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I. INTRODUCTION

This Article surveys revisions to the Official Code of Georgia Annotated (O.C.G.A.)[1] and decisions interpreting Georgia law from June 1, 2019 to May 31, 2020,[2] that affect labor and employment relations for Georgia employers.

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[1] For an analysis of Georgia labor and employment law during the prior survey period, see W. Melvin Haas III, et al. *Labor and Employment Law, Annual Survey of Georgia Law*, 71 Mercer L. Rev. 137 (2019).

[2]Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See generally* THE DEVELOPING

II. RESPONDEAT SUPERIOR

A. Vicarious Liability

Under the doctrine of respondeat superior, an employer may be held vicariously liable for the negligence or intentional torts of employees that are committed within the scope of their employment.[3] To hold an employer vicariously liable for the torts of an employee, the following two elements must be established: (1) the employee was acting in furtherance of the employer's business; and (2) the employee was acting within the scope of the employer's business.[4]

In *Terry v. Old Hat Chimney, LLC*,[5] Matthew Terry (Terry), sued Old Hat Chimney, LLC (Old Hat) and its employee, Nickolas James Payne (Payne), "for damages allegedly sustained when a company van driven by Payne rear-ended Terry's vehicle."[6] Terry brought a claim of negligence against Payne and a claim of vicarious liability through the doctrine of respondeat superior against Old Hat. Old Hat admitted that Payne was actually employed at the time of the accident, and that he was acting within the scope of his employment when the collision occurred.[7] Following this admission, Old Hat then "moved for partial summary judgment on Terry's direct liability claim."[8]

In finding that the Cherokee County Superior Court properly granted partial summary judgment to Old Hat, the Georgia Court of Appeals largely based its decision on precedent established in *Hospital Authority of Valdosta/Lowndes County v. Fender*[9] by the court in 2017.[10] In that case, the court of appeals held "if a defendant employer concedes that it will be vicariously liable under the doctrine of respondeat superior if its employee is found negligent, the employer is entitled to summary judgment on the plaintiff's [duplicative] claims for negligent

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LABOR LAW (John E. Higgins Jr. et al. eds., 7th ed. 2017); BARBRA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (C. Geoffrey Weirich et al. eds., 4th ed. 2007); W. Jonathan Martin II et al., Labor and Employment, *2019 Eleventh Circuit Survey*, 71 Mercer L. Rev. 1059 (2020); Daily Lab. Rep. (BNA). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

[3] Charles R. Adams III, GEORGIA LAW OF TORTS § 7:2 (2017–2018 ed).

[4] *Id.* at § 7:2.

[5] 351 Ga. App. 673, 832 S.E.2d 650 (2019).

[6] *Id.* at 674, 832 S.E.2d at 651.

[7] *Id.*

[8] *Id.*

[9] 342 Ga. App. 13, 21, 802 S.E.2d 346, 354 (2017).

[10] *Terry*, 351 Ga. App. at 674, 832 S.E.2d at 651–52.

entrustment, hiring, training, supervision, and retention."[11] Thus, the court of appeals held that since Old Hat admitted that the doctrine of respondeat superior applied, *Fender* required the court to hold that Terry's claim for negligent hiring, training, and supervision was duplicative of the claim for respondeat superior and must be dismissed.[12] Terry attempted to convince the court to overrule *Fender*, claiming it contravenes O.C.G.A. § 51-12-33(b),[13] Georgia's apportionment statute.[14]

In the case of *Centurion Industries, Inc. v. Naville-Saeger*,[15] Jeremy Carter (Carter) worked as a millwright for A-Lert Construction Services, a division of Centurion Industries, Inc. (Centurion), performing "shutdown work," where a factory would shut down for multiple weeks and Carter would perform maintenance work at the factory during the shutdown period. Carter would often travel to out of town job sites to perform work at shutdown locations. Carter eventually was assigned to a location in Louisiana but requested leave to return to Georgia to take care of personal matters. Upon returning to Georgia, Carter attempted to pass a school bus and hit the car in which Naville-Saeger was a passenger. Carter was found to be driving under the influence of alcohol. The parents of Naville-Saeger then brought separate actions against Centurion, which moved for summary judgment on the basis that Carter was not acting in the course and scope of his employment when the collision occurred. The Lowndes County State Court denied Centurion's motion for summary judgment, and Centurion requested interlocutory review by the court of appeals.[16]

In reversing the judgment of the trial court, the court of appeals determined that Carter was engaged in the purely personal matter of driving to Valdosta while on unpaid leave from work and, therefore, was not acting in the course and scope of his employment.[17] The majority of the court's analysis focused on the applicability of the "special mission" rule, which is an exception to the general rule that an "employee is deemed to act only for his own purposes while commuting to or from work."[18] Finding that the exception did not apply, the court focused on the fact that Centurion had not requested Carter to perform any

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[11] *Fender*, 342 Ga. App. at 21, 802 S.E.2d at 354.

[12] *Terry*, 351 Ga. App. at 674–75, 832 S.E.2d at 652.

[13] O.C.G.A. § 51-12-33(b) (2020).

[14] *Terry*, 351 Ga. App. at 674–75, 832 S.E.2d at 652.

[15] 352 Ga. App. 342, 834 S.E.2d 875 (2019).

[16] *Id.* at 343–44, 834 S.E.2d at 877–78.

[17] *Centurion*, 352 Ga. App. at 347, 834 S.E.2d at 880.

[18] *Id.* at 345, 834 S.E.2d at 879.

particular task and that Carter's acts took place during a time when Carter was on approved leave.[19]

In re In/Ex Systems, Inc. v. Masud,[20] Michael Green (Green) worked for In/Ex Systems, Inc. (In/Ex) as a technician, primarily in commercial construction. As Green drove northbound on Interstate 85 on his way to work, a vehicle suddenly entered his travel lane. Green quickly changed lanes to avoid a collision, at which time the front driver's side tire came off of his vehicle, and struck a vehicle driven by Tahsin Masud's (Masud) wife as she was driving southbound on Interstate 85. Green later pled guilty to driving with unsafe equipment.[21]

Masud, representing the interest of his deceased wife and juvenile daughter who were in the car struck by Green's tire, brought an action against In/Ex alleging vicarious liability for injuries incurred in the accident.[22] "In/Ex filed a motion for summary judgment in both lawsuits, arguing, inter alia, that Green had not been driving negligently at the time of the collision."[23] The Cobb County State Court denied In/Ex's motion for summary judgment, which led to In/Ex's request for review by the court of appeals.[24]

In reversing the finding of the trial court, the court of appeals held that "Green had no knowledge of any unsafe condition that caused the tire to separate from the vehicle."[25] The court also gave credence to the fact that Green's passenger, a co-worker, did not notice any issue with the vehicle.[26] Since Green had no knowledge of any unsafe condition, which was required to hold In/Ex vicariously liable, the court of appeals held that the trial court erred in denying In/Ex's motion for summary judgment.[27]

In re Hernandez v. Schumacher Group Healthcare Consulting, Inc.[28] arose out of an incident where Domingo Hernandez (Mr. Hernandez), husband of the plaintiff, went to the emergency room of Dorminy Medical Center because he was suffering from chest pain. Dr. John Glenn (Dr. Glenn) examined Mr. Hernandez and ordered tests. Dr. Glenn later arranged to transport the decedent to a better equipped hospital.[29]

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[19] *Id.* at 347, 834 S.E.2d at 880.

[20]352 Ga. App. 722, 835 S.E.2d 799 (2019).

[21] *Id.* at 723, 835 S.E.2d at 801.

[22] *Id.* at 722–24, 835 S.E.2d at 800–01.

[23] *Id.* at 723–24, 835 S.E.2d at 801.

[24] *Id.* at 722, 835 S.E.2d at 800.

[25] *Id.* at 726, 835 S.E.2d at 802.

[26] *Id.*

[27] *Id.* at 726, 835 S.E.2d at 802–03.

[28] 352 Ga. App. 838, 835 S.E.2d 787 (2019).

[29] *Id.* at 839, 835 S.E.2d 789.

During the trip to the other hospital, "the decedent went into cardiac arrest and was pronounced dead upon arrival."[30]

Hettie Sue Hernandez filed a complaint against Dr. Glenn and Schumacher Group Healthcare Consulting, Inc. (Schumacher), claiming medical malpractice and wrongful death. Schumacher successfully moved for summary judgment, arguing that Dr. Glenn had never been its employee or agent and was instead an independent contractor of Ben Hill Emergency Group, LLC, which provided emergency department staffing and management services to Schumacher.[31]

On appeal, the court of appeals affirmed Ben Hill County Superior Court's holding.[32] In fact, the court held that Schumacher was a holding company and had never had any employees or agents.[33] Because there was no legal relationship between Dr. Glenn and Schumacher, it was not possible to impose vicarious liability on Schumacher.[34] Furthermore, no employment contract existed between Dr. Glenn and Schumacher.[35]

In *Avis Rent A Car System, LLC v. Johnson*,[36] Brianna Johnson (Johnson) was seriously injured when she was struck by a sport utility vehicle that had been stolen from Avis Rent A Car Systems, LLC's (Avis) car rental lot in downtown Atlanta. Johnson sued Avis, Avis Budget Group, Inc., and Peter Duca, a regional security manager for Avis Budget Group, as well as CSYG, Inc. (CSYG), the operator of the downtown Avis location, and Yonas Gebremichael (Gebremichael), CSYG's owner. After a jury trial, the jury awarded Johnson $7 million in damages, despite finding CSYG and Gebremichael not liable.[37] "Avis filed a motion for judgment notwithstanding the verdict [JNOV] or, in the alternative, for a new trial as to liability."[38] The Gwinnett County State Court denied the motion for JNOV but granted a new trial as to liability. Avis appealed the denial of its motion for judgment notwithstanding the verdict. "Johnson appeal[ed] the grant of Avis's motion for a new trial on the issue of liability."[39]

On appeal, the court of appeals reversed the denial of Avis's motion for judgment notwithstanding the verdict.[40] The court largely based its

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[30] *Id.*

[31] *Id.* at 839–40, 835 S.E.2d at 789.

[32] *Id.* at 846, 835 S.E.2d at 793.

[33] *Id.* at 843–44, 835 S.E.2d at 791.

[34] *Id.* at 844, 835 S.E.2d at 792.

[35] *Id.* at 843–44, 835 S.E.2d at 791.

[36] 352 Ga. App. 858, 836 S.E.2d 114 (2019).

[37] *Id.* at 858, 836 S.E.2d at 115–16.

[38] *Id.*

[39] *Id.* at 859, 836 S.E.2d at 116.

[40] *Id.* at 864, 836 S.E.2d at 119.

decision on Avis's argument that it could not be held vicariously liable when CSYG and Gebremichael were found not liable by the jury.[41]

The case of *Mannion & Mannion, Inc. v. Mendez*[42] involved an accident caused by Loren Blunkall (Blunkall), who worked for Mannion & Mannion, Inc. (Mannion) as a mechanic. Blunkall did not have a set lunch period, and he often went to lunch with a co-worker who lived across the street from Mannion's lot. Before he would leave for lunch, he would tell the other employees working in the office that he was headed out to get lunch. Mannion did have a time clock, but Blunkall did not always clock in and out for lunch. On the day of the accident, Mannion's employees heard Blunkall say he was leaving for lunch. As he was leaving, Blunkall pulled into the intersection and struck Jesus Mendez's (Mendez) motorcycle, knocking Mendez off the bike and injuring him.[43]

Mendez sued Blunkall for negligence, adding Mannion as a defendant under a theory of vicarious liability. Mannion moved for summary judgment, arguing that it could not be liable because Blunkall was not acting in the scope of his employment when he collided with Mendez, but the Liberty County State Court denied Mannion's motion. Mannion filed for interlocutory review and asserted that the trial court erred in denying its summary judgment motion because all of the evidence showed that Blunkall was on his lunch break and not running an errand for Mannion at the time of the accident.[44] In reversing the trial court, the court of appeals agreed with Mannion.[45] Since Blunkall was on his lunch break, the court of appeals held that Blunkall was not acting within the scope of his employment at the time of the accident as a matter of law, and thus, Mannion was entitled to summary judgment.[46]

In *Carnegay v. Walmart Stores, Inc.*,[47] Tyrone Carnegay (Carnegay) was shopping for groceries at Walmart. After he paid for the items he purchased, he thought he had been overcharged. Carnegay returned to the produce aisle and then planned to go back to the cashier for a refund. However, Carnegay decided not to pursue the overpayment. Instead, he walked through the store toward the exit.[48]

Ariana Boyd (Boyd), a Walmart loss prevention officer, noticed Carnegay put the tomato in the bag and then walk toward the exit. Boyd did not know whether Carnegay had paid for the tomato, so Boyd

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[41] *Id.*

[42] 355 Ga. App. 28, 842 S.E.2d 334 (2020).

[43] *Id.* at 29, 842 S.E.2d at 337.

[44] *Id.* at 30, 842 S.E.2d at 337.

[45] *Id.*

[46] *Id.* at 33, 842 S.E.2d at 339.

[47] 353 Ga. App. 656, 839 S.E.2d 176 (2020).

[48] *Id.* at 657, 839 S.E.2d at 179.

informed Trevor King (King), an off-duty police officer, that she thought Carnegay might be shoplifting. As Carnegay approached the door, Carnegay saw Boyd, but she did not speak to him or identify herself as a Walmart employee. Carnegay then encountered King, who was standing directly in front of him. King ordered Carnegay to get on the ground and placed Carnegay under arrest for obstruction for failing to comply with King's instructions. King then grabbed his baton and struck Carnegay a total of seven times, breaking his leg.[49]

Carnegay sued Walmart Stores, Inc. (Walmart), Boyd, and King for battery and false imprisonment. Carnegay argued that Walmart was vicariously liable for the torts of Boyd and King. Carnegay, Walmart, and Boyd moved for summary judgment. Fulton County State Court granted Walmart and Boyd's motion, but denied Carnegay's cross motion for summary judgment, which led to Carnegay's appeal.[50]

The court of appeals thought it was clear that King was acting only as an off-duty police officer when he committed the acts of battery against Carnegay.[51] Before hitting Carnegay with the baton, King placed Carnegay under arrest for obstruction, which is purely a function of a police officer, not an employee.[52] In support, the court cited *Page v. CFJ Properties*,[53] which held that "'[i]n cases involving off-duty police officers working for private employers, . . . the employer escapes liability if the officer was performing police duties which the employer did not direct when the cause of action arose.'"[54] However, the court held that "whether King was acting as a police officer or at the behest of Walmart present[ed] close factual questions that must be resolved by the jury."[55] As to Boyd, it is undisputed that Boyd is a Walmart employee and that any action she took against Carnegay was within the scope of her employment.[56] Enough factual issues remained on the issue of whether Boyd directed King to detain Carnegay that the court felt summary judgment was not appropriate for the false imprisonment claim against Boyd.[57]

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[49] *Id.*

[50] *Id.* at 656–58, 839 S.E.2d at 178–79.

[51] *Id.* at 660, 839 S.E.2d at 180–81.

[52] *Id.*

[53] 259 Ga. App. 812, 813, 578 S.E.2d 522 (2003) (internal citations and quotations omitted).

[54] *Carnegay*, 353 Ga. App. at 659, 839 S.E.2d at 180 (quoting Page v. CFJ Properties, 259 Ga. App. 812, 813, 578 S.E.2d 522 (2003)).

[55] *Id.* at 661, 839 S.E.2d at 181.

[56] *Id.* at 664, 839 S.E.2d at 183.

[57] *Id.*

III. BUSINESS TORTS

A. Negligent Hiring

Under O.C.G.A § 34-7-20,[58] "the employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency."[59] To sustain an action for negligent hiring, the plaintiff must prove the employer hired an employee whom "the employer knew or should have known posed a risk of harm to others where it [was] reasonably foreseeable from the employee's 'tendencies' or propensities that the employee could cause the type of harm sustained by the plaintiff."[60]

In *Avis Rent A Car System, LLC v. Smith*,[61] Adrienne Danielle Smith (Smith) was seriously injured when she was struck by a sport utility vehicle that had been stolen from Avis' car rental lot in downtown Atlanta by former employee, Byron Perry (Perry). Smith sued Avis Rent A Car System, LLC, Avis Budget Group, Inc., and Peter Duca, a regional security manager for Avis Budget Group, as well as CSYG, Inc. (CSYG), the operator of the downtown Avis location, and Yonas Gebremichael (Gebremichael), CSYG's owner for negligent hiring and retention. After a jury trial, the jury returned a verdict for Smith in the amount of $47 million. Avis, CSYG, and Gebremichael filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The trial court denied the motions. Avis, CSYG, and Gebremichael then appealed the denial of its motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.[62]

On appeal, the court of appeals held that Perry was not acting under color of employment when he committed his criminal acts, so CSYG and Gebremichael were entitled to judgment on Smith's negligent hiring and retention claims.[63] The court based its decision on two prior decisions from the court of appeals, *Herrin Business Products v. Ergle*,[64] and *Lear Siegler v. Stegall*,[65] which stood for the proposition that "'to be actionable, the [employee's] tortious act must occur during the [employee's] working hours or while the employee is acting under color of employment. An employer is shielded from liability for those torts his employee commits

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[58] O.C.G.A § 34-7-20 (2008).

[59] O.C.G.A § 34-7-20.

[60] Munroe v. Universal Health Servs., Inc., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004) (internal quotation marks omitted).

[61] 353 Ga. App. 24, 836 S.E.2d 100 (2019).

[62] *Id.* at 24, 836 S.E.2d at 102.

[63] *Id.* at 28, 836 S.E.2d at 105.

[64] 254 Ga. App. 713, 718 (4), 563 S.E.2d 442 (2002) (negligent retention).

[65] **184 Ga. App. 27, 360 S.E.2d 619 (1987) (negligent hiring).**

on the public in general.'"[66] As such, Smith could not prevail on her claim for negligent hiring against CSYG and Gebremichael.[67]

B. Interference with Business Relations

In *Griffin v. Turner*,[68] Gary Daniel Griffin (Griffin) brought an action against Dennis R. Turner (Turner), his neighbor, for tortious interference with contractual and business relations.[69] The court of appeals held that a claim for tortious interference with contractual relations will not be defeated even if there is no contractual employment relationship, and the employee has resigned from the employment.[70]

Griffin and Turner had a disagreement about the boundary line between their properties, which led to Turner taking multiple actions against Griffin related to his employment and his landscaping business. Griffin worked as a photographer for Strawbridge Studios, a company that provided photography services to public school systems. In April 2015, Turner called the offices of Strawbridge Studios, identified himself as a concerned parent, complained about Griffin's past drug arrests, and threatened further action if Griffin's employment was not "dealt" with. Griffin was then asked to resign. Additionally, Turner reached out to some of Griffin's landscaping clients and made disparaging comments about him, which caused Griffin to lose customers. Griffin then filed a lawsuit against Turner alleging interference with contractual and business relations and Turner moved for summary judgment, which was granted by the Richmond County Superior Court, and Griffin appealed.[71]

The court of appeals rejected Turner's arguments that Griffin could not pursue claims for tortious interference with contractual relations relating to Griffin's employment with Strawbridge Studios based on the fact that there was no employment agreement.[72] The court stated that even though the relationship is an at-will relationship, such a relationship may give rise to contractual rights that receive protection from third-party interference.[73] Whether contractual rights existed was a question for the jury, and the trial court erred in granting summary judgment on that claim.[74] Turner further argued that Griffin could not

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[66] *Smith*, 353 Ga. App. at 28, 836 S.E.2d at 105 (quoting *Herrin*, 254 Ga. App. at 718, 563 SE.2d at 446).

[67] *Id.* at 30, 836 S.E.2d at 106.

[68] 350 Ga. App. 694, 830 S.E.2d 239 (2019).

[69] *Id.* at 694, 830 S.E.2d at 241.

[70] *Id.* at 697–98, 830 S.E.2d at 243.

[71] *Id.* at 695–97, 830 S.E.2d at 241–42.

[72] *Id.* at 698, 830 S.E.2d at 243.

[73] *Id.* at 697–98, 830 S.E.2d at 243.

[74] *Id.* at 698, 830 S.E.2d at 243.

prove his claim of tortious interference with business relations because he resigned from Strawbridge Studios.[75] The court of appeals stated that, "[a] jury could find that Turner's interference hindered Griffin's performance of his employment duties and made them more difficult, ultimately resulting in his resignation."[76]

IV. WRONGFUL TERMINATION

A. Georgia Whistleblower Act

Under the Georgia Whistleblower Act (GWA),[77] "no public employer shall retaliate against a public employee for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency."[78] To make out a prima facie case, plaintiffs must establish four elements:

> (1) [They were] employed by a public employer;
>
> (2) [They] made a protected disclosure or objection;
>
> (3) [They] suffered an adverse employment action; and
>
> (4) There is some causal relation between the protected activity and the adverse employment action.[79]

In *City of Pendergrass v. Rintoul*,[80] the court of appeals examined a claim brought by two public employees, Katherine Rintoul (Rintoul), who was the City Clerk for the City of Pendergrass (Pendergrass) from January 2005 to July 2009, and William Garner (Garner) who was a lieutenant with the Pendergrass police department from January 2005 to September 2009. In June 2009, Rintoul and Garner gathered evidence which they believed showed misuse of public tax monies, misuse of city equipment, bribery, and employment of an undocumented immigrant. After presenting the evidence to the mayor, each individual was shunned and experienced retaliation from other city officials. Ultimately, Rintoul was terminated and Garner resigned.[81]

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[75] *Id.*

[76] *Id.*

[77] Ga. H.R. Bill 642, Reg. Sess. (2012) (codified at O.C.G.A § 45-1-4 (Supp. 2014)); *see also* Colon v. Fulton Cnty., 294 Ga. 93, 93, 751 S.E.2d 307, 308 (2013).

[78] O.C.G.A § 45-1-4(d)(2).

[79] Albers v. Georgia Bd. of Regents of Univ. Sys. of Georgia, 330 Ga. App. 58, 61, 766 S.E.2d 520, 523 (2014); *See* Forrester v. Ga. Dep't of Human Serv., 308 Ga. App. 716, 722, 708 S.E.2d 660, 666 (2011).

[80] 354 Ga. App. 618, 841 S.E.2d 399 (2020).

[81] *Id.* at 618–20, 841 S.E.2d at 401–02.

Rintoul and Garner then brought suit against Pendergrass for violations of the GWA. Following a trial, a jury awarded a verdict of $1 million to Rintoul and Garner. Pendergrass sought appeal of the Jackson County Superior Court's denial of its request for a directed verdict, and that the jury award was arbitrary and not supported by the evidence.[82]

Pursuant to O.C.G.A. § 45-1-4(a)(4),[83] the court of appeals held that Rintoul and Garner did prove that Pendergrass was a public employer.[84] Rintoul and Garner were able to show that Pendergrass received a unique value from the State of Georgia, which was of a type that only public employers would be eligible to receive.[85] For example, "the City availed itself of a high speed internet line made available and paid for by the State of Georgia."[86] The court also held that the trial court did not err in denying Pendergrass's motion for a directed verdict based on Garner's retaliation claim.[87] The court of appeals held that by definition under the GWA,[88] Garner experienced numerous instances of retaliation.[89] For example, Garner suffered verbal abuse, was prohibited from taking his patrol car home, suffered loss of rank and pay, and faced isolation from his colleagues.[90]

V. RESTRICTIVE COVENANTS

A. "Blue Penciling"

In 2011, Georgia voters approved a constitutional amendment changing the law on restrictive covenants.[91] Under the amendment, Georgia courts focus their analysis on whether a covenant restricts future employment in a reasonable manner.[92]

The amendment also allows courts to blue pencil agreements to avoid the invalidation of the entire agreement.[93] In order to have agreements subject to blue penciling, employers should have employees with pre 2011

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[82] *Id.*

[83] O.C.G.A. § 45-1-4(a)(4) (2012).

[84] *Rintoul*, 354 Ga. App. at 621, 841 S.E.2d at 403.

[85] *Id.* at 623, 841 S.E.2d at 404.

[86] *Id.*

[87] *Id.* at 624, 841 S.E.2d at 405.

[88] O.C.G.A. § 45-1-4(a)(5).

[89] *Rintoul*, 354 Ga. App. at 626, 841 S.E.2d at 406.

[90] *Id.*

[91] GA. CONST. ART. III, § 6, para. 5(c)(3).

[92] GA. CONST. ART. III, § 6, para. 5(c)(3); *see also* O.C.G.A § 13-8-50 (2010 & Supp. 2012).

[93] Vulcan Steel Structures, Inc. v. McCarty, 329 Ga. App. 220, 220, 764 S.E.2d 458, 459 (2014).

agreements sign new ones.[94] Under Georgia law, continued employment can be sufficient consideration for an at-will employee to sign a new agreement.[95] For any employees who have already signed an agreement with a defined term of employment, employers must offer additional consideration in order for the agreement to constitute a valid new agreement.[96]

In *Belt Power, LLC v. Reed*,[97] the court of appeals dealt with a matter of first impression dealing with the scope and application of Georgia's Restrictive Covenants Act.[98] Belt Power, LLC (Belt Power) sought review of the trial court's final summary judgment order declaring void and unenforceable various restrictive covenants in their contracts with former employees, Steve Reed (Reed) and Jeffrey Harrington (Harrington), and dismissing their counterclaims for breach of those restrictive covenants. Reed and Harrington were territory managers for Belt Power. In 2008, Reed and Harrington bought minority equity shares of the company in accordance to an "LLC Interest Purchase and Restriction Agreement." In 2014, Reed and Harrington, in separate transactions, sold their shares back to Belt Power pursuant to a "Confidentiality, Non-Competition, and Non-Solicitation Agreement." Reed left Belt Power in 2015, and Harrington left Belt Power in 2017. In 2017, they formed Sitka Belt, LLC and brought an action for a declaratory judgment stating that the agreements were not enforceable and seeking a permanent injunction barring Belt Power from attempting to enforce the agreements.[99]

The court of appeals held that the trial court had erred by analyzing the enforceability of the restrictive covenants under common law instead of Georgia's Restrictive Covenants Act.[100] However, since the trial court made an alternative holding that even if the Act applied, the provisions were unreasonable and overly broad, and it would not blue pencil the provisions, the court of appeals determined that the trial court did not abuse its discretion.[101] The court noted that the Act contained the word "may" when referring to the court's ability to modify covenants that are unreasonable.[102] Since "[t]he word 'may' . . . usually implies some degree

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[94] *Id.*

[95] Thomas v. Costal Industrial Services, Inc., 214 Ga. 832, 832, 108 S.E.2d 328, 329 (1959).

[96] Glisson v. Global Sec. Services, L.L.C., 287 Ga. App. 640, 641–642, 653 S.E.2d 85, 86–87 (2007).

[97] 354 Ga. App. 289, 840 S.E.2d 765 (2020).

[98] *Id.* at 289, 840 S.E.2d at 767 (citing O.C.G.A. § 13-8-50).

[99] *Id.* at 289–91, 840 S.E.2d at 767.

[100] *Id.* at 293–94, 840 S.E.2d at 769.

[101] *Id.* at 294, 840 S.E.2d at 769.

[102] *Id.* at 294–95, 840 S.E.2d at 770.

of discretion[,]" the court of appeals held that it is within a trial court's discretion on whether to "blue pencil" an overly broad restrictive covenant.[103]

B. Defenses to Restrictive Covenants

Yash Solutions, LLC v. New York Global Consultants Corp.[104] centered around a dispute involving New York Global Consultants Corp. (NYG), who was a provider of information-technology (IT) consulting, software development, and project-management services. Yash Solutions, LLC (Yash) was a similar IT consulting and business-solutions firm. Both companies recruited and screened consultants to place in other companies. NYG and Yash entered into a Master Supplier Agreement (MSA), wherein NYG would supply IT consultants to Yash, and Yash would place those consultants with clients. The MSA contained a non-compete provision, restricting NYG from providing the same or similar service as Yash to specific clients listed in an addendum to the MSA. Yash placed two NYG consultants, Rathi and Pinto, with one of the clients named in the addendum, EMC, between March 2013, and February 2015.[105]

Once Rathi's placement concluded, Yash was told that it could find a new placement for him with EMC, but Rathi declined placement with EMC. Rathi had already been placed on a new project with EMC. In December of 2014, Yash sent a letter to NYG, alleging that NYG had breached the non-compete provision by placing Rathi with EMC directly. However, Yash continued to place NYG consultants with their clients. NYG then filed a complaint in March of 2015. Both parties filed claims and moved for summary judgment, but the trial court denied NYG's claim for summary judgment as to Yash's counterclaim alleging that NYG breached the non-compete provision. A jury later found that Yash's actions had amounted to a waiver of the non-compete provision.[106]

On appeal, Yash argued that the jury's finding of a waiver was not supported by the evidence presented at trial.[107] The court of appeals noted that the issue was a question of fact for a jury to decide, and because there was some evidence to support the jury verdict, the court of appeals affirmed the trial court's ruling.[108]

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[103] *Id.* at 294–95, 840 S.E.2d at 769–70 (quoting United States v. Rodgers, 461 U.S. 677, 796 (IV) (B), 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983)).

[104] 352 Ga. App. 127, 834 S.E.2d 126 (2019).

[105] *Id.* at 128–29, 834 S.E.2d at 129–30.

[106] *Id.* at 129–31, 834 S.E.2d at 130–31.

[107] *Id.* at 132, 834 S.E.2d at 132.

[108] *Id.* at 135, 834 S.E.2d at 134–35.

Fortress Investment Group, LLC v. Holsinger[109] involved a dispute between Fortress Investment Group, LLC (Fortress), an asset management firm, and Joel Holsinger (Holsinger) who began working for Fortress in 2008. Holsinger signed an initial employment agreement, but later signed a new employment agreement with Fortress on January 15, 2010. Several restrictive covenants were included within the new employment agreement. Holsinger resigned from Fortress in March 2018. After resigning from Fortress, Holsinger met with an asset management firm named Ares Operations LLC. Fortress sent letters to Ares Operations LLC alleging that Holsinger had violated the restrictive covenants in his employment agreement, and that if Ares Operations LLC were to hire Holsinger, it would risk legal exposure.[110]

Holsinger filed suit in Fulton County Superior Court seeking a declaratory judgment that the restrictive covenants were invalid and unenforceable, and injunctive relief barring Fortress from enforcing or threatening to enforce the restrictive covenants. On February 5, 2019, Fortress filed an "emergency motion" asking the superior court to compel Holsinger to submit his electronic devices for forensic imaging and to return allegedly confidential information. The superior court determined that no emergency existed and denied the motion.[111]

On appeal, Fortress contended that the trial court erred in refusing to consider the unrefuted evidence of Holsinger's "unclean hands."[112] However, the court of appeals determined that the trial court did not abuse its discretion when it ruled that Holsinger could not have unclean hands from his failure to abide by restrictive covenants that were unenforceable.[113] The court of appeals noted that the trial court correctly considered whether Holsinger had unclean hands, and concluded that even if Holsinger violated the agreement, that still would not make any previously unenforceable post termination restraints now enforceable going forward.[114]

VI. CONCLUSION

As this Article demonstrates, the issues arising under Georgia law are becoming progressively more challenging each year, with the growing overlap between state and federal issues, as well as growing state regulations, adding to the challenge. Regardless of whether a practitioner specializes in state, federal, administrative, or other matters pertaining

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[109] 354 Ga. App. 405, 841 S.E.2d 55 (2020).

[110] *Id.* at 406–07, 841 S.E.2d at 57–58.

[111] *Id.*

[112] *Id.* at 408, 841 S.E.2d at 59.

[113] *Id.*

[114] *Id.* at 408–09, 841 S.E.2d at 59.

to labor and employment, it is important to recognize and stay abreast of the ever-evolving trends, policies, cases, and state and federal guidelines.