

# Appellate Practice and Procedure

by Roland F. L. Hall\*

## I. INTRODUCTION

This Article surveys decisions addressing appellate law and procedure handed down by the Georgia appellate courts between June 1, 2006 and May 31, 2007. The cases discussed fall into the following categories: (1) appellate jurisdiction, (2) preserving the record, (3) timeliness of appeal, and (4) miscellaneous cases of interest.

## II. APPELLATE JURISDICTION

### A. *Selecting the Correct Appeal Procedure*

As can be seen from the two cases discussed below, it is not always easy to decide which appeal procedure should be used. In *Gelfand v. Gelfand*,<sup>1</sup> the plaintiff ex-wife brought a complaint against the defendant ex-husband for upward modification of child support, sought a ruling holding the defendant ex-husband in contempt, and later amended her complaint to request a declaration regarding the meaning of certain provisions in the divorce settlement agreement. Although the trial court entered an order interpreting the language in the settlement agreement, the trial court did not rule on the request for a finding of contempt or on the request for modification of child support.<sup>2</sup>

After the Georgia Supreme Court granted the plaintiff's application for discretionary appeal, the defendant argued that the supreme court lacked jurisdiction because the plaintiff's declaratory action did not

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1. 281 Ga. 40, 635 S.E.2d 770 (2006).

2. *Id.* at 40, 635 S.E.2d at 771.

resolve all the issues of the case. The plaintiff contended that the trial court's ruling was a declaratory judgment and constituted a final, appealable order.<sup>3</sup> However, the supreme court concluded that the plaintiff's request for declaratory relief was not actually an action for declaratory judgment because, the court noted, "[t]he distinctive characteristic of a declaratory judgment is that the declaration stands by itself and does not seek execution or performance by the defendant," and the plaintiff sought an interpretation of language in the settlement agreement that would enable her to obtain more money from the defendant ex-husband.<sup>4</sup> Because the trial court's order was not a declaratory judgment and did not resolve all pending issues, the supreme court held that the plaintiff's appeal was from a non-final judgment and should have been brought pursuant to the interlocutory appeal procedures of section 5-6-34(b) of the Official Code of Georgia Annotated ("O.C.G.A.").<sup>5</sup> Because the plaintiff had not done so, the supreme court dismissed her appeal.<sup>6</sup>

In *Cox v. Academy of Lithonia, Inc.*,<sup>7</sup> the plaintiff, a charter school, brought suit against the defendants, including the Superintendent of Schools, the Georgia State Department of Education, and the Georgia Board of Education, for declaratory relief and mandamus after the board of education reduced the plaintiff's charter application term from two years to one year. The plaintiff sought a declaration that the term of its renewal was at least two years and, in the alternative, sought issuance of a writ of mandamus requiring the issuance of a revised charter. The trial court granted declaratory relief to the plaintiff, and the defendants filed a direct appeal to the court of appeals.<sup>8</sup>

The plaintiff moved to dismiss the appeal and alleged that the defendants did not comply with the discretionary appeal procedures of O.C.G.A. section 5-6-35(a)(1),<sup>9</sup> which states that appeals from decisions of the superior courts reviewing decisions of state and local agencies must comply with the discretionary appeal procedures.<sup>10</sup> The plaintiff argued that its declaratory judgment action was essentially an appeal of the defendants' administrative decision, and even though a declarato-

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3. *Id.*

4. *Id.*, 635 S.E.2d at 772 (quoting *Kirkland v. Morris*, 233 Ga. 597, 598, 212 S.E.2d 781, 782 (1975)).

5. *Id.* at 41-42, 635 S.E.2d at 772; O.C.G.A. § 5-6-34(b) (1995).

6. *Gelfand*, 281 Ga. at 41, 635 S.E.2d at 772.

7. 280 Ga. App. 626, 634 S.E.2d 778 (2006).

8. *Id.* at 626, 634 S.E.2d at 779.

9. O.C.G.A. § 5-6-35(a)(1) (1995).

10. *Id.*; *Cox*, 280 Ga. App. at 626-27, 634 S.E.2d at 779.

ry judgment could normally be reviewed by direct appeal, the discretionary appeal procedures were required.<sup>11</sup>

The court of appeals agreed with the plaintiff and dismissed the appeal.<sup>12</sup> The court of appeals first distinguished *Department of Transportation v. Peach Hill Properties, Inc.*,<sup>13</sup> in which the plaintiff filed a petition seeking mandamus and declaratory judgment after a change in one of the defendant agency's policies adversely affected the plaintiff. The supreme court in *Peach Hill Properties* held that the defendant agency, which had filed a direct appeal, was not required to use the discretionary appeal procedures.<sup>14</sup> The court of appeals stated that the discretionary appeal procedures in O.C.G.A. section 5-6-35(a)(1) were not required in *Peach Hill Properties* because the plaintiff in that case had challenged a general policy of the agency rather than a specific administrative decision.<sup>15</sup> The court of appeals held that in contrast to the plaintiff in *Peach Hill Properties*, the plaintiff charter school in *Cox* had sought review of an administrative decision, and thus the discretionary appeal procedures were applicable.<sup>16</sup>

The court of appeals also addressed the defendants' argument that O.C.G.A. section 5-6-35(a)(1) did not apply because the case had not been adjudicated by two tribunals.<sup>17</sup> As the supreme court has noted, the legislative intent behind O.C.G.A. section 5-6-35(a)(1) was to give the appellate courts discretion not to accept an appeal when two tribunals (the agency and the superior court in its appellate capacity) have already adjudicated the case.<sup>18</sup> The court of appeals held that because the underlying subject matter was a review of the board of education's decision, the appellants were required to follow the discretionary appeal procedure.<sup>19</sup> The court of appeals relied upon its decision in *Best Tobacco, Inc. v. Department of Revenue*,<sup>20</sup> even though that case was decided on the basis of a different fact pattern and concerned an appeal by the applicant rather than the agency or its representatives.<sup>21</sup>

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11. *Cox*, 280 Ga. App. at 626-27, 634 S.E.2d at 779.

12. *Id.* at 628, 634 S.E.2d at 780.

13. 278 Ga. 198, 599 S.E.2d 167 (2004).

14. *Id.* at 200, 599 S.E.2d at 169.

15. *Cox*, 280 Ga. App. at 627, 634 S.E.2d at 779-80.

16. *Id.*, 634 S.E.2d at 780.

17. *Id.* at 627-28, 634 S.E.2d at 780.

18. *Citizens & S. Nat'l Bank v. Rayle*, 246 Ga. 727, 730, 273 S.E.2d 139, 142 (1980).

19. *Cox*, 280 Ga. App. at 628, 634 S.E.2d at 780.

20. 269 Ga. App. 484, 604 S.E.2d 578 (2004).

21. *Id.* at 484-85, 604 S.E.2d at 578-80.

### B. Standing

In *In re J.L.B.*,<sup>22</sup> the juvenile court adjudicated J.L.B. delinquent and ordered him to be evaluated for drug and alcohol use. J.L.B.'s parents filed a pro se appeal on their own behalf rather than on J.L.B.'s behalf, which presented the court of appeals with an issue of first impression: whether parents have standing to appeal from their minor child's delinquency adjudication on their own behalf as parties to the delinquency action.<sup>23</sup>

The court of appeals held that the parents did have standing.<sup>24</sup> The court of appeals observed that (1) the parents were necessary parties to all legal proceedings concerning their minor child, including a delinquency action; (2) a delinquency order could impose requirements on the parents, such as participating in counseling or paying supervision fees; and (3) parents could face consequences, such as an order of contempt, for failing to attend a delinquency proceeding.<sup>25</sup> Further, under O.C.G.A. sections 15-11-6(b) and 15-11-7(a),<sup>26</sup> parents receive procedural protections in delinquency actions, including representation by counsel and the ability to present evidence.<sup>27</sup> Thus, the court of appeals held, "It follows that, as parties to the delinquency action, parents have the right to appeal the juvenile court's judgment and to participate in the appellate process."<sup>28</sup>

In *Mosely v. Sentence Review Panel*,<sup>29</sup> the plaintiff, a district attorney, entered into a plea agreement with a defendant under which the defendant received a fifteen-year sentence. The defendant subsequently filed a petition with the Georgia Sentence Review Panel (the "Panel") and obtained a reduction in her sentence. The plaintiff brought an action seeking mandamus and injunctive relief against the Panel and other defendants concerning the constitutionality of certain aspects of the Panel's authority to review and reduce sentences. The trial court concluded that the plaintiff lacked standing, and it dismissed the action.<sup>30</sup>

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22. 280 Ga. App. 556, 634 S.E.2d 514 (2006).

23. *Id.* at 556, 634 S.E.2d at 515-16.

24. *Id.* at 558, 634 S.E.2d at 516-17.

25. *Id.* at 557, 634 S.E.2d at 516.

26. O.C.G.A. §§ 15-11-6(b), -7(a) (2005).

27. *J.L.B.*, 280 Ga. App. at 557-58, 634 S.E.2d at 516.

28. *Id.* at 558, 634 S.E.2d at 516.

29. 280 Ga. 646, 631 S.E.2d 704 (2006).

30. *Id.* at 646, 631 S.E.2d at 706.

On appeal, the supreme court first held that the plaintiff lacked standing to seek a writ of mandamus.<sup>31</sup> Although the plaintiff could have sought to compel the Panel to perform its duties, the supreme court held that the plaintiff's objective was to prevent the Panel from performing its duties on the basis that it was acting pursuant to unconstitutional legislation.<sup>32</sup> The supreme court concluded that a challenge to the validity of the Panel's public duties could not be attacked by means of mandamus.<sup>33</sup>

As to the plaintiff's claim for injunctive relief, the supreme court held that the plaintiff essentially sought an injunction against the enforcement of an allegedly unconstitutional statute.<sup>34</sup> The plaintiff claimed that the statute interfered with his authority as a district attorney to negotiate binding plea agreements and that it authorized the imposition of void and improper sentences.<sup>35</sup> The supreme court held that because the plaintiff's official responsibilities included an obligation to challenge statutes interfering with his authority, the plaintiff had standing to challenge the statute's constitutionality and to seek injunctive relief against its enforcement.<sup>36</sup>

### C. Miscellaneous Jurisdictional Issues

In *Forest City Gun Club v. Chatham County*,<sup>37</sup> a case which arose from an eminent domain proceeding, a landowner contended that Chatham County (the "County") used an improper method of calculating the market value of the property taken by the County. The landowner proposed its own method of valuation, and the County moved for summary judgment to exclude certain evidence supporting the landowner's valuation method.<sup>38</sup> The trial court denied in part and granted in part the County's motion, and the landowner appealed pursuant to O.C.G.A. section 9-11-56(h),<sup>39</sup> which provides that a losing party has the right to a direct appeal from an order granting partial summary judgment.<sup>40</sup> The County cross-appealed.<sup>41</sup>

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31. *Id.* at 647, 631 S.E.2d at 706.

32. *Id.*

33. *Id.*

34. *Id.*, 631 S.E.2d at 707.

35. *Id.* at 648, 631 S.E.2d at 707.

36. *Id.*

37. 280 Ga. App. 219, 633 S.E.2d 623 (2006).

38. *Id.* at 219, 633 S.E.2d at 624.

39. O.C.G.A. § 9-11-56(h) (2006).

40. *Id.*; *Forest City Gun Club*, 280 Ga. App. at 219-20, 633 S.E.2d at 624-25.

41. *Forest City Gun Club*, 280 Ga. App. at 220, 633 S.E.2d at 624.

Strictly based on the trial court's and the parties' understanding that a motion for partial summary judgment had been decided, the court of appeals would have had jurisdiction over the appeal and cross-appeal pursuant to O.C.G.A. section 9-11-56(h).<sup>42</sup> Upon examination, however, the court of appeals held that the trial court's rulings did not pertain to any element of damages but addressed only the method of calculating fair market value and the appropriate evidence that could be presented to the jury in ascertaining fair market value.<sup>43</sup> The court of appeals held that the County's motion for summary judgment was "more akin to a motion in limine."<sup>44</sup> Thus, despite the fact that the parties and the trial court referred to the County's motion as one for summary judgment, the court of appeals held that the order did not fall within O.C.G.A. section 9-11-56(h) and that the interlocutory appeal procedures should have been used instead.<sup>45</sup> Because there was no independent jurisdictional basis for the County's cross-appeal, the court of appeals dismissed the cross-appeal as well.<sup>46</sup>

In past cases involving a direct appeal from a final judgment, the court of appeals has held that every order being challenged on appeal must be included in the notice of appeal.<sup>47</sup> The supreme court rejected this principle in *Mateen v. Dicus*,<sup>48</sup> in which it held that when a direct appeal is taken from a final judgment and the appellant includes the judgment in the notice of appeal, the appellate court must review all other orders raised on appeal that "may affect the proceedings below regardless of whether . . . those orders are expressly included in the notice of appeal."<sup>49</sup>

The court of appeals had held that the appellants waived two of their enumerations of error by failing to specifically list the two orders relating to the enumerations in their notice of appeal.<sup>50</sup> In so holding, the court of appeals relied on O.C.G.A. section 5-6-37,<sup>51</sup> which requires that a notice of appeal set forth a concise statement of the judgment,

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42. *Id.*, 633 S.E.2d at 625.

43. *Id.* at 220-22, 633 S.E.2d at 625-26.

44. *Id.* at 222, 633 S.E.2d at 626.

45. *Id.*

46. *Id.*

47. *See, e.g.*, *Bowers v. Lee*, 259 Ga. App. 382, 577 S.E.2d 9 (2003), *overruled by* *Mateen v. Dicus*, 281 Ga. 455, 637 S.E.2d 377 (2006); *Miller v. Miller*, 262 Ga. App. 546, 586 S.E.2d 36 (2003), *overruled by* *Mateen v. Dicus*, 281 Ga. 455, 637 S.E.2d 377 (2006).

48. 281 Ga. 455, 637 S.E.2d 377 (2006).

49. *Id.* at 456, 637 S.E.2d at 378.

50. *Mateen v. Dicus*, 275 Ga. App. 742, 744, 621 S.E.2d 487, 489 (2005), *rev'd*, 281 Ga. 455, 637 S.E.2d 377 (2006).

51. O.C.G.A. § 5-6-37 (1995).

ruling, or order entitling an appellant to take an appeal.<sup>52</sup> On appeal to the supreme court, the court held that this statute must be considered in conjunction with O.C.G.A. section 5-6-34(d),<sup>53</sup> which provides that when a direct appeal is taken from a final judgment, the appellate court must review all judgments, rulings, or orders raised on appeal that may affect the proceedings below.<sup>54</sup> The supreme court also relied on its decision in *Southeast Ceramics, Inc. v. Klem*<sup>55</sup> and on the legislature's intent, as expressed in O.C.G.A. section 5-6-30,<sup>56</sup> for courts to liberally construe the Appellate Practice Act<sup>57</sup> in order to bring about decisions on the merits.<sup>58</sup> The supreme court reversed and specifically overruled prior court of appeals cases requiring that every order being challenged must be included in the notice of appeal.<sup>59</sup>

In *American General Financial Services v. Vereen*,<sup>60</sup> a case which arose when one of the plaintiffs defaulted on a loan agreement with the defendant, the defendant moved to compel arbitration of the plaintiffs' claims. The trial court granted the motion to compel arbitration concerning the plaintiff husband, who was a party to the loan agreement, and denied the motion concerning the plaintiff wife, who was not a party.<sup>61</sup> The defendant filed an interlocutory application for appeal, which was denied by the court of appeals, and the defendant filed a direct appeal.<sup>62</sup> The plaintiffs argued that the court of appeals lacked jurisdiction over the direct appeal.<sup>63</sup>

Although the court of appeals had held in prior cases that an order denying a motion to compel arbitration is not directly appealable prior to final judgment,<sup>64</sup> the defendant argued that a direct appeal was mandated by the Federal Arbitration Act<sup>65</sup> ("FAA"), which provides that an appeal may be taken from an order denying a petition to order arbitration.<sup>66</sup> The defendant contended that on this point, the FAA

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52. *Id.*; *Mateen*, 275 Ga. App. at 743-44, 621 S.E.2d at 489.

53. O.C.G.A. § 5-6-34(d) (1995).

54. *Id.*; *Mateen*, 281 Ga. at 456, 637 S.E.2d at 378.

55. 246 Ga. 294, 271 S.E.2d 199 (1980).

56. O.C.G.A. § 5-6-30 (1995).

57. O.C.G.A. §§ 5-6-30 to -51 (1995 & Supp. 2007).

58. *Mateen*, 281 Ga. at 456, 637 S.E. at 378-79.

59. *Id.* at 456-57, 637 S.E.2d at 379.

60. 282 Ga. App. 663, 639 S.E.2d 598 (2006), *cert. granted*.

61. *Id.* at 664, 639 S.E.2d at 600.

62. *Id.* at 665, 639 S.E.2d at 600.

63. *Id.*

64. *See, e.g.*, *Choate Constr. Co. v. Ideal Elec. Contractors, Inc.*, 246 Ga. App. 626, 626, 541 S.E.2d 435, 436 (2000).

65. 9 U.S.C. §§ 1-307 (2000 & Supp. IV 2004).

66. *Id.* § 16(a)(1)(B); *Am. Gen. Fin. Servs.*, 282 Ga. App. at 665, 639 S.E.2d at 600-01.

preempted Georgia law.<sup>67</sup> In considering the defendant's argument, the court of appeals referenced its prior holding that procedural rules a state establishes for arbitration are not preempted by the FAA if they do not undermine the purposes and objectives of the FAA.<sup>68</sup> The court of appeals concluded that prohibiting direct appeal of an order denying a motion to compel arbitration did not undermine the purposes or objectives of the FAA because the parties still had an avenue for appellate review in seeking certification of the order for immediate appeal.<sup>69</sup> Although this conclusion can be questioned, particularly because the denial of an application for interlocutory appeal could result in a lengthy delay before the party seeking to compel arbitration obtains appellate review, the court of appeals observed that any such delay "is not tantamount to the failure to enforce valid arbitration agreements contrary to congressional objectives."<sup>70</sup> The defendant's direct appeal was dismissed.<sup>71</sup>

### III. PRESERVING THE RECORD

In *Pearson v. Tippmann Pneumatics, Inc.*,<sup>72</sup> the plaintiffs, a minor and his parents, claimed that the defendant manufacturer was negligent and strictly liable for the minor plaintiff's injury from a paintball gun manufactured by the defendant. At trial, the jury requested additional explanation on the element of proximate cause, and both parties submitted proposals for a recharge. The court gave the charge proposed by the defendant, and in its special verdict, the jury found that the defendant's negligence was not the proximate cause of the minor plaintiff's injuries. On appeal, the plaintiffs argued that the trial court failed to accurately recharge the jury on proximate cause.<sup>73</sup>

The court of appeals held that the plaintiffs waived the issue for appeal when they failed to object to the court's recharge before the jury returned its verdict.<sup>74</sup> The plaintiffs also argued that their appeal could be considered under O.C.G.A. section 5-5-24(c),<sup>75</sup> which provides that even if a proper objection is not made, an appellate court may

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67. *Am. Gen. Fin. Servs.*, 282 Ga. App. at 665, 639 S.E.2d at 600-01.

68. *Id.* at 666, 639 S.E.2d at 601 (citing *Simmons Co. v. Deutsche Fin. Servs. Corp.*, 243 Ga. App. 85, 532 S.E.2d 436 (2000)).

69. *Id.*

70. *Id.*

71. *Id.*

72. 281 Ga. 740, 642 S.E.2d 691 (2007).

73. *Id.* at 741-42, 642 S.E.2d at 693.

74. *Pearson v. Tippmann Pneumatics, Inc.*, 277 Ga. App. 722, 727-28, 627 S.E.2d 431, 436 (2006), *rev'd*, 281 Ga. 740, 642 S.E.2d 691 (2007).

75. O.C.G.A. § 5-5-24(c) (1995).

reverse a jury verdict if the charge is erroneous and harmful as a matter of law.<sup>76</sup> The court of appeals refused to consider this argument, stating that the plaintiffs induced any error when they motioned for the recharge.<sup>77</sup>

After granting certiorari, the supreme court held that the court of appeals erred in not considering the merits of the plaintiffs' argument that the substantial error exception in O.C.G.A. section 5-5-24(c) applied.<sup>78</sup> The supreme court held that, under the interpretation by the court of appeals of O.C.G.A. section 5-5-24(c), the statute "could never apply to a substantially erroneous charge because in every instance where it might apply, i.e., where the harmful charge is given due to a failure to request language or failure to object to the charge, the complaining party would be deemed to have induced the error."<sup>79</sup> While the induced error doctrine is typically applied when counsel claims error because of a charge specifically requested by counsel or when counsel accepts another party's charge, the supreme court held that the plaintiffs' "induced error" merely consisted of the plaintiffs' alleged *failure to request* specific language that would have made the recharge accurate or to object to the *absence* of an instruction.<sup>80</sup> The supreme court held that such acts were not induced error because they were the same kinds of acts excused by O.C.G.A. section 5-5-24(c) when there is a substantial error in the charge.<sup>81</sup>

Failing to comply with court procedures, such as late payment of costs or failing to timely file transcripts, can be fatal to a client's appeal even when extenuating circumstances exist, such as the transcript initially being mailed to the wrong attorney. If a mistake occurs, however, the party that makes an effective record establishing how the error occurred and who was responsible stands the better chance of salvaging its appeal. This principle is illustrated by the differing results reached in a pair of cases decided during the survey period.<sup>82</sup>

In *Kelly v. Dawson County*,<sup>83</sup> the trial court dismissed the appellant's appeal for failing to comply with O.C.G.A. section 5-6-42,<sup>84</sup> which requires the appellant to file the trial transcript within thirty days of

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76. *Id.*; *Pearson*, 277 Ga. App. at 728-29, 627 S.E.2d at 436.

77. *Pearson*, 277 Ga. App. at 729, 627 S.E.2d at 436-37.

78. *Pearson*, 281 Ga. at 742-43, 642 S.E.2d at 694.

79. *Id.* at 743, 642 S.E.2d at 694.

80. *Id.* at 742-43, 642 S.E.2d at 694.

81. *Id.*

82. See generally *Kelly v. Dawson County*, 282 Ga. 189, 646 S.E.2d 53 (2007); *J. Kinson Cook of Ga., Inc. v. Heery/Mitchell*, 284 Ga. App. 552, 644 S.E.2d 440 (2007).

83. 282 Ga. 189, 646 S.E.2d 53 (2007).

84. O.C.G.A. § 5-6-42 (1995).

filing the notice of appeal.<sup>85</sup> The appellant filed the transcript four days late. On appeal, the appellant contended that the filing was delayed because the transcript was initially sent to the wrong attorney.<sup>86</sup> The supreme court held that because the appellant had not established how this error caused the filing delay, especially when facts in the record indicated that the appellant's attorney became aware of the error shortly after the notice of appeal was filed, the trial court did not abuse its discretion in dismissing her appeal.<sup>87</sup>

In *J. Kinson Cook of Georgia, Inc. v. Heery/Mitchell*,<sup>88</sup> the defendant moved to dismiss the plaintiff's appeal because of the plaintiff's failure to timely pay costs. The trial court denied the motion to dismiss after the plaintiff presented evidence that (1) the original bill of costs was erroneously mailed to his attorney's former address; (2) once received, the bill of costs was promptly forwarded to the plaintiff for payment and the plaintiff issued a check; (3) during this time, the clerk issued a revised bill of costs to the plaintiff's attorney and verified that the plaintiff's check had not been received; and (4) the plaintiff stopped payment on the prior check and delivered a new check for the revised bill of costs.<sup>89</sup> The court of appeals held that the plaintiff's evidence was sufficient to support the trial court's finding that the delay was not unreasonable or inexcusable.<sup>90</sup>

In previous cases, the court of appeals has held that stating in the notice of appeal that the entire record is to be transmitted is insufficient to ensure that necessary transcripts will be transmitted.<sup>91</sup> In *Yetman v. Walsh*,<sup>92</sup> the appellant likely thought that stating in the notice of appeal that the clerk should "not omit anything from the record on appeal" would ensure that the record included the transcript.<sup>93</sup> However, the notice of appeal did not specifically refer to any transcript. Pursuant to O.C.G.A. section 5-6-37,<sup>94</sup> which requires the notice of appeal to specifically state whether any transcript is to be transmitted as part of the record on appeal,<sup>95</sup> the court of appeals held that the appellant's notice of appeal was insufficient to cause inclusion of the

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85. *Id.*; *Kelly*, 282 Ga. at 189, 646 S.E.2d at 54.

86. *Kelly*, 282 Ga. at 189-90, 646 S.E.2d at 54.

87. *Id.* at 190, 646 S.E.2d at 54-55.

88. 284 Ga. App. 552, 644 S.E.2d 440 (2007).

89. *Id.* at 553, 644 S.E.2d at 444.

90. *Id.*

91. *See, e.g.*, *West v. Austin*, 274 Ga. App. 729, 618 S.E.2d 662 (2005).

92. 282 Ga. App. 499, 639 S.E.2d 491 (2006).

93. *Id.* at 500, 639 S.E.2d at 492.

94. O.C.G.A. § 5-6-37 (1995).

95. *Id.*

transcript in the record.<sup>96</sup> Because the appellant's challenge was to the sufficiency of the evidence underlying the probate court's findings of fact and because the transcript of the evidentiary hearing in question was not included in the record on appeal, the court of appeals affirmed the probate court's ruling.<sup>97</sup>

#### IV. TIMELINESS OF APPEAL

In *Harrell v. Federal National Payables, Inc.*,<sup>98</sup> the trial court entered a contempt order against the plaintiffs for failing to comply with previous orders directing the plaintiffs to respond to postjudgment discovery requests, but the court stated in the order that the plaintiffs could purge themselves of contempt by filing responses by a specified date. The plaintiffs did not appeal the contempt order and submitted responses to the defendant. Months later, the defendant submitted an affidavit to the trial court stating that the plaintiffs had not complied with the contempt order. The trial court ordered the plaintiffs incarcerated, and the plaintiffs appealed.<sup>99</sup>

The defendants moved to dismiss the appeal on the basis that (1) the plaintiffs had failed to timely appeal the contempt order and (2) the court of appeals had no jurisdiction to hear the appeal because the incarceration order was merely a consequence of the plaintiffs' contempt.<sup>100</sup> The court of appeals observed that the plaintiffs could have directly appealed the contempt order.<sup>101</sup> However, the court of appeals concluded that it had jurisdiction to hear an appeal arising from punishment imposed pursuant to a contempt order and that it thus had jurisdiction to consider the plaintiffs' incarceration order.<sup>102</sup> Because under O.C.G.A. section 5-6-34(d)<sup>103</sup> the court of appeals could consider any other non-final rulings entered in the case, it also had jurisdiction to consider the earlier contempt order.<sup>104</sup>

#### V. MISCELLANEOUS

Even when an appeal is successful, the degree of its success might depend on the motions asserted by the appellant at trial. For example,

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96. *Yetman*, 282 Ga. App. at 500, 639 S.E.2d at 492.

97. *Id.*, 639 S.E.2d at 493.

98. 284 Ga. App. 395, 643 S.E.2d 875 (2007).

99. *Id.* at 396, 643 S.E.2d at 876-77.

100. *Id.*

101. *Id.* at 397, 643 S.E.2d at 877.

102. *Id.*

103. O.C.G.A. § 5-6-34(d) (1995).

104. *Harrell*, 284 Ga. App. at 397, 643 S.E.2d at 877.

in *Strickland & Smith, Inc. v. Williamson*,<sup>105</sup> the plaintiff brought a breach of contract claim and was awarded damages for lost profits.<sup>106</sup> The defendant initially appealed, and the court of appeals held that the plaintiff's proof of lost profits was insufficient as a matter of law and that the plaintiff's judgment should be set aside.<sup>107</sup> On remand, the trial court entered a judgment denying the plaintiff's claim. The plaintiff then appealed, contending that the trial court was required to conduct a new trial before it could enter a judgment.<sup>108</sup>

The record showed that at trial, the defendant had not moved for a directed verdict or a judgment notwithstanding the verdict but had only moved for a new trial. The defendant's appeal was thus based solely on the trial court's denial of its motion for a new trial.<sup>109</sup> Had the defendant moved for a directed verdict and then appealed the denial of the motion, the court of appeals could have either ordered a new trial or directed that the judgment be entered in accordance with the motion.<sup>110</sup> However, because the defendant only appealed the denial of a motion for new trial, the court of appeals held that the only available remedy was a new trial, at which the plaintiff could present additional or different evidence.<sup>111</sup>

The supreme court addressed similar issues in *Aldworth Co. v. England*,<sup>112</sup> in which the plaintiffs brought a personal injury action against defendants for injuries resulting from a road-rage incident. The jury awarded compensatory and punitive damages to the plaintiffs. On appeal, the court of appeals held that the defendants' failure to move for directed verdicts on certain issues precluded them from contending that the trial court erred in denying their motions for directed verdicts and for a new trial on the basis of insufficient evidence.<sup>113</sup>

The supreme court granted certiorari "to consider whether a party waives her right to contest the sufficiency of the evidence on appeal by failing to move for a directed verdict on that ground at trial."<sup>114</sup> The supreme court noted that in prior cases, it and the court of appeals had

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105. 281 Ga. App. 784, 637 S.E.2d 170 (2006).

106. *Id.* at 784, 637 S.E.2d at 171.

107. *Williamson v. Strickland & Smith, Inc.*, 263 Ga. App. 431, 434-35, 587 S.E.2d 876, 879-80 (2003).

108. *Strickland & Smith*, 281 Ga. App. at 784, 637 S.E.2d at 171.

109. *Id.* at 785, 637 S.E.2d at 171.

110. *Id.* at 785 & n.7, 637 S.E.2d at 172 & n.7; O.C.G.A. § 9-11-50(e) (1995).

111. *Strickland & Smith*, 281 Ga. App. at 785, 637 S.E.2d at 172.

112. 281 Ga. 197, 637 S.E.2d 198 (2006).

113. *Aldworth Co. v. England*, 276 Ga. App. 31, 37-38, 622 S.E.2d 367, 373-74 (2005), *rev'd in part and aff'd in part*, 281 Ga. 197, 637 S.E.2d 198 (2006).

114. *Aldworth*, 281 Ga. at 197, 637 S.E.2d at 198-99.

relied on O.C.G.A. section 5-6-36(a)<sup>115</sup> in holding that even if a party has failed to move for a directed verdict in the trial court, the party may still contend on appeal that the evidence is insufficient to support a verdict.<sup>116</sup> However, none of these cases addressed whether a successful appellant would be entitled to judgment as a matter of law or would only be entitled to a new trial.<sup>117</sup> After considering the language of section 5-6-36(a) and cases decided under O.C.G.A. section 9-11-50,<sup>118</sup> the supreme court concluded that while the appellants were barred from concluding on appeal that they were entitled to directed judgment, the court of appeals erred in not reviewing the sufficiency of the evidence to determine whether the appellants were entitled to a new trial on the claims at issue.<sup>119</sup>

In *Vaughn v. Roberts*,<sup>120</sup> the appellant appealed from the trial court's order holding her in contempt for disobeying a court order.<sup>121</sup> The court of appeals held that the appellant violated several rules of the court because the appellant's brief, which was less than two pages long, did not contain a statement of the proceedings below or a statement of relevant material facts, cited to an inapplicable code section in the citation to authority, and contained no citations to the record.<sup>122</sup> Further, although the appellant argued that the trial judge was biased, the appellant failed to include any transcripts of the proceedings below.<sup>123</sup> The court of appeals affirmed the trial court's finding of contempt, in part because the appellant failed to comply with the rules of the court of appeals.<sup>124</sup> As sanctions for filing the frivolous appeal, the court of appeals imposed a penalty of \$250 against the appellant and her attorney in favor of the appellee.<sup>125</sup>

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115. O.C.G.A. § 5-6-36(a) (1995). This section provides that the trial court's entry of judgment on the verdict constitutes an adjudication on the sufficiency of the evidence to sustain the verdict and provides a basis for review on appeal without further ruling by the trial court. *Id.*

116. *Aldworth*, 281 Ga. at 199 & n.6, 637 S.E.2d at 199-200 & n.6.

117. *Id.* at 199, 637 S.E.2d at 200.

118. O.C.G.A. § 9-11-50 (2006). This section provides that only a party who has filed a motion for directed verdict can contest an adverse verdict by filing a motion for judgment notwithstanding the verdict. *Id.*

119. *Aldworth*, 281 Ga. at 201, 637 S.E.2d at 201.

120. 282 Ga. App. 840, 640 S.E.2d 293 (2006).

121. *Id.* at 840, 640 S.E.2d at 294.

122. *Id.* at 840-41, 640 S.E.2d at 294-95.

123. *Id.*

124. *Id.*, 640 S.E.2d at 295.

125. *Id.* at 841, 640 S.E.2d at 295.