Mercer Law Review

Volume 58
Number 1 *Annual Survey of Georgia Law*

Article 4

12-2006

Business Associations

Paul A. Quirós

Lynn S. Scott

William B. Shearer III

Business Associations

by Paul A. Quirós*
Lynn S. Scott**
and William B. Shearer III***

This Article surveys noteworthy cases in the areas of corporate, partnership, and limited liability company law decided during the survey period[1] by the Georgia Supreme Court, the Georgia Court of Appeals, the United States Court of Appeals for the Eleventh Circuit, and the United States district courts located in Georgia. This Article also summarizes enactments at the 2006 Session of the Georgia General Assembly to the Official Code of Georgia Annotated ("O.C.G.A.") with respect to commerce, corporation, partnership, and associations law.[2]

---

* Partner in the firm of King & Spalding LLP, Atlanta, Georgia. Furman University (B.A., cum laude, 1979); Mercer University, Walter F. George School of Law (J.D., 1982). Member, Mercer Law Review (1980-1982); Lead Articles II Editor (1981-1982). Member, State Bar of Georgia.

** Partner in the firm of King & Spalding LLP, Atlanta, Georgia. University of Georgia (B.S., 1971); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 1988). Member, Mercer Law Review (1986-1988); Research Editor (1987-1988). Member, State Bar of Georgia.

*** Associate in the firm of King & Spalding LLP, Atlanta, Georgia. Southern Methodist University (B.B.A., 1996); Mercer University, Walter F. George School of Law (J.D., 1999). Member, Mercer Law Review (1997-1999). Member, State Bar of Georgia.

1. The survey period runs from June 1, 2005 through May 31, 2006.

2. No noteworthy amendments were made to Title 7 (Banking and Finance) of the Official Code of Georgia Annotated ("O.C.G.A.") during the 2006 Session of the Georgia General Assembly.

I. CORPORATIONS

A. *Piercing the Corporate Veil*

1. Eleventh Circuit Affirms Holding that Corporation Is Allowed to Pierce Its Own Corporate Veil for Claim Against Former Principal in Bankruptcy. In *Baillie Lumber Co. v. Thompson*,[3] the Eleventh Circuit Court of Appeals affirmed the 2004 holding by the United States District Court for the Middle District of Georgia that an alter ego claim against a corporation's principal was a cause of action rightly belonging to a creditor group as a whole, rather than a specific creditor.[4] As a result, the corporation's bankruptcy estate properly included the alter ego claim, and individual creditors were prohibited from pursuing causes of action outside of the corporation's bankruptcy with respect to the allegations presented in the alter ego claim.[5]

In 2004 the Eleventh Circuit Court of Appeals held that an alter ego claim was common to all creditors but was not convinced that a Georgia corporation could bring an alter ego claim against itself and certified the issue to the Georgia Supreme Court.[6] On April 26, 2005, the Georgia Supreme Court held that (1) Georgia law will allow a representative of a debtor corporation to pursue an alter ego claim against the corporation's former principal and (2) a former principal "found liable under an alter ego theory should be liable for the entirety of the corporation's debt."[7] Based on the Georgia Supreme Court's opinion, the Eleventh Circuit Court of Appeals held that the alter ego action by the corporation's bankruptcy estate against the principal is allowed under Georgia law.[8] The court also confirmed that the alter ego action is property of the bankruptcy estate and subject to the automatic stay of the bankruptcy court that would prevent individual claims by creditors or shareholders outside of the corporation's bankruptcy proceedings.[9]

---

3. 413 F.3d 1293 (11th Cir. 2005).
4. *Id.* at 1295.
5. *Id.*
6. *Id.*
7. Baillie Lumber Co. v. Thompson, 279 Ga. 288, 292, 293, 612 S.E.2d 296, 300, 301 (2005).
8. *Baillie*, 413 F.3d at 1295.
9. *Id.*

2. Individual Liability Under Alter Ego Doctrine Is Not Permissible Under Title VII Claim. In *Dearth v. Collins*,[10] the Eleventh Circuit Court of Appeals held that the alter ego doctrine did not permit individual liability to be imposed under Title VII of the Civil Rights Act of 1964 ("Title VII") against a president, director, and sole shareholder of an employer.[11] While the case primarily addressed relief under Title VII, *Dearth* reinforced Georgia law with respect to the alter ego doctrine.[12]

Brandi M. Dearth, a former employee of Info Pro Group, Inc. ("Info Pro"), sued Richard L. Collins, Info Pro's president, director, and sole shareholder, asserting that he repeatedly made sexual advances towards her and violated Title VII. Dearth argued that even if, as a general matter, individual employees may not be held liable under Title VII, the Eleventh Circuit Court of Appeals should make an exception to the rule based on application of the alter ego doctrine by piercing the corporate veil under Georgia law.[13]

The Eleventh Circuit Court of Appeals rejected Dearth's position for two reasons.[14] First, nothing in Title VII supports a claim that individual capacity liability can be imposed on the basis of the alter ego doctrine.[15] Second, and more importantly, the Eleventh Circuit Court of Appeals concluded that Dearth failed, as a matter of law, to establish that Collins was in fact Info Pro's alter ego.[16] In reaching its decision, the court outlined three essential elements required to pierce the corporate veil under the theory of alter ego doctrine in Georgia:

> "[T]o establish the alter ego doctrine it must be shown (1) that the stockholders' disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; (2) that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and (3) to adhere to the doctrine of corporate entity would promote injustice or protect fraud."[17]

10. 441 F.3d 931 (11th Cir. 2006).
11. *Id.* at 932.
12. *Id.* at 934-35.
13. *Id.* at 932-33.
14. *Id.* at 933.
15. *Id.* at 933-34.
16. *Id.* at 934.
17. *Id.* at 934-35 (quoting McLean v. Cont'l Wingate Co., 212 Ga. App. 356, 359, 442 S.E.2d 276, 279 (1994)).

Dearth presented no evidence that Collins disregarded the corporate form, that he used Info Pro to transact his own affairs, or that he hid behind the corporate form of Info Pro to protect fraudulent behavior.[18] The court held that "adherence to the doctrine of corporate entity in this case does not promote injustice or protect fraud."[19] Moreover, the court stated that "[t]he problem with the 'alter ego' theory [of individual liability in Title VII cases] is that it seeks to impose liability upon shareholders without a showing of fraud or injustice."[20] Because Georgia law expressly requires a showing of fraud or injustice, the court rejected Dearth's argument that she should be allowed to sue and recover against Collins individually under Title VII.[21]

B. Miscellaneous

1. Reverse Stock Split Resulting in Redemption of Shareholder Does Not Create Special Injury Authorizing Direct Action In *Haskins v. Haskins*,[22] the Georgia Court of Appeals affirmed the trial court's grant of summary judgment in favor of Catoosa Bancshares, Inc. ("CBI") and Joseph M. Haskins, Rebecca Haskins, and A. Russell Friberg, Jr. (collectively, the "CBI Defendants") relating to claims for breach of fiduciary duties, conversion, and oppression of minority shareholders.[23] At the heart of the issues in *Haskins* was the claim by Drewry E. Haskins III ("Haskins III") that he incurred a special injury separate and distinct from other shareholders and was thereby authorized to bring a direct action against CBI.[24] The Georgia Court of Appeals disagreed with Haskins III and affirmed the trial court's grant of summary judgment in favor of CBI and the CBI Defendants.[25]

CBI was a closely-held corporation but not a statutory close corporation.[26] Drewry E. Haskins, Jr. ("Haskins Jr."), Haskins III, Joseph Haskins (Haskins Jr.'s second son), A. Russell Friberg, Jr., various members of the Haskins family, and a trust—created for estate planning

18. *Id.*
19. *Id.*
20. *Id.* (quoting Worth v. Tyer, 276 F.3d 249, 262 (7th Cir. 2001) (rejecting an alter ego theory of individual capacity liability in a Title VII lawsuit against the president of a company)) (second alteration in original).
21. *Id.*
22. 278 Ga. App. 514, 629 S.E.2d 504 (2006).
23. *Id.* at 514-15, 629 S.E.2d at 505.
24. *Id.*
25. *Id.* at 515, 629 S.E.2d at 505.
26. *Id.* at 514, 518, 629 S.E.2d at 505, 508.

purposes—held all outstanding shares of CBI. Haskins Jr. founded and controlled CBI prior to his death, and while Joseph Haskins assumed leadership roles at CBI and was elected to the board of directors of CBI, Haskins Jr. became estranged from Haskins III. Under the terms of Haskins Jr.'s will at the time of his death, all of Haskins Jr.'s stock in CBI was transferred to Joseph Haskins. Notwithstanding the terms of the will, Haskins III claimed that he had an oral agreement with his father to inherit the stock and filed for a temporary restraining order to prohibit the transfer of shares to Joseph Haskins. In addition to the case in Georgia, Haskins III initiated litigation in Tennessee with respect to his claim that he had an oral agreement with his father to receive his stock in CBI. The Tennessee claim, which related to the probate of Haskins, Jr.'s will, was not part of the litigation addressed by the Georgia Court of Appeals.[27] The trial court initially granted the temporary restraining order but later permitted the transfer to Joseph Haskins. As a result of the transfer, Joseph Haskins owned the majority of the outstanding shares of CBI.[28]

After the transfer of Haskins Jr.'s shares to Joseph Haskins, CBI's board of directors authorized a four thousand to one reverse stock split. In connection with the reverse stock split, the authorized shares of stock in CBI were reduced from 200,000 shares to fifty shares. At the time of the reverse stock split, the only shareholder with more than 4000 shares was Joseph Haskins. Because Haskins III held less than 4000 shares, his shares, along with the shares of all shareholders other than Joseph Haskins, were to be exchanged for cash in the amount of $427 per share.[29]

Haskins III argued that he should have been able to maintain a direct action because he suffered special damages.[30] The Georgia Court of Appeals disagreed and held that the case was simply about the fair market value of the shares.[31] Once the court of appeals concluded that the case was limited to the mere valuation of the shares, the Georgia

27. *Id.* at 516, 629 S.E.2d at 506.

28. *Id.* at 515-16, 629 S.E.2d at 505-06.

29. *Id.* at 516-17, 629 S.E.2d at 506-07. While the price to be paid per fractional share was not expressly addressed by the court of appeals, it is interesting to note that the board of directors of CBI authorized a payment of $467 per share, CBI actually paid Joseph Haskins $434 per share for a redemption of shares shortly after Haskins Jr.'s death, and CBI only offered $427 per share to Haskins III. *Id.* In addition, during the course of the litigation, Haskins III and his family members ultimately surrendered their shares in CBI and received the $427 per share that had been deposited into the registry of the court for their shares. *Id.* at 517, 629 S.E.2d at 507.

30. *Id.* at 520, 629 S.E.2d at 509.

31. *Id.*

Supreme Court's holding in *Grace Brothers, Ltd. v. Farley Industries, Inc.*[32] made it clear "that the statutory appraisal remedy in O.C.G.A. [section] 14-2-1302(b) . . . is the exclusive remedy."[33] In quoting the Georgia Supreme Court, the Georgia Court of Appeals emphasized that "'[a] remedy beyond the statutory procedure is not available where the shareholder's objection is essentially a complaint regarding the price which he receives for his shares.'"[34]

Despite his varied claims, Haskins III never claimed that CBI's board of directors failed to comply with the Georgia Business Corporations Code[35] or CBI's governing documents, nor did Haskins III claim that the actions were taken by fraudulent or deceptive means.[36] Instead, Haskins III alleged that: "(1) [CBI] acted even though the issue concerning the ownership of the stock raised by his reliance on the alleged promise by his father was unresolved; (2) [CBI] redeemed Joseph Haskins's shares to which [Haskins III] claims ownership; and (3) the proposed reverse stock split would freeze out minority shareholders."[37] The court concluded that Haskins III's "complaint [was] replete with general allegations that he has suffered injuries separate and apart from the other shareholders, but his allegations [did] not demonstrate how this [was] true."[38] Pending resolution of the litigation in Tennessee regarding rightful ownership of Haskins Jr.'s shares, the Georgia Court of Appeals held that Haskins III's allegations did not demonstrate how his injuries were separate and apart from that of other shareholders and that the exercise of his appraisal rights as set forth in O.C.G.A. section 14-2-1302(b) was his sole remedy.[39]

2. No Breach of Fiduciary Duty When Officer and Employees Solicited Business Accounts Previously Serviced By Their Former Employer. In *Mau, Inc. v. Human Technologies, Inc.*,[40] the Georgia Court of Appeals affirmed in part and reversed in part the findings of the trial court regarding allegations of breach of the duty of loyalty and tortious interference with business contracts and relation-

32. 264 Ga. 817, 450 S.E.2d 814 (1994).
33. *Haskins*, 278 Ga. App. at 518, 629 S.E.2d at 508; *Grace Brothers*, 264 Ga. at 820, 450 S.E.2d at 817.
34. *Haskins*, 278 Ga. App. at 518-19, 629 S.E.2d at 508.
35. O.C.G.A. §§ 14-2-101 to -1703 (2003 & Supp. 2006).
36. *Haskins*, 278 Ga. App. at 519, 629 S.E.2d at 508.
37. *Id.*
38. *Id.*
39. *See id.* at 518-19, 520, 629 S.E.2d at 508, 509.
40. 274 Ga. App. 891, 619 S.E.2d 394 (2005).

ships.[41] Herbert Dew, a former vice president of MAU, Inc. ("MAU"), and several other former employees of MAU resigned in May 1999 to form Human Technologies, Inc. ("HTI"), a competing company to MAU.[42] In response to the formation of HTI, MAU sued Dew, HTI, and the other former MAU employees who joined HTI.[43] Dew acknowledged that, "while employed by MAU, he owed it a duty not to use company time or his knowledge as an officer to advance a competing business."[44] As part of their employment arrangements, Dew and the other former MAU employees signed noncompete and nonsolicitation agreements with MAU.[45] However, the trial court found that the noncompete and nonsolicitation agreements were unenforceable.[46] MAU did not appeal the trial court's finding with respect to the noncompete and nonsolicitation agreements.[47]

The record showed, through affidavits and depositions, that prior to leaving MAU, neither Dew nor any of the other former MAU employees (1) contacted or solicited any MAU customers on behalf of HTI, (2) took any confidential documents or information from MAU, or (3) divulged, disclosed, or used any confidential information of MAU in setting up HTI.[48] In determining whether Dew breached his fiduciary duty of loyalty, the court focused on O.C.G.A. section 14-2-831(a)(1)(C),[49] which allows a corporation to sue an officer or director for "[t]he appropriation, in violation of his duties, of any business opportunity of the corporation."[50] The court analyzed the facts of MAU in light of the Georgia Supreme Court's two-prong test (whether an opportunity was in fact a business opportunity rightfully belonging to the corporation and whether the officer in acquiring such opportunity violated his fiduciary duties of loyalty, good faith, and fair dealing) for determining whether an officer should be liable for wrongful appropriation of a business opportunity.[51]

---

41. *Id.* at 891-92, 897, 619 S.E.2d at 395, 399.
42. *Id.* at 892-93, 619 S.E.2d at 395-96.
43. *Id.* at 891-92, 619 S.E.2d at 395.
44. *Id.* at 892, 619 S.E.2d at 395-96.
45. *Id.*
46. *Id.* at 892 n.2, 619 S.E.2d at 396 n.2. The Georgia Court of Appeals did not explain the trial court's rationale for invalidating the noncompete and nonsolicitation agreements. *Id.*
47. *Id.*
48. *Id.* at 893, 619 S.E.2d at 396.
49. O.C.G.A. § 14-2-831(a)(1)(C) (2003).
50. *MAU*, 274 Ga. App. at 894, 619 S.E.2d at 396.
51. *Id.*, 619 S.E.2d at 396-97; *see* Se. Consultants v. McCrary Eng'g Corp., 246 Ga. 503, 273 S.E.2d 112 (1980).

The threshold question in determining whether there has been a wrongful appropriation of a business opportunity is determining whether there was in fact a business opportunity that rightfully belonged to the corporation.[52] Absent the finding of a corporate opportunity, the directors or officers who pursued the opportunity for personal benefit will not be liable.[53] Quoting *United Seal & Rubber Co. v. Bunting*,[54] the court of appeals noted that "'[a] business opportunity arises from a "beachhead" consisting of a legal or equitable interest or an "expectancy" growing out of a pre-existing right or relationship.'"[55] In *United Seal* the Georgia Supreme Court held that although the company had long-standing dealings with its customers, and the sales from these customers accounted for much of its income, there was no contractual arrangement between the company and its customers; instead, the court noted that the customers did not have an exclusive arrangement with the company, and "'the opportunity suggested was an ongoing [one] with no finite aspect.'"[56] Also, the Georgia Court of Appeals in *MAU* noted that "[t]he burden of proof with regard to the threshold question [of whether an opportunity presented to a corporate fiduciary is a 'corporate' opportunity] rests 'upon the party attacking the acquisition.'"[57]

With respect to the case at hand, MAU's only argument for the alleged breach was mere speculation of a business opportunity having arisen before Dew left his employment with MAU; however, this argument was directly contradicted by affidavits and depositions.[58] As a result, the court did not need to reach the issue of whether a breach of a duty of loyalty occurred because MAU had not satisfied its burden of proof to show a business opportunity even existed.[59] With respect to MAU's claim for tortious interference, the court held "there was no legal duty of defendants which could have been breached as the basis for a tortious interference claim" because the trial court invalidated the noncompete and nonsolicitation provisions in the employment contracts and because appellants did not appeal that ruling.[60]

---

52. *MAU*, 274 Ga. App. at 894, 619 S.E.2d at 397.
53. *Id.*
54. 248 Ga. 814, 285 S.E.2d 721 (1982).
55. *MAU*, 274 Ga. App. at 894, 619 S.E.2d at 397 (quoting *United Seal*, 248 Ga. at 815, 285 S.E.2d at 721).
56. *Id.* (quoting *United Seal*, 248 Ga. at 816, 285 S.E.2d at 723) (brackets in original).
57. *Id.* at 895, 619 S.E.2d at 397 (quoting Phoenix Airline Servs. v. Metro Airlines, 260 Ga. 584, 587, 397 S.E.2d 699, 702 (1990)) (brackets in original).
58. *Id.* at 893, 895, 619 S.E.2d at 396, 397.
59. *Id.* at 895, 619 S.E.2d at 397.
60. *Id.* at 896, 619 S.E.2d at 398.

In dicta, however, the court noted that "[e]ven were there proof of such a business opportunity, copying and using customer lists of a former employer in setting up a new competing business, absent a valid noncompete or nonsolicitation contract, is not a breach of a fiduciary duty."[61] While this parting statement appears only in dicta, it is a provocative statement and may give some practitioners pause. The statement clearly addresses breach of fiduciary duties, but other underlying legal concepts (for example, intellectual property rights) should be considered and cannot be disregarded.

II. PARTNERSHIPS

A. *Verbal Partnership Agreement Fails for Lack of Consideration*

In *Wnuk v. Doyle*,[62] the Georgia Court of Appeals affirmed the trial court's grant of summary judgment and held that two partnerships were not formed when the verbal agreements that allegedly formed the partnerships did not describe the consideration the prospective partner was to contribute for her partnership interests in each partnership.[63] In 2002 Carol Wnuk entered into discussions with Larry Garner to acquire Garner's fifty percent interest in land he jointly owned with Leta Doyle. Once Garner agreed to sell the land to Wnuk, the two entered into a written agreement to acquire Garner's fifty percent interest in the land. Several liens encumbered the property, and Wnuk, Garner, and Doyle all endeavored to release the liens. Garner borrowed $50,000 from Wnuk to satisfy the liens and repaid Wnuk $75,000 one year later. In connection with the sale of the property by Garner to Wnuk, Wnuk and Doyle attempted to qualify for a bank loan to finance part of the acquisition. The bank appraised the property and Wnuk and Doyle each paid one-half of the appraisal fee. Wnuk and Garner's contract included a closing condition that Wnuk would qualify for a bank loan on or before May 13, 2003. Wnuk did not close her purchase before the May 13, 2003 deadline, in part, because Wnuk was unable to obtain the financing. After Wnuk was unable to obtain the financing, she introduced two additional potential partners, Tom Parson and Henry Phillips, to Doyle in connection with purchasing the property. Doyle and the two new

61. *Id.* at 895 n.6, 619 S.E.2d at 397 n.6 (citing Bacon v. Volvo Serv. Ctr., 266 Ga. App. 543, 546, 597 S.E.2d 440, 444 (2004)).
62. 276 Ga. App. 550, 623 S.E.2d 740 (2005).
63. *Id.* at 552-53, 623 S.E.2d at 742-43.

partners ultimately agreed to purchase and develop the property on their own and did not include Wnuk.[64]

Wnuk claimed to have had a verbal agreement with Doyle to develop the property dating back to when they attempted to seek the bank financing in February 2003. Wnuk also claimed that the original verbal partnership agreement with Doyle was expanded to include the two new partners when she introduced the partners to Doyle in May 2003. Doyle disputed Wnuk's assertions and claimed that the only agreement she had with Wnuk was to help Wnuk obtain bank financing in connection with Wnuk's proposed purchase of Garner's fifty percent interest in the property.[65]

The Georgia Court of Appeals focused on Wnuk's admission that there had never been a discussion of the amount she was to have paid for either partnership interest she claimed was verbally agreed upon.[66] As a result, the court held that the "omission of the essential term of contract consideration rendered by the alleged verbal agreements [was] too indefinite to be enforced."[67]

B. Written Partnership Agreement Upheld Even Though Consideration Not Expressly Stated

In *Antoskow & Associates, LLC v. Gregory*,[68] the Georgia Court of Appeals affirmed the trial court's grant of summary judgment and held that (1) assent to partnership constituted consideration because a person who allows herself to be held out as a partner in a business is bound for the partnership's contracts and (2) the document allegedly creating a partnership "unambiguously stated that [the person] was a partner in ownership of the subject property."[69]

In 2000 Christopher P. Antoskow and Carolyn M. Gregory executed a document entitled "In Death Do Us Part."[70] One particular sentence

64. *Id.* at 550-52, 623 S.E.2d at 741-42.
65. *Id.* at 552, 623 S.E.2d at 742.
66. *Id.* at 552-53, 623 S.E.2d at 742.
67. *Id.* at 553, 623 S.E.2d at 742.
68. 278 Ga. App. 468, 629 S.E.2d 1 (2005).
69. *Id.* at 470-72, 629 S.E.2d at 4-5.
70. *Id.* at 469-70, 629 S.E.2d at 2-3. The text of the writing is as follows:

> On this day, January 18, 2000, I, Christopher P. Antoskow will state the following: If I, Christopher P. Antoskow, dies with out [sic] Carolyn M. Gregory, and we are still together, she will receive 30% of the Jessica-Morgan Building. . . . If Christopher P. Antoskow and Carolyn M. Gregory are not together at that time she will receive 20%. In any case in incident, Carolyn M. Gregory [will receive] a percentage as a partner in ownership of this property. On the sale of said property, Carolyn Gregory, will receive the said above percentage of whatever the

unambiguously states that Gregory is "a partner in ownership of this property."[71] When determining whether a partnership has been created, the court stated that "the true test to determine whether a partnership has been created is the intention of the parties."[72] Because Gregory assented to the partnership by allowing herself to be held out as a partner in the business pursuant to the terms of the written partnership agreement, the court, applying the rules of contract construction, held that the contract evidenced the partnership and that Gregory's assent to partnership constituted adequate consideration.[73]

Although *Antoskow* was decided less than one month after *Wnuk*, the Georgia Court of Appeals seems to have reached a different conclusion with respect to whether the consideration (as opposed to mere assent to the partnership) was required to be expressly set forth in a partnership agreement. One key distinction between the two cases is that the alleged partnership agreement in *Wnuk* was a verbal agreement, but the alleged partnership agreement in *Antoskow* was a written agreement. The differing results are arguably in line with prior Georgia precedent with respect to the importance of public filings and other written instruments in determining the intent of the parties.[74]

From a practical perspective, to the extent that a person holds himself out as a partner to the public via a written instrument or filing, it appears that the Georgia courts will more readily find that a partnership has been formed even if the exact amount of consideration has not been stated expressly in the document.

III. LIMITED LIABILITY COMPANIES

A. *Statutory Fiduciary Duties May Be Modified or Amended by an Operating Agreement*

In *Ledford v. Smith*,[75] the Georgia Court of Appeals held that fiduciary duties owed among members of a Georgia limited liability company may be modified or eliminated (with a few exceptions) by an

---

> total sale may be at the time of the sale of the property. This was agreed upon by both parties involved in this legal document.

Id. (brackets in original).

71. *Id.* at 470, 629 S.E.2d at 3.

72. *Id.*, 629 S.E.2d at 3-4.

73. *Id.* at 470-71, 629 S.E.2d at 4.

74. *See* Accolades Apartments, L.P. v. Fulton County, 279 Ga. 257, 612 S.E.2d 284 (2005).

75. 274 Ga. App. 714, 618 S.E.2d 627 (2005).

operating agreement.[76] The duties that limited liability members owe to one another under the Georgia Limited Liability Company Act are set forth in O.C.G.A. section 14-11-100.[77] As set forth in the Georgia Limited Liability Company Act, any fiduciary duties that a member may owe to another member of a limited liability company may be modified in a written operating agreement, and the members or managers may in good faith rely upon the provisions of a written operating agreement for the limitation of the scope of their duties.[78] Quoting *Stoker v. Bellemead*,[79] the Georgia Court of Appeals stated:

> [t]he contractual flexibility provided in [O.C.G.A. section 14-11-305] is consistent with O.C.G.A. [section] 14-11-1107(b) of the LLC Act which

---

76. *Id.* at 724-25, 618 S.E.2d at 636.

77. O.C.G.A. § 14-11-100 (2003). In relevant part, the Georgia Limited Liability Company Act provides that:

> In managing the business or affairs of a limited liability company:
>
> (1) A member or manager shall act in a manner he or she believes in good faith to be in the best interests of the limited liability company and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. A member or manager is not liable to the limited liability company, its members, or its managers for any action taken in managing the business or affairs of the limited liability company if he or she performs the duties of his or her office in compliance with this Code section. Except as otherwise provided in the articles of organization or a written operating agreement, a person who is a member of a limited liability company in which management is vested in one or more managers, and who is not a manager, shall have no duties to the limited liability company or to the other members solely by reason of acting in his or her capacity as a member;
>
> . . . .
>
> (4) To the extent that, pursuant to paragraph (1) of this Code section or otherwise at law or in equity, a member or manager has duties (including fiduciary duties) and liabilities relating thereto to a limited liability company or to another member or manager:
>
> (A) The member's or manager's duties and liabilities may be expanded, restricted, or eliminated by provisions in the articles of organization or a written operating agreement; provided, however, that no such provision shall eliminate or limit the liability of a member or manager:
>
> (i) For intentional misconduct or a knowing violation of law; or
>
> (ii) For any transaction for which the person received a personal benefit in violation or breach of any provision of a written operating agreement; and
>
> (B) The member or manager shall have no liability to the limited liability company or to any other member or manager for his or her good faith reliance on the provisions of a written operating agreement, including, without limitation, provisions thereof that relate to the scope of duties (including fiduciary duties) of members and managers.

O.C.G.A. § 14-11-305 (2003).

78. *Ledford*, 274 Ga. App. at 723-24, 618 S.E.2d at 635-36.

79. 272 Ga. App. 817, 825, 615 S.E.2d 1, 9 (2005).

provides that: "It is the policy of this state with respect to limited liability companies to give maximum effect to the principle of freedom of contract and to the enforceability of operating limits."[80]

Dyna-Vision Group, LLC ("Dyna-Vision"),[81] Brenda Smith, Bryan Ownbey, and Bob Thomas (collectively, the "Active Members") formed Signature Hospitality Carpets ("SHC"), a limited liability company, in 1998. The Active Members constituted the management, employees, and officers of SHC, and Dyna-Vision acted as the financial partner to provide credit and management assistance. Pursuant to the terms of SHC's operating agreement, both Dyna-Vision and the Active Members had the right to force a mandatory buy-sell. At the end of 2001 and beginning of 2002, SHC entertained offers for a sale of SHC to Shelby Peeples. However, Dyna-Vision's management believed SHC was worth more than the value offered by Peeples and refused to sell.[82]

Once SHC rejected Peeples's offer, Peeples negotiated separately with the Active Members and entered into a letter of intent whereby Peeples would loan the Active Members $3.5 million to purchase Dyna-Vision's interest in SHC. The loan was to be secured by SHC's assets. Upon the Active Members' purchase of Dyna-Vision's interest in SHC, Peeples would purchase all of SHC's assets from SHC (which, at that time, would be a wholly-owned by the Active Members). The Active Members did not disclose the negotiations or letter of intent to Dyna-Vision or its representatives.[83]

On February 25, 2002, the Active Members presented a "Notice of Offer to Sell or Purchase" to Dyna-Vision in accordance with SHC's operating agreement. While Dyna-Vision initially considered buying the Active Members' interests, it ultimately decided to sell its interests for the $3.5 million as provided in the "Notice of Offer to Sell or Purchase." After Dyna-Vision had sold its membership interests in SHC, Dyna-Vision claimed that there had been a mutual mistake of fact while it had been a member and made a written demand that SHC reconvey certain land and a building that was known as "the Green Road Property" to Signature Leasing Corporation ("SLC").[84] When SHC refused to

---

80. *Ledford*, 274 Ga. App. at 724, 618 S.E.2d at 636 (quoting Stoker v. Bellemead, 272 Ga. App. 817, 825, 615 S.E.2d 1, 9 (2005)).

81. Dyna-Vision Group, LLC was formed and owned by Jimmy Ledford, Larry O'Dell, Bryan Walker, and two others. *Id.* at 715, 618 S.E.2d at 630.

82. *Id.* at 715-17, 618 S.E.2d at 630-31.

83. *Id.* at 717-18, 618 S.E.2d at 631-32. However, the court noted that in any event, there was evidence that Dyna-Vision knew that Peeples was negotiating separately with the Active Members. *Id.* at 718, 618 S.E.2d at 632.

84. *Id.* at 718-19, 618 S.E.2d at 632-33. Jimmy Ledford, Larry O'Dell, Bryan Walker, Brenda Smith, and Bryan Ownbey formed SLC, a limited liability company, to purchase

reconvey the Green Road Property, Dyna-Vision, its owners, and SLC filed suit claiming mutual mistake and unjust enrichment with respect to the transfer of the Green Road property; fraud in the transfer of the Green Road property, in the buyout of Dyna-Vision's ownership interests in SHC, and in the buyout of SHC; and breach of fiduciary duties owed by the Active Members to Dyna-Vision in handling SHC's finances and in conducting the buyout.[85]

The SHC operating agreement reveals that the only obligation of the Active Members to Dyna-Vision or of Dyna-Vision to the Active Members with respect to proposed transfers of interests was to disclose to the other any "bona fide offer from a third party to 'purchase' their 'ownership interest' in SHC."[86] The trial court concluded that the provision was intended to prevent outsiders from buying into SHC and would permit the Active Members to maintain some control over who their business partners were to be. Based on the structure of the agreement between Peeples and the Active Members, the trial court concluded that no third party would buy into SHC to become Dyna-Vision's business partner. Not only was Peeples to acquire assets of SHC, but Peeples would also acquire assets of SHC after the buyout of Dyna-Vision's interest in SHC by the Active Members.[87] As a result, the court held that (1) "neither the financing for the buy-out nor the asset purchase arrangement implicated the disclosure provisions of Paragraph 9.2.1 of the [SHC] Operating Agreement" and (2) "the trial court did not err in granting summary judgment to [the Active Members] on the issue of whether the [SHC] operating agreement required the Active Members to disclose to Dyna-Vision Peeples's involvement in the buyout."[88]

More specifically, Paragraph 7.3 of SHC's operating agreement expressly permitted the members of SHC to do the following:

> "engage in all such other business ventures, including without limitation ventures involving the purchase, sale and operation of other businesses, but no Active Member shall engage in businesses similar to the business of [SHC] by competing with the business of [SHC] while

and hold the Green Road property. SLC then leased the property to SHC and SHC refinanced and consolidated its debts with FNBC in October 2001, two months before the negotiations with Peeples began. *Id.* at 719, 618 S.E.2d at 632.

85. *Id.* at 720, 618 S.E.2d at 633.

86. *Id.*

87. *Id.* at 720-21, 618 S.E.2d at 633-34.

88. *Id.* at 721, 618 S.E.2d at 634.

> they are employed with [SHC], except for business associations of Active Members with Vista Carpet Industries, LLC."[89]

The court held that paragraph 7.3 was "broad enough to allow the Active Members to negotiate with Peeples for the purpose of obtaining financing to fund their buyout of Dyna-Vision's interest in SHC."[90] The court further held that the terms of the operating agreement, which allowed the business opportunity that occurred, eliminated any obligation that the Active Members may have owed to Dyna-Vision with respect to such a business arrangement.[91]

In *Ledford* the Georgia Court of Appeals reinforced the general understanding that a well-drafted operating agreement may reduce or eliminate any implied duties or fiduciary obligations from one member to another.[92] Georgia practitioners should pay careful attention and note the extent to which the fiduciary duties provisions in operating agreements may be an issue in the overall structure of a transaction.

B. Operating Agreement Provisions Trump Georgia Limited Liability Company Act

In *Alimenta (USA), Inc. v. Oil Seed South, LLC*,[93] the Georgia Court of Appeals affirmed the trial court's grant of summary judgment against both Alimenta (USA), Inc. ("Alimenta") and Oil Seed South, LLC ("Oil Seed").[94] *Alimenta* involved a dispute among the joint venture partners in Mid Georgia Processing, LLC ("Mid Georgia"), a limited liability company owned fifty percent by Alimenta and fifty percent by Oil Seed.[95]

After the parties formed the joint venture, cottonseed oil prices dropped precipitously and forced the parties to incur additional debt to finance the ongoing operations. Alimenta ultimately advanced more money than Oil Seed, and Oil Seed did not match the contributions. Alimenta decided to convert some of its outstanding debt owed by Mid Georgia into capital contributions. As a result, Alimenta's ownership interest in Mid Georgia increased to fifty-one percent. Alimenta ultimately sold Mid Georgia to another entity owned by Alimenta and

---

89. *Id.* at 716-17, 618 S.E.2d at 631.
90. *Id.* at 725, 618 S.E.2d at 636.
91. *Id.*
92. *Id.* at 724-25, 618 S.E.2d at 636.
93. 276 Ga. App. 62, 622 S.E.2d 363 (2005).
94. *Id.* at 62, 622 S.E.2d at 365.
95. *Id.*

then sued Oil Seed for indemnification for the additional cash contributions made by Alimenta.[96]

On appeal, the Georgia Court of Appeals held that the indemnification obligation, required pursuant to the operating agreement, applied only to third parties and not to members.[97] Moreover, the court held that Alimenta's claim was "not supported by a reasonable construction of the contract."[98]

Oil Seed counterclaimed for fraud in the inducement and breach of fiduciary duties.[99] While the particulars of the alleged conduct were not specified in the opinion, a portion of the conduct in question occurred prior to the execution of the operating agreement.[100] As a result, the court held that the merger clause contained in the operating agreement barred Oil Seed's claims on breach of fiduciary duty and fraudulent inducement.[101] Similar to the court's opinion in *Ledford*, *Alimenta* demonstrates the willingness of Georgia courts to enforce contract terms under a limited liability company operating agreement that are more specific than Georgia's Limited Liability Company Act.

C. Limited Liability Company Is Distinct Entity Separate from Its Members

In *Winzer v. EHCA Dunwoody, LLC*,[102] the Georgia Court of Appeals held that "a limited liability company cannot appear in court without representation by an attorney."[103] In so holding, the court reinforced the legal conclusion that "a limited liability company, like a corporation, is a separate business entity which can act only through its agents."[104] While *Winzer* provides little foresight in the way of new case law, it continues the line of Georgia jurisprudence that a limited liability company is a stand-alone entity separate and apart from its members.

IV. LEGISLATIVE

In the 2006 Session of the Georgia General Assembly, the General Assembly made one revision to Title 10 of the O.C.G.A. regarding

96. *Id.* at 62-63, 622 S.E.2d at 365.
97. *Id.* at 65, 622 S.E.2d at 366.
98. *Id.*
99. *Id.* at 63, 622 S.E.2d at 365.
100. *See id.* at 65, 622 S.E.2d at 366-67.
101. *Id.*, 622 S.E.2d at 366.
102. 277 Ga. App. 710, 627 S.E.2d 426 (2006).
103. *Id.* at 714, 627 S.E.2d at 430.
104. *Id.*

investment entities[105] and numerous revisions to Title 14 of the O.C.G.A. regarding corporations, partnerships, and associations.[106] Specifically, Title 10 of the O.C.G.A. was amended to more clearly reflect that Georgia may either directly *or indirectly, through an investment entity*, make investments using Georgia's Seed-Capital Fund.[107]

Title 14 of the O.C.G.A. contained multiple revisions.[108] A condensed summary of noteworthy revisions are as follows:

1. The Georgia General Assembly added O.C.G.A. section 14-2-305 and revised multiple sections of the O.C.G.A. to provide that a board of directors can commit a corporation to submit a matter for shareholder approval even if the board of directors subsequently decides to recommend against it.[109] The text of O.C.G.A section 14-2-305 is as follows:

> Subject to the requirements set forth in paragraph (1) of subsection (b) of Code Section 14-2- 1003, with respect to the submission of amendments to the articles of incorporation to shareholders; paragraph (1) of subsection (b) of Code Section 14-2-1103, with respect to the submission of a plan of merger or share exchange to shareholders; paragraph (1) of subsection (b) of Code Section 14-2-1202, with respect to the submission of a disposition of assets requiring shareholder approval to shareholders; and paragraph (1) of subsection (b) of Code Section 14-2-1402, with respect to the submission of a proposed dissolution to shareholders, a corporation may agree to submit a matter to a vote of its shareholders regardless of whether the board of directors determines at any time subsequent to adopting or approving such matter that such matter is no longer advisable and recommends that the shareholders reject or vote against the matter.[110]

This legislative revision is particularly important in the acquisition context when a potential acquirer knows there may be competing bidders for a particular company and the acquirer wants its deal to be submitted to the shareholders even if another "superior" bid causes a board of directors to change its recommendation. This type of provision is also known as a "force the vote" provision that practitioners may include in no-solicitation or no-shop provisions in acquisition agreements.

---

105. *See* Ga. H.B. 1305, Reg. Sess. (2006).
106. *See* Ga. S.B. 469, Reg. Sess. (2006).
107. O.C.G.A. §§ 10-10-1, -3 and -4 (2003 & Supp. 2006).
108. O.C.G.A. §§ 14-2-401, -854, -859, -1003, -1101 to -1104, -1109, -1109.1, -1202, -1302, -1402, -1504, -1506 (2003 & Supp. 2006); O.C.G.A. §§ 14-9-206.2, -902, -905 (2003 & Supp. 2006); O.C.G.A. §§ 14-11-212, -706, -1002, -1101 (2003 & Supp. 2006). The general assembly also enacted O.C.G.A. sections 14-2-104, 14-2-305, 14-2-1109.2, 14-2-1109.3, 14-9-206.8, and 14-11-906 (Supp. 2006), and repealed O.C.G.A. section 14-2-1008.
109. O.C.G.A. §§ 14-2-305, -1003, -1103, -1202, -1402 (2003 & Supp. 2006).
110. O.C.G.A. § 14-2-305.

2. The General Assembly revised O.C.G.A. sections 14-2-854 and 14-2-859 to provide for the advance payment of expenses to a director before determining a director's ultimate entitlement to indemnification.[111]

3. The General Assembly revised multiple sections of Title 14 of the O.C.G.A. to clarify existing law by expressly recognizing the possibility of different treatment of shareholders in a plan of merger or share exchange (i.e., some holders of a single class of stock may be required to accept securities, property, or cash, while the remaining holders of the same class of stock may be required to accept different securities, property, or cash).[112]

4. The General Assembly revised multiple sections of Title 14 of the O.C.G.A. to change certain provisions relating to the election to become a limited liability company, to streamline the process of permitting an entity to convert from one form into another, and to allow entities organized in other states to convert to corporations or partnerships in Georgia.[113]

111. O.C.G.A. §§ 14-2-854, -859.
112. O.C.G.A. §§ 14-2-1101, -1102, -1109, -1302.
113. O.C.G.A. §§ 14-2-1109.1, -1109.2, -1109.3.