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Business Associations

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I. INTRODUCTION

This Article surveys notable cases in the areas of corporate, limited-liability company (LLC), partnership, agency, and joint-venture law decided between June 1, 2016 and May 31, 2017 by the Georgia Supreme Court, the Georgia Court of Appeals, and the United States district courts in Georgia.[1]

II. ISSUES OF FIRST IMPRESSION

In *S.D.E., Inc. v. Finley*,[2] the Georgia Court of Appeals held that a McDonald's shift manager could properly be served with a complaint against the franchisee's corporation.[3] The plaintiff slipped at one of the corporation's restaurants and sued the corporation, serving the shift manager at the restaurant via the local sheriff's office. The shift manager accepted service and put the papers to the side, apparently never notifying the franchisee corporation that it had been served. The franchisee corporation did not answer, and the trial court entered a

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1. For an analysis of business associations law during the prior survey period, see Edward P. Bonapfel & E. Bowen Reichert Shoemaker, *Business Associations, Annual Survey of Georgia Law*, 68 MERCER L. REV. 71 (2016).

2. 340 Ga. App. 684, 798 S.E.2d 303 (2017).

3. *Id.* at 688, 798 S.E.2d at 307. The defendant is a Georgia corporation that owns four Georgia McDonald's restaurants. *Id.* at 684, 798 S.E.2d at 305.

$250,000 default judgment in favor of the plaintiff.[4] The franchisee corporation appealed, and the court of appeals affirmed.[5]

Section 9-11-4(e)(1)[6] of the Official Code of Georgia Annotated (O.C.G.A.) permits service upon a Georgia corporation "by delivering a copy of the summons attached to a copy of the complaint . . . to the president or other officer of such corporation or foreign corporation, a managing agent thereof, or a registered agent thereof."[7] A managing agent is further defined as "a person employed by a corporation or a foreign corporation who is at an office or facility in this state and who has managerial or supervisory authority for" the corporation.[8]

The Georgia Court of Appeals reviewed the facts developed during discovery and concluded that the shift manager qualified as someone with "managerial or supervisory authority," and thus, service was proper.[9] Specifically, the court relied on the facts that the shift manager: (1) handled customer complaints; (2) was responsible for the "quality of the food, service, cleanliness and safety of the premises"; (3) tracked inventory and waste; and (4) made bank deposits.[10] The court also relied on the fact that another shift manager accepted service and successfully gave the documents to a supervisor.[11] The court seemed particularly persuaded by the last fact, writing that "given that another shift manager had also been served and had successfully transmitted the summons and complaint to a corporate officer, there was also evidence that it was anticipated that someone in that position would be served as an agent of the corporate principal."[12] In light of *Finley*, companies doing business in Georgia should ensure proper procedures are in place for the receipt of legal service and other notices.

III. NOTEWORTHY CASES

A. Liability for Successor Companies

In *Sager v. Ivy Falls Plantation Homeowners' Ass'n*,[13] a homeowner sued a homeowners' association seeking a declaratory judgment that the

4. *Id.* at 684, 798 S.E.2d at 304–05.
5. *Id.* at 684, 798 S.E.2d at 305.
6. O.C.G.A. § 9-11-4(e)(1) (2017).
7. O.C.G.A. § 9-11-4(e)(1)(A) (2017).
8. O.C.G.A. § 9-11-4(e)(1)(B) (2017).
9. *S.D.E., Inc.*, 340 Ga. App. at 686, 798 S.E.2d at 306.
10. *Id.* at 687, 798 S.E.2d at 307.
11. *Id.* at 687–88, 798 S.E.2d at 307.
12. *Id.* at 688, 798 S.E.2d at 307.
13. 339 Ga. App. 111, 793 S.E.2d 455 (2016).

homeowners' association could not collect association dues from her.[14] After building a subdivision, the developer incorporated a homeowners' association and recorded covenants for each lot owner. The homeowners' association was dissolved in July 2005. In October 2006, two residents incorporated a new homeowners' association under the same name. The plaintiff purchased property in the subdivision in 2010 and, in 2014, the new homeowners' association attempted to collect dues. The plaintiff sued, and following a hearing, the trial court held that the new homeowners' association was a successor-in-interest to the old homeowners' association based on the "continuity of interest" test.[15]

The Georgia Court of Appeals reversed.[16] The court reviewed the case law behind the continuity of interest test and noted that in most instances the successor assumed the original obligations of the predecessor and usually involved a vote of the membership.[17] However, in *Sager*, "there ha[d] been no transfer of any assets, no vote to incorporate the New Association, nor any other act taken by a majority of purported members with respect to the New Association."[18] Further, "the record contain[ed] no evidence that the New Association took any action to complete the organization process, elect new board members or officers, or adopt new bylaws regarding governance and dues collection authority."[19]

B. Limited-Liability Companies and Managing Member Liability to Limited-Liability Company Members

In *Practice Benefits, LLC v. Entera Holdings, LLC*,[20] Practice Benefits was a member of Entera. After Entera took actions to the alleged detriment of Practice Benefits, including a distribution to all other members of the LLC, Practice Benefits sued Entera and its managing member alleging breach of contract and breach of fiduciary duty. The trial court granted both defendants' motions to dismiss, holding that the

14. *Id.* at 111, 793 S.E.2d at 455.

15. *Id.* at 111–12, 793 S.E.2d at 455–56.

16. *Id.* at 111, 793 S.E.2d at 455.

17. *Id.* at 113–16, 793 S.E.2d at 457–58. For a further discussion of one of these cases, *Dan J. Sheehan Co. v. Fairlawn on Jones Condominium Ass'n*, 334 Ga. App. 595, 780 S.E.2d 35 (2015), where the new association was held to be a "mere continuation" of the old one see Bonapfel & Shoemaker, *supra* note 1, at 74–75.

18. *Sager*, 339 Ga. App. at 116, 793 S.E.2d at 458.

19. *Id.*

20. 340 Ga. App. 378, 797 S.E.2d 250 (2017).

claims against the managing member were derivative in nature and that Entera was not a party to the operating agreement.[21]

With respect to Entera, the Georgia Court of Appeals reversed the judgment in Entera's favor and held that LLCs are bound by the terms of their operating agreements.[22] Specifically, O.C.G.A. § 14-11-101(18)[23] states that an LLC "is bound by its operating agreement whether or not the limited liability company executes the operating agreement."[24] The court of appeals also rejected the managing member's argument that the breach of fiduciary claim against him was derivative in nature.[25] The court acknowledged the general rule that breach of fiduciary duty claims should be brought in derivative suits against the company.[26] However, an exception exists if a plaintiff alleges a "special injury" that is unique to the shareholder.[27] An allegation of a violation of the operating agreement's requirement of a pro rata distribution was a sufficient special injury to survive a motion to dismiss argument that the claim was derivative in nature.[28]

C. Rights and Interests of Limited-Liability Company Members

In *Veterans Parkway Developers, LLC v. RMW Development Fund II, LLC*,[29] the Georgia Supreme Court held that a member of an LLC could not obtain injunctive relief against the LLC to prevent it from making improvements to real property owned by the LLC. Veterans Parkway and RMW formed an LLC to own an apartment complex in Columbus. Veterans Parkway owned 25% of the LLC and was the managing member, while RMW held a 75% interest. Veterans Parkway proposed building a second entrance to the apartment complex, to which RMW objected and filed suit—eventually moving the trial court for an interlocutory injunction to stop the project. The trial court granted the injunction and RMW appealed.[30]

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21. *Id.* at 378–79, 797 S.E.2d at 251–52.

22. *Id.* at 380, 797 S.E.2d at 253.

23. O.C.G.A. § 14-11-101(18) (2017).

24. *Practice Benefits*, 340 Ga. App. at 379, 797 S.E.2d at 253 (quoting O.C.G.A. § 14-11-101(18) (2017)).

25. *Id.* at 380–81, 797 S.E.2d at 253–54.

26. *Id.* at 380, 797 S.E.2d at 253.

27. *Id.* (quoting Grace Bros. v. Farley Indus., 264 Ga. 817, 819, 450 S.E.2d 814, 816 (1994)).

28. *Id.* at 381, 797 S.E.2d at 254.

29. 300 Ga. 99, 793 S.E.2d 398 (2016).

30. *Id.* at 99–100, 793 S.E.2d at 399.

The Georgia Supreme Court recognized the general principle that real property can be sufficiently unique to support equitable remedies, including injunctions.[31] But a member's interest in an LLC "is itself only a personal property interest; a member's stake in a[n] LLC is not an interest in real property or an interest in any specific property of the LLC."[32] Thus, without an interest in the land, RMW could not seek injunctive relief "based upon a claim that the land was threatened with harm."[33] The court also noted that RMW had an adequate remedy at law such that injunctive relief was inappropriate.[34] Accordingly, the supreme court reversed the injunction.[35]

In *Perry Golf Course Development, LLC v. Columbia Residential, LLC*,[36] the Georgia Court of Appeals addressed the issue of whether an arbitration clause was still binding where a previously-binding operating agreement had been deemed unenforceable.[37] The court held that the arbitration clause was enforceable, regardless of whether the LLC's members had abandoned the operating agreement.[38] The court noted that the arbitration clause in this particular case was broadly worded and its application to the facts of this case seemed consistent with the parties' intent.[39] The holding reinforces Georgia courts' authority to interpret arbitration clauses broadly enough to encompass an entire business relationship between LLC members.

D. Reverse Veil-Piercing Still Disallowed in Georgia

In *Corrugated Replacements, Inc. v. Johnson*,[40] the Georgia Court of Appeals affirmed the rule disallowing reverse veil-piercing in Georgia.[41] The plaintiffs were a family involved in a car accident that occurred when a young, intoxicated driver collided with the van carrying the Johnson family, killing one Johnson child and injuring other family members. The plaintiffs sued the company where the driver's father worked and argued for the application of "outsider" reverse veil-piercing. Under this theory, the plaintiffs alleged that they, as outsiders of the company where the

31. *Id.* at 103, 793 S.E.2d at 401.
32. *Id.*
33. *Id.*
34. *Id.* at 103–04, 793 S.E.2d at 401.
35. *Id.* at 104, 793 S.E.2d at 402.
36. 337 Ga. App. 525, 786 S.E.2d 565 (2016).
37. *Id.* at 525–26, 786 S.E.2d at 566.
38. *Id.* at 530, 786 S.E.2d at 569.
39. *Id.* at 530–31, 786 S.E.2d at 569.
40. 340 Ga. App. 364, 797 S.E.2d 238 (2017).
41. *Id.* at 369–71, 797 S.E.2d at 243–44.

driver's father worked, could pierce the corporate veil to satisfy the debts of a corporate insider based on the company's assets.[42]

The court of appeals rejected the theory of reverse veil-piercing and noted that the plaintiffs misread precedential cases and failed to acknowledge the general rejection of the reverse veil-piercing theory that prevails in Georgia jurisprudence.[43] The court of appeals noted that the Georgia Supreme Court had only allowed reverse veil-piercing in "very limited circumstances" when transition remedies, like agency principles and standard judgment collection procedures, were inadequate.[44] Where traditional remedies existed, a new theory of liability—like reverse veil-piercing—was unnecessary. Thus, the court prohibited any exception to the rule that reverse piercing is not a viable claim in Georgia.[45]

E. Jurisdiction Over Corporate Entities

In *Techjet Innovations Corp. v. Benjelloun*,[46] the United States District Court for the Northern District of Georgia found that the Georgia long-arm statute[47] authorized personal jurisdiction over a non-Georgia-based defendant.[48] The court determined that, despite his lack of a physical presence in Georgia, the defendant "had a substantial role in the circumstances that led to th[e] lawsuit," and that he "was a primary participant in the business relationship that gave rise to th[e] suit, and the breach of contract at issue in particular."[49] The court noted that the exercise of jurisdiction was based solely on the plaintiff's allegations in the complaint and that it was the responsibility of the plaintiff to prove the jurisdictional facts at trial.[50] If the facts show the defendant had less of a role in the contracts and communications with the plaintiff than what was alleged, then dismissal could be appropriate at that point in time.[51]

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42. *Id.* at 364–66, 368–69, 797 S.E.2d at 240, 242–43.

43. *Id.* at 368–71, 797 S.E.2d at 243–44.

44. *Id.* at 369, 797 S.E.2d at 243.

45. *Id.* at 370–71, 797 S.E.2d at 243–44.

46. 203 F. Supp. 3d 1219 (2016).

47. O.C.G.A. § 9-10-91 (2017).

48. *Techjet*, 203 F. Supp. 3d at 1221–22.

49. *Id.* at 1228. In so holding, the court affirmed the articulation of the long-arm statute used in *Amerireach.com LLC v. Walker*, 290 Ga. 261, 719 S.E.2d 489 (2011), which held that personal jurisdiction is appropriate where a defendant is a "'primary participant in an alleged wrongdoing intentionally directed at a resident' of Georgia, even if his participation was in his 'corporate capacity.'" *Techjet*, 203 F.Supp. 3d at 1224 (quoting *Walker*, 290 Ga. at 267, 719 S.E.2d at 494).

50. *Techjet*, 203 F. Supp. 3d. at 1229.

51. *Id.*

In *Pandora Franchising, LLC v. Kingdom Retail Group, LLLP*,[52] the Georgia Supreme Court affirmed the Georgia Court of Appeals determination that venue was properly established in the county where a tort was alleged to have occurred in a case against a foreign LLC.[53] The plaintiff, Kingdom Retail Group, sued Pandora in Thomas County "alleging Pandora wrongfully withheld its consent to Kingdom's bid to acquire a number of Pandora franchises."[54] Pandora, a foreign LLC, sought removal to Gwinnett County because that is the location of its principal place of business in Georgia. The trial court granted Pandora's request, which was reversed by the Georgia Court of Appeals.[55]

In upholding the intermediate court's ruling, the Georgia Supreme Court reviewed O.C.G.A. § 14-2-510(b),[56] which provides that tort actions against domestic and foreign corporations are subject to venue in the county where the cause of action originated.[57] The statute further provides for removal of tort actions against corporations as follows: "If venue is based solely on this paragraph, the defendant shall have the right to remove the action to the county in Georgia where the defendant maintains its principal place of business."[58] The court placed particular importance on the phrase "in Georgia," comparing the statute to various other venue statutes that employ the term "principal place of business," all of which use the phrase "principal place of business *in this state*."[59] The court reasoned that "the legislature knew how to make clear its intent to confer venue at the place where a business entity maintained its principal place of business in this state, whether or not it was its worldwide principal place of business."[60] Consequently, if venue is based on subsection (b), the statute only permits removal of actions "to the county in Georgia where the defendant maintains its worldwide principal place of business. If that place is not located in a Georgia county, then no right to remove is granted."[61] It remains to be seen how the "worldwide principal place of business" concept will apply to multinational companies with United States subsidiaries head-quartered in Georgia, such as Mercedes–Benz USA and InterContinental Hotels Group.

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52. 299 Ga. 723, 791 S.E.2d 786 (2016).

53. *Id.* at 723–24, 791 S.E.2d at 787–88. For a discussion of the Georgia Court of Appeals ruling, see Bonapfel & Shoemaker, *supra* note 1, at 80.

54. *Pandora Franchising, LLC.*, 299 Ga. at 724, 791 S.E.2d at 787.

55. *Pandora*, 229 Ga. at 723–24, 791 S.E.2d at 787.

56. O.C.G.A. § 14-2-510(b) (2017).

57. O.C.G.A. § 14-2-510(b)(3) (2017).

58. O.C.G.A. § 14-2-510(b)(4) (2017).

59. *Pandora*, 229 Ga. at 725–26, 791 S.E.2d at 788–89.

60. *Id.* at 726, 791 S.E.2d at 789.

61. O.C.G.A. § 14-2-510(b); *Pandora*, 299 Ga. at 727, 791 S.E.2d at 789.

F. Guarantees by the Corporation Do Not Obligate Its Signatories

In *Lynchar, Inc. v. Colonial Oil Industries, Inc.*,[62] Colonial sued Lynchar and two of its shareholders for amounts owed on an open account. Colonial argued that the shareholders personally guaranteed Lynchar's debts and were therefore liable. The trial court granted Colonial's motion for partial summary judgment on the shareholders' liability.[63]

The Georgia Court of Appeals reversed.[64] The shareholders of Lynchar executed personal guarantees on behalf of T&W Oil, Inc., as a "doing business as" of Lynchar.[65] Colonial's account listed "Lynchar Inc. d/b/a T&W Oil Co." as the billing name and one shareholder signed his emails as "President of T&W Oil Company."[66] Nevertheless, the court refused to enforce the guarantee against the shareholders.[67] The language of the contract was unambiguous and therefore "judicial construction of the contract of guaranty is improper, and parol evidence is inadmissible to cure the defect."[68] The court strictly construed the guarantees and held that the shareholders were not obligated to guarantee Lynchar's debts.[69] *Lynchar* confirms that drafters should use care to ensure that the proper legal entity to be obligated is clearly identified in the parties' contract.

IV. CONCLUSION

As this Article demonstrates, Georgia courts are challenged with deciding progressively more complex issues in corporate, LLC, partnership, agency, and joint-venture law as the business community continues to expand. There are many questions raised by the cases decided during this survey period and practitioners should be prepared to confront these and many more in the coming years.

62. 341 Ga. App. 489, 801 S.E.2d 576 (2017).
63. *Id.* at 489, 801 S.E.2d at 577.
64. *Id.*
65. *Id.* at 491, 801 S.E.2d at 579.
66. *Id.* at 489, 491, 801 S.E.2d at 577–78.
67. *Id.* at 495, 801 S.E.2d at 581.
68. *Id.* at 494–95, 801 S.E.2d at 581.
69. *Id.* at 495, 801 S.E.2d at 581.