Appellate Practice and Procedure

by Roland F. L. Hall*

I. INTRODUCTION

This Article surveys noteworthy decisions addressing appellate practice and procedure handed down by the Georgia appellate courts.[1] The reviewed decisions fall into the following categories: (1) appellate jurisdiction; (2) preserving the record; (3) notice of appeal; (4) timeliness of appeal; and (5) miscellaneous cases of interest. Although there were no dramatic developments during the survey period, the courts addressed several topics of interest to the practitioner, particularly in the areas of preserving issues for appeal and correctly drafting the notice of appeal.

II. APPELLATE JURISDICTION

Several cases during the survey period dealt with the sometimes difficult determination of whether an order or judgment is "final" for purposes of filing a direct appeal under section 5-6-34 of the Official Code of Georgia Annotated ("O.C.G.A.").[2] In *Williams v. City of Atlanta*,[3] the administrator of plaintiff's estate moved to be substituted as a party after plaintiff passed away. The trial court denied the motion for substitution because of the administrator's failure to properly serve all defendants with the motion. After plaintiff re-served all defendants,

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1. This Article primarily surveys cases decided during the survey period; however, because no article on this subject area was published in last year's Georgia Survey, this Article also surveys certain relevant decisions decided immediately before the survey period.

2. O.C.G.A. § 5-6-34 (1995).

3. 263 Ga. App. 113, 587 S.E.2d 261 (2003).

plaintiff filed a motion for reconsideration, which was also denied by the trial court. On the basis of O.C.G.A. section 9-11-25(a)(1),[4] which provides for dismissal of an action against a deceased party if a proper party is not substituted within 180 days of the filing of the suggestion of death, plaintiff asserted in its notice of appeal that the trial court's order was, in effect, a final order.[5] The court of appeals disagreed and held that because dismissal was not automatic under the statute, and the trial court did not dismiss the complaint, the trial court's order denying substitution was not a final appealable order.[6] The court of appeals dismissed the administrator's appeal as premature.[7]

In *Standridge v. Spillers*,[8] plaintiff brought a direct appeal from an order denying his motion for default judgment and asserted that his appeal was an appeal of a final judgment.[9] The court of appeals raised the issue of jurisdiction on its own motion.[10] As noted by the court of appeals, the denial of a motion for default judgment was typically an interlocutory ruling that was not directly appealable.[11] In this case, however, the trial court's order made findings of fact that barred the relief requested by plaintiff and left no remaining issues to be resolved. The trial court's order was effectively a final ruling on the merits of plaintiff's action.[12] The court of appeals held that under the circumstances, the trial court's order was a final judgment, and accordingly, the court of appeals had jurisdiction over plaintiff's direct appeal.[13]

In *Morton v. Fuller*,[14] plaintiffs brought an action against their automobile insurer in plaintiffs' county of residence. After the case was transfered to another county, the trial court dismissed plaintiffs' action without prejudice for failure to add a necessary party. Defendant contended the dismissal was not an appealable final judgment, and, in any event, plaintiffs should not be allowed to raise the issue of venue.[15] The court of appeals disagreed and held that although the dismissal without prejudice might allow plaintiffs to recommence the action at a later time, the dismissal was still an appealable final judgment because

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4. O.C.G.A. § 9-11-25(a)(1) (1993).
5. *Williams*, 263 Ga. App. at 114, 587 S.E.2d at 261-62.
6. *Id.* at 114-15, 587 S.E.2d at 262.
7. *Id.*
8. 263 Ga. App. 401, 587 S.E.2d 862 (2003).
9. *Id.* at 401, 403, 587 S.E.2d at 863-64.
10. *Id.* at 402, 587 S.E.2d at 864.
11. *See* Ware v. Handy Storage, 222 Ga. App. 339, 474 S.E.2d 240 (1996).
12. *Standridge*, 263 Ga. App. at 403, 587 S.E.2d at 864.
13. *Id.*
14. 264 Ga. App. 799, 592 S.E.2d 460 (2003).
15. *Id.* at 799, 592 S.E.2d at 460.

no other claims were pending.[16] In addition the court of appeals held that the issue of venue was properly before it because whether the first court erred in granting defendant's motion to transfer was related to plaintiffs' appeal from the "final judgment."[17] Concluding that the transfer of the action was in error, the court of appeals reversed the lower court's decision.[18]

When an appellant seeks review of claimed errors in multiple orders of the trial court, but not all orders are directly appealable, the appellant still has an opportunity to obtain direct review of all its claims of error.[19] For example, in *Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC*,[20] plaintiffs contended that the court of appeals had jurisdiction over only one of defendants' claims of error. That claim of error arose from the trial court's grant of partial summary judgment to plaintiffs, an order that was directly appealable under O.C.G.A. section 9-11-56(h).[21] According to plaintiffs, defendants' other claims of error, including claims arising from the trial court's denial of summary judgment to defendants on other counts of plaintiffs' complaint, were not directly appealable and were improperly "packaged" with the single appealable claim. Thus, these claims could not be reviewed by the court of appeals.[22] The court of appeals, relying upon prior supreme court precedent, held that when a direct appeal is taken, other rulings or orders issued in the case that affect proceedings in the trial court may be raised on appeal.[23] The court of appeals noted that the "rule is designed to avoid 'appellate rule by installment,'"[24] and held that "[b]ecause the 'packaged' claims are sufficiently related to the directly appealable claim and 'may affect the proceedings below,'" it would review all of defendants' claims.[25]

The court of appeals further clarified the ability of non-parties to appeal from orders or judgments affecting their rights.[26] In *BEA*

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16. *Id.* at 800, 592 S.E.2d at 461.
17. *Id.*
18. *Id.* at 801, 592 S.E.2d at 462.
19. Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC, 262 Ga. App. 457, 459, 585 S.E.2d 643, 647 (2003) (citing Southeast Ceramics v. Klem, 246 Ga. 294, 271 S.E.2d 199 (1980)).
20. 262 Ga. App. 457, 585 S.E.2d 643 (2003).
21. O.C.G.A. § 9-11-56(h) (1993).
22. *Schoenbaum*, 262 Ga. App. at 458-59, 585 S.E.2d at 647.
23. *Id.* at 459, 585 S.E.2d at 647 (citing Southeast Ceramics v. Klem, 246 Ga. 294, 271 S.E.2d 199 (1980)).
24. *Id.* (quoting Southeast Ceramics v. Klem, 246 Ga. 294, 295, 271 S.E.2d 199, 200 (1980)).
25. *Id.* (citations omitted).
26. BEA Systems, Inc. v. Webmethods, Inc., 265 Ga. App. 503, 595 S.E.2d 87 (2004).

Systems, Inc. v. WebMethods, Inc.,[27] plaintiff-appellee brought an action under the Georgia Trade Secrets Act of 1990[28] against defendant, a former employee of plaintiff, seeking injunctive relief that would prohibit defendant from using plaintiff's trade secrets in defendant's employment with plaintiff's competitor, a non-party. The trial court entered an interlocutory injunction restraining the competitor without making a finding that the competitor acted in concert with the employee, and the competitor appealed.[29]

Although appellee argued that the competitor, as a non-party to the action, lacked standing to appeal, the court of appeals held that because the injunction directly affected the competitor, the competitor had standing to appeal.[30] The court of appeals based its holding on a series of federal court decisions in which non-parties adversely affected by injunctions were held to have standing to appeal.[31] The court of appeals noted that its conclusion directly followed from the court's prior holding that a non-party becomes a party with standing to appeal when judgment is entered against that party.[32]

III. PRESERVING THE RECORD

The cases decided during the survey period, addressing preservation of error, illustrate the importance of properly preserving issues for appeal. Several of these cases, however, demonstrate that all hope is not lost for appealing an issue, even when such an issue is not directly raised in the trial court. For example, in *Rouse v. Metropolitan Atlanta Rapid Transit Authority*,[33] decided by the court of appeals sitting en banc, plaintiff sued defendants Metropolitan Atlanta Rapid Transit Authority ("MARTA") and Millar (the elevator service company) for negligence from injuries she received in a MARTA station when her foot was caught in a gap at the bottom of the escalator. Plaintiff alleged that defendants were negligent in allowing the escalator to be used when a dangerous condition existed, and that MARTA failed to use reasonable care in monitoring the escalator's condition. Defendants moved for summary judgment, arguing that they had no prior knowledge of the escalator's condition, and that no evidence showed negligence in

27. 265 Ga. App. 503, 595 S.E.2d 87 (2004).
28. O.C.G.A. §§ 10-1-760 to -767 (2000).
29. *BEA Systems*, 265 Ga. App. at 503, 595 S.E.2d at 88.
30. *Id.* at 508-09, 595 S.E.2d at 91.
31. *Id.*, 595 S.E.2d at 92 (citations omitted).
32. *Id.* (citing Travelers Ins. Co. v. Segan, 190 Ga. App. 66, 67, 378 S.E.2d 367 (1989)).
33. 266 Ga. App. 619, 597 S.E.2d 650 (2004).

maintaining the escalator. The trial court granted summary judgment to defendants.[34]

On appeal the court of appeals noted that defendants were subject to the standard of care applicable to common carriers and were thus required to exercise extraordinary diligence to protect plaintiff from the danger of injury.[35] Plaintiff contended that evidence in the record showed that defendants did not exercise extraordinary diligence because defendants failed to install a comb plate switch that would have automatically turned off the escalator and prevented her injury.[36] Defendants contended that because plaintiff failed to raise the "comb plate switch" argument in the trial court, the argument could not be considered by the court of appeals.[37]

Although the court of appeals acknowledged that plaintiff, in response to defendant's summary judgment motion, failed to argue that defendants had a duty to install the switch, the court of appeals nevertheless held that plaintiff's argument could be considered on appeal.[38] The court of appeals held, with no citation to authority, that because plaintiff raised the argument that defendants failed to exercise extraordinary diligence, such argument included any issue of failure to exercise extraordinary diligence raised by the evidence before the trial court.[39] The court of appeals relied upon the deposition testimony of a former employee of one of the defendants, who testified that such a safety switch existed but had not been installed on all escalators in the MARTA system.[40] According to the court of appeals, such evidence in the record, combined with plaintiff's general arguments concerning the standard of care, was sufficient to preserve the issue for appeal.[41] The court of appeals further held that defendants' failure to install such a switch presented a question of fact, and accordingly reversed the judgment of the trial court.[42]

The dissent, comprised of four judges, noted that plaintiff did not allege in her complaint, nor did she argue in response to summary judgment, that defendants had any duty to add a safety feature, such as the comb plate switch, to make the escalator safer than its original

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34. *Id.* at 619, 597 S.E.2d at 652.
35. *Id.* at 620, 597 S.E.2d at 652.
36. *Id.* at 622, 597 S.E.2d at 653-54.
37. *Id.*, 597 S.E.2d at 654.
38. *Id.*
39. *Id.*
40. *Id.* at 621, 597 S.E.2d at 653.
41. *Id.* at 622, 597 S.E.2d at 654.
42. *Id.* at 624, 597 S.E.2d at 654.

design, and that the trial court had never ruled upon the issue.[43] The dissent argued that the claim was not properly raised below and quoted prior authority for the proposition that the purpose behind summary judgment "is thwarted when a party may withhold meritorious legal arguments until appeal."[44] As noted by the dissent, if the rule did not require that all legal issues first be asserted in the trial court, "a party opposing a motion for summary judgment need not raise any legal issue, spend the next year thinking up and researching additional issues for the appellate court to address, and require the opposing party to address those issues within the narrow time frame of appellate practice [rules]."[45]

In contrast to its decision in *Rouse*, the court of appeals in *Designs Unlimited, Inc. v. Rodriguez*[46] reaffirmed the court's traditional reluctance to review arguments not raised before or reviewed by the trial court.[47] In *Rodriguez* the trial court determined that defendant was not subject to personal jurisdiction in Georgia pursuant to O.C.G.A. section 9-10-91(1),[48] which provides for jurisdiction when a nonresident transacts business within the state.[49] On appeal, plaintiff argued that the trial court erred when it failed to consider whether defendant could be subject to jurisdiction under O.C.G.A. section 9-10-91(2),[50] which provides for jurisdiction when a nonresident commits tortious acts within the state.[51] The court of appeals rejected plaintiff's argument, holding that because plaintiff failed to raise such an argument before the trial court, and the trial court's ruling was limited to plaintiff's argument under O.C.G.A. section 9-10-91(1), the court of appeals could not review plaintiff's asserted enumeration of error.[52] The court noted, as it had on prior occasions, that the court would not apply "'a "wrong for any reason" rule to reverse incorrect rulings on issues not raised or ruled upon in the trial court.'"[53]

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43. *Id.* at 627-28, 597 S.E.2d at 657-58 (Andrews, J., dissenting).

44. *Id.* at 628, 597 S.E.2d at 658 (quoting Pfeiffer v. Ga. Dep't of Transp., 275 Ga. 827, 828, 573 S.E.2d 389, 391 (2002)) (Andrews, J., dissenting).

45. *Id.* (Andrews, J., dissenting).

46. 267 Ga. App. 847, 601 S.E.2d 381 (2004).

47. *See* Pfeiffer v. Ga. Dep't of Transp., 275 Ga. 827, 829, 573 S.E.2d 389, 391 (2002).

48. O.C.G.A. § 9-10-91(1) (1982).

49. *Id.*

50. *Id.* § 9-10-91(2).

51. *Id.*

52. *Designs Unlimited*, 267 Ga. App. at 847, 601 S.E.2d at 381.

53. *Id.* at 847-48, 601 S.E.2d at 381 (quoting Lowery v. Atlanta Heart Assoc., 266 Ga. App. 402, 405, 597 S.E.2d 494, 496 (2004)).

The Georgia Supreme Court addressed a similar issue in *McCombs v. Synthes (U.S.A.)*,[54] a medical products liability case. To consider whether the court of appeals erred when it held that plaintiff was precluded from raising on appeal certain arguments concerning the learned intermediary doctrine,[55] the supreme court granted certiorari.[56] The court of appeals based its holding on plaintiff's failure to specifically assert such arguments before the trial court.[57]

Under the learned intermediary doctrine, a manufacturer of pharmaceuticals or medical devices has a duty to warn the patient's doctor of any dangers associated with its products.[58] Asserting the learned intermediary doctrine, defendants moved for summary judgment on plaintiff's failure-to-warn claim because they contended defendant's warning to plaintiff's doctor was sufficient to satisfy any duty to warn, and they owed no duty to plaintiff. The trial court granted summary judgment to defendants.[59]

On appeal plaintiff argued that a jury question existed as to the adequacy of the warning defendants gave to plaintiff's doctor; however, in response to defendant's motion for summary judgment, plaintiff never raised any argument that the warning to her doctor was inadequate. The court of appeals declined to address plaintiff's contention because of plaintiff's failure to raise such contention in the trial court.[60] The supreme court reversed the judgment, holding that the trial court, in granting summary judgment to defendants, must have necessarily concluded that the warning given by defendants to plaintiff's doctor was adequate as a matter of law.[61] The supreme court held that "the adequacy of the warning was an issue raised by [defendant's] motion for summary judgment, and was an issue necessarily resolved adversely to [plaintiff] by the trial court."[62]

The decision in *Torres v. Tandy Corp.*[63] illustrates the care that must be taken to properly preserve errors in jury instructions and verdict forms for review. In *Torres* plaintiff brought a personal injury action against defendants after she was struck while crossing a street by a

54. 277 Ga. 252, 587 S.E.2d 594 (2003).
55. Sterling Drug, Inc. v. Cornish, 370 F.2d 82, 85 (8th Cir. 1966).
56. *McCombs*, 277 Ga. at 252-53, 587 S.E.2d at 594.
57. *Id.* at 253, 587 S.E.2d at 594 (citing McCombs v. Synthes (U.S.A.), 250 Ga. App. 543, 546, 553 S.E.2d 17, 21 (2001)).
58. *Id.*, 587 S.E.2d at 595.
59. *Id.* at 253-54, 587 S.E.2d at 595.
60. *Id.* at 254, 587 S.E.2d at 595.
61. *Id.*, 587 S.E.2d at 595-96.
62. *Id.*, 587 S.E.2d at 596.
63. 264 Ga. App. 686, 592 S.E.2d 111 (2003).

vehicle driven by one of the defendant's employees. The jury found in favor of defendants. On appeal plaintiff contended, in one of her enumerations of error, that the first question on the special verdict form given to the jury was ambiguous and misleading.[64] The court of appeals held that plaintiff waived this enumeration of error by failing to properly and timely object at trial.[65] Although plaintiff objected at trial to the verdict form on the basis of its length and apportionment of damages, plaintiff never raised any objection to the first question on the verdict form. Further, plaintiff failed to object to the form of the question at the time the verdict was returned.[66]

Verification that all evidence relied upon is part of the record is, of course, essential in building an appeal. In *Piedmont Hospital, Inc. v. Reddick*,[67] plaintiff appealed from a grant of summary judgment to defendants. Plaintiff moved the trial court to supplement the record to include discovery materials that the parties relied upon in arguing summary judgment but which were not filed with the trial court before the summary judgment motion was granted.[68] The court of appeals held that because the trial court was required to base its decision on the materials on file in the trial court, the court of appeals, in reviewing the grant of summary judgment, could only consider evidence presented to the trial court before that court's ruling.[69] Accordingly, the court of appeals affirmed the trial court's denial of plaintiff's motion to supplement the record.[70]

In *Wells Fargo Home Mortgage, Inc. v. Cook*,[71] plaintiff Cook sued defendant for, inter alia, wrongful foreclosure and breach of contract. Defendant defaulted, and pursuant to a jury trial on damages for certain claims of plaintiff, plaintiff was awarded $125,000. No trial transcript was ordered or made. After judgment was entered, defendant moved for a new trial on damages, which the trial court denied.[72]

On appeal defendant contended that the jury verdict was excessive, that the award of attorney fees was improper, and that the trial court impermissibly allowed the addition of two individuals as parties to the case.[73] The court of appeals held that because there was no trial

64. *Id.* at 686-87, 592 S.E.2d at 112, 114.
65. *Id.* at 690, 592 S.E.2d at 114.
66. *Id.*
67. 267 Ga. App. 68, 599 S.E.2d 20 (2004).
68. *Id.* at 69, 599 S.E.2d at 23.
69. *Id.* at 69-72, 599 S.E.2d at 23-25.
70. *Id.* at 72, 599 S.E.2d at 25.
71. 267 Ga. App. 368, 599 S.E.2d 319 (2004).
72. *Id.* at 368, 599 S.E.2d at 321.
73. *Id.* at 368-70, 599 S.E.2d at 321-22.

transcript, and defendant "made no attempt to have the trial court make a transcript or a reconstructed transcript of the proceedings approved by the trial judge," the court was required to assume the judgment was correct.[74] The court of appeals determined that "[i]n the absence of a trial transcript, there is nothing to review, and we can not determine if the verdict is excessive . . . ."[75] Because the judgment did not indicate whether attorney fees were awarded or what evidence was considered, the absence of a trial transcript was also fatal to defendant's claimed error as to the award of attorney fees.[76] The court also held that the absence of the trial transcript made it impossible to review defendant's contention concerning the addition of parties, once again noting that defendant had not attempted to have a transcript made or reconstructed.[77]

Absence of the trial transcript also proved decisive in the case of *Martin v. Martin*.[78] After a bench trial on plaintiff's action for trespass, defendant was ordered to stop using plaintiff's land and to pay punitive damages and attorney fees. On appeal defendant argued that the trial court ignored his defense, and that the evidence showed he lacked the requisite intent. In his brief defendant referenced facts contained in his sworn answer but failed to provide a trial transcript.[79] The court of appeals concluded that it had no choice but to assume the trial court had considered defendant's defense and rejected that defense based on all the evidence heard at trial.[80] The court of appeals reversed the award of punitive damages, however, because it could determine from the record that the award of punitive damages was improper.[81]

The absence of a complete record also prevented full review of petitioner's arguments in the supreme court case of *Strykr v. Long County Board of Commissioners*.[82] Petitioner sought to have certain amendments to a county ordinance permanently enjoined and stricken as unconstitutional. Although petitioner's primary arguments concerned the amendments, petitioner also raised constitutional arguments challenging language in the original ordinance.[83] The supreme court held that because only the amendments to the ordinance were placed in

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74. *Id.* at 369, 599 S.E.2d at 321.
75. *Id.*
76. *Id.*
77. *Id.* at 370, 599 S.E.2d at 322.
78. 267 Ga. App. 596, 600 S.E.2d 682 (2004).
79. *Id.* at 597, 600 S.E.2d at 683.
80. *Id.*
81. *Id.* at 598, 600 S.E.2d at 683.
82. 277 Ga. 624, 593 S.E.2d 348 (2004).
83. *Id.* at 624-26, 593 S.E.2d at 349.

the record, the court could not address any arguments challenging the original ordinance because it could not take judicial notice of a county ordinance that had not been alleged or proved.[84]

IV. NOTICE OF APPEAL

The required contents of the notice of appeal for both the supreme court and the court of appeals are set forth in O.C.G.A. section 5-6-37,[85] and include, inter alia, a concise statement of the judgment, ruling, or order from which the appeal is taken.[86] In preparing a notice of appeal, the appellant must take care to fully describe each order of the trial court that he or she intends to appeal, or otherwise risk waiving issues on appeal. In *Bowers v. Lee*,[87] plaintiffs, who had brought claims against defendants for, inter alia, medical negligence, appealed from an order granting summary judgment to defendants. In their notice of appeal, plaintiffs stated that the motion appealed from was the order granting summary judgment. On appeal plaintiffs contended that the trial court should have granted their motion to enter a default judgment against one of the defendants.[88] Although plaintiffs argued the issue of the propriety of the default judgment in their brief, the court of appeals held that plaintiffs waived consideration of the issue on appeal because their notice of appeal failed to reference the order denying the motion for default judgment.[89]

In its analysis the court of appeals noted that the summary judgment order, from which plaintiffs appealed, referenced a prior order dismissing several of plaintiffs' claims, but did not reference the order denying the motion for default judgment, which had been entered the same day as the order granting dismissal.[90] Presumably, if the summary judgment order had referenced the order denying the motion for default judgment, the court of appeals would have held this reference sufficient to meet the "specification" requirement, and plaintiffs could have avoided waiver.[91]

Failure to properly specify all orders appealed from also spelled defeat for the appellant in *Miller v. Miller*.[92] In his appellate brief, appellant argued that the trial court erred in denying his motion for reconsidera-

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84. *Id.* at 626, 593 S.E.2d at 350.
85. O.C.G.A. § 5-6-37 (1995).
86. *Id.*
87. 259 Ga. App. 382, 577 S.E.2d 9 (2003).
88. *Id.* at 384, 577 S.E.2d at 11.
89. *Id.*
90. *Id.*
91. *Id.*
92. 262 Ga. App. 546, 586 S.E.2d 36 (2003).

tion and his motion to amend the pre-trial order. Both orders were related to the trial court's grant of summary judgment to defendant/appellee.[93] Because appellant sought review in his notice of appeal only of the order granting defendant's motion for summary judgment, the court of appeals held that appellant waived consideration of any issues arising from any other orders of the trial court.[94]

The appellant in *Patel v. Burt Development Co.*[95] enjoyed better fortune when appellee failed to prevail on his argument that appellant's notice of appeal was deficient for failing to specifically identify the order being appealed. The trial court directed a verdict in favor of plaintiff/appellee on a breach of contract claim, and appellant, in his notice of appeal, referred to a "final judgment on the question of liability."[96] Appellee filed a motion to dismiss the appeal pursuant to O.C.G.A. section 5-6-37,[97] contending that appellant's notice of appeal did not sufficiently identify the order from which appeal was taken.[98] The court of appeals held that even when the notice of appeal fails to specifically designate the order from which an appeal is being taken, when the identity of the order is apparent from any or a combination of the notice of appeal, the record, or the enumeration of errors, the appeal will be considered.[99] Because it was obvious from the record that appellant was appealing from the order directing a verdict, the court of appeals denied appellee's motion to dismiss the appeal.[100]

O.C.G.A. section 5-6-37 also requires that the notice of appeal include a designation of those portions of the record to be omitted from the record on appeal.[101] As demonstrated by *Moulton v. Wood*,[102] care should be taken when deciding to omit parts of the record.[103] The court of appeals affirmed the trial court's grant of summary judgment to appellee on the basis that appellant failed to include all material evidence in the record on appeal.[104] Appellant, in her notice of appeal, requested that the clerk include only the complaint, amended complaint,

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93. *Id.* at 550, 586 S.E.2d at 40.
94. *Id.* at 549-50, 586 S.E.2d at 40.
95. 261 Ga. App. 436, 582 S.E.2d 495 (2003).
96. *Id.* at 438, 582 S.E.2d at 497.
97. O.C.G.A. § 5-6-37 (1995).
98. *Patel*, 261 Ga. App. at 438, 582 S.E.2d at 497.
99. *Id.*
100. *Id.*
101. O.C.G.A. § 5-6-37.
102. 265 Ga. App. 389, 593 S.E.2d 911 (2004).
103. *Id.* at 389, 593 S.E.2d at 912.
104. *Id.* at 389-90, 593 S.E.2d at 912.

and filings after appellee's motion for summary judgment.[105] The court noted that the notice of appeal was improper in form because appellant listed those items to be included in the record rather than designating portions of the record to be omitted on appeal.[106] Accordingly, the court of appeals held that because discovery responses, an affidavit, and a deposition cited in the summary judgment documents were not in the record, the court was required to presume that the superior court record supported the grant of summary judgment in favor of appellee.[107] The court of appeals further noted that "appellants who omit portions of the record which they view as not pertaining to any issue on appeal create a probably fatal defect in their appeals."[108]

V. TIMELINESS OF APPEAL

At issue in *Craig v. Holsey*[109] was whether a void motion for new trial extended the time for filing a notice of appeal. After judgment was entered against defendant, defendant filed a timely motion for new trial, which was dismissed because of defendant's failure to perfect service of his motion by obtaining and serving a rule nisi. Defendant filed his notice of appeal within thirty days after dismissal of the motion for new trial but more than thirty days after entry of judgment, and plaintiff moved to dismiss the appeal on the basis of untimely filing of the notice of appeal.[110]

The court of appeals, after holding that the motion for new trial was clearly void for failure to perfect service, noted that a motion for new trial that is void because of untimely filing does not toll the time for filing a notice of appeal.[111] However, when the motion for new trial is timely filed but void on some other basis, such as failure to perfect service, the motion for new trial does toll the time period for filing a notice of appeal.[112] Pursuant to O.C.G.A. section 5-6-38(a),[113] the trial court's order dismissing the motion for new trial is considered an order disposing of the motion.[114] The court of appeals concluded that because the notice of appeal was timely, it could consider plaintiff's

105. *Id.* at 389, 593 S.E.2d at 912.
106. *Id.*
107. *Id.* at 389-90, 593 S.E.2d at 912.
108. *Id.* at 389, 593 S.E.2d at 912.
109. 264 Ga. App. 344, 590 S.E.2d 742 (2003).
110. *Id.* at 344-45, 590 S.E.2d at 744-45.
111. *Id.*, 590 S.E.2d at 745.
112. *Id.* at 345, 590 S.E.2d at 745.
113. O.C.G.A. § 5-6-38(a) (1995).
114. *Craig*, 265 Ga. App. at 344, 590 S.E.2d at 745.

appeal from the verdict and judgment and from the order dismissing plaintiff's motion for new trial.[115]

In *Willis v. City of Atlanta*,[116] the trial court entered two interlocutory orders granting the defendant partial summary judgment on several of the plaintiff's claims and ultimately granted summary judgment to defendant on plaintiff's remaining claims. Plaintiff timely filed a notice of appeal from the final order granting defendant summary judgment. Defendant argued that because plaintiff failed to initiate separate appeals for each of the interlocutory orders within thirty days after each order's entry, plaintiff's appeal from those orders was untimely.[117] The court of appeals disagreed and held that under O.C.G.A. section 9-11-56(h),[118] no separate appeal of the interlocutory orders is required.[119] The court of appeals further held that because the orders appealed from granted partial summary judgment to the defendant, plaintiff's appeal fell under the "exception to the finality rule,"[120] provided by O.C.G.A. section 9-11-56(h), which allows a party, against whom summary judgment was granted, to appeal either after the grant of summary judgment or after the rendition of the final judgment.[121]

VI. MISCELLANEOUS

A. The "Two Term" Rule

In *In re Amar Pal Singh*,[122] the supreme court clarified that the "two term" rule does not apply in every case.[123] Under that rule, which is established in the Georgia Constitution,[124] both the supreme court and the court of appeals are required to "dispose of every case at the term for which it is docketed on the court's docket for hearing or at the next term."[125] Petitioner Singh failed to achieve a passing score on the Georgia bar examination and appealed on the basis that the method of computing scores violated the Rules Governing Admission to the Practice

115. *Id.* at 345, 590 S.E.2d at 745.
116. 265 Ga. App. 640, 595 S.E.2d 339 (2004).
117. *Id.* at 640, 595 S.E.2d at 341.
118. O.C.G.A. § 9-11-56(h) (1993).
119. *Willis*, 265 Ga. App. at 640-41, 595 S.E.2d at 341.
120. *Id.* (quoting Culwell v. Lomas & Nettleton Co., 242 Ga. 242, 243, 248 S.E.2d 641, 642 (1978)).
121. *Id.*
122. 276 Ga. 288, 576 S.E.2d 899 (2003).
123. *Id.* at 290, 576 S.E.2d at 901.
124. GA. CONST. art. VI, § 9, para. 2.
125. *Id.*

of Law[126] in Georgia. Singh argued that because the supreme court did not dispose of his appeal during the term of court in which it was filed or during the following term, he should be admitted to the practice of law by default.[127] The supreme court held that the "two term" rule applies to cases falling within the court's general and exclusive appellate jurisdiction, but the rule does not apply to cases filed in furtherance of the court's exercise of its inherent authority to regulate the practice of law in Georgia.[128] The supreme court noted that, in any case, the only remedy for a court's failure to comply with the "two term" rule is affirmance of the lower court's judgment by operation of law.[129]

B. Court Rules

Although, on occasion, the appellate courts might overlook minor errors of form, strict adherence to format requirements is the best and safest policy. Failure to do so can, in extreme cases, lead to waiver of arguments on appeal. In *Vaughn v. Metropolitan Property & Casualty Insurance Co.*,[130] the court of appeals chastised appellant for "citing to the record sparingly in her statement of facts," failing to number the pages in her brief, failing to state how each enumeration of error was preserved for consideration, and failing to provide a concise statement of the applicable standards of review.[131] The court of appeals also noted that the sequence of argument in appellant's brief did not follow the sequence of the enumerations of error.[132] More seriously, because the appellant failed to support with argument certain of her enumerations of error, the court deemed abandoned all issues reasonably contained within such unsupported enumerations of error.[133] Additionally, the court held that because the argument presented in support of another enumeration of error merely restated the enumeration of error and failed to cite authority, such enumeration of error, under Court of Appeals Rule 27(c)(2),[134] was deemed abandoned.[135]

Even when a party ensures that all evidence necessary to support its appeal or defense of an appeal is in the record, properly citing such evidence can prove essential. As the court of appeals has noted on

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126. GA. R. GOV'G ADMIS. PRAC. LAW (2004).
127. *Singh*, 276 Ga. at 290, 576 S.E.2d at 901.
128. *Id.*, 576 S.E.2d at 900-01.
129. *Id.* at 290 n.3, 576 S.E.2d at 901 n.3.
130. 260 Ga. App. 573, 580 S.E.2d 323 (2003).
131. *Id.* at 574, 580 S.E.2d at 325.
132. *Id.*, 580 S.E.2d at 325-26.
133. *Id.*
134. GA. APP. R. 27(c)(2).
135. *Vaughn*, 260 Ga. App. at 574, 580 S.E.2d at 326.

several occasions in the past few years, from the court's perspective, "'[a]ppellate judges should not be expected to take pilgrimages into records in search of error without the compass of citation and argument.'"[136]

In *Bonner v. Brunson*,[137] the court of appeals refused to sift through a voluminous record in search of evidence cited by plaintiff in his brief.[138] Plaintiff, a subcontractor, brought suit against defendants, an LLC and its owner, to collect money allegedly owed for roofing work plaintiff had performed. Plaintiff claimed that the individual defendant was personally liable for the LLC's debt by virtue of disregarding the corporate form. Plaintiff argued that six payments made by the LLC to a separate corporation owned by the individual defendant constituted evidence of disregarding the corporate form.[139] Citing Court of Appeals Rule 27(c)(3),[140] the court of appeals declined to consider the payments, noting that:

> In support of this contention, [plaintiff] argues only that there is an absence of evidence showing what the payments were for and cites to a 28-page list of checks in the record showing about a thousand checks written by the LLC for various purposes on the project, apparently hoping we will sift through all the checks to find and address the six or more payments.[141]

In the absence of any evidence showing abuse of the corporate form, the court of appeals affirmed the judgment.[142]

C. Mandamus

In *Titelman v. Stedman*,[143] appellant found herself in the unusual situation of being unable to appeal from the court's order because of the lack of a written order. After appellant lost custody of her children, she attempted to file a petition for adjudication of deprivation with the juvenile court. The juvenile court judge denied filing of the petition and refused to sign any order documenting the denial of the filing. As a result appellant could not appeal. Appellant then filed a petition for

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136. Vick v. Tower Place, L.P., 268 Ga. App. 108, 109, 601 S.E.2d 348 (2004) (quoting Rolleston v. Estate of Sims, 253 Ga. App. 182, 185, 558 S.E.2d 411 (2001)) (citation omitted).

137. 262 Ga. App. 521, 585 S.E.2d 917 (2003).

138. *Id.* at 523, 585 S.E.2d at 919.

139. *Id.* at 521, 523, 585 S.E.2d at 918-19.

140. GA. APP. R. 27(c)(3).

141. *Bonner*, 262 Ga. App. at 523, 585 S.E.2d at 919.

142. *Id.* at 523-24, 585 S.E.2d at 919.

143. 277 Ga. 460, 591 S.E.2d 774 (2003).

mandamus seeking an order requiring the juvenile court judge to enter a written order, but the petition was denied.[144] On appeal the supreme court initially noted the well established principle that an oral order is neither final nor appealable until reduced to writing, signed by the judge, and filed with the clerk, because without a judgment in writing, the appellate court has no question to decide.[145] The supreme court held that this principle applies whether a trial court issues an oral ruling on the merits or orally denies the filing of a petition or other pleading.[146] The court concluded that trial courts "have a clear legal duty to enter all of their judgments, including those which deny the filing of an initial pleading."[147] The court held that mandamus was appropriate to compel the juvenile court to enter a written order from which an appeal could be taken.[148]

D. Verified Pleadings

Although not technically a case addressing appellate procedure, the case of *Keyser v. Allied Holdings, Inc*.[149] is of interest to any trial attorney attempting to avoid creating issues that could derail a case on appeal. In *Keyser* plaintiff filed a verified complaint for injunctive relief and damages against defendant, a former employee, on the basis of violation of an employment contract. The trial court granted summary judgment to plaintiff on liability. Defendant appealed, contending the complaint was not properly verified.[150] The court of appeals agreed and held that plaintiff's statement that the facts were true to the best of the knowledge and belief of plaintiff's corporate officer was "just a variation of our old friend 'information and belief'" and did not demonstrate the personal knowledge necessary to verify the complaint for summary judgment purposes.[151] Because no other evidence in the record supported the trial court's grant of summary judgment to plaintiff, the court of appeals reversed the judgment.[152]

144. *Id.* at 460, 591 S.E.2d at 775.
145. *Id.* at 461, 591 S.E.2d at 775.
146. *Id.* at 461-62, 591 S.E.2d at 775.
147. *Id.* at 462, 591 S.E.2d at 775.
148. *Id.*, 591 S.E.2d at 776.
149. 266 Ga. App. 192, 596 S.E.2d 713 (2004).
150. *Id.* at 192, 596 S.E.2d at 714.
151. *Id.* at 193, 596 S.E.2d at 714-15.
152. *Id.*