Mercer Law Review

Volume 73
Number 1 *Annual Survey of Georgia Law*

Article 12

12-2021

Labor and Employment Law

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I. INTRODUCTION

This Article surveys revisions to the Official Code of Georgia Annotated (O.C.G.A.) and decisions interpreting Georgia law from June 1, 2020, through May 31, 2021, that affect labor and employment relations for Georgia employers.[1]

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1. For an analysis of last year's Labor & Employment law during the Survey period, *see* W. Jonathan Martin II, et al., *Labor and Employment Law*, 72 MERCER L. REV. 149 (2020).

II. RECENT LEGISLATION

A. Time and Accommodations for Nursing Mothers

Effective August 5, 2020, employers must provide for reasonable unpaid break time each day for an employee who needs to express breast milk at the worksite during work hours.[2] Employers must provide "a private location, other than a restroom,"[3] where the employee can express breast milk (previously, the language was permissive and stated that an employer "may make reasonable efforts" to provide a room or other location to the employee).[4] Employers who have less than fifty employees can utilize an exception to this obligation if it would impose an undue hardship on the employer.[5]

B. SB 288: Changes in Georgia's Criminal History Report Records

"On January 1, 2021, Georgia joined forty-one other states in allowing a person to remove certain convictions from their criminal record after a period of 'conviction-free' years."[6] Senate Bill 288[7] amended section 35-3-37 of the Official Code of Georgia Annotated to allow individuals with certain felony and misdemeanor convictions on their record the potential to clear and restrict their criminal history report or criminal record by allowing the restriction and sealing of up to two misdemeanor convictions during a person's lifetime and of pardoned felonies.[8] Additionally, once sealed, an individual's criminal history record information is not available to private persons or businesses.[9]

Notably, SB 288 also added a new code section 24-4-419 of the Official Code of Georgia Annotated,[10] which provides protections to employers who bring suit based on conduct of their employees or agents. In those cases, the employee's criminal history will not be admissible against an employer if:

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2. O.C.G.A. § 34-1-6 (2020).
3. O.C.G.A. § 34-1-6(b).
4. O.C.G.A. § 34-1-6(b) (2019).
5. O.C.G.A. § 34-1-6(c).
6. Jordan A. Fishman, *Georgia's SB 288: Giving Rehabilitated Individuals a Second Chance*, STOKES WAGNER, https://stokeswagner.com/publications/georgia-s-sb-288-giving-rehabilitated-individuals-a-second-chance (date of website access) (citing O.C.G.A. § 35-3-37 (2021)).
7. Ga. S. Bill 288, Reg. Sess. (2020).
8. O.C.G.A. § 35-3-37(j)(4)(C) (2021).
9. O.C.G.A. § 35-3-37(a)(6) (2021).
10. O.C.G.A. § 24-4-419(b) (2021).

> (1) The nature of such criminal history record information is not relevant to the facts underlying such proceeding or the veracity of the witness;
>
> (2) Prior to the act giving rise to such proceedings, criminal history record information was restricted or sealed as provided in Code Section 35-3-37, or a pardon for such conduct was granted; or
>
> (3) Such criminal history information is for an arrest or charge that did not result in a conviction.[11]

C. SB 443: Changes in Georgia's Garnishment Laws

On August 5, 2020, Governor Brian Kemp signed Senate Bill 443, [12] which modified portions of section 18-4-1 of the Official Code of Georgia Annotated, Georgia's garnishment laws.[13] The amendment went into effect on January 1, 2021.[14] The most notable change for employers was the garnishment period for continuing garnishments being extended from 179 days (six months) to 1,095 days (three years).[15] Thus, employers facing continuing garnishments must file answers through the 1,095-day period, or until the debt has been repaid in full or otherwise discharged.[16]

SB 443 also expanded the garnishment statute to now apply to a person or entity "under periodic obligations for payment," which can include independent contractors and workers in the "gig" economy.[17] For employers that hire an independent contractor or "an employee of such garnishee subject to federal and state income tax withholding," the employer is not considered to have knowledge of or have an obligation to determine any exemptions based on disposable earnings, until the garnishee is served with or consents to a court order or filed modification form that establishes an alternative basis for determining the amount subject to garnishment.[18] In light of these new changes to the Georgia garnishment laws, all Georgia employers should review their internal policies and procedures for processing garnishments and adjust them accordingly.

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11. *Id.*
12. Ga. S. Bill 443, Reg. Sess. (2020).
13. O.C.G.A. § 18-4-1 (2021).
14. *Id.*
15. O.C.G.A. § 18-4-4(c)(1) (2021).
16. Ga. S. Bill 443, Reg. Sess.
17. O.C.G.A. § 18-4-41(a) (2021).
18. O.C.G.A. § 18-4-5(a)(4) (2021).

III. WRONGFUL TERMINATION

A. Employment At-Will

For an employment agreement to be enforceable, it must include all necessary terms, and the term of employment must be definite.[19] If an employment contract does not state the duration of the term of employment, the contract is "terminable at the will of either party."[20]

In *Zulke v. AC&DC Power Technologies, LLC*,[21] the Georgia Court of Appeals reversed the Clayton County Superior Court's grant of summary judgment in favor of the employer defendant, holding that the Georgia Statute of Frauds did not bar the plaintiff's contract of employment, including the benefit provisions.[22] In April of 2012, the defendant made a verbal employment offer to James Zulke, and subsequently emailed him a written offer specifying the terms of his employment as the chief operations officer.[23] The letter that the defendant sent was dated March 2012, and had no employment start date or duration dates; but did provide "a first year salary of $130,000, with an incentive payment 'after the first year of operations' conditional on meeting company goals in overhead reduction, profitability, and revenue increase." [24]

On April 23, 2012, Zulke returned the defendant's edited employment contract document with an added provision that if he was terminated for any reason within the first year, he would receive "nine 'monthly payments of the base salary amount paid on the first of each month,' reduced to six payments if he was 'terminated for any reason during the second and third years.'"[25] Zulke began his employment in May of 2012 and was later terminated in September of 2014. Zulke did not receive the value of his ownership interest, nor any incentive bonus or severance upon his termination, and sued the company for breach of contract, promissory estoppel, and attorney's fees.[26]

The court of appeals held that since the employment was terminable at will at any point, it logically could have been terminated within the first year and did not fall under the Georgia Statute of Frauds.[27] However, after he completed his first year, he was only entitled to the

19. James W. Wimberly, *Georgia Employment Law* § 1-2 (3rd ed. 2000).
20. Parker v. Crider Poultry, 275 Ga. 361, 362, 565 S.E.2d 797, 798 (2002).
21. 356 Ga. App. 299, 846 S.E.2d 624 (2020).
22. *Id.* at 300, 846 S.E.2d at 626–27.
23. *Id.* at 299, 846 S.E.2d at 626.
24. *Id.*
25. *Id.* at 299–300, 846 S.E.2d at 626.
26. *Id.* at 300, 846 S.E.2d at 626.
27. *Id.* at 303, 846 S.E.2d at 628.

pay that he earned up to discharge because he was an employee at will and did not have a contract entitling him to any more pay for his work.[28] The court of appeals denied summary judgment as to the benefits issue as well because, arguably, Zulke earned the severance agreement upon commencement of his second year, which means it also was not barred by the Statute of Frauds.[29] Therefore, the court remanded this issue back to the trial court for a jury to decide.[30]

IV. RESPONDEAT SUPERIOR

Under the doctrine of *respondeat superior*, an employer may be held vicariously liable for the negligence or intentional torts of employees that are committed within the scope of their employment.[31] To hold an employer vicariously liable for the torts of an employee, the following elements must be established: (1) the employee was acting in furtherance of the employer's business; and (2) the employee was acting within the scope of the employer's business.[32]

A. Vicarious Liability and Apportionment of Fault

In *Quynn v. Hulsey*,[33] the Supreme Court of Georgia fundamentally reversed prior precedent commencing in the 1960's, when it held that section 51-12-33 of the Official Code of Georgia Annotated,[34] known as the apportionment statute, abrogated the *respondeat superior* rule.[35] The longstanding precedent for negligence cases in Georgia was that a plaintiff may not recover damages if they are 50% or more at fault.[36] When the tortious conduct was done by an employed person in the course and scope of business, an employer could defeat claims of negligent hiring, supervision, training, entrustment, or retention by admitting that it is vicariously liable under *respondeat superior*.[37] By admitting

28. *Id*. (quoting E.D. Lacey Mills v. Keith, 183 Ga. App. 357, 359, 359 S.E.2d 148, 152 (1987)).

29. *Id.* at 303, 846 S.E.2d at 628.

30. *Id.*

31. Charles R. Adams III, *Georgia Law of Torts* § 7:2 (2017–2018 ed.).

32. *Id.*

33. 310 Ga. 473, 850 S.E.2d 725 (2020).

34. O.C.G.A. § 51-12-33 (2021).

35. *Quynn*, 310 Ga. at 481, 850 S.E.2d at 731–32.

36. O.C.G.A. § 51-12-33(g) (2021).

37. *Quynn*, 310 Ga. App. at 474–75, 850 S.E.2d at 727.

respondeat superior, the employer's own negligence would not be considered by the jury for purpose of apportioning damages.[38]

Here, the defendant, Riley Hulsey, was driving a truck owned by his employer, TriEst, when he struck and killed an individual attempting to cross the street. The administrator of the estate brought a wrongful death and personal injury action against the defendant and his employer, alleging negligent entrustment, hiring, training, and supervision. The jury found that the decedent was 50% at fault, and the defendant and his employer were 50% at fault; thus, the estate could not recover damages.[39] The State Court of Gwinnett County, affirmed by the Georgia Court of Appeals, held that TriEst was entitled to summary judgment on the plaintiff's claims for negligent entrustment, hiring, training, supervision, and retention, as the statute and case law precedent provided.[40]

Granting certiorari, the Supreme Court of Georgia held that the employer's independent acts of negligently hiring, entrusting, retaining, and supervising are separable from the employee's actions—not a "concerted act between an employer and its employee"—thus, the plaintiff's claims of negligent hiring, training, entrustment, and supervision were in themselves allegations of fault within the apportionment statute.[41]

The supreme court held that the lower courts erred, within the plain language and strict construction of O.C.G.A. § 51-12-33, by not apportioning fault onto TriEst, and erred in finding that TriEst's own admittance of vicarious liability entitled it to summary judgment on the plaintiff's claims.[42] Analyzing and construing the statute strictly, the court concluded that O.C.G.A. § 51-12-33 "mandates that the jury be allowed to consider the fault of all persons who contributed to the alleged injury or damages," and abrogated the historic precedent of the *respondeat superior* rule.[43]

B. Vicarious Liability and Negligence

In *Johnson v. Avis Rent A Car System, LLC,*[44] Brianna Johnson and Adriene Smith were seriously injured when they were struck by a stolen

38. Hosp. Auth. of Valdosta v. Fender, 342 Ga. App. 13, 23, 802 S.E.2d 346, 355 (2017); MasTec N. Am. v. Wilson, 325 Ga. App. 863, 865, 755 S.E.2d 257, 259 (2014).

39. *Quynn*, 310 Ga. App. at 473–74, 850 S.E.2d at 727. *See generally* O.C.G.A. § 51-12-33(g) (2021).

40. *Quynn*, 310 Ga. at 474, 850 S.E.2d at 727.

41. *Id.* at 480, 850 S.E.2d at 731.

42. *Id.* at 481, 850 S.E.2d at 731–32.

43. *Id.*

44. 311 Ga. 588, 858 S.E.2d 23 (2021).

sport utility vehicle driven by Byron Perry. Perry stole the car from his place of employment, Avis Rent A Car Systems, LLC. Johnson and Smith each sued Avis, Avis Budget Group, Inc., Peter Duca (a regional security manager for Avis Budget Group), as well as CSYG, Inc., the operator of the downtown Avis location, and Yonas Gebremichael, CSYG's owner.[45]

Avis appealed the denial of its motion for judgment notwithstanding the verdict, and Johnson appealed the grant of Avis's motion for a new trial on the issue of liability.[46] The Georgia Court of Appeals concluded Avis was entitled to the motion for judgment notwithstanding the verdict on Johnson's direct negligence claims, since Perry's criminal conduct was the proximate cause of the plaintiff's injuries.[47]

The Georgia Supreme Court affirmed the judgment, agreeing that the defendants could not be liable to Johnson and Smith, finding Perry's criminal conduct was not a probable or natural consequence which could have been reasonably foreseen.[48] The Avis facility had only one car stolen previously in 2012, and the evidence did not show that the plaintiff's injuries were reasonably foreseeable due to failing to secure the Avis parking lot from theft.[49] The supreme court also analyzed whether Perry acted "'under color of' . . . employment," by committing an unauthorized act in a way that purports the act is done by reason and virtue of his employment.[50] Here, Perry stole the car after working hours, when he was not able to access Avis vehicles like during a normal workday.[51] He was not accessing the cars in any employment capacity, thus not acting "'under color of' . . . employment," at the time he injured the plaintiffs.[52]

In *Hobbs v. Integrated Fire Protection*,[53] the Gwinnett State Court granted summary judgment for Integrated Fire Protection (IFP), and the Georgia Court of Appeals affirmed.[54] Ethan Hobbs filed suit against IFP alleging wrongful death and negligence in his mother's death. At the time of the accident, the decedent, Victoria Eagle was in a relationship with Jason Johnson, the superintendent for IFP, and as the superintendent, Johnson received a company vehicle and a gas card. Prior to working at IFP, Johnson was convicted of a DUI, which IFP was aware of. IFP's

45. *Id.* at 588, 858 S.E.2d at 26.
46. *Id.* at 588–89, 858 S.E.2d at 26–27.
47. *Id.* at 588, 858 S.E.2d at 27.
48. *Id.* at 589, 858 S.E.2d at 27.
49. *Id.* at 591, 858 S.E.2d at 28.
50. *Id.* at 599, 858 S.E.2d at 34.
51. *Id.* at 600, 858 S.E.2d at 34.
52. *Id.*
53. 357 Ga. App. 790, 850 S.E.2d 256 (2020).
54. *Id.* at 790, 850 S.E.2d at 260.

policy for vehicle use was only for business purposes, unless provided prior approval.[55]

On the night of Eagle's death, Eagle and Johnson went to a sports bar to drink. Eagle walked off from the bar after an incident with another patron, and Johnson got into the IFP vehicle to search for her. Around the time Johnson was searching for Eagle, Denise Martin and Dawn Remington were also leaving the bar. When Johnson spotted Eagle across the street, he parked the truck partially in the street and got out. As Remington was driving, she saw IFP's vehicle that Johnson left and drove around it. Subsequently, Remington ran over Eagle, killing her.[56]

The trial court granted IFP's motion for summary judgment, determining that IFP was not vicariously liable for negligence, because Johnson was not acting within the scope of his employment at the time of the accident, and there was no evidence that IFP was negligent in hiring and supervising Johnson. The court found that IFP's knowledge of Johnson's prior conviction did not "qualify as actual knowledge sufficient to raise a jury question regarding dangerous propensity."[57]

The court of appeals agreed with the trial court, affirming that Johnson was not working at the time of the accident, and that fact was sufficient to rebut a presumption that he was acting within the scope of his employment at the time of the accident.[58] The court also noted that, although Johnson was an on-call employee, his on-call status was a circumstantial fact and insufficient to defeat summary judgment.[59] It was not sufficient for the plaintiff to show constructive knowledge due to the fact that the employer is not liable merely because the employer could have ascertained the incompetency of the driver; the plaintiff needs to show actual knowledge.[60]

In analyzing the negligent hiring and supervising claim, the court of appeals concluded that Johnson's actions of leaving the bar to search for Eagle were not in furtherance of any business related to IFP, and thus, IFP could not have ratified Johnson's conduct.[61] "An employer may ratify tortious conduct by an employee, and thereby assume liability for unauthorized conduct, but for liability to be imposed on the employer by ratification, there must be evidence that the employee's conduct was done

55. *Id.* at 791, 850 S.E.2d at 260–61.
56. *Id.* at 791, 850 S.E.2d at 261.
57. *Id.* at 792, 850 S.E.2d at 262.
58. *Id.* at 793, 850 S.E.2d at 262.
59. *Id.* at 794, 858 S.E.2d at 262.
60. *Id.* at 801, 850 S.E.2d at 266–67.
61. *Id.* at 796–97, 850 S.E.2d at 264.

in furtherance of the employer's business and within the scope of employment."[62]

In *DMAC81, LLC v. Nguyen*,[63] the Georgia Court of Appeals held that the employer of a driver involved in a fatal car accident was not liable under the theories of either *respondeat superior*, or negligent hiring and retention.[64] Specifically, the court held that the special circumstances exception and special mission exception did not apply to the facts of this case.[65]

Cummings was an employee of McAllister's Deli, owned by DMAC81, LLC (DMAC81). He worked on the grill line, but also occasionally assisted with making catering deliveries when requested by his boss. On the days he had catering deliveries, Cummings would go into the store early to prepare the line, and then he would make the catering deliveries in his personal vehicle. Prior to preparing the line earlier than his scheduled shift, Cummings had to receive permission from the manager to come in early but would be paid for all time worked and received a separate payment to reimburse his gas.[66]

On a day when the surrounding area was under state of emergency due to a winter storm, Cummings's manager asked him to deliver a catering order. As Cummings was on his way to the store, he hit a car in the emergency lane and killed Tuan Nguyen and his brother-in-law. A drug test revealed that Cummings had marijuana in his system, and it was also discovered that he had smoked marijuana and taken pain medication after his shift the previous day. The assistant general manager for DMAC81 was friends with Cummings and knew he smoked marijuana occasionally.[67]

However, DMAC81 did not conduct background checks or review driving histories of their employees, but it did have a question on its application as to whether the applicant had any driving accidents or tickets within the previous three years. Thus, DMAC81 was unaware that Cummings had prior arrests for marijuana possession, as well as traffic tickets for reckless driving and driving under the influence that were over seven years old.[68]

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62. *Id.* at 797, 850 S.E.2d at 264 (quoting Travis Pruitt & Assocs., P. C. v. Hooper, 277 Ga. App. 1, 625 S.E.2d 445 (2005)).

63. 358 Ga. App. 170, 853 S.E.2d 400 (2021).

64. *Id.* at 174, 853 S.E.2d at 405.

65. *Id.*

66. *Id.* at 170, 853 S.E.2d at 402–03.

67. *Id.* at 170–71, 853 S.E.2d at 403.

68. *Id.* at 171, 853 S.E.2d at 403.

DMAC81 moved for summary judgment and was granted partial summary judgment by the Bibb County Superior Court on DMAC81's claim that an employer was not liable for an accident caused by its employee when the employee is on his way to work. However, the trial court found that there was a question of fact as to whether Cummings was on a special mission for DMAC81.[69]

In its analysis, the Georgia Court of Appeals first stated the basic law for vicarious liability:

> Every master shall be liable for torts committed by his servant by his command or in the prosecution and within the scope of his business . . . the test to determine whether or not the servant was at the time of injury acting within the scope of his employment and on the business of the master . . . . There is a longstanding general rule that an employee is engaged in a purely personal matter while commuting to or from work.[70]

However, the court of appeals explained that there are exceptions to this tenet.[71] In particular, the special circumstances exception and the special mission exception. Under the special circumstance's exception, the court noted that "[t]he law is clear that in the absence of special circumstances a servant in going to and from work in an automobile acts only for his own purposes and not for those of his employer."[72]

Under the special mission exception, the court of appeals held that the trial court erred in finding a question of fact because there was no evidence that would allow the jury to find that Cummings was engaged in a special mission.[73] The special mission exception applies if the employee was on a "special service or errand . . . in the interest of, or under the direction of, his employer" on the way from home to his work.[74] The focus of the task must be on whether the employer made a direct request or direction that is "'special' or 'uncustomary.'"[75]

Here, the court held that there was no special exception.[76] Cummings made his usual commute to work; he drove his own car and had not yet

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69. *Id.*

70. *Id.* at 172, 853 S.E.2d at 403–04 (citing Centurion Indus. v. Naville-Saeger, 352 Ga. App. 342, 344, 834 S.E.2d 875, 878 (2019)).

71. *Id.* at 172, 853 S.E.2d at 404.

72. *Id.* at 173, 853 S.E.2d at 404 (citing Hargett's Tel. Contrs. v. McKeehan, 228 Ga. App. 168, 170, 491 S.E.2d 391, 393 (1997)).

73. *Id.* at 171–72, 853 S.E.2d at 403.

74. *Id.* at 174, 853 S.E.2d at 405 (citing *Centurion Indus.*, 352 Ga. App. at 345–46, 834 S.E.2d at 879).

75. *Id.*

76. *Id.* at 174, 853 S.E.2d at 405.

clocked in; and he did not receive pay for his commute time.[77] The fact that he was "on call" to make deliveries was not availing, especially since he was already scheduled to work that day. In analyzing the above facts, the court determined that no special circumstances applied to Cummings as to impute liability to DMAC81.[78] Thus, the court of appeals granted DMAC81's motion for summary judgment on this issue. Because the court ruled that Cummings was commuting to work and was not engaged in work for DMAC81, the claim for negligent retention and hiring failed.[79]

C. Independent Contractor

Respondeat superior liability does not generally extend to actions or conduct by independent contractors.[80] A court must first resolve the issue of whether an individual is an employee or an independent contractor, which is determined by examining whether the employer has assumed the right to control the time, manner, and method of executing the work.[81]

In *Wilson v. Guy*,[82] Hunter Guy and V.J. Williamson worked for Robert Wilson at Wilson Builders, Inc. Occasionally, Wilson would ask his employees to perform tasks like landscaping, cleaning, and other property maintenance around his home on the weekends for extra income. This work was offered completely separate from the work done at Wilson's company and was done for Wilson's personal benefit. Guy and Williamson went to Wilson's home to assist him. Wilson left his property and instructed Guy to listen to Williamson. At some point in the day, Williamson told Guy to trim the fence and burn the brush. Guy gathered the brush and spread gasoline on the pile, at which point it ignited and severely burned him. Guy filed suit against Wilson for damages, claiming negligent supervision and training on using gasoline to burn brush, along with a claim of *respondeat superior*. Wilson filed for summary judgment, and the Gwinnett County Superior Court denied the motion.[83]

77. *Id.* at 173, 853 S.E.2d at 404.

78. *Id.* at 174, 853 S.E.2d at 405.

79. *Id.* at 176, 853 S.E.2d at 406.

80. O.C.G.A. § 51-2-4 (2021). "An employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate direction and control of the employer." *Id.*

81. Williamson v. Coastal Physician Servs. of the Se., Inc., 251 Ga. App. 667, 668, 554 S.E.2d 739, 741 (2001).

82. 356 Ga. App. 509, 848 S.E.2d 138 (2020).

83. *Id.* at 509–10, 848 S.E.2d at 140–41.

The Georgia Court of Appeals concluded that Williamson and Guy were independent contractors at the time of the fire, and Wilson was not liable for Guy's injuries.[84] Wilson did not tell Guy or Williamson how to perform the tasks, what tools to use, or what procedure to follow.[85] Although they worked for Wilson at his company, they were still independent contractors while performing work at Wilson's house.[86] Thus, Wilson was not liable for Guy's injuries.[87]

In *Stubbs Oil Company v. Price*,[88] the estates of three deceased victims sued the insurer and insured because of the insured's third-party motor carrier accident while delivering products. The estates alleged vicarious liability against the insured, as the statutory employer of the truck driver and carrier, and liability under a statute which allows direct actions against a motor carrier insurer for hire. The insured and insurer filed for summary judgment, which was denied by the Gordon Superior Court, finding that the third-party carrier could only operate as a private motor carrier.[89] The Georgia Court of Appeals reversed this decision.[90]

Mark Hinson was driving a tanker truck for Southern Oil Refinery, LLC when it collided with the decedents' car. Stubbs Oil hired Southern Oil to deliver fuel to its customers and insurer.[91] The court of appeals held that the evidence showed Stubbs Oil executed a contract with BP, which allowed Stubbs to buy fuel from BP and resell it to retail BP gas stations.[92] Once the fuel was in Stubbs's possession, it owned the fuel along with title and risk of passing. To deliver fuel to the gas station customers, Stubbs hired third-party motor carriers to transport the fuel with tankers, and Southern Oil was one of those carriers. Stubbs did this without written contracts with the carriers and would email the carrier the loading ticket if they were interested in picking up the work. Upon completion, Stubbs would receive a bill of landing and invoice to pay the third-party carrier. Hinson was dispatched the delivery request from Stubbs and was on the way to the BP terminal to pick up the fuel when the accident occurred.[93]

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84. *Id.* at 511, 848 S.E.2d at 141.
85. *Id.* at 512, 848 S.E.2d at 142.
86. *Id.* at 514, 848 S.E.2d at 143.
87. *Id.* at 515, 848 S.E.2d at 144.
88. 357 Ga. App. 606, 848 S.E.2d 739 (2020).
89. *Id.* at 606–07, 848 S.E.2d at 741–42.
90. *Id.* at 616, 848 S.E.2d at 748.
91. *Id.* at 606, 848 S.E.2d at 741.
92. *Id.* at 607, 848 S.E.2d at 742.
93. *Id.* at 607–09, 848 S.E.2d at 742–43.

The court of appeals held that Stubbs acted as a shipper during this transaction, as Stubbs hired Southern Oil, and Southern Oil used its own driver and tank.[94] In its holding, the court noted it has previously held that the presence of a lease between the defendant and owner of the vehicle is "the defining element in creating a statutory employment relationship under the [Federal Motor Carrier Safety Regulations] (FMCSRs)."[95] Stubbs did not own the tanker truck, which had Southern Oil's logo and Department of Transportation number; there was no written or oral lease between Stubbs and Southern Oil; Hinson was directly employed by Southern Oil; and Stubbs had no control over Hinson or Southern Oil beyond asking them to deliver the fuel.[96] For those reasons, the court of appeals also determined that Stubbs could not be vicariously liable since it was an independent contractor.[97]

In *Stalwart Films, LLC v. Bernecker*,[98] the Georgia Court of Appeals held that a stuntman was an employee or borrowed servant of the film company and not an independent contractor.[99] John Bernecker was a stunt actor for the show, *The Walking Dead*. During the performance of a stunt, Bernecker suffered a fatal fall. Bernecker's estate brought a claim of negligence against the production company and others involved with the show. The defendants moved for summary judgment and were denied by the Gwinnett County State Court. The defendants also moved for directed verdict, arguing that Bernecker was an employee or borrowed servant of the defendant, and thus his claims would be barred by the Workers' Compensation Act (WCA). Alternatively, even if Bernecker was an independent contractor, the defendant was his statutory employer, and thus his claims would also be barred by the WCA. The motion was denied, and the jury delivered a verdict for the plaintiff.[100] The defendants appealed the verdict, and the court of appeals reversed.[101]

The court of appeals held that Bernecker was an employee of Stalwart, and it rejected the argument that Bernecker was an independent contractor because he received a 1099 and not a W-2, and as previous precedent has established, that fact does not create a jury question. [102]

94. *Id.* at 610, 848 S.E.2d at 744.
95. *Id.* at 611, 848 S.E.2d 744–45.
96. *Id.* at 611–12, 848 S.E.2d at 745.
97. *Id.* at 612–13, 848 S.E.2d 745–46.
98. 359 Ga. App. 236, 855 S.E.2d 120 (2021).
99. *Id.* at 242, 855 S.E.2d at 125.
100. *Id.* at 237–240, 855 S.E.2d at 122–24.
101. *Id.* at 242–43, 855 S.E.2d at 126.
102. *Id.* at 241, 855 S.E.2d at 125.

The court utilized prior precedent in analyzing "whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work," to conclude that Bernecker was not an independent contractor.[103]

V. BUSINESS TORTS

A. Restrictive Covenants

The Georgia Constitution was amended in 2011, which changed the focus and analysis for courts as to whether a covenant restricts future employment in a reasonable manner.[104] This amendment also allows courts to "blue pencil" agreements made after 2011 in order to avoid the invalidation of the entire agreement.[105] However, agreements made before the approval of the amendment are not subject to blue penciling.[106] These agreements will be held valid as a partial restraint only when the agreement is specific and reasonable in regard to duration, geographic restriction, and scope of the activities prohibited.[107]

As indicated below, and in past Survey periods, courts continue to invalidate agreements because they were entered into prior to 2011 and have invalid provisions under Georgia law.[108] Under Georgia law, employers can require at-will employees to sign a new agreement, with continued employment as sufficient consideration.[109] For employment contracts for a specific term, employers must offer additional consideration, such as monetary payment or other benefits, as the employer is already obligated to continued employment.[110]

In *Grayhawk Homes, Inc. v. Addison,*[111] the Georgia Court of Appeals held that an employee signed an agreement that contained an

103. *Id.* at 240–41, 855 S.E.2d at 124.

104. GA. CONST. art. III, § 6, para. 5(c)(3); *See also* O.C.G.A. § 13-8-50 (2021). For a more in-depth legislative and political history of the restrictive covenant constitutional amendment, *see* W. Melvin Haas II, et al., *Labor and Employment Law*, 71 MERCER L. REV. 137 (2019).

105. *See* Cox v. Altus Healthcare & Hospice, Inc., 308 Ga. App. 28, 31, 706 S.E.2d 660, 664 (2011).

106. Vulcan Steel Structures, Inc. v. McCarty, 329 Ga. App. 220, 220, 764 S.E.2d 458, 459 (2014).

107. *Cox*, 308 Ga. App. at 31, 706 S.E.2d at 664; *see also* W.R. Grace & Co., Dearborn Div. v. Mouyal, 262 Ga. 465, 465, 422 S.E.2d 529, 531 (1992).

108. *See* Haas et al., *supra* note 106, at 137 n. 1.

109. Thomas v. Coastal Indus. Servs., Inc., 214 Ga. 832, 833, 108 S.E.2d 328, 329 (1959).

110. Glisson v. Global Sec. Servs., LLC, 287 Ga. App. 640, 641–42, 653 S.E.2d 85, 86–87 (2007).

111. 355 Ga. App. 612, 845 S.E.2d 356 (2020).

unenforceable penalty provision. [112] However, the court found that, even without a severability clause, the provision was severable from the rest of the employment contract. Thus, the employer was still able to seek actual damages at trial. Grayhawk Homes sued its former employee, Bill Addison, for breach of the restrictive covenants contained in an "Agreement Not to Compete or Disclose Confidential Information."[113]

The agreement contained separate non-compete, non-disclosure, and non-solicitation covenants, as well as a liquidated damages provision.[114] The liquidated damages provision stated that "in the event of Addison's breach of this Agreement, Grayhawk shall be entitled to liquidated damages in the amount of $100,000, plus $50,000 for each year or any portion thereof that Addison was employed by Grayhawk."[115] There was no explanation given as to how the liquidated damages amount was calculated. Addison quit working for Grayhawk after a year and a half, and then went to work for America's Home Place, Inc., where he worked for eight years prior to joining Grayhawk. Grayhawk initiated suit against Addison claiming breach of the restrictive covenant and for punitive damages and attorney's fees.[116]

The Muscogee County Superior Court granted summary judgment in favor of Addison and found that the liquidated damages provision contained in the agreement was an unenforceable penalty provision. The trial court found that the entire agreement was void because it did not contain a severability clause to allow the unenforceable penalty to be severed from the rest of the agreement.[117]

The court of appeals upheld the trial court's decision that the liquidated damages provision was an unenforceable penalty because Grayhawk failed to show that the amount contained in the provision was a reasonable pre-estimate of its probable loss resulting from Addison's breach of the agreement.[118] However, the court disagreed with the trial court's determination that the unenforceable penalty provision voided the entire agreement without a severability clause within the agreement.[119] Specifically, the court noted that "the intent of the parties determines whether a contract is severable."[120] "The parties' intent may

112. *Id.* at 612, 845 S.E.2d at 357.
113. *Id.* at 613, 845 S.E. 2d at 358.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 614, 616, 845 S.E.2d at 358–60.
119. *Id.* at 616, 845 S.E.2d at 360.
120. *Id.*

be expressed directly, through a severability clause, or indirectly, as when the contract contains promises to do several things based upon multiple considerations."[121] The court concluded that Addison's promise to pay liquidated damages due to a breach was a separate promise not to breach the other covenants contained in the agreement, as the liquidated damages provision was even contained in its own separate section.[122] Therefore, the parties intended the contract to be severable, and Grayhawk could seek its actual damages on remand.[123]

In *Wanna v. Navicent Health, Inc.*,[124] Dr. Fady S. Wanna executed an Executive Agreement to serve as an administrator for Navicent, while maintaining his private medical practice. Subsequently, Dr. Wanna entered into a Physician Agreement with Navicent, wherein he would work as a part-time physician and surgeon for the hospital, while still serving as an administrator.[125]

Prior to entering into the Physician Agreement, Dr. Wanna also performed surgeries and procedures at Coliseum Medical Center (Coliseum), another hospital in the area. After signing the Physician Agreement, Dr. Wanna continued to perform surgeries and procedures at Coliseum, while Navicent billed and collected for those surgeries and procedures. Subsequently, Dr. Wanna entered into an Asset Purchase Agreement with Navicent, in which Navicent purchased assets of the professional corporation Dr. Wanna and his practice partners owned. Both the Physician Agreement and the Asset Purchase Agreement contained non-compete and non-solicitation provisions applicable to Dr. Wanna in his capacity as a surgeon.[126]

Dr. Wanna eventually resigned as an administrator for Navicent and modified his Physician Agreement to be a full-time staff physician. About a year later, Navicent adopted a policy that its staff physicians could not perform services for patients at other facilities, including Coliseum. Dr. Wanna discontinued providing services at Navicent and continued to perform surgeries and procedures at Coliseum, which resulted in a suit from Navicent.[127]

The Georgia Court of Appeals held that the restrictive covenants were valid and that genuine issues of fact remained as to whether a "private

121. *Id.* (citing Vegesina v. Allied Informatics, 257 Ga. App. 693, 694, 572 S.E.2d 51, 53 (2002)).

122. *Id.* at 616–17, 845 S.E.2d at 360.

123. *Id.* at 617, 845 S.E.2d at 360.

124. 357 Ga. App. 140, 850 S.E.2d 191 (2020).

125. *Id.* at 141, 850 S.E.2d at 196.

126. *Id.* at 142–43, 850 S.E.2d at 197.

127. *Id.* at 144–45, 850 S.E.2d at 197–98.

practice exception" contained in the restrictive covenants applied in this case.[128] The court affirmed the decision denying Dr. Wanna's motion for summary judgment on the breach of restrictive covenants claims.[129]

VI. CONCLUSION

This Survey period consisted of many changes—albeit some (hopefully) temporary—in the legal system and for employers during the COVID-19 pandemic. Many courts shut down and did not consider cases, and some plaintiffs may have delayed filing of their cases or appeals because of the shutdown. However, with the cases decided by the Georgia courts, it is clear that issues surrounding contingent workers are on the rise for employers. We anticipate much more litigation and legislation as the "gig economy" expands and becomes a more common avenue for work. Employers should remain abreast of the changing law and update their policies and practices accordingly.

128. *Id.* at 161, 850 S.E.2d at 208–09.

129. *Id.* at 162, 850 S.E.2d at 209.