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Labor & Employment Law

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I. INTRODUCTION

This Article surveys revisions to the Official Code of Georgia Annotated (O.C.G.A.) and decisions interpreting Georgia law from June 1, 2015 to May 31, 2016 that affect labor and employment relations for Georgia employers.

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II. RECENT LEGISLATION

A. Protecting Georgia Small Businesses Act

The "Protecting Georgia Small Businesses Act" [1] will become effective January 1, 2017.[2] The purpose of the Act is to clarify the employment relationship between a "franchisor" and a "franchisee."[3] Under the Act, "neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose."[4] The Act states the terms "franchisor" and "franchisee" have the same meanings as in 16 Code of Federal Regulations (C.F.R.) section 436.1.[5] "*Franchisor* means any person who grants a franchise and participates in the franchise relationship."[6] "*Franchisee* means any person who is granted a franchise."[7] However, the Act does not apply to Chapter 9 of Title 34 of the O.C.G.A.,[8] which relates to workers' compensation.[9]

B. Amendments to Employer Unemployment Contributions

In addition to enacting O.C.G.A. § 34-1-9[10] on January 1, 2017, the Act also amended Chapter 8 of Title 34 as of July 1, 2016, which relates to employment security.[11] The Act provides the Commissioner of Labor (Commissioner) authorization "to submit to and receive from the state revenue commissioner certain information related to persons paying into or receiving funds" from the Unemployment Trust Fund (Fund).[12] Further, penalties are provided "for the unlawful divulging of certain confidential information" relating to the Fund.[13]

The Act also enacts O.C.G.A. § 34-8-130,[14] which adds authorization for the Commissioner to submit names and social security numbers of

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1. Ga. S. Bill 277, Reg. Sess. (2016) (amending O.C.G.A. § 34-1-9 (Supp. 2016)).
2. *Id.* § 3.
3. *See* O.C.G.A. § 34-1-9(a).
4. O.C.G.A. § 34-1-9(b).
5. O.C.G.A. § 34-1-9(a) (referencing Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436.1 (2015)).
6. 16 C.F.R. § 436.1(k).
7. 16 C.F.R. § 436.1(i).
8. O.C.G.A. tit. 34 ch. 9 (Supp. 2016).
9. O.C.G.A. § 34-1-9(c).
10. O.C.G.A. § 34-1-9 (Supp. 2016).
11. Ga. H.R. Bill 904, Reg. Sess. (2016) (amending O.C.G.A. tit. 34 ch. 8 (2008 & Supp. 2016)).
12. *Id.* (codified as amended at O.C.G.A. § 34-8-130 (Supp. 2016)).
13. *Id.*
14. O.C.G.A. § 34-8-130 (Supp. 2016).

individuals, and names of any employer along with the number of employees who are being reported, for the state revenue commissioner to verify and report back submitted earnings.[15] Further, "[n]othing in this Code Section shall prevent the Department of Revenue . . . . access to records or information provided for under Code Section 34-8-125."[16]

Lastly, the Act amends O.C.G.A. §§ 34-8-151, 34-8-155, 34-8-180, 34-8-181, and 34-8-185.[17] A statutory provision in the Act explains the following:

> For periods on or after January 1, 2017, but on or before December 31, 2022, each new or newly covered employer shall pay contributions at a rate of 2.64 percent of wages paid by such employer with respect to employment during each calendar year until the employer is eligible for a rate calculation based on experience . . . .[18]

There are variations from the standard rate addressed in different provisions of the Code.[19] "For the periods on or after January 1, 2017, but on or before December 31, 2022, there is an administrative assessment of 0.06 percent to be assessed upon all wages as defined in Code section 34-8-49 . . . ."[20] The Act provides an automatic repeal of Article 6 of Chapter 8 of Title 34 from December 31, 2016, until January 1, 2023.[21] Article 6 of Chapter 8 of Title 34 relates to administrative assessments.

III. WRONGFUL TERMINATION

A. Employment at Will

1. Overview

"Employment at-will in other jurisdictions may be weakening, but in Georgia the presumption remains that all employment is at-will unless a statutory or contractual exception exists."[22] Unlike other states, in which

15. Ga. H.R. Bill 904 § 1 (codified at O.C.G.A. § 34-8-130).
16. O.C.G.A § 34-8-130(b).
17. Ga. H.R. Bill 904 §§ 2 to 6.
18. O.C.G.A. § 34-8-151(d) (Supp. 2016).
19. O.C.G.A. § 34-8-155 (Supp. 2016).
20. O.C.G.A. § 34-8-180(b) (Supp. 2016).
21. Ga. H.R. Bill 904 § 5 (codified at O.C.G.A. § 34-8-181 (Supp. 2016)).
22. W. Melvin Haas III et al., *Labor and Employment Law, Annual Survey of Georgia Law*, 65 MERCER L. REV. 159, 161 (2013). *See, e.g.*, O.C.G.A. § 18-4-7 (2015 & Supp. 2016) (mandating that an employer cannot discharge an employee whose earnings are subject to garnishment); O.C.G.A. § 34-1-3 (2008) (providing that employers cannot discharge an employee who are absent from work as a result of being required to attend a judicial proceeding in response to a court order).

the judiciary has created public policy exceptions to the common law doctrine, Georgia's doctrine of employment at-will is statutory.[23] As a result, the judiciary cannot amend the doctrine.[24] It must be done legislatively.[25] In short:

> In Georgia, the general rule is that an employee, employed at will and not by contract, cannot bring an action against his employer for wrongful discharge from employment or wrongful interference with the employment contract when and where he is an at will employee with no definite and certain contract of employment. The employer with or without cause and regardless of its motives may discharge the employee without liability.[26]

"An indefinite hiring" is at-will employment.[27] The definition of an indefinite hiring includes contract provisions specifying "'permanent employment,' 'employment for life,' [and] 'employment until retirement.'"[28] Further, a contract specifying an annual salary does not create a definite period of employment.[29] Even if an employment contract does specify a definite period of employment, any employment beyond that period becomes employment at-will subject to discharge without cause.[30]

2. Exceptions to Employment at Will

In certain instances, offer letters that contain a strictly defined employment period, among other necessary terms of employment, can be sufficient evidence to overcome the presumption of at-will employment. For instance, in *Tricoli v. Watts*,[31] the plaintiff argued his offer letter incorporated the policy and terms of the Board of Regents, and consequently he was not terminable at will.[32] The Georgia Court of Appeals ruled the policy language the plaintiff relied upon did not create a definite term of employment because it did not state, as a consequence of the

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23. *See* O.C.G.A. § 34-7-1 (2008).

24. Eckhardt v. Yerkes Reg'l Primate Ctr., 254 Ga. App. 38, 39, 561 S.E.2d 164, 165 (2002).

25. *Id.* at 39, 561 S.E.2d at 165-66 (declining to create public policy exception for whistle blowing activities).

26. *Id.* at 38, 561 S.E.2d at 165.

27. O.C.G.A. § 34-7-1 (2008).

28. Ga. Power Co. v. Busbin, 242 Ga. 612, 613, 250 S.E.2d 442, 443-44 (1978).

29. Ikemiya v. Shibamoto Am., Inc., 213 Ga. App. 271, 273, 444 S.E.2d 351, 353 (1994).

30. Schuck v. Blue Cross & Blue Shield, Inc., 244 Ga. App. 147, 147-48, 534 S.E.2d 533, 533-34 (2000).

31. 336 Ga. App. 837, 783 S.E.2d 475 (2016).

32. *Id.* at 839, 783 S.E.2d at 477-78.

Board's failure to provide the plaintiff notice, that the plaintiff's employment would be renewed or otherwise extended.[33] Thus, as a matter of law, the policy language did not overcome the presumption of terminable employment.[34]

Notwithstanding, an employer's publications can give rise to contractual actions in certain situations.[35] In *Shelnutt v. Mayor & Alderman of Savannah*,[36] firefighters sued the City of Savannah for breach of contract after they were promoted without receiving raises pursuant to the City's Pay Policy referenced in their employee handbook. The City filed a motion to dismiss, citing the Handbook's disclaimer that stated it "does not constitute an expressed or implied contract."[37] Treating the Pay Policy and the Handbook as one document, the trial court dismissed the firefighters' claim without further discussion. The firefighters appealed.[38] The Georgia Court of Appeals reversed.[39]

In finding the Pay Policy an enforceable contract, the court of appeals held the trial court erred when it treated the City's Pay Policy and Handbook as one document.[40] The City's Handbook did not include the text of its Pay Policy or explicitly incorporate it, but instead merely referenced the policy in a list of employment related topics.[41] Consequently, because the two documents were considered separately, the disclaimer did not apply to the Pay Policy.[42]

Further, the court of appeals determined the Pay Policy unequivocally provided for a definite, calculable salary increase upon the firefighters' promotion.[43] The court made this determination despite the policy's language allowing the City Manager to make necessary exceptions in her discretion.[44] The court found this qualifying language did not make the policy wholly discretionary nor did it affect the mandatory nature of the policy.[45] Rather, the manager was required to follow the policy unless she decided an exception was essential in a particular case.[46]

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33. *Id.* at 839, 783 S.E.2d at 478.
34. *Id.*
35. JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW §§ 1 to 9 (3d ed. 2000).
36. 333 Ga. App. 446, 776 S.E.2d 650 (2015).
37. *Id.* at 448, 776 S.E.2d at 653.
38. *Id.* at 446-49, 776 S.E.2d at 652-54.
39. *Id.* at 454, 776 S.E.2d at 657.
40. *Id.* at 449, 776 S.E.2d at 654.
41. *Id.* at 448, 776 S.E.2d at 653.
42. *Id.* at 449, 776 S.E.2d at 654.
43. *Id.* at 451-52, 776 S.E.2d at 655-56.
44. *Id.* at 452-53, 776 S.E.2d at 656.
45. *Id.* at 453, 776 S.E.2d at 656-67
46. *Id.* at 453, 776 S.E.2d at 656.

B. Breach of Employment Contract (Other than At-Will)

1. Formulation of Employment Contracts

For an employment agreement to be enforceable, it must include all traditional elements of a contract: offer, acceptance, and consideration.[47] Additionally, it must include all necessary terms and the terms must be definite.[48] During the Survey period, in *Mosaic Business Advisory Services, Inc. v. Stone*,[49] the court upheld a jury verdict in favor of enforcing the terms of a bonus agreement based on a company's net profits, even though the agreement did not include details such as the timing of payment or minimum cash reserves the business would retain.[50]

In *Mosaic*, Stone and Olives opened a consulting firm, named Mosaic, together. The next year, Olives fired Stone. A few days after the termination, Olives and Stone reconciled and agreed to continue discussion of Stone's compensation. For weeks, the parties continued to discuss the compensation agreement orally and by email. Eventually, they agreed that sixty-five percent of the net profit resulting from a project would be paid to the person in charge of that project, and Mosaic would retain the rest for operating expenses. After attempts to finalize other details, including the timing of payments, minimum cash reserves, and founder departure safeguards, the parties' negotiations broke down. Throughout negotiations, Stone continued her employment with Mosaic. Shortly thereafter, Olives informed Stone that he wished to dismantle the business, and Stone subsequently resigned. Mosaic did not pay Stone her July 2012 bonus, and Stone filed a breach of contract action. The jury found for Stone.[51] Mosaic appealed arguing the mid-year bonus was not enforceable because of lack of consideration, indefinite terms, and no final agreement.[52]

First, Mosaic argued the promise of a mid-year bonus was not made at the beginning of Stone's employment, so the promise was a mere gratuity lacking consideration.[53] The court disagreed and held that because the negotiation occurred after Stone's termination and Stone's subsequent

47. *See* WIMBERLY, GEORGIA EMPLOYMENT LAW, *supra* note 35, at §§ 1-2.
48. *Id.*
49. 336 Ga. App 28, 784 S.E.2d 426 (2016).
50. *Id.* at 28-30, 784 S.E.2d at 427-29.
51. *Id.* at 28-31, 784 S.E.2d at 428-30.
52. *Id.* at 31-33, 784 S.E.2d at 430-31.
53. *Id.* at 31-32, 784 S.E.2d at 430-31.

continued employment with Mosaic, Stone's employment was conditioned upon the receipt of her mid-year bonus and Stone's continued employment was valid consideration.[54]

Second, Mosaic argued the terms of the bonus agreement were too indefinite to be enforceable because of the parties' ongoing dispute regarding the minimum amount of liquidity reserves Mosaic should maintain, the pool from which Stone's bonus would be taken, and the calculation of bonus for shared projects.[55] The court disagreed and found these ancillary terms were not indefinite enough to make the bonus agreement unenforceable.[56]

Third, Mosaic argued Stone terminated negotiations before the parties could finalize an agreement.[57] The court disagreed and held there was ample evidence for a jury to find the agreement was finalized based on Stone's testimony that she continued her employment because of her understanding that the parties had come to an agreement regarding the terms of her bonus.[58]

2. Interpretation of Employment Contracts (Other than At-Will Contracts)

When interpreting the true meaning of an employment contract's terms, Georgia courts utilize the usual rules of contract interpretation codified in Title 13 of the O.C.G.A.[59] The aim of contract interpretation is to enforce the true intentions of the parties at the time the contract was formed.[60] If, from the language of the contract, the parties' intention is legally permissible and clear, the contract is enforceable regardless of other rules of contract construction.[61] If the intention of the parties is not clear, the courts look to the ordinary meaning of the contract's language to determine the parties' intention.[62] Yet, if some of the language used is technical, jargon, or a word of art, the language will be interpreted according to the peculiar meaning understood by local practitioners or

54. *Id.* at 32, 784 S.E.2d at 430.

55. *Id.* at 33-34, 784 S.E.2d at 431.

56. *Id.* The court found that there was enough evidence of an agreement as to the amount of the liquidity pool even if the timing of payment from it may not have been definite, and the court further stated that the lack of agreement for shared projects was irrelevant because it was merely hypothetical since no shared projects ever materialized. *Id.*

57. *Id.* at 34, 784 S.E.2d at 431.

58. *Id.* at 34, 784 S.E.2d at 431-32.

59. O.C.G.A. tit. 13 (2010 & Supp. 2016).

60. O.C.G.A. § 13-2-3 (2010).

61. *Id.*

62. O.C.G.A. § 13-2-2(2) (2010).

tradesmen.[63] Additionally, courts interpret terms in the light most favorable to the enforcement of the whole contract.[64]

In *Williams v. Columbus Clinic P.C.*,[65] the Georgia Court of Appeals looked to the meaning of the words "restriction" and "proctorship" in the context of the medical profession to determine whether, as a matter of law, a clinic was permitted to terminate a doctor under a clause in his employment contract.[66] Williams was employed by Columbus Clinic under a valid employment contract for one year. Per the contract, the clinic was allowed to terminate Williams early if his privileges at any hospital were restricted.[67] Shortly after he began work, the medical staff at the hospital where Williams had privileges informed him that "the Hospital was imposing a three- month proctorship on him."[68] The clinic viewed the proctorship as a restriction and consequently terminated him. The trial court granted summary judgment in favor of the clinic.[69] The court of appeals reversed and held that it was unclear whether a proctorship actually restricted Williams' autonomy as a practitioner.[70]

In determining the definition of "restrict," the clinic argued that the court should use the plain definition, while Williams argued that the court should treat "restrict" as a term of art and apply the peculiar meaning of the word in its medical context.[71] The court agreed with Williams.[72] Utilizing the plain definition of "restrict" would result in the clinic having an unfettered right to terminate Williams at any time.[73] This result would be blatantly contrary to the parties' intention to create a contractual employment relationship.[74] However, by analyzing "restrict" in accordance with the definition given to it by the medical field, the parties' intention would be better served. The court looked at the Healthcare Quality Improvement Act (HCQIA),[75] and per the HCQIA, a restriction is something that adversely affects a doctor's privileges.[76] Proctorships

63. *Id.*
64. O.C.G.A. § 13-2-2(4) (2010).
65. 332 Ga. App. 714, 773 S.E.2d 457 (2015).
66. *Id.* at 714, 773 S.E.2d at 458.
67. *Id.* at 715, 773 S.E.2d at 458
68. *Id.* at 714-17, 773 S.E.2d at 459.
69. *Id.* at 716, 717, 773 S.E.2d at 459, 460.
70. *Id.* at 722, 773 S.E.2d at 463.
71. *Id.* at 718-19, 773 S.E.2d at 460-61.
72. *Id.* at 719, 773 S.E.2d at 461.
73. *Id.*
74. *Id.*
75. 42 U.S.C. §§ 11101 to 11152 (2012 & Supp. II 2014).
76. *Williams*, 332 Ga. App. at 718, 773 S.E.2d at 461 (discussing the HCQIA). Specifically, the court reviewed the term as it was interpreted in *Vineville Capital Group v.*

only adversely affect a doctor's privileges if the doctor cannot provide medical care without the proctor's approval.[77] Proctorships are not a restriction if the proctor only observes the doctor to evaluate his professional competence.[78]

Consequently, the court considered whether the proctorship imposed on Williams limited his professional autonomy, constituting a "restriction" on his hospital privileges.[79] The court found there were questions of fact and reversed.[80]

IV. BUSINESS TORTS

A. Negligent Hiring, Retention, and Supervision

Under Georgia law, an employer is required to exercise ordinary care when selecting employees and cannot retain employees after the employer knows them to be incompetent.[81] To maintain an action for negligent hiring, the plaintiff must prove the employer hired an employee, which the employer knew, or should have known, from the employee's actions or tendencies, posed a risk of inflicting the type of harm sustained by the plaintiff.[82] Usually, whether an employer used reasonable care in hiring an employee is a question of fact unless the evidence is "plain, palpable and undisputable."[83]

In *Little-Thomas v. Select Specialty Hospital Augusta, Inc.*,[84] a patient, Joyce, and her husband filed a negligent hiring and retention action against a hospital after the patient was raped by her CNA, Warren Butler. The trial court granted summary judgment in favor of the hospital on both claims.[85] On appeal, the court affirmed that summary judgment on the plaintiff's negligent hiring claim was appropriate.[86] Before he was hired, Butler submitted a written application with three professional references and provided proof of his CNA certification. Then, the hospital

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McCook, 329 Ga. App. 790, 795, 766 S.Ed.2d 156, 160 (2014). *Williams*, 332 Ga. App. at 720, 773 S.E.2d at 461. In this case, the court looked to the HCQIA and then to the National Practitioner Data Guidebook to glean the term's meaning. *Id.*

77. *Williams*, 332 Ga. App. at 721, 773 S.E.2d at 462.

78. *Id.* at 721, 773 S.E.2d at 462-63.

79. *Id.* at 721, 773 S.E.2d at 462.

80. *Id.* at 722, 773 S.E.2d at 463.

81. O.C.G.A. § 34-7-20 (2008).

82. Munroe v. Univ. Health Servs., Inc., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004).

83. *Id.* at 864, 596 S.E.2d at 607 (quoting Robertson v. Kroger Co., 268 Ga. 735, 739, 493 S.E.2d 403, 408 (1997)).

84. 333 Ga. App. 362, 773 S.E.2d 480 (2015).

85. *Id.* at 362-63, 773 S.E.2d at 481-82.

86. *Id.* at 365, 773 S.E.2d at 483.

interviewed Butler, confirmed his prior employment, and performed a criminal background check. The hospital discovered no negative information during this interview and confirmed Butler's references. His references verified his dates of employment, but provided no further information. Butler's criminal background check included one six-year old misdemeanor for writing a bad check. Joyce argued that, if the hospital had been more diligent in its hiring process, it would have discovered Butler had been previously terminated for discourteous behavior. While Butler's previous termination may have revealed tendencies that made Butler an unsuitable employee for other reasons, it was not evidence of Butler's tendencies to engage in nonconsensual sexual violence, like the violence done to Joyce.[87] Thus, the court found the hospital's hiring process was per se reasonable.[88]

However, the court of appeals reversed the trial court's grant of summary judgment on the plaintiff's negligent retention claim.[89] Pursuant to a prior ruling of the Georgia Supreme Court, a plaintiff is not required to prove the hospital knew a defendant's tendencies could result in the specific harm suffered by her, but only that the harm she suffered was "within the risk posed by" a defendant.[90] The court reversed because the evidence showed Butler's coworkers and patients filed several formal complaints with the hospital alleging that Butler had a bad attitude and was aggressive with his patients. Specifically, they reported that Butler would yell and cuss at patients, and handled his patients roughly. Most significantly, Joyce provided evidence of an incident where Butler inappropriately touched a physically vulnerable female patient in an aggressive, sexual, and non-consensual way. The patient's son reported this event to hospital staff on duty at the time it occurred.[91] The court found that all of these facts combined were sufficient evidence for a rational trier of fact to conclude the hospital should have known of Butler's tendencies to engage in the kind of conduct that harmed Joyce.[92] Thus, the court of appeals held that the trial court's grant of summary judgment was inappropriate.[93]

87. *Id.* at 364-65, 773 S.E.2d at 482-83.
88. *Id.* at 365, 773 S.E.2d at 483.
89. *Id.* at 367, 773 S.E.2d at 484.
90. *Id.* at 366, 772 S.E.2d at 483 (quoting *Munroe*, 277 Ga. at 863, 596 S.E.2d at 606).
91. *Id.* at 366, 773 S.E.2d at 483-84.
92. *Id.* at 366-67, 773 S.E.2d at 484.
93. *Id.* at 367, 773 S.E.2d at 484.

B. Tortious Interference with an Employment Contract

An action for tortious interference with an employment contract is rooted in Georgia's laws and prohibits anyone from interfering with another's enjoyment of private property.[94] Actions are allowed against third parties who maliciously persuade someone to breach his or her contract with another person.[95] Per the stranger doctrine, for an employee to prevail on such a claim, the third party must be a stranger to, or receive no direct benefit from, the employee's contract.[96]

In *Howerton v. Harbin Clinic*,[97] Howerton, a surgical technician, filed various claims against multiple defendants including an action against Dr. Kenneth Sands for tortious interference with her employment contract. Howerton was an employee of Floyd Medical Center (FMC). FMC had a contract with Harbin Clinic under which Harbin Clinic was allowed to use FMC's operating rooms, but FMC would supply the technicians. Dr. Sands, a surgical doctor, was an employee of Harbin Clinic who performed surgeries in FMC's operating room with Howerton. Howerton claimed that she was fired as a result of Dr. Sands' tortious interference with her employment contract with FMC.[98] Dr. Sands argued, and the trial court ruled, that Howerton could not maintain her tortious interference claim against Dr. Sands because he had a direct economic interest in her employment contract; hence "he was not a stranger to the contract."[99] The court of appeals disagreed.[100] The court found Dr. Sands had no "direct economic interest" in Howerton's employment contract because the relationship between Dr. Sands and Howerton was too tenuous.[101] The relationship was a result of three separate contracts containing three separate and distinct subject matters.[102]

C. Breach of Fiduciary Duty

O.C.G.A. § 10-6-31[103] requires employers to pay employees, who have performed all their duties, all compensation owed to them.[104] Conversely, if employees violate their duty of loyalty to their employer, employers

94. O.C.G.A. § 51-9-1 (2000).
95. O.C.G.A. § 51-12-30 (2000).
96. Howerton v. Harbin Clinic, 333 Ga. App. 191, 197, 776 S.E.2d 288, 295 (2015).
97. 333 Ga. App. 191, 776 S.E.2d 288 (2015).
98. *Id.* at 191-98, 776 S.E.2d at 290-95.
99. *Id.* at 200, 776 S.E.2d at 296.
100. *Id.* at 191, 776 S.E.2d at 290-91.
101. *Id.* at 199-200, 776 S.E.2d at 296.
102. *Id.*
103. O.C.G.A. § 10-6-31 (2009).
104. *Id.*

may maintain a breach of fiduciary duty action and recover damages.[105] During this Survey period, in *Helms & Greene, LLC v. Willis*,[106] the court of appeals considered whether a business could recover damages from an employee who tried, but failed, to solicit business on his own behalf and not on behalf of his employer.[107]

Helms & Greene filed a breach of fiduciary duty claim against one of its former partners, Kirk Willis, who managed its Dallas office. While employed with Helms & Greene, Willis submitted a proposal for Kirk Willis P.C. to provide legal services to several potential clients. The proposals listed Kirk Willis P.C.'s address as the address of Helms & Greene's Dallas office and identified Helms & Greene's attorneys as attorneys likely to work on the potential clients' legal matters. In addition, Willis used his Helms & Greene secretary to manage the proposals. Nonetheless, Willis never consulted with anyone at Helms & Greene about his proposals, and never submitted the expenses resulting from his proposals to the firm. Some months later, Willis resigned from the firm. The trial court reasoned that, though Willis' unreported marketing efforts were a breach of his fiduciary duty, because those efforts were unsuccessful, those efforts did not benefit Willis or damage the firm. Thus, the trial court granted summary judgement in Willis' favor.[108]

The firm appealed and argued it should have been permitted to maintain its action against Willis because, even though Willis' efforts were not fruitful, the firm could seek to recover compensation it paid Willis during his period of disloyalty.[109] The court of appeals agreed and reversed the trial court.[110] In its reasoning, the court of appeals cited several prior cases where it held an employee's breach of fiduciary duty negates his right to compensation during any period in which the employee was unfaithful.[111]

105. Vinson v. E.W. Buschman Co., 172 Ga. App. 306, 309-10, 323 S.E.2d 204, 207 (1984).

106. 333 Ga. App. 396, 773 S.E.2d 491 (2015).

107. *Id.* at 396, 773 S.E.2d at 492.

108. *Id.* at 396-98, 773 S.E.2d at 492-94.

109. *Id.* at 396, 773 S.E.2d at 492.

110. *Id.*

111. *Id.* at 399-400, 773 S.E.2d at 494-95.

V. VICARIOUS LIABILITY

A. Negligent Entrustment, Joint Venture, and Alter Ego

Generally, employers are held liable for the actions of their employees under the respondeat superior theory.[112] During the Survey period, in *Cobra 4 Enterprises v. Powell-Newman,*[113] the court of appeals considered whether a corporation could be held vicariously liable for the negligent acts of another corporation's employee based on alter ego and joint venture.[114]

Newman was injured in an auto accident with Danny Ayala, an employee of Yellow Ribbon, in a truck leased to Yellow Ribbon by Cobra 4 Enterprises (Cobra 4). Ayala was arrested and charged with various traffic violations as a result of the accident. Newman filed an action for negligence against Ayala. He also filed actions for negligent entrustment and respondeat superior liability against Yellow Ribbon and Yellow Ribbon's owner, Gary Robertson. Newman also named Cobra 4 as a defendant as the lessor of the truck Ayala was driving and as another corporation owned by Robertson. Cobra 4 moved for summary judgment, arguing it had no control of the truck at the time of Ayala's accident so it could not be held vicariously liable. The trial court granted Cobra 4's motion as to Newman's joint venture claim, but ruled there was sufficient evidence to support Newman's claims of negligent entrustment and alter ego. Both parties appealed.[115]

The Georgia Court of Appeals affirmed the trial court's ruling that Cobra 4 and Yellow Ribbon were not engaged in a joint venture.[116] For the corporations' relationship to be considered a joint venture, the two must combine their assets to make a profit, and both must have an equal right to control the conduct of the other during the venture.[117] Here, the two corporations did not comingle funds and Cobra 4 did not have the right to possess or direct any of its trucks while in Yellow Ribbon's possession.[118]

The court of appeals reversed the trial court's ruling that there was evidence Cobra 4 was an alter ego of Yellow Ribbon.[119] For Yellow Ribbon and Cobra 4 to be considered alter egos, there must be evidence the two

112. Hoffman v. Wells, 260 Ga. 588, 589, 397 S.E.2d 696, 698 (1990).
113. 336 Ga. App. 609, 785 S.E.2d 556 (2016).
114. *Id.* at 609-10, 785 S.E.2d at 558-59.
115. *Id.*
116. *Id.* at 612, 785 S.E.2d at 560.
117. *Id.*
118. *Id.* at 613, 785 S.E.2d at 560.
119. *Id.*

corporations were so intertwined that their legal separateness was just an arrangement Robertson designed to perpetuate fraud or evade liability.[120] Whether corporations are alter egos is a question of law.[121] Here, there was some overlap between the corporations; however, they did not share assets, did not comingle funds, had no right to control the other, and Cobra 4 leased trucks to corporations Robertson did not own.[122] Thus, the court found the two corporations were not interchangeable and could not be considered alter egos.[123]

B. Independent Contractor

Respondeat superior liability generally does not extend to the actions of independent contractors.[124] Accordingly, in determining vicarious liability, a court must first resolve if an individual is an employee or an independent contractor. To be considered an independent contractor, the contract must allow for the contractor to control when and how he completes his work.[125]

In *Royal v. Georgia Farm Bureau Mutual Insurance Co.*,[126] Royal was injured while hauling corn in a truck owned by his employer, Williams. Williams' insurance policy did not cover her employees. Royal filed an action against Farm Bureau arguing he was an independent contractor so he was covered by Williams' policy. The trial court ruled Royal was an employee of Williams and granted Farm Bureau's motion for summary judgment. Royal appealed and argued he was an independent contractor per the factors set out in the Restatement of Agency.[127] Specifically, Williams argued Royal's job as a truck driver was distinct from his job as a farmer, and driving a truck is not a usual part of Williams' business. Additionally, it was unclear if Royal was paid hourly or by the bushel, and Williams never paid taxes on Royal's wages.[128] The court of appeals disagreed and affirmed the trial court's ruling.[129] In finding an employment

120. *Id.* at 613, 785 S.E.2d at 561.

121. *Id.*

122. *Id.* at 613, 615, 785 S.E.2d at 561-62.

123. *Id.* at 614, 785 S.E.2d at 562.

124. *See* O.C.G.A. § 51-2-4 (2000). An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and is not subject to the immediate direction and control of the employer. *Id.*

125. Rbf Holding Co. v. Williamson, 260 Ga. 526, 526, 397 S.E.2d 440, 441 (1990).

126. 333 Ga. App. 881, 777 S.E.2d 713 (2015).

127. Restatement (Second) of Agency § 220 (Am. Law Inst. 1958).

128. *Royal*, 333 Ga. App. at 881, 883-85, 777 S.E.2d at 714-16.

129. *Id.* at 881, 777 S.E.2d at 714.

relationship existed, the court of appeals considered several factors. During his employment, Royal followed Williams' instructions or the instructions of Williams' lead driver. Both men controlled Royal's hours, route, how much corn he hauled, how Royal did his job, and Williams gave Royal all his equipment.[130]

VI. CONCLUSION

As this Article demonstrates, the issues arising under Georgia law are becoming progressively more challenging each year due to the growing overlap between state and federal issues, as well as growing state regulations. Regardless of whether a practitioner specializes in state, federal, administrative, or other matters pertaining to labor and employment, it is important to recognize and stay abreast of the ever-evolving trends, policies, cases, and state and federal guidelines.

130. *Id.* at 883, 777 S.E.2d at 715.