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Trial Practice and Procedure

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Trial Practice and Procedure

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I. INTRODUCTION

This Article addresses selected opinions and legislation of interest to the Georgia civil trial practitioner issued during the Survey period of this publication.[1]

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[1] For an analysis of Georgia trial practice and procedure during the prior Survey period, *see* Brandon L. Peak, Joseph M. Colwell, Christopher B. McDaniel, Rory A. Weeks, Ramsey B. Prather, and Michael F. Williford, *Trial Practice and Procedure, Annual Survey of Georgia Law*, 71 Mercer L. Rev. 305 (2019).

II. LEGISLATION

This was an unusual year for the Georgia General Assembly. Due to the COVID-19 pandemic, the legislative session was suspended indefinitely on March 14, 2020, when Governor Kemp declared a Public Health State of Emergency and after only twenty-nine days of the session had been completed. Except for two special sessions convened in March and April, the General Assembly did not resume its regular session until June 15. Despite technically falling outside the Survey period of this publication, the Authors have included a discussion here of Senate Bill 359[2] which was passed during the resumed 2019–2020 regular session and because it impacts Georgia civil trial practice and procedure.

Senate Bill 359, known as the "Georgia COVID-19 Pandemic Business Safety Act," generally establishes immunity from tort liability for claims arising out of exposure to COVID-19 or receiving medical treatment for COVID-19.[3] Senate Bill 359's immunity provision is not limited to healthcare workers, healthcare facilities, or the provision of health care; it also extends broadly to any business that continued to operate during the pandemic.[4] To overcome the immunity from tort liability falling within the scope of the Act, a plaintiff has to prove "gross negligence, willful and wanton misconduct, reckless infliction of harm, or intentional infliction of harm."[5] Senate Bill 359's immunity provision will apply to causes of action accruing until, but not after, July 14, 2021.[6]

III. CASE LAW

A. Apportionment

In *Suzuki Motor of America, Inc. v. Johns*,[7] the Georgia Court of Appeals affirmed a trial court's decision to permit a jury to consider the fault of a motorcycle operator for purposes of apportionment in a strict products liability case against the motorcycle manufacturer.[8] The plaintiffs (a husband and wife) asserted a strict products liability claim against Suzuki after the husband/operator suffered injuries in a motorcycle crash, claiming a design defect existed in the motorcycle's

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[2] Ga. S. Bill 359, Reg. Sess., 2020 Ga. Laws 588 (codified at O.C.G.A. §§ 51-16-1 through 51-16-5 (2020)).

[3] *Id.*

[4] *Id.* at §§ 1, 3.

[5] *Id.* at § 3 (codified at O.C.G.A. § 51-16-2(a) (2020)).

[6] *Id.* at § 4.

[7] 351 Ga. App. 186, 830 S.E.2d 549 (2019), *cert. granted*, Case No. A19A0109 (Jan. 13, 2020).

[8] *Id.* at 198–99, 830 S.E.2d at 560.

front brake piston.[9] The jury found in favor of the plaintiffs, but it apportioned forty-nine percent of the fault to the husband/operator.[10] The plaintiffs appealed the judgment because the trial court "erred by apportioning the damage award on . . . [the plaintiff/operator's] strict liability claim."[11]

The plaintiff/operator purchased the motorcycle in 2005. In 2013, the plaintiff/operator discovered the motorcycle had "spongy" brakes. His father-in-law, a certified motorcycle mechanic, advised the plaintiff/operator to "bleed the brakes."[12] The plaintiff/operator did so, "and the problem appeared to be resolved" based on short test rides that weekend.[13] The following Monday morning, the plaintiff/operator drove the motorcycle to work. When a tractor-trailer pulled out in front of him, the plaintiff/operator's front brakes failed. The plaintiff/operator skidded, hit a curb, and was thrown from the bike, resulting in serious injuries.[14] After rehabilitation and multiple surgeries, the plaintiff/operator "received a recall notice from Suzuki warning him of a dangerous safety defect in his motorcycle's front brake master cylinder."[15]

At trial, the plaintiffs presented evidence of a design defect in the brakes.[16] The defendants presented evidence that the plaintiff/operator's injuries were caused by his negligent operation of the motorcycle, or alternatively, by his failure to adhere to the manufacturer's prescribed brake-maintenance schedule.[17] The jury found in favor of the plaintiffs but apportioned forty-nine percent of the fault to the plaintiff/operator.[18]

In affirming the trial court's decision to reduce the verdict amount by the percentage of fault apportioned to the plaintiff/operator pursuant to Georgia's apportionment statute, the court of appeals relied upon the Georgia Supreme Court's ruling in *Couch v. Red Roof Inns*,[19] where the supreme court held that Georgia's apportionment statute displaced the common law of apportionment.[20] Recognizing that the *Couch* decision addressed whether the apportionment statute displaced the common law rule against apportioning fault in intentional tort cases, the court of appeals nevertheless held that the plain language of the apportionment

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[9] *Id.* at 188, 830 S.E.2d at 553–54.

[10] *Id.* at 189, 830 S.E.2d at 554.

[11] *Id.* at 187, 830 S.E.2d at 553.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 187–88, 803 S.E.2d at 553.

[15] *Id.* at 188, 830 S.E.2d at 553.

[16] *Id.* at 188–89, 830 S.E.2d at 554.

[17] *Id.* at 189, 830 S.E.2d at 554.

[18] *Id.*

[19] 291 Ga. 359, 729 S.E.2d 378 (2012).

[20] *Id.* at 364, 729 S.E.2d at 382–83.

statute extends to strict liability cases because the statute does not "distinguish[] between . . . theories upon which . . . claims are premised," and the Georgia General Assembly failed to otherwise exclude strict liability claims from the broad language of the statute.[21]

B. Default and Default Judgment

In *Bowen v. Savoy*,[22] the Georgia Supreme Court held that a defendant is not required to provide a reasonable explanation for its failure to file a timely answer in order to meet the "proper case" standard for opening default under Section 9-11-55(b)[23] of the Official Code of Georgia Annotated (O.C.G.A.).[24] The plaintiff in *Bowen*, as executor of her mother's estate, filed suit against her sisters, alleging they colluded to misappropriate funds from the estate. The defendants were served and filed a motion to dismiss only, sending the case into automatic default pursuant to O.C.G.A. § 9-11-55(a)[25] when they failed, as required by O.C.G.A. § 9-11-12(a),[26] to answer the complaint within thirty days after service.[27]

The court denied the defendants' motion to dismiss six months later. The defendants thereafter filed an untimely answer. The plaintiff moved for entry of a default judgment and the defendants moved to set aside the default, arguing that a proper case had been made for opening default where their attorney filed a sworn affidavit stating he had failed to file a timely answer due to "his good faith (mis)understanding [of] the Civil Practice Act."[28]

After granting the motion for default judgment and denying the defendants' motion to set aside the default, the trial court issued a certificate of immediate review.[29] The court of appeals affirmed the trial court's judgment because "some reasonable explanation was required to open . . . default under the 'proper case' ground."[30]

O.C.G.A. § 9-11-55(b) grants the trial court discretion to open a default at any time before the entry of a final judgment where the defendant pays costs and demonstrates "providential cause," "excusable neglect," or where the judge determines that a "proper case" has been

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[21] *Suzuki*, 351 Ga. App. at 198, 830 S.E.2d at 560.

[22] 308 Ga. 204, 839 S.E.2d 546 (2020).

[23] O.C.G.A. § 9-11-55(b) (2020).

[24] *Bowen*, 308 Ga. at 208, 839 S.E.2d at 550.

[25] O.C.G.A. § 9-11-55(a) (2020).

[26] O.C.G.A. § 9-11-12(a) (2020).

[27] *Bowen*, 308 Ga. at 204, 839 S.E.2d at 547.

[28] *Id.* at 204–05, 839 S.E.2d at 547–48.

[29] *Id.* at 205, 839 S.E.2d at 548.

[30] *Id.*

made.[31] The supreme court granted certiorari in *Bowen* to decide whether a "reasonable explanation" is required to show a "proper case" for opening default.[32]

The court noted "that the proper case ground [for opening default] is the broadest of the three and permits 'the reaching out . . . in every conceivable case where injustice might result if the default were not opened.'"[33] It further explained that the imposition of a "reasonable excuse" requirement to the "proper case" ground for opening default arose from a misreading of the *Brucker v. O'Connor*[34] case by the court of appeals in *BellSouth Telecommunications, Inc. v. Future Comms., Inc.*,[35] in which the supreme court "held that a default may be opened under that ground 'only where a reasonable explanation for the failure to timely answer exists.'"[36]

The court in *Bowen* held that the court of appeals' holding in *BellSouth Telecommunications, Inc.* is inconsistent with the statute's directive that a trial court consider "all the facts" in determining whether a "proper case" exists.[37] The court reasoned that "[r]equiring a 'reasonable excuse' to open default under the proper case ground is thus unsupported by the statutory language and further, would render the proper case ground 'mere surplusage' by subsuming that ground into the excusable neglect ground"[38] which has long "refer[ed] to cases where there is a *reasonable excuse* for failing to answer."[39]

C. Direct Actions

In *Daily Underwriters of America v. Williams*,[40] the Georgia Court of Appeals addressed whether the direct action provision of O.C.G.A.

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[31] O.C.G.A. § 9-11-55(b); *see also* Karan, Inc. v. Auto-Owners Ins. Co., 280 Ga. 545, 547, 629 S.E.2d 260, 263 (2006).

[32] *Bowen*, 308 Ga. at 204, 839 S.E.2d at 547.

[33] *Id.* at 208, 839 S.E.2d at 550 (internal citations omitted).

[34] 115 Ga. 95, 41 S.E. 245 (1902), *overruled by* Houston v. Lowes of Savannah, Inc., 235 Ga. 201, 219 S.E.2d 115 (1975).

[35] 293 Ga. App. 247, 666 S.E.2d 699 (2008).

[36] *Bowen*, 308 Ga. at 208, 839 S.E.2d at 550 (quoting *BellSouth*, 293 Ga. App. at 250, 666 S.E.2d at 702).

[37] *Id.*

[38] *Id.*

[39] *Brucker*, 115 Ga. at 96, 41 S.E. at 246.

[40] 354 Ga. App. 551, 841 S.E.2d 135 (2020) (McMillian, J., concurring specially) (Phipps, S.A.J. dissenting) (noting Georgia Court of Appeals Rule 33.2(a) (2020), case is physical precedent only).

§ 40-2-140[41] permitted plaintiffs to sue insurers for motor carriers engaged in purely interstate commerce.[42] After suffering injuries in a wreck involving a tractor-trailer, the plaintiffs filed suit against the tractor-trailer driver, the employer motor carrier, and the motor carrier's liability insurer.[43] The plaintiffs relied on O.C.G.A. § 40-1-112(c)[44] as authorizing their direct action claims against the motor carrier's liability insurer.[45] The insurer moved for summary judgment, arguing the plaintiffs' direct action claims should be dismissed because the motor carrier defendant was an interstate motor carrier and the statute relied upon by plaintiffs, O.C.G.A. § 40-1-112(c), applies only to insurers of motor carriers engaged in intrastate activity.[46] The plaintiffs argued in response that O.C.G.A. § 40-2-140, although not cited in their complaint, authorized the plaintiffs' direct action claims against the insurer. The trial court agreed with the plaintiffs and denied the insurer's motion for summary judgment.[47] The court of appeals granted the insurer's application for interlocutory review but ultimately affirmed the trial court's denial of summary judgment.[48]

The court of appeals held that O.C.G.A. § 40-2-140(d)(4)[49] permits a plaintiff injured by an interstate motor carrier to pursue a direct action claim against the motor carrier's liability insurer.[50] The court reiterated that O.C.G.A. § 40-1-112[51] does not authorize direct action claims against insurers of motor carriers engaged in purely interstate commerce since the provisions of that title expressly do not apply to motor carriers engaged in purely interstate commerce.[52] The court further held that a plaintiff does not waive its direct action claim against the liability insurer of a motor carrier engaged in purely interstate commerce by failing to include in the complaint a citation to O.C.G.A. § 40-2-140 if the complaint

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[41] O.C.G.A. § 40-2-140 (2020). "Any person having a cause of action, whether arising in tort or contract, under this Code section may join in the same cause of action the motor carrier and its insurance carrier." (citing O.C.G.A. § 40-2-140(c)(4)).

[42] *Daily*, 354 Ga. App. at 557, 841 S.E.2d at 141.

[43] *Id.* at 552, 841 S.E.2d at 137.

[44] O.C.G.A. § 40-1-112(c) (2020) (providing "it shall be permissible under this part for any person having a cause of action arising under this part to join in the same action the motor carrier and the insurance carrier, whether arising in tort or contract"). *Id.*

[45] *Daily*, 354 Ga. App. at 552, 841 S.E.2d at 137.

[46] *Id.* at 552, 841 S.E.2d at 137–38.

[47] *Id.* at 552, 841 S.E.2d at 138.

[48] *Id.*

[49] O.C.G.A. § 40-2-140(d)(4) (2020).

[50] *Daily*, 354 Ga. App. at 558, 841 S.E.2d at 141.

[51] O.C.G.A. § 40-1-112 (2020).

[52] *Daily*, 354 Ga. App. at 553, 841 S.E.2d at 138 (citing O.C.G.A. § 40-1-126).

puts the liability insurer on notice that a direct action claim is being asserted.[53]

D. Evidence and Expert Testimony

In *Lee v. Smith*,[54] the Georgia Supreme Court held that a trial court abuses its discretion by excluding an expert witness "solely because the witness was identified after the deadline set in a scheduling, discovery, and/or case management order."[55] Although *Lee* involved the exclusion of an expert witness, the court's holding broadly applies to any witness excluded solely because the witness was belatedly disclosed.[56]

In addition to holding that trial courts are not permitted to exclude a witness because the witness was disclosed in violation of a scheduling order, the court established four factors that a trial court must analyze when deciding whether to exclude a witness in these circumstances.[57] Relying on state and federal authority from other jurisdictions, the court held that those factors include: "(1) the explanation for the failure to disclose the witness, (2) the importance of the testimony, . . . (3) the prejudice to the opposing party if the witness [is] allowed to testify," and (4) whether a less harsh remedy than the exclusion of the witness would be sufficient to ameliorate the prejudice and vindicate the trial court's authority.[58] Although the court emphasized that these four factors "should be considered in all cases where a witness is disclosed in an untimely manner in violation of a court-imposed deadline," the court noted that "additional factors might also be appropriate to consider in unusual or extraordinary cases."[59]

In reaching its holding, the court explicitly overruled several Georgia Court of Appeals decisions that "can be read to support the proposition that a trial court does not abuse its discretion by excluding a witness solely because the witness was . . . [disclosed in violation of a scheduling order]."[60]

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[53] *Id.* at 556–57, 841 S.E.2d at 140–41 (Phipps, S.J., dissenting specially). *Id.* at 559–60, 841 S.E.2d at 142 (Phipps, J., dissenting). A petition for writ of certiorari was filed with the Supreme Court of Georgia on May 28, 2020. That petition was still pending at the time this Article was submitted for publishing.

[54] 307 Ga. 815, 838 S.E.2d 870 (2020).

[55] *Id.* at 822–23, 838 S.E.2d at 876.

[56] *Id.* at 823–24, 838 S.E.2d at 877.

[57] *Id.* at 823, 838 S.E.2d at 877.

[58] *Id.* at 823–24, 838 S.E.2d at 877 (alteration in original).

[59] *Id.* at 824 n.5, 838 S.E.2d at 878 n.5.

[60] *Id.* at 822–23, 838 S.E.2d at 876–77 (citing Moore v. Cottrell, Inc., 334 Ga. App. 791, 780 S.E.2d 442 (2015); Kohler v. Van Peteghem, 330 Ga. App. 230, 767 S.E.2d 775 (2014); Vaughan v. WellStar Health System, 304 Ga. App. 596, 601–02, 696 S.E.2d 506 (2010); Collins v. Dickman, 295 Ga. App. 601, 603–04, 672 S.E.2d 433 (2008)).

In *Cham v. ECI Management Corp.*,[61] the Georgia Court of Appeals reaffirmed that evidence of a party's wealth or financial status is no longer "categorically inadmissible" in cases in which punitive damages are not in issue.[62] Analyzing the Georgia Supreme Court's recent decision in *Chrysler Group v. Walden*,[63] the court of appeals explained that "the admissibility of party-wealth evidence is a fact-specific analysis in which the trial court must determine whether the evidence is relevant under O.C.G.A. § 24-4-401 ('Rule 401') and more prejudicial than probative under O.C.G.A. § 24-4-403 ('Rule 403')."[64]

In *Cham*, the plaintiffs filed a wrongful death lawsuit against the owner and manager of an apartment complex where a family member was killed during a robbery in 2015.[65] At trial, counsel for the owner and manager of the apartment complex argued in opening statement that in the years immediately preceding the killing "they went from 'spending 17 to $18,000 a year [on security] to spending $62,000 a year, 100, 200, 300 percent [increase].'"[66] In response, the plaintiffs' counsel attempted to elicit testimony that the defendants' spending on security was a relatively small percentage of their overall budget, but the trial court sustained an objection to this line of questioning on the grounds that it impermissibly sought testimony regarding "the financial worth of the Defendant[s]."[67] The jury rendered a verdict for the defense.[68]

Although the court of appeals reversed the verdict for the defense and remanded on other grounds, the court agreed with the plaintiffs that evidence regarding the percentage of the defendants' overall budget devoted to security was not categorically inadmissible as party-wealth evidence.[69] The court of appeals emphasized that "Georgia's common law rule relating to the relevance of party-wealth evidence is no longer in force," in light of the enactment of Georgia's 2013 Evidence Code.[70] The court of appeals then explained that "[o]n remand, the trial court should first determine whether the evidence is relevant to an issue in this case," and "[i]f so, the trial court should then conduct a balanc[e] of the evidence

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[61] 353 Ga. App. 162, 836 S.E.2d 555 (2019).

[62] *Id.* at 171, 836 S.E.2d at 563.

[63] 303 Ga. 358, 812 S.E.2d 244 (2018).

[64] *Cham*, 353 Ga. App. at 171, 836 S.E.2d at 563 (citing O.C.G.A. §§ 24-4-401 and 24-4-403 (2020)).

[65] *Id.* at 162, 836 S.E.2d at 557.

[66] *Id.* at 168, 836 S.E.2d at 561 (third alteration in original) (quotation marks omitted).

[67] *Id.* at 168–71, 836 S.E.2d at 561–63.

[68] *Id.* at 162, 836 S.E.2d at 557–58.

[69] *Id.* at 171–72, 836 S.E.2d at 563.

[70] *Id.*

under Rule 403, determining whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice."[71]

E. Professional Negligence

In *Lowndes County Health Services, LLC v. Copeland*,[72] the Georgia Court of Appeals affirmed a trial court's ruling that claims arising from the failure to properly staff the night shift at a skilled nursing facility sound in ordinary negligence rather than professional negligence.[73] On October 26, 2012, Bobby Copeland died from complications related to a bowel obstruction while in the care of Heritage Healthcare at Holly Hill (Holly Hill), a skilled nursing facility in Valdosta.[74] The evidence showed that a licensed practical nurse (LPN) who worked the night shift at Holly Hill discovered Copeland had vomited on himself and had a "slightly distended" stomach with no bowel sounds in three of four quadrants around 10:45 PM on October 25.[75] The LPN called the physician's assistant for Holly Hill's medical director, relayed her observations, and asked if Copeland should go to the hospital. The physician's assistant said not to send Copeland to the hospital and instead ordered a blood test, abdominal x-ray, and anti-nausea medication. Around 10:15 a.m. the following morning, Copeland, whose symptoms persisted, was examined by the physician's assistant. Forty-five minutes later, Copeland was transported by ambulance to the emergency department at South Georgia Medical Center. Around 5:30 p.m., Copeland was transferred to the intensive care unit where he died a few hours later.[76]

Copeland's son and the administrator of his estate sued Holly Hill for causing Copeland's death.[77] A jury awarded the plaintiffs over $7.5 million in compensatory damages and found Holly Hill liable for both ordinary and professional negligence.[78] On appeal, Holly Hill challenged the trial court's denial of its motion for directed verdict on the plaintiffs' negligent staffing claim.[79] The plaintiffs alleged that Holly Hill negligently staffed the night shift on October 25, 2012, because no one there could properly assess Copeland's condition.[80] The plaintiffs asserted this was an ordinary negligence claim, but Holly Hill argued

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[71] *Id.* at 172, 836 S.E.2d at 563.

[72] 352 Ga. App. 233, 834 S.E.2d 322 (2019).

[73] *Id.* at 239, 834 S.E.2d at 327.

[74] *Id.* at 233–34, 834 S.E.2d at 324–25.

[75] *Id.* at 233–34, 834 S.E.2d at 324.

[76] *Id.* at 234, 834 S.E.2d at 324–25.

[77] *Id.* at 233, 834 S.E.2d at 324.

[78] *Id.* at 234, 834 S.E.2d at 325.

[79] *Id.* at 237, 834 S.E.2d at 326.

[80] *Id.* at 238, 834 S.E.2d at 326–27.

that the claim sounded in professional negligence and, thus, had to be supported by expert evidence, which the plaintiffs did not present, because staffing decisions involved "professional nursing judgment."[81] The trial court disagreed, and the court of appeals affirmed.[82]

While the evidence showed that a registered nurse made the overnight-staffing schedule, those staffing decisions were based on what Holly Hill had done historically and the judgment of the scheduling nurse "in collaboration with the facility administrator" responsible for Holly Hill's overall operation.[83] As a result and as usual, no registered nurses were scheduled to work the night shift on October 25, meaning no one "qualified to perform an independent nursing assessment of a resident's medical condition" was on duty.[84] At trial, Holly Hill adduced no evidence that the final decision about how many registered nurses were available to schedule on the night shift was made by a medical professional or constituted a medical decision, rather than a business decision based on the comparative cost of paying registered nurses to work.[85] Because the limited availability of registered nurses was the product of "business-related ordinary negligence," the court of appeals held the trial court properly concluded that the plaintiffs' negligent staffing claim sounded in ordinary rather than professional negligence.[86]

F. Punitive Damages

In *Coen v. Aptean, Inc.*,[87] the Georgia Supreme Court considered whether punitive damages are recoverable under the current abusive litigation statutes, O.C.G.A. §§ 51-7-80 through 51-7-85,[88] enacted in 1989.[89] Those statutes permit a victim of abusive litigation to recover "all damages allowed by law as proven by the evidence, including costs and expenses of litigation and reasonable attorney's fees."[90] After examining the plain text of the statutes, reviewing the common law at the time of enactment, and considering the possibility of double recovery, the court unanimously held that a plaintiff can recover punitive damages in a

[81] *Id.* at 238, 834 S.E.2d at 327.

[82] *Id.* at 238–39, 834 S.E.2d at 327.

[83] *Id.*

[84] *Id.* at 238, 834 S.E.2d at 327.

[85] *Id.* at 239, 834 S.E.2d at 327.

[86] *Id.*

[87] 307 Ga. 826, 838 S.E.2d 860 (2020).

[88] O.C.G.A. §§ 51-7-80 through 51-7-85 (2020).

[89] Ga. S. Bill 239, Reg. Sess., 1989 Ga. Laws 408 (Codified at O.C.G.A §§ 51-7-80 through 51-7-85 (2020)).

[90] O.C.G.A. § 51-7-83(a) (2020).

statutory abusive litigation action if the plaintiff is not seeking relief solely for injury to peace, happiness, and feelings.[91]

The plaintiff in *Coen* was fired from CDC Software in April 2012. After his firing, he sued CDC Software for breach of his employment contract.[92] In reaction to several claims and defenses asserted by CDC in response to his complaint, Coen sent an abusive litigation letter to CDC Software, Aptean, and their counsel giving them, as required by the abusive litigation statutes, an opportunity to drop the claims and defenses that "lacked substantial justification."[93] As a result, the defendants dropped some but not all claims and defenses which Coen asserted were without merit.[94] "In April 2014, the trial court granted . . . partial summary judgment" to Coen, ruling the employment contract was "valid and enforceable" and that CDC Software had no basis for not paying him.[95]

Coen then moved under O.C.G.A. § 9-15-14(a)[96] and O.C.G.A. § 9-15-14(b)[97] for attorney's fees and litigation expenses. The trial court granted Coen's motion, awarded him $176,484.80, and held CDC Software, Aptean, and their counsel, jointly and severally liable for the damages. In September 2014, Coen dismissed all remaining claims with prejudice.[98]

After filing three separate abusive litigation lawsuits in 2015, Coen dismissed those actions and filed a renewal action in September 2016, naming all parties from the three prior cases.[99] In the renewal action, Coen sought "damages for injury to his peace, happiness, or feelings; punitive damages; and attorney['s] fees for the pending action."[100] The trial court dismissed Coen's renewal action, as relevant here, because it ruled that punitive damages were unavailable in an abusive litigation action.[101] The court of appeals affirmed the trial court's ruling.[102] The Georgia Supreme Court granted certiorari, reversed, and remanded.[103]

The supreme court held that punitive damages are available in an abusive-ligation action based on the plain text of O.C.G.A. § 51-7-83(a):

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[91] *Coen*, 307 Ga. at 826–27, 838 S.E.2d at 861.

[92] *Id.* at 827, 838 S.E.2d at 861.

[93] *Id.* at 827 n.2, 838 S.E.2d at 861 n.2.

[94] *Id.*

[95] *Id.* at 827, 838 S.E.2d at 861.

[96] O.C.G.A. § 9-15-14(a) (2020).

[97] O.C.G.A. § 9-15-14(b) (2020).

[98] *Coen*, 307 Ga. at 827, 838 S.E.2d at 861.

[99] *Id.* at 827–28, 838 S.E.2d at 861.

[100] *Id.* at 828, 838 S.E.2d at 861.

[101] *Id.* at 828, 838 S.E.2d at 862.

[102] *Id.*

[103] *Id.* at 828–29, 840–41, 838 S.E.2d at 862, 869–70.

"'[a] plaintiff who prevails in an action under this article shall be entitled to all damages allowed by law as proven by the evidence, including costs and expenses of litigation and reasonable attorney's fees.'"[104] The court noted that it "must also consider the legal context in which this statutory text was enacted in 1989."[105] After surveying the common law, the court concluded that punitive damages were generally available in common law abusive litigation actions if the plaintiffs did not seek damages solely for injury to peace, happiness, or feelings.[106] Having concluded that the abusive litigation statutes generally permit recovery of punitive damages, the supreme court remanded the case so that the lower courts could consider whether Coen had satisfied other prerequisites to proceed with his claims.[107]

G. Service of Process

In *Henderson v. James*,[108] the Georgia Court of Appeals addressed whether service by publication was sufficient to confer personal jurisdiction over the defendant in a pending tort action.[109] The plaintiff in *Henderson* filed a personal injury lawsuit against the defendant arising out of an October 4, 2016 car wreck that occurred in Ware County. The initial complaint alleged that the defendant resided in Ware County.[110] After the plaintiff was unable to locate or personally serve the defendant, the plaintiff filed an amended complaint alleging the defendant had "apparently departed . . . Ware County and the State of Georgia."[111] The trial court subsequently authorized service by publication and after the statute of limitations expired, the defendant's insurer filed a motion to dismiss on behalf of the defendant, arguing that service by publication was insufficient to confer personal jurisdiction over the defendant.[112] After the trial court denied the defendant's motion to dismiss, the court of appeals granted an application for discretionary review to determine whether the trial court erred.[113]

"[T]he general rule in Georgia is that service by publication does not confer personal jurisdiction over a defendant in a tort action."[114] An

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[104] *Id.* at 829, 838 S.E.2d at 862 (quoting O.C.G.A. § 51-7-83(a)).

[105] *Id.* at 832, 838 S.E.2d at 864.

[106] *Id.* at 837, 838 S.E.2d at 867–68.

[107] *Id.* at 840–41, 838 S.E.2d at 870.

[108] 350 Ga. App. 361, 829 S.E.2d 429 (2019).

[109] *Id.* at 365, 829 S.E.2d at 433.

[110] *Id.* at 361, 829 S.E.2d at 431.

[111] *Id.*

[112] *Id.* at 362–63, 829 S.E.2d at 431–32.

[113] *Id.* at 361, 829 S.E.2d at 430–31.

[114] *Id.* at 364, 829 S.E.2d at 433.

established but narrow exception to this general rule exists where there is evidence that the defendant (1) resides within the trial court's jurisdiction; (2) has actual knowledge of the lawsuit; and (3) "willfully secrets himself" as a means to frustrate and avoid personal service efforts.[115] The court of appeals held in *Henderson* that this exception was inapplicable under the facts of the case because "the record contain[ed] no evidence whatsoever that [defendant] ha[d] actual knowledge of the lawsuit pending against him[,]" and the amended complaint alleged the defendant no longer resided in the trial court's jurisdiction.[116] Accordingly, service by publication did not confer personal jurisdiction over the defendant, and the court of appeals held that the trial court erred in denying the motion to dismiss filed on the defendant's behalf.[117]

H. Statutes of Limitation

In *Langley v. MP Spring Lake, LLC*,[118] the Georgia Supreme Court reversed the Georgia Court of Appeals and held that a residential lease agreement containing a one-year limitation period for asserting "any legal action" did not preclude the plaintiff from bringing a premises liability tort claim outside the agreed upon one-year limitation period.[119] The court explained that the lease agreement's "Limitation Provision" must be read "in light of the contract as a whole and in the legal context in which it was created."[120]

The purpose and intent of the lease agreement was to create a landlord-tenant relationship.[121] Because the "Limitation Provision" "is found near the end of a contract establishing a lease agreement[,]" it was unclear "whether [the phrase] 'any legal action' should be given its literal meaning, or whether the parties intended to limit its application to lawsuits arising from the lease agreement."[122] In light of this ambiguity, the court determined that "the agreement must be construed against [the apartment complex], the drafter, and in favor of [the plaintiff], the non-drafter."[123] The court noted that the plaintiff's lawsuit "is not legally

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[115] *Id.* (quoting Melton v. Johnson, 242 Ga. 400, 403, 249 S.E.2d 82 (1978)).

[116] *Id.* at 365, 829 S.E.2d at 433.

[117] *Id.*

[118] 307 Ga. 321, 834 S.E.2d 800 (2019).

[119] *Id.* at 321, 834 S.E.2d at 802. The relevant underlying facts and a summary of the Georgia Court of Appeals decision can be found in Mercer Law Review's 2018 Annual Survey of Georgia Law. *See* Brandon L. Peak et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 70 Mercer L. Rev. 253, 269–70 (2018).

[120] *Langley*, 307 Ga. at 325, 834 S.E.2d at 805.

[121] *Id.*

[122] *Id.*

[123] *Id.*

predicated on the landlord-tenant relationship between . . . [the parties]."[124] Instead, the plaintiff's tort claim is "predicated on [the defendant apartment complex]'s status as a property owner and [the plaintiff]'s status as an invitee on that property. The relationship between an owner and an invitee is separate from the relationship between a landlord and a tenant."[125]

Viewed in this context, the ultimate question was whether the parties to the agreement intended for the "Limitation Provision . . . to apply to the conceivable universe of legal claims that may arise between the parties, or is its applicability limited to claims arising from the lease agreement."[126] The court concluded that the "Limitation Provision" was limited to claims arising from the lease agreement and did not apply to tort claims independent of the lease agreement, such as the plaintiff's premises liability claim.[127]

IV. CONCLUSION

The above cases and legislation have, in the Authors' estimation, most significantly affected trial practice and procedure in Georgia during the Survey period. This Article, however, is not intended to be exhaustive of all legal developments for this topic.

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[124] *Id.* at 326, 834 S.E.2d at 805.

[125] *Id.* at 326, 834 S.E.2d at 805–06.

[126] *Id.* at 327, 834 S.E.2d at 806.

[127] *Id.* The court observed:

> It is difficult to believe, for example, that the parties intended the Limitation Provision to apply to tort claims resulting from a traffic accident miles away from the apartment complex between Langley's and the property manager's vehicles, an intentional tort lawsuit against a property manager for punching a tenant, or a shareholder liability suit if Langley happened to be a shareholder in MP Spring Lake, LLC. (1) Instead, when read in the context of the lease agreement, we conclude that the general language "any legal action," in the absence of language specifically encompassing tort claims, is limited to claims arising out of the lease agreement.

Id. Because the lease agreement's "Limitation Provision" did not specifically apply to the plaintiff's premises liability claim, the court did "not reach the question of whether that provision was enforceable" as to such claims. *Id.* at 328, 834 S.E.2d at 807–08.