

Trial Practice and Procedure

by **Kate S. Cook**^{*}
Alan J. Hamilton^{**}
Brandon L. Peak^{***}
John C. Morrison III^{****}
and **Mary K. Weeks**^{*****}

I. INTRODUCTION

This Article addresses significant judicial and legislative developments of interest to the Georgia trial practitioner occurring during the survey period of this publication.¹

* Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. University of the South (B.A., magna cum laude, 1998); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 2002). Member, State Bar of Georgia.

** Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. Auburn University (B.S.B.A., 2001); University of Georgia School of Law (J.D., magna cum laude, 2004). Member, State Bar of Georgia.

*** Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. The Citadel (B.S., summa cum laude, 2001); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 2004). Member, State Bar of Georgia.

**** Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. Mercer University (B.A., magna cum laude, 2003); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 2006). Member, State Bar of Georgia.

***** Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. University of Kentucky (B.A., summa cum laude, 1999); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 2007). Member, State Bar of Georgia.

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*, 61 MERCER L. REV. 363 (2009).

II. LEGISLATION

Georgia Senate Bill 344² amended section 31-8-195.1 of the Official Code of Georgia Annotated (O.C.G.A.)³ to extend sovereign immunity to physicians' assistants working in "safety net clinics."⁴ The initial act only extended immunity to physicians and nurses.⁵

Georgia Senate Bill 491⁶ has been enacted to affect service of process⁷ in the following ways: (1) it allows process servers to be certified statewide;⁸ (2) it requires process servers to be admitted into gated and secured communities for purposes of effecting service;⁹ and perhaps most importantly, (3) it requires proof of service to be made within five business days of service.¹⁰ If proof of service is not timely made, the time a party has to answer is now tolled until the proof of service is filed.¹¹

The Georgia General Assembly recently enacted Georgia Senate Bill 138,¹² which added a new code section that prohibits the implicit finding of any private right of action from any act that is enacted after July 1, 2010.¹³ To narrow the potentially broad ramifications of subpart (a) of the added code section, O.C.G.A. § 9-2-8,¹⁴ subpart (b) of the added section provides that the statute cannot

be construed to prevent the breach of any duty imposed by law from being used as the basis for a cause of action under any theory of recovery otherwise recognized by law, including, but not limited to, theories of recovery under the law of torts or contract or for breach of

2. Ga. S. Bill 344, Reg. Sess., 2010 Ga. Laws 209 (codified at O.C.G.A. § 31-8-195.1 (Supp. 2010)).

3. O.C.G.A. § 31-8-195.1 (2009 & Supp. 2010).

4. Ga. S. Bill 344 at § 1, 2010 Ga. Laws at 209.

5. O.C.G.A. § 31-8-195.1(a)-(b) (2009) (amended 2010).

6. Ga. S. Bill 491, Reg. Sess., 2010 Ga. Laws 822 (codified at O.C.G.A. §§ 9-10-91, 9-11-4, 9-11-4.1 (Supp. 2010)).

7. Senate Bill 491 also allows Georgia superior courts to exercise personal jurisdiction over nonresidents in domestic relations cases. *Id.* at § 1, 2010 Ga. Laws at 823 (codified at O.C.G.A. § 9-10-91(5) (Supp. 2010)).

8. Ga. S. Bill 491 at § 5, 2010 Ga. Laws at 825 (codified at O.C.G.A. § 9-11-4.1(a) (Supp. 2010)).

9. *Id.* at § 3, 2010 Ga. Laws at 824 (codified at O.C.G.A. § 9-11-4(f)(4) (Supp. 2010)).

10. *Id.* at § 4, 2010 Ga. Laws at 825 (codified at O.C.G.A. § 9-11-4(h) (Supp. 2010)).

11. *Id.*

12. Ga. S. Bill 138, Reg. Sess., 2010 Ga. Laws 745 (codified at O.C.G.A. § 9-2-8 (Supp. 2010)).

13. *Id.* at § 2, 2010 Ga. Laws at 745 (codified at O.C.G.A. § 9-2-8(a) (Supp. 2010)).

14. O.C.G.A. § 9-2-8 (Supp. 2010).

legal or private duties as set forth in Code Sections 51-1-6 and 51-1-8 or in Title 13.¹⁵

III. CASE LAW

A. *Voluntary Dismissals, Service of Process, and Notice Issues*

Although the exhaustive opinion of the Georgia Court of Appeals in *Resource Life Insurance Co. v. Buckner*¹⁶ is a must-read for lawyers practicing in the field of consumer class actions, it also provides clarification on the issues of when and under what terms presuit notice is required in the individual and class action context. Plaintiff Buckner filed a class action lawsuit, alleging that she and a class of similarly situated insureds did not receive their refund of unearned credit insurance premiums when their insured automobile loans terminated early.¹⁷ The credit life and disability insurance products at issue in *Resource Life* were single-premium, meaning the entire premium was paid up front and fully earned by the defendant only if the insured loan ran to term.¹⁸ The plaintiff alleged that if the loans did not run to term, the defendant should refund those premiums that had been paid but could never be earned by the defendant.¹⁹

The defendant countered by arguing that it had no obligation to issue refunds to its insureds until each insured provided it with written notice of that insured's entitlement to a refund; consequently, the defendant moved for partial summary judgment on that issue.²⁰ The genesis of the defendant's argument was a statement in its credit insurance certificate that "[i]f the insurance stops before the end of the Term of Insurance, We will on written notice refund any unearned premium."²¹ The trial court denied the defendant's motion for partial summary judgment and granted the plaintiff's motion for class certification.²² On interlocutory appeal,²³ a unanimous panel of the court of appeals rejected the defendant's argument that the language, "on written notice," constituted a mandatory condition precedent that had to be satisfied by

15. Ga. S. Bill 138 at § 2, 2010 Ga. Laws at 745 (codified at O.C.G.A. § 9-2-8(b)).

16. 304 Ga. App. 719, 698 S.E.2d 19 (2010).

17. *Id.* at 719, 721, 698 S.E.2d at 22-24.

18. *See id.* at 719-20, 698 S.E.2d at 23.

19. *See id.* at 721, 698 S.E.2d at 24.

20. *Id.* at 720-21, 698 S.E.2d at 23-24.

21. *Id.*

22. *Id.* at 721-22, 698 S.E.2d at 24.

23. *See generally* O.C.G.A. § 9-11-23(g) (2006) (stating that "a court's order certifying a class . . . shall be appealable in the same manner as a final order").

each of its insureds whose loans had terminated early and who were thus owed a refund of an unearned premium by the defendant.²⁴

The court explained that the “on written notice” language in the defendant’s insurance certificates did not constitute a condition precedent because the certificates did not state that the insureds would forfeit their unearned insurance premiums if they failed to provide written notice.²⁵ The court further held that “under Georgia law, policy language such as that at issue, which does nothing more than require the insured to give notice of a particular event, is insufficient to create a condition precedent.”²⁶ Going one step further, the court noted that even if the certificates’ notice provision was a condition precedent, “the filing of the class action itself was sufficient to provide Resource Life with the requisite notice as to the claims of the putative class members.”²⁷ After dispensing with the defendant’s primary argument in opposition to class certification, the court likewise affirmed the trial court’s class certification order.²⁸ This opinion thus makes clear that by filing a class action, a class representative can satisfy any notice required of absent class members.

In *Boca Petroco, Inc. v. Petroleum Realty II*,²⁹ the Georgia Supreme Court issued a noteworthy opinion that addresses the right to file a notice of lis pendens³⁰ pursuant to O.C.G.A. § 44-14-610³¹ against Georgia properties potentially compromised by out-of-state litigation. In *Boca* underlying litigation was commenced in Florida that concerned property and leasehold rights for various gas stations and convenience stores located in several different Georgia counties. Boca filed notices of lis pendens in the superior court of each respective county where the property at issue was located, and the property owner, Petroleum Realty, filed petitions to cancel those notices.³² The varying superior courts were split concerning the validity of such notices.³³ The supreme court held that lis pendens notices could not be filed to give notice of out-of-state litigation, reasoning that although the ability to file a notice of lis

24. *Resource Life*, 304 Ga. App. at 726, 698 S.E.2d at 27.

25. *Id.* at 726-27, 698 S.E.2d at 27.

26. *Id.* at 727, 698 S.E.2d at 27-28.

27. *Id.* at 727, 698 S.E.2d at 28.

28. *Id.* at 728, 734, 698 S.E.2d at 29, 32.

29. 285 Ga. 487, 678 S.E.2d 330 (2009).

30. The purpose of lis pendens “is to inform prospective purchasers that real property is directly involved in a pending lawsuit, in which lawsuit there is some relief sought in regard to that particular property.” *Id.* at 488, 678 S.E.2d at 332.

31. O.C.G.A. § 44-14-610 (2002).

32. *Boca*, 285 Ga. at 487-88, 678 S.E.2d at 331-32.

33. *See id.* at 488, 678 S.E.2d at 332.

pendens has been codified,³⁴ “Georgia continues to require a showing of the common law elements of lis pendens before finding that litigation gives rise to a valid lis pendens for which notice may be filed.”³⁵ As the supreme court explained, these common law elements include the requirement that a court have jurisdiction of both the person and the subject matter of the suit.³⁶ The supreme court agreed with the court of appeals that because “one state does not have subject matter jurisdiction over real property in another state and cannot directly affect the title of property in another state,” the common law elements justifying filing a notice of lis pendens could not be satisfied in this case.³⁷

Lastly, in *Retention Alternatives, Ltd. v. Hayward*³⁸ the supreme court affirmed the assurance of the court of appeals that a plaintiff may still rely on *Stout v. Cincinnati Insurance Co.*³⁹ to timely serve an uninsured motorist carrier (UMC) for the first time in a renewal action following a voluntary dismissal under O.C.G.A. § 33-7-11(d)⁴⁰ against the tortfeasor.⁴¹ In so holding, the supreme court rejected the appellant UMC’s contention that *Stout* was invalidated when O.C.G.A. § 33-7-11⁴² was amended subsequent to the *Stout* decision.⁴³

B. Damages

In *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*,⁴⁴ the supreme court held O.C.G.A. § 51-13-1⁴⁵ unconstitutional.⁴⁶ The statute was

34. See O.C.G.A. § 44-14-610.

35. *Boca*, 285 Ga. at 487, 489, 678 S.E.2d at 331-32 (quoting *Boca Petroco, Inc. v. Petroleum Realty II*, 292 Ga. App. 833, 835, 666 S.E.2d 12, 14 (2008)) (internal quotation marks omitted).

36. *Id.* at 489, 678 S.E.2d at 333.

37. See *id.* at 489-90, 492, 678 S.E.2d at 333-34 (quoting *Boca Petroco, Inc. v. Petroleum Realty II*, 292 Ga. App. 833, 838, 666 S.E.2d 12, 15 (2008)) (internal quotation marks omitted). But see *id.* at 492-95, 678 S.E.2d at 334-36 (Hunstein, J., dissenting) (questioning whether the majority opinion will obstruct filings of lis pendens notices between Georgia counties).

38. 285 Ga. 437, 678 S.E.2d 877 (2009).

39. 269 Ga. 611, 502 S.E.2d 226 (1998).

40. O.C.G.A. § 33-7-11(d) (2000 & Supp. 2010).

41. See 285 Ga. at 439-40, 678 S.E.2d at 879.

42. O.C.G.A. § 33-7-11 (2000 & Supp. 2010).

43. *Hayward*, 285 Ga. at 440, 678 S.E.2d at 879.

44. 286 Ga. 731, 691 S.E.2d 218 (2010).

45. O.C.G.A. § 51-13-1 (Supp. 2010).

46. *Atlanta Oculoplastic*, 286 Ga. at 731, 691 S.E.2d at 220.

enacted as part of the Tort Reform Act of 2005,⁴⁷ and it capped noneconomic damage awards in medical malpractice cases.⁴⁸ In *Atlanta Oculoplastic*, after receiving a \$1,265,000 verdict in a medical malpractice case, the Nestlehutts moved to have O.C.G.A. § 51-13-1 declared unconstitutional because the statute would have required an \$800,000 reduction in the jury's verdict. The trial court granted the motion after finding that O.C.G.A. § 51-13-1 violated the Georgia Constitution's guarantee of the right to a trial by jury.⁴⁹ The trial court entered a judgment for the Nestlehutts in the full amount of the jury verdict and denied the appellants' motion for a new trial. An appeal to the supreme court ensued.⁵⁰

After tracing the history of the claims and damages involved, the supreme court concluded,

[A]t the time of the adoption of our Constitution of 1798, there did exist the common law right to a jury trial for claims involving the negligence of a health care provider, with an attendant right to the award of the full measure of damages, including noneconomic damages, as determined by the jury.⁵¹

The supreme court then determined that the damages cap in "[O.C.G.A.] § 51-13-1 clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function," infringing upon a party's constitutional right to a jury determination as to noneconomic damages.⁵² The supreme court, therefore, held the law unconstitutional and affirmed the judgment of the trial court.⁵³ The supreme court also determined that its decision would apply retroactively after considering a flexible, three-factor test.⁵⁴

47. Ga. S. Bill 3, § 13, Reg. Sess., 2005 Ga. Laws 1, 16-17 (codified at O.C.G.A. § 51-13-1).

48. O.C.G.A. § 51-13-1(b)-(e).

49. GA. CONST. art. I, § 1, para. 11(a); see *Atlanta Oculoplastic*, 286 Ga. at 731-32, 691 S.E.2d at 220-21.

50. *Atlanta Oculoplastic*, 286 Ga. at 731, 691 S.E.2d at 220.

51. *Id.* at 733-35, 691 S.E.2d at 221-23.

52. *Id.* at 735, 691 S.E.2d at 223.

53. *Id.* at 740, 691 S.E.2d at 226.

54. See *id.* at 738-40, 691 S.E.2d at 225-26. Justices Melton, Nahmias, Carley, and Hines did not concur in the portion of the majority's decision regarding retroactivity. *Id.* at 740, 691 S.E.2d at 226. In a special concurrence authored by Justice Nahmias and joined by Justices Carley and Hines, Justice Nahmias questioned the application of the test the majority used to reach its result, noting that the Supreme Court of the United States had disapproved of the test in its later decisions and that "selective and flexible retroactive application of our decisions" was undesirable. *Id.* at 740-45, 691 S.E.2d at 226-29 (Nahmias, J., concurring specially).

C. Dismissal of Actions/Summary Judgment

The plaintiff in *Naik v. Booker*⁵⁵ filed a wrongful death action after the decedent Helen Robinson died of internal bleeding that was not detected or stopped by the defendant doctor. In his initial affidavit, the plaintiff's expert witness opined to a reasonable degree of medical certainty that the decedent would have survived if the defendant doctor had identified and surgically repaired the decedent's hemorrhage. During his deposition, however, the plaintiff's expert witness opined that he could not say to a reasonable degree of medical certainty that surgical intervention would more likely than not have saved the decedent's life.⁵⁶

Relying on precedent from the supreme court, the court of appeals affirmed the trial court's denial of the defendant doctor's motion for summary judgment on the issue of proximate causation because "[c]ontradictions [in expert witness testimony] go solely to the expert's credibility, and are to be assessed by the jury when weighing the expert's testimony."⁵⁷ Thus, the opinion in *Naik* confirms that when expert testimony creates a genuine issue of material fact, a motion for summary judgment should be denied, even if that expert testimony is later contradicted. This opinion preserves the jury's time-honored role of weighing contradictory evidence, even if that contradictory evidence happens to come from the same witness.

D. Special Masters

In 2009 the Georgia General Assembly enacted Georgia Uniform Superior Court Rule 46,⁵⁸ which authorizes a court to appoint a special master to perform virtually any duty or task normally done by the court.⁵⁹ Prior to the enactment of Rule 46, there was no statutory authority for the appointment of a special master except in limited, specific cases.⁶⁰ The new rule sets out a number of procedural requirements for the appointment of a special master, the qualifications of a special master, the scope of the special master's authority, and the

55. 303 Ga. App. 282, 692 S.E.2d 855 (2010).

56. *Id.* at 282-84, 692 S.E.2d at 855-56.

57. *Id.* at 286-87, 692 S.E.2d at 858 (quoting *Thompson v. Ezor*, 272 Ga. 849, 853, 536 S.E.2d 749, 753 (2000)) (internal quotation marks omitted).

58. GA. UNIF. SUPER. CT. R. 46.

59. *See* GA. UNIF. SUPER. CT. R. 46(a)(1).

60. For example, O.C.G.A. § 9-7-1 (2007) provides for the appointment of an "auditor," which could function similarly to a special master. *See* *E.I. DuPont de Nemours & Co. v. Waters*, 298 Ga. App. 843, 845, 681 S.E.2d 651, 653 (2009).

court's adoption of the special master's findings.⁶¹ This Article will not discuss each of the provisions of the new rule but will instead comment on some of the interesting provisions therein.⁶²

While the authority that may be granted to a special master is broad and diverse, the order appointing the special master must state the duties assigned and any limits on the special master's authority, as well as a number of details about the special master's role.⁶³ The master has authority "to regulate all proceedings and take all appropriate measures to perform fairly and efficiently all assigned duties" *unless* the order appointing the master directs otherwise.⁶⁴ Thus, if a party wants the master's authority limited in any way, he or she must ensure that the limitation is stated in the appointment order. The only other limitation on the master's authority is that the master may not impose contempt sanctions against a party (or any sanction against a nonparty), but the master may recommend such sanctions to the court.⁶⁵

The master must make rather detailed reports to the court on "all motions submitted by the parties."⁶⁶ Once an order or report is entered by the master, the court must afford the parties an opportunity to object to any portion of the order, and the party is entitled to be heard on the objection.⁶⁷ Unless stipulated otherwise, all findings of fact and conclusions of law that the master made or recommended are reviewed anew by the court—" [t]he court *must* decide de novo all objections."⁶⁸ Thus, it is likely that the appointment of a special master will only slow down the administration of justice. It is to be expected that a special master will most often be appointed in hotly contested and complicated cases.⁶⁹ However, it is in such cases that the parties are least likely to agree to anything and object to everything. A contumacious party may object to everything the special master orders, forcing the trial court to review *everything* de novo, essentially relitigating all decided issues. Obviously, such a procedure does not expedite justice. Thus, practitio-

61. See GA. UNIF. SUPER. CT. R. 46.

62. See *E.I. DuPont de Nemours & Co. v. Waters*, 287 Ga. 235, 695 S.E.2d 265 (2010), for further discussion of the requirements of appointing a special master under the newly enacted Georgia Uniform Superior Court Rule 46.

63. GA. UNIF. SUPER. CT. R. 46(b)(2).

64. GA. UNIF. SUPER. CT. R. 46(c).

65. *Id.*

66. GA. UNIF. SUPER. CT. R. 46(f)(i).

67. GA. UNIF. SUPER. CT. R. 46(g)(1).

68. GA. UNIF. SUPER. CT. R. 46(g)(3)-(4) (emphasis added). A master's ruling on procedural matters may be set aside for an abuse of discretion. GA. UNIF. SUPER. CT. R. 46(g)(5).

69. See, e.g., *E.I. DuPont De Nemours & Co.*, 287 Ga. at 237, 695 S.E.2d at 267.

ners must carefully consider the effect of appointing a special master before suggesting or consenting to such an appointment.

E. Defenses

In *Baker v. Harcon, Inc.*,⁷⁰ the court of appeals reversed a trial court order granting summary judgment to a construction subcontractor on the issue of whether the plaintiff construction supervisor had equal knowledge of, and assumed the risk of falling into, a large trash chute in an unfinished commercial project.⁷¹ One interesting part of the opinion in *Baker* is that the injured plaintiff instructed the defendant's employees to construct a trash chute in the very location where he was injured. The plaintiff then returned to the construction project weeks later with a crew to clean up the concrete floor that the defendant had framed.⁷²

As the plaintiff and his crew were cleaning, he and a fellow worker observed a large piece of plywood with a few loose pieces of smaller wood lying on the newly poured concrete floor. The plaintiff then went to pick up the loose plywood, and while he was doing so, he fell through the trash chute. The plaintiff severely injured himself and was rendered totally and permanently disabled.⁷³ The trial court granted the defendant's motion for summary judgment, ruling that (1) the plaintiff had equal knowledge of the danger created by the trash chute but failed to avoid it, and (2) the plaintiff assumed the risk of falling into the chute.⁷⁴

Authoring the majority opinion of the en banc court, the late Judge Bernes conceded that the plaintiff had originally known about the existence of the trash chute.⁷⁵ The court of appeals nevertheless held that a jury question existed as to whether the plaintiff had equal knowledge of the danger and exercised ordinary care because the plaintiff was supervising the construction of several similar buildings during the same time period, none of which had trash chutes.⁷⁶ The court further noted the plaintiff's testimony that when the plaintiff fell, the interior of the building looked much different than it had earlier when the plaintiff gave the defendant's employees instructions about

70. 303 Ga. App. 749, 694 S.E.2d 673 (2010).

71. *Id.* at 749-51, 694 S.E.2d at 675-76.

72. *Id.* at 750-51, 694 S.E.2d at 676.

73. *Id.*

74. *See id.* at 751, 694 S.E.2d at 677.

75. *See id.* at 753, 694 S.E.2d at 677.

76. *Id.* at 753, 694 S.E.2d at 677-78.

where to place the trash chute.⁷⁷ Perhaps more importantly, the court explained that the defendant's act of simply covering the chute up with a scrap piece of plywood violated both Occupational Safety and Health Administration (OSHA) regulations⁷⁸ and industry standards and may have concealed the danger.⁷⁹

It was a much easier task to reverse the trial court's ruling that the plaintiff had assumed the risk of falling into the trash chute. The court explained,

[A] plaintiff's comprehension or general understanding of nonspecific risks that might be associated with the activity at issue is not sufficient. Rather, "[i]n its simplest and primary sense, assumption of the risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone."⁸⁰

Because there was no undisputed evidence that the plaintiff in *Baker* fully understood and appreciated the risk that caused his specific injury, and because he did not consent to being injured by falling through a trash chute that had been covered with scrap plywood, the court of appeals reversed the trial court's decision and held there was insufficient evidence to rule as a matter of law that the plaintiff had assumed the risk that caused his injury.⁸¹

F. Bad Faith, Settlements, and Offers of Settlement

In *Smith v. Baptiste*,⁸² the supreme court affirmed the constitutionality of O.C.G.A. § 9-11-68,⁸³ Georgia's Offer of Settlement statute,⁸⁴ which was enacted as part of the Tort Reform Act of 2005.⁸⁵ In *Baptiste* the trial court found O.C.G.A. § 9-11-68 unconstitutional on the grounds that it impeded tort litigants' right of access to the courts in contravention of article I, section I, paragraph XII of the Georgia Constitution.⁸⁶ In a five-two decision, the supreme court reversed the

77. *Id.*

78. See 29 C.F.R. § 1910.23(a)(3) (2010).

79. *Baker*, 303 Ga. App. at 752, 694 S.E.2d at 677.

80. *Id.* at 754-55, 694 S.E.2d at 678-79 (second alteration in original) (citations omitted) (quoting *Vaughn v. Pleasant*, 266 Ga. 862, 864, 471 S.E.2d 866, 868 (1996)).

81. *Id.* at 755-56, 694 S.E.2d at 679.

82. 287 Ga. 23, 694 S.E.2d 83 (2010).

83. O.C.G.A. § 9-11-68 (2006).

84. *Baptiste*, 287 Ga. at 28-29, 694 S.E.2d at 87-88.

85. Ga. S. Bill 3 at § 5, 2005 Ga. Laws at 5-7.

86. 287 Ga. at 24, 694 S.E.2d at 85.

trial court, reasoning that the Georgia Constitution only provides a right of choice to self-representation, not a right of access to the courts.⁸⁷ The majority also rejected the trial court's ruling that O.C.G.A. § 9-11-68 violated the Georgia Constitution on the grounds that "it permits the recovery of attorney's fees absent the prerequisite showings of either [O.C.G.A.] § 9-15-14 or § 13-6-11," or that O.C.G.A. § 9-11-68 violates the Georgia Constitution's uniformity clause.⁸⁸

With the question of O.C.G.A. § 9-11-68's constitutionality settled, the court of appeals considered, as a matter of first impression, how an offer to settle "[s]tate[s] with particularity any relevant conditions," so as to comply with O.C.G.A. § 9-11-68(a)(4).⁸⁹ In *Great West Casualty Co. v. Bloomfield*,⁹⁰ the court of appeals rejected the plaintiff's contention that an offer to settle must include or attach a copy of the specific release language upon which the offer is conditioned.⁹¹ Instead, the court of appeals held that a "statement of a condition to a settlement agreement requiring the execution of a release" meets the requirements of O.C.G.A. § 9-11-68(a)(4) so long as the statement is specific enough "to render the settlement agreement enforceable under Georgia law."⁹²

In *Cotton States Mutual Insurance Co. v. Brightman*,⁹³ the supreme court left open the issue of under what circumstances an insurer can offer to settle a claim against its insured and take advantage of the "safe harbor" exception to bad faith litigation.⁹⁴ However, in *Fortner v. Grange Mutual Insurance Co.*,⁹⁵ the supreme court clarified that the safe harbor exception does not apply when the insurer conditions its offer to settle upon a full release, dismissal with prejudice, or indemnification on behalf of its insured when the insured has potential unresolved exposure under multiple insurance policies.⁹⁶ In *Fortner* the plaintiff was injured in a vehicular collision caused by the defendant's insured, who had an automobile policy with the defendant as well as separate

87. *Id.* at 27, 694 S.E.2d at 87. *But see id.* at 42-46, 694 S.E.2d at 96-99 (Hunstein, C.J., dissenting). Justice Benham also joined Chief Justice Hunstein's dissent. *Id.* at 46, 694 S.E.2d at 99.

88. *Id.* at 28, 694 S.E.2d at 87-88. *See generally* O.C.G.A. § 9-15-14 (2006); O.C.G.A. § 13-6-11 (2010).

89. *Great W. Cas. Co. v. Bloomfield*, 303 Ga. App. 26, 27-28, 693 S.E.2d 99, 100-01 (2010) (first alteration in original) (internal quotation marks omitted).

90. 303 Ga. App. 26, 693 S.E.2d 99 (2010).

91. *See id.* at 28, 693 S.E.2d at 101.

92. *Id.*

93. 276 Ga. 683, 580 S.E.2d 519 (2003).

94. *See id.* at 687, 580 S.E.2d at 522.

95. 286 Ga. 189, 686 S.E.2d 93 (2009).

96. *See id.* at 191, 686 S.E.2d at 95.

liability coverage with another insurer. Both policies potentially provided insurance coverage for the plaintiff's damages. The defendant eventually offered its policy limits but conditioned acceptance on a full indemnification and release of its insured as well as a dismissal with prejudice.⁹⁷ The plaintiff, who had not reached any settlement with the insurance company holding the tortfeasor's other applicable policy, could not agree to the defendant's terms without risking foregoing recovery under the other policy.⁹⁸ The supreme court held that the safe harbor exception did not apply to the defendant's offer of settlement, noting that

[o]therwise, if two or more insurers are involved in a case and the plaintiff makes a settlement offer to one insurer that conditions settlement on another insurer also settling, the first insurer could, as a matter of law, avoid a bad faith claim by offering its policy limits but making the offer contingent on unreasonable conditions that a plaintiff is guaranteed to reject.⁹⁹

G. Arbitration

The court of appeals issued two noteworthy arbitration decisions during the survey period. In *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*,¹⁰⁰ the court of appeals concluded that the bases for judicial review set forth in the Georgia Arbitration Code¹⁰¹ could not be expanded by contract.¹⁰² The case involved a lease agreement that purported to give the trial court the ability to vacate an arbitration award if the award "is not consistent with applicable law" or satisfied the grounds specified for vacatur in the Arbitration Code.¹⁰³ As a matter of first impression,¹⁰⁴ the court concluded "that the Arbitration Code does not permit contracting parties who provide for arbitration of disputes to contractually expand the scope of judicial review that is authorized by statute."¹⁰⁵ The court found that contractual expansion of the grounds for vacatur "would frustrate both the prompt resolution of arbitrated disputes and the finality of arbitration awards."¹⁰⁶ The

97. *Id.* at 189, 686 S.E.2d at 94.

98. *See id.* at 191, 686 S.E.2d at 95.

99. *Id.*

100. 299 Ga. App. 614, 683 S.E.2d 40 (2009).

101. O.C.G.A. §§ 9-9-1 to -18 (2007 & Supp. 2010).

102. 299 Ga. App. at 617-19, 683 S.E.2d at 43-45.

103. *Id.* at 615, 683 S.E.2d at 42.

104. *Id.* at 618, 683 S.E.2d at 44.

105. *Id.* at 617, 683 S.E.2d at 43.

106. *Id.* at 618, 683 S.E.2d at 44.

supreme court has since affirmed the court of appeals decision,¹⁰⁷ and it appears settled that the “statutory grounds provide the *exclusive* basis for vacatur.”¹⁰⁸

In *Life Care Centers of America v. Smith*,¹⁰⁹ the court of appeals determined the effect of a health care power of attorney on an arbitration agreement.¹¹⁰ Angela Smith had her mother, Gerith Petereit, admitted to a Life Care Center after Petereit suffered a stroke.¹¹¹ Smith executed a number of documents on her mother’s behalf under the authority of a “Durable Power of Attorney for Health Care,” which permitted Smith “to make any and all decisions for [Petereit] concerning [her] personal care, medical treatment, hospitalization, and health care and to require, withhold, or withdraw any type of medical treatment or procedure, even though [her] death may ensue.”¹¹² One of the documents Smith signed on her mother’s behalf was an arbitration agreement. Petereit died as a result of a head injury she received while at the Life Care Center, and Life Care attempted to compel arbitration of the wrongful death claim brought by Smith.¹¹³

The court of appeals held “that the plain language of the health care power of attorney did not give Smith the power to sign away her mother’s or her mother’s legal representative’s right to a jury trial.”¹¹⁴ The court observed that the agreement to arbitrate was optional, and that Smith was not required to sign it as a condition of her mother’s admission into the Life Care Center.¹¹⁵ Noting that there was no Georgia authority directly on point, the court examined persuasive

107. *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 287 Ga. 408, 413, 696 S.E.2d 663, 667 (2010).

108. *Brookfield Country Club*, 299 Ga. App. at 617, 683 S.E.2d at 44.

109. 298 Ga. App. 739, 681 S.E.2d 182 (2009).

110. *Id.* at 739, 681 S.E.2d at 183-84. In a related case heard at the same time by the court of appeals, Life Care argued that Smith’s counsel, John Mabrey, had executed a settlement agreement under which he was precluded from pursuing claims against Life Care for three years. Life Care did not file a motion to disqualify Mabrey but instead sought to compel arbitration to enforce the prior settlement agreement, thereby removing counsel from the presently pending case. *Id.* at 744, 681 S.E.2d at 186-87. The trial court rejected Life Care’s argument, and the court of appeals affirmed. *Id.* at 744-45, 681 S.E.2d at 187. The court determined that “[b]eyond conclusory allegations, Life Care has not shown that Mabrey has violated any provision in the agreement merely by accepting Smith as a client.” *Id.* at 745, 681 S.E.2d at 187. The court noted that although a claim by Life Care against Mabrey for breach of the settlement agreement may exist, there was no evidence of such claim before the court. *Id.*

111. *Id.* at 739, 681 S.E.2d at 184.

112. *Id.* at 740, 681 S.E.2d at 184 (internal quotation marks omitted).

113. *Id.* at 739-40, 681 S.E.2d at 184.

114. *Id.* at 742, 681 S.E.2d at 185.

115. *Id.*

authority from other states, which suggested “that a health care power of attorney was insufficient to bind the principal.”¹¹⁶ Accordingly, the court concluded that the trial court correctly found that Smith was not authorized to bind her mother to arbitration based on the health care power of attorney alone.¹¹⁷

H. Class Actions

In a matter of first impression,¹¹⁸ the court of appeals considered the requirement in O.C.G.A. § 9-11-23(c)(1)¹¹⁹ that a trial court issue a class certification order “[a]s soon as practicable after the commencement of . . . a class action.”¹²⁰ In *Fuller v. Heartwood 11, LLC*,¹²¹ the plaintiff filed his putative class action in March 2004, but through a series of defense motions, stays, and stipulations, he did not file his written motion for class certification until January 2006. This written motion, due to another series of stays, motions, and the transfer of the case to a new presiding judge, was not ruled upon until March 2009, at which time the new judge denied the motion for class certification as untimely under the terms of the above statute. Although the order denying class certification expressly found that the five-year delay unduly prejudiced the parties, the order did not explain the trial court’s grounds for this conclusion.¹²² The court of appeals reversed this ruling, holding that neither O.C.G.A. § 9-11-23 nor any pertinent Georgia case imposes a definite time period by which a motion for class certification must be filed.¹²³ The court of appeals further elaborated that the legislative intent of O.C.G.A. § 9-11-23(c)(1) was for “trial courts to actively manage class certification matters” and to “place[] a shared obligation upon the litigants and the court to ensure that the question of class certification is timely resolved.”¹²⁴ The court of appeals concluded that

[i]n the absence of a local rule governing the timely filing of a motion for class certification, a court may not deny an otherwise proper motion *solely* on the basis that it was untimely. Rather, the court must

116. *Id.* at 743, 681 S.E.2d at 186.

117. *Id.* at 744, 681 S.E.2d at 186.

118. *See Fuller v. Heartwood 11, LLC*, 301 Ga. App. 309, 312, 687 S.E.2d 287, 290 (2009).

119. O.C.G.A. § 9-11-23(c)(1) (2006).

120. *Fuller*, 301 Ga. App. at 311, 687 S.E.2d at 290; *see* O.C.G.A. § 9-11-23(c)(1).

121. 301 Ga. App. 309, 687 S.E.2d 287 (2009).

122. *Id.* at 309-11, 687 S.E.2d at 289-90.

123. *See id.* at 311-12, 687 S.E.2d at 290.

124. *Id.* at 312-13, 687 S.E.2d at 290-91.

determine . . . whether the delay resulted in any actual prejudice to the litigants or to the class. Then, in its order on the motion for class certification, the court shall set forth in writing factual findings supporting its decision.¹²⁵

I. Statutes of Limitation

In *Deen v. Egleston, D.M.D.*,¹²⁶ the United States District Court for the Southern District of Georgia held O.C.G.A. § 9-3-73(b)¹²⁷ unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment¹²⁸ and certified the case for interlocutory appeal.¹²⁹ O.C.G.A. § 9-3-73(b) contains an anti-tolling provision that excepts medical malpractice actions brought by certain persons from the tolling provisions of O.C.G.A. §§ 9-3-90¹³⁰ and 9-3-91.¹³¹ Namely, it excepts medical malpractice actions brought by mentally incompetent and certain minor victims¹³² who did not leave unrepresented estates,¹³³ whose causes of action do not involve the leaving of foreign objects in the body,¹³⁴ and whose claims are not asserted as part of a contribution action.¹³⁵ Thus, when the district court held O.C.G.A. § 9-3-73(b) unconstitutional, those persons enjoyed a brief respite from that exception. However, the United States Court of Appeals for the Eleventh Circuit reversed the district court's decision, holding that O.C.G.A. § 9-3-73(b) survives rational basis scrutiny.¹³⁶

J. Jury Instructions

In an important decision for medical negligence trial practice, the Georgia Supreme Court in *Smith v. Finch*¹³⁷ disapproved "of the so-

125. *Id.* at 313-14, 687 S.E.2d at 291-92. The court of appeals expressly enumerated the following nonexclusive, legitimate reasons for delay: (1) resolving individual dispositive legal issues and (2) conducting discovery regarding issues pertinent to class certification. *Id.* at 314, 687 S.E.2d at 292.

126. 601 F. Supp. 2d 1331 (S.D. Ga. 2009).

127. O.C.G.A. § 9-3-73(b) (2007).

128. U.S. CONST. amend. XIV, § 1.

129. *Deen*, 601 F. Supp. 2d at 1346-47.

130. O.C.G.A. § 9-3-90 (2007).

131. O.C.G.A. § 9-3-91 (2007).

132. O.C.G.A. § 9-3-73(b).

133. *See* O.C.G.A. § 9-3-92 (2007).

134. O.C.G.A. § 9-3-73(e) (2007).

135. *Cf.* O.C.G.A. § 51-12-32(b) (2000) (requiring joint tortfeasors be held liable for contribution when a judgment is entered against all joint tortfeasors but is satisfied by only one).

136. *Deen v. Egleston, D.M.D.*, 597 F.3d 1223, 1238 (11th Cir. 2010).

137. 285 Ga. 709, 681 S.E.2d 147 (2009).

called ‘hindsight’ jury instruction,” which stated in relevant part: “Negligence consists of not foreseeing and guarding against that which is probable and likely to happen, not against that which is only remotely and slightly possible.”¹³⁸ The court held that that sentence “is not a correct statement of Georgia law as to the standard of care” because it “is plainly inconsistent with the medical decision-making process, which often requires the consideration of unlikely but serious consequences in the diagnosis and treatment of disease.”¹³⁹ The court also recognized the charge was “generally inconsistent with the standard for foreseeability in our negligence law.”¹⁴⁰ The court also disapproved as “duplicative” another sentence in the charge that states, “In other words, the concept of negligence does not include hindsight.”¹⁴¹

In another medical malpractice case, the supreme court overruled prior court of appeals precedent and held that a jury instruction on the informed consent doctrine was not warranted in chiropractic cases.¹⁴² In reversing the court of appeals, the supreme court reasoned that informed consent in Georgia “is defined . . . exclusively by statutes and regulations.”¹⁴³ Therefore, because “chiropractic treatments are not among the procedures designated in [O.C.G.A.] § 31-9-6.1 for which informed consent is required,” the court held that “the trial court correctly refused to instruct the jury on the informed consent doctrine.”¹⁴⁴ The curious result of this decision is that it apparently limits a patient’s right to be informed of the risks of treatment they will receive unless that type of treatment or risk is expressly covered by Georgia’s statutory scheme. The decision suggests the wisdom of the General Assembly revising the statutory scheme to add a broad recognition of a patient’s right to be informed of medical treatment risks, as opposed to a specific laundry list of treatments that will inexplicably leave certain patients (such as those visiting chiropractors) with no right of informed consent.

138. *Id.* at 709-10, 681 S.E.2d at 148-49. *See generally* COUNCIL OF SUPER. CT. JUDGES, I GA. SUGGESTED PATTERN JURY INSTRUCTIONS: CIVIL CASES § 62.311 (4th ed. 2004).

139. *Smith*, 285 Ga. at 710, 681 S.E.2d at 149.

140. *Id.*

141. *See id.* at 710, 712, 681 S.E.2d at 149-51.

142. *See Blotner v. Doreika*, 285 Ga. 481, 485, 678 S.E.2d 80, 83 (2009).

143. *Id.* at 484, 678 S.E.2d at 82.

144. 285 Ga. at 484-85, 678 S.E.2d at 82-83. *See generally* O.C.G.A. § 31-9-6.1 (2009).

K. Immunity and Heightened Evidentiary Standards

In *Gliemmo v. Cousineau*,¹⁴⁵ Carol and Robert Gliemmo brought a medical malpractice action against emergency room physician Mark Cousineau, Emergency Medical Specialists of Columbus, P.C., and St. Francis Hospital.¹⁴⁶ After the complaint in the case was filed, the Gliemmos filed a constitutional challenge to O.C.G.A. § 51-1-29.5(c),¹⁴⁷ which was enacted as part of the Tort Reform Act of 2005,¹⁴⁸ and provides,

In an action involving a health care liability claim arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, no physician or health care provider shall be held liable unless it is proven by clear and convincing evidence that the physician or health care provider's actions showed gross negligence.¹⁴⁹

The trial court rejected the Gliemmos' constitutional challenge but certified its decision for immediate review.¹⁵⁰ The supreme court granted the Gliemmos' application for interlocutory review.¹⁵¹

Appellants first argued that O.C.G.A. § 51-1-29.5(c) was "a special law that violates the uniformity clause of the Georgia Constitution because it sets forth a gross negligence standard of liability only for certain emergency care providers."¹⁵² The court observed that "[t]o violate [this] constitutional provision, the statute in question must either be a general law which lacks uniform operation throughout the state or a special law for which provision has been made by existing general

145. 287 Ga. 7, 694 S.E.2d 75 (2010).

146. *Id.* at 7, 694 S.E.2d at 77.

147. O.C.G.A. § 51-1-29.5(c) (Supp. 2010).

148. Ga. S. Bill 3 at § 10, 2005 Ga. Laws at 11-13.

149. *Gliemmo*, 287 Ga. at 7, 694 S.E.2d at 77; *see* O.C.G.A. § 51-1-29.5(c).

150. *Gliemmo*, 287 Ga. at 7, 694 S.E.2d at 77.

151. *Id.* at 7-8, 694 S.E.2d at 77.

152. *Id.* at 8, 694 S.E.2d at 77. The uniformity clause of the Georgia Constitution provides,

Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.

GA. CONST. art. III, § 6, para. 4(a).

law.”¹⁵³ The court first addressed whether O.C.G.A. § 51-1-29.5(c) was a general or a special law, noting that special laws typically “deal[] with a limited activity in a specific industry during a limited time frame.”¹⁵⁴ The court then compared O.C.G.A. § 51-1-29.5(c) to the Hospital Care for Pregnant Women Act,¹⁵⁵ which also requires a “gross negligence” standard of care for certain health care providers.¹⁵⁶ The court observed that it had previously rejected a claim that the Hospital Care for Pregnant Women Act was a special law because the statute “operates statewide and is applicable to all hospitals authorized to operate as provided in the statute.”¹⁵⁷ The court held that like the Hospital Care for Pregnant Women Act, O.C.G.A. § 51-1-29.5(c) “operates uniformly upon all health care liability claims arising from emergency medical care as provided in the statute” and does not create an arbitrary or unreasonable classification.¹⁵⁸ Thus, the court held that O.C.G.A. § 51-1-29.5(c) is a general law that complies with the uniformity clause.¹⁵⁹

The court likewise rejected the Gliemmos’ remaining constitutional challenges, first addressing the Gliemmos’ contention that O.C.G.A. § 51-1-29.5(c) violates the equal protection clause of the Georgia Constitution¹⁶⁰ because it applies only to malpractice actions originating from emergency medical care provided in a hospital emergency department.¹⁶¹ The court held that the statute did not violate equal protection principles because it did not deprive litigants of any fundamental rights and bore a reasonable relationship to legitimate legislative goals.¹⁶² The court also rejected the Gliemmos’ contention that the term “gross negligence” was unconstitutionally vague, holding that the term has a commonly understood meaning and was, therefore, not

153. *Gliemmo*, 287 Ga. at 8, 694 S.E.2d at 77 (quoting *Lasseter v. Ga. Pub. Serv. Comm’n*, 253 Ga. 227, 229, 319 S.E.2d 824, 827 (1984)) (alterations in original) (internal quotation marks omitted).

154. *Id.* (quoting *Lasseter v. Ga. Pub. Serv. Comm’n*, 253 Ga. 227, 229, 319 S.E.2d 824, 827 (1984)) (internal quotation marks omitted).

155. O.C.G.A. §§ 31-8-40 to -46 (2009).

156. *Gliemmo*, 287 Ga. at 8-9, 694 S.E.2d at 77-78. *See generally* O.C.G.A. § 31-8-44.

157. *Gliemmo*, 287 Ga. at 9, 694 S.E.2d at 77 (quoting *Terrell Cnty. v. Albany/Dougherty Hosp. Auth.*, 256 Ga. 627, 629, 352 S.E.2d 378, 381 (1987)) (internal quotation marks omitted).

158. *Id.* at 9, 694 S.E.2d at 78.

159. *Id.* at 10, 694 S.E.2d at 78. The court also determined that as a general law, O.C.G.A. § 51-1-29.5(c) could not violate the provision in the Georgia Constitution that prohibits special laws, GA. CONST. art. III, § 6, para. 4(c). *Gliemmo*, 287 Ga. at 10, 694 S.E.2d at 78-79.

160. GA. CONST. art. I, § 1, para. 2.

161. *Gliemmo*, 287 Ga. at 10, 694 S.E.2d at 79.

162. *Id.* at 11-12, 694 S.E.2d at 79-80.

required to be defined by statute.¹⁶³ The court also determined that the Gliemmos failed to raise a constitutional vagueness challenge to the definition of “emergency medical care” in the trial court; as such, the court declined to address the issue on appeal.¹⁶⁴

In *Krachman v. Ridgeview Institute, Inc.*,¹⁶⁵ the court of appeals expressly resolved the longstanding conflict between the supreme court’s holding in *Gilbert v. Richardson*¹⁶⁶ and the court of appeals holdings in *Etheridge v. Charter Peachford Hospital, Inc.*¹⁶⁷ and *Poss v. Department of Human Resources*.¹⁶⁸ In the latter two cases, the court of appeals had extended the immunity conferred to certain healthcare workers and other persons by O.C.G.A. § 37-3-4¹⁶⁹ to the hospitals and other healthcare facilities that employ such workers.¹⁷⁰ Regarding the extension of immunity, in *Krachman* the court of appeals overruled both *Etheridge* and *Poss* as inconsistent with *Gilbert* and held that a reasonable reading of O.C.G.A. § 37-3-4’s plain text could not provide such immunity for hospitals or other mental health facilities.¹⁷¹

163. *Id.* at 12, 694 S.E.2d at 80.

164. *Id.* at 13, 694 S.E.2d at 80 (internal quotation marks omitted). Justice Benham dissented in *Gliemmo* and was joined by Chief Justice Hunstein and Justice Thompson. *Id.* (Benham, J., dissenting). The dissent disagreed with the majority’s characterization of O.C.G.A. § 51-1-29.5(c) as a special law and questioned the majority’s reliance on *Terrell County*, observing that the gross negligence standard of care was not specifically at issue in that case. See *Gliemmo*, 287 Ga. at 13-16, 694 S.E.2d at 80-82. Further, the dissent argued that O.C.G.A. § 51-1-27 (2000), which prescribes a “reasonable care” standard of care for medical malpractice claims, was a general law that should preclude enactment of special legislation such as O.C.G.A. § 51-1-29.5(c) under the uniformity clause. *Gliemmo*, 287 Ga. at 16-17, 694 S.E.2d at 82-83. Finally, the dissent argued that O.C.G.A. § 51-1-29.5(c) was unconstitutional because it arbitrarily and unreasonably protected some health care providers and not others; for example, the statute would not protect a health care provider that provided emergency assistance in an ambulance rather than an emergency room. *Gliemmo*, 287 Ga. at 17-18, 694 S.E.2d at 83.

165. 301 Ga. App. 361, 687 S.E.2d 627 (2009).

166. 264 Ga. 744, 452 S.E.2d 476 (1994).

167. 210 Ga. App. 482, 436 S.E.2d 669 (1993).

168. 206 Ga. App. 890, 426 S.E.2d 635 (1992).

169. O.C.G.A. § 37-3-4 (1995). O.C.G.A. § 37-3-4 provides for immunity of “[a]ny physician, psychologist, peace officer, attorney, or health official, or any hospital official, agent, or other person employed by a private hospital or at a facility operated by the state, by a political subdivision of the state, or by a hospital authority” when complying in good faith with the admission and discharge of patients pursuant to, inter alia, O.C.G.A. §§ 37-3-20 (1995) and O.C.G.A. § 37-3-22 (1995). O.C.G.A. § 37-3-4.

170. *Etheridge*, 210 Ga. App. at 485, 436 S.E.2d at 672; *Poss*, 206 Ga. App. at 892, 426 S.E.2d at 638; see *Krachman*, 301 Ga. App. at 365 & n.2, 687 S.E.2d at 630 & n.2.

171. 301 Ga. App. at 364-65 & n.2, 687 S.E.2d at 629-30 & n.2.

L. Discovery and Sanctions

Another extremely important aspect of the court of appeals opinion in *Resource Life v. Buckner*¹⁷² is the court's holding that the trial court did not err in entering a discovery sanction that the defendant argued would cost it an excess of \$400 million,¹⁷³ which the Authors believe to be the largest discovery sanction in Georgia history. The trial court's order specifically noted that it was sanctioning the defendant for two independent reasons: (1) the defendant's failure to fully comply with a court order and (2) the defendant's false claim in its discovery responses that it did not have certain information it was ultimately caught concealing.¹⁷⁴ Recognizing the trial court's broad discretion in controlling discovery and issuing sanctions, the court of appeals held the trial court acted appropriately in sanctioning the defendant "because of its patently false discovery responses and its misrepresentations to the trial court."¹⁷⁵ This opinion, read in conjunction with *Metropolitan Atlanta Rapid Transit Authority v. Doe*,¹⁷⁶ makes clear that a party falsely contending it has no responsive evidence to an opposing party's discovery request subjects itself to the most severe sanctions available to the court, including dismissal and default judgment.¹⁷⁷

M. Expert Testimony and Affidavit Requirements

1. Scope of Testimony. The supreme court issued an important opinion regarding the scope of medical expert testimony in medical malpractice actions in *Condra v. Atlanta Orthopaedic Group, P.C.*¹⁷⁸ In *Condra* the court overruled *Johnson v. Riverdale Anesthesia Associates, P.C.*,¹⁷⁹ holding that evidence of a medical expert's personal practices "is admissible both as substantive evidence and to impeach the expert's opinion regarding the applicable standard of care."¹⁸⁰

The plaintiff in *Condra* alleged that her treating physician inappropriately prescribed the drug Tegretol and failed to conduct blood count monitoring. The plaintiff also contended that this oversight caused her

172. 304 Ga. App. 719, 698 S.E.2d 19 (2010).

173. *Id.* at 738-40, 698 S.E.2d at 35-36.

174. *See id.* at 734, 698 S.E.2d at 32.

175. *Id.* at 734-37, 698 S.E.2d at 32-34.

176. 292 Ga. App. 532, 664 S.E.2d 893 (2008).

177. *See id.* at 537, 664 S.E.2d at 898; *see also* O.C.G.A. § 9-11-37(b) (2006).

178. 285 Ga. 667, 681 S.E.2d 152 (2009).

179. 275 Ga. 240, 563 S.E.2d 431 (2002), *rev'd*, 285 Ga. 667, 681 S.E.2d 152 (2009).

180. *Condra*, 285 Ga. at 669, 681 S.E.2d at 154.

to contract aplastic anemia, a serious bone marrow disease.¹⁸¹ Before trial, a medical expert for the defense stated in a deposition that blood count monitoring during Tegretol therapy was not a “mandatory or essential” course of action, but the expert also admitted “that it was his usual practice to conduct blood count monitoring when he prescribed Tegretol.”¹⁸² The defendants moved to prevent the plaintiff from inquiring about the expert’s personal practices at trial, and the trial court granted the motion.¹⁸³ Relying on *Johnson*, the court of appeals affirmed the trial court’s decision, holding that such testimony was irrelevant.¹⁸⁴

The supreme court reversed the court of appeals and overruled *Johnson* based upon a statute regarding expert testimony in civil actions, O.C.G.A. § 24-9-67.1,¹⁸⁵ that was enacted by the legislature as part of the Tort Reform Act of 2005.¹⁸⁶ The statute requires that a testifying medical expert have “actual professional knowledge and experience” in the area of his or her testimony, and that any opinions rendered by the expert must be “the result of having been regularly engaged in: (A) The active practice of such area of specialty of his or her profession for at least three of the last five years.”¹⁸⁷ Based on the language of the statute, the court held that “there can be no dispute as to the relevance . . . of an expert’s personal experience and practice to the threshold inquiry into the expert’s qualifications.”¹⁸⁸ The court further recognized that “[t]he relevance and importance of a medical expert’s personal choice of a course of treatment is highly probative of the credibility of the expert’s opinion concerning the standard of care.”¹⁸⁹ In response to the defendants’ arguments that allowing such testimony would confuse the jury about the difference between an expert’s personal procedures and the relevant standard of care, the court held “that such potential for prejudice does not as a general rule outweigh the usefulness of such information in evaluating an expert’s

181. *Id.* at 667-68, 681 S.E.2d at 153.

182. *Id.* at 668, 681 S.E.2d at 153.

183. *Id.*

184. *Id.* at 669, 681 S.E.2d at 154 (citing *Johnson*, 275 Ga. at 241-42, 563 S.E.2d at 433).

185. O.C.G.A. § 24-9-67.1 (2010).

186. Ga. S. Bill 3 at § 7, 2005 Ga. Laws at 8-10; *Condra*, 285 Ga. at 669, 681 S.E.2d at 154.

187. O.C.G.A. § 24-9-67.1(c)(2)(A).

188. *Condra*, 285 Ga. at 669-70, 681 S.E.2d at 154.

189. *Id.* at 670, 681 S.E.2d at 154; Overby et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 51 MERCER L. REV. 487, 501 (1999).

credibility” and any confusion could be remedied with proper jury instructions.¹⁹⁰

After issuing its opinion in *Condra*, the supreme court remanded a case, *Griffin v. Bankston*,¹⁹¹ that involved a similar issue back to the court of appeals for reconsideration.¹⁹² That case involved a dentist’s failure to prescribe penicillin as a precautionary measure, which allegedly resulted in the patient contracting a bacterial infection. In *Griffin* the oral surgeon who treated the patient during her hospitalization testified that administering penicillin would not have prevented the bacterial infection, but he did not offer testimony on the standard of care applicable to the defendant dentist.¹⁹³ The trial court excluded testimony from the oral surgeon that his personal practice was to administer penicillin as a preventative measure, and, in its first review of the case,¹⁹⁴ the court of appeals affirmed.¹⁹⁵ Upon reconsideration based on the decision in *Condra*, the court of appeals reversed the trial court and held that testimony regarding the treating surgeon’s usual practice was admissible.¹⁹⁶ In so holding, the court of appeals first noted *Condra* should be applied retroactively.¹⁹⁷ Next, the court held that under the logic of *Condra*, evidence of a medical expert’s personal practices may be admissible even if the expert “did not offer an expert opinion concerning the standard of care.”¹⁹⁸ According to the court, the evidence is relevant to the expert’s qualifications and credibility, and, therefore, it should be available for the jury to consider.¹⁹⁹

Thus, based on the decisions in *Condra* and *Griffin*, evidence of a medical expert’s personal practices will likely be admissible.²⁰⁰ The practitioner should be aware of these new decisions both when selecting experts and when deposing opposing experts.

2. Expert Qualifications. In *Craig v. Azizi*,²⁰¹ the court of appeals considered two issues regarding expert qualifications under

190. *Condra*, 285 Ga. at 672, 681 S.E.2d at 155.

191. 302 Ga. App. 647, 691 S.E.2d 229 (2009).

192. *Id.* at 647, 691 S.E.2d at 230.

193. *Id.* at 647-49, 691 S.E.2d at 230-31.

194. *Griffin v. Bankston*, 295 Ga. App. 387, 671 S.E.2d 873 (2008).

195. *Id.* at 387, 671 S.E.2d at 874.

196. *Griffin*, 302 Ga. App. at 649-52, 691 S.E.2d at 231-33.

197. *Id.* at 650, 691 S.E.2d at 232.

198. *Id.* at 651, 691 S.E.2d at 233.

199. *See id.*

200. From these two opinions, it is unclear whether the courts would apply the same admissibility standard to experts outside of the medical malpractice context.

201. 301 Ga. App. 181, 687 S.E.2d 198 (2009).

O.C.G.A. § 24-9-67.1. In *Craig* the trial court dismissed the plaintiff's complaint on the grounds that the expert who provided the affidavit attached to the complaint²⁰² did not meet either of the two statutory qualification requirements:²⁰³ first, that the expert "[w]as licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time,"²⁰⁴ and second, that the expert "had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given."²⁰⁵

As a matter of first impression, the court of appeals preliminarily reversed the trial court's finding that working as a resident physician, instead of as an attending physician, does not constitute "active practice" sufficient to comply with the statute's requirements.²⁰⁶ The court of appeals, nevertheless, affirmed the trial court's dismissal because it agreed that the medical expert had not satisfied the statute's first requirement.²⁰⁷ Although the expert had a medical license from Pennsylvania at the time of the negligent act, he was practicing in Australia at that time.²⁰⁸ The court of appeals held that because of the statute's use of the word "state," a medical expert must practice in the United States at the time of the negligent act to be qualified as an

202. See O.C.G.A. § 9-11-9.1(a) (2006 & Supp. 2010) (requiring a plaintiff to attach an affidavit to the complaint that "set[s] forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim").

203. 301 Ga. App. at 182, 687 S.E.2d at 199.

204. O.C.G.A. § 24-9-67.1(c)(1).

205. O.C.G.A. § 24-9-67.1(c)(2). This prong may be satisfied in one of two ways:

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue.

Id.

206. *Craig*, 301 Ga. App. at 185, 687 S.E.2d at 202.

207. *Id.* at 186, 687 S.E.2d at 202.

208. *Id.*

expert.²⁰⁹ Therefore, in a professional negligence action, the only experts who may testify are those who were licensed and practicing in the United States at the time of the negligent act.

3. Expert Affidavit Requirements. The court of appeals, sitting en banc, clarified a procedural question concerning the expert affidavit requirement of O.C.G.A. § 9-11-9.1 in professional negligence cases.²¹⁰ In *Chandler v. Opensided MRI of Atlanta, LLC*,²¹¹ the court held that a plaintiff who failed to file an affidavit with his original complaint could voluntarily dismiss and refile the suit (with an affidavit attached) outside the statute of limitation pursuant to O.C.G.A. § 9-2-61,²¹² the renewal statute.²¹³ In *Chandler* the defendant failed to file a motion to dismiss at the same time as its answer to the original complaint.²¹⁴ In its answer to the original complaint, the defendant stated, “[A] defense of failure to file an expert affidavit” and included “a generic request, in the prayers for relief, that the case be dismissed.”²¹⁵ The court ruled that these statements were not enough to trigger O.C.G.A. § 9-11-9.1(f),²¹⁶ which prevents a plaintiff who fails to file the required affidavit from dismissing and refile outside the statute of limitations under the renewal statute if “the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading.”²¹⁷ The court recognized, based on the “plain language” of the statute, that an answer saying the complaint should be dismissed was not equivalent to a motion to dismiss.²¹⁸ Because the statute specifically requires a motion filed at the same time as the initial answer, the court held that the defendant had waived its ability to invoke section 9-11-9.1(f).²¹⁹

The procedural scenario that typically arises in cases like *Chandler*, in which the allegations border between simple and professional negligence, is that a plaintiff, presumably believing his or her case

209. *Id.* at 186-87, 687 S.E.2d at 203.

210. *Chandler v. Opensided MRI of Atlanta, LLC*, 299 Ga. App. 145, 682 S.E.2d 165 (2009).

211. 299 Ga. App. 145, 682 S.E.2d 165 (2009).

212. O.C.G.A. § 9-2-61 (2007).

213. *See Chandler*, 299 Ga. App. at 157-58, 682 S.E.2d at 176. *See generally* O.C.G.A. § 9-2-61(a).

214. *Chandler*, 299 Ga. App. at 148, 682 S.E.2d at 170.

215. *Id.* at 149, 682 S.E.2d at 170.

216. O.C.G.A. § 9-11-9.1(f) (Supp. 2010).

217. *Chandler*, 299 Ga. App. at 147-49, 682 S.E.2d at 169-70; *see also* O.C.G.A. § 9-11-9.1(f); O.C.G.A. § 9-2-61.

218. *Chandler*, 299 Ga. App. at 148-49, 682 S.E.2d at 170.

219. *See id.* at 149-50, 682 S.E.2d at 171.

involves simple or ordinary negligence, files a complaint without an expert affidavit. The defendant then buries in a laundry-list of other defenses in the answer the allegation that the complaint was invalid and should be dismissed for failure to include an expert affidavit. The defendant then waits until the statute of limitations runs to file a motion to dismiss, which deprives the plaintiff of the right to dismiss and refile with an affidavit pursuant to the renewal statute. This decision should end such gamesmanship. Regardless, the case is a familiar cautionary tale for plaintiffs: when in doubt about whether the case involves simple or professional negligence, file an expert affidavit with the original complaint.

N. Vicarious Liability

In *Hicks v. Heard*,²²⁰ the supreme court departed from its prior precedent and held as a matter of law that an “on call” employee operating a company-owned vehicle was not acting in the scope of her employment at the time she was involved in an automobile collision.²²¹ The majority opinion acknowledged that its holding differed from the conclusion reached in *Allen Kane’s Major Dodge, Inc. v. Barnes*,²²² the seminal case setting forth the analytical framework on which *Hicks* relied.²²³ The opinion in *Allen Kane’s Major Dodge* explained that if an employee operating a company-owned vehicle is “subject to call at any time,” the issue of whether the employee was operating the vehicle in the scope of his or her employment should survive summary judgment and go to the jury.²²⁴

The majority in *Hicks* argued that the “on call” statement in *Allen Kane’s Major Dodge* was merely dicta “that, if followed, would perpetrate error in the law.”²²⁵ The dissent, authored by Justice Carley and joined by Chief Justice Hunstein and Justice Benham, countered that the majority was merely manipulating the analytical framework set forth in *Allen Kane’s Major Dodge* to reach its desired result.²²⁶ Practitioners with similar cases are advised to carefully review both *Hicks* and *Allen Kane’s Major Dodge* when marshalling evidence to avoid summary judgment on the issue of vicarious liability.

220. 286 Ga. 864, 692 S.E.2d 360 (2010).

221. *Id.* at 864, 876, 692 S.E.2d at 360, 368.

222. 243 Ga. 776, 257 S.E.2d 186 (1979).

223. *See* 286 Ga. at 865, 692 S.E.2d at 362.

224. 243 Ga. App. at 783, 257 S.E.2d at 191 (quoting *Massey v. Henderson*, 138 Ga. App. 565, 566, 226 S.E.2d 750, 752 (1976)) (internal quotation marks omitted).

225. 286 Ga. at 870-71, 692 S.E.2d at 364.

226. *Id.* at 876, 692 S.E.2d at 368 (Carley, P.J., dissenting).

IV. CONCLUSION

The above cases and legislation have most significantly affected trial practice and procedure in Georgia over the survey period. This Article, however, is not intended to be exhaustive of all legal developments on this topic.