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Labor and Employment

by W. Melvin Haas, III*
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I. INTRODUCTION

This Article surveys recent developments in the state statutory and common law that affect labor and employment relations of Georgia employers. Accordingly, it surveys published decisions from the Georgia Supreme Court and Georgia Court of Appeals from June 1, 2002 to May 31, 2003. This Article also includes highlights of certain revisions to the Official Code of Georgia Annotated ("O.C.G.A.").[1]

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1. Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See* Daily Lab. Rep. (BNA); THE DEVELOPING LABOR LAW (Patrick Hardin et al. eds., 4th ed. 2001); BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (Paul W. Cane, Jr. et al. eds., 3d ed. & Supps. 1996-2002). Accordingly, the purpose of this Article is not to cover the latest developments under Title VII of the Civil Rights Act of 1964 (42 U.S.C.

II. RECENT LEGISLATION

A. *Employment Security*

Although Georgia's Employment Security Law[2] is a product of 1930's "New Deal" social legislation,[3] its "declaration of state public policy" has remained unaltered despite numerous revisions:[4] "[T]he public good and general welfare of the citizens of this state require[d] . . . the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."[5]

Without regard to the general assembly's changes to the "Workers' Compensation" section[6] of the Georgia Labor and Industrial Relations Code ("the Code"),[7] the general assembly enacted several amendments to Georgia's Employment Security Law that became effective during the survey period.[8] The most notable amendment expands the disqualifica-

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§§ 2000a-2000h-6), the Fair Labor Standards Act (29 U.S.C. §§ 201-19), the National Labor Relations Act (29 U.S.C. §§ 141-88), the Age Discrimination in Employment Act (29 U.S.C. §§ 621-34), or the Americans with Disabilities Act (42 U.S.C. §§ 12101-2213). Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

2. O.C.G.A. § 34-1-1 (1998).

3. JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW 227 (3d ed. 2000 & Supp. 2002).

4. *Id.* at 227.

5. *Id.* at 227-28 (citing 1937 Ga. Laws 806, 807).

6. Recent developments in workers' compensation law are discussed in H. Michael Bagley et al., *Workers' Compensation Law*, 55 MERCER L. REV. 481 (2003).

7. O.C.G.A. §§ 34-1-1 to 34-14-2 (1998 & Supp. 2003).

8. Two enactments of the general assembly regarding employment security became effective during the survey period. 2002 Ga. Laws 1119-24; Ga. S. Bill 167, Reg. Sess. (2003). However, given the relative complexity of the employment security code, the concomitant regulatory framework, and its general inapplicability to the average practitioner, we have chosen to omit a comprehensive analysis of the legislation. Nevertheless, it should be noted that the "Employment Security and Enhancement Act of 2002," effective July 1, 2002, amended the "Employment Security Law," *inter alia*, by creating a temporary alternative base period, applicable to certain individuals and calculated using "the first four of the last five calendar quarters completed immediately preceding the first day of [the] individual's benefit year," § 2, 2002 Ga. Laws at 1120 (amending O.C.G.A. § 34-8-21 (1998)); by redefining the term "deductible earnings" for claims filed on or after July 1, 2002, to mean "all money in excess of $50.00 each week earned by a claimant for services performed," § 3, 2002 Ga. Laws at 1121 (amending O.C.G.A. § 34-8-30 (1998)); by changing provisions relating to the "standard rate" of employer contributions, § 4, 2002 Ga. Laws at 1121 (amending O.C.G.A. § 34-8-155 (1998)); and by suspending the rate surcharge under O.C.G.A. § 34-8-156 for the period of January 1, 2003, through December 31, 2003, § 5, 2002 Ga. Laws at 1121-22 (amending O.C.G.A. § 34-8-156 (1998)). Similarly, a 2003 enactment, effective May 30, 2003, extends the

tion criteria for individuals employed by "professional employer organizations."[9] Specifically, the legislature amended the Code so that individuals employed by professional employer organizations will be presumed to have voluntarily left employment without good cause if they do not contact the professional employer organizations for reassignment upon the completion of an assignment.[10] With this change, employees of professional employer organizations will now be disqualified on the same basis as individuals employed by a "temporary help contracting firm."[11]

III. WRONGFUL DISCHARGE

A. *Employment at Will*

1. **Overview.** An employment-at-will contract has two notable characteristics. First, either the employee or employer may terminate the employment relationship at any time, with or without cause.[12] Second, and a corollary of the first characteristic, upon the termination of an employment-at-will contract, the employee may not successfully maintain a wrongful termination claim.[13]

While the employment-at-will doctrine is gradually eroding in other jurisdictions,[14] O.C.G.A. section 34-7-1 provides that employment

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suspension of the overall increase in the rate of employer contributions to the Unemployment Trust Fund through December 31, 2004. Ga. S. Bill 167, Reg. Sess. (2003).

9. Ga. S. Bill 167, Reg. Sess. (2003). A professional employer organization is defined as "an employee leasing company . . . that has established a coemployment relationship with another employer, pays the wages of the employees of the coemployer, reserves a right of direction and control over the employees of the coemployer, and assumes responsibility for the withholding and payment of payroll taxes of the coemployer." O.C.G.A. § 34-7-6(a) (1998 & Supp. 2003). A "professional employer organization" is considered "employers under this title and are required to comply with [its] provisions." *Id.* § 34-7-6(d).

10. Ga. S. Bill 167, Reg. Sess (2003).

11. *See* O.C.G.A. § 34-8-157(c) (1998).

12. *See generally* WIMBERLY, *supra* note 3, at 20-21.

13. *Id.*

14. *See* Mark A. Fahleson, *The Public Policy Exception to Employment at Will–When Should Courts Defer to the Legislature?* 72 NEB. L. REV. 956 (1993); Cortlan H. Maddux, *Employers Beware! The Emerging Use of Promissory Estoppel as an Exception to Employment at Will*, 49 BAYLOR L. REV. 197 (1997); Kimberly Anne Huffman, *Salt v. Applied Analytical, Inc.: Clarifying the Confusion in North Carolina's Employment-at-Will Doctrine*, 70 N.C. L. REV. 2087 (1992); Richard J. Pratt, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-at-Will Doctrine*, 139 U. PA. L. REV. 197 (1990); and Melanie Robin Galberry, *Employers Beware: South Carolina's Public Policy Exception to the At-Will Employment Doctrine is Likely to Keep Expanding*, 51 S.C. L. REV. 406 (2000).

contracts in Georgia are at will, unless the parties implicitly or explicitly contract otherwise.[15] Generally, this section means that in the absence of a specified length of employment, the relationship is employment at will.[16] Contract provisions specifying permanent employment, employment for life, or employment until retirement are indefinite, and therefore, they are employment-at-will contracts.[17]

During the survey period, the court of appeals opinion in *Hanne v. Mississippi Management, Inc.*[18] demonstrated just how strictly the courts construe the employment-at-will doctrine by holding that a contract purporting to abrogate the doctrine must *specify* the term of the employment relationship—mere inferences will not suffice.[19] In *Hanne* after an employee was terminated from his employment of five months, he sued for wrongful termination, alleging that a letter agreement between the parties created a two-year employment contract. Specifically, the employee based his contentions on two provisions of the letter agreement.[20] One provision stated that "[a]fter employment here for two years, on April 20, 2000, you will receive a $4,000 bonus . . . [but,] [i]f you leave for any reason before that time, whether it is your choice or not, you will not be eligible to receive this bonus."[21] The second provision stated that if the employee did not remain employed for two years, he would be required to reimburse the employer for the moving expenses paid to him upon his hiring.[22]

The court of appeals held that this language was not sufficient to establish a definite term of employment.[23] The court reasoned that despite the references to a period of two years in the provisions, the provisions did not establish a two-year term of employment because they merely referred to the eligibility of bonuses and the responsibility of the employee to pay back his moving costs if he did not remain with the company for two years.[24] Despite the inferences otherwise, neither provision contained a definite term of employment.[25] The court reiterated that "'[a]n employment contract containing no definite term of employment is terminable at the will of either party, and will not

15. O.C.G.A. § 34-7-1 (1998).
16. *See generally* WIMBERLY, *supra* note 3, at 20-21.
17. WIMBERLY, *supra* note 3, at 20.
18. 255 Ga. App. 143, 564 S.E.2d 557 (2002).
19. *Id.* at 143-44, 564 S.E.2d at 557-58.
20. *Id.*
21. *Id.*, 564 S.E.2d at 557.
22. *Id.* at 144, 564 S.E.2d at 557.
23. *Id.*, 564 S.E.2d at 558.
24. *Id.*, 564 S.E.2d at 557.
25. *Id.*

support a cause of action against the employer for wrongful termination.'"[26] Mere inferences to the contrary will not abrogate this doctrine.[27] Accordingly, the court rejected the employee's argument and upheld the trial court's grant of summary judgment on the breach of employment contract claim.[28]

2. **Terms of an At-Will Contract.** In an employment-at-will contract, the employee agrees to work for the reasonable salary he is paid. If, for example, the employee does not like the salary, or the employer feels that the employee is not worth his agreed upon salary, either party is free to terminate the employment relationship.[29] However, *Rodriguez v. Vision Correction Group, Inc.*[30] illustrates that, in addition to refusing to provide relief to terminated employees, the courts will not provide relief to at-will employees whose compensation terms are altered after the commencement of employment.[31]

In *Rodriguez* the court held that an alleged oral promise to a chief financial officer to pay an employee a specified amount was a term of an employment-at-will contract that could not be enforced.[32] The employee, Rodriguez, was promised by the employer certain stock options, along with her regular salary. The details of this stock option plan were purely speculative, and this promise was never integrated into a writing. Rodriguez was terminated before the stock option plan was exercised, and the employer refused to honor the promise. Agreeing that there was no valid contract, Rodriguez sued under unjust enrichment, claiming that the stock options (along with her salary) represented her market value and that the employer's attempt to keep this payment constituted unjust enrichment.[33]

The court rejected this argument, holding that a plaintiff may not circumvent the employment-at-will doctrine under unjust enrichment.[34] The court stated that to recover under unjust enrichment, plaintiff had the burden to demonstrate that "she was not already reasonably

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26. *Id.*, 564 S.E.2d at 558 (quoting Burton v. John Thurmond Constr. Co., 201 Ga. App. 10, 10, 410 S.E.2d 137, 138 (1991)).
27. *See id.* at 143-44, 564 S.E.2d at 557-58.
28. *Id.* at 144, 564 S.E.2d at 558.
29. *See generally* WIMBERLY, *supra* note 3, at 20-21.
30. 260 Ga. App. 478, 580 S.E.2d 266 (2003).
31. *Id.* at 478, 580 S.E.2d at 266.
32. *Id.* at 479, 580 S.E.2d at 268.
33. *Id.*, 580 S.E.2d at 267-68.
34. *Id.*, 580 S.E.2d at 268.

compensated for her services."[35] Further, the court noted the lack of any "cases where an employee was allowed to recover damages in quantum meruit or unjust enrichment after she was already paid the salary she negotiated."[36] Here, the court reasoned that Rodriguez had admitted that her salary was reasonable.[37] Further, the court reasoned that she conceded that her salary was reasonable by continuing to work for the employer for more than four years.[38] Accordingly, the court affirmed the lower court's summary judgment in favor of the employer.[39]

3. Exceptions to Employment at Will. The statute creating the employment-at-will doctrine also states the most significant exception to the doctrine—unless the parties implicitly or explicitly contract otherwise.[40] Additionally, the Code contains other exceptions to the doctrine. For example, an employer cannot discharge an employee simply because his earnings are subject to one garnishment,[41] and employers cannot discharge employees who are absent from work due to compulsory attendance at a judicial proceeding.[42]

However, as *Balmer v. Elan Corp.*[43] illustrates, the court of appeals refused to allow judicially created public policy exceptions to the doctrine.[44] In *Balmer* the employer allegedly promised plaintiff and other employees that they would not be discharged for cooperating with the Food and Drug Administration's inspection of the employer's facilities. After the inspection, the employer disagreed with the employees' handling of the inspection and fired them. The employees then sued for wrongful termination. At trial the court dismissed the wrongful termination claims, and the employees appealed, arguing that the promise not to fire abrogated the doctrine of employment at will.[45] Specifically, the employees argued that the court should view "freedom of contract" as a policy exception to the doctrine.[46]

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35. *Id.* (citing Nelson & Hill, P.A. v. Wood, 245 Ga. App. 60, 64, 537 S.E.2d 670, 675 (2000); Jackson v. Ford, 252 Ga. App. 304, 308, 555 S.E.2d 143, 148 (2001)).
36. *Id.*
37. *Id.*
38. *Id.* at 480, 580 S.E.2d at 268 (quoting Walker v. Gen. Motors Corp., 152 Ga. App. 526, 527, 263 S.E.2d 266, 267 (1979)).
39. *Id.*
40. O.C.G.A. § 34-7-1.
41. O.C.G.A. § 18-4-7 (1999).
42. O.C.G.A. § 34-1-3 (1998).
43. 261 Ga. App. 543, 583 S.E.2d 131 (2003).
44. *Id.* at 544, 583 S.E.2d at 133.
45. *Id.*
46. *Id.*

The court of appeals rejected the employees' argument, stating that "[a]lthough there can be public policy exceptions to the doctrine, judicially created exceptions are not favored, and Georgia courts thus generally defer to the legislature to create them."[47] Reasoning that the legislature had not created any "freedom to contract" public policy exception—for example, when an employer promises not to fire an employee—the court held that an action for wrongful discharge would not lie on such basis.[48] Accordingly, the court upheld the trial court's dismissal of the wrongful discharge claim.[49]

4. **Sovereign Immunity.** The Georgia Constitution waives sovereign immunity with respect to breach of contract actions against the state government.[50] However, in *Moon v. Terrell County,*[51] the court held that this waiver does not apply in a case in which an employee sues the government under an employment-at-will contract.[52] In *Moon* a discharged employee sued Terrell County for back pay. The trial court dismissed the claim and Moon appealed.[53]

The court of appeals held that "as an at-will employee, Moon could not assert a claim for back pay under Georgia law."[54] The court noted that the Georgia Constitution waives sovereign immunity for "'any action ex contractu for the breach of any *written* contract.'"[55] However, the court previously held that this provision did not include employees-at-will without a written contract.[56] Accordingly, the employee could not maintain an action for back pay against the county.[57]

B. Breach of Employment Contract (other than at-will contracts)

1. **Formulation of Employment Contracts.** To form a valid employment contract, basic rules of contract law apply: Offer, acceptance, and consideration. Further, an employment contract must contain

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47. *Id.* (citing Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 279-80, 528 S.E.2d 238, 239-40 (2000)).
48. *Id.* at 544-45, 583 S.E.2d at 133 (citing Evans v. Bibb Co., 178 Ga. App. 139, 139-40, 342 S.E.2d 484, 485-86 (1986)).
49. *Id.* at 545, 583 S.E.2d at 133-34.
50. GA. CONST. art. I, § 2, para. 9(c).
51. 260 Ga. App. 433, 579 S.E.2d 845 (2003).
52. *Id.* at 434-35, 579 S.E.2d at 847.
53. *Id.* at 433-34, 579 S.E.2d at 846-47.
54. *Id.* at 434, 579 S.E.2d at 847.
55. *Id.* at 435, 579 S.E.2d at 847 (quoting Waters v. Glynn County, 237 Ga. App. 438, 439, 514 S.E.2d 680, 682 (2003) (citing GA. CONST. art. 1, § 2, para. 9(c))).
56. *Id.*
57. *Id.*

a designation of the employee's place of employment, period of employment (if not specified, then at-will[58]), the nature of services to be rendered, and the amount or type of compensation. The terms of an employment contract must be sufficiently definite to be enforceable, and this is a question of law for the judge.[59]

In *Quadron Software International Corp. v. Plotseneder*,[60] the court of appeals considered how to determine whether a contract's terms are sufficiently certain to be enforceable.[61] In *Plotseneder* the employer, Fischer, purchased Blue Rainbow Software International ("Blue Rainbow") and formed Quadron Software International Corporation ("Quadron") to market the product. Fischer then hired plaintiff, Plotseneder, for business development and marketing.[62] The Sales Agreement between the parties contained the following provisions:

> 1. You agree with the proposal I submitted to you and Mark Merenda in April (not dated, see attachment) with the understanding that the projected expenses have not been approved yet. Independent of the actual numbers submitted, you agree with the approach to take the same percentage of the overall expenses of Quadron (here taken from Randall King's business plan) for determining the appropriate numbers for European Sales and other territories outside of North America . . . . 2. I will receive a commission of 10% for all revenues from direct sales (license and maintenance fees) and 5% as an override for sales closed by a third party (for example distributor, agent or other employee). This includes single licenses as well as volume sales . . . . My current base compensation plan as offered and approved by Randall King will remain unchanged.–Should Fischer [International] and Quadron agree to sell each other's products, revenues for Fischer [International] products will be compensated under the same 10% and 5% scheme. 3. My sales territory encompasses all countries except the USA, Canada, and Mexico . . . . 5. Initially, this agreement shall commence on June 1, 1994, for an initial period of 19 months.[63]

Another agreement executed between the parties, a "Development Agreement," obligated plaintiff to fix flaws in two software products owned by Quadron and Fischer International, in exchange for fifty percent of the net revenues from the sales proceeds. This agreement

58. *See supra* section III(A)(1).
59. *See generally* WIMBERLY, *supra* note 3, at 6-7.
60. 256 Ga. App. 284, 568 S.E.2d 178 (2002).
61. *Id.* at 284-91, 568 S.E.2d at 178-83.
62. *Id.* at 285, 568 S.E.2d at 180.
63. *Id.* at 285-86, 568 S.E.2d at 180.

specified a term of three years, regardless of plaintiff's employment with Quadron.[64]

After the parties began employment under the contract, the parties' relationship deteriorated, and Quadron terminated plaintiff in November 1994. Plaintiff then filed a lawsuit against Quadron and Fischer International on several claims, including a breach of contract action in which plaintiff contended that Quadron owed him $6030 for breach of the Sales Agreement. Plaintiff also sought specific performance of the Development Agreement, or $500,000 in the alternative. The trial court granted summary judgment in favor of the employer on all claims except those arising from the breach of the Sales Agreement and the Development Agreement, and defendants appealed.[65]

On appeal defendants argued that the Sales Agreement was too ambiguous to be enforceable.[66] However, the court disagreed.[67] The court stated:

> To be enforceable, a contract's language must be "sufficiently plain and explicit to convey what the parties agreed upon . . . . [I]t is unnecessary that a contract state definitively and specifically all facts in detail to which the parties may be agreeing, but as to such matters, it will be sufficiently definite and certain if it contains matters which will enable the courts, under proper rules of construction, to ascertain the terms and conditions on which the parties intended to bind themselves."[68]

Additionally, "[t]he law does not favor 'the destruction of contracts on the ground of uncertainty if it is possible in the light of the circumstances under which the contract was made to determine the reasonable intention[s] of the parties.'"[69]

Applying these rules of construction, the court held that the Sales Agreement was sufficiently certain to be enforceable.[70] First, defendants argued that the first numbered paragraph was too vague because it referenced a collateral document (the "proposal"), which outlined expenses.[71] The court stated, however, that this proposal was not

64. *Id.* at 286, 586 S.E.2d at 180.
65. *Id.* at 284-87, 568 S.E.2d at 179-81.
66. *Id.* at 287, 568 S.E.2d at 181.
67. *Id.*
68. *Id.* (quoting Pacrim Assocs. v. Turner Home Entm't, Inc., 235 Ga. App. 761, 764, 510 S.E.2d 52, 55 (1998) (internal citations omitted)).
69. *Id.* (quoting Gram Corp. v. Wilkinson, 210 Ga. App. 680, 681, 437 S.E.2d 341, 342 (1993) (internal citations omitted)).
70. *Id.*
71. *Id.* at 288, 568 S.E.2d at 181.

alleged to be an essential term.[72] Further, testimony established that Quadron had paid plaintiff commissions under the agreement, indicating that the parties, by their actions, did not consider the proposal to be essential in determining when or how much Quadron was required to pay.[73]

Second, defendants argued that the Sales Agreement was unenforceable because it did not identify the type of products that would generate the specified commissions.[74] The court reasoned that the Sales Agreement did not purport to restrict the scope of such products, and therefore, no essential term was lacking.[75]

Finally, the court rejected defendants' argument that the Sales Agreement was unenforceable because it left terms to be negotiated in the future.[76] Specifically, defendants pointed to a crossed-out provision stating that the commissions would also apply to products to be determined by Fischer International.[77] The court reasoned that evidence of the parties' conduct subsequent to the agreement demonstrated the terms of the agreement.[78] Accordingly, the court ruled that the agreement was sufficiently certain to be enforceable.[79]

2. Statute of Frauds. Under Georgia's statute of frauds, "[a]ny agreement that is not to be performed within one year from the making thereof"[80] must be in writing and signed by the party to be charged.[81] In *Parker v. Crider Poultry, Inc.*,[82] the supreme court held that a contract containing no definite term of employment did not require compliance with the statute of frauds, despite an employee's completion of over one year under the contract after the dispute arose.[83] Parker entered into a contract with Crider Poultry for an unspecified term of employment. A letter agreement sent by Crider Poultry to Parker confirmed the salary, incentive bonus, job title, starting date, and a required three-month notice provision upon termination of the employment by either party. After holding the position as CEO for a period of

72. *Id.*
73. *Id.*, 568 S.E.2d at 181-82.
74. *Id.*, 568 S.E.2d at 182.
75. *Id.* at 288-89, 568 S.E.2d at 182.
76. *Id.* at 289, 568 S.E.2d at 182.
77. *Id.*
78. *Id.*
79. *Id.*
80. O.C.G.A. § 13-5-30(5) (1998 & Supp. 2002).
81. *Id.* § 13-5-30.
82. 275 Ga. 361, 565 S.E.2d 797 (2002), *reconsid. denied* (July 26, 2002).
83. *Id.* at 362, 565 S.E.2d at 799.

time, Parker decided to leave the company and tendered his three-month notice. Thereafter, the company filed suit against Parker for breach of contract and breach of fiduciary duty. The employer sought to compel Parker to return bonuses that had been advanced to him. Parker counterclaimed, alleging that the company violated the three-month notice provision in the letter agreement, which required the company to allow him to continue to work through the three-month period or give him three months salary. The trial court granted partial summary judgment to Crider on the counterclaim, holding that the letter agreement violated the statute of frauds because it was not signed by the party to be charged (Crider). Parker appealed to the court of appeals, which affirmed based upon the same reasoning. Parker then appealed to the supreme court.[84]

On appeal the supreme court held that the trial court and court of appeals erred in finding that the contract violated the statute of frauds.[85] "A contract of employment of indefinite duration does not fall within the Statute of Frauds"[86] because "at its inception, . . . [it] is an agreement capable of being performed within one year, and the possibility of performance of the contract within one year is sufficient to remove it from the Statute of Frauds."[87] The trial court and court of appeals had determined that because the parties were actually under the contract for more than one year at the time the lawsuit was filed, the agreement had to comply with the statute.[88] The supreme court rejected this argument, reasoning that the argument was based on misplaced reliance of an earlier distinguishable case, which held that a contract had to be in writing because the contracts sought to be enforced were actually contemplated not to be performed within one year of their making.[89] The court reversed the trial court's grant of partial summary judgment and remanded the case to resolve the factual issues.[90]

3. Dismissals "With Cause." Under a contractual agreement between an employer and an employee that requires "cause" for dismissal, an employer who fires an employee without cause can be

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84. *Id.* at 361-62, 565 S.E.2d at 798.
85. *Id.* at 362, 565 S.E.2d at 799.
86. *Id.*, 565 S.E.2d at 798 (citing Wood v. Dan P. Holl & Co., 169 Ga. App. 839, 841, 315 S.E.2d 51, 53 (1984)).
87. *Id.*, 565 S.E.2d at 798-99 (citing Bibb Distrib. Co. v. Stewart, 238 Ga. App. 650, 654, 519 S.E.2d 455, 458-59 (1999)).
88. *Id.*
89. *Id.* *See* Gatins v. NCR Corp., 180 Ga. App. 595, 349 S.E.2d 818 (1986).
90. 275 Ga. at 363, 565 S.E.2d at 799.

liable for breach of contract and for the resulting damages.[91] In *Salhab v. Tift Heart Center, P.C.*,[92] the court of appeals held that whether an employee's alleged acts of unprofessional conduct or conduct detrimental to the employer constituted cause for discharge was an issue of fact for a jury to determine because conflicting testimony in the record established a fact issue concerning credibility.[93] In *Salhab* the parties entered into an employment contract that allowed plaintiff's termination only for cause. After seven months of employment, the employer exercised its right under the contract to discharge plaintiff. Plaintiff sued, arguing that the employer did not have cause for the dismissal, and the trial court granted summary judgment in the employer's favor.[94]

The employee appealed the trial court's finding that there were no genuine issues of material fact to be resolved.[95] The court of appeals agreed with the employee.[96] The court stated that this case was distinct from other cases allowing summary judgment in the employer's favor in which undisputed testimony demonstrated that the employee's performance was unsatisfactory.[97] In this case, the court noted that the record contained conflicting testimony on whether the employee had acted unprofessionally or had engaged in conduct which discredited or damaged the employer's reputation.[98] Therefore, this case concerned issues of credibility, and "summary judgment [is] precluded where [a] question of credibility arises as to a material issue."[99] Accordingly, the court reversed the trial court's ruling and remanded the case for the jury to resolve the credibility issues.[100]

C. Forfeiture Clauses

Generally, the law of contracts disfavors forfeitures.[101] However, the

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91. *See* Savannah Coll. of Art & Design, Inc. v. Nulph, 265 Ga. 662, 460 S.E.2d 792 (1995).

92. 260 Ga. App. 799, 581 S.E.2d 363 (2003).

93. *Id.* at 802, 581 S.E.2d at 365.

94. *Id.* at 799, 581 S.E.2d at 363-64.

95. *Id.*, 581 S.E.2d at 364.

96. *Id.*

97. *Id.* at 800, 581 S.E.2d at 364 (citing Odem v. Pace Acad., 235 Ga. App. 648, 654, 510 S.E.2d 326, 330-31 (1998)).

98. *Id.*

99. *Id.* at 802, 581 S.E.2d at 365 (citing Cherokee County Hosp. Auth. v. Beaver, 179 Ga. App. 200, 205, 345 S.E.2d 904, 908 (1986)).

100. *Id.*

101. *See* Russell v. KDA, Inc., 206 Ga. App. 397, 399, 425 S.E.2d 406, 408 (1992) ("'[W]here a contract in unmistakable terms provides for a forfeiture and is otherwise free from legal infirmity, neither a court of law nor a court of equity will relieve against the

court of appeals recently reiterated that such clauses are not per se unlawful and may be enforced in some circumstances.[102] In *Fernandes v. Manugistics Atlanta, Inc.*,[103] the court of appeals upheld a forfeiture provision in an employment contract that denied an employee sales commissions that were not both earned and payable before the termination of his employment.[104] A sales employee, Fernandes, terminated his employment with Manugistics in 2000 and demanded his commission bonuses from accounts he sold up to the date of his termination. Fernandes's employment contract, however, dictated that sales commissions must be both "earned" and "payable"—meaning the account was both sold and collected upon—before termination of Fernandes's employment for the commissions to be payable. Accordingly, the employer refused to pay the commissions for accounts that had not been collected upon as of the date Fernandes left the company.[105]

The court of appeals reaffirmed the principle that while the law generally disfavors forfeiture clauses, such clauses are not categorically unlawful.[106] The court reasoned, "'[W]here a contract in unmistakable terms provides for a forfeiture and is otherwise free from legal infirmity, neither a court of law nor a court of equity will relieve against the forfeiture.'"[107] Because the contract unambiguously limited the payments of sales commissions to those that were earned and payable through the last day of employment, the forfeiture clause was valid.[108] The court rejected the employee's argument that a prior court's decision in *Rodriguez v. Miranda*[109] disallowed forfeiture provisions.[110] *Rodriguez* merely enunciated a principle of law on forfeiture that an ambiguous provision will be construed against a drafter, not that forfeiture provisions are unenforceable.[111] Accordingly, the court upheld the clause and ruled in favor of the employer.[112]

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forfeiture.'" *Id.* (quoting Equitable Loan & Sec. Co. v. Waring, 117 Ga. 599, 599, 44 S.E. 320, 320 (1903), *superceded by statute as stated in* Williams v. Studstill, 251 Ga. 466, 306 S.E.2d 633 (1983)).

102. *See* Fernandes v. Manugistics Atlanta, Inc., 261 Ga. App. 429, 434, 582 S.E.2d 499, 503 (2003).

103. 261 Ga. App. 429, 582 S.E.2d 499 (2003), *reconsid. denied* (Oct. 6, 2003).

104. *Id.* at 434, 582 S.E.2d at 503.

105. *Id.* at 429-34, 582 S.E.2d at 499-504.

106. *Id.* at 434, 582 S.E.2d at 503.

107. *Id.* (quoting *Equitable Loan & Co.*, 117 Ga. at 599, 44 S.E. at 320).

108. *Id.*

109. 234 Ga. App. 779, 507 S.E.2d 789 (1998).

110. 261 Ga. App. at 434, 582 S.E.2d at 503.

111. *Id.*, 582 S.E.2d at 503-04 (citing *Rodriguez,* 234 Ga. App. 779, 507 S.E.2d 789).

112. *Id.*, 582 S.E.2d at 503.

IV. MISCELLANEOUS EMPLOYMENT TORTS

A. *Negligent Hiring or Retention*

Under O.C.G.A. section 34-7-20, "[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency."[113] Courts have held that this statute imposes a duty on the employer to "warn other employees of dangers incident to employment that 'the employer knows or ought to know but which are unknown to the employee.'"[114] For an employee to sustain an action for negligent hiring and retention, a plaintiff "must show that 'the employer knew or should have known of the employee's propensity to engage in the conduct which caused the plaintiff's injury.'"[115] This propensity "'must consist of evidence substantially related to the injury-causing conduct.'[116] Generally, the determination of whether an employer used ordinary care in hiring an employee is a jury issue."[117]

B. *Tortious Interference with Employment Contract*

Tortious interference with employment contract claims are brought pursuant to O.C.G.A. sections 51-9-1 and 51-12-30.[118] An action for tortious interference lies when an employee-employer contract has been intentionally interfered with by a third party to the contract.[119] The court of appeals decided three notable tortious interference cases in the survey period: Two cases in the context of an at-will employment contract and one case addressing the requirement that the person interfering with the contract be a third party.[120]

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113. O.C.G.A. § 34-7-20 (1998).

114. Tecumseh Prods. Co. v. Rigdon, 250 Ga. App. 739, 740, 552 S.E.2d 910, 912 (2001) (quoting O.C.G.A. § 34-7-20 (1998)).

115. *Id.* (quoting Harper v. City of E. Point, 237 Ga. App. 375, 376, 515 S.E.2d 623, 625 (1999)).

116. *Id.* at 741, 552 S.E.2d at 912 (quoting *Harper*, 237 Ga. App. at 376, 515 S.E.2d at 625).

117. *Id.* (citing Sparlin Chiropractic Clinic v. TOPS Pers. Servs., 193 Ga. App. 181, 387 S.E.2d 411 (1989)).

118. O.C.G.A. §§ 51-9-1, 51-12-30 (2000).

119. *See generally* WIMBERLY, *supra* note 3, at 356-57.

120. Gunnells v. Marshburn, 259 Ga. App. 657, 578 S.E.2d 273 (2003); Automated Solutions Enters., Inc. v. Clearview Software, Inc., 255 Ga. App. 884, 567 S.E.2d 335 (2002); and Nicholson v. Windham, 257 Ga. App. 429, 571 S.E.2d 466 (2002), *cert. denied* (Nov. 25, 2002).

First, in *Gunnells v. Marshburn,*[121] the court of appeals held that an employee could not maintain a tortious interference action based on an employment-at-will contract absent a showing that the defendant committed an independently wrongful act in interfering with the contract.[122] In *Gunnells* the employee, Patricia Gunnells, sued the Banks-Jackson-Commerce Hospital Authority ("BJC") for slander and wrongful termination of employment. Gunnells also sued Dr. Robert Marshburn for slander and wrongful interference with employment. Dr. Marshburn allegedly learned from a telephone call from a pharmacist that Gunnells attempted to illegally obtain prescriptions. Dr. Marshburn reported the incident and an investigation ensued, which subsequently resulted in Gunnells's termination for drug abuse. Gunnells sued, and the trial court dismissed the tortious interference with employment contract claim against Dr. Marshburn. Gunnells appealed.[123]

The court of appeals addressed the requirements for a claim of tortious interference with an at-will employment contract.[124] The court stated:

> "[I]n an action for tortious interference with an employment relationship that is terminable at will, the plaintiff must show that a party with no authority to discharge the employee, being activated by an unlawful scheme or purpose to injure and damage him, maliciously *and unlawfully* persuades the employer to breach the contract with the employee. Malice plus injury to business of itself does not, however, constitute the tort of wrongful interference with business. Rather, *an independent wrongful act* is required as well as an injury."[125]

Applying this rule, the court reasoned that despite Gunnells's showing that Marshburn bore her ill will, she submitted no evidence that Marshburn committed an independent wrongful act.[126] Rather, Dr. Marshburn truthfully reported the pharmacist's allegation that Gunnells attempted to illegally obtain pharmaceuticals.[127] Accordingly, the court upheld the trial court's summary judgment in favor of Marshburn on the tortious interference claim.[128]

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121. 259 Ga. App. 657, 578 S.E.2d 273 (2003).
122. *Id.* at 659-60, 578 S.E.2d at 275.
123. *Id.* at 657-58, 578 S.E.2d at 274.
124. *Id.* at 659-60, 578 S.E.2d at 275.
125. *Id.* (quoting Rose v. Zurowski, 236 Ga. App. 157, 158, 511 S.E.2d 265, 266-67 (1999) (internal citations omitted)).
126. *Id.* at 660, 578 S.E.2d at 275.
127. *Id.*
128. *Id.*

Similarly, in *Automated Solutions Enterprises, Inc. v. Clearview Software, Inc.,*[129] the court of appeals addressed the same issue and expanded upon what types of wrongful acts could satisfy plaintiff's showing of interference with an employment-at-will contract. Automated Solutions Enterprises, Inc. ("ASE") sued James Stritzinger, an officer of Solomon Software and another related company, for allegedly interfering with its at-will employment contract with an employee, Besch. Besch allegedly worked as a software developer for ASE for six and one-half years when he expressed his desire to Stritzinger to leave ASE. Stritzinger responded that there may have been an opening for a position at a software subsidiary of Solomon Software ("STC"). Soon thereafter, Stritzinger and Besch agreed upon the terms of the new employment, and Besch quit his employment with ASE. Stritzinger asked Besch to conceal from ASE the news that he would be leaving the company because Stritzinger was then in negotiations with ASE to merge ASE and STC. The merger never occurred. After Besch left ASE, ASE sued Stritzinger, STC, and Solomon for intentional interference with Besch's employment contract. The trial court subsequently entered summary judgment in favor of defendants on all counts, and ASE appealed.[130]

Among ASE's contentions was that a genuine issue of material fact existed regarding the interference with employment contract claim.[131] As stated in *Gunnells,* a plaintiff alleging interference with an at-will employment contract must show that the defendant committed some independent wrongful act.[132] "'Such wrongful means generally involve predatory tactics such as . . . fraud or misrepresentation . . . .'"[133] ASE asserted that the "wrongful means" requirement was satisfied upon its showing that Stritzinger enlisted Besch to conceal, for purposes of the merger, the news of Besch's hiring away from ASE.[134] The court rejected this argument, reasoning that despite such motives, the merger never occurred.[135] Without some financial injury, there could be no misrepresentation or fraud.[136] Accordingly, the court ruled that ASE had not satisfied its burden to demonstrate an independent wrongful act

129. 255 Ga. App. 884, 567 S.E.2d 335 (2002).

130. *Id.* at 884-86, 567 S.E.2d at 336-37.

131. *Id.* at 884-85, 567 S.E.2d at 336.

132. 259 Ga. App. at 660, 578 S.E.2d at 275.

133. *Automated Solutions,* 255 Ga. App. at 889, 567 S.E.2d at 339 (quoting Am. Bldgs. Co. v. Pascoe Bldg. Sys., Inc., 260 Ga. 346, 349, 392 S.E.2d 860, 863 (1990) (internal citations omitted)).

134. *Id.*

135. *Id.*

136. *Id.*

and affirmed the trial court's summary judgment in favor of defendants.[137]

In the next survey case, *Nicholson v. Windham,*[138] the court of appeals addressed the requirement that a defendant must be a third party to the contract and held that while a former temporary worker of a law firm could not maintain an action against the firm, she could maintain an action against individual employees of the firm.[139] In *Nicholson* a temporary employee, Nicholson, was fired from her employment with a law firm. Allegedly, several individual members asked her to engage in illegal activities and had her fired when she refused. She subsequently brought suit for alleged violations of the Racketeer Influenced & Corrupt Organizations Act ("RICO"), tortious interference with contractual rights, civil conspiracy, intentional infliction of emotional distress, defamation, libel and slander. The trial court dismissed the entire complaint, and Nicholson appealed.[140]

On appeal Nicholson claimed that the trial court erred in dismissing the tortious interference claim against the firm and against individual members of the firm.[141] The court noted that for a plaintiff to prevail on a tortious interference claim, a plaintiff must:

> "establish that the defendant is a 'third party', i.e., a 'stranger' to the contract with which the defendant allegedly interfered." An intended third-party beneficiary of a contract, who is legally authorized to enforce the contract, "cannot be held liable for tortious interference since he is not a stranger to the contract." Furthermore, "[t]he exclusion of third-party beneficiaries . . . has been expanded to cover those who benefit from the contract of others, without regard to whether the beneficiary was intended by the contracting parties to be a third-party beneficiary."[142]

The court reasoned that the law firm clearly was a third-party beneficiary and therefore could not be held liable for tortious interference.[143] The court rejected the individuals' arguments that they too could not be held liable because "'in Georgia, co-employees stand in the place of the employer for the purposes of determining whether one is a

137. *Id.* at 889-90, 567 S.E.2d at 339.

138. 257 Ga. App. 429, 571 S.E.2d 466 (2002), *cert. denied* (Ga. Nov. 25, 2002) (No. A02A0948).

139. *Id.* at 432, 571 S.E.2d at 469.

140. *Id.* at 429-30, 571 S.E.2d at 468.

141. *Id.* at 431, 571 S.E.2d at 469.

142. *Id.* at 432, 571 S.E.2d at 469 (quoting Atlanta Mkt. Ctr. Mgmt. Co. v. McLane, 269 Ga. 604, 608-09, 503 S.E.2d 278, 282-83 (1998)).

143. *Id.*

stranger to a contract.'"[144] The court agreed that "co-employees engaged in conduct 'within the scope of their authority' cannot then be held liable for such conduct under . . . a tortious interference claim."[145] The court reasoned that a co-worker who does not have the authority to discharge an aggrieved employee does not enjoy this privilege.[146] The court held that a fact issue remained as to whether it was within the individual co-workers' scope of authority to solicit plaintiff to engage in criminal activity and cause her to be terminated when she refused.[147] Accordingly, the court reversed the lower court's grant of summary judgment in favor of the individual defendants on the tortious interference claim.[148]

V. RESPONDEAT SUPERIOR

Under the doctrine of respondeat superior, an employer may be held vicariously liable for negligent or intentional torts of employees committed within the scope of the employer's business.[149] To hold an employer-defendant vicariously liable for torts of an employee, "first, the [employee] must be in furtherance of the master's business; and, second, he must be acting within the scope of his [employer's] business."[150] Vicarious liability under respondeat superior does not apply to the acts of independent contractors.[151]

In *Piedmont Hospital, Inc. v. Palladino,*[152] the supreme court held that a hospital employee's manipulation of a patient's genitals was not conduct in furtherance of the hospital's business because the acts were purely personal.[153] Plaintiff, Albert Palladino, underwent an angioplasty at Piedmont Hospital. A hospital employee, Patterson, was responsible for Palladino's post-surgical treatment, including checking the groin area for bleeding or complications. This duty required Patterson to move Palladino's testicles if necessary to check the groin area where the catheter had been inserted. Palladino alleged that upon

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144. *Id.*
145. *Id.* (quoting Lane v. K-Mart Corp., 190 Ga. App. 113, 114, 378 S.E.2d 136, 137 (1989)).
146. *Id.*, 571 S.E.2d at 470.
147. *Id.* at 432-33, 571 S.E.2d at 470.
148. *Id.* at 433, 571 S.E.2d at 470.
149. CHARLES R. ADAMS, III, GEORGIA LAW OF TORTS § 7-2 (2002).
150. *Id.*
151. *Id.*
152. 276 Ga. 612, 580 S.E.2d 215 (2003), *reconsid. denied* (Ga. June 2, 2003) (No. S02Ga1036).
153. *Id.* at 616, 580 S.E.2d at 218.

his awakening from surgery, he discovered Patterson rubbing his penis with both hands, with his mouth nearby.[154]

The court of appeals held that Patterson's acts were in furtherance of the hospital's business because he was authorized to inspect the incision by moving plaintiff's testicles, and his improper act "was 'not so far removed from his accepted duties to preclude liability for his employer.'"[155] The supreme court rejected this argument, citing precedent holding that when an employee abandons his authorized duties to pursue his own personal, morally offensive agenda, the conduct ceases to be within the scope of the employee's employment or connected to the employer's business.[156] Applying this rule to Patterson's conduct, the court reasoned that during his authorized touching of Palladino's groin area for the purposes of medical care, he was within the scope of his employment and in furtherance of the hospital's business.[157] However, at the moment Patterson began manipulating Palladino's genitals, he abandoned the hospital's interests and favored his own personal interests.[158] Moreover, the court reasoned that "simply because a tortious act occurs during the time of employment is not dispositive on the issue of whether an employee was acting within the scope of his employment when the tort was committed."[159] The court concluded that Patterson's actions went beyond the scope of his employment and were unconnected to the hospital's business.[160] The court reversed the lower court on this issue.[161]

The next case in the survey period, *Spencer v. Gary Howard Enterprises, Inc.*,[162] discussed the rebuttable presumption that an employee is in the scope of the employer's business while operating a company

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154. *Id.* at 613, 580 S.E.2d at 216.

155. *Id.* at 616, 580 S.E.2d at 218 (quoting Palladino v. Piedmont Hosp., Inc., 254 Ga. App. 102, 104, 561 S.E.2d 235, 238 (2002)).

156. *Id.* (citing Lucas v. Hosp. Auth. of Dougherty County, 193 Ga. App. 595, 596, 388 S.E.2d 871, 873 (1989); Alpharetta First United Methodist Church v. Stewart, 221 Ga. App. 748, 752, 472 S.E.2d 532, 536 (1996); B.C.B. Co. v. Troutman, 200 Ga. App. 671, 672, 409 S.E.2d 218, 219 (1991); Favors v. Alco Mfg., Co., 186 Ga. App. 480, 482-83, 367 S.E.2d 328, 331 (1998); and Big Brother/Big Sister of Metro Atlanta, Inc. v. Terrell, 183 Ga. App. 496, 498, 359 S.E.2d 241, 243 (1987)).

157. *Id.* at 614, 580 S.E.2d at 217.

158. *Id.*

159. *Id.* at 615-16, 580 S.E.2d at 218 (citing Mountain v. S. Bell Tel. & Tel. Co., 205 Ga. App. 119, 120, 421 S.E.2d 284, 285 (1992); S. Bell Tel. & Tel. Co. v. Sharara, 167 Ga. App. 665, 667, 307 S.E.2d 129, 131 (1983)).

160. *Id.* at 616, 580 S.E.2d at 219.

161. *Id.* at 617, 580 S.E.2d at 219.

162. 256 Ga. App. 599, 568 S.E.2d 763 (2002), *reconsid. denied* (July 19, 2002), *cert. denied* (Oct. 28, 2002).

vehicle.[163] In *Spencer* the court of appeals held that the employer successfully rebutted this presumption by demonstrating that the employee was operating the vehicle without permission.[164] The employee, Strickland, used a company truck to pick up and deliver materials. After finishing his shift on May 28, 1997, Strickland left work in the truck to take co-workers home. Later that evening, around 9:00 p.m., Strickland was involved in an accident while driving under the influence of alcohol. The victim sued Gary Howard Enterprises for Strickland's actions under respondeat superior, and the trial court dismissed.[165]

The court of appeals reviewed whether the employer successfully rebutted the presumption that Strickland was within the scope of employment of Gary Howard Enterprises.[166] The court stated that this presumption "can [be] rebut[ted] by clear, positive, and uncontradicted evidence."[167] The court reasoned that this presumption was rebutted through Howard's affidavit, which demonstrated that at the time of the accident, Strickland did not have permission to use the truck and was not performing any company duties.[168] Additionally, the court rejected plaintiff's argument that a question of fact existed regarding whether Spencer was driving home and still acting within the scope of employment.[169] The court noted that Strickland's workday ended at 4:00 p.m., and the accident occurred at 9:30 p.m.[170] Thus, the court concluded, based on these facts, no reasonable inference could be drawn that Strickland was "still using the truck in furtherance of his employment" at the time of the accident.[171] The court upheld the trial court's dismissal of this claim.[172]

In *Anderson v. Medical Center, Inc.*,[173] the court of appeals considered whether a medical center could be vicariously liable for the actions of obstetricians who were independent contractors.[174] Generally, a master is not liable for the torts committed by an independent contrac-

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163. *Id.* at 600-01, 568 S.E.2d at 766.
164. *Id.*
165. *Id.* at 599-600, 568 S.E.2d at 765-66.
166. *Id.* at 600-01, 568 S.E.2d at 766.
167. *Id.* at 600, 568 S.E.2d at 766 (citing Collins v. Everidge, 161 Ga. App. 708, 708, 289 S.E.2d 804, 805 (1982)).
168. *Id.* at 600-01, 568 S.E.2d at 766.
169. *Id.* at 601, 568 S.E.2d at 766.
170. *Id.*
171. *Id.*
172. *Id.* at 602, 568 S.E.2d at 766.
173. 260 Ga. App. 549, 580 S.E.2d 633 (2003).
174. *Id.* at 550-51, 580 S.E.2d at 635.

tor.[175] In *Anderson,* though, Anderson sued the Medical Center ("the Center") claiming that the Center was vicariously liable for the treating obstetrician's negligence under the doctrine of apparent agency, which essentially provides an exception to the rule against holding a master liable for the torts of independent contractors.[176]

Uncontroverted testimony established that the physicians were in fact independent contractors because "'the employer ha[d] assumed the right to control the time, manner, and method of executing the work'"—which is the test to determine employer versus independent contractor status.[177] Plaintiff argued that under the doctrine of apparent agency, a hospital may be liable for the actions of independent contractors when "(1) the hospital holds out the doctor as its agent, and (2) the patient's justifiable reliance on that holding out leads to injury."[178] The court found no evidence supporting a claim that there was any such representation or reliance, and the Center was therefore not liable for the obstetrician's negligence under respondeat superior.[179] Nevertheless, *Anderson* demonstrates that just because a servant is an independent contractor, liability under respondeat superior is not per se precluded.[180]

In *Page v. CFJ Properties,*[181] the court of appeals held that a department store could not be liable under respondeat superior for the acts of an off-duty police officer performing private security for the store.[182] In *Page* the defendants, operators of the "Flying J" convenience store, hired a police officer to provide private security at their business. While working in this capacity, the officer allegedly saw plaintiff place a bottle of shampoo under his arm beneath his shirt. The officer confronted plaintiff and placed him under arrest. The officer notified the manager that he had arrested plaintiff and would be accompanying plaintiff to the sheriff's department to be booked. Plaintiff was later found not guilty of shoplifting, and he sued the Flying J for malicious arrest and prosecution. The trial court dismissed, holding that the Flying J did not

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175. ADAMS, *supra* note 149, at § 7-2.

176. 260 Ga. App. at 549-50, 580 S.E.2d at 634-35.

177. *Id.* at 550, 580 S.E.2d at 635 (quoting Williamson v. Coastal Physician Serv. of the Southeast, 251 Ga. App. 667, 668, 554 S.E.2d 739, 741 (2001)).

178. *Id.* at 551, 580 S.E.2d at 635 (citing N. Ga. Med. Ctr. v. Stokes, 238 Ga. App. 60, 517 S.E.2d 93 (1999)).

179. *Id.*

180. *Id.* at 549-53, 580 S.E.2d at 634-36.

181. 259 Ga. App. 812, 578 S.E.2d 522 (2003).

182. *Id.* at 814, 578 S.E.2d at 524.

exercise enough control over the officer to be liable under respondeat superior.[183]

On appeal plaintiff argued that the case should not have been dismissed because an issue of fact remained as to whether the officer acted as an employee or independent contractor of the Flying J.[184] The court disagreed.[185] The court stated that generally employers are not liable for the acts of independent contractors, but if the employer

> "[c]ontrols the time, manner, and method of executing the work, an employer-employee relationship exists and liability will attach. In cases involving off-duty police officers working for private employers, however, the employer escapes liability if the officer was performing police duties which the employer did not direct when the cause of action arose."[186]

In this case, the court found that the testimony established that the time of work was coordinated through a sergeant at the sheriff's department.[187] The officer's manner and method of executing the work was not directed through the Flying J because no job descriptions were provided, nor was he told by the Flying J what they expected him to do while providing private security.[188] Rather, he reported to work in the capacity of his job as a sheriff's deputy, as indicated by his wearing a department uniform and his county issued police gear (handcuffs, badge, and weapons).[189] On the day in question, he was not instructed or directed to apprehend plaintiff.[190] The court ruled that the officer's conduct in arresting plaintiff was "a discharge of his function as a police officer," and therefore, the private employer could not be held liable for the officer's actions.[191]

VI. RESTRICTIVE COVENANTS

A. *Noncompete Agreements*

Agreements that place general restraints on trade and have the effect of lessening competition and encouraging monopolies are void as against

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183. *Id.* at 812-13, 578 S.E.2d at 523-24.
184. *Id.* at 813, 578 S.E.2d at 523.
185. *Id.*
186. *Id.*, 578 S.E.2d at 523-24 (quoting Wilson v. Waffle House, Inc., 235 Ga. App. 539, 539, 510 S.E.2d 105, 106 (1998)).
187. *Id.*, 578 S.E.2d at 524.
188. *Id.*
189. *Id.* at 813-14, 578 S.E.2d at 524.
190. *Id.* at 814, 578 S.E.2d at 524.
191. *Id.*

public policy.[192] Generally, noncompete agreements are disfavored in contractual relations because they place restrictions on trade, thereby thwarting competition.[193] Nonetheless, courts will uphold a noncompete agreement when the agreement merely places a partial restraint upon trade.[194] A noncompetition agreement is valid as a partial restraint on trade if the agreement (1) is written, (2) has a specific time, (3) has territorial limitation, and (4) has activity restriction.[195] Additionally, the agreement must be reasonable and that is a question of law for the court to decide.[196] However, depending on the type of contract, the court will apply different levels of scrutiny to the reasonableness of the contract.[197] If the agreement is ancillary to an employment agreement, a stricter standard is applied, and if any provision of the agreement is considered overbroad or unreasonable, the entire agreement is invalid.[198] But, if the agreement is pursuant to a contract for the sale of a business, a less stringent standard allows broader provisions, and even if one provision is deemed overbroad or unreasonable, the court may "blue pencil" to rewrite or sever the overly-broad provision.[199]

During the survey period, the court of appeals decided two cases dealing with noncompete agreements in employment relations. First, in *Gale Industries, Inc. v. O'Hearn,*[200] the court refused to uphold a nonsolicitation agreement because a territorial restriction was overly broad.[201] The court acted in spite of plaintiff's pleas for the court to apply the blue-pencil theory, thereby severing or rewriting the unreasonable portions of the agreement.[202] Plaintiff argued that the agreement was ancillary to the sale of a business. *Gale* concerned two agreements. In 1997 Gale Industries entered into an asset purchase agreement with Betty O'Hearn, the sole shareholder of Moultrie Insulation ("Moultrie"), whereby Gale purchased all assets of Moultrie. On the same day, Gale entered into an employment agreement (that included a noncompete provision) with Troy O'Hearn, the manager of Moultrie. The noncompete

192. *See* O.C.G.A. § 13-8-2 (1982 & Supp. 2003).
193. WIMBERLY, *supra* note 3, § 2-11.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. 257 Ga. App. 220, 570 S.E.2d 661 (2002), *cert. denied* (Ga. Nov. 25, 2002) (No. A02A1300).
201. *Id.* at 222-23, 570 S.E.2d at 663.
202. *Id.* at 221-22, 570 S.E.2d at 662.

provision provided that Troy O'Hearn would not directly or indirectly engage in a list of restricted activities within a 100 mile radius of Moultrie's place of business for a period of five years. Essentially, Troy O'Hearn was required to sign this agreement to remain employed by Moultrie. Troy O'Hearn subsequently became a part owner of Colquitt Insulation, which did business within the restricted area and performed activities that were restricted by the covenant. Gale sued for breach of the noncompete agreement.[203]

The trial court found the agreement unreasonable and granted summary judgment in favor of O'Hearn. On appeal Gale argued that because the asset purchase agreement entered into with Betty O'Hearn referenced the Employment Agreement with Troy O'Hearn, the employment agreement was ancillary to the sale of the business, and therefore, the less stringent standard for reviewing the reasonableness of the noncompete restriction should be used.[204] The court agreed that "'if a contract for the sale of a business and an employment contract are part of the same transaction they may be construed together to supply missing elements and blue penciled to make over broad terms valid.'"[205] The court stated that "contemporaneous agreements entered into between different parties with the sole stockholder not a party to the agreement at issue" are not part of the same transaction.[206] The court reasoned that because the sale involved Betty O'Hearn and did not involve or was contemporaneous with the agreement with Troy O'Hearn, the reasonableness of the noncompete agreement in Troy O'Hearn's employment contract was subject to the more stringent standard.[207] Therefore, if one provision was overly broad, then the entire noncompete agreement would fail.[208]

Next, the court determined that the agreement was invalid because the territorial restriction was overly broad.[209] "'Where the restriction is broad—for example, not limited to clients the employee served—the territorial limitation must be specified and closely tied [to customers O'Hearn served or] to the area [where he] actually worked.'"[210]

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203. *Id.* at 220-21, 570 S.E.2d at 661-62.

204. *Id.*, 570 S.E.2d at 662.

205. *Id.* at 222, 570 S.E.2d at 663 (quoting Lyle v. Memar, 259 Ga. 209, 210, 378 S.E.2d 465, 466 (1989)).

206. *Id.* (citing Drumheller v. Drumheller Bag & Supply, Inc., 204 Ga. App. 623, 626-27, 420 S.E.2d 331, 334 (1992)).

207. *Id.* at 222-23, 570 S.E.2d at 663.

208. *Id.* at 223, 570 S.E.2d at 663.

209. *Id.*

210. *Id.* (quoting Kuehn v. Selton & Assocs., Inc., 242 Ga. App. 662, 664, 530 S.E.2d 787, 790 (2000)).

Because the 100-mile radius restriction extended into Florida, where O'Hearn never worked or performed services, the restriction was unenforceable.[211] In addition, because one restriction was unenforceable, applying the stricter standard for noncompete agreements ancillary to employment contracts, the entire noncompete agreement was unenforceable.[212]

B. Nonsolicitation Agreements

In *Pregler v. C&Z, Inc.*,[213] the court of appeals applied the same principles enunciated in *Gale* to declare that one unenforceable provision in a nonsolicitation agreement rendered the entire nonsolicitation covenant unenforceable.[214] In *Pregler* plantiff appealed the trial court's grant of an interlocutory injunction that enforced a nonsolicitation agreement between plaintiff and Core Investigators, Inc.[215] The agreement stated that plaintiff could not "solicit, divert, appropriate to *or accept* on behalf of any Competing Business, or . . . attempt to solicit, divert, appropriate to or accept on behalf of any Competing Business, any business from any customer or actively sought prospective customer of the Corporation."[216]

Citing the same rule applicable to noncompete covenants ancillary to employment agreements—they may be upheld only when they are strictly limited both in time and geographical effect—the court held that the nonsolicitation provision was unenforceable because it prevented plaintiff from accepting business from unsolicited former clients.[217] The court reasoned that such a restraint was too restrictive because it not only prevented solicitation of former clients, but also former clients who themselves initiated the contact.[218] Such a restriction was held "'unreasonable . . . because in addition to overprotecting [C&Z's] interest, it unreasonably impacts on [Pregler] and on the public's ability to choose the professional services it prefers.'"[219] And because the provision was unreasonable, the court held the entire nonsolicitation agreement to be

211. *Id.*
212. *Id.*
213. 259 Ga. App. 149, 575 S.E.2d 915 (2003).
214. *Id.* at 151, 259 S.E.2d at 916-17.
215. *Id.* at 149, 575 S.E.2d at 916.
216. *Id.* at 150, 259 S.E.2d at 916.
217. *Id.*
218. *Id.*
219. *Id.* (quoting Dougherty, McKinnon & Luby, P.C. v. Greenwald, Denzik & Davis, P.C., 213 Ga. App. 891, 894, 447 S.E.2d 94, 96 (1994)).

invalid because "'Georgia law is clear that if one of them is unenforceable, then they are all unenforceable.'"[220]

VII. CONCLUSION

Although labor and employment issues derived from Georgia law often are not as complex as their federal counterparts, the issues arising under state law are becoming progressively more challenging with each passing year. Adding to the challenge is the growing overlap between state and federal issues. Regardless of whether a practitioner professes to specialize in state, federal, administrative, trial, or other matters pertaining to labor and employment law, it is important to recognize that any one law or legal proceeding can and does impact other relations between employer and employee.

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220. *Id.* at 151, 259 S.E.2d at 916-17 (quoting Advance Tech. Consultants v. Roadtrac, LLC, 250 Ga. App. 317, 320, 551 S.E.2d 735, 737 (2001)).