

Trial Practice and Procedure

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I. INTRODUCTION

This Article seeks to identify and explain the cases and legislation published and enacted within the survey period between June 1, 2008 and May 31, 2009, which impact, illustrate, clarify, or change Georgia's law as it relates to trial practice and procedure.¹

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1. For analysis of Georgia trial practice and procedure law during the prior survey period, see Kate S. Cook et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 60 MERCER L. REV. 397 (2008).

II. LEGISLATION

Georgia General Assembly Senate Bill 276² became effective January 1, 2009, and amends section 33-7-11 of the Official Code of Georgia Annotated (O.C.G.A.),³ Georgia's uninsured motorist statute, in the following notable ways: (1) to specifically exclude the applicability of umbrella or excess liability policies, "unless affirmatively provided for in such policies or in a policy endorsement"; (2) to clarify that the filing of a bankruptcy petition by an uninsured motorist does not impact the uninsured motorist's "legal liability" for purposes of section 33-7-11; and (3) to provide for stacking of uninsured motorist policies *with and in addition to* automobile liability coverage, unless such stacking coverage is specifically rejected by the policyholder.⁴ This is an extremely important development for the personal injury practitioner, and careful study should be given to the applicability of uninsured motorist cases. If a client has *any* uninsured motorist coverage, they will now be able to access or stack that uninsured motorist coverage without any offset for the liability coverage.⁵ Previously, uninsured motorist coverage was only applicable when the uninsured motorist coverage exceeded available liability coverage.⁶

Effective May 4, 2009, O.C.G.A. § 15-12-137.1⁷ provides that potential jurors are not de facto disqualified from serving on cases involving an electric membership corporation of which they are members.⁸ The statute, however, reserves the trial court's discretion to disqualify a potential juror if there is specific evidence of impermissible bias or prejudice.⁹

2. 2008 Ga. Laws 1192.

3. O.C.G.A. § 33-7-11 (2000 & Supp. 2009).

4. 2008 Ga. Laws at 1192–96 (amending O.C.G.A. § 33-7-11(a)(3)–(4), (b)(1)(D)); *see also* Zurich Am. Ins. Co. v. Beasley, 293 Ga. App. 8, 666 S.E.2d 83 (2008); Stephen L. Cotter et al., *Insurance, Annual Survey of Georgia Law*, 60 MERCER L. REV. 191, 199–201 (2008). Although insurers are obligated to provide notice of these new opportunities to elect uninsured motorist benefits prior to the renewal of automobile or uninsured motorist policies occurring after the Bill's effective date, insurers are not obligated to contact insureds regarding the renewal of policies for which insureds have previously refused uninsured motorist coverage. *See* O.C.G.A. § 33-7-11 (b)(1)(D)(ii)(III).

5. *See* O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I); Cotter et al., *supra* note 4, at 200.

6. *See* O.C.G.A. § 33-7-11(a)(1)(B) (2000) (amended 2009).

7. O.C.G.A. § 15-12-137.1 (Supp. 2009).

8. *Id.*

9. *Id.*

Also effective May 4, 2009, newly added O.C.G.A. § 51-1-11(d)–(e)¹⁰ excludes products and public nuisance liability for manufacturers when such causes of action are “based on theories of market share or enterprise, or other theories of industry-wide liability.”¹¹

III. CASE LAW

A. *Filing, Dismissal, Renewal, and Amendments of Actions*

The advent of electronic filing continues to present new issues for Georgia appellate courts. In *Batesville Casket Co. v. Watkins Mortuary, Inc.*,¹² the Georgia Court of Appeals affirmed the dismissal of a renewal action that was physically filed in Fulton County State Court within the requisite six months under O.C.G.A. § 9-2-61(a),¹³ but not electronically filed until after the expiration of the six months.¹⁴ The plaintiff’s argument that e-filing is a “form” for filing actions contemplated by O.C.G.A. § 9-11-3(b)¹⁵ was rejected by the court of appeals.¹⁶

How plaintiffs can refile voluntarily dismissed actions under Georgia’s renewal statute continues to be refined.¹⁷ In *Shy v. Faniel*,¹⁸ the plaintiff filed a second duplicative complaint within days of filing the first complaint. The plaintiff later dismissed the second complaint and then filed two dismissals of the first complaint, one dismissing the defendants-appellants “without prejudice” and the second dismissing other co-defendants “with prejudice.” The trial court dismissed the plaintiff’s third action, finding it was prohibited by O.C.G.A. § 9-2-61(a).¹⁹ The court of appeals disagreed, holding that the filing of the second complaint was not a renewal action, and therefore, the plaintiff was legally permitted to file the third complaint.²⁰

10. O.C.G.A. § 51-1-11(d)–(e) (Supp. 2009).

11. *Id.*

12. 293 Ga. App. 854, 668 S.E.2d 476 (2008).

13. O.C.G.A. § 9-2-61(a) (2007).

14. *Batesville Casket Co.*, 293 Ga. App. at 855, 668 S.E.2d at 478.

15. O.C.G.A. § 9-11-3(b) (2006). This statute provides that the “failure to accurately complete [a] civil case filing form [shall not] provide a basis to dismiss a civil action.” *Id.*

16. See *Batesville Casket Co.*, 293 Ga. App. at 855, 668 S.E.2d at 478.

17. See O.C.G.A. § 9-2-61 (2007); see also O.C.G.A. § 9-11-41(a) (2006).

18. 292 Ga. App. 253, 663 S.E.2d 841 (2008).

19. *Id.* at 254, 663 S.E.2d at 842.

20. *Id.* at 255, 663 S.E.2d at 842. The court of appeals also rejected the application of O.C.G.A. § 9-11-41, as amended by 2003 Ga. Laws 820, 824 (which reduced the number of allowed refilings from three to two) to the plaintiff’s action originally filed before the amended statute’s effective date of July 1, 2003, even though the third complaint was filed after such date. See *Shy*, 292 Ga. App. at 255, 663 S.E.2d at 843; accord *Controlled*

In *National Office Partners, L.P. v. Stanley*,²¹ the court of appeals illustrated the importance of immediately ensuring a defendant is correctly named and served, rather than relying upon O.C.G.A. § 9-10-132²² to correct misnomers.²³ In *Stanley* the plaintiff filed suit against National Office Partners Capitol LP, stating in his complaint this entity was a Texas corporation. He then served CT Corporation System as the registered agent, who returned the papers to the plaintiff's counsel, claiming it was not an agent for service of process for the named entity. In fact, CT Corporation System was the registered agent for National Office Partners, L.P., a Texas limited partnership that was registered to do business in the state of Georgia. National Office Partners, L.P. was the entity whom the plaintiff intended to sue. After default judgment was entered against National Office Partners Capitol LP, the trial court allowed the plaintiff to correct the name of the defendant as a misnomer under O.C.G.A. § 9-10-132 to National Office Partners, L.P.²⁴ The court of appeals reversed, holding that the plaintiff had to move for the substitution of a new party under O.C.G.A. § 9-11-15²⁵ because CT Corporation System refused to accept or acknowledge service of the original complaint.²⁶

B. Service of Process

In *Atcheson v. Cochran*,²⁷ the court of appeals highlighted the importance of serving a defendant with due diligence when a suit is filed shortly before the statute of limitations is set to expire. In *Atcheson* the plaintiffs filed their suit nine days before the expiration of the statute of limitations and did not perfect service until nearly three months after

Blasting, Inc. v. Viars, 293 Ga. App. 284, 284, 666 S.E.2d 626, 627 (2008). The court of appeals lastly considered and rejected the notion that the plaintiff's dismissal of a co-defendant "with prejudice" barred the subsequent third complaint on res judicata grounds. *See Shy*, 292 Ga. App. at 256, 663 S.E.2d at 844.

21. 293 Ga. App. 332, 667 S.E.2d 122 (2008).

22. O.C.G.A. § 9-10-132 (2007).

23. *See Stanley*, 293 Ga. App. at 335, 667 S.E.2d at 125.

24. *Id.* at 332-33, 667 S.E.2d at 123.

25. O.C.G.A. § 9-11-15 (2006).

26. *See Stanley*, 293 Ga. App. at 334-35, 667 S.E.2d at 124-25. The court of appeals contemporaneously determined that the registered agent was excused for not equating National Office Partners Capitol LP with National Office Partners, L.P. when both were Texas business entities operating in Georgia. *Id.* Because the difference in naming was disparate enough to cause credible confusion over the identity of the defendant, and because the plaintiff affirmatively identified the entity as a Texas corporation in his complaint, the possibility of alternate trade names for the named defendant was implicitly ruled out. *See id.*

27. 297 Ga. App. 568, 677 S.E.2d 749 (2009).

such expiration.²⁸ The court of appeals held that although the evidence suggested the defendants were purposefully avoiding service, this delay was not excused because the plaintiffs allowed almost a month to elapse between hiring their first and second investigators to locate the defendants.²⁹ Additionally, the plaintiffs never sought to perfect “service by publication based on the defendant’s conduct.”³⁰

C. Examination and Cross-Examination

In a surprising opinion limiting the effective use of cross-examination to explore prejudices at trial, the court of appeals in *McClellan v. Evans*³¹ affirmed the trial court’s denial of the plaintiffs’ pretrial motion in limine to cross-examine the defendant.³² The motion concerned an agreement between the defendant and the plaintiffs’ uninsured motorist carrier, who was defending in the defendant’s name pursuant to O.C.G.A. § 9-11-37(d),³³ in which the uninsured motorist carrier agreed to waive its subrogation claims.³⁴ The motion sought to explore the defendant’s potential bias stemming from such an agreement.³⁵ Balancing the necessity for a thorough cross-examination against the risks of admitting insurance testimony at trial, the court of appeals concluded that because the plaintiffs “failed to establish that Evans had promised anything to Georgia Farm in exchange for the waiver of subrogation or that the waiver was in any way contingent on the content of Evans’s testimony,” the agreement between Evans and the plaintiffs’ insurance company should have been excluded.³⁶ This conclusion, however, fails to recognize the reality that persons may not truthfully disclose exactly what they agreed to do in exchange for an insurance company waiving its subrogation interest. This ruling also prohibits a jury from evaluating the credibility of a witness upon his or her response to such questioning. Practitioners wishing to explore such agreements at trial should, therefore, establish the scope of the agreement between a defendant and an insurance company during discovery.

28. *Id.* at 568, 677 S.E.2d at 750.

29. *Id.* at 570–71, 677 S.E.2d at 752.

30. *Id.* at 570, 677 S.E.2d at 752.

31. 294 Ga. App. 595, 669 S.E.2d 554 (2008).

32. *Id.* at 596, 669 S.E.2d at 555–56.

33. O.C.G.A. § 9-11-37(d) (2006).

34. *McClellan*, 294 Ga. App. at 596, 669 S.E.2d at 556.

35. *Id.* at 597, 669 S.E.2d at 556.

36. *Id.* at 596–97, 669 S.E.2d at 556.

D. Appearance of Impropriety by Trial Court

The court of appeals in *Wilson v. McNeely*³⁷ addressed whether a trial judge must recuse from a case when a fellow judge from the same district is the defendant.³⁸ In accordance with Canon 2 of the Georgia Code of Judicial Conduct,³⁹ the court vacated all rulings and held that the trial judge should have recused because “it was inappropriate for the trial judge . . . to preside over and rule upon the matter, wherein one of the parties was also a judge sitting on a court within the same circuit.”⁴⁰

E. Closing Argument

The jury in *Kennebeck v. Glover*⁴¹ returned a verdict in favor of the plaintiff, and the defendant appealed on the grounds the plaintiff’s counsel erred during closing argument by suggesting that: (1) the plaintiff’s medical bills were not as costly as they might have otherwise been because he was treated by a military doctor; and (2) the jury should calculate the plaintiff’s pain and suffering by multiplying the plaintiff’s medical bills by a certain number because that is often how defendants calculate damages for pain and suffering.⁴² Citing the wide latitude afforded to counsel during closing arguments, the court of appeals held: (1) because the plaintiff submitted evidence that he was treated at a military base, his counsel did not err in arguing that the medical bills were cheaper than they otherwise might have been; and (2) because the plaintiff’s counsel did not refer to specific damage awards in other cases, he did not err in suggesting a possible method for the jury to calculate pain and suffering damages.⁴³

F. Privilege and Work Product Protection

In *Fulton DeKalb Hospital Authority v. Miller & Billips*,⁴⁴ a law firm sued the hospital authority under the Georgia Open Records Act⁴⁵ to obtain internal investigation records of alleged sexual misconduct by members of the hospital authority’s human resources department. The

37. 295 Ga. App. 41, 670 S.E.2d 846 (2008).

38. *Id.* at 41, 670 S.E.2d at 846–47.

39. GA. CODE OF JUDICIAL CONDUCT Canon 2 (2004).

40. *Wilson*, 295 Ga. App. at 41–42, 43, 670 S.E.2d at 847–48.

41. 294 Ga. App. 822, 670 S.E.2d 459 (2008).

42. *Id.* at 826–27, 670 S.E.2d at 463–64.

43. *Id.*

44. 293 Ga. App. 601, 667 S.E.2d 455 (2008).

45. O.C.G.A. § 50-18-70 to -77 (2009).

hospital authority argued the documents were part of an internally generated work product investigation ordered and supervised by its attorney in anticipation of litigation.⁴⁶ After conducting an in camera review of the documents, the trial court found the documents were not work product and instead “constituted a routine review of complaint allegations and was no different from investigations ordinarily conducted by the Authority’s security department.”⁴⁷

The hospital authority appealed, and the court of appeals affirmed, noting that “[a]ttorney participation . . . does not necessarily bring material within the work product protection.”⁴⁸ One interesting aspect of this opinion is its reasoning that “the evidence support[ed] the conclusion that any expectation of litigation was based on speculation, rather than a reasonable belief of probable legal action.”⁴⁹ This important language indicates some form of overt threat of litigation may now be necessary for parties to rely on the work product protection when no suit or administrative proceedings have commenced.

The court of appeals rendered an important opinion regarding the accountant-client privilege in *Saye v. Deloitte & Touche, LLP*.⁵⁰ The plaintiff in *Saye* was terminated from her job after the defendant sent a letter to the plaintiff’s employer specifying it would not rely on representations from the plaintiff when auditing the employer’s financial statements. The plaintiff filed suit and asserted causes of action for libel, slander, and tortious interference with business and employment relations. The trial court dismissed, finding, inter alia, the defendant’s communications were protected by the accountant-client privilege.⁵¹

An important issue on appeal was whether the accountant-client privilege was an absolute or conditional privilege.⁵² If the privilege was absolute, the defendant could not be sued for defamation.⁵³ If the privilege was conditional, the defendant could be sued if the communication was proven malicious.⁵⁴ Writing for the court, Judge Bernes noted accountant-client communications are conditionally, rather than absolutely, privileged under the requirements of O.C.G.A. § 51-5-8⁵⁵

46. *Miller & Billips*, 293 Ga. App. at 601, 667 S.E.2d at 456.

47. *Id.* at 603, 667 S.E.2d at 457–58.

48. *Id.* at 604, 667 S.E.2d at 458.

49. *Id.*

50. 295 Ga. App. 128, 670 S.E.2d 818 (2008).

51. *Id.* at 128, 129, 670 S.E.2d at 820.

52. *See id.* at 131, 670 S.E.2d at 821.

53. *Id.*

54. *Id.*

55. O.C.G.A. § 51-5-8 (2000).

because they “cannot be characterized as being made in official court documents or within acts of legal process.”⁵⁶

G. Expert Witnesses

The trial court in *Houston v. Phoebe Putney Memorial Hospital, Inc.*⁵⁷ dismissed the plaintiffs’ medical malpractice complaint after finding that the plaintiffs’ expert’s affidavit failed to comply with the requirements of O.C.G.A. § 24-9-67.1(c).⁵⁸ The basis of the plaintiffs’ complaint was that a defendant nurse failed to thoroughly triage one of the plaintiffs who suffered a stroke, which if the nurse had promptly recognized and treated, the harmful effects to the plaintiff could have been minimized.⁵⁹ Pursuant to O.C.G.A. § 9-11-9.1,⁶⁰ the plaintiffs filed the affidavit of a nurse who opined that the defendant nurse’s actions deviated from the standard of care. The trial court dismissed the plaintiffs’ complaint on the basis that the plaintiffs’ affiant—who had experience as a family practice nurse, labor and delivery nurse, and clinical nursing instructor—did not have experience working as a triage nurse in an emergency room, and the plaintiffs appealed.⁶¹

Reversing the trial court,⁶² the court of appeals noted that

the plaintiff’s expert does not have to have knowledge and experience in the same area of practice/specialty as the defendant[.] Instead, . . . the issue is whether the expert has knowledge and experience in the practice or specialty that is relevant to the acts or omissions that the plaintiff alleges constitute malpractice and caused the plaintiff’s injuries.⁶³

The court held that because “the relevant area of nursing practice was the assessment and triage of acute patients, and [the plaintiff’s expert nurse’s] affidavit and curriculum vitae showed that she had ongoing practical experience in the area of patient triage,” and because patient triage is not “exclusively within the professional skills of emergency room nurses,” the affidavit was appropriate.⁶⁴ This opinion reaffirms

56. *Saye*, 295 Ga. App. at 132, 670 S.E.2d at 822.

57. 295 Ga. App. 674, 673 S.E.2d 54 (2009).

58. O.C.G.A. § 24-9-67.1(c) (Supp. 2009); *Houston*, 295 Ga. App. at 675–76, 673 S.E.2d at 56.

59. *Houston*, 295 Ga. App. at 675, 673 S.E.2d at 55–56.

60. O.C.G.A. § 9-11-9.1 (2006 & Supp. 2009).

61. *Houston*, 295 Ga. App. at 675–76, 673 S.E.2d at 56.

62. *Id.* at 679–80, 673 S.E.2d at 59.

63. *Id.* at 679, 673 S.E.2d at 58 (alterations in original) (quoting *Nathans v. Diamond*, 282 Ga. 804, 806, 654 S.E.2d 121, 123 (2007)).

64. *Id.*

that an otherwise qualified expert should be entitled to render an opinion so long as he or she has “practical experience” in the standard of care that was breached, even though he or she may not practice in the same specialty or setting at issue.

Similarly, in *Hamilton-King v. HNTB Georgia, Inc.*,⁶⁵ the court of appeals checked a trial court’s “enthusiastic embrace of its ‘gatekeeper’ role” and reversed the trial court’s ruling striking a qualified expert witness.⁶⁶ The court importantly noted that although trial courts are permitted to consider the federal precedent regarding the admissibility of expert testimony, O.C.G.A. § 24-9-67.1 does not require or command them to do so, and the trial court’s inquiry must remain “flexible” because the key inquiries are whether the testimony is relevant and reliable.⁶⁷

The opinion in *Hamilton-King* is important because it stops what has been a dangerous trend following the enactment of O.C.G.A. § 24-9-67.1. Specifically, when an expert is qualified and his opinions will assist the jury in understanding an issue beyond their ordinary knowledge, *Hamilton-King* makes clear the expert’s testimony should go to the jury so that the jury, and not the trial court, can assess the credibility of the expert’s testimony.⁶⁸

H. Discovery Sanctions

In *AMLI Residential Properties, Inc. v. Georgia Power Co.*,⁶⁹ the court of appeals upheld the trial court’s exclusion of certain evidence as a spoliation sanction.⁷⁰ This case arose from an apartment fire, and the primary issue in the case was whether an overheated ground rod caused the fire. Without informing the defendant, the plaintiff had an expert perform a metallurgical examination of the remains of one of the ground rods.⁷¹ The defendant then retained an expert who examined the remains of the ground rods and testified that the metallurgical testing of the ground rod “permanently altered” the rod, preventing testing that could “check the validity of [the plaintiff’s] theory of causation.”⁷² The trial court, therefore, granted a motion in limine to exclude evidence

65. 296 Ga. App. 864, 676 S.E.2d 287 (2009).

66. *Id.* at 866, 676 S.E.2d at 289.

67. *Id.* at 868, 676 S.E.2d at 290; *see* O.C.G.A. § 24-9-67.1(f).

68. *See Hamilton-King*, 296 Ga. App. at 869, 676 S.E.2d at 291.

69. 293 Ga. App. 358, 667 S.E.2d 150 (2008).

70. *Id.* at 364, 667 S.E.2d at 155–56.

71. *Id.* at 360, 667 S.E.2d at 153.

72. *Id.*

pertaining to the ground rod and granted the defendant's summary judgment motion because no triable issue on causation remained.⁷³

The plaintiff appealed, arguing the trial court erred in imposing spoliation sanctions, mainly on the ground there was no bad faith in the destruction of evidence.⁷⁴ The court of appeals held "[e]xclusionary sanctions may be appropriate where the spoliator has not acted in bad faith."⁷⁵ The court noted a distinction between

"the accidental, random, or unintended dissipation of evidence by persons having no interest in its preservation," and those cases where "a party knowledgeable of litigation strategy, tactics, and policies who invokes the aid and jurisdiction of the Court and its processes . . . acted *unfairly* to preclude the opportunity of an adversary to be apprised of the existence of a defense to a plaintiff's claims."⁷⁶

In that context, the court held that the plaintiff's "destructive testing without notice to [the defendant]—though not judged to be in bad faith—was nevertheless wrongful," and the spoliation sanction was appropriate.⁷⁷

I. Default Judgment

In *Hiner Transport, Inc. v. Jeter*,⁷⁸ the court of appeals held that a default judgment may not be based upon a defendant's failure to answer an amended complaint, even if the amended complaint added the defendant as a party.⁷⁹ The court held that "[a]bsent an order to respond, [a]n amended complaint adding a new party defendant does not require a responsive pleading."⁸⁰ Thus, when adding a new party defendant to a case, the practitioner should consider adding language in a proposed order to add a new party, requiring that the new party answer the amended complaint.⁸¹

73. *Id.* at 360–61, 667 S.E.2d at 153.

74. *Id.* at 361, 667 S.E.2d at 154. The plaintiff also argued that the defendant suffered no prejudice and that any alleged prejudice could be cured. *Id.*

75. *Id.* at 363, 667 S.E.2d at 155.

76. *Id.* (alteration in original) (quoting *N. Assurance Co. v. Ware*, 145 F.R.D. 281, 284 (D. Me. 1993)).

77. *Id.* at 364, 667 S.E.2d at 155.

78. 293 Ga. App. 704, 667 S.E.2d 919 (2008).

79. *Id.* at 705, 667 S.E.2d at 920.

80. *Id.* (second alteration in original) (quoting *Stubbs v. Pickle*, 287 Ga. App. 246, 247, 651 S.E.2d 171, 172 (2007)).

81. See O.C.G.A. § 9-11-21 (2006) (specifying that parties may only be added upon order of the court).

J. Final Judgment and Right to Appeal

During the survey period, Georgia courts decided a number of cases dealing with the issue of when a judgment is considered final, such that the judgment is immediately appealable. In fact, the Georgia Supreme Court decided two such cases on the same day. In *American Medical Security Group, Inc. v. Parker*,⁸² the supreme court held that a discovery sanction dismissing a party's answer and entering a default judgment on liability is not a final order that is directly appealable.⁸³ The court concluded that the order was simply a discovery order under O.C.G.A. § 9-11-37⁸⁴ and not a contempt order.⁸⁵ In addition, the court clarified the difference between a discovery sanctions order and a civil contempt order: "civil contempt is designed to force the contemnor to comply with an order of the court, whereas a sanction, . . . in contrast, lacks any prospective effect and is not designed to compel compliance."⁸⁶

In refusing to characterize the trial court's order as immediately appealable, the supreme court focused on policy rationales. Particularly, the court emphasized that O.C.G.A. § 9-11-37 is "designed to protect courts and opposing parties from delaying or harassing tactics during the discovery process" and that immediate appeals of discovery orders "would undermine trial judges' discretion to structure a sanction in the most effective manner."⁸⁷ In other words, if harsh discovery sanctions were immediately appealable, trial judges would be hesitant to enter them out of fear that the sanction would just create more delay. If that were the case, intransigent parties would be rewarded for their delay instead of punished for it.

K. Estoppel and Res Judicata

In *World Harvest Church, Inc. v. Guideone Mutual Insurance Co.*,⁸⁸ the United States District Court for the Northern District of Georgia addressed a conflict in Georgia law between the well-established rule that estoppel cannot create liability under an insurance policy for risks not covered by the policy, and seemingly contradictory case law, which

82. 284 Ga. 102, 663 S.E.2d 697 (2008).

83. *Id.* at 102, 663 S.E.2d at 698.

84. O.C.G.A. § 9-11-37 (2006).

85. *Parker*, 284 Ga. at 105, 663 S.E.2d at 700.

86. *Id.* (internal quotation marks omitted) (quoting *Cunningham v. Hamilton County*, 527 U.S. 198, 207 (1999)).

87. *Id.* at 106, 663 S.E.2d at 701 (quoting *Cunningham*, 527 U.S. at 208-09).

88. No. 1:07-CV-1675-RWS, 2008 WL 5111218 (N.D. Ga. Dec. 2, 2008).

held estoppel could function to make an insurer liable for a risk not covered by the policy when it undertook to defend its insured without a reservation of rights.⁸⁹ The defendant insurer in *World Harvest* defended the plaintiff in a breach of contract suit for eleven months and then withdrew representation because the lawsuit was not covered under the insured's policy; a fact that was not disputed.⁹⁰

The court clarified that an insurer could be estopped from denying liability under a policy for risk that was not actually covered by the terms of the policy only when the insurer's actions prejudiced its insured.⁹¹ In this case, there was no evidence of prejudice, and the insurer was, therefore, not estopped from asserting the defense of noncoverage.⁹²

In *Dennis v. First National Bank of the South*,⁹³ the Georgia Court of Appeals provided insight regarding when adjudication of issues in a dispossessory proceeding will preclude the relitigation of those same issues in a subsequent lawsuit against a lender. In *Dennis* the plaintiffs sued the original holder of their mortgage for fraud and conversion.⁹⁴ A subsequent assignee of the mortgage successfully sought a writ of possession against the plaintiffs, and in that proceeding the "core issues" in the case were litigated before the court.⁹⁵ Nonetheless, neither collateral estoppel nor res judicata prevented the plaintiffs from bringing a claim for fraud and conversion against the original holder because there was no privity between the original lender and the subsequent assignee of the debt.⁹⁶ The court of appeals reasoned that the defendant (the original lender) was not in privity with the lender that litigated the dispossessory action because the defendant was a predecessor in interest that transferred its interest in the property prior to the commencement of the dispossessory action.⁹⁷

89. *See id.* at *2-3.

90. *Id.* at *1.

91. *Id.* at *5.

92. *Id.*

93. 293 Ga. App. 890, 668 S.E.2d 479 (2008).

94. *Id.* at 890, 668 S.E.2d at 481.

95. *See id.* at 893, 668 S.E.2d at 483.

96. *Id.* at 894, 668 S.E.2d at 483.

97. *Id.*

L. Limitations Defenses

Although in 2007 in *Kaminer v. Canas*,⁹⁸ the Georgia Supreme Court rejected the “discovery” rule in medical malpractice cases,⁹⁹ in *Amu v. Barnes*,¹⁰⁰ the supreme court nonetheless affirmed the continuing viability of the “new injury” rule.¹⁰¹ The court in *Amu* emphasized that the new injury rule “applies only in the ‘most extreme circumstances’”¹⁰² and requires both that the plaintiff remained asymptomatic for a period of time after the misdiagnosis and that the medical condition arising from the misdiagnosis did not in fact exist at the time of the misdiagnosis.¹⁰³

The supreme court rejected the defendant’s argument in *Schramm v. Lyon*¹⁰⁴ that the statute of repose for medical negligence¹⁰⁵ started to run on the first day the doctor treated the plaintiff.¹⁰⁶ Instead, when a plaintiff alleges multiple independent instances of medical negligence, those independent acts that fall within the period of repose are not barred simply because the physician began treating the plaintiff at an earlier date or because a separate negligent act was committed outside the state of repose.¹⁰⁷

An insurance policy in *Bullington v. Blakely Crop Hail, Inc.*¹⁰⁸ required the insured to bring legal action against the insurer within one year of the denial of a claim.¹⁰⁹ When the insurer’s denial letter invited the insured to dispute the denial, which the insured did, the jury could then find the claim was not denied until the insurer sent another letter denying the claim a second time.¹¹⁰

The court of appeals interpreted the limitations period in the insurance policy narrowly and held that because the plaintiff filed an

98. 282 Ga. 830, 653 S.E.2d 691 (2007). For additional discussion of this case, see Kate S. Cook et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 60 MERCER L. REV. 397, 400–01 (2008).

99. *Kaminer*, 282 Ga. at 832, 653 S.E.2d at 694.

100. 283 Ga. 549, 662 S.E.2d 113 (2008).

101. *Id.* at 554, 662 S.E.2d at 118.

102. *Id.* at 552, 662 S.E.2d at 116 (quoting *Burt v. James*, 276 Ga. App. 370, 374, 623 S.E.2d 223, 227 (2005)).

103. *Id.*, 662 S.E.2d at 116–17 (citing *Amu v. Barnes*, 286 Ga. App. 725, 729, 650 S.E.2d 288, 292 (2007)).

104. 285 Ga. 72, 673 S.E.2d 241 (2009).

105. O.C.G.A. § 9-3-71 (2007).

106. *Schramm*, 285 Ga. at 73–74, 673 S.E.2d at 242.

107. *Id.* at 74, 673 S.E.2d at 242.

108. 294 Ga. App. 147, 668 S.E.2d 732 (2009).

109. *Id.* at 149, 668 S.E.2d at 734.

110. *See id.* at 150–51, 668 S.E.2d at 735.

arbitration claim within a year after the denial, the insured satisfied the policy's requirement that he institute legal action within one year.¹¹¹ Thus, the provision did not bar the insured's subsequent lawsuit, which was filed more than one year after the denial letter.¹¹²

However, pursuant to binding precedent, the court of appeals in *Thorton v. Georgia Farm Bureau Mutual Insurance Co.*¹¹³ held that an insurance policy's contractual, one-year limitations period for bringing a claim under the policy was not tolled during the time the claim was being processed.¹¹⁴ The court noted that "[s]ubstantial delays are built into standard insurance policies," and the court called upon the legislature to consider enacting a statute to allow such tolling.¹¹⁵

In *Wilks v. Overall Construction, Inc.*,¹¹⁶ a homeowner brought an action for breach of contract to improve real property against a contractor for faulty construction of a wall and failed subsequent attempts to remedy the problem.¹¹⁷ The court of appeals rejected the plaintiff's contention that the four-year statute of limitations for damage to property applied and that the statute of limitations began to run at the time of the final "unworkmanlike" attempted repair.¹¹⁸ Instead, the six-year statute of limitations for actions on written contracts applied and began to run on the date the work contracted for was substantially completed.¹¹⁹

1. Statute of Repose. In *Bagnell v. Ford Motor Co.*,¹²⁰ the court of appeals applied Georgia's ten-year statute of repose¹²¹ to a strict liability claim brought under Texas law.¹²² The court held as a matter of first impression that a statute of repose is procedural and is therefore governed by Georgia law under choice-of-law rules.¹²³

2. Tolling. Georgia law provides that the statute of limitations is tolled for tort claims brought by victims of crimes until the prosecution

111. *Id.*, 668 S.E.2d at 735–36.

112. *Id.*, 668 S.E.2d at 735.

113. 297 Ga. App. 132, 676 S.E.2d 814 (2009).

114. *See id.* at 135, 676 S.E.2d at 817.

115. *Id.* (alteration in original) (quoting *Nicholson v. Nationwide Mut. Fire Ins. Co.*, 517 F. Supp. 1046, 1050 (N.D. Ga. 1981)).

116. 296 Ga. App. 410, 674 S.E.2d 320 (2009).

117. *Id.* at 411, 674 S.E.2d at 322.

118. *Id.* at 412, 674 S.E.2d at 322.

119. *See id.* at 412–13, 674 S.E.2d at 322–23.

120. 297 Ga. App. 835, 678 S.E.2d 489 (2009).

121. O.C.G.A. § 51-1-11 (2008 & Supp. 2009).

122. *Bagnell*, 297 Ga. App. at 837, 678 S.E.2d at 493.

123. *Id.*

of the crime is final or terminated.¹²⁴ In *Beneke v. Parker*,¹²⁵ the court of appeals initially held that a violation of the Uniform Rules of the Road¹²⁶ constituted a crime sufficient to toll the limitations period if the act was committed with criminal negligence, which is defined as “wilful, wanton, or reckless disregard for the safety of others who might reasonably be expected to be injured thereby.”¹²⁷ After the survey period for this Article ended, the supreme court reversed in part, holding that proof of criminal intent or negligence is unnecessary.¹²⁸ Thus, the statute of limitations will be tolled in a personal injury action whenever “a traffic citation is issued” for a violation of the Uniform Rules of the Road.¹²⁹

M. Preemption, Immunity, and Justiciability

Georgia courts issued a number of noteworthy opinions in the area of immunity during this survey period. The Georgia Court of Appeals in *Smith v. McDowell*¹³⁰ reversed the lower court’s finding of official immunity for a school receptionist who released a student in violation of the school’s policy and procedures, resulting in the child’s abduction.¹³¹ The court disapproved of a developing jurisprudence that reflected “a de facto absolute immunity for school employees.”¹³² Rejecting the defendant’s argument that she exercised discretion in her decision not to follow the policy, the court held that the defendant violated a “hard and fast policy with no exceptions,” and therefore was not protected by official immunity.¹³³

As explained in *Moreland v. Austin*,¹³⁴ the Federal Health Insurance Portability and Accountability Act (HIPAA)¹³⁵ preempts Georgia law on the issue of whether a litigant’s treating physicians may speak informally to counsel for the opposing party.¹³⁶ Any contact by oppos-

124. O.C.G.A. § 9-3-99 (2007).

125. No. S08G2078, 2009 WL 3062640 (Ga. Sept. 28, 2009).

126. O.C.G.A. ch. 40-6 (2007 & Supp. 2009).

127. *Beneke v. Parker*, 293 Ga. App. 186, 188–89, 667 S.E.2d 97, 100 (2008) (quoting O.C.G.A. § 16-2-1(b) (2007)).

128. *Beneke*, 2009 WL 3062640, at *1.

129. *Id.* at *2.

130. 292 Ga. App. 731, 666 S.E.2d 94 (2008).

131. *Id.* at 732–33, 666 S.E.2d at 95.

132. *Id.* at 734, 666 S.E.2d at 96.

133. *Id.* at 733–34, 666 S.E.2d at 96; *see also* *Dollar v. Grammens*, 294 Ga. App. 888, 893–94, 670 S.E.2d 555, 559 (2008).

134. 284 Ga. 730, 670 S.E.2d 68 (2008).

135. Pub. L. 104-191, 110 Stat. 1936 (codified in scattered sections of U.S.C. tits. 18, 26, 29 & 42 (2006)).

136. *Moreland*, 284 Ga. at 733, 670 S.E.2d at 71.

ing counsel with an adverse party's treating physician must be in compliance with HIPAA regulations.¹³⁷ The trial court has discretion to fashion remedies for violation of these regulations.¹³⁸

At issue in *Thomason v. Fulton County*¹³⁹ was a county ordinance providing that judgments entered against county employees would be paid by the county with the exception of any claim that was covered by insurance. The plaintiffs obtained a judgment against a county employee, and the county tendered only the coverage provided under its self-insurance plan.¹⁴⁰ The plaintiffs argued that self-insurance did not qualify as "insurance" under the county ordinance, but the supreme court disagreed, looking to the language of the resolution used to adopt the self-insurance plan.¹⁴¹ The resolution characterized the plan as insurance and demonstrated the county intended to limit its liability to the amounts provided for under the plan.¹⁴²

The plaintiff in *Carmichael v. Kellogg, Brown & Root Services, Inc.*¹⁴³ sustained injuries as a passenger in a tractor-trailer that was part of a supply convoy in Iraq, in which the driver was a civilian employee of defendant contractors, but the convoy itself was under military control.¹⁴⁴ The United States District Court for the Northern District of Georgia held that the claims for negligent operation of the tractor-trailer were nonjusticiable under the political question doctrine because the issue of negligence required examination of the military's training of the civilian drivers, inspection of the drivers and vehicles, and decisions regarding the path and speed of the convoy.¹⁴⁵ The convoy was part of the military's strategy and, therefore, questioning decisions about the convoy amounted to questions about military strategy and battlefield tactics.¹⁴⁶

137. *Id.* at 735, 670 S.E.2d at 73.

138. *Id.*, 670 S.E.2d at 72.

139. 284 Ga. 49, 663 S.E.2d 216 (2008).

140. *Id.* at 50, 663 S.E.2d at 216, 217.

141. *Id.* at 51, 663 S.E.2d at 217.

142. *See id.*

143. 564 F. Supp. 2d 1363 (N.D. Ga. 2008).

144. *Id.* at 1364.

145. *Id.* at 1371-72.

146. *Id.* at 1370-72. As a second ground for finding the claims nonjusticiable, the court agreed with the defendant that there were no judicially manageable standards for determining what was reasonable in the context of driving a highly dangerous route in a military zone. *Id.* at 1371-72.

N. Attorney Fees

1. O.C.G.A. § 9-11-68. In *Wheatley v. Moe's Southwest Grill, LLC*,¹⁴⁷ the United States District Court for the Northern District of Georgia held that Georgia's "offer of settlement" statute, O.C.G.A. § 9-11-68,¹⁴⁸ constituted state substantive law that should be applied by federal courts in diversity actions.¹⁴⁹ In so holding, the court determined that O.C.G.A. § 9-11-68 was not in conflict with Federal Rule of Civil Procedure 68,¹⁵⁰ the federal "offer of judgment" rule.¹⁵¹

While the court held that O.C.G.A. § 9-11-68 must be applied in federal diversity cases, the court also certified questions to the Georgia Supreme Court to determine whether the statute is constitutional.¹⁵² The supreme court has not yet answered these certified questions. In the interim, practitioners should be aware of the potential benefits and risks of O.C.G.A. § 9-11-68 in federal court as well as state court.

2. O.C.G.A. § 9-15-14. In *Olarsch v. Newell*,¹⁵³ the court of appeals reversed the trial court's award of attorney fees under O.C.G.A. § 9-15-14(b)¹⁵⁴ and again emphasized the procedural prerequisites that must be met to support an award of attorney fees.¹⁵⁵ The trial court did not specify "the conduct by the attorney or party upon which the award is made,"¹⁵⁶ nor did it afford the offending party a chance "to confront and challenge testimony as to the value and need for legal services."¹⁵⁷ The court of appeals remanded and directed the trial court to give the offending party an opportunity to be heard, and if the trial court still awards fees, the trial court must "give an explanation of the statutory

147. 580 F. Supp. 2d 1324 (2008).

148. O.C.G.A. § 9-11-68 (2006).

149. *Wheatley*, 580 F. Supp. 2d at 1329.

150. FED. R. CIV. P. 68.

151. *Id.*; *Wheatley*, 580 F. Supp. 2d at 1328–29.

152. *Wheatley*, 580 F. Supp. 2d at 1330. The questions certified are:

1. Does O.C.G.A. § 9-11-68 violate art. I, § 1, ¶ 12 of the Georgia Constitution?
2. Does O.C.G.A. § 9-11-68 violate art. III, § 6, ¶ 4 of the Georgia Constitution?
3. If the answer to both questions 1 and 2 is "no," does O.C.G.A. § 9-11-68 apply to a case such as this, in which the Plaintiff asserts multiple claims, some of which sound in tort and some of which do not?

Id.

153. 295 Ga. App. 210, 671 S.E.2d 253 (2008).

154. O.C.G.A. § 9-15-14(b) (2006).

155. *Olarsch*, 295 Ga. App. at 214, 671 S.E.2d at 257.

156. *Id.* at 213, 671 S.E.2d at 257.

157. *Id.* (quoting *Mitcham v. Blalock*, 214 Ga. App. 29, 32–33, 447 S.E.2d 83, 87 (1994)).

basis for the award and any findings necessary to support it.”¹⁵⁸ As such, any time a practitioner seeks to recover attorney fees, regardless of the conduct of the other party, the practitioner must ensure all procedural safeguards are satisfied.

O. Arbitration

In *Ed Voyles Jeep-Chrysler, Inc. v. Wahls*,¹⁵⁹ the court of appeals held that the defendant waived its contractual right to arbitration.¹⁶⁰ In that case, the defendants served discovery on the plaintiff, received responses to that discovery, and noticed the deposition of the plaintiff.¹⁶¹ The court determined that under the Federal Arbitration Act (FAA),¹⁶² the defendants had waived their right to compel arbitration by “act[ing] inconsistently with the arbitration right, and, in so acting, . . . prejudic[ing] the other party.”¹⁶³ The court considered it a fairly close question and ultimately affirmed the trial court.¹⁶⁴ A defendant who engages in *any* substantial litigation, especially including discovery, before ultimately moving to compel arbitration under the FAA, clearly risks losing the right to compel arbitration.

P. Access to Court Records

In the case of *In re Gwinnett County Grand Jury*,¹⁶⁵ the Georgia Supreme Court reaffirmed the secrecy to be afforded documents and information presented to a grand jury.¹⁶⁶ The issue before the court was “whether documents and recorded testimony presented to a grand jury carrying out its statutory civil responsibility to inspect or investigate any county office or its operations are ‘court records’ available for public inspection” pursuant to an open records request.¹⁶⁷ The court cited the traditional secrecy afforded to both criminal and civil investiga-

158. *Id.* at 214, 667 S.E.2d at 257. The court of appeals also reversed the attorney fees award because the action predated enactment of O.C.G.A. § 9-11-68, and retroactive application of that statute is unconstitutional. *Id.* at 212, 667 S.E.2d at 256; *see Fowler Props., Inc. v. Dowland*, 282 Ga. 76, 78, 646 S.E.2d 197, 200 (2007).

159. 294 Ga. App. 876, 670 S.E.2d 540 (2008).

160. *Id.* at 878–79, 670 S.E.2d at 543.

161. *Id.* at 876, 670 S.E.2d at 541. The defendant subsequently cancelled the deposition. *Id.*

162. 9 U.S.C. §§ 1-16 (2006).

163. *Wahls*, 294 Ga. App. at 877, 670 S.E.2d at 542 (quoting *USA Payday Cash Advance Ctr. #1, Inc. v. Evans*, 281 Ga. App. 847, 849, 637 S.E.2d 418, 419 (2006)).

164. *Id.* at 878–79, 670 S.E.2d at 543.

165. 284 Ga. 510, 668 S.E.2d 682 (2008).

166. *Id.* at 513–14, 668 S.E.2d at 685.

167. *Id.* at 510, 668 S.E.2d at 682.

tions conducted by the grand jury before holding that evidence and testimony presented to the grand jury “are not ‘court records’ subject to [Georgia Uniform Superior Court Rule¹⁶⁸ 21] because the press and public have not traditionally enjoyed access to such material due to the preservation of the secrecy of grand jury proceedings.”¹⁶⁹

In *Sharpton v. Hall*,¹⁷⁰ a case of first impression, the Georgia Court of Appeals confronted the issue of whether certain guardianship records of a deceased incompetent adult could be unsealed when there was an allegation that one of the ward’s guardians breached his fiduciary duty to the ward.¹⁷¹ After examining the text of O.C.G.A. § 29-9-18(b),¹⁷² which addresses interested parties’ access to sealed records,¹⁷³ the court of appeals affirmed the trial court’s order (1) refusing to unseal the ward’s medical records and (2) unsealing the guardianship records.¹⁷⁴ The court of appeals specifically held that the trial court did not abuse its discretion because “the public interest in protecting incompetent adults from chicanery on the part of their guardians outweighs any potential privacy interest of the ward.”¹⁷⁵

Q. Insurance Issues

In *ACCC Insurance Co. v. Carter*,¹⁷⁶ a declaratory judgment action, the United States District Court for the Northern District of Georgia addressed the following unique issue in Georgia’s bad faith law:

When counsel for claimants against an insured party demands an insurer pay the face amount of the policy, but refuses to release the insured in return for the insurance company’s payment, does the insurer act in bad faith in paying policy limits without conditioning payment on release of its insured?¹⁷⁷

In the underlying tort action, the striking driver’s insurance company paid policy limits to the plaintiffs in exchange for a release of liability as to the insurance company only. The plaintiffs and the striking driver then entered a consent judgment for \$4 million, and the striking driver assigned any bad faith claims to the plaintiffs in exchange for the

168. GA. UNIF. SUPER. CT. R. 21.

169. *In re Gwinnett County*, 284 Ga. at 513, 668 S.E.2d at 684–85.

170. 296 Ga. App. 251, 674 S.E.2d 105 (2009).

171. *Id.* at 251, 674 S.E.2d at 105–06.

172. O.C.G.A. § 29-9-18(b) (Supp. 2009).

173. *Id.*

174. *Sharpton*, 296 Ga. at 253, 674 S.E.2d at 106–07.

175. *Id.*

176. 621 F. Supp. 2d 1279 (N.D. Ga. 2009).

177. *Id.* at 1280.

protection of her personal assets. The striking driver's insurance company sought resolution of whether it had previously acted in bad faith.¹⁷⁸ The district court declined to certify this question to the Georgia Supreme Court, holding that the insurance company's conduct was not actionable under Georgia's settled bad faith law because the plaintiffs in the underlying tort action "(a) never offered to settle their claims against [the striking driver] within the policy limits and (b) explicitly stated, more than once, they refused to release [the striking driver] for a settlement at the policy limits."¹⁷⁹

In *Thompson v. Allstate Insurance Co.*,¹⁸⁰ the Georgia Supreme Court reversed a decision by the court of appeals¹⁸¹ that was discussed in last year's article.¹⁸² In *Thompson* the court of appeals held that a settlement release for the liability insurer's policy limits, in which a husband and wife both released claims, did not exhaust the available liability coverage for either the husband or the wife, and therefore, uninsured motorist coverage was recoverable.¹⁸³ While agreeing "that a party must exhaust available liability coverage before recovering under a UM policy[,]"¹⁸⁴ the supreme court disagreed that "the release unambiguously shows that Mr. Thompson did not exhaust the limits of the liability policy,"¹⁸⁵ holding instead that "the joint release in this case does not necessarily indicate that Mrs. Thompson received a portion of the proceeds for her own physical injuries."¹⁸⁶ The supreme court additionally held parol evidence could be considered to evaluate the scope of the release because the uninsured motorist carrier was a "stranger" to the release.¹⁸⁷ Thus, the supreme court has solved one precarious pitfall for practitioners trying to navigate the changing uninsured motorist landscape.

178. *Id.* at 1281–82.

179. *Id.* at 1286.

180. 285 Ga. 24, 673 S.E.2d 227 (2009).

181. *Id.* at 29, 673 S.E.2d at 231.

182. See Kate S. Cook et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 60 MERCER L. REV. 397, 405 (2008).

183. *Thompson*, 285 Ga. at 26, 673 S.E.2d at 229.

184. *Id.* (alteration in original) (quoting *Daniels v. Johnson*, 270 Ga. 289, 290, 509 S.E.2d 41, 42 (1998)).

185. *Id.* at 27, 673 S.E.2d at 230.

186. *Id.* at 28, 673 S.E.2d at 231.

187. *Id.* The insureds filed an affidavit of their attorney that confirmed "[n]o funds were paid or intended to be paid for the claims of [Mrs.] Thompson[,] that her claims were 'nominal' and 'not worth pursuing,' and that '[t]he sole purpose of the settlement with the liability carrier was to settle the claims of [Mr.] Thompson." *Id.* at 25, 673 S.E.2d at 229 (alterations in original). The court of appeals refused to consider the affidavit because it was parol evidence. *Id.* at 26, 673 S.E.2d at 229.

R. Causes of Action

In *Ferrell v. Mikula*,¹⁸⁸ the court of appeals attempted to clarify the somewhat muddled waters concerning the three semi-related torts of false imprisonment, false arrest, and malicious arrest.¹⁸⁹ The court overruled a long line of cases by holding that the tort of malicious arrest, codified in O.C.G.A. § 51-7-1,¹⁹⁰ is actionable if the subject arrest was without a warrant.¹⁹¹

In *Mulligan's Bar & Grill v. Stanfield*,¹⁹² the defendant attempted to stretch the protections of Georgia's Dram Shop Act¹⁹³ to include immunity from ordinary premises liability claims.¹⁹⁴ The court of appeals stated the obvious and affirmed that the Dram Shop Act has express limitations, namely to injuries caused by drunk drivers, and is not meant to provide wholesale insulation to a dram shop for all other torts.¹⁹⁵

IV. CONCLUSION

The preceding statutes and cases constitute what the Authors deem to be the more noteworthy alterations, illustrations, and clarifications to Georgia law impacting trial practice and procedure within this survey period.

188. 295 Ga. App. 326, 672 S.E.2d 7 (2008).

189. *See id.* at 331–33, 672 S.E.2d at 11–13.

190. O.C.G.A. § 51-7-1 (2000).

191. *Ferrell*, 295 Ga. App. at 333, 672 S.E.2d at 13, *overruling* *Todd v. Byrd*, 283 Ga. App. 37, 640 S.E.2d 652 (2006); *Wal-Mart Stores, Inc. v. Johnson*, 249 Ga. App. 84, 547 S.E.2d 320 (2001); *Simmons v. Kroger Co.*, 218 Ga. App. 721, 463 S.E.2d 159 (1995); *McLeod v. Pruco Life Ins. Co.*, 215 Ga. App. 177, 449 S.E.2d 895 (1994); *Mayor & Aldermen of Savannah v. Wilson*, 214 Ga. App. 170, 447 S.E.2d 124 (1994); *Gantt v. Patient Comm. Sys., Inc.*, 200 Ga. App. 35, 406 S.E.2d 796 (1991); *Smith v. Embry*, 103 Ga. App. 375, 119 S.E.2d 45 (1961).

192. 294 Ga. App. 250, 668 S.E.2d 874 (2008).

193. O.C.G.A. § 51-1-40 (2000).

194. *Stanfield*, 294 Ga. App. at 251, 668 S.E.2d at 875.

195. *See id.* at 252, 668 S.E.2d at 875–76. The court stated that

[c]ontrary to [the defendant's] argument, the Georgia Dram Shop Act was never intended to and does not pertain to premises liability claims like the one before this Court. Even liquor stores and bars are required to keep their premises safe, and O.C.G.A. § 51-3-1 irrefutably governs this matter and serves as the basis to support the jury's verdict.

Id. (citing O.C.G.A. § 51-3-1 (2000)).