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**Survey**

**\*313 TRIAL PRACTICE AND PROCEDURE**

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**\*314 I. Introduction**

The most interesting and significant developments in the area of trial practice and procedure during the survey period came not from Georgia's appellate courts but from the Georgia General Assembly. This Article will first analyze the significant legislation that came from beneath the gold dome in 1997. It will then review the most significant appellate cases.

**II. Legislation**

The 1997 session of the Georgia General Assembly produced significant new legislation that will affect trial practitioners across the state. The most notable enactments relate to health and medical insurance reimbursement, [\[FN1\]](#) punitive damages, [\[FN2\]](#) the professional negligence pleading requirement, [\[FN3\]](#) a new medical narrative hearsay exception, [\[FN4\]](#) long arm venue, [\[FN5\]](#) appeal procedures under Official Code of Georgia Annotated ("O.C.G.A.") sections 5-6-34 and 5-6-35, the statutory limit on parental liability for willful and malicious acts of minor children, [\[FN6\]](#) deposition subpoenas, [\[FN7\]](#) and clarification of rules relating to a party's right to open and conclude in final argument. [\[FN8\]](#)

**A. Health and Medical Insurance Reimbursement Law: A Play (Or, Better Yet, Repay) in Two Acts**

For practitioners in tort law, the most practical piece of new legislation from this past session is [O.C.G.A. section 33-24-56.1](#). This statute definitively delineates for the first time a health and medical benefit provider's right of reimbursement, the procedure to be followed in obtaining reimbursement, and the injured party's rights, including the right to be fully compensated for all economic and noneconomic injuries before a right of reimbursement can arise or be enforced.

Practitioners experienced the following dilemma in an increasing number of personal injury cases. The client has

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been grievously injured by a third-party tortfeasor. Long before the client recovers from the \*315 tortfeasor, an insurance company that accepted a premium in exchange for its agreement to pay medical bills in the event of a loss pays the client's extensive medical bills. During the litigation with the tortfeasor, the medical benefits provider seeks to assert a lien or claim reimbursement from any proceeds recovered from the tortfeasor or the liability insurer. This claim is typically asserted pursuant to some provision in the insuring agreement whereby the insurer claims that the contract requires reimbursement for benefits it paid if a recovery is made from a third party who caused the damages. The injured party obviously is inclined to resist reimbursing the medical benefits provider from the proceeds of the recovery. The typical victim confronted with a claim for reimbursement wonders whether he or she paid a premium for the medical benefits coverage or mistakenly took out a loan at a high rate of interest. Several incisive questions relating to fundamental fairness immediately spring to the mind of the injured party's lawyer. If the insurance company gets its consideration back (the benefits it paid in exchange for the premiums), does the client also get his or her consideration back (premium plus interest)? Does the client escape this reimbursement requirement if the client has not been fully compensated for all injuries by the tortfeasor because the recovery was necessarily the result of a compromise? [FN9] Is the client entitled to an offset for a \*316 proportionate share of attorney fees and expenses to be paid out of the recovery from the tortfeasor? [FN10] The insurance representative typically answers all of these questions with a confident "no." Thus, with the proliferation of these claims for reimbursement, it became increasingly difficult to finally resolve tort cases by settlement.

1. Act I. Until March 17, 1997, the answers to these questions in Georgia were completely up in the air. On that date, the Supreme Court of Georgia decided *Duncan v. Integon General Insurance Corp.* [FN11] Peggy Duncan was an injured person much like the hypothetical client above. Her own auto insurer, Integon, had paid five thousand dollars in medical payment benefits. Integon sought to recoup these benefits in full when Ms. Duncan received a fifteen thousand dollar policy limit settlement from the tortfeasor's insurance company. It was undisputed that Ms. Duncan had not been fully compensated by the fifteen thousand dollar settlement even when the Integon medical payments benefits of five thousand dollars were added to the amount recovered. [FN12] Ms. Duncan's medical bills alone exceeded these amounts, not including any general damages for pain and suffering or special damages for lost wages. [FN13]

The supreme court was forced to address the following fundamental question: Who receives first priority to compensatory funds from a tortfeasor for injuries caused by the tortfeasor--an insurance company that was paid a premium to assume the risk of payment of medical benefits or the injured person? Relying on "[t]he weight of authority," [FN14] the supreme court held that the injured person is entitled to first priority until he has been completely compensated for all compensable injuries unless a specific provision in the insurance policy negates the \*317 complete compensation rule. [FN15] Although it indicated that "Georgia public policy strongly supports" [FN16] the complete compensation rule, the court declined to decide whether express policy language negating the complete compensation rule would be enforced. [FN17]

Back to the hypothetical client. After reading *Duncan*, the lawyer reviews the client's insurance policy to see what it says about the issue of reimbursement. From the insured's perspective, the hope is that the policy will be silent. The attorney for the injured party is already mentally drafting a letter to the insurance representative and attaching a copy of *Duncan* when she sees that the policy specifically declares that reimbursement is to be made regardless of whether the injured client has been completely compensated.

2. Act II. Enter the Georgia General Assembly, which enacted O.C.G.A. section 33-24-56.1, effective July 1, 1997. This statute makes complete compensation the rule no matter what the insurance policy states. The pertinent provisions of O.C.G.A. section 33-24-56.1 state the following:

(b) In the event of recovery for personal injury from a third party by or on behalf of a person for whom any benefit provider has paid medical expenses or disability benefits, the benefit provider for the person injured may require reimbursement from the injured party of benefits it has paid on account of the injury, up to the amount allocated to those categories of damages in the settlement documents or judgment, if: (1) The amount of the recovery exceeds the sum of all economic and noneconomic losses incurred as a result of the injury, exclusive of losses for which reimbursement may be sought under this Code section; and (2) The amount of the reimbursement claim is reduced by the pro rata amount of the attorney's fees and expenses of litigation incurred by the injured party in bringing the claim. [FN18]

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Significantly, these provisions make it clear that before a right of reimbursement ever arises, the injured person's recovery must exceed "complete compensation" for all losses incurred as a result of the injury. The obvious reason for this aspect of the statute is that if an injured person is completely compensated but no more than completely compensated, then a reimbursement requirement would make him or her less than compensated. This would be an absurd result for a remedial statute.

\*318 The language in subsection (b)(1) of [O.C.G.A. section 33-24- 56.1](#)-- "exclusive of losses for which reimbursement may be sought under this Code section"--makes it clear that even if the injured person is more than completely compensated, reimbursement can only be allowed to the extent of the overcompensation and no more. The intent of the statute is to give the injured person first priority of recovery from the tortfeasor until complete compensation has been achieved. Only additional funds that amount to a double recovery are to be returned to the insurance company as reimbursement.

Subsection (b) of [O.C.G.A. section 33-24-56.1](#) also caps reimbursement at "the amount allocated to those categories of damages in the settlement documents or judgment." In other words, the parties to a settlement, or the finder of fact, can allocate an amount to medical expenses (or disability). In no event can the insurer be reimbursed for more than that amount.

The insurer has the right under subsection (c) of [O.C.G.A. section 33-24- 56.1](#) to seek a declaratory judgment on its entitlement to reimbursement in the event compensation was paid to the injured person by way of settlement. [\[FN19\]](#) Thus, the insurer has a remedy if it is believed that the parties to the tort action assigned categories of damages that would diminish fair reimbursement. However, if the trier of fact has allocated the damages, then the allocation is conclusively presumed to be reasonable. [\[FN20\]](#)

Subsection (b)(2) of [O.C.G.A. section 33-24-56.1](#) recognizes what has come to be called the "common-fund" doctrine. [\[FN21\]](#) This doctrine requires all beneficiaries of a common fund, generated by the work of a lawyer who represents only one or some of the beneficiaries, to pay a proportionate share of the attorney fees and expenses incurred in obtaining the fund. To require the party who hired the lawyer to pay all the legal fees for obtaining the entire fund would unjustly enrich the other beneficiaries. [\[FN22\]](#) Accordingly, an insurer that receives reimbursement must reduce the reimbursement to reflect a proportionate payment for attorney fees and litigation expenses. [\[FN23\]](#)

In this remarkable piece of legislation, subrogation--when the insurer is not merely asking for repayment but instead is assigned the injured person's right to recovery--is expressly prohibited by subsection (e) of \*319 [O.C.G.A. section 33-24-56.1](#). [\[FN24\]](#) Also, this subsection prevents the tortfeasor or its liability insurer from including an insurer claiming reimbursement as a co-payee on a settlement check or check paying a judgment. This provision is important in everyday practice because prior to the enactment, medical benefit providers would frequently insist on being listed as payee, thus requiring the injured party to completely reimburse them or gaining added leverage in negotiating the amount of reimbursement to the provider.

The legislation also provides that insurers may not reduce their liability under any policy as a setoff against reimbursement claims, nor may they withhold or set off insurance benefits as a means of enforcing a claim for reimbursement. [\[FN25\]](#) This provision is important because it prevents insurers from attempting an end-run around the complete compensation rule or the other statutory requirements by withholding or seeking to offset current and future benefits, which may be sorely needed, thus delaying payment of the claim. In practical application this issue regarding setoff or withholding of benefits frequently arises when an injured party asserts a claim under uninsured and underinsured motorist coverage provided under a policy that previously paid out medical benefits under the separate medical payments coverage provided by the same or a related policy issued by the same insurer.

The statutory scheme is balanced to protect the benefit provider, too. Subsection (g) of [O.C.G.A. section 33-24- 56.1](#) requires the injured person to notify insurance companies that may have a right of reimbursement by certified mail that recovery is being sought from a third-party tortfeasor. The insured must provide the notice at least ten days prior to consummation of settlement or the beginning of trial. In this notice, the injured person must "include a request for information regarding the existence of any claim . . . and an itemization of payments for which the benefit provider seeks reimbursement including the names of payees, the dates of service or payment or both, and

the amounts thereof." [\[FN26\]](#)

To preserve its claim for reimbursement once the statutorily required notice has been given, the insurer must give the injured person the following:

actual notice prior to the consummation of a settlement or commencement of trial, by certified mail . . . of the claim of the benefit provider for reimbursement including a specific itemization of payments for which the benefit provider seeks reimbursement, including the names \*320 of payees, the dates of service or payment or both, and the amounts thereof. [\[FN27\]](#)

The insurer can supplement its claims prior to settlement or trial, but the supplementation must also comply with subsection (h) of the statute. If the injured person fails to notify the insurer of the pendency of a claim against a third-party tortfeasor pursuant to subsection (g), the insurer is not required to give the injured party notice of its claim pursuant to subsection (h).

Insurers cannot contractually avoid the provisions of this statute. [\[FN28\]](#) To the extent the terms of a settlement are relevant to adjudication of the issues created by this statute, those terms are admissible even if the settlement declares them confidential. [\[FN29\]](#) Finally, the section has no application when a workers' compensation carrier seeks reimbursement pursuant to [O.C.G.A. section 34-9-11.1](#). Likewise, the newly enacted statute has no application as against the Department of Medical Assistance when it claims a right of reimbursement for Medicare and Medicaid benefits paid out by the state. [\[FN30\]](#)

#### B. Punitive Damages

The General Assembly amended Georgia's punitive damages statute to remove the cap on punitive damages against defendants acting under the influence of alcohol or drugs. [\[FN31\]](#) Before the change, punitive damages were capped at \$250,000 except in product liability cases and cases when the defendant's conduct evinces a "specific intent" to cause harm. [\[FN32\]](#)

The appellate courts interpreted specific intent to cause harm as requiring a defendant's subjective intent to harm the plaintiff--a virtually impossible standard of proof in anything but an intentional tort even at the pretrial summary judgment stage. [\[FN33\]](#) The anomalous result: an impaired driver who ran over and killed an innocent victim could not be subjected to punitive damages in excess of \$250,000, but a person who intentionally damaged personal property could.

\*321 The new punitive damages statute changes this result. If the defendant acted while under the influence of "alcohol, drugs other than lawfully prescribed drugs administered in accordance with prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to that degree that his or her judgment is substantially impaired," [\[FN34\]](#) punitive damages are not capped. [\[FN35\]](#) This provision applies not just in the context of motor vehicles but to any tortfeasor who acts under the influence of alcohol, drugs, or toxic vapors.

The statute presumably treats defendants alleged to be liable under a theory of passive negligence differently than tortfeasors guilty of active negligence. The statute indicates that passive tortfeasors are not subjected to unlimited punitive damages awards. [\[FN36\]](#) However, it seems apparent from the language of the statute that a tortfeasor who is liable under both active and passive theories (such as an employer sued because it tortiously entrusted a dangerous instrumentality to a person with a known habit of recklessness and also sued under a respondeat superior theory) could legally be subjected to liability for punitive damages in excess of \$250,000 in connection with the active liability theory. [\[FN37\]](#)

#### C. The Professional Negligence Pleading Requirement

The infamous malpractice affidavit pleading requirement, [O.C.G.A. section 9-11-9.1](#), was finally amended, perhaps in response to persistent calls from the appellate courts. [\[FN38\]](#) The changes incorporate procedural and substantive fairness in an attempt to align the provision with the overall goals of the Civil Practice Act of justly, efficiently, and inexpensively resolving cases on their merits. [\[FN39\]](#)

By enacting these changes, the legislature has removed a potentially serious legal malpractice trap for the practitioner. The statute now specifically enumerates the professions to which the pleading requirement applies. [\[FN40\]](#) No longer will a practitioner be surprised to discover, belatedly, that he or she should have filed a malpractice affidavit in an \*322 action against a harbor pilot. [\[FN41\]](#) Additionally, a claim against an organization, even if the underlying act or omission is one of professional negligence, does not require a malpractice affidavit unless the organization is a "licensed healthcare facility." [\[FN42\]](#)

Hopefully, the statute now makes it clear that practitioners will no longer be required to guess whether a potential claim against the Department of Transportation for poor road design or against a product maker for a design defect requires a malpractice affidavit. [\[FN43\]](#) As long as the entity sued is not a professional and is not a licensed healthcare facility, no pleading affidavit is required.

The exception to the pleading requirement found in subsection (b) of [O.C.G.A. section 9-11-9.1](#) for cases when the statute of limitations will expire within ten days now applies if the lawyer has "a good faith basis to believe [the statute of limitations] will expire on any claim stated in the complaint." [\[FN44\]](#) In this scenario, the affidavit may be filed within forty-five days after the filing of the complaint or a longer time period if the court allows. Thus, a lawyer who is legitimately unsure of when the statute of limitations will expire is not forced into the Hobson's choice of filing the lawsuit without an affidavit and hoping the statute of limitations was about to expire or not filing the lawsuit and hoping the statute of limitations was not about to expire. The exception is available to a plaintiff when the statute of limitations is about to expire as to any stated theory of recovery and not just a potential medical malpractice claim.

This subsection, as amended, creates an unintended dilemma for defense lawyers. If the plaintiff fails to submit an affidavit within the required forty-five days after filing the complaint or within any longer period allowed by the trial court, the defendant must preserve the issue by a "motion to dismiss filed contemporaneously with its initial \*323 responsive pleading." [\[FN45\]](#) However, the initial responsive pleading, which is usually the answer, is due thirty days after service of the complaint. [\[FN46\]](#)

The former provision that suspended the time for the defendant to answer the plaintiff's complaint until thirty days after an affidavit is filed has been repealed. So, it might be argued that the defendant is technically required to file a motion to dismiss for failure to state a claim based on failure to file a malpractice affidavit before the plaintiff is even required by law to file the affidavit. Otherwise, presumably, this plea in abatement is waived. The legislature should amend the statute to correct this unintended result. Otherwise, the law will encourage needless motions to dismiss in every case in which subsection (b) of [O.C.G.A. section 9-11-9.1](#) is utilized. [\[FN47\]](#)

The statute continues to provide that it shall not be construed to extend the applicable statute of limitations. However, the amended language makes clear that as long as an affidavit is timely filed, filing an affidavit after the running of the applicable statute of limitations does not create a statute of limitations defense. [\[FN48\]](#)

The legislature deleted the provision from the former statute, which stated that if a plaintiff fails to file an affidavit with the complaint and the defendant raises this failure in the initial responsive pleading, the complaint is subject to dismissal and cannot be amended pursuant to [O.C.G.A. section 9-11-15](#) unless the plaintiff had the affidavit prior to filing of the lawsuit and the failure was the result of a mistake. [\[FN49\]](#) Two significant changes were made in connection with this issue.

First, the defendant must raise the plaintiff's failure to file the affidavit "by motion to dismiss filed contemporaneously with [the] initial responsive pleading." [\[FN50\]](#) Second, if the objection is so preserved, the complaint shall not be subject to renewal under Georgia's renewal statute unless the plaintiff had the affidavit within the time required by the statute and the failure was the result of a mistake. [\[FN51\]](#)

The meaning of this newly inserted language relating to the renewal statute may be more significant than it might at first appear. Under the former statute, as interpreted by the courts, a dismissal based on a \*324 failure to file the requisite affidavit was on the merits and with prejudice. [\[FN52\]](#) Such a claim could not be "renewed" if the statute of limitations had expired, nor could it be "refiled" with the requisite affidavit if the statute of limitations had not expired. By inserting this language preventing renewal when the statute of limitations has expired, it seems the

legislature may implicitly have changed the law to allow refiling when the statute of limitations has not expired. Otherwise, this new language would be meaningless. [\[FN53\]](#)

The language that the failure to state a claim cannot be cured by amendment pursuant to [O.C.G.A. section 9-11-15](#) ("Rule 15") has been dropped. Accordingly, one could reasonably infer that an amendment pursuant to [O.C.G.A. section 9-11-15](#) adding the requisite affidavit will now be allowed. This interpretation, however, is undercut by the fact that another part of the statute as amended, [O.C.G.A. section 9-11-9.1\(d\)](#), relating to an allegedly defective affidavit, specifically allows a curative amendment pursuant to Rule 15. One could reasonably argue that if the legislature intended for a failure to file an affidavit to be curable by amendment, it could have expressly said so just as it did in the context of an allegedly defective affidavit in subsection (d).

[O.C.G.A. section 9-11-9.1\(d\)](#), addressing the procedural aspects and effect of allegedly defective affidavits, is new. If the affidavit is alleged to be defective, the defendant must move to dismiss with specificity (whatever specificity means in the context of a motion) contemporaneously with the initial responsive pleading. The plaintiff may cure the defect by a Rule 15 amendment within thirty days of the motion or longer if the court allows. This new language in subsection (d) may not be as significant, however, in light of a recent Georgia case, *Washington v. Georgia Baptist Medical Center*. [\[FN54\]](#) In *Washington* the court of appeals held that an insufficient affidavit could be amended pursuant to [O.C.G.A. section 9-11-15](#). [\[FN55\]](#)

The amended professional negligence pleading requirement may accomplish what the legislature intended from the beginning. It seems less likely to create its own cottage litigation industry. It is more balanced and may more effectively discourage frivolous suits without killing legitimate suits on technicalities rather than on the merits.

#### \*325 D. A New Hearsay Exception: The Medical Narrative

Perhaps the most innovative piece of legislation coming from the recent legislative session is [O.C.G.A. section 24-3-18](#). In a personal injury trial, this statute allows the admission into evidence of a treating or examining licensed medical practitioner's "medical report in narrative form" in place of more expensive live or deposition testimony. The report must purport to represent the patient's "history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report." [\[FN56\]](#)

The law affords procedural protection to the opponent of the evidence contained in the narrative. First, the proponent of the evidence must provide the opponent with the report and notice of the intention to introduce the report at least sixty days prior to trial. [\[FN57\]](#) Then, the opponent has fifteen days to object to the admissibility of the narrative on grounds other than hearsay. [\[FN58\]](#) Any adverse party has the right to cross-examine the person signing the report and to provide rebuttal testimony. [\[FN59\]](#) Additionally, the party tendering the report may introduce the testimony of the person who signed the report. [\[FN60\]](#) The report shall be submitted to the jury the same way a deposition is submitted. [\[FN61\]](#) It does not go out to the jury during deliberations as documentary evidence.

The practical effect of this legislation may be that the expense and initiative of a deposition or live testimony of a medical provider is shifted to the party who insists on an adversarial context for the taking of evidence. A party will no longer be required to take formal, costly, and time-consuming testimony to confirm what the previously inadmissible medical records say.

#### E. Venue Under the Long Arm Statute

Three substantial changes were made to venue under the Long Arm Statute. [\[FN62\]](#) The most needed revision comes into play in cases involving multiple defendants. Previously, venue as to a nonresident tortfeasor was proper only in the county where the tortious act or omission \*326 occurred. [\[FN63\]](#) For purposes of the joint tortfeasor venue provision (which allows suit to be filed against both defendants in the county of either defendant's residence), [\[FN64\]](#) a nonresident defendant under the Long Arm Statute was not considered a "resident" of the county in which the tortious act or omission occurred. [\[FN65\]](#)

A plaintiff, therefore, was unable to sue resident and nonresident joint tortfeasors in the same county unless the

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resident tortfeasor was a resident of the county where the tortious act or omission occurred. For instance, if defendant A was a resident of Tennessee, defendant B was a resident of Fulton County, and the collision occurred in DeKalb County, defendant A could only be sued in DeKalb County, and defendant B could only be sued in Fulton County. Two lawsuits would be required unless one of the defendants was willing to waive venue as a defense.

Now, "[w]here an action is brought against a resident of this state, any nonresident of this state who is involved in the same transaction or occurrence and who is suable under the provisions of [the Long Arm Statute] may be joined as a defendant in the county where a resident defendant is suable." [\[FN66\]](#) This change makes sense because a nonresident has no vested interest in any particular venue. In a further application of common-sense reform, the amendment also adds that venue will not "vanish" as to the nonresident if a defense verdict or judgment is rendered as to the resident defendant. [\[FN67\]](#) If the resident defendant is dismissed prior to commencement of trial, the action shall be transferred \*327 to a county where venue is proper. [\[FN68\]](#) The amendment applies equally in a contract case or a case involving real property. At long last, a lawsuit involving a nonresident and a resident sued jointly can be brought at once.

Also, in a tort case, venue against a nonresident has been expanded to include not just the county wherein the act or omission took place but also where the injury occurred. [\[FN69\]](#) This addition makes it clear that a tortfeasor who acts outside the state but causes injury within the state is subject to venue in a county in Georgia under the Long Arm Statute. [\[FN70\]](#)

The final change to the venue provisions of the Long Arm Statute applies to contract cases. No longer is the practitioner required to pick the county wherein "the business was transacted." [\[FN71\]](#) In many complex business transactions in which performances extend beyond the confines of one or more counties, selecting one county where "the business was transacted" amounts to purely a guessing game. Now, venue is appropriate in any county wherein "a substantial part of the business was transacted." [\[FN72\]](#) If a transaction involves multiple counties, venue can be had in any of the counties as long as the business transacted was a substantial part of the overall transaction to which the lawsuit relates. [\[FN73\]](#)

#### F. Appeal Procedures Under [O.C.G.A. Sections 5-6-34](#) and [5-6-35](#)

Practitioners have often experienced an appellate dilemma in attempting to negotiate an appeal pursuant to [O.C.G.A. sections 5-6-34](#) and [5-6-35](#). [Section 5-6-34\(a\)](#) defines when a case is directly appealable, including final judgments; [section 5-6-35\(a\)](#) defines when certain final judgments must be appealed by filing an application to appeal.

What does one do if the case seems to be a directly appealable final judgment under [section 5-6-34\(a\)](#) and may or may not, depending upon one's interpretive skills, also require an application to appeal under [section 5-6-35\(a\) and \(b\)](#)? Strict compliance with the applicable provision \*328 has consistently been held to be a prerequisite to the appellate court's jurisdiction on appeal. [\[FN74\]](#)

Previously, the practitioner had three equally vexing choices. The practitioner could file an application pursuant to [section 5-6-35\(b\)](#) and not file a notice of appeal, risking dismissal if the appellate court determined the case did not fall within [section 5-6-35\(a\)](#). The practitioner could file a notice of appeal, risking dismissal if the appellate court determined the case did fall within [section 5-6-35\(a\)](#). Alternatively, the practitioner could file a notice of appeal and an application for an appeal and thoroughly confuse the busy appellate court.

Now, [O.C.G.A. section 5-6-35](#) has been amended to add subsection (f). This subsection makes it clear that if a case is directly appealable pursuant to [section 5-6-34\(a\)](#) and an application is not required pursuant to [section 5-6-35](#), but the attorney nonetheless files an application pursuant to [5-6-35\(b\)](#), the appellate court retains jurisdiction to hear the appeal as if [section 5-6-35\(a\)](#) actually applies. [\[FN75\]](#) Consequently, if one is confused about whether to appeal directly or to apply for permission, there is no penalty if the appellate court disagrees with the lawyer's determination of the issue so long as one opts to file an application pursuant to [section 5-6-35](#).

#### G. Parental Liability for Willful and Malicious Acts of Minor Children

Under [O.C.G.A. section 51-2-3](#), a custodial parent or guardian is now responsible for the willfull and malicious acts of a minor child causing reasonable medical expenses, property damage, or both up to ten thousand dollars plus court costs. The prior limitation was five thousand dollars and only allowed recovery for property damage. [\[FN76\]](#)

#### H. Attorney Signature Sufficient for Deposition Subpoenas

Often, as a trial practitioner, the situation arises when a deposition subpoena is needed but cannot be located in the office. It would certainly be easier on everyone, the busy trial courts included, if attorneys could simply agree to sign deposition subpoenas themselves. After all, lawyers have long been given the power to notice depositions of a party without involving the courts in any way. [\[FN77\]](#)

The legislature has now amended the subpoena statute, [O.C.G.A. section 9- 11-45](#), to allow attorneys to agree that they will sign deposition \*329 subpoenas. The subpoena will be effective so long as the signing attorney is authorized to practice before the court issuing the subpoena or the court in which the action is pending. [\[FN78\]](#)

#### I. Final Arguments: Who Can Open and Close

It has long been the rule in Georgia jurisprudence that if the defendant (who does not have the burden of proof) puts up no evidence or admits a "prima facie case," the defendant has the right to open and close final arguments. [\[FN79\]](#) Recently, however, the appellate courts have expanded the defendant's right to open and close by broadening what is meant by admitting a prima facie case.

For instance, what if the defendant in a personal injury trial admits duty and breach but denies causation and damages? What if that defendant puts up evidence contesting damages only? Accepted wisdom has always been that in such a scenario, the plaintiff, who still has the burden of proof as to essential elements of the tort claim asserted, would still be allowed to open and close in final argument. A prima facie tort claim for negligence involves each of the elements of duty, breach, causation, and damages.

The Georgia Court of Appeals disagreed. In *Peters v. Davis*, [\[FN80\]](#) the court held that all a defendant must do in order to secure the right to open and close is to admit duty and breach or present no evidence. [\[FN81\]](#) The defendant apparently could put up as many witnesses as it wished on half of the elements of a prima facie tort case for negligence--causation and damages--and still be allowed to open and conclude in the final argument. It appeared that one definition of a prima facie negligence case applied in Georgia and another definition applied for the other forty-nine states.

[O.C.G.A. section 9-10-186](#) makes it clear that in a personal injury case, the only way to admit a prima facie case is to admit all the elements of a prima facie case. The only evidence a defendant can introduce and still preserve the right to open and close arguments is cross-examination of the plaintiff and witnesses called by the plaintiff. Even then, the argument remains that if the scope of the cross-examination exceeds the direct examination, the defendant may be argued to have introduced evidence.

### \*330 III. Case Law

#### A. Personal Jurisdiction

One case stands out in the area of personal jurisdiction during this year's survey period. The Georgia Court of Appeals gave a lengthy discussion of the "conspiracy theory" of personal jurisdiction over a nonresident defendant under the Georgia Long Arm Statute [\[FN82\]](#) in *Rudo v. Stubbs*. [\[FN83\]](#) In *Rudo* a Georgia resident (defendant Wilson) contacted a Georgia resident (plaintiff Stubbs) to suggest that Stubbs purchase a set of coins from Gobrecht Numismatics. Gobrecht happens to be a Maryland sole proprietorship owned by defendant O'Higgins and managed by defendant Rudo, both of whom are nonresidents. [\[FN84\]](#) To obtain jurisdiction over nonresident defendants in Georgia, the exercise of jurisdiction must comport with due process, and the nonresident must have committed one of the acts set forth in the Georgia Long Arm Statute. However, the Long Arm Statute does not require that the nonresident have personally committed a listed act but provides that the act may be committed "through an agent." [\[FN85\]](#)

Because coconspirators act as agents of each other when they commit acts in furtherance of a conspiracy, [\[FN86\]](#) the court of appeals stated its agreement with the principle that the "in-state acts of a resident [[[coconspirator] may be imputed to a nonresident [coconspirator] to satisfy jurisdictional requirements under some circumstances." [\[FN87\]](#) In *Rudo* the court of appeals held that in order to satisfy the requirements of due process under a conspiracy theory of jurisdiction, the alleged conspiracy must be targeted at one or more Georgia residents specifically: "When the purpose of a conspiracy is to commit an intentional tort against a Georgian, all of the [[[coconspirators] are purposefully directing their activities toward Georgia and should reasonably anticipate being haled into court here." [\[FN88\]](#)

The court of appeals cautioned that the plaintiff must provide more than mere conclusory allegations of the nonresident's participation in a \*331 conspiracy with a resident. [\[FN89\]](#) The court set forth the requirement of an evidentiary showing of conspiracy, rather than mere allegations of a conspiracy, unless the allegations are unrefuted. [\[FN90\]](#)

The standard of proof to be applied and the effect of a finding are unclear. For instance, if the trial court finds a conspiracy which satisfies personal jurisdiction, is this finding conclusive as to the tort of conspiracy? If so, is the defendant entitled to a jury determination? If not, does jurisdiction vanish upon a finding by the jury that no conspiracy existed (or that the defendant was not a part)? What happens to personal jurisdiction if the jury finds the nonresident liable for the underlying tort but not liable for conspiracy? These questions remain.

#### B. Service of Process

In two unrelated cases, the court of appeals addressed the issue of due diligence in attempting to perfect service on defendants. First, in *Jones v. Isom*, [\[FN91\]](#) plaintiffs filed suit in Clayton County, but the court dismissed the suit because defendant could not be served there. Suit was refiled in Fulton County (one would assume so that defendant could be properly served) well within the statute of limitations. [\[FN92\]](#) For some unknown reason, defendant was never personally served with a copy of the summons and complaint even though the attorney retained by defendant's insurance company sent several letters to plaintiffs' counsel to determine whether defendant had been served. In September 1995, defendant was appointed new counsel who filed an entry of appearance. In November 1995, defendant filed a motion to dismiss for failure to perfect service within the statute of limitations. The trial court granted the motion. [\[FN93\]](#)

The issue on appeal was whether defendant's counsel's entry of appearance, filed twenty months after the complaint was filed and seven months after the statute of limitations had expired, waived the service requirement and obligated defendant to file an answer within thirty days. The court of appeals held that it did not, [\[FN94\]](#) distinguishing the case from *Keith v. Alexander Underwriters, Etc.* [\[FN95\]](#) In *Keith* the court \*332 held that defendants waived service by filing an entry of appearance and that the time the appearance was made "is the equivalent of the time service of process is made in a normal case." [\[FN96\]](#)

The difference, according to the court in *Jones*, was that there was no indication in *Keith* that the statute of limitations had expired; therefore, plaintiff was not required to show due diligence in perfecting service or to obtain a waiver of service in order for his claim to relate back to the time of filing. [\[FN97\]](#) The court cited the well-established rule that when an action is filed within the statute of limitations period but is not served within the limitations period, plaintiff must establish that he or she acted in a reasonable and diligent manner in attempting to ensure that proper service was effected as quickly as possible. [\[FN98\]](#) The court then held that plaintiffs had not met their burden of showing due diligence to ensure that service was made. [\[FN99\]](#) The court held that "even if [defendant's] counsel's notice of appearance constituted a waiver of service at the time it was filed, the burden was still on [plaintiff] to show due diligence and lack of fault in failing to serve [defendant] within the statute of limitations." [\[FN100\]](#) Because plaintiffs failed to show any reasonable effort on their part in effecting service of process, the court of appeals affirmed the dismissal. [\[FN101\]](#)

In another due diligence case, *Jackson v. Nguyen*, [\[FN102\]](#) the court of appeals was satisfied that plaintiffs had exercised reasonable diligence in ensuring that service was perfected. [\[FN103\]](#) In *Jackson* the complaint was filed on May 24, 1995, and the statute of limitations ran on May 29, 1995. Service was not perfected until seventeen days

after the statute of limitations expired even though defendant's correct address was listed on the complaint. Plaintiff's lawyer offered that he had turned the matter over to the sheriff for service. [\[FN104\]](#)

Although the general rule is that "[t]he burden is on the plaintiff, not the sheriff, to show diligence in attempting to insure that proper service has been made as quickly as possible," [\[FN105\]](#) the court noted that this was not a case in which plaintiff was put on notice of a problem by unsuccessful \*333 attempts to serve defendants, nor was it a case in which service was not perfected until years after the complaint was filed. [\[FN106\]](#) The court reiterated the principle that a "plaintiff should not be penalized for reasonably relying upon the sheriff to fulfill his duty to serve properly addressed process papers." [\[FN107\]](#) In giving the sheriff the proper address of defendant for service on the date the complaint was timely filed, the court found that the record showed that plaintiffs had done all that was initially required of them. [\[FN108\]](#) The court held that as a matter of law, plaintiffs were justified in relying on the sheriff to perform his duty to make service at the address given within five days of receiving the summons and complaint. [\[FN109\]](#)

### C. Venue

The Georgia Court of Appeals had occasion to interpret the venue provision of the State Tort Claims Act [\[FN110\]](#) during this year's survey period. *Evans v. Department of Transportation* [\[FN111\]](#) was a wrongful death action brought by Josephine Evans for the death of her daughter, Frances Evans, who was killed when she lost control of her car on a wet highway and collided with a tractor-trailer. The collision occurred in Columbia County; Frances Evans was hospitalized and died in Richmond County. Plaintiff brought suit in Richmond County, and the trial court transferred venue to Columbia County. [\[FN112\]](#)

Venue for tort actions against the Georgia Department of Transportation ("D.O.T.") is governed by [O.C.G.A. section 50-21-28](#):

All tort actions against the state under this article shall be brought in the state or superior court of the county wherein the loss occurred; provided, however, that, in any case in which an officer or employee of the state may be included as a defendant in his individual capacity, the action may be brought in the county of residence of such officer or employee. [\[FN113\]](#)

\*334 The correct venue hinged on the definition of the term "loss" contained in the venue provision. Plaintiff argued that the loss in this case was her daughter's death, which occurred in Richmond County. The D.O.T. argued that the loss occurred in Columbia County where the collision took place. The D.O.T. also argued that plaintiff had filed another suit in Columbia County for injuries her daughter received in the collision and that judicial economy dictated that the wrongful death case also be tried there. [\[FN114\]](#)

The court of appeals agreed with plaintiff that venue in her wrongful death action was proper in Richmond County and only in Richmond County. [\[FN115\]](#) The court relied on the "plain" and "unambiguous" language of the Tort Claims Act, which defines "loss" as follows: "Loss' means personal injury; disease; death; damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death; pain and suffering; mental anguish; and any other element of actual damages recoverable in actions for negligence." [\[FN116\]](#) The court held that it was bound to follow the "plain and unambiguous" language unless doing so would lead to "contradictory, absurd, or wholly impracticable results." [\[FN117\]](#)

In a footnote the court acknowledged that this venue provision, read literally, could result in a waste of state and judicial resources when there are various claims for damages that all equate to a loss under the statute and that could require the filing of a myriad of suits in multiple counties. [\[FN118\]](#) The court further noted that this result seems to require a violation of [O.C.G.A. section 9-2-5\(a\)](#), which prohibits the splitting of a cause of action. However, the court must have implicitly held that the result is not "contradictory, absurd, or wholly impracticable" and left these problems to the legislature. [\[FN119\]](#)

### D. Proper Parties and Claims

Two cases, *Redding v. Walker* [\[FN120\]](#) and *Canal Insurance Co. v. Farmer*, [\[FN121\]](#) are both notable for their lack of equity, and both cases cry out for legislative action. In *Redding*, an automobile collision case, plaintiffs filed

personal injury actions against Walker, the owner of the car that \*335 collided with them, and Watson, the driver of Walker's car. After the suits were filed, defendant Walker was released from all dischargeable debts by order of the bankruptcy court. The trial court dismissed Walker on the basis of the bankruptcy discharge. Plaintiffs appealed, contending that the dismissal of Walker had the erroneous effect of dismissing her insurer. [\[FN122\]](#)

The court of appeals had to jump through several procedural hurdles in finding that it could decide the case. The motion in the trial court was styled as a motion to dismiss and was referred to as such in the court's order. [\[FN123\]](#) However, the court of appeals interpreted the motion as a motion for summary judgment because it presented the defense of bankruptcy discharge rather than one of the defenses contained in [O.C.G.A. section 9- 11-12\(b\)](#). [\[FN124\]](#) Further, the court of appeals noted that defendant attached evidence to the motion (the order of discharge in bankruptcy) that the trial court considered in its ruling. [\[FN125\]](#) Although the court recognized that when a motion to dismiss is converted to a motion for summary judgment, the nonmovant should have thirty days in which to respond with opposing evidence and that plaintiffs were not allowed the time, the court decided that the result would be the same even if plaintiffs had been given full time to respond. [\[FN126\]](#)

Plaintiffs argued that the discharge in bankruptcy did not allow Walker's liability insurer to escape liability and that the case should continue with Walker as defendant to the limit of her insurance. [\[FN127\]](#) The court of appeals disagreed. [\[FN128\]](#) The court noted that no insurer was a party to the suit, and no evidence in the record showed that Walker had liability insurance (even though plaintiffs were not given the time to present this evidence). [\[FN129\]](#) The court found no authority for the proposition that plaintiffs were entitled to retain defendant in the \*336 lawsuit, even nominally, in order to obligate her insurer with a judgment based on the contract of insurance for liability coverage. [\[FN130\]](#)

The court of appeals distinguished *Wilkinson v. Vigilant Insurance Co.*, [\[FN131\]](#) a case that held the defendant's bankruptcy discharge did not entitle plaintiff's uninsured motorist carrier to be dismissed as a party. [\[FN132\]](#) The important distinction, according to the court of appeals, was that the uninsured motorist carrier had been served in the action, was a party, and had filed the motion for summary judgment, unlike the insurer in the present case. [\[FN133\]](#) The Georgia Supreme Court in *Wilkinson* held that the uninsured motorist carrier's potential liability remained in existence under its contract with its insured, the plaintiff. [\[FN134\]](#)

The court of appeals apparently held that defendant's liability insurer's position was different because it was not a party. [\[FN135\]](#) This reasoning seems flawed because an uninsured motorist carrier is free to answer, when served, in its own name as a party or in the name of the tortfeasor. [\[FN136\]](#) Surely the court did not mean that even an uninsured motorist insurer could escape liability if it had simply remained a nonparty.

Presiding Judge Birdsong authored a cogent dissent in which he pointed out the unjust and untenable result worked by the majority. [\[FN137\]](#) The dissent pointed out that defendant-insured's personal bankruptcy discharge did not excuse the insurer from its contractual liability as to the driver of the car:

Now, however, the majority has declared that there [sic] this contracted-for insurance coverage of Pauline Walker's car is not available to the plaintiffs, because the majority has converted Pauline Walker's motion to dismiss to a summary judgment and the trial court's dismissal to a final judgment merely because it examined a federal court document and supporting affidavit, and because there is at this stage no evidence in the record that Pauline Walker had insurance. [\[FN138\]](#)

\*337 The dissent argued forcibly that the appeal should have been dismissed so that the trial court could resolve on the merits the liability of the driver of the car. [\[FN139\]](#)

The insurance company should not be allowed to reap a windfall at the expense of an innocent victim merely because of the financial irresponsibility of its insured. It is indeed ironic that this result effectively holds that insurance purchased to protect one's assets is lost because one has already lost one's assets.

Canal Insurance [\[FN140\]](#) is another case that works an unjust and untenable result. The issue was whether plaintiffs should be deprived of their rights under the Georgia Direct Action Statute [\[FN141\]](#) to sue the insurance company directly when there was evidence that the insurance company intentionally failed to register the insurance policy of its motor contract carrier with the Georgia Public Service Commission ("PSC"). The case arose out of an

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automobile collision between plaintiff and a tractor-trailer that was insured by Canal Insurance. Plaintiffs brought suit against the tractor-trailer driver, owner, and insurance company. The owner of the tractor-trailer never filed for a certificate of public convenience and necessity with the PSC and never filed a bond or insurance policy even though it was legally required to do so. In addition, Canal Insurance did not file a Form E certificate of insurance with the PSC. The trial court denied Canal's motion for summary judgment. [\[FN142\]](#)

Looking to the recent case of Southern General Insurance Co. v. Waymond, [\[FN143\]](#) the court of appeals reasserted that "under the unambiguous terms of the statute, as construed in Glenn McClendon Trucking Co. v. Williams, [\[FN144\]](#) a plaintiff must prove that a policy was filed and approved by the PSC in order to maintain a direct action against the insurer of a motor contract carrier." [\[FN145\]](#) Therefore, the court concluded that plaintiffs could not assert a direct action against Canal Insurance because the insurance policy issued to the tractor-trailer owner was never filed with or approved by the PSC. [\[FN146\]](#)

\*338 Again, in this case the special concurrence argued forcibly against the "inequities which arise under the present statutory scheme for allowing a direct action against the insurer." [\[FN147\]](#) The concurrence pointed out that under the present statute, an essential element of the plaintiff's claim is to show that the carrier fulfilled its obligation to file a bond or insurance policy; furthermore, there is no statutory obligation imposed on the insurer to file proof of the policy. [\[FN148\]](#) These conditions subvert the purpose of the statute: "to protect the public against injuries caused by the motor carrier's negligence." [\[FN149\]](#) Using common sense, the concurrence called upon the legislature to remedy this situation:

To impose the filing obligation on [the carrier owner] ignores the reality of the insurer and carrier relationship: the insurer maintains the copy of the policy, and the insurers are more aware of the filing requirements than many of the carriers. Canal's evasion here was not intended by the statute. [\[FN150\]](#)

In another case involving proper parties to an action, Gordon v. Walker, [\[FN151\]](#) the court of appeals decided that the wife of a decedent was entitled to bring an action even though she was not the named administrator of the decedent's estate at the time she filed the action but was named administrator prior to the filing of defendants' motion to dismiss. [\[FN152\]](#) In Gordon the common-law wife of a deceased bus passenger brought an action against MARTA and a MARTA bus driver. The trial court granted a motion to dismiss two counts of plaintiff's claims--for medical expenses and pain and suffering--on the grounds that those claims could only be maintained by the personal representative of the estate and that plaintiff was not the administrator of the estate when she filed the complaint. [\[FN153\]](#)

This case demonstrates the necessity for litigators to have probate matters resolved, if possible, before bringing a lawsuit. Plaintiff's husband's injuries occurred on November 1, 1991, and he subsequently died (not as a result of those injuries). On June 7, 1993, Mrs. Gordon was granted an "[o]rder from the Probate Court, declaring no administration necessary" with regard to the estate. [\[FN154\]](#) Plaintiff filed her original lawsuit on November 1, 1993. She later dismissed that action \*339 and filed a properly renewed action on February 23, 1995. She filed both actions in her capacities as wife and administratrix of the estate. [\[FN155\]](#)

Plaintiff was actually appointed administratrix of the estate on November 21, 1995, some nine months after filing the complaint. On December 19, 1995, defendants moved to dismiss certain counts of the complaint, asserting that plaintiff lacked standing to bring those claims. Although plaintiff submitted a copy of her Letters of Administration and contended that the motion to dismiss was moot, the trial court granted the motion. [\[FN156\]](#)

The Georgia Court of Appeals agreed with plaintiff. Relying on Walden v. John D. Archbold Memorial Hospital, [\[FN157\]](#) the court pointed out that the "administrator" should be treated as an "indispensable party" who should be joined, if possible, under [O.C.G.A. section 9-11-17](#). [\[FN158\]](#) The court distinguished Walden, in which the dismissal was affirmed, because in that case the administrator was not among the plaintiffs who initially brought suit and the administrator was not named until five months after the trial court dismissed the complaint. [\[FN159\]](#) In Gordon plaintiff had already been named administrator at the time defendants brought their motion to dismiss; therefore, the court held that "at that point, the action was being prosecuted by the real party in interest." [\[FN160\]](#)

Another case in which the main issue involved the plaintiff's status as real party in interest was Watson/Winter Joint Venture v. Milledge. [\[FN161\]](#) The named plaintiff was a joint venture construction contractor who brought

suit against subcontractors. The trial was a bench trial, and at the close of plaintiff's case, defendant Milledge moved for a directed verdict challenging plaintiff's status as real party in interest under [O.C.G.A. section 9-11-17\(a\)](#). [\[FN162\]](#) The trial court found not only that there was no evidence that the named plaintiff was a legal entity but also that the erroneous naming of plaintiff in the pleadings and on the underlying contract was not an "amendable defect" that would provide for retroactive correction. [\[FN163\]](#) The trial court granted defendant's \*340 motion for directed verdict and dismissed plaintiff's complaint with prejudice. [\[FN164\]](#)

The court of appeals pointed out that "[a]n action may be maintained by and in the name of any unincorporated organization or association." [\[FN165\]](#) The appeals court found that even assuming as correct the factual determination that the named joint venture was not a legal entity, that finding did not itself authorize the dismissal with prejudice under defendant's challenge pursuant to [O.C.G.A. section 9-11-17\(a\)](#). [\[FN166\]](#) That statute provides in part that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." [\[FN167\]](#) While recognizing that in Georgia "a joint venture is not a distinct legal entity separate and apart from the parties composing it," [\[FN168\]](#) the real parties in interest were the entities that constituted the joint venture. [\[FN169\]](#) Under [O.C.G.A. section 9-11-17](#), those parties should have been provided a reasonable opportunity to ratify or join the action or, on proper motion, should have been permitted to be joined or substituted in accordance with [O.C.G.A. section 9-11-19\(a\)](#). [\[FN170\]](#)

Finally, one other case involving proper claims in an action deals with third-party practice. The issue arose in *Shleifer v. Bridgestone-Firestone, Inc.*, [\[FN171\]](#) in which plaintiff sued the Shleifers for injuries caused by a collision in which Shleifer was driving. Firestone had recently performed brake work on the Shleifer car. The Shleifers filed a third-party complaint under [O.C.G.A. section 9-11-14\(a\)](#) against Firestone alleging that brake failure caused the collision and seeking indemnity and contribution. The Shleifers amended their third-party complaint to add a direct claim against Firestone for property damage to their own car. Firestone contended that the third-party plaintiff could not join a claim in the impleader action that did not affect the original plaintiff--in essence, that only a claim that would be a proper basis for impleader could be joined in the action. The trial court agreed and dismissed the \*341 amended third-party complaint on Firestone's motion to dismiss for failure to state a claim upon which relief could be granted. [\[FN172\]](#)

The court of appeals reversed [\[FN173\]](#) and stated the following:

Having been brought into the suit, the plain language of the statute concerning joinder of claims indicates that the claim may be added: "A party asserting a claim to relief as . . . [a] third-party claim may join, as independent claims, as many claims, legal or equitable, as he has against an opposing party. [O.C.G.A. \[section\] 9-11-18\(a\)](#)." [\[FN174\]](#)

The court noted the general rule that a third-party claimant can join independent claims and also noted that a claim that is properly joined need not be tried together with other claims if fairness or convenience justifies separating the claims. [\[FN175\]](#)

Firestone relied on *Michaels v. Kessler* [\[FN176\]](#) for the proposition that the court must affirm the decision of the trial court if that court did not abuse its discretion. [\[FN177\]](#) The court of appeals rejected this argument, stating that *Michaels* upheld the court's discretion to sever claims under [O.C.G.A. section 9-11-42\(b\)](#) but did not state that the trial court had discretion to dismiss proper claims in the first place or to reject joinder of claims under [O.C.G.A. section 9-11-18\(a\)](#). [\[FN178\]](#) The court of appeals found no authority for the proposition that joinder under [O.C.G.A. section 9-11-18\(a\)](#) is discretionary and held that the trial court may sever trial of direct claims from the secondary claims but may not dismiss the amended complaint merely because it contains properly joined issues that the court would prefer to sever. [\[FN179\]](#)

#### E. Dismissal of Actions

One notable case involving the subject of voluntary dismissals serves as a warning to those who may seek a voluntary dismissal after a settlement has been reached and announced in open court. In *Leary v. Julian*, [\[FN180\]](#) the parties reached a settlement before trial, and the attorneys for both sides announced the settlement terms before the court. The court reduced the settlement to a written order on February \*342 26, 1996. However, three days before the order was filed, plaintiff filed a voluntary dismissal without prejudice, apparently in contravention of the

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settlement arrangement. [\[FN181\]](#) Defendant subsequently filed a contempt action against plaintiff, alleging that he was violating the terms of the court-ordered settlement. Plaintiff asserted that his voluntary dismissal rendered the order void. The trial court found plaintiff in willful contempt. [\[FN182\]](#)

The Georgia Code provides that a plaintiff may voluntarily dismiss a claim before resting his or her case. [\[FN183\]](#) The rule, however, is that a voluntary dismissal is precluded as soon as the trial court announces a finding, judgment, or decision that terminates the litigation. [\[FN184\]](#) The court of appeals pointed out that "[w]hen a judicial determination is made in open court, there is no requirement that its substance be memorialized in writing or reduced to an order to be effective against the parties or the plaintiff's right to dismiss the claim." [\[FN185\]](#) Moreover, the knowledge of actual, as opposed to possible, conclusion of the litigation will preclude a plaintiff's voluntary dismissal. [\[FN186\]](#) Finally, "[a] finding, judgment, or decision will terminate a given case when it is 'the equivalent of a verdict.'" [\[FN187\]](#)

Thus, the issue before the court in the instant case was whether participation in the agreed-upon, open-court settlement was the equivalent of a verdict. Pointing out that settlement agreements are highly favored in Georgia and that oral settlements are enforceable if the parties' attorneys are vested with authority to enter into these agreements and do so before the court, the Georgia Court of Appeals held that a voluntary dismissal pursuant to Rule 41(a) may not be filed after all parties to an action announce a settlement agreement in open court and the trial court adopts the terms of the agreement in an oral order, even if that order is not reduced to writing until a later time. [\[FN188\]](#) The court made it clear that its holding applies to undisputed settlement agreements whose terms are not questioned by the parties. [\[FN189\]](#)

\*343 The court of appeals decided another case involving the application of dismissals under Rule 41 in this survey period, but this case included the complication of an uninsured motorist carrier's cross-claim. [\[FN190\]](#) The insured plaintiff in *Thomas v. Auto Owners Insurance Co.* sued the driver of a vehicle that was involved in a collision with her. Plaintiff also served the suit on her uninsured-underinsured motorist ("U.M.") carrier, which then filed a cross-claim against the driver-defendant for indemnification. Plaintiff settled with defendant-driver prior to trial, and the court dismissed her complaint against him with prejudice. Importantly, the U.M. carrier did not contest or object to the dismissal. Defendant-driver moved to dismiss or for summary judgment on the cross-claim. The trial court denied the motion. [\[FN191\]](#)

In reversing the trial court, the court of appeals found that the U.M. carrier's lack of objection to plaintiff's dismissal of defendant-driver resulted in the entire action, including the cross-claim, being dismissed with prejudice against the driver. [\[FN192\]](#) The court relied on the rule that "if a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court." [\[FN193\]](#) The court applied the rule to cross-claims as well as counterclaims under the authority of [O.C.G.A. section 9-11-41\(c\)](#). [\[FN194\]](#) The court held that "by virtue of the [U.M. carrier's] failure to object, [plaintiff's] dismissal terminated the entire action including the cross-claim." [\[FN195\]](#)

A final case to note in the area of dismissals is *Little v. Fleet Finance*. [\[FN196\]](#) The case arose over plaintiff's unsuccessful bid at a foreclosure sale for a piece of property. The trial court granted defendant's motion to dismiss plaintiff's fraud claim for failure to state a claim upon which relief can be granted. One finding of the trial court was that plaintiff's fraud claim failed because damages for loss of profit as alleged in the complaint were too remote and speculative to sustain this claim. [\[FN197\]](#)

The court of appeals held that "the speculative nature of damages alleged in a complaint may not afford a basis for the granting of a \*344 motion to dismiss" when the trial court takes the allegations of a complaint as true. [\[FN198\]](#) The court also noted that the trial court ignored the issue of nominal damages, which a jury could find as a result of the commission of an unlawful act. [\[FN199\]](#)

## F. Discovery Practice

As usual, the area of trial practice dealing with discovery in civil cases generated quite a few cases for the Georgia appellate courts.

1. Discovery of Financial Information. The court of appeals had occasion to address discovery of a defendant's financial information in a punitive damages case in *Ledee v. Devoe*. [FN200] Plaintiff brought a suit against defendant and two attorneys for conspiracy, fraud, negligence, and breach of fiduciary duty in the handling of her personal injury case, that was dismissed for want of prosecution and not renewed. Plaintiff claimed that defendant Ledee held himself out as an attorney, which he was not. Defendant moved for summary judgment, asserting that his actions were not the proximate cause of plaintiff's damages. Defendant simultaneously moved for a protective order staying further discovery until his motion for summary judgment was decided and specifically sought protection from producing copies of his tax returns. The trial court denied the motion for protective order, ordered that he sit for a deposition, and required that he answer plaintiff's discovery. Plaintiff served defendant with a notice to take his deposition and attached a subpoena duces tecum that sought more financial information. [FN201] She also served second interrogatories seeking further financial information. Defendant moved again for a protective order, for reconsideration of the prior order, and to quash the subpoena. After oral argument, the trial court denied the motions and issued an order in which it found that \*345 plaintiff had made a prima facie showing of entitlement to punitive damages. [FN202]

The issue before the court of appeals was whether plaintiff was required, as contended by defendant, to make a showing of a causal connection between plaintiff's injuries and defendant's actions first before being allowed discovery of defendant's financial circumstances. The court stated that a mere demand for punitive damages does not authorize the type of discovery sought by plaintiff. [FN203] While acknowledging that the trial court had determined that plaintiff had made out a prima facie case for punitive damages, the court of appeals noted that the trial court had not ruled on the summary judgment motion claiming that defendant had not caused plaintiff's damages as a matter of law and also noted that the record did not indicate that plaintiff had made an evidentiary showing that a factual basis existed for her punitive damages claim. [FN204]

The court of appeals held that mere allegations in the complaint and representations by counsel (and apparently by the trial court) will not suffice; there must be an evidentiary showing. [FN205] Although the court stated that a ruling on the summary judgment motion would be determinative of plaintiff's right to the discovery, the court was also quick to point out that a ruling on a motion for summary judgment is not always required in such a discovery dispute: "It is enough if a plaintiff supports her claim to this kind of discovery with affidavits, discovery responses, or other evidence sufficient to show that an evidentiary basis exists for the punitive damages claim." [FN206] The court also made a point of stating that even if discovery of a defendant's worldly circumstances and business relationships is authorized, the discovery is not unlimited, and the trial court is obligated to assure that there is no unreasonable intrusion into the defendant's privacy by carefully balancing both parties' interests. [FN207] The court seemingly ignored the time-honored principle that appellate courts presume a trial court's ruling to have been supported by evidence absent proof to the contrary by the party claiming error. [FN208]

\*346 2. Withdrawal of Admissions. Two cases of note during the survey period concerned whether a party should be allowed to withdraw admissions. First, in *Walker v. Sutton*, [FN209] the court of appeals applied the principle of estoppel to preclude the withdrawal of admissions. [FN210] The case arose from a motor vehicle collision that occurred on November 16, 1989. Plaintiff sued defendant Sutton, the truck owner, and defendant Willis, his driver. After suit was filed, defendant Sutton answered on November 26, 1991, stating that he was the owner of the logging truck involved in the collision and that Willis, the driver, was acting in the scope of his employment with Sutton at the time of the collision. Sutton admitted the same facts in response to the plaintiff's interrogatories and stipulated in the pretrial order filed on May 20, 1993 that at the time of the wreck, Sutton's vehicle was being operated by Willis, who was acting as Sutton's employee. Only after a jury had been selected in January 1994 did Sutton advise the trial court that a search of his business records revealed that he had sold the truck several weeks before the wreck and that his payroll records revealed that Willis stopped being his employee several weeks before the wreck. [FN211]

Based on this information, the trial court discharged the jury. Defendant filed a motion to withdraw admissions and amend his answer and a motion to amend the pretrial order. Plaintiff filed a motion asserting that defendant should not be allowed to repudiate, change, or withdraw his admissions. The trial court denied plaintiff's motion and granted defendant's motions. Sutton thereafter moved for summary judgment, asserting that he was not the truck owner and the driver was not his employee. The trial court granted that motion as well. [FN212]

The court of appeals reversed, holding that the trial court erred in allowing defendant to withdraw his admissions and amend his answer and the pretrial order. [FN213] The court found that defendant was estopped from tardily contradicting his answer, interrogatory responses, and the pretrial order because of plaintiff's reliance to her detriment. [FN214] In making its decision, the court found that defendant's admissions had misled plaintiff and had precluded her from bringing suit against the alleged true owner of the vehicle because the statute of limitations had expired prior to defendant's coming forward with his \*347 newly discovered information. [FN215] The court of appeals further held that defendant could not withdraw or amend his admissions because he could not show that the merits of the case would be subserved. [FN216]

In another case in which a party sought to withdraw admissions, *Howell v. Styles*, [FN217] the issue was whether plaintiff's requests for admissions of fact were valid if the attorney who signed the requests was not authorized to practice law. The pro se defendant, upon whom the complaint and requests were filed, answered the complaint and attached a copy of a notarized letter from the State Bar of Georgia that purported to certify that the plaintiff's attorney was ineligible to practice law in Georgia due to nonpayment of his license fee for 1993 to 1994. Defendant did not respond to the requests for admissions. Plaintiff, through another attorney, subsequently filed a motion for summary judgment on the ground that defendant had failed to respond to the requests for admissions. Defendant filed a motion to withdraw admissions and responded to the summary judgment motion, asserting that the requests were void because the attorney who signed them was not authorized to practice law. The trial court denied defendant's motion to withdraw admissions and granted summary judgment to plaintiff. [FN218] The court of appeals reversed and remanded. [FN219]

The court of appeals agreed that whether plaintiff's attorney was authorized to practice law at the time he signed and served the requests for admissions was relevant to the issue of whether the trial court should have allowed defendant to withdraw admissions. [FN220] Under state bar rules, a person may not practice law in Georgia unless that person is an active member of the bar in good standing. [FN221] A member is not deemed to be in good standing if found delinquent in payments of the license fee after September 1 of any year. [FN222] In light of these state bar rules, the court of appeals concluded that an attorney who is not in good standing because he failed to pay his license fee is unauthorized to practice law in Georgia. [FN223] Accordingly, the court stated that if plaintiff's attorney was not authorized to practice law when the requests were signed and served by him, then the requests were a nullity, and \*348 defendant was not obligated to respond to them. [FN224] The court of appeals remanded to the trial court for a determination of whether the attorney was authorized to practice law at the time the requests for admission were signed and served. [FN225]

3. Pre-Complaint Depositions. In *St. Joseph Hospital Augusta, Georgia, Inc. v. Black*, [FN226] plaintiff sought to take the deposition of the chief executive officer of St. Joseph Hospital prior to filing a complaint pursuant to [O.C.G.A. section 9-11-27\(a\)](#) in order to perpetuate the testimony. Plaintiff believed that the CEO had information concerning hospital policies and the hospital's decision to grant a certain doctor staff privileges that would aid her in preparing an expert affidavit attesting to the hospital's negligence in an anticipated medical malpractice suit. The trial court granted plaintiff's petition. [FN227] Quoting *Worley v. Worley*, [FN228] the court of appeals reiterated the following:

[T]he purpose of [O.C.G.A. \[section\] 9-11-27\(a\)](#) is to provide for perpetuation of testimony in situations where, for one reason or another, testimony might be lost to a prospective litigant unless steps are taken immediately to preserve and protect such testimony. [O.C.G.A. \[section\] 9- 11-27\(a\)](#) does not provide a substitute for discovery or a method to determine whether a cause of action exists. This code section cannot be used for the purpose of ascertaining facts to be used in drafting a complaint. [FN229]

The appellate court noted that plaintiff did not allege the testimony sought was in any danger of being lost nor that the testimony would be unavailable after the complaint was filed. [FN230] Because the entire purpose of the precomplaint deposition was to enable plaintiff to ascertain facts to be used in preparing her complaint, the petition should have been denied according to the court of appeals. [FN231] The court stated that "[d]iscovery is not required to prepare a malpractice affidavit." [FN232]

4. Discovery Sanctions. Always fertile ground for appeal is a trial court's utilization of dismissal or default judgment as a sanction for \*349 discovery abuse. One case is notable for its application of sanctions to the parties' failure to attend depositions. In *Washington v. South Georgia Medical Center*, [FN233] plaintiffs, husband and

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wife, brought an action against South Georgia Medical Center and Dr. Roy Swindle for medical malpractice. One defendant, Swindle, noticed the depositions of plaintiffs, but plaintiffs failed to appear at the depositions. Both Swindle and the hospital separately moved for sanctions. The trial court scheduled and noticed a hearing on the two motions, but plaintiffs did not attend. The trial court took the matter under advisement thirty-four days after the doctor's motion for sanctions was filed and thirty days after the hospital's motion was filed and signed an order dismissing plaintiffs' action based on their "willful failure to attend their depositions." [FN234] Plaintiffs filed a written response to defendants' motions on the day the order was signed. The response was untimely as to the doctor's motion but was timely as to the hospital's motion. [FN235]

The court of appeals relied on the general rule pertaining to sanctions:

There is no requirement that the plaintiff display and the trial court find actual wilfulness. The sanction of dismissal for failure to comply with discovery provisions of the Civil Practice Act requires only a conscious or intentional failure to act, as distinguished from an accidental or involuntary non-compliance. A conscious or intentional failure to act is in fact wilful. [FN236]

Applying this rule to the facts in the record, which showed that plaintiffs had failed to respond to letters from the doctor concerning their depositions, had failed to attend the depositions, had failed to respond timely to the doctor's motion for sanctions, and had failed to attend the hearing, the court of appeals concluded that the trial court could determine that plaintiffs' failure to comply with the doctor's discovery was intentional. [FN237] However, the court reversed the dismissal as to the claims against the hospital because the trial court did not consider plaintiffs' response to the hospital, which they had filed on the last possible day. [FN238]

This case is most notable for the court of appeals decision that the trial court could consider and even grant on remand the hospital's motion for sanctions for the failure of plaintiffs to attend their depositions\*350 despite the fact that the depositions were noticed by a codefendant but not by the defendant hospital. [FN239] The majority distinguished Singleton v. Eastern Carriers, [FN240] relied upon by the special concurrence, because that case "concerned a plaintiff's failure to respond to written discovery propounded by the movant's co-defendant rather than a failure to attend a deposition noticed by the movant's co-defendant." [FN241] The court of appeals concluded that the difference between written discovery and a deposition (the movant in the written discovery scenario had suffered no expense of preparation or attendance as a result of the plaintiff's failure to answer interrogatories as opposed to a deposition) justified the imposition of sanctions even when the deposition was not noticed by the party moving for sanctions. [FN242] The court stated, "All parties similarly situated, who have been damaged by a party's failure to attend a properly noticed deposition, should be entitled to rely on the failing party to follow the law and attend his deposition regardless of which party originally noticed the deposition." [FN243] Chief Judge Beasley, in a special concurrence, disagreed with this proposition and opined that the hospital could not obtain sanctions for plaintiffs' failure to attend depositions not requested by the hospital. [FN244] The concurrence pointed out that "[i]t is a simple thing to give notice" and that the remedy of sanctions is provided for the party who has been wronged. [FN245]

#### G. Choice of Law

A Georgia Supreme Court case in the area of trial practice and procedure involved choice of law. Alexander v. General Motors Corp. [FN246] is an important decision for its impact on protecting Georgians' rights under Georgia law. Alexander, a Georgia resident, purchased a new General Motors ("GM") vehicle in Georgia, but he was injured while driving in Virginia when the driver's seat of the vehicle failed in a collision and he was ejected. Alexander brought suit against GM in Georgia under a theory of strict product liability. The trial court granted partial summary judgment to GM. Because the tort injuries occurred in Virginia, Virginia substantive law would normally apply under the rule \*351 of *lex loci delicti*. Virginia law does not provide for strict liability actions, so the trial court dismissed Alexander's strict liability claims and permitted Alexander to amend his complaint to state a negligence claim under Virginia law. [FN247]

The Georgia Court of Appeals affirmed the ruling of the trial court, finding that "Virginia products liability law is not radically dissimilar to Georgia law" and pursues similar public policy by different methods so that the Virginia law does not contravene Georgia public policy. [FN248] Therefore, the court of appeals refused to apply the public policy exception to the rule of *lex loci delicti*. [FN249]

Because Virginia does not recognize recovery on the basis of strict liability, the issue before the Georgia Supreme Court was whether the application of the rule of *lex loci delicti* would contravene the public policy embodied in Georgia's [O.C.G.A. section 51-1-11](#). [\[FN250\]](#) The supreme court answered that question in the affirmative and reversed the decision of the court of appeals. [\[FN251\]](#)

In a short and succinct opinion, the supreme court pointed out the differences in Virginia law and Georgia law and the impact those differences have on Georgia citizens: [\[FN252\]](#)

[T]he conclusion . . . that Virginia products liability law is not radically dissimilar to Georgia law but rather pursues a similar public policy by somewhat different methods, misses the crucial point that Georgia's public policy of shifting to manufacturers the burden of loss caused by defective products is effectuated by precisely those somewhat different methods. [\[FN253\]](#)

\*352 The court noted, as one example, that a Virginia negligence claim differs from a Georgia strict liability claim because Georgia law eliminates questions of negligence and the usual defenses to negligence. [\[FN254\]](#) The supreme court found that a comparison of the laws demonstrated that the Virginia law and Georgia law are "radically dissimilar in terms of the burden placed on persons seeking recompense for injuries caused by defective products." [\[FN255\]](#)

The supreme court found that applying Virginia law was contrary to the public policy of Georgia (as expressed by [O.C.G.A. section 51-1-11](#)) of protecting those injured by defective products placed in the stream of commerce in this state and ordered that Georgia law be applied to Alexander's claims against GM. [\[FN256\]](#)

#### H. Trial Procedure

In another Georgia Supreme Court decision, the court was called upon to apply a provision of the Georgia Civil Practice Act, [O.C.G.A. section 9-11-42\(a\)](#), [\[FN257\]](#) which addresses consolidation of trials and joint trials. [\[FN258\]](#) In *Ford v. Uniroyal Goodrich Tire Co.*, [\[FN259\]](#) plaintiff-son and plaintiffs-parents filed separate lawsuits against Uniroyal for injuries sustained in an automobile collision. The trial court ordered that the two actions begin on the same day with separate juries empaneled for each case to hear all common evidence. Both juries found Uniroyal liable for compensatory damages, but only one jury found Uniroyal liable for punitive damages. [\[FN260\]](#) The court of appeals reversed both actions. [\[FN261\]](#) The issue before the supreme court was whether parties who do not agree to consolidation of related cases may be required to try the cases together before separate juries. The Georgia Code provides in [O.C.G.A. section 9-11-42\(a\)](#) ("Rule 42(a)") that:

[w]hen actions involving a common question of law or fact are pending before the court, if the parties consent, the court may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders \*353 concerning proceedings therein as may tend to avoid unnecessary costs or delay. [\[FN262\]](#)

Prior to the trial, Uniroyal had moved to consolidate the actions under this statute, but plaintiffs did not consent and opposed the motion. Thus, the trial court ordered that two juries hear substantially the same evidence in the same courtroom at the same time. Uniroyal opposed that procedure. The court of appeals reversed on other grounds but affirmed the order directing a dual jury trial. [\[FN263\]](#)

The supreme court found that the procedure directed by the trial court was neither a consolidated action nor a joint trial under [O.C.G.A. section 9-11- 42\(a\)](#) because of the presence of two separate juries but was a similar "dual jury trial." [\[FN264\]](#) The court found this distinction between the procedures to be insufficient to preclude Rule 42(a) from governing and held that Rule 42(a) applies to the dual jury trial and other procedures that combine separate actions in joint court proceedings. [\[FN265\]](#) Therefore, the parties must consent before a trial court may consolidate or join related actions for trial. [\[FN266\]](#) The court noted that the consent rule conflicts with the objective of the consolidation rule--to give the trial court broad discretion in controlling its docket--and seemed to take issue with the litigants' control over this matter. [\[FN267\]](#)

A second case concerning the conduct of a trial was *Boyett v. Webster*. [\[FN268\]](#) Boyett involved a personal injury action arising from an automobile collision in which defendant was driving under the influence of alcohol.

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Plaintiff asserted claims for compensatory and punitive damages, alleging that defendant's driving while grossly intoxicated showed willfulness, wantonness, and a conscious disregard for the foreseeable consequences of his actions. The case was bifurcated so that the first phase concerned liability for compensatory damages, amount of \*354 compensatory damages, and liability for punitive damages. The second phase of the trial was to involve the amount, if any, of punitive damages to be awarded. Plaintiff sought to introduce evidence of a prior DUI of defendant in phase one of the trial. However, the trial court granted defendant's motion in limine to exclude that evidence in the first phase in spite of plaintiff's argument that the evidence was directly relevant to the issue of liability for punitive damages. The jury returned a verdict for compensatory damages but not punitive damages. [\[FN269\]](#)

The court of appeals held that the trial court abused its discretion by excluding the evidence of defendant's prior DUI when only the amount of punitive damages was bifurcated from the other issues. [\[FN270\]](#) The court of appeals recognized that the amount of punitive damages must be tried separately from liability under [O.C.G.A. section 51-12-5.1](#). [\[FN271\]](#) However, the court found it to be an abuse of discretion both to bifurcate the trial and exclude evidence relevant to liability for punitive damages from the first phase. [\[FN272\]](#) While it is generally true in suits for negligence that evidence of acts or omissions on other occasions is not admissible, an exception applies to allow admission when defendant's driving under the influence is an aggravating circumstance that would authorize the jury to assess punitive damages. [\[FN273\]](#) Therefore, evidence of a prior DUI is admissible in the liability phase of a bifurcated trial on the issue of whether to award punitive damages:

Even though the danger of prejudice is a reason to exclude this evidence, in balance, this evidence's relevance on liability for punitive damages outweighs any prejudice if the jury is fully charged that this evidence goes only to liability for punitive damages and not to the issues of liability or damages in the particular incident on trial. [\[FN274\]](#)

Pointing out that the trial court has the authority to further sever the issues in a trial, the court of appeals held that it is an abuse of discretion to exclude prior DUI evidence from the issue of liability for punitive damages in a proceeding that is bifurcated only as to amount of punitive damages. [\[FN275\]](#) While the court of appeals recognized the possibility of employing a trifurcated procedure, it did not mandate \*355 trifurcation, leaving this uniquely procedural decision up to the trial judge. [\[FN276\]](#)

## I. Renewal Actions

The court of appeals addressed a question of first impression in *Owens v. Hewell*: [\[FN277\]](#) Under [O.C.G.A. section 9-2-61](#), [\[FN278\]](#) the Georgia renewal statute, from which date does the six-month renewal period run--the date of an Eleventh Circuit Court of Appeals decision dismissing the prior case or the date of the United States Supreme Court's denial of the subsequent petition for certiorari? Plaintiffs in *Owens* filed suit originally in the Northern District of Georgia, but that court dismissed their federal claims for failure to state a claim upon which relief could be granted. The Eleventh Circuit affirmed the district court's dismissal. Without seeking a stay, plaintiffs petitioned the United States Supreme Court for certiorari, which was denied. Subsequently, plaintiffs refiled their state law claims in superior court under the renewal statute. The superior court granted summary judgment to defendants. [\[FN279\]](#)

The renewal statute allows a plaintiff whose timely filed federal action is dismissed without prejudice to renew that claim in a state court within the original statute of limitations or within six months after the dismissal, whichever is later. [\[FN280\]](#) The plaintiffs must refile their claims within six months after those claims have been dismissed in federal court. [\[FN281\]](#) Plaintiffs in *Owens* contended that their renewal action was timely because they refiled it within six months of the United States Supreme Court's denial of their petition for certiorari. [\[FN282\]](#) The Georgia Court of Appeals disagreed. [\[FN283\]](#)

In reaching its decision, the court noted that plaintiffs had a statutory right to appeal to the United States Court of Appeals but did not have a statutory right to appeal to the United States Supreme Court because the grant of certiorari is a discretionary review. [\[FN284\]](#) The court also found persuasive the Eighth Circuit case, *Glick v. Ballentine Produce*, [\[FN285\]](#) in which this issue was previously addressed. The Eighth \*356 Circuit affirmed a trial court's dismissal for failure to comply with the time limitation of a renewal statute because plaintiffs never sought a stay while petitioning for certiorari. [\[FN286\]](#) The Eighth Circuit likewise rejected the argument that the filing of a petition for certiorari prevents the judgment of the court of appeals from becoming final until the Supreme Court

acts on the petition and ruled that the mere petition for certiorari does not have the effect of operating as a stay. [\[FN287\]](#) The Georgia Court of Appeals held that plaintiffs' unsuccessful pursuit of a discretionary appeal to the Supreme Court did not extend their right to renew their action under [O.C.G.A. section 9-2-61](#) absent a stay and further held that the six-month renewal period runs from the date of the Eleventh Circuit's decision. [\[FN288\]](#)

Another important case on renewal actions that litigators should keep in mind is *Reid v. United States Fidelity & Guaranty Co.* [\[FN289\]](#) The case is important in its application of the renewal statute to uninsured-underinsured motorist ("U.M.") carriers. Plaintiff-insured filed an action against defendants for injuries she allegedly sustained in an automobile collision. Defendants were insured by State Casualty Insurance Company. Plaintiff-insured did not serve her U.M. carrier because there was apparently no reason to believe defendants were uninsured. During the pendency of the lawsuit and more than two years after the date of the collision, defendants' liability carrier was declared insolvent. Subsequently, plaintiff-insured served her U.M. carrier, but before the U.M. carrier's answer was due, plaintiff-insured voluntarily dismissed the suit. She filed a renewal action within the six-month period allowed under [O.C.G.A. section 9-2-61](#). In the renewal action, the U.M. carrier moved for summary judgment asserting that the original action against it was void because the statute of limitations had expired prior to service on the U.M. carrier. The trial court granted summary judgment to the U.M. carrier. [\[FN290\]](#)

The rule announced by the Georgia Supreme Court in *Hobbs v. Arthur* [\[FN291\]](#) is that the "privilege of dismissal and renewal does not apply to cases decided on their merits or to void cases, but does allow renewal if the previous action was merely voidable." [\[FN292\]](#) Furthermore, the supreme court has held that the renewal statute is remedial in **\*357** nature and is to be construed liberally to allow renewal. [\[FN293\]](#) A suit is generally only voidable, not void, until the trial court enters an order dismissing a valid action. [\[FN294\]](#)

The court of appeals pointed out that although the U.M. carrier in the present case would most likely have raised a statute of limitations defense in the original suit, plaintiff dismissed the suit before the U.M. carrier did so. [\[FN295\]](#) The case was merely voidable until the time the trial court could rule on an asserted affirmative defense. [\[FN296\]](#) Any defenses raised in a renewed action are adjudicated only with respect to the renewed action. [\[FN297\]](#) The court of appeals noted that *Hobbs* and *Georgia Farm Bureau Mutual Insurance Co. v. Kilgore*, [\[FN298\]](#) wherein the supreme court held that dismissal of an action is not required when there was a significant delay between the timely filing of a tort claim and service on a U.M. carrier even when service was not perfected until after the running of the statute of limitations, [\[FN299\]](#) have seemingly created an exception to the supreme court holding in *Bohannon v. J.C. Penney Casualty Insurance Co.* [\[FN300\]](#) that a U.M. carrier must be served within the time allowed for valid service on the defendant in a tort action. [\[FN301\]](#)

While our courts generally disfavor doing indirectly what cannot be done directly, it appears that *Kilgore's* application of *Hobbs* allows an uninsured motorist carrier to be brought into a voidable action after the statute of limitation has run as to it and, then, after dismissal and refile, precludes raising defenses which could have been asserted only in the original action. [\[FN302\]](#)

The court of appeals appears to approve of the result: "It would seem a terrible injustice to say that persons who had purchased uninsured motorist coverage in complete good faith could be denied the benefit of their contracts under such circumstances." [\[FN303\]](#) The court ended with a call for legislative action, or at least reconsideration by the supreme **\*358** court, regarding the applicability of the two-year statute of limitations. [\[FN304\]](#)

#### J. Miscellaneous

Though not entirely ground-breaking cases, the following represent interesting opinions that may prove useful to litigators.

It seems that every year a case will pop up concerning the issue of qualifying jurors as to the defendant's insurance carrier. [\[FN305\]](#) With *Smith v. Crump*, [\[FN306\]](#) this year was no different. In affirming the qualification of the jury as to defendant's liability carrier, the court of appeals, in an opinion authored by Judge Eldridge, gave a succinct lesson in the history and reasoning of the rule, beginning in the 1920s. [\[FN307\]](#) The court pointed out that "[s]ince 1921, when the first jury was qualified as to insurance coverage and the various other situations when insurance is properly before the jury, there has been no systemwide failure of justice caused by the knowledge of the existence of insurance." [\[FN308\]](#)

The court was most persuasive in its response to Chief Judge Beasley's argument in *Franklin v. Tackett* [\[FN309\]](#) that jurors who do not know the insurance carrier is involved cannot be affected in making their decision. [\[FN310\]](#) The court made the cogent argument, also made by these authors in last year's survey, [\[FN311\]](#) that ignorance of the existence of insurance would prevent bias only so long as the jurors remain ignorant:

\*359 However, what if [the jurors] were not truthful in their voir dire to disclose employment or stock ownership on purpose; what if during trial they suddenly become aware of their interest; or what if, more insidious, someone reveals the common interest between the juror and the party on trial by a company logo on a lapel pin, stationery, file folder or anything that would make the association in the juror's mind? [\[FN312\]](#)

Most important, noted the court, is that there be a public perception of fairness and impartiality of a jury as well as the actual impartiality of the jury. [\[FN313\]](#) The Georgia appellate courts have balanced the interests of the parties and determined, as a matter of public policy, that the harm, if any, to the insured from qualifying the jury as to the insurer is "vastly outweighed by the fundamental right to an impartial jury." [\[FN314\]](#)

Another case of interest on jury issues, but on the subject of jury instructions, is *Jefferson Insurance Co. v. Dunn*. [\[FN315\]](#) In *Jefferson Insurance*, the court of appeals affirmed the principle that a jury charge on the adverse inference permitted when a party withholds evidence is proper when a person in a civil action invokes a testimonial privilege. [\[FN316\]](#) "Although a person does have a right to invoke the privilege[s] [under [O.C.G.A. section 24-9-27](#)] in a civil case in order to protect himself, when he does so, an inference against his interest may be drawn by the factfinder." [\[FN317\]](#)

Finally, like cases on qualifying the jury as to insurers, at least one case seems to surface each year that implicates technological advances such as the infamous fax machine. Again, with the case of *Department of Transportation v. Norris*, [\[FN318\]](#) this year was no different. The main issue in *Norris* was whether plaintiff timely filed his ante litem notice on the Georgia Department of Transportation ("D.O.T.") under [O.C.G.A. section 50-21-26](#). [\[FN319\]](#) Plaintiff brought an action for wrongful death and other damages against the D.O.T. Plaintiff mailed his ante litem notice within twelve months of the date of loss, but the state did not receive the \*360 notice until one day after the expiration of the twelve-month period. [\[FN320\]](#) The court of appeals has previously held that written notice must be received by the state within the requisite statutory period. [\[FN321\]](#) *Norris* had an interesting twist, however. Plaintiff also attempted to provide the required notice by a fax that was sent and received within the requisite time period. The trial court denied the D.O.T.'s motion to dismiss, finding that the fax transmission satisfied the requirement of [O.C.G.A. section 50-21-26\(a\)\(1\)](#) that the notice be given in writing. The trial court decided that the "requirement of receipt of the notice within twelve months does not require that the certified mail or personal delivery be accomplished within the same time frame so long as notice has been given in writing and mailed by certified mail, return receipt requested, within that time frame." [\[FN322\]](#)

The court of appeals did not agree with the trial court's interpretation of the statute's requirements. The court held that the statute's provisions must be read together so that "a proper notice of claim must be given by a writing which is both delivered by the date required by [O.C.G.A. \[section\] 50-21-26\(a\)\(1\)](#) and delivered by the method provided in [O.C.G.A. \[section\] 50-21-26\(a\)\(2\)](#)." [\[FN323\]](#)

The court also added its opinion that a facsimile transmission does not satisfy the statutory requirement that the notice be in writing. [\[FN324\]](#) "Such a transmission is an audio signal via a telephone line containing information from which a writing may be accurately duplicated, but the transmission of beeps and chirps along a telephone line is not a writing, as that term is customarily used." [\[FN325\]](#)

#### \*361 IV. Conclusion

Both the General Assembly and the appellate courts made important contributions to the law of Georgia in the area of trial practice and procedure during the survey period. The authors hope this Article will be useful to the practitioner in keeping abreast of these important developments.

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[FN1]. See [O.C.G.A. § 33-24-56.1 \(Supp. 1997\)](#).

[FN2]. See id. [§ 51-12-5.1](#).

[FN3]. See id. [§ 9-11-9.1](#).

[FN4]. See id. [§ 24-3-18](#).

[FN5]. See id. [§ 9-10-93](#).

[FN6]. See id. [§ 51-2-3](#).

[FN7]. See id. [§ 9-11-45](#).

[FN8]. See id. [§ 9-10-186](#).

[FN9]. The theory that the injured person should be fully compensated for all economic and noneconomic losses before any right of reimbursement or subrogation can arise on the part of a health insurer has been called the "made whole" doctrine, the "complete compensation" rule, and the "full compensation" rule by various authorities and has achieved wide acceptance in various applications and to differing extents. See, e.g., [Powell v. Blue Cross & Blue Shield](#), 581 So. 2d 772 (Ala. 1990); [Marquez v. Prudential Property & Cas. Ins. Co.](#), 620 P.2d 29 (Colo. 1980); [Florida Farm Bureau Ins. Co. v. Martin](#), 377 So. 2d 827 (Fla. Dist. Ct. App. 1979); [Hardware Dealers Mut. Fire Ins. Co. v. Ross](#), 262 N.E.2d 618 (Ill. App. Ct. 1970); [Capps v. Klebs](#), 382 N.E.2d 947 (Ind. App. Ct. 1978); [Wescott v. Allstate Ins. Co.](#), 397 A.2d 156 (Me. 1979); [Frost v. Porter Leasing Corp.](#), 436 N.E.2d 387 (Mass. 1982); [Westendorf v. Stasson](#), 330 N.W.2d 699 (Minn. 1983); [Home Ins. Co. v. Hartshorn](#), 91 So. 1 (Miss. 1922); [Skauge v. Mountain States Tel. & Tel. Co.](#), 565 P.2d 628 (Mont. 1977); [St. Paul Fire & Marine Ins. Co. v. W.P. Rose Supply Co.](#), 198 S.E.2d 482 (N.C. Ct. App. 1973); [Providence Washington Ins. Co. v. Hogges](#), 171 A.2d 120 (N.J. Super. Ct. 1961); [Lombardi v. Merchants Mut. Ins. Co.](#), 429 A.2d 1290 (R.I. 1981); [Wimberly v. American Cas. Co.](#), 584 S.W.2d 200 (Tenn. 1979); [Ortiz v. Great S. Fire & Cas. Co.](#), 597 S.W.2d 342 (Tex. 1980); [Vermont Indus.](#)

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[Dev. Auth. v. Setze, 600 A.2d 302 \(Vt. 1991\)](#); [Thiringer v. American Motors Ins. Co., 588 P.2d 191 \(Wash. 1978\)](#); [Garrity v. Rural Mut. Ins. Co., 253 N.W.2d 512 \(Wis. 1977\)](#). The authors refer to the doctrine in this Article as the complete compensation rule.

The rationale for the rule is that the insured has paid the insurer a premium to accept the risk of being required to pay the injured person's medical expenses and the risk that the payments will go unreimbursed if, for instance, no person was at fault or if the at-fault party is insolvent. If recovery can be obtained from the at-fault party but, for whatever reason, the recovery is insufficient to compensate fully the injured person for all injuries, the question becomes who receives first priority from proceeds insufficient to compensate both the injured person and the insurance company: the injured person or the insurance company that was paid to accept the risk and that built this exact risk into the rates it charged for the insurance policy. Increasingly, courts are siding with the injured person, which is exactly the stance the General Assembly took in passing [O.C.G.A. § 33-24-56.1](#).

[FN10]. See, e.g., [O.C.G.A. § 34-9-11.1 \(Supp. 1997\)](#) (addressing reimbursement of providers of workers' compensation benefits and specifically providing for offset reflecting reasonable attorney fees and expenses of litigation expended in obtaining recovery from third-party tortfeasors).

[FN11]. [267 Ga. 646, 482 S.E.2d 325 \(1997\)](#).

[FN12]. See [id. at 646, 482 S.E.2d at 325](#). "Ms. Duncan settled her \$48,148 claim against the tortfeasor for the \$15,000 limit of his liability insurance policy." *Id.*

[FN13]. *Id.*

[FN14]. [Id. at 647, 482 S.E.2d at 326](#). The supreme court cited [Shelter Ins. Co. v. Frohlich, 498 N.W.2d 74, 80 \(Neb. 1993\)](#) and 8A Appleman, Insurance Law & Practice § 4903.65, 25 (Supp. 1996-1997).

[FN15]. [267 Ga. at 647-48, 482 S.E.2d at 326-27](#).

[FN16]. *Id.*

[FN17]. *Id.*

[FN18]. [O.C.G.A. § 33-24-56.1\(b\)](#).

[FN19]. *Id.* [§ 33-24-56.1\(c\)](#).

[FN20]. *Id.* [§ 33-24-56.1\(d\)](#).

[FN21]. See [Georgia v. Private Truck Council of Am., Inc., 258 Ga. 531, 535, 371 S.E.2d 378, 381 \(1988\)](#) (citing [Ewing v. First Nat'l Bank, 209 Ga. 932, 76 S.E.2d 791 \(1953\)](#) and [Boeing Co. v. Van Gemert, 444 U.S. 472, 478 \(1980\)](#)).

[FN22]. *Id.*

[FN23]. [O.C.G.A. § 33-24-56.1\(b\)\(2\)](#).

[FN24]. *Id.* [§ 33-24-56.1\(e\)](#).

[FN25]. *Id.* [§ 33-24-56.1\(f\)](#).

[FN26]. *Id.* [§ 33-24-56.1\(g\)](#).

[FN27]. *Id.* [§ 33-24-56.1\(h\)](#).

[FN28]. *Id.* [§ 33-24-56.1\(j\)](#).

[FN29]. Id. [§ 33-24-56.1\(k\)](#).

[FN30]. Id. [§ 33-24-56.1\(l\)](#).

[FN31]. Id. [§ 51-12-5.1](#).

[FN32]. Id. [§ 51-12-5.1\(e\), \(f\)](#).

[FN33]. See [Viau v. Fred Dean, Inc.](#), 203 Ga. App. 801, 804-05, 418 S.E.2d 604, 608 (1992); [J.B. Hunt Transp., Inc. v. Bentley](#), 207 Ga. App. 250, 255- 56, 427 S.E.2d 499, 503-04 (1992).

[FN34]. [O.C.G.A. § 51-12-5.1\(f\)](#).

[FN35]. Id.

[FN36]. Id.

[FN37]. See [Gilbert v. C.S.X. Transp., Inc.](#), 197 Ga. App. 29, 33, 397 S.E.2d 447, 451 (1990) (holding that defendant's "separate and independent acts of negligence" in sending plaintiff to the plant in truck without cab shield is not passive as matter of law).

[FN38]. See [Johnson v. Brueckner](#), 216 Ga. App. 52, 53-54, 453 S.E.2d 76, 78 (1994) (Blackburn, J.) (pointing out that [O.C.G.A. section 9-11-9.1](#) is rigorous and unfair and has resulted in increased, rather than decreased, litigation).

[FN39]. See [O.C.G.A. § 9-11-1 \(1993\)](#).

[FN40]. [O.C.G.A. § 9-11-9.1\(a\), \(f\)](#).

[FN41]. See [Lutz v. Foran](#), 262 Ga. 819, 820, 427 S.E.2d 248, 249 (1993) (applying pleading requirement to actions alleging professional negligence against harbor pilot).

[FN42]. [O.C.G.A. § 9-11-9.1\(a\)](#). This aspect of the amended statute seems to indicate, for example, that a plaintiff who sues a physician doing business as a professional corporation will not be required to file an affidavit under the statute. A professional corporation is neither a "professional licensed by the State of Georgia" nor a "licensed healthcare facility." Id.

[FN43]. The courts have answered the former question affirmatively and the latter negatively. See [SK Hand Tool Corp. v. Lowman](#), 223 Ga. App. 712, 712- 16, 479 S.E.2d 103, 104-07 (1996) (pleading requirement inapplicable to strict product liability design defect claims); [Jackson v. Department of Transp.](#), 201 Ga. App. 863, 865-66, 412 S.E.2d 847, 849-50 (1991) (pleading requirement applicable to a claim against Department of Transportation for negligent design of road).

[FN44]. [O.C.G.A. § 9-11-9.1\(b\)](#).

[FN45]. Id.

[FN46]. Id. [§ 9-11-12\(a\) \(1993\)](#).

[FN47]. This dilemma may be more academic than practical. In the first place, a small number of lawsuits involve subsection (b). Second, defendants would most likely file a motion to dismiss when the plaintiff has invoked subsection (b) anyway.

[FN48]. [O.C.G.A. § 9-11-9.1\(c\)](#).

[FN49]. [Id. § 9-11-9.1\(e\) \(1993\).](#)

[FN50]. [Id.](#)

[FN51]. [Id.](#)

[FN52]. [Abe Eng'g, Inc. v. Griffin, Cochran & Marshall, 212 Ga. App. 586, 443 S.E.2d 1 \(1994\).](#)

[FN53]. See, e.g., [Lawson v. State, 224 Ga. App. 645, 647, 481 S.E.2d 856, 860 \(1997\)](#) (if avoidable, a statute should not be interpreted so as to render any statutory provision meaningless); [City of Buchanan v. Pope, 222 Ga. App. 716, 717, 476 S.E.2d 53, 55 \(1996\).](#)

[FN54]. [223 Ga. App. 762, 478 S.E.2d 892 \(1996\).](#)

[FN55]. [Id. at 764, 478 S.E.2d at 895.](#)

[FN56]. [O.C.G.A. § 24-3-18\(a\) \(Supp. 1997\).](#)

[FN57]. [Id.](#)

[FN58]. [Id.](#)

[FN59]. [Id.](#)

[FN60]. [Id.](#)

[FN61]. [Id. § 24-3-18\(b\).](#)

[FN62]. [Id. § 9-10-93 \(1982\).](#)

[FN63]. [Id. § 9-10-93.](#)

[FN64]. [Ga. Const. art. VI, § II, para. IV.](#) See also [O.C.G.A. § 9-10-31 \(1982\).](#)

[FN65]. See [Goodman v. Vilston, Inc., 197 Ga. App. 718, 720, 399 S.E.2d 241, 243 \(1990\)](#) (although the Long Arm Statute confers jurisdiction over a nonresident, for purposes of joint tortfeasor venue provision, it does not confer residency status upon nonresident defendants).

[FN66]. [O.C.G.A. § 9-10-93.](#)

[FN67]. [Id.](#) Georgia practitioners are painfully familiar with the age-old and uniquely Georgia phenomenon of "vanishing venue." If, for whatever reason, the only resident defendant(s) is absolved of liability, even after trial, or even after appeal, venue vanishes over joint tortfeasors who were not residents of the county where the case is pending. Any verdict or judgment vanishes as well, and the parties must begin anew in a county where venue properly lies. See, e.g., [Ross v. Battle, 117 Ga. 877, 880, 45 S.E. 252, 254 \(1903\); Brooks v. H & H Creek, Inc., 223 Ga. App. 635, 638, 478 S.E.2d 451, 455 \(1996\); Collipp v. Newman, 217 Ga. App. 674, 675, 458 S.E.2d 701, 701-02 \(1995\); Zepp v. Toporek, 211 Ga. App. 169, 172, 438 S.E.2d 636, 640 \(1993\); Timberlake Grocery Co. v. Cartwright, 146 Ga. App. 746, 747, 247 S.E.2d 567, 568 \(1978\).](#)

The long arm venue statute eliminating "vanishing venue" in at least one context marks the first inroads the legislature has made on this inefficient and uneconomical anachronism in Georgia law. Perhaps more will come in the future, and the costly doctrine of vanishing venue will itself vanish.

[FN68]. [O.C.G.A. § 9-10-93.](#)

[FN69]. [Id.](#)

[FN70]. This amendment brings the venue provision in line with the long arm jurisdictional statute, [O.C.G.A. section 9-10-91 \(1982\)](#), which authorizes the state to exercise jurisdiction against a defendant who committed a tortious act outside Georgia that caused injury in Georgia.

[FN71]. [O.C.G.A. § 9-10-93](#).

[FN72]. Id.

[FN73]. Id.

[FN74]. See [Boyle v. State, 190 Ga. App. 734, 380 S.E.2d 57 \(1989\)](#).

[FN75]. [O.C.G.A. § 5-6-35 \(Supp. 1997\)](#).

[FN76]. Id. [§ 51-2-3\(a\) \(1982\)](#).

[FN77]. Id. [§ 9-11-30 \(1993\)](#).

[FN78]. Id. [§ 9-11-45](#).

[FN79]. See Unif. Sup. Ct. R. 13.4 (1997). See also [Lissmore v. Kincade, 188 Ga. App. 548, 549-50, 373 S.E.2d 819, 822 \(1988\)](#).

[FN80]. [214 Ga. App. 885, 449 S.E.2d 624 \(1994\)](#).

[FN81]. Id. at 887, 449 S.E.2d at 626.

[FN82]. [O.C.G.A. § 9-10-91](#).

[FN83]. [221 Ga. App. 702, 472 S.E.2d 515 \(1996\)](#).

[FN84]. Id. at 702, 472 S.E.2d at 516.

[FN85]. See [O.C.G.A. § 9-10-91](#).

[FN86]. [221 Ga. App. at 703, 472 S.E.2d at 516](#) (citing [American Thread Co. v. Rochester, 82 Ga. App. 873, 62 S.E.2d 602 \(1950\)](#)).

[FN87]. Id.

[FN88]. Id. at 704, [472 S.E.2d at 517](#) (citing [National Egg Co. v. Bank Leumi le-Israel, B.M., 514 F. Supp. 1125 \(N.D. Ga. 1981\)](#)).

[FN89]. Id.

[FN90]. Id.

[FN91]. [223 Ga. App. 7, 477 S.E.2d 139 \(1996\)](#).

[FN92]. Id. at 7, [477 S.E.2d at 139](#). The automobile collision giving rise to the suit occurred on February 1, 1993. The complaint was filed in Fulton County on January 21, 1994. Id.

[FN93]. Id., [477 S.E.2d at 139-40](#).

[FN94]. [Id.](#), 477 S.E.2d at 140.

[FN95]. [Id.](#) at 7-8, 477 S.E.2d at 140 (distinguishing [Keith v. Alexander Underwriter Etc.](#), 219 Ga. App. 36, 463 S.E.2d 732 (1995)).

[FN96]. [219 Ga. App.](#) at 39, 463 S.E.2d at 734.

[FN97]. [223 Ga. App.](#) at 8, 477 S.E.2d at 140.

[FN98]. [Id.](#)

[FN99]. [Id.](#)

[FN100]. [Id.](#), 477 S.E.2d at 140-41.

[FN101]. [Id.](#)

[FN102]. [225 Ga. App.](#) 599, 484 S.E.2d 337 (1997).

[FN103]. [Id.](#) at 600, 484 S.E.2d at 338.

[FN104]. [Id.](#) at 599-600, 484 S.E.2d at 338.

[FN105]. [Id.](#) at 600, 484 S.E.2d at 338 (quoting [Corley v. Gilley](#), 205 Ga. App. 660, 661, 423 S.E.2d 55, 56 (1992)).

[FN106]. [Id.](#)

[FN107]. [Id.](#) (quoting [DeLoach v. Hewes](#), 211 Ga. App. 321, 321, 439 S.E.2d 94, 95 (1993) and [Bennett v. Matt Gay Chevrolet Oldsmobile](#), 200 Ga. App. 348, 350 n.2, 408 S.E.2d 111, 114 n.2 (1991)).

[FN108]. [Id.](#)

[FN109]. [Id.](#) at 601, 484 S.E.2d at 339. See also [O.C.G.A. § 9-11-4\(c\) \(1993\)](#) ("When service is to be made within this state, the person making such service shall make the service within 5 days from the time of receiving the summons and complaint.")

[FN110]. See [O.C.G.A. § § 50-21-20](#) to -37 (1994).

[FN111]. [226 Ga. App.](#) 74, 485 S.E.2d 243 (1997).

[FN112]. [Id.](#) at 75, 485 S.E.2d at 244.

[FN113]. [O.C.G.A. § 50-21-28.](#)

[FN114]. [226 Ga. App.](#) at 74-75, 485 S.E.2d at 244-45.

[FN115]. [Id.](#) at 75, 485 S.E.2d at 245.

[FN116]. [O.C.G.A. § 50-21-22\(3\) \(1994\).](#)

[FN117]. [226 Ga. App.](#) at 75, 485 S.E.2d at 245.

[FN118]. [Id.](#), 485 S.E.2d at 245 n.2.

[\[FN119\]](#). See *id.*

[\[FN120\]](#). 225 Ga. App. 653, 485 S.E.2d 252 (1997).

[\[FN121\]](#). 222 Ga. App. 539, 474 S.E.2d 732 (1996).

[\[FN122\]](#). 225 Ga. App. at 653-54, 485 S.E.2d at 253.

[\[FN123\]](#). *Id.* at 654, 485 S.E.2d at 253.

[\[FN124\]](#). *Id.*

[\[FN125\]](#). *Id.* The court of appeals also reasoned that a bankruptcy discharge is an affirmative defense, which asserts a bar to recovery and not merely an abatement of an action. *Id.* The court used the distinction as an additional basis for calling the trial court's ruling a summary judgment rather than a dismissal because matters in abatement are the subject of [O.C.G.A. section 9-11-12\(b\)](#) (except [O.C.G.A. § 9-11-12\(b\)\(6\)](#)) and matters in bar are the subject of summary judgments. [Id.](#), 485 S.E.2d at 254.

[\[FN126\]](#). [Id.](#) at 655-56, 485 S.E.2d at 254. (The court, it seems, applied the standard for deciding a motion to dismiss by deciding the plaintiff could not recover under any set of facts.)

[\[FN127\]](#). [Id.](#) at 655, 485 S.E.2d at 254.

[\[FN128\]](#). *Id.*

[\[FN129\]](#). *Id.*

[\[FN130\]](#). [Id.](#) at 656, 485 S.E.2d at 254-55.

[\[FN131\]](#). 236 Ga. 456, 224 S.E.2d 167 (1976).

[\[FN132\]](#). 225 Ga. App. at 656, 485 S.E.2d at 255.

[\[FN133\]](#). *Id.*

[\[FN134\]](#). *Id.*

[\[FN135\]](#). *Id.* The trial court was affirmed by four members of the court of appeals (Beasley, J., Andrews, C.J., Johnson, J., and Smith, J.). *Id.* Four members dissented as to the affirmance (McMurray, J., Birdsong, J., Pope, P.J., and Blackburn, J.). *Id.* One member did not participate (Ruffin, J.). *Id.*

[\[FN136\]](#). [O.C.G.A. § 33-7-11\(d\)](#) (Supp. 1997).

[\[FN137\]](#). 225 Ga. App. at 658, 485 S.E.2d at 256 (Birdsong, P.J., dissenting).

[\[FN138\]](#). *Id.*

[\[FN139\]](#). *Id.*

[\[FN140\]](#). 222 Ga. App. 539, 474 S.E.2d 732 (1996).

[\[FN141\]](#). [O.C.G.A. § 46-7-12](#) (Supp. 1997).

[\[FN142\]](#). 222 Ga. App. at 540, 474 S.E.2d at 732.

[FN143]. [221 Ga. App. 613, 472 S.E.2d 325 \(1996\)](#).

[FN144]. [183 Ga. App. 508, 359 S.E.2d 351 \(1987\)](#).

[FN145]. [222 Ga. App. at 540, 474 S.E.2d at 733](#) (quoting [Waymond, 221 Ga. App. 613, 472 S.E.2d 325 \(1996\)](#)).

[FN146]. Id.

[FN147]. Id. (Pope, P.J., concurring specially).

[FN148]. Id. at 541, [474 S.E.2d at 733](#).

[FN149]. Id. (quoting [Andrews v. Yellow Freight Sys., 262 Ga. 476, 421 S.E.2d 712 \(1992\)](#)).

[FN150]. Id., [474 S.E.2d at 734](#).

[FN151]. [224 Ga. App. 861, 482 S.E.2d 489 \(1997\)](#).

[FN152]. Id. at 861-62, [482 S.E.2d at 490](#).

[FN153]. Id. at 861, [482 S.E.2d at 490](#).

[FN154]. Id.

[FN155]. Id.

[FN156]. Id.

[FN157]. [197 Ga. App. 275, 398 S.E.2d 271 \(1990\)](#). The court noted that this case was apparently never cited to the trial court. Id.

[FN158]. [224 Ga. App. at 861-62, 482 S.E.2d at 490](#).

[FN159]. Id. at 862, [482 S.E.2d at 490](#).

[FN160]. Id.

[FN161]. [224 Ga. App. 395, 480 S.E.2d 389 \(1997\)](#).

[FN162]. [O.C.G.A. § 9-11-17\(a\) \(1993\)](#).

[FN163]. [224 Ga. App. at 396, 480 S.E.2d at 390](#).

[FN164]. Id.

[FN165]. Id. (quoting [O.C.G.A. § 9-2-24 \(1982\)](#)).

[FN166]. Id.

[FN167]. [O.C.G.A. § 9-11-17\(a\)](#).

[FN168]. [224 Ga. App. at 397, 480 S.E.2d at 391](#) (quoting [Boatman v. George Hyman Constr. Co., 157 Ga. App. 120, 123, 276 S.E.2d 272, 275 \(1981\)](#)).

[FN169]. Id.

[FN170]. *Id.* See [O.C.G.A. § 9-11-19\(a\) \(1993\)](#) (joinder of parties needed for just adjudication).

[FN171]. [223 Ga. App. 256, 477 S.E.2d 405 \(1996\)](#).

[FN172]. *Id.* at 256, 477 S.E.2d at 406. See [O.C.G.A. § 9-11- 12\(b\)\(6\) \(1993\)](#).

[FN173]. [223 Ga. App. at 258, 477 S.E.2d at 407](#).

[FN174]. *Id.* at 256, 477 S.E.2d at 406 (quoting [O.C.G.A. § 9-11- 18\(a\) \(1993\)](#)).

[FN175]. *Id.* (citing [Huff v. Valentine, 217 Ga. App. 310, 311-12, 457 S.E.2d 249, 250 \(1995\)](#) and [O.C.G.A. § 9-11-42\(b\) \(1993\)](#)).

[FN176]. [191 Ga. App. 103, 381 S.E.2d 103 \(1989\)](#).

[FN177]. [223 Ga. App. at 256-57, 477 S.E.2d at 406](#).

[FN178]. *Id.* at 257, 477 S.E.2d at 406.

[FN179]. *Id.* at 257-58, 477 S.E.2d at 407.

[FN180]. [225 Ga. App. 472, 484 S.E.2d 75 \(1997\)](#).

[FN181]. *Id.* at 472-73, 484 S.E.2d at 76.

[FN182]. *Id.* at 473, 484 S.E.2d at 76.

[FN183]. See [O.C.G.A. § 9-11-41\(a\) \(1993\)](#) ("[A]n action may be dismissed by the plaintiff, without order or permission of court, by filing a written notice of dismissal at any time before the plaintiff rests.").

[FN184]. [225 Ga. App. at 473, 484 S.E.2d at 77](#) (citing [Jones v. Burton, 238 Ga. 394, 396, 233 S.E.2d 367, 368 \(1977\)](#)).

[FN185]. *Id.* (citing [Jones, 238 Ga. 394, 233 S.E.2d 367](#)).

[FN186]. *Id.*

[FN187]. *Id.* (quoting [Bytell v. Paul, 173 Ga. App. 83, 84, 325 S.E.2d 451, 453 \(1984\)](#)).

[FN188]. *Id.* at 474, [484 S.E.2d at 77](#).

[FN189]. *Id.*

[FN190]. [Thomas v. Auto Owners Ins. Co., 221 Ga. App. 815, 472 S.E.2d 707 \(1996\)](#).

[FN191]. *Id.* at 815-16, 472 S.E.2d at 708.

[FN192]. *Id.*, [472 S.E.2d at 709](#).

[FN193]. *Id.*, [472 S.E.2d at 708](#) (quoting [O.C.G.A. § 9-11- 41\(a\) \(1993\)](#)).

[FN194]. *Id.*; [O.C.G.A. § 9-11-41\(c\)](#) (providing that this code section applies to the dismissal of any counterclaim, cross-claim, or third-party claim).

[\[FN195\]. 221 Ga. App. at 815-16, 472 S.E.2d at 709.](#)

[\[FN196\]. 224 Ga. App. 498, 481 S.E.2d 552 \(1997\).](#)

[\[FN197\]. Id. at 499, 481 S.E.2d at 555.](#)

[\[FN198\]. Id. at 500, 481 S.E.2d at 556.](#)

[\[FN199\]. Id.](#) The court did affirm the dismissal based on other reasons not addressed here. [Id. at 504, 481 S.E.2d at 558.](#)

[\[FN200\]. 225 Ga. App. 620, 484 S.E.2d 344 \(1997\).](#)

[\[FN201\]. Id. at 621, 484 S.E.2d at 345-46.](#) The plaintiff's subpoena contained five enumerated requests, including the following:

1. The last five financial statements prepared by you, for you, or for any company in which you have a financial interest; ... 3. All federal and state income tax returns submitted by you ... for each of the last five years; 4. Each and every bank statement (including all checking, savings and other such accounts) in which you maintained an account on [date] ....

[Id. at 621-22, 484 S.E.2d at 346.](#)

[\[FN202\]. Id. at 623, 484 S.E.2d at 347.](#)

[\[FN203\]. Id. at 624, 484 S.E.2d at 347.](#)

[\[FN204\]. Id.](#) (citing [Holman v. Burgess](#), 199 Ga. App. 61, 404 S.E.2d 144 (1991)).

[\[FN205\]. Id.](#)

[\[FN206\]. Id. at 624-25, 484 S.E.2d at 348](#) (citation omitted).

[\[FN207\]. Id. at 625, 484 S.E.2d at 348.](#)

[\[FN208\]. Goodman v. Lake Buckhorn Estates Home Owners Assoc.](#), 224 Ga. App. 765, 767, 481 S.E.2d 882, 884 (1997).

[\[FN209\]. 222 Ga. App. 638, 476 S.E.2d 34 \(1996\).](#)

[\[FN210\]. Id. at 639, 476 S.E.2d at 36.](#)

[\[FN211\]. Id. at 638, 476 S.E.2d at 35-36.](#)

[\[FN212\]. Id. at 638-39, 476 S.E.2d at 36.](#)

[\[FN213\]. Id. at 639, 476 S.E.2d at 36.](#)

[\[FN214\]. Id.;](#) see [O.C.G.A. § 24-4-24\(b\)\(8\)](#) (1995).

[\[FN215\]. 222 Ga. App. at 639, 476 S.E.2d at 36.](#)

[\[FN216\]. Id. at 640, 476 S.E.2d at 36.](#)

[\[FN217\]. 221 Ga. App. 781, 472 S.E.2d 548 \(1996\).](#)

[\[FN218\]. Id. at 781, 472 S.E.2d at 549.](#)

[\[FN219\]. Id. at 781-82, 472 S.E.2d at 549.](#)

[\[FN220\]. Id. at 784, 472 S.E.2d at 551.](#)

[\[FN221\]. See Ga. State Bar R. 1-203.](#)

[\[FN222\]. See Ga. State Bar R. 1-204.](#)

[\[FN223\]. 221 Ga. App. at 783, 472 S.E.2d at 551.](#)

[\[FN224\]. Id. at 784, 472 S.E.2d at 551.](#)

[\[FN225\]. Id.](#)

[\[FN226\]. 225 Ga. App. 139, 483 S.E.2d 290 \(1997\).](#)

[\[FN227\]. Id. at 139, 483 S.E.2d at 290.](#)

[\[FN228\]. 161 Ga. App. 44, 288 S.E.2d 854 \(1982\).](#)

[\[FN229\]. 225 Ga. App. at 139, 483 S.E.2d at 291 \(quoting \[Worley, 161 Ga. App. at 45, 288 S.E.2d at 856\]\(#\)\).](#)

[\[FN230\]. Id.](#)

[\[FN231\]. Id. at 140, 483 S.E.2d at 291.](#)

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

[\[FN233\]. 221 Ga. App. 640, 472 S.E.2d 328 \(1996\).](#)

[\[FN234\]. Id. at 640, 472 S.E.2d at 328-29.](#)

[\[FN235\]. Id. at 640-41, 472 S.E.2d at 329.](#)

[\[FN236\]. Id. at 641, 472 S.E.2d at 329 \(quoting \[Stolle v. State Farm Ins. Co., 206 Ga. App. 235, 236, 424 S.E.2d 807, 809 \\(1992\\)\]\(#\)\).](#)

[\[FN237\]. Id., 472 S.E.2d at 330.](#)

[\[FN238\]. Id. at 642, 472 S.E.2d at 330.](#)

[\[FN239\]. Id.](#)

[\[FN240\]. 192 Ga. App. 227, 384 S.E.2d 202 \(1989\).](#)

[\[FN241\]. 221 Ga. App. at 642, 472 S.E.2d at 330.](#)

[\[FN242\]. Id., 472 S.E.2d at 330-31.](#)

[\[FN243\]. Id., 472 S.E.2d at 330.](#)

[\[FN244\]. Id. at 643, 472 S.E.2d at 331 \(Beasley, C.J., concurring specially\).](#)

[\[FN245\]. Id.](#)

[\[FN246\]. 267 Ga. 339, 478 S.E.2d 123 \(1996\).](#)

[\[FN247\]. Id. at 339, 478 S.E.2d at 123.](#)

[\[FN248\]. Alexander v. General Motors Corp., 219 Ga. App. 660, 661, 466 S.E.2d 607, 609 \(1995\), vacated, 224 Ga. App. 238, 481 S.E.2d 7 \(1997\).](#)

[\[FN249\]. Id.](#)

[\[FN250\]. 267 Ga. at 339, 478 S.E.2d at 123. O.C.G.A. section 51-1- 11\(b\)\(1\) \(1997\)](#) provides the following:

[that the] manufacturer of any personal property sold as new property ... shall be liable in tort, irrespective of privity, to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained.

[\[FN251\]. 267 Ga. at 339-40, 478 S.E.2d at 123.](#)

[\[FN252\]. Id. at 340, 478 S.E.2d at 124.](#) An example of the differences found in the two states' laws is a notification requirement in Virginia's warranty law that is not required under Georgia's strict liability law.

[\[FN253\]. Id. \(citations omitted\).](#)

[\[FN254\]. Id.](#)

[\[FN255\]. Id.](#)

[\[FN256\]. Id. at 340-41, 478 S.E.2d at 124.](#)

[\[FN257\]. O.C.G.A. § 9-11-42\(a\) \(1993\).](#)

[\[FN258\]. Ford v. Uniroyal Goodrich Tire Co., 267 Ga. 226, 476 S.E.2d 565 \(1996\).](#)

[\[FN259\]. 267 Ga. 226, 476 S.E.2d 565 \(1996\).](#)

[\[FN260\]. Id. at 226, 476 S.E.2d at 567.](#)

[\[FN261\]. Uniroyal Goodrich Tire Co. v. Ford, 218 Ga. App. 248, 461 S.E.2d 877 \(1995\), rev'd in part, 267 Ga. 226, 476 S.E.2d 565 \(1996\).](#)

[\[FN262\]. O.C.G.A. § 9-11-42\(a\).](#)

[\[FN263\]. 267 Ga. at 226-27, 476 S.E.2d at 567.](#)

[\[FN264\]. Id. at 228, 476 S.E.2d at 568.](#) The court cited Black's Law Dictionary for definitions of consolidated actions and joint trials:

consolidation [is] the act of "uniting several actions into one trial and judgment ... where all the actions are between the same parties, pending in the same court, and involving substantially the same subject-matter, issues, and defenses." A joint trial is defined as a "trial of two or more persons ... conducted within the framework of one trial." Id.

[\[FN265\]. Id.](#)

[\[FN266\]. Id. at 229, 476 S.E.2d at 568.](#)

[FN267]. [Id. at 230, 476 S.E.2d at 569.](#)

[FN268]. [224 Ga. App. 843, 482 S.E.2d 377 \(1996\)](#), cert. granted, 1997 Ga. LEXIS 576 (1997).

[FN269]. [224 Ga. App. at 843-44, 482 S.E.2d at 379.](#)

[FN270]. [Id. at 844, 482 S.E.2d at 379.](#)

[FN271]. [Id.; O.C.G.A. § 51-12-5.1\(d\)\(1\), \(2\) \(Supp. 1997\).](#)

[FN272]. [224 Ga. App. at 845, 482 S.E.2d at 380.](#)

[FN273]. [Id. \(citing Thompson v. Moore, 174 Ga. App. 331, 329 S.E.2d 914 \(1985\) and Holt v. Grinnell, 212 Ga. App. 520, 441 S.E.2d 874 \(1994\)\).](#)

[FN274]. [Id.](#)

[FN275]. [Id. at 846, 482 S.E.2d at 381.](#)

[FN276]. [Id.](#)

[FN277]. [222 Ga. App. 563, 474 S.E.2d 740 \(1996\).](#)

[FN278]. [O.C.G.A. § 9-2-61 \(Supp. 1997\).](#)

[FN279]. [222 Ga. App. at 563, 474 S.E.2d at 741.](#) See [O.C.G.A. § 9-2-61.](#)

[FN280]. [O.C.G.A. § 9-2-61.](#)

[FN281]. [222 Ga. App. at 564, 474 S.E.2d at 741;](#) see [O.C.G.A. § 9-2-61.](#)

[FN282]. [Id. at 564, 474 S.E.2d at 741.](#)

[FN283]. [Id. at 565, 474 S.E.2d at 742.](#)

[FN284]. [Id. at 564, 474 S.E.2d at 741-42 \(citing 28 U.S.C. § 1254\(1\) and Potts v. Flax, 313 F.2d 284, 290 \(5th Cir. 1963\)\).](#)

[FN285]. [397 F.2d 590 \(8th Cir. 1968\).](#)

[FN286]. [222 Ga. App. at 564-65, 474 S.E.2d at 742 \(citing Glick, 397 F.2d at 594\).](#)

[FN287]. [Id. \(citing Glick, 397 F.2d at 594\).](#)

[FN288]. [Id. at 565, 474 S.E.2d at 742.](#)

[FN289]. [223 Ga. App. 204, 477 S.E.2d 369 \(1996\).](#)

[FN290]. [Id. at 204, 477 S.E.2d at 370.](#)

[FN291]. [264 Ga. 359, 444 S.E.2d 322 \(1994\).](#)

[FN292]. [223 Ga. App. at 205, 477 S.E.2d at 370 \(quoting Hobbs, 264 Ga. at 360, 444 S.E.2d at 323\).](#)

[FN293]. [Id.](#)

[\[FN294\]](#). Id.

[\[FN295\]](#). Id.

[\[FN296\]](#). Id.

[\[FN297\]](#). Id. at 206, [477 S.E.2d at 371](#).

[\[FN298\]](#). [265 Ga. 836, 462 S.E.2d 713 \(1995\)](#).

[\[FN299\]](#). Id. at 837, [462 S.E.2d at 714](#).

[\[FN300\]](#). [259 Ga. 162, 377 S.E.2d 853 \(1989\)](#).

[\[FN301\]](#). Id. at 163, [377 S.E.2d at 853](#).

[\[FN302\]](#). [223 Ga. App. at 206, 477 S.E.2d at 371](#).

[\[FN303\]](#). Id.

[\[FN304\]](#). Id. at 207, [477 S.E.2d at 371](#). The court of appeals applies common-sense reasoning in its argument against applying the two-year statute of limitations to U.M. carriers in these situations. The court notes the dilemma of lawyers who represent plaintiffs in automobile collision cases and who have no reason to anticipate that the defendants would become uninsured after suit is filed:

[I]f the two-year statute is to be strictly applied, these lawyers would be forced to serve[ ] their client's uninsured motorist carrier in every case and try to hold them in the case against the slim possibility that the defendant would become uninsured before the case was concluded and any judgment collected. Should counsel serve the uninsured carrier under those circumstances, he or she would immediately be called upon to defend a motion for summary judgment or a declaratory judgment action, no doubt including an application for frivolous litigation expenses, based on a defense that the defendant was not uninsured.

[Id. at 206-07, 477 S.E.2d at 371](#).

[\[FN305\]](#). See last year's survey for a thorough discussion of this issue. C. Frederick Overby & Teresa T. Abell, [Trial Practice and Procedure, 48 Mercer L. Rev. 517, 560 \(1996\)](#).

[\[FN306\]](#). [223 Ga. App. 52, 476 S.E.2d 817 \(1996\)](#).

[\[FN307\]](#). Id. at 54-55, [476 S.E.2d at 819](#).

[\[FN308\]](#). Id. at 55, [476 S.E.2d at 820](#).

[\[FN309\]](#). [209 Ga. App. 448, 433 S.E.2d 710 \(1993\)](#).

[\[FN310\]](#). Id. at 450, [433 S.E.2d at 711](#) (Beasley, P.J., concurring specially).

[\[FN311\]](#). Overby & Abell, *supra* note 305, at 562.

[\[FN312\]](#). [223 Ga. App. at 56, 476 S.E.2d at 820](#).

[\[FN313\]](#). Id.

[\[FN314\]](#). Id.

[\[FN315\]](#). [224 Ga. App. 732, 482 S.E.2d 383 \(1997\)](#).

[\[FN316\]. Id. at 743, 482 S.E.2d at 393.](#)

[\[FN317\]. Id. \(quoting \*Simpson v. Simpson\*, 233 Ga. 17, 21, 209 S.E.2d 611, 614 \(1974\), and citing \*Ostroff v. Coyner\*, 187 Ga. App. 109, 115-16, 369 S.E.2d 298, 304 \(1988\)\).](#)

[\[FN318\]. 222 Ga. App. 361, 474 S.E.2d 216 \(1996\), rev'd, 268 Ga. 192, 486 S.E.2d 826 \(1997\).](#) Two judges of the three-judge panel concurred in the judgment only.

[\[FN319\]. O.C.G.A. § 50-21-26 \(1994\).](#)

[\[FN320\]. 222 Ga. App. at 361, 474 S.E.2d at 217.](#)

[\[FN321\]. \*Hardy v. Candler County\*, 214 Ga. App. 627, 631, 448 S.E.2d 487, 490 \(1994\), overruled by \*Norris v. Georgia Dep't of Transp.\*, 268 Ga. 192, 486 S.E.2d 826 \(1997\).](#)

[\[FN322\]. 222 Ga. App. at 361-62, 474 S.E.2d at 217.](#)

[\[FN323\]. Id. at 362, 474 S.E.2d at 218.](#) This court of appeals opinion was reversed by the Georgia Supreme Court after this year's survey period ended. See [Norris v. Georgia Dep't of Transp.](#), 268 Ga. at 192, 486 S.E.2d at 828. The supreme court wisely held that actual receipt by the state of the ante litem notice is not required under the Tort Claims Act. Id. The notice must be mailed within the time prescribed. Id. The court noted that to hold the sender responsible for ensuring actual receipt within the statutory time would put an unreasonable burden on the sender because a document placed in the mail is no longer in the sender's control. Id.

[\[FN324\]. 222 Ga. App. at 362, 474 S.E.2d at 218.](#)

[\[FN325\]. Id.](#) The supreme court stated that because it had found that a mailed notice of claim satisfies the statute, it would not decide whether a facsimile notice would suffice as a writing. [268 Ga. at 193, 486 S.E.2d at 827 n.1.](#)

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