Mercer Law Review

Volume 60
Number 1 *Annual Survey of Georgia Law*

Article 17

12-2008

Trial Practice and Procedure

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Trial Practice and Procedure

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I. INTRODUCTION

This Article addresses significant judicial and legislative developments of interest to the Georgia trial practitioner.

II. LEGISLATION

Georgia Senate Bill 276 (SB 276)[1] will substantially alter two aspects of litigating uninsured and underinsured motorist claims. First, SB 276 appears facially to allow uninsured motorist (UM) policies to exclude liability for property or personal injury claims for which an insured has been compensated through medpay, workers' compensation, or other liability insurance.[2] Second, SB 276 allows for the stacking of UM and

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1. Ga. S. Bill 276, Reg. Sess. (2007) (adopted on May 14, 2008, effective in pertinent part January 1, 2009).

2. *See id.* § 2. In *Dees v. Logan*, 282 Ga. 815, 653 S.E.2d 735 (2007), the Georgia Supreme Court held that the prior version of O.C.G.A. § 33-7-11 (2000) "did not . . . authorize an insurer to setoff benefits for personal injury." *Dees*, 282 Ga. at 816, 653 S.E.2d at 737. As such, the court did not allow the uninsured motorist carrier to reduce its payment by the amount the plaintiff had received in workers' compensation and disability payments. *Id.*

liability policies and for the implementation of deductible limits.[3] Insureds, however, may reject such stacking coverage or, as before, all UM coverage.[4] Practitioners must therefore take special care to read the language of their clients' UM policies to ascertain the extent of their UM limits.[5]

III. CASE LAW

A. *Vanishing Venue, Service of Process, and Notice Issues*

Georgia's reintroduced "vanishing venue doctrine"[6] gives a nonresident defendant the right to transfer venue immediately "[i]f all defendants who reside in the county in which an action is pending are discharged from liability before or upon the return of a verdict by the jury or the court hearing the case without a jury."[7] In *Georgia Casualty & Surety Co. v. Valley Wood, Inc.*,[8] the trial court entered an order dismissing with prejudice the only resident defendant in a declaratory judgment insurance action. The trial court expressly noted in its order of dismissal, however, that the defendant, who was also a plaintiff in the underlying lawsuit for which Georgia Casualty was seeking declaratory judgment, had already obtained relief on her claims and had no remaining claims at issue in the underlying lawsuit.[9] The Georgia Court of Appeals held that this order of dismissal was akin to a dismissal effected by consent judgment and, therefore, could not be used to invoke the vanishing venue statute.[10]

Perfecting service against the State has always been one of the many pitfalls in pursuing an action under the Georgia Tort Claims Act (GTCA).[11] In *Georgia Pines Community Service Board v. Summerlin*,[12] however, the Georgia Supreme Court made two significant rulings regarding these service issues. First, service does not have to be personally handed to a person explicitly authorized to receive process by the GTCA.[13] Rather, litigants should refer to the Civil Practice Act's

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3. Ga. S. Bill 276 § 1(a)(2).
4. *See id.* § 1(a)(3).
5. SB 276 also contains specific provisions for claimants who have filed for Chapter 11 bankruptcy. *See id.* § 1(a)(4).
6. 2005 Ga. Laws 1, 2-3 (approved Feb. 16, 2005); O.C.G.A. § 9-10-31(d) (2007).
7. O.C.G.A. § 9-10-31(d).
8. 290 Ga. App. 177, 659 S.E.2d 410 (2008).
9. *Id.* at 177, 659 S.E.2d at 411.
10. *Id.* at 178-79, 659 S.E.2d at 412.
11. O.C.G.A. §§ 50-21-20 to -37 (2006 & Supp. 2008).
12. 282 Ga. 339, 647 S.E.2d 566 (2007).
13. *Id.* at 340, 647 S.E.2d at 568.

(CPA)[14] requirement regarding *how* service of process should be made.[15] Second, "[t]he service of process provision of the [GTCA] is procedural in nature, not jurisdictional," and therefore a state defendant can waive defects in service of process.[16] In the similar cases of *Backensto v. Georgia Department of Transportation*[17] and *Ingram v. Department of Transportation*,[18] the court of appeals also held that absent prejudice to the State, a plaintiff's GTCA claim would not be barred by her failure to mail the attorney general a copy of her complaint and to certify this mailing by amending her complaint prior to the expiration of the applicable statute of limitations.[19]

Generally of note on the topic of service during this survey period, the court of appeals has expressly noted the existing conflict concerning "whether [under the CPA] the plaintiff must exercise the greatest possible diligence [in perfecting service] from the point at which he first has notice of a problem with service of the complaint, or only from the point at which the defendant raises a service defense."[20] Until this conflict is resolved, practitioners would be advised to work immediately and meticulously towards resolving any known service defects.

It is well settled that a complete failure to give ante litem notice[21] for claims arising under the GTCA will bar any action against the State, regardless of whether the State had actual notice of the claims.[22] However, in *Cummings v. Georgia Department of Juvenile Justice*,[23] the supreme court held that the GTCA's ante litem notice provision will not bar suit if a claimant incorrectly but in good faith identifies the responsible state entity in her ante litem notice if the claimant correctly notifies the Department of Administrative Services and there is no prejudice to the State.[24]

The court of appeals shed light on when a statutory notice provision requires pre-suit notice in *SunTrust Bank v. Hightower*.[25] Noting that

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14. O.C.G.A. §§ 9-11-1 to -133 (2006 & Supp. 2008).

15. *Summerlin*, 282 Ga. at 341, 647 S.E.2d at 568; *see* O.C.G.A. § 9-11-4 (2006).

16. *Summerlin*, 282 Ga. at 343, 647 S.E.2d at 570.

17. 284 Ga. App. 41, 643 S.E.2d 302 (2007).

18. 286 Ga. App. 220, 648 S.E.2d 729 (2007).

19. *Backensto*, 284 Ga. App. at 43-44, 643 S.E.2d at 304-05 (citing O.C.G.A. § 50-21-35 (2006)); *Ingram*, 286 Ga. App. at 221-22, 648 S.E.2d at 730-31 (citing O.C.G.A. § 50-21-35 (2006)).

20. Montague v. Godfrey, 289 Ga. App. 552, 555 n.4, 657 S.E.2d 630, 634 n.4 (2008).

21. *See* O.C.G.A. § 50-21-26 (2006).

22. *See* Cummings v. Ga. Dep't of Juvenile Justice, 282 Ga. 822, 823-34, 653 S.E.2d 729, 731 (2007); *see* O.C.G.A. § 50-21-26.

23. 282 Ga. 822, 653 S.E.2d 729 (2007).

24. *Id.* at 825, 827, 653 S.E.2d at 732, 733.

25. 291 Ga. App. 62, 660 S.E.2d 745 (2008).

the CPA already requires a written demand for damages to be included in every complaint, the court of appeals stated that a statutory notice provision may be satisfied by giving notice in the complaint if the CPA does not render the statutory notice provision redundant.[26] The court of appeals cited the Official Code of Georgia Annotated (O.C.G.A.) §§ 7-4-14[27] and 33-31-9(c)[28] as examples of notice provisions that co-exist with the CPA because, "given the purpose to be served by [these] demand requirement[s] . . . it does not matter whether the demand or notice is first provided in the complaint."[29] By contrast however, O.C.G.A. § 44-14-3(c),[30] which "authorizes the grantor [of a secured instrument] to recover $500 as liquidated damages upon written demand"[31] after the failure of the grantee to cancel a security deed within sixty days after satisfaction of the debt, was held to require pre-suit notice because if such a demand was first given in the complaint, it would constitute nothing more than a demand for damages already contemplated by the CPA.[32]

B. Statutes of Limitation and Repose

During the survey period, Georgia courts considered a number of cases considering the application of statutes of limitation and statutes of repose in medical malpractice actions involving misdiagnoses.

First, in *Kaminer v. Canas*,[33] the supreme court considered a case in which the treating physician failed to diagnose a minor patient with pediatric AIDS.[34] The patient displayed signs of pediatric AIDS in 1993, but the condition was not diagnosed until 2001.[35] The trial court denied summary judgment on behalf of the doctors "on all medical malpractice claims where the injury occurred within 2 years of the date [the] action was filed and the negligent or wrongful act or omission that caused the injury occurred within 5 years of the date [the] action was filed."[36] The court of appeals affirmed because the physicians had seen

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26. *Id.* at 66-67, 660 S.E.2d at 748-49.
27. O.C.G.A. § 7-4-14 (2004).
28. O.C.G.A. § 33-31-9(c) (2005).
29. *SunTrust Bank*, 291 Ga. App. at 67, 660 S.E.2d at 749.
30. O.C.G.A. § 44-14-3(c) (2002 & Supp. 2008).
31. *SunTrust Bank*, 291 Ga. App. at 66-67, 660 S.E.2d at 749 (citing O.C.G.A. § 44-14-3(c)).
32. *Id.*, 660 S.E.2d at 748-49.
33. 282 Ga. 830, 653 S.E.2d 691 (2007).
34. *See id.* at 830, 653 S.E.2d at 693.
35. *Id.*
36. *Id.*

the patient within two years of the commencement of the action and "persisted in their failure to diagnose his worsening AIDS condition."[37]

The supreme court reversed the court of appeals.[38] The court relied on the notion that "in most misdiagnosis cases, the two-year statute of limitations[39] and the five-year statute of repose[40] begin to run simultaneously on the date that the doctor negligently failed to diagnose the condition and, thereby, injured the patient."[41] The supreme court rejected the patient's argument that the doctors' subsequent failures to diagnose "additional or increased symptoms . . . constitute[d] new and separate instances of professional negligence."[42]

The court of appeals considered several misdiagnosis cases in the wake of *Kaminer*, issuing opinions with lengthy dissents. The first post-*Kaminer* misdiagnosis case to appear in the court of appeals, *Cleaveland v. Gannon*,[43] involved a factual situation somewhat similar to that in *Kaminer*: a doctor failed to diagnose cysts in the patient's kidney as cancerous, and the kidney cancer metastasized about two years after the misdiagnosis. The patient filed suit within two years of discovering the metastasized kidney cancer, but more than two years after the initial misdiagnosis.[44]

In this case, and unlike *Kaminer*, the court of appeals sitting *en banc* held that the patient's claim was not time-barred.[45] The court applied the "subsequent injury" exception, determining that the metastatic cancer was a new injury and that the patient was asymptomatic for metastatic cancer at the time of the misdiagnosis.[46]

Judge Andrews authored a dissent that relied heavily upon the supreme court's holding in *Kaminer*.[47] The dissent did not rely upon

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37. *Id.* at 830-31, 653 S.E.2d at 693.

38. *Id.* at 838, 653 S.E.2d at 697-98.

39. O.C.G.A. § 9-3-71(a) (2007).

40. O.C.G.A. § 9-3-71(b) (2007).

41. *Kaminer*, 282 Ga. at 832, 653 S.E.2d at 694; *see* O.C.G.A. § 9-3-71 (2007).

42. *Kaminer*, 282 Ga. at 834, 653 S.E.2d at 695.

43. 288 Ga. App. 875, 655 S.E.2d 662 (2007) (en banc), *cert. granted*, 2008 Ga. LEXIS 66 (Ga. Jan. 28, 2008). The court of appeals issued its opinion in *Cleaveland* one month after the supreme court issued its opinion in *Kaminer*.

44. *Id.* at 877, 655 S.E.2d at 664.

45. *Id.* at 880, 655 S.E.2d at 667.

46. *Id.* at 879 n.5, 653 S.E.2d at 666 n.5. Two conditions must be met for the "subsequent injury" exception to the statute of limitations to apply: there must be "evidence that the plaintiff developed a new injury" and "the plaintiff also must remain asymptomatic for a period of time following the misdiagnosis." *Id.* (quoting Amu v. Barnes, 286 Ga. App. 725, 729, 650 S.E.2d 288, 292 (2007)).

47. *See Cleaveland*, 288 Ga. App. at 883-90, 655 S.E.2d at 668-73 (Andrews, P.J., dissenting).

the "subsequent injury" exception because the kidney cancer was present at the time of the misdiagnosis and merely progressed and metastasized thereafter, and was therefore not a "new" injury for which the statute of limitations could be tolled.[48] Moreover, the dissent rejected the "subsequent injury" exception altogether, rhetorically asking: "[H]ow can a doctor misdiagnose an 'asymptomatic' condition?"[49]

In *Lyon v. Schramm*,[50] the court of appeals distinguished *Kaminer* as it applied to the five-year statute of repose.[51] This case involved a patient who had her spleen removed over twenty years ago. In 2004 the patient suffered an overwhelming post-splenectomy infection (OPSI). In August 2006 the patient sued eight doctors who had treated her during the five years preceding the lawsuit and who had failed to warn her of the risk of contracting OPSI. The trial court dismissed the patient's claims against three doctors whose treatment began before August 2001 because they were time-barred by the five-year statute of repose.[52]

The court of appeals reversed the trial court.[53] In so holding, the court of appeals again distinguished *Kaminer*, this time by characterizing the patient's malpractice claims as a "failure to warn" claim as opposed to a misdiagnosis claim.[54] The court explained that in misdiagnosis cases, there is generally "a complete tort" at the time of the misdiagnosis; that is, the concurrence of a negligent act and injury.[55] In failure to warn cases, however, the tort is not complete until the injury actually occurs.[56] The significance of the difference is that once a cause of action accrues, subsequent failures to lessen the effect of the earlier negligent act *do not* constitute new acts of negligence.[57] However, when the cause of action has not yet accrued, each subsequent failure to warn may represent a new negligent act once the injury ultimately occurs.[58] Thus, the majority concluded that this case was distinguishable from *Kaminer* because in *Kaminer* the injury and the

48. *Id.* at 888-89, 655 S.E.2d at 672.

49. *Id.* at 889, 655 S.E.2d at 673.

50. 291 Ga. App. 48, 661 S.E.2d 178 (2008), *cert. granted*, 2008 Ga. LEXIS 630 (Ga. Mar. 27, 2008).

51. *See id.* at 53-54, 661 S.E.2d at 182-83.

52. *Id.* at 48-49, 661 S.E.2d at 179.

53. *Id.* at 54, 661 S.E.2d at 183.

54. *See id.* at 50, 661 S.E.2d at 180.

55. *Id.* at 51-52, 661 S.E.2d at 181. The court observed that in misdiagnosis cases, the injury generally occurs at the time of the *initial* misdiagnosis. *Id.*

56. *Id.*

57. *Id.* at 52, 661 S.E.2d at 181-82 (citing Jankowski v. Taylor, Bishop & Lee, 246 Ga. 804, 806, 273 S.E.2d 16, 18-19 (1980)).

58. *Id.* at 50, 661 S.E.2d at 180.

negligent act, the initial misdiagnosis, occurred simultaneously.[59] In this case, however, the injury did not happen until *after* the negligent act itself had occurred.[60]

Judge Andrews also authored a dissenting opinion in *Lyon*, again arguing that the holding of *Kaminer* should render this patient's claims time-barred.[61] According to Judge Andrews, the holding in *Kaminer* established that the "the five-year period of repose commenced to run from the first act of negligence (misdiagnosis) by each physician, not from subsequent negligent acts occurring during the course of treatment."[62] As such, Judge Andrews did not recognize a fundamental difference between the misdiagnosis claim in *Kaminer* and the failure to warn claim asserted in this case.[63]

The supreme court has granted certiorari in both *Cleaveland*[64] and *Lyon*.[65] Practitioners should pay attention to the court's decisions in these cases to evaluate the scope of *Kaminer*.

C. *Dismissal of Actions*

In *Zepp v. Brannen*,[66] the supreme court clarified that a written order capable of tolling the five-year period preceding when a suit may be dismissed for nonaction under O.C.G.A. §§ 9-2-60(b)[67] and 9-11-41(e)[68] need not "be one entered in response to a motion intiated by a party."[69] In so holding, the supreme court declared any inconsistent language in its prior opinion of *Department of Transportation v. Tillett Bros. Construction Co.*[70] to be mere dicta and specifically disapproved *McCombs v. Georgia Natural Gas Co.*[71] and *Center Developers v. Southern Trust Co.*[72] to the extent that these cases relied upon *Tillett*.[73]

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59. *Id.* at 54, 661 S.E.2d at 182-83.
60. *Id.*
61. *See id.* at 55-57, 661 S.E.2d at 183-84 (Andrews, P.J., concurring in part and dissenting in part).
62. *Id.* at 56, 661 S.E.2d at 184 (citing *Kaminer*, 282 Ga. 830, 837-38, 653 S.E.2d 691, 697).
63. *See id.* at 56-57, 661 S.E.2d at 184.
64. 2008 Ga. LEXIS 66 (Ga. Jan. 28, 2008).
65. 2008 Ga. LEXIS 630 (Ga. July 8, 2008).
66. 283 Ga. 395, 658 S.E.2d 567 (2008).
67. O.C.G.A. § 9-2-60(b) (2007).
68. O.C.G.A. § 9-11-41(e) (2006).
69. *Zepp*, 283 Ga. at 397, 658 S.E.2d at 569.
70. 264 Ga. 219, 443 S.E.2d 610 (1994).
71. 283 Ga. App. 618, 644 S.E.2d 277 (2007).
72. 275 Ga. App. 843, 622 S.E.2d 31 (2005).
73. *Zepp*, 283 Ga. at 398, 658 S.E.2d at 569.

In *Jenkins v. Crea*,[74] the court of appeals held that the prior action pending doctrine will bar a subsequent identical suit even when the second suit was brought as a compulsory counterclaim in a different venue, at least when the plaintiff in the second action concedes to a consolidation of the two actions.[75]

D. Estoppel of Actions

Georgia's appellate courts addressed the estoppel effect of bankruptcy claims upon civil actions in *National Building Maintenance Specialists, Inc. v. Hayes*[76] and *Pechin v. Lowder*.[77] In *Hayes* the plaintiff failed to list a potential tort claim in her Chapter 13 bankruptcy petition and at no time amended her bankruptcy schedule to reflect that claim. However, the plaintiff did file an application with the bankruptcy court for leave to hire an attorney to represent her in the tort claim, which the bankruptcy court approved and communicated to all parties of interest. The defendant later moved for dismissal, claiming the plaintiff was judicially estopped from pursuing her tort action.[78] The court of appeals held that the plaintiff's application with the bankruptcy court for leave to employ counsel provided sufficient notice of her tort claim that precluded estoppel of her claim.[79]

In *Pechin* the plaintiffs filed for Chapter 13 bankruptcy. Three years later, while the plaintiffs' bankruptcy was still pending, the incident giving rise to the plaintiffs' tort action occurred. Nearly a year after the underlying incident, the plaintiffs paid off their creditors in full, dismissed their bankruptcy action without prejudice, and then filed a tort action. At no time did the plaintiffs amend their bankruptcy schedules to include their potential tort claims.[80] The court of appeals affirmed the trial court's ruling that the plaintiffs were not judicially estopped from pursuing their tort claims by their failure to amend their bankruptcy schedules because the resulting prejudice from this failure was slight.[81]

74. 289 Ga. App. 174, 656 S.E.2d 849 (2008).
75. *See id.* at 174-76, 656 S.E.2d at 850-51.
76. 288 Ga. App. 25, 653 S.E.2d 772 (2007).
77. 290 Ga. App. 203, 659 S.E.2d 430 (2008).
78. *Hayes*, 288 Ga. App. at 27, 653 S.E.2d at 774-75.
79. *Id.* at 27-28, 653 S.E.2d 774-75.
80. *Pechin*, 290 Ga. App. at 203, 659 S.E.2d at 431.
81. *Id.* at 205, 659 S.E.2d at 432.

E. Settlement of Uninsured Motorist Claims

Allstate Insurance Co. v. Thompson[82] highlights a dangerous landmine that practitioners must avoid when settling for the liability insurer's policy limits when multiple plaintiffs are involved. In these cases, great care must be taken to preserve claims under uninsured motorist (UM) insurance. This case involved an accident in which the appellant, Richard Thompson, and his wife were injured. Although the wife asserted claims for her injuries and for loss of consortium, those claims were relatively minor. The Thompsons settled with the striking driver for $100,000, his policy limits. The release contained the names of both Mr. Thompson and his wife, but it expressly provided that it was not intended to release any claims against UM coverage. Both Mr. Thomspon and his wife signed the release.[83]

When the appellant sought to recover from his UM carrier, the carrier moved for summary judgment, arguing the appellant had not exhausted the available liability coverage, as required by statute.[84] Particularly, the UM carrier argued that some of the $100,000 must have been applied to the wife's claims; therefore, the appellant must have settled his claims for less than $100,000, the applicable policy limits. In response, the appellant's attorney filed an affidavit testifying that the wife's injuries were nominal and not worth pursuing, and that the intent of the release was to settle Mr. Thompson's claims for the policy limits. The trial court denied the UM carrier's motion for summary judgment pertaining to Mr. Thompson's claims.[85]

The court of appeals reversed, holding that the release plainly covered the claims of both Mr. Thompson and his wife.[86] The court also held that the attorney's affidavit was inadmissible as parol evidence construing the unambiguous release.[87]

Thus, practitioners must take care in drafting releases when settling with liability insurers for the policy limits with the intent of pursuing UM benefits. Any misstep may prove fatal to these claims.

82. 291 Ga. App. 465, 662 S.E.2d 164 (2008).
83. *Id.* at 465-66, 662 S.E.2d 165.
84. *See* O.C.G.A. § 33-7-11(b)(1)(D)(ii).
85. *Thompson,* 291 Ga. App. at 466, 662 S.E.2d at 166.
86. *Id.* at 467, 662 S.E.2d at 166.
87. *Id.* at 467-68, 662 S.E.2d at 166-67.

F. Settlement / Offer of Judgment

In *Fowler Properties, Inc. v. Dowland*,[88] the supreme court held that retrospective application of the offer-of-settlement statute[89] violated the state constitution.[90] The case involved a lawsuit that was filed before O.C.G.A. § 9-11-68(b)(1)[91] became effective, but the defendant made a settlement offer after the statute's effective date.[92] The defendant sought to use the offer-of-settlement statute to recover attorney fees, but the court held that the statute affected substantive rights and therefore could not be applied retroactively.[93] In its consideration, the court focused on the time that the plaintiff initiated her action, noting that at that time, "the possibility that she may be responsible for paying the opposing party's attorney fees and expenses of litigation by rejecting an offer of settlement did not exist."[94]

The offer-of-settlement statute was amended in 2006[95] to change the threshold percentages necessary to trigger an obligation to pay attorney fees.[96] *Kromer v. Bechtel*[97] involved a lawsuit filed and settlement offer made after O.C.G.A. § 9-11-68(b)(1) became effective but before the 2006 amendment became effective.[98] Under the old version of the statute, the defendant was entitled to recover attorney fees, but the judgment did not meet the threshold under the new version of the statute.[99] The plaintiff sought to apply the amended version of the statute, but the court of appeals rejected the plaintiff's argument, holding that "[a]pplying the current statute retroactively in this case would impair [the defendant's] rights to recover attorney fees and costs

88. 282 Ga. 76, 646 S.E.2d 197 (2007).

89. O.C.G.A. § 9-11-68 (2006).

90. *Fowler*, 282 Ga. at 79-80, 646 S.E.2d at 200 (citing Hargis v. Dep't of Human Res., 272 Ga. 617, 618, 533 S.E.2d 712, 713 (2000)).

91. O.C.G.A. § 9-11-68(b)(1) (2006).

92. *Fowler*, 282 Ga. at 77, 646 S.E.2d at 199. O.C.G.A. § 9-11-68 became effective on February 16, 2005.

93. *Fowler*, 282 Ga. at 78, 646 S.E.2d at 200; *see also* GA. CONST. art. I, § 1, para. 10.

94. *Fowler*, 282 Ga. at 78, 646 S.E.2d at 200.

95. 2006 Ga. Laws 446, 447-48.

96. *Id.* Prior to April 27, 2006, O.C.G.A. § 9-11-68(b) awarded attorney fees if the judgment obtained by the offeree was not "at least 25 percent more favorable than the last offer." 2005 Ga. Laws 1, 6 (current version at O.C.G.A. § 9-1-68(b)(1)). After April 27, 2006, the amendment provides for a recovery of attorney fees by the defendant "if the final judgment . . . obtained by the plaintiff is less than 75 percent of such offer of settlement." O.C.G.A. § 9-11-68(b)(1).

97. 289 Ga. App. 306, 656 S.E.2d 910 (2008).

98. *See id.* at 306, 656 S.E.2d at 911.

99. *See id.*; O.C.G.A. § 9-11-68(b)(1).

under the statute in effect at the time the offer of settlement was made."[100] Interestingly, the court focused on the defendant's substantive rights at the time the settlement offer was made rather than the time that the case was filed, as was the case in *Fowler*.[101]

G. Causes of Action

1. Wrongful Death. In *Davenport v. Ford Motor Co.*,[102] the United States District Court for the Northern District of Georgia held that wrongful death actions may not be based upon breach of warranty claims.[103]

2. Vaccine Design Defect Claims. In *Ferrari v. American Home Products Corp.*,[104] the court of appeals held, as a matter of first impression, that the National Childhood Vaccine Injury Compensation Act of 1986[105] (the Vaccine Act) did not preempt state law design defect claims against vaccine and mercury preservative manufacturers.[106] The court of appeals analyzed the Vaccine Act's preemptive effect in light of the watershed opinion of *Bates v. Dow AgroSciences, LLC*,[107] in which the United States Supreme Court instituted a duty upon courts "to accept the reading of an express preemption statute that disfavors preemption,"[108] rather than merely employing a rebuttable presumption against preemption, and in which the Supreme Court cut off the preemption analysis at the language of the statute rather than investigating the legislative intent of any ambiguous statutory language.[109] The Vaccine Act provides, in relevant part: "No vaccine manufacturer shall be liable in a civil action . . . if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings."[110] Using the Supreme Court's rationale in *Bates*, the court of appeals in *Ferrari* concluded that the use of the word "unavoidable"

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100. *Kromer*, 289 Ga. App. at 307, 656 S.E.2d at 912.
101. *See id.*; *see Fowler*, 282 Ga. at 78, 646 S.E.2d at 200.
102. No. 1:05-cv-3047-WSD, 2007 WL 4373601 (N.D. Ga. Dec. 12, 2007).
103. *Id.* at *4.
104. 286 Ga. App. 305, 650 S.E.2d 585 (2007).
105. 42 U.S.C. §§ 300aa-1 to 300aa-34 (2000).
106. *Ferrari*, 286 Ga. App. at 312, 650 S.E.2d at 590.
107. 544 U.S. 431 (2005).
108. *Ferrari*, 286 Ga. App. at 310, 650 S.E.2d at 589 (emphasis omitted) (citing *Bates*, 554 U.S. at 449).
109. *See id.* at 309-12, 650 S.E.2d at 588-90; *see Bates*, 554 U.S. at 449.
110. 42 U.S.C. § 300aa-22(b)(1) (2000).

was ambiguous and could be read to allow a parallel state court negligence action.[111]

H. Arbitration

In *Harrison v. Eberhardt*,[112] the court of appeals considered the interplay between Georgia state law and the Federal Arbitration Act (FAA).[113] This case involved a home warranty in a real estate agreement in which an arbitration agreement was present but not initialed by the parties.[114] Under Georgia law, arbitration agreements in residential real estate contracts are unenforceable unless "the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement."[115] The arbitration agreement stated that it would be governed by the provisions of the FAA.[116] The court held that "[w]hen an agreement expressly provides for the FAA to govern, the FAA preempts Georgia's requirement that the parties initial the provision."[117]

I. Class Actions

In *Gay v. B.H. Transfer Co.*,[118] the court of appeals reversed the trial court's order denying class certification.[119] The trial court denied class certification primarily on the basis that the court found no merit in the named plaintiffs' claims against the defendant.[120] In reversing the trial court, the court of appeals reaffirmed the notion that "'the first issue to be resolved [in a putative class action] is not whether the plaintiffs have stated a cause of action or may ultimately prevail on the merits but whether the requirements of [O.C.G.A. § 9-11-23] have been met.'"[121]

111. *Ferrari*, 286 Ga. App. at 312, 650 S.E.2d at 590 (citing *Bates*, 544 U.S. at 449).
112. 287 Ga. App. 561, 651 S.E.2d 826 (2007).
113. 9 U.S.C. §§ 1-307 (2006).
114. *See Harrison*, 287 Ga. App. at 563, 651 S.E.2d at 828.
115. O.C.G.A. § 9-9-2(c)(8) (2007).
116. *Harrison*, 287 Ga. App. at 563, 651 S.E.2d at 828.
117. *Id.* (citing Langfitt v. Jackson, 284 Ga. App. 628, 635, 644 S.E.2d 460, 466 (2007)).
118. 287 Ga. App. 610, 652 S.E.2d 200 (2007).
119. *Id.* at 613, 652 S.E.2d at 202.
120. *Id.* at 612-13, 652 S.E.2d at 202.
121. *Id.* at 612, 652 S.E.2d at 202 (second alteration in original) (quoting Sta-Power Indus. v. Avant, 134 Ga. App. 952, 954, 216 S.E.2d 897, 900 (1975)).

J. Attorney Fees

In *Pipe Solutions, Inc. v. Inglis*,[122] the court of appeals reaffirmed the requirement under O.C.G.A. § 13-6-11[123] to specifically plead for and offer evidence of attorney fees when asserting that a defendant has acted in bad faith or been stubbornly litigious.[124]

In *Note Purchase Co. of Georgia v. Brenda Lee Strickland Realty, Inc.*,[125] the court of appeals reversed the trial court's award of attorney fees pursuant to O.C.G.A. § 9-15-14(b).[126] Although the trial court's order stated that "the above-styled lawsuit lacks substantial justification," the trial court failed to specify the conduct upon which it made its award.[127] Additionally, the trial court entered the attorney fee award without a hearing.[128]

Although not relevant to its decision in *Note*, the court of appeals considered the effect of a late-filed affidavit in support of a motion for attorney fees under O.C.G.A. § 9-15-14.[129] Section 9-15-14(e) of the O.C.G.A. requires a motion for attorney fees to be filed "not later than 45 days after the final disposition of the action."[130] In this case, the motion for attorney fees was timely filed, but the affidavit in support of the motion was not filed until after forty-five days.[131] The plaintiff argued that the late-filed affidavit rendered the motion void under Uniform Superior Court Rule 6.1,[132] which provides that "'every motion . . . when filed shall include or be accompanied by citations of supporting authorities and . . . supporting affidavits.'"[133] However, instead of holding that motions supported by late-filed affidavits are void *ab initio*, the court of appeals held the "decision to consider a late-filed affidavit . . . lies within the sound discretion of the trial court."[134]

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122. 291 Ga. App. 328, 661 S.E.2d 683 (2008).

123. O.C.G.A. § 13-6-11 (1981 & Supp. 2008).

124. *Pipe Solutions, Inc.*, 291 Ga. App. at 329-30, 661 S.E.2d at 685-86 (citing O.C.G.A. § 13-6-11).

125. 288 Ga. App. 594, 654 S.E.2d 393 (2007).

126. *Id.* at 595-96, 654 S.E.2d at 395; O.C.G.A. § 9-15-14(b) (2006).

127. *Note*, 288 Ga. App. at 595, 654 S.E.2d at 395.

128. *Id.* at 596, 654 S.E.2d at 395.

129. *See id.*, 654 S.E.2d at 395-96; O.C.G.A. § 9-15-14 (2006).

130. O.C.G.A. § 9-15-14(e).

131. *Note*, 288 Ga. App. at 596, 654 S.E.2d at 395.

132. GA. UNIF. SUPER. CT. R. 6.1.

133. *Note*, 288 Ga. at 596, 654 S.E.2d at 396 (first ellipsis in original) (quoting GA. UNIF. SUPER. CT. R. 6.1).

134. *Id.* at 597, 654 S.E.2d at 396.

K. Standing

Georgia appellate courts issued several significant decisions on constitutional standing. In *Perdue v. Lake*,[135] the supreme court dismissed a challenge to Georgia's voter identification law for lack of standing.[136] The court held that because the plaintiff in the case could have voted under the 2006 Photo ID Act[137] using either approved forms of non-photo identification or her MARTA ID card, she could not satisfy "'[t]he only prerequisite to attacking the constitutionality of a statute,'" namely, "'a showing that [the statute] is hurtful to the attacker.'"[138]

The supreme court addressed third-party standing in *Feminist Women's Health Center v. Burgess*.[139] *Burgess* involved an equal protection and privacy challenge to a Georgia Medicaid rule[140] that allowed Medicaid funding for abortions only if a mother's life is endangered, or in case of rape or incest.[141] The challenge in *Burgess* was brought by a Medicaid eligible woman who alleged her abortion was "medically necessary" and several health care facilities who had performed medically necessary abortions for low-income women in the past and had been refused payment for those procedures under Georgia's Medicaid rules. The trial court dismissed the entire action, holding that the health care facilities lacked third-party standing and that the woman had failed to exhaust her administrative remedies.[142]

The supreme court reversed.[143] As to the health care facilities, the court recognized it had never before "squarely addressed third-party standing."[144] The court looked to United States Supreme Court precedent to adopt a three-part test for third-party standing: (1) there must be an injury in fact; (2) there must be a close relation to the third party; and (3) there must be some hindrance to the third party's ability

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135. 282 Ga. 348, 647 S.E.2d 6 (2007).

136. *Id.* at 349, 647 S.E.2d at 8.

137. O.C.G.A. § 21-2-417 (2008).

138. *Lake*, 282 Ga. at 348-49, 647 S.E.2d at 7-8 (quoting Agan v. State, 272 Ga. 540, 542, 533 S.E.2d 60, 62 (2000)).

139. 282 Ga. 433, 651 S.E.2d 36 (2007).

140. DIV. OF MED. ASSISTANCE, GA. DEP'T OF CMTY. HEALTH, *Policies and Procedures for Hospital Services* § 911.1; DIV. OF MED. ASSISTANCE, GA. DEP'T OF CMTY. HEALTH, *Policies and Procedures for Physician Services* § 904.2; DIV. OF MED. ASSISTANCE, GA. DEP'T OF CMTY. HEALTH, *Policies and Procedures for Family Planning Clinic Services* § 903.

141. Sources cited *supra* note 140.

142. *Burgess*, 282 Ga. at 433-34, 651 S.E.2d at 37.

143. *Id.* at 433, 651 S.E.2d at 37.

144. *Id.* at 434, 651 S.E.2d at 38.

to protect her own interests.[145] Applying this test, the court concluded that the health care facilities could successfully show third-party standing.[146] First, they had injury-in-fact due to their "direct financial interest in obtaining State funding to reimburse them for . . . medically necessary abortions" performed for Georgia low-income women.[147] Second, the court held the doctor-patient relationship made the health care facilities "uniquely qualified to litigate the constitutionality" of the Medicaid rule as applied to their low-income patients.[148] Third, the court held that "privacy concerns and mootness issues significantly hinder" a woman's ability to assert her own right to Medicaid funding for a "medically necessary abortion."[149] The court reinstated the action, but did not reach the merits of the plaintiffs' constitutional challenge.[150]

L. Immunity

In *Heller v. City of Atlanta*,[151] the court of appeals addressed official immunity and what constitutes a "ministerial act."[152] *Heller* involved the death of a passenger in a taxi cab, with little or no tire tread, that lost control on a wet Interstate 85 overpass and struck a tree. The plaintiff brought wrongful death claims against several defendants. As it pertains to immunity defenses, the significant claims were against the City of Atlanta inspector who, the day before the accident, allowed the cab to pass a mandatory city inspection. The plaintiff alleged that failing to spot the bald tire and passing the cab through the inspection violated the inspector's ministerial duties. The trial court granted summary judgment in favor of the city inspector on the grounds of official immunity.[153] The court of appeals reversed and reinstated the plaintiff's claim against the inspector.[154] Specifically, the court held the inspector's duties to check the cab tires and to complete an inspection checklist were "simple, absolute, and definite; hence they were ministerial," and the court held that the inspector "is not entitled to

145. *Id.* at 434-35, 651 S.E.2d at 38 (citing Powers v. Ohio, 499 U.S. 400, 411 (1991)).
146. *Id.* at 435, 651 S.E.2d at 39.
147. *Id.*
148. *Id.* at 436, 651 S.E.2d at 39.
149. *Id.*
150. *See id.* at 436-37, 651 S.E.2d at 39-40.
151. 290 Ga. App. 345, 659 S.E.2d 617 (2008).
152. *See id.* at 347, 659 S.E.2d at 620.
153. *Id.* at 345-46, 659 S.E.2d at 619.
154. *Id.* at 346, 659 S.E.2d at 619.

official immunity" and may be held liable "if a jury determines that he performed his tasks negligently."[155]

M. Discovery and Sanctions

The court of appeals clarified the responsibilities of a party claiming privilege, requiring the party to specifically and timely prove those claims.[156] In *Georgia Cash America, Inc. v. Strong*,[157] the trial court overruled privilege claims in which the defendants "failed to establish" those claims prior to the hearing on the plaintiffs' motion to compel and "took a chance that the court would sustain their overbreadth objections before they would even begin the process of establishing those privileges."[158] In *Strong* the defendants essentially took the position that they could object in stages and that privilege claims only had to be proved if and when the plaintiff first obtained an order overruling defendant's overbreadth objections.[159] The court of appeals rejected that tactic and upheld the trial court's order overruling the defendant's privilege claims.[160] The ruling is significant for this reason: it affirms that the party claiming privilege must prove its claims regarding specific documents, beginning with an adequate privilege log.[161] A party cannot simply claim a blanket privilege and avoid the obligation to prove those claims because privileged documents are also subject to numerous other objections (for example, breadth, relevance, and burden).[162]

The court in *Strong* also dealt with discovery sanctions.[163] After the trial court overruled the defendants' objections and privilege claims, the defendants failed to comply with the trial court's order compelling document production.[164] The trial court consequently struck the defendants' arbitration defenses as a sanction under O.C.G.A. § 9-11-37.[165] The defendants argued on appeal that the sanction was invalid because their failure to comply with the trial court's order was not "willful" and they "had no other choice but to violate the . . . order

155. *Id.* at 349, 659 S.E.2d at 622.
156. *See* Ga. Cash Am., Inc. v. Strong, 286 Ga. App. 405, 412-13, 649 S.E.2d 548, 555 (2007).
157. 286 Ga. App. 405, 649 S.E.2d 548 (2007).
158. *Id.* at 408-09, 649 S.E.2d at 552-53.
159. *See id.* at 414, 649 S.E.2d at 556.
160. *See id.* at 413, 649 S.E.2d at 555.
161. *See id.* at 412-13, 649 S.E.2d at 555.
162. *See id.*
163. *See id.* at 413-15, 649 S.E.2d at 555-56.
164. *Id.* at 408-09, 649 S.E.2d at 552-53.
165. *Id.* at 410, 649 S.E.2d at 553; O.C.G.A. § 9-11-37 (2006).

compelling discovery in order to protect the privileged documents."[166] In other words, the defendants argued their noncompliance should be excused because they were only disregarding the order to preserve their privilege claims for appeal.[167] The court held that the argument had "no merit" because the defendants never sought a protective order and "failure to comply with discovery will not be excused . . . unless the party applied for a protective order."[168]

The supreme court dealt with work product rulings and resulting sanctions in *Ford Motor Co. v. Gibson*.[169] This case involved product liability claims against Ford and a trailer-hitch manufacturer, alleging that defects in a Mercury Marquis and the trailer-hitch attached to its bumper caused a post-collision fuel-fed fire, resulting in the wrongful death of the plaintiff's decedent.[170] In discovery, the plaintiff requested the rear crash-testing Ford had conducted on vehicles similar to the subject Mercury Marquis.[171] Ford refused to produce testing "relating to prior litigation claiming that they were attorney work product."[172] The trial court found that the plaintiff "had established a substantial need for the documents and that a substantial equivalent of the documents could not otherwise be obtained without undue hardship."[173] Accordingly, "after an in camera review," the trial court ordered the documents produced.[174] Ford defied the trial court's order and "invited" a contempt finding "so that it could immediately appeal."[175] The trial court did not find Ford in contempt but instead entered issue preclusion sanctions.[176] The supreme court upheld the trial court's orders and affirmed the judgment on the jury's verdict in favor of the plaintiffs.[177]

Of importance to trial practitioners, the supreme court applies a "clear abuse of discretion" standard of review to a trial court's decision that a party has met the exception to the work product doctrine under O.C.G.A.

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166. *Strong*, 286 Ga. App. at 414, 649 S.E.2d at 556.
167. *See id.*
168. *Id.*
169. 283 Ga. 398, 659 S.E.2d 346 (2008).
170. *Id.* at 399, 659 S.E.2d at 348-49.
171. *Id.* at 400, 659 S.E.2d at 349.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 406, 659 S.E.2d at 353.

§ 9-11-26(b)(3).[178] The supreme court also reaffirmed the power of trial courts to enter various sanctions for willful violations of their orders.[179] Based on the record, the court concluded that Ford "ran the risk" of "default judgment," and the trial court "did not abuse its discretion" by imposing a "lesser sanction of issue preclusion" in light of its conclusion that Ford had "willfully disobeyed its prior discovery order."[180]

N. Expert Testimony

Georgia courts continue to grapple with the application of O.C.G.A. § 24-9-67.1,[181] the heightened expert testimony rules the legislature passed for civil cases.[182] First, in *Gibson* the supreme court clarified that a motion to exclude expert testimony under O.C.G.A. § 24-9-67.1 must be filed before the final pretrial conference.[183] In *Nathans v. Diamond*,[184] however, the court held that the expert statute is a procedural law, meaning it can be applied retroactively to cases that arose or were pending when the statute was enacted.[185] Appellate courts continue to deal with rulings in medical malpractice cases regarding whether an expert has the required

> actual professional knowledge and experience in the area . . . in which the opinion is to be given as the result of having been regularly engaged in . . . active practice of such area . . . for at least three of the last five years . . . or . . . teaching . . . as an employed member of the faculty of an educational institution . . . how to . . . render the treatment which is alleged to have been . . . rendered negligently by the defendant.[186]

While it is clear the expert does not have to be in the same specialty as the defendant,[187] defining the "area" in which the "opinion" lies remains key to determining an expert's qualification, and the trial judge's ruling will not be disturbed unless an abuse of discretion is

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178. *Id.* at 401, 659 S.E.2d at 350 (quoting Ambassador Coll. v. Goetzke, 244 Ga. 322, 323, 260 S.E.2d 27, 28 (1979)); O.C.G.A. § 9-11-26(b)(3) (2006).

179. *See Gibson*, 283 Ga. at 402, 659 S.E.2d at 351.

180. *Id.*

181. O.C.G.A. § 24-9-67.1 (Supp. 2008).

182. *See id.*

183. *Gibson*, 283 Ga. at 404, 659 S.E.2d at 351-52 ("the time period within which [the defendant] was entitled to a hearing and ruling on its motion had already passed, because the final pretrial conference had already taken place"). *Id.*, 659 S.E.2d at 352.

184. 282 Ga. 804, 654 S.E.2d 121 (2007).

185. *Id.* at 809, 654 S.E.2d at 125.

186. O.C.G.A. § 24-9-67.1(c)(2); *see, e.g.*, Spacht v. Troyer, 288 Ga. App. 898, 655 S.E.2d 656 (2007).

187. *See* Cotten v. Phillips, 280 Ga. App. 280, 282-85, 633 S.E.2d 655, 657-58 (2006).

shown.[188] As the supreme court stated in *Nathans*, "the issue is whether the expert has knowledge and experience . . . that is relevant to the acts or omissions that the plaintiff alleges constitute malpractice and caused the plaintiff's injuries."[189]

Section 24-9-67.1 of the O.C.G.A. survived a constitutional attack on numerous grounds in *Mason v. The Home Depot U.S.A., Inc.*[190] Specifically, the supreme court held that the plaintiffs in a civil case lacked standing to challenge the statute based on the equal protection argument that the statute applies its heightened expert requirements in civil cases only.[191] The court also rejected challenges based on due process, separation of powers, and unconstitutional retroactive application of law.[192]

O. Evidence

The court of appeals reversed a defense verdict and held that a *res ipsa loquitur* jury charge should have been given in a peculiar case involving a traffic accident.[193] Specifically, the court reasoned that if the three elements of *res ipsa* are satisfied, and there is an "incomplete explanation of the facts of the occurrence" regarding its "'true cause,'" then "'*res ipsa loquitur* remains in the case, leaving to the jury a permissible inference of negligence.'"[194] On the other hand, when an accident's cause is *"fully explained"* by the case evidence, *res ipsa* does not apply.[195] The court specifically rejected the defendant's argument that applying *res ipsa* in a motor vehicle accident case would open the proverbial floodgates of litigation.[196]

In a dram shop case, the supreme court held that a spoliation presumption was appropriate when the bar in question had videotape from "the date of the accident" that was "recorded over after four days,

188. *See Spacht*, 288 Ga. App. at 660, 655 S.E.2d at 903-04.

189. *Nathans*, 282 Ga. at 806, 654 S.E.2d at 123 (citing *Cotten*, 280 Ga. App. at 284, 633 S.E.2d at 658).

190. 283 Ga. 271, 658 S.E.2d 603 (2008).

191. *Id.* at 273 n.2, 658 S.E.2d at 606 n.2 (holding that to the extent the plaintiffs' challenge rests on how criminal defendants are disadvantaged by the statute, "they lack standing . . . because they are not criminal defendants").

192. *See id.* at 275-78, 658 S.E.2d at 608-09.

193. *See* Doyle v. RST Constr. Specialty, Inc., 286 Ga. App. 53, 60, 648 S.E.2d 664, 670 (2007).

194. *Id.* at 57-58, 648 S.E.2d at 668 (quoting Harrison v. Se. Fair Ass'n, 104 Ga. App. 596, 608, 122 S.E.2d 330, 338 (1961)).

195. *Id.* at 58, 648 S.E.2d at 668 (emphasis in original).

196. *See id.* at 59-60, 648 S.E.2d at 669-70.

in the regular course of business."[197] The court concluded that a rebuttable spoliation presumption arose because the bar's "manager was aware of her customer's involvement in the accident . . . and took steps to investigate the day after it occurred, yet failed to preserve the recording of the pertinent events."[198] This decision highlights the importance of interrupting normal business practices that could destroy recordings or other evidence.[199]

IV. CONCLUSION

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

197. Baxley v. Hakiel Indus., Inc., 282 Ga. 312, 313-14, 647 S.E.2d 29, 29-30 (2007).

198. *Id.* at 313, 647 S.E.2d at 30.

199. *See id.* at 313-14, 647 S.E.2d at 30; *see also* Wal-Mart Stores, Inc. v. Lee, 290 Ga. App. 41, 659 S.E.2d 905 (2008) (upholding spoliation sanction for reusing and recording over videotape of incident).