

# Trial Practice and Procedure

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## I. INTRODUCTION

This Article surveys noteworthy cases in the field of civil trial practice during the survey period<sup>1</sup> by the Georgia Supreme Court and the Georgia Court of Appeals and relevant enactments by the Georgia General Assembly. This Article does not address the related and important topic of evidence, which is addressed in a separate survey. After describing relevant legislation, this Article surveys developments in trial practice in the order that they would be encountered in the typical case: pleadings, discovery, motions practice, juries and jury selection, statements and arguments of counsel, trial motions, jury instructions, and verdict forms.

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1. The survey period runs from June 1, 2005 through May 31, 2006.

## II. LEGISLATION

As compared to the significant changes made to laws affecting trial practitioners during the previous survey period,<sup>2</sup> the Georgia General Assembly made relatively minor changes to such laws during this survey period. Nonetheless, the following two pieces of legislation are noteworthy.

A. *House Bill 239*

With the enactment of House Bill 239 (“HB 239”),<sup>3</sup> the General Assembly vastly improved the language of the “offer of judgment” rule contained in Official Code of Georgia Annotated (“O.C.G.A.”) section 9-11-68,<sup>4</sup> which was enacted for the first time in 2005.<sup>5</sup> Gone are conflicting provisions about the triggering of the obligation of one party to pay the attorney fees and expenses of litigation of another party in certain circumstances.<sup>6</sup> The law now establishes a clear mechanism whereby defendants and plaintiffs have the ability to make an offer of judgment (or settlement) to an opposing party prior to trial, which might result in recovery of attorney fees and costs incurred after the rejection of the last offer, if certain conditions are met.<sup>7</sup>

Prior to HB 239, subsections (b) and (d) of O.C.G.A. section 9-11-68 established two conflicting methods for calculating whether an offeree would be obligated to pay an offeror’s attorney fees and costs.<sup>8</sup> The confusion arose from the use of the term “more favorable than” in the context of the offer in subsection (b), and the judgment in subsection (d).<sup>9</sup> Fortunately, with HB 239, the legislature abandoned the “more favorable than” language and replaced it with a more simplified system in which offers by defendants and offers by plaintiffs are addressed in separate subparts.<sup>10</sup>

In O.C.G.A. section 9-11-68(b)(1), if a defendant makes an offer that is rejected by the plaintiff, then the defendant shall be entitled to attorney fees and costs incurred after the rejection of the last offer “if the final judgment is one of no liability or the final judgment obtained by the

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2. *See generally* Ga. S.B. 3, Reg. Sess. (2005) (enacting comprehensive tort reform).

3. Ga. H.B. 239, Reg. Sess. (2006).

4. O.C.G.A. § 9-11-68 (2006).

5. Ga. S.B. 3.

6. Ga. H.B. 239.

7. O.C.G.A. § 9-11-68.

8. Ga. S.B. 3.

9. *Id.*

10. O.C.G.A. §§ 9-11-68(b)(1), (2).

plaintiff is less than 75 percent of such offer of settlement.”<sup>11</sup> Thus, if a defendant invokes O.C.G.A. section 9-11-68 with an offer of settlement, the plaintiff must obtain a judgment that is at least seventy-five percent of the value of the defendant’s offer in order to avoid sanctions.<sup>12</sup> In other words, to justify the decision to go to trial, the plaintiff must eventually recover an amount relatively similar to the amount offered.

In O.C.G.A. section 9-11-68(b)(2), if the plaintiff makes an offer that is rejected by the defendant, then the plaintiff shall be entitled to recover attorney fees and costs incurred after the rejection of the last offer if “the plaintiff recovers a final judgment in an amount greater than 125 percent of such offer of settlement.”<sup>13</sup> Thus, if the plaintiff invokes O.C.G.A. section 9-11-68 with an offer of settlement, then the defendant must prevent the plaintiff from obtaining a judgment that is greater than 125 percent of the value of the plaintiff’s offer to avoid sanctions in the form of attorney fees.<sup>14</sup> In other words, to justify the decision to go to trial, the defendant must keep the plaintiff from recovering an amount that is relatively higher than the plaintiff’s offer.<sup>15</sup>

In addition, HB 239 expanded O.C.G.A. section 9-11-68 by striking language that limited its reach to a “tort claim for money.”<sup>16</sup> In so doing, the legislature increased the number of different types of civil actions to which the offer of judgment provisions will apply.<sup>17</sup> And finally, HB 239 added a provision to O.C.G.A. section 9-11-68 whereby an appeal of a final judgment will postpone the payment of attorney fees and costs purportedly owed pursuant to that same final judgment.<sup>18</sup> In this way, a plaintiff or defendant is not obligated to pay attorney fees and costs resulting from an opposing party’s successful offer of settlement while the final judgment is under scrutiny.<sup>19</sup> Nor will a plaintiff or defendant be forced to pay any attorney fees or costs resulting from an opposing party’s successful offer of settlement if the final judgment is overturned on appeal.<sup>20</sup>

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11. *Id.* § 9-11-68(b)(1).

12. *Id.*

13. *Id.* § 9-11-68(b)(2).

14. *Id.*

15. *Id.*

16. Ga. H.B. 239.

17. *Id.*

18. O.C.G.A. § 9-11-68(d)(1).

19. *Id.*

20. *Id.*

### B. House Bill 1195

House Bill 1195 (“HB 1195”)<sup>21</sup> was also enacted by the General Assembly during this survey period and is important to trial practitioners because it alters two provisions of the “Georgia Civil Practice Act.”<sup>22</sup> First, HB 1195 changes O.C.G.A. section 9-11-3(b)<sup>23</sup> to require the plaintiff to file the appropriate civil case filing form at the time of filing the complaint.<sup>24</sup> Previously, the plaintiff was only required to file the civil case filing form “as soon as practicable thereafter.”<sup>25</sup> As part of making the civil case filing form mandatory at the time of filing the complaint, the General Assembly also provided the means for the plaintiff to cure mistakes made in the filing of such form.<sup>26</sup> If the plaintiff fails to file the form or files a defective form, then the court shall require the plaintiff to either file the form or file an amended form.<sup>27</sup> And most importantly, “[i]n no case shall the failure to accurately complete the civil case filing form required by this Code section provide a basis to dismiss a civil action.”<sup>28</sup>

Second, HB 1195 amended O.C.G.A. section 9-11-58(b)<sup>29</sup> and made the civil case disposition form a prerequisite to the clerk’s entry of judgment.<sup>30</sup> While prior law required the civil case disposition form to be filed at the time of the filing of the final judgment, the final judgment was not contingent upon the filing of the civil case disposition form.<sup>31</sup> Current law now simply states that “[t]he entry of the judgment shall not be made by the clerk of the court until the civil case disposition form is filed.”<sup>32</sup> Finally, trial practitioners should note that the amount of a sealed or otherwise confidential settlement agreement is not required to be disclosed on the civil case disposition form.<sup>33</sup>

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21. Ga. H.B. 1195, Reg. Sess. (2006).

22. O.C.G.A. §§ 9-11-1 to -133 (2006).

23. O.C.G.A. § 9-11-3(b) (2006).

24. Ga. H.B. 1195.

25. O.C.G.A. § 9-11-3(b) (1993 & Supp. 2005).

26. *Id.* § 9-11-3(b) (2006).

27. *Id.*

28. *Id.*

29. O.C.G.A. § 9-11-58(b) (2006).

30. Ga. H.B. 1195.

31. O.C.G.A. § 9-11-58(b) (1993 & Supp. 2005).

32. *Id.* § 9-11-58(b) (2006).

33. *Id.*

## III. CASE LAW

## A. Pretrial Procedure

## 1. Pleadings

**a. Answers.** In *Shields v. Gish*,<sup>34</sup> the Georgia Supreme Court, overruling a pair of cases to the contrary,<sup>35</sup> held that a defendant could not be held in default for failing to file an answer to an amended complaint, even though the amended complaint was accompanied by a summons.<sup>36</sup> The supreme court based its holding on the plain language of O.C.G.A. section 9-11-8(d),<sup>37</sup> which states: “Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.”<sup>38</sup> The court held that because an answer to an amended complaint is not required under O.C.G.A. section 9-11-15(a),<sup>39</sup> the defendant’s failure to respond constituted a denial, and thus no default was warranted.<sup>40</sup>

**b. Defenses.** O.C.G.A. section 9-11-12(h)<sup>41</sup> requires four defenses—personal jurisdiction, venue, process, and service of process—to be raised in the first responsive pleading or be waived.<sup>42</sup> Cases in the survey period again made it clear that these defenses must be raised explicitly and that pleading the defenses for the first time in an amended pleading is insufficient.<sup>43</sup> In *Euler-Siac S.P.A. v. Drama Marble Co.*,<sup>44</sup> the court of appeals held that when a resident<sup>45</sup> defen-

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34. 280 Ga. 556, 629 S.E.2d 244 (2006).

35. See *Teamsters Local 515 v. Roadbuilders, Inc. of Tenn.*, 249 Ga. 418, 291 S.E.2d 698 (1982); *Wilson Welding Serv. v. Partee*, 234 Ga. App. 619, 507 S.E.2d 168 (1998).

36. *Shields*, 280 Ga. at 557-58, 629 S.E.2d at 247.

37. O.C.G.A. § 9-11-8(d) (2006).

38. *Shields*, 280 Ga. at 557, 629 S.E.2d at 246 (quoting O.C.G.A. § 9-11-8(d)).

39. O.C.G.A. § 9-11-15(a) (2006).

40. *Shields*, 280 Ga. at 558, 629 S.E.2d at 247.

41. O.C.G.A. § 9-11-12(h) (2006).

42. *Id.*

43. *McNeil v. McCollum*, 276 Ga. App. 882, 889, 625 S.E.2d 10, 16 (2005); *Ahmad v. Excell Petroleum, Inc.*, 276 Ga. App. 167, 168-69, 623 S.E.2d 6, 8-9 (2005) (holding that pro se defendant’s failure to object to personal jurisdiction or service of process in initial letter to court constituted a waiver of those defenses).

44. 274 Ga. App. 252, 617 S.E.2d 203 (2005).

45. The court of appeals noted that a nonresident defendant:

cannot be forced to come into a foreign state to defend against a claim or to contest jurisdiction unless it has engaged in some act by which it avails itself of

dant did not answer the complaint, the defendant waived the defenses of lack of personal jurisdiction and venue, which were based on a forum selection clause.<sup>46</sup>

In a holding of doubtful validity, the court of appeals in *Wilson v. 72 Riverside Investments, LLC*<sup>47</sup> held that the defendant waived a defense of lack of subject matter jurisdiction by failing to raise the issue before the trial court.<sup>48</sup> The jurisdictional defect, according to the defendant, was that the case involved patent law issues “that must be interpreted by a federal court.”<sup>49</sup> “Fairness to the trial court and to the parties,” the court of appeals reasoned, “demands that legal issues be asserted in the trial court.”<sup>50</sup> The plain language of the Civil Practice Act<sup>51</sup> and countless decisions establish that the parties may not waive issues relating to subject matter jurisdiction and that the issue of whether the court has the power to adjudicate the dispute is an issue that must be considered at each stage of the litigation.<sup>52</sup>

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the benefits and protections of that jurisdiction’s laws. Accordingly, a nonresident served in an action under Georgia’s Long Arm Statute does not waive the lack of personal jurisdiction defense by not answering the complaint.

*Id.* at 255 n.6, 617 S.E.2d at 206 n.6. In *Euler-Siac*, the defendant Drama Marble resided in Georgia and the personal jurisdiction and venue defenses were based solely on an agreement in which the parties agreed to the “exclusive jurisdiction of Texas courts and the application of its law.” *Id.* at 252, 617 S.E.2d at 204.

46. *Id.* at 256, 617 S.E.2d at 206.

47. 277 Ga. App. 312, 626 S.E.2d 521 (2006).

48. *Id.* at 314, 626 S.E.2d at 523-24.

49. *Id.*, 626 S.E.2d at 523.

50. *Id.*, 626 S.E.2d at 523-24. “Routinely, this Court refuses to review issues not raised in the trial court.” *Id.*, 626 S.E.2d at 523. *But see Euler-Siac*, 274 Ga. App. at 254 n.2, 617 S.E.2d at 206 n.2 (noting “[s]ubject matter jurisdiction is conferred to a court by state law, and cannot be extended or divested by waiver or agreement of the parties.”)

51. O.C.G.A. § 9-11-12(h)(3). “Whenever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” *Id.*

52. The court of appeals might have reached the correct result, however, because the scope of exclusive federal court jurisdiction to hear patent cases is relatively narrow. Federal courts have exclusive jurisdiction “of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks,” 28 U.S.C. § 1338(a) (2000), but that jurisdiction is narrowly defined to include only:

those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

*Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809 (1988).

**c. Amendments to Pleadings.** A number of cases in the survey period applied the “relation back” factors of O.C.G.A. section 9-11-15(c).<sup>53</sup> “Under the plain wording of O.C.G.A. section 9-11-15(c), the defendant sought to be added must have actual notice of the institution of the action, not merely notice of the incidents giving rise to the litigation.”<sup>54</sup> The failure to seek leave of court before amending an answer to include a counterclaim will authorize the dismissal of the counterclaim with prejudice if the counterclaim is compulsory and without prejudice if the counterclaim is permissive.<sup>55</sup>

**d. Joinder of Parties.** In *Searcy v. Searcy*,<sup>56</sup> the Georgia Supreme Court considered the concept of “complete relief” as a basis for joinder under O.C.G.A. sections 9-11-13(h)<sup>57</sup> and 9-11-19(a)(1).<sup>58</sup> In *Searcy*, a divorce case, the trial court found (1) a portion of the husband’s undivided interest in the estates of his late parents could be awarded as alimony and (2) the executors of the estate could be joined as parties to the divorce case.<sup>59</sup> The supreme court agreed that the husband’s interest in the estates could be awarded as alimony<sup>60</sup> but held that the executors of the estates did not need to be made parties to the divorce to afford the parties “complete relief.”<sup>61</sup> The supreme court explained that the wife could be awarded the husband’s interest in the estates regardless of whether the executors were made parties to the case: “The absence of the Co-executors from this litigation would not render the

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53. O.C.G.A. § 9-11-15(c) (2006); *see, e.g.*, *Rasheed v. Kloop Enters.*, 276 Ga. App. 91, 622 S.E.2d 442 (2005) (allowing relation back); *McNeil v. McCollum*, 276 Ga. App. 882, 625 S.E.2d 10 (2005) (allowing relation back to “John Doe” complaint).

54. *Green v. Cent. State Hosp.*, 275 Ga. App. 569, 573, 621 S.E.2d 491, 495 (2005) (quoting *Khawaja v. Lane Co.*, 239 Ga. App. 93, 96, 520 S.E.2d 1, 4 (1999)).

55. *Sampson v. Haywire Ventures, Inc.*, 278 Ga. App. 525, 527, 629 S.E.2d 515, 518 (2006).

56. 280 Ga. 311, 627 S.E.2d 572 (2006).

57. O.C.G.A. § 9-11-13(h) (2006). This statute states in relevant part:

When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in this chapter, if jurisdiction over them can be obtained.

*Id.*

58. O.C.G.A. § 9-11-19(a) (2006). This statute states in relevant part: “A person who is subject to service of process shall be joined as a party in the action if: (1) In his absence complete relief cannot be afforded among those who are already parties; or (2) He claims an interest relating to the subject of the action . . . .” *Id.*

59. 280 Ga. at 311, 627 S.E.2d at 573.

60. *Id.* at 312, 627 S.E.2d at 574.

61. *Id.* at 312-13, 627 S.E.2d at 574.

relief afforded the wife partial or hollow because she would obtain an interest as full and complete as that presently held by Husband.”<sup>62</sup>

**e. Misnomers.** When a plaintiff amends the complaint to change the name of the defendant, is that the correction of a misnomer or the addition of a new party? The answer can be outcome-determinative if the statute of limitations has run. In *Valdosta Hotel Properties, LLC v. White*,<sup>63</sup> the plaintiff filed suit the day before the statute of limitations expired and named as the sole defendant “Hilton Hotels Corporation d/b/a Hampton Inn Valdosta.” Hilton moved for summary judgment, explaining that Hilton merely licensed the Hampton Inn name and that the hotel was actually owned and operated by another entity, Valdosta Hotel Properties, LLC (“Valdosta Hotel”). The plaintiff then filed an “Amendment to Complaint to Correct Misnomer,” explaining that Hilton had been incorrectly named and that the correct name of the party was “Valdosta Hotel Properties, LLC d/b/a Hampton Inn Valdosta.” Valdosta Hotel then moved for summary judgment on the statute of limitations issue. The trial court denied the motion.<sup>64</sup> The court of appeals reversed, holding that changing the name of the defendant from Hilton to Valdosta Hotel was not the mere correction of a misnomer for which leave of court is not required, but was the addition of a new party, which requires leave of court and does not automatically relate back to the date the original complaint was filed.<sup>65</sup> This case shows the danger of relying upon the “d/b/a” of a business, particularly if the statute of limitations is about to run. If the wrong corporation is sued, naming the correct “d/b/a” will be of no help.

**f. Summary Judgment.** Several cases in the survey period demonstrate the importance of taking great care in responding to a motion for summary judgment with affidavits having the proper evidentiary foundation.<sup>66</sup> In *Wilson v. Edward Don & Co.*,<sup>67</sup> an action

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62. *Id.* at 313, 627 S.E.2d at 574.

63. 278 Ga. App. 206, 628 S.E.2d 642 (2006).

64. *Id.* at 207-08, 628 S.E.2d at 644-45.

65. *Id.* at 209-10, 628 S.E.2d at 645-46.

66. The cases discussed in the text should be distinguished from those in which the nonmoving party has presented at least some evidence, with a proper foundation, that creates an issue of fact. In such instances, the motion for summary judgment will properly be denied. See *Town of Register v. Fortner*, 274 Ga. App. 586, 588, 618 S.E.2d 26, 28 (2005). “It is axiomatic that under O.C.G.A. § 9-11-56, summary judgment is appropriate only when the facts, construed against the movant, plainly and palpably show the nonexistence of any genuine issue of material fact.” *Id.*

67. 275 Ga. App. 787, 622 S.E.2d 18 (2005).

for nonpayment of a debt, the defendant opposed summary judgment with his own affidavit stating that “to the best of [his] knowledge,” the debt had been paid by a third party.<sup>68</sup> The court of appeals affirmed the grant of summary judgment to the plaintiff, holding that the defendant’s affidavit did not provide any evidence that the plaintiff had in fact been paid.<sup>69</sup> “Generalized arguments amounting to mere conclusions have no probative value to pierce the facts presented by the movant for summary judgment.”<sup>70</sup>

The failure of medical malpractice plaintiffs to attach certified copies of medical records to expert affidavits was fatal in at least two cases during the survey period. In *Bregman-Rodoski v. Rozas*,<sup>71</sup> the malpractice plaintiff opposed the defendant’s motion for summary judgment by relying upon her own expert’s affidavit but failed to attach certified copies of any medical records to the affidavit.<sup>72</sup> The court of appeals affirmed the trial court’s grant of the defendant’s motion for summary judgment.<sup>73</sup> To be sufficient to controvert the defendant’s expert opinion and to create an issue of fact, the court held that “the plaintiff’s expert must base his opinion on medical records which are sworn or certified copies, or upon his own personal knowledge.”<sup>74</sup> Similarly, in *Rudd v. Paden*,<sup>75</sup> the court of appeals reversed the denial of a dentist’s motion for summary judgment, holding that the plaintiff’s failure to attach certified copies of dental records to her expert’s affidavit rendered the affidavit of no probative value and insufficient to create an issue of fact, even though there was no dispute as to the existence or content of the records themselves.<sup>76</sup> The court of appeals explained that had the plaintiff needed more time to obtain certified copies of the dental records, she should have moved for additional time to respond to the motion for summary judgment under O.C.G.A. section 9-11-56(f).<sup>77</sup>

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68. *Id.* at 788, 622 S.E.2d at 20.

69. *Id.* at 789, 622 S.E.2d at 20.

70. *Id.* at 788-89, 622 S.E.2d at 20 (quoting *Jay Gleason Adver. Serv. v. Gleason*, 193 Ga. App. 445, 445, 388 S.E.2d 43, 44 (1989)).

71. 273 Ga. App. 835, 616 S.E.2d 171 (2005).

72. *Id.* at 836, 616 S.E.2d at 172.

73. *Id.* at 838, 616 S.E.2d at 174.

74. *Id.* at 836-37, 616 S.E.2d at 173. In addition, under O.C.G.A. section 9-11-56(e) (2006), on motion for summary judgment, “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto.” *Bregman-Rodoski*, 273 Ga. App. at 836, 616 S.E.2d at 173 (quoting O.C.G.A. § 9-11-56(e)) (brackets in original).

75. 279 Ga. App. 141, 630 S.E.2d 648 (2006).

76. *Id.* at 143, 630 S.E.2d at 650.

77. *Id.* at 144, 630 S.E.2d at 651; O.C.G.A. § 9-11-56(f) (2006).

In a pair of cases, the court of appeals also clarified that a defendant moving for summary judgment on an affirmative defense may not rely on the absence of evidence in the record disproving the affirmative defense but instead must come forward with affirmative evidence proving every element of the affirmative defense. A showing that there is no evidence that the plaintiff filed suit within the limitations period, for example, will not support the granting of a defendant's motion for summary judgment absent some other showing by the defendant.<sup>78</sup>

In *Landsberg v. Powell*,<sup>79</sup> the court of appeals reversed the grant of the defendant's motion for summary judgment, holding that the trial court's failure to hold a hearing on the motion despite the defendant's request was reversible error.<sup>80</sup> Though the plaintiff had not himself requested a hearing, he was entitled under Uniform Superior Court Rule 6.3<sup>81</sup> to rely upon the defendant's request.<sup>82</sup>

## 2. Discovery

Cases in the survey period confirmed the broad discretion granted to trial courts to dismiss cases and enter defaults as sanctions for abusive

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78. *E.g.*, *Ward v. Bergen*, 277 Ga. App. 256, 260, 626 S.E.2d 224, 228 (2006) (reversing grant of defendant's motion for summary judgment on statute of limitations defense). "A defendant moving for summary judgment based on an affirmative defense may not rely upon an absence of evidence in the record disproving the affirmative defense." *Id.* At the summary judgment stage, the burden was upon the defendant to come forward with evidence demonstrating as a matter of law the suit was not brought within the limitations period. *Id.*; see *Brown v. Coast Dental of Ga., P.C.*, 275 Ga. App. 761, 769, 622 S.E.2d 34, 40 (2005) (reversing grant of defendant's motion for summary judgment on statute of limitations defense).

79. 278 Ga. App. 13, 627 S.E.2d 922 (2006).

80. *Id.* at 14, 627 S.E.2d at 923-24; see also *Bennett v. McDonald*, 238 Ga. App. 414, 518 S.E.2d 912 (1999) (holding that it is an error to grant either motion without a hearing where both parties had filed motions for summary judgment, but only one had requested a hearing).

81. UNIF. SUPER. CT. R. 6.3. The rule provides:

Unless otherwise ordered by the court, all motions in civil actions, including those for summary judgment, shall be decided by the court without oral hearing, except motions for new trial and motions for judgment notwithstanding the verdict. However, oral argument on a motion for summary judgment shall be permitted upon written request made in a separate pleading bearing the caption of the case and entitled "Request for Oral Hearing," and provided that such pleading is filed with the motion for summary judgment or filed not later than five (5) days after the time for response.

*Id.*

82. *Landsberg*, 278 Ga. App. at 14, 627 S.E.2d at 923-24.

tactics in discovery.<sup>83</sup> In *Flott v. Southeast Permanente Medical Group, Inc.*,<sup>84</sup> for example, the court of appeals affirmed the dismissal of the plaintiff's case for discovery abuse because the plaintiff "caused completely unnecessary delay and expense by pretending to cooperate in discovery when she knew that her expert witness was not going to give a deposition because he had withdrawn."<sup>85</sup> The court of appeals held that the plaintiff had acted willfully because she had numerous opportunities to inform the defendants that their efforts to take the expert's deposition were unnecessary.<sup>86</sup> The court of appeals further held that "[t]he trial court was authorized to conclude that [the plaintiff] was intentionally prolonging the discovery process."<sup>87</sup>

It is reversible error, however, if no discovery order has been entered, to dismiss a case or to enter a default judgment as a discovery sanction without a hearing.<sup>88</sup>

### 3. *Motions in Limine*

In *Telcom Cost Consulting, Inc. v. Warren*,<sup>89</sup> the Georgia Court of Appeals discussed the appropriate uses for a motion in limine:

A motion in limine is a pretrial motion which may be used two ways:

1) The movant seeks, not a *final* ruling on the admissibility of evidence, but only to prevent the mention by anyone, during the trial, of a

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83. See, e.g., *City of Atlanta v. Paulk*, 274 Ga. App. 10, 13, 616 S.E.2d 210, 212 (2005) (affirming sanction of designating facts establishing the City's liability because the City had not produced responsive documents until three days before trial); *Gropper v. STO Corp.*, 276 Ga. App. 272, 275-77, 623 S.E.2d 175, 180-81 (2005) (affirming dismissal of the plaintiff's case for discovery abuse because the plaintiff had engaged in a prolonged pattern of discovery abuse); *Smith v. Glass*, 273 Ga. App. 327, 328, 615 S.E.2d 172, 173 (2005) (affirming dismissal of complaint because the pro se plaintiff failed to respond to discovery or explain his failure to attend rule nisi hearing on discovery sanctions). In addition, the Georgia Supreme Court in *Bayless v. Bayless*, 280 Ga. 153, 625 S.E.2d 741 (2006), held that trial courts have the "inherent power" to impose sanctions, including the striking of defensive pleadings and the barring of the introduction of supporting evidence, if necessary to compel obedience to its orders and to control the conduct of everyone connected with a judicial proceeding. *Id.* at 155, 625 S.E.2d at 743.

84. 274 Ga. App. 622, 617 S.E.2d 598 (2005).

85. *Id.* at 624, 617 S.E.2d at 600.

86. *Id.* at 625, 617 S.E.2d at 601.

87. *Id.*

88. E.g., *Greenbriar Homes, Inc. v. Builders Ins.*, 273 Ga. App. 344, 615 S.E.2d 191 (2005). "Where, as here, a court has not entered a discovery order, it must conduct a hearing on the question of whether the offending party's failure to respond to discovery was willful before imposing the extreme sanction of default or dismissal." *Id.* at 347, 615 S.E.2d at 194.

89. 275 Ga. App. 830, 621 S.E.2d 864 (2005).

certain item of evidence or area of inquiry until its admissibility can be determined *during the course of the trial* outside the presence of the jury. 2) The movant seeks a ruling on the admissibility of evidence prior to the trial.<sup>90</sup>

A motion in limine to exclude evidence may require significant briefing and perhaps multiple hearings prior to trial and thus should be filed sufficiently early. In *Colp v. Ford Motor Co.*,<sup>91</sup> the defendant filed a motion in limine to exclude evidence of other allegedly similar incidents.<sup>92</sup> The plaintiff intended to offer evidence of thirty-seven other automobile accidents that she claimed satisfied the substantial similarity test as set forth in *Cooper Tire & Rubber Co. v. Crosby*.<sup>93</sup> In *Colp* the trial court considered voluminous evidence, reviewed multiple briefs, and conducted a two-day hearing, which included testimony by experts for both parties. The trial court excluded all thirty-seven of the plaintiff's proffered other incidents for failure to meet the substantial similarity test.<sup>94</sup> The appellate court affirmed the trial court's exclusion of all thirty-seven other accidents, citing the general rule that "questions of relevance are within the domain of the trial court, and, absent a manifest abuse of discretion, a court's refusal to admit evidence on grounds of lack of relevance will not be disturbed on appeal."<sup>95</sup>

#### B. *Juries and Jury Selection*

In *Brown v. Columbus Doctors Hospital, Inc.*,<sup>96</sup> the court of appeals revisited the trial court's obligation during voir dire to "ferret out bias"<sup>97</sup> when a prospective juror has a relationship with a party that is close or subordinate, or suggests bias.<sup>98</sup> The trial court must do more than rehabilitate the juror through the use of talismanic questions.<sup>99</sup> It must conduct voir dire "adequate to the situation,"<sup>100</sup> whether by questions of its own or through those of counsel.<sup>101</sup>

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90. *Id.* at 832, 621 S.E.2d at 866 (quoting *Harper v. Patterson*, 270 Ga. App. 437, 441, 606 S.E.2d 887, 892 (2004)).

91. 279 Ga. App. 280, 630 S.E.2d 886 (2006).

92. *Id.* at 280, 630 S.E.2d at 887.

93. 273 Ga. 454, 543 S.E.2d 21 (2001).

94. *Colp*, 279 Ga. App. at 282-83, 630 S.E.2d at 888.

95. *Id.* at 284, 630 S.E.2d at 889 (quoting *Karoly v. Kawasaki Motors Corp.*, 259 Ga. App. 225, 227, 576 S.E.2d 625, 627 (2003)).

96. 277 Ga. App. 891, 627 S.E.2d 805 (2006).

97. *Id.* at 895, 627 S.E.2d at 808.

98. *Id.* at 894, 627 S.E.2d at 808.

99. *Id.*

100. *Id.*

101. *Id.*

The prospective juror in *Brown* stated during voir dire that if he were the plaintiff, he “would not want someone in his frame of mind to be sitting as a juror,”<sup>102</sup> that it would be “difficult” for him to put aside his prejudices because of an ongoing business relationship with Columbus Doctors Hospital, Inc., and that he believed that malpractice suits in general were affecting his economic livelihood.<sup>103</sup> While the trial court and defense counsel attempted several times to rehabilitate the prospective juror, the juror never clearly agreed that he could be fair and impartial.<sup>104</sup>

After *Brown* moved to strike the juror for cause, the trial court denied the request. *Brown* then used one of his peremptory strikes to remove the juror. The jury rendered a defense verdict, and *Brown* appealed.<sup>105</sup> The court of appeals reversed the jury’s defense verdict, holding that *Brown* had rebutted the presumption that potential jurors are presumed impartial.<sup>106</sup> Because the trial court failed to “ferret out bias, an abuse of discretion resulted, and a new trial is required.”<sup>107</sup>

### C. Statements and Arguments of Counsel

Two cases during the survey period clarified the rules regulating a defendant’s right to opening and closing argument.<sup>108</sup> In a civil case, a defendant may obtain the right to open and close argument by (1) admitting the plaintiff’s prima facie case or (2) submitting no evidence.<sup>109</sup>

In *Kia Motors America, Inc. v. Range*,<sup>110</sup> the court of appeals explained that a defendant’s timing in admitting a prima facie case is crucial to his ability to open and close final argument.<sup>111</sup> Prima facie evidence must be admitted before plaintiffs puts on their proof.<sup>112</sup> However, timing “is not critical . . . for a defendant asserting his right to open and close final argument because he submitted no evidence.”<sup>113</sup> Accordingly, the court of appeals in *Range* held that the trial court erred

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102. *Id.* at 893, 627 S.E.2d at 807.

103. *Id.* at 893-94, 627 S.E.2d at 807-08.

104. *Id.*

105. *Id.* at 891, 627 S.E.2d at 806-07.

106. *Id.* at 894-95, 627 S.E.2d at 808.

107. *Id.* at 895, 627 S.E.2d at 808.

108. See *Kia Motors Am., Inc. v. Range*, 276 Ga. App. 360, 623 S.E.2d 514 (2005); *Rouse v. Polott*, 274 Ga. App. 226, 617 S.E.2d 185 (2005).

109. *Range*, 276 Ga. App. at 361, 623 S.E.2d at 515.

110. 276 Ga. App. 360, 623 S.E.2d 514 (2006).

111. *Id.* at 363, 623 S.E.2d at 516.

112. *Id.* at 362-63, 623 S.E.2d at 516.

113. *Id.* at 363, 623 S.E.2d at 517.

by denying Kia its right to open and close because Kia submitted no evidence at trial and had no obligation to announce this intention before the plaintiff closed her case-in-chief.<sup>114</sup> The court of appeals arrived at this conclusion after overruling *Georgia Pipe Co. v. Lawler*.<sup>115</sup>

A defendant waives the right to opening and closing argument, however, when the defendant makes the plaintiff's witness his own.<sup>116</sup> In *Rouse v. Polott*,<sup>117</sup> the plaintiff read select portions of a deposition transcript into evidence, but he did so outside the presence of the jury.<sup>118</sup> While the defendant did not waive her right to opening and closing argument by introducing other relevant parts of the same transcript in the presence of the jury, the court of appeals held that the defendant "admitted additional portions of the deposition that were not relevant to the portions that [the plaintiff] had read."<sup>119</sup> Accordingly, the court of appeals held that the defendant had made the witness his own, and therefore the defendant lost the right to opening and closing argument.<sup>120</sup>

#### D. Trial Motions

There are numerous grounds on which a party may move for a mistrial.<sup>121</sup> However, merely moving for a mistrial does not preserve those grounds for appeal if the trial court takes some corrective action. "Where a defendant objects and moves for a mistrial during the examination of a witness, and the trial court denies the motion but takes some corrective action, . . . he must renew the objection or motion; otherwise, the issue is waived."<sup>122</sup> Apparently, this mistake is common, as five appellate cases in the survey period cited this failure to abide by the renewal requirement as grounds for denying review of appellate issues.<sup>123</sup>

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114. *Id.* at 365, 623 S.E.2d at 518.

115. 262 Ga. App. 22, 584 S.E.2d 634 (2003). "*Ga. Pipe Co.* must be overruled to the extent it holds that a defendant who presents no evidence loses his right to open and close the final argument unless he asserts the right before the plaintiff submits evidence." *Range*, 276 Ga. App. at 365, 623 S.E.2d at 518.

116. *Rouse*, 274 Ga. App. at 229, 617 S.E.2d at 188.

117. 274 Ga. App. 226, 617 S.E.2d 185 (2005).

118. *Id.* at 228, 617 S.E.2d at 187.

119. *Id.* at 229, 617 S.E.2d at 188.

120. *Id.*

121. See generally RONALD L. CARLSON, GEORGIA TRIAL HANDBOOK § 31 (3d ed. 2003).

122. *Jones v. State*, 279 Ga. App. 139, 140, 630 S.E.2d 643, 645 (2006) (quoting *Nowill v. State*, 271 Ga. App. 254, 255, 609 S.E.2d 188, 190 (2005)).

123. See *id.*; *Daniels v. State*, 278 Ga. App. 332, 336, 629 S.E.2d 36, 40 (2006); *Cook v. State*, 276 Ga. App. 803, 806, 625 S.E.2d 83, 87 (2005); *Dickerson v. State*, 275 Ga. App. 695, 697, 621 S.E.2d 831, 834 (2005); *Parker v. State*, 274 Ga. App. 347, 351, 617 S.E.2d

In *SBP Management, LLC v. Price*,<sup>124</sup> the court of appeals distinguished the time for filing a motion for new trial from a statute that required filing an appeal within seven days.<sup>125</sup> O.C.G.A. section 44-7-56<sup>126</sup> concerns appeals from judgments in landlord and tenant dispossession actions and provides that “[a]ny judgment by the trial court shall be appealable pursuant to Chapters 2, 3, 6, and 7 of Title 5, provided that any such appeal shall be filed within seven days of the date such judgment was entered . . . .”<sup>127</sup> The trial court denied SBP’s motion for new trial as untimely because it was filed later than seven days after the judgment was entered.<sup>128</sup> The court of appeals reversed because O.C.G.A. section 44-7-56 does not reference Title 5.<sup>129</sup> O.C.G.A. section 5-5-40(a)<sup>130</sup> requires that motions for new trial be brought within thirty days of entry of judgment.<sup>131</sup>

#### E. Jury Instructions

During the survey period, multiple cases addressed jury instructions, largely applying the black-letter rules.<sup>132</sup> The most interesting cases

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625, 629 (2005).

124. 277 Ga. App. 130, 625 S.E.2d 523 (2006).

125. *Id.* at 131, 625 S.E.2d at 524-25.

126. O.C.G.A. § 44-7-56 (1991 & Supp. 2006).

127. *Id.*

128. *SBP*, 277 Ga. App. at 131, 625 S.E.2d at 524.

129. *Id.* at 132, 625 S.E.2d at 525.

130. O.C.G.A. § 5-5-40(a) (1995 & Supp. 2006).

131. *Id.*

132. *See, e.g.*, *Bailey v. Edmundson*, 280 Ga. 528, 534, 630 S.E.2d 396, 402 (2006) (“There is no requirement that only verbatim pattern charges are permissible.”); *Wynn v. City of Warner Robins*, 279 Ga. App. 42, 47, 630 S.E.2d 574, 579 (2006) (“In order for a refusal to charge to be error, the requests must be entirely correct and accurate, and adjusted to the pleadings, law, and evidence, and not otherwise covered in the general charge.” (quoting *Hefner v. Maiorana*, 259 Ga. App. 176, 177, 576 S.E.2d 580, 581 (2003))); *Brock v. King*, 279 Ga. App. 335, 340-41, 629 S.E.2d 829, 835 (2006) (“As a general rule a requested charge should be given where it has been raised by the evidence, embraces a correct and complete principle of law, has not been substantially included in the general instructions given, and is specifically adjusted to the evidence.” (quoting *Joiner v. Lane*, 235 Ga. App. 121, 122, 508 S.E.2d 203, 206 (1998))); *Beasley v. Wachovia Bank*, 277 Ga. App. 698, 701, 627 S.E.2d 417, 421 (2006) (“Inapplicable but correct charges, unless harmful, are not grounds for a new trial.”); *Swanson v. Hall*, 275 Ga. App. 452, 455, 620 S.E.2d 576, 579 (2005) (“It is within the discretion of the trial court to determine whether supplemental jury instructions are necessary.”); *Gates v. Navy*, 274 Ga. App. 180, 181, 617 S.E.2d 163, 165 (2005) (“It is well established that jury instructions must be read and considered as a whole in determining whether the charge contained error.” (quoting *Wadkins v. Smallwood*, 243 Ga. App. 134, 139, 530 S.E.2d 498, 503 (2000))).

focused on the “extraordinary exception to waiver”<sup>133</sup> provision set forth in O.C.G.A. section 5-5-24(c):<sup>134</sup> “Notwithstanding any other provision of this Code section, the appellate courts shall consider and review erroneous charges where there has been a substantial error in the charge which was harmful as a matter of law, regardless of whether objection was made hereunder or not.”<sup>135</sup>

To avoid emasculating the rule that civil litigants must timely and properly preserve charging objections, Georgia courts have repeatedly held that this statute must be “strictly construed” and that instances in which it applies are “rare,” requiring exceptional circumstances.<sup>136</sup> To say that a substantial error was harmful under O.C.G.A. section 5-5-24(c) is to say “that it was blatantly prejudicial or resulted in a gross miscarriage of justice.”<sup>137</sup> However, even the review of substantial error under the statute is not available when the giving of an instruction, or the failure to give an instruction, was induced or acquiesced in by counsel during trial.<sup>138</sup>

Parsing the record and the trial transcript, the court of appeals in *Cherokee National Life Insurance Co. v. Eason*<sup>139</sup> held that the appellant waived its right to appellate review under O.C.G.A. section 5-5-24(c) because it “specifically acquiesced and aided”<sup>140</sup> in the allegedly erroneous instruction read to the jury:

Cherokee National did not merely fail to object to the charge; it also failed to object to the verdict form or legality before deliberations began . . . , stated that it had no objection to the form of the verdict after it was returned, failed to object to either the court’s proposed or actual response to the jury’s inquiry regarding stubborn litigiousness and attorney fees, and specifically agreed with the court’s proposed instruction that would allow the jury to consider stubborn litigiousness in determining whether attorney fees would be awarded.<sup>141</sup>

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133. *Pearson v. Tippmann Pneumatics, Inc.*, 277 Ga. App. 722, 729, 627 S.E.2d 431, 437 (2006), *cert. granted*.

134. O.C.G.A. § 5-5-24(c) (1995 & Supp. 2006).

135. *Id.*

136. *E.g.*, *Cmty. Bank v. Handy Auto Parts, Inc.*, 270 Ga. App. 640, 645, 607 S.E.2d 241, 245 (2004); *Setliff v. Littleton*, 264 Ga. App. 711, 714, 592 S.E.2d 180, 183 (2003); *see, e.g.*, *Jackson v. Neese*, 276 Ga. App. 724, 727, 624 S.E.2d 139, 142 (2005) (finding no error under O.C.G.A. § 5-5-24(c)).

137. *Alta Anesthesia Assocs. of Ga., P.C. v. Gibbons*, 245 Ga. App. 79, 85, 537 S.E.2d 388, 394 (2000) (quoting *Lavender v. State*, 234 Ga. 608, 609, 216 S.E.2d 855, 857 (1975)).

138. *Pearson*, 277 Ga. App. at 729, 627 S.E.2d at 437; *Cherokee Nat’l Life Ins. Co. v. Eason*, 276 Ga. App. 183, 187, 622 S.E.2d 883, 886-87 (2005).

139. 276 Ga. App. 183, 622 S.E.2d 883 (2005).

140. *Id.* at 186, 622 S.E.2d at 886.

141. *Id.* at 187, 622 S.E.2d at 887.

The court of appeals reached the same result in *Pearson v. Tippmann Pneumatics, Inc.*,<sup>142</sup> a product liability case. There, the court of appeals held that the appellant waived appellate review under O.C.G.A. section 5-5-24(c) by inducing his own alleged error in the trial court's recharge on proximate cause.<sup>143</sup>

In *Pearson* the appellant argued, among other things, that the recharge erroneously omitted key language discussing the foreseeability of intervening causes.<sup>144</sup> The court of appeals refused to consider this argument, however, concluding that the appellant had effectively acquiesced to the trial court's original decision to give the pattern charge on foreseeability and that "after the jury posed its proximate cause question to the trial court, [the appellant] did not request that the trial court recharge on foreseeability or that the trial court expand or elaborate upon its previous foreseeability instruction."<sup>145</sup> Based on these facts, the court of appeals held that the appellant had invited or induced his own alleged error.<sup>146</sup>

#### F. Verdict Forms

In *Government Employees Insurance Co. v. Progressive Casualty Insurance Co.*,<sup>147</sup> the court of appeals upheld the trial court's broad discretion in formulating special verdict forms.<sup>148</sup> At trial, Progressive objected to a special verdict form because the form allowed the jury to reach conclusions of law about insurance coverage.<sup>149</sup> The court of appeals acknowledged that the language of the verdict form "may have been inartful and may have mixed in a question of law."<sup>150</sup> Nonetheless, the appellate court upheld the verdict because of the broad language of O.C.G.A. section 9-11-49(a),<sup>151</sup>

which authorizes courts to construct a special verdict in any of three ways: (1) "the court may submit to the jury written questions susceptible of categorical or other brief answer"; (2) the court "may submit written forms of several special findings which might properly be made under the pleadings and evidence"; or (3) the court "may use such other

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142. 277 Ga. App. 722, 627 S.E.2d 431 (2006).

143. *Id.* at 729, 627 S.E.2d at 437.

144. *Id.*

145. *Id.*

146. *Id.* at 729-30, 627 S.E.2d at 437.

147. 275 Ga. App. 872, 622 S.E.2d 92 (2005).

148. *Id.* at 875, 622 S.E.2d at 95.

149. *Id.* at 873, 622 S.E.2d at 93.

150. *Id.* at 875, 622 S.E.2d at 95.

151. O.C.G.A. § 9-11-49(a) (2006).

method of submitting the issues and requiring the written findings thereon as it deems most appropriate.” This latter language is quite broad and allows the court great discretion in formulating the special verdict “as it deems most appropriate.” Subsection (b) of OCGA § 9-11-49 reaffirms this discretion, providing that in cases where a special verdict is required (specifically referencing declaratory judgment cases), “[t]he court shall prescribe the form of the questions for submission to the jury.”<sup>152</sup>

As to damages, a party who wishes to obtain an explanation or an appellate review of a jury’s calculation of damages should object to any verdict form that gives a jury “free rein to set damages.”<sup>153</sup> In *Beasley v. Wachovia Bank*,<sup>154</sup> the defendant, Beasley, appealed on several grounds, including that no evidence supported the \$1 million award against her.<sup>155</sup> The court of appeals explained that jury verdicts less than the amount proven at trial should be upheld if the verdict is within the range of damages shown, even if it appears that the verdict was not calculated according to a proven formula.<sup>156</sup> The court of appeals explained that “[i]f [Beasley] desired an explanation of the basis for the damage award, [she] should have objected to the verdict form, which allowed the jury free rein to set damages. [Her] failure to do so while the jury was still present and available to reform the verdict waived any objection.”<sup>157</sup>

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152. *Government Employees Ins. Co.*, 275 Ga. App. at 874-75, 622 S.E.2d at 94-95 (quoting O.C.G.A. § 9-11-49).

153. *E.g.*, *Beasley*, 277 Ga. App. at 699, 627 S.E.2d at 420.

154. 277 Ga. App. 698, 627 S.E.2d 417 (2006).

155. *Id.* at 699-700, 627 S.E.2d at 419-20.

156. *Id.* at 699, 627 S.E.2d at 420.

157. *Id.* (quoting *Brock v. Douglas Kohoutek, L.P.*, 225 Ga. App. 104, 109, 483 S.E.2d 342, 346-47 (1997)) (brackets in original); *see also* *The Pep Boys-Manny, Moe & Jack, Inc. v. Yahyapour*, 279 Ga. App. 674, 677, 632 S.E.2d 385, 388-89 (2006).