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*475 TRIAL PRACTICE AND PROCEDURE

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I. Introduction

The recent survey period was most notable for the diversity of issues impacting trial practice and procedure. The appellate courts considered cases marking the culmination or continuation of evolving legal precedent from recent years, and they explored some seemingly new areas that may evolve and develop over the course of future surveys. This Article analyzes the recent judicial developments in the law relating to jury instructions, attorney fees and damages, actions against state entities, venue, pleading, judicial and collateral estoppel, and other issues of import to the trial practitioner. The authors also highlight the legislation passed by the General Assembly that will impact trial practice.

*476 II. Case Law

A. Jury Instructions

If one mantra emerges, survey period after survey period, it would be for lawyers to state their objections to the court's jury charge early, often, and as many times as the court will tolerate. Once again, in Adams v. Metropolitan Atlanta Rapid Transit Authority, [FN1] the court of appeals admonished that counsel's failure to state a specific objection to a jury charge constituted a waiver under Official Code of Georgia Annotated ("O.C.G.A.") section 5-5-24(a), [FN2] and noted such objection can be made before the jury returns its verdict. [FN3] An objection merely listing the charge not given is insufficient to preserve the error for review. [FN4]

The court of appeals in Adams noted, however, O.C.G.A. section 5-5-24(c) requires appellate review, regardless of whether a proper objection was made, if the charge contains a substantial error that is harmful as a matter of law. [FN5] Adams involved a passenger suing a common carrier. The reviewing court found no error as a matter of law in the court's failure to define "extraordinary diligence" for the jury. [FN6] While concluding the trial judge should define such technical words that persons untrained in the law may misunderstand, the court of appeals observed

previous appellate decisions that found litigants had not been deprived of a fair trial when the court's charge did not define the terms "reasonable doubt," "corroboration," "accident," "spirituous liquors," "possession," and "maliciously." [FN7]

Counsel's duty to object clearly to charges was again emphasized in Thrash v. Rahn. [FN8] The court in Thrash observed that evidence supporting a charge does not have to be direct evidence but may stem from a fair inference about the subject. [FN9]

After the sobering pronouncements in Adams and Thrash, the court in Golden Peanut Co. v. Bass [FN10] was much more forgiving. One issue at ***477** stake was the trial court's failure to give a requested pattern charge. [FN11] The court discussed past appellate confusion regarding the difference between a refusal to give a charge and a failure to give a charge [FN12] and reviewed the seminal decision of Continental Casualty Co. v. Union Camp Corp. [FN13] With eleven judges participating, the court decided that fifteen of its previous decisions, including Adams decided a mere five months earlier, had been incorrectly decided and should no longer be followed. [FN14] In reversing the trial court for failing to give Golden Peanut's requested jury charge on accord and satisfaction, the full bench of the court of appeals opined the better practice to be followed by litigants and courts of this state would be to place one's reasoning for the requested charge in the record. [FN15] Nonetheless, it is not necessary to have more than a perfunctory objection identifying the charge so the reviewing court can ascertain the grounds urged below. [FN16] Golden Peanut's minimalist objection to the trial court's failure to submit a written request to charge was held to be adequate to preserve the objection according to Continental Casualty. [FN17]

B. Judgment Notwithstanding the Verdict

Experienced trial lawyers have long contended there is no difference in the standard applied to motions for directed verdict and motions for judgment notwithstanding the verdict ("j.n.o.v."), although obtaining relief postjudgment seems more difficult once the jury has spoken. Atlantic Coast Cable, Inc. v. Mallory, [FN18] reiterated the movant's evidentiary burden, stating: "'A directed verdict (and judgment n.o.v.) is not proper unless there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demands a certain verdict." ' [FN19] The court reversed the trial court's grant of j.n.o.v., finding the corporate veil had been pierced and an individual was liable for corporate debts because the individual abused the corporate form. [FN20]

***478** In a previous suit about a debt incurred for the laying of new cable, the corporate defendant consented to entry of judgment against it. Later, plaintiff sued the corporation's individual officers, Mallory and Watts, seeking to hold them personally liable. The jury found against both officers, and the trial court, having denied a directed verdict during the trial, granted j.n.o.v. after the verdict. [FN21]

Finding Mallory and Watts commingled personal funds with corporate funds, the appellate court concluded the corporate veil was pierced when parties disregarded the separateness of the legal entities. [FN22] In Georgia, the rule has long been that confusing separate properties, records, or control of legal entities leads to problems in asserting corporate defenses. Because some facts supported the verdict, Mallory and Watts could not claim the evidence in their favor was plain, palpable, and indisputable. [FN23]

In applying this "any evidence" test to the grant of j.n.o.v., the court of appeals in Ledee v. Devoe [FN24] affirmed the trial court's refusal to disturb the jury's findings, and concluded that denial of the motion was not error if there was evidence to support the verdict. [FN25] The facts of this case again demonstrate lawyer defendants carry a heavy burden, especially when their alleged negligence is compounded by dissembling.

Findley referred Bertha Devoe to Ledee to represent her in a premises liability case. Ledee presented himself as Devoe's attorney though he was not, nor ever was, licensed. In fact, Findley filed the claim, but not before he was disbarred. The underlying action was dismissed for want of prosecution. Devoe sued Ledee and Findley, and the jury awarded Devoe damages, including $100,000 in punitive damages. [FN26] The appellate court affirmed and found scienter to be present, supporting not only claims of professional negligence but also allegations of fraud and conspiracy. [FN27]

The court of appeals reversed a partial grant of j.n.o.v. in Kraft v. Dalton. [FN28] The trial judge upheld plaintiff's

award of general damages in a breach of contract case but granted j.n.o.v. on the claim for expenses of litigation against defendant. [FN29] The appellate court found a basis for ***479** the award of expenses of litigation, and yet again wrote, "'[j.n.o.v.] is properly granted only when there can be only one reasonable conclusion as to the proper judgment." ' [FN30]

C. Attorney Fees and Damages

In Friedrich v. Fidelity National Bank, [FN31] the court of appeals announced Georgia will follow the "percentage of the fund" rule [FN32] in fixing the measure of attorney fees in class actions when the recovery results in a common fund. [FN33] The court in Friedrich looked to the Eleventh Circuit's opinion in Camden I Condominium Ass'n v. Dunkle [FN34] and concluded the "percentage of the fund" rule is preferable both to the lodestar [FN35] and twelve-factor test, [FN36] both of which make "the most heavily weighted criteria [in fixing a fee] the time and labor required." [FN37]

The court rejected the lodestar approach, observing its undesirable effects on litigation. [FN38] The court found persuasive the criticisms that "the lodestar method 'encourages significant elements of inefficiency' [and gives] incentive to attorneys 'to spend as many hours as possible, billable to a firm's most expensive attorneys' [as well as] afford[ing] 'a ***480** strong incentive against early settlement since attorneys will earn more the longer a litigation lasts." ' [FN39] Because the twelve-factor approach focuses primarily on the hours invested by counsel, the court of appeals rejected it as well. [FN40] The court chose the "percentage of the fund" method because it more closely comports with goals developed "to encourage early settlement or determination of cases; to provide predictability . . . and to arrive at fee awards that are fair and equitable to the parties and that take into account the economic realities of the practice of law." [FN41] Thus, "unless unusual circumstances would make its use unfair or impractical," the percentage of the fund method is to be applied in Georgia. [FN42] To facilitate appellate review of common fund fee awards, the court gave some guidance to trial courts in setting the amount of recoverable attorney fees:

> [W]hen awarding attorney fees in this type of case, a trial court must "articulate specific reasons for selecting the percentage upon which the . . . award is based." The trial court's order must identify all factors on which the court relied and explain how each factor affected the selection of the percentage awarded as attorney fees. [FN43]

The court further instructed:

> "[T]he Johnson factors [or twelve-factor test] continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases. Other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel, any nonmonetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action. In most instances, there will also be additional factors unique to a particular case which will be relevant to the [trial] court's consideration." [FN44]

Finally, the court of appeals reiterated an undue focus on the amount of hours worked by counsel is inappropriate in fee setting, because in common fund cases "'the measure of the recovery is the best determinant of the reasonableness and quality of the time expended." ' [FN45]

***481** In Olariu v. Marrero, [FN46] the court of appeals considered whether medical expenses discharged in bankruptcy would constitute a collateral source payment. The court held such expenses were not collateral source payments, and, therefore, defendant was entitled to a set-off of such expenses against past medical expenses awarded by a jury. [FN47]

In Olariu, plaintiff Marrero sought damages for personal injuries she sustained in an automobile collision with defendant Olariu. [FN48] The court concluded while "a reasonable argument can be made for treating debts discharged in bankruptcy as subject to the 'collateral source rule," ' two compelling reasons for authorizing a set-off exist. [FN49] First, "the effects of a bankruptcy do not constitute a 'collateral source' at all [because] [t]here is no third party acting as an additional source of recovery [and] [d]ebts in bankruptcy become unrecoverable by operation of law." [FN50] Secondly, the court wrote, "to hold otherwise might encourage bankruptcy." [FN51]

Olariu raises several interesting points for practitioners. First, though discharged medical expenses are not recoverable by a plaintiff, the defendant is prohibited from introducing the fact of discharge at trial. [FN52] The

trial court's failure to exclude the fact of discharge may result in reversible error. [FN53]

Second, it appears a plaintiff can introduce evidence of past medical expenses and seek a verdict for those expenses even though the trial court will set off the amounts discharged in bankruptcy after the verdict is returned. [FN54] This point is apparent from the holding of Candler Hospital, Inc. v. Dent, [FN55] relied upon in Olariu.

***482** Third, the court of appeals in Olariu expressly noted that permitting defendant to set-off medical expenses discharged in bankruptcy "shall not limit the rights of plaintiff's trustee in bankruptcy." [FN56] This fact raises the procedural question of when and how the trustee should collect any discharged debts.

Finally, Olariu presumably limits the category of damages to which a set-off is applied to the same type of expenses discharged in bankruptcy. [FN57] In Olariu, the category subject to the set-off was plaintiff's past medical expenses. Accordingly, when a plaintiff's property is damaged and the debt owing on the property is discharged in bankruptcy, any verdict allocating money for that loss would be subject to a set-off.

In Olariu the court of appeals was faced with two fundamental principles. The first was the principle underpinning the collateral source doctrine, namely, that "'a tortfeasor [should not] derive any benefit from a reduction in damages for medical expenses paid by others.'" [FN58] The second principle, which Olariu elevated over the first, is a plaintiff should not receive a double recovery. [FN59] It appears application of the rule announced in Olariu may permit defendants to benefit from a plaintiff's bankruptcy in certain cases.

D. Actions Against The State--Ante Litem Notices, Venue, and Pleading

The case law makes clear there are many pitfalls in suing the State, and the practitioner who does so should meticulously follow the provisions of the Georgia Torts Claims Act ("GTCA"). [FN60]

1. Notice. In Williams v. Georgia Department of Human Resources, [FN61] the Supreme Court of Georgia considered the requisite substance of an ante litem notice to preserve one's claims against the State. The court held that the ante litem notice must describe the nature of the loss to preserve a claim; simply giving notice of the negligent act is insufficient. [FN62]

In Williams, Paul and Sheila Williams sent an ante litem notice to the State of Georgia claiming a public health nurse failed to diagnose Sheila ***483** Williams's breast cancer, and as a result, Sheila Williams suffered pain, disfigurement, and a reduced life expectancy. The notice also stated Paul Williams suffered a loss of consortium. Eleven weeks after the notice was sent, Sheila Williams died, but Paul Williams gave no additional ante litem notice to the State. [FN63]

Paul Williams sued for loss of consortium and wrongful death. [FN64] The supreme court held the Williams' ante litem notice did not and could not have provided the State adequate notice of a wrongful death claim because it was given before Mrs. Williams' death. [FN65] The court looked to the GTCA, which defines a "loss" as "personal injury; disease; death; damage to tangible property . . .; pain and suffering; mental anguish; and any other element of actual damages recoverable in actions for negligence." [FN66]

Chief Justice Benham's dissent, joined by Justices Hunstein and Thompson, criticized the majority decision as an overly technical application of the GTCA's notice provisions, an application that subverted the remedial purpose of the statute. [FN67] The dissent pointed out the purpose of the GTCA is to "alleviate the harsh effects of sovereign immunity" and to assist the State in facilitating the settlement of claims. [FN68] Chief Justice Benham reasoned the Williams' notice was sufficient to put the State on notice of the ensuing wrongful death action, "given the permissive language of the statute." [FN69] Further, the State was certainly aware of Mrs. Williams's death as "the State's attorney attended Mrs. Williams'[s] deposition that was taken early in order to preserve her testimony before her imminent death." [FN70]

Finally, the dissent pointed to Brown v. United States, [FN71] which interpreted the Federal Tort Claims Act notice provisions. [FN72] In Brown, plaintiff filed notice of his claim for medical malpractice and instituted suit. During the pendency of the action, plaintiff died. [FN73] The Eleventh Circuit held a separate notice of the

wrongful death claim was not needed as it "would serve no useful purpose [because it was] unlikely ***484** that the agency would conduct a second investigation or otherwise act any differently." [FN74]

The majority in Williams, nonetheless, focused on the description, or lack of description, of the loss suffered by plaintiff, and dismissed the wrongful death claim. [FN75] This holding makes clear one should carefully follow the ante litem notice provisions of the GTCA or risk losing a meritorious claim. Specifically, when possible, a notifying party should describe the loss with the same language used in the GTCA.

2. Venue. In Dean v. Tabsum, Inc., [FN76] the Supreme Court of Georgia held O.C.G.A. section 50-21-28 [FN77] provides the only venue option for tort actions against the State, though other defendants may be joined in the action. [FN78] The court held the venue provision in section 50-21-28, which provides that tort actions against the State must be brought in the county where the loss occurred, were not rendered unconstitutional by article six, section two, paragraph four of the 1983 Georgia Constitution, which deems venue proper in the county of residence of any joint tortfeasor. [FN79]

In Dean plaintiff sued the Georgia Department of Transportation and two corporate defendants, both Cobb County residents, for the death of her husband in an automobile accident that occurred in Pickens County. [FN80] The supreme court denied plaintiff's venue choice of Cobb County, and held the only available venue was Pickens County; the county of the place of loss. [FN81] The court extended Campbell v. Department of Corrections, [FN82] in which the court had earlier reasoned the venue options of O.C.G.A. section 50-21- 28 reflect an express condition for the State's waiver of sovereign immunity. [FN83] Interestingly, that statute trumps the constitutional provision that would otherwise allow venue in the county of residence of any joint tortfeasor. [FN84]

***485** 3. Pleading. The supreme court's decision in Minnix v. Department of Transportation, [FN85] provided some breathing room for those plaintiffs suing based on the negligent act of a professional employed by the State. In Minnix the court held the requirements of O.C.G.A. section 9-11-9.1 [FN86] do not apply to a suit against the Department of Transportation ("DOT") even though the cause of action may be based on professional negligence. [FN87]

The court initially noted the failings of the original professional malpractice statute and examined the amended version passed in 1997. [FN88] The court then concluded only "two categories of defendants" are subject to section 9-11-9.1: "1) those professionals licensed by the State of Georgia and listed in [O.C.G.A. section] 9-11-9.1 (f)[;] and 2) 'any licensed health care facility alleged to be liable based on the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (f)." ' [FN89]

Because the DOT is not a health care facility, no expert affidavit was required, though the court did note, that because the case concerned an alleged breach of a professional standard of care, plaintiff "must still produce at trial expert testimony of the applicable standard of professional conduct and a deviation from that standard" to prevail. [FN90]

Two final guideposts can be gleaned from Minnix: (1) no expert affidavit is needed to pursue a claim against an employer (State or otherwise) for the negligence of its professional employees unless that employer is a licensed healthcare facility, but (2) suit against any state-operated healthcare facility that otherwise satisfies section 9-11-9.1 does require a professional affidavit.

E. Judicial Estoppel

In Kittle v. ConAgra Poultry Co., [FN91] a poultry farmer's action against a large poultry corporation for breach of contract, fraud, promissory estoppel, and violations of the Federal Packers & Stockyards Act [FN92] failed upon the trial court's application of the principle of judicial estoppel. Prior to filing his complaint against ConAgra, Kittle filed a ***486** voluntary bankruptcy petition in the United States Bankruptcy Court in Tennessee. [FN93] A schedule attached to that petition required Kittle to list all "contingent and unliquidated claims of every nature," [FN94] and Kittle listed none. Seven months later, Kittle sued ConAgra for business losses as well as for discriminatory practices that subjected him to unreasonable prejudice and disadvantage. He claimed he had not violated the petition schedule, because the basis of his action arose after he had filed bankruptcy. Kittle further claimed that

because he was proceeding under a Chapter 7 bankruptcy, he had no duty to amend as in Chapter 11 or Chapter 13. [FN95] Citing Reagan v. Lynch, [FN96] which observed that Georgia law is consistent with the decisions of the federal district courts, [FN97] the court stated:

> The doctrine of judicial estoppel arises under federal law and precludes a party from asserting a position in one judicial proceeding which is inconsistent with a position successfully asserted by the party in an earlier proceeding. The essential function and justification of judicial estoppel [is] to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice. The primary purpose of the doctrine is not to protect the litigants, but to protect the integrity of the judiciary. The doctrine is directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings and is designed to prevent parties from making a mockery of justice through inconsistent pleadings. Although application of the doctrine of judicial estoppel is severe, whether to apply it depends entirely on the actions of the plaintiff. [FN98]

In a Chapter 13 federal bankruptcy petition case, Spoon v. Johnson, [FN99] judicial estoppel was also employed to prevent a federal petitioner from obtaining a tort judgment on an unliquidated state law tort claim. [FN100] The court of appeals reminded appellant that whatever his assertions about inconsistency between state and federal law, "'[t]he Supremacy ***487** Clause of the United States Constitution dictates that federal law preempts any inconsistent state law." ' [FN101] The opinion ends with the tantalizing question of whether the Federal Constitution authorizes Congress to enact the preemptive legislation, an issue that appellant did not address. [FN102]

F. Collateral Estoppel

Unlike judicial estoppel, collateral estoppel applies when a fact or point of law is actually litigated and determined by a valid judgment, and if that determination is essential to the judgment, it becomes conclusive in a subsequent action between the same parties. This principle is also known as estoppel by judgment or issue preclusion. The survey period saw an impressive number of cases reaching the court of appeals addressing the collateral estoppel doctrine beginning with Dickerson v. Dickerson. [FN103]

Mr. Dickerson died intestate in an electrical accident. His brother applied for letters of administration from Lumpkin County Probate Court and became the administrator. Barbara Fuller, a/k/a Barbara Dickerson, asked the Lumpkin County Probate Court to set aside the appointment because she was the late Mr. Dickerson's common-law wife. As administrator, the brother filed a wrongful death suit in Rockdale County against the City of Conyers. [FN104] The City moved to add Barbara as an involuntary plaintiff, pursuant to O.C.G.A. section 9-11-19, [FN105] and asked the jury to resolve the issue of the common-law marriage. The jury verdict form had a specific question about the marriage. Barbara protested Rockdale County's ability to litigate her claims but testified at length. The jury awarded $4.7 million but found Barbara would get nothing. The Rockdale trial court's order ruled the jury's finding had no res judicata effect on her Lumpkin County action. No party appealed the rulings of the Rockdale County Court. [FN106]

Meanwhile, the Lumpkin County Probate Court transferred the case to Lumpkin Superior Court. The Lumpkin Superior Court held collateral estoppel barred Barbara's further claim and found the ***488** common-law marriage issue was essential in determining who was to receive the monetary award of the Rockdale judgment. [FN107]

The Georgia Court of Appeals affirmed the superior court's decision and observed res judicata would not apply because different causes of action were at issue in each case, namely, wrongful death in Rockdale and a probate matter in Lumpkin. [FN108] The appellant court further observed that had the trial court addressed collateral estoppel in its order, the statements would have been dicta. [FN109]

Collateral estoppel does not always require the presence of exactly the same parties. Parties or their privies in both actions will suffice to support application of the doctrine. [FN110] Privity connotes those who are so connected with a party to the judgment as to have an identity of interest, and therefore, the party to the judgment represents the same legal right; when this identity is found to exist, all are concluded and bound by the judgment.

In the insurance context, an insurer that fails to offer a defense for its insured can find itself collaterally estopped from later contesting a judgment sought against it by an automobile accident victim as the assignee of the insured.

In Atlanta Casualty Insurance Co. v. Gardenhire, [FN111] a factual dispute over who was driving an automobile led Atlanta Casualty to refuse to defend the insured. The carrier thought the insured was "taking the fall" to protect her uninsured roommate, who had no coverage under a Named Driver Exclusion Agreement. The named insured, left to her own defense, lost at trial. She then assigned her claims against Atlanta Casualty to the injured plaintiff, who brought a second suit, this time directly against the carrier. The trial judge granted summary judgment against Atlanta Casualty, because the doctrine of collateral estoppel prevented it from relitigating the issue of who was driving the automobile. [FN112] The court of appeals, in partially reversing the lower court's ruling, held Atlanta Casualty was not collaterally estopped from litigating the amount of coverage because that issue had not been litigated in the first action. [FN113]

A nonjudicial foreclosure proceeding cannot trigger the application of the doctrines of either res judicata or collateral estoppel, as Judge ***489** Ellington held by reversing the trial court in Dorsey v. Mancuso. [FN114] By contrast, as held in Roth v. Gulf Atlantic Media of Georgia, Inc., [FN115] res judicata could bar a minority shareholder's action against a corporation and a majority shareholder for breach of contract and fraudulent inducement, even though the plaintiff there had voluntarily dismissed some of his claims in the prior suit after the trial court granted summary judgment on the remainder of the complaint. [FN116] Roth argued that absent the lower court entering a final judgment under O.C.G.A. section 9-11-54(b), [FN117] which must be appealed within thirty days, such judgment could not be final on all claims and lacked res judicata effect. [FN118] The court of appeals observed if the losing party chooses to appeal the partial grant of summary judgment (having the option because there had been no section 9-11- 54(b) language entered), the appellate decision is binding under O.C.G.A. section 9-11-60(h) and bars relitigation of other issues that could have been litigated the first time around. [FN119]

If default occurs under a writ of possession, it becomes an admission by the defendant of both allegations of fact and of fair inferences to be drawn from those facts, as held in Spooner v. Deere Credit, Inc. [FN120] These admissions extend to privies of the defendant.

Even mothers of children seeking damages from a child's father for alleged fraudulent misrepresentation of income can be barred by the doctrine of res judicata. In Turner v. Butler, [FN121] finding the unfortunate mother to be in privity with the Department of Human Resources, the court of appeals granted the father's motion for j.n.o.v. [FN122] The court observed the mother's procedural remedy was to move to set aside the initial judgment for reasons of fraud within three years of the judgment, which she had not done. [FN123] The court cautioned that the fraud that permits a judgment to be set aside is limited to matters extrinsic and collateral to the issue and does not include fraud in procuring a judgment by false testimony. [FN124]

***490** G. Insurance

In Wilson Industrial Electric, Inc. v. Cincinnati Insurance Co., [FN125] a manufacturer of a stone cutting saw sought coverage from its comprehensive general liability insurer for potential liability to an injured worker. The saw was designed and built to customer specifications without a guard protecting users from coming into contact with the blade. [FN126] The court of appeals affirmed the grant of declaratory relief to the insurer, finding appellant's argument that the absence of a safety guard made the manufacture of the saw "incomplete" to be meritless. [FN127] Wilson Industrial unsuccessfully tried to persuade the trial court and the court of appeals that such incompleteness created an ambiguity in the completed operations hazard exclusion language and triggered coverage. [FN128] The court of appeals demurred, deciding even if the Occupational Safety and Health Act [FN129] required such guards, the machinery in this case, as ordered by the customer, was complete under the plain language of the policy. [FN130]

Ambiguity is construed against the drafter of an insurance contract. In Connell v. Guarantee Trust Life Insurance Co., [FN131] the court of appeals held the insurer's failure to precisely define "treatment" in the policy meant a jury issue was present as to plaintiff's health claim coverage. [FN132] The court thus reversed the portion of the trial court's order granting summary judgment to the health insurer. [FN133]

The court, construing a contract strictly against the insurer/drafter and in favor of the insured, cited O.C.G.A. section 13-2-2(5), [FN134] stating: "'[I]f a provision of an insurance contract is susceptible of two or more constructions, even when the multiple constructions are all logical and reasonable, it is ambiguous, and the statutory

rules of contract construction will be applied." ' [FN135] Mrs. Connell prevailed in her quest to take her case to a jury.

***491** The wisdom of assumption once again was called into question in Continental Insurance Co. v. American Motorist Insurance Co. [FN136] An employee of an office products firm was helping a deliveryman push a hydraulic pallet jack loaded with copier paper up the ramp outside the warehouse in which she was employed. The deliveryman lost control of the pallet, and the warehouse employee was seriously injured. She sued the deliveryman and United Stationers, the entity who owned the delivery truck he was driving. The deliveryman was employed by yet another company, TLI, which was required by Stationers to maintain a business automobile liability insurance policy for anyone injured by a permissive user of a covered vehicle. Stationers also had a comprehensive general liability policy ("CGL") that provided commercial coverage but excluded bodily injuries arising from "auto" loading and unloading, including the use of a hand truck. While Stationers' insurance broker and Continental Insurance Company (issuer of the CGL policy) decided how to proceed, no one thought to enter a defense for Sheahan, the deliveryman. Furthermore, no one notified American Motorist Insurance Company (issuer of the auto policy). [FN137]

Plaintiff obtained a default judgment in a significant amount against Sheahan and then sued Continental directly in federal court, claiming status as a third-party beneficiary of the policy. Continental settled with plaintiff and sought reimbursement for the settlement from American. The trial judge rejected Continental's claim by considering the intention of the parties as viewed through the prism of understanding of a layman and not an insurance expert or attorney. The court found the ordinary meaning applied to a hand truck, a device for small deliveries, was clearly distinguishable from a pallet jack, a device capable of hydraulically lifting 5,000 pounds. [FN138]

Concluding that the test of construction for an insurance policy is not what an insurer intended the words to mean but what a reasonable person in the shoes of the insured would understand, the court agreed the CGL applied and not the automotive policy. [FN139] Parenthetically, the court noted Continental had undertaken a defense without issuing a reservation of rights and without filing a declaratory judgment action to ascertain its liability. [FN140]

***492** In Allstate Insurance Co. v. Hamler, [FN141] the court of appeals reversed the trial court and found for an insurance carrier. [FN142] While Hamler provided some information to Allstate, the court held Hamler breached the insurance contract by repeatedly failing to produce financial documents that could vitiate the suspected fraud by the insured. [FN143] The court emphasized an insured can breach his contract of insurance by failing to provide any material information to the insurer called for under the policy. [FN144]

Furthermore, in Bituminous Casualty Corp. v. Northern Insurance Co. of New York, [FN145] the court of appeals affirmed a trial court's decision that insurers are not required to defend against losses specifically excluded by a policy. [FN146] There the court recognized that one of two dueling carriers was not notified of a pending lawsuit in Alabama, although coverage had been denied by that insurer in a prior Georgia action. [FN147] Additionally, the court of appeals considered the fact that the second insurer had previously issued a bilateral reservation of rights and nonwaiver agreement in the Georgia case. [FN148]

Affirming a lack of coverage owing to the "business risk" exclusion, the court reviewed an insurer's obligation to defend, observing:

"Whether an insurer is obligated to defend an action against its insured is determined by the contract; and since the contract obligates the insurer to defend claims asserting liability under the policy; even if groundless, the allegations of the complaint are looked to to determine whether a liability covered by the policy is asserted. Thus, the issue is not whether the insured is actually liable to the plaintiffs . . .; the issue is whether a claim has been asserted which falls within the policy coverage and which the insurer has a duty to defend." [FN149]

Similarly, in Corouthers v. Doe, [FN150] the court affirmed a judgment for the insurer on behalf of an uninsured motorist carrier. [FN151] Clearly, the insurance contract required that the unknown vehicle actually be in ***493** motion when plaintiff's injury occurred. Corouthers, in fact, walked into a protruding cargo load that was stationary at the time of the incident and, hence, coverage was excluded, even though it could be argued she was injured by an unknown vehicle. [FN152]

H. Attorney/Client Relations

Obtaining an opposing party's medical records can be fraught with peril, especially when those records contain privileged notations, such as those recorded by a psychiatrist. Ever since the court of appeals decision in Orr v. Sievert, [FN153] courts have wrestled with the parameters of how much a party puts into issue about prior medical treatment by participating in a civil or criminal lawsuit. The scope of impeachment through vigorous cross-examination can be particularly problematic when matters of privilege are involved.

In Karpowicz v. Hyles, [FN154] a criminal defense lawyer was sued for negligence, abuse of process, unlawful use of subpoena, fraud and deceit, invasion of privacy, tortious interference with confidential relationship, and negligent infliction of emotional distress filed by a woman who alleged his client raped her. All of these allegations stemmed from defendant-attorney Hyles's obtaining, by subpoena duces tecum served on a medical record's custodian of a psychiatric facility, documents that allowed him to cross-examine the complainant's mother. The cross-examination revealed the mother previously admitted her daughter to the psychiatric facility for "excessive lying." [FN155]

Distinguishing Karpowicz from the much discussed supreme court opinion in King v. State, [FN156] the court of appeals affirmed summary judgment for Hyles on all counts. [FN157] The court in Karpowicz reasoned Hyles had an obligation as a criminal defense attorney that superseded any obligation to third-parties, and his obligation included a constitutional right to confront complaining witnesses. [FN158] Additionally, Hyles did not use any privileged psychiatric materials in his cross-examination of the complaining witness's mother, but used only the fact of her daughter's admission to the facility and the statement made by the ***494** mother, not the daughter, on reasons for admission to the treating facility. [FN159]

In Goodman v. Glover, [FN160] plaintiff, who committed malpractice, brought a legal malpractice claim against the counsel who defended him. [FN161] The court of appeals reversed the trial court's grant of summary judgment for plaintiff and granted summary judgment for defendant. [FN162]

Glover claimed that counsel failed to raise an "ironclad" defense upon motion for directed verdict and failed to preserve that issue for appeal, subjecting him to a verdict in the underlying case of $186,142. [FN163] The court of appeals found Glover could not prove defendant's negligence could have proximately caused his damages because a prior appellate opinion, [FN164] already rejected his "ironclad" defense; therefore his assertion that the "case within the case" could not have succeeded was flawed. [FN165]

Finally, in Tunsil v. Jackson, [FN166] the court of appeals issued an opinion affirming a verdict for plaintiff against plaintiff's previously employed attorneys for legal malpractice and breach of fiduciary duty. Mr. Jackson hired the Tunsil brothers, one licensed in Georgia and one in Florida, to represent him in a wrongful death case for his son who had been killed when struck by a passing automobile. While there was some factual controversy about how the accident occurred, the Tunsils failed to file a timely complaint, and their client's action was barred by the two-year Georgia statute of limitations. The Tunsils were then less than forthright with Mr. Jackson about the reason the case was lost, and instead painted a dismal picture of the facts of the case to him. A jury awarded Jackson actual damages, punitive damages, and the expenses of litigation and attorney fees. [FN167]

In affirming, the court of appeals found ample proof in the record to support the verdict and concluded that plaintiff had demonstrated all three bases for a legal malpractice claim: (1) plaintiff had employed the attorney; (2) the attorney failed to exercise ordinary skill, care, and diligence; and (3) such negligence was the proximate cause of damage to ***495** the client. [FN168] The court further found punitive damages were warranted because the attorney failed to inform the client of all material facts that concern the case. [FN169] In this case, the court found reason under O.C.G.A. section 51- 12-5.1(b) [FN170] to support "conscious indifference to consequences" holding that "'knowingly or willfully disregarding" ' the rights of another equates to the intentional disregard of those rights. [FN171]

I. Miscellaneous

Following the supreme court's lead in Lee v. State Farm Mutual Insurance Co., [FN172] the court of appeals further enunciated the circumstances under which a party may recover for negligent infliction of emotional distress

in Nationwide Mutual Fire Insurance Co. v. Lam. [FN173] In Lam, Mai Bach Lam and her husband brought an action after they were in an automobile collision. Mrs. Lam admitted she sustained no physical injuries from the collision although the terror of the collision aggravated a pre-existing mental illness. Following the wreck, Mrs. Lam suffered severe anxiety, was hospitalized for about ten days for psychiatric complications, and was treated thereafter with lithium. Mrs. Lam's medical expenses for these injuries totaled $12,000. [FN174]

Nationwide, Mrs. Lam's uninsured motorist carrier, argued Mrs. Lam could not recover damages for negligent infliction of emotional distress and raised the familiar and antiquated "impact rule" as its defense. [FN175] After careful and thoughtful analysis of the history of the impact rule in Georgia, the court of appeals held "because Lam sustained a pecuniary loss resulting from a trespass and a mental injury to the person, she [could] pursue her claim for damages notwithstanding the lack of physical injury." [FN176] The decision in Lam is another step in the enlightened direction of recognition of psychological injuries.

***496** Last year's survey discussed the decision by the court of appeals in Ezor v. Thompson, [FN177] when it was held the Prophecy rule [FN178] would not apply to nonparty expert witnesses. [FN179] The supreme court affirmed this holding in Thompson v. Ezor, [FN180] and declined to extend the rationale of Prophecy to nonparty expert witnesses at the summary judgment stage. [FN181] In affirming the court of appeals, the court wrote that three compelling reasons prevented Prophecy's extension to nonparty expert witnesses. [FN182] First, a party should not be penalized when he has no power to prevent a witness from providing contradictory testimony. Second, because testimony may be contradictory does not make it inadmissible. Third, contradictions in a witness's testimony go merely to the weight and credibility of the testimony and should be addressed by the jury, not the trial judge, as the jury considers the veracity of a particular witness. [FN183]

A final case deserves mentioning if not for instruction, at least for amusement. With unmatched nerves of steel, plaintiff in Gullatt v. Omega Psi Phi Fraternity, Inc. [FN184] tested the waters in computing the statute of limitations. Gullatt filed his personal injury suit on the Monday following the expiration of the statute of limitations on the preceding Saturday. When defendants filed their motion to dismiss, so confident in his position was Gullatt that he did not even bother to file a timely written response. The trial court dismissed plaintiff's complaint. [FN185]

Although a party who fails to file a written response to a motion to dismiss "'waives his right to present evidence in opposition to the mo-tion," ' the court of appeals held defendants were not entitled to have the cause dismissed in light of O.C.G.A. section 1-3-1(d)(3), [FN186] because the ***497** face of Gullatt's complaint showed the suit was timely filed. [FN187] With an understated word to the wise, the court stressed the steady approach to practice, writing: "We emphasize that failing to file a written response to a motion a litigant opposes, even to point out the obvious, is certainly ill-advised." [FN188]

III. Legislation

This year's General Assembly effected several changes of interest to practitioners.

A. Medical Records

The Legislature amended O.C.G.A. section 31-33-3 [FN189] and fixed the maximum fees collectable by entities requested to provide copies of an individual's medical records. The statute provides the costs of copying paper records shall not exceed $.75 per page for the first 20 pages, $.65 per page for pages 21-100, and $.50 per page for pages in excess of 100. [FN190] The entity providing the records may not charge more than $20 for administrative costs incurred in the search and retrieval of such records, and the provider of the records may not charge more than $7.50 for each record certified. [FN191]

B. Bad Faith Penalties For Failure to Fairly Adjust First Party Insurance Claims

The Legislature also amended O.C.G.A. section 33-4-6 [FN192] to provide for an increased penalty for bad faith actions. The statute applies to cases in which the insured demands payment of a claim against his or her own insurer for a loss, and the demand is not met in good faith within sixty days. [FN193] If a jury makes a finding that the refusal to settle the claim was made in bad faith, the insured shall be entitled to recover fifty percent of the amount

of the loss or $5,000, whichever is greater, plus reasonable attorney fees. [FN194]

***498** The Legislature also provided that upon filing a bad faith action pursuant to O.C.G.A. section 33-4-6(b), [FN195] plaintiff shall deliver a copy of the complaint and demand to the Commissioner of Insurance and the consumers' insurance advocate. [FN196] The amendments to the statute are to discourage insurers that resist the prompt payment of just claims.

C. Appeals from Magistrate Court

Though a verdict or judgment of the magistrate courts cannot exceed $15,000, once an appeal from a magistrate verdict is made to the superior or state court, the prevailing party may obtain a verdict in excess of the $15,000. [FN197] This change was effected by O.C.G.A. section 5-3-30(b). [FN198] Thus, when one obtains a verdict or judgment in magistrate court, the appealing party should be cognizant that the reviewing court's verdict or judgment will not be subject to the cap of the magistrate court's jurisdictional limits.

IV. Conclusion

This year's survey period yielded several notable decisions and legislative developments. While the survey is not intended to be exhaustive, the authors have endeavored to provide material that will be useful to keep practitioners apprised of the significant changes in the area of trial practice and procedure.

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[FN1]. 246 Ga. App. 698, 542 S.E.2d 130 (2000) (abrogated by Golden Peanut Co. v. Bass, 249 Ga. App. 224, 547 S.E.2d 637 (2001), discussed infra note 10).

[FN2]. O.C.G.A. § 5-5-24(a) (1995).

[FN3]. 246 Ga. App. at 698-99, 542 S.E.2d at 131.

[FN4]. Id. at 699, 542 S.E.2d at 131-32.

[FN5]. Id., 542 S.E.2d at 132.

[FN6]. Id. at 700, 542 S.E.2d at 132.

[FN7]. Id.

[FN8]. 249 Ga. App. 351, 547 S.E.2d 694 (2001).

[FN9]. Id. at 352, 547 S.E.2d at 695.

[FN10]. 249 Ga. App. 224, 547 S.E.2d 637 (2001).

[FN11]. Id. at 224, 547 S.E.2d at 640.

[FN12]. See Kres v. Winn Dixie Stores, Inc., 183 Ga. App. 854, 360 S.E.2d 415 (1987).

[FN13]. 249 Ga. App. at 231-34, 547 S.E.2d at 644-46 (citing Continental Cas. Co. v. Union Camp Corp., 230 Ga. 8, 195 S.E.2d 417 (1973)).

[FN14]. Id. at 231-32, 547 S.E.2d at 646.

[FN15]. Id. at 236, 547 S.E.2d at 648.

[FN16]. Id. at 235, 547 S.E.2d at 648.

[FN17]. Id. at 234-35, 547 S.E.2d at 646 (citation omitted).

[FN18]. 246 Ga. App. 174, 540 S.E.2d 206 (2000).

[FN19]. Id. at 175, 540 S.E.2d at 207 (quoting MARTA v. Mehretab, 224 Ga. App. 263, 266, 480 S.E.2d 310, 313 (1997) (citation and punctuation omitted).

[FN20]. Id. at 175-76, 540 S.E.2d at 207-08.

[FN21]. Id. at 174-75, 540 S.E.2d at 207.

[FN22]. Id. at 176-77, 540 S.E.2d at 208 (citing Earnest v. Merck, 183 Ga. App. 271, 358 S.E.2d 661 (1987)).

[FN23]. Id. at 177, 540 S.E.2d at 208.

[FN24]. 250 Ga. App. 15, 549 S.E.2d 167 (2001).

[FN25]. Id. at 18, 549 S.E.2d at 171.

[FN26]. Id. at 15, 549 S.E.2d at 169.

[FN27]. Id.

[FN28]. 249 Ga. App. 754, 549 S.E.2d 543 (2001).

[FN29]. Id. at 755, 549 S.E.2d at 543-44.

[FN30]. Id., 549 S.E.2d at 544 (quoting Pulte Home Corp. v. Woodland Nursery, 230 Ga. App. 455, 456, 496 S.E.2d 546, 549 (1998)).

[FN31]. 247 Ga. App. 704, 545 S.E.2d 107 (2001).

[FN32]. The "percentage of the fund" rule, true to its name, mandates that the attorney(s) responsible for the class recovery receive some pro rata share of the total proceeds recovered, as opposed to being compensated on an hourly basis.

[FN33]. 247 Ga. App. at 704, 545 S.E.2d at 108. A "common fund" is simply an amount in which all interested parties are entitled to share equally.

[FN34]. 946 F.2d 768 (11th Cir. 1991).

[FN35]. The "lodestar" approach requires a trial court to "multiply the number of hours reasonably spent by trial counsel by a reasonable hourly rate [and the resulting] figure can then 'be adjusted upward or downward for certain

factors known as multipliers, such as contingency and the quality of the work performed, to arrive at a final fee.'" 247 Ga. App. at 706, 545 S.E.2d at 109 (citations omitted) (quoting Camden I, 946 F.2d at 772).

[FN36]. The "twelve-factor" test derives from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The factors set out in Johnson are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Id. at 717-19.

[FN37]. Friedrich, 247 Ga. App. at 706, 545 S.E.2d at 109 (quoting Camden I, 946 F.2d at 772 (citation and punctuation omitted)).

[FN38]. Id. at 706-07, 545 S.E.2d at 109-10.

[FN39]. Id. at 707, 545 S.E.2d at 109 (citations omitted) (quoting Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1268-69 (D.C. Cir. 1993)).

[FN40]. Id. at 706, 545 S.E.2d at 109.

[FN41]. Id. (quoting Camden I, 946 F.2d at 773 (citation omitted)).

[FN42]. Id. at 707, 545 S.E.2d at 110.

[FN43]. Id. (quoting Camden I, 946 F.2d at 775).

[FN44]. Id. at 707-08, 545 S.E.2d at 110 (alteration in original) (quoting Camden I, 946 F.2d at 775).

[FN45]. Id. at 706, 545 S.E.2d at 109 (quoting Camden I, 946 F.2d at 773).

[FN46]. 248 Ga. App. 824, 549 S.E.2d 121 (2001).

[FN47]. Id. at 827, 549 S.E.2d at 124.

[FN48]. Id. at 824, 549 S.E.2d at 122.

[FN49]. Id. at 826, 549 S.E.2d at 123.

[FN50]. Id., 549 S.E.2d at 123-24.

[FN51]. Id. at 827, 549 S.E.2d at 124.

[FN52]. See id.

[FN53]. The court wrote, "[e]ven though we hold that medical expenses discharged through bankruptcy may be credited against a plaintiff's recovery of special damages for medical expenses, the discharge is nevertheless irrelevant to a jury's determination of these damages and may be prejudicial as well." Id.

[FN54]. See id.

[FN55]. 228 Ga. App. 421, 491 S.E.2d 868 (1997). In Candler, defendant hospital had written off some of plaintiff's medical bills. The court permitted the hospital a set-off on the ensuing medical malpractice verdict but held the plaintiff could prove all medical expenses undiminished by the write-off. Id. at 422, 491 S.E.2d at 869. This same proposition from Candler is cited in Olariu. See Olariu, 248 Ga. App. at 825, 549 S.E.2d at 123.

[FN56]. 248 Ga. App. at 827, 549 S.E.2d at 124.

[FN57]. See id.

[FN58]. Id. at 826, 549 S.E.2d at 123 (quoting Bennett v. Haley, 132 Ga. App. 512, 522, 208 S.E.2d 302, 310 (1974)).

[FN59]. See id.

[FN60]. The Georgia Torts Claim Act is found at O.C.G.A. sections 50-21- 20 to -37 (1998 & Supp. 2001).

[FN61]. 272 Ga. 624, 532 S.E.2d 401 (2000).

[FN62]. Id. at 626, 532 S.E.2d at 404.

[FN63]. Id. at 624, 532 S.E.2d at 402.

[FN64]. Id.

[FN65]. Id., 532 S.E.2d at 403-04.

[FN66]. O.C.G.A. § 50-21-22(3) (1998).

[FN67]. 272 Ga. at 627-28, 532 S.E.2d at 404-05 (Benham, C.J., dissenting).

[FN68]. Id. at 628, 532 S.E.2d at 405.

[FN69]. Id. at 627, 532 S.E.2d at 404.

[FN70]. Id. at 630, 532 S.E.2d at 406.

[FN71]. 838 F.2d 1157 (11th Cir. 1988).

[FN72]. 28 U.S.C. § § 2671-2680 (1990).

[FN73]. 838 F.2d at 1159.

[FN74]. Id. at 1161.

[FN75]. 272 Ga. at 626, 532 S.E.2d at 404.

[FN76]. 272 Ga. 831, 536 S.E.2d 743 (2000).

[FN77]. O.C.G.A. § 50-21-28 (1998).

[FN78]. 272 Ga. at 834, 536 S.E.2d at 746.

[FN79]. Id.

[FN80]. Id. at 831, 536 S.E.2d at 744.

[FN81]. Id. at 834, 536 S.E.2d at 746.

[FN82]. 268 Ga. 408, 490 S.E.2d 99 (1997).

[FN83]. 272 Ga. at 832, 536 S.E.2d at 744 (citing Campbell, 268 Ga. 408, 490 S.E.2d 99 (1997)).

[FN84]. Id. at 833, 536 S.E.2d at 746.

[FN85]. 272 Ga. 566, 533 S.E.2d 75 (2000).

[FN86]. O.C.G.A. § 9-11-9.1 (Supp. 2001).

[FN87]. 272 Ga. at 567, 533 S.E.2d at 76.

[FN88]. Id. at 568-69, 533 S.E.2d at 77-78.

[FN89]. Id. at 570, 533 S.E.2d at 79 (quoting O.C.G.A. § 9-11- 9.1(a) (Supp. 2001)).

[FN90]. Id. at 572, 533 S.E.2d at 80.

[FN91]. 247 Ga. App. 102, 543 S.E.2d 411 (2000).

[FN92]. 7 U.S.C. § § 181-231 (2000).

[FN93]. 247 Ga. App. at 103, 543 S.E.2d at 412.

[FN94]. Id. at 102-03, 543 S.E.2d at 412.

[FN95]. Id. at 102-05, 543 S.E.2d at 412-13.

[FN96]. 241 Ga. App. 642, 524 S.E.2d 510 (1999).

[FN97]. Id. at 643, 524 S.E.2d at 511.

[FN98]. 247 Ga. App. at 104-05, 543 S.E.2d at 413 (citations and punctuation omitted).

[FN99]. 247 Ga. App. 754, 545 S.E.2d 328 (2001).

[FN100]. See also Wolfork v. Tackett, 241 Ga. App. 633, 526 S.E.2d 436 (1999). Cases such as McBride v. Brown, 246 Ga. App. 149, 538 S.E.2d 863 (2000) are distinguishable. There the petitioner "did make an attempt to remedy the omission through amendment which the bankruptcy court denied, and he did not benefit from the nondisclosure at the expense of his creditors." Id. at 150, 538 S.E.2d at 864.

[FN101]. 247 Ga. App. at 755, 545 S.E.2d at 328-29 (alteration in original) (quoting Lance v. Am. Edwards Lab., 215 Ga. App. 713, 715, 452 S.E.2d 185, 187 (1994)) (internal citations omitted).

[FN102]. Id.

[FN103]. 247 Ga. App. 812, 545 S.E.2d 378 (2001).

[FN104]. Id. at 812, 545 S.E.2d at 379.

[FN105]. O.C.G.A. § 9-11-19 (1993).

[FN106]. 247 Ga. App. at 812-13, 545 S.E.2d at 379.

[FN107]. Id. at 813-14, 545 S.E.2d at 379-80.

[FN108]. Id., 545 S.E.2d at 380.

[FN109]. Id. at 814, 545 S.E.2d at 381.

[FN110]. See Am. States Ins. Co. v. Walker, 223 Ga. App. 194, 195, 477 S.E.2d 360, 362-63 (1996).

[FN111]. 248 Ga. App. 42, 545 S.E.2d 182 (2001).

[FN112]. Id. at 43, 545 S.E.2d at 183.

[FN113]. Id. at 42-44, 545 S.E.2d at 182-83.

[FN114]. 249 Ga. App. 259, 259-60, 547 S.E.2d 787, 788 (2001).

[FN115]. 244 Ga. App. 677, 536 S.E.2d 577 (2000).

[FN116]. Id. at 677, 536 S.E.2d at 578-79.

[FN117]. O.C.G.A. § 9-11-54(b) (1993).

[FN118]. 244 Ga. App. at 679, 536 S.E.2d at 580.

[FN119]. Id.

[FN120]. 244 Ga. App. 681, 682, 536 S.E.2d 581, 583 (2000) (citing Walker, 223 Ga. App. at 195, 477 S.E.2d at 362).

[FN121]. 245 Ga. App. 250, 537 S.E.2d 703 (2000).

[FN122]. Id. at 250, 537 S.E.2d at 704.

[FN123]. Id. at 252-53, 537 S.E.2d at 705.

[FN124]. Id., 537 S.E.2d at 706. See Young v. Young, 271 Ga. 568, 522 S.E.2d 455 (1999).

[FN125]. 246 Ga. App. 90, 539 S.E.2d 612 (2000).

[FN126]. Id. at 91, 539 S.E.2d at 613.

[FN127]. Id. at 90-91, 539 S.E.2d at 612-13.

[FN128]. Id. at 91, 539 S.E.2d at 613.

[FN129]. 29 U.S.C. § 651 (1994 & Supp. 2001).

[FN130]. 246 Ga. App. at 92, 539 S.E.2d at 614.

[FN131]. 246 Ga. App. 467, 541 S.E.2d 403 (2000).

[FN132]. Id. at 470-71, 541 S.E.2d at 406.

[FN133]. Id. at 467, 541 S.E.2d at 404.

[FN134]. O.C.G.A. § 13-2-2(5) (1981).

[FN135]. 246 Ga. App. at 470, 541 S.E.2d at 406 (quoting Peachtree Cas. Ins. Co. v. Kim, 236 Ga. App. 689, 690, 512 S.E.2d 46, 47 (1999)) (citation and punctuation omitted).

[FN136]. 247 Ga. App. 331, 542 S.E.2d 607 (2000).

[FN137]. Id. at 331-33, 542 S.E.2d at 608-09.

[FN138]. Id. at 333-35, 542 S.E.2d at 609-11.

[FN139]. Id. at 335-36, 542 S.E.2d at 610-11.

[FN140]. Id. at 332, 542 S.E.2d at 609.

[FN141]. 247 Ga. App. 574, 545 S.E.2d 12 (2001).

[FN142]. Id. at 574, 545 S.E.2d at 12.

[FN143]. Id. at 575, 545 S.E.2d at 13.

[FN144]. Id. at 578, 545 S.E.2d at 15 (citing Halcome v. Cincinnati Ins. Co., 254 Ga. 742, 334 S.E.2d 155 (1985)).

[FN145]. 249 Ga. App. 532, 548 S.E.2d 495 (2001).

[FN146]. Id. at 532, 548 S.E.2d at 496.

[FN147]. Id.

[FN148]. Id. at 533, 548 S.E.2d at 496.

[FN149]. Id., 548 S.E.2d at 496-97 (quoting Penn-American Ins. Co. v. Disabled Am. Veterans, Inc., 224 Ga. App. 557, 562, 481 S.E.2d 850, 851 (1997)).

[FN150]. 244 Ga. App. 491, 536 S.E.2d 165 (2000).

[FN151]. Id. at 491, 536 S.E.2d at 165.

[FN152]. Id. at 493-94, 536 S.E.2d at 167.

[FN153]. 162 Ga. App. 677, 292 S.E.2d 548 (1982).

[FN154]. 247 Ga. App. 292, 543 S.E.2d 51 (2000).

[FN155]. Id. at 294, 543 S.E.2d at 53.

[FN156]. 272 Ga. 788, 535 S.E.2d 492 (2000). The court held that a criminal defendant had a reasonable expectation of privacy in her medical records and that those records could not be disclosed without her consent and without notice to her or waiver. Id. at 790, 535 S.E.2d at 495.

[FN157]. 247 Ga. App. at 295, 543 S.E.2d at 54.

[FN158]. Id. at 294, 543 S.E.2d at 53.

[FN159]. Id.

[FN160]. 247 Ga. App. 829, 544 S.E.2d 214 (2001).

[FN161]. Id. at 829, 544 S.E.2d at 214.

[FN162]. Id. at 830, 544 S.E.2d at 215.

[FN163]. Id. at 829, 544 S.E.2d at 214.

[FN164]. Glover v. Ware, 236 Ga. App. 40, 510 S.E.2d 895 (1999).

[FN165]. 247 Ga. App. at 829-30, 544 S.E.2d at 214-15.

[FN166]. 248 Ga. App. 496, 546 S.E.2d 875 (2001).

[FN167]. Id. at 496, 546 S.E.2d at 876-77.

[FN168]. Id. at 498, 546 S.E.2d at 877.

[FN169]. Id. at 499, 546 S.E.2d at 878.

[FN170]. O.C.G.A. § 51-12-5.1(b) (2000).

[FN171]. 248 Ga. App. at 499, 546 S.E.2d at 878 (quoting Home Ins. Co. v. Wynn, 229 Ga. App. 220, 225, 493 S.E.2d 622, 628 (1997)) (citations and punctuation omitted).

[FN172]. 272 Ga. 583, 533 S.E.2d 82 (2000) (extending the right of a mother to recover negligent infliction of emotional distress when both mother and child were injured in automobile collision and mother witnessed her child's suffering and death).

[FN173]. 248 Ga. App. 134, 546 S.E.2d 283 (2001).

[FN174]. Id. at 135, 546 S.E.2d at 283-84.

[FN175]. Id. at 136, 546 S.E.2d at 284.

[FN176]. Id. at 138, 546 S.E.2d at 285-86.

[FN177]. 241 Ga. App. 275, 526 S.E.2d 609 (1999). See C. Frederick Overby et al., Trial Practice and Procedure, 52 Mercer L. Rev. 447 (2000), for a discussion of Ezor and the inequities of applying Prophecy to nonparty expert testimony.

[FN178]. "The Prophecy rule requires trial courts, when considering summary judgment motions, to (1) eliminate all portions of a party's self-contradictory testimony that are favorable to, and left unexplained by, that party; and (2) consider the remaining evidence in favor of the party opposing summary judgment." Thompson v. Ezor, 272 Ga. 849, 851, 536 S.E.2d 749, 752 (2000).

[FN179]. 241 Ga. App. at 279, 526 S.E.2d at 612.

[FN180]. 272 Ga. 849, 536 S.E.2d 749 (2000).

[FN181]. Id. at 850, 536 S.E.2d at 751.

[FN182]. Id. at 853, 536 S.E.2d at 753.

[FN183]. Id.

[FN184]. 248 Ga. App. 779, 546 S.E.2d 927 (2001).

[FN185]. Id. at 779-80, 546 S.E.2d at 928-29.

[FN186]. O.C.G.A. § 1-3-1(d)(3) (Supp. 2001).

[FN187]. 248 Ga. App. at 780, 546 S.E.2d at 929 (quoting Lee v. City of Atlanta, 219 Ga. App. 264, 265, 464 S.E.2d 879, 880 (1995)) (citation and punctuation omitted).

[FN188]. Id.

[FN189]. O.C.G.A. § 31-33-3(a) (2001).

[FN190]. Id.

[FN191]. Id.

[FN192]. O.C.G.A. § 33-4-6(a) (Supp. 2001).

[FN193]. Id.

[FN194]. Id.

[FN195]. Id. § 33-4-6(b).

[FN196]. Id.

[FN197]. Id. § 5-3-30(b).

[FN198]. Id.

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