

Business Associations

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I. INTRODUCTION

This Article surveys noteworthy cases in the areas of corporate, limited liability company, partnership, and agency law decided between June 1, 2009 and May 31, 2010¹ by the Georgia Supreme Court, the Georgia Court of Appeals, the United States Court of Appeals for the Eleventh Circuit, and the United States district courts located in Georgia. In addition to surveying decisions by Georgia courts and federal courts located in Georgia, this Article discusses an important decision by the Supreme Court of the United States.

II. CORPORATIONS

A. *Supreme Court of the United States Addresses Corporate Citizenship*

In *Hertz v. Friend*,² the Supreme Court held that the nerve center test is the proper test to use in determining a corporation's principal place

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1. For an analysis of cases decided during the prior survey period, see Paul A. Quirós et al., *Business Associations, Annual Survey of Georgia Law*, 61 MERCER L. REV. 45 (2009).

2. 130 S. Ct. 1181 (2010).

of business for diversity jurisdiction purposes, thereby resolving a split among the circuit courts.³ The United States Constitution provides that Congress may authorize federal courts to exercise diversity jurisdiction, allowing federal courts to assert jurisdiction over citizens of different states.⁴ Accordingly, Congress enacted 28 U.S.C. § 1332,⁵ which establishes federal jurisdiction in cases between citizens of different states.⁶ In determining if there is diversity of citizenship between the parties, giving rise to federal jurisdiction, the citizenship of each party must be determined.⁷ For persons, citizenship is determined by the state in which the person is domiciled.⁸ For corporations, citizenship is determined by the state in which a corporation is incorporated *and* the state where the corporation has its principal place of business.⁹ Interpretation of the term “principal place of business” was left to the courts because § 1332 itself did not provide a definition.¹⁰ As a result, courts developed two main tests for determining a corporation’s principal place of business: the “nerve center test” and the “business activities test.”¹¹

Under the nerve center test, a corporation’s principal place of business is the state “where [the] corporation’s officers direct, control, and

3. *Id.* at 1192.

4. U.S. CONST. art. III, § 2. The rationale for allowing federal courts to have jurisdiction based solely on diversity is so that out-of-state parties do not suffer local prejudice during the judicial process. *Hertz*, 130 S. Ct. at 1188.

5. Act of June 25, 1948, ch. 646, 62 Stat. 930 (codified as amended at 28 U.S.C. § 1332 (2006)).

6. 28 U.S.C. § 1332(a)(1) (2006).

7. *Mas v. Perry*, 489 F.2d 1396, 1398-99 (5th Cir. 1974).

8. *Id.* at 1399.

9. 28 U.S.C. § 1332(c)(1). The initial approach taken by the Supreme Court was that a corporation was a citizen of the state in which it was incorporated. *See Louisville, Cincinnati, & Charleston R.R. Co. v. Letson*, 43 U.S. 497, 558 (1844) (holding a corporation is a citizen of the state of its incorporation); *Marshall v. Baltimore & Ohio R.R. Co.*, 57 U.S. 314, 325 (1853) (reaffirming *Letson*). However, many corporations were abusing this approach. *See Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 524 (1928) (holding a corporation’s motives in reincorporating were not a factor in determining diversity jurisdiction). In response to this fraud and abuse, Congress codified § 1332(c)(1), which established a corporation would also be a citizen of the state where it has its principal place of business. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415 (codified at 28 U.S.C. § 1332(c)(1)).

10. *See* 28 U.S.C. § 1332.

11. *See Hertz*, 130 S. Ct. at 1191-94. A third test, sometimes referred to as the total activities test, developed as a result of courts combining aspects of both the nerve center and business activities tests. *See Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 162 (6th Cir. 1993).

coordinate the corporation's activities."¹² In contrast, the business activities test evaluates a number of different factors to determine if a corporation's business activities in one state "substantially predominate[]" over the business activities in other states.¹³ These factors include "the location of employees, tangible property, production activities, sources of income, and where *sales* take place."¹⁴ Prior to *Hertz*, the circuit courts had split on which test to use to determine a corporation's principal place of business.¹⁵ The question presented in *Hertz* was which one of these tests is the proper one to apply.¹⁶

In *Hertz* two California citizens sued the Hertz Corporation (Hertz) in California state court for violating California's hour and wage laws. Hertz filed a notice of removal, claiming that because Hertz was diverse from the plaintiffs, the federal courts were available to it. Hertz supported this claim by submitting a declaration listing its principal place of business as New Jersey, the state where Hertz maintained its corporate offices.¹⁷ The United States District Court for the Northern District of California held Hertz's principal place of business to be California based on the amount of business Hertz did in California. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.¹⁸

In light of the circuit split, the Supreme Court granted certiorari "[i]n an effort to find a single, more uniform interpretation of the . . . phrase" "principal place of business."¹⁹ The Supreme Court reviewed the different approaches and ultimately held that a corporation's principal

12. *Hertz*, 130 S. Ct. at 1192.

13. *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 500 (9th Cir. 2001). This test does not require a state to have a majority of the corporation's business activities in order to be considered its principal place of business. *Id.* Rather, the business activities in a particular state must be significantly more than in any other state. *Id.*

14. *Id.* at 500 (emphasis added).

15. *Compare id.* (applying business activities test and noting the nerve center test is only used in the event there is no one state that substantially predominates), *Diaz-Rodriguez v. Pep Boys Corp.*, 410 F.3d 56, 61 (1st Cir. 2005) (applying business activities test), *and Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 915 (10th Cir. 1993) (applying business activities test), *with Wis. Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280, 1282 (7th Cir. 1986) (applying nerve center test), *and Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (applying nerve center test).

16. *Hertz*, 130 S. Ct. at 1185-86.

17. *Id.* at 1186. The declaration stated Hertz did business in 44 states and that California "accounted for 273 of Hertz's 1,606 car rental locations; about 2,300 of its 11,230 full-time employees; about \$811 million of its \$4.371 billion in annual revenue; and about 3.8 million of its approximately 21 million annual transactions, *i.e.*, rentals." *Id.*

18. *Id.* at 1186-87.

19. *Id.* at 1192.

place of business should be determined using the nerve center test.²⁰ The Supreme Court concluded that “principal place of business’ is best read as referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities.”²¹ The Supreme Court offered three main reasons to support its holding: 1) statutory language, 2) simplicity and predictability, and 3) legislative history.²² First, the phrase “principal place of business” requires that a court select the one “‘main, prominent’ . . . place . . . *within* a [s]tate [but] not the [s]tate itself.”²³ Under the business activities test, courts were looking to the state rather than the corporation’s place of business within the state.²⁴ Second, complex tests such as the business activities test only complicate a case and waste a litigant’s time and money when trying to determine if a particular court has jurisdiction.²⁵ However, the nerve center test offers a predictable way for the parties to make decisions.²⁶ Finally, judicial history suggests Congress enacted the statute to provide simplicity and practicality.²⁷

The Supreme Court noted that there is “no perfect test that satisfies all administrative and purposive criteria.”²⁸ For example, the *Hertz* nerve center test may present difficulties in situations where a corporation divides its overall command and control throughout different offices in different states.²⁹ However, the test still requires courts to look “in a single direction, towards the center of *overall* direction, control, and coordination.”³⁰ The Supreme Court reversed the Ninth Circuit and held diversity jurisdiction existed between the California citizens and Hertz because under the nerve center test, Hertz’s principal place of business was New Jersey, not California.³¹

The main implication of the Supreme Court’s decision in *Hertz* is that corporations may now be more confident that the federal courts will be available when filing a notice of removal based on diversity jurisdiction

20. *Id.* at 1190-92.

21. *Id.* at 1192.

22. *Id.* at 1192-94.

23. *Id.* at 1192-93.

24. *Id.* at 1193.

25. *Id.*

26. *Id.* at 1193-94.

27. *Id.* at 1194.

28. *Id.*

29. *Id.*

30. *Id.* (emphasis added). The Supreme Court also noted there may be situations in which the nerve center test cuts against the basic rationale of federal diversity jurisdiction. *Id.* Nevertheless, the Court determined that the need for a “clearer rule” trumps those rare cases. *Id.*

31. *Id.* at 1195.

(or when bringing an action in federal court based on diversity). The nerve center test should provide corporations a simpler way to determine their principal place of business. However, while the Supreme Court's opinion points courts to the "center of overall direction, control, and coordination," there will likely be room for interpretation of "direction, control, and coordination."³² One may envision a situation in which a corporation has nerve centers in two different states with one nerve center controlling and coordinating production and the other controlling and coordinating the financial and business decisions of the corporation. Thus, while the Supreme Court's decision in *Hertz* offers a simpler test, there may still be further clarification to come regarding the exact meaning of "nerve center."

B. Piercing the Corporate Veil

1. Georgia Courts Continue to Reject Theory of Outsider Reverse Veil Piercing. In *Otero v. Vito*,³³ the United States District Court for the Middle District of Georgia applied the Georgia Supreme Court's decision in *Acree v. McMahan*³⁴ on behalf of a third-party creditor who sought to recover from a corporate entity for the debts of its owner.³⁵ In *Otero* George R. Vito (Dr. Vito) set up a series of entities (Vito Entities) "in a deliberate strategy to put his assets out of the reach of his creditors without losing control of those assets."³⁶ Dr. Vito testified that he used corporations, limited liability companies, and trusts, as well as the names of his brothers and father, to shield his personal assets from attachment by his creditors.³⁷ The Vito Entities were primarily used "to place legal title to Dr. Vito's real estate . . . and personal property in the name of third parties" as well as to pay for Dr. Vito's personal expenses.³⁸ Furthermore, evidence in the record indicated that income from Dr. Vito's podiatry practice supported the other Vito Entities and that Dr. Vito had commingled the funds of all

32. *Id.* at 1194.

33. No. 5:07-cv-405 (CAR), 2009 WL 3063426 (M.D. Ga. Sept. 22, 2009).

34. 276 Ga. 880, 585 S.E.2d 873 (2003). The supreme court in *Acree* held that an "outsider,' such as a third-party creditor, [cannot] pierce the veil in order to reach a corporation's assets to satisfy claims against an individual corporate insider." *Id.* at 881, 585 S.E.2d at 874.

35. *Otero*, 2009 WL 3063426, at *6.

36. *Id.* at *1-2.

37. *Id.* at *2. Although his brothers and father were listed as officers and shareholders, the undisputed evidence established that Dr. Vito maintained sole and complete control over the Vito Entities. *Id.* at *4.

38. *Id.* at *5.

the Vito Entities.³⁹ The strategies Dr. Vito used to maintain the Vito Entities included “using loans and security agreements to tie up accounts receivable, using proceeds from loans to purchase annuities and real property, and using cash flow from the businesses to repay the loans creating equity in the real property and cash value in the annuities.”⁴⁰

Given the complete unity of interest between Dr. Vito and the Vito Entities, the district court entered summary judgment in favor of the plaintiff on his claim that the Vito Entities constituted alter egos of Dr. Vito.⁴¹ However, the court did not pierce the corporate veil in this case because Georgia law does not recognize a claim for outsider “reverse veil-piercing,”⁴² and a third-party creditor cannot “satisfy the debts of an individual out of [a] corporation’s assets.”⁴³ Instead, the court applied the Georgia Uniform Fraudulent Transfers Act (UFTA)⁴⁴ to the case.⁴⁵ The court found the Vito Entities “had no legitimate [purpose] and no income other than through fraudulent transfers.”⁴⁶ Therefore, the transfers of Dr. Vito’s real estate and personal property to the Vito Entities were voidable under the UFTA.⁴⁷ The court granted summary judgment in favor of the plaintiff creditor and ordered the Vito Entities’ assets to be considered Dr. Vito’s assets in bankruptcy.⁴⁸

The decision in *Otero* illustrates Georgia’s reluctance to incorporate outsider reverse veil-piercing into Georgia corporate law. In cases like *Otero*, plaintiff claimants in Georgia must rely on legal remedies such as the UFTA to obtain a judgment in their favor.

2. Georgia Court of Appeals Upholds Jury Verdicts Piercing the Corporate Veil in Two Cases. In *Anthony v. Gator Cochran Construction, Inc.*,⁴⁹ the court of appeals affirmed a jury verdict,

39. *Id.* at *6.

40. *Id.* at *2.

41. *Id.* at *1.

42. *Id.* at *6 (quoting *Acree*, 276 Ga. at 881, 585 S.E.2d at 874) (internal quotation marks omitted).

43. *Acree*, 276 Ga. at 881, 585 S.E.2d at 874 (emphasis omitted) (quoting *C.F. Trust, Inc. v. First Flight, L.P.*, 306 F.3d 126, 134 (4th Cir. 2002)) (internal quotation marks omitted).

44. O.C.G.A. §§ 18-2-70 to -80 (2010).

45. *Otero*, 2009 WL 3063426, at *7.

46. *Id.* at *11.

47. *Id.* The transfers were void pursuant to O.C.G.A. § 18-2-77(a)(1), or if the transfers occurred before July 1, 2002, they were void pursuant to Georgia’s prior fraudulent transfers law, O.C.G.A. § 18-2-22 (repealed 2002). *Otero*, 2009 WL 3063426, at *11.

48. *Otero*, 2009 WL 3063426, at *11.

49. 299 Ga. App. 126, 682 S.E.2d 140 (2009), *cert. granted*. The decision in *Anthony* is currently under review by the Georgia Supreme Court. *See id.*

concluding that a group of five related entities and their owner were jointly and severally liable for the debts of the collective group.⁵⁰ Gator Cochran Construction, Inc. (Cochran), a construction and fabrication company, started its business with an investment from Ray Anthony. In return for the investment, Cochran did work for several companies owned by Anthony (collectively “the Anthony Entities”). Over the course of their dealings, the Anthony Entities failed to pay Cochran for certain invoices as they became due, ultimately accumulating a debt of \$606,747.96. Cochran filed suit, seeking to recover the monies owed for the unpaid invoices. Finding the Anthony Entities to be alter egos of each other, the jury awarded damages to Cochran in the full amount of the debt of the Anthony Entities jointly or severally.⁵¹ The Anthony Entities moved for judgment notwithstanding the verdict or, alternatively, a new trial. The motion was denied, and the Anthony Entities appealed.⁵²

In affirming the trial court’s decision, the court of appeals cited language from *Baillie Lumber Co. v. Thompson*,⁵³ stating that to prevail on a veil-piercing claim, “it is necessary to show that the shareholders disregarded the corporate entity and made it a mere instrumentality for the transaction of their own affairs; that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist.”⁵⁴ The court discovered evidence in the record that the Anthony Entities, and Anthony personally, “‘entwined’ their finances and dealings with Cochran.”⁵⁵ Specifically, invoices sent by one Anthony entity were often paid by another, and Ray Anthony himself testified that he decided which invoices would be paid and which of the Anthony Entities would pay it.⁵⁶ In addition, the court noted that Anthony provided further evidence of the commingling of the Anthony Entities’ funds when he asked, “[w]hy do I have to take

50. *Id.* at 126-27, 682 S.E.2d at 141-42.

51. *Id.* at 126-27, 682 S.E.2d at 142. Certain Anthony Entities were also awarded \$141,422.46 based on their counterclaim for separate debt that Cochran owed them. *Id.* at 127, 682 S.E.2d at 142.

52. *Id.* at 127, 682 S.E.2d at 142.

53. 279 Ga. 288, 612 S.E.2d 296 (2005).

54. *Anthony*, 299 Ga. App. at 127-28, 682 S.E.2d at 142 (quoting *Baillie*, 279 Ga. at 289-90, 612 S.E.2d at 299).

55. *Id.* at 128, 682 S.E.2d at 142; see *J-Mart Jewelry Outlets, Inc. v. Standard Design*, 218 Ga. App. 459, 460, 462 S.E.2d 406, 407 (1995) (stating that commingling funds interchangeably or confusing properties, records, or control of separate entities is evidence that supports piercing the corporate veil).

56. *Anthony*, 299 Ga. App. at 128, 682 S.E.2d at 143.

it out of this pocket and put it in that pocket?”⁵⁷ In light of Anthony’s testimony and evidence supporting the amount of damages awarded by the jury, the court of appeals held “the trial court did not err in denying the Anthony Entities’ motion.”⁵⁸

In *Renee Unlimited, Inc. v. City of Atlanta*,⁵⁹ the court of appeals affirmed a jury verdict in favor of the City of Atlanta (City) and against a borrower’s owner and CEO and a related corporation, holding the two to be alter egos of each other.⁶⁰ In August 1995 Simbic, Inc. (Simbic) purchased the West Lake Apartment Complex (West Lake) from the Lucky Rucker Aiken Foundation (Foundation).⁶¹ In May 1999 Simbic transferred its ownership interest in West Lake to Renee, Inc. (Renee) via quitclaim deed for a purchase price of \$10.⁶² However, Simbic “remained indebted to the Foundation under a Purchase Money Deed to Secure Debt and Security Agreement.”⁶³ In August 1999 Joseph Bickers,⁶⁴ on behalf of Simbic, entered into a loan funding agreement with the City in which the City agreed to loan Simbic up to \$500,000 for projects at West Lake. In October 2001 the City and Bickers, again on behalf of Simbic, entered into another loan funding agreement that provided up to \$400,000 of additional funds.⁶⁵ By July 2002 the City had issued “JT Bickers d/b/a Simbic-West Lake Court Apartments” a series of checks totaling \$731,409.⁶⁶ Bickers used these funds to pay Simbic’s debt to the Foundation⁶⁷ and also to make improvements at West Lake.⁶⁸

In 2004 Bickers and Simbic decided to sell West Lake to MGG Properties, Inc. (MGG).⁶⁹ However, because Simbic transferred the property to Renee in 1999, it was Renee who actually and legally sold the property.⁷⁰ In the purchase and sale agreement, Renee represented that it was responsible for the loan from the City and agreed it would

57. *Id.*

58. *Id.*

59. 301 Ga. App. 254, 687 S.E.2d 233 (2009).

60. *Id.* at 254-55, 687 S.E.2d at 235.

61. *Id.* at 255, 687 S.E.2d at 236.

62. *Id.* at 255, 260, 687 S.E.2d at 236, 239.

63. *Id.* at 255, 687 S.E.2d at 236.

64. Bickers was owner and CEO of both Simbic and Renee. *Id.*

65. *Id.*

66. *Id.* at 255-56, 687 S.E.2d at 236 (internal quotation marks omitted).

67. Two checks issued by the City, each totaling \$275,000, were endorsed by Bickers for the Foundation. *Id.* at 256, 687 S.E.2d at 236. “After receiving [these] payment[s,] the Foundation released its security interest in West Lake.” *Id.*

68. *Id.*

69. *Id.* at 260, 687 S.E.2d at 239.

70. *Id.* at 255, 260, 687 S.E.2d at 236, 239.

pay the debt when it became due, even though Renee was not a party to the loan funding agreements. The money loaned by the City to Bickers was never repaid.⁷¹ At trial, the jury found that Bickers and Renee were alter egos of Simbic and were unjustly enriched by the loans from the City.⁷²

The court of appeals upheld the jury verdict, holding the evidence showed Bickers, Simbic, and Renee “disregarded the separateness of legal entities by commingling on an interchangeable or joint basis or confusing the otherwise separate properties, records[,] or control.”⁷³ The court reached its decision for four distinct reasons. First, Bickers owned and served as CEO of both Simbic and Renee during the entire period in question.⁷⁴ Second, when Bickers began accepting loans from the City on behalf of Simbic, Simbic had already transferred ownership in West Lake to Renee.⁷⁵ Third, Bickers used the money from the loans to benefit both Simbic and Renee, paying the Foundation on behalf of Simbic and paying for improvements at West Lake on behalf of Renee.⁷⁶ Finally, the court noted that Renee legally sold the property to MGG even though Bickers and Simbic made the decision to sell.⁷⁷ Thus, the opinions in both *Anthony* and *Renee Unlimited, Inc.* represent fact patterns in which Georgia courts are likely to disregard the corporate form.

3. Nonsignatory to Contract Bound by Contractual Choice of Law Provision. In *Rayonier Wood Products, LLC v. Scanware, Inc.*,⁷⁸ the United States District Court for the Southern District of Georgia held that the United States Bankruptcy Court for the Southern District of Georgia did not err in finding FinScan OY (FinScan) to be an alter ego of ScanWare, Inc. and thus bound by ScanWare’s contractual choice of law provision.⁷⁹ In May 2006, ScanWare entered into a contract with Rayonier Wood Products (Rayonier) under which ScanWare would provide Rayonier with a lumber grading system intended and expected to perform better than 95% of similar systems conforming to industry

71. *Id.* at 256, 687 S.E.2d at 236.

72. *Id.* at 254, 687 S.E.2d at 235. Simbic was not a party at trial because the trial court had previously entered default judgments against it. *Id.* at 255, 687 S.E.2d at 235.

73. *Id.* at 259-60, 687 S.E.2d at 238-39 (quoting *Heyde v. Xtraman, Inc.*, 199 Ga. App. 303, 306, 404 S.E.2d 607, 610 (1991)) (internal quotation marks omitted).

74. *Id.* at 255, 687 S.E.2d at 236.

75. *Id.*

76. *Id.* at 256, 687 S.E.2d at 236.

77. *Id.* at 260, 687 S.E.2d at 239.

78. 420 B.R. 915 (S.D. Ga. 2009).

79. *Id.* at 923.

standards. The contract signed by the two parties included a choice of law provision that required any dispute in connection with the contract to be litigated in Emanuel County, Georgia. At the time the contract was executed, FinScan held a minority ownership interest in ScanWare and did not sign the contract.⁸⁰

In July 2008 Rayonier filed suit against ScanWare and FinScan in the Superior Court of Emanuel County, Georgia, after the lumber grading system failed to meet industry standards. In October 2009 ScanWare filed for bankruptcy, and FinScan subsequently filed a notice of removal to bankruptcy court. Rayonier then filed a motion to remand the action to state court based on the choice of law provision in the contract between Rayonier and Scanware. The bankruptcy court granted Rayonier's motion to remand, and FinScan appealed.⁸¹

The district court noted that binding FinScan to the "choice of law provision [would] effectively pierce[] the corporate veil" because FinScan and ScanWare were two separate legal entities.⁸² However, the district court nonetheless held the bankruptcy court properly granted Rayonier's motion to remand,⁸³ stating that "Georgia courts will pierce the corporate veil to remedy injustices which arise where a party has overextended [its] privilege . . . to evade contractual or tort responsibility."⁸⁴ In this case, FinScan had only a minority interest in ScanWare when ScanWare signed the contract.⁸⁵ However, this minority ownership indicated the parties' close relationship.⁸⁶ Additionally, FinScan remained continuously and heavily involved in ScanWare's business: Rayonier was in direct communication with FinScan employees from the beginning of the business relationship, and FinScan's president served

80. *Id.* at 917-18. FinScan acquired 100% ownership of ScanWare in October 2007. *Id.* at 918 n.2.

81. *Id.* at 918.

82. *Id.* at 922.

83. *Id.* at 925.

84. *Id.* at 922 (emphasis omitted) (quoting *Garrett v. Women's Health Care, P.C.*, 243 Ga. App. 53, 56, 532 S.E.2d 164, 168 (2000)) (internal quotation marks omitted). *Compare id.*, with *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1299 (11th Cir. 1998) (holding that a nonparty to a contract will be bound to the contract's forum selection clause if the party is "closely related" to the dispute so that it is "foreseeable" the party will be bound). Georgia law does not mirror the language used in *Lipcon*; however, the underlying premise is the same: Georgia courts will pierce the corporate veil to remedy an injustice caused by a corporation's avoidance of contractual liability. *ScanWare*, 420 B.R. at 922.

85. *ScanWare*, 420 B.R. at 922.

86. *Id.*; see also *Lipcon*, 148 F.3d at 1299 (quoting *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1297 (3d Cir. 1996)) (noting "that a sister corporation that did not sign an . . . agreement could not be bound by [that] agreement, but . . . if [that] 'corporation's interests were directly related to . . . the [signatory's] conduct,' the corporation" could be bound).

as the president of ScanWare following its acquisition.⁸⁷ Finally, the lumber grading systems ScanWare sold appeared to be merely FinScan machines with FinScan's logo and slogan appearing on the machine as well as FinScan's address appearing in a footer on each page of the instruction manual.⁸⁸ Accordingly, the court concluded that ScanWare was an alter ego of FinScan and that FinScan was therefore bound by the contract's choice of law provision.⁸⁹ The decision in *ScanWare* illustrates that Georgia courts will not hesitate to bind a nonsignatory to a contract if the court finds the signatory to be an alter ego of the nonsignatory party.

C. Fiduciary Duties

1. GTSA Claim Does Not Preempt Claims Made That Do Not Involve the Misappropriation of Proprietary Information. In *Professional Energy Management, Inc. v. Necaise*,⁹⁰ the Georgia Court of Appeals held the Georgia Trade Secrets Act of 1990 (GTSA)⁹¹ did not preempt a claim for breach of fiduciary duty.⁹² Professional Energy Management, Inc. (PEM) sued former PEM employee Ty Necaise, Robert Allen, and LUMA Energy Resource Management, Inc. (LUMA), a corporation formed by Necaise and Allen. PEM made several allegations against Necaise, Allen, and LUMA, alleging breach of fiduciary duty, conversion, breach of confidentiality and a nondisclosure agreement, and violation of the GTSA. The trial court dismissed each of PEM's claims except for the GTSA claim.⁹³ Relying on the District Court for the Northern District of Georgia's decision in *Diamond Power International, Inc. v. Davidson*,⁹⁴ the trial court found the GTSA claim preempted the other claims PEM made.⁹⁵

The court of appeals reversed the trial court's dismissal of PEM's non-GTSA claims.⁹⁶ The court of appeals explained that while the district court in *Diamond Power* held that claims conflicting with a GTSA claim

87. *ScanWare*, 420 B.R. at 922.

88. *Id.* at 922-23.

89. *Id.* at 923.

90. 300 Ga. App. 223, 684 S.E.2d 374 (2009 & Supp. 2010).

91. O.C.G.A. §§ 10-1-760 to -767 (2009).

92. 300 Ga. App. at 226, 684 S.E.2d at 378. The court of appeals also held the GTSA did not preempt claims for tortious interference with contractual relations, conversion, and breach of confidentiality and nondisclosure agreement. *Id.* at 226-27, 686 S.E.2d at 378-79.

93. *Id.* at 223-24, 684 S.E.2d at 376-77.

94. 540 F. Supp. 2d 1322 (N.D. Ga. 2007).

95. *Necaise*, 300 Ga. App. at 224, 684 S.E.2d at 377.

96. *Id.* at 225, 684 S.E.2d at 377-78.

should be dismissed, the district court also noted that “if a claim seeks to remedy an injury caused not by the misappropriation of proprietary information, . . . [the] claim cannot be said to be in conflict with the GTSA.”⁹⁷ In the present case, PEM alleged that Necaise breached his fiduciary duty by soliciting PEM customers for a rival business, LUMA, while Necaise was still an employee at PEM.⁹⁸ The court of appeals determined that Necaise’s alleged solicitation was outside the scope of the GTSA and not preempted by the GTSA.⁹⁹ Thus, the court reasoned that PEM’s claim for breach of fiduciary duty, if proven, would entitle PEM to relief.¹⁰⁰ However, because LUMA demonstrated at trial that PEM could not establish that LUMA owed PEM any duty, the court of appeals affirmed the trial court’s dismissal of PEM’s breach of fiduciary duty claim.¹⁰¹ The court of appeals decision in *Necaise* clarifies the rule set forth in *Diamond Power* that claims made alongside a GTSA claim should be dismissed when they conflict with the GTSA claim; however, if the claims do not relate to “the misappropriation of proprietary information,” the claims should not be dismissed.¹⁰²

2. Georgia Court of Appeals Applied Two-Part Test in Addressing Misappropriation of Corporate Opportunity Claim. In *Brewer v. Insight Technology, Inc.*,¹⁰³ the court of appeals upheld a jury verdict finding Darren Brewer liable to Insight Technology, Inc. (ITI) for misappropriation of corporate opportunity and breach of fiduciary duty.¹⁰⁴ In 1996 Gary Aliengena formed ITI as a trucking load-board business and hired Darren Brewer as marketing director. Soon thereafter, Brewer became president of ITI. Brewer’s duties as president included overseeing the company’s daily activities and managing the company’s software and website development.¹⁰⁵ In 1998 ITI developed FactorLoads as a freight factoring division. This division matched small, independent truckers with one-time jobs and aimed to exploit a

97. *Id.* at 225, 684 S.E.2d at 377 (quoting *Diamond Power*, 540 F. Supp. 2d at 1345) (internal quotation marks omitted).

98. *Id.* at 225-26, 684 S.E.2d at 378. There is no breach of a fiduciary duty if an employee merely makes plans to enter into a competing business. *Id.* at 225, 684 S.E.2d at 378. However, an employee is not “entitled to solicit customers for a rival business before the end of his employment.” *Id.*

99. *Id.* at 226, 684 S.E.2d at 378.

100. *Id.*

101. *Id.* at 229, 684 S.E.2d at 380.

102. *See id.* at 225, 684 S.E.2d at 377.

103. 301 Ga. App. 694, 689 S.E.2d 330 (2009).

104. *Id.* at 694, 689 S.E.2d at 333.

105. *Id.* The business was based online and matched truckers with freight-line jobs as the jobs became available. *Id.*

small portion of the trucking market. In 2000 Brewer met Pat Hull, owner of GetLoaded.com (GetLoaded), one of ITI's competitors in the load-board business. Brewer attempted to negotiate an agreement with Hull to allow ITI to advertise on Hull's website, but Hull declined. In 2002 Hull created his own factoring business, FreightCheck, LLC (FreightCheck) to compete with ITI's FactorLoads. Subsequently, Brewer became an equal partner in FreightCheck. Thereafter, he managed and operated FreightCheck from the same building where ITI was located, used the same resources for the two businesses, and directed ITI employees to do work for FreightCheck.¹⁰⁶

In 2003 "Brewer [convinced] Aliengena to sell ITI to GetLoaded."¹⁰⁷ However, before the sale was finalized, Aliengena became aware of Brewer's involvement with Hull and FreightCheck. Aliengena fired Brewer and filed suit against him for breach of fiduciary duty and misappropriation of corporate opportunity.¹⁰⁸ A jury found Brewer liable to ITI, and Brewer appealed.¹⁰⁹

In affirming the trial court, the court of appeals cited section 14-2-831(a)(1)(C) of the Official Code of Georgia Annotated (O.C.G.A.)¹¹⁰ and stated, "A corporation may sue an officer or director for 'the appropriation, in violation of his duties, of any *business opportunity* of the corporation.'"¹¹¹ Relying on the test enunciated by the supreme court in *Southeast Consultants, Inc. v. McCrary Engineering Corp.*,¹¹² the court of appeals further stated that to impose liability for misappropriation of corporate opportunity, two prongs must be addressed: 1) "whether the appropriated opportunity was in fact a business opportunity rightfully belonging to the corporation," and 2) "if the . . . opportunity was a bona fide corporate opportunity, the court must determine whether the corporate official violated a fiduciary duty in appropriating that opportunity."¹¹³

106. *Id.*

107. *Id.* at 695, 689 S.E.2d at 333.

108. *Id.* at 694-95, 689 S.E.2d at 333.

109. *Id.* at 694-95, 689 S.E.2d at 333-34.

110. O.C.G.A. § 14-2-831(a)(1)(C) (2003 & Supp. 2010).

111. *Brewer*, 301 Ga. App. at 695, 689 S.E.2d at 334 (emphasis added); *see also* O.C.G.A. § 14-2-831(a)(1)(C).

112. 246 Ga. 503, 273 S.E.2d 112 (1980).

113. *Brewer*, 301 Ga. App. at 695, 689 S.E.2d at 334 (emphasis added) (quoting *McCrary*, 246 Ga. at 508, 273 S.E.2d at 117). However, "if [the] court finds that the business opportunity was *not* a corporate opportunity, the directors or officers . . . are immune from liability." *Id.* (quoting *McCrary*, 246 Ga. at 508, 273 S.E.2d at 117).

In analyzing the first prong of the *McCrary* test,¹¹⁴ the court of appeals defined “business opportunity” as an opportunity the corporation is “financially able to undertake, is, from its nature, in the line of the corporation’s business[,] is of practical advantage to it, [and] is one in which the corporation has an interest or reasonable expectancy.”¹¹⁵ In the present case, the court of appeals held that the evidence showed GetLoaded and ITI were both engaged in the load-board business, ITI had the financial means to undertake the opportunity of doing business with GetLoaded, and ITI would have financially benefitted from a merger with GetLoaded.¹¹⁶ Thus, ITI satisfied the first prong of the *McCrary* test.¹¹⁷ Regarding the second prong, the court held that as a corporate officer, Brewer had a duty “not [to] engage in direct competition with the corporation’s business.”¹¹⁸ Because Brewer became a co-owner of FreightCheck at the same time he was acting as president for ITI, he breached his fiduciary duty to ITI.¹¹⁹

D. Stock Ownership

1. Georgia Court of Appeals Held It is for a Jury to Decide Whether a Company Acted in Good Faith When Deciding Not to Award Benefits Under Stock Option Agreements. In *Capital Health Management Group, Inc. v. Hartley*,¹²⁰ the court of appeals upheld a jury verdict finding Capital Health Management Group, Inc. (Capital Health) did not act in good faith or with honest judgment in deciding not to award a former employee her stock appreciation rights under a deferred compensation agreement.¹²¹ Capital Health, a

114. *McCrary*, 246 Ga. at 508, 273 S.E.2d at 117.

115. *Brewer*, 301 Ga. App. at 696, 689 S.E.2d at 334 (quoting *Parks v. Multimedia Techs., Inc.*, 239 Ga. App. 282, 288-89, 520 S.E.2d 517, 524 (1999)). Brewer argued that the jury instruction was erroneous because the trial judge did not employ the language from *McCrary* that states a business opportunity is one in which the corporation has “a beachhead in the sense of a legal or equitable interest or expectancy growing out of a preexisting right or relationship.” *Id.* at 698, 689 S.E.2d at 335-36 (emphasis added) (quoting *McCrary*, 246 Ga. at 508, 273 S.E.2d at 117) (internal quotation marks omitted). The court of appeals held that the “beachhead” language only pertains to cases involving former officers and that the judge therefore properly instructed the jury. *Id.* at 698, 689 S.E.2d at 336; see also *United Seal & Rubber Co. v. Bunting*, 248 Ga. 814, 815, 285 S.E.2d 721, 722-23 (1982) (adopting “beachhead” language in a case involving a former officer).

116. *Brewer*, 301 Ga. App. at 696, 689 S.E.2d at 334.

117. *Id.* at 696, 689 S.E.2d at 335.

118. *Id.* at 696-97, 689 S.E.2d at 335.

119. *Id.* at 697, 689 S.E.2d at 335.

120. 301 Ga. App. 812, 689 S.E.2d 107 (2009).

121. *Id.* at 816-17, 823, 689 S.E.2d at 111, 115.

private corporation, provided management services to home healthcare agencies. The company hired Deborah Moss Hartley in 1997 as a regional director of operations and within two years promoted her to regional vice president of operations. Capital Health and Hartley entered into a “Stock Appreciation Rights Agreement” (Agreement) that provided Hartley would be paid the value of 60,000 shares of stock in Capital Health upon the sale of all or substantially all of the Capital Health common stock if Hartley was still employed at the time the stock was sold or had been terminated as the result of a disability. The Agreement also provided that a compensation committee (Committee) composed of members of Capital Health’s board of directors would administer, interpret, adopt, and revise the Agreement. Additionally, the term “disability” would be defined by the Committee.¹²²

In 2000 Hartley began experiencing severe fatigue and headaches and was soon diagnosed with fibromyalgia. By November 2000, Hartley could not carry out her work responsibilities and ultimately informed Capital Health she would not be able to return to work. Capital Health received a physician’s certification documenting Hartley’s fibromyalgia. Capital Health then notified Hartley that she would receive a termination letter. Hartley testified that Capital Health told her she was being terminated due to her disability. In June 2005, Capital Health sold all of its common stock; however, it did not notify or pay Hartley the value of the 60,000 shares promised to her under the Agreement. Capital Health asserted that because the Agreement gave it discretionary decision-making power, it had the right to withhold payment with respect to the 60,000 shares.¹²³

As decided in *Planning Technologies, Inc. v. Korman*,¹²⁴ an agreement may provide for a board of directors to have final and conclusive decision-making authority with regard to a stock option plan.¹²⁵ However, any decision made by the board must be made in good faith and in the exercise of honest judgment.¹²⁶ Hartley sued Capital Health to recover the \$343,861 value of the subject shares. A jury returned a verdict that Capital Health did not act in good faith or with

122. *Id.* at 813-14, 689 S.E.2d at 109.

123. *Id.* at 814-16, 689 S.E.2d at 110-11.

124. 290 Ga. App. 715, 660 S.E.2d 39 (2008). *See generally* Paul A. Quirós et al., *Business Associations, Annual Survey of Georgia Law*, 60 MERCER L. REV. 35, 39-40 (2008) (discussing the decision in *Korman*).

125. *See* 290 Ga. App. at 719 & n.2, 660 S.E.2d at 42-43 & n.2.

126. *Id.* at 720, 660 S.E.2d at 43.

honest judgment when it decided not to pay Hartley the money owed to her under the Agreement. Capital Health appealed.¹²⁷

First, Capital Health argued that whether it abused its decision-making authority under the Agreement was a legal question to be decided by a judge, not a fact question for the jury.¹²⁸ The court of appeals disagreed and held that, as in any contract case, the question of good faith is for a jury to decide.¹²⁹ Second, Capital Health argued that Hartley was fired as a result of corporate reorganization, not because of her disability; therefore, the Agreement did not require her to be paid the value of the stock.¹³⁰ However, the court held there was no evidence to support Capital Health's argument.¹³¹ Thus, the court allowed the jury's determination that Hartley was terminated due to her disability to stand.¹³² Capital Health further argued that there was no evidence to support the jury's finding that Capital Health acted out of an improper pecuniary motive.¹³³ According to the court, "there was evidence that Capital Health's decision to deny payment to Hartley under the Agreement was not made in good faith and did not involve the exercise of honest judgment."¹³⁴ Specifically, when the sale of Capital Health stock occurred, Capital Health's three shareholders split the money not paid out to employees such as Hartley.¹³⁵ One of the company's shareholders, Todd Weibusch, approved the termination of Hartley and received one-third of the stock value owed to her under the Agreement.¹³⁶ Accordingly, the court held the jury was entitled to find that Capital Health did not act in good faith when deciding not to pay Hartley the money due under the Agreement.¹³⁷ The decision in *Capital Health* reaffirmed the holding in *Korman* and also established that a jury, not a judge, is to determine "whether a party exercised good

127. *Capital Health*, 301 Ga. App. at 816-17, 689 S.E.2d at 111.

128. *Id.* at 817, 689 S.E.2d at 111.

129. *Id.* at 817-18, 689 S.E.2d at 112; *see also, e.g.*, *Camp v. Peetluk*, 262 Ga. App. 345, 585 S.E.2d 704 (2003); *Rogers v. Farmers & Merchants Bank*, 247 Ga. App. 631, 545 S.E.2d 51 (2001).

130. *Capital Health*, 301 Ga. App. at 819, 689 S.E.2d at 113.

131. *See id.* at 820, 689 S.E.2d at 113.

132. *Id.*

133. *Id.* at 821, 689 S.E.2d at 114. In *Korman* the court of appeals held that "a decision [is] not made in good faith if [it is] based on an improper pecuniary motive." 290 Ga. App. at 720, 660 S.E.2d at 43.

134. *Capital Health*, 301 Ga. App. at 822, 689 S.E.2d at 115.

135. *Id.* at 816, 689 S.E.2d at 111.

136. *Id.* at 821-22, 689 S.E.2d at 114.

137. *Id.* at 821-22, 689 S.E.2d at 114-15.

faith and honest judgment in the performance” of a stock option agreement.¹³⁸

2. Georgia Securities Act Not a Basis for Liability When Purchaser of Stock Knows of Seller’s Misrepresentations. In *Fernandez v. WebSingularity, Inc.*,¹³⁹ the court of appeals applied O.C.G.A. § 10-5-14(a)(1)¹⁴⁰ and held that a purchaser of stock could not rely on the Georgia Securities Act of 1973¹⁴¹ “if . . . [t]he purchaser knew of the untrue statement of a material fact or omission of a statement of a material fact.”¹⁴² Waldemar Fernandez purchased \$319,999.95 of stock in WebSingularity, Inc. (WebSingularity). Fernandez alleged he purchased the stock because WebSingularity CEO Kenneth Gavranovic represented that Fernandez would purchase one-third of the company’s issued and outstanding stock. After purchasing the stock, Fernandez learned that he in fact had only purchased about 7% of the stock. Subsequently, Fernandez withdrew his offer to buy the stock and demanded the return of his money. WebSingularity refused to return Fernandez’s money, and Fernandez filed suit, alleging a violation of the Georgia Securities Act.¹⁴³ The trial court granted WebSingularity’s motion to dismiss and Fernandez appealed.¹⁴⁴

In support of his Georgia Securities Act claim, Fernandez relied on *Meason v. Gilbert*,¹⁴⁵ in which the Georgia Supreme Court held that “[t]o allow a purchaser to waive by contract at the time of purchase all violations of the Securities Act would eviscerate the very protections afforded by the statute and such a purported waiver would be void and

138. *Id.* at 817-18, 689 S.E.2d at 112.

139. 299 Ga. App. 11, 681 S.E.2d 717 (2009).

140. O.C.G.A. § 10-5-14(a)(1) (2000) (repealed 2008).

141. O.C.G.A. ch. 10-5 (2000) (repealed 2008). The Georgia Securities Act was repealed in its entirety in 2008, Ga. S. Bill 358, Reg. Sess., 2008 Ga. Laws 381, and replaced by the Georgia Uniform Securities Act. O.C.G.A. ch. 10-5 (2009 & Supp. 2010).

142. *Fernandez*, 299 Ga. App. at 19, 681 S.E.2d at 724 (alteration in original) (internal quotation marks omitted); see O.C.G.A. § 10-5-14(a)(1) (repealed 2008).

143. *Fernandez*, 299 Ga. App. at 11-12, 681 S.E.2d at 720. Fernandez’s complaint alleged four additional theories of recovery: “(1) money had and received; (2) breach of an agreement to rescind; (3) conversion; . . . and ([4]) fraud and deceit.” *Id.* at 12, 681 S.E.2d at 720 (footnote omitted). Fernandez also sought punitive damages and litigation expenses. *Id.* Subsequently, Fernandez voluntarily dismissed the fraud and deceit claim. *Id.* The trial court dismissed all allegations in the complaint. See *id.* at 13, 681 S.E.2d at 720. The court of appeals affirmed the dismissal of the rescission claim but reversed the dismissal of Fernandez’s other claims. *Id.*

144. *Id.* at 11-12, 681 S.E.2d at 720.

145. 236 Ga. 862, 226 S.E.2d 49 (1976).

of no effect.”¹⁴⁶ In the present case, Fernandez received and executed a subscription agreement that did not show Fernandez would receive a one-third stock interest in WebSingularity. Additionally, Fernandez did not claim WebSingularity prevented him from reading the agreement or that the language was ambiguous. Therefore, based on the subscription agreement, Fernandez knew he would not receive one-third of WebSingularity’s issued stock.¹⁴⁷ Nonetheless, based on *Meason*, Fernandez argued that WebSingularity violated the Georgia Securities Act because if WebSingularity was permitted to orally promise a certain amount of stock, but actually showed a lesser amount in the subscription agreement, it would render the Georgia Security Act meaningless.¹⁴⁸

In rejecting Fernandez’s argument, the court of appeals first noted that the supreme court in *Meason* interpreted the Georgia Securities Act prior to the 1973 amendment¹⁴⁹ to the Act.¹⁵⁰ In fact, the supreme court in *Meason* expressly stated that it had “no opinion about whether the result would be the same in the case of a knowing relinquishment of rights.”¹⁵¹ In contrast to the pre-1973 statute used in *Meason*, the 1973 amended version of the Georgia Securities Act applicable in the present case *does* provide for an exception to liability when a “purchaser [knows] of [an] untrue statement of a material fact or omission of a statement of a material fact.”¹⁵² In the present case, Fernandez received a subscription agreement that stated he would only receive about 7% of the company’s issued and outstanding stock.¹⁵³ Even though Fernandez may have relied on Gavronavic’s oral statements that he would own one-third of WebSingularity’s stock, based on the subscription agreement, Fernandez “knew” for purposes of O.C.G.A. § 10-5-14(a)(1) that he was subscribing for only about 7% of that stock.¹⁵⁴

146. *Fernandez*, 299 Ga. App. at 18, 681 S.E.2d at 724 (quoting *Meason*, 236 Ga. at 863, 226 S.E.2d at 50) (internal quotation marks omitted).

147. *Id.* at 19, 681 S.E.2d at 724-25.

148. *See id.* at 17-18, 681 S.E.2d at 723-24.

149. Ga. H.R. Bill 264, Reg. Sess., 1973 Ga. Laws 1202 (codified as amended at O.C.G.A. ch. 10-5 (2009 & Supp. 2010)).

150. *Fernandez*, 299 Ga. App. at 18, 681 S.E.2d at 724; *see* GA. CODE ANN. § 97-112(b) (1972) (codified as amended at O.C.G.A. ch. 10-5 (2009 & Supp. 2010)). The language of the statute applied in *Meason* did not provide an exception to liability when the purchaser knew of an untrue statement. *See Fernandez*, 299 Ga. App. at 18, 681 S.E.2d at 724; GA. CODE ANN. § 97-112(b).

151. *Fernandez*, 299 Ga. App. at 19, 681 S.E.2d at 724 (quoting *Meason*, 236 Ga. at 863 n.2, 226 S.E.2d at 50 n.2) (internal quotation marks omitted).

152. O.C.G.A. § 10-5-14(a)(1) (repealed 2008).

153. *Fernandez*, 299 Ga. App. at 12, 18, 226 S.E.2d at 720, 724.

154. *Id.* at 19, 226 S.E.2d at 724-25.

Therefore, the court of appeals held WebSingularity had not violated O.C.G.A. § 10-5-12(a).¹⁵⁵

The Georgia Securities Act as applied in *Fernandez* was repealed in 2008.¹⁵⁶ However, it is likely that a court would make the same ruling on similar facts because the Georgia Uniform Securities Act,¹⁵⁷ which replaced the prior act, also provides a seller is not liable if the purchaser “[knew] the untruth or omission.”¹⁵⁸

III. LIMITED LIABILITY COMPANY

In *Brock Built, LLC v. Blake*,¹⁵⁹ the court of appeals applied the business judgment rule to determine whether a limited liability company’s officer breached his fiduciary duty.¹⁶⁰ Brock Built, LLC (Brock Built) hired Henry Blake as a construction manager in 2003 and promoted Blake to president of the company in 2005. In connection with the promotion, the two parties entered into a contract that provided Brock Built would pay Blake a base salary and incentive compensation, which was a percentage of the company’s profit margin.¹⁶¹ The contract stipulated Blake would act as the company’s president through 2007, and the contract would automatically renew for one-year terms after 2007. The contract also allowed for either party to terminate the relationship at any time, with or without cause, but if Brock Built terminated Blake without cause, Blake would be entitled to severance payments equal to one year of his annual salary amount.¹⁶²

In 2006 Brock Built severed its relationship with Blake and failed to pay the incentive compensation and severance set forth in the contract. Blake sued for breach of contract for the company’s failure to pay the severance and full amount of incentive compensation. Blake also claimed breach of fiduciary duty in determining the company’s annual profit for purposes of the incentive compensation. Brock Built counter-claimed, also alleging breach of contract and fiduciary duties.¹⁶³ Brock Built claimed Blake breached his fiduciary duties by 1) accelerating 2005 profits for the purpose of increasing his incentive compensation and 2)

155. *Id.* at 12, 226 S.E.2d at 720; *see* O.C.G.A. § 10-5-12(a) (repealed 2008).

156. Ga. S. Bill 358 at § 1, 2008 Ga. Laws at 382.

157. O.C.G.A. ch. 10-5 (2009 & Supp. 2010).

158. O.C.G.A. § 10-5-58(c) (2009).

159. 300 Ga. App. 816, 686 S.E.2d 425 (2009).

160. *Id.* at 822, 686 S.E.2d at 430.

161. *Id.* at 817, 686 S.E.2d at 427. “The [c]ontract defined ‘profit margin’ as ‘the net profit of the Company before federal and state income taxes.’” *Id.*

162. *Id.* at 817, 686 S.E.2d at 427-28.

163. *Id.* at 817-18, 686 S.E.2d at 428.

failing to properly manage the company's affairs.¹⁶⁴ The trial court granted summary judgment in favor of Blake on his claim for breach of contract and against Brock Built's counterclaims. Brock Built appealed.¹⁶⁵ The court of appeals upheld the trial court's grant of summary judgment in regards to Blake's breach of contract claim for severance pay but held the incentive compensation claim presented a jury question.¹⁶⁶

In addressing Brock Built's counterclaim for breach of fiduciary duties, the court of appeals applied the business judgment rule, which "affords an officer the presumption that he or she acted in good faith, and absolves the officer of personal liability unless it is established that he or she engaged in fraud, bad faith[,] or an abuse of discretion."¹⁶⁷ Additionally, the court stated that "[a]llegations amounting to mere negligence, carelessness, or 'lackadaisical performance' are insufficient as a matter of law."¹⁶⁸ The court held that Blake's conduct did not amount to fraud, bad faith, or an abuse of discretion.¹⁶⁹ Specifically, the court noted that Brock Built did not offer any evidence that would support its claim of breach of a fiduciary duty.¹⁷⁰ The court cited *Turner Broadcasting System, Inc. v. CBS, Inc.*¹⁷¹ to support the proposition that the fact Blake would gain personally from the actions he took did not in itself preclude the application of the business judgment rule.¹⁷² Furthermore, the court held Brock Built's claim that Blake did not properly perform his duties as an officer of the company "amounted at best to a showing of negligent or careless performance," which is insufficient as a matter of law to support a claim for breach of fiduciary duty.¹⁷³ Accordingly, the court of appeals affirmed the trial

164. *Id.* at 821, 686 S.E.2d at 430.

165. *Id.* at 818, 686 S.E.2d at 428.

166. *Id.* at 818, 821, 686 S.E.2d at 428, 430. The court of appeals stated the evidence showed that Brock Built terminated Blake without cause and therefore owed Blake the severance pay as guaranteed by the contract. *Id.* at 818, 686 S.E.2d at 428. However, the court of appeals held Blake was not entitled to summary judgment on the incentive compensation claim because a jury question existed as to whether Brock Built paid Blake the full incentive compensation. *Id.* at 820-21, 686 S.E.2d at 429-30.

167. *Id.* at 821-22, 686 S.E.2d at 430.

168. *Id.* at 822, 686 S.E.2d at 430 (quoting *Medserv Corp. v. Nemnom*, 1997 U.S. Dist LEXIS 29924, at *9 (11th Cir. 1998)).

169. *Id.* at 822, 686 S.E.2d at 431.

170. *Id.*

171. 627 F. Supp. 901 (N.D. Ga. 1985).

172. *Brock Built*, 300 Ga. App. at 822-23, 686 S.E.2d at 431.

173. *Id.* at 823, 686 S.E.2d at 431.

court's grant of summary judgment in favor of Blake on the breach of fiduciary duties counterclaim.¹⁷⁴

Interestingly, the court of appeals in *Brock Built* cited O.C.G.A. §§ 14-2-830¹⁷⁵ and 14-2-842¹⁷⁶ in addressing a corporate officer's fiduciary duties.¹⁷⁷ The code sections cited by the court of appeals pertain to *corporations*.¹⁷⁸ However, O.C.G.A. § 14-11-305¹⁷⁹ governs *Brock Built*, a *limited liability company*.¹⁸⁰ Since the language of § 14-11-305 is almost identical to that in §§ 14-2-830 and 14-2-842, the court of appeals extended the application of the business judgment rule in similar situations to limited liability companies.

IV. PARTNERSHIP

A. *Each Partner in a Partnership Owes a Fiduciary Duty of Good Faith to Each Other Partner*

In *Asgharneya v. Hadavi*,¹⁸¹ the court of appeals reaffirmed the long-standing principle that each partner in a general partnership owes a duty of good faith to the other partners in the partnership.¹⁸² In 2001 Asghar Asgharneya and Javad Hadavi formed a partnership in which each party contributed equal capital and agreed to split equally the profits from a check-cashing business. Asgharneya and Hadavi, however, did not execute a written document to memorialize the partnership—all communications were verbal. For three years, the business grew steadily and profitably, averaging \$100,000 a year in profits. In 2004 the parties agreed to change the way they ran the business and orally agreed to a new business plan. According to the new plan, each partner would operate the business for one month at a time, alternating months. The partner working at the store would be responsible for all expenses and would keep all profits from the month worked.¹⁸³

174. *Id.*

175. O.C.G.A. § 14-2-830 (2003).

176. O.C.G.A. § 14-2-842 (2003).

177. *Brock Built*, 300 Ga. App. at 821, 686 S.E.2d at 430.

178. *See* O.C.G.A. §§ 14-2-830, -842.

179. O.C.G.A. § 14-11-305 (2003).

180. *See* O.C.G.A. § 14-11-305. The language of § 14-11-305 nearly mirrors the language of §§ 14-2-830 and 14-2-842. *Compare* O.C.G.A. § 14-11-305, *with* O.C.G.A. §§ 14-2-830, -842.

181. 298 Ga. App. 693, 680 S.E.2d 866 (2009).

182. *Id.* at 697, 680 S.E.2d at 870.

183. *Id.* at 693-94, 680 S.E.2d at 868.

Pursuant to the agreement, Asgharneya worked the first month, starting in May of 2004. However, when Hadavi returned to work, he found that Asgharneya had boarded up the store and opened up his own check-cashing business in competition with the old business. Hadavi then filed suit, alleging breach of contract, civil conspiracy, and unjust enrichment. The trial court held the parties had modified their original oral agreement and that they did not agree to terminate the original agreement as Asgharneya claimed. Thus, the trial court found for Hadavi and awarded him damages in the form of lost profits and attorney fees.¹⁸⁴

On appeal, Asgharneya argued that the partnership was a partnership at will, terminable at any time, and that he therefore could not be liable for breach of contract.¹⁸⁵ In rejecting this argument, the court of appeals conceded that the partnership was terminable any time by either party because it was a partnership at will.¹⁸⁶ However, the court also noted that this right to terminate “must be exercised in good faith.”¹⁸⁷ The court stated, “Any partnership agreement includes, as a matter of law, an agreement for each partner to act in ‘the utmost good faith’ toward the other partner. The power . . . to dissolve the partnership . . . must be exercised in good faith.”¹⁸⁸ In this case, Asgharneya terminated his relationship with Hadavi to take advantage of a profitable business opportunity and excluded his partner from participating.¹⁸⁹ Thus, the court of appeals affirmed the ruling of the lower court and held Asgharneya did not act in good faith when terminating his partnership with Hadavi.¹⁹⁰ The court of appeals decision in *Asgharneya* serves as a reminder that despite having the ability to terminate an agreement at any time, partners in a general partnership owe each other a duty of good faith.

184. *Id.* at 694-95, 680 S.E.2d at 869.

185. *Id.* at 697, 680 S.E.2d at 870.

186. *Id.*; see *Arford v. Blalock*, 199 Ga. App. 434, 437, 405 S.E.2d 698, 702 (1991) (explaining that a partnership formed by oral agreement and for an indefinite period of time is a partnership at will terminable by either party).

187. *Asgharneya*, 298 Ga. App. at 697, 680 S.E.2d at 870.

188. *Id.* (citation omitted) (quoting *Arford*, 199 Ga. App. at 437-38, 405 S.E.2d at 702); see also *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (explaining that “[n]ot honesty alone, but the punctilio of an honor the most sensitive, is . . . the standard of behavior”).

189. See *Asgharneya*, 298 Ga. App. at 694-95, 680 S.E.2d at 869.

190. *Id.* at 697-98, 680 S.E.2d at 871.

B. A Partner Served in a Subsequent Lawsuit Can Be Held Individually Liable for a Prior Judgment Against the Partnership

In *J.T. Turner Construction Co. v. Summerour*,¹⁹¹ the court of appeals addressed a question that had not been brought before the court for nearly 100 years.¹⁹² J.T. Turner Construction Company, Inc. (Turner) filed suit against SWI Partners (SWI), a general partnership, and obtained a judgment against Ernest Burns, one of SWI's partners. Turner subsequently filed suit against Randy Hatcher and Orlando Summerour, the other SWI partners. Turner alleged that Hatcher and Summerour were jointly and severally liable to SWI for the judgment rendered against it and moved for summary judgment.¹⁹³ "The trial court . . . denied Turner's motion, finding that Turner [must] 'present a prima facie case, and prove the elements of the counts alleged . . . in the original suit'" against SWI.¹⁹⁴ Agreeing with Hatcher and Summerour, the trial court held that they "could not be held liable until they had their day in court."¹⁹⁵ Turner appealed.¹⁹⁶

The court of appeals began its discussion by noting three rules of law that apply to general partnerships: 1) all partners are jointly and severally liable for the partnership's debts, obligations, and liabilities;¹⁹⁷ 2) a judgment entered against a general partnership binds the assets of the partnership as well as the "assets of any general partner[] . . . properly served in the suit;" and 3) a general partner's assets are not bound unless the general partner "had his day in court" or in some way waived the need for service.¹⁹⁸ The court further stated that, notwithstanding the defendants' argument, "partners not personally served in the original suit or who do not appear in the original trial against the partnership are nonetheless subject to be sued individually."¹⁹⁹

Next, the court cited its decision in *Lamar-Rankin Drug Co. v. Copeland*,²⁰⁰ which held that "a partner served in a subsequent lawsuit can be held individually liable for a prior judgment" entered against the

191. 301 Ga. App. 323, 687 S.E.2d 612 (2009).

192. *See id.* at 324, 687 S.E.2d at 614.

193. *Id.* at 323, 687 S.E.2d at 613.

194. *Id.*

195. *Id.* (internal quotation marks omitted).

196. *Id.*

197. O.C.G.A. § 14-8-15(a) (2003); *Summerour*, 301 Ga. App. at 323, 687 S.E.2d at 613.

198. *Summerour*, 301 Ga. App. at 323-24, 687 S.E.2d at 613 (quoting *Sugarman v. Shaginaw*, 151 Ga. App. 621, 626, 260 S.E.2d 731, 734 (1979)) (internal quotation marks omitted).

199. *Id.* at 324, 687 S.E.2d at 614.

200. 7 Ga. App. 567, 67 S.E.2d 703 (1910).

partnership if the plaintiff proves: 1) the individual sued was a partner, 2) the original claim against the partnership was proved, and 3) the account sued upon was the same as in the original suit.²⁰¹ Applying the test in *Copeland* to the facts in *Summerour*, the court held that Hatcher and Summerour were both partners of SWI, Turner proved his claim in the original suit, and the account sued upon in the subsequent suit was identical to the original suit.²⁰² Because Turner could prove the three elements of the test set forth in *Copeland*, Turner was entitled to summary judgment.²⁰³ The court of appeals decision in *Summerour* is significant because it reaffirms a century-old precedent with respect to what must be proved for a partner in a general partnership to be held liable for a judgment rendered against the partnership in a prior suit.

V. AGENCY

In *Eayrs v. Absolute Roofing, Inc.*,²⁰⁴ the court of appeals applied O.C.G.A. § 10-6-23²⁰⁵ in holding that an agent was not personally liable when acting on behalf of a principal.²⁰⁶ Allan Eayrs needed repair work done to fix the leaking roof of a house he owned. Eayrs contacted several companies to do the work, one of which was Absolute Roofing, Inc. (Absolute Roofing). Don Harris, acting on behalf of Absolute Roofing, drafted a proposal for Eayrs. Eayrs accepted the proposal and paid Absolute Roofing for the work. However, the roof continued to leak after the work was performed. Eayrs sued Absolute Roofing and Harris. The trial court granted summary judgment in favor of Harris, and Eayrs appealed.²⁰⁷

The court of appeals stated that pursuant to O.C.G.A. § 10-6-23, “if the principal is disclosed and the agent professes to act for him, . . . the act will be held to be the act of the principal.”²⁰⁸ The evidence established that Eayrs dealt with Absolute Roofing as a disclosed principal²⁰⁹ and that Harris did not hold himself out to be other than an agent of

201. *Summerour*, 301 Ga. App. at 324, 687 S.E.2d at 614 (citing *Copeland*, 7 Ga. App. at 568, 67 S.E.2d at 704).

202. *Id.*

203. *Id.*

204. 300 Ga. App. 825, 686 S.E.2d 432 (2009).

205. O.C.G.A. § 10-6-23 (2009).

206. *Eayrs*, 300 Ga. App. at 826, 686 S.E.2d at 433.

207. *Id.* at 825-26, 686 S.E.2d at 433.

208. *Id.* at 826, 686 S.E.2d at 433. Compare O.C.G.A. § 10-6-23, with O.C.G.A. § 10-6-85 (2009) (stating an agent can be individually liable when acting outside his scope of authority).

209. *Eayrs*, 300 Ga. App. at 826, 686 S.E.2d at 434.

Absolute Roofing.²¹⁰ The court affirmed summary judgment with respect to Harris because Eayrs knew Harris acted as an agent for Absolute Roofing; therefore, Harris could not be held personally liable for Absolute Roofing's work.²¹¹ Thus, the court of appeals opinion in *Eayrs* affirms the principle that an agent will not be held personally liable for his acts if the agent is acting on behalf of a disclosed principal.

VI. MISCELLANEOUS

A. Remedies at Law Limited When a "Sophisticated Purchaser" Fails to Exercise Due Diligence in Discovering Possible Discrepancies in a Purchase Agreement

In *A & B Blind & Drapery Co. v. B & B Glass & Storefronts, Inc.*,²¹² the court of appeals upheld the trial court's ruling that a purchaser was only entitled to set off the business purchase price when the seller breached warranties under the purchase agreement.²¹³ A & B Blind & Drapery Co. (A & B) sought to purchase B & B Glass and Storefronts, Inc. (B & B). The two parties entered into an asset purchase agreement (Agreement), pursuant to which A & B purchased B & B's assets for \$347,107. A & B paid \$150,000 in cash and gave B & B a promissory note for \$197,107. The Agreement included a statement of accounts receivable and payable and several provisions addressing B & B's debts and obligations. Specifically, the Agreement stated that A & B would not assume any of B & B's debts or obligations. Furthermore, the Agreement provided for a set-off against the promissory note for any payments A & B might be required to pay with respect to any such debts, obligations, or liabilities of B & B.²¹⁴ The Agreement also contained a clause in which B & B warranted that its financial statements were accurate and that in the event of a breach of the warranty, A & B would "have the right to invoke any remedy allowed at law or in equity."²¹⁵

Approximately two months after closing under the Agreement, A & B executed a replacement promissory note due to an increase in B & B's obligations not known at the time of closing. The replacement note was for \$137,000. A & B failed to make any payments on the note. B & B subsequently filed suit to recover the value of the principal, plus interest

210. *Id.* at 826, 686 S.E.2d at 433.

211. *Id.* at 826, 686 S.E.2d at 434.

212. 298 Ga. App. 210, 679 S.E.2d 782 (2009).

213. *Id.* at 212-13, 679 S.E.2d at 784-85.

214. *Id.* at 210, 679 S.E.2d at 783.

215. *Id.* at 211, 679 S.E.2d at 783.

and attorney fees. A & B asserted its right to set off uncollectible accounts receivable and undisclosed debts under the Agreement and counterclaimed for breach of warranty, fraud, and misrepresentation. The trial court found that A & B was entitled to a \$29,797.34 set-off and entered judgment in favor of B & B for \$107,202.66, plus interest and attorney fees.²¹⁶ The trial court rejected A & B's claims for additional damages because A & B "failed to exercise due diligence to discover the discrepancies in payables and receivables."²¹⁷

On appeal, A & B argued that B & B misrepresented its accounts payable and receivable and that A & B decided to purchase the business in large part because of the stated value of the business.²¹⁸ A & B further argued that the trial court erred in limiting its remedy to a set-off when the Agreement expressly provided for "any remedy allowed at law."²¹⁹ In upholding the trial court's ruling, the court of appeals stated the evidence showed that A & B did not "exercise[] due diligence to discover [the] discrepancies."²²⁰ Specifically, the transcript revealed A & B's president, Jesse M. Chastain, to be an experienced accountant who had purchased five businesses prior to the agreement with B & B. Furthermore, Chastain testified he did not thoroughly review B & B's records.²²¹ Accordingly, the court of appeals held that the trial court properly rejected A & B's claims, other than its set-off claim, in light of the evidence before the trial court and that it did not erroneously interpret the Agreement.²²² The practical lesson from *A & B Blind & Drapery* is that "sophisticated purchasers" looking to purchase the assets of another business should review the target's books and records, including the business's accounts receivable and payable, in valuing a business to ensure the application of remedies negotiated in the acquisition agreement.

216. *Id.* at 211, 679 S.E.2d at 783-84. The trial court determined the set-off amount of \$29,797.34 by "setting off certain receivables and costs of collection." *Id.* at 211, 679 S.E.2d at 784.

217. *Id.* at 211-12, 679 S.E.2d at 784.

218. *Id.* at 212-13, 679 S.E.2d at 784.

219. *Id.* at 211-12, 679 S.E.2d at 784 (internal quotation marks omitted).

220. *Id.* at 213, 679 S.E.2d at 785.

221. *Id.*

222. *Id.*

B. Noncompete Clause Enforced When Seller Attempted to Disguise His Ownership in Another Company to Avoid the Restrictions of the Noncompete

In *Corey v. Clear Channel Outdoor, Inc.*,²²³ the court of appeals affirmed the trial court's decision that the seller of a business was liable for violating a noncompete clause when the seller attempted to circumvent the clause by disguising his ownership in another company.²²⁴ In *Corey* Clear Channel Outdoor, Inc. (Clear Channel) entered into an agreement with Corey Media, Inc. (Corey Media), owned by William Corey, whereby Clear Channel purchased Corey Media's billboard assets. The agreement included a noncompete clause prohibiting Corey from competing with Clear Channel for two years in the billboard business in Atlanta, Georgia. However, the noncompete clause did not prohibit employees, officers, or directors of Corey Media from competing with Clear Channel in their individual capacity. As consideration for the agreement not to compete, Clear Channel paid Corey \$2 million.²²⁵

Before the sale to Clear Channel, Corey Media formed a new company, U.S. Media, allegedly owned by Diane Smith-McIver (McIver). However, evidence at trial established that McIver never actually owned or ran U.S. Media. The evidence also established that Corey funded U.S. Media with the proceeds of the sale of Corey Media to Clear Channel. Furthermore, Corey used Corey Media employees to run U.S. Media. In the two years after the sale of Corey Media to Clear Channel, U.S. Media purchased nine billboards in the restricted Atlanta area.²²⁶

Another of Corey's companies, Corey Airport Services, submitted a bid for concession advertising inside the Atlanta airport. Subsequently, Clear Channel sued Corey and Corey Airport Services for breaching the noncompete clause, "alleg[ing] that the advertising displays inside the airport were 'outdoor advertising.'"²²⁷ Corey denied that the airport advertisement constituted an outdoor billboard. Clear Channel responded by amending its complaint, alleging Corey and U.S. Media violated the noncompete clause with respect to the nine Atlanta billboards. Corey counterclaimed, alleging that Clear Channel violated the noncompete clause by suing him. The trial court dismissed Corey's counterclaim because the noncompete clause placed no duty on Clear

223. 299 Ga. App. 487, 683 S.E.2d 27 (2009).

224. *Id.* at 489, 492, 683 S.E.2d at 30-32.

225. *Id.* at 487, 683 S.E.2d at 29.

226. *Id.* at 488, 683 S.E.2d at 30-31.

227. *Id.* at 488, 683 S.E.2d at 30.

Channel not to sue.²²⁸ A jury then awarded \$2 million in damages to Clear Channel for Corey's breach of the noncompete clause.²²⁹

On appeal, Corey again argued that Clear Channel violated the noncompete clause by suing him.²³⁰ In upholding the trial court's decision, the court of appeals noted that the parties' agreement did not include "an implied duty which Clear Channel violated by filing suit against Corey."²³¹ The noncompete clause represented a promise by Corey in exchange for the \$2 million paid by Clear Channel; thus, the \$2 million, not a promise not to sue, constituted the consideration for Corey's promise.²³² Furthermore, the court noted that Corey's argument on appeal was irrelevant to whether he breached the noncompete clause.²³³ Accordingly, the court of appeals affirmed the trial court's decision finding Corey liable to Clear Channel for breach of the noncompete clause.²³⁴

C. Suit Filed on Behalf of a Nonprofit Corporation Must be Made by a Board of Directors Properly Authorized to Act on Behalf of the Corporation

In *Victory Drive Deliverance Temple, Inc. v. Jackson*,²³⁵ a group of church members claiming to be the church's board of directors fired the church's newly hired senior pastor. However, the senior pastor, Theodore Jackson Sr., refused to leave, arguing the group's action did not bind the church because the group was not an authorized board of directors pursuant to the church's articles of incorporation. The plaintiffs, the group of individuals acting as the board of directors, consisted of John Anderson, Kathryn Anderson, Della Mae Wheeler, Carlene Wilkinson, and Carol Davis. Two of the five group members represented original board members under the church's articles of incorporation—Kathryn Anderson and Wheeler. The plaintiffs argued that the newly formed group represented a valid board of directors because Kathryn Anderson and Wheeler ratified the election of the three

228. *Id.* at 488-89, 683 S.E.2d at 30-31.

229. *Id.* at 489, 683 S.E.2d at 30.

230. *Id.* at 490, 683 S.E.2d at 31. At trial Corey argued he did not violate the noncompete clause because McIver acted in her own individual capacity in running U.S. Media. *Id.* at 489, 683 S.E.2d at 30-31. Corey did not make this argument on appeal. *See id.* at 490, 683 S.E.2d at 31. Instead, Corey only argued that Clear Channel violated the covenant by suing him. *Id.*

231. *Id.* at 490-91, 683 S.E.2d at 31-32.

232. *Id.* at 491, 683 S.E.2d at 32.

233. *See id.* at 491-92, 683 S.E.2d at 32.

234. *Id.* at 492, 683 S.E.2d at 32.

235. 298 Ga. App. 563, 680 S.E.2d 588 (2009).

other individuals. However, the church's articles of incorporation provided that to be binding, an action of the board must be approved by a majority of the board members.²³⁶ The articles also provided that the current board would consist of four members—Jackson, Mary Lee Anderson, Kathryn Anderson, and Wheeler.²³⁷ Jackson alleged the group did not constitute a properly formed board of directors because only two of the board members ratified the election of the three new board members. Thus, the board's action did not constitute a majority, and the alleged newly formed board could not bind the church.²³⁸ Jackson moved for the suit to be dismissed, and the trial court granted his motion.²³⁹

In affirming the trial court's dismissal, the court of appeals noted the long-standing rule that "[a]ll civil actions must be brought by a proper party plaintiff."²⁴⁰ In the present case, the articles of incorporation required the consent of a majority of the board members to an action binding the church.²⁴¹ Because the plaintiffs in this case did not constitute a properly formed board of directors pursuant to the church's articles of incorporation, they could not properly bring suit on behalf of the church; in other words, they were not a proper party plaintiff.²⁴² Accordingly, the court affirmed the dismissal of the suit.²⁴³ The court of appeals decision in this case illustrates the need for all companies to comply with their internal governing documents in order to give validity to the actions of the board of directors.

236. *Id.* at 563-64 & n.1, 680 S.E.2d at 589-90 & n.1.

237. *Id.* at 563-64, 680 S.E.2d at 589. The articles of incorporation provided the senior pastor of the church would be chairman of the board. *Id.* at 563, 680 S.E.2d at 589. Originally, Bishop Anderson, the church's senior pastor prior to Jackson, held the title of chairman. *Id.* However, at the time of the action, Jackson held the title because of his position as senior pastor. *See id.*

238. *Id.* at 563-64, 680 S.E.2d at 589.

239. *Id.* at 563, 680 S.E.2d at 589.

240. *Id.* at 566, 680 S.E.2d at 591; *Turner v. Kelley*, 212 Ga. 175, 176, 91 S.E.2d 356, 357 (1956).

241. *Jackson*, 298 Ga. App. at 563-64, 680 S.E.2d at 589.

242. *Id.* at 563-64, 566, 680 S.E.2d at 589-91.

243. *Id.* at 564, 566, 680 S.E.2d at 590-91.