

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 Court of Appeals between June 1, 2009 and May 31, 2010.¹ The cases discussed fall into the following categories: (1) appellate jurisdiction; (2) preserving the record; and (3) miscellaneous cases of interest.

II. APPELLATE JURISDICTION

A. *Selecting the Correct Appeal Procedure*

As can be seen from the cases discussed below, it is not always easy to decide which appeal procedure should be used. In *Owens v. Green Tree Servicing LLC*,² a dispossessory action, the defendant appealed from the trial court's issuance of a writ of dispossession and contended that the trial court erred when it rejected his defense of wrongful foreclosure. The defendant filed a separate appeal from the trial court's order requiring him to pay rent into the registry of the court pending resolution of the first appeal.³

The Georgia Court of Appeals affirmed the trial court's order in the first appeal in part because the defendant failed to include a trial

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1. For analysis of Georgia appellate practice and procedure law during the prior survey period, see Roland F. L. Hall, *Appellate Practice and Procedure, Annual Survey of Georgia Law*, 61 MERCER L. REV. 31 (2009).

2. 300 Ga. App. 22, 684 S.E.2d 99 (2009).

3. *Id.* at 22-23, 684 S.E.2d at 100.

transcript in the record.⁴ However, the more interesting point was raised in the second appeal, in which the plaintiff argued that the defendant was required to follow the interlocutory appeal procedures that required the defendant to pay rent pending appeal.⁵ The court of appeals held that the cases cited by the plaintiff⁶ on this point were inapposite because in those cases “the appeal was from an order directing [a] tenant to pay rent pending the disposition of the dispossessory case.”⁷ In *Owens* the issue of dispossession had already been decided, and the payment of rent pending appeal was ordered pursuant to a post-judgment order.⁸

The court of appeals held that a post-judgment order that requires payment of rent pending appeal is similar to a post-judgment order that requires the posting of a supersedeas bond and is subject to direct appeal.⁹ The court of appeals ultimately dismissed the second appeal as moot in light of its disposition of the first appeal.¹⁰

In *Torres v. Piedmont Builders, Inc.*,¹¹ after the property owners became involved in a dispute with their homebuilder, they filed a motion with the Superior Court of Fulton County, Georgia for appointment of an arbitrator to resolve the dispute. Although the owners argued that the construction contract neither specified the arbitrator nor any procedure for selecting one, the superior court dismissed the action and ordered that the arbitration be administered by an arbitration firm named in the contract. After the owners filed a direct appeal, the homebuilder argued that the appeal should be dismissed for failure to follow the interlocutory appeal procedures.¹²

The homebuilder relied on prior cases holding that the grant of a motion to compel arbitration cannot be directly appealed under section 5-6-34(a)(4) of the Official Code of Georgia Annotated (O.C.G.A.)¹³ and must be appealed under O.C.G.A. § 5-6-34(b)¹⁴ using the applicable

4. *Id.* at 23-24, 684 S.E.2d at 100-01.

5. *Id.* at 24, 684 S.E.2d at 101.

6. *Carter v. Landel/Arundel, Inc.*, 172 Ga. App. 115, 322 S.E.2d 108 (1984); *Wall v. T.J.B. Servs., Inc.*, 141 Ga. App. 437, 233 S.E.2d 810 (1977).

7. *Owens*, 300 Ga. App. at 24, 684 S.E.2d at 101.

8. *Id.*

9. *Id.* at 24-25, 684 S.E.2d at 101.

10. *Id.* at 25, 684 S.E.2d at 101.

11. 300 Ga. App. 872, 686 S.E.2d 464 (2009).

12. *Id.* at 872, 686 S.E.2d at 465.

13. O.C.G.A. § 5-6-34(a)(4) (1995 & Supp. 2009).

14. *Id.* § 5-6-34(b).

interlocutory appeal procedures.¹⁵ However, the court of appeals distinguished those cases because they did not involve final judgments.¹⁶ The court held that the appeal arose from a final order that dismissed the owners' initial action in its entirety.¹⁷ Under O.C.G.A. § 5-6-34(a)(1),¹⁸ the appeal was from a final judgment and was therefore directly appealable.¹⁹

In *In the Interest of J.N.*,²⁰ a case involving deprivation proceedings concerning two juveniles, an order was entered terminating a plan for reunification of the children with the parents and placing the children in the custody of relatives. The juveniles' biological father petitioned for modification of the order, requesting that the children be immediately transferred into his custody or that he be awarded regular visitation. The juvenile court denied the petition, and the father filed a direct appeal.²¹

The court of appeals first considered whether the father had the right to file a direct appeal pursuant to O.C.G.A. § 5-6-34(a)(11),²² which allows a direct appeal from all child custody case judgments or orders.²³ It was determined to be unclear whether the phrase "child custody cases" included child deprivation proceedings when the juvenile court entered a child custody order.²⁴ While the court noted that a deprivation proceeding may require child custody determinations, it also stated that the primary purpose of such a proceeding is to determine whether the child is deprived rather than to determine child custody issues.²⁵ Thus, the court concluded that O.C.G.A. § 5-6-34(a)(11) does not authorize a direct appeal.²⁶

However, the court of appeals did hold that pursuant to O.C.G.A. §§ 5-6-34(a)(1) and 15-11-3,²⁷ the juvenile court's order was a final judgment; thus, it was directly appealable.²⁸ Section 15-11-3 provides that

15. *Torres*, 300 Ga. App. at 872, 686 S.E.2d at 465 (quoting *Pace Constr. Corp. v. Northpark Assocs.*, 215 Ga. App. 438, 439, 450 S.E.2d 828, 829 (1994)).

16. *Id.*

17. *Id.* at 872, 686 S.E.2d at 465-66.

18. O.C.G.A. § 5-6-34(a)(1) (1995 & Supp. 2009).

19. *Torres*, 300 Ga. App. at 872-73, 686 S.E.2d at 466.

20. 302 Ga. App. 631, 691 S.E.2d 396 (2010).

21. *Id.* at 631, 691 S.E.2d at 397.

22. O.C.G.A. § 5-6-34(a)(11) (Supp. 2009).

23. *Id.*; *In the Interest of J.N.*, 302 Ga. App. at 631-32, 691 S.E.2d at 397-98.

24. *In the Interest of J.N.*, 302 Ga. App. at 632, 691 S.E.2d at 398 (internal quotation marks omitted).

25. *Id.*

26. *Id.* at 632-33, 691 S.E.2d at 398.

27. O.C.G.A. § 15-11-3 (2008).

28. *In the Interest of J.N.*, 302 Ga. App. at 634, 691 S.E.2d at 399.

appeals from a final judgment of a juvenile court “shall be taken to the Court of Appeals or the Supreme Court in the same manner as appeals from the superior court,”²⁹ while § 5-6-34(a)(1) provides that all final judgments of a superior court are by direct appeal.³⁰ The court of appeals concluded that the juvenile court order placing the children in the long-term custody of relatives clearly constituted a final order from which a direct appeal could have been taken.³¹ As a result, the juvenile court’s order denying the father’s petition to modify the final order in that proceeding was itself a final order from which a direct appeal could be taken.³² The court overruled its decision in *In the Interest of B.S.H.*³³ to the extent it held otherwise.³⁴ In that case, the court stated that an appeal from an O.C.G.A. § 15-11-40(b)³⁵ motion was only available by application.³⁶

In *In the Interest of J.L.K.*,³⁷ a juvenile who was determined to be delinquent by the Lowndes County, Georgia Juvenile Court filed two separate motions for reconsideration, modification, or vacatur of the orders entered regarding his disposition. The juvenile court denied both motions, and the juvenile filed a direct appeal from the denial of the second motion.³⁸ The court of appeals initially considered whether it had jurisdiction over the appeal.³⁹

On appeal, the juvenile argued that the juvenile court should have set aside the order on the basis of O.C.G.A. § 15-11-40(a)(3),⁴⁰ which allows a juvenile court order to be set aside if such is required by newly discovered evidence.⁴¹ The juvenile also argued that the order should have been set aside on the basis of O.C.G.A. § 15-11-70(d),⁴² which allows the juvenile court to terminate an order of disposition of a child determined to be delinquent if the purposes of the order have been accomplished.⁴³

29. O.C.G.A. § 15-11-3.

30. O.C.G.A. § 5-6-34(a)(1).

31. *In the Interest of J.N.*, 302 Ga. App. at 634, 691 S.E.2d at 399.

32. *Id.*

33. 236 Ga. App. 879, 514 S.E.2d 70 (1999).

34. *In the Interest of J.N.*, 302 Ga. App. at 634, 691 S.E.2d at 399.

35. O.C.G.A. § 15-11-40(b) (2008).

36. *In the Interest of J.N.*, 302 Ga. App. at 634, 691 S.E.2d at 399 (quoting *In the Interest of B.S.H.*, 236 Ga. App. at 882, 514 S.E.2d at 73).

37. 302 Ga. App. 844, 691 S.E.2d 892 (2010).

38. *Id.* at 844, 691 S.E.2d at 893.

39. *Id.*

40. O.C.G.A. § 15-11-40(a)(3).

41. *Id.*; *In the Interest of J.L.K.*, 302 Ga. App. at 846, 691 S.E.2d at 894.

42. O.C.G.A. § 15-11-70(d) (2008).

43. *Id.*; *In the Interest of J.L.K.*, 302 Ga. App. at 845-46, 691 S.E.2d at 894.

The court of appeals noted that in at least one prior opinion, it had held that an appeal from a denial of an O.C.G.A. § 15-11-40 motion must be made pursuant to the discretionary appeal procedures,⁴⁴ although that portion of the opinion was subsequently overruled by its decision in *In the Interest of J.N.*⁴⁵ In addition, the court of appeals recognized that O.C.G.A. § 5-6-35(a),⁴⁶ the statute governing discretionary appeals, does not specifically list O.C.G.A. §§ 15-11-40 or 15-11-70 as being subject to the discretionary appeal procedures.⁴⁷

The court of appeals then considered whether an order denying a motion to modify a final delinquency determination under O.C.G.A. §§ 15-11-40 or 15-11-70 is a final judgment or an interlocutory judgment because a direct appeal can only be taken from a final judgment.⁴⁸ As discussed above, the court of appeals had recently held in *In the Interest of J.N.* that a juvenile court's order denying a motion seeking a modification based on changed circumstances was a directly appealable final judgment.⁴⁹ In the case at hand, the court of appeals held that the same rule should apply to the juvenile court's order and that the order was a final judgment that was thus directly appealable.⁵⁰

In *Owens v. St. Victor*,⁵¹ an action for breach of contract and fraud against corporate defendants and an individual defendant, the individual defendant's wife filed a motion for invocation by a third party seeking to express her interest in the case. The trial court entered an order striking and dismissing the answer of two of the corporate defendants and all their other pleadings. The trial court subsequently denied the wife's motion for invocation by a third party, and the wife and the individual defendant appealed.⁵²

The court of appeals held that because the case was still pending for all the defendants when the notice of appeal was filed, a direct appeal was not authorized.⁵³ While the trial court decided to strike the corporate defendants' answers, it had not entered a final judgment as to

44. *In the Interest of J.L.K.*, 302 Ga. App. at 846, 691 S.E.2d at 894 (quoting *In the Interest of B.S.H.*, 236 Ga. App. at 882, 514 S.E.2d at 73).

45. *Id.* (citing *In the Interest of J.N.*, 302 Ga. App. 631, 691 S.E.2d 399).

46. O.C.G.A. § 5-6-35(a) (1995 & Supp. 2010).

47. *In the Interest of J.L.K.*, 302 Ga. App. at 846, 691 S.E.2d at 894; see O.C.G.A. § 5-6-35(a).

48. *In the Interest of J.L.K.*, 302 Ga. App. at 846, 691 S.E.2d at 894.

49. *Id.* at 847, 691 S.E.2d at 895 (citing *In the Interest of J.N.*, 302 Ga. App. at 634, 691 S.E.2d at 399).

50. *Id.*

51. 300 Ga. App. 302, 684 S.E.2d 423 (2009).

52. *Id.* at 302, 684 S.E.2d at 423.

53. *Id.* at 302-03, 684 S.E.2d at 424.

those defendants or the individual defendant.⁵⁴ The court of appeals held that because the appellants failed to follow the required interlocutory appeal procedures, it lacked jurisdiction to consider the appeal.⁵⁵

In *Coastal Marshlands Protection Committee v. Altamaha Riverkeeper, Inc.*,⁵⁶ the defendant, Coastal Marshlands Protection Committee, issued a permit to a developer to build a dock over state-owned marshlands, and the plaintiff, Altamaha Riverkeeper, Inc., challenged the defendant's decision before an administrative law judge (ALJ). The ALJ affirmed the issuance of the permit, and the plaintiff subsequently sought review of the decision in the Superior Court of Fulton County, Georgia, which reversed the ALJ's decision and remanded for rehearing. In the first appeal, the defendant challenged the superior court's reversal of the ALJ's decision. In the second appeal, the intervenors, banks that had foreclosed on the developer's property, also appealed the superior court's decision.⁵⁷ In both cases the appellants obtained a certificate of immediate review and followed the interlocutory appeal procedures.⁵⁸

The court of appeals discussed the superior court's conclusion that the ALJ improperly restricted the manner in which the plaintiff could meet its burden of proof in challenging the permit and remanded the case for rehearing before the ALJ.⁵⁹ The court then held that because returning the case to the ALJ required reconsideration of the issue under a different standard rather than recommencement of the agency proceedings, the order was not final.⁶⁰ Because the order was not final and was thus not appealable, the court of appeals held that it lacked jurisdiction over both appeals.⁶¹

B. Miscellaneous Jurisdictional Issues

In *In the Interest of A.C.*,⁶² the Fulton County, Georgia Juvenile Court ordered the termination of the parental rights of a juvenile's parents.⁶³ The father filed an application for discretionary appeal with the court of appeals in which he, for the first time, raised a constitutional challenge to O.C.G.A. § 5-6-35(a)(12),⁶⁴ which had been amended to

54. *Id.* at 303, 684 S.E.2d at 424.

55. *Id.*

56. 304 Ga. App. 1, 695 S.E.2d 273 (2010).

57. *Id.* at 1, 695 S.E.2d at 274.

58. *Id.* at 3, 695 S.E.2d at 275.

59. *Id.*

60. *Id.* at 3-4, 695 S.E.2d at 276.

61. *Id.* at 4, 695 S.E.2d at 276.

62. 285 Ga. 829, 686 S.E.2d 635 (2009).

63. *Id.* at 831-32, 686 S.E.2d at 637.

64. O.C.G.A. § 5-6-35(a)(12) (Supp. 2009).

require that appeals from orders terminating parental rights be by application rather than by direct appeal.⁶⁵ The court of appeals transferred the case to the Georgia Supreme Court.⁶⁶

The supreme court initially noted that it generally would not rule on a challenge to the constitutionality of a statute when the issue has not been raised in the trial court.⁶⁷ The court then acknowledged that there is a limited exception to this general rule when a constitutional challenge to a statute governing appellate procedure is necessarily first raised on appeal.⁶⁸ The court decided to address the father's constitutional challenge pursuant to the exception⁶⁹ and stated that this "narrow departure from the general rule governing a constitutional challenge is justified because the statute of appellate procedure at issue comes into play only when an adverse ruling below is obtained and the dissatisfied party determines to pursue an appeal."⁷⁰ The supreme court also expressly overruled *In the Interest of D.R.*,⁷¹ in which the court of appeals held that because a parent's constitutional challenge to O.C.G.A. § 5-6-35(a)(12) was not raised or ruled upon in the trial court, it was not reviewable on appeal.⁷² The supreme court then addressed the constitutional challenge but ultimately rejected it.⁷³

In *Spurlock v. Department of Human Resources*,⁷⁴ the father sought a modification of child support. The Department of Human Resources (DHR) recommended a reduction of the father's child-support payments, but the trial court only ordered a portion of the recommended reduction. The court of appeals granted the father's application for discretionary appeal and then transferred the case to the supreme court based on the supreme court's divorce and alimony jurisdiction.⁷⁵

The supreme court first considered whether an order for modification of child support arising from a DHR review under O.C.G.A. § 19-11-12⁷⁶ fell under its divorce and alimony jurisdiction.⁷⁷ The court noted that

65. *Id.*; *In the Interest of A.C.*, 285 Ga. at 832, 686 S.E.2d at 637.

66. *In the Interest of A.C.*, 285 Ga. at 832, 686 S.E.2d at 637.

67. *Id.* at 832, 686 S.E.2d at 638.

68. *Id.*

69. *Id.* at 833, 686 S.E.2d at 638.

70. *Id.* at 832-33, 686 S.E.2d at 638.

71. 298 Ga. App. 774, 681 S.E.2d 218 (2009).

72. *In the Interest of A.C.*, 285 Ga. at 833 n.3, 686 S.E.2d at 638 n.3 (citing *In the Interest of D.R.*, 298 Ga. App. at 782, 681 S.E.2d at 225).

73. *Id.* at 833-34, 686 S.E.2d at 639.

74. 286 Ga. 512, 690 S.E.2d 378 (2010).

75. *Id.* at 512, 690 S.E.2d at 380.

76. O.C.G.A. § 19-11-12 (2010).

77. *Spurlock*, 286 Ga. at 512, 690 S.E.2d at 380.

a child support award made in a divorce proceeding always constitutes alimony, but outside of the divorce context, the award might not represent alimony.⁷⁸ The court also noted that it frequently exercises its jurisdiction in divorce and alimony cases brought under O.C.G.A. § 19-6-19⁷⁹ for modification of child support awarded in a divorce decree and in actions arising from DHR's review under O.C.G.A. § 19-11-12 of awards of child support originally awarded in a divorce decree.⁸⁰ The court concluded that it had jurisdiction because "appeals from orders in proceedings for modification of a child support award which arose from a prior divorce or alimony action, regardless of the code section under which the modification was pursued, are subject to the jurisdiction of this Court."⁸¹

Justice Nahmias raised an interesting point in his special concurrence, which was joined by two other justices.⁸² He contended that not a single court of competent jurisdiction had ever granted the father's discretionary appeal application because the court of appeals purported grant of the appeal occurred before the court realized that it lacked jurisdiction and transferred the appeal to the supreme court.⁸³ After the transfer, the supreme court denied the mother's motion to dismiss without explanation.⁸⁴

Justice Nahmias noted that in some cases the supreme court simply decided the case without addressing the application, while in others the court issued unpublished orders directing that the correct procedure is to strike and re-docket the transferred appeal as an application to be granted or denied by the supreme court.⁸⁵ Justice Nahmias argued that the court should strike the transferred, granted appeal, re-docket the appeal, and announce its own decision on the application,⁸⁶ while the majority held that such a procedure was unnecessary because the court had implicitly determined that the application for appeal was properly granted.⁸⁷ Justice Nahmias insisted that any such implicit determination that an application was granted properly "by a court with no authority to do so . . . disregards the constitutional limits and

78. *Id.* at 513, 690 S.E.2d at 380.

79. O.C.G.A. § 19-6-19 (2004 & Supp. 2009).

80. *Spurlock*, 286 Ga. at 513, 690 S.E.2d at 380.

81. *Id.* at 514, 690 S.E.2d at 381.

82. *Id.* at 517, 690 S.E.2d at 383 (Nahmias, J., concurring specially). Justices Hines and Melton joined the special concurrence. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 522, 690 S.E.2d at 386.

86. *Id.* at 519-20, 690 S.E.2d at 384.

87. *Id.* at 514, 690 S.E.2d at 381 (majority opinion).

statutory requirements that are supposed to govern the authority of judges in a democratic system” and might actually delay certain appeals, causing unnecessary additional litigation expenses.⁸⁸

Justice Nahmias also noted that the majority’s procedure raised another question of jurisdiction because the father’s application for discretionary appeal was filed in the wrong court and not docketed in the supreme court before the thirty-day deadline under O.C.G.A. § 5-6-35(d)⁸⁹ had expired.⁹⁰ Justice Nahmias stated,

[T]his Court and the Court of Appeals have routinely—and correctly, in my view—considered and decided on the merits applications that were transferred by the other appellate court more than 30 days after the entry of the trial court’s order. The Court should also take this jurisdictional issue out of the shadows of undiscussed practice into the light of a published and binding opinion.⁹¹

III. PRESERVING THE RECORD

During every survey period, there are cases that demonstrate the critical importance of making a complete record in the trial court. In *Thompson v. Princell*,⁹² an action for dental malpractice, the plaintiff claimed that the defendant dentist failed to disclose the risks and alternatives to the surgery in accordance with O.C.G.A. § 31-9-6.1,⁹³ the informed consent statute, which governs certain medical procedures.⁹⁴ The jury found in favor of the defendant, and the plaintiff contended on appeal that the trial court erred when it refused to give the plaintiff’s proposed charge on the informed consent statute.⁹⁵

On appeal, the plaintiff argued that the statutory definition of general anesthesia under O.C.G.A. § 43-11-1(7)⁹⁶ supported a charge on the informed consent statute.⁹⁷ The court of appeals held that because the plaintiff did not request a written charge on the statutory definition and never raised the statute’s applicability at the charge conference, the plaintiff had waived the argument for purposes of appeal.⁹⁸ The court

88. *Id.* at 517-18, 690 S.E.2d at 383 (Nahmias, J., concurring specially).

89. O.C.G.A. § 5-6-35(d) (1995 & Supp. 2009).

90. *Spurlock*, 286 Ga. at 525, 690 S.E.2d at 387-88 (Nahmias, J., concurring specially).

91. *Id.* at 526, 690 S.E.2d at 388.

92. 304 Ga. App. 256, 696 S.E.2d 91 (2010).

93. O.C.G.A. § 31-9-6.1 (2009).

94. *Id.*

95. *Thompson*, 304 Ga. App. at 256, 696 S.E.2d at 93.

96. O.C.G.A. § 43-11-1(7) (2008).

97. *Thompson*, 304 Ga. App. at 258-59, 696 S.E.2d at 93-94.

98. *Id.* at 259, 696 S.E.2d at 95.

of appeals ultimately held that the plaintiff was not entitled to a charge addressing the informed consent statute.⁹⁹

The timing requirements for objecting to submitted jury charges are different from those for objecting to the court's failure to give a requested charge.¹⁰⁰ For example, in *Tucker Nursing Center, Inc. v. Mosby*,¹⁰¹ the defendant argued on appeal that the trial court's jury instruction on the "eggshell" plaintiff and concurrent negligence constituted error. Although the defendant only made general objections after the charges were given to the jury, the defendant contended that it had made specific objections to the charges at the charge conference.¹⁰² The court of appeals stated that "objections to charges must be made after the jury is charged and before the verdict; objections made at charging conferences before the charge is given do not preserve charging issues for appellate review."¹⁰³ The court also noted that pursuant to O.C.G.A. § 5-5-24(a),¹⁰⁴ general objections to jury charges are insufficient to preserve such objections for review.¹⁰⁵

The defendant might still have preserved its objection to the charges for review if it had requested that the charge conference be recorded or transcribed.¹⁰⁶ The court of appeals raised the possibility that the objection could have been preserved if the "trial court had knowledge of the specific arguments that were presented during the charge conference, thus giving him the necessary insight to rule intelligently on the general objections posed following the charge."¹⁰⁷ However, because there was no record of the conference, the court concluded that it could not consider the defendant's objections on appeal.¹⁰⁸

In *Christie v. Rainmaster Irrigation, Inc.*,¹⁰⁹ another case addressing jury charges, the plaintiff contractor brought suit against the defendant property owner in connection with installation of a commercial irrigation system. The plaintiff obtained a verdict and judgment against the

99. *Id.* at 260, 696 S.E.2d at 95.

100. *See, e.g.*, *Tucker Nursing Ctr., Inc. v. Mosby*, 303 Ga. App. 80, 87, 692 S.E.2d 727, 733 (2010).

101. 303 Ga. App. 80, 692 S.E.2d 727 (2010).

102. *Id.* at 87, 692 S.E.2d at 733 (internal quotation marks omitted).

103. *Id.* (quoting *Christie v. Rainmaster Irrigation, Inc.*, 299 Ga. App. 383, 387, 682 S.E.2d 687, 691 (2009)) (internal quotation marks omitted).

104. O.C.G.A. § 5-5-24(a) (1995).

105. *See Tucker Nursing Ctr., Inc.*, 303 Ga. App. at 87, 692 S.E.2d at 733.

106. *See id.*

107. *Id.*

108. *Id.*

109. 299 Ga. App. 383, 682 S.E.2d 687 (2009).

defendant for compensatory damages and attorney fees.¹¹⁰ Upon the defendant's appeal from the verdict and judgment, the court of appeals held that the defendant had failed to take the proper steps to preserve many of its arguments for review.¹¹¹ Specifically, although the defendant asserted that the trial court failed to give jury charges on certain issues, the defendant failed to raise any objection after the jury was charged.¹¹²

While the court of appeals ultimately based its holding on the rule that objections made at the charging conference are not sufficient to preserve charging issues for appeal, the court noted that "[i]n any event, the trial conference was not transcribed."¹¹³ As noted in *Tucker Nursing Center*, it is possible that if the defendant in *Christie* had raised objections during the charging conference, and if that conference had been reported and made part of the record, the trial court could have construed those objections as continuing objections and considered them on appeal.¹¹⁴

In *Armstrong v. Rapson*,¹¹⁵ a medical malpractice action against the defendant surgeon and his professional corporation, the trial court denied the defendants' motion for summary judgment.¹¹⁶ In its order, the trial court indicated that it relied upon the complete appellate record in making its decision.¹¹⁷ The defendants appealed the trial court's denial of their motion for summary judgment.¹¹⁸

The defendants' notice of appeal was not in the form required under O.C.G.A. § 5-6-37¹¹⁹ because it designated the items to be *included* in the record rather than designating the portions of the record to be *omitted* on appeal.¹²⁰ However, upon reviewing the trial court's record, the court of appeals determined that the defendants had failed to include several items that the trial court might have relied upon in reaching its decision, such as several depositions that had been filed.¹²¹ Because

110. *Id.* at 383-84, 682 S.E.2d at 689.

111. *Id.* at 386, 682 S.E.2d at 690-91.

112. *Id.* at 386-87, 682 S.E.2d at 691.

113. *Id.* at 386-87 & n.2, 682 S.E.2d at 691 & n.2.

114. 303 Ga. App. at 87, 692 S.E.2d at 733.

115. 299 Ga. App. 884, 683 S.E.2d 915 (2009).

116. *Id.* at 884, 683 S.E.2d at 916.

117. *Id.* at 885, 683 S.E.2d at 917.

118. *Id.* at 884, 683 S.E.2d at 916.

119. O.C.G.A. § 5-6-37 (1995).

120. *Armstrong*, 299 Ga. App. at 884, 683 S.E.2d at 916; *see also* O.C.G.A. § 5-6-37.

121. *Armstrong*, 299 Ga. App. at 884-85, 683 S.E.2d at 916.

evidence was omitted from the appellate record, the court of appeals held that it was required to affirm the order denying summary judgment.¹²²

IV. MISCELLANEOUS

In *Jackson v. State*,¹²³ after the court of appeals affirmed the denial of an inmate's "motion to vacate void judgment with respect to his . . . convictions," the inmate sought to file a motion for reconsideration.¹²⁴ Although the inmate had notified the clerk of the court of appeals of his new address, the clerk continued to send mail to his old address, including the opinion of the court of appeals. Consequently, the deadline for filing the motion passed before the defendant received the opinion. The clerk acknowledged the error, noted that the court of appeals had already issued the remittitur to the trial court, and stated that the inmate could petition for writ of certiorari, requesting that the supreme court remand the case to the appellate court with instructions to recall the remittitur.¹²⁵

The supreme court raised several interesting points. The court initially noted that the inmate's petition for certiorari was untimely under Georgia Supreme Court Rule 12¹²⁶ and 38(2)¹²⁷ and would ordinarily have been dismissed.¹²⁸ However, the court decided that because the deadline was required by its court rules and not by statute, it would exercise its discretion to make an exception to its deadlines.¹²⁹

In considering whether the court of appeals could have recalled the remittitur, the supreme court observed that prior case law suggested that neither the court of appeals nor the supreme court has the authority to recall a remittitur once issued,¹³⁰ although there was contrary authority as well.¹³¹ The court also noted that the power to recall a remittitur is well established in the federal courts.¹³² Stating that "the authority of an appellate court to recall the remittitur, or mandate as it is called in the federal system, is an accepted feature of

122. *Id.* at 884, 885, 683 S.E.2d at 916, 917.

123. 286 Ga. 407, 688 S.E.2d 351 (2010).

124. *Id.* at 407, 688 S.E.2d at 352.

125. *Id.*

126. GA. SUP. CT. R. 12.

127. GA. SUP. CT. R. 38(2).

128. *Jackson*, 286 Ga. at 407, 688 S.E.2d at 352-53 (citing GA. SUP. CT. R. 12, 38(2)).

129. *Id.* at 407-08, 688 S.E.2d at 353.

130. *Id.* at 408, 688 S.E.2d at 353 (citing *Hagan v. Robert & Co. Assocs.*, 222 Ga. 469, 470, 150 S.E.2d 663, 665 (1966)).

131. *Id.* (citing *David G. Brown, P.E., Inc. v. Kent*, 274 Ga. 849, 849, 561 S.E.2d 89, 90 (2002); *Hawk v. W. & A.R. Co.*, 146 Ga. 373, 373, 91 S.E.2d 115, 115 (1917)).

132. *Id.* (citing *Calderon v. Thompson*, 523 U.S. 538, 549 (1998)).

modern appellate practice,” the supreme court held that “this Court and the Court of Appeals have the power to recall the remittitur.”¹³³

In this survey period, the court of appeals issued several decisions in which it imposed substantial penalties for filing frivolous appeals and violating its rules. In *Farr v. Rice*,¹³⁴ the plaintiff, the guarantor of promissory notes on which the defendant borrowers had defaulted, sought indemnification from the defendants for payment of a judgment obtained against the plaintiff by the defendants’ lender. The trial court granted summary judgment to the plaintiff, who was the stepmother of one of the defendants. The defendants appealed from the trial court’s judgment.¹³⁵ The defendants had not made any payments toward the principal amount due, yet they argued on appeal that “the principal payments . . . on the promissory notes were not *really* ‘past due.’”¹³⁶ The court of appeals held that the defendants failed to identify any possible defense to their liability for the notes or their failure to reimburse the guarantor.¹³⁷ Thus, as a frivolous appeal penalty pursuant to O.C.G.A. § 5-6-6,¹³⁸ the court of appeals ordered the defendants to pay the plaintiff 10% of the \$1.3 million judgment amount.¹³⁹

The case of *Ferdinand v. City of East Point*¹⁴⁰ arose from a collection agreement under which Fulton County (County) and its Tax Commissioner agreed to bill and collect ad valorem taxes on behalf of the City of East Point (City), with the County receiving 1% of the amount collected as its compensation. The County deducted nearly \$3 million from the amount it remitted to the City pursuant to the agreement to fund the County’s settlement of a refund claim by AT&T Communications (AT&T). The County’s settlement agreement with AT&T required the County to obtain the settlement funds from various political entities in the County, including the City. The County and its Tax Board and Tax Commissioner brought an interpleader action against the City and AT&T, and the City brought counterclaims against the County for breach of the collection agreement. The City ultimately entered into a

133. *Id.*

134. 300 Ga. App. 247, 684 S.E.2d 370 (2009).

135. *Id.* at 247-48, 684 S.E.2d at 371.

136. *Id.* at 248, 684 S.E.2d at 371.

137. *Id.*

138. O.C.G.A. § 5-6-6 (1995). The statute provides that the appellate court may award 10% damages “upon any judgment for a sum certain which has been affirmed” when in the opinion of the court the appeal was taken solely for purposes of delay. *Id.*

139. *Farr*, 300 Ga. App. at 248, 684 S.E.2d at 372.

140. 301 Ga. App. 333, 687 S.E.2d 617 (2009).

consent order, which resulted in distribution of the interpleaded fund but left the City free to pursue its counterclaim.¹⁴¹

The trial court granted partial summary judgment to the City in 2005, finding that the County breached the agreement by deducting the money for the AT&T settlement from the City's tax proceeds. In 2006 the trial court issued a final judgment that awarded nearly \$3 million to the City.¹⁴² In the initial appeal, the court of appeals affirmed the trial court's judgment on the issue of liability but remanded to the trial court to allow the parties full opportunity to address the issue of damages.¹⁴³ On remand, the trial court granted summary judgment in the City's favor for the withheld tax revenue plus interest.¹⁴⁴

In the second appeal from the trial court's grant of summary judgment, the City moved for frivolous appeal damages and penalties against the County.¹⁴⁵ The City's motion requested 10% damages pursuant to O.C.G.A. § 5-6-6, which provides that the appellate court may award 10% damages "upon any judgment for a sum certain which has been affirmed."¹⁴⁶ The court of appeals held that it had already confirmed the County's liability pursuant to the collection agreement, it was undisputed that the amount in question was withheld from the tax revenues remitted to the City, and the arguments on appeal were without merit.¹⁴⁷ The court of appeals concluded that the appeal was solely for purposes of delay and directed the trial court to enter judgment in favor of the City for frivolous appeal damages in the amount of \$288,582.78.¹⁴⁸ Furthermore, the court of appeals imposed monetary penalties against the County and its counsel under Georgia Court of Appeals Rule 15(b)¹⁴⁹ for filing a frivolous appeal.¹⁵⁰

In *Transportation Insurance Co. v. Piedmont Construction Group, LLC*,¹⁵¹ the insured, a general contractor, brought a third-party action against its insurer for refusal to provide coverage or defend the insured for fire damage caused to a building during renovation. The trial court

141. *Id.* at 334-35, 687 S.E.2d at 619-20.

142. *Id.* at 335-36, 687 S.E.2d at 620.

143. *Id.* at 333-34, 687 S.E.2d at 619 (citing *Ferdinand v. City of East Point*, 288 Ga. App. 152, 159-60, 653 S.E.2d 529, 534-35 (2007)).

144. *Id.* at 336, 687 S.E.2d at 620.

145. *Id.* at 339, 687 S.E.2d at 622.

146. *Id.*; see also O.C.G.A. § 5-6-6 (internal quotation marks omitted).

147. *Ferdinand*, 301 Ga. App. at 339, 687 S.E.2d at 623.

148. *Id.* at 339-40, 687 S.E.2d at 623.

149. GA. CT. APP. R. 15(b).

150. *Ferdinand*, 301 Ga. App. at 340, 687 S.E.2d at 623.

151. 301 Ga. App. 17, 686 S.E.2d 824 (2009).

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granted summary judgment to the insured.¹⁵² The court of appeals held that despite receiving an exhaustive opinion from the trial court explaining every detail of its decision, the insurer proceeded to appeal not only coverage but even its duty to defend the insured.¹⁵³ The court of appeals determined that the insurer relied solely on its “misreading of a single Georgia decision” and held that the “appeal in the face of controlling law . . . justify[d] the award of attorney fees [and frivolous appeal penalties] under Court of Appeals Rule 15(b).”¹⁵⁴

152. *Id.* at 17, 686 S.E.2d at 825-26.

153. *Id.* at 23, 686 S.E.2d at 829.

154. *Id.* at 23-24, 686 S.E.2d at 829.