Trial Practice and Procedure

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I. INTRODUCTION

This survey period included significant legislative changes and yielded several interesting and important decisions to practitioners who prepare and try cases. This Article addresses judicial opinions that cover, among other topics that interest the trial practitioner, issues of damages, discovery, products liability, torts, standing, and sovereign immunity. The Article also highlights important changes in Georgia's statutory law that significantly impact trial practice.

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II. LEGISLATION

A. *Senate Bill 3*

By far, the most significant event for trial practitioners during the survey period was the passage of Senate Bill 3 ("SB 3") by the Georgia General Assembly.[1] At least as stunning as the radical, ill-advised changes to age-old Georgia tort law were the countless examples of poor draftsmanship and a seeming contempt for basic thoughtfulness found in this bill's language. It is beyond the scope of this survey to discuss each provision of SB 3 in detail. The authors briefly address the most significant aspects of this tort reform legislation from the perspective of trial lawyers affected by these changes.

1. Adoption of *Daubert* Rule for Experts. Of all the changes made by SB 3, the supposed adoption of the *Daubert*[2] rule for determining whether an expert witness is competent to testify may be the most significant to trial practitioners.[3] Any practitioner who has dealt with *Daubert* motion practice in federal court can attest to the fact that adoption of this standard in Georgia civil cases will increase litigation costs and decrease efficiency. Perhaps that is why the Georgia appellate courts consistently rejected *Daubert*.[4]

Prior to the adoption of SB 3, the general rule allowed admission of expert testimony, and the finder of fact evaluated the basis of the opinion in determining the weight to give the evidence.[5] Under the new law, the burden of evaluating expert testimony shifts to the trial judge, who the law literally requires to become an expert in the given field.[6] The trial judge effectively becomes the last word on whether or not the proffered testimony meets the test of scientific reliability.[7]

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1. Ga. S. Bill 3, Reg. Sess. (2005).
2. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
3. *See* O.C.G.A. § 24-9-67.1 (Supp. 2005).
4. *See* Orkin Exterminating Co. v. McIntosh, 215 Ga. App. 587, 592-93, 452 S.E.2d 159, 165 (1994); Jordan v. Ga. Power Co., 219 Ga. App. 690, 692-93, 466 S.E.2d 601, 604-05 (1995); Norfolk S. Ry. Co. v. Baker, 237 Ga. App. 292, 294, 514 S.E.2d 448, 451 (1999).
5. *See* O.C.G.A. § 24-9-67 (1995) (providing that "[t]he opinions of experts on any question of science, skill, trade, or like questions shall always be admissible . . . ."), *amended by* 2005 Ga. Laws 1, § 7 (stating "[*i*]*n criminal cases*, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible . . . .") (emphasis added).
6. *See* Ga. S. Bill 3, Reg. Sess. (2005).
7. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 139 (1997) (holding that the standard of review for a trial judge's *Daubert* ruling is abuse of discretion).

Although federal courts have been known to hold multi-week, marathon hearings sorting through every item of evidence relied upon by proffered experts, no provision of federal law suggests such a procedure. Georgia's new law, however, goes a step further than the federal law. Official Code of Georgia Annotated ("O.C.G.A.") section 24-9-67.1(d)[8] actually provides for a pretrial hearing to determine whether a given expert is qualified to testify, or whether the proffered testimony satisfies the *Daubert* standard, or both.[9]

Subsection (c)[10] also differs from the federal *Daubert* counterpart. This subsection sets forth additional requirements for qualifying experts in professional malpractice actions relating to both the credentials of the proferred expert and the professional defendant.[11] Any practitioner who plans to bring a professional malpractice case must look at this provision first thing and make sure that the prospective expert meets the requirements because, if not, the expert's testimony is inadmissible no matter how qualified she may otherwise be.[12]

The most interesting language contained in the new section deserves to be quoted. In subsection (f),[13] the legislature declared that "[i]t is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states."[14] How does a trial court begin to apply such a statement? For instance, must expert evidence be excluded if it would be excluded in the courts of any *two* "other states?" What if forty-seven other states admit the evidence? Can the trial court prevent Georgia from being "viewed as open to [certain] expert evidence" by merely filing unpublished opinions that cannot be "viewed" by anyone? This might be the first time in history that courts have been directed to consider what other people might think before entering an order. One must wonder which legislator is actually responsible for drafting this curious, and no doubt singularly unique, legislative pronouncement. If one ever asks why we need lawyers in the legislature, please be sure to cite this curious provision as exhibit number one. Trial practitioners and trial courts will be forced to sort through these puzzling issues.

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8. O.C.G.A. § 24-9-67.1(d).
9. *Id.*
10. *Id.* § 24-9-67.1(c).
11. *Id.*
12. *Id.*
13. *Id.* § 24-9-67.1(f).
14. *Id.*

2. Joint and Several Liability. According to word on the street, SB 3 abolished joint and several tort liability in Georgia. That is the result clearly intended by the many lobbyists and special interests that worked so hard to get the bill passed. The actual language of the enactment, however, seems to strengthen Georgia's joint and several liability.[15]

Prior to SB 3, Georgia law distinguished between two different scenarios: (1) if the plaintiff was not at fault, liability among multiple defendants was joint and several, and (2) if the plaintiff was, to some degree, at fault for causing his injuries, liability among multiple defendants was several, not joint.[16] Scenario number one was, and still is, controlled by O.C.G.A. section 51-12-31,[17] while scenario number two is controlled by O.C.G.A. section 51-12-33.[18]

Because prior Georgia law only preserved joint and several liability under scenario number one, let us examine whether SB 3 changes anything. The old provision stated that, "where an action is brought jointly against several trespassers, the plaintiff may recover damages for the greatest injury done by any of the defendants against all of them."[19] The new provision provides that "where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury."[20]

How does this new language abolish joint and several liability? Under this new statement of the law, a plaintiff "may recover damages for an injury caused by *any* of the defendants" from the "defendants liable for the injury."[21] This statement is consistent with joint and several liability for indivisible injuries. A defendant who is five percent responsible for an indivisible injury is still, indisputably, "liable for the injury."[22] Therefore, an innocent plaintiff can still recover his damages from any such defendant that is "liable for the injury."[23] The legislature could have easily stated that the liability of multiple tortfeasors

15. *See* Michael L. Wells, *Joint Liability Rules*, 39 GA. L. ADVOC. 2, Spring/Summer 2005, at 18 (noting that supposed changes to joint and several liability are nowhere to be found in the actual legislation).
16. O.C.G.A. § 51-12-31 (2000).
17. *Id.*
18. O.C.G.A. § 51-12-33 (2000 & Supp. 2005).
19. O.C.G.A. § 51-12-31 (2000).
20. O.C.G.A. § 51-12-31 (2000 & Supp. 2005).
21. *Id.* (emphasis added).
22. *Id.*
23. *Id.*

shall be several, not joint, like it did in O.C.G.A. section 51-12-33 under scenario number two, but it chose not to.[24]

The continued existence of O.C.G.A. section 51-12-32,[25] authorizing contribution among joint tortfeasors, provides further support for the notion that joint and several liability has not been abolished.[26] If joint and several liability is abolished, the statute authorizing contribution among joint tortfeasors becomes mere surplusage.[27]

The statute actually strengthens joint and several liability by removing the confusing language from the previous law authorizing the plaintiff to recover damages "for the greatest injury done by any of the defendants against all of them."[28] Taken literally, the former language required hairsplitting the indivisible injury to determine which defendant inflicted "the greatest injury" and then allowing joint and several liability only as to that amount[29]—an obviously non-sensical result.

In scenario number two, when the plaintiff is partially at fault, SB 3 creates a mess. Not only is liability still several, not joint, but the new law creates a zany procedure whereby a defendant can purportedly blame absent tortfeasors for a percentage of the harm to the plaintiff, so as to reduce the liability of the tortfeasors before the court.[30] The statute is curiously silent as to the trial procedures for accomplishing this result. For instance, who bears the burden of proof for the absent tortfeasor's liability? What defenses can be asserted on behalf of the absent tortfeasor and by whom? The statute does not even state the standard of liability as to the non-party, i.e., must the defendant seeking to reduce its own liability prove duty, breach, causation, and damages, or something less? The statute is silent.

3. Venue. SB 3 brings back "vanishing venue" after a mere six-year absence.[31] This oddity of Georgia venue law was abolished by the legislature in 1999, but SB 3 re-invigorates it. Once again, if a plaintiff sues two joint tortfeasors in the county of residence of one but not the other and fails to obtain a verdict against the resident defendant, venue

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24. *Id.*
25. O.C.G.A. § 51-12-32 (2000).
26. *See* Wells, *supra* note 15, at 18.
27. *Id.*
28. O.C.G.A. § 51-12-31 (2000).
29. *Id.*
30. *See* O.C.G.A. § 51-12-33(c) (2000 & Supp. 2005).
31. O.C.G.A. § 9-10-31(d) (1982 & Supp. 2005).

"vanishes."[32] This is true even if the plaintiff obtained a verdict and judgment against the non-resident defendant.[33]

What if two defendants from different counties are both liable? Under article VI, section 2, paragraph 4 of the Georgia Constitution, "[s]uits against . . . joint tort-feasors . . . residing in different counties may be tried in either county."[34] If SB 3 truly abolished joint and several liability, then is there no longer such a thing as a "joint tort-feasor" under Georgia law? Must all defendants be sued separately now in their home counties? Or does the constitutional provision recognizing joint tortfeasors trump any statutory attempt at abolishing joint liability? Did the legislature even consider these questions?

The legislation creates forum non conveniens for the first time in Georgia history.[35] It also allows for venue transfer by a medical malpractice defendant to the defendant's home county if the tortious act giving rise to the lawsuit occurred in that county.[36] This provision is constitutionally suspect because the Georgia Supreme Court has previously ruled that a statute cannot limit the venue options available under the Georgia Constitution.[37]

4. Offer of Judgment. For the first time under Georgia law, O.C.G.A. section 9-11-68 creates an "offer of judgment" rule.[38] The problem with Georgia's special version of this rule, however, is that not even a law professor can figure it out.[39] The law seems to set forth a sort of "loser pays" rule. It provides procedures for the plaintiffs and the defendants to make an offer of judgment or settlement prior to trial.[40] If the offer of judgment is not beaten by a certain mathematical margin, then the "loser" must pay the offering party's attorney fees and litigation expenses.[41] Simple so far? Well, let us read on.

How is a "loser" defined? Well, it depends on whether one reads subsection (b) or subsection (d)(1).[42] The mathematical formula for

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32. *Id.*
33. *Id.*
34. GA. CONST. art. VI, § 2, para. 4.
35. *See* O.C.G.A. § 9-10-31.1(a) (Supp. 2005).
36. *Id.* § 9-10-31(c) (1982 & Supp. 2005).
37. Glover v. Donaldson, 243 Ga. 479, 482-83, 254 S.E.2d 857, 859-60 (1979).
38. O.C.G.A. § 9-11-68 (Supp. 2005).
39. *See* Lonnie T. Brown, Jr., *Offers of Judgment*, 39 GA. L. ADVOC. 2, Spring/Summer 2005, at 15 (describing the confusing nature of Federal Rule of Civil Procedure 68 as "child's play" compared to Georgia's new law).
40. O.C.G.A. § 9-11-68.
41. *Id.*
42. *Id.* § 9-11-68(b), (d)(1).

determining when one's obligation to pay is triggered is different in the two subsections. In subsection (b), the "loser's" obligation arises if the judgment is not at least twenty-five percent more favorable than the offer.[43] In subsection (d)(1), the obligation to pay arises if the offer of judgment was twenty-five percent more favorable than the judgment.[44] Without getting into the math, these two formulas have different numerators and denominators, so they will never be equal. Real scenarios exist in which both parties could be entitled to receive attorney fees and litigation expenses from the other side.

A problem for plaintiff lawyers is this: how does one respond to an offer of judgment under the statute? In typical negotiations, the plaintiff starts high and the defendant starts low. The parties then work toward a middle ground and, possibly, a settlement. Can a plaintiff afford to do that now, if the defendant continues to make offers of judgment? Every time the defendant makes a higher offer of judgment, the defendant becomes more likely to prevail on its claim under this statute.[45] Would it ever be in the plaintiff-client's best interests to negotiate under these circumstances, knowing that negotiations could render the client liable for the defendant's attorney fees and litigation expenses?

The authors suggest that plaintiff lawyers consider these implications carefully. Perhaps any time the defendant in a tort suit solicits settlement negotiations, the plaintiff's counsel should demand that the defendant waive, in writing, any claims under the offer of judgment rule. By doing so, the negotiation does not harm the client.

5. Other Provisions of SB 3. In SB 3, the General Assembly also placed caps on noneconomic damages in medical malpractice cases.[46] The cap is $350,000 per claimant against medical providers, no matter how many providers are liable.[47] The cap is $350,000 per claimant against any one medical facility, with an aggregate cap of $700,000 per claimant against multiple liable medical facilities.[48] The aggregate cap per claimant against all possible medical malpractice defendants is $1,050,000.[49] Finally, if future damages exceed $350,000, upon request, the trial court may order that the amount be paid in the form of periodic payments funded by an annuity.[50]

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43. *Id.* § 9-11-68(b).
44. *Id.* § 9-11-68(d)(1).
45. *Id.* § 9-11-68.
46. O.C.G.A. § 51-13-1 (Supp. 2005).
47. *Id.* § 51-13-1(b).
48. *Id.* § 51-13-1(d).
49. *Id.* § 51-13-1(e).
50. *Id.* § 51-13-1(f).

III. CASE LAW

A. *Damages*

In what may be a record, *Security Life Insurance Co. v. St. Paul Fire & Marine Insurance Co.*[51] made its *eighth* appearance before a Georgia appellate court.[52] This time, the Georgia Supreme Court addressed the Unliquidated Damages Interest Act,[53] which governs prejudgment interest awarded if the amount of the judgment exceeds the amount demanded.[54] The supreme court determined that set-offs for payments by co-tortfeasors should be subtracted when determining the amount on which an interest award should be based.[55] The court also held that an award of attorney fees which was later vacated was not part of the award,[56] and further ruled that the time period for calculating the post-judgment interest ran from the date of entry of the original judgment, even though that award was eventually vacated and modified.[57]

B. *Torts*

In response to a certified question from the Eleventh Circuit Court of Appeals, the Georgia Supreme Court addressed an issue of first impression in *CSX Transportation, Inc. v. Williams*,[58] holding that "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace."[59] The plaintiff argued that the employer owed a duty because "where one by his own act, although without negligence on his part, created a dangerous situation, he is under a duty to remove the hazard or give warning of the danger so as to prevent others from being injured where it is reasonable for[e]seeable that this will occur."[60] The court rejected the argument, noting that this case did not involve CSX Transporation, Inc. "spreading asbestos dust among the general population, thereby

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51. 278 Ga. 800, 606 S.E.2d 855 (2004).
52. *Id.* at 800, 606 S.E.2d at 857.
53. O.C.G.A. § 51-12-14(a) (Supp. 2005).
54. *Security Life Ins. Co.*, 278 Ga. at 800, 606 S.E.2d at 857 (citing O.C.G.A. § 51-12-14(a)).
55. *Id.* at 800-01, 606 S.E.2d at 857-58.
56. *Id.* at 802, 606 S.E.2d at 858.
57. *Id.* at 803, 606 S.E.2d at 859.
58. 278 Ga. 888, 608 S.E.2d 208 (2005).
59. *Id.* at 891, 608 S.E.2d at 210.
60. *Id.* (quoting United States v. Aretz, 248 Ga. 19, 26, 280 S.E.2d 345, 350-51 (1981)).

creating a dangerous situation in the world beyond the workplace."[61] The court instead felt that the policy considerations more appropriately supported the rationale that "an employer's duty to provide a safe workplace does not extend to persons outside the workplace," period.[62] As persuasive authority for its decision, the court pointed to the New York case of *Widera v. Ettco Wire & Cable Corp.*[63] and declined "to extend on the basis of foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace."[64] In *Widera* the New York court declined to extend the employer's liability "where a worker's clothing was contaminated at the workplace by lead dust and chemicals with which his wife came into contact when she washed them, contact that was alleged to have caused birth defects in their child with whom she was pregnant at the time."[65]

Despite recognizing that a subsequent New York decision addressing a factual scenario nearly identical to the facts of *Williams*, the court in *In re New York City Asbestos Ligitation*[66] retreated from the position it took in *Widera* and found it was error to hold that an employer "owed no duty of care to the wife as a matter of law on the ground that an employer's duty to provide employees with a safe workplace did not extend to non-employees exposed to asbestos off premises."[67] The Georgia Supreme Court held that the policy of refusing to extend employer liability to persons who are neither employees nor employed at the worksite, as enunciated in *Widera*, remains valid.[68] In dealing with claims for employer liability, the trial practitioner should be cognizant that, at times, the normal rules of foreseeability do not appear to apply.

In *Dolphin Realty v. Headley*,[69] a landlord liability case with bizarre and tragic facts, the Georgia Court of Appeals applied the settled principle that a "tenant will be precluded from recovery, even where such prior acts are known to the landlord . . . when he or she has equal or superior knowledge of the risk and fails to exercise ordinary care for

61. *Id.* at 891, 608 S.E.2d at 210.
62. *Id.* (quoting United States v. Aretz, 248 Ga. 19, 26, 280 S.E.2d 345, 350-51 (1981)).
63. 204 A.D.2d 306 (N.Y. App. Div. 1994).
64. *Williams*, 278 Ga. at 890-91, 608 S.E.2d at 210.
65. *Id.* at 891, 608 S.E.2d at 210 (citing *Widera*, 204 A.D.2d 306).
66. 14 A.D.3d 112 (N.Y. App. Div. 2004) (involving a "wife alleging injury from asbestos brought home on her husband's work clothes").
67. *Id.* at 113.
68. *Williams*, 278 Ga. at 892, 608 S.E.2d at 210.
69. 271 Ga. App. 479, 610 S.E.2d 99 (2005).

his or her own safety."[70] A more cryptic set of facts for application of this settled principle could not be envisioned, as in this case the tenant's "superior knowledge" resulted from the fact that the tenant, Headley, had previously been attacked by the same person who, at the time of the first attack, "told Headley he would give her some advice—'not to go out after dark and not to do laundry after dark.'"[71] In a factually accurate but nonetheless startling statement, the court of appeals stated in a matter-of-fact fashion that summary judgment was appropriate because "[h]ere, after being told by the assailant not to continue to do laundry after dark, Headley proceeded to do just that, knowing her belief, as alleged here, that the lighting was insufficient and foliage interfered with some lighting."[72]

In *MARTA v. Rouse*,[73] the supreme court shed some light on what constitutes "extraordinary care" with regard to common carrier liability.[74] The court held that "a common carrier, in exercising extraordinary care, must stay informed of safety advances in product design, but is not held to a *per se* rule that requires those carriers to buy and incorporate those safety advances into previously-purchased, non-defective products."[75]

In *Fortner v. Town of Register*,[76] the supreme court held that the Georgia Code of Public Transportation[77] does not preempt the common law,[78] and thus the "duty to maintain protective devices and the duty not to obstruct vision at a crossing" remain in effect.[79] In this wrongful death action, the plaintiff alleged that the defendants failed to keep the railroad right-of-way clear of visual obstructions caused by overgrown vegetation.[80] The court held that planted vegetation may constitute a "structure" as used in O.C.G.A. section 32-6-51,[81] which "prohibits the

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70. *Id.* at 481, 610 S.E.2d at 102 (quoting Habersham Venture v. Breedlove, 244 Ga. App. 407, 409-10, 535 S.E.2d 788, 790 (2000)).

71. *Id.* at 479, 610 S.E.2d at 101.

72. *Id.* at 482, 610 S.E.2d at 103.

73. 279 Ga. 311, 612 S.E.2d 308 (2005).

74. *Id.* at 312, 612 S.E.2d 309.

75. *Id.* at 315, 612 S.E.2d at 311.

76. 278 Ga. 625, 604 S.E.2d 175 (2004).

77. O.C.G.A. § 32-6-51(b) (2001 & Supp. 2005).

78. *Fortner*, 278 Ga. at 625-26, 604 S.E.2d at 178.

79. *Id.* at 627, 604 S.E.2d at 178. *Fortner* overruled *Evans Timber Co. v. Central of Georgia Railroad Co.*, 239 Ga. App. 262, 519 S.E.2d 706 (1999), in which the court held that "O.C.G.A. [section] 32-6-200 preempted the common-law duty of railroads to initiate and authorize the installation of protective devices at grade crossings on public roads." *Fortner*, 278 Ga. at 626, 604 S.E.2d at 178.

80. *Id.* at 625, 604 S.E.2d at 177.

81. O.C.G.A. § 32-6-51 (2001 & Supp. 2005).

placement or maintenance of structures visible from public roads which . . . obstruct views in a hazardous manner."[82] In so doing, the court determined that the term "unauthorized" with respect to an obstruction as used in O.C.G.A. section 32-6-51,[83] includes "not only the placement or maintenance of structures which are prohibited by some statute, code, or local ordinance, but also those which lack any governmental authorization."[84] The court reasoned that the legislature "surely did not contemplate that, under its statutory scheme, a person would be free to place or maintain obstructions or distractions which adversely affect the safety of public roads so long as no other legislation specifically proscribes them."[85]

C. *Proximate Cause*

In a pair of cases, the Georgia Supreme Court reaffirmed the existing standard of proximate cause in cases with multiple tortfeasors by shunning entreaties to increase a plaintiff's burden. In *John Crane, Inc. v. Jones*,[86] the plaintiff sued several asbestos manufacturers for injuries resulting from exposure to the manufacturers' products containing asbestos.[87] At trial, the lone remaining defendant argued that the plaintiff must prove that exposure to the defendant's product was a "substantial contributing factor" to the plaintiff's injuries.[88] The court did not agree. In rejecting the addition of "substantial" to Georgia's longstanding "contributing factor" standard in negligence cases involving concurrent tortfeasors,[89] the court noted that "Georgia law clearly contemplates differing degrees of culpability among joint tortfeasors."[90] The court further recognized the practical effect of a "substantial factor" standard would be to multiply the issues at trial, including the creation of "a separate and independent hurdle that the plaintiff will have to overcome in addition to the standard elements of a claim of negligence."[91]

In *Thompson v. Thompson*,[92] a case involving two alleged tortfeasors, one of whom settled prior to trial, the Georgia Supreme Court examined

82. *Fortner*, 278 Ga. at 628, 604 S.E.2d at 179.
83. O.C.G.A. § 32-6-51.
84. *Fortner*, 278 Ga. at 628, 604 S.E.2d at 179.
85. *Id.*
86. 278 Ga. 747, 604 S.E.2d 822 (2004).
87. *Id.* at 747, 604 S.E.2d at 823.
88. *Id.* at 748, 604 S.E.2d at 823-24.
89. *Id.,* 604 S.E.2d at 824.
90. *Id.*
91. *Id.* at 751, 604 S.E.2d at 825-26.
92. 278 Ga. 752, 605 S.E.2d 30 (2004).

the trial court's instructions to the jury that proximate cause is "sometimes called the dominant cause."[93] The supreme court held that the charge constituted reversible error based, in part, on the "dominant cause" language's inconsistency with the fact that an injury may have more than one proximate cause[94] and the resultant risk of misleading and confusing the jury.[95]

D. Discovery

Decisions concerning discovery this survey period addressed basic principles that are well-established. For example, in *Ford Motor Co. v. Lawrence,*[96] writing for a unanimous Georgia Supreme Court, Justice Benham "reiterate[d] the precept that mandamus is not a vehicle by which a party may obtain review of a judicial order which is subject to appellate review."[97] Ford sought a writ of mandamus in the superior court to challenge the state court judge's order directing Ford to produce crash test documents in a product liability action. The supreme court ruled that the trial judge had "neither violated any legal duties nor grossly abused his discretion. In fact, . . . Judge Lawrence has not abused his discretion whatsoever."[98]

When a judicial action can be challenged through appellate review, either by means of an interlocutory appeal or an appeal after an adverse final judgment, mandamus is not appropriate.[99] Ford had both of these avenues available, as the court of appeals was entertaining its appeal and it could also appeal after a final judgment.[100] Whether this decision will discourage the use of this delaying tactic remains to be seen.

A quartet of cases reflected the well-worn principle that a litigant who refuses to participate in discovery may find his day in court pronounced officially over.[101] When a litigant completely fails to respond to

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93. *Id.* at 754, 605 S.E.2d at 32 (quoting *John Crane, Inc.*, 278 Ga. at 752, 604 S.E.2d at 826).

94. *Id.* at 753-54, 605 S.E.2d at 32.

95. *Id.*

96. 279 Ga. 284, 612 S.E.2d 301 (2005).

97. *Id.* at 284, 612 S.E.2d at 302.

98. *Id.* at 285, 612 S.E.2d at 302.

99. *Id.* at 286, 612 S.E.2d at 303.

100. *Id.* at 287, 612 S.E.2d at 304.

101. *See* Russaw v. Burden, 272 Ga. App. 632, 634-35, 612 S.E.2d 913, 915 (2005) (counsel failed to appear at hearing addressing dismissal); Woods v. Gatch, 272 Ga. App. 642, 644, 613 S.E.2d 187, 190 (2005) (dismissal appropriate upon finding that failure to appear for deposition was willful); Smith v. Glass, 273 Ga. App. 327, 327-28, 615 S.E.2d 172, 173 (2005) (dismissal when plaintiff failed to appear at hearing).

discovery, the court need not enter an order before sanctioning that party; but if the court does not enter such an order, the court must hold a hearing before striking an answer or dismissing the case.[102]

E. Work-Product Protection & Waiver

In *McKesson Corp. v. Green*,[103] the supreme court addressed the issue of whether a party waives work-product protection when it discloses otherwise protected materials to a government agency investigating allegations against the party.[104] The court concluded that McKesson Corporation waived any work-product protection by providing certain documents to the Securities and Exchange Commission ("SEC") because the SEC had been an actual *or potential* adversary of McKesson when the documents were disclosed.[105] The court rejected McKesson's contention that it shared a "common interest" with, and thus did not have an adversarial relationship with, the SEC:[106]

> When a party discloses protected materials to a government agency investigating allegations against it, it uses those materials to forestall prosecution (if the charges are unfounded) or to obtain lenient treatment (in the case of well-founded allegations). These objectives, however rational, are foreign to the objectives underlying the work-product doctrine. Moreover, an exception for disclosures to government agencies is not necessary to further the doctrine's purpose; attorneys are still free to prepare their cases without fear of disclosure to an adversary as long as they and their clients refrain from making such disclosures themselves. Creating an exception for disclosures to government agencies may actually hinder the operation of the work-product doctrine. If internal investigations are undertaken with an eye to later disclosing the results to a government agency, the outside counsel conducting the investigation may hesitate to pursue unfavorable information or legal theories about the corporation. Thus, allowing a party to preserve the doctrine's protection while disclosing work product to a government agency could actually discourage attorneys from fully preparing their cases.[107]

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102. Greenbriar Homes, Inc. v. Builders Ins., 273 Ga. App. 344, 346-47, 615 S.E.2d 191, 193-94 (2005).

103. 279 Ga. 95, 610 S.E.2d 54 (2005).

104. *Id.* at 95-96, 610 S.E.2d at 56.

105. *Id.* at 96, 610 S.E.2d at 56.

106. *Id.*

107. *Id.* at 97, 610 S.E.2d at 56-57 (quoting Westinghouse Elec. Corp. v. Republic of Phil., 951 F.2d 1414, 1429-30 (3d Cir. 1991)).

Thus, a party's disclosure of otherwise protected materials to a government agency that is investigating allegations against that party operates as a waiver of any work-product protection.[108]

F. Juries & Verdict Forms

In *Gallagher v. McKinnon*,[109] the court of appeals held that an objection to an improper verdict form must be raised while the jury is still in the box.[110] This issue surfaced when Gallagher wanted to acquire enough of McKinnon's stock to take control of the statutory close corporation. His opportunity came after a company-sponsored party where McKinnon ended up inebriated in a truck with a female employee, who testified that McKinnon made unwanted sexual advances, but that the two did not have sex. McKinnon, for his part, did not remember anything.[111]

Gallagher turned his partner's blackout into a buyout. He lied to McKinnon, telling him that Yeomans was claiming McKinnon had sex with her and that the company was facing a sexual harassment lawsuit. Gallagher then pressured McKinnon into agreeing to have the corporation issue 750 additional shares in Gallagher's name to "protect the corporation's interests."[112]

McKinnon moved to set aside the transaction, and the jury agreed.[113] On appeal, Gallagher contended the verdict form was inadequate because it did not clearly require a finding that McKinnon justifiably relied on Gallagher's statements.[114] The court of appeals refused to address this issue, as Gallagher had not raised the issue in the presence of the jury to allow an opportunity to reform the verdict.[115]

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108. The fact that McKesson provided those documents to the SEC "pursuant to confidentiality agreements specifying that McKesson was not waiving work-product protection" did not appear to have any impact on the court's analysis. *McKesson*, 279 Ga. at 95, 610 S.E.2d at 55. The court did note, however, that the confidentiality agreement was "far from airtight" and did not ensure that "the audit documents would not be disclosed to others." *Id.* at 97, 610 S.E.2d at 57.

109. 273 Ga. App. 727, 615 S.E.2d 746 (2005).

110. *Id.* at 732, 615 S.E.2d at 751.

111. *Id.* at 728, 615 S.E.2d at 748.

112. *Id.* at 729, 615 S.E.2d at 749.

113. *Id.* at 729-30, 615 S.E.2d at 749.

114. *Id.* at 732, 615 S.E.2d at 751.

115. *Id.*

G. Assumption of Risk

In *D & S Electric, Inc. v. Batson*,[116] the court of appeals made it unmistakably clear that, in order for the doctrine of assumption of risk to bar an action, the plaintiff must have knowledge of the "*specific*, *particular* risk of harm, and not simply general, nonspecific risks."[117] In *Batson*, the plaintiff brought an action for injuries from an electrical shock sustained from allegedly faulty wiring. Although the plaintiff had knowledge that a particular table had shocked another employee "like the shock from a battery,"[118] the court of appeals held that a genuine issue of material fact existed as to whether "Batson fully appreciated the risk she faced by touching" the table in light of the fact that "others who received shocks from the table were apparently not injured."[119]

H. Products Liability

As set forth in O.C.G.A. section 51-1-11.1(b),[120] a "product seller is not a manufacturer . . . and is not liable as such." In *Buchan v. Lawrence Metal Products, Inc.*,[121] the court of appeals provided some guidance with respect to when an entity, which otherwise would be considered a mere seller, becomes so involved in the design of a product that it may be considered a manufacturer and subject to strict liability.[122] In *Buchan* the plaintiff brought a strict liability action for injuries sustained when a vinyl retractable tape on a crowd-control barrier detached from a metal post and struck him in the arm.[123] The trial court granted Lawrence Metal Products, Inc.'s motion for summary judgment, finding that it was a mere seller[124] because another entity "designed and manufactured the retractable tape cassette [for the Tensabarrier crowd-control system], and that Lawrence Metal merely produced the metal posts in which the cassettes were inserted . . . [and] merely labeled, marketed, and sold the Tensabarrier system."[125]

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116. 270 Ga. App. 210, 606 S.E.2d 37 (2004).
117. *Id.* at 212, 606 S.E.2d at 39 (citing Rubin v. Cello Corp., 235 Ga. App. 250, 252, 510 S.E.2d 541 (1998)) (emphasis added).
118. *Id.* at 211, 606 S.E.2d at 38.
119. *Id.* at 212, 606 S.E.2d at 39.
120. O.C.G.A. § 51-1-11.1(b) (2000).
121. 270 Ga. App. 517, 607 S.E.2d 153 (2004).
122. *Id.* at 520-21, 607 S.E.2d at 156.
123. *Id.* at 517, 607 S.E.2d at 154.
124. *Id.* at 517-18, 607 S.E.2d at 154.
125. *Id.* at 517, 607 S.E.2d at 156.

In reversing the trial court, the court of appeals held that "Lawrence Metal had an active role in the production, design, and assembly of the Tensabarrier crowd-control *system*."[126] Although it "had no part in the design or assembly of the retractable tape cassettes," Lawrence Metal could still be considered a manufacturer of the "Tensabarrier system [which] consists of the cassettes *and the posts*, and [which] cannot serve its purpose without both components."[127] Because Lawrence Metal designed the posts necessary to secure the cassettes, it had a "real role in the creation of the *system*" that Buchan alleged to be defective,[128] and thus was subject to suit as a manufacturer under O.C.G.A. section 51-1-11.[129]

I. Statutes of Limitation, Renewal Actions, Expert Affidavit Requirements, and Service of Process

During this survey period, the Georgia Supreme Court decided two cases impacting the limitations period for a claimant to file an action for substandard realty construction. First, in *Tiismann v. Linda Martin Homes Corp.*,[130] the supreme court held that the two-year statute of limitations for an action brought under the Fair Business Practices Act of 1975[131] does not begin to accrue "until the violation of the statute occurs *and* plaintiff is entitled to bring an action and seek a remedy."[132] Therefore, the court reasoned that the statute of limitations commenced on the date the faulty property was conveyed to the plaintiff, rather than on the date the statutory violation occurred.[133]

Likewise, in *Scully v. First Magnolia Homes*,[134] the supreme court held that the six-year limitations period for a breach of contract action concerning defectively constructed property began to run from the date the homeowners signed the contract to purchase the property, rather

126. *Id.* at 521, 607 S.E.2d at 156 (emphasis added).

127. *Id.*

128. *Id.*

129. *Id.*, 607 S.E.2d at 157 (noting that "[i]t is this active role in the design and production of the system which distinguishes this case from one like *Buford v. Toys R' Us*, 217 Ga. App. 565, 566, 458 S.E.2d 373, 374 (1995), in which we held that a toy retailer that completed the assembly of a partially assembled bicycle could not be held strictly liable for injuries incurred after a manufacturer's weld gave way.").

130. 279 Ga. 137, 610 S.E.2d 68 (2005).

131. O.C.G.A. §§ 10-1-390 to -407 (2000 & Supp. 2005).

132. *Tiismann*, 279 Ga. at 138, 610 S.E.2d at 69 (quoting 54 C.J.S. *Limitations of Actions* § 198 (1987)).

133. *Id.* at 140, 610 S.E.2d at 70.

134. 279 Ga. 336, 614 S.E.2d 43 (2005).

than the date of the property's substantial completion.[135] The court in *Scully* extended its previous holding in *Colormatch Exteriors, Inc. v. Hickey*,[136] a case which involved tort claims against a builder, to hold the following in *Scully*:

> [W]here a contractor makes improvements to his own real property for the express purpose of sale and the property actually is sold, the applicable period of limitations for claims of damage to realty [sounding in contract theory] does not begin to run until the initial sale of the improved property [i.e., the date of purchase], regardless of the date of substantial completion.[137]

The Georgia Court of Appeals also decided several noteworthy cases pertaining to the above-enumerated subjects during this survey period. In *Cochran v. Bowers*,[138] the court held that the forty-five day grace period provided for by O.C.G.A. section 9-11-9.1(b),[139] during which claimants may "file an expert affidavit under certain circumstances" to accompany their previously filed complaint alleging professional negligence under O.C.G.A. section 9-11-9.1, applies to claims filed before either the final date for the applicable statute of limitations or statute of repose.[140] In reaching this conclusion, the court noted that O.C.G.A. section 9-11-9.1 refers only to "period of limitations,"[141] rather than specifically referencing the applicable "statute of limitations" for such claims. Additionally, the court reasoned that its ruling was the only interpretation of O.C.G.A. section 9-11-9.1(b) that contemplated the reasonable intent of the General Assembly in enacting this piece of legislation.[142]

In *Landau v. Davis Law Group, P.C.*,[143] the court of appeals also addressed O.C.G.A. section 9-11-9.1(b)'s forty-five day grace period.[144] In *Landau* the court of appeals rejected a counterclaimant's contention that O.C.G.A. section 9-11-9.1(b)'s use of the phrase "period of limitation" refers also to the thirty-day period in which a counterclaimant must file

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135. *Id.* at 338-39, 614 S.E.2d at 46.
136. 275 Ga. 249, 569 S.E.2d 495 (2002).
137. *Scully*, 279 Ga. at 338-39, 613 S.E.2d at 46 (quoting *Colormatch*, 275 Ga. at 250, 569 S.E.2d at 496) (internal quotations omitted).
138. 274 Ga. App. 449, 617 S.E.2d 563 (2005).
139. O.C.G.A. § 9-11-9.1(b) (1993), *amended by* O.C.G.A. § 9-11-9.1(b) (Supp. 2005).
140. *Cochran*, 274 Ga. at 450, 453, 617 S.E.2d at 564, 566.
141. *Id.* at 452, 617 S.E.2d at 865-66.
142. *Id.* at 453, 617 S.E.2d at 566.
143. 269 Ga. App. 904, 605 S.E.2d 461 (2004).
144. *Id.* at 905-06, 605 S.E.2d at 463.

his or her responsive pleadings.[145] Somewhat contradictory to its more recent 2005 holding in *Cochran*, the court of appeals held in its 2004 decision of *Landau* that "the phrase 'period of limitation' refers *only to the statute of limitation* that applies to a particular action."[146]

In *Askins v. Colon*,[147] the defendant, Colon, struck and injured the plaintiff on July 28, 2001. The plaintiff filed a lawsuit on September 25, 2002, and Colon's lawyers answered the suit on November 4, 2002, asserting all service defenses. On August 26, 2003, the defendant executed an acknowledgment of service. The plaintiff then dismissed his original suit and filed a renewal action on September 11, 2003, serving Colon with this renewal suit on October 20, 2003. Colon then moved to dismiss the renewal action on the grounds that the original suit filed on September 25, 2002 was void and, therefore, could not be renewed. Colon asserted two separate rationales explaining why the 2002 suit was void: first, he asserted that his acknowledgment of service was invalid because it did not conform with the mandatory language requirements of O.C.G.A. section 9-11-4(1);[148] and second, he alleged that the acknowledgment was void because the plaintiff's counsel contacted him personally to sign the acknowledgment even though the plaintiff's counsel knew Colon was represented.[149] The court of appeals rejected both arguments, holding that O.C.G.A. section 9-10-73[150] does not mandate any specific form or language, and that neither the Georgia Rules of Professional Conduct[151] nor any other Georgia legal authority supports "the exclusion of an acknowledgment of service on the basis of an ex parte communication."[152]

Lastly, the court of appeals made it clear in *Stone Exchange, Inc. v. Surface Technical Corp.*[153] that the plaintiff cannot substitute service upon a corporate defendant pursuant to O.C.G.A. section 9-11-4(e)(1)[154] when the plaintiff has knowledge of the defendant corporation's location.[155] Distinguishing its holding in *Daly's Driving School, Inc. v. Scott*,[156] the court noted that although the defendant corporation

145. *Id.*
146. *Id.* (emphasis added).
147. 270 Ga. App. 737, 608 S.E.2d 6 (2004).
148. O.C.G.A. § 9-11-4(1) (1993 & Supp. 2005).
149. *Askins*, 270 Ga. App. at 737-38, 608 S.E.2d at 8.
150. O.C.G.A. § 9-10-73 (1982).
151. GEORGIA RULES OF PROF'L CONDUCT R. 4.2 (2001).
152. *Askins*, Ga. App. at 739-40, 608 S.E.2d at 9-10.
153. 269 Ga. App. 770, 605 S.E.2d 404 (2004).
154. O.C.G.A. § 9-11-4(e)(1) (1993 & Supp. 2005).
155. 269 Ga. App. at 772, 605 S.E.2d at 405.
156. 238 Ga. App. 443, 519 S.E.2d 1 (1999).

failed to keep a registered agent available in Georgia as required by law, the plaintiff in *Stone Exchange* had been in contact with the defendant corporation at a known address and failed even to attempt service at that address before resorting to substituted service under O.C.G.A. section 9-11-4(e)(1).[157] The court held that a plaintiff cannot refuse to attempt service if she has actual knowledge of where a corporate defendant may be properly served.[158]

J. Standing

In reversing the decision of the court of appeals, the supreme court held in *Gonzalez v. Department of Transportation*[159] that a plaintiff's status as a nonresident alien does not deprive her of standing to file suit in a Georgia court.[160] The court of appeals based its decision on *AT&T Corp. v. Sigala*,[161] but the Georgia Supreme Court stated that its decision in *Sigala* should not be extended beyond its core holding that:

> Georgia courts can apply the doctrine of forum non conveniens to dismiss, in proper cases, "lawsuits brought in our state courts by nonresident aliens who suffer injuries outside this country." Properly considered in that way, *Sigala* is not authority for dismissing a suit by a nonresident alien based on injuries suffered *in this country*.[162]

The effect of the court of appeals decision, had it been allowed to stand, would have been "to deny non-resident aliens, injured by the State, access to any court, even one sitting in the alien's home country."[163]

K. Litigating Insurance Issues

The supreme court, in *Gordon v. Atlanta Casualty Co.,*[164] reaffirmed the definition of "all" when it held that an insured's benefits extended to cover damages stemming from an injury to the insured's minor son, who was not a "covered person" under the insured's policy.[165] Determining

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157. *Stone Exchange*, 269 Ga. App. at 773, 605 S.E.2d at 406.
158. *Id.*
159. 279 Ga. 230, 610 S.E.2d 527 (2005).
160. *Id.* at 231, 610 S.E.2d at 528.
161. 274 Ga. 137, 549 S.E.2d 373 (2001), *superseded by statute*, O.C.G.A. § 9-10-31.1 (Supp. 2005).
162. *Gonzalez*, 279 Ga. at 231, 610 S.E.2d at 528-29 (emphasis added) (internal citations omitted).
163. Jason L. Crawford et al., *Trial Practice & Procedure*, 56 MERCER L. REV. 433, 443 (2004) (discussing decision of court of appeals in *Gonzalez* and noting reasons that *Sigala* did not dictate the result reached by court of appeals).
164. 279 Ga. 148, 611 S.E.2d 24 (2005).
165. *Id.* at 149, 611 S.E.2d at 25.

that the plain language of O.C.G.A. section 33-7-11(a)(1)[166] is not illogical, the supreme court declined to ascribe any other meaning to this section other than what the General Assembly has enacted.[167]

L. Sovereign Immunity

Several court of appeals decisions addressed different aspects of the Georgia Tort Claims Act ("GTCA").[168] *Camp v. Coweta County*[169] involved interpretation of the GTCA's requirement that, to perfect service of process, a copy of the complaint must be mailed to the attorney general and a certificate of compliance with this requirement shall be attached to the complaint.[170] The plaintiff failed to comply with either requirement at the time of filing and service of the original complaint, but attempted to cure the service defect by amending the complaint within the statute of limitations to include a certificate of compliance and by mailing the amended complaint to the attorney general.[171] The court rejected the plaintiff's efforts, finding that a defect in service of process upon the attorney general is not curable by amendment, regardless of whether the statute of limitations has run,[172] thereby necessitating dismissal of the suit.[173]

Practitioners should be aware: if you do not jump through all the right procedural hoops in the service of a GTCA complaint, the failure to do so is not amendable, and you are out of court. In so holding, the court of appeals may have taken strict construction of the GTCA a bit far and elevated form over substance to a fault. In fact, the court's opinion seems to make proper service an impossibility. In *Camp*, it seems the technical failure to mail a copy to the attorney general and attach a certificate of compliance to the complaint should be curable by amendment, especially considering that the State was served twice with the complaint pursuant to O.C.G.A. section 50-21-35 and that the statute of limitations had not expired.

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166. O.C.G.A. § 33-7-11(a)(1) (2000 & Supp. 2005).

167. *Gordon*, 279 Ga. at 149-50, 611 S.E.2d at 25-26. O.C.G.A. section 33-7-11(a)(1) "provides, in pertinent part, that an automobile insurance policy issued in this state shall contain 'an endorsement or provisions undertaking to pay the insured all sums which said insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.'" 279 Ga. at 149-50, 611 S.E.2d at 25-26 (quoting O.C.G.A. section 33-7-11(a)(1)).

168. O.C.G.A. § 50-21-20 to -37 (2002 & Supp. 2005).

169. 271 Ga. App. 349, 609 S.E.2d 695 (2005).

170. *See* O.C.G.A. § 50-21-35 (2002).

171. *Camp*, 271 Ga. App. at 351-52, 609 S.E.2d at 698.

172. *Id.* at 354, 609 S.E.2d at 699.

173. *Id.*

In its holding, the decision in *Camp* fails to address the inherent impossibility of O.C.G.A. section 50-21-35's requirement that the plaintiff certify, at the time of the filing of the complaint, that the attorney general "has been mailed" a copy of the complaint.[174] Presumably, the copy of the complaint mailed to the attorney general should have the clerk's date stamp on it. As such, it is impossible to honestly certify with the *original* complaint that a copy of the complaint showing the date of filing "has been mailed" to the attorney general. One cannot mail a date-stamped copy of the complaint until *after* the complaint has been filed.

The court in *Camp* seems to hold that simply failing to attach the certificate of compliance to the original complaint *alone* is enough to invalidate service under the GTCA.[175] That is, even if the plaintiff in fact mailed a copy of the complaint to the attorney general, *Camp* apparently holds that the certificate itself must be filed with the original complaint. And, because the court of appeals has held that such a failure cannot be cured by amendment, the only remedy available to the plaintiff is to dismiss and refile against the state *if* the statute of limitations has not run.[176] If the statute of limitations has run, the plaintiff will apparently be out of court forever because service could never be perfected in the original suit, a prerequisite to utilizing Georgia's renewal statute.[177] Specifically, the plaintiff cannot file an amended complaint with the certificate stapled to the complaint.[178] This apparent refusal to allow the plaintiff to cure such a simple issue—which involves literally *stapling* a certificate to the original complaint—by amendment is a departure from years of established Georgia case law.[179]

While unnecessary to the court's holding, the opinion in *Camp* goes on to state that the plaintiff's ante litem notice was inadequate because it did not "provide the specific place or time of the incident or the nature of Camp's injuries."[180] The holding seems untenable because the plaintiff's letter specifically noted that the plaintiff was injured on

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174. *Id.* at 353, 609 S.E.2d at 698-99.

175. *Id.* at 354, 609 S.E.2d at 699.

176. *Id.* at 333, 609 S.E.2d at 698-99.

177. *See id.* at 353, 609 S.E.2d at 698-99.

178. *Id.*

179. *See* Davis v. Emmis Publishing Corp., 244 Ga. App. 795, 798, 536 S.E.2d 809, 812 (2000) (stating "[g]enerally, the failure to verify a complaint is an amendable defect"); *see also* Driver v. Nunnallee, 226 Ga. App. 563, 564, 487 S.E.2d 122, 124 (1997) (noting perfection of service of an amended complaint within the statute of limitations cures defective service of original complaint).

180. *Camp*, 271 Ga. App. at 355, 609 S.E.2d at 700.

"August 27, 2002, at the Coweta County Fairgrounds [and that] Mr. Camp's legs were shattered [and] [i]t is unclear at this point whether Mr. Camp will ever regain the full use of his legs."[181] The point of an ante litem notice is to afford the State an opportunity to investigate potential claims and, presumably, try to resolve such claims short of litigation. What more meaningful description could have been given other than that the plaintiff's legs were shattered? And, on how many fairgrounds were prisoners, such as Mr. Camp, working on August 27, 2002 in Coweta County?

The irony in *Camp* and other recent GTCA decisions is that, although the GTCA was intended to allow plaintiffs to bring suit against the State and to ameliorate against the harsh consequences of having victims of the State's negligence go uncompensated, many of these decisions run counter to that goal and instead turn the GTCA into an arsenal of procedural arrows by which the State can avoid defending cases on their merits. The supreme court has granted certiorari and may perhaps take the opportunity to alter this disturbing trend in GTCA cases.[182]

Other relevant GTCA-related rulings (1) held that delivery of an ante litem notice to the Commissioner of the Department of Administrative Services ("DOAS"), rather than to the Risk Management Division of DOAS, is ineffectual to waive sovereign immunity,[183] and (2) held that in determining whether an action sounds in tort or contract for purposes of applicability of the GTCA, the focus is on the duty breached rather than the act causing the loss.[184]

IV. CONCLUSION

This Article is not exhaustive of all developments in case and statutory law for the survey period. The authors have, however, attempted to address those cases and statutes that have most significantly impacted trial practice and procedure in Georgia.

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181. *Id.* at 354-55, 609 S.E.2d at 699-700.

182. Camp v. Coweta County, Case No. S05C0892, 2005 Ga. LEXIS 350 (Ga. May 10, 2005).

183. Shelnutt v. Georgia Dep't of Transp., 272 Ga. App. 109, 110, 611 S.E.2d 762, 763 (2005).

184. Alverson v. Employees' Ret. Sys. of Ga., 272 Ga. App. 389, 390-92, 613 S.E.2d 119, 120-22 (2005).