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Trial Practice and Procedure

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I. INTRODUCTION

The Georgia Appellate Courts continue to consider and clarify the impact of the Tort Reform Act of 2005[1] on trial practice and procedure while addressing other legislation and case law similarly imperative to litigation in Georgia courts. Although the Georgia General Assembly enacted less legislation related to trial practice and procedure during this survey period than in recent years, the few laws passed are noteworthy.

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1. 2005 Ga. Laws 1, 1-2.

II. LEGISLATION

A. *Professional Malpractice Actions and Expert Affidavit Requirements*

Effective July 1, 2007, Official Code of Georgia Annotated ("O.C.G.A.") section 9-11-9.1[2] has been amended in two significant aspects.[3] First, subsection (a)(2) has been expanded to require the filing of an expert affidavit contemporaneously with any action that alleges a partnership, corporation, trust, company, association, or other legal entity is liable for the action or inaction of a professional, as defined under subsection (g).[4] Second, a safe harbor provision has been reestablished allowing for the late filing of an expert affidavit up to forty-five days past the date of the filing of the complaint.[5] This safe harbor provision operates under the following circumstances: (1) when the statute of limitations will run or is reasonably expected to run within ten days of filing the complaint; (2) when the complaint alleges that an expert affidavit could not be timely secured prior to filing; and (3) when the plaintiff's attorney contemporaneously files an affidavit attesting that he or she was not retained more than ninety days before the expiration of the limitations period.[6] If a complaint alleging professional malpractice is filed without an attached expert affidavit, the deadline to file an answer and commence discovery is thirty days after the expert affidavit is filed.[7]

B. *The Asbestos Act*

On November 20, 2006, the Georgia Supreme Court in *Daimler-Chrysler Corp. v. Ferrante*[8] held the Asbestos Act[9] unconstitutional on the ground that the Act contained an inseverable and unconstitutional requirement that its provisions be applied retroactively.[10] In response, the Georgia General Assembly enacted Senate Bill 182,[11] which took effect May 1, 2007, to strike the former Asbestos Act and insert a new,

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2. O.C.G.A. § 9-11-9.1 (Supp. 2007).
3. *See id.*
4. *Id.* § 9-11-9.1(a)(2), (g).
5. *See id.* § 9-11-9.1(b).
6. *Id.*
7. *Id.* § 9-11-9.1(d).
8. 281 Ga. 273, 637 S.E.2d 659 (2006).
9. O.C.G.A. §§ 51-14-1 to -10 (Supp. 2006), *invalidated by Ferrante*, 281 Ga. 273, 637 S.E.2d 659.
10. *Ferrante*, 281 Ga. at 273-75, 637 S.E.2d at 661-62.
11. Ga. S. Bill 182, Reg. Sess. (2007).

perhaps more successful, Asbestos Act.[12] Similar to the previous Asbestos Act, the most recent incarnation of the Asbestos Act requires physical impairment as an essential element of an asbestos or silica claim.[13]

III. CASE LAW

A. *Causes of Action*

1. Negligent Failure to Warn. As a matter of first impression, the Georgia Court of Appeals held in *Johnson v. Ford Motor Co.*[14] that a plaintiff need not establish bodily harm to maintain a claim for negligent failure to warn.[15] The plaintiff in *Johnson* filed suit after her house burned down due to a defective component in her neighbor's Lincoln Town Car. The plaintiff sought compensatory and punitive damages for, *inter alia*, the defendants' negligent post-sale failure to warn about the dangers of the vehicle and its component parts. Because the plaintiff suffered no bodily injury, the trial court granted Ford's motion for summary judgment on the plaintiff's negligent failure to warn claim.[16] Relying on the Restatement Second of Torts,[17] the court of appeals vacated the trial court's grant of summary judgment and held:

> "[B]odily harm" is not required to maintain a claim for negligent failure to warn as set out in Section 388 of the Restatement Second of Torts. Further, . . . "[a] negligent failure to warn claim may arise from a manufacturer's post-sale knowledge acquired months, years, or even decades after the date of the first sale of the product."[18]

Because the plaintiff's punitive damages claim was also based on her claim for negligent failure to warn, the court also vacated the denial of punitive damages and remanded the case to the trial court.[19]

2. RICO Actions. The Georgia Supreme Court in *Williams General Corp. v. Stone*[20] granted certiorari to address "whether a corporation is

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12. O.C.G.A. §§ 51-14-1 to -13 (Supp. 2007).
13. *See id.* § 51-14-4.
14. 281 Ga. App. 166, 637 S.E.2d 202 (2006).
15. *Id.* at 173, 637 S.E.2d at 207.
16. *Id.* at 171-72, 637 S.E.2d at 206.
17. RESTATEMENT (SECOND) OF TORTS § 388 (1965).
18. *Johnson*, 281 Ga. App. at 173, 637 S.E.2d at 207 (quoting Hunter v. Werner Co., 258 Ga. App. 379, 383, 574 S.E.2d 426, 431 (2002)).
19. *Id.*
20. 280 Ga. 631, 632 S.E.2d 376 (2006).

considered a 'person' under the Georgia civil [Racketeer Influenced and Corrupt Organizations ("RICO")] Act . . . and can thus be held directly liable for conspiring with its officers" to commit a crime or fraud under the RICO Act.[21] Initially, the court noted that the definitions section of the RICO Act does not expressly define "person."[22] Consequently, the court looked to other definitions of person in the O.C.G.A. which do define person to include a corporation.[23] The court therefore held that "a corporation is a 'person' for purposes of the Georgia civil RICO Act."[24] After the court's holding in *Williams General*, it is clear there is a cause of action against a corporation for a violation of the Georgia RICO Act.[25]

B. Litigating Insurance Issues

The Georgia Court of Appeals issued the most important insurance decision of 2006 in *Abrohams v. Atlantic Mutual Insurance Agency*.[26] In *Abrohams* the court clarified that O.C.G.A. section 33-7-11[27] requires uninsured motorist ("UM") coverage for umbrella policies providing automobile coverage as long as the insured has not specifically rejected UM coverage when obtaining or renewing the umbrella policy.[28]

The court of appeals conceded that the text of O.C.G.A. section 33-7-11 does not address umbrella or excess liability policies.[29] Because the express terms of the statute provide no guidance, the court of appeals observed that nothing in the Georgia Insurance Code[30] distinguishes between primary and excess coverage policies.[31] The court concluded that "[h]ad the legislature intended to limit the application of [O.C.G.A. section] 33-7-11 to primary policies only . . . it could easily have done so."[32]

After further examining the public policy considerations of the Georgia UM statute and determining them to be commensurate with its holding, the court of appeals addressed two additional issues.[33] First, the court

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21. *Id.* at 631, 632 S.E.2d at 377; O.C.G.A. §§ 16-14-1 to -10 (2007).
22. *Williams Gen. Corp.*, 280 Ga. at 631, 632 S.E.2d at 377 (citing O.C.G.A. § 16-14-3).
23. *Id.* at 631-32, 632 S.E.2d at 377-78.
24. *Id.* at 631, 632 S.E.2d at 377.
25. *See id.*
26. 282 Ga. App. 176, 638 S.E.2d 330 (2006).
27. O.C.G.A. § 33-7-11 (Supp. 2007).
28. *Abrohams*, 282 Ga. App. at 180, 638 S.E.2d at 333.
29. *Id.* at 179, 638 S.E.2d at 332.
30. O.C.G.A. §§ 33-1-1 to 33-61-2 (2000, 2005 & Supp. 2007).
31. *Abrohams*, 282 Ga. App. at 179, 638 S.E.2d at 332.
32. *Id.*
33. *Id.* at 180, 638 S.E.2d at 333.

considered whether the statute applied to the plaintiffs' policy, which was merely a renewal of a policy that existed prior to the July 1, 2001 amendment to O.C.G.A. section 33-7-11.[34] Because the plaintiffs "had never been offered nor had they declined UM coverage as part of their umbrella policy," the court held that O.C.G.A. section 33-7-11 applied, and therefore, the plaintiffs had UM coverage under their umbrella policy.[35] Second, the court of appeals addressed whether language in the plaintiffs' umbrella policy was void because it specifically excluded UM coverage and thereby contradicted section 33-7-11.[36] The court held the exclusionary language void because O.C.G.A. section 33-7-11 "requires that insurers provide UM coverage in umbrella and excess policies that provide automobile and motor vehicle liability insurance."[37]

Subsequent to *Abrohams*, in *Soufi v. Haygood*,[38] the Georgia Court of Appeals addressed the separate issue of whether an insured was entitled to $300,000 in UM coverage (the amount of liability coverage) when the insured did not specifically refuse $300,000 in UM coverage after the 2001 amendment to O.C.G.A. section 33-7-11, but had specifically denied such UM coverage prior to the amendment.[39] Prior to the 2001 amendment, the plaintiff in *Soufi* purchased a $300,000 automobile insurance liability policy but specifically elected to obtain only $100,000 in UM coverage. After the 2001 amendment, the insured added an additional automobile to the insurance policy and was later struck by an uninsured motorist in an automobile accident.[40] The court of appeals held that the insured was entitled to only $100,000 in UM coverage because the insurance coverage for the automobile purchased after the 2001 amendment was intended to be part of the original pre-2001 policy.[41] Because the new automobile was simply added to the existing automobile coverage, the court held the insurer was "not required to notify the [insured] of the change in the law or to secure a separate UM election at the time the [insured] added the [new automobile] to [the] policy."[42]

After *Abrohams* and *Soufi*, it appears that an insured will be entitled to the full amount of UM coverage authorized under either the insured's

34. *Id.* at 180-81, 638 S.E.2d at 333-34.
35. *Id.* at 181, 638 S.E.2d at 334.
36. *Id.* at 181-82, 638 S.E.2d at 334.
37. *Id.* at 182, 638 S.E.2d at 334.
38. 282 Ga. App. 593, 639 S.E.2d 395 (2006).
39. *Id.* at 594-96, 639 S.E.2d at 397-98.
40. *Id.* at 593-94, 639 S.E.2d at 396-97.
41. *Id.* at 593, 596, 639 S.E.2d at 396, 398.
42. *Id.* at 596-97, 639 S.E.2d at 398-99.

umbrella or liability policy regardless of whether that policy was originally entered into prior to the 2001 amendment *if the insured has not specifically rejected UM coverage in the amount equal to the liability or umbrella coverage.*[43]

In *Hulsey v. Travelers Indemnity Co. of America*,[44] Judge Batten of the United States District Court for the Northern District of Georgia addressed whether an insurance company could be held liable for an excess judgment after the insurance company failed to tender its insured's policy limits in response to the plaintiff's time-limited settlement demand, or "*Holt* demand."[45] In *Hulsey* the plaintiff was rendered a quadriplegic when a permissive driver wrecked the insured's vehicle. The plaintiff in the underlying action demanded that the insured tender her policy limits of $250,000. The insurance company refused on the basis that it was still investigating whether the driver was covered under the insured's insurance policy. The case was ultimately tried, and the plaintiff was awarded $2,192,250 in damages. The insurance company tendered its policy limits after the judgment, and the defendant assigned his bad faith claim against the insurance company.[46]

The defendant in the underlying action then sued the insurance company. Both parties moved for summary judgment on the issue of whether the insurance company acted in bad faith by failing to settle the dispute within its insured's policy limits in response to a valid *Holt* demand. The insurance company contended that it could not be liable for bad faith because, at the time it refused to tender its policy limits in response to the *Holt* demand, it was still considering whether the driver was covered under the insurance policy.[47]

Judge Batten rejected the insurance company's argument and held that a genuine issue existed whether the insurance company "either knew or through the exercise of ordinary care should have known that [the defendant in the underlying case] was a permissive driver prior to the expiration of [the plaintiff's] time-limited settlement demand."[48] Judge Batten specifically noted that an insurance company has a duty to equally consider the interests of the insured and ruled that a

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43. *See Abrohams*, 282 Ga. App. 176, 638 S.E.2d 330; *Soufi*, 282 Ga. App. 593, 639 S.E.2d 395.

44. 460 F. Supp. 2d 1332 (N.D. Ga. 2006).

45. *Id.* at 1334; *see* S. Gen. Ins. Co. v. Holt, 262 Ga. 267, 268-69, 416 S.E.2d 274, 276-77 (1992).

46. *Hulsey*, 460 F. Supp. 2d at 1333.

47. *Id.* at 1333-35.

48. *Id.* at 1335.

reasonable jury could find, under the circumstances, that the insurance company did not so consider the "[defendant's] interests by failing to settle [the underlying case] within the policy limits."[49]

C. Service of Process, Statutes of Repose, and Amendment of Pleadings

1. Service of Process. In *B&B Quick Lube, Inc. v. G&K Services Co.*,[50] the Georgia Court of Appeals considered the level of "reasonable diligence" necessary to attempt service of process on a corporation via its registered agent.[51] Although service of process on a corporation is usually perfected by serving the corporation's registered agent, "[i]f . . . the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the secretary of the corporation at its principal office."[52] In determining the meaning of reasonable diligence in the statute, the court of appeals turned to cases involving service of process outside of the statute of limitation period, in which a "plaintiff must establish that service was made in a reasonable and diligent manner."[53] In those cases, reasonable and diligent service could be completed if a plaintiff provided "the sheriff's office with the proper address of the defendant on the date the complaint was timely filed."[54] Because the plaintiff in this case demonstrated that it had provided the sheriff's office with the defendant's correct address, the court held the plaintiff's attempted service was reasonably diligent, and the plaintiff was entitled to perfect service under O.C.G.A. section 14-2-504(b).[55]

The Georgia Court of Appeals also reaffirmed the importance of exercising the "greatest possible diligence" to promptly serve a defendant where the complaint is timely filed but not served until after the statute of limitation has expired.[56] In *Kelley v. Lymon*,[57] the court upheld a trial court's decision to dismiss the plaintiff's complaint when service

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49. *Id.*
50. 283 Ga. App. 299, 641 S.E.2d 198 (2007).
51. *Id.* at 300, 641 S.E.2d at 200.
52. O.C.G.A. § 14-2-504(a)-(b) (2003).
53. *B&B Quick Lube, Inc.*, 283 Ga. App. at 301, 641 S.E.2d at 200.
54. *Id.* (citing Lee v. Kim, 275 Ga. App. 891, 893, 622 S.E.2d 99, 101 (2005); Jackson v. Nguyen, 225 Ga. App. 599, 600, 484 S.E.2d 337, 339 (1997); Bennett v. Matt Gay Chevrolet Oldsmobile, Inc., 200 Ga. App. 348, 350, 408 S.E.2d 111, 113-14 (1991)).
55. *Id.*
56. Kelley v. Lymon, 279 Ga. App. 849, 850, 632 S.E.2d 734, 735 (2006).
57. 279 Ga. App. 849, 632 S.E.2d 734 (2006).

had not been perfected fifteen months after the statute of limitation had expired.[58] At first glance, this is certainly not a surprising outcome. However, the record established that the plaintiff (1) "hired a private investigator/skip tracer to locate [the defendant]," (2) had tried to depose the defendant, and (3) moved to compel responses to discovery and attendance at a deposition that would have allowed her to find and serve the defendant.[59] According to the court, the plaintiff's critical error was that after the private investigator failed to find the defendant, the plaintiff "did little to attempt" to find the defendant and instead "sought to have the trial court compel [the defendant's] deposition" and to force the defendant to come to her.[60] The court considered this an "attempt to shift the burden of [the plaintiff's] search onto the trial court."[61] Such an attempt could in "no way" constitute even reasonable diligence, much less the required "'greatest possible diligence.'"[62]

2. Statutes of Repose. There is no general common law exception to statutes of repose for failure-to-warn claims.[63] Thus, in *Taylor v. S & W Development, Inc.*,[64] the Georgia Court of Appeals held that it could not "'engraft'" an "'exception[]'" onto the eight-year statute of repose for deficient construction of an improvement to real property.[65] In reaching its decision, the court noted the legislature's inclusion of an exception to the product liability statute of repose for failure-to-warn claims and the absence of such an exception to the improvements to real property statute.[66] Ultimately, the court concluded that had the legislature intended to exclude a warnings claim from the operation of the improvements to real property repose statute, the legislature would have done so.[67]

3. Amendment of Pleadings. In *Shuler v. Hicks, Massey & Gardner, LLP*,[68] the Georgia Court of Appeals considered the propriety of amending a complaint after a plaintiff has failed to comply with the

58. *Id.* at 849, 632 S.E.2d at 735.
59. *Id.* at 850, 632 S.E.2d at 735.
60. *Id.* at 850-51, 632 S.E.2d at 736.
61. *Id.* at 851, 632 S.E.2d at 736.
62. *Id.* (quoting Ingraham v. Marr, 246 Ga. App. 445, 447, 540 S.E.2d 652, 654 (2000)).
63. *See* Taylor v. S & W Dev., Inc., 279 Ga. App. 744, 745, 632 S.E.2d 700, 702 (2006) (citing Harrison v. Holseneck, 208 Ga. 410, 412, 67 S.E.2d 311, 313 (1951)).
64. 279 Ga. App. 744, 632 S.E.2d 700 (2006).
65. *Id.* at 745, 632 S.E.2d at 701-02 (quoting *Harrison*, 208 Ga. at 412, 67 S.E.2d at 313).
66. *Id.* at 745-46, 632 S.E.2d at 702.
67. *Id.*
68. 280 Ga. App. 738, 634 S.E.2d 786 (2006).

expert affidavit requirements of O.C.G.A. section 9-11-9.1.[69] In this case, the trial court granted the defendant's motion to dismiss, reasoning both that the plaintiff's failure to comply with the affidavit requirements rendered the complaint a nullity and that the amended complaint had been filed outside of the statute of limitations.[70] The court of appeals reversed, holding that "the failure to file an expert affidavit within the time confines set forth in [O.C.G.A. section] 9-11-9.1 does not result in an automatic adjudication on the merits or preclude a plaintiff from amending the complaint after the expiration of the relevant statute of limitation."[71] Thus, the plaintiff's failure to file an expert affidavit only rendered the case subject to dismissal, not automatically void.[72] The plaintiff was therefore entitled to amend his complaint at any time.[73]

D. Venue

In *EHCA Cartersville, LLC v. Turner*,[74] the Georgia Supreme Court considered the constitutionality of O.C.G.A. section 9-10-31(c),[75] which changed the rules regarding transfer of medical malpractice cases as part of the Tort Reform Act of 2005.[76] According to O.C.G.A. section 9-10-31(c), in a medical malpractice action, "a nonresident defendant may require that the case be transferred to the county of that defendant's residence if the tortious act upon which the medical malpractice claim is based occurred in the county of that defendant's residence."[77] The supreme court addressed whether O.C.G.A. section 9-10-31(c) violated the joint tortfeasor venue provision of the Georgia Constitution,[78] which provides that an action may be tried in the county of residence of either tortfeasor.[79]

The supreme court held that O.C.G.A. section 9-10-31(c) was indeed unconstitutional.[80] In so holding, the court observed that although the

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69. *Id.* at 738, 634 S.E.2d at 787 (discussing O.C.G.A. § 9-11-9.1 (2006), *amended by* O.C.G.A. § 9-11-9.1 (Supp. 2007)).

70. *Id.*

71. *Id.* at 739-40, 634 S.E.2d at 788 (citing Labovitz v. Hopkinson, 271 Ga. 330, 332-33, 519 S.E.2d 672, 675 (1999)).

72. *Id.* at 740, 634 S.E.2d at 788.

73. *Id.*; *see also* O.C.G.A. § 9-11-15(a) (2006).

74. 280 Ga. 333, 626 S.E.2d 482 (2006).

75. O.C.G.A. § 9-10-31(c) (2007).

76. *EHCA Cartersville, LLC*, 280 Ga. at 333, 626 S.E.2d at 483; *see* 2005 Ga. Laws 1, 1-2.

77. O.C.G.A. § 9-10-31(c).

78. GA. CONST. art. VI, § 2, para. 4.

79. *EHCA Cartersville, LLC*, 280 Ga. at 334-35, 626 S.E.2d at 485.

80. *Id.*

Georgia Constitution authorizes the Georgia General Assembly to enact laws that permit Georgia superior courts to exercise the power to change venue,[81] O.C.G.A. section 9-10-31(c) vests the power to change venue in nonresident defendants, not the trial court.[82]

The supreme court also considered whether O.C.G.A. section 9-10-31.1(a),[83] the forum non conveniens statute, was constitutional.[84] In holding the statute constitutional, the court noted that the statute vested the ability to transfer cases in the courts themselves.[85] Further, the court held that the forum non conveniens statute could be applied retroactively.[86]

E. Verification and Affidavit Pleading Requirements

In *Allen v. Wright*,[87] the Georgia Supreme Court ruled that O.C.G.A. section 9-11-9.2,[88] which required a medical malpractice plaintiff to make certain medical disclosures to the opposing party,[89] was preempted by the federal Health Insurance Portability and Accountability Act ("HIPAA") of 1996,[90] which protects a patient's medical information.[91] In so holding, the supreme court relied heavily on the court of appeals holding in *Northlake Medical Center, LLC v. Queen*[92] that O.C.G.A. section 9-11-9.2 and HIPAA could not coexist.[93] Specifically, the court noted that HIPAA requires any medical authorization to include certain elements, including express notice to the patient of the right to revoke the authorization.[94] By comparison, the court noted that O.C.G.A. section 9-11-9.2 does not require the medical authorization form to contain such a notification provision.[95] Unable to reconcile O.C.G.A.

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81. GA. CONST. art. VI, § 2, para. 7.
82. *EHCA Cartersville, LLC*, 280 Ga. at 335-36, 626 S.E.2d at 485-86.
83. O.C.G.A. § 9-10-31.1(a) (2007).
84. *EHCA Cartersville, LLC*, 280 Ga. at 337, 626 S.E.2d at 486.
85. *Id.*
86. *Id.*, 626 S.E.2d at 487.
87. 282 Ga. 9, 644 S.E.2d 814 (2007).
88. O.C.G.A. § 9-11-9.2 (2006).
89. *Id.*
90. Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, 42 U.S.C.).
91. *Allen*, 282 Ga. at 12, 644 S.E.2d at 816-17.
92. 280 Ga. App. 510, 634 S.E.2d 486 (2006).
93. *Allen*, 282 Ga. at 12-13, 644 S.E.2d 816-17 (citing *Northlake Med. Ctr.*, 280 Ga. App. at 515, 634 S.E.2d at 491); *see also* Griffin v. Burden, 281 Ga. App. 496, 636 S.E.2d 686 (2006); Crisp Reg'l Hosp., Inc. v. Sanders, 281 Ga. App. 393, 636 S.E.2d 123 (2006).
94. *Allen*, 282 Ga. at 11, 644 S.E.2d at 816.
95. Specifically, O.C.G.A. section 9-11-9.2(b) requires the following:

section 9-11-9.2 with HIPAA's requirements, the court held that HIPAA preempted the Georgia statute.[96]

Justice Hunstein concurred in part and dissented in part, arguing that although O.C.G.A. section 9-11-9.2(c) should be preempted, the remaining portions of section 9-11-9.2 could coexist with the HIPAA requirements.[97] Essentially, Justice Hunstein's dissent amounted to a disagreement with the majority over statutory construction principles.[98] Applying the precept that "'a court [is] to construe a statute as valid when possible,'" Justice Hunstein concluded that an authorization form could be drafted that would satisfy both the Georgia statute and HIPAA because O.C.G.A. section 9-11-9.2 did not expressly prohibit an authorization form from including an express release provision.[99]

The majority, however, applied the principle of *expressio unius est exclusio alterius* to conclude the General Assembly intended to exclude any other content from the authorization form because section 9-11-9.2 expressly requires the authorization form to include certain specific content.[100] While the majority and Justice Hunstein both noted the validity of each competing tenet of statutory construction, they disagreed about which tenet should be given priority.

Various cases during this survey period also considered the expert affidavit requirements set forth in the revised O.C.G.A. section 9-11-9.1.[101] In *Howell v. Shumans*,[102] the Georgia Court of Appeals held that section 9-11-9.1 did not require an expert affidavit when the complaint alleged invasion of privacy by a nurse who disclosed private

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> The authorization shall provide that the attorney representing the defendant is authorized to obtain and disclose protected health information contained in medical records to facilitate the investigation, evaluation, and defense of the claims and allegations set forth in the complaint which pertain to the plaintiff or, where applicable, the plaintiff's decedent whose treatment is at issue in the complaint. This authorization includes the defendant's attorney's right to discuss the care and treatment of the plaintiff or, where applicable, the plaintiff's decedent with all of the plaintiff's or decedent's treating physicians.

O.C.G.A. § 9-11-9.2(b).

96. *Allen*, 282 Ga. at 12, 644 S.E.2d at 816.

97. *Id.* at 15, 644 S.E.2d at 818 (Hunstein, P.J., concurring in part and dissenting in part). According to O.C.G.A. section 9.2(c), a plaintiff must authorize the release of all health information, not just information relevant to the plaintiff's action. O.C.G.A. § 9-11-9.2(c).

98. *Allen*, 282 Ga. at 14-20, 644 S.E.2d at 818-21 (Hunstein, P.J., concurring in part and dissenting in part).

99. *Id.* at 16, 644 S.E.2d at 819 (quoting Banks v. Ga. Power Co., 267 Ga. 602, 603, 481 S.E.2d 200, 202 (1997)).

100. *Id.* at 14, 644 S.E.2d at 817 (majority opinion).

101. O.C.G.A. § 9-11-9.1 (Supp. 2007).

102. 281 Ga. App. 459, 636 S.E.2d 182 (2006).

medical information.[103] Similarly, in *Shuler v. Hicks, Massey & Gardner, LLP*,[104] the court of appeals held that a plaintiff need not present an expert affidavit in a fraud case, even if the fraud claim alleged the same pertinent facts as a professional malpractice claim.[105] In this case, the plaintiff filed a professional malpractice claim but did not contemporaneously file an expert affidavit. The defendant moved to dismiss, but the plaintiff subsequently amended the complaint to omit the malpractice claim and add a claim for fraud.[106]

The courts in both *Howell*[107] and *Shuler*[108] relied on the supreme court's decision in *Labovitz v. Hopkinson*,[109] which was decided before the recent amendments to O.C.G.A. section 9-11-9.1 and held that "claims grounded on a professional's *intentional* acts which allegedly resulted in injury . . . are not required to be accompanied by an expert affidavit."[110] The court in *Shuler* reasoned that the recent amendment did not alter the applicability of the rule in *Labovitz* because the General Assembly declined to modify the language upon which the court in *Labovitz* relied.[111]

Lastly, in *Tenet Healthcare Corp. v. Gilbert*,[112] the Georgia Court of Appeals clarified that an expert affidavit suffices under O.C.G.A. sections 9-11-9.1[113] and 24-9-67.1[114] if the affiant was licensed *at the time of the alleged act or omission*, regardless of whether the affiant is licensed at the time he or she signs the expert affidavit.[115]

F. Evidence and Expert Testimony

In *Snider v. Basilio*,[116] the supreme court considered the following question: "[Under] what circumstances, if any, is evidence of a nurse's failure to pass a licensing examination admissible in a medical malpractice action against the employing physician?"[117] The plaintiffs

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103. *Id.* at 459-60, 636 S.E.2d at 182-83.
104. 280 Ga. App. 738, 634 S.E.2d 786 (2006).
105. *Id.* at 741, 634 S.E.2d at 789.
106. *Id.* at 738, 634 S.E.2d at 787.
107. 281 Ga. App. at 459-60, 636 S.E.2d at 183.
108. 280 Ga. App. at 739-40, 634 S.E.2d at 788.
109. 271 Ga. 330, 519 S.E.2d 672 (1999).
110. *Id.* at 336, 519 S.E.2d at 678.
111. *Shuler*, 280 Ga. App. at 741, 634 S.E.2d at 789.
112. 277 Ga. App. 895, 627 S.E.2d 821 (2006).
113. O.C.G.A. § 9-11-9.1 (2006), *amended by* O.C.G.A. § 9-11-9.1 (Supp. 2007).
114. O.C.G.A. § 24-9-67.1 (Supp. 2007).
115. *Gilbert*, 277 Ga. App. at 900-01, 627 S.E.2d at 827.
116. 281 Ga. 261, 637 S.E.2d 40 (2006).
117. *Id.* at 261, 637 S.E.2d at 41.

sued their child's pediatrician for allowing the on-call nurse, who was unlicensed and had failed the nursing licensing examination three times, to give unsupervised and incorrect medical advice that resulted in their child's misdiagnosis and injuries.[118] The court clarified that the very fact that the nurse "was unlicensed[, not why she was unlicensed,] was key to resolving [the] issue" at trial.[119] Consequently, the court of appeals and the supreme court both affirmed the trial court's ruling in this case, which was to admit evidence showing the nurse was unlicensed but to strike any evidence showing the nurse's previous failures to pass the licensing examination.[120]

In a line of cases beginning with *Cotten v. Phillips*,[121] the court of appeals clarified that O.C.G.A. section 24-9-67.1(c) does not require expert witnesses in medical malpractice cases to practice in the same specialty as the doctor against whom they are testifying.[122] Later, in *Abramson v. Williams*,[123] the court of appeals noted that the Georgia General Assembly considered and rejected a modification to O.C.G.A. section 24-9-67.1 that would have contained such a requirement.[124] The court of appeals also discussed its holding in *Cotten*, which was adopted from the trial court's holding in that case:

> "It appears that the legislature has allowed for an overlap in specialties, whereby an otherwise qualified medical doctor belonging to Specialty A can render an opinion about the acts or omissions of another medical doctor belonging to Specialty B—so long as the opinion of the expert witness belonging to Specialty A pertains to Specialty A."[125]

The court of appeals also determined in *Canas v. Al-Jabi*[126] that even in a medical malpractice action, an expert should be assessed according to O.C.G.A. subsection 24-9-67.1(b), not subsection (c), when

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118. *Id.* at 261-62, 637 S.E.2d at 41.

119. *Id.* at 263, 637 S.E.2d at 42.

120. *Id.* at 263-64, 637 S.E.2d at 42.

121. 280 Ga. App. 280, 633 S.E.2d 655 (2006).

122. *Id.* at 283, 633 S.E.2d at 657-58; *see also* MCG Health, Inc. v. Barton, 285 Ga. App. 577, 580, 647 S.E.2d 81, 85 (2007); Mays v. Ellis, 283 Ga. App. 195, 197-98, 641 S.E.2d 201, 203 (2007); Canas v. Al-Jabi, 282 Ga. App. 764, 795, 639 S.E.2d 494, 521 (2006); Abramson v. Williams, 281 Ga. App. 617, 618-19, 636 S.E.2d 765, 766-67 (2006).

123. 281 Ga. App. 617, 636 S.E.2d 765 (2006).

124. *Id.* at 619, 636 S.E.2d at 767.

125. *Id.* at 618-19, 636 S.E.2d at 767 (quoting *Cotten*, 280 Ga. App. at 283, 633 S.E.2d at 657).

126. 282 Ga. 764, 639 S.E.2d 494 (2006).

the expert's testimony relates to issues other than medical malpractice.[127]

G. Mootness and Notice Issues

In *McGowan v. Progressive Preferred Insurance Co.*,[128] the Georgia Supreme Court held that an appraisal clause in an automobile insurance contract could not moot or negate a plaintiff's claim that the insurer had conspired to intentionally undervalue her vehicle damage claim.[129] In this case, the plaintiff alleged breach of contract, fraud, and Georgia RICO claims against her insurer and a company it used to provide "total-loss valuations" in connection with vehicle property damage claims.[130] The trial court ordered an appraisal pursuant to a term of the insurance contract. The appraisal resulted in a higher valuation than the initial amount determined by the insurer and its appraiser. The insurer then paid the higher amount and moved to dismiss.[131] The trial court granted the motion, finding that the issues raised by the plaintiff's claims were "rendered moot in light of the appraisal process and the resulting higher payment" for the plaintiff's vehicle.[132] The court of appeals affirmed.[133]

In reversing the court of appeals, the supreme court recognized that an "appraisal clause" does not address "broader issues such as an insurer's potential liability to an insured for claims made in a lawsuit."[134] Thus, the court held that an appraisal clause could not moot the plaintiff's fraud, breach of contract, and RICO claims.[135] According to the court, to hold otherwise "would be tantamount to converting the appraisal clause into an arbitration clause," which is impermissible in a contract between an insurer and an insured.[136]

In addition to the mootness issues above, a handful of issues regarding notice requirements have recently been determined by Georgia courts.[137] In *Perdue v. Athens Technical College*,[138] the Georgia

127. *Id.* at 794, 639 S.E.2d at 521.
128. 281 Ga. 169, 637 S.E.2d 27 (2006).
129. *Id.* at 172, 637 S.E.2d at 29.
130. *Id.* at 169-70, 637 S.E.2d at 27-28.
131. *Id.* at 170, 637 S.E.2d at 27-28.
132. *Id.*, 637 S.E.2d at 28.
133. *Id.*
134. *Id.* at 171, 637 S.E.2d at 28.
135. *Id.* at 171-72, 637 S.E.2d at 29.
136. *Id.* at 172-73, 637 S.E.2d at 29.
137. *See* Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta, 281 Ga. 342, 638 S.E.2d 307 (2006); Perdue v. Athens Technical Coll., 283 Ga. App. 404, 641 S.E.2d 631 (2007); J.M.I.C. Life Ins. Co. v. Toole, 280 Ga. App. 372, 634 S.E.2d 123 (2006).

Court of Appeals affirmed the dismissal of a complaint based on the Georgia Tort Claims Act[139] because the plaintiff's *ante litem* notice "did not state '[t]he amount of the loss claimed,' as required by [O.C.G.A. section] 50-21-26(a)(5)(E)."[140] The court was unpersuaded by the plaintiff's argument that it was "not practicable . . . to quantify her monetary demand" because she was seeking noneconomic damages, which can only be measured by "the enlightened conscience of the jury."[141] Ultimately, the court held that a plaintiff must adhere to the *ante litem* notice requirements, including stating an amount of loss claimed.[142]

In *Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta*,[143] however, the Georgia Supreme Court recognized that a plaintiff who fails to give sufficient *ante litem* notice may cure the problem by dismissing its claim, giving the required pre-litigation notice, and then later amending its complaint to add the claim back.[144]

In *J.M.I.C. Life Insurance Co. v. Toole*,[145] the Georgia Court of Appeals held that the notice requirement in O.C.G.A. section 33-31-9[146] does *not* require an insured to give his or her insurer "pre-suit notice" of an early loan payoff.[147] Instead, the court held that filing suit against the insurer for a refund of an unearned premium provides sufficient notice to the insurer under Georgia law.[148]

H. Arbitration

In *Crawford v. Great American Cash Advance, Inc.*,[149] the Georgia Court of Appeals considered, *inter alia*, whether an arbitration provision in a payday loan contract could be enforced when the plaintiff contended that the underlying contract itself was void *ab initio*.[150] The court affirmed the trial court's order compelling arbitration and held that the arbitrator, not the trial court, must determine whether the contract

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138. 283 Ga. App. 404, 641 S.E.2d 631 (2007).
139. O.C.G.A. § 50-21-20 to -37 (2006).
140. 283 Ga. App. at 408, 641 S.E.2d at 634 (citing O.C.G.A. § 50-21-26(a)(5)(E)).
141. *Id.*
142. *Id.*
143. 281 Ga. 342, 638 S.E.2d 307 (2006).
144. *Id.* at 351, 638 S.E.2d at 316.
145. 280 Ga. App. 372, 634 S.E.2d 123 (2006).
146. O.C.G.A. § 33-31-9 (2005).
147. 280 Ga. App. at 374, 634 S.E.2d at 126-27.
148. *Id.* at 374-75, 634 S.E.2d at 127.
149. 284 Ga. App. 690, 644 S.E.2d 522 (2007).
150. *Id.* at 692, 644 S.E.2d at 525.

containing the arbitration provision is in fact void.[151] Thus, the court in *Crawford* clarified that the trial court must only determine whether the arbitration provision in the contract is valid.[152] The court further noted that if the arbitration provision is deemed valid, the arbitrator is tasked with determining whether the entire contract in which the arbitration provision is contained is valid.[153]

In *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I*,[154] the United States District Court for the Northern District of Georgia decided, as a matter of first impression, that "absent a showing that the parties specifically agreed to retroactively rescind or terminate the arbitration agreement itself, an arbitration agreement generally survives novation and remains enforceable against an original party."[155] Thus, the court in *Goshawk* made it clear that parties are bound by earlier arbitration agreements even if there has subsequently been a novation of the contract in which the arbitration provision is contained.[156]

I. Res Judicata

In *Bryan County v. Yates Paving & Grading Co.*,[157] the Georgia Supreme Court recognized that an arbitration agreement does not preclude a trial court's decision pertaining to "a principle of law that does not arise out of the contract documents."[158] In this case, the court specifically held that the question of whether res judicata barred the plaintiffs' claims based on an earlier arbitration proceeding was an issue for the court, not an arbitrator.[159]

In *BKJB Partnership v. Moseman*,[160] the Georgia Court of Appeals decided an issue concerning choice of law in the context of claim preclusion analysis.[161] Specifically, the court held that Georgia courts, in determining the preclusive effect of a federal trial court judgment in a state law diversity case, should look to "'the law that would be applied by state courts in the State in which the first federal diversity court sits.'"[162]

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151. *Id.* at 695, 644 S.E.2d at 526.
152. *Id.* at 692-93, 644 S.E.2d at 525.
153. *Id.* at 692, 644 S.E.2d at 524.
154. 466 F. Supp. 2d 1293 (N.D. Ga. 2006).
155. *Id.* at 1299.
156. *Id.*
157. 281 Ga. 361, 638 S.E.2d 302 (2006).
158. *Id.* at 363, 638 S.E.2d at 304.
159. *Id.* at 364, 638 S.E.2d at 304-05.
160. 284 Ga. App. 862, 644 S.E.2d 874 (2007).
161. *Id.* at 865, 644 S.E.2d at 876.
162. *Id.* (quoting Q Int'l Courier v. Smoak, 441 F.3d 214, 218 (4th Cir. 2006)).

J. Sovereign Immunity

In *Georgia Forestry Commission v. Canady*,[163] the Georgia Supreme Court clarified the scope of the provision in the Georgia Tort Claims Act which ensures that the state is not liable for "'the method of providing law enforcement, police, or fire protection.'"[164] The supreme court held that the term "method" had been previously interpreted by the appellate courts so broadly that it "effectively negate[d], insofar as law enforcement, police, and fire protection personnel [were] concerned, the waiver of sovereign immunity" under the Georgia Tort Claims Act.[165] That line of cases was therefore abrogated, and sovereign immunity is now provided for "the making of policy decisions by state employees and officers . . . and . . . the acts and omissions of state employees and officers executing and implementing those policies." [166]

K. Summary Judgment, Default Judgment, and Voluntary Dismissal

1. Summary Judgment. In *All Tech Co. v. Laimer Unicon, LLC*,[167] the Georgia Court of Appeals affirmed a trial court's sua sponte grant of summary judgment based on the statute of limitations.[168] In this case, the defendant raised the statute of limitations in its answer, and also made reference to its statute of limitations defense in a responsive brief opposing the plaintiff's summary judgment motion.[169] Following the trial court's decision to enter summary judgment against the plaintiff, the court of appeals held that the plaintiff had sufficient notice of the basis of the court's ruling based on the defendant's answer and the argument in the defendant's responsive brief.[170]

In *Brookview Holdings v. Saurez*,[171] a premises liability case based on a failure to provide security, the Georgia Court of Appeals affirmed

163. 280 Ga. 825, 632 S.E.2d 105 (2006).

164. *Id.* at 826, 632 S.E.2d at 107 (quoting O.C.G.A. § 50-21-24(6)).

165. *Id.* at 827, 632 S.E.2d at 108.

166. *Id.* at 830, 632 S.E.2d at 110. The cases abrogated by *Georgia Forestry Commission* were as follows: *Hilson v. Department of Public Safety*, 236 Ga. App. 638, 512 S.E.2d 910 (1999); *Price v. State*, 250 Ga. App. 872, 553 S.E.2d 194 (2001); *Blackston v. Georgia Department of Public Safety*, 274 Ga. App. 373, 618 S.E.2d 78 (2005); and *Lona v. Hall County*, 219 Ga. App. 853, 467 S.E.2d 186 (1996).

167. 281 Ga. App. 579, 636 S.E.2d 753 (2006).

168. *Id.* at 581, 636 S.E.2d at 755-56.

169. *Id.*

170. *Id.* at 581-82, 636 S.E.2d at 756.

171. 285 Ga. App. 90, 645 S.E.2d 559 (2007).

the denial of a summary judgment motion based solely on opinion evidence pertaining to proximate cause, noting that a plaintiff's proof "is to be treated with indulgence" on summary judgment.[172]

2. Default Judgment. In *Bannister v. Honeywell International, Inc.*,[173] the United States District Court for the Northern District of Georgia considered the curious instance of a defendant, while in automatic default in state court, removing a case to federal court.[174] In this case, two defendants were in automatic default in state court. Subsequently, the plaintiff voluntarily dismissed all other defendants, creating complete diversity between the plaintiff and the remaining defendants. The defendants timely removed the case to federal court and filed answers. The plaintiff moved for a default judgment in that court, arguing that the defendants were already in default when the case arrived in federal court.[175] Relying on Federal Rule of Civil Procedure 81(c),[176] which provides the procedure for a defendant to answer a removed case, and Federal Rule of Civil Procedure 55(a),[177] which provides for entry of default only where the party does not answer a complaint, the court concluded default was unwarranted.[178] Thus, plaintiffs should be cautious when handling a case in which a foreign defendant is in default in state court and not dismiss parties that would create complete diversity and thus allow a defendant a second chance to answer the complaint.[179]

3. Voluntary Dismissal. Amended O.C.G.A. section 9-11-41(a)-(3),[180] which became effective July 1, 2003,[181] currently provides that the voluntary dismissal of a second complaint, not a third, operates as an adjudication on the merits.[182] In *Davis v. Lugenbeel*,[183] the Georgia Court of Appeals held that this amended provision could not be used

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172. *Id.* at 96, 645 S.E.2d at 566.
173. No. 1:06-cv-1772-WSD, 2006 WL 3709524 (N.D. Ga. Dec. 14, 2006).
174. *Id.* at *1.
175. *Id.*
176. FED. R. CIV. P. 81(c).
177. FED. R. CIV. P. 55(a).
178. *Bannister*, 2006 WL 3709524, at *2.
179. A plaintiff need not worry if the case has been filed for more than one year. *See* 28 U.S.C. § 1446(b) (2000).
180. O.C.G.A. § 9-11-41(a)(3) (2006).
181. *See* 2003 Ga. Laws 820, 828.
182. O.C.G.A. § 9-11-41(a)(3).
183. 283 Ga. App. 642, 642 S.E.2d 337 (2007).

retroactively to dismiss a case that was originally filed before the amended statute's effective date.[184]

L. Sanctions

In *Fowler v. Atlanta Napp Deady, Inc.*,[185] the Georgia Court of Appeals affirmed the trial court's order striking the defendants' answer and counterclaims as a sanction for discovery abuse.[186] The defendants answered the plaintiffs' initial discovery request by promising to produce responsive documents at some unspecified time in the future. After being contacted numerous times by the plaintiffs' counsel, the defendants produced incomplete discovery responses over two months after they were originally due. Three months after the defendants produced incomplete discovery responses, the plaintiffs moved to compel full and complete discovery responses. The trial court granted the motion on November 17, 2005, ordering the defendants to respond in full by December 7, 2005. The defendants produced additional documents prior to December 7, 2005, but at a deposition on December 13, 2005, a representative admitted that the defendants had not produced numerous categories of information despite the plaintiffs' request and the court's order for their production. Upon hearing that the defendants had still not fully complied with their discovery obligations, the plaintiffs moved for sanctions, and the trial court granted that motion on February 21, 2006.[187]

Four days before the court's hearing on the plaintiffs' motion for sanctions and ten days before the case was scheduled to be tried, the defendants produced additional documents and asked the court to disregard their previous refusal to comply with the court's orders due to health concerns. The trial court granted the plaintiffs' motion for sanctions and dismissed the defendants' answer.[188] The defendants appealed and contended that their failure to comply was not "'wilful.'"[189]

The court of appeals rejected that argument and offered the following explanation:

> [T]he defendants made repeated empty promises to fully respond to the plaintiffs' request for production of documents. They did not fully respond, however, until after the court imposed the sanction of

184. *Id.* at 642-43, 642 S.E.2d at 338.
185. 283 Ga. App. 331, 641 S.E.2d 573 (2007).
186. *Id.* at 334-35, 641 S.E.2d at 576.
187. *Id.* at 333-34, 641 S.E.2d at 575-76.
188. *Id.*
189. *Id.* at 334, 641 S.E.2d at 576.

> dismissal, and long after the deadline in the order compelling discovery had passed. . . .
>
> We find no merit in the defendants' argument that the trial court should not have imposed the extreme sanction of dismissal because they did not totally fail to produce documents. In *State Farm [Mutual Automobile Insurance] Co. v. Health Horizons*, a whole court decision, we rejected a similar argument, noting that "[i]f that were the law, then a defendant could endlessly respond to a motion to compel by partially complying while asserting various forms of privilege or unavailability or difficulty of production in order to 'stay in the game.'"[190]

After *Fowler* it is clear that a party's empty promise to produce documents at some unspecified time in the future will not insulate a party from the imposition of severe sanctions, and a belated production does not cure the earlier failure to produce after a motion for sanctions is filed.[191]

M. Damages Issues

In *Smith v. Life Insurance Co. of North America*,[192] the United States District Court for the Northern District of Georgia considered the applicability of Georgia's anti-subrogation statute[193] to a benefit provider's attempt to seek a "set-off" of benefits.[194] Georgia's anti-subrogation statue provides that administrators of employee benefit plans may only seek reimbursement of medical expenses paid if the amount of recovery exceeds the sum of all economic and noneconomic losses incurred as a result of an injury, and any reimbursement claim must be reduced by the pro rata amount of attorney fees and litigation expenses incurred by the injured party.[195] In this case, the defendant initially attempted to avoid the Georgia statute by arguing that the term "reimbursement" in the statute did not include an offset of monthly disability payments.[196] The district court rejected this argument, noting that O.C.G.A. section 33-24-56.1(f) specifies that providers may not "'withhold or *set off* insurance benefits as a means of enforcing a claim for reimbursement.'"[197]

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190. *Id.* at 334-35, 641 S.E.2d at 576 (footnote omitted) (quoting State Farm Mut. Auto Ins. Co. v. Health Horizons, Inc., 264 Ga. App. 443, 447, 590 S.E.2d 798, 801 (2003)).

191. *See id.*

192. 466 F. Supp. 2d 1275 (N.D. Ga. 2006).

193. O.C.G.A. § 33-24-56.1 (2005).

194. 466 F. Supp. 2d at 1287.

195. O.C.G.A. § 33-24-56.1(b).

196. *Smith*, 466 F. Supp. 2d at 1287-89.

197. *Id.* at 1287-89 (emphasis added) (quoting O.C.G.A. § 33-24-56.1(f)).

The district court similarly rejected the defendant's claim that the Employee Retirement Income Security Act ("ERISA") of 1974[198] preempted Georgia's anti-subrogation statute.[199] In reaching its decision, the district court noted that ERISA does not preempt state statutes that relate to an employee benefit plan if that statute "'regulates insurance.'"[200] Applying the United States Supreme Court's analysis in *Kentucky Ass'n of Health Plans v. Miller*,[201] the district court determined that Georgia's anti-subrogation statute regulated insurance because it is directed toward the insurance industry and substantially affects the risk pooling arrangement between an insurer and an insured.[202] Therefore, the district court held that ERISA did not preempt the Georgia statute, and the defendant was not entitled to a set-off.[203]

N. Jury Charges and Strikes

In *Flexible Products Co. v. Ervast*,[204] the Georgia Court of Appeals held that the trial court erred because its jury charge was "contradictory and confusing."[205] The court of appeals specifically noted that "[t]he trial court's charges failed to address the relationship between [a] general rule and [its] exception" regarding liability for corporate directors and officers.[206] The general rule at issue was a provision in O.C.G.A. section 15-19-17,[207] which, according to the court of appeals, foreclosed "liability for actions based on the advice of counsel."[208] The court further noted "that an exception . . . for corporate directors and officers subject to certain conditions" was codified in O.C.G.A. sections 14-2-830 and 14-2-842.[209] In *Ervast* the trial court first charged the jury on the relevant exception for the defendants' liability and then charged on the general rule in a later unrelated instruction.[210] The court of appeals held that this error warranted a new trial.[211]

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198. 29 U.S.C. §§ 1001-1461 (2000).
199. *Smith*, 466 F. Supp. 2d at 1290-92.
200. *Id.* at 1290 (quoting 29 U.S.C. § 1144(b)).
201. 538 U.S. 329 (2003).
202. *Smith*, 466 F. Supp. 2d at 1291.
203. *Id.* at 1292.
204. 284 Ga. App. 178, 643 S.E.2d 560 (2007).
205. *Id.* at 180, 643 S.E.2d at 563.
206. *Id.*
207. O.C.G.A. § 15-19-17 (2005).
208. *Ervast*, 284 Ga. App. at 180, 643 S.E.2d at 563 (citing O.C.G.A. § 15-19-17).
209. *Id.*; O.C.G.A. §§ 14-2-830, -842 (2003).
210. 284 Ga. App. at 179-80, 643 S.E.2d at 564.
211. *Id.* at 180, 643 S.E.2d at 563.

In *Pearson v. Tippmann Pneumatics, Inc.*,[212] the Georgia Supreme Court warned about the necessity of adequately charging a jury on proximate cause in actions against multiple defendants so that a jury will understand that more than one actor can proximately cause an injury.[213] The supreme court also reversed the court of appeals holding that the plaintiffs had failed to preserve their objection to the trial court's proximate cause recharge under O.C.G.A. section 5-5-24[214] by not requesting specific language in an alternate charge, even though they had originally submitted a proposed recharge and objected to the court's chosen language before and after the recharge was given.[215]

Lastly, in *Sellers v. Burrowes*,[216] the Georgia Court of Appeals determined that a trial court abused its discretion by wrongly declining to strike a potential juror for cause in a medical malpractice case, thus forcing the plaintiff to unnecessarily use a peremptory strike at trial.[217] The juror disclosed to the trial court and counsel that she was the niece of three doctors and the sister of another, "that she would find in favor of the doctor absent 'clear and convincing proof[,]' . . . that she would resolve any doubts in the evidence in favor of the doctor," and that she was not the "'best person'" to serve as a juror in that case.[218] Although the trial court and defense counsel attempted to rehabilitate the juror, the court of appeals determined that the potential juror was still too biased to serve and noted:

> "Running through the entire fabric of our Georgia decisions is a thread which plainly indicates that the broad general principle intended to be applied in every case is that each juror shall be so free from either prejudice or bias as to guarantee the inviolability of an impartial trial. If error is to be committed, let it be in favor of the absolute impartiality and purity of the jurors."[219]

O. *Post-trial Litigation Issues*

In *Mateen v. Dicus*,[220] the Georgia Supreme Court clarified that a notice of appeal need not specify "every order that could possibly present

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212. 281 Ga. 740, 642 S.E.2d 691 (2007).

213. *Id.* at 743-44, 642 S.E.2d at 694-95.

214. O.C.G.A. § 5-5-24 (1995).

215. *Pearson*, 281 Ga. at 742-43, 642 S.E.2d at 694; *see* Pearson v. Tippmann Pneumatics, Inc., 277 Ga. App. 722, 627 S.E.2d 431 (2006), *rev'd*, 281 Ga. 740, 642 S.E.2d 691 (2007).

216. 283 Ga. App. 505, 642 S.E.2d 145 (2007).

217. *Id.* at 508, 642 S.E.2d at 148.

218. *Id.*

219. *Id.* (quoting Guoth v. Hamilton, 273 Ga. App. 435, 615 S.E.2d 239, 242 (2005)).

220. 281 Ga. 455, 637 S.E.2d 377 (2006).

an issue on appeal."[221] Thus, the supreme court held that a notice of appeal filed from a final judgment preserves all issues for appellate review.[222]

In *Rouse v. Arrington*,[223] the Georgia Court of Appeals explained that when a trial court enters dismissal as a sanction, but then in a subsequent order clarifies that the dismissal was with prejudice, the subsequent order begins a new thirty-day period within which the plaintiff can file a notice of appeal.[224] According to the court of appeals, even though the trial court styled its subsequent order *nunc pro tunc* (now for then), a change of the dismissal to "with prejudice" went "to the very heart of the [plaintiff's] substantive rights" and thus "effectively commenced a new 30-day period during which [the plaintiff] could file her notice of appeal."[225]

In *Aldworth Co. v. England*,[226] the Georgia Supreme Court held that a defendant who fails to challenge the sufficiency of the plaintiff's evidence with a directed verdict motion *cannot* obtain judgment as a matter of law at the appellate level based on a sufficiency of the evidence argument.[227] However, the court further held that a defendant can seek a new trial based on sufficiency of the evidence on appeal, even if he or she failed to file a directed verdict motion.[228]

P. Attorney Fees

In *EarthResources, LLC v. Morgan County*,[229] the Georgia Supreme Court considered the applicability of Georgia's Strategic Lawsuit Against Public Participation ("anti-SLAPP") statute[230] to a county's claim for attorney fees.[231] In this case, the defendant Morgan County prevailed in the trial court on summary judgment. Morgan County also sought and received attorney fees from the plaintiff.[232] The plaintiff appealed, arguing that the anti-SLAPP statute precluded Morgan County's claim for attorney fees under O.C.G.A. section 9-15-14(a).[233] The supreme

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221. *Id.* at 456, 637 S.E.2d at 378.
222. *Id.*
223. 283 Ga. App. 204, 641 S.E.2d 214 (2007).
224. *Id.* at 206, 641 S.E.2d at 216-17.
225. *Id.*
226. 281 Ga. 197, 637 S.E.2d 198 (2006).
227. *Id.* at 197-98, 637 S.E.2d at 199.
228. *Id.*
229. 281 Ga. 396, 638 S.E.2d 325 (2006).
230. O.C.G.A. § 9-11-11.1 (2006).
231. *EarthResources*, 281 Ga. at 401, 638 S.E.2d at 329.
232. *Id.* at 396-97, 638 S.E.2d at 327.
233. O.C.G.A. § 9-15-14(a) (2006).

court disagreed, relying on the Georgia General Assembly's purposes behind enacting the anti-SLAPP statute—to encourage Georgians to exercise their constitutional rights by petitioning the government to redress grievances.[234] The statute was not intended to allow citizens to pursue abusive litigation while avoiding the consequences of O.C.G.A. section 9-15-14; therefore, the award of attorney fees was proper.[235]

The Georgia Court of Appeals reaffirmed the evidentiary requirements necessary to support an award of attorney fees in *In re Serpentfoot*.[236] In this case, the trial court awarded the defendant attorney fees of $2500 on the ground that the plaintiff's conduct was "unreasonably and stubbornly litigious and . . . frivolous."[237] First noting that O.C.G.A. section 13-6-11[238] generally does not allow a defendant to recover attorney fees, the court focused on O.C.G.A. section 9-15-14(b) and its requirement of "'express findings of fact and conclusions of law as to the statutory basis for'" awarding attorney fees.[239] Finding no such express support in the trial court's order, the court of appeals vacated the award of attorney fees.[240]

IV. CONCLUSION

Although this survey is not meant to be an exhaustive summary of all pertinent case and statutory law for the designated period, the foregoing presents what the authors believe to be the most significant developments in Georgia's trial practice and procedure.

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234. *EarthResources*, 281 Ga. at 401, 628 S.E.2d at 329.

235. *Id.*

236. 285 Ga. App. 325, 646 S.E.2d 267 (2007).

237. *Id.* at 328, 646 S.E.2d at 268, 270.

238. O.C.G.A. § 13-6-11 (1982 & Supp. 2007). Specifically, this statute permits an award of attorney fees where a defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. *Id.*

239. *In re Serpentfoot*, 285 Ga. App. at 329, 646 S.E.2d at 271 (quoting Hall v. Monroe County, 271 Ga. App. 895, 897, 611 S.E.2d 120, 123 (2005)).

240. *Id.* The court also vacated the award because appellant had provided no evidentiary basis to support the reasonableness of the attorney fee award. *Id.*