Mercer Law Review

Volume 67
Number 1 *Annual Survey of Georgia Law*

Article 16

12-2015

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Trial Practice and Procedure

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I. INTRODUCTION

This Article addresses several significant opinions issued and legislation passed during the survey period of this publication for the Georgia civil trial practitioner.[1]

II. LEGISLATION

There are a few bills passed during this year's legislative session that trial practitioners should note. The first is House Bill 190,[2] referred to as the "Uber bill."[3] This law imposes minimum liability insurance requirements on "transportation network compan[ies]"[4] and defines when those liability insurance requirements apply (for example, when the transportation network company's insurance policy covers a driver "logged on to the transportation network company's digital network").[5]

Trial practitioners should also note House Bill 342,[6] which abrogates negligence per se claims against nursing homes while also providing that trial courts may admit relevant nursing home regulations to establish the appropriate standard of care and the nursing home's alleged violations thereof.[7] The statute provides, "No violation of any regulations . . . shall constitute negligence per se," but the trial court "in any civil action shall take judicial notice of these regulations and admit them into evidence if found to be relevant to the harm alleged in the complaint."[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*, 66 MERCER L. REV. 211 (2014).

2. Ga. H.R. Bill 190, Reg. Sess. (codified at O.C.G.A. § 33-1-24 (Supp. 2015)).

3. *See* Aaron Gould Sheinin, *Uberbills Advance in State House*, ATLANTA J. CONST., Mar. 3, 2015, http://www.ajc.com/news/news/state-regional-govt-politics/uber-bills-advance-in-state-house/nkM8g/.

4. O.C.G.A. § 33-1-24(b).

5. O.C.G.A. § 33-1-24(a)(5).

6. Ga. H.R. Bill 342, Reg. Sess. (codified at O.C.G.A. § 31-7-3.2 (Supp. 2015)).

7. O.C.G.A. § 31-7-3.2(i).

8. *Id.*

III. CASE LAW

A. *Alternative Dispute Resolution*

In *BDO USA, LLP v. Coe*,[9] the Georgia Court of Appeals held that the Federal Arbitration Act (FAA)[10] does not preempt Georgia's procedural statute for pursuing a motion to compel arbitration.[11] Coe sued BDO USA, LLP (BDO) in Illinois, alleging various claims against BDO arising out of tax services BDO provided to Coe. BDO filed a petition in the Superior Court of Fulton County to compel arbitration pursuant to arbitration clauses found in the "consulting agreements" between the parties.[12] Coe then moved to dismiss that petition, and the trial court granted the motion pursuant to section 9-9-6(a) of the Official Code of Georgia Annotated (O.C.G.A.),[13] finding that the court lacked subject matter jurisdiction to consider the petition while the arbitrable issues were pending before an Illinois court.[14] On appeal, BDO claimed the trial court erred in dismissing the petition because O.C.G.A. § 9-9-6(a) was preempted by the FAA and the trial court had jurisdiction to consider the petition under § 4 of the FAA.[15] The court of appeals held that "our Supreme Court in *Jape* suggests that the procedural provisions found in §§ 3 and 4 of the FAA do not apply to state court proceedings" and "Georgia courts generally apply Georgia law to procedural matters."[16] The court further held that the FAA does not preempt O.C.G.A. § 9-9-6(a) "to the extent it controls whether a Georgia court is the appropriate forum for pursuing a motion to compel arbitration" and that

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9. 329 Ga. App. 79, 763 S.E.2d 742 (2014).

10. 9 U.S.C. §§ 1 to 307 (2012).

11. *Coe*, 329 Ga. App. at 83-84, 763 S.E.2d at 747; *see also* O.C.G.A. § 9-9-6(a) (2007) ("If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action.").

12. *Coe*, 329 Ga. App. at 79, 79-80, 763 S.E.2d at 744.

13. O.C.G.A. § 9-9-6(a).

14. *Coe*, 329 Ga. App. at 79, 763 S.E.2d at 744.

15. *Id.* at 80, 763 S.E.2d at 744. BDO argued it was unable to file a petition to compel arbitration in a federal district court in Georgia because there was incomplete diversity between the parties and an Illinois federal district court was without authority to compel arbitration outside Illinois. *Id.* at 81 n.1, 763 S.E.2d at 745 n.1.

16. *Id.* at 82, 763 S.E.2d at 746 (citing Am. Gen. Fin. Servs. v. Jape, 291 Ga. 637, 641, 732 S.E.2d 746, 749 (2012) and Continental Ins. Co. v. Equity Residential Props. Trust, 255 Ga. App. 445, 445, 565 S.E.2d 603, 603-04 (2002), *cert. denied*, 2002 Ga. LEXIS 74 (2002)).

the trial court properly held it was without jurisdiction to consider BDO's motion to compel under O.C.G.A. § 9-9-6(a).[17]

B. Ante Litem Notice

In *Board of Regents of the University System of Georgia v. Myers*,[18] the Georgia Supreme Court addressed the ante litem notice requirement in O.C.G.A. § 50-21-26(a)(5)(E),[19] which requires the claimant to state the "amount of the loss claimed to the extent of the claimant's knowledge and belief and as may be practicable under the circumstances."[20] The court held that the plaintiff's ante litem notice was insufficient because it did not state any amount of loss—such as the medical expenses the claimant had incurred by the time of the notice.[21]

In *Warnell v. Unified Government of Athens-Clarke County*,[22] the Georgia Court of Appeals held that the limited waiver of sovereign immunity under O.C.G.A. § 33-24-51(b),[23] based on a county's purchase of liability insurance, does not bar the county from raising the twelve month ante litem notice requirement under O.C.G.A. § 36-11-1[24] as a defense.[25]

C. Attorney Fees

In *Tolson v. Sistrunk*,[26] the court of appeals held that the attorney lien statute, O.C.G.A. § 15-19-14(b),[27] "affords protection to former counsel who performed legal work for a client in anticipation of filing a lawsuit, even if successor counsel ultimately filed the suit."[28] The court, however, reversed the trial court's award of twenty-five percent of the total contingency to the law firm that originated the case concluding, "Origination or procurement of a case is not a service rendered on behalf of the client and does not confer any value or benefit upon him or her" for purposes of the attorneys' lien statute.[29]

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17. *Id.* at 84, 763 S.E.2d at 747.
18. 295 Ga. 843, 764 S.E.2d 543 (2014).
19. O.C.G.A. § 50-21-26(a)(5)(E) (2013).
20. *Myers*, 295 Ga. at 846, 764 S.E.2d at 546 (quoting O.C.G.A. § 50-21-26(a)(5)(E)) (internal quotation marks omitted).
21. *Id.*
22. 328 Ga. App. 903, 763 S.E.2d 284 (2014).
23. O.C.G.A. § 33-24-51(b) (2013).
24. O.C.G.A. § 36-11-1 (2012).
25. *Warnell*, 328 Ga. App. at 905, 763 S.E.2d at 287.
26. 332 Ga. App. 324, 772 S.E.2d 416 (2015).
27. O.C.G.A. § 15-19-14(b) (2015).
28. *Tolson*, 332 Ga. App. at 329, 772 S.E.2d at 421.
29. *Id.* at 332, 772 S.E.2d at 423.

In *McClure v. McCurry*,[30] the court of appeals addressed whether a party waived its right to seek attorney fees under O.C.G.A. § 9-15-14[31] by failing to include its request for fees in the pretrial order.[32] The court concluded the statute includes its own procedural requirements, which only require a party to seek fees "by motion at any time during the course of the action but not later than 45 days after the final disposition of the action."[33] The court determined there was no authority to support the appellants' position that a party waives its rights to attorney fees under § 9-15-14 if it does not include such a request in the pretrial order.[34]

In *Hal Wright Esq. v. Gentemann*,[35] the court of appeals held that a lawyer may recover fees incurred in suing to collect the fees owed by a former client as long as the engagement agreement provides a right to recover attorney fees.[36] The court concluded that if the request for attorney fees is supported by a contract, "an award of attorney fees is available with respect to a firm or attorney's self-representation in an action to collect fees owed by a client."[37]

In *LabMD, Inc. v. Savera*,[38] the court of appeals affirmed the trial court's conclusion that fees incurred by a party for representation in a related declaratory judgment action over insurance coverage for the underlying lawsuit was necessary to the defense of the underlying lawsuit and recoverable under O.C.G.A. § 9-15-14.[39] The court, however, vacated the award of fees and remanded the case for further proceedings because the trial court did not consider whether the plaintiff was entitled to a setoff for attorney fees paid by the plaintiff's counsel or for fees paid by the defendant's insurance company.[40]

D. Class Actions

In *Georgia-Pacific Consumer Products, LP v. Ratner*,[41] the Georgia Supreme Court further defined the "commonality" requirement under

30. 329 Ga. App. 342, 765 S.E.2d 30 (2014).
31. O.C.G.A. § 9-15-14 (2015).
32. *McClure*, 329 Ga. App. at 342, 765 S.E.2d at 30.
33. *Id.* at 343, 765 S.E.2d at 31.
34. *Id.* at 331, 765 S.E.2d at 31-32.
35. 327 Ga. App. 650, 760 S.E.2d 654 (2014).
36. *Id. at* 652, 760 S.E.2d at 656.
37. *Id.*
38. 331 Ga. App. 463, 771 S.E.2d 148 (2015).
39. *Id.* at 467, 771 S.E.2d at 152.
40. *Id.* at 468, 771 S.E.2d at 153.
41. 295 Ga. 524, 762 S.E.2d 419 (2014).

O.C.G.A. 9-11-23(a)[42] for the certification of a class action.[43] The plaintiffs were property owners who claimed they suffered property damage as a result of hydrogen sulfide gas emissions from a nearby sludge field.[44] The court determined that meeting the commonality requirement for class certification means there must not simply be "common questions" among the plaintiffs—there must also be common answers.[45] In other words, those questions must be capable of being resolved for everyone at once.[46] The plaintiffs did not present evidence that would establish the entire area, by which the class was defined, was contaminated by the hydrogen gas from the sludge field and, therefore, did not meet this requirement.[47] However, the court was careful to point out that "[n]o one should misunderstand us to say that commonality never can be shown in the context of environmental mass torts, that it cannot be shown in this case, or even that it cannot be shown in this case as to the class as the trial court defined it."[48] Thus, *Ratner* sets the bar high for establishing commonality in a toxic tort case, but not insurmountably so.

E. Dismissal and Renewal

The Georgia Court of Appeals in *Gresham v. Harris*[49] declined to follow the interpretation of Georgia's renewal statute[50] in *Morris v. Haren*,[51] a decision by the United States Court of Appeals for the Eleventh Circuit.[52] The court concluded that "an event short of the termination of the plaintiff's action against the relevant defendant or defendants cannot constitute a discontinuance under the renewal statute."[53] The court also held that "the renewal period does not begin to run until the case is actually terminated as a result of such action."[54]

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42. O.C.G.A. § 9-11-23(a) (2015).
43. 295 Ga. at 528, 763 S.E.2d at 423.
44. *Id.* at 524, 762 S.E.2d at 420.
45. *Id.* at 528, 762 S.E.2d at 423.
46. *Id.* at 528 n.12, 762 S.E.2d at 423 n.12.
47. *Id.* at 529, 762 S.E.2d at 423-24.
48. *Id.* at 531, 762 S.E.2d at 425.
49. 329 Ga. App. 465, 765 S.E.2d 400 (2014), *cert. denied*, 2015 Ga. LEXIS 74 (2015).
50. O.C.G.A. § 9-2-61(a) (2007) ("When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff *discontinues or dismisses* the same, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later . . . ." (emphasis added)).
51. 52 F.3d 947 (11th Cir. 1995).
52. *Gresham*, 329 Ga. App. at 467, 765 S.E.2d 403.
53. *Id.*
54. *Id.* at 468, 765 S.E.2d at 403.

In *Gottschalk v. Woods*,[55] the court of appeals held that "the start of the six-month window for renewal . . . was triggered by the date the Eleventh Circuit affirmed the decision of the district court dismissing [the plaintiff's] Federal Lawsuit, not the later date when the Eleventh Circuit's mandate was issued."[56] The court determined that since the plaintiff did not "seek and obtain any further review and the case was not remanded to the district court for further proceedings," the "issuance of the mandate [was] immaterial . . . because the controversy in federal court effectively ended when the Eleventh Circuit issued its decision affirming the district court."[57]

F. Emergency Room Statute

Georgia's emergency room statute (E.R. Statute)[58] requires a plaintiff to show gross negligence by clear and convincing evidence to recover for injuries "arising out of the provision of emergency medical care."[59] In *Hospital Authority of Valdosta v. Brinson*,[60] the Georgia Court of Appeals held that when determining whether the E.R. Statute applied, the critical question is not the patient's *actual* condition but, rather, whether the patient "presented [] symptoms that should have alerted the health care providers that [the patient] required emergency medical care."[61] The court concluded that because the defendants testified the patient was stable and treated appropriately, and the plaintiff testified that the patient had some alarming symptoms when he arrived at the hospital, the question of whether the E.R. Statute applied had to be resolved by the jury.[62]

G. Hospital Liens

In *Kight v. MCG Health, Inc.*,[63] the Georgia Supreme Court addressed the court of appeals decision in *MCG Health, Inc. v. Kight*,[64] holding, inter alia, that the court of appeals did not err when it reversed the award of partial summary judgment on the ground that "the [hospital] lien was invalid because there was no debt owing at the time

55. 329 Ga. App. 730, 766 S.E.2d 130 (2014).
56. *Id.* at 734, 766 S.E.2d at 134.
57. *Id.* at 735-36, 766 S.E.2d at 135.
58. O.C.G.A. § 51-1-29.5 (Supp. 2015).
59. O.C.G.A. § 51-1-29.5(c).
60. 330 Ga. App. 212, 767 S.E.2d 811 (2014), *reconsideration denied* (Dec. 5, 2014).
61. *Id.* at 220-21, 767 S.E.2d at 817.
62. *Id.* at 221, 767 S.E.2d at 817.
63. 296 Ga. 687, 769 S.E.2d 923 (2015).
64. 325 Ga. App. 349, 750 S.E.2d 813 (2013).

it was filed."[65] The court determined that "[c]ontrary to the ruling of the trial court and [the patient's] arguments to this Court, the [h]ospital was owed money on the date that the lien was filed"—that is, the patient owed unpaid deductibles and co-pays to the hospital.[66] The court rejected the patient's argument that the hospital "waived its right to impose a lien" because the hospital's contract with the patient's insurance plan "explicitly reserves the [h]ospital's right to collect deductibles and co-pays directly from [the patient]" and the hospital did not otherwise agree that it had no recourse against the patient.[67] The court also rejected the patient's attempt to rewrite the hospital lien statute by imposing a requirement that the lien "be exact on the date it was filed or be considered void ab initio."[68]

With two sentences, the court diminished the holding in the court of appeals opinion:

> We note that the Court of Appeals opinion, in dicta, discusses wide-ranging applications of the hospital lien law which simply are not relevant to the facts of the case currently before this Court. This opinion affirms the Court of Appeals for the reasons given above, and we neither reach nor adopt any of the dicta and reasoning except as set forth herein.[69]

H. Immunity

In *Hartley v. Agnes Scott College*,[70] the Georgia Supreme Court held that campus police officers for private colleges do not come within the definition of a "state officer or employee" in the Georgia Tort Claims Act (GTCA)[71] and are, therefore, not entitled to immunity under the GTCA.[72]

The court of appeals addressed the immunity of the Georgia Department of Transportation (DOT) in three separate cases. In *Department of Transportation v. Kovalcik*,[73] there was evidence that the DOT's role in the underlying events included both approving construction plans for the redesign of a state road and inspecting the physical property for

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65. *Kight*, 296 Ga. at 687-88, 769 S.E.2d at 924.
66. *Id.* at 688, 689, 769 S.E.2d at 924, 925 (emphasis omitted).
67. *Id.* at 689, 769 S.E.2d at 925.
68. *Id.* at 690, 769 S.E.2d at 925.
69. *Id.*
70. 295 Ga. 458, 759 S.E.2d 857 (2014).
71. O.C.G.A. § 50-21-20 to -37 (2013) (defining "state officer or employee" with O.C.G.A. § 50-21-22(7)).
72. *Hartley*, 295 Ga. at 466-67, 759 S.E.2d at 864.
73. 328 Ga. App. 185, 761 S.E.2d 584 (2014).

compliance with DOT standards as built in accordance with those plans.[74] The court held that under the GTCA, immunity is waived to the extent the DOT's role included inspection of the state property to detect hazards or determine compliance with the law, but noted the DOT is immune under its licensing powers to claims predicated on the DOT's improper authorization of construction plans.[75]

In *Department of Transportation v. Jarvie*,[76] the court of appeals "decline[d] to extend the waiver of sovereign immunity to include independent contractors' conduct even if a State actor in some way attempts to ensure that contractors are operating safely on a State-approved project."[77] The court held that the DOT was immune from liability for its decision to allow the stockpiling of aggregate material in the highway median by an independent contractor.[78] The court distinguished *Kovalcik* on the basis that *Kovalcik* involved the DOT inspecting a completed roadway project, whereas the DOT's role in *Jarvie* was limited to monitoring the method of construction as previously approved.[79]

In a third case, *Georgia Department of Transportation v. Owens*,[80] the court of appeals, citing *Kovalcik* and *Jarvie*, held that the DOT was immune to negligence claims based on the DOT's approval of a site-specific traffic control plan and an on-site inspection of the contractor's implementation of those plans.[81] However, because there was some evidence that the DOT exercised responsibility for proposing—rather than merely approving—modifications to the traffic control plan, the court held that the DOT was not immune to claims relating to the DOT's duty to modify the basic traffic control plan.[82]

I. Insurance and Direct Actions

In *Carter v. Progressive Mountain Insurance*,[83] the Georgia Supreme Court reversed the decision of the court of appeals and held that the manner in which a plaintiff allocates settlement funds pursuant to a limited liability release does not preclude the plaintiff from seeking uninsured motorist benefits so long as the defendant's liability coverage

74. *Id.* at 189, 761 S.E.2d at 588.
75. *Id.* at 189-91, 761 S.E.2d at 588-89; *see also* O.C.G.A. § 50-21-24(9) (2013).
76. 329 Ga. App. 681, 766 S.E.2d 94 (2014).
77. *Id.* at 684, 766 S.E.2d at 98 (footnote omitted).
78. *Id.* at 685, 766 S.E.2d at 98.
79. *Id.* at 684 n.14, 766 S.E.2d at 97 n.14.
80. 330 Ga. App. 123, 766 S.E.2d 569 (2014).
81. *Id.* at 137-38, 766 S.E.2d at 580-81.
82. *Id.* at 136-37, 766 S.E.2d at 580.
83. 295 Ga. 487, 761 S.E.2d 261 (2014).

is exhausted.[84] The plaintiff's allocation of settlement funds to punitive damages and compensatory damages was of no consequence because, in total, the defendant's liability policy *was* exhausted.[85] Therefore, the plaintiff was not precluded from seeking uninsured motorist benefits from his carrier.[86]

In *FCCI Insurance Co. v. McLendon Enterprises, Inc.*,[87] the Georgia Supreme Court answered a certified question from the United States Court of Appeals for the Eleventh Circuit and extended the rationale applied in *Tinsley v. Worldwide Insurance Co.*,[88] holding that a tortfeasor's partial immunity from a suit does not preclude an insured driver from recovering uninsured motorist benefits.[89] The insurer claimed it was not obligated to pay uninsured benefits because its insured driver was not "legally entitled to recover" anything from the tortfeasor due to the tortfeasor's partial sovereign immunity from the suit.[90] The court rejected the insurer's argument since allowing "an insurer to escape liability under its contract" solely because the tortfeasor is immune from suit "would be contrary to the purpose of the [Uninsured Motorist Act]."[91]

In *Mornay v. National Union Fire Insurance Co. of Pittsburgh, P.A.*,[92] the court of appeals interpreted O.C.G.A. § 40-1-100(12)(B)(vii),[93] which

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84. *Id.* at 487, 494, 761 S.E.2d at 263, 267.

85. *Id.* at 488-90, 761 S.E.2d at 263-64. The plaintiff and the defendant executed a limited liability release with the defendant for $30,000—the defendant's liability insurance limits. *Id.* at 488, 761 S.E.2d at 263. In doing so, the plaintiff allocated $29,000 to punitive damages and $1000 to compensatory damages. *Id.* The trial court and the court of appeals erred in finding the plaintiff's allocation of some of the settlement funds to punitive damages failed to exhaust the limits of the defendant's liability insurance policy. *Id.* at 493, 761 S.E.2d at 267.

86. *Id.* at 489-90, 761 S.E.2d at 264.

87. 297 Ga. 136, 772 S.E.2d 651 (2015).

88. 212 Ga. App. 809, 442 S.E.2d 877 (1994), *cert. denied*, 1994 Ga. LEXIS 801 (1994). In *Tinsley v. Worldwide Insurance Co.*, despite the fact that sovereign immunity *completely* barred recovery from the tortfeasor, the court of appeals held the plaintiff could recover from his uninsured motorist carrier. *Id.* at 811, 442 S.E.2d at 879.

89. *FCCI Ins. Co.*, 297 Ga. at 141, 772 S.E.2d at 654.

90. *Id.* at 138-39, 772 S.E.2d at 653. The insurance policy provided that the insurer will pay "all sums in excess of the applicable deductible option . . . that the 'insured' is legally entitled to recover as compensatory damages from the owner or driver of an 'uninsured motor vehicle.'" *Id.* at 138 n.6, 772 S.E.2d at 653 n.6 (alterations in original).

91. *Id.* at 141, 772 S.E.2d at 654 (quoting *Tinsley*, 212 Ga. App. at 810, 442 S.E.2d at 878) (internal quotation marks omitted).

92. 331 Ga. App. 112, 769 S.E.2d 807 (2015), *cert. denied*, 2015 Ga. LEXIS 474 (2015).

93. O.C.G.A. § 40-1-100 (2015). The statute provides in relevant part that the term "motor carrier" shall not include:

is part of Georgia's Motor Carrier Act[94] and governs the exclusion of certain vehicles.[95] Declining to allow the plaintiff to bring a direct action against the defendant's insurance company, the court held that the defendant's vehicle was not a "motor carrier" within the meaning of the statute because the vehicle's *actual* seating capacity, as opposed to the vehicle's initially designed seating capacity, was relevant for determining whether the vehicle was a "motor carrier" applicable to the Act.[96]

J. Motions for New Trial and Appeals

In *Sewell v. Cancel*,[97] the Georgia Supreme Court overruled *Fulton v. Pilon*,[98] holding that where a cross-appeal is timely filed and procedurally proper, the cross-appeal need not be factually related to the issues raised in the main appeal.[99] The court also held that an appellee may raise, in its cross-appeal, adverse rulings that were issued after the filing of the notice of appeal for the main appeal.[100]

In *Armstrong v. Gynecology & Obstetrics of Dekalb, P.C.*,[101] the court of appeals affirmed the trial court's denial of a motion for new trial after the plaintiff presented evidence that jurors used their cell phones to look up words included in the jury instructions.[102] The court held that because there was no testimony regarding the substance of the definitions found by the jurors and no showing that the information was

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> (vii) Vehicles, owned or operated by the federal or state government or by any agency, instrumentality, or political subdivision of the federal or state government, or privately owned and operated for profit or not for profit, *capable of transporting not more than ten persons* for hire when such vehicles are used exclusively to transport persons who are elderly, disabled, en route to receive medical care or prescription medication, or returning after receiving medical care or prescription medication.

Id. § 40-1-100(12)(B)(vii) (emphasis added).

94. O.C.G.A. tit. 46, ch. 7 (2004 & Supp. 2015).

95. *Mornay*, 331 Ga. App. at 114-16, 769 S.E.2d at 809-11. Note, the vehicle at issue "was originally designed to seat at least 12 passengers." *Id.* at 114, 769 S.E.2d at 809. At the time the plaintiff's claim arose, the vehicle had been retrofitted to transport a wheelchair and no more than three other passengers. *Id.*

96. *Id.* at 116, 769 S.E.2d at 810-11.

97. 295 Ga. 235, 759 S.E.2d 485 (2014).

98. 199 Ga. App. 861, 406 S.E.2d 517 (1991).

99. *Sewell*, 295 Ga. at 239, 759 S.E.2d at 488.

100. *Id.* at 239-40, 759 S.E.2d at 488.

101. 327 Ga. App. 737, 761 S.E.2d 133 (2014).

102. *Id.* at 737-38, 740, 761 S.E.2d at 135, 137.

prejudicial, the trial court did not abuse its discretion in denying a new trial.[103]

In *Womack v. Johnson*,[104] the court of appeals held the appellants waived any right to complain about a photograph of the defendant's infant child that was shown to the jury during opening statements because the appellants did not object at the time the photo was shown but, instead, waited until the next day to raise the issue with the trial court.[105] The court held that "when a party waits until the conclusion of the opposing party's argument to object or move for a mistrial, any error is not preserved for appellate review."[106]

K. Sanctions

In *North Druid Development, LLC v. Post, Buckley, Schuh & Jernigan, Inc.*,[107] the court of appeals held that it is reversible error for a trial court to dismiss a party's complaint as a sanction by inferring willfulness from the party's failure to respond to discovery requests.[108] The court explained that willfulness may not be inferred; rather, the trial court must afford the party an opportunity to be heard before dismissal is imposed as a sanction.[109] In *North Druid Development*, the plaintiff failed to respond to the defendant's discovery requests and good faith letters attempting to resolve the plaintiff's discovery responses. The defendant filed a motion to dismiss and, in the alternative, to compel discovery. The plaintiff then produced some responsive documents, but failed to respond to the defendant's motion. The trial court granted the motion and dismissed the plaintiff's complaint with prejudice without entering an order compelling discovery or affording the plaintiff an opportunity to be heard. Three years after the entry of final judgment, the plaintiff attempted to have the dismissal set aside, but the trial court denied the motion and re-entered its order dismissing the complaint with prejudice.[110] The court of appeals held the trial court

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103. *Id.* at 740, 761 S.E.2d at 137.

104. 328 Ga. App. 543, 762 S.E.2d 428 (2014).

105. *Id.* at 545, 762 S.E.2d at 429-30.

106. *Id.*

107. 330 Ga. App. 432, 767 S.E.2d 29 (2014), *reconsideration denied, cert. denied*, 2015 Ga. LEXIS 267 (2015).

108. *Id.* at 438-39, 767 S.E.2d at 34-35.

109. *Id.*

110. *Id.* at 433-35, 767 S.E.2d at 31-33. The plaintiff attempted to file its former attorney's affidavit explaining its failure to respond to discovery requests, but the trial court struck the affidavit and "explain[ed] that it would not consider the merits of the sanctions motion, but would instead limit the hearing to the question of whether the order of dismissal should be set aside on procedural grounds." *Id.* at 434, 767 S.E.2d at 32.

erred when it granted the dismissal without first entering an order compelling discovery and when the plaintiff failed to comply, affording the plaintiff an opportunity to be heard on the motion for sanctions.[111] The court disagreed with the defendant's position that "a court may infer wilfulness [sic] from a party's failure to respond to discovery requests without affording the offending party an opportunity to explain its conduct."[112] Therefore, the court vacated the dismissal and remanded the case.[113]

L. Settlement and Offer of Settlement Statute

When the plaintiff seeks punitive damages, the defendant's offer of settlement under O.C.G.A. § 9-11-68[114] must state with particularity the amount for which he proposes to settle the punitive claim.[115] In *Chadwick v. Brazell*,[116] the Georgia Court of Appeals held that failure to specifically allocate a portion of the proposed settlement to the punitive claim prohibits an award of attorney fees under the offer of settlement statute.[117]

In *Georgia Department of Corrections v. Couch*,[118] the Georgia Supreme Court provided guidance on how to calculate attorney fees when a party is entitled to fees under the offer of settlement statute, O.C.G.A. § 9-11-68.[119] In *Couch*, the jury's verdict triggered the application of fees under the statute. The plaintiff had a forty percent contingency fee agreement with his lawyers. His lawyers submitted evidence that the value of their services, had those services been billed at an hourly rate from the time of the offer to the time of settlement, was over $90,000. The trial court decided that the contingency fee agreement would set the value of the attorney fee award and awarded $49,542 in costs.[120]

Although the Georgia Court of Appeals affirmed this ruling, the Georgia Supreme Court reversed.[121] The supreme court reasoned that the statute only permitted recovery for those fees incurred *after* the offer

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111. *Id.* at 435-36, 767 S.E.2d at 33-34.
112. *Id.* at 438, 767 S.E.2d at 34.
113. *Id.* at 439, 767 S.E.2d at 35.
114. O.C.G.A. § 9-11-68 (2015).
115. *See id.* § 9-11-68(a)(6); Chadwick v. Brazell, 331 Ga. App. 373, 771 S.E.2d 75 (2015).
116. 331 Ga. App. 373, 771 S.E.2d 75 (2015).
117. *Id.* at 377, 771 S.E.2d at 79.
118. 295 Ga. 469, 759 S.E.2d 804 (2014).
119. *Id.* at 483-86, 759 S.E.2d at 815-18.
120. *Id.* at 470, 482-83, 759 S.E.2d at 807, 815.
121. *Id.* at 486, 759 S.E.2d at 818.

of settlement was rejected.[122] Therefore, a trial court could not simply award the full value of the contingency fees to the defendant without considering that some of those fees were earned before the offer of settlement was rejected.[123] The court noted that although there was record evidence of the number and value of hours the plaintiff's counsel worked after the offer was rejected, the trial court did not appear to have relied on that evidence.[124]

Tillman v. Mejabi[125] is an important case for any lawyer making or responding to a demand. In *Tillman*, the plaintiff made a demand for the policy limits of a defendant's automobile insurance policy "in full and final settlement" of the plaintiff's claims without including a proposed release.[126] The insurer accepted the demand by enclosing a check for the limits and a general release.[127] The Georgia Court of Appeals held the settlement was enforceable and the trial court did not err in ordering the plaintiff to execute a release because the parties had reached "a meeting of the minds on the essential terms irrespective of [the insurer's] inclusion of a general release with terms unacceptable to the [plaintiff's] attorney."[128]

In *Patel v. Patel*,[129] the defendant signed a mediation agreement without indicating he was signing on behalf of his corporation, of which he was the sole shareholder and chief executive officer. The agreement required the defendant to transfer certain properties to the other party. Those properties, however, belonged to the corporation.[130] The court of appeals reversed the trial court's grant of the motion to enforce the settlement.[131] The appellate court reasoned there was a question of fact regarding whether the defendant had the authority to bind the corporation because (1) the defendant provided affidavits, which he stated he signed in his individual capacity and not on behalf of the corporation, and (2) the record evidence established only that the defendant was the president of the corporation, not the sole shareholder.[132]

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122. *Id.* at 485, 759 S.E.2d at 816-17.
123. *Id.*
124. *Id.* at 484, 759 S.E.2d at 816.
125. 331 Ga. App. 415, 771 S.E.2d 110 (2015).
126. *Id.* at 111-12, 771 S.E.2d at 416.
127. *Id.* at 112, 771 S.E.2d at 416-17.
128. *Id.* at 113, 771 S.E.2d at 418.
129. 327 Ga. App. 733, 761 S.E.2d 129 (2014), *cert. denied*, 2014 Ga. LEXIS 1005 (2014).
130. *Id.* at 733-34, 761 S.E.2d at 131, 133.
131. *Id.* at 734, 761 S.E.2d at 131.
132. *Id.* at 735-36, 761 S.E.2d at 132.

In *Tiller v. RJJB Associates, LLP*,[133] the court of appeals emphasized the need to state with particularity the claims that an offer of settlement will resolve.[134] Two defendants offered to settle "any and all claims arising out of" the subject incident under O.C.G.A. § 9-11-68.[135] However, it was unclear whether the offer included the proposed settlement of claims against a third defendant, against whom the plaintiff already had a default judgment.[136] In addition, the offer was not clear regarding its conditions since it required the plaintiff to dismiss her "Complaint" without stating whether the offer was referring to the original complaint or her amended complaint, which added the third defendant.[137]

M. Statutes of Limitations

In *Gallant v. MacDowell*,[138] the Georgia Supreme Court interpreted O.C.G.A. § 9-3-96,[139] which governs the tolling of the statute of limitations based on alleged fraudulent concealment by the defendant.[140] The court explained that when there is alleged fraudulent concealment by a doctor, the patient's consultation with a second doctor typically triggers the end of the tolling of the limitations period under O.C.G.A. § 9-3-96 because the patient is no longer deterred from discovering facts that were allegedly concealed.[141] The court determined the same rationale does not apply when the patient's consulting doctor provided to the patient joint medical services with the defendant doctor that is alleged to have fraudulently concealed facts from the patient.[142] Thus, the statute of limitations will continue to toll until the patient is no longer deterred from learning the true facts or consults with a doctor who is independent of the defendant doctor's services.[143]

In *Georgia Regional Transportation Authority v. Foster*,[144] the court of appeals held the tolling provision of O.C.G.A. § 36-33-5(d)[145] does

133. 331 Ga. App. 622, 770 S.E.2d 883 (2015).
134. *Id.* at 626, 770 S.E.2d at 887.
135. *Id.* at 623, 770 S.E.2d at 885.
136. *Id.* at 626, 770 S.E.2d at 887.
137. *Id.* at 625-26, 770 S.E.2d at 886.
138. 295 Ga. 329, 759 S.E.2d 818 (2014).
139. O.C.G.A. § 9-3-96 (2014).
140. *Gallant*, 295 Ga. at 332-33, 759 S.E.2d at 821.
141. *Id.* at 332, 759 S.E.2d at 821.
142. *Id.* at 333, 759 S.E.2d at 821.
143. *Id.* at 332-33, 759 S.E.2d at 821.
144. 329 Ga. App. 258, 764 S.E.2d 862 (2014).
145. O.C.G.A. § 36-33-5(d) (2014).

not apply to claims brought pursuant to the GTCA.[146] The court strictly interpreted a provision in O.C.G.A. § 50-21-27(e),[147] and held the tolling provision in O.C.G.A. § 36-33-5(d)—applicable to claims against municipalities—was not "intended to apply outside the confines of its Title, Subpart, and Chapter."[148] The court held that applying the municipal ante litem tolling provision to the State would impose an obligation on the State that the legislature did not intend.[149]

N. Venue, Removal, and Remand

In *Georgia Department of Human Services v. Dougherty County*,[150] the court of appeals held that in a non-tort action against a state governmental agency, where the legislature has not carved out a venue exception, the place where the defendant resides pursuant to article 6, section II, paragraph 6 of the Georgia Constitution of 1983[151] is the proper venue.[152] Accordingly, because the principal offices of the Georgia Department of Human Services and the Division of Child Support Services are located in Fulton County, the court determined that Fulton County is the proper venue for a suit against these governmental entities that seeks to recover statutory service of process fees.[153]

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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146. *Ga. Reg'l Transp. Auth.*, 329 Ga. App at 261, 764 S.E.2d at 865.

147. O.C.G.A. § 50-21-27(e) (2013) ("All provisions relating to the tolling of limitations of actions, as provided elsewhere in this Code, shall apply to causes of action brought pursuant to this article.").

148. *Ga. Reg'l Transp. Auth.*, 329 Ga. App at 260, 764 S.E.2d at 865.

149. *Id.* at 261, 794 S.E.2d at 865. Unlike municipalities, the court noted the State has no obligation or deadline to respond to ante litem notices for claims brought pursuant to the GTCA. *Id.*

150. 330 Ga. App. 581, 768 S.E.2d 771 (2015).

151. GA. CONST. art VI, § 2, para. 6 (1983).

152. *Dougherty Cnty.*, 330 Ga. App. at 582, 768 S.E.2d at 772.

153. *Id.* at 582, 768 S.E.2d at 772-73.