's claims against the DOC and BPP except for the County's request that the two Georgia statutes governing reimbursement of inmate costs be declared unconstitutional. The DOC and BPP moved for summary judgment on the basis that the County did not have standing to bring suit challenging the constitutionality of the statutes and that the DOT and BPP were in compliance with the challenged statutes. The County admitted that the DOC and BPP were in compliance with the statutes, but nonetheless moved for summary judgment, challenging the constitutionality of the statutes. The trial court denied all of the summary judgment motions.[47]

The Georgia Court of Appeals granted the DOC and BPP's application for interlocutory appeal and held that although the County had standing to bring suit, its constitutional challenge was not preserved for

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courts. *See* Nelms v. Georgian Manor Condo. Ass'n, 253 Ga. 410, 413, 321 S.E.2d 330, 333 (1984).

42. *Couch*, 280 Ga. at 583, 630 S.E.2d at 366-67.

43. *Id.*

44. *Id.*, 630 S.E.2d at 367.

45. *Id.* at 584, 630 S.E.2d at 367.

46. 274 Ga. App. 865, 619 S.E.2d 373 (2005).

47. *Id.* at 865-66, 619 S.E.2d at 374. The statutes at issue were O.C.G.A. sections 42-9-49 (1997) and 42-5-51(c) (1997).

constitutional review.[48] The reasoning of the court of appeals ran as follows: (1) the supreme court has exclusive appellate jurisdiction over cases questioning the constitutionality of a statute; (2) the supreme court does not rule on constitutional questions unless it clearly appears in the record that the trial court distinctly ruled on the point; (3) in the instant case, the trial court impliedly, rather than explicitly, rejected the County's constitutional challenge when it denied the County's motion for summary judgment; and therefore, (4) the constitutional challenge was neither ripe for review nor in the appropriate forum for review.[49] On this basis, the court of appeals held that it would neither adjudicate the County's constitutional challenge nor transfer the case to the Georgia Supreme Court.[50] Also, because the County did not dispute that the DOC and BPP were in compliance with the statutes, the court of appeals held that the DOC and BPP's motion for summary judgment should have been granted.[51]

Under the court of appeals' analysis, it appears that if the trial court, in its ruling on the County's motion for summary judgment, had explicitly addressed the constitutional argument raised by the County, then the constitutional challenge would have been ripe for review.[52] As to this point, although the court of appeals did recognize that prior cases suggested that a trial court's implicit denial of a constitutional challenge should be reviewed, the court of appeals held that "the express ruling requirement remains the law."[53] It is interesting to compare this analysis with the supreme court's analysis in a prior case where constitutional challenges had not been preserved for review because the trial court "'neither explicitly nor implicitly ruled upon those challenges.'"[54]

C. *Miscellaneous Jurisdictional Issues*

In *Georgia Department of Transportation v. Strickland*,[55] a slip and fall case brought by the plaintiff against the Department of Transportation ("DOT") and the City of Sylvania, Georgia (the "City"), the Georgia Court of Appeals granted the DOT's application for interlocutory appeal

48. 274 Ga. App. at 866, 619 S.E.2d at 374.
49. *Id.* at 868, 619 S.E.2d at 375-76.
50. *Id.*, 619 S.E.2d at 376.
51. *Id.*
52. *See id.* at 868, 868 n.13, 619 S.E.2d at 375-76, 376 n.13.
53. *Id.* at 868 n.13, 619 S.E.2d at 375 n.13.
54. Hindman v. State, 234 Ga. App. 758, 765, 507 S.E.2d 862, 868 (1998).
55. 279 Ga. App. 753, 632 S.E.2d 416 (2006).

from the trial court's denial of the DOT's motion for summary judgment.[56] The City cross-appealed from the denial of its motion for summary judgment. Because the DOT was required to follow the interlocutory appeal procedures in bringing its appeal, the plaintiff contended that the City's cross-appeal should be dismissed on the basis of its failure to follow those same procedures.[57] The court of appeals rejected the plaintiff's argument, holding first that although the City was a co-defendant, it was also an appellee entitled to file a cross-appeal pursuant to O.C.G.A. section 5-6-38(a),[58] which allows the court of appeals to consider an interlocutory matter that is the subject of cross-appeal, provided that the main appeal is properly before the court of appeals.[59] Second, the court held that the fact that the main appeal was an interlocutory appeal did not require the City to follow the interlocutory appeal procedures because O.C.G.A. section 5-6-34(d)[60] allows the court of appeals to consider all judgments, rulings, and orders rendered in the case, even where the main appeal is taken pursuant to the interlocutory appeal procedures.[61] Based on this reasoning, the court of appeals denied the plaintiff's motion to dismiss the City's cross-appeal.[62]

In *Walker v. Department of Transportation*,[63] the plaintiffs, landowners and a billboard company, applied to the defendant, DOT, for permits to place billboards on the landowners' property, which adjoined an interstate highway. The DOT denied the applications, and the DOT's action was affirmed by an administrative law judge.[64] The plaintiffs petitioned the superior court for judicial review of the DOT's decision and then entered into a stipulation with the defendant for a future hearing before the superior court.[65] The superior court ruled that the DOT's action was affirmed by operation of law pursuant to O.C.G.A. section 32-6-95(c),[66] which provides that if the superior court does not hear the case within 120 days from the date the petition for review is filed, the final agency decision is considered affirmed.[67] On appeal, the

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56. *Id.* at 753, 632 S.E.2d at 417.
57. *Id.*
58. O.C.G.A. § 5-6-38(a) (1995).
59. *Strickland*, 279 Ga. App. at 755-56, 632 S.E.2d at 419.
60. O.C.G.A. § 5-6-34(d) (1995).
61. *Strickland*, 279 Ga. App. at 756, 632 S.E.2d at 419.
62. *Id.*
63. 279 Ga. App. 287, 630 S.E.2d 878 (2006).
64. *Id.* at 287, 630 S.E.2d at 880.
65. *Id.* at 288, 630 S.E.2d at 880.
66. *Id.*, 630 S.E.2d at 880-81; O.C.G.A. § 32-6-95(c) (2006).
67. O.C.G.A. § 32-6-95(c).

plaintiffs contended that the superior court erred in ruling that the DOT's action was affirmed by operation of law and that it was within the superior court's discretion to retain jurisdiction on the basis of the parties' stipulation to a hearing date beyond the 120-day period.[68] Based on a prior Georgia Court of Appeals decision[69] interpreting a similarly worded workers' compensation statute,[70] the court of appeals held that because no hearing was scheduled and no ruling was issued within the 120-day period, the superior court had no jurisdiction to review the DOT decision, which was affirmed by operation of law pursuant to O.C.G.A. section 32-6-95(c).[71]

III. PRESERVING THE RECORD

Even when it appears that issues concerning jury selection have been plainly raised in the trial court, care must be taken to make the proper record to preserve such issues for appellate review. For example, in *Wynn v. City of Warner Robins*,[72] a motor vehicle personal injury case, a prospective juror stated during voir dire that because of her experience handling personal injury claims for a railroad, she would require the plaintiff to prove his case beyond a reasonable doubt. The plaintiff's counsel moved to excuse the juror for cause. Upon examination by the defendant's counsel, the juror stated that she thought she could apply the preponderance of the evidence standard. The plaintiff's counsel followed up with further questions and the juror once again stated that she would apply the reasonable doubt standard. The plaintiff's counsel once again moved to excuse her for cause. After intervention by the court, the juror was read the pattern charge on the preponderance standard, and the juror agreed that she could apply it. The plaintiff's counsel then asked two final questions, in response to which the juror promised she could be fair and impartial, and the plaintiff's counsel did not renew the motion to excuse for cause and did not obtain a ruling from the court. The juror was selected as a member of the jury, which returned a verdict for the defense.[73] On appeal, the plaintiff argued that the trial court erred in failing to excuse the juror for cause.[74] On the basis of the plaintiff's failure to renew his motion to excuse for cause

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68. *Walker*, 279 Ga. App. at 288, 630 S.E.2d at 880-81.
69. Borden, Inc. v. Holland, 212 Ga. App. 820, 821, 442 S.E.2d 916, 917 (1994).
70. O.C.G.A. § 34-9-105(b) (2004).
71. *Walker*, 279 Ga. App. at 290, 630 S.E.2d at 882.
72. 279 Ga. App. 42, 630 S.E.2d 574 (2006).
73. *Id.* at 45-47, 630 S.E.2d at 576.
74. *Id.* at 45, 630 S.E.2d at 578.

a third time, the Georgia Court of Appeals held that the plaintiff failed to preserve the issue for appellate review.[75]

Although it is best to raise any claims and defenses early in the case to ensure appellate review, all hope is not lost for appealing an issue even when the issue is first raised during summary judgment proceedings or, in certain cases, even when the issue is not directly raised in the trial court.[76] However, when the opposing party is given no opportunity to act on the issue, it is less likely that the issue will be preserved for review. For example, in *Stewart v. Storch*,[77] the plaintiff-tenant brought an action against the defendant, her former landlord, claiming that the defendant was vicariously liable for sexual harassment committed by the defendant's husband, who acted as the property manager for the defendant. The plaintiff appealed from the grant of summary judgment to the defendant and in addition to raising arguments concerning vicarious liability, also argued that the defendant was negligent in permitting the defendant's husband to have contact with female tenants.[78] The plaintiff did not bring a negligence claim against the defendant in her pleadings or in response to the defendant's motion for summary judgment, but first alleged negligence in a supplemental brief filed three days before summary judgment was granted to the defendant.[79] The Georgia Court of Appeals held that because the defendant was given no opportunity to move for summary judgment on any negligence claim and because the negligence claim was not timely raised by the assertion in the supplemental brief, the court of appeals lacked jurisdiction to consider any negligence claim.[80]

In contrast, in *Smith v. Henry*,[81] a libel and slander case, the Georgia Court of Appeals held that it could address the defendant's claim of privilege even though the trial court did not specifically address the claim in denying the defendant's motion for summary judgment.[82] The court of appeals held that because the defendant had raised the issue in his brief and argued it at the hearing, the trial judge had implicitly ruled upon the issue by denying the motion.[83]

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75. *Id.* at 46-47, 630 S.E.2d at 579.

76. *See, e.g.*, Rouse v. Metro. Atlanta Rapid Transit Auth., 266 Ga. App. 619, 597 S.E.2d 650 (2004). For an analysis of this remarkable decision, see Roland F. L. Hall, *Appellate Practice and Procedure*, 56 MERCER L. REV. 61, 64-66 (2004).

77. 274 Ga. App. 242, 617 S.E.2d 218 (2005).

78. *Id.* at 247, 617 S.E.2d at 222.

79. *Id.*, 617 S.E.2d at 223.

80. *Id.* at 247-48, 617 S.E.2d at 223.

81. 276 Ga. App. 831, 625 S.E.2d 93 (2005).

82. *Id.* at 832, 625 S.E.2d at 95.

83. *Id.* at 832 n.3, 625 S.E.2d at 95 n.3.

In *Cherokee National Life Insurance Co. v. Eason*,[84] the plaintiff, a beneficiary under a life insurance policy, brought suit against the defendant insurance company, claiming wrongful refusal to pay benefits and seeking attorney fees pursuant to O.C.G.A. section 13-6-11.[85] The jury was instructed on the basis of O.C.G.A. section 13-6-11 that it could award attorney fees if it found that the defendant's refusal to pay was in bad faith or if it found that the defendant was being stubbornly litigious in failing to pay. During the jury's deliberations, the jury sent a note asking the trial court judge whether the jury was required to find bad faith on the part of the defendant in refusing to pay the plaintiff in order to award attorney fees. The trial court judge, after consulting with the parties' counsel, instructed the jury that it could award attorney fees on the basis of either bad faith or stubborn litigiousness. The jury returned a verdict for the plaintiff, including an award of attorney fees on the basis of stubborn litigiousness.[86]

On appeal, the defendant insurance company contended that because O.C.G.A. section 33-4-6(a)[87] only provides for an award of attorney fees against an insurer where the insurer acts in bad faith and because the jury had not found that the defendant acted in bad faith, the attorney fees award was unauthorized and subject to reversal.[88] In essence, the defendant argued that attorney fees are only permitted in cases against insurers where there is bad faith and that the general penalty provisions of O.C.G.A. section 13-6-11 do not apply in such cases.[89] Although the Georgia Court of Appeals noted a line of cases supporting the defendant's argument,[90] it held that the defendant had failed to preserve the issue for appellate review.[91] The court of appeals held that the defendant (1) failed to state its position concerning attorney fees to the trial court; (2) permitted the verdict form to include the basis of stubborn litigiousness; and (3) voiced no objection to the jury charge or the clarification given by the court.[92] The court of appeals held that the principle that a substantial error in a jury charge may receive review, even in the absence of objection,[93] did not apply because the

84. 276 Ga. App. 183, 622 S.E.2d 883 (2005).
85. *Id.* at 183, 186, 622 S.E.2d at 884, 886; O.C.G.A. § 13-6-11 (1982 & Supp. 2006).
86. *Eason*, 276 Ga. App. at 184 n.3, 622 S.E.2d at 885 n.3.
87. O.C.G.A. § 33-4-6(a) (2005).
88. *Eason*, 276 Ga. App. at 185, 622 S.E.2d at 885.
89. *Id.* at 185-86, 622 S.E.2d at 886.
90. *Id.* at 186 n.6, 622 S.E.2d at 886 n.6.
91. *Id.* at 186, 622 S.E.2d at 886.
92. *Id.*
93. *See* O.C.G.A § 5-5-24(c) (1995).

defendant made no effort to present its argument to the trial court.[94] Further, the court of appeals held that even though the trial court informed counsel that they could reserve objections to the jury charge until after the transcript was prepared, the attorney fee issue was not preserved for appeal because the defendant induced and acquiesced in the error.[95]

Failure to comply with appellate procedures, particularly the procedures for filing transcripts, can have dire consequences for the appellant. For example, in *Adams v. Hebert*,[96] the appellant's counsel failed to comply with O.C.G.A. section 5-6-42,[97] which requires the appellant to file the trial transcript within thirty days of the filing of the notice of appeal.[98] The trial court granted the appellee's motion to dismiss the appeal. The appellant appealed the dismissal, contending that the failure of the appellant's counsel to timely file the transcript occurred because his office staff had failed to correctly enter case information in the office's case management and docket control system. The appellant's counsel had also filed an affidavit in response to the motion to dismiss the appeal, in which counsel stated that he had never before been late in filing a trial transcript and that the failure to file was a mere clerical error.[99] The court of appeals affirmed the dismissal of the appeal, holding that because the appellant's counsel had the transcript in his possession at the time he filed the notice of appeal, there "was nothing to prevent the timely filing of the transcript."[100] The court of appeals further held that the failure to timely file the transcript was unreasonable because the delay in filing the transcript resulted in the case being placed on a subsequent appellate court calendar and prejudiced the appellee's ability to administer the estate at issue.[101]

In *West v. Austin*,[102] the defendants appealed from the trial court's denial of their motion for a new trial following a jury verdict in favor of the plaintiffs.[103] The Georgia Court of Appeals held that because the defendants had failed to include a trial transcript in the appellate

94. *Eason*, 276 Ga. App. at 187, 622 S.E.2d at 887.
95. *Id.*
96. 279 Ga. App. 158, 630 S.E.2d 652 (2006).
97. *Id.* at 158, 630 S.E.2d at 653; O.C.G.A. § 5-6-42 (1995).
98. O.C.G.A. § 5-6-42.
99. *Adams*, 276 Ga. App. at 158-59, 630 S.E.2d at 653.
100. *Id.* at 160, 630 S.E.2d at 654.
101. *Id.* at 159-60, 630 S.E.2d at 654.
102. 274 Ga. App. 729, 618 S.E.2d 662 (2005).
103. *Id.* at 729, 618 S.E.2d at 663.

record, it was required to affirm the trial court's ruling.[104] The defendants moved for reconsideration of the court of appeals opinion, claiming that their notice of appeal stated that the "'entire record'" was to be transmitted to the court of appeals.[105] In response, the court of appeals stated, "[W]e take this opportunity to remind the bar that such language is not sufficient to ensure the transmittal of transcripts to this Court."[106] On the basis of O.C.G.A. section 5-6-37,[107] which directs that the notice of appeal must specifically state whether any transcript is to be transmitted as part of the record on appeal, the court of appeals held that it was the appellants' burden to ensure that the trial transcript was filed and that by failing to designate that transcripts be included in the appellate record, the appellants had failed to meet this burden.[108]

In *Wilson v. 72 Riverside Investments, LLC*,[109] the magistrate court entered a judgment in favor of the plaintiff, 72 Riverside Investments. The plaintiff subsequently filed a petition to execute the judgment against the defendant, Wilson, and others in superior court. In its petition, the plaintiff alleged that the defendant owned pending patent applications and sought permission to levy on any patents or patent applications.[110] After a hearing on the plaintiff's petition—at which the defendant appeared pro se—the superior court ruled that while it did not have the authority to determine what, if any, patents the defendant owned, it would enter an order permitting the plaintiff to levy upon whatever patent rights were owned by the defendant.[111] On appeal, the defendant argued that the superior court lacked jurisdiction to enter a ruling on any questions involving patent law.[112] The Georgia Court of Appeals noted that the defendant had not raised the affirmative defense of subject matter jurisdiction in his answer or in a separate motion.[113] This failure was not surprising in light of the defendant's pro se representation. However, the court of appeals also noted that even though the defendant and the trial court "discussed at length the fact that a federal court would have to determine whether [the defendant] owned the patent applications," because the defendant had "never questioned the court's jurisdiction to address the issues raised in the

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104. *Id.* at 730, 618 S.E.2d at 663.
105. *Id.*
106. *Id.*
107. O.C.G.A. § 5-6-37 (1995).
108. *West*, 274 Ga. App. at 730, 618 S.E.2d at 663-64.
109. 277 Ga. App. 312, 626 S.E.2d 521 (2006).
110. *Id.* at 312-13, 626 S.E.2d at 522-23.
111. *Id.* at 313, 626 S.E.2d at 523.
112. *Id.* at 314, 626 S.E.2d at 523.
113. *Id.*

case," the issue of jurisdiction was not preserved for appeal.[114] Presumably, then, if the defendant had raised the jurisdictional issue during his colloquy with the trial court during the hearing, he might have successfully preserved the issue for appellate review.

IV. MISCELLANEOUS

A. *Ex Parte Motions*

In *City of Pendergrass v. Skelton*,[115] the plaintiff, a member of the National Guard, brought suit against the defendants for, inter alia, false arrest, battery, and kidnapping. After the plaintiff failed to respond to the defendants' discovery requests and the defendants moved for sanctions, the plaintiff moved to stay proceedings pursuant to the Servicemembers Civil Relief Act.[116] Although the plaintiff did not serve a copy of the motion on the defendants and no certificate of service was attached, the trial court granted the motion on the day it was filed and stayed the proceedings. The defendants appealed, contending that the trial court erred in granting the plaintiff's motion ex parte.[117] The Georgia Court of Appeals agreed, citing both Uniform Superior Court Rule 4.1,[118] which prohibits ex parte communications not authorized by law or by rule, and prior case law establishing that ex parte hearings are authorized only in the case of extraordinary matters such as temporary restraining orders.[119] The court of appeals held that because nothing in the record or in the plaintiff's motion established any basis for concluding that the plaintiff's "legal position would change if the defendants were served with a copy of the motion and given the opportunity to respond and appear at the hearing," the granting of the motion ex parte was in error.[120] The court of appeals vacated the stay and remanded the case to the trial court for a hearing.[121]

B. *Sanctions*

The court of appeals continues to signal its willingness to penalize frivolous appeals, even where the appellant is acting pro se and the

114. *Id.*, 626 S.E.2d at 524.
115. 278 Ga. App. 37, 628 S.E.2d 136 (2006).
116. *Id.* at 37-38, 628 S.E.2d at 137-38; 50 U.S.C. § 522 (2000).
117. *Skelton*, 278 Ga. App. at 38, 628 S.E.2d at 138.
118. UNIF. SUPER. CT. R. 4.1.
119. *Skelton*, 278 Ga. App. at 39, 628 S.E.2d at 138 (citing Biggs v. Heriot, 249 Ga. App. 461, 462, 549 S.E.2d 131, 132 (2001)).
120. *Id.*
121. *Id.* at 42, 628 S.E.2d at 140.

opposing party does not seek sanctions. In *Popham v. Garrow*,[122] the plaintiff brought suit against several defendants and appealed from the trial court's grant of summary judgment to the defendants.[123] The Georgia Court of Appeals held that the appellant, acting pro se, had failed to support any of the enumerated errors in his appellate brief with citations to the record or to legal authority and instead had simply asked the court of appeals to remand the case for a trial.[124] The court of appeals held, sua sponte, that the appeal was frivolous and that sanctions were appropriate, and the court imposed a penalty of $1000 against the appellant in favor of the appellees pursuant to subsections (b) and (c) of Court of Appeals Rule 15.[125]

In *Oswell v. Nixon*,[126] the plaintiff filed suit against the defendants, five attorneys, in which the plaintiff claimed that the defendants represented a party opposing the plaintiff. The plaintiff further alleged that in connection with that case, the opposing party had filed a motion that included a declaration by one of the defendants concerning events occurring a few days before that defendant was sworn in as a member of the Georgia Bar. The plaintiff claimed that this action constituted the unauthorized practice of law and that the other defendants negligently trained and supervised the defendant giving the declaration. The trial court ultimately dismissed the plaintiff's action and awarded attorney fees to the defendants on the basis that the plaintiff's action was substantially frivolous.[127]

On appeal, the Georgia Court of Appeals noted that the plaintiff's brief did not contain any citations to the record and that the two-paragraph argument in the plaintiff's brief contained no citations of authority.[128] The court of appeals agreed with the trial court that there was no legal theory under which the plaintiff could be granted the relief he requested, and the court of appeals proceeded to grant the defendants' motion for sanctions against the plaintiff and his counsel for filing a frivolous appeal.[129] After noting that the plaintiff and his counsel had wasted the resources of the court of appeals and of the defendants, the court of appeals imposed a penalty in the amount of $1000, to be divided equally between the plaintiff and his counsel.[130]

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122. 275 Ga. App. 499, 621 S.E.2d 468 (2005).
123. *Id.* at 499, 621 S.E.2d at 469.
124. *Id.* at 500, 621 S.E.2d at 469-70.
125. *Id.*
126. 275 Ga. App. 205, 620 S.E.2d 419 (2005).
127. *Id.* at 205-06, 620 S.E.2d at 420-21.
128. *Id.*
129. *Id.* at 208, 620 S.E.2d at 422.
130. *Id.*

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