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Brandon L. Peak

Joseph M. Colwell

Christopher B. McDaniel

Rory A. Weeks

Daniel E. Philyaw

See next page for additional authors

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Authors

Brandon L. Peak, Joseph M. Colwell, Christopher B. McDaniel, Rory A. Weeks, Daniel E. Philyaw, and L'Zandra V. Jones

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Trial Practice and Procedure

Brandon L. Peak*

Joseph M. Colwell**

Christopher B. McDaniel***

Rory A. Weeks****

Daniel E. Philyaw*****

L'Zandra V. Jones******

I. INTRODUCTION

This Article addresses selected opinions and legislation of interest to the Georgia civil trial practitioner issued during the Survey period[1] of this publication.[2]

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

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

***Associate, Butler Wooten & Peak LLP. 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, Butler Wooten & Peak LLP. 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, Butler Wooten & Peak LLP. University of Missouri (B.S., magna cum laude, 2014); University of Georgia School of Law (J.D., cum laude, 2018). Member, State Bar of Georgia.

******Associate, Butler Wooten & Peak LLP. Georgia State University (B.A., 2016); Mercer University School of Law (J.D., magna cum laude, 2020). Member, State Bar of Georgia.

1. For an analysis of Georgia trial practice and procedure during the prior Survey period, *see* Brandon L. Peak et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 71 MERCER L. REV. 305 (2019).

2. The Authors wish to credit and give special thanks to Elizabeth N. McBride, a rising third-year student at Mercer University School of Law, who worked as a summer law

II. LEGISLATION

House Bill 714[3] amended O.C.G.A. § 9-11-67.1—which applies to insurance demand letters arising out of motor vehicle wreck claims—to impose new requirements on claimants under that statute. Significantly, House Bill 714 revised the statute to apply to pre-answer offers of settlement in motor vehicle wreck cases, rather than to offers of settlement prior to filing an action. Settlement offers must now include all records, medical or otherwise, in the offeror's possession that were incurred as a result of the subject claim. Additionally, settlement offers may now include a term requiring that "the recipient shall provide the offeror a statement, under oath, regarding whether all liability and casualty insurance issued by the recipient that," does or may provide coverage for "the claim at issue has been disclosed to the offeror."[4] Payment deadlines may not be more than forty days from receipt of the offer, which is changed from the current deadline of ten days from the date of written acceptance.[5]

House Bill 714 also amended the provisions related to the liability and penalties that an insurer will face upon refusal to pay an insured for any loss pursuant to uninsured motorist coverage under motor vehicle liability policies.[6] Now, penalties for refusals made in bad faith are increased to not more than 25% of the recovery or $25,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution of the case.[7]

Senate Bill 234 created the Georgia Uniform Mediation Act, meant to provide uniformity in the laws governing mediation, its participants, and communication during mediation.[8] The bill adds Chapter 17 to Title 9, which defines terms relating to mediation,[9] specifies which communications made during a mediation are privileged and not subject

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clerk with Butler Wooten & Peak LLP and whose contributions to and work on this Article were invaluable.

3. Ga. H.R. Bill 714, Reg. Sess. (2021) (codified at O.C.G.A. § 9-11-67.1 (2021) and O.C.G.A. § 33-7-11 (2021)).

4. *Id.* at § 1(a)(3) (codified at O.C.G.A § 9-11-67.1(a)(1)(3) (2021)).

5. *Id.* at § 1(g) (codified at O.C.G.A § 9-11-67.1(g) (2021)).

6. *Id.* at § 2

7. *Id.* at § 2(j) (House Bill 714 applies to all causes of action accruing on or after July 1, 2021).

8. Ga. S. Bill 234, Reg. Sess. (2021) (codified at O.C.G.A. §§ 9-17-1, 9-17-3, 9-17-3, 9-17-4, 9-17-5 (2021)).

9. O.C.G.A. § 9-17-1 (2021).

to discovery or admissible in evidence,[10] how to waive the privilege,[11] and when the privilege does not apply.[12]

III. CASE LAW

A. Apportionment

Georgia's appellate courts issued several significant opinions affecting the law of apportionment in this state during the Survey period.

In *Johns v. Suzuki Motor of America, Inc.*,[13] the plaintiffs asserted claims of strict products liability based on design defect and negligence against the manufacturer and distributor of a motorcycle when the motorcycle's front brake failed and the plaintiff–operator was injured.[14] At trial, the evidence showed that the brake failure was caused by a defect in the design of the front master brake cylinder, which created a corrosive condition and misdirected the flow of brake fluid. However, the plaintiff-operator admitted that contrary to instructions in the motorcycle owner's manual to replace the brake fluid every two years, he had not changed the brake fluid in the eight years he owned the motorcycle. The jury found in favor of the plaintiffs on all claims but apportioned 51% of fault to the defendants and 49% of fault to the plaintiff-operator.[15] Based on Georgia's apportionment statute, O.C.G.A. § 51-12-33(a),[16] the trial court reduced the jury's award of damages.[17] The Georgia Court of Appeals affirmed.[18]

The Supreme Court of Georgia granted certiorari to decide whether subsection (a) of Georgia's apportionment statute, O.C.G.A. § 51-12-33,[19] applies to a strict products liability claim under O.C.G.A. § 51-1-11.[20] The court ultimately held that strict products liability claims are subject to apportionment under the statute.[21] The court opined that the broad language of the apportionment statute "governs actions 'for injury to

10. O.C.G.A. § 9-17-3 (2021).
11. O.C.G.A. § 9-17-4 (2021).
12. O.C.G.A. § 9-17-5 (2021).
13. 310 Ga. 159, 850 S.E.2d 59 (2020).
14. *Id.* at 160, 850 S.E.2d at 61.
15. *Id.*
16. O.C.G.A. § 51-12-33(a) (2021).
17. *Johns*, 310 Ga. at 160, 850 S.E.2d at 61.
18. *Id.* at 161, 850 S.E.2d at 61 (citing Suzuki Motor of America v. Johns, 351 Ga. App. 186, 198, 830 S.E.2d 549, 560 (2019)).
19. O.C.G.A. § 51-12-33 (2021).
20. *Johns*, 310 Ga. at 159–60, 850 S.E.2d at 60; O.C.G.A. § 51-1-11 (2021).
21. *Johns*, 310 Ga. at 160, 850 S.E.2d at 60.

person,' without in any way distinguishing between the theories upon which those claims are premised."[22] Thus, strict products liability claims fall within the apportionment statute's ambit.[23]

The court rejected arguments that an exception for strict products liability claims should be read into the apportionment statute because of case law prior to its enactment holding that principles of comparative negligence do not apply to such claims. The court held that this precedent was supplanted when the statute was enacted. The court further disapproved of the court of appeals decision in *Patterson v. Long*,[24] which followed after the enactment of the apportionment statute, "to the extent [it] indicates that the decisions prohibiting the application of comparative negligence to strict products liability claims survived the 2005 enactment" as well as federal court decisions with similar holdings.[25] The court emphasized that

> permitting comparative negligence to be applied to strict products liability claims does not, however, mean the end of strict products liability[,] . . . . [since] [p]laintiffs raising strict products liability claims will still generally be relieved of the burden of showing that the injury-causing product defect was the result of the manufacturer's negligence.[26]

The court explained that "considering *a* plaintiff's responsibility[,] [or fault,] for an injury does not require proof of the manufacturer's negligence."[27] And though the court recognized that comparing a plaintiff's fault with a product defect is difficult, the court expressed its "faith in the ability of juries to compare disparate types of fault."[28]

In *Quynn v. Hulsey*,[29] the administrator of the estate of a man struck and killed by a truck brought a wrongful death action against the driver of the truck and his employer, the owner of the truck. The trial court granted partial summary judgment to the driver's employer on the plaintiff's claims for punitive damages and for negligent hiring, training, and supervision based on the employer's admissions of *respondeat*

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22. *Id.* at 162, 850 S.E.2d at 62 (quoting *Suzuki Motor of Am. Inc.*, 351 Ga. App. at 198, 830 S.E.2d at 560).

23. *Id.* at 162, 850 S.E.2d at 62.

24. 321 Ga. App. 157, 741 S.E.2d 242 (2013).

25. *Johns*, 310 Ga. at 165–66, 850 S.E.2d at 64.

26. *Id.* at 167, 850 S.E.2d at 65; *see also* Zaldivar v. Prickett, 297 Ga. 589, 594, 774 S.E.2d 688, 693 (2015) (stating that O.C.G.A. §§ 55-12-33(a) and (g) "codify the doctrine of comparative negligence").

27. *Johns*, 310 Ga. at 167–68, 850 S.E.2d at 66.

28. *Id.* at 168, 850 S.E.2d at 66.

29. 310 Ga. 473, 850 S.E.2d 725 (2020).

superior. After a trial on the plaintiff's remaining negligence claims, the jury found the driver and his employer 50% at fault and the decedent 50% at fault, thereby precluding the plaintiff from recovering damages. The plaintiff appealed, contending that the trial court erred in granting partial summary judgment to the employer on its claims for negligent entrustment, hiring, training, and supervision. But the Court of Appeals of Georgia affirmed, rejecting the plaintiff's argument that the apportionment statute required the trier of fact to consider the fault of all persons who contributed to the injury.[30]

The Supreme Court of Georgia reversed, holding that the apportionment statute, O.C.G.A. § 51-12-33,[31] abrogated the decisional law rule that an "employer is entitled to summary judgment on the plaintiff's claims for negligent entrustment, hiring, training, supervision, and retention" if it concedes "it will be vicariously liable under the doctrine of *respondeat superior* if its employee is found negligent," the "Respondeat Superior Rule."[32] The court reasoned that the apportionment statute requires the trier of fact to assess the relative fault of all those who contributed to the plaintiff's injury and apportion the damages based on that assessment of relative fault.[33] But, "[a]dherence to the Respondeat Superior Rule would preclude the jury from apportioning fault to the employer for negligent entrustment, hiring, training, supervision, and retention" claims.[34] Thus, the court concluded that "the Respondeat Superior Rule is inconsistent with the plain language of the apportionment statute,"[35] and, since "statutes trump cases[,]"[36] the apportionment statute required the elimination of the Respondeat Superior Rule.[37]

In dissent, Justice McMillian opined that O.C.G.A. § 51-12-33,[38] which apportions fault at the verdict stage, was compatible with "the Respondeat Superior Rule when it is applied to dismiss claims before trial."[39] Justice McMillian pointed to the court's opinion in *Loudermilk*, where the court noted that other legal theories, such as vicarious liability

30. *Id.* at 473–74, 850 S.E.2d at 727.

31. O.C.G.A. § 51-12-33.

32. *Quynn*, 310 Ga. at 474–75, 482, 850 S.E.2d at 727, 732 (emphasis added) (quoting Hosp. Auth. v. Fender, 342 Ga. App. 13, 21, 802 S.E.2d 346, 354 (2017)).

33. *Id.* at 476, 850 S.E.2d at 728–29.

34. *Id.* at 477, 850 S.E.2d at 729.

35. *Id.*

36. *Id.* (quoting Couch v. Red Roof Inns, Inc., 291 Ga. 359, 364, 729 S.E.2d 378, 382 (2012)).

37. *Id.* at 481, 850 S.E.2d at 732.

38. O.C.G.A. § 51-12-33.

39. *Quynn*, 310 Ga. at 484, 850 S.E.2d at 733 (McMillian, J., dissenting).

or other agency-based or derivative theories of liability, may preclude division of fault as a matter of law such that the apportionment statute does not apply.[40] Justice McMillian also referenced persuasive authority from courts in other states that had determined the Respondeat Superior Rule was compatible with similar apportionment statutes.[41]

In *Atlanta Women's Specialists, LLC v. Trabue*,[42] the Supreme Court of Georgia re-affirmed the general rule "that a defendant must file a notice of nonparty fault naming *any* nonparty upon whose fault the defendant seeks apportionment of damages."[43] In *Trabue*, the plaintiffs asserted a medical malpractice action against Atlanta Women's Specialists (AWS) and Dr. Stanley Angus after Shannon Trabue sustained a catastrophic brain injury.[44] The complaint alleged negligence and asserted that AWS was vicariously liable for the actions of Dr. Angus and a nonparty physician, Dr. Simonsen, both of whom were employees of AWS.[45]

At trial, Dr. Angus sought to have the jury apportion fault between him and Dr. Simonsen and then to apportion damages between him and AWS.[46] Neither Dr. Angus nor AWS filed a pretrial notice of nonparty fault with respect to Dr. Simonsen pursuant to the apportionment statute.[47] Accordingly, the trial court denied counsel's "request to require the jury to apportion damages between Dr. Angus and AWS based on the percentages of fault of Dr. Angus," and the nonparty physician.[48] The jury awarded a nearly $46,000,000 verdict in favor of the plaintiffs. Subsequently, the trial court granted the defendant's motion for a new trial on the issue of apportionment.[49] Upon review, the Georgia Court of Appeals reversed the grant of a new trial, and the Supreme Court of Georgia affirmed.[50]

The court held that Dr. Angus was required to comply with the nonparty pretrial notice rule to obtain apportionment of damages

40. *Id.* at 484, 850 S.E.2d at 734 (McMillian, J., dissenting) (citing FDIC v. Loudermilk, 305 Ga. 558, 575 n.20, 826 S.E.2d 116, 129 n.20 (2019)).

41. *Id.* at 485–86, 850 S.E.2d at 734–35 (McMillian, J., dissenting).

42. 310 Ga. 331, 850 S.E.2d 748 (2020).

43. *Id.* at 342, 850 S.E.2d at 757.

44. *Id.* at 331, 850 S.E.2d at 751.

45. *Id.* at 335, 850 S.E.2d at 753.

46. *Id.* at 331–332, 850 S.E.2d at 751.

47. *Id.* at 332, 850 S.E.2d at 751.

48. *Id.* (Where defendants asked for apportionment of damages under O.C.G.A. § 51-12-33(b), resulting in a denial by the trial court, which relied on O.C.G.A. § 51-12-33(d)).

49. *Id.* at 332, 850 S.E.2d at 751.

50. *Id.* at 333, 341–42, 850 S.E.2d at 752, 757.

between him and AWS—whose fault was partially predicated on the conduct of Dr. Simonsen.[51] Dr. Angus contended that subsection O.C.G.A. § 51-12-33(b)[52] was applicable and argued that the jury should "apportion damages between him and AWS based on his own percentage of fault and the percentage of fault of Dr. Simonsen."[53] The court disagreed and reasoned that a nonparty cannot be liable for damages under the statute's language.[54] Dr. Angus was required to comply with the 120-day notice of nonparty fault requirement, and the fact that AWS's liability was predicated, in part, under the doctrine of *respondeat superior* for the acts of another employee not named as a defendant did not relieve Dr. Angus of this responsibility under the apportionment statute.[55]

B. Choice of Law

In *Auld v. Forbes*,[56] the Supreme Court of Georgia considered whether Georgia's or Belize's statute of limitations applied to a wrongful death action arising from an incident in Belize but filed in Georgia.[57] In *Auld*, fourteen-year-old Tomari Jackson drowned while swimming in a river on a school trip in Belize. Jackson's mother, Adell Forbes, filed suit in Georgia after Belize's one-year limitation period for wrongful death had run. The trial court found that Forbes's claims were time-barred under Belize law, but the court of appeals reversed, holding instead that Georgia's two-year statute of limitations on wrongful death claims applied.[58] On review, the supreme court reversed and held that Belize's statute of limitations applied to the plaintiff's claim.[59]

The court observed that Georgia law differentiates between substantive and procedural law and determines which law will apply through the doctrines of *lex loci delicti* and *lex fori*, respectively.[60] Under the *lex loci delicti* doctrine, tort actions are governed by the substantive law of the forum where the last event necessary to make the defendants liable occurred. Although the trip was planned in Georgia, the court reasoned that "'last event necessary to make the defendants liable . . . —

51. *Id.* at 339, 850 S.E.2d at 755. O.C.G.A. § 51-12-33(d) provides procedural requirements for the 120-day nonparty pretrial notice rule.
52. O.C.G.A. § 51-12-33(b).
53. *Trabue*, 310 Ga. at 338, 850 S.E.2d at 755.
54. *Id.* at 339, 850 S.E.2d at 755–56.
55. *Id.* at 340, 850 S.E.2d at 756.
56. 309 Ga. 893, 848 S.E.2d 876 (2020).
57. *Id.* at 893, 848 S.E.2d at 878.
58. Forbes v. Auld, 351 Ga. App. 555, 555 830 S.E.2d 770, 771 (2019).
59. *Auld*, 309 Ga. at 894, 848 S.E.2d at 879.
60. *Id.*

that is, Jackson's drowning—took place in Belize, and that Belize was where the injury was suffered."[61] The court also noted that statutes of limitations are generally procedural and are thus governed by the doctrine of *lex fori*, or the law of the forum. The doctrine of *lex loci* will govern, however, "where the foreign statute creating a cause of action not known to the common law prescribes a shorter [limitations] period . . . than that prescribed by the law of the [forum.]"[62] Since wrongful death claims are statutory in nature, and the Belize limitations period was shorter than Georgia's, the court concluded the limitation period in Belize governs.[63]

The supreme court noted that while Georgia recognizes a public policy exception to *lex loci delicti*,[64] a mere difference in law did not justify the use of the exception here.[65] Moreover, the court held, Georgia's wrongful death statute provides no remedy for an extraterritorial death because Georgia's Wrongful Death Act has long been understood to not have extraterritorial application.[66] Therefore, the court disagreed with Forbes that Belize's measure of damages is so dissimilar to Georgia's that Georgia courts should substitute Georgia law,[67] thus overruling *Carroll Fulmer Logistics Corp. v. Hines*,[68] which held that a difference in the measure of damages for a wrongful death violated Georgia's public policy.[69]

C. Discovery

In *General Motors, LLC v. Buchanan,*[70] the Court of Appeals of Georgia declined to adopt the Apex Doctrine as the rule of law in Georgia and

61. *Id.* at 895, 848 S.E.2d at 879.

62. *Id.* (quoting Taylor v. Murray, 231 Ga. 852, 853, 204 S.E.2d 747, 748 (1974)).

63. *Id.* at 895, 848 S.E.2d at 880.

64. *See* Coon v. Medical Center, Inc., 300 Ga. 722, 727, 797 S.E.2d 828, 832 (2017) ("the Georgia court will not apply the law of the place where the injury was sustained if it would conflict with Georgia's public policy").

65. *Auld*, 309 Ga. at 896, 848 S.E.2d at 880 ("the public policy exception applies only if the out-of-state law is so 'radically dissimilar to anything existing in our own system of jurisprudence' that it would 'seriously contravene' the policy embodied in Georgia law.") (citing Southern Ry. Co. v. Decker, 5 Ga. App. 21, 25, 29, 62 S.E.2d 678, 680, 682 (1908)).

66. *Id.* at 896, 848 S.E.2d at 881 ("[A]lthough wrongful death claims recognized under Belize law provide a somewhat different remedy than wrongful death claims brought under Georgia law and have a shorter limitation period, Belize's wrongful death law is not so radically dissimilar that it cannot be applied by Georgia courts").

67. *Id.* at 898, 848 S.E.2d at 881–82.

68. 309 Ga. App. 695, 710 S.E.2d 888 (2011).

69. *Id.* at 697–98, 710 S.E.2d at 891.

70. 359 Ga. App. 412, 858 S.E.2d 102 (2021).

affirmed the trial court's order allowing the deposition of General Motors, LLC's Chief Executive Officer (CEO) to move forward.[71] In the course of the underlying product liability lawsuit, the plaintiff, Robert Buchanan, requested to take the deposition of Mary Barra, the CEO of defendant General Motors, LLC (GM).[72] GM filed a motion for protective order in an effort to prevent Barra from being deposed. The trial court denied GM's motion, which led to GM's interlocutory appeal to the court of appeals.[73]

The court concluded that the information Buchanan sought to obtain through the deposition of GM's CEO was both relevant and reasonably calculated to lead to the discovery of admissible evidence as required by O.C.G.A. § 9-11-26.[74] The court declined GM's urging to adopt the Apex Doctrine—a rule of law adopted in some jurisdictions which imposes special requirements upon parties seeking to depose an "Apex" employee of a corporate defendant, such as the CEO—concluding that the Apex Doctrine "is inconsistent with Georgia's discovery provisions that require a liberal construction in favor of supplying a party with facts."[75]

D. Motions in Limine

The Georgia appellate courts issued two significant opinions on motions in limine (MILs) during the Survey period. It is pertinent to note for these discussions that there are generally two types of MILs. The first seeks a "final ruling on the admissibility of evidence" usually pretrial though sometimes during trial.[76] The second seeks "to prevent the mention of certain evidence or an area of inquiry until its admissibility can be determined during trial outside the presence of the jury."[77] Trial courts do not have to rule on MILs without the contextual benefit of trial.

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71. *Id.* at 412, 858 S.E.2d at 103–04. General Motors, LLC filed a petition for writ of certiorari to the Georgia Supreme Court on June 9, 2021. The petition remained pending at the time this article was submitted for publishing.

72. *Id.*, at 413, 858 S.E.2d at 104.

73. *Id.* at 414, 858 S.E.2d at 105.

74. *Id.* at 416, 858 S.E.2d at 106; O.C.G.A. § 9-11-26 (2021).

75. *Buchanan*, 359 Ga. App. at 418, 858 S.E.2d at 107 (noting that no Georgia state appellate court has ever applied the Apex Doctrine).

76. Williams v. Harvey, 311 Ga. 439, 442, 858 S.E.2d 479, 484 (2021); *see* Walton v. Datry, 185 Ga. App. 88, 90–91, 363 S.E.2d 295, 298 (1987) ("In a broad sense the term [motion in limine] refers 'to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered,'" and such a motion may be made orally or in writing) (quoting Luce v. United States, 469 U.S. 38, 40 n.2 (1984)).

77. *Williams*, 311 Ga. at 442, 858 S.E.2d at 484.

But if they do, that ruling controls the action going forward, though discretion remains to modify the ruling at trial.[78]

The first significant case concerns cross-examination questions that violated a trial court's pretrial MIL rulings but where no contemporaneous objection to the violation was made at trial. For over 150 years, Georgia has embraced the contemporary objection rule, which requires counsel to object to a perceived error "at the earliest possible opportunity in the progress of the case" to preserve the purported error for appellate review.[79] Yet starting in 1979, the Supreme Court of Georgia held that when a MIL to exclude certain evidence is denied, the moving party need not object at trial to preserve the issue for appellate review.[80] Three years later, the supreme court extended that rule to MIL rulings granting a request to exclude certain evidence. Ultimately, according to the supreme court, those rules were extended from evidence to argument by the court of appeals.[81]

In *Kennison v. Mayfield*,[82] the Georgia Court of Appeals, sitting en banc, issued a nearly unanimous opinion—twelve judges concurred in full, and one judge concurred in the judgment—holding that "absent a contemporaneous objection that . . . counsel was violating the ruling in limine, the mere grant[ing] of [party's] motions in limine did not preserve error for appellate review." [83] In reaching this conclusion, the court of appeals distinguished one of its recent decisions, *Harvey v. Williams*,[84] which dealt with the possibility of a pretrial MIL ruling preserving for appellate review the issue whether counsel's purported violation of that ruling during closing argument constituted reversible error despite the lack of a contemporaneous objection.[85]

After *Kennison*, it is now clear that counsel cannot let violations of MIL rulings on evidence pass without contemporaneous objection at trial and then pursue a reversal on appeal based on that violation.[86] But a different rule applied to violations of MIL rulings on argument that passed

78. *Id.* at 443, 858 S.E.2d at 484; *see* State v. Botts, 346 Ga. App. 227, 227, 816 S.E.2d 103, 104 (2018) ("Of course, [t]he trial court has the discretion to modify its rulings on a motion in limine at any time[.]").

79. *Williams*, 311 Ga. at 442, 858 S.E.2d at 484 (quoting Sharpe v. Ga. Dep't of Transp., 267 Ga. 267, 267, 476 S.E.2d 722, 723 (1996)).

80. *Id.* at 443, 858 S.E.2d at 484.

81. *Id.* at 443, 858 S.E.2d at 485.

82. 359 Ga. App. 52, 856 S.E.2d 738 (2021) (en banc).

83. *Id.* at 60, 856 S.E.2d at 745.

84. 354 Ga. App. 766, 841 S.E.2d 386 (2020), *rev'd by* Williams v. Harvey, 311 Ga. 439, 858 S.E.2d 479 (2021).

85. *Kennison*, 359 Ga. App. at 60 n.11, 856 S.E.2d at 745 n.11.

86. *Id.* at 60–61, 856 S.E.2d at 745–46.

without contemporaneous objection at trial under the court of appeals' opinion in *Harvey v. Williams*.[87] That confusing anomaly was corrected two months later by the Supreme Court of Georgia.

Writing for a unanimous court in *Williams v. Harvey*, Justice Carla McMillian first outlined the history of the contemporaneous objection rule and the Georgia case law that had created an exception to the contemporaneous objection rule for MIL rulings on both evidence and argument.[88] Justice McMillian then examined the relationship between O.C.G.A. § 24-1-103,[89] and its federal analogue, Federal Rule of Evidence 103,[90] and held that Georgia Rule 103 is "specifically patterned" on Federal Rule 103.[91] Reemphasizing that when a provision of Georgia's current Evidence Code is materially similar to a federal rule, Georgia courts looked to federal appellate courts' interpretation of the federal rule, specifically the U.S. Court of Appeals for the Eleventh Circuit and the U.S. Supreme Court. The court held that the adoption of O.C.G.A. § 24-4-103 abrogated Georgia case law, holding that "no contemporaneous objection is required to preserve the alleged error when a party violates . . . a ruled-upon motion in limine" about "the admissibility of evidence" at trial.[92] This decision imprinted the Supreme Court of Georgia's stamp of approval on the Georgia Court of Appeals' holding in *Kennison*.

While acknowledging that O.C.G.A. § 24-1-103 "applies only to evidence," the supreme court held that there is "no reason why this rationale should not equally apply to statements made by counsel during opening statements and closing arguments."[93] The court noted three reasons why it makes sense to extend the rule to MIL rulings reaching opening statements and closing arguments.[94] First, opening statements and closing arguments must be based on the evidence that was or will be presented at trial.[95] Second, requiring parties to make contemporaneous objections to supposed violations of MIL rulings "further[s] the purpose of the contemporaneous objection rule—to afford an opportunity for the trial court to remediate error at the time it is made."[96] Third, a

87. *See Williams*, 311 Ga. at 443, 858 S.E.2d at 484, 485.
88. *Id.* at 442–43, 858 S.E.2d at 484–85.
89. O.C.G.A. § 24-1-103.
90. FED. R. EVID. r. 103 (2021).
91. *Id.* at 445, 858 S.E.2d at 486.
92. *Id.*
93. *Id.*
94. *Id.* at 445–46, 858 S.E.2d at 486.
95. *Id.* at 445, 858 S.E.2d at 486.
96. *Id.* at 446, 858 S.E.2d at 486.

contemporaneous objection is required to preserve for appellate review the issue of a violation of a MIL ruling in the Eleventh Circuit and other federal appellate courts.[97]

In sum, the rule in Georgia is now clear: "[A] contemporaneous objection must be made at the time an alleged violation of a ruled-upon motion in limine occurs at trial—whether during the presentation of evidence or in opening statements or arguments made by counsel before the factfinder—in order to preserve the error for appeal."[98]

E. Municipal Liability

In *Atlantic Specialty Insurance Company v. City of College Park*,[99] the Court of Appeals of Georgia held that the City of College Park's sovereign immunity was waived up to the amount of insurance coverage purchased by the City with respect to certain motor vehicle negligence claims, despite endorsements contained in the insurance policy purporting to preserve the City's sovereign immunity.[100] The plaintiffs in the underlying case filed a wrongful death suit against the City alleging the City's police recklessly pursued a vehicle which proximately caused the motor vehicle wreck that killed three people.[101]

At the time of the wreck, the City had two insurance policies issued by Atlantic Specialty Insurance Company (Atlantic) with a combined coverage amount of $5,000,000.[102] Atlantic intervened in the underlying lawsuit for the purpose of arguing that the City's policy limits were capped at $700,000 based on policy language preserving the City's sovereign immunity for liability exceeding the statutory waiver amounts set forth in O.C.G.A. § 36-92-2.[103] The trial court disagreed, "finding as a matter of law the limits of the policy issued to the City are $5,000,000."[104] The court of appeals affirmed the trial court's decision and noted that the General Assembly intended "to increase compensation for those who

97. *Id.* at 446, 858 S.E.2d at 486–87.

98. *Id.* at 447, 858 S.E.2d at 487.

99. 357 Ga. App. 556, 851 S.E.2d 189 (2020).

100. *Id.* at 565, 851 S.E.2d at 195–96. The Supreme Court of Georgia granted Atlantic's Petition for Writ of Certiorari on July 7, 2021. The issue before the supreme court is whether "the City's insurance policy waive[s] the City's sovereign immunity under OCGA § 36-92-2(d)(3)." *cert. granted*, Atl. Specialty Ins. Co. v. City of Coll. Park, No. S21C0482, 2021 Ga. LEXIS 564 (Jul. 7, 2021). This question remained pending at the time this article was submitted to be published.

101. *Atlantic*, 357 Ga. App. at 557, 851 S.E.2d at 191.

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

103. *Id.* at 561–62, 851 S.E.2d at 193; O.C.G.A. § 36-92-2 (2021).

104. *Atlantic*, 357 Ga. App. at 559, 851 S.E.2d at 192.

sustain injuries arising out of the use of a government motor vehicle."[105] The court of appeals further noted that Atlantic's interpretation of the policy endorsement would be "counter to the General Assembly's clear legislative intent."[106]

F. Product Liability

In *Maynard v. Snapchat, Inc.*,[107] the Georgia Court of Appeals affirmed the trial court's dismissal of a design defect claim against Snapchat.[108] The plaintiffs asserted a design defect claim against Snapchat for its Speed Filter[109] after the plaintiffs suffered injuries when a distracted driver crashed into the rear of the plaintiffs' vehicle.[110] The plaintiffs alleged that "Snapchat negligently designed the Speed Filter, encouraging users to endanger themselves and others on the roadway."[111] The trial court dismissed the claim, finding that Snapchat owed no duty to the plaintiffs, and the court of appeals affirmed.[112]

On appeal, the plaintiffs contended that they sufficiently alleged a duty under the applicable design defect risk-utility balancing test.[113] The court of appeals noted that a plaintiff has an obligation to identify a legal duty before the court would apply the risk-utility balancing test.[114] Further, the court noted that "[u]nder Georgia law, there is no 'general legal duty to all the world not to subject others to an unreasonable risk of harm.'"[115] The general rule is that "there is no duty to control the conduct of third persons to prevent them from causing physical harm to

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105. *Id.* at 563, 851 S.E.2d at 194.

106. *Id.*

107. 357 Ga. App. 496, 851 S.E.2d 128, *cert. granted*, Maynard v. Snapchat, Inc., No. S21C0555, 2021 Ga. LEXIS 547 (July 07, 2021). This case is assigned to the October 2021 Oral Argument calendar of the Supreme Court of Georgia.

108. *Maynard*, 357 Ga. App. at 497, 851 S.E.2d at 130.

109. *Id.* at 497–98, 851 S.E.2d at 130. (The Speed Filter "allows Snapchat users to record their speed and overlay that speed onto a Snapchat photo or video.") *Id.* at 497, 851 S.E.2d at 130. The plaintiffs filed suit against both the at-fault driver and Snapchat on negligence claims. *Id.* at 498, 357 Ga. App. at 498, 851 S.E.2d at 130.

110. *Id.*, at 498, 851 S.E.2d at 130 (stating the plaintiffs alleged that the at-fault driver drove "in excess of 100 miles per hour" so that she could capture the speed using the Speed Filter).

111. *Id.*

112. *Id.* at 497, 851 S.E.2d at 130.

113. *Id.* at 499, 851 S.E.2d at 131. The court also noted that the risk-utility balancing test from Banks v. ICI Americas, 264 Ga. 732, 450 S.E.2d 671 (1994), is the proper test for evaluating negligent design defect claims.

114. *Maynard*, 357 Ga. App. at 502, 851 S.E.2d at 133.

115. *Id.* at 499, 851 S.E.2d at 131 (citing Dept. of Labor v. McConnell, 305 Ga. 812, 816, 828 S.E.2d 352, 358 (2019)).

others."[116] The court noted that the manufacturer's duty to exercise reasonable care does not extend to safeguard against a third party's intentional misuse of the product.[117] Chief Judge McFadden wrote a scathing dissent criticizing the majority's emphasis on accidental versus intentional misuse.[118] The Supreme Court of Georgia granted a writ of certiorari in July and will hear oral arguments in October 2021.

G. Punitive Damages

In *Reid v. Morris*,[119] the Supreme Court of Georgia considered whether an intoxicated person who was not the drunk driver in a car accident could be considered an "active tort-feasor" under Georgia's punitive damages statute.[120] Defendant Keith Stroud asked his drunk friend, Lakenin Morris, to drive his car. Morris subsequently hit and injured the plaintiff, Alonzo Reid.[121] Although the trial court found that both defendants were liable for Reid's injuries and both acted with the requisite state of mind to impose punitive damages under O.C.G.A. § 51-12-5.1(b),[122] the court refused to order Stroud to pay punitive damages based on the trial court's understanding of prior court of appeals interpretations[123] of O.C.G.A. § 51-12-5.1(f)[124] holding that "[t]he 'active tortfeasor' means the DUI driver and this is the only person the statute

116. *Id.* (quoting Stanley v. Garrett, 356 Ga. App. 706, 710, 848 S.E.2d 890, 894 (2020)).

117. *Id.* at 500, 851 S.E.2d at 131–32.

118. *Id.* at 504, 851 S.E.2d at 134 (McFadden, J., dissenting); *see also Id.* at 504, 851 S.E.2d at 135 (noting that the Georgia "Supreme Court has articulated the public policy of Georgia by explicitly delineating a manufacturer's duty in the context of products liability, a duty that encompasses the foreseeable misuse of the product") (citing Chrysler Corp. v. Batten, 264 Ga. 723, 724, 450 S.E.2d 208, 211 (1994)).

119. 309 Ga. 230, 845 S.E.2d 590 (2020), (cert. was granted on April 22, 2020, No. S20A0107).

120. *Reid*, 309 Ga. at 233, 845 S.E.2d at 594.

121. *Id.* at 230–31, 845 S.E.2d at 592.

122. O.C.G.A. § 51-12-5.1 (2021).

123. *Reid*, 309 Ga. at 231–32, 845 S.E.2d at 593 (*see* Capp v. Carlito's Mexican Bar & Grill #1, Inc., 288 Ga. App. 779, 655 S.E.2d 232 (2007); Corrugated Replacements, Inc. v. Johnson, 340 Ga. App. 364, 797 S.E.2d 238 (2017)).

124. O.C.G.A. § 51-12-5.1(f), as amended, provides as follows:

> In a tort case in which the cause of action does not arise from product liability, if it is found that the defendant acted, or failed to act, with the specific intent to cause harm, or that the defendant acted or failed to act while under the influence of alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired, there shall be no limitation regarding the amount which may be awarded as punitive damages against an active tort-feasor but such damages shall not be the liability of any defendant other than an active tort-feasor.

authorizes an award of punitive damages against."[125] The Supreme Court of Georgia held that the trial court's reasoning in failing to consider awarding punitive damages against Stroud was erroneous.[126]

Vacating the trial court's decision, the supreme court explained that "O.C.G.A. § 51-12-5.1(f) does not categorically bar an award of punitive damages against Stroud, because the term 'active tort-feasor' . . . is not necessarily limited to drunk drivers."[127] The statute, as amended in 1997, includes defendants who were negligent while intoxicated to the degree that their judgment was substantially impaired and provided that these damages "shall not be the liability of any defendant other than an active tort-feasor."[128] The effect of this amendment is that punitive damages awards against defendants who were not active tort-feasors would be limited by the $250,000 cap outlined in O.C.G.A. § 51-12-5.1(g).[129]

As the court explained, the amended subsection (f) refers to more than just DUI drivers; rather, plaintiffs "may seek an uncapped punitive damages award against any defendant who was intoxicated to the degree that his or her judgment was substantially impaired as long as that defendant also was an active tort-feasor."[130] The text, due to the distinction between defendants who "acted" and those who "failed to act," suggests that an active tort-feasor is "a defendant who engages in an affirmative act of . . . tortious conduct, as opposed to a defendant whose negligence consists of an omission to act . . . ."[131] Therefore, to determine whether uncapped punitive damages could be awarded against defendants who were not the drunk driver in cases such as this one, trial courts must consider "whether the defendant was intoxicated to the degree that his judgment was substantially impaired" and whether his conduct that proximately caused the plaintiff's injury was active or passive.[132]

IV. CONCLUSION

The above cases and legislation have, in the Authors' estimation, most significantly affected trial practice and procedure in Georgia during the Survey period. This Article, however, is not intended to be exhaustive of all legal developments for this topic.

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125. *Reid*, 309 Ga. at 232, 845 S.E.2d at 593.
126. *Id.*
127. *Id.* at 233, 845 S.E.2d at 594.
128. *Id.* at 236, 845 S.E.2d at 596 (quoting O.C.G.A. § 51-12-5.1(f)).
129. *Id.* at 236–37, 845 S.E.2d at 596.
130. *Id.* at 237, 845 S.E.2d at 596.
131. *Id.* at 237, 845 S.E.2d at 596–97.
132. *Id.* at 238, 845 S.E.2d at 597.