

# Trial Practice and Procedure

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## I. INTRODUCTION

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

## II. LEGISLATION

Signed by Governor Deal on May 3, 2011, House Bill 24<sup>2</sup> rewrites and replaces the Georgia Evidence Code<sup>3</sup> as codified in Title 24 of the Official Code of Georgia Annotated (O.C.G.A.).<sup>4</sup> The Act loosely conforms Title 24 to the Federal Rules of Evidence and makes the changes effective for any motion, hearing, or trial commencing on or after January 1, 2013.<sup>5</sup>

## III. CASE LAW

### A. Choice of Law

In *Carroll Fulmer Logistics Corp. v. Hines*,<sup>6</sup> the Georgia Court of Appeals held that the substantive law of Georgia applied to a wrongful death and survival action filed in Georgia but arising from a Florida tractor-trailer wreck.<sup>7</sup> Utilizing the public policy exception<sup>8</sup> to the traditional doctrine of *lex loci delicti*,<sup>9</sup> the court determined that the Florida Wrongful Death Act,<sup>10</sup> which specifically provides for the calculation of wrongful death damages based upon the value of the

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1. For analysis of Georgia trial practice and procedure law during the prior survey period, see Kate S. Cook et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 62 MERCER L. REV. 339 (2010).

2. Ga. H.R. Bill 24, Reg. Sess., 2011 Ga. Laws 99 (to be codified at O.C.G.A. tit. 24).

3. O.C.G.A. tit. 24 (2010).

4. Ga. H.R. Bill 24 § 2.

5. *Id.* § 1. Because of this effective date, any substantive changes to the Georgia Evidence Code will be addressed in the next survey period.

6. 309 Ga. App. 695, 710 S.E.2d 888 (2011).

7. *Id.* at 695, 698, 710 S.E.2d at 890-91.

8. Under this exception, a Georgia court will not apply another state's substantive law if that state's law contravenes public policy, notwithstanding the fact that the tort at issue occurred in that other state. *Id.* at 696, 710 S.E.2d at 890.

9. See *Dowis v. Mud Slingers, Inc.*, 279 Ga. 808, 809, 621 S.E.2d 413, 414 (2005) (stating that under the doctrine of *lex loci delicti* a tort action is governed by the substantive law of the state where the tort was committed).

10. FLA. STAT. §§ 768.16-.26 (2011), available at <http://www.leg.state.fl.us/Statutes/index>.

decendent's life to the statutory survivors and prohibits damages for pre-death physical and mental anguish,<sup>11</sup> differed sufficiently from Georgia law so as "to render the Florida Act in contravention of Georgia public policy."<sup>12</sup> The court of appeals held that "the trial court correctly ruled that Georgia rather than Florida substantive law applies to the wrongful death and survival actions."<sup>13</sup>

### B. Dismissals, Renewals, and Service of Process

In *Teel v. Wal-Mart Stores East LP*,<sup>14</sup> the United States District Court for the Middle District of Georgia, applying Georgia law, ruled that a plaintiff demonstrated "just enough" reasonable diligence to perfect service after the statute of limitations expired, despite her initial failure to ensure her process server was court-appointed and her use of ordinary United States mail to petition for an order appointing a special process server once the error was discovered.<sup>15</sup>

In *Kilgore v. Stewart*,<sup>16</sup> the plaintiff originally sued two parties, voluntarily dismissed them one at a time, and then filed a renewal action against both parties pursuant to Georgia's renewal statute.<sup>17</sup> The Georgia Court of Appeals held that the plaintiff's first dismissal was ineffective because the plaintiff failed to obtain a court order permitting voluntary dismissal of fewer than all of the parties to the action, as required by Georgia law.<sup>18</sup> Because a prerequisite to filing a valid renewal action is a valid dismissal of the original action, and because neither defendant was validly dismissed from the original action by the time the plaintiff filed the renewal action, the court reasoned that the renewal action should likewise have been dismissed.<sup>19</sup>

In *Ehrhardt v. Manuel*,<sup>20</sup> the court of appeals reemphasized that a plaintiff is entitled to file one, and only one, renewal action after the

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11. See FLA. STAT. § 768.21.

12. *Carroll*, 309 Ga. App. at 698, 710 S.E.2d at 891.

13. *Id.*

14. No. 4:10-CV-114 (CDL), 2010 WL 5462511 (M.D. Ga. Dec. 29, 2010).

15. *Id.* at \*2-3. In an interesting procedural footnote, the court explained that Georgia law required the court to review the issue of reasonable diligence de novo at the motion to dismiss stage, and that it was not required to convert the motion to dismiss into a motion for summary judgment. *Id.* at \*2 n.1. The court also observed that when a trial court treats the issue of reasonable diligence de novo, it makes factual determinations that should not be reversed on appeal absent an abuse of the trial court's discretion. *Id.*

16. 307 Ga. App. 374, 705 S.E.2d 209 (2010).

17. *Id.* at 374, 705 S.E.2d at 209; O.C.G.A. § 9-2-61(a) (2007).

18. *Kilgore*, 307 Ga. App. at 375, 705 S.E.2d at 209-10 (quoting *Rosales v. Davis*, 260 Ga. App. 709, 710, 580 S.E.2d 662, 663 (2003)); see also O.C.G.A. § 9-11-21 (2006).

19. *Kilgore*, 307 Ga. App. at 375, 705 S.E.2d at 210.

20. 306 Ga. App. 6, 700 S.E.2d 910 (2010).

expiration of the applicable statutes of limitation.<sup>21</sup> The plaintiffs in *Ehrhardt* timely filed suit, voluntarily dismissed their case, and then re-filed the suit after the running of the applicable statutes of limitation. After no written orders were filed in the renewal action for five years, the case was dismissed by operation of law.<sup>22</sup> The plaintiff sought to re-file again, arguing that the one-renewal limitation found in O.C.G.A. § 9-2-61<sup>23</sup> should not be applicable to cases filed after a dismissal pursuant to the “five-year rule.”<sup>24</sup> The court of appeals rejected the plaintiffs’ argument, holding that the plaintiffs “were only entitled to one renewal after the running of the statutes of limitation” despite the fact that the second dismissal was pursuant to the five-year rule.<sup>25</sup>

The court of appeals dealt a similar blow to the plaintiff in *Williams v. Patterson*.<sup>26</sup> In *Williams*, service on the original action took nearly a year. The plaintiff then dismissed the case and re-filed it shortly thereafter, but was again unable to timely effect service. The defendant filed an answer and a motion to dismiss, asserting, among other things, that the plaintiff’s action was barred by lack of service of process.<sup>27</sup> The court of appeals held that the plaintiff had not been reasonably diligent in effecting service, observing that there had been at least two

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21. *Id.* at 7, 700 S.E.2d at 912.

22. *Id.* at 6, 700 S.E.2d at 911.

23. O.C.G.A. § 9-2-61 (2007).

24. *Ehrhardt*, 306 Ga. App. at 7, 700 S.E.2d at 911. There are two versions of the five-year rule. See O.C.G.A. § 9-2-60(b)-(c) (2007); and O.C.G.A. § 9-11-41(e) (2006). The relevant portions of O.C.G.A. § 9-2-60 provide the following:

(b) Any action or other proceeding filed in any of the courts of this state in which no written order is taken for a period of five years shall automatically stand dismissed with costs to be taxed against the party plaintiff.

(c) When an action is dismissed under this Code section, if the plaintiff recommences the action within six months following the dismissal then the renewed action shall stand upon the same footing, as to limitation, with the original action.

O.C.G.A. § 9-2-60(b)-(c). O.C.G.A. § 9-11-41(e) provides the following:

Any action in which no written order is taken for a period of five years shall automatically stand dismissed, with costs to be taxed against the party plaintiff. For the purposes of this Code section, an order of continuance will be deemed an order. When an action is dismissed under this subsection, if the plaintiff recommences the action within six months following the dismissal then the renewed action shall stand upon the same footing, as to limitation, with the original action.

O.C.G.A. § 9-11-41(e).

25. *Ehrhardt*, 306 Ga. App. at 7, 700 S.E.2d at 912. The court further held that this result was mandated by prior precedent. See *id.* at 7, 700 S.E.2d at 911-12 (citing *White v. KFC Nat’l Mgmt. Co.*, 229 Ga. App. 73, 74, 493 S.E.2d 244, 246 (1997)).

26. 306 Ga. App. 624, 703 S.E.2d 74 (2010).

27. *Id.* at 625-26, 703 S.E.2d at 75-76.

lengthy periods during which the plaintiff made no attempt to perfect service despite being previously notified of the defendant's lack of service defense.<sup>28</sup> The court also rejected the argument that, pursuant to O.C.G.A. § 33-7-11(e),<sup>29</sup> the plaintiff should have been afforded an additional twelve months.<sup>30</sup> The court found that O.C.G.A. § 33-7-11(e) simply described "the amount of time that a plaintiff must continue diligent attempts to serve a defendant while proceeding with litigation against the plaintiff's own [uninsured motorist] carrier," and it did not "creat[e] an expansion of the time in which personal service accomplished outside the limitation period will relate back to the time of filing of plaintiff's complaint."<sup>31</sup>

However, in *Robinson v. Boyd*,<sup>32</sup> the Georgia Supreme Court reaffirmed its position that untimely service in an originally-filed action cannot serve as grounds for dismissal in a subsequent renewal action.<sup>33</sup> The court determined that the renewal statute was clear and that permitting the defendant to raise the defense of untimely service in the original action would "essentially ask [the court] to rewrite an unambiguous statute."<sup>34</sup>

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28. *Id.* at 627-28, 703 S.E.2d at 76-77.

29. O.C.G.A. § 33-7-11(e) (Supp. 2011).

30. *Williams*, 306 Ga. App. at 628-29, 703 S.E.2d at 78. O.C.G.A. § 33-7-11(e) authorizes service by publication for the purpose of obtaining a nominal judgment against a striking driver so that the injured party may proceed against his own uninsured motorist insurance carrier. O.C.G.A. § 33-7-11(e). In relevant part, O.C.G.A. § 33-7-11(e) provides the following:

In cases where the owner or operator of any vehicle causing injury or damage is known and either or both are named as defendants in any action for such injury or damages but the person resides out of the state, has departed from the state, cannot after due diligence be found within the state, or conceals himself to avoid the service of summons, and this fact shall appear by affidavit to the satisfaction of the judge of the court, and it shall appear either by affidavit or by a verified complaint on file that a claim exists against the owner or driver in respect to whom service is to be made and that he is a necessary or proper party to the action, the judge may grant an order that the service be made on the owner or driver by the publication of summons.

O.C.G.A. § 33-7-11(e).

31. *Williams*, 306 Ga. App. at 629, 703 S.E.2d at 78.

32. 288 Ga. 53, 701 S.E.2d 165 (2010).

33. *Id.* at 56, 701 S.E.2d at 168. The court in *Robinson* reaffirmed its holding in *Hobbs v. Arthur*, 264 Ga. 359, 360-61, 444 S.E.2d 322, 323 (1994) ("[I]nasmuch as diligence in perfecting service of process in an action properly refiled under [O.C.G.A.] § 9-2-61(a) must be measured from the time of filing the renewed suit, any delay in service in a valid first action is not available as an affirmative defense in the renewal action."). *Robinson*, 288 Ga. at 56, 701 S.E.2d at 168.

34. *Robinson*, 288 Ga. at 56, 701 S.E.2d at 168. The court likewise rejected defendant's arguments that the substantial delay of service in the original case constituted a due

C. *Statutes of Limitation and Statutes of Repose*

In a unanimous opinion, the Georgia Supreme Court reversed the court of appeals in *Newell Recycling of Atlanta, Inc. v. Jordan Jones & Goulding, Inc.*<sup>35</sup> and held that the six-year statute of limitations for written contracts,<sup>36</sup> rather than the four-year statute of limitations for oral or implied contracts,<sup>37</sup> applies where a claim is based on professional malpractice arising out of a written contract.<sup>38</sup> In *Newell*, the defendant designed a purportedly defective automobile shredding facility for the plaintiff, and the work for the facility was governed by a “Draft Scope of Work” document.<sup>39</sup> The plaintiff sued the defendant for breach of contract and professional malpractice within six years—but not within four years—of the defendant’s last purported negligent act or breach.<sup>40</sup> The defendant moved for summary judgment, arguing that the plaintiff’s claims were subject to the four-year statute of limitations for actions based upon an “implied promise or undertaking.”<sup>41</sup> The trial court denied the motion, ruling that a fact issue remained whether there was a written contract triggering the six-year statute of limitations. The court of appeals reversed the trial court, holding that the four-year statute of limitations applied, regardless of the written contract, because the plaintiff’s claims were essentially for the breach of an implied, not written, promise to perform professional services according to the applicable standard of care.<sup>42</sup>

The supreme court reversed, holding that “the threshold inquiry is to determine whether a written agreement actually exists between the parties such that any implied duties sued upon would have grown directly out of the existence of the written contract itself.”<sup>43</sup> If there is

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process violation and that the plaintiff’s action should be barred by the equitable doctrine of laches. *Id.* at 57-58, 701 S.E.2d at 168-69.

35. 288 Ga. 236, 703 S.E.2d 323 (2010).

36. See O.C.G.A. § 9-3-24 (2007) (“All actions upon simple contracts in writing shall be brought within six years after the same become due and payable.”).

37. See O.C.G.A. § 9-3-25 (2007) (“All actions upon open account, or for the breach of any contract not under the hand of the party sought to be charged, or upon any implied promise or undertaking shall be brought within four years after the right of action accrues.”).

38. *Newell Recycling*, 288 Ga. at 237, 703 S.E.2d at 325.

39. *Id.* at 236, 703 S.E.2d at 324.

40. *Id.*

41. *Id.*; O.C.G.A. § 9-3-25.

42. *Newell Recycling*, 288 Ga. at 236-37, 703 S.E.2d at 324-25; see also *Jordan Jones & Goulding, Inc. v. Newell Recycling of Atlanta, Inc.*, 299 Ga. App. 294, 298-99, 682 S.E.2d 666, 670 (2009), *rev’d*, 288 Ga. 236, 703 S.E.2d 323 (2010).

43. *Newell Recycling*, 288 Ga. at 237-38, 703 S.E.2d at 325.

a complete written contract, then the six-year statute of limitations applies “regardless of whether the alleged breach stems from the express terms of the agreement or duties that are implied in the agreement as a matter of law.”<sup>44</sup>

In *Deen v. Stevens*,<sup>45</sup> the supreme court rejected an equal protection constitutionality challenge to O.C.G.A. § 9-3-73(b),<sup>46</sup> which specifically exempts medical malpractice claims from the general tolling provisions for plaintiffs who are “legally incompetent because of mental retardation or mental illness.”<sup>47</sup> In finding that the statute survived rational basis scrutiny, the court closely tracked the reasoning of the United States Court of Appeals for the Eleventh Circuit in a related case.<sup>48</sup>

In a 4-3 decision, the supreme court held in *Rosenberg v. Falling Water, Inc.*<sup>49</sup> that when an injury occurs outside of the statute of repose period, a defendant cannot be equitably estopped from utilizing a statute of repose defense even when the plaintiff alleges a fraudulent concealment of a defect claim.<sup>50</sup> In *Rosenberg*, the plaintiff filed suit against a construction company for personal injuries arising out of a deck collapse.<sup>51</sup> The defendant moved for summary judgment based on the eight-year statute of repose<sup>52</sup> for personal injuries resulting from improvements on real property because the deck collapse and personal injuries occurred more than eight years after the defendant completed the deck.<sup>53</sup> The plaintiff argued that the defendant should be equitably

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44. *Id.* at 238, 703 S.E.2d at 326.

45. 287 Ga. 597, 698 S.E.2d 321 (2010).

46. *Id.* at 597, 698 S.E.2d at 322; O.C.G.A. § 9-3-73(b) (2007).

47. O.C.G.A. § 9-3-73(b); *see also* *Kumar v. Hall*, 262 Ga. 639, 643-44, 423 S.E.2d 653, 657 (1992) (holding that “mental retardation or mental illness” includes mental incompetence). Similarly, O.C.G.A. § 9-3-91 tolls the limitations period where a person suffers a disability after his or her claim accrues. O.C.G.A. § 9-3-91 (2007).

48. *Stevens*, 287 Ga. at 601, 698 S.E.2d at 324; *see Deen v. Egleston*, 597 F.3d 1223, 1238 (11th Cir. 2010). Although the Eleventh Circuit was considering the Equal Protection Clause under the United States Constitution, the Georgia Supreme Court could comfortably rely on its analysis “[b]ecause the protection provided in the Equal Protection Clause of the United States Constitution is coextensive with that provided in Art. I, Sec. I, Par. II of the Georgia Constitution of 1983, [courts] apply them as one.” *Stevens*, 287 Ga. at 601, 698 S.E.2d at 324 (quoting *Favorito v. Handel*, 285 Ga. 795, 797, 684 S.E.2d 257, 261 (2009)) (internal quotation marks omitted).

49. 289 Ga. 57, 709 S.E.2d 227 (2011).

50. *Id.* at 57, 709 S.E.2d at 228.

51. *Id.* at 58, 709 S.E.2d at 229.

52. *See* O.C.G.A. § 9-3-51(a) (2007).

53. *Rosenberg*, 289 Ga. at 58-59, 289 S.E.2d at 229.

estopped<sup>54</sup> from asserting the statute of repose defense because the defendant fraudulently concealed a defect in the deck construction.<sup>55</sup>

The majority held that the statute of repose is unassailable when the injury itself occurred outside of the statutory time period.<sup>56</sup> In so holding, the court distinguished *Rosenberg* from cases where the injury occurred during the period of liability, but the plaintiff was deterred from filing suit until after the statute of repose had run due to the defendant's fraudulent concealment.<sup>57</sup> In essence, the majority concluded that the plaintiff never had a cause of action because his injury occurred after the statute of repose had run; therefore, there was no cause of action for the defendant to fraudulently conceal.<sup>58</sup> Chief Justice Hunstein, in her dissent, argued that completely precluding equitable estoppel in cases such as this "subvert[ed] the purpose of the equitable estoppel doctrine by incentivizing fraud."<sup>59</sup>

In *Campbell v. Altec Industries, Inc.*,<sup>60</sup> the Georgia Supreme Court, on a certified question from the United States Court of Appeals for the Eleventh Circuit,<sup>61</sup> clarified the time at which the ten-year statute of repose<sup>62</sup> begins to run in product liability actions.<sup>63</sup> The Eleventh Circuit certified the following question to the Georgia Supreme Court:

In a strict liability or negligence action, does the statute of repose in [O.C.G.A.] § 51-1-11<sup>64</sup> begin running when (1) a component part

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54. See O.C.G.A. § 24-4-27 (2010).

55. *Rosenberg*, 289 Ga. at 60, 709 S.E.2d at 230.

56. *Id.* at 61, 709 S.E.2d at 231.

57. *Id.* at 60, 709 S.E.2d at 230; see *Esener v. Kinsey*, 240 Ga. App. 21, 21-22, 522 S.E.2d 522, 523 (1999); *Hill v. Fordham*, 186 Ga. App. 354, 357, 367 S.E.2d 128, 132 (1988).

58. *Rosenberg*, 289 Ga. at 60, 709 S.E.2d at 230.

59. *Id.* at 66, 709 S.E.2d at 234 (Hunstein, C.J., dissenting) (citing *Hill*, 186 Ga. App. at 357, 367 S.E.2d at 131-32). Justice Hunstein wrote the following:

One who fraudulently conceals his or her negligence and thereby deters another from preventing or avoiding an injury in the first place is, if anything, more culpable than one who fraudulently conceals the cause of an injury after the injury occurs. Likewise, the rationale for equitable estoppel applies with equal if not greater force when both the delayed but preventable injury *and* the resultant late filing of an action are attributable to the defendant's alleged misconduct.

*Id.* at 67, 709 S.E.2d at 234.

60. 288 Ga. 535, 707 S.E.2d 48 (2011) [hereinafter *Campbell II*].

61. See *Campbell v. Altec Indus., Inc.*, 605 F.3d 839, 842 (11th Cir. 2010) [hereinafter *Campbell I*].

62. O.C.G.A. § 51-1-11(b)(2) (2011).

63. *Campbell II*, 288 Ga. at 535, 707 S.E.2d at 48-49.

64. O.C.G.A. § 51-1-11(b)(2) (2011). The statute of repose provision provides that "[n]o action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury." *Id.*



causing an injury is assembled or tested, (2) a finished product, which includes an injuring component part, is assembled, or (3) a finished product, which includes an injuring component part, is delivered to its initial purchaser?<sup>65</sup>

The supreme court provided a straightforward answer: “the statute of repose . . . begins to run when a finished product is sold as new to the intended consumer who is to receive the product . . . .”<sup>66</sup> In so holding, the Georgia Court of Appeals previous ruling in *Johnson v. Ford Motor Co.*<sup>67</sup> was overruled by the supreme court.<sup>68</sup>

Generally speaking, parties may contract for limitations periods in addition to, or in lieu of, statutory limitations periods.<sup>69</sup> In *Thornton v. Georgia Farm Bureau Mutual Insurance Co.*,<sup>70</sup> the Georgia Supreme Court considered one such contractual limitations period in a homeowner’s insurance policy that required suits under the policy to be “started one year after the date of the loss,” but also provided that a loss was not payable until “60 days after [the insurance company] receive[d] [the insured’s] proof of loss . . . .”<sup>71</sup> The insurance company ultimately denied the plaintiff’s claim for fire damage. The plaintiff filed suit more than one year after the date of the fire, contending the suit was timely because the one-year limitations period should be tolled during the sixty-day period in which a claim is nonpayable under the terms of the insurance policy. The trial court granted summary judgment to the defendant.<sup>72</sup> Both the court of appeals and the supreme court affirmed.<sup>73</sup> In affirming the court of appeals, the supreme court held that the insurance policy was unambiguous; the limitations period began to run on “the date of the loss,” not on the date that the claim became due and payable.<sup>74</sup> The date of the loss was clearly the date of the fire.<sup>75</sup> The supreme court further rejected the plaintiff’s arguments that failing to toll the limitations period during the sixty-day loss payment period was unfair and that the two provisions in the insurance policy amounted to an ambiguity that should be construed in favor of the insured.<sup>76</sup>

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65. *Campbell I*, 605 F.3d at 842.

66. *Campbell II*, 288 Ga. at 535, 707 S.E.2d at 48-49.

67. 281 Ga. App. 166, 171, 637 S.E.2d 202, 206 (2006).

68. *Campbell II*, 288 Ga. at 537, 707 S.E.2d at 50.

69. *Order of United Commercial v. Wolfe*, 331 U.S. 586, 608 (1947).

70. 287 Ga. 379, 695 S.E.2d 642 (2010).

71. *Id.* at 380, 695 S.E.2d at 643.

72. *Id.*

73. *Id.*

74. *Id.* at 381, 695 S.E.2d at 644.

75. *Id.*

76. *Id.* at 383, 384-85, 695 S.E.2d at 645-46.

#### D. Tort Issues

Courts construing Georgia law made several significant premises liability decisions during the survey period. In *Kent v. Callaway Gardens Resort, Inc.*,<sup>77</sup> the United States District Court for the Middle District of Georgia, interpreting Georgia law, determined that summary judgment was inappropriate in a slip and fall case that occurred on a wet floor at the Callaway Gardens butterfly center.<sup>78</sup> The court first held that genuine issues of material fact existed as to the defendant's constructive knowledge of the hazardous condition—the plaintiff produced evidence that the defendant had not established reasonable inspection procedures and that the hazard would have been discovered during a reasonable inspection.<sup>79</sup> The court then found that the plaintiff produced evidence sufficient to show a genuine question of fact whether the allegedly hazardous condition actually caused the child's fall.<sup>80</sup> In so finding, the court emphasized the role of the jury in determining causation, noting that the “[p]laintiff’s evidence on causation, while certainly disputed, does not rise to the level of speculation such that her claim should be decided by a lone judge rather than a jury of her peers.”<sup>81</sup> The district court found that “the Georgia Supreme Court . . . intended for these issues to be resolved by a jury and not by summary adjudication.”<sup>82</sup>

The Georgia Court of Appeals reached the opposite result in *Kane v. Landscape Structures, Inc.*,<sup>83</sup> affirming a grant of summary judgment to the defendant manufacturer.<sup>84</sup> In *Kane*, a nine-year-old boy was seriously injured when he fell from the top of a piece of playground equipment manufactured by the defendant.<sup>85</sup> The court of appeals held that the boy “appreciated the obvious risk of falling that is associated with climbing to high places, and he voluntarily chose to assume the risk.”<sup>86</sup> As evidence that the boy understood and voluntarily assumed

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77. No. 4:09-CV-70 (CDL), 2010 WL 2528321 (M.D. Ga. June 18, 2010).

78. *Id.* at \*1.

79. *Id.* at \*3-4. The court also found that the defendant failed to point the court to any evidence establishing the negligence of the child who fell and was injured. *Id.* at \*4.

80. *Id.* at \*5.

81. *Id.* The plaintiff produced evidence that the child's pants were wet immediately after she fell, and an affidavit by the injured child stated that the floor was slippery and wet where she fell. *Id.*

82. *Id.* at \*6.

83. 309 Ga. App. 14, 709 S.E.2d 876 (2011).

84. *Id.* at 20, 709 S.E.2d at 881.

85. *Id.* at 14, 709 S.E.2d at 877.

86. *Id.*

the risk of climbing on the equipment, the court noted, among other things, that the boy testified his mother warned him against climbing things, and he knew the particular piece of playground equipment from which he fell was not intended for climbing.<sup>87</sup> Judge Barnes dissented and argued that, for the assumption-of-the-risk defense to apply in this case, the child must have “had a particularized and subjective awareness of the risk involved in *climbing* on this playground equipment,” rather than simply an understanding of the general risk of falling.<sup>88</sup> Judge Barnes concluded that whether the child “appreciated the danger in climbing the [playground equipment] is a question of fact for a jury to determine.”<sup>89</sup>

In *Freeman v. Eichholz*,<sup>90</sup> the court of appeals affirmed a grant of summary judgment in favor of the defendant attorney in a legal malpractice action, concluding that the plaintiff could not have prevailed in her underlying premises liability claim.<sup>91</sup> First, the court was required to determine whether the plaintiff, who was injured while visiting a prison inmate, was an invitee or a licensee.<sup>92</sup> In resolving this issue of apparent first impression, the court held that, because inmate visitors and the state penal system mutually benefit from prisoner visitation, the plaintiff should be considered an invitee rather than a licensee.<sup>93</sup> The court also held, however, that although the trial court incorrectly found that the plaintiff was a licensee, the trial court correctly found that the defendant did not breach its duty of ordinary care to ensure the plaintiff’s safety.<sup>94</sup> The court held that no “evidence [existed] from which a jury could infer that the defendants in the underlying suit had superior knowledge of the hazard” about which the plaintiff complained.<sup>95</sup> Because the plaintiff could not have prevailed in the underlying action, she was consequently unable to show that her attorney’s actions were the proximate cause of her claimed injuries.<sup>96</sup>

The plaintiff in *Morris v. Harley Davidson Motor Co.*<sup>97</sup> was seriously injured, and his wife was killed, when a tire on the motorcycle they were

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87. *Id.* at 15-16, 709 S.E.2d at 878.

88. *Id.* at 23, 709 S.E.2d at 883 (Barnes, P.J., dissenting).

89. *Id.*

90. 308 Ga. App. 18, 705 S.E.2d 919 (2011).

91. *Id.* at 18, 705 S.E.2d at 921.

92. *See id.* at 20-21, 705 S.E.2d at 922-23.

93. *Id.* at 21-22, 705 S.E.2d at 923.

94. *Id.* at 22, 705 S.E.2d at 923.

95. *Id.* at 23, 705 S.E.2d at 924.

96. *Id.* at 23-24, 705 S.E.2d at 924.

97. No. 3:09-CV-74 (CDL), 2010 WL 2723079 (M.D. Ga. July 7, 2010).

riding failed.<sup>98</sup> The plaintiff exceeded the motorcycle's "Gross Vehicle Weight Rating" and was also pulling a trailer—both practices against which the owner's manual warned; however, the plaintiff admitted he never read the manual and never saw the warnings on the motorcycle itself.<sup>99</sup> In its opinion, the court of appeals distinguished between two types of failure to warn cases under Georgia law, stating that a plaintiff may allege that a manufacturer "(1) . . . fail[ed] to adequately communicate the warning to the ultimate user or (2) . . . fail[ed] to provide an adequate warning of the product's potential risks."<sup>100</sup> Where, as in this case, the relevant question is whether the manufacturer failed to adequately and reasonably communicate the warning to the user, the court held the fact that the user did not see or read the warning does not bar the user's recovery.<sup>101</sup> The court ultimately concluded that genuine issues of material fact existed as to both "the adequacy and reasonableness of Harley-Davidson's means and method of conveying the warnings" and proximate causation.<sup>102</sup>

The court of appeals also rendered a decision sharply limiting the scope of recovery pursuant to the Georgia Dram Shop Act (GDSA)<sup>103</sup> in *Flores v. Exprezit! Stores 98-Georgia, LLC*.<sup>104</sup> This decision was reversed by the Georgia Supreme Court in July 2011.<sup>105</sup> However, the court of appeals decision does continue to offer some valuable insight into the court's approach to the Dram Shop Act generally.

In *Flores*, the court of appeals held that the GDSA did not apply to sales of closed containers of alcohol by convenience stores or other retailers of packaged alcohol.<sup>106</sup> The GDSA imposes liability on any "person . . . who knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that

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98. *Id.* at \*1.

99. *Id.* at \*2.

100. *Id.* at \*3 (quoting *Wilson Foods Corp. v. Turner*, 218 Ga. App. 74, 75, 460 S.E.2d 532, 534 (1995)).

101. *Id.* The court again emphasized the importance of having a jury determine disputed issues in this type of a failure to warn case, such as "whether or not the manufacturer was negligent in failing to place a warning in such position, color and size print or to use symbols which would call the user's attention to the warning or cause the user to be more likely to read the label and warning than not." *Id.* (quoting *Camden Oil Co. v. Jackson*, 270 Ga. App. 837, 841, 609 S.E.2d 356, 359 (2004)) (internal quotation marks omitted).

102. *Id.* at \*4.

103. O.C.G.A. § 51-1-40 (2000).

104. 304 Ga. App. 333, 696 S.E.2d 125 (2010), *rev'd*, 289 Ga. 466, 713 S.E.2d 368 (2011).

105. *Flores v. Exprezit! Stores 98-Georgia, LLC*, 289 Ga. 466, 713 S.E.2d 368 (2011).

106. *Flores*, 304 Ga. App. at 333, 696 S.E.2d at 126.

such person will soon be driving a motor vehicle . . . .”<sup>107</sup> Despite this “plain and unambiguous” language, the court of appeals found that applying the GDSA to sellers of packaged alcohol would be “wholly impracticable.”<sup>108</sup> The court reasoned that juries would be required to speculate about factors stipulated in the GDSA, such as when and where the purchaser of the alcohol would consume it, and whether the seller of the alcohol would have any basis for knowing the purchaser would be driving soon.<sup>109</sup> Because such “speculation or guesswork . . . is an improper basis for imposing liability,” the court simply held that the Georgia General Assembly did not intend the GDSA to apply to packaged alcohol sales, even where sufficient evidence existed as to each element of the GDSA.<sup>110</sup>

In *Flores*, the court of appeals assumed, without deciding, that the plaintiffs had raised evidence “sufficient to raise factual issues under the GDSA.”<sup>111</sup> In its reversal of *Flores*, the supreme court determined that because the GDSA “uses the terms ‘sells, furnishes, or serves’ alcohol in the disjunctive, it is clear that it was intended to encompass the sale of an alcoholic beverage at places other than the proverbial dram shop.”<sup>112</sup> The court also noted that the “upshot of the [c]ourt of [a]ppeals’ decision” was that “a convenience store cannot be held liable for selling closed or packaged alcoholic beverages to a noticeably intoxicated adult under any set of circumstances.”<sup>113</sup> The supreme court squarely rejected this notion in favor of the concept that each GDSA case “must rise or fall on its own facts.”<sup>114</sup>

#### *E. Damages and Remedies*

In *Cavalier Convenience, Inc. v. Sarvis*,<sup>115</sup> the court of appeals concluded that O.C.G.A. § 51-12-33,<sup>116</sup> as amended in 2005,<sup>117</sup> requires the trier of fact to apportion its award of damages among multiple liable persons, even if the plaintiff bears no fault for the injury or

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107. O.C.G.A. § 51-1-40(b).

108. *Flores*, 304 Ga. App. at 336, 696 S.E.2d at 127.

109. *Id.* at 336, 696 S.E.2d at 127-28; O.C.G.A. § 51-1-40(b).

110. *Flores*, 304 Ga. App. at 336, 696 S.E.2d at 128.

111. *Id.* at 334, 696 S.E.2d at 126.

112. 289 Ga. at 467, 713 S.E.2d at 369; O.C.G.A. § 51-1-40(b).

113. 289 Ga. at 468, 713 S.E.2d at 370.

114. *Id.* at 469, 713 S.E.2d at 371.

115. 305 Ga. App. 141, 699 S.E.2d 104 (2010), *cert. granted*.

116. O.C.G.A. § 51-12-33 (Supp. 2011).

117. See Ga. S. Bill 3, Reg. Sess., 2005 Ga. Laws 1 (codified as amended at O.C.G.A. § 51-12-33 (Supp. 2011)).

damages claimed.<sup>118</sup> The plaintiff contended that the statute only mandates apportionment when the plaintiff is alleged to have been at fault to some degree for the injuries, and apportionment is authorized only after a reduction equal to the plaintiff's fault.<sup>119</sup> The court disagreed.<sup>120</sup> Focusing on the plain language of the statute, the court held that when "damages are to be awarded in an action brought against more than one person for injury to person or property," whether or not the plaintiff is responsible to some degree for the injury, "the trier of fact 'shall . . . apportion its award of damages among the persons who are liable according to the percentage of fault of each person.'"<sup>121</sup> Accordingly, for now, apportionment among defendants is required even where it is undisputed that the plaintiff is not at fault.<sup>122</sup>

In *Barnett v. Farmer*<sup>123</sup> the court of appeals required apportionment of damages to an immune party as a matter of physical precedent.<sup>124</sup> In this case, a husband and wife brought claims for personal injury arising out of an automobile collision.<sup>125</sup> The trial court declined to charge the jury to apportion damages to the husband-driver if the jury found that the negligence of both the defendant and the husband contributed to the wife's injuries.<sup>126</sup> The court of appeals reversed the trial court's decision and held that O.C.G.A. § 51-12-33 requires a jury instruction on the apportionment of damages to the husband because there was evidence from which the jury could conclude the husband was negligent.<sup>127</sup> The court reasoned that apportionment did not violate interspousal immunity because it "in no way requires [the wife] to file suit against her husband, but instead, precludes her from recovering from [the defendant] that portion of her damages, if any, that a trier of fact concludes resulted from the negligence of her husband."<sup>128</sup>

Finally, in *SRB Investment Services LLP v. Branch Banking & Trust Co.*,<sup>129</sup> the supreme court clarified that all four factors set forth by the

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118. *Cavalier*, 305 Ga. App. at 145, 699 S.E.2d at 107.

119. *Id.* at 144, 699 S.E.2d at 107.

120. *Id.* at 145, 699 S.E.2d at 107.

121. *Id.*; O.C.G.A. § 51-12-33(b).

122. *See Cavalier*, 305 Ga. App. at 145, 699 S.E.2d at 107. The Georgia Supreme Court has granted certiorari but has not declared an opinion on this issue. *Id.* at 141, 699 S.E.2d at 104.

123. 308 Ga. App. 358, 707 S.E.2d 570 (2011).

124. *Id.* at 362, 707 S.E.2d at 573-74; *see* GA. APP. CT. R. 33(a) (requiring that decisions in which judges do not concur fully are physical, not binding, precedent).

125. *Barnett*, 308 Ga. App. at 358, 707 S.E.2d at 571.

126. *Id.* at 360, 707 S.E.2d at 573.

127. *Id.* at 362, 707 S.E.2d at 573-74.

128. *Id.* at 362, 707 S.E.2d at 574.

129. 289 Ga. 1, 709 S.E.2d 267 (2011).

court in *Bishop v. Patton*<sup>130</sup> need not be proven by a party seeking an interlocutory injunction.<sup>131</sup>

#### F. Attorney Fees

In *O'Connor v. Bielski*,<sup>132</sup> the supreme court disapproved of the 1965 decision in *Taylor v. Sharpe*<sup>133</sup> and held that a landowner was not entitled to an award of attorney fees in a partition action against his former fiancée where the action sought neither to preserve nor enhance their common property.<sup>134</sup> Georgia courts have recognized a narrow exception to the rule that attorney fees may only be awarded as provided by statute or contract.<sup>135</sup> Pursuant to this narrow exception, “a court of equity may award attorney fees to a party who at his own expense has maintained a successful suit for the protection or increase of common property or a common fund . . . .”<sup>136</sup> However, “this exception applies only where the [legal] proceedings are deemed to have been conducted entirely for the common benefit of all.”<sup>137</sup> In addition, this “allowance [of attorney fees] will not be made in favor of . . . parties who in good faith interpose a [substantial] real contest against other parties to the partition action.”<sup>138</sup> In *O'Connor*, the landowner’s position was “directly adverse” to his former fiancée’s, and the landowner “sought neither to preserve nor enhance their common property” through the partition action.<sup>139</sup> Accordingly, the landowner was not entitled to attorney fees.<sup>140</sup>

In *PN Express, Inc. v. Zegel*,<sup>141</sup> the court of appeals held that when a defendant’s liability is vicarious, Georgia’s apportionment statute<sup>142</sup> does not apply between the defendant and the agent–employee tortfeasor.<sup>143</sup> The court reached this result because “[g]enerally, where a party’s liability is solely vicarious, that party and the actively-

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130. 288 Ga. 600, 604, 706 S.E.2d 634, 638-39 (2011).

131. *SRB Inv. Servs.*, 289 Ga. at 5 & n.7, 709 S.E.2d at 271 & n.7.

132. 288 Ga. 81, 701 S.E.2d 856 (2010).

133. 221 Ga. 282, 144 S.E.2d 390 (1965).

134. *O'Conner*, 288 Ga. at 83-84 & n.2, 701 S.E.2d at 858 & n.2.

135. *Id.* at 83, 701 S.E.2d at 858.

136. *Id.* (citations and internal quotation marks omitted).

137. *Id.* (citations, punctuation, and internal quotation marks omitted).

138. *Id.* (citations and internal quotation marks omitted).

139. *Id.* at 84, 701 S.E.2d at 858.

140. *Id.*

141. 304 Ga. App. 672, 697 S.E.2d 226 (2010).

142. O.C.G.A. § 51-12-33.

143. *PN Express*, 304 Ga. App. at 680, 697 S.E.2d at 233.

negligent tortfeasor are regarded as a single tortfeasor.”<sup>144</sup> For that reason, where the defendant trucking company was allegedly liable for the acts of the truck driver, the apportionment statute did not require the jury to apportion fault between the trucking company and the truck driver.<sup>145</sup>

### G. Jury and Trial

In *Anthony v. Gator Cochran Construction, Inc.*,<sup>146</sup> the supreme court held that neither a party’s failure to object to a verdict form on the face of which the potential for a contradictory verdict was apparent, nor a party’s failure to object to a contradictory verdict upon the return of that verdict, waived the party’s right to challenge the verdict as “contradictory and repugnant” on appeal.<sup>147</sup> The court observed that “a verdict that is contradictory and repugnant is void, and no valid judgment can be entered thereon.”<sup>148</sup> In reaching this result, the court overruled two decisions from the court of appeals:<sup>149</sup> *Brannan Auto Parts v. Raymark Industries*<sup>150</sup> and *Ford Motor Co. v. Tippins*.<sup>151</sup>

In *Kesterson v. Jarrett*,<sup>152</sup> the court of appeals held that a trial court, under specific circumstances, has the discretion to “limit a severely injured plaintiff’s presence during the liability phase of a bifurcated trial . . . .”<sup>153</sup> Specifically, the court held the following:

a trial court has the discretion to limit a severely injured plaintiff’s presence during the liability phase of a bifurcated trial when, after an evidentiary hearing upon a written motion and after an opportunity to observe the plaintiff, the court makes the following factual findings in a written order: (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial likelihood that the plaintiff’s presence in the courtroom will cause the jury to be biased toward the plaintiff based on sympathy rather than the evidence such that the jury would be prevented or substantially impaired from performing its duty; (4) the plaintiff is unable to communicate with counsel or to participate in the trial in any

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144. *Id.*

145. *Id.*

146. 288 Ga. 79, 702 S.E.2d 139 (2010).

147. *Id.* at 80, 702 S.E.2d at 140-41.

148. *Id.* at 79, 702 S.E.2d at 140 (citation, punctuation, and internal quotation marks omitted).

149. *Id.* at 80, 702 S.E.2d at 141.

150. 183 Ga. App. 82, 357 S.E.2d 807 (1987).

151. 225 Ga. App. 128, 483 S.E.2d 121 (1997), *cert. granted*.

152. 307 Ga. App. 244, 704 S.E.2d 878 (2010).

153. *Id.* at 250, 704 S.E.2d at 884.



meaningful way; and (5) the plaintiff is unable to comprehend the proceedings.<sup>154</sup>

The court acknowledged that “[a] party’s right to be present during trial is a cherished right, one which must be diligently safeguarded,” reassuring that due process protects that right.<sup>155</sup>

However, the court reasoned that, under the above circumstances, “the plaintiff’s presence is not truly an exercise of his or her right to be present, because the plaintiff is incapable of making . . . a conscious choice . . . . [T]he plaintiff functions almost as an exhibit, as a piece of evidence.”<sup>156</sup> For that reason, the court held that the trial court had discretion to exclude a plaintiff from the courtroom during the trial’s liability phase because the plaintiff had a “profoundly limited cognitive function” and was not even “able to respond to yes or no questions with an eyeblink.”<sup>157</sup>

#### H. Discovery, Evidence, and Testimony

In *Baker v. Wellstar Health System, Inc.*,<sup>158</sup> the supreme court held that the Health Insurance Portability and Accountability Act of 1996,<sup>159</sup> which preempts Georgia’s procedural requirements for ex parte contact between defense counsel and a litigant’s treating physicians,<sup>160</sup> does not extend to preempt the substantive right of medical privacy conferred by Georgia law.<sup>161</sup> Such privacy protects a litigant from opposing counsel’s unfettered ex parte contact with an unknown array of the litigant’s treating physicians.<sup>162</sup> Therefore, any qualified protective order entered by a trial court allowing for such ex parte contact

should state with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting

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154. *Id.* (footnote omitted).

155. *Id.* at 251, 704 S.E.2d at 884-85.

156. *Id.* at 250, 704 S.E.2d at 884.

157. *Id.* at 246, 250, 704 S.E.2d at 881, 883-84 (punctuation and internal quotation marks omitted).

158. 288 Ga. 336, 703 S.E.2d 601 (2010).

159. Pub. L. No. 104-91, 110 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

160. *See* *Moreland v. Austin*, 284 Ga. 730, 733, 670 S.E.2d 68, 71 (2008).

161. *Baker*, 288 Ga. at 338, 703 S.E.2d at 604.

162. *See id.*

defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary . . . . In addition, . . . trial courts should consider whether the circumstances . . . warrant requiring defense counsel to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, requiring the transcription of the interview by a court reporter at the patient-plaintiff's request.<sup>163</sup>

In *Walker v. Cromartie*,<sup>164</sup> appellants challenged, in part, the constitutionality of the expert affidavit requirement of O.C.G.A. § 9-11-9.1.<sup>165</sup> The challenge, which was based on the statute's purported violation of the United States Constitution's Equal Protection Clause<sup>166</sup> and Due Process Clause,<sup>167</sup> and the Georgia Constitution's separation of powers clause<sup>168</sup> and uniformity clause,<sup>169</sup> was rejected by the supreme court.<sup>170</sup>

### I. Appellate Issues

The case of *Cooper v. Spotts*<sup>171</sup> resolved a conflict in the caselaw regarding a trial court's jurisdiction to rule on a motion for new trial when an application or appeal has been filed and the appellate court's jurisdiction to consider an appeal while a motion for new trial is pending.<sup>172</sup> Overruling *Department of Human Resources v. Holland*,<sup>173</sup> the court of appeals held that, when a motion for new trial is pending, the trial court is not divested of jurisdiction to rule on that motion by the filing of a discretionary application, and likewise, the appellate court has no jurisdiction to consider an appeal until the trial court has disposed of the motion.<sup>174</sup>

In *Expedia, Inc. v. City of Columbus*,<sup>175</sup> the defendant attempted to directly appeal a trial court's discovery order by arguing, inter alia, that it was immediately reviewable under the collateral order doctrine.<sup>176</sup>

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163. *Id.* at 339-40, 703 S.E.2d at 605.

164. 287 Ga. 511, 696 S.E.2d 654 (2010).

165. *Id.* at 511, 696 S.E.2d at 656; O.C.G.A. § 9-11-9.1 (2011).

166. U.S. CONST. amend. XIV.

167. U.S. CONST. amend V.

168. GA. CONST. art. I, § 2, para. 3.

169. GA. CONST. art. III, § 6, para. 4(a).

170. *Walker*, 287 Ga. at 512-13, 696 S.E.2d at 657.

171. 309 Ga. App. 361, 710 S.E.2d 159 (2011).

172. *See id.* at 364, 710 S.E.2d at 161.

173. 236 Ga. App. 273, 511 S.E.2d 628 (1999).

174. *Cooper*, 309 Ga. App. at 364, 710 S.E.2d at 161.

175. 305 Ga. App. 450, 699 S.E.2d 600 (2010).

176. *Id.* at 452, 699 S.E.2d at 602.

The collateral order doctrine “permits appeals from a small category of decisions ‘that are [(i)] conclusive, [(ii)] that resolve important questions separate from the merits, and [(iii)] that are effectively unreviewable on appeal from the final judgment in the underlying action.’”<sup>177</sup> The court of appeals adopted the United States Supreme Court’s reasoning from *Mohawk Industries v. Carpenter*,<sup>178</sup> and held that discovery orders failed to meet the final prong in the collateral order test because there are a number of alternative methods of obtaining review of discovery orders, and because deferring review of a discovery order until after final judgment in a case would not meaningfully harm the policy objective of full and frank communications between attorneys and their clients.<sup>179</sup>

### J. Immunity / Bars to Action

The Georgia Supreme Court held, in *Schorr v. Countrywide Home Loans, Inc.*,<sup>180</sup> that, in a class action, satisfaction by the representative plaintiffs of a statutory presuit requirement to make a written demand for liquidated damages constitutes satisfaction of that requirement on behalf of all class members.<sup>181</sup> The general rule, articulated in *Barnes v. City of Atlanta*,<sup>182</sup> allows a class representative to satisfy preconditions for suit on behalf of the entire class.<sup>183</sup> In *Barnes*, the court emphasized that the plaintiffs’ satisfaction of the pre-suit requirement was sufficient to put the defendant on notice of its potential class action liability.<sup>184</sup> Likewise, in *Schorr*, the named plaintiffs’ individual demands to Countrywide for it to pay them the statutorily mandated \$500 in liquidated damages was sufficient to put Countrywide on notice of its potential class action liability for all similarly situated claimants.<sup>185</sup>

Under *Schorr*, a class representative may generally satisfy any presuit condition on behalf of all class members.<sup>186</sup> However, exceptions to that rule may exist where there are “genuinely unique statutory requirements,” such as where the statute “prohibits [the] utilization of a class action, [or] expressly requires individual [satisfaction of the precondition

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177. *Id.* (alteration in original) (quoting *Swint v. Chambers Cnty. Comm.*, 514 U.S. 35, 42 (1995)).

178. *See* 130 S. Ct. 599, 606-07 (2009).

179. *Expedia*, 305 Ga. App. at 453, 699 S.E.2d at 603.

180. 287 Ga. 570, 697 S.E.2d 827 (2010).

181. *Id.* at 573, 697 S.E.2d at 829.

182. 281 Ga. 256, 637 S.E.2d 4 (2006).

183. *Id.* at 258, 637 S.E.2d at 6; *Schorr*, 287 Ga. at 573, 697 S.E.2d at 829.

184. 281 Ga. at 257-59, 637 S.E.2d at 6.

185. 287 Ga. at 572, 637 S.E.2d at 829.

186. *Id.* at 573, 697 S.E.2d at 829.

for suit].<sup>187</sup> Over a dissenting opinion, the majority found that the statute at issue involved no such exceptions.<sup>188</sup>

The court of appeals expanded access to the courts and eliminated the wasteful pursuit of likely futile administrative remedies in *Georgia Society of Ambulatory Surgery Centers v. Georgia Department of Community Health*,<sup>189</sup> which involved Georgia Society of Ambulatory Surgery Centers's (GSASC) challenge to the Georgia Department of Community Health's (DCH) attempt to collect information from surgery centers beyond what was allowed by law.<sup>190</sup> The DCH sought dismissal on the ground that GSASC had not exhausted its administrative remedies because the surgery centers were entitled to an administrative hearing under the Administrative Procedures Act<sup>191</sup> and an appeal of any adverse decision to the Commissioner of the DCH.<sup>192</sup> The court of appeals held, however, that GSASC's undisputed failure to exhaust available administrative remedies did not preclude judicial review of the agency's action because (1) resorting to the available remedies would be futile, and (2) exhaustion is not required where the plaintiff challenges the agency's authority or power to act.<sup>193</sup> In support of its determination of futility, the court reasoned that it was "highly implausible" that the Commissioner would abandon his position that the agency had power to seek the information at issue, conclude that the agency's conduct was illegal, and find for the surgery centers.<sup>194</sup> Although an impartial administrative law judge would preside over the initial administrative hearing, the Commissioner would owe that judge's decision no deference in his review of an appeal taken from the administrative hearing.<sup>195</sup>

The court of appeals, in *McCobb v. Clayton County*,<sup>196</sup> reversed the trial court's dismissal on the ground of sovereign immunity where a plaintiff alleged the following: (1) the county police officer undertook a police chase in reckless disregard for proper law enforcement procedures, thereby causing the decedent to run off the road and hit a tree; and (2)

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187. *Id.* (quoting *Barnes*, 281 Ga. at 258, 637 S.E.2d at 6) (internal quotation marks omitted).

188. *Id.*

189. 309 Ga. App. 31, 710 S.E.2d 183 (2011) [hereinafter *GSASC*].

190. *Id.* at 31, 710 S.E.2d at 184.

191. O.C.G.A. tit. 50, ch. 13, art. 1 (2009 & Supp. 2011).

192. *GSASC*, 309 Ga. App. at 37, 710 S.E.2d at 188; O.C.G.A. §§ 50-13-13(a)(1), -17(a) (2009).

193. *GSASC*, 309 Ga. App. at 37, 710 S.E.2d at 188-89.

194. *Id.* at 38, 710 S.E.2d at 189.

195. *Id.* at 39, 710 S.E.2d at 189-90.

196. 309 Ga. App. 217, 710 S.E.2d 207 (2011).

under O.C.G.A. § 33-24-51,<sup>197</sup> the county's sovereign immunity was waived up to the amount of its liability insurance for any injuries arising out of the use of a motor vehicle.<sup>198</sup> In so doing, the court rejected dicta from *Peeples v. City of Atlanta*<sup>199</sup> that suggested an injury does not arise out of the officer's use of a motor vehicle unless the officer's vehicle physically contacts the suspect's vehicle.<sup>200</sup> The court also held that, although O.C.G.A. §§ 36-92-1 to -5<sup>201</sup> specifically provide for the waiver of sovereign immunity for a local government officer's negligence, a county's sovereign immunity is waived under O.C.G.A. § 40-6-6(d)<sup>202</sup> for an officer's reckless disregard for proper law enforcement procedures when engaging in a police chase.<sup>203</sup>

In *Morgan v. Horton*,<sup>204</sup> the court of appeals held that O.C.G.A. § 12-6-148<sup>205</sup> conferred immunity to a landowner for a motor vehicle collision purportedly caused by excessive smoke from a prescribed land burn.<sup>206</sup> The landowner relied entirely upon a local forestry service office's chief ranger, who had more than thirty years of experience and was certified to conduct and supervise prescribed burns.<sup>207</sup> Except for several brief periods, the ranger monitored the fire while on site and ensured that it never left the burn area.<sup>208</sup> Since the ranger was experienced in conducting controlled burns and closely monitored the fire, the court held that, pursuant to O.C.G.A. § 12-6-148, the landowner was protected from liability.<sup>209</sup>

#### K. Insurance

In *State Farm Mutual Insurance Co. v. Adams*,<sup>210</sup> the supreme court held that when an uninsured motorist (UM) insurer is liable up to policy limits for the amount of the insured's damages minus other "available coverages,"<sup>211</sup> and when the liability insurer devotes a portion of its

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197. O.C.G.A. § 33-24-51 (2005).

198. *McCobb*, 309 Ga. App. at 218, 710 S.E.2d at 209-10.

199. 189 Ga. App. 888, 377 S.E.2d 889 (1989).

200. *McCobb*, 309 Ga. App. at 219, 710 S.E.2d at 210; see *Peeples*, 189 Ga. App. at 890, 377 S.E.2d at 892-93.

201. O.C.G.A. §§ 36-92-1 to -5 (2006).

202. O.C.G.A. § 40-6-6(d) (2011).

203. *McCobb*, 309 Ga. App. at 221, 710 S.E.2d at 211.

204. 308 Ga. App. 192, 707 S.E.2d 144 (2011).

205. O.C.G.A. § 12-6-148 (2006).

206. *Morgan*, 308 Ga. at 192, 707 S.E.2d at 147.

207. *Id.* at 193, 707 S.E.2d at 147-48.

208. *Id.* at 196, 707 S.E.2d at 149-50.

209. *Id.*

210. 288 Ga. 315, 702 S.E.2d 898 (2010).

211. *Id.* at 316, 702 S.E.2d at 900; O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I) (Supp. 2011).

coverage to pay an insured's hospital lien, the amount of available coverages is not reduced by the amount of that hospital lien.<sup>212</sup> In other words, as the court summarized the rule in *Adams's* companion case, "[hospital] liens could not be used to reduce a tortfeasor's available coverage and [thereby] increase the coverage of an insured's uninsured motorist carrier."<sup>213</sup>

The decision in *Adams* centered on the language in O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I),<sup>214</sup> which provides that "available coverages" shall be reduced in the same amount by which the liability coverage has been reduced below the limits of coverage "by reason of payment of other claims or otherwise . . . ."<sup>215</sup> The court held that a liability insurer's payment of an insured's hospital lien did not constitute a payment of "other claims or otherwise," because "[w]hen a tortfeasor's liability carrier pays a hospital lien to a hospital standing in the shoes of the insured, it does so *for the direct benefit of the insured.*"<sup>216</sup> Therefore, the court reasoned, if a liability insurer paid off the insured's hospital lien and the insured collected the amount of that hospital lien from the uninsured motorist (UM) insurer, the insured would receive "double recovery" in the amount of the hospital lien.<sup>217</sup> For that reason, the insured was not permitted to subtract the amount of the hospital lien from available coverages before subtracting available coverages from his total damages when determining the amount owed by the UM insurer.<sup>218</sup>

In *Sapp v. Canal Insurance Co.*,<sup>219</sup> the supreme court held that the Motor Carrier Act<sup>220</sup> governs an insurance contract issued to a known motor carrier even if the policy does not indicate it is a motor carrier policy and the motor carrier has failed to obtain the permit for motor carrier operation required by Georgia law.<sup>221</sup> The court reasoned that "the policy purpose of the Act [is] to protect the motoring public," so "any negative consequences arising from noncompliance with the Act by the

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212. *Adams*, 288 Ga. at 320, 702 S.E.2d at 902.

213. *Am. Int'l S. Ins. Co. v. Floyd*, 288 Ga. 322, 322, 704 S.E.2d 755, 756 (2010).

214. O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I) (Supp. 2011). At the time the court issued its opinion in *Adams*, the language at issue was located at O.C.G.A. § 33-7-11(b)(1)(D)(ii) (2000). The general assembly has since amended the statute so that the language now appears at O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I).

215. O.C.G.A. § 33-7-11(b)(1)(D)(ii)(I).

216. *Adams*, 288 Ga. at 319, 702 S.E.2d at 902.

217. *Id.* at 318-19, 702 S.E.2d at 902.

218. *Id.* at 320, 702 S.E.2d at 902.

219. 288 Ga. 681, 706 S.E.2d 644 (2011).

220. O.C.G.A. tit. 46, ch. 7 (2004 & Supp. 2011).

221. *Sapp*, 288 Ga. at 687, 706 S.E.2d at 650.

insured motor carrier or its insurer should be suffered by one or both of the noncompliant parties rather than by the innocent motoring public.”<sup>222</sup> For this reason, when the policy at issue did not purport to be a motor carrier policy and restricted coverage to incidents occurring within fifty miles of Tifton, Georgia, the Motor Carrier Act nonetheless authorized the insured’s direct action against the insurer and invalidated the policy’s radius-of-use provision.<sup>223</sup>

In *VFH Captive Insurance Co. v. Pleitez*,<sup>224</sup> the court of appeals held that although captive insurance companies<sup>225</sup> are specifically governed by the Captive Insurance Company Act (CICA),<sup>226</sup> they are also governed by the Uninsured Motorist Statute<sup>227</sup> to the extent that the statute does not conflict with the CICA.<sup>228</sup> In reaching that conclusion, the court relied on O.C.G.A. § 33-41-3(b),<sup>229</sup> which establishes that “[i]nsurance policies . . . issued by a captive insurance company for . . . motor vehicle accident insurance shall be in conformity with all minimum requirements for coverages and coverage amounts established by the state for such types of insurance.”<sup>230</sup> The court held the Uninsured Motorist Statute’s requirement that the insurer either supply UM coverage or obtain a written rejection of such coverage from the insured<sup>231</sup> is a minimum requirement within the meaning of O.C.G.A. § 33-41-3(b), and therefore applies to captive insurance companies.<sup>232</sup> The court suggested, but did not hold, that some other provisions of the Uninsured Motorist Statute, such as the requirement that “insured” be defined broadly to include resident relatives of the named insured,<sup>233</sup> might conflict with the CICA and may therefore be inapplicable to captive insurance companies.<sup>234</sup>

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222. *Id.* at 685, 706 S.E.2d at 648-49.

223. *Id.* at 681, 706 S.E.2d at 646.

224. 307 Ga. App. 240, 704 S.E.2d 476 (2010).

225. A captive insurance company only insures vehicles for hire. *Id.* at 240, 704 S.E.2d at 477.

226. O.C.G.A. tit. 33, ch. 41 (2000 & Supp. 2011).

227. O.C.G.A. § 33-7-11 (2000 & Supp. 2011). This statute is not officially labeled the “Uninsured Motorist Statute,” but is commonly referred to by that name, as in the instant decision. *See, e.g., Pleitez*, 307 Ga. App. at 241, 704 S.E.2d at 478.

228. *Pleitez*, 307 Ga. App. at 242-43, 704 S.E.2d at 479.

229. O.C.G.A. § 33-41-3(b) (2000).

230. *Id.* at 242, 704 S.E.2d at 478 (alteration in original) (internal quotation marks omitted); O.C.G.A. § 33-41-3(b).

231. *See* O.C.G.A. § 33-7-11(a)(3).

232. *Pleitez*, 307 Ga. App. at 242, 704 S.E.2d at 478.

233. *See* O.C.G.A. § 33-7-11(b)(1)(B).

234. *Pleitez*, 307 Ga. App. at 241, 704 S.E.2d at 478.

In *Georgia Interlocal Risk Management Agency v. Godfrey*,<sup>235</sup> the court of appeals held that a municipality may legally provide motor vehicle insurance to its employees through a self-insurance program that offers narrower UM coverage than the coverage prescribed by the Uninsured Motorist Statute.<sup>236</sup> The legislature has waived sovereign immunity “only to the limits of the coverage provided [by the municipality].”<sup>237</sup> In other words, because the legislature has waived a municipality’s sovereign immunity only to the extent that the municipality thinks it fit to provide insurance coverage, “any attempt to require . . . coverage under [the Uninsured Motorist Statute] would run afoul of [the municipality’s] sovereign immunity.”<sup>238</sup> For that reason, although the City of Newnan’s decision to provide uninsured motorist coverage but not underinsured motorist coverage contravened the Uninsured Motorist Statute, sovereign immunity barred the insured’s attempt to obtain UM coverage that conformed to the statute.<sup>239</sup>

In *Lankford v. State Farm Mutual Automobile Insurance Co.*,<sup>240</sup> the court of appeals issued a rather harsh opinion underscoring the importance of providing insurers with written notice of an automobile wreck as soon as reasonably possible, and thus affirmed summary judgment for the defendant.<sup>241</sup> The defendant was both the striking driver’s liability insurer and the plaintiff’s UM insurer. Within days of the collision causing the plaintiff’s injuries, the defendant wrote the plaintiff a letter referencing the striking driver’s liability policy. One month later, the plaintiff’s employer placed the defendant on notice of a subrogation interest for medical expenses it had paid on the plaintiff’s behalf. Roughly one year after the wreck, the plaintiff discussed his injuries and workers’ compensation claim with the defendant’s agent. The plaintiff then filed suit just before the expiration of the statute of limitations and provided written notice to the defendant that he may be entitled to UM coverage.<sup>242</sup> The defendant thereafter filed a motion for summary judgment on the ground that the plaintiff failed to give State Farm written notice in accordance with his policy, which provided that he “must give us or one of our agents written notice of the accident or loss as soon as reasonably possible.”<sup>243</sup> The plaintiff countered that

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235. 305 Ga. App. 130, 699 S.E.2d 377 (2010).

236. *Id.* at 132-33, 699 S.E.2d at 378.

237. *Id.* at 133, 699 S.E.2d at 378.

238. *Id.* at 133, 699 S.E.2d at 379.

239. *Id.* at 134, 699 S.E.2d at 379.

240. 307 Ga. App. 12, 703 S.E.2d 436 (2010).

241. *Id.* at 15-16, 703 S.E.2d at 440.

242. *Id.* at 12-13, 703 S.E.2d at 438.

243. *Id.* at 13, 703 S.E.2d at 438.



the defendant had actual notice of the collision and had first contacted the plaintiff about the collision only days after it had occurred.<sup>244</sup>

On appeal, the court distinguished the defendant's actual knowledge of the collision from the plaintiff's obligation to provide written notice under the policy, holding that "notification by an unrelated third party such as [the striking driver] did not relieve [the plaintiff] of his separate, contractual obligation to provide notice . . . under his own policies."<sup>245</sup>

The court went on to note that it "know[s] of no authority requiring an insurer to cross-reference the names of all parties involved in an accident to determine whether they, too, have insurance through the insurer; instead the insurer is entitled to rely upon its contractual notice provisions."<sup>246</sup>

#### IV. CONCLUSION

The above cases and legislation have, in the Authors' estimation, 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.

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244. *Id.* at 15, 703 S.E.2d at 440.

245. *Id.* at 15-16, 703 S.E.2d at 440.

246. *Id.* at 16, 703 S.E.2d at 440.