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***447 TRIAL PRACTICE AND PROCEDURE**

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I. Introduction

This survey period is most notable for the diversity of cases touching upon trial practice and procedure decided by the Georgia appellate courts. Among those were cases fleshing out the permissible parameters of attorney-client contractual relations, scaling back the malpractice affidavit pleading requirement, defining further what constitutes a doctor-patient relationship, interpreting the wrongful death act to determine who can properly bring a claim, and declining to apply the self-contradictory testimony rule to a party's expert witness. Other *448 important decisions addressed previously undecided evidentiary questions, confused medical providers attempting to comply with third-party requests for production of documents, and expanded the remedies available to Georgia plaintiffs who are the victims of negligently inflicted emotional injury.

Although the legislation passed during the survey period is less diverse, it will still potentially affect trial practitioners. The General Assembly expanded the previously narrow alternatives for establishing proper venue against corporate defendants. Mandatory liability insurance policy limits were increased for bodily injury and/or death from \$15,000 per person and \$30,000 per incident to \$25,000 per person and \$50,000 per incident. Finally, in line with the service provision contained in the Federal Rules of Civil Procedure, plaintiffs are now allowed to seek a waiver of formal service of process in order to avoid the trouble and expense of formal service.

II. Case Law

A. Attorney-Client Relations

This survey period provided an opportunity for the Georgia Court of Appeals to establish precedent regarding the interaction between the state's ethical rules and attorney-client contracts. In *Brandon v. Newman*, [FN1] Judge Miller, writing for a unanimous panel, provided the following synopsis with respect to one of the fee-splitting ethical rules at issue: "We hold that an attorney's express employment contract obtained through a violation of Disciplinary Standard 13 of [Bar Rule 4-102\(d\)](#) is itself void as against public policy and therefore affirm the trial court's forfeiture of the lien." [FN2] The court also found that the splitting of fees between a lawyer and nonlawyer violated Disciplinary Standard 26 and any contract involving this violation was also void as a matter of public policy. [FN3]

In *Brandon* former Georgia lawyer Bobby Gay Beazley recommended that the appellee, Mr. Newman, retain the services of a specific lawyer to seek recovery for personal injuries Mr. Newman suffered in a truck wreck. Dissatisfied with the services of this first lawyer, Newman retained lawyer number two, Mr. Brandon, whom Mr. Beazley also *449 recommended. The fee agreement between Newman and Brandon contained a provision whereby, in the event Newman dismissed Brandon, the lawyer would be paid the greater of \$150 per hour or a contingency fee of any offers made during the litigation. [FN4]

Brandon also entered into an agreement with nonlawyer Beazley, in which Brandon agreed to pay Beazley a twenty-five percent contingency fee from any net proceeds paid to Brandon. The nature of this agreement became the central issue before the court of appeals. It turned out that Newman was dissatisfied with Brandon, so Newman hired a third lawyer who ultimately settled the case for an amount previously offered in the case while Brandon was handling it. Brandon filed an attorney's lien. Newman filed a motion for forfeiture and cancellation of the lien based upon Brandon's fee-splitting agreement with Beazley. The trial court granted the motion to forfeit and cancel the attorney's lien. [FN5]

The court of appeals appeared to have little problem affirming the trial court's ruling. [FN6] The court wrote: "Georgia courts will not enforce illegal or immoral contracts because so doing would implicate the judiciary by facilitating the illegality or immorality. The trial court correctly granted Newman's motion to forfeit Brandon's [O.C.G.A. § 15-19-14\(b\)](#) attorney's lien." [FN7]

The not-so-subtle message from *Brandon* is that attorney fee issues are serious business. The lawyer is well advised to read Georgia's ethical standards on the subject carefully.

B. Professional Malpractice Claims

The attorney-client relationship was also at issue in the Georgia Supreme Court's decision in *Labovitz v. Hopkinson*. [FN8] In that case, the supreme court continued to provide avenues of potential relief from the historically stringently applied (but recently amended) professional malpractice affidavit statute, the Official Code of Georgia Annotated ("O.C.G.A.") section 9-11-9.1. [FN9] Here the court broadened the rule that a claim arising out of intentional misconduct, by definition, does not fall within the purview of the professional malpractice affidavit requirements. [FN10] The context for the ruling in *Labovitz* was a legal malpractice claim.

*450 The facts in *Labovitz* are familiar. Plaintiff filed a claim for legal malpractice within the ten-day window prior to the expiration of the statute of limitations. She invoked the statutory forty-five day extension to file an expert affidavit, but she failed to do so within that time. The trial court denied plaintiff's motion for a further extension within which to file the affidavit and granted defendant's motion to dismiss for failure to state a claim. [FN11]

After the forty-five day period passed, plaintiff amended her complaint to add claims for fraud and misrepresentation arising from the same general set of facts as the original complaint. The trial court again dismissed the amended complaint for failure to state a claim. Plaintiff appealed both the dismissal arising from her failure to file an expert affidavit and the dismissal arising from her amended complaint. [FN12]

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The court of appeals found the trial court properly dismissed the legal malpractice case as a result of plaintiff's failure to file an expert affidavit, but it reversed the trial court's dismissal of the amended complaint. [FN13] The supreme court granted certiorari to determine what effect, if any, the doctrine of res judicata had on the claims set forth in the amended complaint. [FN14] The court's analysis focused upon whether an expert affidavit is required in cases arising out of alleged intentional misconduct. [FN15]

The court unanimously held the professional malpractice affidavit requirement has no application to claims arising from intentional misconduct. [FN16] The legal malpractice claim was gone, but the intentional misconduct (fraud) claim remained. Another obvious lesson is, if possible, to file cases well before the statute is going to run and to look objectively and deliberately at the issue of whether fraud or some similar intentional tort is a viable avenue of relief. The predicate for a legal malpractice claim is often that a lawyer withheld information essential to a client's decision making or failed to pursue a claim and never told the client of the transgression. In other words, these claims may often arise out of factual scenarios that involve colorable claims of intentional misconduct.

Professional relationships of a different sort took center stage in *Schrader v. Kohout*, [FN17] a case in which a mental health patient brought *451 a claim of medical malpractice against a psychologist with whom the treating psychologist consulted. The consulting psychologist, Schrader, never saw the patient, never saw the patient's records, and did not know the patient's last name. The patient's primary psychologist paid Schrader, apparently out of personal funds. Schrader did, however, provide extensive consultative services to assist with the care and treatment of the patient. These fee-based services continued over a four-year period during which the patient's condition was extensively discussed. [FN18]

A majority of the court of appeals found no physician-patient relationship existed between Schrader and the patient; therefore, the court reversed the trial court's denial of summary judgment. [FN19] The fact Schrader never examined or met with the patient was important to the court. The primary psychologist screened the flow of information to the patient. [FN20]

Judge Pope and Judge Eldridge dissented, emphasizing an important aspect of public policy:

As a matter of public policy, a professional should not be permitted to profit monetarily and experientially from professional consultation regarding the care and treatment of a patient, and still escape the duty to exercise ordinary care as a professional for such patient. Otherwise, a professional could indirectly through consultations use humans as guinea pigs upon whom to experiment without incurring liability. [FN21] Schrader was consulted because she had special expertise in handling the types of mental health problems the patient was suffering. [FN22] A blanket shield protecting an individual like Schrader from liability may be inappropriate, given the fact that the consultative advice may have proximately caused harm.

C. Standing

In *Tolbert v. Maner*, [FN23] the Georgia Supreme Court wrestled with relationships of another sort: intrafamily relationships. In that case the court was faced with statutory interpretation of Georgia's Wrongful Death Act. [FN24] The basic question was whether a grandchild of the *452 decedent could recover under the Wrongful Death statute if his father, the natural child of the decedent, predeceased him. [FN25]

A unanimous court held the grandchild could not recover. [FN26] After recognizing the statute was in derogation of the common law, thus requiring strict construction, the court examined the interplay between three of its subsections: O.C.G.A. section 51-4-2(a), (b)(2), and (d)(1). [FN27] The court determined that under the express language of subsection (a), a wrongful death claim may only be brought by a surviving spouse or a decedent's children. [FN28] Under subsection (b)(2), the court held the reference to "child" and "children" means the decedent's child or children. [FN29] Under subsection (d)(1), the court found children of a child claimant who dies during the pendency of a wrongful death claim are entitled to recover per stirpes the child claimant's share. [FN30] Convinced that interpretation harmonized the language of the related subsections, the court rejected the grandchild's claims. [FN31]

In what might be described as an adventure in the various manifestations of the family tree, the court justified its ruling in a footnote in which it hypothesized its construction avoided the inconsistency that might arise if a child

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claimant dies during the pendency of a wrongful death action. [FN32] The court expressed concern that subsection (b)(2) under a contrary construction would be read to vest rights in the claim to the child's siblings rather than his or her children. [FN33] Subsection (d)(1) provides that a deceased child's children may share per stirpes in recovery. So, in a situation in which a child claimant dies during the pendency of a wrongful death action, leaving behind siblings and his or her own children, the statute would not provide a clear answer as to who should take under the claim.

The court did not address another potential scenario: A child whose own parents predecease her and who is raised by her grandparents would be left out of the equation if the grandparents should die wrongfully at the hands of another. Under the court's ruling, the grandchild would have no right to recover under the Wrongful Death Act. Perhaps that result is what the General Assembly intended, but as a matter of fairness and practicality (and maybe the ultimate intent of *453 the law), the result seems at odds with the underlying premise of the Act. In any event, the court's bright line rule may avoid further litigation on the issue.

D. Evidence

Of course, evidence is an area in which litigation will never be avoided. Several appellate decisions further refining the contours of every imaginable evidentiary point were handed down during this survey period. In *Cornelius v. Macon-Bibb County Hospital Authority*, [FN34] a case alleging medical malpractice against two doctors and a hospital, several evidentiary points were addressed, two of which are worthy of comment. First, the court of appeals addressed the propriety of a hypothetical question directed at an opposing party. [FN35] Second, the court added to the growing case law surrounding the admission or failure to admit gruesome photographs. [FN36]

With respect to the hypothetical question, plaintiffs attempted to ask one of the defendant doctors "whether a patient who has pain out of proportion to the physical findings, nausea, vomiting, tachycardia and an unidentified mass on x-ray should be admitted to the hospital." [FN37] Apparently, there was some question whether all the underlying facts were placed in evidence by other witnesses, specifically, whether there was testimony that the decedent had pain out of proportion to the physical findings. The trial court did not allow the question to be asked. [FN38] The court of appeals dispensed with the issue by finding the right to cross examine an adverse party trumps the rule that an expert witness may only be asked a hypothetical based on facts placed in evidence from other witnesses. [FN39] In addition, the court found the error harmful, thus requiring reversal and a new trial because it went to a "highly contested and vital" issue in the case. [FN40]

*454 The court of appeals found no error in the trial court's exclusion of autopsy photographs. [FN41] Plaintiffs contended the autopsy photographs were important for the jury's consideration because they showed the viable condition of the decedent's bowel. Viability would have rebutted defendants' argument that the decedent's disease, rather than malpractice, was the cause of her death. The trial court excluded the photographs after balancing the probative value of the evidence against its tendency to be inflammatory and prejudicial. In addition, it appeared plaintiffs did not attempt to present the photographs through expert testimony but instead sought to introduce them so the jury could come to the conclusion that a portion of the bowel was not affected by disease. [FN42] The court of appeals reviewed the photographs and found that without expert testimony a layperson would be unable to draw conclusions about viability. [FN43]

Cornelius provides a good review of two evidentiary points. First, the practitioner should always keep in mind that the right of cross examination in this state is paramount, ranking higher in evidentiary priorities than the strictures of hypothetical questions. As a result, hypothetical questions to a party-defendant are an effective way of drawing out facts and a course of conduct that otherwise might not be appropriately directed to a testifying expert witness. Second, if autopsy or other gruesome photographs are necessary to explain a fact, develop a point, or otherwise contribute to one's case, it is essential that a proper foundation be laid to tender the photographs. The foundation would include the testimony of an expert witness explaining the need and importance of the evidence if the point is beyond the normal understanding of the jury.

The testimony of expert witnesses' generated significant controversy in *Ezor v. Thompson*. [FN44] The question presented in *Ezor* was whether the self-contradictory testimony rule applies to experts. The full court of appeals

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bench weighed in on the issue. The majority (ten of the judges) said no, and a vocal minority (Judges Blackburn and Andrews) said yes. [\[FN45\]](#)

In oversimplified terms, the self-contradictory testimony rule provides that when a party testifies in his or her own favor and then gives contradictory testimony on the same issue or fact, a court or jury should consider only the testimony most unfavorable to the party. The leading *455 case in Georgia addressing the rule is *Prophecy Corp. v. Charles Rossignol, Inc.* ("Prophecy"). [\[FN46\]](#) In *Ezor* the court of appeals had to decide whether the Prophecy rule extended to an expert witness whose testimony (first by affidavit, then by deposition contradicting the affidavit, then by second affidavit reaffirming the position taken in the first affidavit) was the sole support for a medical malpractice case. [\[FN47\]](#)

As noted, the court found that the rule does not extend to the testimony of an expert witness. [\[FN48\]](#) Instead, questions of contradiction in expert testimony go to the weight of the evidence under traditional principles of impeachment and credibility. In so ruling, the court emphasized that a party has no greater power to prevent contradictions in an expert witness' testimony than a lay witness' (to which the rule plainly does not apply). [\[FN49\]](#) The court resolved a conflict in prior decisions that applied the rule inconsistently in the context of expert testimony. [\[FN50\]](#)

The dissenting judges took issue with the broad rule announced by the court. [\[FN51\]](#) Judge Blackburn noted: "Contrary to the majority's analysis, the issue is whether Prophecy applies, and summary judgment is thus appropriate, when the allegations of an expert's affidavit required by [O.C.G.A. § 9-11- 9.1](#) are subsequently contradicted by the affiant's own sworn deposition testimony, and the plaintiff has no other evidence of malpractice." [\[FN52\]](#) The dissent traced the history of case law addressing the issue and harmonized it with the facts in *Ezor*. [\[FN53\]](#) Finding that principles of stare decisis compelled the opposite result of the majority's position, the dissent explained:

Given this history of the Supreme Court's refusal to review this issue, and absent any rational analysis supporting the overruling of these cases, this Court is engaging in the rawest form of speculation and prediction to assume that our Supreme Court will change its position on this issue and overrule those cases it has declined to address in the past. [\[FN54\]](#)

What is the better rule? A jury is specifically designed to handle questions of inconsistency, credibility, and bias. To file a medical *456 malpractice case, a party is required to submit an affidavit in which the affiant swears he or she is testifying truthfully. If in deposition the affiant changes course and contradicts prior sworn testimony, should the case be over? Probably not. The party should not be penalized by the loss of a jury trial, but the practical side of law practice suggests a jury might not take kindly to a witness' repeated change in testimony if the change is unexplained. All this theoretical speculation will soon be moot, however, as the Georgia Supreme Court has granted certiorari to resolve the issue. [\[FN55\]](#)

There was more dissent in the ranks in *Hopson v. Kennestone Hospital, Inc.*, [\[FN56\]](#) in which a majority of the court of appeals took a rather dogmatic approach to the applicability of the psychiatrist-patient privilege. [\[FN57\]](#) The court stated: "Communications between a patient and a psychiatrist are absolutely privileged." [\[FN58\]](#) Consequently, those privileged communications are not within the scope of a party's request that a nonparty hospital produce nonprivileged patient records. [\[FN59\]](#)

In *Hopson* no objection was filed to a third-party request to a hospital for medical records. Consequently, the hospital sent the records, which contained allegedly privileged psychiatrist-patient information. [\[FN60\]](#)

The hospital also sued the patient, whose records it produced, to collect on an unpaid balance. The patient counterclaimed, alleging damage as a result of the improper production of privileged medical records. [\[FN61\]](#) The court of appeals reversed the grant of summary judgment to the hospital on the patient's counterclaim, finding that nonparty requests for medical records, by their nature, seek nonprivileged information. [\[FN62\]](#)

The dissent recognized more acutely that the psychiatrist-patient privilege, like other privileges, may be waived by a party's conduct. [\[FN63\]](#) One way this waiver might occur is if a party fails to object when a nonparty request for potentially privileged information is sent to a hospital or other medical provider, like the request sent in *Hopson*.

[\[FN64\]](#)

One problem with the majority rule is it imposes no obligation on the patient to object to the production of potentially responsive medical *457 records, and it creates a fear in the nonparty hospital or medical provider that it may be sued for responding fully to a document request. One way to confront the need for full disclosure, in light of the protections afforded to psychiatrist-patient records, would be to send a request to a nonparty provider for all medical records, including records the provider believes may contain psychiatrist-patient privileged records, unless the patient objects to production of this information. This solution might suggest a more affirmative duty on the patient to object to production or provide some proof that the records are in fact privileged. After all, the burden to prove privilege should still rest with the party asserting the privilege, and, as other cases in this survey period have confirmed, it is not always easy to identify physician-patient relationships. [\[FN65\]](#) Or perhaps the request itself might include language requiring a log of potentially responsive, but privileged, materials so the trial court might decide whether production would be appropriate.

E. Damages

One of the more volatile, or at least emotional, opinions from this survey period addresses the potential recovery of emotional distress damages by a mother who witnessed her daughter suffer and die. Georgia's long-standing impact rule was addressed at length in *Lee v. State Farm Mutual Insurance Co.*, [\[FN66\]](#) a case in which the Georgia Supreme Court partly opened the door to the recovery of emotional distress claims when the emotional distress is not directly tied to the plaintiff's own physical injury. [\[FN67\]](#)

In *Lee* a mother and daughter were severely injured in a hit-and-run accident. The mother witnessed her daughter suffer and die an hour later from wreck-related trauma. [\[FN68\]](#) Under a traditional impact rule analysis, the mother would have been barred from recovering separate emotional distress damages arising from witnessing her daughter's suffering and demise because the requisite proof that the mother's physical injury caused the mother's emotional distress was lacking. [\[FN69\]](#)

In a shift in precedent, the supreme court found the policy rationale for the impact rule did not exist in *Lee*. [\[FN70\]](#) The court attempted to carve out a narrow exception to the rule under an "appropriate and compelling *458 situation . . . in which the distress is the result of physical injury negligently inflicted on another." [\[FN71\]](#) Thus, when an individual herself or himself suffers physical injury, he or she may now, under appropriate circumstances, recover emotional distress damages from witnessing another person suffer.

Although an encouraging development in the area of damages and a step in a more enlightened direction, the court's opinion stopped short of allowing parties to pursue recovery in situations in which it is still necessary to recognize avenues of relief. For example, if the mother in *Lee* had not sustained physical injury herself, the opinion would still bar her recovery for emotional distress damages. In the court's desire to establish a bright-line test, it failed to open the door more than a crack at this point.

Justice Hunstein wrote a special concurrence (joined by Justice Sears) in which she recognized the artificial limitations inherent in the majority opinion. [\[FN72\]](#) She explained:

The majority cautions against an imprudent abandonment of over a hundred years of Georgia precedent. However, this Court, by unanimously accepting the proposition that emotional injuries due to witnessing a negligently-caused injury to a third person are compensable, has abandoned that law. Having made this important and long overdue decision, however, it behooves this Court not to misdirect the law into an imprudent approach that has been roundly rejected and criticized by our sister states. [\[FN73\]](#) The boundaries of bystander liability in Georgia may continue to broaden because only future cases can define appropriate circumstances for liability. At some point, it is hoped Georgia will fall into line with the more practical and modern approach to these cases. The decision in *Lee* is a cautious step in that direction.

F. Depositions

In *J.H. Harvey Co. v. Reddick*, [\[FN74\]](#) the court of appeals considered whether a party may make substantive, material changes to his or her deposition testimony after the deposition has been concluded. [\[FN75\]](#) The court held

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the plain language of [O.C.G.A. section 9-11-30\(e\)](#) permits *459 both procedural as well as substantive changes to be made by way of an errata sheet. [\[FN76\]](#)

In Reddick plaintiff brought an action for injuries she sustained when she slipped and fell on defendant's premises. After giving her deposition testimony, plaintiff timely submitted an errata sheet making sixteen changes to her testimony, explaining the changes were necessary because she was confused by the propounded deposition questions. Defendant alleged error in the trial court's refusal to strike the amendments to the deposition, or to sustain defendant's objections to the amendments, and argued plaintiff's attorney failed to object to the questions at the time of the deposition. [\[FN77\]](#)

During plaintiff's deposition she was asked, inter alia, to what cause she attributed her fall. [\[FN78\]](#) Plaintiff replied, "I don't know." [\[FN79\]](#) Plaintiff's supplemented answer on her errata sheet stated "[s]omething slippery on the floor" made her fall. [\[FN80\]](#)

[O.C.G.A. section 9-11-30](#) provides that "[i]f requested by the deponent or a party, . . . the deponent shall have 30 days . . . in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them." [\[FN81\]](#) The court of appeals noted several federal cases interpreting the corresponding federal provision and wrote that "a witness may make any changes in form or substance which the witness desires, even if the changes contradict the original answers or even if the deponent's reasons for making the changes are unconvincing." [\[FN82\]](#)

However, the court pointed out the various safeguards against abuse of the procedure by a deponent. [\[FN83\]](#) First, the original answers given by a deponent remain part of the record and can be used to impeach the deponent or for clarification of an answer. [\[FN84\]](#) "This is because a deposition is not a take home examination and an errata sheet will not eradicate the import of previous testimony taken under oath." [\[FN85\]](#) Second, if the changes render the deposition "incomplete or useless without further testimony, then the examiner may reopen the deposition *460 and propound further questions to the witness concerning the nature of and reason for the changes." [\[FN86\]](#) Third, if the deponent is a party to the case, "his self-contradictory testimony must be construed against him and cannot create an issue of fact for the purpose of summary judgment unless the contradiction is adequately explained." [\[FN87\]](#)

G. Sealed Records

The supreme court in *In Re Motion of the Atlanta Journal-Constitution* [\[FN88\]](#) reaffirmed the mandate that court records not be placed under seal absent specific factual findings by a trial court that the harm resulting to a party's privacy interests "clearly outweighs the public's substantial interest in access to [court] records." [\[FN89\]](#) The parties each consented and jointly urged the court to enter an order to seal the record. [\[FN90\]](#) In connection with the entry of the order, the trial court failed to hold a hearing on the matter and simply entered the requested order, which stated only that "[t]he Court finds that the potential harm to the parties' privacy clearly outweighs the public interest." [\[FN91\]](#) No specific factual findings supporting the trial court's conclusion were ever entered in the record. [\[FN92\]](#)

The Atlanta Journal-Constitution ("AJC"), which was not a party to the underlying action, moved the trial court for access to the sealed record and for a hearing on its motion. After the trial court denied AJC's efforts, AJC appealed to the supreme court. [\[FN93\]](#) The supreme court observed that "[s]uperior courts may restrict or prohibit access to court records only if they do so in compliance with the requirements of [Uniform Superior Court] Rule 21." [\[FN94\]](#)

The supreme court reaffirmed the substantial interests and protection afforded the public's fundamental right to access court records. [\[FN95\]](#) "By their nature, civil lawsuits quite often cause litigants to experience an invasion of privacy and resulting embarrassment . . ." [\[FN96\]](#) However, trial courts are not permitted to seal court records without "factual findings that explain how a privacy invasion that may be suffered by a *461 party or parties seeking to seal a record differs from the type of privacy invasion that is suffered by all parties in civil suits." [\[FN97\]](#) Absent those findings by the trial court, "closing the record from public scrutiny" is unjustified. [\[FN98\]](#)

The supreme court likewise held as error the failure to hold a hearing upon whether the record should be sealed. [\[FN99\]](#) "The requirement of a hearing held upon reasonable notice is indispensable to the integrity of the process

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mandated for limiting access to court records, because 'justice faces its greatest threat when courts dispense it secretly.'" [\[FN100\]](#)

Hence, trial courts should be wary in entering any order that impinges upon the public's right to access court records before first weighing legitimate privacy concerns of litigants against the substantial interest of the public's access to court records. Even when both parties to the action urge the court to place a record under seal, no order to seal the records should be entered "unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" [\[FN101\]](#)

H. Statute of Limitations, Statute of Repose, and Tolling

The court of appeals held in *Abend v. Klautt* [\[FN102\]](#) that the five-year statute of repose of [O.C.G.A. section 9-3-71\(b\)](#), which applies to medical malpractice claims, does not bar foreign-object medical malpractice actions brought pursuant to [O.C.G.A. section 9-3-72](#). [\[FN103\]](#) In *Abend* plaintiff underwent a surgical procedure in 1987 during which Dr. Abend implanted a catheter in a vein in plaintiff's chest. Two years later, Abend performed surgery on plaintiff to remove the catheter. In April 1996 plaintiff began to experience severe complications, including slurred speech, facial drooping, lack of physical coordination, and numbness. These symptoms were brought on after a five-inch portion of the catheter, which defendant failed to remove in 1989, migrated to plaintiff's heart. [\[FN104\]](#)

Plaintiff subsequently brought an action against Abend less than one year after the remaining portion of the catheter was removed. Defendant*462 raised as a defense the five-year statute of repose arguing the action was barred. [\[FN105\]](#) Considering the legislative intent and the case law from which the foreign-object statute was codified, the court of appeals noted that [O.C.G.A. section 9-3-71](#) provides a two-year statute of limitations for medical malpractice and a five-year statute of repose. [\[FN106\]](#) However, [O.C.G.A. section 9-3-72](#), the foreign object statute, provides that "[t]he limitations of [Code Section 9-3-71](#) shall not apply where a foreign object has been left in a patient's body." [\[FN107\]](#) The court held that "the language of [O.C.G.A. § 9-3-72](#) stating that 'the limitations' of [O.C.G.A. § 9-3-71](#) shall not apply refers to two periods of time in [O.C.G.A. § 9-3-71](#) which generally limit when an action can be brought—the two-year statute of limitations and the five-year statute of repose." [\[FN108\]](#) This conclusion was also supported by the language used in [O.C.G.A. section 9-3-73](#) regarding medical malpractice actions brought on behalf of minors or incompetents. This code section, after setting out the statute of limitations and period of ultimate repose, provides in relevant part:

(d) Subsection (b) of this Code section is intended to create a statute of limitations and subsection (c) of this Code section is intended to create a statute of repose.

(e) The limitations of subsections (b) and (c) of this Code section shall not apply where a foreign object has been left in a patient's body. [\[FN109\]](#)

Second, the court held the legislative intent to exempt foreign-object cases from the five-year statute of repose was reflected in the differing policy reasons that support the two sections. [\[FN110\]](#) The court stated the statute of repose was enacted to address the following concerns inhering in nonforeign-object medical malpractice cases, as previously decided by the Georgia Supreme Court:

Because of the nature of the practice of medicine, uncertainty over the causes of illness and injury makes it difficult for insurers to adequately assess premiums based on known risks. Furthermore, the passage of time makes it more difficult to determine the cause of injury, particularly in diseases where medical science cannot pinpoint the exact cause. [\[FN111\]](#) *463 The court explained that in enacting the five-year statute of repose, the Legislature sought to cut off "exposure to medical malpractice claims brought many years after the alleged negligent act or omission, particularly in cases where the passage of time makes it more difficult to establish causation." [\[FN112\]](#) Conversely, the court reasoned, permitting a cause of action upon the discovery of a foreign object does not suffer from similar concerns "because the directly traceable nature of the negligence causing the injury eliminated the dangers normally associated with belated claims." [\[FN113\]](#) In other words, a foreign-object case leaves little room for speculation as to negligence, identity of the negligent party, and causation. Therefore, the court of appeals held the five-year statute of repose should not be applied to medical negligence cases based upon foreign objects left in a patient's body. [\[FN114\]](#)

The court of appeals again addressed the statute of repose in a medical malpractice action in *Esener v. Kinsey*.

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[FN115] The court in *Esener* held that when a defendant fraudulently deprives a plaintiff of the ability to bring a medical malpractice action within the statute of repose, the defendant is equitably estopped from asserting the statute of repose as a defense upon a finding that the plaintiff acted diligently to discover the fraud. [FN116]

In *Esener* plaintiffs discovered the true cause of the injuries giving rise to the suit seventy-eight days prior to the ten-year anniversary of the malpractice. Plaintiffs alleged that defendant, despite knowing the actual cause of the injury, concealed his negligence from plaintiffs. [FN117] This concealment constitutes fraud "[w]here a relationship of trust and confidence such as a physician-patient relationship exists, [because] there is a duty to disclose the cause of any injury." [FN118] Plaintiffs then brought a malpractice action against the defendant obstetrician-gynecologist for birth injuries to their minor daughter that occurred more than ten years prior to the filing of the case. [FN119]

The court in *Esener* began by underscoring the difference between a statute of limitations and a statute of ultimate repose, namely that statutes of limitations are procedural, delineating the time within which *464 an action may be brought for an existing right. [FN120] Statutes of repose, on the other hand, prescribe a time frame in which a right may accrue at all. [FN121] The court, therefore, reasoned statutes of repose cannot be tolled. [FN122] Nevertheless, the court stated the statute of repose should not "relieve a defendant of liability for injuries which occurred during the period of liability, but which were concealed from the patient by the defendant's own fraud." [FN123] Thus, the court held:

if the evidence of defendant's fraud or other conduct on which the plaintiff reasonably relied in forbearing the bringing of a lawsuit is found by the jury to exist, then the defendant, under the doctrine of equitable estoppel, is estopped from raising the defense of the statute of ultimate repose. [FN124]

Nonetheless, it appears a jury must determine a plaintiff exercised due diligence "in order for the doctrine of equitable estoppel to prevent the defendant from asserting the defense of the statute of repose." [FN125] Given the equitable nature of the estoppel, it seems consistent to require the plaintiff to have clean hands.

The court affirmed that "[t]he sun never sets on fraud" and provided an avenue for plaintiffs who have been the victim of not only malpractice, but also fraud, to seek recourse against the tortfeasor. [FN126] To have held otherwise would have "provide[d] an incentive for a doctor or other medical professional to conceal his or her negligence with the assurance that after ten years such fraudulent conduct w[ould] insulate him or her from liability." [FN127]

In a matter of first impression, the court of appeals held in *Whirl v. Safeco Insurance Co.* [FN128] that the two-year statute of limitations for personal injury governs when an automobile insurer can bring a subrogation action against a tortfeasor to recover uninsured or underinsured benefits paid to its insured. [FN129] In *Whirl* defendant *Whirl* was involved in an automobile collision that caused injuries to Safeco's insured. Because *Whirl* was uninsured at the time of the collision, Safeco paid uninsured medical benefits to its insured. As a result, *465 Safeco sought to recoup its payments pursuant to O.C.G.A. section 33-7-11(f) by filing suit against *Whirl*. The suit was not brought until some two years after the collision. [FN130]

O.C.G.A. section 33-7-11(f) provides in relevant part that an insurer who pays a claim shall be "subrogated to the rights of the insured to whom such claim was paid against the person causing such injury." [FN131] The court reasoned the insurer "stands in the shoes of the insured," and "any action [for subrogation] must be brought in the insured's name as the real party in interest." [FN132] Thus, "the rights to which the subrogee succeeds are the same as, and no greater than, those of the subrogor; therefore, the subrogee's rights are subject to any limitations incident to them in the hands of the subrogor, and subject to any defenses" that could have been asserted against the subrogor. [FN133]

The court rejected Safeco's argument that the twenty-year statute of limitation provided for in O.C.G.A. section 9-3-22 should apply because no limitation period is given in the subrogation statute. [FN134] Safeco relied upon Georgia cases applying the twenty-year statute of limitations under the old no-fault insurance regime. [FN135] However, the court noted the no-fault right of subrogation applied only to property damage claims and was an assigned cause of action in that the insurer was required to prosecute any action in its own name. [FN136] Conversely, the court wrote, subrogation based upon O.C.G.A. section 33-7-11(f) is for reimbursement of benefits paid on account of personal injury, which is not assignable and, therefore, must be maintained in the name of the

injured party, not the insurer. [\[FN137\]](#) Thus, the court held the same rights, remedies, and defenses applicable to an individual tort victim are applicable to an insurer seeking subrogation. [\[FN138\]](#)

I. Judicial Estoppel

Practitioners should take note of *Wolfork v. Tackett*, [\[FN139\]](#) in which the court of appeals held one is judicially estopped from pursuing an unliquidated tort claim in a state court after failing to list the claim as *466 an asset in his or her federal petition for Chapter 13 bankruptcy. [\[FN140\]](#) This principle applies whether the cause of action accrues before or after filing the bankruptcy petition. [\[FN141\]](#)

The court reasoned federal law requires a Chapter 13 bankruptcy petitioner to list all assets, including "[u]nliquidated tort claims [that] are personal property included as part of the [bankruptcy] estate." [\[FN142\]](#) For this reason, "failure to disclose an asset . . . in a bankruptcy proceeding amounts to a denial that such a claim exists and bars subsequent attempts to pursue it." [\[FN143\]](#) When a tort claim arises "after the filing of the Chapter 13 bankruptcy petition but before the bankruptcy is closed," the claim is considered after-acquired property that a petitioner has an affirmative duty to disclose to the bankruptcy court. [\[FN144\]](#)

When a plaintiff fails to disclose the tort claim in the bankruptcy case, a defendant is entitled to summary judgment in the tort action. [\[FN145\]](#) Thus, to avoid this pitfall, practitioners must be concerned with their clients' financial status and be sure that any tort action is listed in a Chapter 13 bankruptcy even though the cause of action accrued long after the bankruptcy claim was filed. Moreover, even when the bankruptcy proceeding is closed prior to the accrual of the tort claim, a plaintiff must move to have the bankruptcy petition re-opened to declare the existence of the asset. Failure to do so precludes further pursuit of the claim.

J. Subject Matter Jurisdiction--RICO and Insurance Fraud

As Georgia's Racketeering Influenced and Corrupt Organizations ("RICO") Act [\[FN146\]](#) gains more broad-based application in the state's appellate tribunals, insurers are trying harder to find ways of having the claims dismissed before the merits are reached. The court of appeals was unimpressed with the creative lawyering exhibited by the insurer's counsel in *Griffeth v. Principal Mutual Insurance Co.* [\[FN147\]](#) In *Griffeth Charles and Linda Griffeth*, who were self-employed, sought group health insurance from Principal Mutual Insurance Company ("PMIC") in 1993. Their premiums were substantially increased over several *467 years, and they canceled their policy in 1996. [\[FN148\]](#) Plaintiffs also complained to the Insurance Commissioner who, in turn, warned PMIC of its "concern that the company was not complying with Georgia's small group pooling laws." [\[FN149\]](#) When the Commissioner's office notified PMIC it was turning the matter over to its enforcement division, PMIC terminated its coverage for all Georgia policyholders under the plan. [\[FN150\]](#)

The Griffeths filed a class action suit asserting claims for fraud, violation of Georgia's RICO Act, and breach of contract against PMIC. The gravamen of their claim was that PMIC illegally and fraudulently marketed and sold group policies that were, in effect, nothing but individual policies to farmers, small businessmen, and similar self-employed individuals. [\[FN151\]](#) In essence, plaintiffs alleged PMIC misrepresented the nature of the policies and "committed various illegal and tortious acts, including violations of the Georgia Insurance Code, O.C.G.A. § 33-2-1, et seq." [\[FN152\]](#) The trial court, ruling the Griffeths failed to exhaust administrative remedies available to them, found the Georgia Insurance Commissioner had exclusive jurisdiction over the claims and dismissed the complaint for lack of subject matter jurisdiction. [\[FN153\]](#)

In reversing the trial court, the court of appeals relied on *Provident Indemnity Life Insurance Co. v. James* [\[FN154\]](#) which held: "[S]imply alleging Insurance Code violations does not transform a civil RICO complaint into a cause of action which must be pursued exclusively through administrative channels, particularly when numerous other predicate acts are alleged in the complaint, including fraud." [\[FN155\]](#) Like the court in *James*, the Griffeth panel found the tort claims stood on their own merits and had fully vested as a legal action. [\[FN156\]](#) The trial court erroneously concluded it was without jurisdiction to hear the claims. [\[FN157\]](#) The court of appeals responsibly distinguished those cases in which the plaintiff sought a judicial determination of the Commissioner's findings. [\[FN158\]](#) In those circumstances, cases should be dismissed for not properly pursuing the administrative procedure for contesting the *468 agency's decision. [\[FN159\]](#) No agency findings of that sort were present in *Griffeth*, as

PMIC withdrew its coverages before any official action was taken by the Commissioner's office. [\[FN160\]](#) Although Griffeth turns on its own facts, the case more broadly signals that trial courts will routinely maintain subject matter jurisdiction over broad RICO and fraud claims against insurers.

K. Jury Instructions

Practitioners in the personal injury arena, both plaintiff and defense, should make themselves aware of *Burchfield v. Madrie*, [\[FN161\]](#) a seemingly benign yet important decision in which the court held a jury charge on preexisting conditions was proper even though there was no direct evidence of any preexisting injury. [\[FN162\]](#) In *Burchfield* defendant negligently rear-ended plaintiff's vehicle. Plaintiff claimed his shoulder popped during impact and pain radiated down his right arm. He declined emergency medical attention but went to a company doctor later that day. Months after the collision, he was diagnosed with a torn rotator cuff in the right shoulder. He was eventually referred to an orthopedic surgeon specializing in shoulder injuries who ultimately performed surgery to repair the rotator cuff tear. [\[FN163\]](#)

In a deposition, the surgeon could not establish with certainty that the injury occurred as a result of the collision but did offer that "everything fit together." [\[FN164\]](#) The surgeon also acknowledged that repetitive use of the arm and recreational activities could cause rotator cuff injuries. Plaintiff testified at trial that he had never experienced any problems with his right arm or shoulder before the collision. While he admitted he had been involved in an earlier collision, he denied any shoulder injuries occurred from that collision. He also acknowledged he played some golf and tennis. The trial court charged the jury on preexisting conditions but instructed the jury that plaintiff could recover if the collision aggravated any condition. A verdict was rendered for defendant, and plaintiff appealed, claiming the preexisting condition charge was erroneous because there was no direct evidence of any previous or dormant shoulder injury. [\[FN165\]](#)

***469** The court of appeals found no problem with the preexisting-condition jury charge and noted there was "circumstantial evidence from which the jury could have inferred that his sporting activities and the earlier collision [[could have] caused or contributed to his injury." [\[FN166\]](#)

Both plaintiff and defense lawyers can learn important trial practice lessons from *Burchfield*. First, from the plaintiff's perspective, because many injuries suffered in motor vehicle collisions can also occur in the course of everyday living, plaintiffs' attorneys must be prepared to address causation issues and combat any notion that other causes for the injury exist. Second, when using medical testimony on causation, the plaintiff's attorney must ensure the doctor can state within a reasonable degree of medical certainty that the collision caused the injury. Third, from the defense perspective, it is always prudent to search for another explanation for the cause of the injury to give the jury something else to consider in their deliberations. The time-honored defense "smokescreen" approach to injury litigation can apparently still score points when effectively employed.

L. Notice/Ante-Litem

While Federal Express continues to battle the U.S. Postal Service for business, the legal observer continues to wonder when Federal Express delivery will be considered valid notice with respect to service issues. Perhaps the tide is turning somewhat with the recent holding in *Georgia Ports Authority v. Harris*. [\[FN167\]](#) In *Harris* plaintiff, a longshoreman, was injured at the Brunswick port on December 20, 1993. Counsel for Harris sent a letter that enclosed a "State of Georgia Tort Claim" and that set out the matters required by [O.C.G.A. section 50-21-26\(a\)\(5\)](#). [\[FN168\]](#) That letter was sent via Federal Express overnight mail to the Risk Management Division of the Department of Administrative Services ("DOAS"). A copy of the letter was attached to Harris's complaint, which, on its face, stated: "RECEIVED DEC 20 1994 DOAS/FISCAL DIVISION." [\[FN169\]](#) Defendant Georgia Ports Authority ("GPA") filed a motion to dismiss based on insufficient notice under the Georgia Tort Claims Act ("GTCA"). The trial court concluded the ante litem notice physically delivered to ***470** DOAS by Federal Express on the anniversary date of the injury satisfied the GTCA. [\[FN170\]](#)

On appeal, GPA contended the lower court erred in denying the motion to dismiss because Harris did not strictly comply with the GTCA's ante litem notice requirement. The central issue was whether delivery by Federal Express constituted personal delivery in compliance with the statute. [\[FN171\]](#) Judge Ellington, writing for the majority of

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the en banc court of appeals, cited the following provision of [O.C.G.A. section 50-21-26\(a\)](#):

No person . . . having a tort claim against the state under this article shall bring any action against the state upon such claim without first giving notice of the claim as follows: . . . (2) Notice of a claim shall be given in writing and shall be mailed by certified mail, return receipt requested, or delivered personally to and a receipt obtained from the Risk Management Division of the Department of Administrative Services. In addition, a copy shall be delivered personally to or mailed by first-class mail to the state government entity [involved]. [\[FN172\]](#)

Interestingly, especially considering the court's eventual holding, the appellate court began its analysis of the notice issue by observing, "[b]y its own terms, the State Tort Claims Act must be strictly construed," and we have held that substantial compliance with [O.C.G.A. § 50-21-26\(a\)\(2\)](#) is insufficient." [\[FN173\]](#) Actual notice in the form of personal delivery was admitted because the DOAS' "received" stamp was located on the face of the letter. However, DOAS did not issue a separate paper receipt at the time of delivery or any other time, and it was undisputed that the Federal Express delivery person obtained nothing in the way of a receipt from DOAS. [\[FN174\]](#) Despite this seeming lack of strict compliance, the court held that "strict compliance does not require us to use the receipt provision to harm the very party it was designed to benefit, namely, one with a tort claim against the state." [\[FN175\]](#) With apparent logical inconsistency (but, perhaps, common sense) in its holding, the court used substantial compliance in place of strict compliance. [\[FN176\]](#)

Many lessons can be learned from Harris. First, it is dangerous to rely on an appellate court to bail one's client out of a potentially case-*471 threatening notice/service problem. While Federal Express delivery was ultimately permissible, the court essentially ignored the lack of a return receipt, a requirement under the GTCA. Second, to ensure strict compliance with the statute, and not have to worry about a close call, personal service from a courier or certified mail should be used. Alternatively, if Federal Express is utilized, its delivery person must be instructed to obtain a receipt of the delivery. Federal Express may not allow this practice; if it does not, Federal Express should not be used. Third, when time is of the essence with regard to notice requirements, it is not a bad idea for the lawyer, or a trusted employee, to handle service of the ante litem notice personally because he or she would know that a delivery receipt was necessary to comply unquestionably with the statute.

M. Notice/Abusive Litigation

After failing to name a lawyer and his professional corporation ("PC") in an abusive litigation ante litem notice, a county water authority lost the right to bring abusive litigation claims in *Carroll County Water Authority v. Bunch*. [\[FN177\]](#) In a previous suit, the Carroll County Water Authority ("CCWA") successfully defended itself against fraud and RICO claims made against it by a county resident. Shortly thereafter, CCWA sued the resident, the resident's attorney, and his PC for abusive litigation under [O.C.G.A. section 51-7-80](#). [\[FN178\]](#) The required notice was properly sent by certified mail to "Dr. H. Gilbert Maddox, Jr., by and through his attorney of record, Gary Bunch." [\[FN179\]](#) The notice alerted Maddox of potential abusive litigation claims but failed to allege specifically similar claims against Bunch or his PC. [\[FN180\]](#)

The appellate court, again citing strict compliance, noted that "[t]he statutory tort of abusive litigation is in derogation of the common law and its notice provisions are 'strictly construed in order to accomplish its overriding purpose to give a prospective defendant the chance to change position and avoid liability.'" [\[FN181\]](#) Because the notice failed to name the lawyer and the lawyer's PC specifically, the notice respecting those parties was invalid, and the trial court correctly granted summary judgment to those two defendants. [\[FN182\]](#) The maxim here is obvious to *472 the practitioner-in one's notice letter, individually name every potential defendant who could be named in the subsequent tort suit for abusive litigation.

N. Summary Judgment/Affidavit

If either plaintiff or defense attorneys fail to attack, rebut, or at least question a strong affidavit against them on summary judgment, they will be fighting an uphill battle to have the motion denied. This survey period saw this kind of story played out unfavorably for plaintiff in *Pass v. Bouwsma*, [\[FN183\]](#) a dram shop liability case in which plaintiff could not survive summary judgment on the issue of whether defendant furnished alcohol to the driver while he was in a state of noticeable intoxication. On January 5, 1996, Don Glenn arrived at Michelle Bouwsma's house to take her out for drinks in Athens, Georgia. Glenn was drinking a beer when he arrived at her house. He

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had a cooler full of beer on the floorboard of his truck. Bouwsma denied she ever handed Glenn a beer from the cooler. While at two bars in the Athens area, both individuals drank alcoholic beverages. Bouwsma denied she ever purchased any alcohol for, or furnished any alcohol to, Glenn. Later that evening, on the way to Bouwsma's home, Bouwsma fell asleep while Glenn drove. Glenn ran off the road on a curve, over-steered, crossed the center line, and struck a vehicle head-on in which Pass was riding as a passenger. Pass died in the collision. She was seven months pregnant at the time, and the unborn baby died as well. [\[FN184\]](#)

The administrator of Pass's estate brought an action against Bouwsma and contended Bouwsma provided, furnished, or sold alcohol to Glenn while he was in an obvious state of intoxication. Bouwsma moved for summary judgment and attached her own affidavit in which she claimed she never handed Glenn a beer from the cooler and never purchased for or furnished to him any alcohol. Importantly, plaintiff filed no evidence in opposition to the motion or the affidavit. Summary judgment was granted to Bouwsma, and an appeal followed. On appeal, plaintiff contended the trial court erred in relying on a self-serving affidavit when there was no other evidence produced in support of the motion. [\[FN185\]](#) Plaintiff cited *McLeod v. Westmoreland* [\[FN186\]](#) and argued the affidavit should have been stricken because it was nothing more than a self-serving verification of Bouwsma's answer. [\[FN187\]](#)

*473 The court of appeals disagreed and found the affidavit described "the events of the evening in question in some detail." [\[FN188\]](#) Finding the affidavit passed the requirements of [O.C.G.A. section 9-11-56\(e\)](#), the court remarked the affidavit "was factually detailed, relevant, material, and negated the essential elements of plaintiff's case." [\[FN189\]](#) Interesting, for trial practice purposes, was the court's comment that a movant for summary judgment does not have to be subject to cross-examination before her affidavit may be considered in support of the motion. [\[FN190\]](#) Plaintiff had an opportunity to cross-examine defendant on deposition but failed to do so. When Bouwsma pierced plaintiff's complaint, the burden to create a material issue of fact shifted to plaintiff, who failed to attack the affidavit. [\[FN191\]](#)

More critical, yet logical, lessons can be drawn from Pass. The affiant's deposition should be taken to discern the truthfulness and accuracy of the allegations. To defeat summary judgment, material issues of fact must be present. Other witnesses, like patrons or employees of the bars visited by Glenn and Bouwsma, should have been questioned to refute the contentions in the affidavit. Perhaps someone saw Bouwsma, in contradiction to the affidavit, furnishing alcohol to Glenn. On the other hand, if thorough investigation revealed that Bouwsma in fact never furnished alcohol to Glenn, the claim should not be pursued. Whatever the case, the practitioner should arduously canvass all potential witnesses from whatever source in order to address the critical elements of the case, which, if lacking, could signal a swift end to any pending litigation.

O. Default

While the appellate courts are generally loath to affirm defaults or reverse a default denial, three cases from the survey period demonstrated somewhat of a retreat from this stance. The entry of default for failing to file an answer timely is serious, and businesses, which are frequently candidates for suits, should be carefully advised by their counsel or managers as to what should be done to respond timely. Judges at the trial and appellate levels prefer that cases be decided on their merits, but defaults and default judgments will still be upheld under certain circumstances.

*474 In *Ellis v. Five Star Dodge, Inc.*, [\[FN192\]](#) the trial court's grant of an auto dealership's motion to vacate default was reversed on appeal. [\[FN193\]](#) Davis and Sheila Ellis bought a car from defendant Five Star Dodge. The car had numerous problems, and the Davises attempted to rescind the purchase. The dealership refused, and the Davises filed suit on March 7, 1997. On March 10, 1997, Jeff Smith, the dealership's general manager, was served. After being served, Smith gave the complaint to another employee, Bobby Cramer. [\[FN194\]](#) Cramer then consulted with another employee, Bo Willis, who "'advised' [Cramer] that he had forwarded the documents to the insurance carrier and that the lawsuit was 'being handled.'" [\[FN195\]](#) Cramer admitted he "'did nothing further with the complaint.'" [\[FN196\]](#) There was no evidence in the record that any employee took any steps to ensure the suit was answered, and there was no evidence of any communication from the insurance company that it received the complaint. There was also no mention of any communication between the carrier and defendant about the case before it went into default. [\[FN197\]](#)

On defendant's motion to vacate the default, the dealership alleged the failure to file a timely answer was due to

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excusable neglect because defendant "believed it had referred the action to its insurance carrier for defense, and was not aware that the insurance carrier had not received the complaint." [FN198] The trial court opened the default on grounds of excusable neglect. [FN199] The appellate court found this ruling to be an abuse of discretion because the dealership failed to show excusable neglect as a matter of law. [FN200] The basis for the ruling was defendant's failure to use diligence to assure the complaint would be answered. The following admonishment was issued: "[T]his Court cannot condone such inaction." [FN201]

Reliance on the insurance company to answer the complaint is a recognized defense, but the defendant must still show that diligence was exercised. The corporate defendant should designate one person to be in charge of ensuring the answer is filed, not just forwarded to the carrier. The complaint should be hand delivered, and the employee *475 should record the name of the person who received it, as well as the date and time. Routine follow-up calls should be made to make sure someone is handling the matter. If the insurance company is dragging its feet, the defendant should use an in-house attorney or hire an attorney to file a timely answer.

Believe it or not, plaintiffs should be wary of pushing too hard for default when an insurance company provides coverage for the claims. If the defendant was the entity that failed to forward the complaint to the insurer, as in *Ellis*, the insurer may have valid grounds to deny coverage for the claim under the notice provisions of its liability policy. If the defendant, whether a company or individual, is insolvent or does not have other insurance or assets to satisfy a judgment, the plaintiff could be left without a recovery. Careful consideration should be given to the notion of allowing the defendant out of default in exchange for assurances that coverage will be in force. However, if liability for the injury is questionable, damages are large, and the defendant has plenty of money to pay any judgment, the attorney should push fervently for the entry of default. Alternatively, if liability is clear and the defendant may be unable to pay a judgment without insurance, the plaintiff's attorney should notify the insurer at the time suit is filed by sending the complaint by certified mail, return receipt requested, to the claims adjuster in charge of handling the file. This procedure will likely prevent the insurer from denying coverage if its insured fails to notify the insurer of the suit in time to file an answer.

A reversal of a motion to set aside a default judgment occurred in *Mitchell v. Speering*. [FN202] While *Mitchell* hinged on different facts, the lesson to be learned is the same—one must take affirmative steps to ensure an answer is filed. If service is questionable, one should appear specially but still file an answer. Take no chances. In *Mitchell* plaintiff and defendant were involved in a car wreck in which plaintiff was injured. Plaintiff's attorney used some of the same strategy offered above when he forwarded the complaint to Allstate, Speering's insurer. The return receipt bore the date of June 8, 1998. Allstate forwarded it to its counsel, who received it the following day. Speering personally accepted service of the complaint on August 15, 1998, and the process server's affidavit was file-stamped by the clerk's office on August 24. The case went into default when no answer was filed by Speering, and a default judgment was obtained on October 5. [FN203]

Speering moved to set aside the default judgment by relying on an affidavit filed by her defense attorney's legal assistant. According to the *476 affidavit, the clerk's office provided misinformation about service. The legal assistant averred she had checked with the clerk's office on seven occasions between June 16 and October 22 and had been advised each time that service had not been perfected on Speering. The assistant's affidavit did not disclose the name or names of any persons in the clerk's office with whom she allegedly spoke. Mitchell produced an affidavit from the clerk of court, who confirmed the entry of service had been filed and, if a call had been placed questioning service, the caller would have been told of the entry of service. Speering, who had been personally served, testified she did absolutely nothing about the complaint and remarked that "they [the pleadings] kind of got under my pile of things to do and I didn't get back to them." [FN204] She did not contact Allstate or any attorney after being served. [FN205]

On these facts, the trial court set aside the default judgment and found that "defense counsel's office justifiably relied upon verbal communications with personnel in the Clerk's office regarding the status of service of process. During these communications, an error occurred which may have contributed to the failure to file a timely answer." [FN206] The court of appeals reversed, agreeing with plaintiff that defendant's own negligence contributed to the entry of judgment. [FN207] In the trial court, Speering relied on *O.C.G.A. section 9-11-60(d)(2)*, which states that "a judgment may be set aside where that judgment was procured on the basis of '[f]raud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant.'" [FN208] The appellate court found

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this section inapplicable because there was negligence or fault on the part of the movant; namely, Speering did nothing to ensure the complaint was answered. [\[FN209\]](#) The court considered the legal assistant's affidavit but ruled it did not obviate defendant's duty to ensure a timely answer would be filed. [\[FN210\]](#)

Judge Ruffin's opinion in Mitchell saddles the defendant with most of the blame, but the practitioner should not take solace in such a result. When faced with a similar situation, several steps could be taken to avoid any possibility of default or default judgment. Clerk's offices are filled with men and women handling hundreds of files. They are often overworked and underpaid. Many nightmares can be avoided by *477 physically going to the clerk's office and looking at the file. If the lawyer cannot make the trip, a trusted paralegal or legal assistant should go. If defendant's counsel had made this trip in Mitchell, the entry of service would have been seen; a phone call would have been made to Speering to confirm service, and a timely answer would have been filed. Another feasible alternative would be to make a special appearance and file an answer. Of course, in Mitchell, when the phone call was made to the client to discuss the answer, counsel probably would have been apprised of service. This fact brings up another good point: Call the client. Lastly, it probably goes without saying that it is never a good idea to make oneself an enemy of the clerk's office. Good rapport with the clerk's office can be invaluable.

In a third default case during the survey period, US-1 Van Lines of Georgia, Inc. v. Ho, [\[FN211\]](#) the court of appeals affirmed a default judgment entered against a moving company. [\[FN212\]](#) Ho filed a renewal complaint against US-1 Van Lines of Georgia, Inc. ("US-1") on June 29, 1998. When US-1 failed to answer, plaintiff moved for entry of a default judgment and a trial on damages. On October 1, 1998, the trial court notified US-1 it was required to appear for a nonjury trial on damages on November 5, 1998. On the day of the trial, a US-1 employee, who was not an attorney, appeared on behalf of the corporation, requested a continuance and produced a letter from the company president that also asked for a continuance. [\[FN213\]](#) Because the corporation was not represented by an attorney, as required by *Eckles v. Atlanta Technology Group Inc.*, [\[FN214\]](#) the trial court went forward with the trial as if no one had appeared on behalf of US-1. A default judgment was entered, and US-1 appealed, claiming the court erred in refusing to grant the continuance. [\[FN215\]](#)

The court of appeals found the trial court did not abuse its discretion and properly applied *Eckles*. [\[FN216\]](#) Of importance to the appellate court, in addition to *Eckles*, was the fact US-1 had over one month to retain a lawyer who could have moved for a continuance or represented US-1 at the damages trial. [\[FN217\]](#) Relying on *Daughtry v. State*, [\[FN218\]](#) the court held that "[a] trial court's denial of a continuance is proper when the *478 defendant negligently fails to employ counsel promptly or where it appears the defendant is using the tactic for delay." [\[FN219\]](#)

III. Legislation

Some of the more interesting developments touching upon trial practice and procedure took the form of much-needed legislation in the areas of corporate venue, increased liability insurance minimum policy limits, and service of process. Although case law will necessarily flesh out the implications of the new enactments, some brief observations are warranted.

The General Assembly expanded the restrictive corporate venue rules, if only incrementally. [\[FN220\]](#) Whereas, before, corporate venue was generally limited to the county where the defendant chose to locate its registered agent for service of process, the new corporate venue statute allows an altogether new basis for proper corporate venue:

In actions for damages because of torts, wrong, or injury done, in the county where the cause of action originated. If venue is based solely on this paragraph, the defendant shall have the right to remove the action to the county in Georgia where the defendant maintains its principal place of business. A notice of removal shall be filed within 45 days of service of the summons. Upon motion by the plaintiff filed within 45 days of the removal, the court to which the case is removed may remand the case to the original court if it finds that removal is improper under the provisions of this paragraph. Upon the defendant's filing of a notice of removal, the 45 day time period for filing such notice shall be tolled until the remand, the entry of an order by the court determining that the removal is valid, or the expiration of the time period for the plaintiff to file a motion challenging the removal, whichever occurs first . . . [\[FN221\]](#) Although the procedural aspects of the provision are relatively straightforward, some substantive aspects merit exploration.

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The only time the new provision comes into play occurs when it is the only basis for venue in the county in which the case is filed. When this basic criterion is met, the defendant can then only remove the case to the county in Georgia where the defendant maintains its principal place of business. This language leaves unanswered the most obvious question: What if the defendant's principal place of business is not in any "county in Georgia" ? Does that fact mean the case cannot be *479 removed, or does it mean the court must decide which "county in Georgia" holds the corporation's "principal place of business" in Georgia? The question is left for the courts to decide.

In a significant piece of legislation for trial practitioners working in the trenches of insurance litigation, the General Assembly increased the minimum liability insurance policy limits from \$15,000 to \$25,000 because of bodily injury to or death of one person in any one accident. [FN222] The minimum limit because of bodily injury to or death of two or more persons in any one accident was raised to \$50,000. [FN223] The implications of this simple change to the trial practitioner in day-to-day practice cannot be overstated.

The General Assembly amended [O.C.G.A. section 9-11-4](#) to provide for waiver of formal service of a complaint and summons, which should save unnecessary costs previously associated with service. [FN224] The addition to the statute provides that corporations or associations, subject to service under subsection (e) of the statute (domestic corporations, registered foreign corporations, or corporations having an agent in this State) and competent adults have a duty to avoid unnecessary costs incident to service when they have received notice of an action against them. [FN225]

The amendment provides, in essence, that a plaintiff may give notice of the action in writing via first class mail sent directly to an individual or to an appointed agent of a corporation, accompanied by a copy of the complaint. The statute also enumerates other particulars, all of which are addressed in the forms following the code section. A defendant in the United States who waives formal service pursuant to a request under [O.C.G.A. section 9-11-4\(d\)](#) need not file an answer until sixty days from the date the requesting party mailed the request for waiver. [FN226]

The amendment adds a real incentive for parties to comply with a request for waiver. A party who refuses to waive service and thereby causes the requesting party to make service of the summons by traditional means "shall [be liable for] the costs subsequently incurred in effecting service . . . unless good cause for the failure is shown." [FN227] Costs include those associated with the service as well as "a reasonable attorney's fee [for] any motion to collect the costs of service." [FN228]

*480 IV. Conclusion

This year's survey period yielded several notable decisions and legislative developments, the more significant of which are collected and reviewed in this article. While this survey is not intended to be exhaustive, the authors hope that the material will be useful in keeping readers apprised of the ever-changing area of trial practice and procedure.

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[FN1]. [243 Ga. App. 183, 532 S.E.2d 743 \(2000\)](#).

[FN2]. [Id. at 183, 532 S.E.2d at 744](#) (internal footnote omitted). Disciplinary Standard 13 prohibits the giving of referral fees to individuals who simply recommend services of a particular lawyer.

[FN3]. [Id. at 185, 532 S.E.2d at 747](#).

[FN4]. [Id. at 183-84, 532 S.E.2d at 745](#).

[FN5]. [Id.](#)

[FN6]. [Id. at 187, 532 S.E.2d at 747](#).

[FN7]. [Id.](#) (footnote omitted).

[FN8]. [271 Ga. 330, 519 S.E.2d 672 \(1999\)](#).

[FN9]. [Id. at 333, 519 S.E.2d at 675-76](#).

[FN10]. [Id. at 334, 519 S.E.2d at 676](#).

[FN11]. [Id. at 331, 519 S.E.2d at 674](#).

[FN12]. [Id.](#)

[FN13]. [Id. at 331-33, 519 S.E.2d at 674, 676](#).

[FN14]. [Id. at 331, 519 S.E.2d at 674](#).

[FN15]. [Id.](#)

[FN16]. [Id. at 337, 519 S.E.2d at 678](#).

[FN17]. [239 Ga. App. 134, 522 S.E.2d 19 \(1999\)](#).

[FN18]. [Id. at 135-36, 522 S.E.2d at 20-21](#).

[FN19]. [Id. at 137, 522 S.E.2d at 21](#).

[FN20]. [Id.](#)

[FN21]. [Id. at 141, 522 S.E.2d at 24](#) (Pope & Eldridge, JJ., dissenting).

[FN22]. [239 Ga. App. at 135, 522 S.E.2d at 20](#).

[FN23]. [271 Ga. 207, 518 S.E.2d 423 \(1999\)](#).

[FN24]. [O.C.G.A. § 51-4-2 \(Supp. 2000\)](#).

[FN25]. [271 Ga. at 207, 518 S.E.2d at 424](#).

[FN26]. [Id. at 208, 518 S.E.2d at 425](#).

[\[FN27\]](#). *Id.*

[\[FN28\]](#). *Id.*

[\[FN29\]](#). *Id.* at 209-10, 518 S.E.2d at 426.

[\[FN30\]](#). *Id.* at 210, 518 S.E.2d at 426.

[\[FN31\]](#). *Id.* at 209, 518 S.E.2d at 426.

[\[FN32\]](#). *Id.* at 210 n.6, 518 S.E.2d at 426 n.6.

[\[FN33\]](#). *Id.* at 209, 519 S.E.2d at 426.

[\[FN34\]](#). 243 Ga. App. 480, 533 S.E.2d 420 (2000).

[\[FN35\]](#). *Id.* at 483, 533 S.E.2d at 424.

[\[FN36\]](#). *Id.* at 486-87, 533 S.E.2d at 426-27.

[\[FN37\]](#). *Id.* at 483, 533 S.E.2d at 424.

[\[FN38\]](#). *Id.*

[\[FN39\]](#). *Id.*

[\[FN40\]](#). *Id.* at 488, 533 S.E.2d at 427 (quoting [Hyles v. Cocknill](#), 169 Ga. App. 132, 140, 312 S.E.2d 124, 132 (1983)). Judge Smith wrote a special concurrence in which he stated he agreed the hypothetical question went to a "highly contested and vital" issue in the case. On that basis alone, he suggested the case be remanded for trial. He also found that whatever response the witnesses gave to the question, it would be cumulative. In other words, Judge Smith's concurrence supports the proposition that the question of cumulativeness is irrelevant if the hypothetical question relates to a "highly contested and vital" issue. [Id.](#) at 488, 533 S.E.2d at 428 (Smith, J., concurring specially).

[\[FN41\]](#). *Id.* at 486, 533 S.E.2d at 426.

[\[FN42\]](#). *Id.* at 487, 533 S.E.2d at 427.

[\[FN43\]](#). *Id.*

[\[FN44\]](#). 241 Ga. App. 275, 526 S.E.2d 609 (1999).

[\[FN45\]](#). *Id.* at 279, 526 S.E.2d at 612.

[\[FN46\]](#). 256 Ga. 27, 343 S.E.2d 680 (1986).

[\[FN47\]](#). 241 Ga. App. at 275, 526 S.E.2d at 609-10.

[\[FN48\]](#). *Id.* at 279, 526 S.E.2d at 612.

[\[FN49\]](#). *Id.* at 278, 526 S.E.2d at 611.

[\[FN50\]](#). *Id.* at 379, 526 S.E.2d at 612

[\[FN51\]](#). *Id.* (Blackburn & Andrews, JJ., dissenting).

[FN52]. [Id.](#) (citation omitted).

[FN53]. [Id.](#) at 281-84, 526 S.E.2d at 613-15.

[FN54]. [Id.](#) at 284, 526 S.E.2d at 615.

[FN55]. [Id.](#), cert. granted.

[FN56]. [241 Ga. App. 829, 526 S.E.2d 622 \(1999\).](#)

[FN57]. [Id.](#) at 829, 526 S.E.2d at 622.

[FN58]. [Id.](#), 526 S.E.2d at 623.

[FN59]. [Id.](#)

[FN60]. [Id.](#)

[FN61]. [Id.](#), 526 S.E.2d at 624.

[FN62]. [Id.](#) at 830, 526 S.E.2d at 624.

[FN63]. [Id.](#) at 832, 526 S.E.2d at 625 (McMurray, J., dissenting).

[FN64]. [Id.](#)

[FN65]. The court of appeals majority analysis in [Schrader v. Kohout, 239 Ga. App. 134, 522 S.E.2d 19 \(1999\)](#), is a primary example.

[FN66]. [272 Ga. 583, 533 S.E.2d 82 \(2000\).](#)

[FN67]. [Id.](#) at 583-84, 533 S.E.2d at 83.

[FN68]. [Id.](#) at 584, 533 S.E.2d at 83.

[FN69]. [Id.](#) at 586, 533 S.E.2d at 85.

[FN70]. [Id.](#) at 588, 533 S.E.2d at 86.

[FN71]. [Id.](#)

[FN72]. [Id.](#) at 589, 533 S.E.2d at 87 (Hunstein, J., concurring specially).

[FN73]. [Id.](#) at 590, 533 S.E.2d at 87-88.

[FN74]. [240 Ga. App. 466, 522 S.E.2d 749 \(1999\).](#)

[FN75]. [Id.](#) at 466, 522 S.E.2d at 749.

[FN76]. [Id.](#) at 473, 522 S.E.2d at 755.

[FN77]. [Id.](#) at 472-73, 522 S.E.2d 754-55.

[FN78]. [Id.](#) at 472, 522 S.E.2d at 754.

[FN79]. [Id.](#)

[FN80]. [Id. at 473, 522 S.E.2d at 754.](#)

[FN81]. [O.C.G.A. § 9-11-30\(e\) \(Supp. 2000\).](#)

[FN82]. [240 Ga. App. at 473, 522 S.E.2d at 755](#) (citation omitted).

[FN83]. [Id. at 474, 522 S.E.2d at 755.](#)

[FN84]. [Id.](#)

[FN85]. [Id.](#) (citation omitted).

[FN86]. [Id.](#) (citation omitted).

[FN87]. [Id.](#) (citing [Prophesy, 256 Ga. at 28-29, 343 S.E.2d at 680-81.](#))

[FN88]. [271 Ga. 436, 519 S.E.2d 909 \(1999\).](#)

[FN89]. [Id. at 437-38, 519 S.E.2d at 911.](#)

[FN90]. [Id. at 436, 519 S.E.2d at 910.](#)

[FN91]. [Id. at 437, 519 S.E.2d at 910.](#)

[FN92]. [Id. at 438, 519 S.E.2d at 911.](#)

[FN93]. [Id.](#)

[FN94]. [Id.](#)

[FN95]. [Id., 519 S.E.2d at 910-11.](#)

[FN96]. [Id., 519 S.E.2d at 911.](#)

[FN97]. [Id.](#)

[FN98]. [Id.](#)

[FN99]. [Id., 519 S.E.2d at 912.](#)

[FN100]. [Id.](#) (quoting [Atlanta Journal & Constitution v. Long, 258 Ga. 410, 411, 369 S.E.2d at 755, 757 \(1988\).](#))

[FN101]. [Id. at 438 n.10, 519 S.E.2d at 911 n.10](#) (quoting [Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14 \(1986\).](#))

[FN102]. [243 Ga. App. 271, 531 S.E.2d 722 \(2000\).](#)

[FN103]. [Id. at 271, 531 S.E.2d at 723-24.](#)

[FN104]. [Id. at 271-72, 531 S.E.2d at 724.](#)

[FN105]. [Id. at 272-73, 531 S.E.2d at 724.](#)

[FN106]. [Id. at 273, 531 S.E.2d at 725.](#)

[FN107]. [O.C.G.A. § 9-3-72 \(Supp. 2000\).](#)

[FN108]. [243 Ga. App. at 274, 531 S.E.2d at 725](#) (quoting [O.C.G.A. § 9-3-72](#)).

[FN109]. [Id., 531 S.E.2d at 725-26](#) (quoting [O.C.G.A. § 9-3-73\(d\)-\(e\)](#)).

[FN110]. [Id. at 276, 531 S.E.2d at 726.](#)

[FN111]. [Id. \(quoting Craven v. Lowndes County Hosp. Auth., 263 Ga. 657, 659, 437 S.E.2d 308, 310 \(1993\)\).](#)

[FN112]. [Id., 531 S.E.2d at 726-27.](#)

[FN113]. [Id., 531 S.E.2d at 727.](#)

[FN114]. [Id.](#)

[FN115]. [240 Ga. App. 21, 522 S.E.2d 522 \(1999\).](#)

[FN116]. [Id. at 24, 522 S.E.2d at 525.](#)

[FN117]. [Id. at 21, 522 S.E.2d at 523.](#)

[FN118]. [Id. at 22, 522 S.E.2d at 523.](#)

[FN119]. [Id.](#)

[FN120]. [Id. at 22-23, 522 S.E.2d at 524.](#)

[FN121]. [Id. \(citing Hill v. Fordham, 186 Ga. App. 354, 357-58, 367 S.E.2d 128, 131 \(1988\)\).](#)

[FN122]. [Id. at 22, 522 S.E.2d at 524.](#)

[FN123]. [Id.](#)

[FN124]. [Id. at 23, 522 S.E.2d at 524.](#)

[FN125]. [Id. at 23-24, 522 S.E.2d at 524-25.](#)

[FN126]. [Id. at 23, 522 S.E.2d at 524](#) (citation omitted).

[FN127]. [Id.](#)

[FN128]. [241 Ga. App. 654, 527 S.E.2d 262 \(1999\).](#)

[FN129]. [Id. at 654, 527 S.E.2d at 263.](#)

[FN130]. [Id. at 655, 527 S.E.2d at 263-64.](#)

[FN131]. [O.C.G.A. § 33-7-11\(f\) \(2000\).](#)

[FN132]. [241 Ga. App. at 656, 527 S.E.2d at 264](#) (citation omitted).

(Cite as: 52 Mercer L. Rev. 447)

[FN133]. [Id. at 656-57, 527 S.E.2d at 265](#) (citation omitted).

[FN134]. [Id. at 657, 527 S.E.2d at 265.](#)

[FN135]. [Id.](#)

[FN136]. [Id.](#)

[FN137]. [Id. at 656, 527 S.E.2d at 264.](#)

[FN138]. [Id. at 658, 527 S.E.2d at 265.](#)

[FN139]. [241 Ga. App. 633, 526 S.E.2d 436 \(1999\).](#)

[FN140]. [Id. at 634, 526 S.E.2d at 438.](#)

[FN141]. [Id. at 633, 526 S.E.2d at 437.](#)

[FN142]. [Id.](#)

[FN143]. [Id.](#)

[FN144]. [Id. at 634, 526 S.E.2d at 437.](#)

[FN145]. [Id., 526 S.E.2d at 438.](#)

[FN146]. [O.C.G.A. § § 16-4-1 to 16-14-15 \(1999 & Supp. 2000\).](#)

[FN147]. [243 Ga. App. 618, 533 S.E.2d 126 \(2000\).](#)

[FN148]. [Id. at 618, 533 S.E.2d at 126-27.](#)

[FN149]. [Id. at 619, 533 S.E.2d at 127.](#)

[FN150]. [Id.](#)

[FN151]. [Id.](#)

[FN152]. [Id.](#)

[FN153]. [Id.](#)

[FN154]. [234 Ga. App. 403, 506 S.E.2d 892 \(1998\).](#)

[FN155]. [Id. at 404-05, 506 S.E.2d at 894.](#)

[FN156]. [243 Ga. App. at 620, 533 S.E.2d at 128.](#)

[FN157]. [Id. at 619, 533 S.E.2d at 128.](#)

[FN158]. [Id. at 620-21, 533 S.E.2d 128.](#)

[FN159]. [Id. at 621, 533 S.E.2d at 128.](#)

[FN160]. [Id.](#)

[\[FN161\]. 241 Ga. App. 39, 524 S.E.2d 798 \(1999\).](#)

[\[FN162\]. Id. at 41, 524 S.E.2d at 800.](#)

[\[FN163\]. Id. at 39-40, 524 S.E.2d at 799.](#)

[\[FN164\]. Id. at 40, 524 S.E.2d at 799.](#)

[\[FN165\]. Id. at 40-41, 524 S.E.2d at 799-800.](#)

[\[FN166\]. Id. at 41, 524 S.E.2d at 800.](#)

[\[FN167\]. 243 Ga. App. 508, 533 S.E.2d 404 \(2000\).](#)

[\[FN168\]. Id. at 510, 533 S.E.2d at 407.](#) A previous purported ante litem notice had been sent to Danny Thompson of the Georgia Ports Authority on July 26, 1994. Id. The court of appeals in Harris did not address the efficacy of this letter or the manner in which it was delivered, thus leaving the reader to conclude that notice was insufficient.

[\[FN169\]. Id.](#)

[\[FN170\]. Id.](#)

[\[FN171\]. Id.](#)

[\[FN172\]. Id. at 511, 533 S.E.2d at 408](#) (quoting [O.C.G.A. § 50-21- 26\(a\)](#)).

[\[FN173\]. Id. at 512, 533 S.E.2d at 408](#) (quoting [Kim v. Department of Transp.](#), 235 Ga. App. 480, 481, 510 S.E.2d 50, 52 (1998)).

[\[FN174\]. Id.](#)

[\[FN175\]. Id.](#)

[\[FN176\]. Id.](#)

[\[FN177\]. 240 Ga. App. 533, 523 S.E.2d 412 \(1999\).](#)

[\[FN178\]. Id. at 533-34, 523 S.E.2d at 413.](#)

[\[FN179\]. Id. at 534, 523 S.E.2d at 413.](#)

[\[FN180\]. Id.](#), 523 S.E.2d at 413-14.

[\[FN181\]. Id.](#) (quoting [Talbert v. Allstate Ins. Co.](#), 200 Ga. App. 312, 314, 408 S.E.2d 125, 127 (1991)).

[\[FN182\]. Id. at 535, 523 S.E.2d at 414.](#)

[\[FN183\]. 239 Ga. App. 902, 522 S.E.2d 484 \(1999\).](#)

[\[FN184\]. Id. at 902, 522 S.E.2d at 485-86.](#)

[\[FN185\]. Id. at 903, 522 S.E.2d at 486.](#)

[\[FN186\]. 117 Ga. App. 659, 161 S.E.2d 335 \(1968\).](#)

[\[FN187\]. 239 Ga. App. at 903, 522 S.E.2d at 486.](#)

[\[FN188\]. Id.](#)

[\[FN189\]. Id.](#)

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

[\[FN191\]. Id. at 903-04, 522 S.E.2d at 486-87.](#)

[\[FN192\]. 242 Ga. App. 474, 529 S.E.2d 904 \(2000\).](#)

[\[FN193\]. Id. at 475, 529 S.E.2d at 904.](#)

[\[FN194\]. Id. at 475-76, 529 S.E.2d at 904-05.](#)

[\[FN195\]. Id. at 476, 529 S.E.2d at 905.](#)

[\[FN196\]. Id.](#)

[\[FN197\]. Id.](#)

[\[FN198\]. Id. at 475, 529 S.E.2d at 905.](#)

[\[FN199\]. Id. at 476, 529 S.E.2d at 905.](#)

[\[FN200\]. Id.](#)

[\[FN201\]. Id. at 477, 529 S.E.2d at 906.](#)

[\[FN202\]. 239 Ga. App. 472, 521 S.E.2d 419 \(1999\).](#)

[\[FN203\]. Id. at 472, 521 S.E.2d at 419-20.](#)

[\[FN204\]. Id. at 473, 521 S.E.2d at 420.](#)

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

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

[\[FN207\]. Id. at 474, 521 S.E.2d at 421.](#)

[\[FN208\]. Id. at 473, 521 S.E.2d at 420 \(quoting \[O.C.G.A. § 9-11- 60\\(d\\)\\(2\\) \\(1993\\)\]\(#\)\).](#)

[\[FN209\]. Id.](#)

[\[FN210\]. Id. at 474, 521 S.E.2d at 420-21.](#)

[\[FN211\]. 240 Ga. App. 417, 523 S.E.2d 643 \(1999\).](#)

[\[FN212\]. Id. at 417, 523 S.E.2d at 643.](#)

[\[FN213\]. Id.](#)

[FN214]. [267 Ga. 801, 485 S.E.2d 22 \(1997\)](#).

[FN215]. [240 Ga. App. at 417, 523 S.E.2d at 644](#).

[FN216]. [Id.](#)

[FN217]. [Id. at 418, 523 S.E.2d at 644-45](#).

[FN218]. [225 Ga. App. 45, 482 S.E.2d 532 \(1997\)](#).

[FN219]. [240 Ga. App. at 418, 523 S.E.2d at 645](#).

[FN220]. See [O.C.G.A. § 14-2-510 \(Supp. 2000\)](#).

[FN221]. [O.C.G.A. § 14-2-510\(b\)\(4\) \(Supp. 2000\)](#).

[FN222]. [Id. § 33-7-11\(a\)\(1\)\(A\)](#).

[FN223]. [Id.](#)

[FN224]. [Id. § 9-11-4\(d\)](#).

[FN225]. See [id. § 9-11-4\(d\)\(2\)\(A\), \(B\)](#).

[FN226]. See [id. § 9-11-4\(d\)\(5\)](#).

[FN227]. [Id. § 9-11-4\(d\)\(4\)](#).

[FN228]. [Id. § 9-11-4\(d\)\(7\)](#).

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