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Insurance

Thomas D. Martin

Bradley S. Wolff

Maren R. Cave

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Thomas D. Martin*

Bradley S. Wolff**

Maren R. Cave***

I. INTRODUCTION

During this Survey period, the courts in Georgia remained active despite the pandemic.[1] In the property arena, the Survey disclosed only a few decisions from the Georgia Court of Appeals but several from the district courts in Georgia as parties grappled with coverage disputes relating to policy time limits, bad faith, and the effects of COVID-19 on business losses. In the automobile arena, the Georgia Court of Appeals addressed sovereign immunity, and the Georgia Supreme Court refined the "cause test" for evaluating a series of collisions. In the uninsured motorist (UM) arena, the court of appeals weighed in on various issues relating to UM coverage, including late notice, vehicles that qualify for UM coverage, and renewal actions against UM carriers. In the third-party arena, the relevant decisions during the Survey period concerned responses to time-limited demands and the ongoing complexities associated with responding appropriately.

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*Partner, Swift, Currie, McGhee & Hiers. University of Georgia (B.A., summa cum laude, 1984); University of Georgia School of Law (J.D., cum laude, 1987). Member, State Bar of Georgia.

**Partner, Swift, Currie, McGhee & Hiers. Vanderbilt University (B.A., cum laude, 1983); University of Georgia School of Law (J.D., cum laude, 1986). Member, State Bar of Georgia.

***Partner, Swift, Currie, McGhee & Hiers. St. Olaf College (B.A., 1997); Mercer University School of Law (J.D., 2000). Member, State Bar of Georgia.

1. For an analysis of Insurance Law during the prior Survey period, *see* Maren R. Cave, Thomas D. Martin, and Bradley S. Wolff, *Insurance*, *Annual Survey of Georgia Law,* 72 MERCER L. REV. 131 (2020).

II. PROPERTY INSURANCE CASES

A. Agency

In *American Reliable Insurance Co. v. Lancaster*,[2] the Lancasters brought suit against American Reliable Insurance Company (American) and an insurance agent asserting breach of their policy and bad faith.[3] The Lancasters purchased insurance for their property from a local insurance agent. They remitted their first premium payment to the agent. Subsequently, American issued a policy to the Lancasters. Toward the end of the policy period, American mailed a renewal notice to the Lancasters informing them of the sum due to renew the policy and how to pay the premium through American's website or via mail. The notice also indicated that the policy sent was a direct-bill policy as opposed to an agency-bill policy. The Lancasters claimed that they never received this notice.[4]

Eventually, American mailed a notice to the Lancasters informing them that it would terminate their policy if they did not pay the premiums. This notice also included instructions on how to pay. The Lancasters claimed that they never received the notice. Instead, the Lancasters paid premiums to the same local agent from whom they acquired the policy. When the Lancasters suffered a total fire loss, they requested coverage. American denied their claim. The Lancasters brought suit against American and the agent.[5]

The Bleckley Superior Court concluded that there were genuine issues concerning the agent's status.[6] The court of appeals disagreed. The court of appeals held that the agent was not an actual or apparent agent of American for purposes of accepting renewal premiums.[7] American's notices indicated that customers should pay premiums directly to American. The Lancasters failed to show that American authorized the agent to accept the premium payments on its behalf.[8] The court also rejected the Lancasters' claim that American's cancellation did not bind them because they never received it. American's proof of mailing from the United States Postal Service was sufficient to satisfy the requirements of notice.[9] Besides, the policy expired by its own terms for

2. 356 Ga. App. 854, 849 S.E.2d 697 (2020).
3. *Id.* at 854, 849 S.E.2d at 698.
4. *Id.* at 854–55, 849 S.E.2d at 698–99.
5. *Id.* at 855–56, 849 S.E.2d at 699.
6. *Id.* at 856, 849 S.E.2d at 699.
7. *Id.* at 857, 849 S.E.2d at 700.
8. *Id.* at 858, 849 S.E.2d at 701.
9. *Id.* at 859–60, 849 S.E.2d at 701–02.

non-payment; thus, a cancellation notice from American was not required.[10] Finally, because the Lancasters' claims against American failed as a matter of law, so too did their claims under the bad faith statute, section 33-4-6 of the Official Code of Georgia Annotated.[11]

B. Suit Limitation Periods

In *Premier Eye Care Associations v. Mag Mutual Insurance Co.*, Premier Eye Care Associates, P.C. (Premier) brought suit against Mag Mutual Insurance Company (MAG) claiming breach of an insurance policy and bad faith.[12] A leak from a restaurant located in a suite above Premier damaged Premier's office. Premier submitted various claims with MAG. MAG made multiple payments to Premier for personal property damages, expenses, and loss of income. Then, for months, MAG did not make any additional payments to Premier as the parties negotiated a possible settlement on remaining claims. When negotiations failed, MAG paid its assessment of Premier's business interruption claim.[13]

Dissatisfied with MAG's payments, Premier made a bad faith demand. The parties attempted mediation but were unsuccessful. Approximately two years after failed negotiations and over three years after the loss occurred, Premier filed suit against MAG. MAG filed a motion to dismiss, arguing that Premier's complaint was time-barred by a two-year time limit in the policy. In response, Premier argued that MAG waived the suit limitation provision when it paid portions of the claim and engaged in mediation within months of the two-year deadline. Premier also argued that MAG could not enforce the time limit because MAG breached the contract and acted in bad faith. The Fulton State Court granted MAG's motion.[14]

The Georgia Court of Appeals affirmed.[15] The court of appeals reiterated an oft-stated principle that "mere negotiation for settlement, unsuccessfully accomplished, is 'not that type of conduct designed to lull the claimant into a false sense of security so as to constitute a waiver of the limitation defense.'"[16] Premier was aware that MAG did not intend to fully pay the amounts that Premier claimed because MAG did not

10. *Id.* at 860, 849 S.E.2d at 702.

11. *Id.* at 861, 849 S.E.2d at 702; *see* O.C.G.A. § 33-4-6 (2021).

12. 355 Ga. App. 620, 844 S.E.2d 282 (2020).

13. *Id.* at 620–23, 844 S.E.2d at 284–86.

14. *Id.* at 622, 844 S.E.2d at 285.

15. *Id.* at 628, 844 S.E.2d at 289.

16. *Id.* at 626, 844 S.E.2d at 288 (quoting Stone Mountain Collision Ctr. v. Gen. Cas. Co. of Wis., 307 Ga. App. 394, 396, 705 S.E.2d 163, 165 (2010)).

acquiesce to numerous letters Premier sent complaining about the inadequacy of MAG's payments. Moreover, although MAG participated in mediation, the parties failed to reach a settlement after which Premier had approximately seven months to file suit before the two-year limitation period expired. Premier did not submit any evidence to show that MAG continued to negotiate or even communicate at all during that time.[17] Nevertheless, Premier waited almost two more years before filing suit. Accordingly, the court rejected Premier's allegations of waiver.[18]

During the Survey period, there were several decisions from Georgia's federal district courts concerning suit limitation periods. In *Chambers v. State Farm Fire & Casualty Co.*,[19] the United States District Court for the Northern District of Georgia upheld a one-year suit limitation period, despite the insured's claim that the Georgia Supreme Court's COVID-19 judicial emergency orders tolled the time limit.[20] Conversely, the United States Court of Appeals for the Eleventh Circuit, in an unpublished opinion, upheld the general principle that appraisal will toll the suit limitation period while the appraisal is ongoing.[21] The United States District Court for the Southern District of Georgia applied a "delayed discovery rule" in *Rountree v. Encompass Home & Auto Insurance Co.*, despite relying upon cases from other jurisdictions and only one Georgia case that was physical precedent only.[22]

In *JSPS, Inc. v. First Nonprofit Insurance Co.*,[23] the United States District Court for the Middle District of Georgia concluded that a question of fact might exist regarding an insurance company's possible waiver of a one-year suit period where the company did not deny the claim until after the one-year period expired.[24] Likewise, relying upon an earlier decision from the Middle District concerning unresolved diminished value (DV) claims,[25] the Northern District in *Huck v. Philadelphia Indemnity Insurance Co.*[26] rejected strict enforcement of a one-year suit period where the carrier failed to address DV claims before the suit period expired.[27]

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17. *Id.* at 627, 844 S.E.2d at 288.

18. *Id.*

19. No. 1:20-CV-2643-TWT, 2020 U.S. Dist. LEXIS 206871 (N.D. Ga. Nov. 5, 2020).

20. *Id.* at *10.

21. Omni Health Sols., LLC v. Zurich Am. Ins. Co., No. 19-12406, 2021 U.S. App. LEXIS 15126, at *25 (11th Cir. May 21, 2021).

22. 501 F.Supp.3d 1351, 1357 (S.D. Ga. 2020).

23. No. 1:20-CV-21, 2020 U.S. Dist. LEXIS 207592 (M.D. Ga. Sep. 30, 2020).

24. *Id.* at *7.

25. Long v. State Farm Fire, 272 F. Supp. 3d 1344, 1349 (M.D. Ga. 2017).

26. No. 1:19-CV-03336, 2020 U.S. Dist. LEXIS 191835 (N.D. Ga. Oct. 16, 2020)

27. *Id.* at *8–9.

C. Water Damage and Bad Faith

During the Survey period, the district courts in Georgia also addressed bad faith issues in several water damage cases. In *Valles v. State Farm Fire & Casualty Co.*,[28] the Northern District rejected an insured's attempt to bring tort claims against an insurer for allegedly underpaying the insured's claim when the only legal duty the insured relied upon for the tort claims was the insurer's duty under the insurance policy.[29] The Northern District rejected the insured's attempt to create independent duties under the Fair Business Practices Act and the Unfair Claim Settlement Practices Act.[30]

Furthermore, the district court rejected the insured's attempts to formulate fraud and misrepresentation claims out of mere allegations that the insurer mishandled the claim.[31] The district court held such claims failed because they related solely to the insurer's alleged failure to pay the insurance claim, a duty that arose under the insurance contract.[32] For the same reasons, another judge in the Northern District rejected tort and extra-contractual claims brought in another water damage and mold case.[33] In *Passmore v. Travelers Casualty & Surety Co.*,[34] the Southern District granted the insurer's motion for summary judgment on bad faith relating to damages from Hurricane Irma[35] but denied the insurer's motion regarding the insured's alleged failure to submit documents substantiating her claim.[36] The Southern District concluded that there were disputed questions concerning the insured's cooperation and some conflicting opinions about the amount of the loss.[37]

D. COVID-19

The district courts also weighed in on several COVID-19-related property cases, particularly as those cases related to business losses. The Northern District in *Henry's Louisiana Grill, Inc. v. Allied Insurance Co. of America*[38] set the stage, rejecting a restaurant's claim for lost business

28. No. 1:19-CV-5593, 2021 U.S. Dist. LEXIS 18008 (N.D. Ga. Feb. 1, 2021).

29. *Id.* at *8.

30. *Id.* at *10–12.

31. *Id.* at *13.

32. *Id.* at *12–13.

33. Scott v. Charter Oak Fire Ins. Co., No. 1:20-CV-4420, 2021 U.S. Dist. LEXIS 67262 (N.D. Ga. Mar. 24, 2021).

34. No. 2:19-CV-0059, 2020 U.S. Dist. LEXIS 183397 (S.D. Ga. Oct. 2, 2020).

35. *Id.* at *31.

36. *Id.* at *19–20.

37. *Id.* at *31.

38. 495 F. Supp. 3d 1289 (N.D. Ga. 2020).

income resulting from the public health emergency Georgia's Governor Kemp declared in an executive order.[39] According to the Northern District, the emergency order did not create a "direct physical loss" necessary to a business income claim.[40] The district court also rejected the insured's request for civil authority coverage because the governor's order did not limit access to private businesses or their operations.[41]

Similarly in *Johnson v. Hartford Fire Insurance Co.*,[42] another judge in the Northern District concluded that a group of dentists and dental practices seeking certification in a class action failed to demonstrate that COVID-19 caused physical damage to their property sufficient to sustain their claims for business interruption coverage against various insurers.[43] Despite the fact that the dentist offices might have been "altered" by the virus, the court in *Johnson* adopted the more restrictive view of physical damage that the district court in *Henry's Louisiana Grill* required. Likewise, the judge in *Johnson* adopted the analysis of the district court in *Henry's Louisiana Grill* as it related to civil authority coverage.[44] Similar analyses and results followed in *K D Unlimited Inc. v. Owners Insurance Co.*,[45] *Karmel Davis & Associates. v. Hartford Financial Services Group*,[46] *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Insurance Co.*,[47] *Lemontree Academy, LLC v. Utica Mutual Insurance Co.*,[48] *Restaurant Group Management v. Zurich American Insurance Co.*,[49] *Hilco, Inc. v. Hartford Fire Insurance Co.*,[50] and *G&A Family Enterprises, LLC v. American Family Insurance Co.*[51]

39. *Id.* at 1290.
40. *Id.* at 1296.
41. *Id.*
42. 510 F. Supp. 3d 1326 (N.D. Ga. 2021).
43. *Id.* at 1334.
44. *Id.* at 1337.
45. No. 1:20-CV-2163, 2021 U.S. Dist. LEXIS 5926 (N.D. Ga. Jan. 5, 2021).
46. No. 1:20-CV-02181, 2021 U.S. Dist. LEXIS 22896 (N.D. Ga. Jan. 26, 2021).
47. No. 1:20-CV-02248, 2021 U.S. Dist. LEXIS 37150 (N.D. Ga. Mar. 1, 2021).
48. No. 3:20-CV-126, 2021 U.S. Dist. LEXIS 92913 (M.D. Ga. Mar. 11, 2021).
49. No. 1:20-CV-4782, 2021 U.S. Dist. LEXIS 94597 (N.D. Ga. Mar. 15, 2021).
50. No. 1:20-CV-4514, 2021 U.S. Dist. LEXIS 78886 (N.D. Ga. Apr. 12, 2021).
51. No. 1:20-CV-03192, 2021 U.S. Dist. LEXIS 91942 (N.D. Ga. May 13, 2021).

III. AUTOMOBILE CASES

A. Motor Vehicle Liability Insurance

1. Sovereign Immunity

Municipalities, like other branches of government, enjoy sovereign immunity under Georgia law.[52] However, several Georgia statutes provide for the waiver of sovereign immunities by municipalities when their motor vehicles are involved in accidents.[53] And where a municipality purchases motor vehicle insurance with limits in excess of the mandatory waiver amount,[54] the waiver extends to the limits provided by the insurance policy.[55]

In *Atlantic Specialty Insurance Co. v. City of College Park*,[56] the Georgia Court of Appeals held that an insurance policy that provided a business auto limit of $1 million and an excess liability limit of $4 million could not also limit the coverage for damages a motor vehicle accident caused to the statutory minimum waiver amount ($700,000) by an endorsement which said the policy does not constitute a waiver of sovereign immunity and "[w]e have no duty to pay 'damages' on your behalf under this policy unless the defenses of sovereign and governmental immunity are inapplicable to you."[57]

The plaintiffs brought a wrongful death action against the City of College Park after a vehicle pursued by College Park Police crashed into the decedents' vehicle, killing them. Atlantic Specialty Insurance Company (Atlantic) intervened to litigate the limits of coverage it provided to College Park. Atlantic insured College Park under a policy that included business auto and excess liability coverage with a total limit of $5 million. Both coverages contained disclaimers of any waiver of sovereign immunity, and Atlantic did not have to pay damages unless

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52. GA. CONST. art. IX, § 2, para. 9; O.C.G.A. § 36-33-1 (2021) ("[I]t is the public policy of the State of Georgia that there is no waiver of the sovereign immunity of municipal corporations of the state and such municipal corporations shall be immune from liability for damages.").

53. *See* O.C.G.A. § 36-33-1 (2021); O.C.G.A. § 33-24-51 (2021); O.C.G.A. § 36-92-2 (2021).

54. O.C.G.A. § 36-92-2 provides, in pertinent part:

> (a) The sovereign immunity of local government entities for a loss arising out of claims for the negligent use of a covered motor vehicle is waived up to the following limits: . . . (3) . . . [A]n aggregate amount of $700,000.00 because of bodily injury or death of two or more persons in any one occurrence.

55. O.C.G.A. § 33-24-51(b).

56. 357 Ga. App. 556, 851 S.E.2d 189 (2020), *cert. granted*, No. S21C0482, 2021 Ga. LEXIS 564 (Jul. 7, 2021).

57. *Id.* at 558, 564, 851 S.E.2d at 192, 195.

the defense of sovereign immunity was inapplicable. Atlantic argued that the statutory minimum waiver limit of $700,000 applied.[58] However, the same statute states, "[t]he waiver provided by this chapter shall be increased to the extent that . . . [t]he local government entity purchases commercial liability insurance in an amount in excess of the waiver set forth in this Code section."[59]

Although the parties contracted to limit the waiver of sovereign immunity to the statutory minimum, the court held that the endorsement's limitation was unenforceable as a violation of the General Assembly's clear intent to provide compensation for injuries arising out of motor vehicle accidents.[60] The court held that College Park's purchase of automobile liability insurance greater than $700,000 increased its waiver of sovereign immunity to the full policy limits of $5 million.[61]

2. The Cause Test

The Supreme Court of Georgia adopted the "cause test" in 2010[62] to determine the number of "accidents" at issue for purposes of applying an automobile liability policy when the insured struck two bicyclists in a series of collisions.[63] In *Danner v. Travelers Property Casualty Insurance Co.*,[64] the United States Court of Appeals for the Eleventh Circuit applied the cause test and held that where two other vehicles struck an automobile in rapid succession, the series of collisions was a single accident for purposes of determining the policy limits available.[65] The insured, Danner, was struck by a truck and then, while he was stopped in the road after the first impact, an SUV struck Danner. Danner could not recall the difference in time between the two collisions but stated he had not regained control of his vehicle when the second vehicle struck. Danner and his wife filed a declaratory judgment action against their insurer, seeking a ruling that the UM policy limit applied to each collision separately.[66]

In determining whether the two collisions constituted a single accident, the court considered that Danner had not regained control of

58. *Id.* at 557–59, 851 S.E.2d at 191–92.

59. O.C.G.A. § 36-92-2(d)(3).

60. *Atl. Specialty*, 357 Ga. App. at 563, 851 S.E.2d at 194; *see also* Atl. Specialty Ins. Co. v. City of College Park, 319 F. Supp. 3d 1287, 1294 (N.D. Ga. 2018).

61. *Id.* at 565, 851 S.E.2d at 195–96.

62. State Auto Prop. & Cas. Co. v. Matty, 286 Ga. 611, 615, 690 S.E.2d 614, 618 (2010).

63. *Id.* at 613, 690 S.E.2d at 617 (concluding that the "number of accidents is determined by the number of causes of the injuries.").

64. 848 Fed. App'x. 890 (11th Cir. 2021) (unpublished decision).

65. *Id.* at 892–93.

66. *Id.* at 891.

his vehicle prior to the second collision and that he had no opportunity to avoid the second collision.[67] In addition, the court noted the absence of any evidence that the second collision caused any separate and distinct injuries.[68] Therefore, the court affirmed the district court's summary judgment to the insurance company, holding the series of collisions resulted from a single cause and was a singular "accident" under the policy for purposes of determining the limits available.[69]

B. UM Cases

1. Unexcused Late Notice

The failure of insureds to notify their UM carriers of accidents and injuries, and the courts' interpretation of various policy language requiring such notice, has been a recurring issue for many years.[70] The court of appeals returned to this issue in two cases decided during the Survey period.

In *GEICO General Insurance Co. v. Breffle*,[71] the Georgia Court of Appeals held that the insured's thirteen-month delay in providing his insurer notice of an accident was unreasonable as a matter of law when the policy provision required notice "as soon as possible after an accident."[72] GEICO insured Breffle under a motor vehicle policy that provided $250,000 in UM coverage. Thirteen months after an accident, and after having undergone extensive medical treatment, Breffle first notified GEICO of the accident and then subsequently served GEICO as an unnamed defendant in a lawsuit against the other driver.[73] The court rejected Breffle's argument that the notice provision was vague and undefined and held that "[a]s soon as possible after the accident" is unambiguous.[74] The court rejected Breffle's excuse for the delay in giving notice—that he did not think he would need to use his UM coverage—as a matter of law.[75]

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67. *Id.* at 892; *see Matty*, 286 Ga. at 613, 690 S.E.2d at 617.

68. *Id.* at 892–93.

69. *Id.* at 893.

70. *See* Jenkins & Miller, *Ga. Automobile Ins.* § 35:2 (2020–2021 ed.); Martin, Wolff, and Cave, *Insurance, Annual Survey of Georgia Law*, 70 MERCER L. REV. 111, 114–15 (2018); Wolff, Cave, and Schatz, *Insurance, Annual Survey of Georgia Law*, 69 MERCER L. REV. 117, 121–22 (2017).

71. 355 Ga. App. 276, 844 S.E.2d 179 (2020), *cert. denied*, 2021 Ga. LEXIS 45 (Jan. 11, 2021).

72. *Id.* at 278–79, 844 S.E.2d at 181–82.

73. *Id.* at 276, 844 S.E.2d at 179–80.

74. *Id.* at 278, 844 S.E.2d at 181.

75. *Id.* at 279, 844 S.E.2d at 181–82.

In *Hyde v. State Farm Mutual Automobile Insurance Co.*,[76] the court of appeals held that an insured's twenty-two-month delay in providing notice of an accident and possible UM claim to her insurer was unjustified.[77] On August 18, 2016, Hyde was involved in a collision while driving her employer's vehicle. At the time of the accident, Hyde had a State Farm insurance policy that included UM coverage. Under the policy, State Farm required the insured to provide notice of potential claims and details of the injury and treatment "as soon as reasonably possible after the injured insured is first examined or treated for the injury."[78]

A doctor examined Hyde for injuries on the day of the accident. Almost four months later, Hyde's lawyer wrote to her employer, giving notice of a potential UM claim under the employer's policy on its vehicle. The employer, also a State Farm insured, notified the insurer of the claim under its own coverage. When Hyde served State Farm as a UM carrier in her suit against the other driver on June 13, 2018, State Farm argued that Hyde failed to comply with the notice condition of her policy.[79]

The court held that although Hyde provided notice to her employer, her policy required Hyde to provide notice directly to State Farm and insurers are not required to cross-reference claims to determine if the parties involved have other insurance with the company.[80] Hyde argued that the policy language was ambiguous because it required reporting a "claim" without defining the term or when a claim arises.[81] Given that the other driver had liability insurance, Hyde argued that when a claim for UM benefits arose was a question of fact.[82] The court rejected that argument, holding the policy unambiguously required reporting to the carrier "as soon as reasonably possible after the injured insured is first examined or treated for the injury," not "as soon as reasonably possible" after she knew she might present a UM claim.[83]

Finally, the court distinguished this case from *Progressive Mountain Insurance Co. v. Bishop*, where an eleven-month delay in providing notice was potentially justified because Bishop notified the insurer a year before undergoing surgery.[84] Whereas Hyde provided notice approximately

76. 356 Ga. App. 533, 848 S.E.2d 145 (2020).
77. *Id.* at 538, 848 S.E.2d at 149.
78. *Id.* at 537, 848 S.E.2d at 148.
79. *Id.* at 534–35, 848 S.E.2d at 146–47.
80. *Id.* at 538, 848 S.E.2d at 149.
81. *Id.* at 536, 848 S.E.2d at 147.
82. *Id.* at 537, 848 S.E.2d at 148.
83. *Id.*
84. 338 Ga. App. 115, 790 S.E.2d 91 (2016).

three months after surgery and more than a year after she notified her employer of a potential UM claim.[85] Therefore, the court held Hyde's delay in notifying her insurer was unexcused and unreasonable as a matter of law.[86]

2. UM Coverage for the Insured's Vehicle

The Uninsured Motorist Act and most, if not all policies, exclude from the definition of "uninsured motor vehicle" a vehicle which is "owned by or furnished for the regular use of the named insured, the spouse of the named insured, and, while residents of the same household, the relative of either."[87] The question in *Auto-Owners Insurance Co. v. Parker*,[88] was whether that exclusion applied when the injured "insured" was a minor child who did not own or operate the vehicle.[89]

Tyler Parker was the named insured of a policy covering a Ford F-150 truck. Tyler crashed the truck with his daughter, Savannah Parker, riding in the passenger seat. Savannah's guardian ad litem sued Tyler's estate and had Auto-Owners Insurance Company served as a UM carrier. Auto-Owners paid the liability policy limit but argued it had no liability under the UM coverage because Tyler owned the truck and therefore could not be "uninsured" under the policy or statute.[90] The Georgia Court of Appeals held that the exclusion applied to vehicles that the *named* insured owned or had available for regular use.[91] In conclusion, the court quoted this maxim from Jenkins & Miller: "the insured motor vehicle cannot be the uninsured motor vehicle."[92]

3. Due Diligence Required for Renewal of UM Lawsuit

Although section 9-2-61 of the Official Code of Georgia Annotated permits the renewal of a lawsuit outside the statute of limitations where the plaintiff files a renewal action within six months of a voluntary dismissal, the Georgia Court of Appeals held in *Durland v. Colotl*,[93] that there can be no renewal of a lawsuit against a tortfeasor and a UM carrier where service on the tortfeasor in the original action was accomplished

85. *Id.* at 120, 790 S.E.2d at 96; *Hyde*, 356 Ga. App. at 537, 848 S.E.2d at 148.
86. *Hyde*, 356 Ga. App. at 538, 848 S.E.2d at 149.
87. O.C.G.A. § 33-7-11(b)(1)(D) (2021).
88. 359 Ga. App. 267, 857 S.E.2d 245 (2021).
89. *Id.* at 269, 857 S.E.2d at 248.
90. *Id.* at 267–68, 857 S.E.2d at 247.
91. *Id.* at 269, 857 S.E.2d at 248.
92. *Id.* at 270, 857 S.E.2d at 249 (quoting Jenkins & Miller, *supra* note 70, at § 32:1).
93. 359 Ga. App. 170, 855 S.E.2d 83 (2021).

only by publication.[94] However, the result might have been different if the plaintiff had exercised due diligence to locate the tortfeasor after the publication service as required by section 33-7-11(e) of the Official Code of Georgia Annotated.[95]

Durland sued the defendant and his own UM carrier, USAA, on November 28, 2016, following a motor vehicle accident. The trial court granted Durland's request to serve the defendant by publication after Durland was unable to personally serve him. After publication, Durland no longer pursued efforts to obtain personal jurisdiction over the defendant. USAA moved to dismiss the action on the ground that Durland did not exercise diligence in locating the defendant. On January 10, 2019, Durland dismissed his action, and he then filed a renewal on June 4, 2019, after the statute of limitations had expired. The Dekalb Superior Court granted USAA's motion to dismiss the renewal action on the ground that section 9-2-61 of the Official Code of Georgia Annotated only permits the renewal of actions that were valid at the time of dismissal, and without personal service, the original action was not valid.[96]

The court of appeals affirmed, holding that an action served only by publication is not a pending action against the defendant because the trial court does not have personal jurisdiction and, therefore, the case cannot be dismissed and renewed outside the limitations period.[97] Further, the court held that Durland's failure to continue exercising due diligence to locate Colotl after the publication in the original action, as section 33-7-11(e) of the Official Code of Georgia Annotated requires, meant that the publication service "never ripened into personal service."[98] Although the court of appeals did not cite any authority for the proposition that publication service could "ripen" into personal service by the continuing exercise of due diligence, the outcome of this case might have been in Durland's favor had he made reasonable efforts to find Colotl after publishing notice in the original action. As it was, the court affirmed the trial court's dismissal, concluding that Durland could not renew his suit "in view of his failure to personally serve Colotl in the original action, following service by publication and a lack of diligence to locate Colotl."[99]

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94. *Id.* at 175, 855 S.E.2d at 87.
95. O.C.G.A. § 33-7-11(e).
96. *Id.* at 171, 855 S.E.2d at 84–85.
97. *Id.* at 174–75, 855 S.E.2d at 87.
98. *Id.*
99. *Id.* at 175, 855 S.E.2d at 87.

IV. LIABILITY CASES

Georgia courts once again addressed the bad faith ramifications for an insurance company's failure to meet demands and settle claims in four separate appellate decisions this past Survey period. In response to certified questions from the United States Court of Appeals for the Eleventh Circuit, the Supreme Court of Georgia in *GEICO Indemnity Co. v. Whiteside*[100] addressed an insurer's obligation to settle a claim against its insured—even if that insured failed to give notice of the lawsuit to that carrier—and resulting bad faith consequences.[101] While driving Karen Griffis's Ford Explorer as a permissive driver, Winslett struck Guthrie, who was riding a bicycle. Guthrie's lawyer sent GEICO, who insured Griffis, a letter demanding GEICO tender its $30,000 policy limits to settle the liability claim against Winslett. GEICO rejected the settlement demand.[102]

Several weeks later, Guthrie filed suit against Winslett. However, Winslett did not send GEICO the suit papers or inform GEICO of the lawsuit despite language in the GEICO policy requiring such notice. The Superior Court of Muscogee County later entered a default judgment of $2,916,204 against Winslett who then filed bankruptcy. Guthrie's attorney was permitted to represent the bankruptcy trustee, Whiteside, who in turn filed a lawsuit against GEICO alleging it negligently or in bad faith failed to settle Guthrie's claim against Winslett.[103] In response, GEICO claimed that the policy's notice provision, and section 33-7-15 of the Official Code of Georgia Annotated relieved GEICO of liability for the judgment, as Winslett never notified GEICO of Guthrie's lawsuit.[104]

The United States District Court for the Middle District of Georgia concluded Winslett's failure to notify GEICO did not prevent her or the trustee from recovering in tort for GEICO's negligent or bad faith failure to settle under "circumstances where GEICO was a proximate cause of Winslett's failure to give notice of the lawsuit."[105] GEICO appealed to the

100. 311 Ga. 346, 857 S.E.2d 654 (2021).

101. *Id.* at 346, 857 S.E.2d at 657–58.

102. *Id.* at 346–47, 857 S.E.2d at 658.

103. *Id.* at 347–48, 857 S.E.2d at 658–59.

104. *Id.* at 348–49,857 S.E.2d at 659; O.C.G.A. § 33-7-15(b) (2000) provides that noncompliance by the insured with a policy provision which requires the insured to send his insurer a copy of every summons or other process "shall constitute a breach of the insurance contract which, if prejudicial to the insurer, shall relieve the insurer of its obligation to defend the insureds under the policy and of any liability to pay any judgment or other sum on behalf of its insureds."

105. *Id.* at 349, 857 S.E.2d at 660.

Eleventh Circuit, which certified three questions to the Georgia Supreme Court.[106]

In response to the first question, the Georgia Supreme Court in *Whiteside* conclusively held that O.C.G.A. § 33-7-15 did not relieve GEICO of liability for a bad faith failure to settle, even if GEICO never received notice of the lawsuit from its insured's permissive driver.[107] Notably, the supreme court concluded the issue was not whether Winslett breached a condition precedent to coverage, which "she did," but rather whether Winslett's breach was an "intervening act" sufficient to break the causal chain between GEICO's "unreasonable rejection" of the demand and the excess default judgment.[108] The supreme court reasoned GEICO reasonably should have foreseen Winslett's breach, as she was not the named insured under the policy and would not have a copy of the policy language, among other factors.[109] The supreme court concluded a reasonable insurance company, such as GEICO, could determine that such a person may not provide notice of a lawsuit.[110] The supreme court ultimately concluded that while the language of O.C.G.A. § 33-7-15 and the insurance policy's notice provisions relieves an insurer of providing a benefit under the policy, it did not foreclose the possibility of the insurer's tort liability that may arise out of that contractual relationship in a later suit, and such tort suits were not precluded as a matter of law.[111]

Second, the supreme court in *Whiteside* concluded that an insured can sue an insurer for bad faith when, after the insurer refused to settle but before the trial court entered judgment against the insured, the insured lost coverage for failing to adhere to the notice provision in the policy.[112] Specifically, as GEICO accepted liability for the accident on behalf of the permissive driver shortly after the accident occurred, GEICO's duty to settle arose as soon as it received Guthrie's time-limited policy demand,

106. *Id.* at 349–50, 857 S.E.2d at 660.

107. *Id.* at 355, 857 S.E.2d at 663.

108. *Id.* (noting the policy's notice requirement was directed at "you," which was more narrowly defined than "insured," as "the policyholder named in the declarations or his or her spouse if a resident of the same household." However, the policy uses language discussing the duty to defend "you and any other insureds" and to pay judgments on "your and any other insureds[ʻ] behalf." The policy also discussed notice from the injured party in terms of "if the insured has failed to give written notice.").

109. *Id.* at 355–56, 857 S.E.2d at 664. The district court also noted she was "not stable," and living in an apartment with no electricity. *Id.*

110. *Id.* at 356, 857 S.E.2d at 664.

111. *Id.* at 359–60, 857 S.E.2d at 666.

112. *Id.* at 359, 857 S.E.2d at 666.

and the supreme court rejected GEICO's argument that no bad faith claim existed until an excess judgment was rendered.[113]

Finally, the supreme court in *Whiteside* held that an insurer has no right to contest special damages in a "follow-on suit" for bad faith, even if it had no prior notice of or participation in that suit.[114] The supreme court concluded Georgia law was well settled that "after an insurer's liability for wrongful refusal to settle a claim against its insured is established, the insured or its assignee is entitled as a matter of law to recover damages equal to the amount by which the judgment exceeds policy coverage."[115] The supreme court reasoned if Winslett's bankruptcy estate did not recover enough from GEICO to satisfy Guthrie's judgment, her estate would not be fully compensated for her damages, and GEICO would escape responsibility for breaching its settlement duty to Winslett.[116]

The Georgia Court of Appeals also confronted the potential ramifications for insurers in handling time-limited demands in three separate decisions, with notable commentary by Chief Judge Christopher McFadden in two of those decisions regarding the unexpected results created in the realm of bad faith litigation since the court's ruling in *Southern General Insurance Co. v. Holt*.[117] First, in *Pritchard v. Mendoza*,[118] the Georgia Court of Appeals reversed an order enforcing a settlement, and concluded that there was no binding settlement when the insurer did not accept the "precise terms" of the time-limited demand.[119]

Pritchard was injured in an automobile accident and made a time-limited demand to Progressive Insurance Company under section 9-11-67.1 of the Official Code of Georgia Annotated, which set forth a number of terms, including that Pritchard would not "agree to any specific venue provisions" or "choice of law provisions." The time-limited demand further mandated that the payment of the $25,000 limit was not full and complete compensation to Pritchard and that Progressive could not include any language in the release to the contrary. Progressive

113. *Id.* at 359–60, 857 S.E.2d at 666–67.

114. *Id.* at 360, 857 S.E.2d at 667.

115. *Id.* at 360–61, 857 S.E.2d at 667 (quoting Cotton States Mut. Ins. Co. v. Brightman, 256 Ga. App. 451, 456, 568 S.E.2d 498, 456 (2002), *aff'd*, 276 Ga. 683, 580 S.E.2d 519 (2003)).

116. *Id.* at 361–62, 857 S.E.2d at 668.

117. 262 Ga. 267, 416 S.E.2d 274 (1992) (holding an insured has a claim for bad faith against an insurance company for its failure to settle a claim within the policy limits based on time-limited settlement offer by the injured person's attorney).

118. 357 Ga. App. 283, 850 S.E.2d 472 (2020).

119. *Id.* at 289, 850 S.E.2d at 476.

accepted the demand, sent a check for $25,000, but also sent a "Georgia General Release" which included language that, for "sole consideration" of $25,000, Pritchard released Mendoza from any further claims. Further, the release stated that its terms were to be construed under Georgia law.[120]

Counsel for Pritchard informed Progressive that its release violated the demand and filed suit. Progressive filed a motion to enforce the settlement, which the trial court granted. Pritchard appealed, claiming that Progressive's response was "not identical, unequivocal, and without variance" of the demand.[121] The court of appeals agreed, holding that Progressive failed to comply with section 9-11-67.1 when it did not submit a conforming release as required by the demand.[122] Since Progressive's release contained improper choice-of-law and sufficiency-of-consideration language, the court concluded Progressive failed to perform an act as required for acceptance of the demand and that there was no binding settlement.[123]

In two other decisions from the Georgia Court of Appeals—*White v. Cheek*[124] and *Wright v. Nelson*[125]—Chief Judge McFadden wrote separate concurrences regarding the enforcement of time-limited demand settlements and the so-called "perverse incentive" to "set up a bad faith claim" which has arisen since the *Holt* decision.[126] In *White*, the demand specifically required that any communications related to the demand "must be made in writing."[127] Yet, the claims adjuster with GEICO left voicemails with counsel for the claimant, inquiring if its insured was actually involved in the automobile accident, as GEICO's investigation revealed it was a hit and run collision.[128] The court concluded that GEICO "violated" the requirement that communications be in writing, and the parties did not reach a binding settlement agreement under section 9-11-67.1.[129]

Chief Judge McFadden concurred specially, claiming GEICO's voicemails were "reasonable clarifications of facts" relevant to the offer

120. *Id.* at 284–86, 850 S.E.2d at 473–75.

121. *Id.* at 286–87, 850 S.E.2d at 475.

122. *Id.* at 289, 850 S.E.2d at 476.

123. *Id.*

124. 2021 Ga. App. LEXIS 236, 859 S.E.2d 104 (2021) (McFadden, C.J., concurring specially).

125. 358 Ga. App. 871, 856 S.E.2d 421 (2021) (McFadden, C.J., concurring fully and specially).

126. *White*, 2021 Ga. App. LEXIS 236, at *12, 859 S.E.2d at 110.

127. *Id.* at *2, 859 S.E.2d at 106.

128. *Id.* at *5–6, 859 S.E.2d at 107.

129. *Id.* at *11–12, 859 S.E.2d at 109.

but were not a counteroffer.[130] Moreover, he noted that while the claimant could proceed towards a bad faith claim, such a claim "would lack merit because of the onerous requirements" included in the demand letter itself and because the letter was "compelling, if not dispositive, evidence of a lack of intent to settle the claim and so of bad faith."[131]

Similarly in *Wright*, the court of appeals held that the plaintiff accepted a demand and reached a binding settlement when Allstate tendered the policy limits and indicated an intent to follow up with a written release.[132] After the plaintiff accepted the demand, an attorney from Allstate sent a "proposed" limited liability release accompanied by a letter stating that if the release "meets with your approval, please have your client sign it and return the original to me."[133] The court of appeals concluded that the trial court erred in finding no enforceable agreement because an "objectively reasonable person would understand" the cover letter from Allstate's attorney sought the claimant's approval of the proposed release and was not "objecting" to the terms of the settlement agreement.[134]

Writing separately, Chief Judge McFadden expressed concern that "plaintiffs' attorneys have incentives contrary" to the judicially expressed intent in *Holt* to resolve claims or risk bad faith exposure, and "plaintiffs sometimes structure offers not to reach settlements, but rather to elicit rejections."[135] Chief Judge McFadden's concurrence hinted that the Georgia General Assembly could address these potential pitfalls by establishing a "safe harbor, specifying conduct by insurers that would constitute good faith as a matter of law."[136]

V. CONCLUSION

Few insurance decisions during this Survey period were groundbreaking or reflected significant changes in Georgia law. There were only a small number of Georgia Court of Appeals decisions in the property context with most arising from the district courts. In the automobile context, the Georgia Court of Appeals continued to address the intricacies of UM law while addressing minor issues relating to general automobile liability. The principal liability or third-party cases during the Survey period, however, focused on the pitfalls of responding

130. *Id.* at *14, 859 S.E.2d at 110.
131. *Id.* at *13, 19 859 S.E.2d at 110, 112.
132. 358 Ga. App. at 871, 856 S.E.2d at 422.
133. *Id.* at 873, 856 S.E.2d at 423.
134. *Id.* at 875–76, 856 S.E.2d at 424–25.
135. *Id.* at 876–77, 856 S.E.2d at 425.
136. *Id.* at 880, 856 S.E.2d at 427.

to time-limited demands, with the Chief Judge of the Georgia Court of Appeals sending out a clarion call to action for the Georgia legislature.