

# Trial Practice and Procedure

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## I. INTRODUCTION

This survey period yielded several decisions of interest and importance to practitioners trying cases and preparing for trial. This Article will analyze the recent judicial developments in the law relating to evidence, insurance, jurors and jury instructions, professional liability, service of process, and damages, as well as other issues of import to the trial practitioner.

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## II. CASE LAW

## A. Evidence

During this survey period, the Georgia Supreme Court clarified the self-contradictory testimony rule of *Prophecy Corp. v. Charles Rossignol, Inc.*<sup>1</sup> In *CSX Transportation, Inc. v. Belcher*,<sup>2</sup> the state's high court held, in division one of its opinion, that if a party adopts a prior unsworn statement under oath, and that adopted statement contradicts other sworn testimony given by that same party, the testimony that is favorable to the party's position must be disregarded.<sup>3</sup> The court overruled a court of appeals opinion from last year, which held that even if a party affirms the truthfulness of a prior unsworn statement under oath, and even if that unsworn statement contradicts other sworn testimony given by the party, the *Prophecy* rule cannot be invoked.<sup>4</sup>

The holding in *Belcher* was dictum because the court found in division two that plaintiff had not actually adopted, during his sworn deposition, the allegedly contradictory unsworn statement.<sup>5</sup> The decision highlights the need for trial practitioners to prepare their clients meticulously before their depositions. Specifically, lawyers should (1) insist upon receiving through written discovery any and all statements given by the client; and (2) prepare the client only to adopt portions of prior statements that are unconditionally true.

In *Wood v. D. G. Jenkins Homes, Inc.*,<sup>6</sup> the court of appeals reversed the trial court's exclusion of other similar incident evidence.<sup>7</sup> Plaintiffs sued defendant-builder for building a house too close to plaintiffs' property in violation of a setback requirement and for building a cross tie wall that encroached on plaintiffs' property. In support of their punitive damages claim, plaintiffs attempted to introduce evidence that the builder had repeatedly violated setback requirements. The trial court ruled that the evidence was inadmissible in the first phase of the trial, the phase that would determine liability for compensatory and punitive damages. The trial court further held that if the jury were to find the builder liable for punitive damages, the other similar incident

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1. 256 Ga. 27, 343 S.E.2d 680 (1986).

2. 276 Ga. 522, 579 S.E.2d 737 (2003).

3. *Id.* at 523-24, 579 S.E.2d at 739-40.

4. *Id.* at 524, 579 S.E.2d at 740; *see* *Robison v. George*, 253 Ga. App. 635, 637, 560 S.E.2d 108, 111 (2002).

5. *Belcher*, 276 Ga. at 524, 579 S.E.2d at 740.

6. 255 Ga. App. 572, 565 S.E.2d 886 (2002).

7. *Id.* at 574-75, 565 S.E.2d at 889.

evidence would be admissible in the second phase of the trial, in which the jury determines the amount of punitive damages.<sup>8</sup>

The court of appeals reversed, recognizing, as the point of departure, the bedrock principle that other similar incidents are relevant to the phase one issue of liability for punitive damages.<sup>9</sup> The real question became whether the probative value was substantially outweighed by the possible prejudicial effect of the evidence.<sup>10</sup> In most cases, such evidence should be admitted.

In *Yang v. Washington*,<sup>11</sup> the court of appeals held that a trial court should allow a litigant to voir dire an expert witness concerning his qualifications.<sup>12</sup> The court also held that if the trial court denies a litigant the opportunity to voir dire the witness, the error is harmless so long as the litigant is allowed a full cross-examination.<sup>13</sup>

In a medical malpractice case decided this survey period, *Byrd v. Medical Center of Central Georgia, Inc.*,<sup>14</sup> the court of appeals found that the trial court abused its discretion by excluding from evidence a hospital surgery department's service manual that both supported plaintiff's claim that defendants violated the applicable standard of care and contradicted defense testimony about the standard of care.<sup>15</sup> The court rejected the argument that the manual applied to the surgery department generally and not to gynecologists performing gynecological surgery who had never seen the manual.<sup>16</sup>

### B. Insurance

The court of appeals untangled complex subrogation issues in *International Maintenance Corp. v. Inland Paper Board & Packaging, Inc.*<sup>17</sup> In that case, the workers' compensation carrier and the employer of the injured worker successfully intervened to protect their subrogation interest in the employee's tort action. However, the trial court dismissed the intervenors' claims because of a conflict of interest that became apparent during the litigation.<sup>18</sup>

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8. *Id.* at 572, 565 S.E.2d at 887.

9. *Id.* at 572-75, 565 S.E.2d at 887-89.

10. *Id.* at 573, 565 S.E.2d at 888-89.

11. 256 Ga. App. 239, 568 S.E.2d 140 (2002).

12. *Id.* at 242, 568 S.E.2d at 144.

13. *Id.* at 242-43, 568 S.E.2d at 144.

14. 258 Ga. App. 286, 574 S.E.2d 326 (2002).

15. *Id.* at 289-90, 574 S.E.2d at 329.

16. *Id.* at 288-89, 574 S.E.2d at 329.

17. *Int'l Maint. Corp. v. Inland Paper Bd. & Packaging, Inc.*, No. A02A0105, 2002 WL 1751397 (Ga. Ct. App. June 26, 2002).

18. *Id.* at \*1.

The employer agreed to indemnify one of the tortfeasors that was being sued by the employee. The workers' compensation carrier was also the liability carrier for the employer and, by virtue of the indemnification agreement, became the ultimate liability carrier for the tortfeasor. Therefore, when the tortfeasor moved for summary judgment, rather than supporting the position of the injured employee (and the subrogation claims that they supposedly intervened to protect), the intervenors urged the trial court to grant the tortfeasor's motion for summary judgment.<sup>19</sup>

The appellate court characterized the actions of the intervenors as "blatantly egregious" and "fundamentally wrong,"<sup>20</sup> but nonetheless found that the trial court lacked the power to prevent such actions by litigants.<sup>21</sup> In so doing, the court of appeals cited statutory and case authority for the proposition that a trial court lacks discretion when ruling on an initial motion to intervene brought pursuant to the workers' compensation subrogation statute, Official Code of Georgia ("O.C.G.A.") section 34-9-11.1.<sup>22</sup> The court of appeals chose not to allow the trial court to punish an intervenor that, once allowed in the case, abuses the legislatively granted right to intervene by using its status as a party in the case to advance an improper agenda.<sup>23</sup>

In division two of its opinion, the court held that when intervention is allowed pursuant to subsection (b) of O.C.G.A. section 34-9-11.1, the court may properly allow a plaintiff to dismiss a defendant from the lawsuit over the intervenors' objection.<sup>24</sup> The statute and cases make clear that after such a settlement with a tortfeasor, the dispute is entirely between the injured employee and the intervenors.<sup>25</sup> The court noted that the ruling would have been different if the employer or insurance company were a party pursuant to subsection (c) of O.C.G.A. section 34-9-11.1, which allows the employer and or insurer to sue the tortfeasor directly.<sup>26</sup> The court also suggested that the ruling might have been different if the injured employee settled with the tortfeasor before bringing suit.<sup>27</sup> While the former observation comports with authority from the Georgia Supreme Court,<sup>28</sup> the latter point is

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19. *Id.*

20. *Id.* at \*2.

21. *Id.*

22. *Id.*; O.C.G.A. § 34-9-11.1(b) (1995).

23. *Int'l Maint. Corp.*, 2002 WL 1751397, at \*2.

24. *Id.* at \*3; O.C.G.A. § 34-9-11.1(b).

25. *Int'l Maint. Corp.*, 2002 WL 1751397, at \*4.

26. *Id.*; O.C.G.A. § 34-9-11.1(c).

27. *Int'l Maint. Corp.*, 2002 WL 1751397, at \*4.

28. See *Ga. Elec. Membership v. Hi-Ranger, Inc.*, 275 Ga. 197, 563 S.E.2d 841 (2002).

inconsistent with the court's own analysis. If an injured employee may settle with and dismiss a tortfeasor from a filed lawsuit, and then the matter becomes purely one of reimbursement between the employee and the employer or insurance carrier, why should the outcome be any different if a lawsuit has not been filed? The court left that question for future appellate determination.

In a straight forward yet important case for trial practitioners, *Horace Mann Insurance Corp. v. Mercer*,<sup>29</sup> the court of appeals reaffirmed the principle that multiple uninsured or underinsured motorist coverages "stack," even if the insurance policy expressly purports to prevent stacking.<sup>30</sup> The court held that when a person is the beneficiary of multiple policies covering multiple vehicles, the coverages may be stacked.<sup>31</sup> Such a situation is still legally different from when an insured is the beneficiary of *one* policy covering multiple vehicles—a situation in which stacking may be prohibited.<sup>32</sup> According to the court, this distinction is derived from the text of Georgia's Uninsured Motorist Statute.<sup>33</sup>

### C. Jurors and Jury Instructions

This survey period, the appellate courts applied, from last year's survey period, the supreme court's landmark holding in *Kim v. Walls*.<sup>34</sup> In *Kim* the supreme court affirmed the court of appeals determination that when a potential juror expresses bias against a party, the trial court is not free to rehabilitate the juror with talismanic questioning but must allow the challenging party a thorough opportunity to voir dire the juror and explore the extent of the juror's bias.<sup>35</sup>

The court of appeals applied these principles in *Powell v. Amin*.<sup>36</sup> In *Powell* a prospective juror named Atkinson admitted that he was a pharmacist who derived income from prescriptions written by defendant doctor and that he would be reluctant to serve on the jury.<sup>37</sup> The trial court asked the juror the "talismanic question" of whether he thought he could base his decision solely and exclusively upon the evidence<sup>38</sup>

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29. 257 Ga. App. 278, 570 S.E.2d 589 (2002).

30. *Id.* at 279, 570 S.E.2d at 589.

31. *Id.*, 570 S.E.2d at 589-90.

32. *Id.*, 570 S.E.2d at 590.

33. *Id.* at 280, 570 S.E.2d at 590; O.C.G.A. § 33-7-11 (Supp. 2003).

34. 275 Ga. 177, 563 S.E.2d 847 (2002).

35. *Id.* at 178, 563 S.E.2d at 849.

36. 256 Ga. App. 757, 569 S.E.2d 582 (2002).

37. *Id.* at 759, 569 S.E.2d at 584.

38. *Id.*, 569 S.E.2d at 584-85 (quoting *Kim v. Walls*, 275 Ga. 177, 179, 563 S.E.2d 847, 849 (2002)).

and did not allow counsel to conduct “voir dire of sufficient scope and depth to ascertain any partiality.”<sup>39</sup> The court of appeals ruled that the trial court abused its discretion by qualifying juror Atkinson in this manner.<sup>40</sup>

The court of appeals held that the trial court’s qualification of prospective juror Burch, who expressed a similar bias in favor of defendant-doctor, was not an abuse of discretion because counsel was offered the opportunity to conduct further voir dire but declined.<sup>41</sup> The opinion makes clear that the key is the opportunity for a thorough and sifting voir dire of the potential juror.<sup>42</sup> Courts should afford counsel the opportunity to flesh out fully the juror’s biases. Counsel who want to preserve the issue on appeal must request that opportunity.

This survey period, in *Zwiren v. Thompson*,<sup>43</sup> the supreme court answered the question whether, in a malpractice case, an expert’s opinion on proximate cause must be expressed to a reasonable degree of medical certainty or, instead, to a reasonable degree of medical probability.<sup>44</sup> The supreme court held that either statement is acceptable.<sup>45</sup> In an attempt to remedy the confusion that has plagued jury charges on this subject for years, the court authored its own charge.<sup>46</sup> Juries should now be instructed that the determination of proximate cause “must be based on reasonable medical probability or reasonable medical certainty.”<sup>47</sup>

In another case involving a controversial jury charge, *Beach v. Lipham*,<sup>48</sup> the supreme court affirmed the trial court’s use of a charge that medical providers are presumed to have acted in an ordinarily skillful manner.<sup>49</sup> The court rejected plaintiff’s argument that the charge implies that plaintiff must prove his case by something more than a preponderance of the evidence.<sup>50</sup> The court acknowledged in dictum that “the pattern charge may be confusing to jurors because they are not told how much weight to give the presumption or how much

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39. *Id.* (quoting *Kim*, 275 Ga. at 179, 563 S.E.2d at 849).

40. *Id.*, 569 S.E.2d at 585.

41. *Id.* at 759-60, 569 S.E.2d at 585.

42. *Id.* at 760, 569 S.E.2d at 585-86.

43. 276 Ga. 498, 578 S.E.2d 862 (2003).

44. *Id.* at 499-501, 578 S.E.2d at 864-66.

45. *Id.*

46. *Id.* at 503-04, 578 S.E.2d at 867.

47. *Id.* at 504, 578 S.E.2d at 867.

48. 276 Ga. 302, 578 S.E.2d 402 (2003).

49. *Id.* at 302, 578 S.E.2d at 404.

50. *Id.* at 305, 578 S.E.2d at 406.

rebuttal evidence is required [to overcome the presumption].”<sup>51</sup> However, rather than authoring a suggested new charge, the court merely called for a new pattern charge to be written.<sup>52</sup> In the meantime, beleaguered trial courts must decide whether to give a confusing charge and be sustained on appeal or attempt to draft a better, less confusing charge and risk reversal.

#### D. Professional Liability

While it is clear that an expert affidavit must be filed, pursuant to O.C.G.A. section 9-11-9.1,<sup>53</sup> when *professional malpractice* is alleged, the determination of what constitutes professional malpractice and, thus, what triggers the affidavit requirement, can at times bewilder the trial practitioner.

In *Pomerantz v. Atlanta Dermatology & Surgery, P.A.*,<sup>54</sup> Mr. Pomerantz visited the doctor’s office to have “stitches removed following an earlier mole biopsy.”<sup>55</sup> During the procedure, Pomerantz lost consciousness and fell onto the floor from his seated position on the examination table. The decision turned on whether the failure to provide the patient with support during the procedure constituted ordinary or professional negligence.<sup>56</sup> The court of appeals affirmed the trial court’s dismissal of the action for failure to file an expert affidavit, noting that there was “no allegation that it was apparent that Pomerantz might lose consciousness or that he warned anyone that he might.”<sup>57</sup> Without any indication or warning by Pomerantz that he might lose consciousness, the decision to seat Pomerantz on the table during the procedure without any support was “a matter of professional judgment [and an expert affidavit was required] because a lay person is not expected to know when such a procedure could cause a patient to lose consciousness.”<sup>58</sup> The lesson for trial practitioners: when in doubt as to whether certain acts constitute ordinary or professional negligence, one should err on the side of caution by filing an expert affidavit.

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51. *Id.*

52. *Id.*

53. O.C.G.A. § 9-11-9.1 (1997).

54. 255 Ga. App. 698, 566 S.E.2d 425 (2002).

55. *Id.* at 698, 566 S.E.2d at 425.

56. *Id.* at 699, 566 S.E.2d at 426.

57. *Id.* at 698, 566 S.E.2d at 426.

58. *Id.* at 699, 566 S.E.2d at 426; *see also* Crisp Reg’l Nursing & Rehab. Ctr. v. Johnson, 258 Ga. App. 540, 542, 574 S.E.2d 650, 653 (2002) (stating that whether use of wheelchair or other precautions were proper to prevent fall of patient was a matter of professional judgment even though patient told nurse that she did not feel well prior to fall).

The termination of the physician-patient relationship was addressed by the court of appeals in *Grant v. Douglas Women's Clinic, P.C.*<sup>59</sup> Because of her high risk pregnancy, Mrs. Grant was hospitalized from May 8, 1996, through July 19, 1996. From May 8, 1996, through June 10, 1996, Dr. Potter provided treatment to Mrs. Grant.<sup>60</sup> "On June 10, the last time Dr. Potter examined Mrs. Grant, he wrote on her chart: 'Nothing to add—Looks good [signed] Potter.'"<sup>61</sup> From that date until the time of her dismissal from the hospital, Dr. Potter had no further contact with Mrs. Grant, but he was informally consulted by the doctor who discharged Mrs. Grant from the hospital on July 19. A week after Mrs. Grant was released from the hospital, she went into premature labor and lost her newborn child as a result of an infection.<sup>62</sup>

When Mrs. Grant subsequently brought an action against Dr. Potter alleging "negligence in discharging Mrs. Grant from the hospital when she and her child were at risk of infection,"<sup>63</sup> the trial court granted summary judgment in favor of Dr. Potter on the grounds that he had withdrawn from treating Mrs. Grant.<sup>64</sup> Because the physician-patient relationship no longer existed, Dr. Potter owed no legal duty to Mrs. Grant.<sup>65</sup> The court of appeals reversed, holding that "a jury issue remains as to whether Dr. Potter provided reasonable notice of his intent to withdraw from Mrs. Grant's treatment."<sup>66</sup> The mere chart notation that Dr. Potter had "[n]othing to add"<sup>67</sup> did not, as a matter of law, constitute reasonable notice of his withdrawal.<sup>68</sup> The court of appeals also noted that the jury would be authorized to consider whether the physician-patient relationship ended by "(1) mutual consent; (2) the patient's dismissal of the physician; or (3) the cessation of the need for the relationship."<sup>69</sup>

In *Pilzer v. Virginia Life Insurance Reciprocal*,<sup>70</sup> the court of appeals reaffirmed the principle that, in medical malpractice actions, contribution claims against joint tortfeasors must be brought within five years of the date that the negligent act or omission occurred, as required by

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59. 260 Ga. App. 676, 580 S.E.2d 532 (2003).

60. *Id.* at 677, 580 S.E.2d at 533.

61. *Id.*

62. *Id.*

63. *Id.* at 677-78, 580 S.E.2d at 533-34.

64. *Id.*

65. *Id.* at 678, 580 S.E.2d at 533.

66. *Id.* at 679, 580 S.E.2d at 534.

67. *Id.* at 678, 580 S.E.2d at 534.

68. *Id.*

69. *Id.* at 679, 580 S.E.2d at 534.

70. 260 Ga. App. 736, 580 S.E.2d 599 (2003).

the statute of repose, O.C.G.A. section 9-3-71(b).<sup>71</sup> Because liability for contribution necessarily depends on whether joint tortfeasors were negligent in their professional capacity, the twenty-year statute of limitation on contribution actions of O.C.G.A. section 9-3-22 is trumped by the statute of repose governing medical malpractice actions.<sup>72</sup> The court noted that to hold otherwise would defeat the purposes of the statute of repose for medical malpractice actions.<sup>73</sup>

As discussed in detail in last year's survey article,<sup>74</sup> the supreme court in *Young v. Williams*<sup>75</sup> held that if the continuing treatment doctrine is to be adopted in Georgia, the legislature must amend the statute.<sup>76</sup> The courts are constrained from creating the doctrine by judicial interpretation of the current statute.<sup>77</sup> In *Williams v. Devell R. Young, M.D., P.C.*,<sup>78</sup> the court of appeals dismissed the action and made this plea to the legislature:

In light of the inequities inherent in cases like this one, in which a patient remains under the care of one physician and the statute of limitation expires on her claim, we encourage the General Assembly to look into and remedy this situation by enacting a statute allowing the incorporation of the continuous treatment doctrine into the existing statute of limitation provided for in O.C.G.A. § 9-3-71. A legislative enactment to this effect would create a more just statutory scheme for this type of medical malpractice case.<sup>79</sup>

In its initial opinion, which was reversed by the supreme court, the court of appeals underscored the positive impact that the continuing treatment doctrine would have upon the physician-patient relationship.<sup>80</sup> It is

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71. *Id.* at 737, 580 S.E.2d at 601; O.C.G.A. § 9-3-71(b) (1985).

72. *Pilzer*, 260 Ga. App. at 736-37, 580 S.E.2d at 600-01; O.C.G.A. § 9-3-22 (2003).

73. *Pilzer*, 260 Ga. App. at 738, 580 S.E.2d at 601.

74. Matthew E. Cook et al., *Trial Practice & Procedure*, 54 MERCER L. REV. 545, 571-72 (2002).

75. 274 Ga. 845, 560 S.E.2d 690 (2002).

76. *Id.* at 848, 580 S.E.2d at 693.

77. *Id.*

78. 258 Ga. App. 821, 575 S.E.2d 648 (2002).

79. *Id.* at 824-25, 575 S.E.2d at 651.

80. See *Williams v. Devell R. Young, M.D., P.C.*, 247 Ga. App. 337, 341, 543 S.E.2d 737, 741 (2000), *rev'd* 274 Ga. 845, 560 S.E.2d 690 (2002).

“(1) [A] patient should properly place trust and confidence in his physician and should be excused from challenging the quality of care being rendered to him until that confidential relationship terminates; (2) to require a patient to bring suit against his physician before treatment is terminated would conceivably afford the physician a defense that the patient left before treatment was terminated and before the physician had a chance to effectuate a proper result; and (3) the treating physician is in the best position to identify and correct the malpractice.”

now up to the legislature to decide whether the doctrine should become Georgia law.<sup>81</sup>

*E. Statutes of Limitations, Service of Process, and Jurisdiction*

The importance of exercising due diligence in perfecting service after the expiration of the statute of limitation and documenting the steps taken to do so cannot be overemphasized.<sup>82</sup> “Where the statute of limitation accrues between the date of filing and the date of service, whether or not it relates back (if the service is more than five days after the filing) depends on the length of time and the diligence used by the plaintiff.”<sup>83</sup> In *Zeigler v. Hambrick*,<sup>84</sup> the court of appeals affirmed the trial court’s dismissal of an action for failing “to act diligently in serving Hambrick 21 days after filing the renewal action.”<sup>85</sup> Although Zeigler claimed the marshal’s office was having trouble serving Hambrick because of demands on the office, she “provided no evidence . . . that she took *any* steps to ensure that her renewal action was served, such as by making inquiries at the marshal’s office or by requesting a special process server.”<sup>86</sup> The burden rests on the plaintiff to provide specific details showing diligence in perfecting service, so Zeigler’s failure to put forth any evidence in that regard was fatal to her action despite the fact that it took only twenty-one days to perfect service.<sup>87</sup>

In an action against a nonresident motorist, the court of appeals held that service may properly be made under either the Long Arm Statute<sup>88</sup>

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*Id.* at 341, 543 S.E.2d at 741 (quoting *Vitner v. Miller*, 208 Ga. App. 306, 308-09, 430 S.E.2d 671, 673 (Pope, C.J., concurring specially)) (citations omitted).

81. 258 Ga. App. at 825, 575 S.E.2d at 651.

82. *Poteate v. Rally Mfg., Inc.*, 260 Ga. App. 34, 37, 579 S.E.2d 44, 47 (2003).

83. *Id.* at 36, 579 S.E.2d at 46 (quoting *Bible v. Hughes*, 146 Ga. App. 769, 770, 247 S.E.2d 584, 585 (1978)).

84. 257 Ga. App. 356, 571 S.E.2d 418 (2002).

85. *Id.* at 356, 571 S.E.2d at 419.

86. *Id.* at 357, 571 S.E.2d at 420.

87. *Id.*; see also *Poteate*, 260 Ga. App. at 37, 579 S.E.2d at 47 (holding trial court did not abuse its discretion in concluding plaintiff failed to exercise due diligence where plaintiff waited three weeks from the date the waiver of service request was due before forwarding the complaint to the sheriff for service on defendant); *Williams v. Bragg*, 260 Ga. App. 377, 378, 579 S.E.2d 800, 801 (“when a plaintiff is aware of a defendant’s correct address, he must also determine the correct county in which that address is found, otherwise his actions . . . will support a summary judgment against him [when the statute of limitation expires between the date the complaint is filed and the date of service.]”) (quoting *Cantin v. Justice*, 224 Ga. App. 195, 196, 480 S.E.2d 250, 251-52 (1997)).

88. *Farrie v. McCall*, 256 Ga. App. 446, 446, 568 S.E.2d 603, 603 (2002); O.C.G.A. § 9-10-94 (1966).

or the Nonresident Motorists Act (“NRMA”).<sup>89</sup> In *Farrie v. McCall*,<sup>90</sup> the trial court reluctantly dismissed an action that arose from the nonresident’s use of a motor vehicle within the state, despite the fact that defendant was properly served under the Long Arm Statute, and it found that the NRMA provided the exclusive means of service.<sup>91</sup> The court of appeals reversed, holding that the NRMA “provides only an alternative, not an exclusive, means of perfecting service on a nonresident motorist.”<sup>92</sup> The NRMA simply provides for a more lenient method of service,<sup>93</sup> and a plaintiff should not be denied access to court for pursuing another, equally valid, method of service.

In *Soley v. Dodson*<sup>94</sup> and *Ward v. Dodson*,<sup>95</sup> plaintiffs originally brought claims against Clarence Dodson, a sheriff’s deputy, in his individual capacity only. After voluntarily dismissing the suits, plaintiffs attempted to use the renewal statute<sup>96</sup> to assert claims against Dodson both individually and in his official capacity as deputy sheriff.<sup>97</sup> Because the claim against Dodson in his official capacity is in reality a suit against the state, the claims against him in his official capacity did not satisfy the requirement of substantial identity of the parties between the original action and the renewal action.<sup>98</sup> The renewal statute may not be used to suspend the statute of limitation as to different defendants from those originally sued; thus, the claims against Dodson in his official capacity were barred by the statute of limitation.<sup>99</sup>

The purchasers of a home made from synthetic stucco brought a negligence action against the home builder and a products liability

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89. *Farrie*, 256 Ga. App. at 446, 568 S.E.2d at 603; O.C.G.A. § 40-12-1 (1967).

90. 256 Ga. App. 446, 568 S.E.2d 603 (2002).

91. *Id.* at 446, 568 S.E.2d at 603; O.C.G.A. § 9-10-94; O.C.G.A. § 40-12-1.

92. *Farrie*, 256 Ga. App. at 446, 568 S.E.2d at 603; *see also* *King v. Barrios*, 257 Ga. App. 538, 538, 571 S.E.2d 531, 532 (2002) (holding that service on a nonresident motorist is proper under either the Nonresident Motorist Act or the Long Arm Statute).

93. *See* *Tate v. Hughes*, 255 Ga. App. 511, 512, 565 S.E.2d 853, 854 (2002) (holding that service was properly perfected over nonresident motorist by serving Georgia Secretary of State and sending a copy of the suit via certified mail; and, where the statute is complied with, service is perfected irrespective of whether defendant actually received the notice).

94. 256 Ga. App. 770, 569 S.E.2d 870 (2002).

95. 256 Ga. App. 660, 569 S.E.2d 554 (2002).

96. O.C.G.A. § 9-2-61(a) (1998).

97. *Soley*, 256 Ga. App. at 771, 569 S.E.2d at 871-72; *Dodson*, 256 Ga. App. at 660, 569 S.E.2d at 555.

98. *Soley*, 256 Ga. App. at 772, 569 Ga. App. at 873; *Dodson*, 256 Ga. App. at 662, 569 S.E.2d at 556-57.

99. *Soley*, 256 Ga. App. at 773, 569 Ga. App. at 873; *Dodson*, 256 Ga. App. at 662, 569 S.E.2d at 557.

action against the manufacturer of the stucco in *Colormatch Exteriors, Inc. v. Hickey*.<sup>100</sup> The supreme court held that the purchasers' right of action accrued against the builders and that the statute of limitation<sup>101</sup> began to run on the date they purchased the property, rather than the earlier date of substantial completion.<sup>102</sup> The statute of limitation began to run against the stucco manufacturer, however, on the date of substantial completion.<sup>103</sup>

In *Yukon Partners, Inc. v. Lodge Keeper Group, Inc.*,<sup>104</sup> the court of appeals recognized that "[c]ontractual clauses providing advance consent to the jurisdiction of a court which would not otherwise have personal jurisdiction are valid and enforceable."<sup>105</sup> The court held that a contract's mere recitation in the signature block that the agreement was executed in Georgia was not the type of advance consent sufficient to confer personal jurisdiction over a defendant.<sup>106</sup>

#### F. Default

The holding of the court of appeals in *Metropolitan Deluxe, Inc. v. Bradsher*<sup>107</sup> serves as a valuable lesson: extensions of time to file an answer should always be filed with the court.<sup>108</sup> In *Bradsher* the "two opposing counsel [had] reached [an] agreement that either of them was authorized to take extensions of time, with each authorized to sign the other's name to such an extension . . . ."<sup>109</sup> To confirm an extension of time to file defendant's answer, counsel telephoned plaintiff's counsel and was informed that an extension would be granted, as authorized by previous agreement. Based upon the agreement and the telephone confirmation, defendant filed its answer on August 16, 1999, less than fifteen days after the original due date, without ever filing a stipulation extending the time to answer and without paying costs.<sup>110</sup>

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100. 275 Ga. 249, 569 S.E.2d 495 (2002).

101. O.C.G.A. § 9-3-30(a) (2000).

102. *Colormatch Exteriors, Inc.*, 275 Ga. at 252, 569 S.E.2d at 497.

103. *Id.* at 253, 569 S.E.2d at 499 (leaving for another day the determination of whether the action accrues upon substantial completion of the entire building or of the stucco installation only).

104. 258 Ga. App. 1, 572 S.E.2d 647 (2002).

105. *Id.* at 8, 572 S.E.2d at 652 (quoting *Brown v. U.S. Fid. & Guar. Co.*, 208 Ga. App. 834, 835, 432 S.E.2d 256, 258-59 (1993)).

106. *Id.* at 7-8, 572 S.E.2d at 653.

107. 258 Ga. App. 265, 573 S.E.2d 504 (2002).

108. *Id.* at 267, 573 S.E.2d at 506-07.

109. *Id.* at 265-66, 573 S.E.2d at 506.

110. *Id.* at 266, 573 S.E.2d at 506.

On August 23, defendant responded to interrogatories, and on September 3, plaintiff's counsel expressed "dissatisfaction with the answers to the interrogatories, which were unsworn and, in [plaintiff's] counsel's opinion, unresponsive."<sup>111</sup> Despite the gentlemen's agreement that defendant had an extension of time to file an answer, plaintiff filed a motion to strike defendant's answer and for entry of a default judgment based on the fact that an extension had not been filed with the court.<sup>112</sup>

The court upheld the entry of default by the trial court because a case "automatically becomes in default by operation of law unless the time for filing an answer has been extended as provided by law . . . [and] [a]n agreement between the parties is insufficient; it must also be formalized by filing it with the court."<sup>113</sup> The court noted that the default could have been opened as a matter of right by filing an answer *and* paying costs within fifteen days of the deadline imposed by the Civil Practice Act.<sup>114</sup> Although defendant did file its answer within that time limit, it failed to pay costs in reliance upon the agreed extension.<sup>115</sup> This failure to pay costs operated as a bar to the opening of default judgment.<sup>116</sup>

### G. Damages

This year's survey period yielded several noteworthy decisions addressing damages. In *Sumitomo Corp. of America v. Deal*,<sup>117</sup> the court of appeals reversed the trial court's reduction of a punitive damages award in a nuisance and trespass case.<sup>118</sup> Two Gwinnett County homeowners sued a developer, alleging that a residential development subjected the downstream landowners' property to siltation, erosion, and flooding. The jury awarded approximately \$175,000 in compensatory damages and \$42,000 in attorney fees to one homeowner. To these amounts, the jury added \$275,000 in punitive damages. The trial court ruled that the punitive damages award was unconstitutional-

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111. *Id.*

112. *Id.*

113. *Id.* at 267, 573 S.E.2d at 506-07; *see also* *Wilcher v. Smith*, 256 Ga. App. 427, 428-29, 568 S.E.2d 589, 591-92 (2002) (reversing trial court and holding case automatically in default for filing answer after date imposed by Civil Practice Act because stipulation for extension had not been filed).

114. *Metro. Deluxe, Inc.*, 258 Ga. App. at 267, 573 S.E.2d at 507.

115. *Id.*

116. *Id.*

117. 256 Ga. App. 703, 569 S.E.2d 608 (2002).

118. *Id.* at 704, 569 S.E.2d at 611.

ly excessive and reduced it to \$100,000.<sup>119</sup> The court of appeals reversed, applying the factors from *BMW of North America, Inc. v. Gore*.<sup>120</sup> The court focused on the fact that the developer had notice of the problems the homeowners experienced, yet did nothing to remedy them.<sup>121</sup> Also, the court examined the ratio of compensatory damages to punitive damages, only 1 to 1.42, and noted that it fell well within the range of acceptable awards.<sup>122</sup>

In *BDO Seidman, LLP v. Mindis Acquisition Corp.*,<sup>123</sup> the supreme court defined the proper measure of damages in a negligent misrepresentation case.<sup>124</sup> The appropriate measure of damages is “[t]he difference between the value of what [the plaintiff] has received in the transaction and its purchase price or other value given for it [and] [p]ecuniary loss suffered otherwise as a consequence of the plaintiff’s reliance upon the representation.”<sup>125</sup> In adopting this measure of damages, the court reasoned that negligent misrepresentation features a lesser degree of culpability than fraudulent misrepresentation.<sup>126</sup> Damages for fraudulent misrepresentation are the “difference between the value of the thing sold at the time of delivery and what would have been its value if the representations made by the defendants had been true.”<sup>127</sup>

The court of appeals addressed another noteworthy damages issue in *Nash v. Allstate Insurance Co.*<sup>128</sup> A traffic accident tragically left five children without their mother and led to a dispute between the family and a hospital over how the insurance funds should be divided. The striking driver had \$15,000 in liability insurance, and the deceased mother had \$10,000 in underinsured motorist (“UM”) coverage after the UM setoff was applied. Both insurers paid the proceeds into the registry of the court. The trial court ruled that the hospital was entitled to over \$18,000 of the funds, as it held a lien for providing care to the decedent prior to her death.<sup>129</sup>

Judge Barnes isolated the issue on appeal by determining that the only claim that had been filed was the wrongful death claim filed by the

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119. *Id.* at 704, 709, 569 S.E.2d at 611, 614.

120. *Id.* at 709, 569 S.E.2d at 614-15; 517 U.S. 559 (1996).

121. *Sumitomo Corp.*, 256 Ga. App. at 709-10, 569 S.E.2d at 615.

122. *Id.* at 710, 569 S.E.2d at 615.

123. 276 Ga. 311, 578 S.E.2d 400 (2003).

124. *Id.* at 311-12, 578 S.E.2d at 401.

125. *Id.* at 312, 578 S.E.2d at 401.

126. *Id.* at 313, 578 S.E.2d at 402.

127. *Id.* at 311 n.1, 578 S.E.2d at 400 n.1.

128. 256 Ga. App. 143, 567 S.E.2d 748 (2002).

129. *Id.* at 143-44, 567 S.E.2d at 748-49.

children.<sup>130</sup> The mother's estate, which was responsible for the hospital bills, had not asserted a claim seeking compensation for medical bills. Under those facts, the wrongful death beneficiaries were entitled to receive and keep the insurance proceeds because the lien did not operate upon the wrongful death claim but, rather, only upon a claim for recovery of the hospital bills.<sup>131</sup> Accordingly, the court of appeals reversed the trial court and ordered all of the funds to be distributed to the wrongful death beneficiaries.<sup>132</sup>

In *C-Staff, Inc. v. Liberty Mutual Insurance Co.*,<sup>133</sup> the supreme court made clear the principle that a judgment creditor may only enforce a judgment against a judgment debtor.<sup>134</sup> In that case, plaintiff sued C-Staff and an individual in federal district court in Florida. The federal court dismissed the suit against the individual for lack of personal jurisdiction. Plaintiff secured a \$3.7 million judgment against C-Staff and attempted to execute the judgment against the individual and two other entities in federal court in Atlanta. The district court allowed the action to enforce the judgment to proceed against all parties. The Eleventh Circuit certified a question to the Georgia Supreme Court.<sup>135</sup> The supreme court held that O.C.G.A. section 9-11-69 does not allow a judgment creditor to implead and hold liable persons who were not parties to the judgment.<sup>136</sup>

#### H. Products Liability

Cases involving products liability resulted in several opinions that impact trial practitioners. Perhaps the most significant products liability case this survey period was *Ontario Sewing Machine Co. v. Smith*.<sup>137</sup> In that case, a worker cut her hand using a machine manufactured by the Ontario Sewing Machine Company. Prior to the incident, the manufacturer had recalled the machine, directed the worker's employer to stop using it, and provided the employer with the opportunity to purchase a newer, more expensive machine. The trial court granted summary judgment to the manufacturer, ruling that the

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130. *Id.* at 145, 567 S.E.2d at 750.

131. *Id.* at 144, 567 S.E.2d at 749.

132. *Id.* at 146, 567 S.E.2d at 750.

133. 275 Ga. 624, 571 S.E.2d 383 (2002).

134. *Id.* at 624, 571 S.E.2d at 383.

135. *Id.* at 624-26, 571 S.E.2d at 383-85.

136. *Id.*; O.C.G.A. § 9-11-69 (1987).

137. 275 Ga. 683, 572 S.E.2d 533 (2002).

employer's failure to stop using the machine after the recall was the sole proximate cause of the worker's injury.<sup>138</sup>

The court of appeals reversed, ruling as a matter of law that the manufacturer's actions were the proximate cause of plaintiff's injuries.<sup>139</sup> The court of appeals set forth the post sale duties that a manufacturer-seller owes to discover defects and warn potential users of those defects.<sup>140</sup> The supreme court affirmed with direction, holding that the proper ruling was simply to leave the proximate cause issue to the jury.<sup>141</sup> The supreme court's opinion makes clear that issues relating to a manufacturer's post sale duties to warn and recall are for juries to decide, not judges.

Other recent products liability cases are instructive for all trial practitioners. In *Hunter v. Werner Co.*,<sup>142</sup> the court of appeals refused to allow a party to benefit on the merits from abusing the discovery process.<sup>143</sup> The case concerned the failure of a fiberglass ladder. In discovery, defendant produced a technical manual dated from the year 1997, which warned of the dangers of sudden failure if fiberglass ladders were not transported using special racks. At the summary judgment hearing, defense counsel argued that the information contained in the 1997 manual could not be used to establish the manufacturer's prior knowledge of the danger because the incident occurred in 1996. After the hearing, plaintiffs' expert filed a supplemental affidavit stating that he was familiar with an earlier version of the technical manual, dated 1995, that contained the same information about the need to transport fiberglass ladders on special racks. The trial court refused to consider the supplemental affidavit and granted summary judgment for defendant.<sup>144</sup>

The court of appeals found that the trial court abused its discretion by refusing to consider the supplemental affidavit.<sup>145</sup> The court focused on the fact that defendant "manipulated the procedural rules by withholding the pre-1997 manual and then bas[ed] an argument on the absence of such a manual after it was too late to supplement the record."<sup>146</sup> The court refused to let stand a ruling that "rewards [a

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138. *Id.* at 684, 572 S.E.2d at 534.

139. *Id.* at 684-85, 572 S.E.2d at 534-35; see *Smith v. Ontario Sewing Mach. Co.*, 249 Ga. App. 364, 365, 548 S.E.2d 89, 93 (2001).

140. 275 Ga. at 685-86, 572 S.E.2d at 535.

141. *Id.* at 687, 572 S.E.2d at 536.

142. 258 Ga. App. 379, 574 S.E.2d 426 (2002).

143. *Id.* at 383, 574 S.E.2d at 430.

144. *Id.* at 381-82, 574 S.E.2d at 429-30.

145. *Id.* at 383, 574 S.E.2d at 430.

146. *Id.* at 382, 574 S.E.2d at 430.

defendant] for what appears to be its failure to adhere to the discovery rules.”<sup>147</sup>

The importance of making an objection to a jury charge in court, and not just at the charge conference, was highlighted in *Karoly v. Kawasaki Motors Corp., U.S.A.*<sup>148</sup> In that case, plaintiff objected to a charge in conference but failed to renew the objection on the record when given the opportunity.<sup>149</sup> The court of appeals ruled that plaintiff waived the objection.<sup>150</sup>

### I. Defamation

During this survey period, the Georgia Supreme Court clarified Georgia’s law defining a “limited-purpose public figure” in *Mathis v. Cannon*<sup>151</sup> to determine the proper standard of liability for defamation cases.<sup>152</sup> The court was concerned with balancing the constitutional right of free speech under the First Amendment against an individual’s right to protect his reputation.<sup>153</sup> In a suit for defamation, whether the plaintiff is characterized as a private or public figure will, in most cases, determine how the court will strike that balance.<sup>154</sup> The law affords greater protection to private figures because they have not “voluntarily exposed themselves to increased risk of injury from defamatory falsehoods . . . .”<sup>155</sup> “[I]n order for a ‘public figure’ to recover in a suit for defamation, there must be proof by clear and convincing evidence of actual malice on the part of the defendant,”<sup>156</sup> while those “who are ‘private persons’ must only prove that the defendant acted with ordinary negligence.”<sup>157</sup> Determining who is a private or public figure, however, can be difficult, especially when the plaintiff was an ordinary citizen who was unknown to the public before becoming involved in a public controversy. The issue is whether the law in such cases should elevate an ordinary person with limited public exposure to public figure status.

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147. *Id.* at 383, 574 S.E.2d at 430.

148. 259 Ga. App. 225, 576 S.E.2d 625 (2003).

149. *Id.* at 226, 576 S.E.2d at 626.

150. *Id.*

151. 276 Ga. 16, 573 S.E.2d 376 (2002).

152. *Id.* at 22-23, 573 S.E.2d at 381.

153. *Id.* at 16, 573 S.E.2d at 377.

154. *Id.* at 22, 573 S.E.2d at 381.

155. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 323 (1974).

156. *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 816, 555 S.E.2d 175, 183 (2001).

157. *Id.*

In *Mathis* plaintiff filed a libel action against the defendant based on defendant's publication of defamatory statements regarding plaintiff's role as an independent contractor for Crisp County's Solid Waste Management Authority and its unprofitable operation of the waste recovery function. The trial court found that plaintiff was a private figure and granted his motion for summary judgment on the issue of liability. The court of appeals affirmed and held that defendant's statements constituted libel per se,<sup>158</sup> as plaintiff was a private figure, and not a limited-purpose public figure, which would have required application of the more stringent test for determining liability.<sup>159</sup>

The Georgia Supreme Court granted defendant's petition for certiorari to review whether the court of appeals erred in finding that plaintiff was a private figure.<sup>160</sup> Reversing the lower court's decision, the supreme court held that plaintiff was a limited-purpose public figure and that the lower courts applied the wrong standard of liability in determining fault.<sup>161</sup>

Under Georgia law, the supreme court held, "[w]hether a person is a public figure is a question of law that requires the court to review the nature and extent of the individual's participation in the specific controversy that gave rise to the defamation."<sup>162</sup> The court reasoned that "some persons may hold positions with such pervasive fame or power that they are deemed public figures for all purposes, but more often 'an individual voluntarily injects himself or is drawn into a particular public controversy and . . . becomes a public figure for a limited range of issues.'"<sup>163</sup> Additionally, the court held that the facts of each case must satisfy the three-prong test set forth in *Atlanta Journal-Constitution v. Jewell*.<sup>164</sup> Under the *Jewell* analysis, "a court 'must' [1] isolate the public controversy, [2] examine the plaintiff's involvement in the controversy, and [3] determine whether the alleged

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158. *Mathis*, 276 Ga. at 16-17, 573 S.E.2d at 377. "At common law, libel was a strict liability tort that did not require proof of falsity, fault, or actual damages. Since the United States Supreme Court's decision in *New York Times Co. v. Sullivan*, the law of defamation has undergone substantial changes." *Id.* at 20, 573 S.E.2d at 380 (internal citations omitted). Today, according to the Restatement, there are four essential elements in a cause of action for defamation: "(1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault by the defendant amounting at least to negligence; and (4) special harm . . ." *Id.*

159. *Id.* at 17, 573 S.E.2d at 377.

160. *Id.*

161. *Id.* at 25, 573 S.E.2d at 383.

162. *Id.* at 22, 573 S.E.2d at 381.

163. *Id.* (quoting *Gertz*, 418 U.S. at 351) (internal citations omitted).

164. *Id.* at 22-23, 573 S.E.2d at 381; 251 Ga. App. 808, 555 S.E.2d 175 (2001).

defamation was germane to the plaintiff's participation in the controversy."<sup>165</sup>

In *Mathis* the supreme court concluded that plaintiff was a central figure in the local public controversy concerning solid waste disposal and that defendant's alleged defamatory remarks were germane to plaintiff's involvement in the controversy.<sup>166</sup> Thus, plaintiff became a limited-purpose public figure for proving defamation.<sup>167</sup>

### J. Arbitration

In a surprising decision this survey period, the Georgia Supreme Court reversed a court of appeals decision which had vacated an arbitrator's award because it was rendered in manifest disregard of the law.<sup>168</sup> In *Progressive Data Systems, Inc. v. Jefferson Randolph Corp.*,<sup>169</sup> the court held, based on *Green v. Hundle*,<sup>170</sup> that "an arbitration award can be vacated in *only* one of four statutory ways,"<sup>171</sup> and the statute does not include "manifest disregard of the law"<sup>172</sup> as one of those grounds.<sup>173</sup> Accordingly, O.C.G.A. section 9-9-13(b) provides four *exclusive* grounds for vacating an arbitration award, and a party seeking to vacate such an award must show one of the following:

"(1) Corruption, fraud, or misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping of the arbitrators of their authority . . .; or (4) A failure to follow the procedure of this [Code], unless the party . . . continued with the arbitration with notice of this failure and without objection."<sup>174</sup>

The court reasoned that because the legislature set forth four statutory grounds for vacating an arbitration award, the court "should not be so bold as to *judicially* mandate"<sup>175</sup> the inclusion of another; namely manifest disregard of the law.<sup>176</sup> Because the "Georgia

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165. *Mathis*, 276 Ga. at 23, 573 S.E.2d at 381 (quoting *Jewell*, 251 Ga. at 817, 555 S.E.2d at 183).

166. *Id.* at 24-25, 573 S.E.2d at 382-83.

167. *Id.* at 25, 573 S.E.2d at 383.

168. *Progressive Data Sys., Inc. v. Jefferson Randolph Corp.*, 275 Ga. 420, 421, 568 S.E.2d 474, 475 (2002).

169. 275 Ga. 420, 568 S.E.2d 474 (2002).

170. 266 Ga. 592, 468 S.E.2d 350 (1996).

171. *Progressive Data Sys.*, 275 Ga. at 420, 568 S.E.2d at 475.

172. *Id.* at 421, 568 S.E.2d at 475.

173. *Id.* at 420-21, 568 S.E.2d at 475.

174. *Id.* at 420, 568 S.E.2d at 475 (quoting O.C.G.A. § 9-9-13(b) (1988)).

175. *Id.* at 421, 568 S.E.2d at 475.

176. *Id.*

Arbitration Code is in derogation of the common law [it] must be strictly construed.”<sup>177</sup>

As Justice Carley points out in the dissenting opinion, the holding in this case has the effect of “rendering judicial review [of such cases] a meaningless exercise, [with the result that] an arbitrator is free to ignore the law . . . .”<sup>178</sup>

### K. *Sovereign Immunity*

In *Department of Transportation v. Montgomery Tank Lines, Inc.*,<sup>179</sup> the supreme court addressed the state’s liability for contribution or indemnity claims.<sup>180</sup> After paying a settlement for wrongful death, the striking driver and his insurer brought actions for contribution and indemnity against the Department of Transportation (“DOT”), alleging that the DOT negligently designed and maintained the intersection where the fatal collision occurred.<sup>181</sup> The DOT moved to dismiss, contending “that the definition of ‘loss’ set forth in O.C.G.A. § 50-21-22(3) is a ‘limitation’ on the waiver of sovereign immunity, and absolutely precludes any claims against the State for contribution and indemnity.”<sup>182</sup> The supreme court rejected the contention, holding

that the [Georgia Tort Claims Act] waives the State’s sovereign immunity for [contribution and indemnity] claims so long as the activity of the State that is alleged to make it a tortfeasor, and thus subject to a claim for contribution or indemnity, does not fall within one of the exceptions to the waiver of sovereign immunity listed in O.C.G.A. § 50-21-24.<sup>183</sup>

### III. CONCLUSION

This year’s survey period yielded several noteworthy decisions. While the survey is not intended to be exhaustive, the Authors have attempted to provide material that will be useful for keeping practitioners updated in the area of trial practice and procedure.

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177. *Id.* at 420, 568 S.E.2d at 475.

178. *Id.* at 423, 568 S.E.2d at 476 (Carley, J., dissenting).

179. 276 Ga. 105, 575 S.E.2d 487 (2003).

180. *Id.* at 105, 575 S.E.2d at 488.

181. *Id.*

182. *Id.* at 106, 575 S.E.2d at 489.

183. *Id.* at 105, 575 S.E.2d at 488.