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Survey Articles

*487 TRIAL PRACTICE AND PROCEDURE

C. Frederick Overby [FNa1]; Jason Crawford [FNaa1]; Teresa T. Abell [FNaaa1]; and Matthew E. Cook [FNaaaa1]

I. Introduction

This survey period yielded several notable decisions covering the professional malpractice affidavit/pleading requirement, renewal actions, attorney-client relations, and the summary judgment standard. Refinements in the areas of insurance practice, jury qualifications, releases, default judgment, and privileges lend important guidance to practitioners, judges, and scholars in the area of trial practice and procedure. The most significant legislative development of trial practice and procedure addressed the longstanding "vanishing venue" doctrine.

*488 II. Case Law

A. The Professional Negligence Pleading Requirement of O.C.G.A. section 9- 11-9.1

As usual, the most frequently litigated area during the survey period was the professional negligence pleading requirement of O.C.G.A. section 9-11-9.1, a statute passed with the promise that it would reduce unnecessary litigation in malpractice cases. Trial practitioners are indeed fortunate that this statute exists to diminish litigation if the litigation prompted by this statute is any indication of this pressing need.

The case of Phoebe Putney Memorial Hospital v. Skipper [FN1] provides a telling example of the litigation boom spawned by O.C.G.A. section 9-11- 9.1. [FN2] The pleading requirement issue was addressed at every level up to the supreme court and then re-addressed on remand by the court of appeals. In the last leg of the marathon litigation, focusing almost exclusively on plaintiff's pleading proficiency, the court of appeals held the lack of a valid jurat on the affidavit renders the affidavit voidable but not void, such that an original, properly executed affidavit can be substituted before the trial court's ruling on the defendant's motion to dismiss in order to save the claim. [FN3]

The 1997 amendments to the statute liberalizing the requirements and softening the penalty for noncompliance did not apply in Skipper, but "since the Supreme Court construed the amendment as an affirmation of legislative intent

already implied, that intent [was] honored in construing the former version." [FN4] If the amended version had applied, however, subsection (d) would have expressly saved the claim under the facts of the case because it allows a plaintiff to cure a defective affidavit. [FN5] Comparing the holdings of Skipper and Davis v. Kaiser Foundation Health Plan of Georgia, Inc., [FN6] a case discussed elsewhere in this Article in connection with reimbursement claims made by healthcare insurance providers, one can only guess when a legislative enactment is presumed to change existing law and when it is deemed to be an affirmation of existing legislative intent or public policy. The cases provide no clear answer.

***489** Harris v. Murray [FN7] makes clear that the 1997 amendments to O.C.G.A. section 9-11-9.1 do not apply retroactively, despite the statute's being deemed "procedural," as opposed to "substantive." [FN8] The legislature is free to prescribe only prospective application for even a procedural statute, which is what it did with respect to the 1997 amendments. [FN9]

The court of appeals in Harris also held that an affidavit is no less an affidavit because the witness was not formally administered an oath at the time and place of execution. [FN10]

It is not necessary that the oath administered be formal, nor is it necessary that any exact words or specific ceremony be used to constitute a valid administration of an oath. "What the law requires is that there must be, in the presence of the officer, something done whereby the person to be bound consciously takes upon himself the obligation of an oath." [FN11]

This holding is not only in accord with age-old case law cited by the majority opinion, but is also consistent with the practices of real world notary publics everywhere. If the law were suddenly to require some formal, ceremonial administration of an oath, as suggested by Judge Andrews in his dissent urging dismissal of plaintiff's case for lack of ceremony, most affidavits around the state would become nullities, creating perhaps even more unnecessary litigation than O.C.G.A. section 9-11-9.1. [FN12]

Another intriguing question recently decided by the court of appeals is whether a malpractice suit is void, or merely voidable, because the affiant in deposition is unable to confirm the acts of negligence to which he testified in his initial malpractice affidavit filed contemporaneously ***490** with the complaint. [FN13] For if the suit is a nullity, then it cannot be dismissed and refiled successfully under Georgia's Renewal Statute. [FN14]

In Sawyer v. DeKalb Medical Center, Inc., [FN15] the court of appeals decided this issue, which was inspired by O.C.G.A. section 9-11-9.1. In that case, plaintiff's medical affiant, Dr. Bryant, apparently drew a blank when asked about the hospital's negligence in his deposition. Plaintiff dismissed her case and refiled within six months pursuant to O.C.G.A. section 9-2-61, the Renewal Statute, attaching the affidavit of a different, presumably less forgetful physician. [FN16] The court held that the initial suit was merely voidable because the first affidavit, as filed, was admittedly sufficient in and of itself and because objections to the plaintiff's failure to comply with O.C.G.A. section 9-11-9.1 could be waived. [FN17] Such a determination comports with the policy of the Georgia Civil Practice Act that requires the court to liberally construe pleadings, including malpractice affidavits, in favor of the pleader, "so long as such construction does not detract from the purpose of section 9-11-9.1 of reducing the number of frivolous malpractice suits." [FN18]

B. The Renewal Statute

What is a plaintiff's lawyer to do if he properly sues the tortfeasor in a case arising from a motor vehicle collision only to find out after the expiration of the statute of limitations that the liability insurer is insolvent? The answer to this question was reaffirmed this survey period: dismiss and refile under O.C.G.A. section 9-2-61, the Renewal Statute. The case that paved the way for this successful tactic is Stout v. Cincinnati Insurance Co. [FN19]

In Stout the Supreme Court of Georgia reaffirmed the principle that service upon an uninsured or underinsured motorist carrier is not the same as the service required to make an entity a party to the underlying tort action, but is, instead, merely a vehicle to provide notice of the existence of a lawsuit in which the insurer may ultimately be held financially responsible. [FN20] It is the validity of the service of the underlying lawsuit on the defendant which ultimately controls. [FN21] Otherwise, an insurance company that is not a party to the lawsuit would be ***491**

permitted to assert a defense not even available to the defendant. [FN22] Therefore, service upon an uninsured or underinsured motorist carrier is valid if it would be valid upon the defendant in the case.

The holding in Stout eliminates the harsh results that would otherwise befall a plaintiff who discovers the insolvency of the liability insurer only after the expiration of the statute of limitations by providing such plaintiff with an escape hatch. Still, under this law a plaintiff is forced to execute a number of seemingly pointless machinations--she must dismiss a valid action against a properly served defendant and refile the action, serving the same defendant again along with the insurance carrier. This exercise seems unnecessary in light of the late Justice Weltner's suggestion in the case of Bohannon v. J.C. Penney Casualty Insurance Co., [FN23] echoed by Justice Fletcher in his special concurrence in Stout, [FN24] that under such circumstances the plaintiff ought to be allowed "to serve the [uninsured motorist] carrier 'as soon as reasonably possible after becoming aware, by whatever means, that there is substantive doubt as to the existence of adequate insurance coverage of an event that might become the subject of an uninsured motorist claim." ' [FN25]

C. Summary Judgment Standard in "Slip and Fall" Cases

During the most recent survey period, one thing has become crystal clear to the plaintiffs' and defense's bars: the lower courts have taken the supreme court's admonition in Robinson v. Kroger Co. [FN26] quite seriously. In that landmark opinion, analyzed in detail last survey period, [FN27] the supreme court brought the standard for granting summary judgment in slip and fall cases back in line with the standard applied in negligence cases generally. [FN28] During the most recent survey period, cases that in previous years would have been doomed to summary judgment are suddenly viable as a matter of law. In fact, this survey ***492** period marks the return of a near-extinct species of appellate opinion--the reversal of a trial court for granting summary judgment in slip and fall cases.

One prime example of the havoc wreaked by Robinson on the hopes for summary judgment harbored by premises owners is the case of Flournoy v. Hospital Authority of Houston County. [FN29] In that case, citing the supreme court's statement that "the 'routine' issues of premises liability, i.e., the negligence of the defendant and the plaintiff, and the plaintiff's lack of ordinary care for personal safety[,] are generally not susceptible of summary adjudication," [FN30] the court of appeals reversed the trial court's grant of summary judgment. [FN31] Setting up a stark contrast between pre- and post- Robinson slip and fall law, the court overruled the case of Manley v. Gwinnett Place Associates, [FN32] a case that barred a plaintiff from recovery as a matter of law because she was able to appreciate the hazardous condition on the premises. [FN33] In Flournoy the court (1) deferred to the jury as to issues of negligence, and (2) refused to require plaintiff to disprove his own negligence before defendant established negligence on the part of plaintiff. [FN34] The result was a reversal of the trial court's grant of summary judgment in a slip and fall case. [FN35]

Further proof that timing is indeed everything if you bring or defend a slip and fall case is provided by Laffoday v. Winn Dixie Atlanta, Inc. [FN36] In that case, Judge Andrews reversed the grant of summary judgment in a slip and fall case because, according to Judge Andrews, "'appellate courts must apply the law as it exists at the time of the appellate court's judgment, even though doing so might change the judgment of the trial court which was correct at the time it was rendered." ' [FN37] In other words, according to Judge Andrews, the trial court correctly granted summary judgment based on the law as it existed at the time of the ruling. [FN38] However, the law had changed, via Robinson, before the court of appeals had rendered its decision, and thus, required reversal. [FN39] Ms. Laffoday's ***493** admission in her deposition that she had not been concentrating upon each footfall before her fall would have been fatal pre- Robinson, while post- Robinson, it was only a factor for the jury to consider in making its liability determination. [FN40]

Yet another reversal of a grant of summary judgment in a slip and fall case occurred in Sutton v. Winn Dixie Stores, Inc. [FN41] In Sutton plaintiff slipped and fell upon entering a grocery store after coming in from a heavy downpour. The owner of the premises had actual knowledge of the slick entryway to the store based on evidence that employees had been ordered to mop the entryway every five minutes, to place a yellow warning sign in the area, and to install a rubber safety mat for patrons to walk across as they entered the building. [FN42] Although there is no duty to continuously mop or warn of potential accumulations during a downpour, the voluntary undertaking by the store triggered a duty to perform the undertaken tasks with ordinary care. [FN43] Although plaintiff had mere constructive knowledge of the hazard-- obviously plaintiff was aware it was raining outside--the court could not say

as a matter of law plaintiff failed to exercise ordinary care to avoid the danger. [FN44] Under pre- Robinson case law, plaintiff's constructive knowledge would have foreclosed recovery, removing from the jury its ability to determine under the facts whether the premises owner's actual knowledge was "superior" to the invitee's constructive knowledge.

D. Attorney-Client Relations

In Zielinski v. Clorox Co., [FN45] the supreme court adopted the federal test for determining when an attorney-client relationship exists between a corporate employee and that corporation's legal counsel. [FN46] In Zielinski plaintiff brought suit against Clorox and one of its employee supervisors, alleging a claim against the supervisor for tortious interference with employment. At trial plaintiff sought to impeach the supervisor with statements the supervisor made at a meeting with corporate counsel and several other Clorox employees to discuss how to handle an investigation of plaintiff concerning an alleged embezzlement scheme. A transcript of the meeting was provided to a district attorney by Clorox. The trial court held an attorney-client privilege existed ***494** between the supervisor and corporate counsel and the privilege was not waived with regard to the employee by Clorox's forwarding of the transcript to the district attorney. [FN47] The supreme court disagreed and adopted the federal test for determining whether an attorney-client relationship existed between the employee and corporate counsel, stating that an employee asserting the privilege has the burden of proving that such privilege exists. [FN48] The court, quoting United States v. International Brotherhood of Teamsters, [FN49] held:

First, [employees who seek to assert the privilege] must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company. [FN50]

The court held the supervisor had not established an attorney-client privilege under the test because, among other things, his communications with corporate counsel were made in the presence of other employees and the statements made to counsel concerned the corporation's affairs. [FN51]

In a decision with potentially far reaching implications in the legal malpractice context, the court of appeals refused to recognize a lost opportunity cause of action in favor of clients who are prejudiced by failure of their attorney to file a timely appeal and refused to ease the virtually insurmountable burden a plaintiff faces in such legal malpractice cases. In Dow Chemical Co. v. Ogletree, Deakins, Nash, Smoak & Stewart, [FN52] the court of appeals reaffirmed the near impossible standard of proof that clients face when bringing a legal malpractice action against their attorney(s) for failure to file a timely appeal. [FN53] Specifically, to establish that the attorney's negligence was the proximate cause of the client's injury, an aggrieved client must show that had an appeal ***495** been filed, the trial court decision would have been overturned and the appellate decision would have been in the client's favor. [FN54] It would logically follow that the next unstated, but surely looming step in one's proof would be a showing that the client's position would have been subsequently improved on retrial after remittitur to the trial court.

In the underlying case giving rise to the alleged malpractice, Dow Chemical was sued in the federal district court in the Northern District of Georgia for its alleged negligence in maintenance of coagulation ponds and the subsequent damage resulting to plaintiffs' neighboring property. The jury returned a verdict against Dow awarding plaintiffs $450,000 in compensatory and $2 million in punitive damages. Judgment was entered on the verdict January 29, 1990. Ogletree obtained an order from the district court extending the ten day time period for the filing of post trial motions to March 8, 1990. After a denial of Dow's motion for judgment notwithstanding verdict ("JNOV") or a new trial, Dow filed a notice of appeal with the Eleventh Circuit. The Eleventh Circuit rejected the appeal as untimely, holding the district court lacked the authority to extend the ten day period for the filing of post trial motions, and therefore, Dow's failure to file its notice of appeal within thirty days of the entry of judgment was untimely. As a result, Dow filed a malpractice action against Ogletree. The trial court granted Ogletree's motion for summary judgment with respect to the issue of whether Ogletree could be held liable for failure to file a timely appeal. [FN55] The court of appeals affirmed, holding the burden remained on the client to show an appeal would have been

successful if filed. [FN56]

Two notable problems with the decision are apparent. The first is the nature of the proof that a plaintiff must provide a court in Dow's situation. In legal malpractice cases involving the failure to appeal, according to the court, the issue of proximate cause is for the court to decide and not the jury, unlike any other malpractice case, indeed, unlike any other negligence case. [FN57] The court in Ogletree wrote, "[t]he question of whether an appeal would have been successful is a question of law, exclusively within the province of judges." [FN58] The court explained that the question is for the court and precludes the use of expert testimony. [FN59] In Ogletree plaintiff presented the affidavit of a former ***496** United States district court judge in which the former judge gave his opinion that an appeal to the Eleventh Circuit, timely filed, would likely have resulted in the $2 million punitive award being overturned. [FN60] The court wrote that Dow's assertion that the affidavit should have been considered by the trial court was "without merit." [FN61] The court held it would be error for a court to rely upon the opinion of an expert in making the determination regarding how a court would rule on an appeal. [FN62]

Deciding proximate cause as a question of law in legal malpractice cases is wholly at odds with the way the issue is handled in all other malpractice cases and in all other negligence cases. [FN63] Generally, the trier of fact is to make the decision regarding the proximate cause of a plaintiff's injury, aided by the testimony of experts. At the summary judgment stage, because proximate cause is so clearly a factual question, the Georgia Civil Practice Act requires not only consideration of the nonmovant's expert affidavit, but deference to that testimony and all favorable inferences that can be drawn therefrom. [FN64] Though it may be difficult for a jury or expert to decide what a panel of judges would likely have done, the task seems no less complex for one court to predict how another court would have ruled on appeal or for a medical expert to opine about the probability of a different medical outcome.

Additionally, it seems the court carved out an exception to the professional negligence pleading requirement, O.C.G.A. section 9-11-9.1, by refusing to allow expert affidavits regarding proximate cause in legal malpractice cases. [FN65] That statute specifically requires an affidavit from an attorney in order to initiate a viable malpractice action, and during this survey period, the court of appeals ruled that a malpractice action brought subject to section 9-11-9.1 must be dismissed absent proof contained in the initial affidavit "'of the likelihood that the alleged negligence caused the injury or death." ' [FN66]

The second problem with the decision stems from the court's rejection of the client's argument for the adoption of a "'lost opportunity' standard, ***497** under which a plaintiff may sue its attorney for the lost opportunity to appeal, without regard to whether the appeal would have been successful." [FN67] The court wrote, "[i]t is possible that the mere filing of an appeal, although meritless, could create uncertainty in the mind of the appellee and thus induce him to settle [and] failure to file such an appeal could damage the appellant by depriving him of the opportunity to settle." [FN68] The court refused to consider the "lost opportunity" standard for legal malpractice cases, however, pointing out that "Dow's brief fail[ed] to mention any evidence showing that it was in fact damaged by such lost opportunity in this case." [FN69] However, the court indicated that such an argument would not prevail even had Dow presented evidence of damage resulting from the lost opportunity to appeal, stating "it is highly questionable whether such speculative damages can properly serve as the basis for a malpractice action." [FN70] The court went on to conclude that "'[f]ailure to file an appeal which would be unsuccessful on the merits or frivolous would not harm the losing litigant but instead would save the litigant time, money, and anguish." ' [FN71] From this opinion, one must conclude that the client was apparently ungrateful to its attorney, whose violation of the standard of care was presumably in the client's best interest.

The court's concluding remarks seem to ignore two critical points: (1) that mechanisms, such as sanctions, exist to prevent truly frivolous appeals, and (2) though the damages to the plaintiff may be hard to compute, that fact alone does not necessarily render them speculative. The court glossed over the very real effect that the filing of an appeal has on settlement negotiations, particularly where the jury verdict is large and is composed primarily of punitive damages. [FN72] A jury could just as well apply its "enlightened conscience" to the determination of damages in a legal malpractice lost opportunity case as in other areas where it is asked to do the same. Computing damages in a lost opportunity case would be no more ephemeral than computing damages for pain and suffering, loss of consortium, or punitive damages, all of which courts entrust to the enlightened conscience of an impartial jury. [FN73]

***498** In Holland v. State Farm Mutual Automobile Insurance Co., [FN74] the court of appeals found an attorney's lien for fees superior to that of a hospital or of the Department of Medical Assistance ("DMA"). [FN75] In Holland an automobile accident victim was treated at the Floyd Medical Center ("FMC"). DMA asserted a lien on Mr. Holland's claim for recovery against the driver of the automobile in which Mr. Holland had been a passenger. Likewise, the hospital asserted a lien for the amount of medical bills in excess of the Medicaid payments made by DMA. State Farm brought an interpleader action to determine the priority of liens asserted against the insurance proceeds, and subsequently, Holland's attorney asserted a lien in Holland's motion for reconsideration, after the trial court had found liens in favor of DMA and FMC. [FN76]

The trial court held the attorney's lien was not timely asserted and the lien for attorney fees was subject to the liens asserted by DMA and FMC. [FN77] The court of appeals reversed the trial court, holding that the attorney's lien was not ripe until an award was made by the trial court, which, in this case, was the award of the liens to DMA and FMC. [FN78] The court held, therefore, that the assertion of the lien in the motion for reconsideration was timely. [FN79] Moreover, the court wrote that the liens in favor of DMA and FMC, pursuant to O.C.G.A. sections 49-4-149 [FN80] and 44-14-470, [FN81] were, by their plain language, subject to an attorney's lien for fees. [FN82] So, under Georgia law practitioners are advised that some liens, apparently, are inherently better than others.

Calling for the supreme court to overrule old case precedent, the court of appeals reluctantly held an attorney's lien time barred, applying the four year statute of limitations for suit on an open account to an attorney's lien on real property in Jones v. Wellon. [FN83] In that case, plaintiff brought an action to quiet title and to remove a lien placed on plaintiff's real estate by his former attorney, pursuant to O.C.G.A. section 15-19-14(c). [FN84] The court held that because the attorney failed to bring suit to enforce the lien against the real property within the four ***499** year statute of limitations mandated for suit on an open account, enforcement of the debt was barred and, likewise, the lien was extinguished. [FN85]

The court of appeals criticized the 1941 supreme court precedent that constrained it to make the decision in Jones:

The ramification of the law as it now stands under Johnson is that attorneys are prompted to sue their clients at the earliest opportunity to receive their fees. The unfortunate bottom line is that attorneys are encouraged to sacrifice the ethical and moral ideals embodied in the lawyer-client relationship in order to protect their economic livelihood. [FN86]

The court pointed out that the supreme court's decision in Johnson v. Giraud, [FN87] which relied upon Peavy v. Turner, [FN88] was decided at a time when attorney liens were grouped in the Code with liens generally, and thus, were subject to being foreclosed within the time period prescribed in the general lien statute. [FN89]

The court criticized the decision in Johnson for failing to recognize what the court of appeals believed was the clear intention of the General Assembly in removing the attorney's lien statute from the general lien section in the Code, namely, to remove any time restriction for foreclosure of an attorney's lien. [FN90] The court wrote, "[t]his segregation of the attorney lien indicates an intent by the legislature that it be treated as a special remedy for attorneys, separate and distinct from other remedies created under the Code." [FN91] The court of appeals was referring to the fact that the statute governing attorney liens on real property, O.C.G.A. section 15-19- 14, [FN92] is separate and not subject to the time limitations placed on other liens against real property, such as the materialman's lien of O.C.G.A. section 44-14-361, [FN93] which requires commencement of an action within 12 months from the date a claim becomes due and owing. Moreover, the court pointed out, although an ***500** attorney's lien against a client's personal property under O.C.G.A. section 15-19-15 specifically provides a fixed time period within which the liens must be satisfied, the legislature failed to make a lien against real property under O.C.G.A. section 15-19-14 subject to any time provision. [FN94] The court expounded, "[c]learly, if the legislature had intended for attorney liens on real property to be governed by the procedures set forth under Title 44, it would have explicitly provided therefor, as it did for liens covered by OCGA [section] 15-19-15." [FN95]

Though the court advanced four arguments against imposition of a statute of limitations upon the foreclosure of an attorney's lien against real property, the policy behind such unique treatment is difficult to understand. The court admirably decried the fact that "attorneys are prompted to sue their clients at the earliest opportunity to receive their fees [and thus] are encouraged to sacrifice the ethical and moral ideals embodied in the lawyer-client relationship in

order to protect their economic livelihood." [FN96] The court nonetheless failed to explain the "ethical and moral" superiority of placing a lien against a client's property and waiting for the "ethical and moral" time to foreclose, as opposed to the filing of a lawsuit on open account.

E. Jury Qualifications

Switzer v. Gorman [FN97] presented two interesting questions for the court of appeals. First, the court upheld the trial court's refusal to strike a juror for cause in a medical malpractice case, when the juror stated he and his wife had been patients of defendant doctor for about ten years. [FN98] During voir dire, plaintiff's counsel asked the juror whether his relationship with defendant-doctor would cause the juror to "'lean to' the doctor's side or give Dr. Gorman the benefit of the doubt," to which the juror replied affirmatively. [FN99] The juror further answered plaintiff's counsel that he "probably" would be unable to render a true verdict in the case due to his knowledge of the defendant. [FN100] The trial judge then asked the juror, "could you base your verdict in this case solely upon the sworn testimony of witnesses who testify and the law that I give you in charge and . . . on the law as I have said and put any personal feelings ***501** that you might have aside?" [FN101] The juror then answered he could, and the court qualified the juror. [FN102]

The court of appeals found no abuse of the trial court's discretion for refusing to strike the juror for cause when it was not established that the juror had an opinion "so fixed and definite that it would not be changed by the evidence or the charge of the court upon the evidence." [FN103] It is important to note that while the court wrote that the existence of a doctor-patient relationship between a juror and party would not justify removing the discretion of the trial court, [FN104] the court did not hold that it would have been an abuse of discretion to have removed the juror for cause. In other words, a trial court would be free to remove a juror for cause based upon the juror's doctor-patient relationship with a defendant doctor. So the posture of the case reveals nothing more than no per se disqualification based on the doctor-patient relationship exists.

The Switzer opinion involved a second issue which seems to be a troubling development in Georgia law. The issue arose in the context of the cross-examination of defendant's expert regarding the appropriate standard of care. [FN105] The court held it was not an appropriate method of impeachment for an attorney to cross-examine the expert on the course of treatment the expert would personally have undertaken for the patient. [FN106] The court's decision was solidly supported by Georgia precedent. [FN107] Nonetheless, careful analysis leads one to question the soundness of the precedent foreclosing this line of questioning. In Georgia courts, parties have

the right to a thorough and sifting cross-examination [that] extends to all matters, relevant and material to the controversy, within the knowledge of the witness. The purpose of cross-examination is to provide a searching test of the intelligence, memory, accuracy, and veracity of the witnesses, and it is better for cross-examination to be too free than too much restricted. [FN108]

The relevance and importance of a medical expert's personal choice of a course of treatment is highly probative of the credibility of the expert's opinion concerning the standard of care. A jury is free to disregard the ***502** expert's opinion entirely and find that the standard of care is reflected by the course of treatment the expert would have chosen, a highly probable scenario if other evidence admitted in the case supports this proposition. For example, assume two courses of treatment are used in the medical community, course "A" and course "B." Further assume that course "B" has five times the survival rate of course "A." If the defendant doctor has chosen course "A" and hires an expert who personally always follows course "B," but will testify that course "A" meets the standard of care, the jury will be aided by revelation of this point on cross-examination, because it is free to disregard the expert's opinion as to the standard of care. Permitting the expert to be cross-examined on a personal choice regarding course of treatment and why it would be different than the defendant-doctor allows a full examination of the expert's opinion on standard of care and the basis therefor.

Another case involving the qualifying of jurors was Wallace v. Swift Spinning Mills, Inc., [FN109] wherein plaintiff sought to have jurors qualified regarding an insurance company, its parent corporation, and its sister entities. [FN110] In Swift the court of appeals held that failure to qualify jurors with respect to their relationships with insurers, that are not insurers of parties to the suit, does not create a presumption of harmful error "absent an affirmative showing to the trial court by the proponent of such qualification that there is a strong probability that

insurance companies that are not insurers of the parties have a direct, demonstrable financial stake in the outcome of the case." [FN111] In Swift defendant was insured by American Motorist Insurance Company, which plaintiff alleged was a subsidiary, sister, or otherwise related corporation to four other insurance companies. The trial court refused plaintiff's demand to qualify the jurors as to the other four insurance companies. After a verdict for defendant, plaintiff appealed, arguing the trial court's refusal to qualify jurors as to their relationship with the other four insurers created a presumption of harmful error. [FN112] The court of appeals affirmed the trial court because plaintiff failed to provide any proof of the financial relationship between American Motorist and the other four insurers which would tend to show that the "'subsidiaries' had any financial interest in the case or that they would be affected in any way by the outcome" of the case. [FN113]

***503** In a footnote, the court outlined what showing would be required to establish a direct financial interest among insurance companies, such that qualification of the jury panel would be required as to subsidiary corporations who are not insurers of the parties in the case. [FN114] Once a plaintiff has discovered the identity of the defendant's insurer pursuant to O.C.G.A. section 15-19-7:

> [P]laintiff would have to put up certified records from the Insurance Commissioner or industry publications showing the financial relationship between an insurer and any other insurance company to demonstrate a direct financial stake in the case. If the insurer is not a corporation but a partnership, joint venture, cooperative, trust, or association that acts as an insurer under a trade name, then each entity that has a financial stake in the insurer should be qualified. Plaintiff must show the identity and nature of the insurer, which demonstrates the financial interest as insurer. The nature of the insurer may be demonstrated by Insurance Commissioner records of qualification and financial ability, trade publications, partnership registration, trade name registrations, or any other evidence that would prove the nature of the insurer. [FN115]

In Swift plaintiff argued the insurance companies were all related through a parent corporation, Kemper National Insurance Company. [FN116] The court rejected plaintiff's argument because plaintiff failed to establish the relationship with affirmative proof. [FN117] The court wrote that if plaintiff had "shown that the insurer was the name of a division of a parent corporation and that such division had no separate corporate entity, the trial court would have to qualify the jury," and likewise, "if the real entity was a corporation operating under a number of trade names," the court would have to qualify the jury. [FN118] As the court noted, it may "be extremely difficult . . . to find jurors who are not subject to disqualification due to a prohibited relationship with any of the subsidiaries of large corporation," but nevertheless, where a plaintiff can show a common financial interest in the outcome of a suit among the companies, qualification of the jurors is required. [FN119]

Accordingly, the court of appeals has given clear guidance to attorneys preparing to prove the financial connection and relatedness of insurers during voir dire if they seek to have the jury panel qualified as to other ***504** entities related in some respect to the insurers of parties. It would appear that something more than a parent-subsidiary or sibling corporate relationship is required.

F. Discovery Practice

Addressing an issue of first impression, the court of appeals brought Georgia in line with the federal rules regarding authentication of documents. In Davis v. Healthcare Corp., [FN120] defendant produced plaintiff's medication record in response to plaintiff's request for production of documents, and in defendant's written response, defendant stated that "[t]he medication sheets on [plaintiff] during her stay at the Defendant's facility are attached." [FN121] The document in dispute was an order purportedly made by the facility's physician concerning plaintiff's care while at defendant's facility. [FN122] Typically medical records are authenticated by certification of an attendant of the records. However, the court wrote that the Georgia "rules of evidence provide a wide variety of means by which a party may authenticate a writing," and "[t]he use of circumstantial evidence is one of these methods." [FN123] The court held "that while possession, standing alone, cannot authenticate a document, possession, together with other circumstances [] may." [FN124]

The court found the "other circumstances" required to authenticate a document were its content and appearance. [FN125] In addition to the production of the document by defendant in discovery and denoted therein as the "medication sheet" of plaintiff, defendant, in brief to the court, did not deny the authenticity of the document but

only argued plaintiff had not carried the burden of authenticating a document defendant had produced. [FN126] Additionally, the circumstantial evidence relied upon by the court showed the document listed the patient and her doctor, the medication plaintiff was receiving during her stay, and the room number in which she was placed while in defendant's facility. [FN127] The court held these circumstances coupled with defendant's possession of the medication record was sufficient to establish the authenticity of the document. [FN128] This holding obviates the peculiar dilemma a party previously faced when a document was produced by the opposing party, ***505** who should have had more knowledge concerning the origin of the document than the receiving party, but who nevertheless refused to admit to the authenticity of the document. By considering possession of the document as a prominent factor in authentication, the dilemma is eased substantially. The court seems to be moving in the direction of a common sense rule, shifting the burden to the party that produces evidence in discovery to demonstrate that the evidence is not authentic when that evidence was created by the same party.

The issue of privilege was addressed in Price v. State Farm Mutual Automobile Insurance Co. [FN129] by the court of appeals during the survey period and bears mentioning for the warning contained therein for practitioners desiring to assert privilege claims. The case arose as a result of an automobile wreck. Plaintiff sued defendant Engleman for negligence and negligent infliction of emotional distress. The uninsured motorist carrier, State Farm, was also served with a copy of the complaint. State Farm then served plaintiff and his treating psychiatrist with a request for production of the psychiatrist's treatment records and bills for plaintiff. Plaintiff and the psychiatrist did not file an objection to the request within ten days pursuant to O.C.G.A. section 9-11-34(c)(2). [FN130] When State Farm moved to compel the records, plaintiff filed a response asserting the records were protected from discovery by the psychiatrist-patient privilege. The trial court subsequently granted State Farm's motion to compel production of the records. [FN131]

The court of appeals pointed out it previously held that a trial court abused its discretion when it failed to grant a motion to compel records from a plaintiff's dentist when no objection was filed within the ten-day period under O.C.G.A. section 9-11-34(c)(2). [FN132] The court held plaintiff's "belated assertion of the psychiatrist-patient privilege in this case [did] not demand a different result." [FN133] The court of appeals stated the psychiatrist-patient privilege can be waived:

***506** Since it is well-established that a party's failure to timely object to a discovery request will result in a waiver of the right to object, we find that [plaintiff's] failure to object within ten days resulted in a waiver of his right to object to [defendant's] discovery request based upon the psychiatrist-patient privilege. [FN134]

G. Insurance/Complete Compensation Rule

Although the Legislature codified the complete compensation rule in 1997 and proclaimed that insurers are not free to avoid the rule by specifically-crafted contractual language, cases were nonetheless decided during this survey period under the law as it existed prior to the enactment of O.C.G.A. section 33- 24-56.1. [FN135] Such cases are controlled by the supreme court's decision in the pivotal case of Duncan v. Integon General Insurance Corp., [FN136] in which the highest court declared the complete compensation rule is the public policy of the State of Georgia. [FN137] The supreme court declined to address whether or not an insurer is free to override that public policy by specific contractual language because the policy at issue in Duncan was silent on the matter. [FN138] Therefore, any purported ruling on the matter would have been dicta. The court of appeals took the opportunity during the survey period to flesh out the answer that the supreme court left open in Duncan.

In Davis v. Kaiser Foundation Health Plan of Georgia, Inc., [FN139] the court of appeals held prior to the statutory codification of the complete compensation rule, insurers were free to avoid the complete compensation rule and Georgia's public policy by express contractual language contained in the insurance policy. [FN140] This decision is somewhat troubling for several reasons.

First, the supreme court made clear in Duncan that the complete compensation rule is the public policy of the State of Georgia--so much so that the supreme court held the requirement would be engrafted as a matter of law onto any insurance contract that did not expressly stipulate otherwise. [FN141] Because the complete compensation rule is clearly the public policy of this state, it is unprecedented that insurers ***507** would be given the ability to override Georgia public policy by the terms of an adhesion contract.

Second, the reasoning offered by Judge Andrews in support of the holding is somewhat suspect. Judge Andrews cited one's general freedom to contract and that by passing O.C.G.A. section 33-24-56.1 codifying the complete compensation rule, the Legislature intended to change existing law. [FN142] Although one is generally free to contract as he or she pleases, that freedom must yield if "the General Assembly has declared [that the provision is contrary to public policy]" or if "the consideration of the contract is contrary to good morals and contrary to law." [FN143] Both the General Assembly and the supreme court declared the complete compensation rule to be the public policy of the state. O.C.G.A. section 33-24-56.1, through all of its procedural and substantive codification of the complete compensation rule surely changed the law, but it clearly did not change the State's public policy in favor of the complete compensation rule. In fact, the statute seems to have been prompted by that very public policy and a desire to ensure substantive and procedural fairness to all parties.

In Jefferson-Pilot Insurance Co. v. Fraker, [FN144] another case in which O.C.G.A. section 33-24-56.1 is inapplicable, the court of appeals refused to enforce an insurance policy provision which required the insured to pay over to the insurer one-third of any "recovery made . . . by way of judgment, settlement, or otherwise" received by the plaintiff or his dependant as a result of any action brought on account of injuries arising from any incident in which the plaintiff's insurer had paid medical expenses on behalf of the insured. [FN145] The policy required such payment without regard to whether the insured was first completely compensated for his injuries. [FN146] The court relied upon the bright-line rule created in Duncan v. Integon General Insurance Corp., [FN147] that an injured person be fully compensated for her injuries before an insurer has a right of reimbursement, absent clear contract language to the contrary. [FN148] Thus, the court held a provision in an insurance policy will not be upheld when it does not specifically indicate the insurer's ***508** right of reimbursement applies even in the event an insured is not completely compensated. [FN149]

Holland v. State Farm Mutual Automobile Insurance Co., [FN150] a case discussed earlier in this Article for its prioritizing of attorney liens, is of further interest to practitioners who are interested in addressing the claim for reimbursement for medical expenses paid by the Department of Medical Assistance ("DMA") or medical services provided by a medical service provider, such as a hospital. In Holland the court rejected plaintiff's argument for an extension of the complete compensation rule which bars claims of reimbursement asserted by private insurers unless and until the injured person has been completely compensated for all injuries received. [FN151] The court refused to apply the rule to an entity that has not received premiums from the injured party. [FN152]

The ruling accords with O.C.G.A. section 33-24-56.1, the statutory codification of the complete compensation rule, with respect to the DMA's claim for reimbursement. O.C.G.A. section 33-24-56.1(l) specifically exempts reimbursement claims made by the Department of Community Health from the complete compensation rule. [FN153] The court of appeals did not address this argument.

H. Insurance/Bad Faith

In Metropolitan Property & Casualty Insurance Co. v. Crump, [FN154] the court of appeals held that a judgment creditor lacked standing to bring a garnishment action against a tortfeasor's insurer for bad faith refusal or negligent failure to settle a claim. [FN155] In Crump plaintiff, who had acquired a judgment in excess of the tortfeasor's liability insurance policy limits, sought to garnish the tortfeasor's potential action for bad faith against Metropolitan, the tortfeasor's insurer. [FN156] Essentially, plaintiff tried an indirect approach to what is clearly prohibited by Georgia law, that is, to recover a judgment in excess of the policy limits of the tortfeasor's liability insurance policy directly from the insurer. The court wrote that, "[i]t is well established that a claimant in an ***509** automobile collision case has no 'employment, contractual, or other relationship' with the other driver's liability insurer," and thus, "may not maintain [an] action against other motorist's liability insurer for failure to settle within policy limits." [FN157] Not only is there no relationship between the insurer and the injured third-party such that the insurer may be liable to a third-party for negligence or bad faith in handling the claim, but a "'defendant in a tort action is not subject to garnishment until the tort claim is reduced to judgment." ' [FN158] Essentially, a garnishment action is not ripe until a tort claim has been reduced to a judgment, and then the garnishment is only proper against the defendant against whom the judgment was obtained. Addressing language cited by plaintiff from Jefferson Insurance Co. v. Dunn, [FN159] that a chose in action may be subject to garnishment, the court held such statement was mere dicta and did not apply to the facts at issue. [FN160]

I. Releases

In Miller v. Grand Union Co., [FN161] the supreme court held that neither a covenant not to sue nor a release executed in favor of an employee extinguishes a cause of action against the employee's employer, [FN162] overruling Harris v. Hanna Creative Enterprises. [FN163] Harris held that a release in favor of an employee foreclosed suit against an employer. [FN164] The court in Miller wrote that under modern law, covenants not to sue and releases have the same effect because a cause of action is foreclosed against only those persons actually named in the instrument. [FN165]

In Miller plaintiff brought claims against defendant store under the doctrine of respondeat superior, alleging, among other things, false imprisonment, assault, and battery committed upon plaintiff by defendant's employee. Defendant's employee gave an affidavit favorable to plaintiff in exchange for a covenant not to sue naming only the ***510** employee. The defendant-employer moved for summary judgment arguing that under Harris the covenant not to sue extinguished any claim plaintiff had against defendant. [FN166] The supreme court overruled Harris, finding that Harris was based upon a misinterpretation of an earlier case, [FN167] Posey v. Medical Center-West. [FN168] The court found Posey simply brought the effect of releases in line with covenants not to sue, holding only those parties named in such instruments are protected from suit. [FN169] Insofar as Harris had created an exception to this rule with respect to claims based on the doctrine of respondeat superior, the court specifically overruled the case. [FN170] Thus, the rule in Georgia is clear: only those parties named in releases or covenants not to sue are protected by such instruments.

The supreme court interpreted the requirement that liability insurance proceeds be exhausted before an injured person may seek uninsured/underinsured ("UM") benefits from her own insurer in Daniels v. Johnson. [FN171] In that case plaintiff was injured by defendant who was covered by a liability insurance policy with a face amount of $10,000. Pursuant to O.C.G.A. section 33-34-3(a)(2) (Georgia's "deemer statute"), such a policy is deemed to provide at least $15,000 in coverage, Georgia's minimum allowable automobile liability coverage amount. [FN172] Plaintiff settled his claim against the insurer for the stated amount of the policy ($10,000), executed a limited release as provided for in O.C.G.A. section 33-24-41.1 [FN173] in order to preserve his claim against the UM carrier, and served his UM carrier. [FN174]

The supreme court held that plaintiff's settlement for the stated value of the policy, rather than the value of the policy after application of the deemer statute, satisfied the exhaustion requirement so plaintiff could proceed to collect benefits from his UM provider. [FN175] The court further held that a "UM carrier may plead and prove the availability of coverage under the deemer statute and thus have its liability reduced by the amount the plaintiff waived under that statute." [FN176] The court also found that permitting an insured to recover for the stated policy limits, ***511** rather than requiring a settlement for the amount possible under the deemer statute serves public policy and eases "both the process of plaintiffs' recovering for their injuries and the process of resolving lawsuits." [FN177]

In a special concurrence, Justices Hines and Hunstein, along with Chief Justice Benham, wrote that because UM statutes are remedial in nature, they should be liberally construed. [FN178] The concurrence would have held even where a plaintiff settles for less than the stated limits of a policy, such settlement should be deemed to satisfy the exhaustion requirement when that settlement is made in good faith, and therefore, the plaintiff should be permitted to proceed to seek UM benefits. [FN179] Such an interpretation would reduce litigation, speed the payment of claims, and reduce the costs incurred by insureds in resolving claims. [FN180] Otherwise, the concurrence wrote, requiring a plaintiff to settle for the policy limits in order to meet the requirements for seeking UM coverage "is in reality a call to litigate." [FN181] The majority declined to judicially repeal the exhaustion requirement, deferring this task to the General Assembly. [FN182]

J. Default

A hotly litigated area of practice during the survey period was the law relating to default judgments. In Roberson v. Gnann, [FN183] the court of appeals held invalid a party's attempt to extend the time required for filing an answer by private agreement between the parties to the suit, when the parties did not bother to follow the rules set forth by the Civil Practice Act. [FN184] Specifically, the parties agreed among themselves that defendant would not be

required to file an answer until settlement negotiations were completed, which turned out to be some five months after the original complaint was served on defendant. The parties did not file this agreement with the trial court, but instead, filed a series of three stipulations in an effort to extend the time for filing the answer. [FN185] Each of these stipulations was untimely, however, and thus, ineffective. [FN186] The court of appeals held "[a] private agreement ***512** between counsel extending time to file pleadings is not binding except when in compliance with [[[[O.C.G.A. section 9-11-6(b)] and it is filed with the court." [FN187] According to the court, O.C.G.A. section 9-11-6(b) provides for extensions of time limits set by the Civil Practice Act. [FN188] The Code section provides "'the parties, by written stipulation of counsel filed in the action, may extend the period . . . (1) if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or,'"if after the expiration of the period, an extension may be granted by the court upon a showing that the act was not done due to excusable neglect. [FN189]

The parties had first filed a written stipulation for an extension of time within which to file the answer, twelve days after the case had gone into automatic default. [FN190] After the time for filing the answer had expired, defendant's remedy would have been either to (1) open the default pursuant to O.C.G.A. section 9-11-55(a) because he was still within time to open default as a matter of right, or (2) move the trial court to grant an extension of time to file his answer by a showing of excusable neglect under O.C.G.A. section 9-11-6(b)(2). [FN191] Defendant made neither of these motions but relied upon the private agreement with opposing counsel. [FN192]

The parties had privately agreed to end settlement negotiations on October 31, 1997, and that defendant's answer would be due on November 17, 1997, if no settlement had been reached. Accordingly, plaintiff's attorney sent a letter to defendant on November 12, 1997, informing defendant that if no answer was filed by November 17, 1997, plaintiff would file a motion for default. [FN193] The court of appeals held the letter embodying the agreement between the parties and plaintiff's assertion he would file a motion for default judgment were "of no legal significance," and the letter "did not extend the statutory time required for the filing of [defendant's] answer or serve to open the default." [FN194]

Defendant further argued that plaintiff had waived the default by his conduct. [FN195] The court distinguished Roberson from the cases in which ***513** the plaintiff did not move for default until after the case had moved to trial or appeal. [FN196] The court found no waiver under the totality of the circumstances of the case, writing "[w]e will not invoke waiver against [[[[plaintiff] for his attempts to accommodate [defendant]." [FN197]

Conversely, the court of appeals in Patel v. Gupta [FN198] reiterated the strong policy in Georgia of deciding cases on their merits and disfavoring the extreme sanction of imposing default on a party. [FN199] In Patel the court held the trial court erred when it found "'[a] default, prior to judgment, may be opened if the Defendant has made out an extremely good case for excusable neglect." ' [FN200] The court of appeals held the proper standard required of a party in default is not an "extremely good case" but only that a party must give a "reasonable excuse." [FN201] The court noted that the "'rule permitting opening of default is remedial in nature and should be liberally applied." ' [FN202] Moreover, the court wrote, "[i]t is well-settled that a statute which confers discretion upon a judge to decide a particular question also imposes a correlative duty to exercise that discretion when the occasion arises." [FN203]

Likewise, the supreme court in Exxon Corp. v. Thomason, [FN204] reaffirming Georgia's disdain for default judgments, cautioned that to establish a meritorious defense, which is a prerequisite to the opening of default under O.C.G.A section 9-11-55(b), [FN205] a party need only show that were it permitted to present a defense, the case might come out differently than it would if the default stands. [FN206] The court held a party seeking to open default need not show it would "completely defeat plaintiff's claim," but only that the outcome might be different. [FN207] Thus, in Thomason, when the plaintiffs had alleged in their complaint acts sufficient to justify punitive damages, and defendants were prepared to present evidence that the acts would not justify an ***514** imposition of punitive damages, the court held defendants had satisfied the requirement of showing a meritorious defense. [FN208]

The setting aside of a default after the term of court in which the default was entered has expired is to be done only in limited circumstances. In Lee v. Restaurant Management Services, [FN209] the trial court entered a default judgment in favor of plaintiff after defendant failed to answer the complaint on November 19, 1996. Defendant

made no motion to the trial court until December 2, 1996, after the expiration of the term of court. The trial court opened the judgment pursuant to its inherent powers, finding the failure to answer "'was due to a mistake unmixed with negligence or fault on Defendant's [] part." ' [FN210] The mistake in question was an error by defendant's insurer to hire legal counsel and to ensure that the complaint filed by plaintiff was answered. [FN211]

The court of appeals reversed, holding the mistake alleged by defendant was not unmixed with defendant's negligence because defendant could have uncovered the mistake by a "modest follow-up" with its insurer regarding why a complaint had not been filed on defendant's behalf. [FN212] Thus, the court wrote that defendant's "proper remedy is to seek redress against its insurer" and not to have the judgment set aside, as the defendant urged, pursuant to O.C.G.A. section 9-11-60. [FN213] Because O.C.G.A. section 9-11-60 embodies equitable principles, a court considering whether a party seeking relief under the statute should be granted must determine whether a "'party, by reasonable diligence, could have had knowledge of the truth, [and if so,] equity shall not grant relief." ' [FN214] Thus, without a clear showing that a party is free from any negligence in litigating its case, a default judgment will not be set aside after the term within which it was granted has expired.

K. Venue

In Patterman v. Travelers, Inc., [FN215] the court of appeals held the venue provision of O.C.G.A. section 33-4-1(2) applies to any "claim [that] arises out of [an insurer's] 'role as an insurer'"or "'business as an in-***515** surer,'"and is not limited to actions arising from an insurance contract between the insurer and the insured. [FN216] In Patterman plaintiffs brought a class action suit against defendants alleging "several counts of fraud, fraudulent inducement, negligence, racketeering, and unfair business practices," which arose from defendant's alleged solicitation and deceptive sales techniques to induce plaintiffs to give up existing life insurance policies in favor of policies offered by defendants. [FN217]

At issue was the language of O.C.G.A. section 33-4-1 that provides several alternative places wherein an action against an insurer may be commenced [FN218] and specifically, the phrase "whenever any person shall have a claim or demand on any insurer." [FN219] Defendants contended such "claim or demand" referred only to claims based on the insurance contract itself. [FN220] The court rejected the argument, holding no such limitation appeared from the face of the statute and, referencing the Insurance Code's definition of transact, wrote that it is "clear that matters prior to the execution of an insurance contract, such as solicitation of business and preliminary negotiations, can constitute the business of insurance." [FN221] The court also noted, "nothing in the statute indicates that it is intended [to be available only to in-state parties]." [FN222] Thus, the court of appeals held the venue provision of O.C.G.A section 33-4-1(2) applies to claims arising from the business activities of an insurance company as an insurer whether before, during, or after an insurance contract is signed. [FN223]

L. Statute of Limitations

In Wade v. Whalen, [FN224] the court of appeals reaffirmed the high standard plaintiffs must adhere to in service of process on defendants after the statute of limitations has expired, once it is known to a plaintiff there is a problem with service. [FN225] In Wade plaintiff filed a medical malpractice action two days before the statute of limitations expired and failed to make proper service on defendant until some eight months after the statute of limitations had expired. Plaintiff subsequently ***516** attempted service on defendant at an Atlanta address where defendant had resided before moving to Texas. When the sheriff of Cobb County, through whom plaintiff had attempted service, returned the service form to plaintiff showing that service was unsuccessful, plaintiff attempted service by certified mail to the Atlanta address. Although the form provided by the post office contained an option by which a sender could discover any forwarding address of the recipient for an additional fee, plaintiff did not purchase the option. Thus, when the certified mail was forwarded to defendant's new address in Texas, and plaintiff subsequently received the certified card with defendant's signature, plaintiff was not made aware of defendant's new address. Additionally, plaintiff failed to take immediate steps to effect service upon defendant after he was notified of defendant's whereabouts by a private investigator, and when he became aware of the problems in effecting service on defendant. Instead, plaintiff tarried several days before re-attempting service. [FN226]

The court held the duty of due diligence required of a plaintiff to effect service after the statute of limitations has expired "is elevated to an even higher duty of the greatest possible diligence once plaintiff becomes aware there is a

problem with service." [FN227] Once a sheriff returns the service form showing service cannot be made, "'reasonable diligence' is insufficient." [FN228] The court wrote "'[t]he burden is on the plaintiff to ascertain a defendant's residence,'"both before and after filing suit, and "[p]laintiff is obligated to ascertain this information before filing suit." [FN229]

The special concurrence in Wade stated that it would reserve the higher duty of "'the greatest possible diligence'"for cases wherein a response asserting the defense had been filed. [FN230] The special concurrence pointed out that only imposing the higher duty on plaintiffs who are made aware there is a problem with service by the sheriff "creates an illogical distinction" because "[m]any plaintiffs are aware that there is a problem with service, despite the fact that the sheriff has not so indicated on a return of service." [FN231] Further, the concurring opinion ***517** pointed out the dearth of Georgia Supreme Court precedent holding a plaintiff to a standard beyond due diligence. [FN232]

In Hunter, Maclean, Exley & Dunn, P.C. v. Frame, [FN233] the court addressed O.C.G.A. section 9-3-96, which provides for the tolling of the statute of limitations where a plaintiff is prevented from bringing a claim by the fraud of the defendant. [FN234] In Frame plaintiff was represented by defendant law firm in connection with the sale of plaintiff's corporation. Some material omissions were made in the closing documents. Plaintiff was subsequently sued and held liable for the omissions by his buyer and as a result filed suit against his lawyer, yet outside the statute of limitations. [FN235] The supreme court held the mere fact that a confidential relationship exists between parties, standing alone, is not sufficient to toll the statute of limitations pursuant to O.C.G.A. section 9-3-36. [FN236]

A plaintiff must establish three elements to toll the statute of limitations, pursuant to O.C.G.A. section 9-3-96:

(1) actual fraud involving moral turpitude on the part of the defendant; (2) the fraud must conceal the existence of the cause of action from the plaintiff, thereby debarring or deterring the knowing of the cause of action; and (3) plaintiff exercised reasonable diligence to discover the cause of action, notwithstanding the failure to discover within the statute of limitation. [FN237]

The court in Frame reaffirmed that plaintiffs who are aggrieved by persons in a confidential relationship are not relieved of establishing the fraudulent intent of a defendant in order to toll the statute of limitations. [FN238] The court held that before the statute of limitations will be tolled for fraud, a plaintiff must show an intention by the defendant to conceal or deceive the plaintiff and as a result, that plaintiff was deterred from bringing his or her suit. [FN239] The supreme court explained that the existence of a confidential relationship places a higher burden ***518** upon a defendant to disclose the existence of fraud and a lower duty upon a plaintiff to discover such fraud. [FN240] Nonetheless, a plaintiff must still show a defendant's fraudulent intent to preclude a plaintiff from bringing a suit within the statute of limitations. [FN241] Thus, the existence of a confidential relationship "affects only the extent of (a) the defendant's duty to reveal fraud, and (b) the plaintiff's corresponding obligation to discover the fraud for herself." [FN242]

M. Pleading Practice

The Georgia Court of Appeals decided several cases addressing the technicalities of pleading practice. In McCormick v. Acree, [FN243] the court of appeals addressed the issue of whether a complaint was void or merely voidable when it was signed by a lawyer who was not in good standing with the State Bar of Georgia. Plaintiffs filed their complaint on December 15, 1992, which bore the signature of their lawyer who had not paid his bar dues at the time he signed the complaint and, therefore, was not a member in good standing of the State Bar of Georgia. Thereafter, plaintiffs amended their complaint, adding the name of an attorney who was a member in good standing at the time the complaint was filed. Three years later, defendants filed a motion to dismiss, arguing plaintiffs' complaint was void because the attorney who signed the original complaint was not a member in good standing when the complaint was filed. The trial court granted the motion, finding that because the complaint was not filed in accordance with O.C.G.A. section 9-11-11(a), it was void and a nullity and could not be amended. [FN244]

The court of appeals disagreed with the trial court and reversed, holding the complaint was merely voidable and could be amended to cure the defect. [FN245] Recognizing that O.C.G.A. section 9-11-11(a) requires that all pleadings be signed by either the party, if not represented by an attorney, or by at least one attorney of record if

represented, the court of appeals liberally construed O.C.G.A. section 9-11-15(a) to allow amendment of pleadings without leave of the court prior to the entry of a pretrial order. [FN246] Because plaintiffs had amended their complaint to include the signature of an attorney in good standing prior to the entry ***519** of the pretrial order, the trial court erred in dismissing the complaint. [FN247]

In McCombs v. Southern Regional Medical Center, Inc., [FN248] the court of appeals addressed the issue of whether the answer of one defendant was filed on behalf of four alleged corporate defendants. Plaintiff in McCombs had undergone spinal surgery which involved the installation of a plate device. The plate system was manufactured by Synthes (U.S.A.). After experiencing problems, plaintiff instituted a products liability action against Defendants Synthes, Inc., Synthes North America, Inc., Synthes Ltd., U.S.A., Synthes Spine Company, L.P., a/k/a Synthes Spine Company L.P., and Synthes (U.S.A.), a/k/a Synthes, U.S.A. [FN249] Each of the named defendants was a separate legal entity. [FN250]

One answer was filed in response to plaintiff's complaint--the answer of Defendant Synthes Spine Company L.P. Plaintiff moved for entry of default against three of the Synthes defendants because they failed to timely file an answer. The trial court denied that motion, finding that the first paragraph of the answer was the joint answer of all Synthes entities. [FN251] The court of appeals reversed, finding the answer was made on behalf of only one Synthes defendant. [FN252]

In analyzing the pleading, the court looked first at what the pleading itself said it was: "Answer of Defendant Synthes Spine Company L.P." [FN253] The court noted the caption reflected that the answer was that of only one defendant, and the opening paragraph referred to that single defendant. [FN254] The first paragraph of the complaint averred that defendant had been improperly named as the other listed Synthes defendants and averred that the other Synthes defendants did not market, manufacture, or distribute the product at issue; the complaint should be dismissed as to those four entities. The trial court determined that the first paragraph, but not the remainder of the pleading, was the joint answer of all of the named defendants. [FN255] However, the court of appeals disagreed with the trial court that such language in one ***520** paragraph constituted the answer of those entities. [FN256] The court stated it was unreasonable to examine one paragraph out of the entire answer in isolation and concluded it was intended to be the pleading of all the defendants but that the remainder of the answer was intended to be the answer of only one defendant. [FN257]

The court of appeals also found compelling the fact that the attorneys signing the answer identified themselves as representatives for only Synthes Spine Company, L.P., and not the other Synthes entities. [FN258] Because the other Synthes defendants were separate legal entities, the court held they could not benefit from the answer filed solely by one Synthes defendant. [FN259] Having filed no answer, those defendants were in default. [FN260]

The court of appeals gave some guidance during the survey period on the issue of compulsory counterclaims in the case of Bigley v. Mosser, [FN261] a libel action. Under O.C.G.A. section 9-11-13(a), if a claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, such claim must be asserted as a compulsory counterclaim. [FN262] Georgia courts have interpreted the "same transaction or occurrence" requirement to mean "whether or not there exists a logical relationship between the respective claims of the parties." [FN263]

In Bigley plaintiffs sued defendant Mosser for libel. Mosser had previously sued plaintiffs for libel. The underlying events of both sets of lawsuits involved the management of a homeowner association and election to the association's board of directors. The first lawsuit, instituted by Mosser, alleged plaintiffs distributed a flyer during the election which contained libelous statements about Mosser. Plaintiffs did not assert counterclaims against Mosser in those actions. The instant lawsuit brought by plaintiffs against Mosser alleged Mosser made libelous statements about them in a newsletter distributed during the same election. Mosser moved to dismiss the complaint, arguing plaintiffs should have asserted their claims as compulsory counterclaims in her prior cases. The trial court granted the motion, finding that there ***521** was a logical relationship between the claims because they all arose out of the disputed board election. [FN264]

The Georgia Court of Appeals noted that while Georgia courts have applied the logical relationship test, they have not set forth factors to consider in determining whether such a relationship exists. [FN265] "Clearly, the mere fact

that some tangential relationship may be articulated between two claims is not sufficient to find them 'logically related' for purposes of the compulsory counterclaim statute." [FN266] The court looked to federal court analysis of the logical relationship test, finding that "a 'logical relationship . . . arises (1) when the same aggregate or operative facts serve[] as the basis for both claims; or (2) the case facts supporting the original claim activate [[[[] legal rights of the defendant that would otherwise remain dormant." ' [FN267] The court noted the "logical relationship test requires a determination of 'whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." ' [FN268] The question boils down to whether the facts in the main claim and counterclaim are both "common" and "operative." [FN269]

In the present case, the Georgia Court of Appeals found that, although the board election was common to both actions, the election itself was not the operative fact upon which all the various claims were based. [FN270] Each claim was based on a different statement, made at a different time and in a different publication. [FN271] Because the "success or failure of the various claims will depend upon whether each particular statement was false and defamatory," the fact that the statements were all made in the context of a board election was not significant to the resolution of claims. [FN272] The acts were not "logically related" because they were based on separate and distinct occurrences of alleged libel; each individual statement, and its truth or falsity, constituted the subject matter of each claim. [FN273]

The court noted that, to the contrary, cases in which a logical relationship has been found have generally focused on claims arising out ***522** of the same basic dispute or the same contractual relationship between the parties. [FN274] In Bigley the court held plaintiffs' claims were not compulsory counterclaims, because the common thread--the election--was not the operative fact underlying all the various claims. [FN275]

N. Personal Jurisdiction

Of much practical significance in the realm of personal jurisdiction is the case of Escareno v. Carl Nolte Sohne GmbH, [FN276] decided by the Georgia Supreme Court on a question certified by the United States Court of Appeals for the Eleventh Circuit. [FN277] The question certified was whether the appointment of an administrator for Alejandro Escareno's estate was proper, based upon a pending cause of action in Fulton County against Carl Nolte Sohne GmbH, a foreign defendant, or upon the presence of the case file in decedent's counsel's office in Fulton County. [FN278]

While working in Georgia, decedent Escareno suffered third degree burns when a crucible allegedly manufactured by Carl Nolte Sohn, a German company, burst and showered him with molten zinc. Escareno filed a diversity suit against Carl Nolte Sohn and others in the Federal District Court for the Northern District of Georgia. Escareno died later the same year while he was a resident in Mexico. He left no property in Georgia other than his interest in the lawsuit and the file in his lawyer's possession. His lawyer was appointed temporary administrator of the estate and sought to substitute himself as a party plaintiff. The district court denied the substitution and dismissed the case. The Eleventh Circuit Court of Appeals reversed and remanded. On remand, Escareno's lawyer petitioned the Fulton County Probate Court for the appointment of an administrator of the estate, which was granted. The administrator then sought substitution as plaintiff, and the federal district court again dismissed the suit, holding the probate court in Fulton County lacked jurisdiction under O.C.G.A. section 15-9-31 to appoint an administrator because Escareno, a resident of Mexico, did not have property in Fulton County or a cause of action against a Fulton County resident. [FN279]

The Georgia Supreme Court analyzed the Georgia statutes addressing the jurisdiction of a probate court over the estate of a nonresident: ***523** O.C.G.A. sections 15-9-32, 15-9-31(2), and 53-6-21. [FN280] The supreme court found those laws "evidence an intent for the situs of the estate to follow the location of the cause of action." [FN281] The supreme court held that reading the provisions together "demonstrates that the pendency of a nonresident decedent's lawsuit in a county is a sufficient basis for the administration of the estate in that county." [FN282] The court concluded the appointment of an administrator for Escareno's estate in Fulton County, where the lawsuit was pending, was proper. [FN283] To hold, as defendant argued, that a "cause of action is sufficient only if it is against a resident of the county in which it is brought" would have the result terminating a pending lawsuit on the nonresident's death, even if defendant's negligence caused the death. [FN284] The Georgia Supreme Court declined

to allow such an unjust result.

III. Legislation

Governor Barnes signed a bill which purports to extinguish the age-old problem of "vanishing venue." While the problem may still exist with regard to cases filed before July 1, 1999, the legislation eliminates this inefficiency in those cases filed on or after July 1, 1999. Under O.C.G.A. section 9-10- 31, [FN285] prior to its amendment, when multiple defendants were sued, some being residents of different counties, vanishing venue often posed a significant problem. For example, two defendants, A and B, could be sued in any county in which either defendant was a resident. However, if suit was brought against defendants A and B in A's home county, and defendant A was subsequently discharged from liability, venue would immediately vanish as to defendant B. This vanishing act, unfortunately, required transfer of the case to B's county of residence and a new trial. [FN286]

***524** Under the amended statute the problem is resolved. [FN287] The changes to the statute provide first that, prior to the commencement of the trial, if "the court determines . . . [t]he plaintiff has brought the action in bad faith against all defendants residing in the county in which the action is brought" or if "as a matter of law, no defendant residing in the county in which the action is brought is a proper party," the action is to be transferred to a county where venue is proper. [FN288] The plaintiff shall have the right to choose among venues if more than one proper venue exists. [FN289] The statute places the burden of proving that transfer is appropriate on the complaining party. [FN290]

The statute also provides that if a defendant whose residence is required for venue in a particular county is "discharged from liability before the commencement of trial," the remaining defendant(s) may require transfer of the case to a proper venue. [FN291] Where venue is proper in several counties, the plaintiff again may choose to which county the case will be transferred. [FN292]

Lastly, and perhaps most significantly, the statute provides that where "all defendants who reside in the county in which an action is pending are discharged from liability after the commencement of trial," venue may be transferred only if all parties consent to the transfer. [FN293] The statute provides that a trial is commenced when the jury in a jury trial is sworn or when the first witness is sworn in a bench trial. [FN294]

The statute strikes a fair balance between practical efficiency and the rights of defendants to be sued in their county of residence under the Georgia Constitution. Section 2 of the statute enunciates the purpose of the amendments: "to provide for a fairer and more predictable rule of venue [and] to eliminate the waste of time and resources to courts and parties under the vanishing venue doctrine." [FN295]

IV. Conclusion

As is true year after year, the cases decided during the survey period did not settle all potential issues, leaving plenty of room for new interpretation in subsequent survey periods. While this survey is not intended to be exhaustive, it seeks to address the more notable ***525** substantive and practical developments. The authors hope the readers find this material useful in staying abreast of recent developments in trial practice and procedure.

[FNa1]. Partner in the firm of Butler, Wooten & Fryhofer, Columbus and Atlanta, Georgia. Georgia Southwestern State University (B.S., 1981); Walter F. George School of Law, Mercer University (J.D., 1984). Member, State Bars of Georgia and Alabama.

[FNaa1]. Associate in the firm of Butler, Wooten & Fryhofer, Columbus and Atlanta, Georgia. Georgia State University (B.B.A., magna cum laude, 1990); University of Georgia (J.D., magna cum laude, 1993). Member, State Bar of Georgia.

[FNaaa1]. Associate in the firm of Butler, Wooten & Fryhofer, Columbus and Atlanta, Georgia. Columbus State University (B.A., summa cum laude, 1991); Walter F. George School of Law, Mercer University (J.D., magna cum laude, 1995). Member, State Bar of Georgia.

[FNaaaa1]. Associate in the firm of Butler, Wooten & Fryhofer, Columbus and Atlanta, Georgia. Piedmont College (B.A., 1996); Walter F. George School of Law, Mercer University (J.D., cum laude, 1999). Member, State Bar of Georgia.

[FN1]. 235 Ga. App. 534, 510 S.E.2d 101 (1998).

[FN2]. O.C.G.A. § 9-11-9.1 (1993).

[FN3]. 235 Ga. App. at 534-37, 510 S.E.2d at 102-05.

[FN4]. Id. at 534 n.4, 510 S.E.2d at 103 n.4.

[FN5]. O.C.G.A. § 9-11-9.1(d) (1993 & Supp. 1999).

[FN6]. 235 Ga. App. 13, 508 S.E.2d 431 (1998).

[FN7]. 233 Ga. App. 661, 504 S.E.2d 736 (1998).

[FN8]. Id. at 662-63, 504 S.E.2d at 738-39.

[FN9]. Id. at 662, 504 S.E.2d at 738. This reasoning makes logical sense, for although it has long been the law that the General Assembly cannot prescribe the retroactive application of a substantive law, the converse has never been true: the General Assembly has always been free to provide for prospective application only of a procedural law. Id. (citing Pritchard v. Savannah St. R.R. 87 Ga. 294, 13 S.E. 493 (1891); Slaughter v. Culpepper, 35 Ga. 25 (1866)). To rule otherwise would foreclose the legislature from ever determining when an enactment is to be prospective only, and when it is to be retroactive. Under that scenario, if the legislation were substantive, its application could only be prospective; if the legislation were procedural, it could only be retroactive. The law has never been so restrictive in this area.

[FN10]. Id. at 664, 504 S.E.2d at 740.

[FN11]. Id. (quoting McCain v. Bonner, 122 Ga. 842, 846, 51 S.E. 36, 38 (1905)) (citations omitted).

[FN12]. Id. at 669, 504 S.E.2d at 742.

[FN13]. See Sawyer v. DeKalb Med. Ctr., Inc., 234 Ga. App. 54, 506 S.E.2d 197 (1998).

[FN14]. See O.C.G.A. § 9-2-61 (1982 & Supp. 1999).

[FN15]. 234 Ga. App. 54, 506 S.E.2d 197 (1998).

[FN16]. Id. at 54, 506 S.E.2d at 198.

[FN17]. Id. at 55-57, 506 S.E.2d at 199-200.

[FN18]. Id. at 56-57, 506 S.E.2d at 200.

[FN19]. 269 Ga. 611, 502 S.E.2d 226 (1998).

[FN20]. Id. at 611-12, 502 S.E.2d at 227.

[FN21]. Id. at 612, 502 S.E.2d at 227.

[FN22]. Id.

[FN23]. 259 Ga. 162, 163-64, 377 S.E.2d 853, 853-54 (1989) (Weltner, J., dissenting).

[FN24]. 269 Ga. at 613-14, 502 S.E.2d at 228 (Fletcher, J., concurring specially).

[FN25]. Id. at 613, 502 S.E.2d at 228 (citing Bohannon v. J.C. Penney Cas. Ins. Co., 259 Ga. at 163-64, 377 S.E.2d at 853-54). Both the holding of the majority in Stout and the Weltner/Fletcher approach eliminate the harshness of denying uninsured motorist benefits to one who has paid premiums for those benefits and yet discovered the applicability of the coverage past the expiration of the statute of limitations. The Weltner/Fletcher approach advocates a simpler, less technical way of accomplishing the same thing.

[FN26]. 268 Ga. 735, 493 S.E.2d 403 (1997).

[FN27]. C. Frederick Overby et al., Trial Practice and Procedure, 50 Mercer L. Rev. 359, 360 (1998).

[FN28]. 268 Ga. at 748-49, 493 S.E.2d at 413-14.

[FN29]. 232 Ga. App. 791, 504 S.E.2d 198 (1998).

[FN30]. Id. at 792, 504 S.E.2d at 199 (citing Robinson v. Kroger Co., 268 Ga. at 748, 493 S.E.2d at 414).

[FN31]. Id. at 793, 504 S.E.2d at 200.

[FN32]. 216 Ga. App. 379, 454 S.E.2d 577 (1995).

[FN33]. Id. at 381-82, 454 S.E.2d at 579-80.

[FN34]. 232 Ga. App. at 792-93, 504 S.E.2d at 199-200.

[FN35]. Id. at 793, 504 S.E.2d at 199.

[FN36]. 235 Ga. App. 832, 510 S.E.2d 598 (1998).

[FN37]. Id. at 834, 510 S.E.2d at 599 (quoting Sharfuddin v. Drug Emporium, 230 Ga. App. 679, 498 S.E.2d 748 (1998)).

[FN38]. Id.

[FN39]. Id., 510 S.E.2d at 599-600.

[FN40]. Id.

[FN41]. 233 Ga. App. 424, 504 S.E.2d 245 (1998).

[FN42]. Id. at 424-25, 504 S.E.2d at 246-47.

[FN43]. Id. at 425, 504 S.E.2d at 247.

[FN44]. Id. at 427-28, 504 S.E.2d at 249.

[FN45]. 270 Ga. 38, 504 S.E.2d 683 (1998).

[FN46]. Id. at 41, 504 S.E.2d at 686.

[FN47]. Id. at 38-39, 504 S.E.2d at 684-85.

[FN48]. Id. at 40-41, 504 S.E.2d at 685-86.

[FN49]. 119 F.3d 210, 215 (2d Cir. 1997).

[FN50]. 270 Ga. at 41, 504 S.E.2d at 686.

[FN51]. Id. at 41-42, 504 S.E.2d at 686.

[FN52]. 237 Ga. App. 27, 514 S.E.2d 836 (1999).

[FN53]. Id. at 29, 514 S.E.2d at 839.

[FN54]. Id.

[FN55]. Id. at 28-29, 514 S.E.2d 838-39.

[FN56]. Id. at 29, 514 S.E.2d at 839.

[FN57]. Id.

[FN58]. Id. at 30, 514 S.E.2d at 840 (quoting Hipple v. Brick, 202 Ga. App. 571, 415 S.E.2d 182 (1992)).

[FN59]. Id.

[FN60]. Id., 514 S.E.2d at 839.

[FN61]. Id.

[FN62]. Id., 514 S.E.2d at 840.

[FN63]. See, e.g., Lincoln County v. Edmond, 231 Ga. App. 871, 875, 501 S.E.2d 38, 42 (1998); Pace v. M.E. Hunter & Assoc., 195 Ga. App. 23, 25, 392 S.E.2d 545, 548 (1990).

[FN64]. See O.C.G.A. § 9-11-56 (1993). See also Vizzini v. Blonder, 165 Ga. App. 840, 303 S.E.2d 38, 39 (1983).

[FN65]. See 237 Ga. App. at 30, 514 S.E.2d at 839-40.

[FN66]. Patterson v. Fulton-DeKalb Hosp. Auth., 233 Ga. App. 706, 708, 505 S.E.2d 232, 234 (1998) (citing Abdul-Majeed v. Emory Univ. Hosp., 225 Ga. App. 608, 609, 484 S.E.2d 257, 259 (1997)).

[FN67]. 237 Ga. App. at 29, 514 S.E.2d at 839.

[FN68]. Id. at 29-30, 514 S.E.2d at 839.

[FN69]. Id. at 30, 514 S.E.2d at 839.

[FN70]. Id.

[FN71]. Id. (quoting McMann v. Mockler, 233 Ga. App. 279, 281, 503 S.E.2d 894 (1998)).

[FN72]. Id. at 29-30, 514 S.E.2d at 839.

[FN73]. See, e.g., Hospital Auth. of Gwinnett County v. Jones, 259 Ga. 759, 760-61, 386 S.E.2d 120, 122-23 (1989) (amount of punitive damages measured by enlightened conscience of jury), rev'd on other grounds, 499 U.S. 914; Turpin v. Worley, 206 Ga. App. 341, 343, 425 S.E.2d 895, 898 (1993) (amount of damages for pain and

suffering measured by enlightened conscience of jury).

[FN74]. 236 Ga. App. 832, 513 S.E.2d 48 (1999).

[FN75]. Id. at 834, 513 S.E.2d at 50.

[FN76]. Id. at 833-34, 513 S.E.2d at 49-50.

[FN77]. Id.

[FN78]. Id. at 834, 513 S.E.2d at 50.

[FN79]. Id.

[FN80]. O.C.G.A. § 49-4-149 (1998).

[FN81]. Id. § 44-14-470 (1982).

[FN82]. 236 Ga. App. at 834, 513 S.E.2d at 50.

[FN83]. 237 Ga. App. 62, 514 S.E.2d 880 (1999).

[FN84]. Id. at 62, 514 S.E.2d at 881.

[FN85]. Id. at 66, 514 S.E.2d at 883.

[FN86]. Id. While the court's statement is surely valid, the authors believe that real world experience, unfortunately, reveals at least as much opportunity for abuse of the attorney-client relationship by the improper utilization of attorney liens as with the improper filing of lawsuits on open account.

[FN87]. 191 Ga. 577, 13 S.E.2d 365 (1941).

[FN88]. 107 Ga. 401, 33 S.E. 409 (1899).

[FN89]. 237 Ga. App. at 66, 514 S.E.2d at 883.

[FN90]. Id.

[FN91]. Id. at 65, 514 S.E.2d at 883.

[FN92]. O.C.G.A. § 15-19-14 (1999).

[FN93]. Id. § 44-14-361 (1982).

[FN94]. 237 Ga. App. at 65, 514 S.E.2d at 882.

[FN95]. Id.

[FN96]. Id. at 66, 514 S.E.2d at 883.

[FN97]. 235 Ga. App. 794, 510 S.E.2d 581 (1998).

[FN98]. Id. at 795, 510 S.E.2d at 581.

[FN99]. Id., 510 S.E.2d at 581-82.

[FN100]. Id., 510 S.E.2d at 581.

[FN101]. Id., 510 S.E.2d at 582.

[FN102]. Id.

[FN103]. Id.

[FN104]. Id.

[FN105]. Id. at 795-96, 510 S.E.2d at 582.

[FN106]. Id. at 796, 510 S.E.2d at 582.

[FN107]. Id. (citing Brannen v. Prince, 204 Ga. App. 866, 421 S.E.2d 76 (1992)).

[FN108]. Thomas v. Baxter, 234 Ga. App. 663, 666-67, 507 S.E.2d 766, 770 (1998).

[FN109]. 236 Ga. App. 613, 511 S.E.2d 904 (1999).

[FN110]. Id. at 614, 511 S.E.2d at 905-06.

[FN111]. Id. at 615, 511 S.E.2d at 906.

[FN112]. Id. at 613-14, 511 S.E.2d at 905-06.

[FN113]. Id. at 616, 511 S.E.2d at 907 (internal quotations supplied by court).

[FN114]. Id. at 616 n.6, 511 S.E.2d at 907 n.6.

[FN115]. Id.

[FN116]. Id. at 617, 511 S.E.2d at 907.

[FN117]. Id.

[FN118]. Id. at 616 n.7, 511 S.E.2d at 907 n.7.

[FN119]. Id. at 615, 511 S.E.2d at 906-07.

[FN120]. 234 Ga. App. 744, 507 S.E.2d 563 (1998).

[FN121]. Id. at 747, 507 S.E.2d at 566 (internal quotations omitted).

[FN122]. Id. at 744, 507 S.E.2d at 564.

[FN123]. Id. at 746, 507 S.E.2d at 565 (internal quotations omitted).

[FN124]. Id. at 747, 507 S.E.2d at 566.

[FN125]. Id.

[FN126]. Id. at 747 n.3, 507 S.E.2d at 566 n.3.

[FN127]. Id. at 747-48, 507 S.E.2d at 566.

[FN128]. Id. at 748, 507 S.E.2d at 567.

[FN129]. 235 Ga. App. 792, 510 S.E.2d 582 (1998).

[FN130]. O.C.G.A. section 9-11-34(c)(2) provides in pertinent part:
The nonparty, any party, or the person whose records are sought may file an objection with the court in which the action is pending and shall serve a copy of such objection on the nonparty to whom the request is directed, who shall not furnish the requested materials until further order of the court .... If no objection is filed within ten days of the request, the nonparty to whom the request is directed shall promptly comply therewith.

[FN131]. 235 Ga. App. at 792, 510 S.E.2d at 583.

[FN132]. Id. at 793, 510 S.E.2d at 583 (citing McFarlin v. Taylor, 187 Ga. App. 54, 55, 369 S.E.2d 330, 331 (1988)).

[FN133]. Id., 510 S.E.2d at 583-84.

[FN134]. Id. at 793-94, 510 S.E.2d at 584.

[FN135]. O.C.G.A. § 33-24-56.1 (1992).

[FN136]. 267 Ga. 646, 482 S.E.2d 325 (1997).

[FN137]. Id. at 647, 482 S.E.2d at 326.

[FN138]. Id. at 647-48, 482 S.E.2d at 326-27.

[FN139]. 235 Ga. App. 13, 508 S.E.2d 431 (1998).

[FN140]. Id. at 14-15, 508 S.E.2d at 432.

[FN141]. 267 Ga. at 647, 482 S.E.2d at 326.

[FN142]. 235 Ga. App. at 15, 508 S.E.2d at 432.

[FN143]. Department of Transp. v. Brooks, 254 Ga. 303, 312, 328 S.E.2d 705, 713 (1985).

[FN144]. 234 Ga. App. 430, 507 S.E.2d 188 (1998).

[FN145]. Id. at 433, 507 S.E.2d at 190-91.

[FN146]. Id. at 431-32, 507 S.E.2d at 190. In Jefferson-Pilot both the execution of the policy and the injury sustained by plaintiff occurred prior to the enactment of O.C.G.A. section 33-24-56.1 which "prohibits reimbursement provisions unless the insured is first completely compensated," and therefore, the state was inapplicable. Id.

[FN147]. 267 Ga. 646, 482 S.E.2d 325 (1997).

[FN148]. 234 Ga. App. at 431, 507 S.E.2d at 189-90.

[FN149]. Id. at 433, 507 S.E.2d at 190.

[FN150]. 236 Ga. App. 832, 513 S.E.2d 48 (1999).

[FN151]. Id. at 834, 513 S.E.2d at 50.

[FN152]. Id.

[FN153]. O.C.G.A. § 33-24-56.1(l) (1992) provides that the complete compensation rule "shall not apply to the rights of the Department of Community Health to recover under Article 7 of Chapter 4 of Title 49, nor shall it affect the subrogation rights and obligations provided in Code Section 34-9-11.1 [the workers' compensation subrogation statute]."

[FN154]. 237 Ga. App. 96, 513 S.E.2d 33 (1999).

[FN155]. Id. at 96, 513 S.E.2d at 33.

[FN156]. Id., 513 S.E.2d at 34.

[FN157]. Id. at 96-97, 513 S.E.2d at 34 (citing Superior Ins. Co. v. Dawkins, 229 Ga. App. 45, 50, 494 S.E.2d 208, 212 (1997); Nationwide Mut. Ins. Co. v. Turner, 135 Ga. App. 551, 218 S.E.2d 276 (1975)).

[FN158]. Id. at 98, 513 S.E.2d at 34 (quoting Brenau College v. Mincey, 82 Ga. App. 429, 431, 61 S.E.2d 301, 302 (1950)).

[FN159]. 224 Ga. App. 732, 482 S.E.2d 383 (1997).

[FN160]. 237 Ga. App. at 98, 513 S.E.2d at 35.

[FN161]. 270 Ga. 537, 512 S.E.2d 887 (1999).

[FN162]. Id. at 537, 512 S.E.2d at 888.

[FN163]. 208 Ga. App. 549, 430 S.E.2d 846 (1993).

[FN164]. Id. at 550, 430 S.E.2d at 847-48.

[FN165]. 270 Ga. at 538, 512 S.E.2d at 888.

[FN166]. Id. at 537, 512 S.E.2d at 887-88.

[FN167]. Id. at 539, 512 S.E.2d at 889.

[FN168]. 257 Ga. 55, 354 S.E.2d 417 (1987).

[FN169]. 270 Ga. at 538, 512 S.E.2d at 888.

[FN170]. Id.

[FN171]. 270 Ga. 289, 509 S.E.2d 41 (1998).

[FN172]. O.C.G.A. § 33-34-3(a)(2) (1992).

[FN173]. O.C.G.A. § 33-24-41.1 (1992).

[FN174]. 270 Ga. at 289-90, 509 S.E.2d at 42-43.

[FN175]. Id. at 290, 509 S.E.2d at 43.

[FN176]. Id. at 291, 509 S.E.2d at 43.

[FN177]. Id. at 290, 509 S.E.2d at 43.

[FN178]. Id. at 292, 509 S.E.2d at 44 (Hines, J., concurring specially).

[FN179]. Id.

[FN180]. Id.

[FN181]. Id.

[FN182]. Id. at 291, 509 S.E.2d at 43.

[FN183]. 235 Ga. App. 112, 508 S.E.2d 480 (1998).

[FN184]. Id. at 115, 508 S.E.2d at 483.

[FN185]. Id. at 112, 508 S.E.2d at 481.

[FN186]. Id. at 114, 508 S.E.2d at 482.

[FN187]. Id.

[FN188]. Id. at 113-14, 508 S.E.2d at 482.

[FN189]. Id.

[FN190]. Id. at 114, 508 S.E.2d at 482.

[FN191]. Id. at 114-15, 508 S.E.2d at 482-83. The Court did not address whether one of defendant's options would have been to seek an extension on the basis of excusable neglect, but clearly that was an option pursuant to O.C.G.A. section 9-11-6(b)(2).

[FN192]. Id. at 114, 508 S.E.2d at 482.

[FN193]. Id. at 112-13, 508 S.E.2d at 481.

[FN194]. Id. at 114, 508 S.E.2d at 482-83.

[FN195]. Id. at 115, 508 S.E.2d at 483.

[FN196]. Id.

[FN197]. Id.

[FN198]. 234 Ga. App. 441, 507 S.E.2d 763 (1998).

[FN199]. Id. at 443, 507 S.E.2d at 764.

[FN200]. Id. at 442, 507 S.E.2d at 764 (citing Cobb County Fair Assoc. v. Boyle, 143 Ga. App. 754, 240 S.E.2d 136 (1977)).

[FN201]. Id. at 443, 507 S.E.2d at 765.

[FN202]. Id., 507 S.E.2d at 764 (quoting Ryles v. First Oglethorpe Co., 213 Ga. App. 327, 328, 444 S.E.2d 578, 580 (1994)).

[FN203]. Id., 507 S.E.2d at 765.

[FN204]. 269 Ga. 761, 504 S.E.2d 676 (1998).

[FN205]. O.C.G.A. § 9-11-55(b) (1993).

[FN206]. 269 Ga. at 761, 504 S.E.2d at 677.

[FN207]. Id.

[FN208]. Id. at 762, 504 S.E.2d at 678.

[FN209]. 232 Ga. App. 902, 503 S.E.2d 59 (1998).

[FN210]. Id. at 903-04, 503 S.E.2d at 60 (quoting O.C.G.A. § 9-11- 60(e)).

[FN211]. Id., 503 S.E.2d at 61.

[FN212]. Id. at 905, 503 S.E.2d at 61.

[FN213]. Id. (citing Bagwell v. Parker, 182 Ga. App. 313, 315, 355 S.E.2d 463 (1987)).

[FN214]. Id. at 904, 503 S.E.2d at 61 (quoting O.C.G.A. § 23-2-29 (1982)).

[FN215]. 235 Ga. App. 784, 510 S.E.2d 307 (1998).

[FN216]. Id. at 786, 510 S.E.2d at 309 (citing Liberty Mut. Ins. Co. v. Lott, 246 Ga. 423, 423, 271 S.E.2d 833, 834 (1980)).

[FN217]. Id. at 784-85, 510 S.E.2d at 308.

[FN218]. O.C.G.A. § 33-4-1 (1992).

[FN219]. 235 Ga. App. at 785, 510 S.E.2d at 308-09.

[FN220]. Id., 510 S.E.2d at 309.

[FN221]. Id. at 787, 510 S.E.2d at 309.

[FN222]. Id. at 788, 510 S.E.2d at 310.

[FN223]. Id. at 787, 510 S.E.2d at 309.

[FN224]. 232 Ga. App. 765, 504 S.E.2d 456 (1998).

[FN225]. Id. at 766, 504 S.E.2d at 459.

[FN226]. Id. at 766-68, 504 S.E.2d at 459-60.

[FN227]. Id. at 766, 504 S.E.2d at 459.

[FN228]. Id. (citing Sykes v. Springer, 220 Ga. App. 388, 390, 469 S.E.2d 472, 474-75 (1996)).

[FN229]. Id. at 768, 504 S.E.2d at 460.

[FN230]. Id. at 770-71, 504 S.E.2d at 462 (Pope, P.J., concurring specially) (quoting Roberts v. Bienert, 183 Ga. App. 751, 752, 360 S.E.2d 25, 26 (1987)).

[FN231]. Id. at 772, 504 S.E.2d at 463.

[FN232]. Id. at 771, 504 S.E.2d at 462. Judge Pope cited Poloney v. Tambrands, Inc., 260 Ga. 850, 412 S.E.2d 526 (1991) and Georgia Farm Bureau Mutual Insurance Co. v. Kilgore, 265 Ga. 836, 462 S.E.2d 713 (1995), wherein the supreme court only required a plaintiff exercise due diligence in effecting service of process. Id.

[FN233]. 269 Ga. 844, 507 S.E.2d 411 (1998).

[FN234]. O.C.G.A. § 9-3-96 (1982).

[FN235]. 269 Ga. at 845, 507 S.E.2d at 412.

[FN236]. Id. at 847-48, 507 S.E.2d at 414.

[FN237]. Charter Peachford Behavioral Health Sys., Inc. v. Kohout, 233 Ga. App. 452, 457, 504 S.E.2d 514, 522 (citing Jim Walter Corp. v. Ward, 245 Ga. 355, 265 S.E.2d 7 (1980)).

[FN238]. 269 Ga. at 847, 507 S.E.2d at 413-14.

[FN239]. Id. at 849, 507 S.E.2d at 415.

[FN240]. Id.

[FN241]. Id.

[FN242]. Id. at 848, 507 S.E.2d at 414.

[FN243]. 232 Ga. App. 834, 503 S.E.2d 88 (1998).

[FN244]. Id. at 834-35, 503 S.E.2d at 89.

[FN245]. Id. at 836, 503 S.E.2d at 89-90.

[FN246]. Id., 503 S.E.2d at 89. The court relied on Bandy v. Hospital Authority of Walker County, 174 Ga. App. 556, 332 S.E.2d 46 (1985) in deciding the present case. 232 Ga. App. at 835-36, 503 S.E.2d at 89.

[FN247]. 232 Ga. App. at 836, 503 S.E.2d at 89-90.

[FN248]. 233 Ga. App. 676, 504 S.E.2d 747 (1998).

[FN249]. Id. at 676, 504 S.E.2d at 749.

[FN250]. Id. at 677-78, 504 S.E.2d at 749.

[FN251]. Id. at 679, 504 S.E.2d at 751.

[FN252]. Id. at 681-82, 504 S.E.2d at 752.

[FN253]. Id. at 679, 504 S.E.2d at 750. The court noted: "'It is usually informative, in determining what a pleading is, to look at what the pleader says it is.'" Id. (quoting Cato Oil Co. v. Lewis, 250 Ga. 24, 26, 295 S.E.2d 527 (1982)).

[FN254]. Id.

[FN255]. Id.

[FN256]. Id. at 681, 504 S.E.2d at 752.

[FN257]. Id.

[FN258]. Id. at 679-80, 504 S.E.2d at 751.

[FN259]. Id. at 677, 504 S.E.2d at 749.

[FN260]. Id. at 681-82, 504 S.E.2d at 752.

[FN261]. 235 Ga. App. 583, 509 S.E.2d 406 (1998).

[FN262]. O.C.G.A. § 9-11-13(a) (1993).

[FN263]. 235 Ga. App. at 583, 509 S.E.2d at 406 (citing Aycock v. Calk, 228 Ga. App. 172, 174, 491 S.E.2d 383 (1997)).

[FN264]. Id. at 584-85, 509 S.E.2d at 407.

[FN265]. Id. at 585, 509 S.E.2d at 408.

[FN266]. Id.

[FN267]. Id. (quoting Majik Market v. Best, 684 F. Supp. 1089, 1090 (N.D. Ga. 1987)).

[FN268]. Id. at 585-86, 509 S.E.2d at 408 (quoting Blue Dane Simmental Corp. v. American Simmental Ass'n, 952 F. Supp. 1399, 1410 (D. Neb. 1997)).

[FN269]. Id. at 586, 509 S.E.2d at 408.

[FN270]. Id.

[FN271]. Id.

[FN272]. Id., 509 S.E.2d at 408-09.

[FN273]. Id. at 587, 509 S.E.2d at 409.

[FN274]. Id.

[FN275]. Id. at 588, 509 S.E.2d at 410.

[FN276]. 270 Ga. 264, 507 S.E.2d 743 (1998).

[FN277]. 139 F.3d 1456 (11th Cir. 1998).

[FN278]. 270 Ga. at 264, 507 S.E.2d at 743.

[FN279]. Id. at 264-65, 507 S.E.2d at 743-44.

[FN280]. Id. at 265, 507 S.E.2d at 744. O.C.G.A. section 15-9-32 provides that "[w]hen a nonresident decedent has property or a cause of action in more than one county, letters of administration may be granted in any county in which such property or cause of action is located." O.C.G.A. section 15- 9-31(2) provides that a probate court can grant administration of the estate of a nonresident person "with a bona fide cause of action against some person therein." And O.C.G.A. section 53-6-21 provides that "application for letters of administration of a nonresident's estate shall be made in a county where some portion of the estate is located."

[FN281]. 270 Ga. at 265, 507 S.E.2d at 744.

[FN282]. Id.

[FN283]. Id. at 266, 507 S.E.2d at 744.

[FN284]. Id.

[FN285]. O.C.G.A. § 9-10-31 (1982).

[FN286]. Id.

[FN287]. Id. § 9-10-31 (Supp. 1999).

[FN288]. Id. § 9-10-31(a).

[FN289]. Id.

[FN290]. Id.

[FN291]. Id. § 9-10-31(b) (emphasis added).

[FN292]. Id.

[FN293]. Id. § 9-10-31(c) (emphasis added).

[FN294]. Id. § 9-10-31(d).

[FN295]. 1991 Ga. Laws 746.

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