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W. Jonathan Martin II

Alyssa K. Peters

Patricia-Anne Brownback

David S. Cromer

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Labor and Employment Law

W. Jonathan Martin II*

Alyssa K. Peters**

Patricia-Anne Brownback***

David S. Cromer****

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, 2021 to May 31, 2022,[1] that affect labor and employment relations for Georgia employers.[2]

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*Equity Partner, Constangy, Brooks, Smith, & Prophete LLP, Macon, Georgia. University of Georgia (B.B.A., cum laude, 1991); Mercer University School of Law (J.D., magna cum laude, 1994). Member, Mercer Law Review (1992–1994); Administrative Editor (1993–1994). Member, State Bar of Georgia.

**Partner, Constangy, Brooks, Smith, & Prophete LLP, Macon, Georgia. University of Georgia (B.A., 2004); Georgia State University (J.D., 2008). Member, Georgia State Law Review (2006–2008). Member, State Bar of Georgia.

***Associate, Constangy, Brooks, Smith, & Prophete, LLP, Macon, Georgia. Mercer University (B.B.A., cum laude, 2013); Mercer University School of Law (J.D., cum laude, 2016). Member, Mercer Law Review (2014–2016). Member, State Bar of Georgia.

****Associate, Constangy, Brooks, Smith, & Prophete, LLP, Macon, Georgia. Gordon State College (B.A., cum laude, 2015); Mercer University School of Law (J.D., magna cum laude, 2018). Member, Mercer Law Review (2016–2017); Editor in Chief (2017–2018). Member, State Bar of Georgia.

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1. For an analysis of Georgia labor and employment law during the prior survey period, *see* W. Jonathan Martin II et al. *Labor and Employment Law*, *Annual Survey of Georgia Law*, 73 MERCER L. REV. 137 (2021), https://digitalcommons.law.mercer.edu/cgi/viewcontent.cgi?article=2701&context=jour_mlr [https://perma.cc/2X6L-LW3B].

2. Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and caselaw. *See generally* THE DEVELOPING LABOR LAW (John E. Higgins Jr. et al. eds., 6th ed. 2016); BARBRA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (C. Geoffrey Weirich et al. eds., 4th

II. RECENT LEGISLATION

A. Constitutional Carry

Employers and their counsel should take note of Georgia's new "Constitutional Carry" law, which was signed by Governor Brian Kemp on April 12, 2022.[3] The most significant part of the new law is O.C.G.A. § 16-11-127(c),[4] which says any "lawful weapons carrier" can carry a knife or handgun in any location aside from a very small list of off-limits locations, such as court houses, jails, and polling places.[5] The term "lawful weapons carrier" is critical because that term is defined as any person who has a weapons carry permit *or is eligible* to receive such a permit and is not otherwise prohibited from owning a firearm.[6] In other words, the need for a weapons carry permit is now gone.

Importantly, owners of private property and people or entities in control of private property through a lease may prohibit a person who is carrying a knife or firearm from entering the property.[7] Of special importance to employers in Georgia is the recently amended O.C.G.A. § 16-11-135(b),[8] which says employers cannot condition an offer of employment on a requirement that the prospective employee agree not to have firearms in their vehicles while parked on company property.[9] However, the employer can still require that any firearm contained within an employee's car be locked out of sight in a trunk, glove box, or similar compartment.[10] In light of this new law, employers should review their policies and consider adding a provision addressing firearms in the workplace.

B. H.R. Bill 1390: A New Retaliation Remedy for Local Government

ed. 2007); *see also* W. Jonathan Martin II & Patricia-Anne Brownback, *Labor and Employment*, *Eleventh Circuit Survey*, 73 MERCER L. REV. 1305 (2022), https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss4/15/ [https://perma.cc/3UMA-CMP8]; *Daily Labor Report*, BLOOMBERG LAW, https://www.bloomberglaw.com/product/labor/bloomberglawnews/daily-labor-report [https://perma.cc/7EVV-N3D2] (last visited Aug. 27, 2022). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the Survey period.

3. Chairman John Meadows Act, Ga. S. Bill 319, Reg. Sess., 2022 Ga. Laws 74.
4. O.C.G.A. § 16-11-127(c) (2022).
5. O.C.G.A. §§ 16-11-127(b)–(c) (2022).
6. O.C.G.A. § 16-11-125.1(2.1) (2022).
7. O.C.G.A. § 16-11-127(c).
8. O.C.G.A. § 16-11-135(b).
9. *Id.*
10. *Id.*

Employees

This year, the Georgia General Assembly passed House Bill 1390.[11] Under this new law, codified at O.C.G.A. §§ 34-5A-1 and 34-5A-2,[12] employees of any Georgia county, municipality, or consolidated government can bring a lawsuit against their employer in a Georgia Superior Court if they believe they have been retaliated against for reporting sexual harassment in the workplace.[13] The new law defines sexual harassment as:

> [S]exual advances, requests for sexual favors, sexual or sex-based conduct, or any other unwelcome and offensive conduct of a sexual nature where: (A) Submission to the conduct involved is made, implicitly or explicitly, a term or condition of work; (B) Submission to or rejection of the conduct is used as the basis for a personnel decision affecting the individual's work; or (C) Such conduct creates an intimidating, hostile, or offensive work environment, provided that an intimidating, hostile, or offensive work environment is not created when the conduct does not rise above the level of what a reasonable person would consider merely tactless, inconsiderate, overfamiliar, or otherwise impolite, particularly with regard to the totality of the circumstances.[14]

Interestingly, while the new law is primarily focused on "employee[s]" of local governments, it also applies to anyone who works for a local government in a "similar capacity" as an employee.[15] Thus, volunteers and independent contractors could potentially fall under the law's protection.

Under H.R. Bill 1390, an employee who has been retaliated against will be able to sue his or her employer in state superior court according to the guidelines set out in O.C.G.A. § 45-1-4,[16] otherwise known as the Georgia Whistleblower Act (GWA). The GWA already allowed local government employees to sue their employers for retaliatory conduct, but it did not specifically provide for a remedy for retaliation based on sexual harassment.[17] Under the GWA, and therefore under H.R. Bill 1390, a would-be plaintiff has three years from the date of the retaliatory act to

11. Ga. H.R. Bill 1390, Reg. Sess., 2022 Ga. Laws 347.
12. O.C.G.A. §§ 34-5A-1 through 34-5A-2 (2022).
13. *Id.*
14. O.C.G.A. § 34-5A-1.
15. O.C.G.A. § 34-5A-2(a).
16. O.C.G.A. § 45-1-4 (2022).
17. O.C.G.A. § 45-1-4(e)(1).

file a lawsuit, or one year after discovering that retaliation took place, whichever is earlier.[18]

This three-year statute of limitations makes H.R. Bill 1390 very different from the large body of federal law that already exists in this area. Title VII of the Civil Rights Act of 1964[19] is similar to H.B. 1390 in that it prohibits covered employers from retaliating against an employee who complains about sexual harassment.[20] However, Title VII actions present certain procedural hurdles for would-be plaintiffs to overcome. Most notable is the fact that Title VII plaintiffs cannot file a lawsuit against their employers without first submitting a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days.[21] H.B. 1390's less stringent deadlines may clear the way for local government employees to more easily sue their employers, as plaintiffs will now have another less restrictive option at their disposal.

In light of the potential uptick in litigation arising from H.R. Bill 1390, local governments should take a close look at their employee handbooks and human resources manuals to make sure they give clear guidance to department heads and other managers regarding best practices on how to appropriately handle allegations of sexual harassment.

III. RESPONDEAT SUPERIOR

Generally, an employer can only be held vicariously liable for the actions of an employee through the doctrine of *respondeat superior* when the employee acts within the scope of their employment during the commission of a negligent act.[22] Purely personal acts by the employee, meaning those that are not committed within the scope of their employment with the employer, are not subject to *respondeat superior*.[23] For example, tortious actions that occur during an employee's lunch break or on their commute to or from work would generally be considered completely personal to the employee, and thus not trigger vicarious liability under *respondeat superior*.[24]

The potential complexities of this rule are exemplified by *Cotton v. Prodigies Child Care Management, LLC*.[25] Here, Andrea Cotton's car was

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18. *Id.*
19. 42 U.S.C. §§ 2000e–2000e-17.
20. 42 U.S.C. § 2000e-3(a).
21. 42 U.S.C. § 2000e-5(e)(1).
22. *See generally* DMAC81, LLC v. Nguyen, 358 Ga. App. 170, 853 S.E.2d 400 (2021).
23. *Id.* at 172, 853 S.E.2d at 403–04.
24. *Id.* at 173, 853 S.E.2d at 404 (citing Dougherty Equip. Co. v. Roper, 327 Ga. App. 434, 436, 757 S.E.2d 885, 888 (2014)).
25. 363 Ga. App. 376, 870 S.E.2d 112 (2022).

struck by a car driven by Bianca Bouie, a teacher.[26] Cotton sued Bouie and her employer—Prodigies Childcare Management, LLC (Prodigies Childcare)—claiming that the employer was vicariously liable under the theory of *respondeat superior*. At the time of the accident, Bouie was employed as a lead teacher. Prodigies Childcare had promoted Bouie into this position to encourage her to further her education, but the employer did not require Bouie to take any classes, nor did it pay any amount of her tuition. While on her lunch break, Bouie traveled to an event for extra class credit where she subsequently fell behind schedule. As she drove back to work, Bouie became distracted by her cell phone as she tried to inform Prodigies Childcare of her late status, and she collided with Cotton's car. Cotton claimed that Bouie was acting within the scope of her employment and furtherance of her employer's business at the time of the accident because she was traveling back to work after attending a class meant to further her employment with Prodigies Childcare. Moreover, Cotton alleged that Bouie's phone call to let her employer know that she was running late showed that she was operating within the course and scope of her employment. Prodigies Childcare moved for summary judgment based on the fact that Bouie was on her lunch break, off the clock, and using her personal vehicle and phone at the time of the accident, arguing that she was engaged in a purely personal errand at the time of the accident.[27]

The Superior Court of Clarke County granted the employer's motion, and the plaintiff appealed.[28] The Georgia Court of Appeals reversed the decision of the trial court, noting that genuine issues of material fact remained regarding whether Bouie was acting in the course and scope of her employment at the time of the accident.[29] Because Bouie was using her phone to contact her employer with the purpose of updating them about her late arrival, the court reasoned that "special circumstances" might exist from which a jury could find that Bouie was acting within the course and scope of her employment.[30]

Respondeat superior was also the central theme in *Blake v. Tribe Express*.[31] Here, Blake sued co-defendants Tribe Express, Inc. (Tribe) and its employee, Prosser, a tractor-trailer driver.[32] Before the accident at issue occurred, Prosser's employment with Tribe was terminated, and he

26. *Id.* at 376, 870 S.E.2d at 113.
27. *Id.* at 377, 870 S.E.2d at 114.
28. *Id.*
29. *Id.* at 382, 870 S.E.2d at 117.
30. *Id.* at 378, 381, 870 S.E.2d at 115–16.
31. 360 Ga. App. 874, 862 S.E.2d 336 (2021).
32. *Id.* at 875–76, 862 S.E.2d at 339.

was instructed to return his company-owned truck to Tribe. Prosser was less than a mile away from returning the truck when he turned around, drove eighty miles in the opposite direction into a closed express lane and eventually collided with the median wall, bringing the truck to a halt. Once the truck was stopped, Prosser ran on foot across I-75, causing Blake to swerve in an effort to avoid hitting Prosser. This caused Blake to collide with Prosser's stolen semi-truck. Prosser pled guilty to theft by taking.[33]

After Blake sued Tribe and Prosser, Tribe moved for summary judgment, asserting that Prosser was not acting in the scope of his employment.[34] The Superior Court of Lumpkin County granted Tribe's motion for summary judgment, and Blake appealed.[35] The Georgia Court of Appeals affirmed the decision, noting that Prosser was not acting in furtherance of Tribe's business when he admittedly stole the semi-truck.[36]

The court of appeals also reexamined how *respondeat superior* operates with independent contractors in *Healthcare Staffing, Inc. v. Edwards*.[37] Healthcare Staffing, Inc. (HCS) provided personnel to work with mentally incapacitated adults at Gateway Behavioral Health Services (Gateway).[38] Errol Wilkins, an HCS employee contracted to work with Gateway, was fired after an investigation revealed that he had been abusing at least three patients for some time. The guardians of the abused patients filed suit against HCS for failure to train and supervise Wilkins as well as negligent retention, breach of contract, assault and battery, negligent hiring, and fraud. HCS filed a motion for summary judgment on numerous grounds, including an argument that it could not be held vicariously liable under *respondeat superior* because of the "borrowed servant" doctrine. The Superior Court of Liberty County denied this motion, and HCS appealed.[39]

The court of appeals began its analysis of HCS's *respondeat superior* argument by explaining the "borrowed servant" exception to the doctrine of *respondeat superior*:

> If a master lends his servants to another, then the master is not responsible for any negligence of the servant committed within the scope of his employment by the other. In order for an employee to be a

33. *Id.* at 875, 862 S.E.2d at 339.
34. *Id.* at 876, 862 S.E.2d at 339.
35. *Id.* at 874, 862 S.E.2d at 338.
36. *Id.* at 882, 862 S.E.2d at 343.
37. 360 Ga. App. 131, 860 S.E.2d 874 (2021).
38. *Id.* at 132, 860 S.E.2d at 877.
39. *Id.* at 131–32, 860 S.E.2d at 876–77.

> borrowed employee, the evidence must show that (1) the special master had complete control and direction of the servant for the occasion; (2) the general master had no such control[;] and (3) the special master had the exclusive right to discharge the servant.[40]

The court advised that all three of these factors should be evaluated at the time of the accident or negligent act.[41] Here, HCS failed to satisfy the third factor of the "borrowed servant" rule because HCS (the "general master") retained the exclusive right to terminate employees working at Gateway (the "special master").[42] Thus, the trial court's denial of HCS's summary judgment motion was affirmed.[43]

Respondeat superior in the healthcare industry is an interesting area of focus. O.C.G.A. § 51-2-5.1(f)[44] provides:

> Whether a health care professional is an actual agent, an employee, or an independent contractor shall be determined by the language of the contract between the health care professional and the hospital. In the absence of such a contract, or if the contract is unclear or ambiguous, a health care professional shall only be considered the hospital's employee or actual agent if it can be shown by a preponderance of the evidence that the hospital reserves the right to control the time, manner, or method in which the health care professional performs the services for which licensed, as distinguished from the right to merely require certain definite results.[45]

The court of appeals had the occasion to apply this unique rule in *Chybicki v. Coffee Regional Medical Center, Inc*.[46] Here, Donald Chybicki sued Coffee Regional Medical Center (Hospital) for the death of a family member due to the alleged negligence of an anesthesiologist working within the Hospital.[47] The Hospital moved for summary judgment, claiming that the anesthesiologist was not an employee of the Hospital for whom the Hospital could be vicariously liable, but an independent contractor. The Superior Court of Coffee County granted this motion, and Chybicki appealed.[48]

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40. *Id.* at 133, 860 S.E.2d at 877–78 (quoting Odum v. Sup. Rigging & Erecting Co., 291 Ga. App. 746, 748, 662 S.E.2d 832, 834 (2008)).
41. *Healthcare Staffing*, 360 Ga. App. at 133, 860 S.E.2d at 878.
42. *Id.* at 133–35, 860 S.E.2d at 878.
43. *Id.* at 132, 860 S.E.2d at 877.
44. O.C.G.A. § 51-2-5.1(f) (2009).
45. *Id.*
46. 361 Ga. App. 654, 865 S.E.2d 259 (2021).
47. *Id.* at 654, 865 S.E.2d at 260.
48. *Id.*

Applying O.C.G.A. § 51-2-5.1(f), the court of appeals began by analyzing the contract between the anesthesiologist and the Hospital.[49] The court noted that the contract between the anesthesiologist and the Hospital clearly defined the anesthesiologist as an independent contractor, and the contract precluded the Hospital from having the type of control over the anesthesiologist which might otherwise indicate that he was an employee.[50] Thus, the court held the trial court correctly determined the anesthesiologist was an independent contractor, and the Hospital could therefore not be vicariously liable for the anesthesiologist's alleged negligence.[51]

The relationship between independent contractors and employers was also examined in *Cajun Contractors, Inc. v. Peachtree Property Sub, LLC*[52] and *Augusta Chronicle v. Woodall*.[53] In *Cajun*, a taxi driver was injured by a metal pole that fell from the rooftop pool of a hotel in Atlanta.[54] The taxi driver sued the general contractor under the theory of *respondeat superior*, stating the general contractor was liable for his injuries because its subcontractors working on the roof were negligently trained, supervised, and retained. The general contractor argued there was no evidence showing the individuals who worked on the hotel project were acting as its employees. However, the plaintiff provided evidence that the general contractor exercised the right to control the time, manner, and method in which the subcontractors performed the renovation that led to the accident. Beyond that, the general contractor performed acts that would be typical of one who would be regarded as a "boss"[55] or "project manager," and the defendant was vicariously liable.[56]

Augusta Chronicle involved a plaintiff who sued the Augusta Chronicle newspaper seeking to impose vicarious liability for an accident involving the plaintiff and an individual who delivered newspapers.[57] Augusta Chronicle moved for summary judgment, arguing the newspaper deliverer was an independent contractor.[58] The Superior Court of Jefferson County denied the motion, stating there were genuine questions of fact regarding the defendant's control over the delivery

49. *Id.* at 662, 865 S.E.2d at 265.

50. *Id.*

51. *Id.* at 664, 865 S.E.2d at 266.

52. 360 Ga. App. 390, 861 S.E.2d 222 (2021).

53. 360 Ga. App. 576, 859 S.E.2d 617 (2021).

54. *Cajun*, 360 Ga. App. at 390, 861 S.E.2d at 229.

55. Conveniently enough, the general contractor's last name was "Bossier." *Id.* at 391, 861 S.E.2d at 229–30.

56. *Id.* at 393, 861 S.E.2d at 231.

57. 360 Ga. App. at 576, 859 S.E.2d at 618.

58. *Id.*

driver at the time of the accident because "evidence in the record showed that The Augusta Chronicle maintained control over the manner and method of [the delivery driver's] deliveries."[59]

The court of appeals reversed the ruling of the trial court, noting that while the defendant had requirements for the delivery driver, the delivery locations and times were handed down straight from the customer.[60] Augusta Chronicle only had the right to require results in conformity with the customer's delivery requests, but the driver retained the right to perform the deliveries by his own means, methods, and manner.[61] Therefore, Augusta Chronicle could not be held liable.[62] The difference in these two cases show that those employers who have direct control over an independent contractor's means, methods, and manner of work can be held liable for their tortious actions.

IV. NEGLIGENT HIRING/RETENTION AND INDEPENDENT CONTRACTORS

The interplay between negligent hiring and retention claims, independent contractors, and *respondeat superior* was examined in *Miller v. Polk*.[63] There, Jerline Miller sued Anesthesia Consultants of Georgia (ACG), a company that provides staff to clinics.[64] Miller asserted that ACG was vicariously liable for the death of his wife because they negligently credentialed, hired, trained, and supervised the nurse who was charged with caring for Miller's wife. The nurse had faced a litany of disciplinary actions by the Alabama and Georgia Boards of Nursing for various substance abuse issues in the past. ACG moved for summary judgment, claiming that the nurse was an independent contractor, and the corporation was not responsible for her actions. The Superior Court of DeKalb County granted the motion, and plaintiff appealed.[65] The Georgia Court of Appeals reaffirmed the longstanding rule that "an employer has a legal duty to exercise ordinary care in the selection of its own employees," but this duty does not pertain to those who are independent contractors.[66]

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59. *Id.*
60. *Id.* at 578–79, 859 S.E.2d at 619–20.
61. *Id.* at 579, 859 S.E.2d at 619.
62. *Id.* 579, 859 S.E.2d at 619–20.
63. 363 Ga. App. 771, 872 S.E.2d 754 (2022).
64. *Id.* at 771–72, 872 S.E.2d at 757.
65. *Id.*
66. *Id.* at 781, 872 S.E.2d at 763 (quoting New Star Realty v. Jungang PRI USA, 346 Ga. App. 548, 561, 816 S.E.2d 501, 513 (2018)).

V. NON-COMPETES AND NON-SOLICITATION AGREEMENTS

Non-competition and non-solicitation agreements are both types of restrictive covenants.[67] Generally speaking, these restrictive covenants must be reasonable as to time, territory, and scope.[68] Georgia courts had the occasion to review restrictive covenants a number of times during the Survey period.

In *BB&T Insurance Services, Inc. v. Renno*,[69] Renno was hired by BB&T Insurance in 2001 when BB&T bought the company at which Renno was employed.[70] Renno entered into an employment agreement with BB&T which contained non-competition, non-solicitation, and confidentiality provisions. Renno was made Vice President and worked for BB&T for over fifteen years. In 2018, Renno resigned. When cleaning out Renno's office after his departure, BB&T discovered that Renno had attempted to take binders containing customer information and had alerted BB&T's customers that he was leaving the company and going to work for a competitor. BB&T also discovered that Renno attempted to export the contact information of 2,000 customers from his company computer. Renno also took two BB&T employees with him. After Renno left BB&T, several BB&T clients moved their business to Renno's new employer, which according to BB&T, cost BB&T nearly $1,000,000 in lost commission revenue.[71]

BB&T sued, claiming that Renno violated the various restrictive covenants in his employment agreements.[72] Renno moved for summary judgment, which was granted by the Superior Court of Cobb County. The court found that the restrictive covenants were part of Renno's employment contract and not merely ancillary to BB&T's acquisition of Renno's former company. Therefore, the trial court viewed the restrictive covenants under strict scrutiny and ruled it was overbroad. BB&T appealed.[73]

The Georgia Court of Appeals began its analysis by explaining the different scrutiny levels applied to restrictive covenants.[74] More specifically, the court explained that Georgia law divides "restrictive covenants into covenants ancillary to an employment contract, which

67. *See* JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW § 2:22 (5th ed. 2022).

68. *See, e.g.*, Early v. MiMedx Grp., Inc., 330 Ga. App. 652, 660, 768 S.E.2d 823, 829 (2015).

69. 361 Ga. App. 415, 864 S.E.2d 608 (2021).

70. *Id.* at 415, 864 S.E.2d at 611.

71. *Id.* at 416, 864 S.E.2d at 612.

72. *Id.* at 416–17, 864 S.E.2d at 612.

73. *Id.* at 417, 864 S.E.2d at 612.

74. *Id.* at 418–19, 864 S.E.2d at 613.

receive strict scrutiny and are not blue-penciled, and covenants ancillary to a sale of business, which receive much less scrutiny and may be blue-penciled."[75] The court then concluded the agreement in question was part of Renno's employment contract and was not merely ancillary to the acquisition of Renno's former employer, largely because the employment agreement and sale agreement were two different documents, and only the employment agreement contained the restrictive covenants.[76] Finally, the court analyzed the provisions of the employment agreement and found them to be overbroad and unenforceable.[77] Thus, the court affirmed the trial court's grant of summary judgment to Renno.[78]

Lane Dermatology & Dermatologic Surgery, LLC v. Smith[79] presented an interesting question regarding non-solicitation agreements.[80] There, Laura Smith worked at Lane Dermatology (Lane) in Columbus, Georgia.[81] She signed a non-solicitation agreement with Lane in which she agreed not to solicit any of Lane's patients within a fifteen-mile radius of Lane's business. Eventually, Smith accepted a position with another company based in Newnan, Georgia. Soon thereafter, her new employer installed an updated sign at the Columbus office, which included Smith's name on the same road where Lane is located.[82]

Lane sued Smith for violating the non-solicitation agreement.[83] The Superior Court of Muscogee County denied summary judgment for Lane which was affirmed by the court of appeals.[84] The court of appeals held that Smith did not solicit Lane's patients, observing that "[w]e have interpreted the term 'solicit' to involve a 'personal petition and importunity addressed to a particular individual to do some particular thing,' that is, the employee must make some 'affirmative action' to reach out to customers."[85] Furthermore, it was the new employer's decision to

75. *Id.* (quoting Swartz Invs. v. Vion Pharm., 252 Ga. App. 365, 368, 556 S.E.2d 460, 463 (2001)). It is important to note that the contract at issue here was executed in 2001, ten years before the General Assembly amended O.C.G.A. § 13-8-53 to allow for blue penciling in employment agreements.

76. *Renno*, 361 Ga. App. at 419–20, 864 S.E.2d at 614.

77. *Id.* at 425, 864 S.E.2d at 618.

78. *Id.* at 430, 864 S.E.2d at 621.

79. 360 Ga. App. 370, 861 S.E.2d 196 (2021).

80. *Id.* at 372, 861 S.E.2d at 200.

81. *Id.* at 371, 861 S.E.2d at 200.

82. *Id.* at 372, 861 S.E.2d at 200.

83. *Id.* at 371, 861 S.E.2d at 199.

84. *Id.* at 373, 861 S.E.2d at 201.

85. *Id.* at 374, 861 S.E.2d at 202.

put up the sign with Smith's name on it, and Smith had no authority to take the sign down.[86]

Burbach v. Motorsports of Conyers, LLC[87] is instructive for attorneys dealing with non-compete agreements containing a choice of law provision.[88] There, an employee signed a non-compete agreement with his employer, a multi-state company.[89] The non-compete agreement contained a choice of law provision stating that Florida law would control the agreement. The employee left the company and accepted a role with a competitor. The employer filed an action for a temporary restraining order (TRO) and permanent injunction in Georgia. The Superior Court of Henry County ruled that the Florida choice-of-law provision was valid, and therefore used Florida law to ultimately find that the non-compete agreement was valid. Because the trial court found that the non-compete agreement was valid under Florida law, it granted the TRO in Georgia.[90]

The employee appealed, arguing that the trial court should have ignored the choice of law provision and applied Georgia law instead.[91] The court of appeals agreed and reversed.[92] The court reaffirmed that choice of law provisions "are prima facie valid," but if a party can show that a non-compete agreement violates Georgia "public policy" and the selected forum state (here, Florida) would probably enforce the non-compete, then a Georgia court will typically ignore the choice of law provision.[93] The court of appeals examined the non-compete agreement to determine whether it would be enforceable under Georgia law, and thus not violative of Georgia public policy.[94]

The court held that the non-compete agreement would likely not be enforceable under Georgia law because the non-compete agreement was overly broad.[95] The court then turned to the second prong of its test and deduced that a Florida court would indeed enforce the non-compete agreement because Florida's law on non-compete agreements differs greatly from that of Georgia.[96] Thus, the court of appeals held that the trial court should not have adhered to the choice of law provision because

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86. *Id.* at 376, 861 S.E.2d at 203.
87. 363 Ga. App. 188, 871 S.E.2d 63 (2022).
88. *Id.*
89. *Id.* at 188–89, 871 S.E.2d at 65.
90. *Id.* at 188–90, 871 S.E.2d at 65–66.
91. *Id.* at 188, 871 S.E.2d at 65.
92. *Id.*
93. *Id.* at 190–91, 871 S.E.2d at 66.
94. *Id.* at 190–92, 871 S.E.2d at 66–67.
95. *Id.* at 191–92, 871 S.E.2d at 67.
96. *Id.* at 192–93, 871 S.E.2d at 67–68.

the non-compete agreement violated Georgia public policy, and a Florida court would likely have enforced the otherwise unenforceable non-compete agreement.[97]

VI. APEX DEPOSITION DOCTRINE

Perhaps one of the most significant recent developments in the labor and employment sphere came in *General Motors, LLC v. Buchanan*.[98] In that case, the Supreme Court of Georgia provided guidance regarding the so-called "apex doctrine."[99] Throughout the country, some courts in both federal and state jurisdictions have determined litigants are not automatically entitled to take the deposition of adverse, high-ranking corporate officers—those at the "apex" of the corporation. In other words, a plaintiff suing a large corporation will not necessarily be able to take the CEO's deposition unless the plaintiff can show that the CEO is the only person with the knowledge or information being sought. Proponents of the apex doctrine suggest that high-level executives in large corporations could be subject to unending depositions simply because of their status within the corporations, and so the apex doctrine is needed to "prevent the high level official deposition that is sought simply because he is the CEO or agency head—the top official, not because of any special knowledge of, or involvement in, the matter in dispute."[100] Some federal courts have interpreted the apex doctrine as a "burden-shifting" system, where "the party seeking to compel the deposition of a high-ranking executive, . . . has the burden of showing that [the target's] deposition is necessary."[101]

In the last several years, some Georgia litigants, especially corporate defendants, have attempted to utilize the apex doctrine in order to shield their "C-Suite" executives from depositions. However, it has been unclear whether Georgia courts had formally adopted the apex doctrine. The supreme court answered this question in *Buchanan*, where it held Georgia would not adopt the apex doctrine outright, but trial courts should examine some of the factors typically associated with the doctrine in order to determine whether a protective order should be entered barring the deposition of high-ranking corporate executives.[102]

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97. *Id.* at 193, 871 S.E.2d at 68.

98. 313 Ga. 811, 874 S.E.2d 52 (2022).

99. *Id.* at 811, 874 S.E.2d at 57.

100. *Id.* at 818, 874 S.E.2d at 61 (quoting Minter v. Wells Fargo Bank, 258 F.R.D. 118 (M.D. 2009)).

101. *Buchanan*, 313 Ga. at 819, 874 S.E.2d at 62 (quoting Degenhart v. Arthur State Bank, No. CV411-041, 2011 U.S. Dist. LEXIS 92295, at *6 (S.D. Ga. Aug. 8, 2011)).

102. *Buchanan*, 313 Ga. at 812, 874 S.E.2d at 57–58.

In *Buchanan*, the plaintiff sued General Motors on behalf of his wife who was killed in an automobile made by the defendant.[103] The plaintiff sought to depose the CEO of General Motors during discovery, and General Motors argued that the apex doctrine should prevent the deposition because the CEO did not have personal, unique, or superior knowledge of information relevant to the case and that the information sought by the plaintiff could be obtained using less intrusive means. General Motors was also concerned that allowing the plaintiff in this case to depose the CEO would simply lead to the harassment of high-level company officials in future cases. The Superior Court of Cobb County denied General Motors's application for a protective order, which was affirmed by the Georgia Court of Appeals. General Motors then appealed to the Supreme Court of Georgia.[104]

The supreme court began its analysis by taking note of the differences between the Federal Rules of Civil Procedure's guidance regarding the scope of discovery[105] and Georgia's rules on that topic.[106] Georgia's rule regarding the scope of discovery is much broader than its federal counterpart, and Georgia law is also clear that any time a litigant desires to be shielded from discovery via a protective order the litigant bears the burden of establishing a protective order is needed.[107]

While these principles persuaded the court against a wholesale adoption of the apex doctrine, the supreme court helpfully provided important guidance regarding when a protective order under O.C.G.A. § 9-11-26(c)[108] is an appropriate way to protect a high-level corporate officer from unnecessary and harassing depositions.[109] Under that statute, a protective order is appropriate when discovery would cause "annoyance, embarrassment, oppression, or undue burden or expense."[110] According to the court's holding in *Buchanan*, a trial court considering a Motion for Protective Order regarding a high-ranking corporate executive should consider "whether the executive's high rank, the executive's lack of unique personal knowledge of relevant facts, and the

103. *Id.* at 812, 874 S.E.2d at 58.

104. *Id.* at 814, 874 S.E.2d at 59.

105. *See* FED. R. CIV. P. 26(b)(1) (2022). Rule 26 states that parties may obtain discovery on matters that are "relevant to any party's claim . . . and proportional to the needs of the case." *Id.*

106. O.C.G.A. § 9-11-26(b)(1) (2022). Georgia's statute provides that parties may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." *Id.*

107. *Buchanan*, 313 Ga. at 820, 874 S.E.2d at 63; *see also* O.C.G.A. § 9-11-26(c) (2022).

108. O.C.G.A. § 9-11-26(c).

109. *Buchanan*, 313 Ga. at 811, 874 S.E.2d at 57.

110. O.C.G.A. § 9-11-26(c).

availability of information from other sources demonstrate good cause for a protective order."[111] Thus, while a trial court cannot necessarily issue a protective order based solely on the fact that the proposed deponent is a high-level executive, the executive's seniority and familiarity with the facts of the case can be considered.[112]

VII. CONCLUSION

As this Article shows, the issues facing Georgia labor and employment lawyers are becoming more complex with each passing year. Practitioners should continue to recognize and stay abreast of the ever-evolving trends and cases.

111. *Buchanan*, 313 Ga. at 811–12, 874 S.E.2d at 57.
112. *Id.* at 812, 874 S.E.2d at 57.