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Brandon L. Peak

Tedra L. Cannella

Robert H. Snyder

David T. Rohwedder

Joseph M. Colwell

See next page for additional authors

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Authors

Brandon L. Peak, Tedra L. Cannella, Robert H. Snyder, David T. Rohwedder, Joseph M. Colwell, Christopher B. McDaniel, Rory A. Weeks, and Ramsey B. Prather

Trial Practice and Procedure

by Brandon L. Peak,* Tedra L. Cannella,**
Robert H. Snyder,*** David T. Rohwedder,****
Joseph M. Colwell,***** Christopher B. McDaniel,******
Rory A. Weeks,******* and Ramsey B. Prather********

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*Partner in the firm of Butler Wooten & Peak LLP, Columbus and Atlanta, Georgia. The Citadel (B.S., summa cum laude, 2001); Mercer University School of Law (J.D., magna cum laude, 2004). Member, State Bar of Georgia.

**Partner in the firm of Butler Wooten & Peak LLP, Columbus and Atlanta, Georgia. Emory University (B.A., 2000); Georgetown Public Policy Institute (M.P.P., 2004); University of Georgia School of Law (J.D., magna cum laude, 2007). Member, State Bar of Georgia.

***Associate in the firm of Butler Wooten & Peak LLP, Columbus and Atlanta, Georgia. University of Georgia (B.A., cum laude, 1999); University of Georgia School of Law (J.D., magna cum laude, 2008). Member, State Bar of Georgia and State Bar of Florida.

****Associate in the firm of Butler Wooten & Peak LLP, Columbus and Atlanta, Georgia. University of Alabama at Birmingham (B.A., with honors, 2005); University of Pennsylvania School of Medicine (MBE, summa cum laude, 2006); Samford University, Cumberland School of Law (J.D., 2009). Member, State Bar of Georgia.

*****Associate in the firm of Butler Wooten & Peak LLP, Columbus and Atlanta, Georgia. Mercer University (B.A., cum laude, 2010); Mercer University School of Law (J.D., magna cum laude, 2013). Member, State Bar of Georgia.

******Associate in the firm of Butler Wooten & Peak LLP, Columbus and Atlanta, Georgia. Columbus State University (B.A., summa cum laude, 2010); Mercer University School of Law (J.D., magna cum laude, 2014). Member, State Bar of Georgia.

*******Associate in the firm of Butler Wooten & Peak LLP, Columbus and Atlanta, Georgia. University of Georgia (A.B., cum laude, 2008); University of Georgia (M.A., 2012); University of Georgia School of Law (J.D., magna cum laude, 2013). Member, State Bar of Georgia.

********Associate in the firm of Butler Wooten & Peak LLP, Columbus and Atlanta, Georgia. New York University (B.A., magna cum laude, 2005); Tulane University Law School (J.D., magna cum laude, 2010). Member, State Bar of Georgia.

I. INTRODUCTION

This Article addresses several significant opinions and legislation of interest to the Georgia civil trial practitioner issued during the June 1, 2016 to May 31, 2017 survey period.[1]

II. LEGISLATION

This year, the Georgia General Assembly considered several significant bills. Trial practitioners should pay close attention to two bills in particular that were passed and signed into law.

The first is House Bill 192,[2] which modified the "business judgment rule" applicable to directors and officers of banks, trust companies, and corporations in shareholders' derivative suits or suits on behalf of bank depositors. For example, section 7-1-490[3] of the Official Code of Georgia Annotated (O.C.G.A.), which codifies the common law business judgment rule, was amended to provide that:

> There shall be a presumption that the process directors and officers followed in arriving at decisions was done in good faith and that such directors and officers have exercised ordinary care; provided, however, that this presumption may be rebutted by evidence that such process constitutes gross negligence by being a gross deviation of the standard of care of a director or officer in a like position under similar circumstances.[4]

Sections 14-2-830[5] and 14-2-842[6] of the O.C.G.A. were amended to provide an identical presumption and burden on the plaintiff to prove gross negligence in order to overcome the presumption.[7] These standards apply to causes of action arising on or after July 1, 2017.[8]

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1. For an analysis of trial practice and procedure during the prior survey period, see Brandon L. Peak et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 68 MERCER L. REV. 301 (2016).

2. Ga. H.R. Bill 192, Reg. Sess., 2017 Ga. Laws 248 (codified at O.C.G.A. §§ 7-1-490, 14-2-830, 14-2-842 (2017)).

3. O.C.G.A. § 7-1-490 (2017).

4. O.C.G.A. § 7-1-490(c) (2017); *see* F.D.I.C. v. Loudermilk, 295 Ga. 579, 591, 761 S.E.2d 332, 341 (2014) (stating "OCGA § 7-1-490(a) is perfectly consistent with the business judgment rule acknowledged at common law in the decisions of this Court.").

5. O.C.G.A. § 14-2-830 (2017).

6. O.C.G.A. § 14-2-842 (2017).

7. *See* O.C.G.A. §§ 14-2-830(c) (2017) and 14-2-842(c) (2017).

8. Ga. H.R. Bill 192, § 4, Reg. Sess. (2017).

The second bill is Senate Bill 126,[9] which modifies the venue provision for suits brought under the Georgia Tort Claims Act (GTCA).[10] In the 2016 decision *Board of Regents v. Jordan*,[11] the Georgia Court of Appeals held that, under the GTCA, "[I]t is clear that the legislature intended to allow a tort action to be brought against the State in the county where economic loss, pain and suffering, mental anguish, and other elements of actual damages occurred."[12] In *Jordan*, the alleged negligent act occurred in Richmond County, but the plaintiff filed suit in DeKalb County, where he received medical treatment for his injuries.[13] The court of appeals held that the trial court did not err in denying the defendants' motion to transfer venue to Richmond County under the GTCA.[14]

Senate Bill 126 was a reaction to the court's holding in *Jordan*. Senate Bill 126 amended O.C.G.A. § 50-21-28[15] to provide for causes of action arising on or after July 1, 2017:

> All tort actions against the state under this article shall be brought in the state or superior court of the county *wherein the tort giving rise to the loss occurred*; provided, however, that wrongful death actions may be brought in the county *wherein the tort giving rise to the loss occurred or the county wherein the decedent died.*[16]

III. CASE LAW

A. Apportionment

In *Brown v. Tucker*,[17] the Georgia Court of Appeals clarified Georgia law and held that a defendant seeking to apportion fault to a nonparty has the burden of proving, by a preponderance of the evidence, the nonparty's negligence caused some or all of the plaintiff's damages.[18] The plaintiff, Tisha Tucker, was a passenger in a truck driven by the defendant, Tammy Brown, whose truck collided into the rear of a tractor-trailer rig parked by the side of the road. Tucker was injured in the wreck and the subject lawsuit ensued. The plaintiff opted not to sue the driver of the tractor-trailer, despite evidence that the tractor-trailer driver was

9. Ga. S. Bill 126, Reg. Sess., 2017 Ga. Laws 238 (codified at O.C.G.A. § 50-21-28).
10. O.C.G.A. §§ 50-21-20–37 (2017).
11. 335 Ga. App. 703, 782 S.E.2d 809 (2016).
12. *Id.* at 704, 782 S.E.2d at 811.
13. *Id.* at 703, 782 S.E.2d at 810.
14. *Id.* at 704, 782 S.E.2d at 811.
15. O.C.G.A. § 50-21-28 (2017).
16. *Id.* (emphasis added).
17. 337 Ga. App. 704, 788 S.E.2d 810 (2016).
18. *Id.* at 717, 788 S.E.2d at 821.

negligent. Prior to trial, the defendant identified the tractor-trailer driver as a nonparty defendant to whom the jury should apportion fault.[19] At trial, the defendant "asked the court to charge the jury that she had the burden of showing [only] a *rational basis* for apportioning fault to the nonparty [truck driver]."[20] The court, however, charged the jury that the defendant must prove the nonparty's negligence caused the plaintiff's injuries by a preponderance of the evidence.[21]

Relying upon language in *Levine v. Suntrust Robinson Humphrey*,[22] the defendant took issue with the burden of proof required by the trial court's jury charge and argued she need only show a rational basis for apportioning fault to a nonparty.[23] The court noted that *Levine* was inapplicable,[24] and explained that the defendant's rational basis charge would offer "the jury no guidance about how much evidence the defendant must produce to meet her burden of assigning fault to a nonparty."[25]

Affirming the trial court's jury charge, the court of appeals explained that the defendant's attempt to apportion fault to a nonparty "is an assertion of fact . . . essential to the defense. As an affirmative defense, the defendant bears the burden of proving her assertion of fact."[26] As with other affirmative defenses, the court held that it is the defendant's burden to prove her defense by a preponderance of the evidence.[27]

The court of appeals' holding is in line with cases where the affirmative defense of contributory negligence is asserted.[28] In cases where the defendant asserts contributory negligence, the defendant has the burden

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19. *Id.* at 704–05, 788 S.E.2d at 813–14. There was evidence presented at trial that portions of the tractor-trailer were sticking out in the roadway at the time of the collision. *Id.*

20. *Id.* at 714, 788 S.E.2d at 820 (emphasis added).

21. *Id.* The trial court instructed the jury: "Now, for you to consider the negligence of the nonparty [tractor-trailer driver], the Defendant must prove by a preponderance of the evidence that the negligence of [tractor-trailer driver], if any, was a proximate cause of the injuries to the Plaintiff." *Id.*

22. 321 Ga. App. 268, 269, 272, 740 S.E.2d 672, 678 (2013) (stating, in the context of summary judgment, "it is the defendant's burden to establish a rational basis for apportioning fault to a nonparty.").

23. *Brown*, 337 Ga. App. at 716, 788 S.E.2d at 821.

24. The court did not address jury charges in *Levine*. Instead, the court in *Levine* merely addressed whether the trial court erred in granting summary judgment to the defendant regarding a claim for damages to a business. *Id.*

25. *Id.*

26. *Id.* at 715, 788 S.E.2d at 820.

27. *Id.*

28. *Id.* at 716, 788 S.E.2d at 821.

of proving that defense by a preponderance of the evidence.[29] In both instances, whether a defendant is attempting to establish a contributory negligence defense or attempting to apportion fault to a nonparty, the defendant is seeking to have another person bear responsibility for the plaintiff's damages.[30] Thus, the court reasoned that the defendant's burden should be the same.[31] The standard is now clear: the defendant must prove by a preponderance of the evidence that the nonparty's fault was a proximate cause of the plaintiff's injuries.

B. Arbitration Clauses

In *United Health Services of Georgia, Inc. v. Norton*,[32] a unanimous Georgia Supreme Court reversed the Georgia Court of Appeals and held that an arbitration agreement between a nursing home and a patient was enforceable against the patient's husband in a wrongful death action.[33] Lola Norton's power of attorney signed an arbitration agreement on her behalf, requiring arbitration of any disputes arising from her stay at the nursing home. The Federal Arbitration Act governed the agreement, and specifically applied to wrongful death claims brought by her beneficiaries after her death.[34] The court reasoned that the case was "controlled by the longstanding precedent that a wrongful death action is wholly derivative of a decedent's right of action."[35] If the deceased has done something that operates as a bar against his recovery, then that bar will apply equally to his personal representative after death.[36] For example, a waiver or release that would bar a decedent's recovery would also bar recovery by his personal representative.[37]

Citing *Turner v. Walker County*,[38] the court noted that a defense available against a decedent in life is also available against his beneficiaries in a wrongful death action.[39] Because the duty to arbitrate is an affirmative defense and because "any wrongful death claims are

29. *Id.*
30. *Id.*
31. *Id.*
32. 300 Ga. 736, 797 S.E.2d 825 (2017).
33. *Id.* at 736, 797 S.E.2d at 826.
34. *Id.*
35. *Id.* at 737, 797 S.E.2d at 827.
36. *Id.* at 738, 797 S.E.2d at 827.
37. *Id.*
38. 200 Ga. App. 565, 408 S.E.2d 818 (1991).
39. *Norton*, 300 Ga. at 738, 797 S.E.2d at 827. In *Turner*, the decedent signed a covenant not to sue, and the court held that the defendant could assert the defense of the covenant not to sue against the wrongful death beneficiaries. *Turner*, 200 Ga. App. at 566, 408 S.E.2d at 819.

wholly derivative of claims Lola could have pursued, the requirement to arbitrate [was] also a viable defense against Lola's wrongful death beneficiaries."[40] Although the court used broad language to declare that a wrongful death case is derivative of the decedent's own personal injury claim, it is unclear how far that principle extends.[41] The court specifically declined to address whether wrongful death beneficiaries would be barred by "procedural defenses" available against the decedent or barred only by "substantive defenses."[42]

C. Choice of Law

In *Coon v. Medical Center, Inc.*,[43] the Georgia Supreme Court held that "where a claim in a Georgia lawsuit is governed by the common law, and the common law is also in force in the other state [where the tort was committed], the common law as determined by Georgia's courts will control."[44] Explaining the origin of this "approach" to common law choice-of-law questions (which is sometimes referred to as the "presumption of identity"),[45] the court explained that "the prevailing view at the time the doctrine was established [by the court] was that there is one common law that can be properly discerned by wise judges, not multiple common laws by which judges make law for their various jurisdictions."[46] While acknowledging that this approach "may seem anachronistic to lawyers and judges trained and professionally steeped in relativist theories of legal realism,"[47] the court, citing Georgia decisions dating as far back as the 1880s, emphasized that "[u]ntil it becomes clear that a better rule exists, we will adhere to our traditional approach."[48]

Coon involves a tragic set of facts. Coon, an Alabama resident, was pregnant. She traveled to a hospital in Georgia for a checkup and learned that her unborn baby did not have a heartbeat. She delivered the stillborn baby at the Georgia hospital. Another stillborn baby had also recently been delivered at the hospital. During the process of preparing the two babies' remains to be sent to the hospital morgue, hospital

40. *Norton*, 300 Ga. at 739, 797 S.E.2d at 828.

41. *Id.* at 737, 797 S.E.2d at 827.

42. *Id.* at 739 n.4, 797 S.E.2d at 828 n.4.

43. 300 Ga. 722, 797 S.E.2d 828 (2017).

44. *Id.* at 723, 797 S.E.2d at 829.

45. Mass. Bay Ins. Co. v. Fort Benning Family Cmtys., LLC, No. 4:15-CV-75-CDL, 2017 LEXIS 76913, at *1 (M.D. Ga. May 15, 2017) (stating "In *Coon*, the Georgia Supreme Court expressly embraced the presumption of identity . . . .").

46. *Coon*, 300 Ga. at 730, 797 S.E.2d at 834.

47. *Id.*

48. *Id.* at 733, 797 S.E.2d at 836.

workers placed the wrong identifying information on the babies. Coon eventually returned to Alabama and had a funeral for her baby; however, the baby she buried was not hers. The Georgia hospital notified Coon of the hospital's mistake by telephone two weeks after the funeral.[49] Coon received the telephone call in Alabama.[50]

Coon asserted a claim for negligent infliction of emotional distress against the Georgia hospital in a Georgia court. The hospital moved for summary judgment and argued that Georgia law regarding negligent infliction of emotional distress requires the plaintiff to have suffered a "physical impact." Coon, in contrast, argued that Alabama law applied because she received the hospital's telephone call in Alabama. Coon contended summary judgment could not be entered because Alabama's common law cause of action for negligent infliction of emotional distress does not require a physical impact. The trial court ultimately concluded that Georgia law applied because application of Alabama law would have conflicted with public policy embodied in Georgia's physical impact rule.[51] The Georgia Court of Appeals affirmed for the same reason.[52]

The Georgia Supreme Court affirmed for a different reason.[53] The court explained that, "[f]rom the beginning, . . . Georgia court[s] [have] appl[ied] the common law as expounded by the courts of Georgia" when adjudicating claims arising out of states "where the common law is in force."[54] Although Coon argued that the court should reject this "archaic" rule, the court disagreed.[55] Instead, the court emphasized that "a precedent's antiquity is a factor that weighs in favor of adhering to it."[56]

D. Foreseeability

In *Goldstein, Garber & Salama, LLC v. J.B.*,[57] the plaintiff, a patient of the defendant dental practice, was sexually assaulted by a registered nurse anesthetist, Paul Serdula, while under anesthesia during a dental

49. *Id.* at 723 n.25, 797 S.E.2d at 830 n.25.

50. *Id.*

51. *Id.* at 725–26, 797 S.E.2d at 831–32.

52. *Id.*

53. *Id.* at 728, 797 S.E.2d at 833.

54. *Id.* at 729, 797 S.E.2d at 834. The common law is "in force" in any state that "was one of, or formed from the territory of one of, the original 13 colonies that inherited the common law of England." *Id.* at 731 n.5, 797 S.E.2d at 834 n.5. The Georgia Supreme Court left open the question as to whether it would follow the approach described in *Coon* when adjudicating claims arising out of a state that was not formed from one of the original thirteen colonies. *See generally id.*

55. *Id.* at 733, 797 S.E.2d at 836.

56. *Id.*

57. 300 Ga. 840, 797 S.E.2d 87 (2017).

procedure. The defendant hired Serdula as an independent contractor through an anesthesia staffing agency, which conducted an independent credentialing process on Serdula before he was placed with the dental practice. The plaintiff sued both the dental practice and Serdula, but dropped her claims against Serdula after he pled guilty to numerous criminal charges and was sentenced to life in prison.[58] At trial, the defendant dental practice sought a directed verdict on plaintiff's claims for professional negligence and negligence *per se*. The practice argued that the plaintiff could not show proximate cause because Serdula's intervening criminal acts were not foreseeable to the defendant, and because the plaintiff's injuries—sexual assault—were not within the class of harm the dental anesthesia statute, O.C.G.A. § 43-11-21.1,[59] intended to guard against.[60]

The trial court denied the motion and the jury rendered a verdict against the dental practice for both professional negligence and negligence *per se*.[61] The Georgia Court of Appeals affirmed the verdict, concluding that whether Serdula's criminal acts were foreseeable was a matter for the jury, and that a different statute in the same chapter as the dental anesthesia statute provided broad protections for the "health, safety, and welfare" of dental patients. Therefore, the injuries suffered by the plaintiff were within the harms protected against by the dental anesthesia statute.[62]

The Georgia Supreme Court disagreed with both rulings[63] and reaffirmed the longstanding rule that, when an intervening and independent wrongful act of a third person produces an injury, the intervening act is treated as the proximate cause of the injury unless the defendant had reason to anticipate, apprehend, or foresee the independent wrongful act.[64] However, the supreme court disagreed with the court of appeals' conclusion that there was evidence from which a jury could conclude that Serdula's criminal acts were foreseeable.[65] Absent evidence that the defendant dental practice knew of previous assaults by Serdula, a general understanding among the dental industry of the possibility of sexual assaults while patients are under anesthesia is not

58. *Id.* at 841, 794 S.E.2d at 89.

59. O.C.G.A. § 43-11-21.1 (2017).

60. Goldstein, Garber & Salama LLC v. J.B., 335 Ga. App. 416, 418, 779 S.E.2d 484, 488 (2015).

61. *Id.*

62. *Goldstein*, 300 Ga. at 845–46, 774 S.E.2d at 92.

63. *Id.* at 840, 774 S.E.2d at 88.

64. *Id.* at 841–42, 774 S.E.2d at 89–90.

65. *Id.* at 843, 774 S.E.2d at 90.

sufficient evidence for a jury to conclude that Serdula's acts were foreseeable.[66]

The supreme court also rejected the court of appeals' conclusion that sexual assault was a harm that O.C.G.A. § 43-11-21.1 intended to guard against.[67] Instead, the court concluded that it intended to guard against medical complications arising from the improper use of anesthesia due to inadequate equipment, training, or experience.[68] Because sexual assault was a remote and non-medical injury, the court concluded that the defendant dental practice's actions could not constitute negligence *per se*, and the trial court should have directed a verdict in favor of the defendant.[69]

E. Pre-suit Offers to Settle Personal Injury Claims

In 2013, the Georgia General Assembly enacted O.C.G.A. § 9-11-67.1,[70] which governs pre-suit offers to settle personal injury claims arising from the use of a motor vehicle.[71] *Grange Mutual Casualty Co. v. Woodard*[72] is the first case to interpret the statute. The statute contains several "material terms" that must be included in every pre-suit offer.[73] It also provides that the offeree "may accept the [material terms] by providing written acceptance[.]"[74] Through their attorney, the plaintiffs sent a demand letter under the new statute, but added several terms beyond those the statute required.[75] Most importantly, the letter made both acceptance in writing and timely payment of the demand conditions of acceptance.[76]

In response to the Woodards' demand, Grange sent its written acceptance within the time period the letter required. Grange generated the checks within the deadline but, due to what appeared to be a computer error, the address on the checks was wrong, and the Woodards' attorney never received them. The Woodards rejected Grange's attempt to issue new checks as an untimely settlement offer, and Grange sued in

66. *Id.* at 842–83, 774 S.E.2d at 90.

67. *Id.* at 844–45, 774 S.E.2d at 91–92.

68. *Id.* at 846–47, 774 S.E.2d at 92–93.

69. *Id.*

70. Ga. H.R. Bill 336, Reg. Sess., 2013 Ga. Laws 271, § 1 (codified at O.C.G.A. § 9-11-67.1).

71. O.C.G.A. § 9-11-67.1 (2017).

72. 300 Ga. 848, 797 S.E.2d 814 (2017).

73. O.C.G.A. § 9-11-67.1(a) (2017).

74. O.C.G.A. § 9-11-67.1(b) (2017).

75. *Woodard*, 300 Ga. at 848–49, 797 S.E.2d at 816–17.

76. *Id.*

federal court to enforce what it contended was a binding settlement agreement. The parties filed cross motions for summary judgment. Grange argued that O.C.G.A. § 9-11-67.1 made written acceptance the sole means of accepting an offer. Grange further contended the statute did not permit the plaintiff to create a unilateral contract, that is, contracts that require full performance to accept the contract. The Woodards, however, contended that nothing in the statute prohibited them from contracting in the manner permitted by Georgia law. The district court ruled the statute did permit unilateral contracts that made timely payment a condition of acceptance, and held that no settlement contract was formed because Grange failed to make a timely payment. Grange appealed.[77]

On certiorari from the United States Court of Appeals for the Eleventh Circuit, the Georgia Supreme Court considered whether O.C.G.A. § 9-11-67.1 permitted pre-suit offers that required acceptance in the form of performance and, more specifically, whether the statute permitted a demand that made timely payment a condition of acceptance.[78] To interpret the statute, the supreme court applied several "background principles of law."[79] Statutory text must be given its plain and ordinary meaning and read "in its most natural and reasonable way."[80] "[C]ritical to [the court's] understanding of the statute" is the principle that "[a]ll statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it."[81]

The court then discussed the existing condition of law regarding the formation of contracts.[82] "There is no enforceable settlement between parties absent mutual agreement between them."[83] A contract is not created unless the offer is "accepted unequivocally and without variance of any sort."[84] Further, "an offeror is the master of his or her offer, and free to set the terms thereof."[85] It was with this background that the court turned to the statute itself. Section 9-11-67.1 provides:

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77. *Id.* at 849–50, 797 S.E.2d at 817–18.

78. *Id.* at 851, 797 S.E.2d at 818.

79. *Woodard*, 300 Ga. at 852, 797 S.E.2d at 818–19.

80. *Id.*

81. *Id.* (quoting Botts v. Se. Pipe-Line Co., 190 Ga. 689, 700–01, 10 S.E.2d 375, 382 (1940)).

82. *Id.*

83. *Id.* at 852, 797 S.E.2d at 819.

84. *Id.* (quoting Frickley v. Jones, 280 Ga. 573, 574, 630 S.E.2d 374, 376 (2006)).

85. *Id.* at 853, 797 S.E.2d at 819 (quoting Atkinson v. Cook, 271 Ga. 57, 58, 518 S.E.2d 413, 414 (1999)).

> (a) Prior to the filing of a civil action, any offer to settle a tort claim for personal injury, bodily injury, or death arising from the use of a motor vehicle and prepared by or with the assistance of an attorney on behalf of a claimant or claimants shall be in writing and contain the following material terms:
>
> (1) The time period within which such offer must be accepted, which shall be not less than 30 days from receipt of the offer;
>
> (2) Amount of monetary payment;
>
> (3) The party or parties the claimant or claimants will release if such offer is accepted;
>
> (4) The type of release, if any, the claimant or claimants will provide to each releasee; and
>
> (5) The claims to be released.
>
> (b) The recipients of an offer to settle made under this Code section may accept the same by providing written acceptance of the material terms outlined in subsection (a) of this Code section in their entirety.
>
> (c) Nothing in this Code section is intended to prohibit parties from reaching a settlement agreement in a manner and under terms otherwise agreeable to the parties.
>
> . . .
>
> (g) Nothing in this Code section shall prohibit a party making an offer to settle from requiring payment within a specified period; provided, however, that such period shall be not less than ten days after the written acceptance of the offer to settle.[86]

A seven-judge majority held that this statute did not "expressly or by necessary implication" displace Georgia's common law contract principles.[87] The court held that subsection (a), which provides five material terms for offers made under the statute, was non-exclusive. [88] In other words, "[e]very Pre-Suit Offer must contain the five enumerated terms, but additional terms are not prohibited."[89] The court cited several reasons why the subsection (a) terms were not the only terms permitted

86. O.C.G.A. § 9-11-67.1.
87. *Woodard*, 300 Ga. at 854, 797 S.E.2d at 820.
88. *Id.* at 855, 797 S.E.2d at 820.
89. *Id.*

in the pre-suit offer.[90] First, the statute did not explicitly state that no other terms could be included in the offer.[91] Second, subsection (g) explicitly contemplated that an offer could require payment within a certain number of days, which was just one example of a term not enumerated in subsection (a) that an offeror could include in his pre-suit offer.[92] Third, subsection (c) allowed the parties to make offers both "in a manner" and "under terms" upon which they agreed.[93] "[T]he use of the word 'manner' in subsection (c) indicates that not only are additional 'terms' permissible, but a claimant may ask the recipient of a Pre-Suit Offer to do something to accept the offer beyond stating the recipient's acceptance in writing."[94] Thus, unilateral contracts that require acceptance in the form of performance are permissible under the statute. In short, acceptance under O.C.G.A. § 9-11-67.1 requires written acceptance of the five terms enumerated in subsection (a); but while that written acceptance is necessary, "whether it is sufficient depends on the offer."[95]

The court declined to answer questions that required it to apply the law to the facts of the case.[96] Thus, the Eleventh Circuit resolved the remaining issues, holding that the Woodards made timely payment a condition of acceptance, and Grange failed to timely accept the offer when it did not deliver the checks within the required deadline.[97] Therefore, no binding settlement agreement was created under the statute.[98]

F. Statutes of Limitation & Tolling

In 2005, the Georgia General Assembly enacted a statute tolling the statute of limitations for "any cause of action in tort that may be brought by the victim of an alleged crime" [99] so long as the victim's torts claims "arise[ ] out of the facts and circumstances"[100] related to an alleged crime committed in Georgia.[101] Under the statute, the tolling period runs from

90. *Id.*
91. *Id.*
92. *Id.* at 855, 797 S.E.2d at 820–21.
93. *Id.* at 855, 797 S.E.2d at 821 (quoting O.C.G.A. § 9-11-67.1(c)).
94. *Id.*
95. *Id.* at 856, 797 S.E.2d at 821.
96. *Id.* at 858, 797 S.E.2d at 823.
97. Grange Mutual Cas. Co. v. Woodard, 861 F.3d 1224, 1233 (11th Cir. 2017).
98. *Id.*
99. Crime Victims Restitution Act of 2005, Ga. H.R. Bill 172, Reg. Sess., 2005 Ga. Laws Act 20, § 2 (codified at O.C.G.A. § 9-3-99). The Act became effective July 1, 2005. *Id.* § 8.
100. *Id.*
101. *Id.*

the date of the alleged crime or act giving rise to the tort action "until the prosecution of such crime or act *has become final or otherwise terminated.*"[102]

A frequently-litigated issue became whether the tolling statute applied only to a crime victim's tort claims against the person accused of committing the crime that gave rise to those tort claims. The answer, according to a series of Georgia Court of Appeals decisions handed down between 2007 and 2015, was yes.[103] However, in *Harrison v. McAfee*, [104] a case decided during the survey period, the court of appeals overturned those prior decisions.[105]

In June 2011, plaintiff Harrison was at the Shamrock bar in Macon, Georgia, when a group of masked robbers burst into the bar and shot him. The shooter escaped and still remains at large. In August 2013, more than two years after Harrison was shot, he filed a premises liability action against Dargan McAfee, the alleged owner of the Shamrock, to recover for his personal injuries. Harrison then amended his complaint twice: first, to allege tolling under O.C.G.A. § 9-3-99[106] applied given his status as a crime victim and, second, to add a corporation McAfee formed to own the bar.[107] The defendants moved for summary judgment, contending that Harrison's claims were time-barred because neither McAfee nor his corporation shot Harrison. In granting the defendants' motion, the trial court rejected Harrison's argument that the Georgia Court of Appeals misconstrued the crime victims tolling statute by holding that it applied only to crime victims' actions against alleged perpetrators. Harrison appealed.[108]

Sitting *en banc*, the court of appeals overruled its prior decisions and held that the crime victims tolling statute "applies regardless of whether the defendant in the case has been accused of committing the crime from which the cause of action arises."[109] The court reversed the trial court and revived Harrison's tort claims.[110]

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102. O.C.G.A. § 9-3-99 (2017) (emphasis added). The statute caps the length of the tolling period at six years for all alleged crimes or tortious acts except for "childhood sexual abuse." *Id.*; *see also* O.C.G.A. § 9-3-33.1(a)(1) (defining *childhood sexual abuse*); O.C.G.A. § 9-3-33.1(b)(2)(A) (extending time to file civil actions for childhood sexual abuse committed after July 1, 2015).

103. *See* Harrison v. McAfee, 338 Ga. App. 393, 395–97, 788 S.E.2d 872, 874–75 (2016).

104. 338 Ga. App. 393, 788 S.E.2d 872 (2016).

105. *Id.* at 401, 788 S.E.2d at 878.

106. O.C.G.A. § 9-3-99 (2017).

107. *Harrison*, 338 Ga. App. at 394, 788 S.E.2d at 873–74.

108. *Id.* at 394, 788 S.E.2d at 874.

109. *Id.* at 394, 395, 402, 788 S.E.2d at 874, 879.

110. *Id.* at 402, 788 S.E.2d at 879.

Harrison, written by now Georgia Supreme Court Justice Nels Peterson, is important for at least two reasons. First, the statute of limitations for crime victims who have tort claims arising out of those crimes is tolled until the criminal prosecution is final or otherwise terminated. That change will have a significant impact on statute of limitations defenses in numerous tort cases. Second, *Harrison* overruled the prior cases interpreting the statute because they were at odds with the statute's plain meaning. In doing so, the court explained that the principle of *stare decisis* does not necessarily preclude the court from changing course and correcting wayward statutory interpretations.[111] That reasoning, endorsed in full by twelve of the fourteen judges on the panel, is generally applicable.[112]

G. The "One Bite" Rule

There are no more "free bites" in Georgia. In *Steagald v. Eason*,[113] the Georgia Supreme Court unanimously reversed the Georgia Court of Appeals and held that Georgia law does not require proof or knowledge of an actual prior dog bite to hold a defendant responsible for a dog bite injury.[114] In dog bite cases, Georgia's "first bite rule" requires the plaintiff to present evidence that the defendant (dog owner or dog keeper) had knowledge of the dog's dangerous or vicious nature prior to the dog biting the plaintiff.[115] In the past, Georgia courts have interpreted this to mean that "the dog must have, on a prior occasion, *done the same act* which resulted in the injury comprising the tort action."[116] The court expressly disapproved of this interpretation in *Steagald*.[117] In *Steagald*, the court held that it could infer the defendant's requisite knowledge (of a dog's dangerous propensity to bite someone) from a dog's behavior other than an actual previous bite.[118]

In *Steagald*, plaintiff's neighbor's dog "Rocks" bit her while in her neighbor's yard. The plaintiff sustained serious injuries, and the subject

111. *See id.* at 400–02, 788 S.E.2d at 877–78.

112. *Id.* at 402, 788 S.E.2d at 878.

113. 300 Ga. 717, 797 S.E.2d 838 (2017).

114. *Id.* at 719, 797 S.E.2d at 840.

115. *Id.*

116. *Id.* at 720, 797 S.E.2d at 841 (emphasis added) (quoting Hamilton v. Walker, 235 Ga. App. 635, 635, 510 S.E.2d 120, 121 (1998)).

117. *Id.* The supreme court disapproved of the holding in *Hamilton v. Walker*, 235 Ga. App. 635, 510 S.E.2d 120 (1998), a prior 4-3 split decision by the court of appeals. *Steagald*, 300 Ga. at 720, 797 S.E.2d at 841.

118. *Steagald*, 300 Ga. at 720–21, 797 S.E.2d at 840.

lawsuit ensued.[119] There was no evidence that Rocks had bitten anyone prior to biting the plaintiff.[120] There was, however, evidence the defendants had knowledge that the dog previously "growled and snapped" at others.[121] The plaintiffs relied on those previous "snapping incidents" as proof the defendants knew the dog had a dangerous propensity to bite.[122] The trial court found there was no evidence the defendants "had reason to know the dog to be vicious or dangerous,"[123] and granted the defendant's motion for summary judgment.[124]

The court of appeals affirmed the trial court and concluded "the snapping incidents [were] not sufficient proof of knowledge."[125] Reversing the court of appeals, the supreme court held the dog's previous acts of snapping at people amounted to an attempted dog bite, which "[M]ost certainly may be proof of a propensity to bite."[126] In reaching this conclusion, the court drew on cases outside the dog bite context and analogized a dog owner's duty to that of an employer in negligent hiring or retention cases.[127] The requisite knowledge of an employer can be inferred so long as "it is reasonably foreseeable from the employee's 'tendencies' or propensities that the employee could cause the type of harm sustained by the plaintiff."[128] The court reasoned that a dog owner's requisite knowledge can be similarly established.[129]

To establish a dog owner's knowledge of a dog's dangerous propensities, the plaintiff does not have to prove "an incident involving the exact same conduct and the exact same injury" occurred.[130] Rather, to infer the dog owner's requisite knowledge, the plaintiff need only show

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119. *Id.* at 718, 797 S.E.2d at 839–40.

120. *Id.* at 720, 797 S.E.2d at 841.

121. *Id.* at 718, 797 S.E.2d at 839. About a week prior to biting the plaintiff, Rocks "growled and snapped" at one of the defendants, Cheryl Eason, while she was trying to feed the dog. *Id.* There was also evidence that Cheryl Eason, on the same day, "observed Rocks growling, barking, and snapping at Gary [Steagald]" as he reached his hand near the dog's pen. *Id.*

122. *Id.* at 720, 797 S.E.2d at 841.

123. *Id.* at 717–18, 797 S.E.2d at 839.

124. *Id.*

125. *Id.* at 720, 797 S.E.2d at 841.

126. *Id.* at 720–21, 797 S.E.2d at 841.

127. *Id.* at 719–20, 797 S.E.2d at 840–41.

128. *Id.* at 720, 797 S.E.2d at 840–41 (quoting Munro v. Univ. Health Servs., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004)).

129. *Id.* at 720, 797 S.E.2d at 841 (quoting Torrance v. Brennan, 209 Ga. App. 65, 67, 432 S.E.2d 658, 660 (1993)).

130. *Id.* at 720, 797 S.E.2d at 841 (quoting *Torrance*, 209 Ga. App. at 67, 432 S.E.2d at 660).

the defendant's knowledge of a prior "incident that would cause a prudent person to anticipate the actual incident that caused the injury."[131]

H. Uninsured/Underinsured Motorist Coverage

In *Government Employees Insurance Co. v. Morgan*,[132] the Georgia Court of Appeals granted an application for interlocutory review to consider whether, pursuant to O.C.G.A. § 33-7-11(a)(1),[133] Wanda and Victor Morgan's policy of uninsured and underinsured motorist (UM) coverage with GEICO provided the default amount of UM coverage, namely, an amount equal to the policy's liability limits, or the statutory minimum amount of $25,000.[134] The trial court "rul[ed] as a matter of law that the Morgans' policy provided UM coverage with a limit of $100,000 per person,"[135] finding, "There [was] no evidence [the Morgans] affirmatively chose a lower amount of coverage."[136] The court of appeals affirmed.[137]

Section 33-7-11(a)(1) of the O.C.G.A., as amended in 2001, "require[s] insurance policies issued in Georgia to contain provisions for UM coverage which at the option of the insured shall be (i) not less than $25,000 per person, or (ii) equal to the policy's bodily injury liability insurance coverage."[138] "The 2001 amendment was intended to make a policy's liability limits the default provision for UM coverage, unless an insured affirmatively elects UM coverage in a lesser amount."[139] Although, "Georgia law requires insurers to provide UM coverage . . . unless the insured rejects the coverage in writing,"[140] section 33-7-11(a)(1) of the O.C.G.A. does not contain a "specific requirement that an insured's affirmative election of a lesser amount of UM coverage must be made in writing."[141] An insurer contending a "lesser coverage should be enforced instead of the statutory default coverage[]" has the "burden of

131. *Id.* (quoting Kringle v. Elliott, 301 Ga. App. 1, 2, 686 S.E.2d 665, 666 (2009)).

132. 341 Ga. App. 396, 800 S.E.2d 612 (2017).

133. O.C.G.A. § 33-7-11(a)(1) (2017).

134. *Gov't Emps. Ins. Co.*, 341 Ga. App. at 397, 800 S.E.2d at 613.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 398, 800 S.E.2d at 614.

139. *Id.* at 399, 800 S.E.2d at 614 (quoting Soufi v. Haygood, 282 Ga. App. 593, 595, 639 S.E.2d 395, 397–98 (2006)).

140. *Id.* at 398, 800 S.E.2d at 614.

141. *Id.* at 399, 800 S.E.2d at 614.

showing that [the insured] *did* in fact make an affirmative choice of lesser coverage."[142]

Of particular importance to the practitioner is GEICO's argument that "the Morgans' [prior] written rejections of UM coverage . . . limit their UM claim to the statutory minimum coverage amount of $25,000."[143] Citing O.C.G.A. § 33-7-11(a)(3), which has been interpreted as "an exception to Subsection (a)(1)'s requirement that an insurer offer UM coverage each time a policy is issued or delivered,"[144] GEICO contended, "Subsection (a)(1) offers an insured a 'one-time option' of obtaining UM coverage either at the $25,000 statutory minimum or at an amount equal to the policy's liability coverage limits . . . even if the insured later chooses to add UM coverage to the policy."[145] The court of appeals rejected GEICO's argument, stating "the exception set forth in Subsection (a)(3) applies only '*absent a request*' for UM coverage. The exception does not apply where . . . an insured who previously rejected UM coverage later requests that UM coverage be added to the policy."[146] In other words, "the default provision applies *whenever* the insured obtains UM coverage, whether that occurs when the insured first buys the policy or when the insured requests UM coverage at some later date—unless the insured affirmatively chooses a lower limit."[147]

I. Venue

In *Pandora Franchising, LLC v. Kingdom Retail Group, LLLP*,[148] the Georgia Supreme Court considered whether the Georgia Court of Appeals correctly interpreted the removal provision under Georgia's corporate venue statute, O.C.G.A. § 14-2-510(b)(4).[149] According to subsection (b)(4), domestic and foreign corporations authorized to transact business in Georgia are subject to venue "in the county where the cause of action originated."[150] However, "[i]f 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."[151] The question in *Pandora* was whether a foreign

142. *Id.* at 399, 800 S.E.2d at 615.
143. *Id.*
144. *Id.* at 400, 800 S.E.2d at 615.
145. *Id.*
146. *Id.*
147. *Id.*
148. 299 Ga. 723, 791 S.E.2d 786 (2016).
149. O.C.G.A. § 14-2-510(b)(4) (2017).
150. *Id.*
151. *Id.*

corporation, whose principal place of business is admittedly located in another state,[152] has the right of removal under subsection (b)(4).[153]

Kingdom Retail Group, LLLP (Kingdom) sued Pandora Franchising, LLC (Pandora) in Thomas County pursuant to subsection (b)(4), alleging "this is the county where the cause of action originated."[154] Citing the same O.C.G.A. section, Pandora filed a notice of removal seeking to "remove the complaint to Gwinnett County where, Pandora claimed . . . 'it maintains its registered office as its principal place of business in Georgia.'"[155] The trial court granted Pandora's request.[156] "The court of appeals granted Kingdom's application for interlocutory review and reversed the grant of removal."[157] The supreme court granted certiorari to determine whether "only a corporation with its worldwide principal place of business, or 'nerve center' in Georgia has the right to remove the claim to the county in Georgia where that principal place of business is located."[158]

Pandora contended, "the legislature meant to permit a company such as itself, which maintains its worldwide principal place of business in a place other than Georgia, to remove such a claim to the county in which it maintains its Georgia principal place of business."[159] The supreme court disagreed, stating that the legislature intended the right of transfer provided by subsection (b)(4) be conferred only to a corporation who maintains its worldwide principal place of business in Georgia.[160] In other words, foreign corporations do not have a right of removal under O.C.G.A. § 14-2-510(b)(4), and the action can be maintained in the county where the cause of action originated.[161]

IV. CONCLUSION

The above cases and legislation have, in the Authors' estimation, significantly affected trial practice and procedure in Georgia during the

152. *Pandora*, 299 Ga. at 723–24, 791 S.E.2d at 787. "In its application for certificate of authority to transact business in Georgia, Pandora identifies its principal place of business as being located in Maryland." *Id.*

153. *Id.* at 726, 791 S.E.2d at 788.

154. *Id.* at 724, 791 S.E.2d at 787.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

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

161. *See id.* at 727, 791 S.E.2d at 789 (stating "If [a defendant's worldwide principal place of business] is not located in a Georgia county, then no right to remove is granted.").

survey period. This Article, however, is not intended to be exhaustive of all legal developments for this topic.