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**\*517 TRIAL PRACTICE AND PROCEDURE**

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I. Introduction

Developments in the law of personal jurisdiction and venue, the professional malpractice affidavit pleading requirement embodied by Official Code of Georgia Annotated ("O.C.G.A.") section 9-11-9.1, [\[FN1\]](#) and the doctrines of res judicata and collateral estoppel continued to refine the law during this survey period. Additionally, this survey reviews significant decisions discussing disqualification of jurors for cause, actions for prenatal injuries, procedure in connection with trials involving default judgment, and remedies for spoliation of evidence. Due to the number of decisions, this review seeks to analyze the most significant and practical developments in the areas of trial practice and procedure in Georgia for the survey period.

**\*518 II. Personal Jurisdiction**

The most judicial activity in the area of personal jurisdiction during the survey period occurred in cases involving nonresident foreign corporations. In five cases, the court of appeals refined Georgia law relating to personal jurisdiction, particularly as applied to nonresident foreign corporations.

A. Nonresident Foreign Corporations

Is "general jurisdiction" applicable to foreign corporations in Georgia? The most significant holding on personal jurisdiction during this year's survey period came in the case of Pratt & Whitney Canada, Inc. v. Sanders. [\[FN2\]](#) In this case, the plaintiffs were not Georgia residents, the defendant was a foreign corporation, and the alleged tort, a plane crash, occurred in Kentucky. [\[FN3\]](#) Defendant, Pratt & Whitney Canada, Inc., challenged personal jurisdiction. [\[FN4\]](#) Plaintiffs argued that regardless of the fact that the defendant's tortious conduct had insufficient Georgia connections to invoke the Long Arm Statute, Pratt & Whitney's continuous and systematic-- albeit unrelated--activity within Georgia established the company's "presence" within the state so that it could be subjected to general personal jurisdiction in Georgia in any case. [\[FN5\]](#)

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The court held that with respect to nonresident foreign corporations, the only way to establish personal jurisdiction is by showing the type of specific contacts set forth in the Long Arm Statute, [O.C.G.A. section 9-10-90](#). [\[FN6\]](#) The court relied on the Long Arm Statute's definition of nonresident to include foreign corporations not authorized to transact business in Georgia. [\[FN7\]](#) Judge McMurray argued in his dissent that the Long Arm Statute is merely a form of asserting "specific jurisdiction" over a nonresident based on that party's conduct within the state. [\[FN8\]](#)

The Long Arm Statute makes no attempt to address general jurisdiction over a party who is neither (1) a resident of the state, nor (2) present within its borders. [\[FN9\]](#) The court recognized that a resident corporation, as defined in the Long Arm Statute, like a resident \*519 individual, can be subject to general jurisdiction because of its presence within the state. [\[FN10\]](#) The court failed to explain why a nonresident corporation, unlike a nonresident individual, cannot be held liable based on transitory "presence" within the state. The United States Supreme Court has held that a foreign corporation can be deemed "present" so that general jurisdiction can be exercised if that corporation's activities within the state are continuous and systematic. [\[FN11\]](#) The fact that Georgia's Long Arm Statute defines "nonresident" to include foreign corporations not authorized to transact business in Georgia should make no difference. [\[FN12\]](#) The statutory definition of nonresident also encompasses individuals who reside in another state, [\[FN13\]](#) yet the court concedes that such individuals are subject to personal jurisdiction in Georgia if present in Georgia when served with process. [\[FN14\]](#)

The court's apparent elimination of "general jurisdiction" with respect to nonresident foreign corporations creates an anomaly in the law and an illogical result. [\[FN15\]](#) Foreign corporations that obey Georgia law and register to transact business here are declared subject to personal jurisdiction in Georgia in any case, regardless of whether the conduct at issue would satisfy the Long Arm Statute. Conversely, foreign corporations that engage in continuous and systematic activity in Georgia, but do not bother to register with the Secretary of State, are rewarded with immunity from suit here, unless the Long Arm Statute applies.

Does the failure to answer a complaint resulting in default preclude a defendant foreign corporation from subsequently attacking jurisdiction? In two very similar cases, *Hoesch America, Inc. v. Dai Yang Metal Co.*, [\[FN16\]](#) and *B & D Fabricators v. D.H. Blair Investment Banking Corp.*, [\[FN17\]](#) the court of appeals held that foreign corporate defendants did not waive their personal jurisdiction defenses by failing to answer the plaintiffs' complaints and allowing the actions to go into default. [\[FN18\]](#) The court relied on established federal authority, which holds that "[a] defendant is always free to ignore the judicial \*520 proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." [\[FN19\]](#)

The court glossed over the fact that in both cases, the challenge to the underlying judgment came not in a collateral proceeding, but directly in the case at issue. Such a "direct attack" upon jurisdiction, the court held, is authorized by [O.C.G.A. section 9-11-60\(d\)\(1\) and \(f\)](#), [\[FN20\]](#) which allows a party to bring a motion to set aside a judgment void for lack of personal jurisdiction at any time. [\[FN21\]](#)

In *B & D Fabricators*, the court also seemed to answer another practical personal jurisdiction question: When has a defendant made a general appearance in a case so as to waive the personal jurisdiction defense? It has long been the rule that "[g]enerally . . . a waiver results when a nonresident submits to the jurisdiction of the court by seeking a ruling from the court on the merits of the case or otherwise enters a general appearance without raising the issue." [\[FN22\]](#) Seemingly at odds with this general principle, however, is the notion that a defendant may answer a complaint on the merits while simultaneously preserving, by objection, his or her personal jurisdiction defense. [\[FN23\]](#)

The defendant in *B & D Fabricators* had addressed the merits in its initial pleadings, but had also objected based on lack of personal jurisdiction. [\[FN24\]](#) The court noted that the defendant's initial pleadings were a request to open the default judgment, which requires that the defendant set up a meritorious defense. [\[FN25\]](#) The reason the personal jurisdiction defense was not waived, however, became a matter of timing. [\[FN26\]](#) "Inasmuch as [[[the defendant] did not plead to the merits without raising a jurisdictional defense, there was no waiver." [\[FN27\]](#) Thus, the court seemed to indicate that pleading the merits of the case does not result in waiver as long as the defendant simultaneously raises the personal jurisdiction defense.

\*521 What is the plaintiff's burden when the defendant challenges personal jurisdiction? In *Cobb County v. Jones*

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Group P.L.C., [FN28] the court of appeals reaffirmed the procedural requirements for making and opposing a challenge to personal jurisdiction. The defendant has the ultimate burden of proving lack of personal jurisdiction. [FN29] Nonetheless, a motion to dismiss must be granted if the plaintiff cannot show sufficient facts to create an inference that jurisdiction exists. [FN30] A defendant may raise matters outside the pleadings by offering testimony by affidavit or other proper evidence, and if the defendant's evidence pierces the plaintiff's pleadings, the plaintiff then has the burden of coming forward with evidence which creates an inference that jurisdiction exists. [FN31] In other words, the court has adopted a procedure similar to the familiar procedure on motions for summary judgment. [FN32]

#### B. Jurisdiction over Nonresident Individuals

In Phears v. Doyne, [FN33] the court of appeals again relied on the long line of cases which held that an advertisement in a national publication and a subsequent contract with a Georgia resident is not transaction of business in Georgia pursuant to the Long Arm Statute, O.C.G.A. section 9-10-91(1). [FN34] The court also held that with respect to tort claims, a defendant is required only to submit an affidavit denying the type of contacts set forth in the Long Arm Statute, and if the plaintiff cannot rebut the allegations contained in the affidavit, jurisdiction cannot exist. [FN35]

### \*522 III. Service of Process

#### A. Service on an Uninsured Motorist Carrier

The courts addressed several issues involving service of process in this year's survey period. First, the Georgia Supreme Court addressed the issue of service of process on an uninsured motorist ("UM") carrier which was not perfected until two days after the statute of limitations had expired. [FN36] In Georgia Farm Bureau Mutual Insurance Co. v. Kilgore, [FN37] the underlying accident occurred on May 31, 1990, and the plaintiffs filed a claim against the owner of the other vehicle on February 15, 1991. After it was determined that the tractor was uninsured, the plaintiffs requested the sheriff to serve a copy of their claim on their UM carrier on May 15, 1992, which was within the two year statute of limitation. [FN38] The sheriff did not perfect service until June 2, 1992--two days after the limitations period expired--due to the UM carrier's agent's absence from the country until that date. [FN39] The trial court denied the insurance carrier's motion to dismiss on the ground that service was untimely, [FN40] and the Georgia Court of Appeals affirmed. [FN41]

The issue before the supreme court was whether a significant delay between the filing of the tort claim and service on the uninsured motorist carrier required dismissal when, within the applicable period of limitations, the plaintiff sought to have the uninsured motorist carrier served and service was perfected within a reasonable time thereafter, but outside of the period of limitations. [FN42] The court answered this in the negative and affirmed the trial court's denial of the insurance carrier's motion to dismiss. [FN43]

The statute dealing with uninsured motorist coverage, O.C.G.A. section 33-7-11(d), requires service of the pleading on the UM carrier as though the carrier were actually named as a defendant in the tort action. [FN44] The Supreme Court of Georgia looked to the law governing \*523 relation back of service to the filing of the lawsuit [FN45] and focused on the diligence of the plaintiff in perfecting service. [FN46] Noting that O.C.G.A. section 9-11-4 does not provide a time limit within which service must be initiated by the plaintiff, the court found that the mere time lapse between the date of filing and the date of service is not a valid basis for dismissal. [FN47] The court then narrowed the time on which to focus on the plaintiff's diligence, stating that the focus is on the plaintiff's efforts after becoming aware that the process server failed to perfect service, rather than on the time lapse between the initial filing of the claim and the first effort to have it served. [FN48] The court held that under the circumstances of the case, the plaintiffs exercised reasonable diligence, and the carrier's motion to dismiss was properly denied. [FN49]

#### B. Service of Process for Renewal Actions

In two cases, the court of appeals stood firmly behind the rule that a renewal action is valid only if the defendant is properly served before the statute of limitations runs in the original action. [FN50] In Ludi v. Van Metre, [FN51]

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the plaintiff brought a medical malpractice action against a physician and sought to have process served on him. [FN52] The process server handed the complaint and summons to a receptionist in Dr. Ludi's office; however, Dr. Ludi's subsequent affidavit stated that she was not authorized to accept service for him. Service was attempted again at Ludi's home, but outside of the statute of limitations. [FN53]

Plaintiff Van Metre then voluntarily dismissed her suit without prejudice and filed a renewal action. [FN54] The court of appeals stated that "for the purpose of the renewal statute, the mere filing of the initial suit does not operate to toll the statute of limitation. In order for a case to \*524 qualify as a renewal action, 'the earlier filing must have been a valid action, with proper service on [defendant].'" [FN55] Because service on a receptionist was not proper personal service in the original action before the running of the statute of limitations, the suit could not be renewed. [FN56] The court did not address the issue of whether the subsequent attempt to perfect service at Ludi's residence outside the statute of limitations related back to the date of filing the lawsuit, but only stated that that attempt at service occurred outside the statute of limitation. [FN57]

Similarly, in *Brooks v. Young*, [FN58] the court of appeals held that improper service of process on a minor alone within the statute of limitation would not suffice for a renewal action. [FN59] The plaintiff in *Brooks* filed a complaint against a minor, which was served only on Brooks, the minor, and not on her parents or guardians. [FN60] After Brooks reached her majority, and after the statute of limitation had run, the plaintiff again served Brooks. The court held that it found no authority to support the theory that service after reaching majority and after the statute of limitation had expired could somehow cure the defective service on her as a minor. [FN61] Because the plaintiff did not strictly comply with O.C.G.A. section 9-11-4(d)(3), [FN62] and service was not perfected prior to the expiration of the statute of limitation, the original suit was void and could not be renewed. [FN63]

#### C. Service on the Georgia Department of Transportation

The court of appeals interpreted the service provision of O.C.G.A. section 32-2-5(b) [FN64] in *Department of Transportation v. Marks*. [FN65] This statute provides that service of process may be accomplished by personally serving the commissioner of the Georgia Department of Transportation ("D.O.T.") or by leaving a copy of the same in the office of the commissioner in the D.O.T. building in Atlanta. [FN66] In *Marks*, the \*525 plaintiff served the D.O.T. by placing a copy of the summons and complaint in a package addressed to the D.O.T. Commissioner at his office in the D.O.T. building in Atlanta and having it delivered by United Parcel Service ("U.P.S."). U.P.S. delivered the package to the mailroom manager, who delivered it to the commissioner's office. [FN67] The trial court held that service was sufficient under O.C.G.A. section 32-2-5(b), and held the D.O.T. in default for failure to file an answer. [FN68]

The court of appeals reversed, stating that the language of O.C.G.A. section 32-2-5(b) did not evidence the legislature's intention to authorize a form of service in substitution for the personal service required by the common law and by O.C.G.A. section 9-11-4. [FN69] The court interpreted the service statute as providing that service may be accomplished by personally serving a person other than the D.O.T. Commissioner in the commissioner's office who is authorized or otherwise qualified to receive service on behalf of the D.O.T. [FN70] Furthermore, the personal service must be made by an authorized person. [FN71] While U.P.S. may deliver, they cannot properly accomplish service of process under this statute.

#### D. Acknowledgment of Service Document is not a Waiver of Service of Summons

The court of appeals also decided whether a defendant had waived service of summons by signing an acknowledgment of service document. [FN72] In *Stamps v. Bank South, N.A.*, [FN73] the defendant had defaulted on a promissory note and had made an agreement with the bank to pay back the money owed. As part of the agreement, Stamps executed an acknowledgment of service. When Stamps failed to make his payments, the bank notified him that it was proceeding under the agreement to take judgment against him. The bank filed the complaint, acknowledgment of service, and consent order and obtained a judgment against Stamps. Stamps later moved to set aside the consent order, asserting insufficient service of process. [FN74] The trial court held that Stamps had waived service of process by executing the acknowledgment of service. [FN75]

The acknowledgment of service states:

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\*526 I . . . acknowledge service of the within and foregoing Complaint and Consent Order attached thereto. I am a resident of Dekalb County and consent to jurisdiction in Dekalb County for all matters related to this legal action, even if I were to move out of this County prior to the filing of this action with the Clerk of the Court. [\[FN76\]](#)

The court of appeals held that Stamps did not waive service of summons in the acknowledgment of service document. [\[FN77\]](#)

The court first stated that by this document, "Stamps expressly acknowledged service of the complaint prior to commencement of the action, which is permissible as long as the waiver of service before commencement of the action is limited to a specific suit intended by the parties that is filed without unreasonable delay." [\[FN78\]](#) But, the court observed that Stamps obviously did not and could not acknowledge receiving service of the summons which had not yet been issued. [\[FN79\]](#) While Stamps could have intended to waive service of summons when later issued, the acknowledgment did not contain a waiver of service of summons, or process, or a general waiver of all further service. [\[FN80\]](#) The court held that a mere acknowledgment of service of the complaint did not constitute waiver of service of summons as required by [O.C.G.A. section 9-11-4](#). [\[FN81\]](#)

#### IV. Venue

##### A. The Vanishing Venue Doctrine

During this survey period, the court of appeals quashed any lingering doubts about the viability of the vanishing venue doctrine in Georgia after the case of *Carney v. JDN Construction Co.* [\[FN82\]](#) In *Collipp v. Newman*, [\[FN83\]](#) the court reaffirmed the "venerable principle of vanishing venue . . . well established at the turn of the century" [\[FN84\]](#) that "[w]here suit is brought against two defendants, one of whom resides in the county, the court has no jurisdiction of the nonresident defendant unless \*527 the resident codefendant is liable in the action." [\[FN85\]](#) The vanishing venue rule provides that when a single suit is brought against several joint tortfeasors in a county in which one of the defendants is a resident, and the jury finds that the resident defendant is not liable but the nonresident defendants are liable, jurisdiction as to the nonresident defendants vanishes, and the court has no jurisdiction to enter judgment against the nonresident defendants. [\[FN86\]](#)

The courts have grudgingly made some small concessions to the harshness of the rule. For instance, the entry of a consent judgment against the resident defendant will satisfy the requirement that a judgment be entered against the resident defendant. [\[FN87\]](#) In *Carney v. JDN Construction Co.*, [\[FN88\]](#) the court of appeals held that "[a]lthough appellant subsequently settled with [[the county resident defendants], there has been no finding that [the county resident defendants] are not liable to appellant" and denial of defendant's motion to transfer was held proper. [\[FN89\]](#)

Interpreting these cases, the trial court in *Collipp* denied the nonresident defendants' motion to transfer the case from Chatham County to Wayne County after the plaintiffs settled their claims against the Chatham County defendants and dismissed those claims with prejudice. [\[FN90\]](#) The court of appeals held that this denial was erroneous and was based on a misinterpretation of *Carney*. [\[FN91\]](#) The court explained that in *Carney*, the resident defendants actually remained parties in the case: the settlement agreement was reached during the trial, and the resident defendants were never removed from the case. [\[FN92\]](#) Further, in *Carney*, the defendants' dismissal was not a provision of the settlement, and a jury could have found them liable, unlike the settlement and dismissal with prejudice in *Collipp*. [\[FN93\]](#) Therefore, the court of appeals concluded by emphatically stating that there has been no change in established venue principles. [\[FN94\]](#)

##### \*528 B. Venue Selection Clause

The court of appeals upheld a contractual venue selection clause in *Brinson v. Martin*, [\[FN95\]](#) which was contained in an employment contract between Brinson and Woodmen of the World Life Insurance Society ("Woodmen"). [\[FN96\]](#) The contract in question stated that it would be construed according to Nebraska laws and that the exclusive venue of any legal proceeding arising out of the contract would be Douglas County, Nebraska. [\[FN97\]](#) Brinson brought suit in the Superior Court of Cobb County against Woodmen and four Woodmen employees (collectively "Martin") who are all Georgia residents. Brinson claimed damages for breach of contract and invasion of privacy

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against Woodmen, and interference with economic relations and unjust enrichment against Martin. [FN98] The trial court dismissed Brinson's complaint against all defendants on the basis of improper venue, and Brinson appealed, claiming that the venue clause was unreasonable, unjust, overreaching, unenforceable, and violative of Georgia public policy. [FN99]

Utilizing choice of law principles, the court of appeals determined that Georgia law would be proper to decide the venue issue. [FN100] Because contract provisions governing the place of bringing suit are a matter of procedure, rather than affecting a party's substantive rights, the court held that the rule of *lex fori* demands that Georgia law governs the issue of venue. [FN101] The court held that this was so despite the fact that under its own terms the contract was to be construed according to Nebraska law. [FN102] Under the court's analysis, choice of law provisions in contracts will not apply to control the remedy and procedure to be applied in the forum state. [FN103]

After deciding this initial matter, the court promptly undermined the plaintiff's argument that all venue selection clauses are against Georgia public policy and will not be enforced by Georgia courts. [FN104] The court \*529 distinguished cases cited by the plaintiff, [FN105] stating that those cases applied to intrastate transactions and dealt with specific state insurance law that has its own venue provisions. [FN106] The court applied the rule that "where no Georgia law specifically governs venue, and where more than one state and its citizens are involved, 'such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances,'" [FN107] and held that under Georgia law, the venue selection clause was not unreasonable under the circumstances of the case. [FN108]

Even more significant is the court's determination of the additional issue of whether the venue selection clause would apply to defendant Martin and others for claims of tortious interference with economic relations and unjust enrichment. These defendants were not signatories to the contract containing the venue selection clause. The court first looked to a federal district court decision of the Northern District of Georgia which held that "because the claims against the other defendants arose directly or indirectly from a single contract connecting the plaintiffs with all the defendants, the other defendants were transaction participants entitled to rely on the forum selection clause." [FN109]

Analogizing the instant issue to arbitration clauses, the court reasoned that the same considerations would apply. [FN110] The court stated that Brinson's claims arose either directly or indirectly from the contract with Woodmen, and that if defendant Martin were not allowed to rely on the clause, separate actions in different forums would likely be brought, possibly yielding varying decisions "inconsistent with the administration of justice." [FN111] After allowing the nonparties to the contract to rely on the venue selection clause, the court cautioned that this decision is not intended to apply to actions filed only against nonsignatories. [FN112]

#### \*530 C. Venue over the Georgia Department of Transportation

During this survey period the court of appeals decided a venue issue involving the D.O.T. In *C.W. Matthews Contracting Co. v. Barnett*, [FN113] the court held that the D.O.T. was deemed a resident of the county where it was sued if the cause of action arose in that county. [FN114] The matter to be decided was whether a joint tortfeasor with the D.O.T. could be sued in the county where the cause of action arose, since the joint tortfeasor was not a resident of that county. [FN115] The answer depended on whether the D.O.T. was deemed to be a resident of the county. [FN116]

Under *O.C.G.A. section 32-2-5(b)*, [FN117] all actions against the D.O.T., other than *ex contractu* actions, shall be brought in the county in which the cause of action arose. The court noted that this situation is similar to suits against corporations which are to be filed in the county where the cause of action arose. [FN118] Applying the reasoning of *Dependable Insurance Co. v. Gibbs*, [FN119] which creates an implied designation of that county as the residence of the corporation for the purpose of that suit, the court of appeals held that *O.C.G.A. section 32-2-5(b)* also constitutes an implied designation of the county in which the cause of action arose as the residence of the D.O.T. for the purpose of that action. [FN120] This reasoning allowed joinder of the joint tortfeasor who resided in a different county.

#### \*531 V. Proper Parties to an Action

During this survey period, the cases involving issues of proper parties to a lawsuit ranged from fetuses [\[FN121\]](#) to the deceased. [\[FN122\]](#) Several of the most interesting cases are highlighted.

#### A. Actions for Prenatal Injuries

In two very different cases, both the Supreme Court of Georgia and Court of Appeals of Georgia were faced with potential parties who sustained injuries in utero. First, the supreme court, in response to a question certified by the United States Court of Appeals for the Eleventh Circuit, held that a fetal victim of a tort must be born alive in order to seek recovery from the alleged tortfeasor pursuant to [O.C.G.A. section 51-1-9](#). [\[FN123\]](#) In *Peters v. Hospital Authority of Elbert County*, Mrs. Peters delivered a stillborn child, and she and her husband sought to recover damages for the prenatal injuries allegedly inflicted by the defendants on the child and for the pain and suffering of the child. [\[FN124\]](#) The Eleventh Circuit certified the following question to the supreme court: "Can a parent state a cause of action on behalf of a stillborn child for damages arising from prenatal injuries to the child? In essence, does a stillborn child have a right to recover for injuries sustained while inside the womb?" [\[FN125\]](#)

Recognizing that Georgia law allows a child born after sustaining a tortious prenatal injury to bring an action for that injury, the court nevertheless found that the case law implicitly held that the live birth of the child was a prerequisite to the child bringing suit. [\[FN126\]](#) However, the court noted that the parent is entitled to recover the full value of the life of the stillborn child. [\[FN127\]](#) The court was required to decide whether the unborn was a "person" under [O.C.G.A. section 51-1-9](#), [\[FN128\]](#) which \*532 authorizes "every person" against whom a tort is committed to recover. [\[FN129\]](#) The court declined to define a fetus as a person because it was "reluctant to accord legal rights to the unborn without conditioning those rights upon live birth." [\[FN130\]](#) The court further held that this holding does not violate the equal protection clauses of the state and federal constitution because it is "rationally related to a legitimate governmental purpose--a limitation on who is entitled to bring a tort action is an attempt to provide solid ground in the quagmire surrounding fetal injury." [\[FN131\]](#)

In *Hitachi Chemical Electro-Products, Inc. v. Gurley*, [\[FN132\]](#) the court of appeals reaffirmed the principle that a child may sue for injuries suffered in utero. [\[FN133\]](#) In this case, the plaintiffs brought actions alleging that the birth defects suffered by their children were caused when the parents were negligently and willfully exposed to hazardous chemicals while working at the defendant's factory. The defendants sought to dismiss the claims, asserting that the plaintiffs sought relief for injuries sustained prior to conception. The court of appeals stated that the supreme court has previously recognized the existence of a cause of action to an unconceived child [\[FN134\]](#) under some situations. [\[FN135\]](#) The court of appeals therefore held that the plaintiffs' allegations sufficiently stated a claim upon which relief could be granted. [\[FN136\]](#)

#### B. Intervention of a Party

The issue in *AC Corp. v. Myree* [\[FN137\]](#) was whether a person could intervene in an action where his motion to allow intervention was not granted until after the statute of limitations had run. The court of appeals answered Myree's question affirmatively. The action was brought initially by Myree's employer, AtlantaStaff, under [O.C.G.A. section 34-9-11.1](#), [\[FN138\]](#) to recover money it had paid to Myree under the \*533 Workers' Compensation Act. [\[FN139\]](#) Myree sought to intervene pursuant to [O.C.G.A. section 9- 11-24\(a\)](#). [\[FN140\]](#)

Both the parties and the court acknowledged that if a party to the suit had moved to add Myree as a party plaintiff pursuant to [O.C.G.A. section 9-11- 21](#), the motion would have failed if it had not been granted prior to the running of the statute of limitation. [\[FN141\]](#) "[F]iling a motion to add a party does not toll the statute of limitation." [\[FN142\]](#) However, the court of appeals held that a motion to intervene is different, and that a motion to intervene does not necessarily require adherence to the Civil Practice Act's rules for adding parties. [\[FN143\]](#)

Because an intervenor "takes the case as [he] finds it" and cannot expand the litigation, but "merely stakes a claim to a share in the result of the pending litigation," the rules are different than for the initial parties plaintiff and defendant, and [O.C.G.A. sections 9-11-21](#) and [9-11-15](#) do not apply. [\[FN144\]](#) The court of appeals advised that trial courts should allow intervention under [O.C.G.A. section 9-11-24](#) as long as the application to intervene is timely and the intervenors meet the requirements of 9-11-24. [\[FN145\]](#) Therefore, the court found that Myree should be

allowed to intervene because he fully complied with the intervention statute before the statute of limitation had expired, even though the statute of limitation may have barred his independent claim. [\[FN146\]](#)

## VI. Statute of Limitations

### A. Retroactive Application of [O.C.G.A. section 34-9-11.1](#)

One of the most significant series of cases during the survey period involved the issue of the statute of limitations under the workers' compensation subrogation statute, [O.C.G.A. section 34-9-11.1](#). [\[FN147\]](#) This statute was amended by the Georgia General Assembly, eliminating the one-year limitation period. The amendment to the statute was enacted \*534 on April 18, 1995 and took effect on July 1, 1995. The new statute provides in relevant part that:

(c) Such action against such other person by the employee must be instituted in all cases within the applicable statute of limitations. If such action is not brought by the employee within one year after the date of injury, then the employer or such employer's insurer may but is not required to assert the employee's cause of action in tort, either in its own name or in the name of the employee. The employer or its insurer shall immediately notify the employee of its assertion of such cause of action, and the employee shall have a right to intervene . . . .

(e) It is the express intent of the General Assembly that the provisions of subsection (c) of this Code section be applied not only prospectively but also retroactively to injuries occurring on or after July 1, 1992. [\[FN148\]](#)

In *Vaughn v. Vulcan Materials Co.*, [\[FN149\]](#) an employee of a trucking company suffered a compensable workers' compensation injury at the defendant's ("Vulcan") quarry on December 16, 1992. One year and eight months later, on August 18, 1994, Vaughn brought a negligence action against Vulcan. The trial court, on April 11, 1995, granted summary judgment to the defendant and dismissed the lawsuit based on the one-year statute of limitation in the workers' compensation statute. [\[FN150\]](#) On April 19, 1995, the day after the statute was amended, Vaughn filed an emergency motion to vacate the judgment because the general assembly had amended the statute, thereby eliminating the one-year statute of limitation. [\[FN151\]](#)

The statute provides that the revision applies retroactively to all injuries occurring on or after July 1, 1992. [\[FN152\]](#) The Georgia Supreme Court held that the trial court's denial of Vaughn's emergency motion to vacate the judgment was erroneous in light of the recent amendment of the statute. [\[FN153\]](#) The court noted that the reviewing court applies the law that exists at the time of its judgment, rather than the law prevailing at the time of the judgment under review. [\[FN154\]](#) The reviewing court may thus reverse a judgment that was correct when it was rendered, or affirm a judgment that was erroneous at the time it was rendered, when the law has been changed in the meantime and where \*535 the application of the new law will not impair a vested right under the prior law. [\[FN155\]](#)

The court decided that reinstatement of Vaughn's claim was proper, stating that there is no vested right in a statute of limitation and that the legislature may revive a claim that would have been previously barred by a limitation period without violating the constitutional prohibition against retroactive laws. [\[FN156\]](#) Because Vaughn's injury occurred after July 1, 1992, he was permitted under the amended statute to bring his action under the applicable statute of limitation of two years.

Five opinions by the court of appeals follow the identical reasoning of the supreme court in reinstating claims under the newly amended statute. [\[FN157\]](#) The court of appeals utilized the same analysis as the supreme court to decide that the plaintiffs' claims in each case should be reinstated. The defendants in three of the cases sought to attack the court's holdings that retroactive application of the statute would not impair any vested rights. [\[FN158\]](#) The hallmark of these cases is the analysis in *Moore v. Savannah Cocoa, Inc.*, [\[FN159\]](#) in which the court of appeals held that the defendant had no vested right in a statute of limitation or in a statutory assignment of a right contained in the former statute. [\[FN160\]](#)

The appellate courts may reverse a judgment that was correct at the time it was rendered, but which is incorrect due to a change in the law when the reviewing court makes its judgment, but only if the application of the new law will not impair a vested right under the prior law. [\[FN161\]](#) Therefore, the defendant in *Moore* argued that it had a vested right in the one-year statute of limitation contained in the former O.C.G.A. section 34-9-11.1. The court of appeals

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disagreed, pointing out that:

\*536 [s]tatutes of limitation find their justification in necessity and convenience rather than in logic . . . . They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control. [\[FN162\]](#)

Next, the defendant sought to argue that it had a vested right in the assignment of the employee's claim to his employer and insurance carrier. [\[FN163\]](#) Again, the court of appeals disagreed, maintaining that while a prior contractual assignment may create vested rights in an assignee, the assignment in this case was a statutory remedy which the legislature could change. [\[FN164\]](#) Therefore, the court held that no vested right existed in the assignment. [\[FN165\]](#)

The court of appeals also summarily dismissed this same argument in *Dowdy v. Earthwise Restaurant Management*, [\[FN166\]](#) holding that the assignment was statutory and not a vested right. [\[FN167\]](#) Here, the defendants sought to add a new spin to their argument, stating that the employee's claim was assigned to her employer by the former statute, and was never reassigned to her after the amendment to the statute. The court of appeals rejected that argument because the amended statute clearly and specifically provides for the retroactive application of subsection (c), which deletes the language concerning assignment of actions. [\[FN168\]](#)

Finally, the court of appeals also addressed these issues in *Draughn v. Delta Airlines, Inc.* [\[FN169\]](#) The factual scenario is much the same as the previous cases: Draughn was injured in 1992, received workers' compensation benefits, and filed an action against Delta in 1994. The trial court granted summary judgment to the defendant based on the former one-year statute of limitation. [\[FN170\]](#) The court of appeals again \*537 utilized the analysis that the legislative amendment applied retroactively so that Draughn's claim was reinstated because it was filed within two years of the incident. [\[FN171\]](#) This case, however, is slightly different, in that Draughn's injury occurred on March 28, 1992. The amended statute, by its language, applies retroactively to injuries occurring on or after July 1, 1992. [\[FN172\]](#)

The court did not determine these dates to be a problem in reinstating Draughn's claim. The court first pointed out that the effective date of the former O.C.G.A. section 34-9-11.1 was July 1, 1992. Thus, the court found that the "General Assembly's decision not to extend the retroactive application of the amended statute in subsection (e) to claims arising before that date is an expression of its intention that the former statute was not applicable to injuries occurring prior to July 1, 1992." [\[FN173\]](#) Therefore, the court applied the law as it existed at its judgment and held that Draughn timely filed his claim under the amended statute. [\[FN174\]](#)

## B. Medical Malpractice Actions

Medical malpractice actions are governed by [O.C.G.A. section 9-3-71\(a\)](#), [\[FN175\]](#) which requires medical malpractice actions to be brought within two years after the date of the injury arising from a negligent or wrongful act. The case law in Georgia dealing with the statute of limitations when the negligent act involves a misdiagnosis is conflicting. The courts are apparently in disagreement as to whether the date the misdiagnosis is made is the injury which starts the statute of limitations running, or whether the date the consequence of the misdiagnosis becomes apparent to the plaintiff starts it running. Two cases decided during this survey period demonstrate the conflict.

In *Ford v. Dove*, [\[FN176\]](#) the administratrix of the deceased brought a medical malpractice action against the defendant, asserting that the defendant misdiagnosed the deceased's kidney cancer. [\[FN177\]](#) The expert's affidavit stated that the defendant was negligent on March 6, 1989, in failing to take an x-ray of Mr. Dove's kidney to rule out cancer in light of other symptoms. The expert also stated that the defendant was further negligent in failing to perform follow-up urinalysis for two years \*538 after blood was first noted in Mr. Dove's urine. [\[FN178\]](#) The deceased's kidney cancer was ultimately diagnosed on March 9, 1991, and the plaintiff's claim was filed on March 5, 1993. [\[FN179\]](#) The trial court denied the defendant's motion for partial summary judgment based on the two-year statute of limitation. [\[FN180\]](#)

The court of appeals began its analysis with the rule that "[i]nitiating the period of limitation in a medical

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malpractice action when the alleged negligence is first discovered would be contrary to the plain language of [ss 9-3-71](#) and [9-3-73](#)." [\[FN181\]](#) The court then set forth the general rule regarding misdiagnosis cases: "[T]he injury begins immediately upon the misdiagnosis due to the pain, suffering, or economic loss sustained by the patient from the time of the misdiagnosis until the medical problem is properly diagnosed and treated. The misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis." [\[FN182\]](#) According to the court, the fact that a patient does not know the medical cause of the suffering does not affect the applicability of [O.C.G.A. section 9-3-71\(a\)](#). [\[FN183\]](#)

The court apparently disagrees with the exception to the rule which it cites in *Whitaker v. Zirkle*. [\[FN184\]](#) In *Whitaker*, the defendant misdiagnosed the presence of cancer in a mole on the plaintiff, and the plaintiff manifested no additional symptoms for seven years after the initial misdiagnosis. Shortly after symptoms manifested themselves, the cancer was properly diagnosed and metastasis had occurred. [\[FN185\]](#) The court in *Whitaker* held that the injury the plaintiff was alleging was not that the misdiagnosis caused the cancer, but that the cancerous cells subsequently metastasized, and this subsequent metastasis would not have occurred if the cancer had been properly diagnosed and treated at the time of the original biopsy. [\[FN186\]](#) "When an injury occurs subsequent to the date of medical treatment, the statute of limitation commences from the date the injury is discovered." [\[FN187\]](#)

While the court in *Ford* criticized the *Whitaker* decision as a deviation from the plain language of the statute, it decided not to resolve the \*539 discrepancy because it opined that *Whitaker* is factually distinguishable. [\[FN188\]](#) First, the court found that the plaintiff's expert contradicted himself in his affidavit and a deposition. [\[FN189\]](#) The expert stated in his affidavit that the defendant's negligence caused Mr. Dove to die "as a result of a metastasized cancerous left kidney tumor which could have been removed without complications" if a timely diagnosis had been made. [\[FN190\]](#) At a subsequent deposition, the expert admitted that he could not assess the size and extent of the tumor when the misdiagnosis was made, there was no way to assess the size of the cancer in 1989 when Mr. Dove had an abnormal urinalysis, and he did not know if there was any nodal involvement or distant seeding of the tumor at that time. [\[FN191\]](#) The court of appeals found this testimony to contradict the expert's opinion in the affidavit that Mr. Dove's cancer had not metastasized and was curable in March of 1989. [\[FN192\]](#) The court reasoned that under *Whitaker*, there would have to be viable evidence that the tumor had not metastasized at the time of the misdiagnosis. [\[FN193\]](#)

Second, the court distinguished *Whitaker* on the basis of the time lapse between the initial misdiagnosis and the manifestation of further symptoms. [\[FN194\]](#) In *Whitaker*, the plaintiff suffered no further symptoms until nearly seven years after the misdiagnosis. [\[FN195\]](#) In contrast, the court found that the deceased's injury physically manifested itself at least four months prior to the proper diagnosis, which was made on March 9, 1991, placing the date of injury at approximately November of 1990. Since the suit was not filed until March 5, 1993, it was filed more than two years after November of 1990. [\[FN196\]](#) The court decided that the deceased's subjective belief that his pain stemmed from something other than the misdiagnosed kidney cancer did not matter and did not change the date of his injury. [\[FN197\]](#)

Fortunately for the plaintiff in *Staples v. Bhatti*, [\[FN198\]](#) another panel of the court of appeals analyzed a similar issue, but reached a different result. In *Staples*, the plaintiff underwent a mammography on June 1, \*540 1989. *Staples* went for a follow-up with her physician, *Bhatti*, the next day on June 2, 1989, and *Bhatti* told her that she had not received the results of the mammogram. Although *Bhatti* subsequently received the results which indicated the possibility of cancer, she did not inform *Staples* of those results. [\[FN199\]](#) Approximately three years later, in March of 1992, *Staples* discovered a lump in her breast and had another mammogram performed in April of 1992 which revealed a mass located in the same spot as where the calcifications were noted in 1989. *Staples* was forced to undergo a modified radical mastectomy on April 14, 1992. *Staples* brought suit on April 1, 1993. [\[FN200\]](#) The trial court granted the defendant's motion for summary judgment on the grounds that the suit was barred by the two-year statute of limitation of [O.C.G.A. section 9-3-71](#). [\[FN201\]](#)

Unlike the court in *Ford*, the court of appeals in *Staples* held that "the focus of [O.C.G.A. s 9-3-71\(a\)](#) is not on the date of the negligent act but the consequence of the defendant's acts on the plaintiff." [\[FN202\]](#) However, the court proceeded to analyze the facts in much the same manner as the court in *Ford*. The court pointed out that the injury occurred, not on the date of misdiagnosis, but on the date when the small cancer present in 1989 was allowed to grow and spread to *Staples*' lymph node, increasing the risk that the cancer would metastasize and prove fatal to

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Staples. [\[FN203\]](#) Since the precise date could not be pinpointed, the court looked to the date when the plaintiff began experiencing symptoms. Since the suit was filed nearly one year after that date, it was well within the two-year statute of limitations. [\[FN204\]](#)

The flaw in the court's analysis is the failure to take into account the practical reality that patients trust and rely on their physicians. Until a proper diagnosis is made, a patient should be able reasonably to rely on his or her doctor's opinions and will not necessarily seek other diagnoses. Under these decisions, such reliance can be the eventual downfall of the misdiagnosed patient by beginning the running of the statute of limitations well before the patient discovers the correct diagnosis. As a matter of logic and policy, such a result tends to \*541 encourage distrust in personal physicians and fosters the repeated opportunity for injustice by allowing wrongs to go without a remedy.

## VII. Professional Malpractice Affidavit Requirement

The malpractice affidavit requirement of [O.C.G.A. section 9-11-9.1](#) attempts to set forth the proper form and content of an expert affidavit to be attached to any complaint alleging professional malpractice. [\[FN205\]](#) The claim will be dismissed if the requirements of this statute are not met. [\[FN206\]](#) This statute has been fertile ground for litigation.

### A. Forty-five-day Extension for Filing the Affidavit

One of the more disputed issues during this survey period in regard to [O.C.G.A. section 9-11-9.1](#) would seem to be the automatic forty-five-day extension for filing the affidavit when the complaint is filed within ten days of the running of the statute of limitation. [\[FN207\]](#) The case of *Works v. Aupont* [\[FN208\]](#) demonstrates the divisiveness caused by this subsection of the statute. [O.C.G.A. section 9-11-9.1\(b\)](#) provides:

The contemporaneous filing requirement of subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire within ten days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires. [\[FN209\]](#)

The question addressed in *Works* was whether the plaintiff must prove that time constraints prevented the filing of the affidavit with the complaint when the defendant challenges the allegation that time constraints prevented the filing of the affidavit. [\[FN210\]](#) In *Works*, the plaintiff followed the procedures of [O.C.G.A. section 9-11-9.1\(b\)](#): she filed the complaint within ten days of the expiration of the statute of limitations, and she invoked the automatic forty-five-day extension alleging that "the statute of limitations will expire within ten (10) days \*542 of the filing of this complaint and because of such time restraints an expert affidavit concerning the Defendant Doctors could not be prepared for filing with the complaint." [\[FN211\]](#) Five days later, she filed the expert affidavit. The trial court, on the defendants' motion, rejected the plaintiff's allegation that time constraints prevented her from filing the affidavit contemporaneously with the complaint and dismissed the complaint. [\[FN212\]](#) The court of appeals pointed out that the trial court dismissed the plaintiff's complaint "because [it] did not believe plaintiffs' allegation that 'time constraints' prevented compliance" with the statute. [\[FN213\]](#)

The court of appeals reversed, holding that [O.C.G.A. section 9-11-9.1\(b\)](#) unambiguously provides for an automatic forty-five-day extension for filing the affidavit in any case in which the statute of limitations will expire within ten days of the date of filing and, because of time constraints, the plaintiff alleges that an affidavit cannot be prepared. [\[FN214\]](#) The court of appeals stated unequivocally that "[i]f these two conditions are met, it does not matter whether the trial court believes or disbelieves a plaintiff's allegation that 'time constraints' prevented compliance with the contemporaneous filing requirement of [O.C.G.A. s 9-11-9.1\(a\)](#)." [\[FN215\]](#) Only if the plaintiff wishes an extension beyond the forty-five-day period must a hearing be had to determine whether good cause exists for further delay. [\[FN216\]](#)

Chief Judge Beasley's special concurrence points out the rigidity of the statute and the inordinately detailed nature of the exceptions to the rule which rob the judiciary of the ability to tailor general standards in its wisdom and discretion. [\[FN217\]](#) Chief Judge Beasley did not agree with the majority that the plaintiff cannot be called on to

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show the existence of the two requirements for an automatic extension. Chief Judge Beasley acknowledged that such a procedure would invite a "mini-trial," in that the parties and court would go on a fact-finding journey at the outset of the proceedings if the defendants demanded it in order to determine whether the plaintiffs truly could not have the affidavit prepared and on hand to file it with the complaint. [FN218] However, Chief Judge Beasley does distinguish the requirement of a good faith explanation for the \*543 unavailability of the affidavit from the requirement of "good cause" necessary for a further extension. [FN219]

In a dissent, Judge Andrews rather scathingly opines that the majority's construction of the statute renders its provisions meaningless. [FN220] Judge Andrews stated in his dissent that although the statute does mandate an extension when the statutory requisites are met, he "reject[s] the premise that those requisites may be satisfied through deceit." [FN221]

In *Keefe v. Northside Hospital, Inc.*, [FN222] which also involved the forty-five-day extension, the court of appeals restrictively interpreted the issue of whether the plaintiff must expressly allege that because of time constraints the affidavit could not be prepared. [FN223] In *Keefe*, the plaintiffs stated in their complaint that "pursuant to O.C.G.A. s 9-11-9.1, the Plaintiffs are filing this cause of action within ten (10) days of the statute of limitations, and the Plaintiffs by law shall supplement and amend to this Complaint within forty-five (45) days a pertinent affidavit of an expert . . . ." [FN224] Due to this language, the defendant argued that the plaintiff had failed to properly invoke the forty-five-day extension of time under O.C.G.A. section 9-11-9.1(b). The plaintiffs contended, however, that they had put the defendant on notice that they were invoking their automatic right to an extension and had therefore met the requirements of the statute. [FN225]

The court of appeals agreed with the defendants, holding that the allegation of time constraints may not be merely implied, but must be expressly stated. [FN226] Referring to its decision in *Works v. Aupont*, [FN227] the court noted that the language required in the complaint is not mere verbiage, but a representation of a fact which is not subject to challenge by either the defendant or the trial court. [FN228] Because the language of the plaintiff's complaint is conclusively presumed to be true, and the trial court must rely on its truthfulness, the language required by the \*544 statute plays an important role, and the court was compelled to hold that the language must be expressly stated in the complaint. [FN229]

A final issue involving the forty-five-day extension period pertained to the time in which the defendant has to answer the complaint when the plaintiff invokes the forty-five-day extension. The case of *McGarr v. Gilmore* [FN230] involved multiple defendants, including corporate roadway contractors, the Georgia Department of Transportation ("D.O.T."), and employees of the D.O.T. [FN231] The plaintiff alleged that the defendants were negligent in the placement of warning or protective devices, and the plaintiff, in his complaint, invoked the forty-five-day extension to file an expert affidavit. [FN232] After one trip to the court of appeals to determine that the defendants had thirty days after the filing of the expert affidavit in which to file their answers, [FN233] the plaintiff again sought a default judgment against the D.O.T. employees, arguing that evidence acquired after the appeal showed that the employees were not professional engineers, so the forty-five-day extension did not apply to them. [FN234]

The court of appeals squarely rejected this argument. [FN235] The plaintiff's actions in invoking the forty-five-day extension, and in relating the affidavit in general allegations of negligence to all the defendants, automatically gave all defendants the same time period in which to respond to the complaint. [FN236] In essence, it was the plaintiff's fault in not distinguishing between professionals and nonprofessionals in his complaint. The court noted that the plaintiff's dilemma in having to determine at the complaint stage, before discovery, which defendants are "professionals" will only arise when the plaintiff does not file an affidavit contemporaneously with the complaint. [FN237] In the ordinary course of events, where the complaint is filed with more than ten days remaining to the statute of limitation, all defendants will have thirty days from the date of service to answer. [FN238]

#### \*545 B. Collateral Estoppel After Dismissal Based on an Insufficient Affidavit

In last year's survey article, [FN239] the authors of this survey discussed the court of appeals decision in *Greene County Hospital Authority v. Waldroup*, [FN240] holding that a claim for wrongful death would be barred by collateral estoppel if it was asserted after a claim for personal injury, based on the same injuries, was dismissed due

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to the lack of an expert affidavit. [FN241] Shortly after last year's survey period was over, the Georgia Supreme Court reversed this decision of the court of appeals in Waldroup v. Greene County Hospital Authority, [FN242] utilizing the same analysis employed in last year's survey article.

In Waldroup, the plaintiff brought a medical malpractice action for personal injuries against the defendants, but failed to attach sufficient expert affidavits to the complaint. The trial court dismissed the complaint as to the defendant hospital. [FN243] Subsequently, the plaintiff's husband died of his injuries, and the trial court allowed the plaintiff to amend her complaint to re-instate the hospital as a defendant. [FN244] The amended complaint reasserted the personal injury claims and added a new claim for wrongful death. [FN245] The court of appeals held that Waldroup's personal injury claim was barred by res judicata and her wrongful death claim was barred by collateral estoppel. [FN246]

While the supreme court agreed that the plaintiff's personal injury action would be barred by res judicata, [FN247] the court did not agree that the plaintiff's wrongful death action would be barred by collateral estoppel. [FN248] The doctrine of collateral estoppel precludes the litigation of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties. [FN249] Collateral estoppel only \*546 precludes the issues that were actually litigated in the prior action. [FN250] The supreme court held that while a dismissal for failure to comply with the affidavit requirement of O.C.G.A. section 9-11-9.1 is an adjudication on the merits for purposes of res judicata, it is not an actual litigation of an issue for purposes of collateral estoppel. [FN251] The court found that the plaintiff's actions were not actually litigated and decided when her first action was dismissed; the only issue that was decided when the first action was dismissed was that the plaintiff had failed to state a personal injury cause of action due to her failure to satisfy the expert affidavit requirement. [FN252] Even though that ruling was "on the merits," it did not decide or litigate the claims. [FN253]

#### C. Filing of the Expert Affidavit by Facsimile

Roberts v. Faust [FN254] and Allen v. Caldwell [FN255] involve two cases where the expert affidavit was sought to be filed by facsimile. Previously, in Sisk v. Patel, [FN256] the court held that a plaintiff should be allowed to file a facsimile of a properly executed affidavit with a complaint in order to avoid the expiration of the statute of limitations, with the original being filed as a supplemental pleading. [FN257]

In Roberts, the plaintiffs invoked the forty-five day extension for filing an expert affidavit, and they subsequently received two additional extensions from the trial court. [FN258] On the last day of their extension, the plaintiffs filed a facsimile of their expert affidavit. Two weeks later, they filed the original affidavit. The defendant argued that the plaintiffs failed to show that the original was in the physical possession of the plaintiffs before they filed the facsimile. To the contrary, the court of appeals held that an original affidavit does not have to be in the plaintiff's physical possession in order for it to be considered "available." [FN259] The court of appeals determined that the trial court did not err in considering the facsimile of the affidavit or in allowing the plaintiffs to supplement their complaint with the original affidavit. [FN260]

\*547 Allen v. Caldwell [FN261] involved an affidavit sent by facsimile to the plaintiffs' attorney, but which was unnotarized. [FN262] The plaintiffs attached a copy of the unnotarized, faxed affidavit to their renewal complaint in a medical malpractice action.

The absence of a valid notary seal was fatal to the plaintiffs' submitted affidavit. [FN263] "While a facsimile affidavit can satisfy the requirements of O.C.G.A. s 9-11-9.1, . . . 'in the absence of a valid jurat, a writing in the form of an affidavit has no force, no validity, amounts to nothing, when standing alone, or when construed in connection with other evidence.'" [FN264] The court held that this affidavit did not satisfy the statutory requirements. [FN265]

Furthermore, in a five to four decision, the majority of the court held that an affidavit previously filed in the plaintiffs' original action would not suffice to satisfy the affidavit required in the renewal action. [FN266] Even though the renewed complaint incorporated the original pleadings by reference, the majority of the court found that a statement in the renewed complaint that the required affidavit was attached specifically negated the inference that the original affidavit was incorporated by reference. [FN267] The majority also pointed out that the facsimile and

the supposed original of the facsimile differed. [\[FN268\]](#)

The dissent in Allen agreed with the majority that the unnotarized affidavit was not an affidavit within the meaning of [O.C.G.A. section 9-11-9.1](#); however, the dissent would hold that the affidavit requirement was satisfied because there was a proper affidavit in the record informing the defendant of the negligence alleged on his part. [\[FN269\]](#)

In Redmond v. Shook, [\[FN270\]](#) another case involving expert affidavits, the court of appeals held that "[l]ong-distance swearing is not permissible." [\[FN271\]](#) In Redmond, the expert affidavit was signed by the expert in Pennsylvania and notarized by the notary public in Georgia, and the \*548 oath was administered by the notary to the expert over the telephone. [\[FN272\]](#) Citing a case from 1912, the court of appeals held that an oath cannot be administered over the telephone in Georgia. [\[FN273\]](#) Therefore, the plaintiff's expert affidavit was invalid. The court of appeals, in this case, declined to liberally construe the pleadings so as to do substantial justice. [\[FN274\]](#)

In many of these cases, the courts harken back to the words of Sisk v. Patel, [\[FN275\]](#) in a constant plea to the legislature to repeal this ungainly, unworkable, and unforgiving statute: [\[FN276\]](#)

[T]he history of [O.C.G.A. s 9-11-9.1](#) in the appellate courts has shown beyond a reasonable doubt that it is only with great difficulty made workable in the practical arena of litigation, and has largely failed to achieve its purpose of reducing frivolous litigation. Rather, it has created an added layer of motions regarding the sufficiency of affidavits preceding the motions for summary judgment on the merits. Rather than continuing to interpret and reconcile subsection after subsection added to the statute by the legislature in attempts to fix what is fundamentally broken, the better approach is to construe pleadings liberally to do substantial justice in accordance with [O.C.G.A. s 9-11-8\(f\)](#). [\[FN277\]](#)

## VIII. Res Judicata and Collateral Estoppel

The requirements for res judicata and collateral estoppel are fairly well established in Georgia. [O.C.G.A. section 9-12-40](#) provides:

A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside. [\[FN278\]](#)

Three requirements must be met for res judicata to apply: (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) \*549 previous adjudication on the merits by a court of competent jurisdiction. [\[FN279\]](#) Similarly, collateral estoppel requires identity of the parties, but not identity of the claim. For collateral estoppel to apply, the same issue must have been actually litigated and decided in a previous action. [\[FN280\]](#)

### A. Res Judicata

The Georgia Supreme Court decided the case of Stone Man, Inc. v. Green, [\[FN281\]](#) which involved the application of the doctrine of res judicata. The issue was whether an equitable suit in the first action barred a damages suit in a subsequent action. The supreme court held that res judicata applied. [\[FN282\]](#) In their first action for equitable relief, the plaintiffs sought to have the defendant's quarry closed because it constituted a nuisance. The jury found that the quarry was a nuisance, but the trial court granted only a partial injunction in which it imposed certain restrictions on the continued operation of the quarry. [\[FN283\]](#) Subsequently, the plaintiffs brought a second action, but this time for damages resulting from the defendant's operation of his quarry. The defendant moved to dismiss based on res judicata, but the trial court denied the motion. [\[FN284\]](#)

The supreme court held that the difference between a suit in equity and a suit for damages will not preclude the application of res judicata or collateral estoppel if the issues are identical. [\[FN285\]](#) The supreme court found that the trial court's identification of specific aspects of the operation constituting a nuisance and fashioning remedies to address those aspects was a "final judicial determination that operation of the quarry in accordance with the imposed limitations does not constitute an actionable nuisance." [\[FN286\]](#) Therefore, since the issue in both cases was whether the quarry constituted a nuisance, the court found that the litigation of this issue in the second action for damages was barred by res judicata. [\[FN287\]](#) The court did hold, however, that the plaintiffs could \*550 assert a

claim for any violations of the partial injunction or seek a modification of its terms on proof of changed circumstances. [\[FN288\]](#)

The dissent, authored by Justice Sears, took issue with an apparent discrepancy in the majority's opinion. [\[FN289\]](#) Although the majority ruled that the trial court's partial injunction was a final judgment that the operation of the quarry in accordance with the limitations was not a nuisance, the majority went on to hold that the plaintiffs could seek a modification of the injunction on showing a change in condition. [\[FN290\]](#) The dissent pointed out that any modification would have to be predicated on a finding that the quarry continued to be a nuisance, in contradiction to the court's finding of a final judgment that the quarry is no longer a nuisance. [\[FN291\]](#) Justice Sears wrote that, as a matter of policy, it is unwise to give res judicata effect to injunctions such as the one issued by the trial court due to the uncertain nature of whether the injunction will remedy the evil it seeks to redress. [\[FN292\]](#) The dissent further stated that:

[I]f the court knows that such an injunction will be given res judicata effect if the restrictions on the business fail to alleviate the damage, the court may instead issue an injunction closing the business. We should not discourage trial courts from seeking practical, economic solutions to today's difficult problems. [\[FN293\]](#)

#### B. Collateral Estoppel

During the current survey period, several cases of interest occurred in the area of collateral estoppel. [\[FN294\]](#) The question of whether the issues involved in related lawsuits were identical for purposes of collateral estoppel was resolved in *Coleman v. Columns Properties, Inc.* [\[FN295\]](#) and *Winding River Village Condominium Ass'n v. Barnett.* [\[FN296\]](#)

The supreme court reversed the decision of the court of appeals in *Coleman*, holding that the State Board of Workers' Compensation's determination that the plaintiff failed to prove her injury "arose out of and in the course of her employment" in the initial workers' compensation claim was a significantly different issue than whether the plaintiff \*551 was an invitee in the subsequent premises liability action. [\[FN297\]](#) The plaintiff in *Coleman* was employed by the defendant to clean houses under construction by the defendant under the supervision of her husband, who was a construction supervisor for the defendant. The plaintiff was injured on one of the construction sites when she fell while leaving her husband's job site office trailer after picking up her paycheck. [\[FN298\]](#) Ms. Coleman filed a workers' compensation claim, but the Board denied the claim, finding that Coleman did not show that her fall arose out of and in the course of her employment. Thereafter, Coleman and her husband filed a premises liability action against the defendant, alleging that she was an invitee of the defendant. The court of appeals held that the Board's determination that Coleman was not within the scope of her employment meant that Coleman was present at the site either as a licensee or trespasser. [\[FN299\]](#)

Pointing out that an administrative decision can act as an estoppel in a judicial proceeding with the same parties only if the issues are identical, the supreme court held that the issues involved in Coleman's actions were not identical. [\[FN300\]](#) The issue in workers' compensation is the relationship between the injury and the employment; the issue in premises liability is the relationship between the injured individual and the owner of the property. [\[FN301\]](#) Therefore, collateral estoppel did not operate to preclude the plaintiffs' premises liability claims. [\[FN302\]](#)

In *Winding River Village*, [\[FN303\]](#) much like the previously discussed decision in *Waldroup*, the court of appeals looked to the effect of collateral estoppel between a personal injury action and a subsequent wrongful death action. [\[FN304\]](#) The plaintiff's young daughter fell into the defendants' pool, nearly drowned, and sustained brain damage. The child filed a personal injury suit against the defendants, and an arbitration panel awarded damages to the plaintiff. This arbitration award became the judgment of the trial court. [\[FN305\]](#) The child died soon thereafter, and the plaintiff-parent filed a wrongful death action. The defendants moved for summary judgment and also moved to add the \*552 child's mother as a party plaintiff. The trial court initially denied both motions. [\[FN306\]](#)

The defendants argued that recovery in the personal injury action extinguished any right to pursue a wrongful death action. The court disagreed because the damages recoverable in the wrongful death action--the full value of the life of the child and expenses resulting from the death--were not recoverable in the personal injury action. [\[FN307\]](#) Therefore, res judicata did not bar the plaintiff's wrongful death action. [\[FN308\]](#)

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Next, the defendants argued that collateral estoppel could not be used offensively to establish their negligence in the present action, even though the arbitration panel had made an award against them in the prior action. Again, the court of appeals disagreed, stating that the doctrine of collateral estoppel has been asserted successfully by plaintiffs in subsequent litigation. [FN309] "[I]n reaching its decision, the arbitration panel necessarily decided that Perry Realty and Winding River were negligent and their negligence was a proximate cause of the decedent's injuries." [FN310] Under the rule of collateral estoppel, the defendants were precluded from relitigating the issue of their negligence. [FN311]

However, the court did agree with the defendants that the child's mother should be added as a party plaintiff because issues concerning her negligent supervision of the child could be litigated in the present action and were not barred by collateral estoppel. [FN312] In a personal injury action, a parent's negligence cannot be imputed to the child, so the issue of contributory negligence in the first action was not relevant and was not litigated in the prior action. [FN313] But in an action for wrongful death, the parent's contributory negligence is relevant, and the total amount of damages may be reduced due to contributory negligence. [FN314] The court held that collateral estoppel did not preclude the defendants from asserting different defenses in the wrongful death action than they were able to assert in the personal injury action. [FN315]

#### \*553 IX. Default Judgment and Dismissal

Once a case is adjudged to be in default, the only issue remaining to be decided at the default trial is the amount of damages to be recovered by the plaintiff. [FN316] The pertinent statute on default judgments is O.C.G.A. section 9-11-55, which states:

If the case is still in default after the expiration of the period of 15 days, the plaintiff at any time thereafter shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the complaint or other original pleading were supported by proper evidence, without the intervention of a jury, unless the action is one ex delicto or involves unliquidated damages, in which event the plaintiff shall be required to introduce evidence and establish the amount of damages before the court without a jury, with the right of the defendant to introduce evidence as to damages and the right of either to move for a new trial in respect of such damages. [FN317]

Due to the default, the defendant is in the position of having admitted every material allegation contained in the complaint. The Georgia Supreme Court has previously addressed this issue and concluded that, when the defendant's answer and other defensive pleadings are stricken and default judgment is entered, the defendant is "in the position of having admitted each and every material allegation of the plaintiff's complaint except as to any damages alleged. Hence, he is concluded as to his liability, and is estopped to contest the merits of the case." [FN318]

##### A. Default Trial on Damages

The court of appeals had two occasions to address issues involving a trial on damages after default judgment was entered against the defendants. [FN319] In *Magnan v. Miami Aircraft Support*, both sides argued that the trial judge erred in his rulings on what evidence could \*554 be admitted by the defendant in default. The court of appeals first cited the rule that the defendant is prohibited from introducing evidence which goes to the right of recovery, even if the same evidence bears on the assessment of damages. [FN320] The court broke the cause of action down into two components: "(1) the breach of a legal duty which resulted in an injury and which gave rise to a right of recovery by virtue of the default, and (2) the amount of damages." [FN321] The court held that the defendant's default did not result in the admission of any specific amount of damages, and it could contest the issue of damages by "rigid cross-examination" and by the introduction of evidence only as long as it did not touch on the issue of liability. [FN322] The court found that evidence going to the extent and effects of the plaintiffs' exposure to pesticides was properly presented by the defendant. [FN323]

The plaintiffs further argued that the trial court erred in instructing the jury that the "defendant has a right to dispute the damages even to the point of showing their non-existence." [FN324] Since the burden was on the plaintiffs to prove their damages, the court of appeals found that the instruction was a correct statement of law, and

that the defendant was allowed to contest whether the plaintiffs had met their burden of showing any damages. [\[FN325\]](#)

On its part, the defendant sought to introduce evidence of other employees who were exposed to the pesticide but did not suffer injuries. The court of appeals held that since the fact of injury was admitted by the default, this evidence should be excluded. [\[FN326\]](#) This holding comports with the well-established rule that the defendant is precluded from introducing evidence as to damages if that same evidence touches on the right of recovery. [\[FN327\]](#)

Daniel v. Causey [\[FN328\]](#) is the flip side of Magnan, but in Daniel, the defendants sought to exclude evidence going to liability. [\[FN329\]](#) Daniel is a medical malpractice case in which the defendants went into default. During the jury trial on damages, the trial court allowed the plaintiffs to introduce evidence as to what the doctor did. The defendants argued \*555 that this evidence was relevant to liability rather than damages and therefore should not be allowed. The court of appeals distinguished this situation, however, pointing out that the issue of punitive damages was before the jury. [\[FN330\]](#) The court held that when punitive damages are involved, evidence of the defendant's conduct is both relevant and necessary to the issue of the amount of damages necessary to punish and deter that conduct. [\[FN331\]](#)

These results make sense. In a default situation, it is the defendant's own omission or conduct which has created the predicament. If the courts were to allow the defendant to introduce evidence tending to negate liability, then it would get the same trial that it would have received if it had not caused a default. Similarly, the defendant should not be allowed to hide evidence of his or her wrongful conduct when punitive damages are involved by going into default.

#### B. Default Judgment for Failure to Respond to Discovery

One significant case in the area of default judgments involves the use of default judgment as a sanction for discovery abuse. [\[FN332\]](#) [O.C.G.A. section 9-11-37\(b\)](#) allows the sanction of default when a party fails to obey or comply with an order to provide or permit discovery. [\[FN333\]](#) In *Didio v. Chess*, [\[FN334\]](#) the defendant failed to respond to interrogatories propounded by the plaintiff. The plaintiff mailed him a letter requesting the responses by an extended date, but the defendant again failed to respond. After a motion to compel and a discovery order directing the defendant to answer the interrogatories within twenty days of receipt of the order, the defendant still did not meet his deadline. [\[FN335\]](#) On the plaintiff's motion, the trial court found the defendant in contempt and struck his answer. [\[FN336\]](#)

The court of appeals affirmed, finding that the defendant willfully and consciously disregarded the discovery order. [\[FN337\]](#) Importantly, the court of appeals held that the entire time from service of discovery to service of answers to discovery is to be taken into account in determining whether a party acted with conscious indifference to the consequences \*556 of failure to comply with the discovery order. [\[FN338\]](#) What transpires between the time the order compelling discovery is propounded and the deadline set by the order is important, but this holding by the court of appeals recognizes the games played and delaying tactics employed by parties before the order compelling discovery is entered and takes those into account in deciding whether a party is willfully or consciously disregarding a court order. In fact, in further recognition of these tactics, the court specifically rejected the defendant's contention that the responses he provided after the plaintiff filed a motion for contempt precluded the default sanction. [\[FN339\]](#) This stance taken by the court serves to enforce the trial courts' power to enforce their orders in the face of disobedience to the laws and to their orders.

#### C. Dismissal as a Remedy for Spoliation of Evidence

On a related issue, the court of appeals, in *Chapman v. Auto Owners Insurance Co.*, [\[FN340\]](#) approved the sanction of dismissing a party's case or preventing a party's expert from testifying when that party engages in spoliation of evidence. [\[FN341\]](#) In *Chapman*, the court was called on to answer the question of "whether the trial court's only means to address the destruction of evidence was to charge the jury that spoliation of evidence raises a rebuttable presumption against the spoliator." [\[FN342\]](#) This was an issue of first impression for the Georgia appellate courts, and the court looked to other jurisdictions for analysis of the problem. [\[FN343\]](#)

The facts of Chapman are as follows: In late January, 1992, a fire occurred at a store which was insured by the plaintiff, Auto Owners Insurance Company ("Auto Owners"). The defendant's (Chapman Electrical) employees had been working at the store. The plaintiff hired a consultant, ATS, to investigate the cause of the fire, and the ATS employee removed wires, circuit breakers, and other electrical parts from the store for testing. Shortly thereafter, the defendant's insurer contacted ATS requesting inspection of the items removed, but this did not take place. [\[FN344\]](#) ATS concluded on March 9, 1992, that the fire was caused by the negligence of one of the defendant's employees in cutting into a live circuit. On April 5, 1993, the plaintiff filed the action, and \*557 ten days later ATS destroyed the wiring, circuit breakers, and other items it had removed for the plaintiff. [\[FN345\]](#)

The defendant moved for dismissal or for preclusion of the testimony of the plaintiff's expert concerning the destroyed evidence. The trial court held that under Georgia law, its only option was to give a jury instruction on the negative presumption created when evidence is spoliated. [\[FN346\]](#) The court of appeals also found no Georgia cases which address any other remedy for destruction of evidence. [\[FN347\]](#) Therefore, the court looked to the law of other jurisdictions which have upheld the exclusion of testimony about the destroyed evidence. [\[FN348\]](#) Looking to a decision of the Ninth Circuit Court of Appeals, [\[FN349\]](#) the court was persuaded that a jury charge is insufficient to counter the prejudice resulting to a party who is unable to put on a full argument or defense because of the destruction of evidence. [\[FN350\]](#)

The court of appeals was also persuaded that this remedy is predicated on the trial court's inherent power and discretion to control the course of the case, to make evidentiary rulings conducive to a fair and orderly trial, and to exclude relevant evidence if its prejudice outweighs its probative value. [\[FN351\]](#) The court was not inclined to agree with the plaintiff's argument that photographs were an adequate substitute for the destroyed evidence. Relying on a Massachusetts case, the court noted that the "physical items themselves, in the precise condition they were in immediately after the incident, would be far more useful and persuasive to the jury than photographs." [\[FN352\]](#)

The court in Chapman took note of five factors delineated in Northern Assurance Co. v. Ware [\[FN353\]](#) for assistance in deciding whether to exclude testimony about the destroyed evidence:

(1) whether the [adverse party] was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the [party destroying the evidence] acted in good or bad faith; and (5) the \*558 potential for abuse if expert testimony about the evidence was not excluded. [\[FN354\]](#)

Furthermore, the court also noted that in Ware, the district court stated that the sanction of dismissal should be reserved for cases where a party has maliciously destroyed relevant evidence with the purpose of precluding another party from examining it. [\[FN355\]](#)

The court's holding is imminently reasonable, provided that it is applied to either party--plaintiff or defendant--whenever spoliation of evidence occurs. The court's holding does not limit the rule to one party or the other. The court simply finds that in certain circumstances, "allowing the case to proceed or an expert to testify about destroyed evidence which the opposing party is unable to test may result in trial by ambush which cannot be cured by a jury instruction." [\[FN356\]](#)

The trial courts now have at least three options upon spoliation of the evidence: a curative jury instruction, preclusion of an expert from testifying about the evidence, or dismissal. Thus the remedies which the court of appeals adopts is largely a matter for the trial court's discretion.

## X. Discovery Practice

Of practical importance to trial lawyers in Georgia is the Georgia General Assembly's amendment to [O.C.G.A. section 9-11-30\(b\)\(4\)](#) which governs the recording of depositions on oral examination. [\[FN357\]](#) The former code section required a party to obtain an order from the court in order to videotape a deposition. [\[FN358\]](#) However, effective July 1, 1996, a deposition may be videotaped at the option of either party, unless the court orders otherwise. [\[FN359\]](#)

Other than cases previously cited in this article concerning discovery, there were few cases concerning novel discovery issues during this survey period. Only two issues decided by the court of appeals are notable.

Surprisingly, the court of appeals decided a discovery dispute by granting interlocutory appeal to the defendant in the case of *Copher v. Mackey*. [FN360] In this case, the plaintiff served on the defendant three different sets of interrogatories, and no set of interrogatories totalled over fifty, including subparts. But together, the sets totalled eighty-one, \*559 including subparts. The defendant sought a protective order as to the third set, which the trial court denied by concluding that the fifty interrogatory limit of O.C.G.A. section 9-11-33 is a "per set" limit and not a cumulative limit. [FN361]

The court of appeals disagreed with the trial court after a lengthy analysis of the statute's history and purpose. After "considering the evolution" of the statute, the court of appeals held that a party may not serve a cumulative total of more than fifty interrogatories. [FN362] However, the court did note that the statute provides for serving more than fifty interrogatories by leave of the trial court. [FN363]

Next, the case of *Sturgill v. Garrison* [FN364] involved the work product protection afforded to statements given by a party to its insurer in anticipation of litigation. In this case, the plaintiff gave a recorded statement to an independent investigator hired by her insurer to investigate the automobile wreck. The defendant served the investigator with a request for production of documents in order to obtain the statement. The plaintiff objected on the basis of the work product protection. Though the defendant did not contest the plaintiff's objection, he subpoenaed the investigator for a deposition. The plaintiff therefore sought a protective order to prevent the deposition, but the trial court denied the protective order. [FN365]

The defendant's argument that the deposition should be allowed was not well taken. He argued that O.C.G.A. section 9-11-26(b)(3) was not applicable because that section deals with the discovery of documents and tangible things. [FN366] The words of O.C.G.A. section 9-11-26(b)(3) do technically refer to documents and tangible things. [FN367] However, the court correctly observed that a party who is not entitled to obtain a copy of a plaintiff's statement to her insurer because that party cannot demonstrate substantial need or undue hardship is certainly not entitled to require production of the statement at a deposition, nor is he entitled to require the investigator to testify as to the content of the statement. [FN368] The court held that the showing of substantial need and undue hardship contained in O.C.G.A. section 9-11-26(b)(3) applies \*560 equally to situations where a party seeks to obtain the equivalent of trial preparation materials through a deposition. [FN369]

## XI. Voir Dire of Jury

### A. Qualifying the Jury as to Relationships with Insurance Companies Involved

Perhaps two of the most important cases decided during the survey period were *Byrd v. Daus* [FN370] and *Strickland v. Stubbs*. [FN371] Decided within days of each other by two separate panels of the court of appeals, these cases involved the issue of whether the trial court must qualify the jury with respect to their relationships with, or financial interests in, the interested insurance companies to the action when requested by the plaintiff. This issue continues to surface time and again, but the court has remained steadfast in requiring the judge to qualify the jury on this matter. [FN372]

In *Byrd*, a medical malpractice action, the trial court refused the plaintiffs' request to qualify prospective jurors regarding any relationships they may have with MAG Mutual Insurance Company, the defendant's insurer. [FN373] The trial court failed to specifically ask whether the panel had an interest in MAG Mutual Insurance Company and asked only if anyone on the jury panel had a financial interest in the case. [FN374] The trial court then further reviewed jury questionnaires to determine if anyone on the panel was a doctor. [FN375]

The court of appeals acknowledged it was constrained to follow the rule long propounded by the supreme court. [FN376] The failure to qualify \*561 the jury as to this matter, once requested by the plaintiff, creates a presumption of harmful error which requires the grant of a new trial. [FN377] The court pointed out that the fact that no one on the jury panel was a doctor, as revealed by the jury questionnaire, did not eliminate the possibility that a member of the panel could have a financial interest in the insurance company. [FN378] The court stated that "even if there

were no doctors on the panel itself, any member of one of their immediate families may be a doctor or an employee of the company, both of which could create a financial interest in the company such that its disclosure was mandatory." [\[FN379\]](#) The court thus held that the trial court erred in not qualifying the jury panel with regard to MAG Mutual Insurance Company and reversed. [\[FN380\]](#)

Likewise, in *Strickland*, the court of appeals upheld the trial court's duty to qualify prospective jurors as to relationships they may have with any insurance carrier having a financial interest in the outcome of the case. [\[FN381\]](#)

Chief Judge Beasley appears to be the main proponent of changing this long-standing precedent and has authored several special concurrences in support of her position that jurors should not be qualified during voir dire as to their potential relationship with the interested insurance company. [\[FN382\]](#) Her seminal concurrence came in *Franklin v. Tackett*, [\[FN383\]](#) where Chief Judge Beasley (then Presiding Judge) explored the evolution of the current rule. Chief Judge Beasley's theory is that a juror would not be biased by having a relationship with the interested insurance company if that juror did not know that any insurance company was involved, or did not know which insurance company may be involved. [\[FN384\]](#) Therefore, according to Chief Judge Beasley, the jurors should not be told that an insurance company is involved through voir dire, in order to essentially keep the jurors innocent of this fact. [\[FN385\]](#)

\*562 Chief Judge Beasley's reasoning is based upon the collateral source rule that generally, liability insurance is not admissible in evidence, and unnecessary disclosure of the fact is ground for a mistrial or reversal. [\[FN386\]](#) The court of appeals has held that this collateral source rule does not change the long-standing rule regarding qualification of jurors. [\[FN387\]](#)

The collateral source rule stems from the fact that irrelevant evidence should be excluded. Since collateral source evidence is irrelevant to the issues of liability and damages, it is excluded. However, there are instances when collateral source evidence can be relevant and thus admissible, such as when used to impeach testimony. [\[FN388\]](#) If, during the middle of a trial, collateral source evidence is introduced and the jurors have not been qualified to reveal their biases, a mistrial will result, causing loss of time, money, and judicial resources.

Furthermore, there is no way, in reality, to fully qualify the jury through the use of the question of whether any of the panel is connected in any way to anyone or to any company which has a financial interest in the outcome of the case, as suggested by Chief Judge Beasley, or to simply find out their employment and stock ownership. Again, Chief Judge Beasley's theory is that if the juror is innocent of the fact that he or she has such a connection, there can be no bias. However, this argument is flawed, as innocence can be quickly lost, and a juror could find himself or herself in the position of becoming biased during the trial if insurance were to become an issue.

To take this theory to the extreme, the most perfect, unbiased juror would be one that did not know the identities of the parties to the case, did not know the judge's identity, did not know the identities of any of the witnesses, and did not know the identities of the other jurors. Such a trial would need to be conducted by placing bags over everyone's heads. There would not even be the need for voir dire of the jurors. Obviously, such an example is impractical and serves only the point of illustrating the importance of qualifying the jurors as to their potential \*563 biases. As Chief Judge Beasley pointed out in her concurrence to *Franklin*, "an impartial jury is the corner-stone of the fairness of trial by jury." [\[FN389\]](#)

#### B. Excusing for Cause a Juror who has an Ongoing Relationship With a Defendant Doctor

A final case of significance is *Baxter v. Cohen*, [\[FN390\]](#) in which the issue to be decided was whether the trial court erred in refusing to excuse one of the defendant doctor's current patients from the jury. During voir dire, one of the potential jurors revealed that both she and her husband were current patients of the defendant doctor and had been for ten years. She had also acknowledged that she was not sure that she could be fair and that it would probably be tougher to prove to her that the defendant had done anything wrong. However, defense counsel coaxed a response from the juror who finally indicated that she would listen to the evidence and apply the law as the judge instructed. [\[FN391\]](#)

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The court noted the longstanding rule that "[j]urors should come to the consideration of a case . . . free from even a suspicion of prejudgement or fixed opinion." [FN392] The Baxter decision further indicates, based on Luke v. Suber, [FN393] that "the better practice would be to eliminate defendant's former patients (and their spouses) from the panel of potential jurors if possible." [FN394] After examining the treatment of this issue in other states, the court adopted the view that while a more liberal exclusion of jurors for cause may eliminate some jurors unnecessarily, in the interest of fairness, "if error is to be committed, let it be in favor of the absolute impartiality and purity of the jurors." [FN395]

The court of appeals concluded, based on the facts in Baxter, that the relationship of a current patient to his or her doctor is so close that fairness requires that the juror be discharged where that doctor is a \*564 defendant in a medical malpractice case. [FN396] The court found that to expect a patient in this type of relationship of trust and confidence to be objective in determining whether or not the doctor was negligent "simply ignores reality and human nature." [FN397] Finally, the court of appeals stated emphatically that "a court's refusal to excuse a current patient for cause not only is unfair, . . . but makes a mockery of our judicial system in the eyes of the public." [FN398] The court of appeals found this clear-cut rule to be preferable to a rule only creating a rebuttable presumption; it is easier to apply and promotes fairness. [FN399]

## XII. Conclusion

This survey is neither exhaustive nor all inclusive due to the number of reported decisions. The authors hope that the discussion of the highlighted decisions will be useful to readers of this survey.

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[FN1]. [O.C.G.A. s 9-11-9.1 \(1993\)](#).

[FN2]. [218 Ga. App. 1, 460 S.E.2d 94 \(1995\)](#).

[FN3]. [Id. at 1, 460 S.E.2d at 95](#).

[FN4]. [Id.](#)

[FN5]. [Id. at 3, 460 S.E.2d at 96](#).

[FN6]. [Id. at 2, 460 S.E.2d at 96](#).

[FN7]. [Id. at 2 n.2., 460 S.E.2d at 95 n.2.](#)

[FN8]. [Id. at 6, 460 S.E.2d at 99](#) (McMurray, P.J., dissenting).

[FN9]. [O.C.G.A. s 9-10-90 \(1982\)](#).

[FN10]. [218 Ga. App. at 2, 460 S.E.2d at 95.](#)

[FN11]. [Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.9 \(1984\).](#)

[FN12]. See [O.C.G.A. s 9-10-90.](#)

[FN13]. Id.

[FN14]. [Pratt & Whitney Canada, Inc., 218 Ga. App. at 3, 460 S.E.2d at 96.](#)

[FN15]. [Id. at 7, 460 S.E.2d at 99](#) (McMurray, P.J., dissenting) (citing [Helicopteros, 466 U.S. at 414 n.9](#)).

[FN16]. [217 Ga. App. 845, 459 S.E.2d 187 \(1995\).](#)

[FN17]. [220 Ga. App. 373, 469 S.E.2d 683 \(1996\).](#)

[FN18]. [Hoesch America, Inc., 217 Ga. App. at 845, 459 S.E.2d at 188-89; B & D Fabricators, 220 Ga. App. at 373, 469 S.E.2d at 684-85.](#)

[FN19]. [Hoesch America, Inc., 217 Ga. App. at 846, 459 S.E.2d at 189](#) (quoting [Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694, 706 \(1982\)](#)). See also [Baldwin v. Iowa State, Assoc., 283 U.S. 522, 525 \(1931\)](#).

[FN20]. [O.C.G.A. s 9-11-60 \(1993\).](#)

[FN21]. [Hoesch America, Inc., 217 Ga. App. at 847, 459 S.E.2d at 189.](#)

[FN22]. [Id. at 848, 459 S.E.2d at 187.](#)

[FN23]. See [O.C.G.A. s 9-11-12\(h\)](#) (allowing defense of lack of personal jurisdiction in answer defending on merits).

[FN24]. [B & D Fabricators, 220 Ga. App. at 374, 469 S.E.2d at 685.](#)

[FN25]. Id.

[FN26]. Id.

[FN27]. Id. (emphasis added).

[FN28]. [218 Ga. App. 149, 460 S.E.2d 516 \(1995\).](#)

[FN29]. [Id. at 149, 460 S.E.2d at 518.](#)

[FN30]. Id.

[FN31]. Id.

[FN32]. See [O.C.G.A. s 9-11-56.](#)

[FN33]. [220 Ga. App. 550, 470 S.E.2d 236 \(1996\).](#)

[FN34]. [Id. at 551, 470 S.E.2d at 237.](#) See [Flint v. Gust, 180 Ga. App. 904, 351 S.E.2d 95 \(1986\)](#); [Gust v. Flint, 257 Ga. 129, 356 S.E.2d 503 \(1987\)](#); [Smith v. Air Ambulance Network, 207 Ga. App. 75, 427 S.E.2d 305 \(1993\)](#); [A.A.A. v. Lindburg, 172 Ga. App. 753, 324 S.E.2d 480 \(1984\)](#).

[FN35]. [220 Ga. App. at 552, 470 S.E.2d at 237](#) (citing *Gust*, 257 Ga. at 130, 356 S.E.2d at 504).

[FN36]. [Georgia Farm Bureau Mutual Ins. Co. v. Kilgore](#), 265 Ga. 836, 836, 462 S.E.2d 713, 714 (1995).

[FN37]. *Id.*

[FN38]. *Id.*

[FN39]. *Id.*

[FN40]. *Id.*

[FN41]. *Id.*

[FN42]. *Id.*

[FN43]. *Id.*

[FN44]. [O.C.G.A. s 33-7-11 \(d\) \(Supp. 1996\)](#).

[FN45]. [265 Ga. at 837, 462 S.E.2d at 714](#). "If the timely filing of the pleadings is followed by timely service perfected as authorized by law, the subsequent service will relate back to the initial filing even though the statute of limitations has run in the interim." *Id.*

[FN46]. [265 Ga. at 837, 462 S.E.2d at 714-15](#).

[FN47]. *Id.*, 462 S.E.2d at 715 (citing *Childs v. Catlin*, 134 Ga. App. 778, 782, 216 S.E.2d 360 (1975)).

[FN48]. *Id.*, 462 S.E.2d at 715.

[FN49]. *Id.* at 838, 462 S.E.2d at 715. Justice Fletcher, in a special concurrence, opined that diligence in service should be measured from the date of the filing of the complaint, and that the majority's new rule relieves the plaintiff of the responsibility to promptly initiate service after filing the complaint. [265 Ga. at 838, 462 S.E.2d at 715](#) (Fletcher, P.J., concurring specially).

[FN50]. See [O.C.G.A. s 9-2-61 \(Supp. 1996\)](#) (renewal statute).

[FN51]. [Ludi v. Van Metre](#), 221 Ga. App. 479, 471 S.E.2d 913 (1996).

[FN52]. *Id.* at 480, 471 S.E.2d at 914.

[FN53]. *Id.*, 471 S.E.2d at 914-15.

[FN54]. *Id.*, S.E.2d at 915.

[FN55]. *Id.* at 481, 471 S.E.2d at 915 (quoting *Finch v. Weaver*, 213 Ga. App. 514, 515, 445 S.E.2d 289 (1994)).

[FN56]. *Id.* at 482, 471 S.E.2d at 915.

[FN57]. *Id.*, 471 S.E.2d at 916.

[FN58]. [220 Ga. App. 47, 467 S.E.2d 230 \(1996\)](#).

[FN59]. *Id.* at 48, 467 S.E.2d at 232.

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[FN60]. [Id. at 47, 467 S.E.2d at 231.](#) See [O.C.G.A. s 9-11-4\(d\)\(3\) \(1993\)](#) (service on a minor).

[FN61]. [220 Ga. App. at 48, 467 S.E.2d at 231.](#)

[FN62]. [O.C.G.A. s 9-11-4\(d\)\(3\).](#)

[FN63]. [220 Ga. App. at 48, 467 S.E.2d at 231.](#)

[FN64]. [O.C.G.A. s 32-2-5\(b\) \(1996\).](#)

[FN65]. [219 Ga. App. 738, 466 S.E.2d 273 \(1995\).](#)

[FN66]. [O.C.G.A. s 32-2-5\(b\) \(1996\).](#)

[FN67]. [219 Ga. App. at 738, 466 S.E.2d at 274.](#)

[FN68]. [Id.](#)

[FN69]. [Id. at 739, 466 S.E.2d at 274.](#)

[FN70]. [Id.](#)

[FN71]. [Id.](#) See [O.C.G.A. ss 9-10-72](#) and [9-11-4\(c\).](#)

[FN72]. [Stamps v. Bank South, N.A., 221 Ga. App. 406, 471 S.E.2d 323 \(1996\).](#)

[FN73]. [Id.](#)

[FN74]. [Id. at 406, 407, 471 S.E.2d at 324-25.](#)

[FN75]. [Id. at 407, 471 S.E.2d at 325.](#)

[FN76]. [Id. at 409, 471 S.E.2d at 326.](#)

[FN77]. [Id.](#)

[FN78]. [Id.](#)

[FN79]. [Id.](#)

[FN80]. [Id.](#)

[FN81]. [Id.](#) See [O.C.G.A. s 9-11-4 \(1993\).](#)

[FN82]. [206 Ga. App. 785, 426 S.E.2d 611 \(1992\).](#)

[FN83]. [217 Ga. App. 674, 458 S.E.2d 701 \(1995\).](#)

[FN84]. [Id. at 675, 458 S.E.2d at 701.](#)

[FN85]. [Id.](#) (quoting [Ross v. Battle, 117 Ga. 877, 880, 45 S.E. 252 \(1903\)](#)) (emphasis in original).

[FN86]. See [Southeastern Truck Lines v. Rann, 214 Ga. 813, 815, 108 S.E.2d 561, 563 \(1959\).](#)

[FN87]. See [Motor Convoy v. Brannen, 194 Ga. App. 795, 391 S.E.2d 671, aff'd 260 Ga. 340, 393 S.E.2d 262](#)

[\(1990\).](#)

[\[FN88\]. 206 Ga. App. 785, 426 S.E.2d 611 \(1992\).](#)

[\[FN89\]. Id. at 790, 426 S.E.2d at 616.](#)

[\[FN90\]. Collip, 217 Ga. App. at 674-75, 458 S.E.2d at 701.](#)

[\[FN91\]. Id. at 676, 458 S.E.2d at 702.](#)

[\[FN92\]. Id.](#)

[\[FN93\]. Id.](#)

[\[FN94\]. Id.](#)

[\[FN95\]. 220 Ga. App. 638, 469 S.E.2d 537 \(1996\).](#)

[\[FN96\]. Id. at 639, 469 S.E.2d at 539.](#)

[\[FN97\]. Id. at 638, 469 S.E.2d at 538.](#)

[\[FN98\]. Id.](#)

[\[FN99\]. Id.](#)

[\[FN100\]. Id. at 638-39, 469 S.E.2d at 538.](#)

[\[FN101\]. Id. at 638, 469 S.E.2d at 538.](#) "Under the rule of lex fori, procedural or remedial questions are governed by the law of the forum, the state in which the action is brought." Id. (quoting [Lloyd v. Prudential Sec.](#), 211 Ga. App. 247, 248, 438 S.E.2d 703, 704 (1993)).

[\[FN102\]. Id. at 638-39, 469 S.E.2d at 538.](#)

[\[FN103\]. Id. \(citing \[Lloyd\]\(#\), 211 Ga. App. at 248, 438 S.E.2d at 704\).](#)

[\[FN104\]. Id. at 639, 469 S.E.2d at 538-39.](#)

[\[FN105\]. Id.](#) Plaintiff relied on [Fidelity Co. of Maryland v. Gainesville Iron Works](#), 125 Ga. App. 829, 189 S.E.2d 130 (1972) and [Cartridge Rental Network v. Video Entertainment](#), 132 Ga. App. 748, 209 S.E.2d 132 (1974). Id.

[\[FN106\]. \[Brinson\]\(#\), 229 Ga. App. at 639, 469 S.E.2d at 538-39.](#)

[\[FN107\]. Id. \(quoting \[Harry S. Peterson Co. v. National Union Co.\]\(#\), 209 Ga. App. 585, 434 S.E.2d 778 \(1993\)\).](#)

[\[FN108\]. Id.](#), 469 S.E.2d at 539. The court held that the record did not support Brinson's arguments that he had no notice of the clause or that there was manifest disparity of bargaining positions. Id.

[\[FN109\]. Id. \(citing \[Stephens v. Entre Computer Ctrs.\]\(#\), 696 F. Supp. 636, 638-40 \(N.D. Ga. 1988\)\).](#)

[\[FN110\]. Id. at 640, 469 S.E.2d at 539-40.](#)

[\[FN111\]. Id. at 641, 469 S.E.2d at 540.](#)

[\[FN112\]. Id.](#)

[FN113]. [C.W. Matthews Contracting Co., Inc. v. Barnett](#), 219 Ga. App. 763, 466 S.E.2d 657 (1996).

[FN114]. [Id.](#) at 764, 466 S.E.2d at 658.

[FN115]. [Id.](#) at 763, 466 S.E.2d at 657.

[FN116]. [Id.](#) at 764, 466 S.E.2d at 658. See [Ga. Const. art. VI, s II, para. IV](#) (allowing an action to be maintained against joint tortfeasors who reside in different counties of Georgia in the county of residence of either).

[FN117]. [O.C.G.A. s 32-2-5\(b\)](#) (1996).

[FN118]. [C.W. Matthews Contracting Co.](#), 219 Ga. App. at 764, 466 S.E.2d at 658.

[FN119]. [218 Ga. 305, 307, 127 S.E.2d 454, 456](#) (1962).

[FN120]. [219 Ga. App. at 764, 466 S.E.2d at 658.](#)

[FN121]. [Peters v. Hospital Auth. of Elbert County](#), 265 Ga. 487, 458 S.E.2d 628 (1995), and [Hitachi Chem. Electro-Products, Inc. v. Gurley](#), 219 Ga. App. 675, 466 S.E.2d 867 (1995).

[FN122]. [Maddox v. Wilson](#), 219 Ga. App. 158, 159, 464 S.E.2d 226, 228 (1995) ("A deceased person cannot be a party to legal proceedings."). In this case, a substitution of parties was not made after a suggestion of death. [Id.](#)

[FN123]. [Peters](#), 265 Ga. at 488, 458 S.E.2d at 630. [O.C.G.A. s 51-1-9](#) states, "Every person may recover for torts committed to himself, his wife, his child, his ward, or his servant."

[FN124]. [265 Ga. 487, 487, 458 S.E.2d 628, 629](#) (1995).

[FN125]. [Id.](#)

[FN126]. [Id.](#) at 488, 458 S.E.2d at 629.

[FN127]. [Id.](#) (citing [Porter v. Lassiter](#), 91 Ga. App. 712, 87 S.E.2d 100 (1995) and [Shirley v. Bacon](#), 154 Ga. App. 203, 267 S.E.2d 809 (1980)).

[FN128]. [O.C.G.A. s 51-1-9](#) (1982).

[FN129]. [Peters](#), 265 Ga. at 488, 458 S.E.2d at 629.

[FN130]. [Id.](#), 458 S.E.2d at 629-30.

[FN131]. [Id.](#), 458 S.E.2d at 630.

[FN132]. [219 Ga. App. 675, 466 S.E.2d 867](#) (1995).

[FN133]. [Id.](#) at 676, 466 S.E.2d 868 (citing [Peters](#), 265 Ga. 487, 458 S.E.2d 628 (1995)).

[FN134]. See [McAuley v. Wills](#), 251 Ga. 3, 303 S.E.2d 258 (1983).

[FN135]. [Hitachi Chem. Electro-Products, Inc.](#), 219 Ga. App. at 677, 466 S.E.2d at 868.

[FN136]. [Id.](#) The court also held that the children's claims were not barred by the exclusive remedy provision of the Workers' Compensation Act because their claims are not derivative of any claims that could be asserted by their parents. [Id.](#), 466 S.E.2d at 869.

[\[FN137\]. 221 Ga. App. 513, 471 S.E.2d 922 \(1996\).](#)

[\[FN138\]. O.C.G.A. s 34-9-11.1 \(1992 & Supp. 1996\)](#)

[\[FN139\]. AC Corp., 221 Ga. App. at 514, 471 S.E.2d at 924.](#)

[\[FN140\]. O.C.G.A. s 9-11-24\(a\) \(1993\).](#)

[\[FN141\]. 221 Ga. App. at 514, 471 S.E.2d at 924.](#)

[\[FN142\]. Id.](#)

[\[FN143\]. Id.](#)

[\[FN144\]. Id. at 515, 471 S.E.2d at 924 \(citing \[Gregory v. Allstate Ins. Co.\]\(#\), 124 Ga. App. 461, 214 S.E.2d 696 \(1975\) and \[Department of Admin. Servs. v. Brown\]\(#\), 219 Ga. App. 27, 464 S.E.2d 7 \(1995\)\).](#)

[\[FN145\]. AC Corp., 221 Ga. App. at 515-16, 471 S.E.2d at 925.](#)

[\[FN146\]. Id.](#)

[\[FN147\]. O.C.G.A. s 34-9-11.1 \(1992 & Supp. 1996\)](#)

[\[FN148\]. Id.](#)

[\[FN149\]. \[Vaughn v. Vulcan Materials Co.\]\(#\), 266 Ga. 163, 465 S.E.2d 661 \(1996\).](#)

[\[FN150\]. Id. at 163, 465 S.E.2d at 661.](#)

[\[FN151\]. Id. at 163-64, 465 S.E.2d at 661.](#)

[\[FN152\]. Id. at 164, 465 S.E.2d at 662. See \[O.C.G.A. s 34-9-11.1\\(e\\)\]\(#\).](#)

[\[FN153\]. \[Vaughn\]\(#\), 266 Ga. at 164, 465 S.E.2d at 662.](#)

[\[FN154\]. Id.](#)

[\[FN155\]. Id. \(citing \[City of Valdosta v. Singleton\]\(#\), 197 Ga. 194, 208, 28 S.E.2d 759 \(1944\)\).](#)

[\[FN156\]. Id. \(citing \[Canton Textile Mills v. Lathem\]\(#\), 253 Ga. 102, 105, 317 S.E.2d 198 \(1994\)\).](#)

[\[FN157\]. \[Moore v. Savannah Cocoa, Inc.\]\(#\), 217 Ga. App. 869, 459 S.E.2d 580 \(1995\); \[Draughn v. Delta Airlines, Inc.\]\(#\), 218 Ga. App. 540, 462 S.E.2d 445 \(1995\); \[Conner v. Greene\]\(#\), 219 Ga. App. 860, 467 S.E.2d 199 \(1996\); \[Wilson v. Christian\]\(#\), 220 Ga. App. 221, 469 S.E.2d 362 \(1996\); and \[Dowdy v. Earthwise Restaurant Mgmt., Inc.\]\(#\), 221 Ga. App. 220, 471 S.E.2d 42 \(1996\).](#)

[\[FN158\]. See \[Moore v. Savannah Cocoa, Inc.\]\(#\), 217 Ga. App. 869, 459 S.E.2d 580 \(1995\); \[Wilson v. Christian\]\(#\), 220 Ga. App. 221, 469 S.E.2d 362 \(1996\); and \[Dowdy v. Earthwise Restaurant Mgmt., Inc.\]\(#\), 221 Ga. App. 220, 471 S.E.2d 42 \(1996\).](#)

[\[FN159\]. 217 Ga. App. 869, 459 S.E.2d 580 \(1995\).](#)

[\[FN160\]. Id. at 871, 459 S.E.2d at 582.](#)

[\[FN161\]. Id. at 870-71, 459 S.E.2d at 582.](#)

[\[FN162\]. Id. at 871, 459 S.E.2d at 582 \(quoting \*Canton Textile Mills v. Lathem\*, 253 Ga. 102, 105, 317 S.E.2d 189 \(1984\)\).](#)

[\[FN163\]. \*Moore\*, 217 Ga. App. at 871, 459 S.E.2d at 582.](#) The court pointed out the irony of the defendant claiming a vested right in the assignment when the employer and insurer, the actual assignees, did not even assert the claim. [Id. at 871 n.1, 459 S.E.2d at 582 n.1.](#)

[\[FN164\]. Id.](#)

[\[FN165\]. Id.](#)

[\[FN166\]. 221 Ga. App. 220, 471 S.E.2d 42 \(1996\).](#)

[\[FN167\]. Id. at 224, 471 S.E.2d at 46.](#)

[\[FN168\]. Id. at 223, 471 S.E.2d at 45.](#)

[\[FN169\]. 218 Ga. App. 540, 462 S.E.2d 445 \(1995\).](#)

[\[FN170\]. Id. at 540, 462 S.E.2d at 445.](#)

[\[FN171\]. Id. at 541, 462 S.E.2d at 446.](#)

[\[FN172\]. O.C.G.A. s 34-9-11.1 \(1982 & Supp. 1996\).](#)

[\[FN173\]. \*Draughn\*, 218 Ga. App. at 540, 462 S.E.2d at 445.](#)

[\[FN174\]. Id., 462 S.E.2d at 446.](#)

[\[FN175\]. O.C.G.A. s 9-3-71\(a\) \(1982 & Supp. 1996\).](#)

[\[FN176\]. 218 Ga. App. 828, 463 S.E.2d 351 \(1995\).](#)

[\[FN177\]. Id. at 828, 463 S.E.2d at 353.](#)

[\[FN178\]. Id. at 829, 463 S.E.2d at 353.](#)

[\[FN179\]. Id. at 828, 831, 463 S.E.2d at 354.](#)

[\[FN180\]. Id. at 828-29, 463 S.E.2d at 353.](#)

[\[FN181\]. Id. at 830, 463 S.E.2d at 354 \(quoting \*Crowe v. Humana\*, 263 Ga. 833, 834, 439 S.E.2d 654, 655 \(1994\)\).](#)

[\[FN182\]. Id. \(quoting \*Frankel v. Clark\*, 213 Ga. App. 222, 223, 444 S.E.2d 147, 149 \(1993\)\).](#)

[\[FN183\]. Id. at 831, 463 S.E.2d at 354.](#)

[\[FN184\]. 188 Ga. App. 706, 374 S.E.2d 106 \(1988\).](#)

[\[FN185\]. Id. at 706, 374 S.E.2d at 107.](#)

[\[FN186\]. Id. at 708, 374 S.E.2d at 108.](#)

[\[FN187\]](#). Id.

[\[FN188\]](#). [Ford, 218 Ga. App. at 831, 463 S.E.2d at 354.](#)

[\[FN189\]](#). Id. at 829, 463 S.E.2d at 353.

[\[FN190\]](#). Id.

[\[FN191\]](#). Id.

[\[FN192\]](#). Id.

[\[FN193\]](#). Id. at 831, 463 S.E.2d at 354.

[\[FN194\]](#). Id.

[\[FN195\]](#). [Whitaker, 188 Ga. App. at 706, 374 S.E.2d at 107.](#)

[\[FN196\]](#). [Ford, 218 Ga. App. at 831, 463 S.E.2d at 354.](#)

[\[FN197\]](#). Id. at 831, 463 S.E.2d at 354-55 (citing [Henry v. Medical Ctr., 216 Ga. App. 893, 894, 456 S.E.2d 216 \(1995\)](#)).

[\[FN198\]](#). [220 Ga. App. 404, 469 S.E.2d 490 \(1996\).](#)

[\[FN199\]](#). Id. at 404-05, 469 S.E.2d at 490-91.

[\[FN200\]](#). Id. at 405, 469 S.E.2d at 491.

[\[FN201\]](#). Id. See [O.C.G.A. s 9-3-71 \(Supp. 1996\)](#) ("(a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within 2 years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.").

[\[FN202\]](#). [220 Ga. App. at 405, 469 S.E.2d at 491](#) (quoting [Vitner v. Miller, 208 Ga. App. 306, 430 S.E.2d 671 \(1993\)](#)).

[\[FN203\]](#). Id. at 405-06, 469 S.E.2d at 491.

[\[FN204\]](#). Id. at 406, 469 S.E.2d at 491.

[\[FN205\]](#). [O.C.G.A. s 9-11-9.1 \(1993\).](#)

[\[FN206\]](#). Id.

[\[FN207\]](#). Id. [s 9-11-9.1\(b\).](#)

[\[FN208\]](#). [219 Ga. App. 577, 465 S.E.2d 717 \(1995\)](#). In this opinion written by Presiding Judge McMurray, two judges concurred, one concurred specially, two concurred in the judgment only, and three dissented.

[\[FN209\]](#). [O.C.G.A. s 9-11-9.1\(b\).](#)

[\[FN210\]](#). [Works, 219 Ga. App. at 578, 465 S.E.2d at 718.](#)

[\[FN211\]](#). Id. at 577, 465 S.E.2d at 718.

[\[FN212\]](#). Id.

[\[FN213\]](#). Id. at 578, 465 S.E.2d at 718.

[\[FN214\]](#). Id.

[\[FN215\]](#). Id., 465 S.E.2d at 718-19.

[\[FN216\]](#). Id., 465 S.E.2d at 719 (citing [Piedmont Hosp. v. Draper](#), 205 Ga. App. 160, 161, 421 S.E.2d 543 (1992)).

[\[FN217\]](#). Id. at 579, 465 S.E.2d at 719-20 (Beasley, C.J., concurring specially).

[\[FN218\]](#). Id. at 580, 465 S.E.2d at 720 (Beasley, C.J., concurring specially).

[\[FN219\]](#). Id. at 582, 465 S.E.2d at 721 (Beasley, C.J., concurring specially).

[\[FN220\]](#). Id. (Andrews, J., dissenting).

[\[FN221\]](#). Id. at 583, 465 S.E.2d at 722 (Andrews, J., dissenting).

[\[FN222\]](#). 219 Ga. App. 875, 467 S.E.2d 9 (1996).

[\[FN223\]](#). Id. at 875, 467 S.E.2d at 9.

[\[FN224\]](#). Id.

[\[FN225\]](#). Id. at 875-76, 467 S.E.2d at 10.

[\[FN226\]](#). Id. at 877, 467 S.E.2d at 10.

[\[FN227\]](#). 219 Ga. App. 577, 465 S.E.2d 717 (1995).

[\[FN228\]](#). [Keefe](#), 219 Ga. App. at 876, 467 S.E.2d at 10.

[\[FN229\]](#). Id. at 877, 467 S.E.2d at 10. The court did imply that a less strict standard may apply to pro se cases. [Id.](#), 467 S.E.2d at 10-11.

[\[FN230\]](#). 220 Ga. App. 286, 469 S.E.2d 720 (1996).

[\[FN231\]](#). Id. at 286, 469 S.E.2d at 721.

[\[FN232\]](#). Id.

[\[FN233\]](#). [Department of Transp. v. Gilmore](#), 209 Ga. App. 656, 434 S.E.2d 114 (1993).

[\[FN234\]](#). [McGarr](#), 220 Ga. App. at 287, 469 S.E.2d at 721.

[\[FN235\]](#). Id. at 287-88, 469 S.E.2d at 722.

[\[FN236\]](#). Id.

[\[FN237\]](#). Id. at 288, 469 S.E.2d at 722.

[\[FN238\]](#). Id.

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[FN239]. C. Frederick Overby & Jason Crawford, [Trial Practice and Procedure](#), 47 Mercer L. Rev. 353, 365-68 (1995).

[FN240]. [215 Ga. App. 344, 451 S.E.2d 62 \(1994\)](#).

[FN241]. [Id. at 345, 451 S.E.2d at 64](#).

[FN242]. [265 Ga. 864, 463 S.E.2d 5 \(1995\)](#).

[FN243]. [Id. at 865, 463 S.E.2d at 6](#).

[FN244]. [Id.](#)

[FN245]. [Id.](#)

[FN246]. [Greene County Hosp. Auth., 215 Ga. App. at 348, 451 S.E.2d at 66](#).

[FN247]. [Waldroup, 265 Ga. at 866, 463 S.E.2d at 7](#). The court held that the 3 requirements of res judicata had been satisfied: (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction. [Id.](#)

[FN248]. [Id. at 868, 463 S.E.2d at 8](#).

[FN249]. [Id. at 866-67, 463 S.E.2d at 7](#).

[FN250]. [Id. at 867, 463 S.E.2d at 7](#).

[FN251]. [Id. at 868, 463 S.E.2d at 6-7](#).

[FN252]. [Id., 463 S.E.2d at 8](#).

[FN253]. [Id.](#)

[FN254]. [217 Ga. App. 787, 459 S.E.2d 448 \(1995\)](#).

[FN255]. [221 Ga. App. 54, 470 S.E.2d 696 \(1996\)](#).

[FN256]. [217 Ga. App. 156, 456 S.E.2d 718 \(1995\)](#).

[FN257]. [Id. at 159, 456 S.E.2d at 720](#).

[FN258]. [Roberts, 217 Ga. App. at 787, 459 S.E.2d at 449](#).

[FN259]. [Id. at 788, 459 S.E.2d at 449](#).

[FN260]. [Id. at 789, 459 S.E.2d at 450](#). In a special concurrence by Chief Judge Beasley, she again laments the detailed and precise nature of this statute which yields little discretion to trial judges to accommodate peculiar circumstances such as faxed documents. [Id. at 790, 459 S.E.2d at 450](#) (Beasley, C.J., concurring specially).

[FN261]. [221 Ga. App. 54, 470 S.E.2d 696 \(1996\)](#).

[FN262]. [Id. at 54-55, 470 S.E.2d at 697](#).

[FN263]. [Id. at 55, 470 S.E.2d at 697](#).

[FN264]. Id. (quoting Harvey v. Kidney Ctr. of Cent. Ga., 213 Ga. App. 319, 320, 444 S.E.2d 590 (1994); Hill-Everett v. Jones, 197 Ga. App. 872, 873, 399 S.E.2d 739 (1990)).

[FN265]. Id., 470 S.E.2d at 698.

[FN266]. Id.

[FN267]. Id.

[FN268]. Id.

[FN269]. Id. at 56, 470 S.E.2d at 698 (Blackburn, J., dissenting).

[FN270]. 218 Ga. App. 477, 462 S.E.2d 172 (1995).

[FN271]. Id. at 477, 462 S.E.2d at 173 (quoting Carnes v. Carnes, 138 Ga. 1, 6, 74 S.E. 785 (1912)).

[FN272]. Id., 462 S.E.2d at 172.

[FN273]. Id., 462 S.E.2d at 173.

[FN274]. Id. at 478, 462 S.E.2d at 173.

[FN275]. 217 Ga. App. 156, 456 S.E.2d 718 (1995).

[FN276]. See, e.g., Works v. Aupont, 219 Ga. App. 577, 577-78, 465 S.E.2d 717, 718 (1995) ("In Sisk ..., a majority of this Court recently recognized that O.C.G.A. section 9-11-9.1 has done more to spawn wasteful litigation than to 'achieve its purpose of reducing frivolous litigation.'"). (citation omitted).

[FN277]. Allen, 221 Ga. App. at 56-57, 470 S.E.2d at 699 (Blackburn, J., dissenting) (quoting Sisk, 217 Ga. App. at 159-60, 456 S.E.2d at 720).

[FN278]. O.C.G.A. s 9-12-40 (1982).

[FN279]. Waldroup, 265 Ga. 864, 866, 463 S.E.2d 5, 7 (1995).

[FN280]. Id. at 866-67, 463 S.E.2d at 7. For a discussion of collateral estoppel involving the malpractice affidavit requirement, see Section VI, *supra*.

[FN281]. 265 Ga. 877, 463 S.E.2d 1 (1995).

[FN282]. Id. at 878, 463 S.E.2d at 2.

[FN283]. Id. at 877, 463 S.E.2d at 1.

[FN284]. Id. at 878, 463 S.E.2d at 1.

[FN285]. Id., 463 S.E.2d at 1-2.

[FN286]. Id., 463 S.E.2d at 2.

[FN287]. Id.

[FN288]. Id. at 878-79, 463 S.E.2d at 2.

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[FN289]. [Id. at 879, 463 S.E.2d at 2](#) (Sears, J., dissenting).

[FN290]. [Id. at 882, 463 S.E.2d at 4](#) (Sears, J., dissenting).

[FN291]. [Id.](#)

[FN292]. [Id.](#)

[FN293]. [Id. at 882-83, 463 S.E.2d at 5](#) (Sears, J., dissenting).

[FN294]. See the discussion of [Waldroup v. Greene County Hosp. Auth., 265 Ga. 864, 463 S.E.2d 5 \(1995\)](#), supra at Section VI, analyzed in the context of malpractice affidavits.

[FN295]. [266 Ga. 310, 467 S.E.2d 328 \(1996\)](#).

[FN296]. [218 Ga. App. 35, 459 S.E.2d 569 \(1995\)](#).

[FN297]. [Coleman, 266 Ga. at 311-12, 467 S.E.2d at 330](#).

[FN298]. [Id. at 310, 467 S.E.2d at 329](#).

[FN299]. [Columns Properties, Inc. v. Coleman, 216 Ga. App. 428, 429, 454 S.E.2d 546, 548 \(1995\)](#), rev'd, [266 Ga. 310, 467 S.E.2d 328 \(1996\)](#).

[FN300]. [Coleman, 266 Ga. at 311, 467 S.E.2d at 329-30](#).

[FN301]. [Id., 467 S.E.2d at 330](#).

[FN302]. [Id.](#)

[FN303]. [218 Ga. App. 35, 459 S.E.2d 569 \(1995\)](#).

[FN304]. The supreme court decision in Waldroup had not been decided until after the court of appeals decided Winding River.

[FN305]. [Winding River, 218 Ga. App. at 35, 459 S.E.2d at 570-71](#).

[FN306]. [Id. at 35-36, 459 S.E.2d at 571](#).

[FN307]. [Id. at 36, 459 S.E.2d at 571](#).

[FN308]. [Id.](#)

[FN309]. [Id. at 37, 459 S.E.2d at 572](#) (citing [McFadden Business Publications v. Guidry, 177 Ga. App. 885, 341 S.E.2d 294 \(1986\)](#); [Reese Realty Co. v. Pal Realty Co., 182 Ga. App. 215, 355 S.E.2d 125 \(1987\)](#)).

[FN310]. [Id.](#)

[FN311]. [Id.](#)

[FN312]. [Id. at 37-38, 459 S.E.2d at 572](#).

[FN313]. [Id. at 38, 459 S.E.2d at 572](#).

[FN314]. [Id., 459 S.E.2d at 572-73](#).

[\[FN315\]. Id., 459 S.E.2d at 572.](#)

[\[FN316\]. O.C.G.A. s 9-11-55 \(1982\); See also Holland v. Tennyson, 201 Ga. App. 125, 410 S.E.2d 447 \(1991\).](#)

[\[FN317\]. O.C.G.A. s 9-11-55 \(1982\) \(emphasis added\).](#)

[\[FN318\]. Hazzard v. Phillips, 249 Ga. 24, 26, 287 S.E.2d 191, 193 \(1982\); accord Moss v. Wilkie, 210 Ga. App. 688, 437 S.E.2d 367 \(1993\); Krystal Co. v. Carter, 180 Ga. App. 667, 350 S.E.2d 306 \(1986\); Southwest Community Hosp. & Medical Ctr., Inc. v. Thompson, 165 Ga. App. 442, 443, 301 S.E.2d 501, 503 \(1983\) \("The element of proximate cause, as well as negligence, having been alleged in plaintiff's complaint is admitted due to the default."\); Whitby v. Maloy, 150 Ga. App. 575, 258 S.E.2d 181 \(1979\); Flanders v. Hill Aircraft & Leasing Corp., 137 Ga. App. 286, 223 S.E.2d 482 \(1976\).](#)

[\[FN319\]. Magnan v. Miami Aircraft Support, Inc., 217 Ga. App. 855, 459 S.E.2d 592 \(1995\); Daniel v. Causey, 220 Ga. App. 589, 469 S.E.2d 839 \(1996\).](#)

[\[FN320\]. 217 Ga. App. at 856, 459 S.E.2d at 594.](#)

[\[FN321\]. Id.](#)

[\[FN322\]. Id.](#)

[\[FN323\]. Id.](#)

[\[FN324\]. Id. at 857, 459 S.E.2d at 595.](#)

[\[FN325\]. Id.](#)

[\[FN326\]. Id. at 859, 459 S.E.2d at 596.](#)

[\[FN327\]. See Flanders v. Hill Aircraft & Leasing Corp., 137 Ga. App. 286, 223 S.E.2d 482 \(1976\).](#)

[\[FN328\]. 220 Ga. App. 589, 469 S.E.2d 839 \(1996\).](#)

[\[FN329\]. Id. at 589, 469 S.E.2d at 839.](#)

[\[FN330\]. Id. at 590, 469 S.E.2d at 840.](#)

[\[FN331\]. Id.](#)

[\[FN332\]. Didio v. Chess, 218 Ga. App. 550, 462 S.E.2d 450 \(1995\).](#)

[\[FN333\]. O.C.G.A. s 9-11-37\(b\) \(1993\).](#)

[\[FN334\]. 218 Ga. App. 550, 462 S.E.2d 450 \(1995\).](#)

[\[FN335\]. Id. at 550-51, 462 S.E.2d at 451-52.](#)

[\[FN336\]. Id. at 551, 462 S.E.2d at 452.](#)

[\[FN337\]. Id.](#)

[\[FN338\]. Id.](#)

[\[FN339\]](#). Id.

[\[FN340\]](#). [220 Ga. App. 539, 469 S.E.2d 783 \(1996\)](#).

[\[FN341\]](#). Id.

[\[FN342\]](#). Id. at 539, 469 S.E.2d at 784.

[\[FN343\]](#). Id. at 540, 469 S.E.2d at 784.

[\[FN344\]](#). Id.

[\[FN345\]](#). Id.

[\[FN346\]](#). Id.; see [O.C.G.A. s 24-4-22 \(1995\)](#).

[\[FN347\]](#). [Chapman, 220 Ga. App. at 540, 469 S.E.2d at 784](#).

[\[FN348\]](#). Id.

[\[FN349\]](#). [Unigard Sec. Ins. Co. v. Lakewood Eng'g Corp., 982 F.2d 363 \(9th Cir. 1992\)](#).

[\[FN350\]](#). [Chapman, 220 Ga. App. at 540-41, 469 S.E.2d at 784](#).

[\[FN351\]](#). Id. at 541, 469 S.E.2d at 784 (citing [CRS Serrine v. Dravo Corp., 213 Ga. App. 710, 713, 445 S.E.2d 782 \(1994\)](#)).

[\[FN352\]](#). Id., 469 S.E.2d at 785 (citing [Nally v. Volkswagen of America, 539 N.E.2d 1017 \(Mass. 1989\)](#)).

[\[FN353\]](#). [145 F.R.D. 281 \(D. Me. 1993\)](#).

[\[FN354\]](#). [Chapman, 220 Ga. App. at 542, 469 S.E.2d at 785](#).

[\[FN355\]](#). Id. at 542, 469 S.E.2d at 785-86 (citing [Ware, 145 F.R.D. at 282 n.2](#)).

[\[FN356\]](#). Id., 469 S.E.2d at 786.

[\[FN357\]](#). [O.C.G.A. s 9-11-30\(b\)\(4\) \(Supp. 1996\)](#).

[\[FN358\]](#). Id. [s 9-11-30\(b\)\(4\) \(1993\)](#).

[\[FN359\]](#). Id. [s 9-11-30\(b\)\(4\) \(Supp. 1996\)](#).

[\[FN360\]](#). [220 Ga. App. 43, 467 S.E.2d 362 \(1996\)](#).

[\[FN361\]](#). Id. at 43-44, 467 S.E.2d at 363.

[\[FN362\]](#). Id. at 45, 467 S.E.2d at 364-65.

[\[FN363\]](#). Id., 467 S.E.2d at 365.

[\[FN364\]](#). [219 Ga. App. 306, 464 S.E.2d 902 \(1995\)](#).

[\[FN365\]](#). Id. at 306, 464 S.E.2d at 902.

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[FN366]. [Id. at 306-07, 464 S.E.2d at 903.](#) See [O.C.G.A. s 9-11- 26\(b\)\(3\) \(1993\)](#).

[FN367]. [O.C.G.A. s 9-11-26\(b\)\(3\) \(1993\)](#).

[FN368]. [Sturgill, 219 Ga. App. at 307, 464 S.E.2d at 903.](#)

[FN369]. [Id.](#)

[FN370]. [218 Ga. App. 145, 460 S.E.2d 819 \(1995\)](#).

[FN371]. [218 Ga. App. 279, 459 S.E.2d 473 \(1995\)](#).

[FN372]. See, e.g., [Franklin v. Tackett, 209 Ga. App. 448, 433 S.E.2d 710 \(1993\)](#); [Crosby v. Spencer, 207 Ga. App. 487, 428 S.E.2d 607 \(1993\)](#); [Patterson v. Lauderback, 211 Ga. App. 891, 440 S.E.2d 673 \(1994\)](#); [Gonzalez v. Wells, 213 Ga. App. 494, 445 S.E.2d 332 \(1994\)](#).

[FN373]. [Byrd, 218 Ga. App. at 145, 460 S.E.2d at 820.](#)

[FN374]. [Id.](#) The trial judge relied on Judge Beasley's special concurrence in [Franklin v. Tackett](#), *supra*, explaining that he believed his question satisfied the plaintiff's right to exclude anyone with an interest in the insurer, without interjecting the issue of insurance into the case. [Id.](#)

[FN375]. [Id.](#) The trial judge apparently believed that since MAG Mutual is owned exclusively by doctors, his review of the professions of the potential jurors revealing no doctors satisfied him that no one could have a financial interest in the insurance company. [Id.](#)

[FN376]. [Id. at 146, 460 S.E.2d at 820-21.](#) See [Atlanta Coach Co. v. Cobb, 178 Ga. 544, 549-51, 174 S.E. 131, 132-34 \(1934\)](#).

[FN377]. [Byrd, 218 Ga. App. at 146, 460 S.E.2d at 821.](#)

[FN378]. [Id.](#)

[FN379]. [Id.](#)

[FN380]. [Id.](#)

[FN381]. [Strickland, 218 Ga. App. at 279-80, 459 S.E.2d at 474 \(1995\)](#) (citing [Gonzalez v. Wells, 213 Ga. App. 494, 495, 445 S.E.2d 332, 333-34 \(1994\)](#)).

[FN382]. See [Franklin v. Tackett, 209 Ga. App. 448, 450-55, 433 S.E.2d 710, 711-15 \(1993\)](#) (Beasley, P.J., concurring specially); [Gonzalez v. Wells, 213 Ga. App. 494, 496-97, 445 S.E.2d 332, 334-35 \(1994\)](#) (Beasley, P.J., concurring specially); and [Strickland v. Stubbs, 218 Ga. App. 279, 281-82, 459 S.E.2d 473, 475-76 \(1995\)](#) (Beasley, C.J., concurring specially).

[FN383]. [209 Ga. App. 448, 450-55, 433 S.E.2d 710, 711-15 \(1993\)](#) (Beasley, P.J. concurring specially).

[FN384]. [Id. at 450, 433 S.E.2d at 711.](#)

[FN385]. [Id., 433 S.E.2d at 712.](#)

[FN386]. See [Denton v. Con-way S. Express, 261 Ga. 41, 402 S.E.2d 269 \(1991\)](#), overruled by [Grissom v. Gleason, 262 Ga. 374, 376-77, 418 S.E.2d 27, 29-30 \(1992\)](#).

[FN387]. [Crosby v. Spencer, 207 Ga. App. 487, 490, 428 S.E.2d 607, 611 \(1993\)](#); [Franklin v. Tackett, 209 Ga.](#)

[App. 448, 450, 433 S.E.2d 710, 711 \(1993\).](#)

[FN388]. [Patterson v. Lauderback, 211 Ga. App. 891, 893, 440 S.E.2d 673, 676 \(1994\)](#) (evidence of the availability of collateral insurance benefits to pay medical bills, although generally inadmissible, was relevant for the limited purpose of impeaching the plaintiff's testimony).

[FN389]. [Franklin, 209 Ga. App. at 451, 433 S.E.2d at 712](#) (Beasley, P.J., concurring specially).

[FN390]. [220 Ga. App. 893, 470 S.E.2d 450 \(1996\).](#)

[FN391]. [Id. at 893, 470 S.E.2d at 450-51.](#)

[FN392]. [Id., 470 S.E.2d at 451](#) (quoting [Ellison v. National By-Products, 153 Ga. App. 475, 476, 265 S.E.2d 829 \(1980\)](#)).

[FN393]. [217 Ga. App. 84, 456 S.E.2d 598, \(1995\).](#)

[FN394]. [Baxter, 220 Ga. App. at 894 n.1, 470 S.E.2d at 451 n.1](#) (quoting [Luke v. Suber, 217 Ga. App. 84, 87, 456 S.E.2d 598, 601 \(1995\)](#)).

[FN395]. [Id. at 894 n.2, 470 S.E.2d at 451 n.2](#) (quoting [Cambron v. State, 164 Ga. 111, 114, 137 S.E. 780 \(1927\)](#)).

[FN396]. [Id. at 894, 470 S.E.2d at 451.](#) After the survey period, the Georgia Supreme Court reversed this decision of the court of appeals in *Cohen v. Baxter*, No. S96G1226, 97 F.C.D.R. 200 (Ga. Jan. 21, 1997). The supreme court held that it was in error to adopt a per se rule that a potential juror must be excused for cause when he or she has an ongoing doctor-patient relationship with the defendant doctor in a medical malpractice case. *Id.* at 201. The supreme court stated that the trial court should retain its discretion to judge the credibility of a juror. *Id.* The court also partially based its decision on the slippery slope argument, rationalizing that the establishment of a per se rule to the doctor-patient relationship would open the door to a per se rule for other categories of relationships. *Id.* Finally, the court noted that a per se rule might make impanelling a full jury difficult in medical malpractice trials in some rural counties. *Id.*

In a theoretical, "perfect" world setting, the supreme court's decision might be workable, allowing trial court judges to divine whether a potential juror can be unbiased despite a necessary relationship of trust and confidence with his or her doctor. The American Heritage Dictionary defines "bias" as a preference or inclination that inhibits impartiality. In the real world, a potential juror who has chosen the defendant doctor as his or her personal physician has openly exhibited his or her preference for that physician. It would be naive to assume that the juror could remain completely impartial. The impact of the supreme court's decision is to increase the plaintiff's burden of proof with respect to disqualification of the patient-juror. One must query why the supreme court rejected the court of appeals logic "if error is to be committed, let it be in favor of the absolute impartiality and purity of the jurors."

[FN397]. *Id.*

[FN398]. *Id.*

[FN399]. *Id.* at 894 n.2, [470 S.E.2d at 451 n.2](#) (comparing the Alabama rule to the rule adopted by Illinois and Vermont, and now Georgia).

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