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Trial Practice and Procedure

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I. INTRODUCTION

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

II. LEGISLATION

One of the most significant bills passed and signed into law during this year's legislative session was House Bill 927, otherwise known as the Appellate Jurisdiction Reform Act of 2016.[2] House Bill 927 changes the procedures of the Georgia Court of Appeals, transfers jurisdiction over certain cases from the Georgia Supreme Court to the court of appeals, and makes significant changes to the Supreme Court's composition.[3] In the court of appeals, House Bill 927 removes the statutory procedures for cases heard by more than a single division of the court of appeals, and it provides that the court of appeals may establish its own rules governing cases heard by more than a single division.[4] House Bill 927 similarly provides that the court of appeals shall establish its own rules regarding precedent and overruling prior precedent, rather than remaining bound by statutory procedures.[5] The court of appeals will now have direct appellate jurisdiction (instead of the cases being directly appealable to the Georgia Supreme Court) over cases involving the following: title to land; all equity cases, except those involving the death penalty; wills; extraordinary remedies, except those involving the death penalty; divorce and alimony; and all other cases not reserved to the Georgia Supreme Court or conferred on other courts.[6] House Bill 927 makes changes to the composition of the Georgia Supreme Court.[7] The bill adds two justices to the Georgia Supreme Court, provides for a procedure for appointment by the Governor for these two new justices, and changes the terms of the court.[8]

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1. For an analysis of Georgia trial practice and procedure during the prior survey period, see Brandon L. Peak et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 67 MERCER L. REV. 257 (2015).

2. Ga. H.R. Bill 927, Reg. Sess. (2016) (codified in various sections of O.C.G.A. tit. 15 (Supp. 2016)).

3. *See generally id.*

4. *Id.* § 2-1 (codified at O.C.G.A. § 15-3-1(c) (2015 & Supp. 2016)).

5. *Id.* § 2-1(2).

6. *Id.* § 3-1 (codified at O.C.G.A. § 15-3-3.1 (2015 & Supp. 2016)).

7. *See generally id.*

8. *Id.* §§ 4-1, 4-2, 4-3, and 5-1 (codified at O.C.G.A. §§ 15-2-1.1, -4, -10, and -16) (2015 & Supp. 2016)).

Trial practitioners should pay close attention to these changes to Georgia's appellate courts and how these changes will affect appeals from Georgia's trial courts.

III. CASE LAW

A. Ante Litem Notice

In *City of Greensboro v. Rowland*,[9] the Georgia Court of Appeals held that the plaintiffs had provided adequate ante litem notice under section 36-33-5(b)[10] of the Official Code of Georgia Annotated (O.C.G.A.).[11] The plaintiffs' counsel sent the city letters identifying the plaintiffs' street addresses, explaining that the plaintiffs had retained counsel because of "run-off of waste water on their property as a result of a project undertaken by the City of Greensboro, which has ultimately resulted in an unlawful taking of their property rights,"[12] and noting that counsel was authorized to settle the case without first filing an action.[13] The court held that the notice was adequate, even though it did not identify a specific event, because "repeated instances of flooding is a claim for continuing trespass or nuisance"[14] and gives rise to a new cause of action daily.[15]

In *In re Estate of Leonard*,[16] the Georgia Court of Appeals affirmed, over a dissent, the trial court's grant of summary judgment to Whitfield County because, under O.C.G.A. § 36-11-1,[17] the plaintiff failed to send a timely ante litem notice.[18] The majority opinion concluded that the plaintiff's ante litem notice was untimely even though the plaintiff's counsel sent a letter to the county's outside counsel less than six months after the eighty-two year old plaintiff suffered two broken legs while riding a county bus.[19] The majority emphasized that the county had not formally authorized its outside counsel to accept service on the county's behalf and deemphasized that negotiations between the county's outside counsel

9. 334 Ga. App. 148, 778 S.E.2d 409 (2015).

10. O.C.G.A. § 36-33-5(b) (2012 & Supp. 2016).

11. *Rowland*, 334 Ga. App. at 152-53, 778 S.E.2d at 413.

12. *Id.* at 152, 778 S.E.2d at 413.

13. *Id.*

14. *Id.*

15. *Id.*

16. 336 Ga. App. 768, 783 S.E.2d 470 (2016). This case is physical precedent only. Seven judges heard this appeal. While five judges joined the majority opinion, three judges concurred in the judgment only. Thus, lacking a majority as to any division, the opinion has no precedential value. GA. CT. APP. R. 33(a) (2015).

17. O.C.G.A. § 36-11-1 (2012).

18. *In re Estate of Leonard*, 336 Ga. App. at 769, 783 S.E.2d at 471.

19. *Id.* at 769-70, 783 S.E.2d at 471-72.

and the plaintiff's counsel had taken place before the ill-fated letter was sent.[20]

In *Silva v. Georgia Department of Transportation*,[21] the Georgia Court of Appeals held that the plaintiff had not strictly complied with O.C.G.A. § 50-21-26(a)(5)(E),[22] the ante litem notice provision of the Georgia Tort Claims Act, because she did not include the amount of loss claimed.[23] In doing so, the court concluded that *Board of Regents of the University System of Georgia v. Myers*[24]—which held that even if the full extent of the "loss was yet to be determined,"[25] failure to "state any amount of loss whatsoever"[26] did not constitute strict compliance with the statute[27]—applied retroactively.[28]

B. Apportionment

In *Zaldivar v. Prickett*,[29] the plaintiff was employed by the non-party, Overhead Door, when he was involved in a wreck with the defendant. The plaintiff and the defendant blamed each other for the wreck. At trial, the defendant sought to have the jury apportion fault to Overhead Door for negligently entrusting the vehicle to the plaintiff.[30] The Georgia Court of Appeals held that fault could not be apportioned to Overhead Door because the negligent entrustment of plaintiff's employer could not be the proximate cause of the plaintiff's injuries.[31] The Georgia Supreme Court disagreed, holding that "negligent entrustment of an instrumentality can be a proximate cause of an injury to the person to whom the instrumentality was entrusted."[32] The supreme court provided a detailed analysis

20. *Id.* at 771, 778 S.E.2d at 472. The majority, unlike the dissent, was unmoved by the fact that the county's outside counsel acknowledged service of the summons and complaint on behalf of the county and that the county's answer did not raise the defense of insufficient service of process. *See id.* at 774, 783 S.E.2d at 474 (Miller, P.J., dissenting).

21. 337 Ga. App. 116, 787 S.E.2d 247 (2016).

22. O.C.G.A. § 50-21-26(a)(5)(E) (2013).

23. *Silva*, 337 Ga. App. at 117-18, 787 S.E.2d at 249.

24. 295 Ga. 843, 764 S.E.2d 543 (2014).

25. *Id.* at 846, 764 S.E.2d at 546.

26. *Id.*

27. *Id. Myers* teaches that "the plain language [of O.C.G.A. § 50-21-26(a)(5)(E)] requires notice of the amount of the loss claimed at that time, within the belief and knowledge of the claimant, as may be practicable under the circumstances." *Id.* at 846, 764 S.E.2d at 547.

28. *Silva*, 337 Ga. App. at 119, 787 S.E.2d at 249.

29. 297 Ga. 589, 774 S.E.2d 688 (2015).

30. *Id.* at 590-91, 774 S.E.2d at 691.

31. *Id.*

32. *Id.* at 591, 774 S.E.2d at 691.

of what "fault" means under the apportionment statute.[33] It reasoned that fault under the applicable subsection:

> [I]s most naturally and reasonably understood to require the trier of fact to consider any breach of a legal duty that sounds in tort for the protection of the plaintiff, the breach of which is a proximate cause of the injury about which he complains, whether that breach is attributable to the plaintiff himself, a defendant with liability, or another.[34]

Because an employer could have a duty to not negligently entrust a vehicle to an employee, and a breach of that duty could proximately cause the plaintiff's injury, the jury could apportion fault to the employer.[35]

C. Class Actions

In an important class action case, *Glynn County v. Coleman*,[36] the Georgia Court of Appeals, in cases seeking to obtain refunds of ad valorem taxes pursuant to O.C.G.A. § 48-5-380,[37] affirmed the trial court's order certifying multiple classes.[38] First, the court of appeals held that it was not proper for the defendant to attack class certification under O.C.G.A. § 9-11-12(b)(6),[39] holding that "[w]hile a defendant can certainly seek a ruling on a dispositive motion before certification of a class, it cannot use a dispositive motion as a vehicle to deny class certification."[40] The court further held that O.C.G.A. § 48-5-380 allows for the filing of class actions seeking refunds of ad valorem taxes.[41] Finally, the court held that claims seeking non-monetary relief such as injunctive relief, mandamus, and declaratory judgment are allowable in a class action.[42]

In *Lisk v. Lumber One Wood Preserving, LLC*,[43] the United States Court of Appeals for the Eleventh Circuit held that Federal Rule of Civil Procedure 23[44] controls in a case filed in federal court even if the case

33. *Id.* at 593-96, 774 S.E.2d at 693-96.

34. *Id.* at 596, 774 S.E.2d at 694.

35. *See id.* at 604, 774 S.E.2d at 699 (permitting a trier of fact to assign fault to an employer under O.C.G.A. § 51-12-33(c)).

36. 334 Ga. App. 559, 779 S.E. 2d 753 (2015).

37. O.C.G.A. § 48-5-380 (2010 & Supp. 2016).

38. *Coleman*, 334 Ga. App. at 559, 779 S.E.2d at 754.

39. O.C.G.A. § 9-11-12(b)(6) (2015).

40. *Coleman*, 334 Ga. App. at 561, 779 S.E. 2d at 755.

41. *Id.* at 564, 779 S.E. 2d at 757.

42. *Id.*

43. 792 F.3d 1331 (2015).

44. Fed. R. Civ. P. 23.

was filed pursuant to a state statute that expressly precludes class actions brought by an individual.[45] The case was brought under the Alabama Deceptive Trade Practices Act,[46] which expressly states that no individual can bring a class action pursuant to its provisions.[47] The Eleventh Circuit held that Rule 23 applied because the case was filed in federal court and that allowing the plaintiff to proceed with a class action was acceptable because doing so did not "abridge, enlarge or modify any *substantive* right."[48]

D. Discovery & Sanctions

In *Elliott v. Resurgens, P.C.*,[49] the Georgia Court of Appeals reversed and remanded the case for a new trial.[50] The court held that the trial court abused its discretion by excluding probative testimony of a witness who had not been disclosed during discovery, but whose name appeared in the discovery materials, as the curative measure for the alleged discovery violation.[51] The appellate court reiterated that "the only appropriate remedy was postponement of trial or a mistrial."[52]

In *Monolith Companies, LLC v. Hunter Douglas Hospitality, Inc.*,[53] more than six months after the defendant's answer, the plaintiff served requests for admission to which the defendant neither responded nor objected.[54] Under O.C.G.A. § 9-11-36(a)(2),[55] the requests for admission were thus deemed admitted. On appeal, the Georgia Court of Appeals held that "the trial court was without authority to disregard [these] admissions."[56]

E. Dismissal & Renewal

In *Global Ship Systems, LLC v. RiverHawk Group, LLC*,[57] the Georgia Court of Appeals reiterated that Georgia's voluntary dismissal statute,

45. *Lisk*, 792 F.3d at 1335.

46. ALA. CODE §§ 8-19-5(5), (7) (2002).

47. *Lisk*, 792 F.3d at 1334. *See also* ALA. CODE § 8-19-10(f) (2002).

48. *Lisk*, 792 F.3d at 1337-38 (quoting 28 U.S.C. § 2072(b) (2012) (emphasis added)).

49. 336 Ga. App. 217, 782 S.E.2d 867 (2016).

50. *Id.* at 222, 782 S.E.2d at 871.

51. *Id.*

52. *Id.* at 221, 782 S.E.2d at 870 (quoting City of Atlanta v. Bennett, 322 Ga. App. 726, 731, 746 S.E.2d 198, 202 (2013)).

53. 333 Ga. App. 898, 777 S.E.2d 726 (2015).

54. *Id.* at 898, 777 S.E.2d at 727.

55. O.C.G.A. § 9-11-36(a)(2) (2015).

56. *Monolith Cos., LLC*, 333 Ga. App. at 901, 777 S.E.2d at 728.

57. 334 Ga. App. 860, 780 S.E.2d 697 (2015).

O.C.G.A. § 9-11-41,[58] which allows a plaintiff to dismiss an action once without prejudice, cannot be circumvented by adding new plaintiffs to a subsequently filed lawsuit.[59] In *Global Ship Systems, LLC*, certain plaintiffs, termed "Global Ship Plaintiffs" by the court, filed their first lawsuit on October 31, 2007 and voluntarily dismissed the same on November 20, 2007. The Global Ship Plaintiffs, with additional plaintiffs not party to the first suit, filed a second lawsuit on November 14, 2008, which was voluntarily dismissed around May 4, 2009. Pursuant to O.C.G.A. § 9-2-61,[60] a third lawsuit, identical to the second, was filed within six months of the second voluntary dismissal. The trial court granted summary judgment to defendants and dismissed the plaintiffs' third action on the grounds that it was barred by O.C.G.A. § 9-11-41(a)(3).[61]

The plaintiffs appealed, contending that the trial court erred because not all plaintiffs were parties to the first lawsuit that was voluntarily dismissed.[62] Affirming the trial court's grant of summary judgment, the court of appeals confirmed that the "relevant inquiry is whether '*any* of the Appellants was a plaintiff who voluntarily dismissed both actions.'"[63] Because the Global Ship Plaintiffs were parties to the first and second action, both of which were voluntarily dismissed, the second dismissal was an adjudication on the merits.[64]

F. Evidentiary Issues

In *Petrenko v. Moseri*,[65] the plaintiff sued the defendant for injuries she sustained in a car wreck caused by the defendant.[66] One of the issues on appeal was whether the defendant, who admitted fault prior to trial,[67] lost the right to opening and closing arguments by using a document to

58. O.C.G.A. § 9-11-41 (2015).

59. *Glob. Ship Sys., LLC*, 334 Ga. App. at 863, 780 S.E.2d at 700.

60. O.C.G.A. § 9-2-61(a) (2007).

61. *Glob. Ship Sys., LLC*, 334 Ga. App. at 861-62, 780 S.E.2d at 699. The trial court dismissed the third action because the plaintiffs' second voluntary dismissal operated as an adjudication on the merits. *Id.*

62. *Id.* at 862, 780 S.E.2d at 700. Specifically, the plaintiffs argued that the second voluntary dismissal was the first and only voluntary dismissal for the non-Global Ship Plaintiffs, and therefore should not act as an adjudication on the merits. *Id.*

63. *Id.* (quoting Dillard Land Invs., LLC v. S. Fla. Invs., LLC, 320 Ga. App. 209, 212, 739 S.E.2d 696, 698 (2013)).

64. *Id.* at 863, 780 S.E.2d at 700.

65. 333 Ga. App. 14, 775 S.E.2d 272 (2015).

66. *Id.* at 14, 775 S.E.2d at 273.

67. The trial was actually defended by the plaintiff's uninsured motorist carrier, State Farm, who proceeded in the name of the striking driver, Moseri. *See id.*

refresh the plaintiff's recollection during cross examination but not formally tendering the document into evidence.[68] The court of appeals held the defendant did not lose the right to opening and closing arguments because "documents used to refresh a witness's present recollection generally cannot be admitted in evidence unless they are otherwise admissible."[69] Therefore, because "the exhibit was neither read nor shown to the jury, and Petrenko's testimony was limited to a recollection of information contained in the document,"[70] the defendant did not introduce any evidence, and the defendant retained the right to opening and closing arguments.[71]

In *Cheney v. Lawson*,[72] the plaintiff brought a medical malpractice action against a doctor who the plaintiff alleged negligently performed breast augmentation on the plaintiff.[73] After losing at trial, the defendant appealed, arguing the trial court erred by admitting a summary of the plaintiff's medical bills into evidence.[74] The defendant claimed the summary of the plaintiff's bills should not have been admitted because "the underlying bills were not admitted into evidence, and [the plaintiff] failed to lay the necessary foundation for their admission."[75]

The court of appeals agreed with the defendant that a proper foundation had not been laid for the one page summary of the plaintiff's medical bills.[76] The summary in question listed charges from multiple providers, not all of the listed charges were related to plaintiff's breast augmentation surgery or the treatments that followed it due to her injuries, and the plaintiff failed to establish which listed charges actually related to the breast augmentation surgery and procedures that followed.[77] The

68. *Id.* at 17-18, 775 S.E.2d at 275-76. *See also* O.C.G.A. § 9-10-186 (2007) ("In civil actions, where the burden of proof rests with the plaintiff, the plaintiff is entitled to the opening and concluding arguments except that if the defendant introduces no evidence or admits a prima-facie case, the defendant shall be entitled to open and conclude. . . .").

69. *Petrenko*, 333 Ga. App. at 18, 775 S.E.2d at 275 (quoting Bischoff v. Payne, 239 Ga. App. 824, 826, 522 S.E.2d 257, 257 (1999)).

70. *Id.* at 19, 775 S.E.2d at 276.

71. *Id.*

72. 333 Ga. App. 180, 773 S.E.2d 297 (2015).

73. *Id.* at 180-81, 773 S.E.2d at 298.

74. *Id.*

75. *Id.* at 181, 773 S.E.2d at 298.

76. *Id.* at 182-83, 773 S.E.2d at 299.

77. *Id.* ("In this case, there was no testimony that the charges listed in the summary were incurred as a result of the procedure performed by [defendant]."). *See also* Daniel v. Parkins, 200 Ga. App. 710, 711-12, 409 S.E.2d 233, 234 (1991) (quoting Lester v. S.J. Alexander, Inc., 127 Ga. App. 470, 470, 193 S.E.2d 860, 860 (1972) ("Where [medical] bills include charges for treatment, drugs, and hospitalization for items other than those arising out of the cause of action, the plaintiff has the duty to segregate the irrelevant expenses

court of appeals reversed the judgment, finding the admission of the summary was not harmless error.[78] The *Cheney* case is an important admonition to trial practitioners who intend to use medical summaries to prove a plaintiff's medical losses at trial to make sure that a proper foundation is laid by the plaintiff or by other competent witnesses before introducing the summary, including segregating unrelated medical expenses from related medical expenses.

G. Expert Testimony & Expert Affidavits

In *Dubois v. Brantley*,[79] the plaintiff brought a medical malpractice action against a doctor, along with his employer, who had performed a laparoscopic procedure to repair the plaintiff's umbilical hernia.[80] The plaintiff contended the doctor "negligently punctured his pancreas with a trocar in connection with the laparoscopic procedure . . . ."[81] Pursuant to O.C.G.A. § 9-11-9.1,[82] the plaintiff attached the expert affidavit of another doctor, Dr. Swartz, to his complaint.[83] Dr. Swartz performed laparoscopic abdominal procedures in the past to repair umbilical hernias, but at the time the complaint was filed, Dr. Swartz no longer repaired umbilical hernias laproscopically but, instead, repaired them by open surgery.[84] The defendants moved for summary judgment and argued Dr. Swartz was not qualified to offer expert testimony in the case because he only repaired one umbilical hernia laparoscopically in the five years preceding the complaint.[85] The trial court denied the motion and found Dr. Swartz qualified.[86]

The Georgia Court of Appeals reversed the trial court's order, finding that Dr. Swartz "was not qualified as a matter of law under Rule 702(c)(2)(A)[87] to offer any opinion about negligence in connection with a laparoscopic procedure to repair an umbilical hernia. . . ."[88] The court of appeals reasoned that the language of Rule 702(c)(2)(A) was clear, and

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since he has the burden of proof to show his losses in such manner as can permit calculation thereof with a reasonable degree of certainty.")).

78. *Cheney*, 333 Ga. App. at 183, 773 S.E.2d at 300.
79. 297 Ga. 575, 775 S.E.2d 512 (2015).
80. *Id.* at 575, 775 S.E.2d at 513.
81. *Id.* (footnote omitted).
82. O.C.G.A. § 9-11-9.1 (2015).
83. *Dubois*, 297 Ga. at 576-77, 775 S.E.2d at 514-15.
84. *Id.* at 576, 775 S.E.2d at 514.
85. *Id.* at 578, 775 S.E.2d at 515. *See generally* O.C.G.A. § 24-7-702(c) (2013).
86. *Dubois*, 297 Ga. at 578, 775 S.E.2d at 515.
87. O.C.G.A. § 24-7-702(c)(2)(A) (2013).
88. *Dubois*, 297 Ga. at 579, 775 S.E.2d at 515.

because Dr. Swartz had not laparoscopically repaired an umbilical hernia but one time in the past five years, he was not qualified under Rule 702(c)(2)(A).[89]

The plaintiff appealed, and the issue for the Georgia Supreme Court was how "procedure" in Rule 702(c)(2)(A) should be interpreted, and what level of specificity was required to qualify a doctor under that Rule to offer expert testimony in a medical malpractice case.[90] The supreme court held that the defendants and the court of appeals interpreted "procedure" too narrowly by arguing Dr. Swartz was not qualified because he had only performed one laparoscopic procedure to repair an umbilical hernia in the five years preceding the complaint (yet acknowledging Dr. Swartz regularly performed other kinds of abdominal laparoscopic procedures using trocars to penetrate the abdominal cavity, just not to repair umbilical hernias).[91] The supreme court held that "[a] careful reading of the text shows that Rule 702(c)(2)(A) and (B) do not require that an expert actually have performed or taught the very procedure at issue."[92] Instead, the supreme court held an "appropriate level of knowledge" may be demonstrated more generally, and so long as "the expert has sufficient knowledge about the performance of the procedure—however generally or specifically it is characterized, so long as it is the procedure that the defendant is alleged to have performed negligently . . .,"[93] then the expert is qualified under the rule and may offer his or her opinions.[94] The "gatekeeping" function of Rule 702 is still within the discretion of the trial judge.[95] This case has important implications for trial practitioners who litigate medical malpractice cases, because the supreme court seems to have created a more lenient standard for medical expert qualification with its decision in the *Dubois* case.

H. Immunity

In *Gravitt v. Olens*,[96] the Georgia Court of Appeals held that the City of Cumming could not assert immunity to bar an enforcement action under the Open Meetings Act (OMA)[97] brought by the state (via the attorney

89. *Id.* at 579, 775 S.E.2d at 515-16.
90. *Id.* at 579-84, 775 S.E.2d at 516-18.
91. *Id.* at 582-84, 775 S.E.2d at 517-19.
92. *Id.* at 584, 775 S.E.2d at 519.
93. *Id.* at 587, 775 S.E.2d at 520.
94. *Id.*
95. *Id.* at 585, 775 S.E.2d at 519-20.
96. 333 Ga. App. 484, 774 S.E.2d 263 (2015).
97. *See* O.C.G.A. §§ 50-14-1 to -6 (2013 & Supp. 2016).

general) because the city's sovereign immunity derives from the state.[98] The court also held that the mayor, whom the state sued personally, was not entitled to "official immunity" (i.e.qualified immunity) because the OMA's mandates were "so clear, definite and certain as merely to require the execution of a relatively simple, specific duty"[99] that compliance with the actions required by this Act was thus ministerial rather than discretionary.[100]

I. Insurance & Direct Actions

In *Allstate Fire & Casualty Insurance Co. v. Rothman*,[101] the Georgia Court of Appeals departed from the stacking rules usually applied by Georgia courts when dealing with multiple uninsured or underinsured motorist (UM) insurance policies.[102] The plaintiff was traveling in his employer's truck when he was injured by an underinsured driver. After the at-fault liability carrier's (Travelers) insurance coverage was exhausted, a dispute arose between the plaintiff's personal UM carrier (Allstate) and the employer's UM carrier (Westfield) as to which of the two carriers was entitled to reduce, or set-off, the amount already tendered to the plaintiff by Travelers. The stacking rules in Georgia typically grant such set-off to the last policy in line for payment. Under that rule, which the trial court applied, Westfield was entitled to and awarded the set-off.[103]

On appeal, Allstate argued that even though it was the primary UM carrier, it was entitled to the set-off because the plaintiff specifically elected and contracted for a "reduced by" insurance policy.[104] Relying on its decision in *Donovan v. State Farm Mutual Automobile Insurance Co.*,[105] the court of appeals agreed.[106] The court explained that when there are multiple UM policies, but only one of those policies provides "reduced by" coverage, then that carrier is entitled to the set-off, notwithstanding the traditional stacking rules.[107] Despite being the primary UM

98. *Gravitt*, 333 Ga. App. at 487, 774 S.E.2d at 268.

99. *Id.* at 491, 774 S.E.2d at 270 (quoting Roper v. Greenway, 294 Ga. 112, 115, 751 S.E.2d 351, 353 (2013)).

100. *Id.*

101. 332 Ga. App. 670, 774 S.E.2d 735 (2015).

102. *Id.* at 672-74, 774 S.E.2d at 737-38.

103. *Id.* at 670-72, 774 S.E.2d at 736-38.

104. *Id.* at 673, 774 S.E.2d at 737. The Allstate UM policy was the only "reduced by" policy. Westfield's UM policy was an "added-on" policy. *Id.*

105. 329 Ga. App. 609, 765 S.E.2d 755 (2014).

106. *Allstate Fire & Cas. Ins. Co.*, 332 Ga. App. at 674-75, 774 S.E.2d at 737-38.

107. *Id.* at 673-74, 774 S.E.2d at 737-38.

carrier, Allstate was the only carrier with a "reduced by" policy and was contractually entitled to the set-off.[108]

In *Sentinel Insurance Co. v. USAA Insurance Co.*,[109] the Georgia Court of Appeals, in a matter of first impression, addressed the priority of uninsured and underinsured motorist (UM) coverage in the context of a limited liability company.[110] After the plaintiff was injured in a car wreck, a dispute arose between two UM carriers as to which carrier was primarily responsible for the plaintiff's injuries.[111] One of the UM carriers, Sentinel, issued a commercial automobile policy insuring the vehicle the plaintiff was injured in, with the sole named insured being a limited liability company (LLC) that the plaintiff co-owned.[112] The personal insurance carrier of plaintiff's husband, USAA, extended UM coverage to the plaintiff.[113] Applying the "more closely identified with" test, the trial court found the plaintiff was more closely identified with the LLC's UM policy provided by Sentinel.[114] The court of appeals reversed the trial court's decision and held that "because a limited liability company is a separate legal entity from its owners, [the plaintiff] is more closely identified with her family policy."[115]

J. Jury Instructions

In *Wong v. Chappell*,[116] a medical malpractice case, the court of appeals held "[c]ontrary to the trial court's rationale, simply because expert evidence is required to prove causation does not mean a case involved professional malpractice."[117] The court held the trial court's failure to give the plaintiff's requested jury charge on ordinary negligence warranted reversal because some of the plaintiff's claims alleged ordinary negligence.[118] The court determined that the trial court "exacerbated that

108. *Id.* at 674, 774 S.E.2d at 738.

109. 335 Ga. App. 664, 782 S.E.2d 718 (2016).

110. *Id.* at 667, 782 S.E.2d at 721.

111. *Id.* at 664, 782 S.E.2d at 719.

112. *Id.* at 665, 667, 782 S.E.2d at 719, 721. The plaintiff co-owned the LLC that was the named insured under the Sentinel policy, and the plaintiff owned and operated a company under the LLC. *Id.*

113. *Id.* at 665, 782 S.E.2d at 719 (failing to extend coverage to the LLC or the vehicle in which the plaintiff was injured).

114. *Id.* at 666, 782 S.E.2d at 720.

115. *Id.* at 667, 782 S.E.2d at 721.

116. 333 Ga. App. 422, 773 S.E.2d 496 (2015).

117. *Id.* at 425, 773 S.E.2d at 499.

118. *Id.* at 426, 773 S.E.2d at 500.

error by instructing the jury that the professional negligence standard applied to all of [the plaintiff's] claims."[119]

K. Offer of Judgment

In *Alessi v. Cornerstone Associates, Inc.*,[120] the court of appeals determined that Georgia's offer of judgment statute, O.C.G.A. § 9-11-68,[121] has no application in binding arbitration.[122] The court's holding was based on the statute's plain language, which "reflects that the legislature contemplated that it would apply only in the context of traditional civil litigation and not in the context of alternative dispute resolution,"[123] and the lack of any reference to arbitration proceedings in that statute.[124]

L. Statutes of Limitations and Repose

In *Smith v. Danson*,[125] a divided court of appeals held that a claim for medical malpractice arising from a misdiagnosis that occurred after a surgery was not time barred.[126] The plaintiff originally alleged that malpractice occurred during a surgery performed more than two years before the case was filed, but the plaintiff abandoned that claim in response to the defendant's motion for summary judgment in favor of a standalone claim related to a post-operative misdiagnosis of a non-negligent complication from the surgery.[127] The court of appeals held that, under O.C.G.A. § 9-3-71,[128] because the misdiagnosis occurred less than two years before the case was filed, it was not time barred.[129] The dissent argued that the case should have been dismissed because the plaintiff had never fully abandoned the claim for negligence during the surgery and because "the statute of limitations on a medical malpractice claim . . . begins on the date of the patient's *injury*," which the dissent reasoned occurred during the surgery.[130]

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119. *Id.* at 427, 773 S.E.2d at 501.

120. 334 Ga. App. 490, 780 S.E.2d 15 (2015).

121. O.C.G.A. § 9-11-68 (2015).

122. *Alessi*, 334 Ga. App. at 495, 780 S.E.2d at 18.

123. *Id.* at 493, 780 S.E.2d at 17.

124. *Id.* at 495, 780 S.E.2d at 18.

125. 334 Ga. App. 865, 780 S.E.2d 481 (2015).

126. *Id.* at 865-66, 780 S.E.2d at 482-83.

127. *Id.* at 871, 780 S.E.2d at 486.

128. O.C.G.A. § 9-3-71 (2010).

129. *Smith*, 334 Ga. App. at 870-71, 780 S.E.2d at 486.

130. *Id.* at 876, 780 S.E.2d at 489 (Dillard, J., dissenting) (quoting Kaminer v. Canas, 282 Ga. 830, 834, 653 S.E.2d 691, 695 (2007)).

In *Piedmont Hospital v. D.M.*,[131] the Georgia Court of Appeals held that a claim for failing to inform a patient that he was HIV-positive sounded in professional, as opposed to ordinary, negligence and was therefore barred by the five-year medical malpractice statute of repose, O.C.G.A. § 9-3-71(b).[132]

M. Summary Judgment

In *Nguyen v. Southwest Emergency Physicians, P.C.*,[133] the Georgia Supreme Court interpreted two definitions found in Georgia's emergency room statute:[134] "bona fide emergency services" and "emergency medical care."[135] The plaintiffs in *Nguyen* filed a malpractice action against a hospital and its staff. The plaintiffs took their daughter to the emergency room after she fell off her bed and hit her head. Based on triage conducted at the emergency room, the hospital concluded the daughter had no serious injuries and discharged her. In fact, the daughter suffered a skull fracture and subdural hematoma, which the plaintiffs alleged the hospital and staff negligently failed to diagnose and treat.[136] Prior to trial, the plaintiffs moved for partial summary judgment, contending the emergency room statute did not apply.[137] The trial court granted the motion, agreeing with the plaintiff's contention.[138] But the court of appeals reversed, "holding that although [the daughter] was not diagnosed with a serious condition, there was some evidence that she had a medical condition that triggered the ER statute, so it is a question for the jury whether O.C.G.A. § 51-1-29.5 applies."[139]

On appeal to the Georgia Supreme Court, the court held that the emergency room statute establishes an objective, rather than a subjective, standard for interpreting the terms "bona fide emergency services" and "emergency medical care."[140] Concerning the former, "the health care provider's subjective belief about what kind of care he was providing the patient or what kind of care the patient needed does not determine whether

131. 335 Ga. App. 442, 779 S.E.2d 36 (2015).
132. *Id.* at 448, 779 S.E.2d at 41; O.C.G.A. § 9-3-71(b) (2007).
133. 298 Ga. 75, 779 S.E.2d 334 (2015).
134. O.C.G.A. § 51-1-29.5 (2000 & Supp. 2016).
135. *Nguyen*, 298 Ga. at 77-80, 779 S.E.2d at 337-38.
136. *Id.* at 75-77, 779 S.E.2d at 336-37.
137. *Id.* at 77, 779 S.E.2d at 337.
138. *Id.*
139. *Id.*
140. *Id.* at 77-80, 779 S.E.2d at 337-38.

'bona fide emergency services' were provided."[141] With respect to the latter, which requires an assessment of the patient's medical condition,[142] "[t]he patient's actual medical or traumatic condition is determinative . . . the health care provider's subjective opinion about the patient's condition is not controlling."[143] Ultimately, the court held that there was a genuine issue of fact as to whether the emergency room statute applied, which would have to be resolved by the jury.[144]

N. Venue, Jurisdiction, Removal, and Remand

In *American College Connection, Inc. v. Berkowitz*,[145] the Georgia Court of Appeals addressed the reach of the long-arm statute when the defendant's minimum contacts in the state arise largely from internet transactions in that state.[146] The defendant was a company incorporated in Nebraska that helped high school athletes gain access to college athletic programs and financial aid. Students filled out a profile online and the defendant used that information to advocate for the students with colleges and universities nationwide. The plaintiff was a high school coach who signed a contract to refer students to the defendant in exchange for referral fees. When the plaintiff sued for breach of contract, the defendant argued that it lacked sufficient contacts in the state to be subject to personal jurisdiction.[147]

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141. *Id.* at 80, 779 S.E.2d at 338. The court provided this explanation:

> Thus, the "bona fide emergency services" element precludes a health care provider from benefitting from the protections of the ER statute with regard to care that, viewed objectively, was not emergency service, such as giving routine flu shots at a clinic set up in an ER. But medical services commonly provided in an emergency department, like evaluating, classifying, and treating patients who come in asserting that they require emergency care, will generally be "bona fide emergency services," even if the result of those services is that the patient is diagnosed as not needing (or no longer needing) emergency treatment.

Id. at 80, 779 S.E.2d at 339.

142. *Id.* at 81, 779 S.E.2d at 339 ("In order for the ER statute to apply, the patient must have had a 'medical or traumatic condition manifesting itself by acute symptoms of such severity . . . such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy . . . .'" (quoting O.C.G.A. § 51-1-29.5(a)(5) (2000 & Supp. 2016)).

143. *Id.*

144. *Id.* at 85, 779 S.E.2d at 341-42. The court also noted the conflicting positions both parties may have to take at trial given that whether the emergency room statute applies is a question of fact for the jury to decide. *See id.* at 85 n.3, 779 S.E.2d at 341 n.3.

145. 332 Ga. App. 867, 775 S.E.2d 226 (2015).

146. *Id.* at 868-69, 775 S.E.2d 227-28.

147. *Id.*

Under the Georgia Long-Arm Statute,[148] courts may exercise personal jurisdiction over nonresidents who transact business in the state to the maximum extent permitted by procedural due process.[149] A "single event may be a sufficient basis if its effects within the forum are substantial enough."[150] The court of appeals found that there was personal jurisdiction over the defendant for three reasons. First, the defendant's website was interactive, allowing users in Georgia to exchange information with the defendant in Nebraska.[151] Second, the defendant had several existing clients who were Georgia residents.[152] Third, the defendant hired the plaintiff to obtain clients from Georgia, which she did, and that activity was the basis of the lawsuit.[153]

The most notable holding in the case was that the actions of the plaintiff, who was an independent contractor, constituted actions of the defendant's "agent" in the state.[154] The court stated that

> in the minimum-contacts context under O.C.G.A. § 9-10-91, we are not dealing with the traditional principal-agency theory of respondeat superior. Rather we are concerned with whether a forum state may exercise personal jurisdiction over a nonresident defendant based upon the minimum contact theory. And with the relaxation of the due-process criteria, the *jurisdictional distinction* between agents and independent contractors has begun to fade.[155]

Thus, the court affirmed the trial court and held that it could exercise personal jurisdiction over the defendant.[156]

The Georgia Tort Claims Act (GTCA)[157] provides that tort actions against the state must be brought "in the state or superior court of the county wherein the loss occurred."[158] In *Board of Regents of University System of Georgia v. Jordan*,[159] it was undisputed that all negligent acts

148. O.C.G.A. § 9-10-91 (2007 & Supp. 2016).

149. *Am. Coll. Connection, Inc.*, 332 Ga. App. at 870, 775 S.E.2d at 228.

150. *Id.* at 871, 775 S.E.2d at 229 (quoting Crossing Park Props., LLC v. JDI Fort Lauderdale, LLC, 316 Ga. App. 471, 476, 729 S.E.2d 605, 609 (2012) (internal quotations and punctuation omitted).

151. *Id.* at 872, 775 S.E.2d at 230.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* (internal footnote and quotations omitted).

156. *Id.*

157. O.C.G.A. § 50-21-28 (2013).

158. *Id.*

159. 335 Ga. App. 703, 782 S.E.2d 809 (2016).

occurred in Richmond County.[160] The court of appeals held that the GTCA permitted the plaintiffs to bring suit in Dekalb County, where the plaintiffs underwent corrective surgery to remedy those acts of negligence.[161] The court reasoned a substantial portion of the plaintiffs' losses occurred in the form of economic losses, pain and suffering, and mental anguish.[162] Under the GTCA, where venue under the statute lies in multiple counties the plaintiff may elect among them.[163]

In *Hankook Tire Co. v. White*,[164] the Georgia Court of Appeals considered what constitutes "collusion" between parties who enter a consent judgment.[165] The plaintiff, White, sued Hankook Tire Company (Hankook), a Korean corporation, and, inter alia, a Georgia corporation residing in Clayton County.[166] During the course of the litigation, the plaintiff settled with the resident defendant, and a consent judgment was entered against the resident defendant.[167] Hankook moved to transfer the case on the ground that venue had vanished.[168]

Venue does not normally vanish under O.C.G.A. § 9-10-31(d)[169] when a consent judgment is entered against the resident defendant.[170] The exception to that rule is when the plaintiff and the resident defendant have "colluded."[171] Hankook argued that the plaintiff colluded with the resident defendant because (1) the plaintiff admitted the consent judgment was entered into for the express purpose of maintaining venue, and (2) the judgment recited the settlement value as a nominal amount (even though the actual value was $500,000).[172] The court declined to define collusion with respect to the vanishing venue statute.[173] But it noted "we can recognize collusion when we see it, and it is not present here."[174] The simple fact that the plaintiff negotiated a consent judgment to retain

160. *Id.* at 703, 782 S.E.2d at 810.
161. *Id.* at 704, 782 S.E.2d at 811.
162. *Id.*
163. *Id.*
164. 335 Ga. App. 453, 781 S.E.2d 399 (2016).
165. *See generally id.*
166. *Id.* at 453-54, 781 S.E.2d at 399-400.
167. *Id.*
168. *Id.*
169. O.C.G.A. § 9-10-31(d) (2007).
170. *See Hankook Tire Co.*, 335 Ga. App. at 453-54, 781 S.E.2d at 399.
171. *Id.* at 454, 781 S.E.2d at 399.
172. *Id.* at 454, 781 S.E.2d at 400.
173. *Id.* at 454 n.3, 781 S.E.2d at 400 n.3.
174. *Id.*

venue was not improper.[175] The value of the settlement was substantial.[176] And there was no evidence that the parties acted in concert.[177] The court therefore affirmed the trial court's denial of Hankook's motion to transfer venue.[178]

In *Kingdom Retail Group, LLP v. Pandora Franchising, LLC*,[179] the defendant was a foreign corporation that had its principal place of business in Maryland and a registered agent in Gwinnett County.[180] The plaintiff sued the defendant in tort in Thomas County because the wrongful acts occurred there. The defendant attempted to transfer the case to Gwinnett County[181] under the corporate venue statute,[182] which provides in applicable part:

> In actions for damages because of torts, wrong, or injury done, [venue lies] in the county where the cause of action originated. If venue is based solely on this paragraph, the defendant shall have the right to remove the action to the county in Georgia where the defendant maintains its principal place of business. . . .[183]

The trial court granted the motion transferring the case, and the plaintiff appealed.[184]

The Georgia Court of Appeals reversed, holding that the county where the foreign corporation had a registered agent was not the county where it maintained its "principal place of business."[185] In a plurality opinion, the court noted that "principal place of business" is a term with a very specific meaning: in questions of residency and jurisdiction, it "is used almost exclusively to refer to a single place in the world meeting a certain standard, not to a place within a state meeting that standard."[186] Thus, the statute allowed transfer of venue from the place where the tort occurred to the county where the defendant maintains its principal place of business "*only if* a defendant's principal place of business . . . is located

175. *Id.* at 454, 781 S.E.2d at 400.
176. *Id.* at 454 n.1, 781 S.E.2d at 400 n.1.
177. *Id.* at 454 n.2, 781 S.E.2d at 400 n.2.
178. *Id.* at 454, 781 S.E.2d at 400.
179. 334 Ga. App. 812, 780 S.E.2d 459 (2015).
180. *Id.* at 812-13, 780 S.E.2d at 460.
181. *Id.*
182. O.C.G.A. § 14-2-510 (2003).
183. O.C.G.A. § 14-2-510(b)(4).
184. *Kingdom Retail Group*, 334 Ga. App. at 812-13, 780 S.E.2d at 460.
185. *Id.* at 813-14, 780 S.E. at 460-61.
186. *Id.* at 816, 780 S.E.2d at 462.

in Georgia."[187] It was undisputed that the defendant in *Kingdom Retail* had its principal place of business in Maryland; therefore, the court of appeals reversed and remanded the case to Thomas County.[188]

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.

187. *Id.* at 818, 780 S.E.2d at 463 (emphasis added).

188. *Id.* at 817-18, 780 S.E.2d at 463.