Trial Practice and Procedure

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I. INTRODUCTION

This Article addresses several significant opinions and legislation of interest to the Georgia civil trial practitioner issued during the survey period of this publication.[1]

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1. For an analysis of Georgia trial practice and procedure during the prior survey period, see Brandon L. Peak et al., *Trial Practice and Procedure*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 321 (2017).

II. LEGISLATION

There were several significant bills and resolutions that were passed by the Georgia General Assembly this year. Trial practitioners should pay close attention to the following legislation in particular.

The first is House Bill 904,[2] which amended the immunity provisions of Georgia's Recreational Property Act (RPA)[3] in response to *Mayor & Aldermen of Garden City v. Harris*,[4] a Georgia Supreme Court decision. In *Harris*, the court held that a child could not recover for injuries sustained on a landowner's property under the RPA because the child had not paid to be admitted to a ball game on the landowner's property, even though the child's parents paid for their own admittance.[5] House Bill 904 amends the RPA to provide that if anyone is charged for admission to a particular event, then the RPA's immunity provisions do not apply, even as to patrons who did not pay to enter the event.[6]

The second is House Resolution 993,[7] a proposed constitutional amendment that will create a statewide business court.[8] The proposed constitutional amendment will appear on the November 2018 ballot. If the measure is passed, enabling legislation will follow to outline the specific parameters of the statewide business court.

The third is Senate Bill 407,[9] which will require statewide e-filing of pleadings in civil cases starting on January 1, 2019.[10] The new e-filing law will impose uniform filing fees on litigants in civil cases.[11]

III. CASE LAW

A. Appeals

In *Jones v. Peach Trader Inc.*,[12] the Georgia Supreme Court clarified "the parameters of a trial court's authority to dismiss a notice of appeal

2. Ga. H.R. Bill 904, Reg. Sess., 2018 Ga. Laws 554 (codified as amended at O.C.G.A. § 51-3-25 (2018)).

3. O.C.G.A. §§ 51-3-20 to -26 (2018).

4. 302 Ga. 853, 809 S.E.2d 806 (2018).

5. *Id*. at 853–54, 809 S.E.2d at 807–08.

6. Ga. H.R. Bill 904.

7. Ga. H.R. Res. 993, Reg. Sess., 2018 Ga. House J. 250.

8. *Id*.

9. Ga. S. Bill 407, Reg. Sess., 2018 Ga. Laws 416 (codified at O.C.G.A. § 15-6-11 (2018)).

10. *Id*.

11. *See id*.

12. 302 Ga. 504, 807 S.E.2d 840 (2017).

under [Official Code of Georgia Annotated (O.C.G.A.) §] 5-6-48,"[13] considering "whether the trial court was permitted to dismiss [a] notice of appeal based on its own conclusion that the underlying decision or judgment was not appealable."[14] The supreme court held that, under O.C.G.A. § 5-6-48(b),[15] "Georgia law vests appellate courts with the sole authority to determine if a decision or judgment is appealable."[16] Trial courts are permitted to dismiss an appeal in accordance with O.C.G.A. § 5-6-48(c)[17] "only when there 'has been an unreasonable delay in the filing of the transcript' or where 'there has been an unreasonable delay in the transmission of the record to the appellate court' caused by the failure of a party to pay costs or file an indigency affidavit."[18] In other words, "[o]ther dismissals are reserved to the appellate courts."[19]

Before *Jones v. Peach Trader Inc.*, there was conflicting appellate authority on the extent of a trial court's authority to dismiss an appeal. In *Jones v. Singleton*,[20] for example, the Georgia Supreme Court stated "[t]he trial court properly dismissed appellants' first two notices of appeal since at the time they were filed, there was no final judgment in the case."[21] The "Court of Appeals has . . . applied *Jones* [*v. Singleton*] to permit a trial court to dismiss an appeal for the reasons set forth in O.C.G.A. § 5-6-48(b)."[22] Though the supreme court had previously stated, "[a]n appellate court is the sole authority in determining whether a filed notice of appeal or discretionary application is sufficient to invoke its jurisdiction,"[23] other supreme court decisions had "approv[ed] trial court dismissals in some instances."[24] Because the supreme court in *Jones v. Peach Trader Inc.* reiterated that trial courts do not have the authority to dismiss appeals pursuant to O.C.G.A. § 5-6-48(b), the supreme court "disapprove[d] of [*Jones v. Singleton*] and others to the extent that they suggest otherwise."[25]

13. O.C.G.A. § 5-6-48 (2018).

14. *Peach Trader Inc.*, 302 Ga. at 506–07, 807 S.E.2d at 842–43.

15. O.C.G.A. § 5-6-48(b) (2018).

16. *Peach Trader Inc.*, 302 Ga. at 504, 807 S.E.2d at 841.

17. O.C.G.A. § 5-6-48(c) (2018).

18. *Peach Trader Inc.,* 302 Ga. at 508–09, 807 S.E.2d at 844 (quoting O.C.G.A. § 5-6-48(c)).

19. *Id.* at 509, 807 S.E.2d at 844.

20. 253 Ga. 41, 316 S.E.2d 154 (1984).

21. *Id.* at 42, 316 S.E.2d at 155.

22. *Peach Trader Inc.*, 302 Ga. at 509–10, 807 S.E.2d at 845.

23. *Id.* at 506, 807 S.E.2d at 842.

24. *Id.*

25. *Id.* at 510, 807 S.E.2d at 845.

The supreme court also "note[d] that trial courts need not be stymied by the repetitive filing of notices of appeal challenging interlocutory decisions solely for the purpose of creating disruption and delay."[26] The court stated, "[I]f an appellate court determines that an appeal was not authorized because the decision at issue was interlocutory rather than final . . . then supersedeas never attached because the case was not truly on appeal; accordingly, the trial court's intervening decisions will stand."[27]

B. Apportionment

In *Martin v. Six Flags Over Georgia II, L.P.* (*Six Flags*),[28] the Georgia Supreme Court held that the trial court's refusal to submit the question of apportionment to non-parties to the jury "requires [a] retrial only for the apportionment of damages"[29] and does not require retrial on the issues of liability and calculation of damages.[30] *Six Flags* arises out of a brutal gang attack on Joshua Martin by as many as nine other people at a bus stop outside the park in 2007.[31] At trial, the jury found in favor of Martin, "assess[ing] its verdict 92% to Six Flags and 2% to each of the four named defendants, all of whom had criminal convictions in connection with the attack on Martin."[32] Six Flags also sought leave to "allow apportionment among the non-parties, [who were alleged to have been involved in the attack]," but the trial court rejected that request, "finding that, given the absence of a criminal conviction against any of these individuals, the evidence was insufficient to permit apportionment against them."[33] The court of appeals held that the trial court erred and "that the jury's verdict was infirm in its entirety and ordered the judgment [be] reversed and the case remanded for a new trial."[34] The supreme court granted certiorari to determine whether, in light of the

26. *Id.*
27. *Id.*
28. 301 Ga. 323, 801 S.E.2d 24 (2017).
29. *Id.* at 324, 801 S.E.2d at 28.
30. *Id.* at 340–41, 801 S.E.2d at 38.
31. *Id.* at 323–26, 801 S.E.2d at 29.
32. *Id.* at 336, 801 S.E.2d at 35.
33. *Id.*
34. *Id.*

trial court's apportionment error,[35] "a complete retrial [was] necessary, as opposed to a partial trial limited to apportionment."[36]

Guided by the principle that "where a judgment appealed from can be segregated, so that the correct portions can be separated from the erroneous, the court will not set aside the entire judgment, but only that portion which is erroneous,"[37] the supreme court rejected Six Flags's contention that "the damages calculation and the apportionment of fault be done at the same time and, therefore, precludes the segregation of these steps."[38] The court held that "[t]his construction is also at odds with the language of [O.C.G.A. § 51-12-33(f)(1)],[39] which provides that 'assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.'"[40] The court concluded that this case "falls within the realm of the ordinary case in which liability and the calculation of damages sustained are distinct from the apportionment of fault."[41] In other words, "The relative fault of those individuals likewise would have no effect on the total amount of damages Martin has sustained as a result of the injuries he suffered in the attack."[42] Retrial would only be required on the issue of apportionment and not on the issues of liability and the measure of total damages.[43]

C. Joinder of Parties

In *Anderson v. Lewis*,[44] the Georgia Court of Appeals, sitting en banc, unanimously overruled *O'Hara v. Gilmore*[45] and held that the dismissal

35. The supreme court stated, "[i]mplicit in the framing of this question [was] the understanding[] . . . that the trial court did in fact commit error in declining Six Flags's request to submit to the jury the question of apportionment to non-parties." *Id.*

36. *Id.* at 337, 801 S.E.2d at 35. The supreme court also granted certiorari to determine "whether Six Flags could properly be held liable for the injuries inflicted in this attack." *Id.* at 324, 801 S.E.2d at 27. The court answered that question in the affirmative, "hold[ing] that . . . although the landowner's duty is to maintain safety and security within its premises and approaches, liability may arise from a breach of that duty that proximately causes injuries even if the resulting injury ultimately is completed beyond that territorial sphere." *Id.* at 330, 801 S.E.2d at 31.

37. *Id.* at 338, 801 S.E.2d at 36.

38. *Id.* at 339, 801 S.E.2d at 37.

39. O.C.G.A. § 51-12-33(f)(1) (2018).

40. *Six Flags*, 301 Ga. at 339, 801 S.E.2d at 37 (quoting O.C.G.A. § 51-12-33(f)(1)).

41. *Id.* at 341, 801 S.E.2d at 38.

42. *Id.*

43. *Id.*

44. 344 Ga. App. 119, 809 S.E.2d 260 (2017).

45. 310 Ga. App. 620, 713 S.E.2d 869 (2011).

of an allegedly negligent driver for lack of service of process "provide[s] no basis for granting summary judgment" to the vehicle's owner.[46] *Anderson* involved the family purpose doctrine, which makes the owner of a vehicle vicariously liable for the negligence of family members in certain circumstances.[47] In *Anderson*, the plaintiff was injured when her car collided with a car owned by Clarence Lewis, but driven by Lewis's grandson, Dana Brown. The plaintiff sued both Lewis and Brown, but she was unable to serve Brown.[48] The trial court dismissed Brown for lack of service and granted summary judgment to Lewis pursuant to the *O'Hara* decision, in which the court held the dismissal of the allegedly negligent driver makes the vehicle owner immune from liability as a matter of law.[49]

On appeal, the Georgia Court of Appeals concluded that *O'Hara* was inconsistent with the principles set forth by the Georgia Supreme Court in *Hedquist v. Merrill Lynch, Pierce, Fenner & Smith*[50] and overruled *O'Hara*.[51] The new rule is that only an "adjudication on the merits, i.e., an actual determination of the absence of negligence of the servant" bars a judgment against a vehicle's owner as a matter of law.[52]

D. Jurisdiction & Venue

In *Blakemore v. Dirt Movers, Inc.*,[53] the Georgia Court of Appeals addressed whether, under O.C.G.A. § 14-2-510(b)(4),[54] a domestic motor carrier could remove a tort action to the county in which the carrier's principal place of business is located if, under O.C.G.A. § 40-1-117(b),[55] venue is also proper in the county where the tort was committed.[56] In general, venue as to corporations is provided for in O.C.G.A. § 14-2-510(b)(4), which states:

> Each domestic corporation and each foreign corporation authorized to transact business in this state shall be deemed to reside and to be subject to venue . . . in the county where the cause of action originated. If venue is based solely on this paragraph, the defendant shall have

46. *Anderson*, 344 Ga. App. at 121, 809 S.E.2d at 261.
47. *Id.* at 120–21, 809 S.E.2d at 261.
48. *Id.* at 119–21, 809 S.E.2d at 260–61.
49. *Id.* at 120, 809 S.E.2d at 261.
50. 272 Ga. 209, 528 S.E.2d 508 (2000).
51. *Anderson*, 344 Ga. App. at 121, 809 S.E.2d at 261.
52. *Id.*
53. 344 Ga. App. 238, 809 S.E.2d 827 (2018).
54. O.C.G.A. § 14-2-510(b)(4) (2018).
55. O.C.G.A. § 40-1-117(b) (2018).
56. *Blakemore*, 344 Ga. App. at 238, 809 S.E.2d at 828.

> the right to remove the action to the county in Georgia where the defendant maintains its principal place of business.[57]

O.C.G.A. § 40-1-117,[58] on the other hand, provides a unique venue option as to domestic motor carriers. Section 40-1-117 provides the following:

> [A]ny action against any resident or nonresident motor carrier for damages by reason of any breach of duty, whether contractual or otherwise . . . may be brought in the county where the cause of action or some part thereof arose . . . . The venue prescribed by this Code section shall be cumulative of any other venue provided by law.[59]

In *Blakemore*, the plaintiff filed a wrongful death lawsuit against the defendant–domestic motor carrier in Bibb County, where the wreck occurred. The domestic motor carrier filed a notice of removal to Jeff Davis County State Court, where its principal place of business was located, pursuant to O.C.G.A. § 14-2-510(b)(4). Once removed, the Jeff Davis County court denied the plaintiff's motion to remand the case to Bibb County.[60]

On appeal, the Georgia Court of Appeals held that it was error to deny the motion to remand to Bibb County.[61] The court held that "the plain language of O.C.G.A. § 14-2-510(b)(4) limits a defendant corporation's right of removal to cases in which venue is based only upon that specific paragraph. Accordingly, if there is a separate basis for venue, as in this case, the defendant corporation has no right of removal."[62] The court held that "a corporation has no right of removal under O.C.G.A. § 14-2-510(b)(4) if the complaint alleges facts to support proper venue under a different statutory provision."[63] Because the defendant in *Blakemore* was subject to the venue provision unique to domestic motor carriers, the defendant could not remove the case pursuant to O.C.G.A. § 14-2-510(b)(4).[64]

In *Carpenter v. McMann*,[65] the Georgia Court of Appeals addressed whether a John Doe defendant named under the uninsured motorist

57. O.C.G.A. § 14-2-510(b)(4).
58. O.C.G.A. § 40-1-117 (2018).
59. O.C.G.A. § 40-1-117(b).
60. *Blakemore*, 344 Ga. App. at 238–39, 809 S.E.2d at 828–29.
61. *Id.* at 243, 809 S.E.2d at 831.
62. *Id.* at 240, 809 S.E.2d at 829.
63. *Id.*
64. *See id.* at 242, 809 S.E.2d at 830–31.
65. 341 Ga. App. 791, 802 S.E.2d 74 (2017).

statute, O.C.G.A. § 33-7-11,[66] should be considered a nominal party for venue purposes when determining the proper county where joint tortfeasors may be sued.[67] In *Carpenter*, the plaintiffs were passengers in a vehicle that was abruptly cut off by a driver on the interstate and then rear-ended by the defendant's vehicle. The John Doe driver that cut off the plaintiffs' vehicle left the scene and was never identified. The plaintiffs filed a lawsuit in Bibb County, where the wreck happened, naming the defendant and the unidentified John Doe as parties. The named defendant filed a motion to transfer venue to Crawford County, his county of residence. The trial court denied the motion to transfer.[68]

On appeal, the court of appeals held that the defendant had no right to have the case transferred to his county of residence.[69] Section 33-7-11 provides that

> [i]n cases where the owner or operator of a vehicle causing injury or damages is unknown and an action is instituted against the unknown defendant as "John Doe," the residence of such "John Doe" defendant shall be presumed to be in the county in which the accident causing injury or damages occurred, or in the county of residence of the plaintiff, at the election of the plaintiff in the action.[70]

The defendant argued, despite the language of the uninsured motorist statute, that the "John Doe defendant should be treated as a nominal party, and [the defendant], a known party, should be able to insist on having the action heard in his own county of residence."[71]

The court of appeals disagreed, holding that the plain language of the uninsured motorist statute required the trial court to consider the residence of the John Doe defendant to be the county where the injury occurred or the county of the plaintiff's residence, at plaintiff's election.[72] As a result, "because the Georgia Constitution provides for venue in the home county of either tortfeasor when joint tortfeasors are sued," the defendant could not remove the case to his home county.[73]

66. O.C.G.A. § 33-7-11 (2018).
67. *Carpenter*, 341 Ga. App. at 791–92, 802 S.E.2d at 75.
68. *Id.* at 792, 802 S.E.2d at 75.
69. *Id.* at 794, 802 S.E.2d at 76.
70. O.C.G.A. § 33-7-11(d)(1) (2018).
71. *Carpenter*, 341 Ga. App. at 793, 802 S.E.2d at 76.
72. *Id.* at 793–94, 802 S.E.2d at 76.
73. *See id.* at 792, 802 S.E.2d at 75.

E. Jury Charges

In *Almassud v. Mezquital*,[74] the Georgia Court of Appeals reversed a $30 million jury verdict, holding the trial court failed to give a jury instruction requested by the defendant that the court of appeals concluded was supported by the evidence.[75] The defendant's vehicle crossed the center line and struck the plaintiff's vehicle. The plaintiff sued the defendant and alleged the defendant "knowingly operated the [vehicle] on public roadways while it was unsafe, that [the defendant's] acts constituted negligence per se, and that [the defendant's] conduct proximately caused [the plaintiff's] injuries." The defendant contended that "the steering of the vehicle had failed and caused the collision, that [the defendant] did not knowingly operate the [vehicle] while it was unsafe, and that [the plaintiff's] injuries were proximately caused by the negligence of [a] nonparty" auto repair business.[76]

At trial, the plaintiff presented evidence that the defendant's conduct constituted negligence per se because the defendant violated Georgia statutes prohibiting driving an unsafe vehicle, operated a vehicle in the wrong lane of travel, and failed to maintain a lane.[77] The defendant "presented some evidence, including his own testimony and that of an expert witness, supporting [the] defense theory" that "the steering [in the defendant's SUV] failed immediately before the collision, and that [the defendant] did not know of any defect in the vehicle" because the steering mechanism had been incorrectly installed shortly before the wreck by the auto-repair business.[78]

Based on the evidence he presented at trial, the defendant requested the trial court instruct the jury that, in order for the defendant to be liable for negligence per se, "there has to be some knowledge on the part of the driver that he is, in fact, operating an unsafe or defective vehicle." The trial court refused to give this instruction. Instead, the trial court "instructed the jury on each of the statutes in question" and "[a]t the conclusion of each instruction on the substance of each statute, the trial court told the jury that 'a violation of this statute is negligence per se.'"[79]

Noting that "[i]t is the duty of the trial court, whether requested or not, to give the jury appropriate instructions on every substantial and vital issue presented by the evidence, and on every theory of the case," the court of appeals held that the trial court's instruction constituted

74. 345 Ga. App. 456, 811 S.E.2d 110 (2018), *reconsideration denied* (Mar. 28, 2018).

75. *Id.* at 458, 811 S.E.2d at 112.

76. *Id.* at 456, 811 S.E.2d at 111.

77. *Id.* at 457–58, 811 S.E.2d at 111–12.

78. *Id.* at 459, 811 S.E.2d at 113.

79. *Id.* at 457–58, 811 S.E.2d at 111–12.

reversible error.[80] As the court explained, once the plaintiff "made out a prima facie showing that [the defendant's] operation of the vehicle was negligence per se because [the defendant] violated at least one state statute . . . 'the burden then shifted to [the defendant] to show that the violation was unintentional and in the exercise of ordinary care.'"[81] Because the defendant presented some evidence that his violations of the statutes were unintentional, the defendant "was entitled to a jury instruction on the vital issues of knowledge of a defect and unintentional violations [of the statutes] that were raised by the pleadings, the evidence, and the defense theory of the case."[82]

F. Recreational Property Act

During the survey period, Georgia's appellate courts decided three important cases involving the Recreational Property Act (RPA). The RPA's stated purpose "is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting the owners' liability toward persons entering thereon for recreational purposes."[83] The following three cases—including one case which prompted action by the Georgia General Assembly—all involved the extent of the immunity afforded to property owners by the RPA.

The first case, *Mayor & Aldermen of Garden City v. Harris*,[84] discussed in the first section of this Article,[85] involved a six-year-old girl who was seriously injured after falling thirty feet through the bleachers at Garden City Stadium, where she and her parents had gathered to watch a ball game.[86] The Georgia Supreme Court held that the RPA shields landowners from liability from anyone who has been invited to use the property without paying a charge (unless an exception applies).[87] *Harris* triggered a swift response from the General Assembly and a change to the statutory language.[88]

80. *Id.* (quoting Mullis v. Chaika, 118 Ga. App. 11, 18, 162 S.E.2d 448, 453 (1968)).

81. *Id.* at 459, 811 S.E.2d at 112 (quoting Williams v. Calhoun, 175 Ga. App. 332, 333–34, 333 S.E.2d 408, 411 (1985)).

82. *Id.* at 459, 811 S.E.2d at 113.

83. O.C.G.A. § 51-3-20 (2018).

84. 302 Ga. 853, 809 S.E.2d 806 (2018).

85. *See supra* notes 2–6 and accompanying text.

86. *Harris*, 302 Ga. at 853–54, 809 S.E.2d at 807–08.

87. *Id.* at 855, 809 S.E.2d at 808–09.

88. House Bill 904 revises the exception in § 51-3-25(2) and effectively overrules *Harris*. Now, that subsection provides: "On a date when the owner of land charges any individual who lawfully enters such land for recreational use and any individual is injured in connection with the recreational use for which the charge was made." O.C.G.A. § 51-3-25(2) (2018).

The second case, *Mercer University v. Stofer*,[89] was a wrongful death case. The plaintiffs sued Mercer for the death of their mother, Sally Stofer, who died after falling at a free concert at Washington Park in Macon in July 2014. While Macon–Bibb County owns the park, Mercer had a permit to use the park to host a concert. Mercer paid nothing to use the park, but the school did pay for security at the event and for liability insurance. "The concert was part of Mercer's 'Second Sunday' concert series which was planned, promoted and hosted by Mercer's College Hill Alliance, a division of Mercer [University]."[90]

The plaintiffs' mother attended the concert with her sister Carol Denton. After they arrived at the park, the two sisters found a stairway with a handrail that they used to make their way down a hill. About halfway down, the sisters left the stairs and found a spot to sit on a grassy hill. At the park, vendors were selling food and drinks, but the plaintiffs' mother did not buy anything. Later, when the sisters decided to leave, they used the same stairway, but this time they started at the bottom, below where they sat. The lower portion of the stairway had no handrail, but the sisters chose to use it because the grassy hill was too slippery and difficult to ascend. At one point, Denton, who was climbing the stairs first, turned around to check on her sister. When she did, Denton saw her sister lose her balance, fall backward, and hit her head on the stairs. That impact caused profuse bleeding, and her sister never regained consciousness, slipped into a coma, and died. The plaintiffs sued Mercer for their mother's death. Mercer moved for summary judgment, arguing that it was immune from liability under the RPA. The trial court denied Mercer's motion, and Mercer appealed.[91]

In its opinion, the court of appeals explained that, because the plaintiffs' mother had not been charged to attend the concert, there was "no dispute over whether the activity at issue was purely recreational."[92] That conclusion, the court explained, followed naturally from the Georgia Supreme Court's recent decision in *Harris*.[93] But unlike *Harris*, where the parties agreed that the young girl was using the stadium for recreational activities as defined by the RPA, the parties in *Stofer* disputed Mercer's purpose in inviting the public to a free concert.[94] Mercer claimed that the free concert was purely recreational, but the

89. 345 Ga. App. 116, 812 S.E.2d 146 (2018), *cert. granted*, No. 518C1022, 2018 Ga. LEXIS 663 (Sept. 24, 2018).

90. *Id.*

91. *Id.* at 117–18, 812 S.E.2d at 148–49.

92. *Id.*

93. *Id.*; *see also supra* notes 2–6, 84–88 and accompanying text.

94. *Stofer*, 345 Ga. App. at 119, 812 S.E.2d at 149.

plaintiffs argued that "Mercer's purpose in holding this concert series was to promote its private interests, as well as the commercial interests of businesses abutting its campus."[95]

Because Mercer's purpose for inviting the public to the concert free of charge was disputed, the court of appeals held that, under Georgia Supreme Court precedent, the pertinent inquiry involves both "the plaintiff's purpose in using the venue" and "the defendant's purpose in offering it."[96] The court concluded that the fact-finder had to apply a balancing test to determine the purpose for which Mercer had invited the public to the free concert.[97] That balancing test, as articulated by the supreme court, mandates that "all social and economic aspects of the activity be examined. Relevant considerations on this question include, without limitation, the intrinsic nature of the activity, the type of service or commodity offered to the public, and the activity's purpose and consequence."[98]

The court held that the evidence in *Stofer* amply demonstrated that factual questions about Mercer's purpose existed and must be resolved by the factfinder.[99] As a result, the court affirmed the denial of summary judgment to Mercer under the RPA.[100]

Stofer is precedential even though Chief Judge Stephen Dillard concurred *dubitante*.[101] In his separate concurrence, Judge Dillard noted that, while he joined the court's opinion because it faithfully followed the Georgia Supreme Court's RPA precedent, he doubted that "possibly subjecting Mercer University to liability comports with the *codified* purpose and plain meaning of the RPA."[102] Judge Dillard stated that, in his view, the relevant inquiry is "whether the owner obtained a direct pecuniary benefit from the activity."[103] A contrary rule that "allow[s] tenuous, indirect economic benefits to factor into whether a property owner is afforded the [immunity] provided by the RPA, renders the protections of the statute illusory and discourages property owners from holding or permitting the very activities the Act seeks to encourage."[104] Judge Dillard concluded that "a fair reading of the RPA strongly suggests

95. *Id.* (emphasis omitted).

96. *Id.* at 119, 812 S.E.2d at 150 (emphasis omitted).

97. *Id.* at 120, 812 S.E.2d at 150.

98. *Id.* (emphasis omitted) (quoting Anderson v. Atlanta Comm. for the Olympic Games, 273 Ga. 113, 117, 537 S.E.2d 345, 349 (2000)).

99. *Id.* at 122, 812 S.E.2d at 151.

100. *Id.* at 123, 812 S.E.2d at 152.

101. *Id.* at 127 n.8, 812 S.E.2d at 154 n.8 (Dillard, C.J., concurring *dubitante*).

102. *Id.* at 127, 812 S.E.2d at 155.

103. *Id.* at 128, 812 S.E.2d at 156.

104. *Id.* at 129, 812 S.E.2d at 156.

that the *only* relevant economic consideration in these cases is whether an admission fee is charged to the public."[105] Yet despite a palpable tension between *Harris* and earlier supreme court decisions, Judge Dillard noted that the court of appeals could not resolve the tension.[106] For that reason, he joined the court's opinion.[107]

The third case, *Handberry v. Stuckey Timberland, Inc.*,[108] is also a wrongful death case. The plaintiff, Marie Handberry, sued Stuckey Timberland, Inc. (Stuckey) for the wrongful death of her husband, William Handberry Senior. Stuckey owned and managed real estate in Jefferson County. "In June 2015, Stuckey leased the Jefferson County property to Robbie Brett 'only for fishing and hunting purposes.'" The lease explicitly provided that Brett's agents, servants, employees, and guests could use the property for fishing and hunting. After signing the lease, Brett started a hunting club with several friends, including Handberry's husband. On July 25, 2015, Handberry's husband went to look "at the property in preparation for hunting there at a later time." As he rode a four-wheel vehicle, the vehicle went over an abandoned well hidden by tall grass and flipped. Handberry's husband was ejected, became trapped in the well, and died.[109]

Handberry sued Stuckey for negligence as well as willful and malicious conduct arising from its failure to inspect the property and warn about the well. Handberry averred that her husband was not hunting when he died but rather was scouting hunting locations. Stuckey argued that it was immune from Handberry's negligence claims under the RPA. The trial court agreed and granted Stuckey's partial motion to dismiss and motion to strike "[a]ll allegations of negligence and constructive knowledge" against Stuckey.[110]

After granting Handberry's request for interlocutory appeal,[111] the Georgia Court of Appeals affirmed the trial court's ruling based on the plain language of the RPA and O.C.G.A. § 27-3-1(e),[112] which extends

105. *Id.* It should be noted that *Stofer* was decided before the enactment of House Bill 904, amending the exceptions to the RPA and effectively overruling *Harris*, so it is unclear whether that legislative action would affect Judge Dillard's reading of the RPA.

106. *Id.* at 129–30, 812 S.E.2d at 156–57.

107. *Id.* at 130, 812 S.E.2d at 157.

108. 345 Ga. App. 191, 812 S.E.2d 547 (2018), *cert. denied*, No. S18C1042, 2018 Ga. LEXIS 688 (Oct. 9, 2018).

109. *Id.* at 192, 812 S.E.2d at 549.

110. *Id.* at 192, 812 S.E.2d at 549–50.

111. *Id.* at 192 n.2, 812 S.E.2d at 550 n.2.

112. O.C.G.A. § 27-3-1(e) (2018).

RPA protections to persons who allow others to enter their land for hunting.[113] Specifically, section 27-3-1(e) provides that

> [a]ny owner of land . . . who gives permission to another person to hunt . . . upon the land with or without charge shall be entitled to the same protection from civil liability provided by [the RPA] to landowners who allow the public to use their land for recreational purposes without charge.[114]

On appeal, Handberry argued that the RPA did not protect Stuckey because Stuckey "did not *directly* give [her husband] permission to be on the land."[115] In making that argument, Handberry noted that section 27-3-1(e) extends the RPA protections only to an owner "who gives permission to another person to hunt."[116] The court of appeals, however, found two problems with that argument.

First, Handberry's argument failed as a matter of fact because Stuckey gave permission to enter under the lease not only to Brett but also to Brett's guests, one of whom was Handberry's husband.[117] The court thus concluded that Stuckey gave Handberry's husband "express or direct permission to enter upon the land for hunting purposes."[118] Second, Handberry's argument failed as a matter of law even if Stuckey did not directly grant her husband permission to be on the land. In reaching its conclusion, the court read sections 27-3-1(e) and 51-3-23[119] *in pari materia* and emphasized that section 27-3-1(e) provides that an owner "who gives permission to another person to hunt," whether "with or without charge, *shall be entitled to the same protection from civil liability*" as the RPA gives "landowners who allow the public to use their land for recreational purposes without charge."[120] The RPA's protections explicitly cover the owner's direct and indirect permission.[121] So, even if Stuckey gave Handberry's husband only indirect permission to enter, the RPA still applied.[122] Additionally, because the RPA applied, Handberry

113. *Handberry*, 345 Ga. App. at 193, 812 S.E.2d at 550; *see also* O.C.G.A. § 27-3-1(e).

114. O.C.G.A. § 27-3-1(e).

115. *Handberry*, 345 Ga. App. at 194, 812 S.E.2d at 551.

116. *Id.* (emphasis omitted). While Handberry averred that her husband was "not hunting" on the land when he died, the court of appeals affirmed the trial court's finding that, as a matter of law, his scouting efforts "fell within the legal definition of hunting." *Id.* at 192–93, 812 S.E.2d at 550 (citing O.C.G.A. § 27-1-2(39) (2018) (defining "hunting")).

117. *Id.* at 194, 812 S.E.2d at 551.

118. *Id.*

119. O.C.G.A. § 51-3-23 (2018).

120. *Handberry*, 345 Ga. App. at 194, 812 S.E.2d at 551.

121. *Id.*

122. *Id.* at 194–95, 812 S.E.2d at 551.

was not entitled to relief "for her claims of negligence based on constructive knowledge, ordinary diligence, or a duty to inspect for and to warn of unknown perils."[123]

G. Spoliation

In *Phillips v. Owners Insurance Co.*,[124] the Georgia Court of Appeals declined to recognize "an independent tort of negligent third-party spoliation of evidence."[125] The court of appeals noted that Georgia law affords other potential avenues of recovering against a third-party for spoliation of relevant evidence, which weighed against recognizing an independent cause of action in tort.[126]

Kenneth Phillips was involved in a rollover wreck following a tire blowout on May 11, 2013. A week later, Phillips's attorney notified Phillips's auto insurer, Owners Insurance Company, that the cause of the wreck was being investigated and that Phillips's vehicle should be preserved. On May 31, 2013, Owners Insurance agreed to notify Phillips's attorney before moving the vehicle.[127] Owners Insurance stored the vehicle for nearly a year and a half before selling the vehicle without notifying Phillips or his attorney. After making a demand for damages to the manufacturer of the potentially defective tire that failed on Phillips's vehicle, Phillips's attorney contacted Owners Insurance to obtain the tire from the wrecked vehicle. Owners Insurance then informed Phillips's attorney for the first time that the vehicle was sold months beforehand. Phillips subsequently filed suit against Owners Insurance contending that "the sale of the car foreclosed Phillips's opportunity to recover his full damages from the tire manufacturer" and asserting claims for "third-party spoliation of evidence, breach of contract, promissory estoppel, and negligence." The trial court granted Owners Insurance's

123. *Id.* at 195, 812 S.E.2d at 552.

124. 342 Ga. App. 202, 802 S.E.2d 420 (2017).

125. *Id.* at 202, 802 S.E.2d at 421.

126. *Id.* at 205, 802 S.E.2d at 423. Some of the "potential avenues of recovery" discussed by the court include potential causes of action for breach of contract, promissory estoppel, and negligence. *Id.* at 205–207, 802 S.E.2d at 423–24. The court "express[ed] no opinion as to whether the laws of the State of Georgia" recognize a negligence claim for spoliation of evidence, but took the time to note that a number of states "have recognized that [a tort claim for spoliation of evidence] may be stated under traditional principles of negligence." *Id.* at 207 n.8, 802 S.E.2d at 424 n.8.

127. *Id.* at 202–03, 802 S.E.2d at 421–22. A few weeks after this agreement, Phillips and Owners Insurance reached a settlement on Phillips's property damage claim and Phillips subsequently signed the title of the vehicle over to Owners Insurance. *Id.* at 203, 802 S.E.2d at 422.

motion for summary judgment with respect to Phillips's claim for third-party spoliation of evidence.[128]

The court of appeals affirmed the trial court's order.[129] The court noted that "neither a statute nor any ruling of the Georgia Supreme Court has established third-party negligent spoliation of evidence as an independent tort in this state."[130] In further support of its decision, the court suggested that recognition of a new cause of action was not necessary in this instance where Phillips failed to demonstrate that existing legal remedies were inadequate.[131]

In *Cooper Tire & Rubber Co. v. Koch*,[132] the Georgia Supreme Court provided additional guidance on when a party's duty to preserve relevant evidence begins. In light of the well-established standard that "a plaintiff's duty to preserve relevant evidence in her control arises when that party actually anticipates or reasonably should anticipate litigation,"[133] the court explained "the duty [to preserve relevant evidence] often will not arise at the same moment for the plaintiff and the defendant, because of their differing circumstances."[134]

In *Koch*, Cooper Tire moved for sanctions for the plaintiff's alleged spoliation of evidence. The trial court denied Cooper Tire's motion.[135] On appeal, the court of appeals upheld the trial court's ruling and held that

128. *Id.* at 203–04, 802 S.E.2d at 422. Owners Insurance moved for summary judgment on all claims except the negligence claim. *Id.* at 204 n.2, 802 S.E.2d at 422 n.2. The trial court granted the motion with respect to the third-party spoliation claim and denied the motion with respect to the breach of contract and promissory estoppel claims. *Id.* at 204, 802 S.E.2d at 422.

129. *Id.* at 202, 802 S.E.2d at 421.

130. *Id.* at 204, 802 S.E.2d at 422–23.

131. *Id.* at 205–06, 802 S.E.2d at 423–24.

132. 303 Ga. 336, 812 S.E.2d 256 (2018).

133. *Id.* at 336, 812 S.E.2d at 258–59.

134. *Id.* at 340, 812 S.E.2d at 261.

135. *Id.* at 338, 812 S.E.2d at 260. The plaintiff's husband, Gerald Koch, was seriously injured in a rollover wreck after the left-rear tire on his Ford Explorer failed while driving on the interstate. After the wreck, Mr. Koch's vehicle was towed to a wrecker yard where it was stored and began accumulating storage costs. Sometime after the wreck Mr. Koch told his wife, the plaintiff in the subject lawsuit, "to save the tires." The plaintiff then told the facility storing the vehicle to save the left- rear tire that failed. Because the plaintiff could not afford the storage costs owed to the storage facility, the plaintiff allowed the facility to scrap the vehicle and the three remaining companion tires in exchange for the storage costs owed. Mr. Koch died soon thereafter. Several weeks after Mr. Koch's death, the plaintiff's daughter first contacted an attorney regarding the possibility of a lawsuit. A lawsuit later ensued, and the defendant–tire manufacturer filed a motion to dismiss or impose sanctions for spoliation based on the alleged spoliation of the vehicle and the three companion tires. *Id.* at 336–38, 812 S.E.2d at 259–60.

"the Plaintiff did not yet have a duty to preserve" the relevant evidence at the time the evidence was destroyed.[136]

Affirming the court of appeals decision, the Georgia Supreme Court explained that the facts and circumstances of each case will determine when a party's duty to preserve evidence arises.[137] In reviewing the lower court's holding, the court gave weight to the fact that the plaintiff was "an individual with no apparent previous experience with litigation."[138] Thus, statements made to the plaintiff in *Koch*, which may trigger the duty to preserve evidence for a different party under different circumstances, did not trigger this plaintiff's duty to preserve the relevant evidence.[139]

H. Statutes of Limitation

In *Langley v. MP Spring Lake, LLC*,[140] the Georgia Court of Appeals held that a residential lease agreement containing a one-year limitation period for all claims was enforceable and precluded the plaintiff from bringing a personal injury action against an apartment complex outside the agreed upon, one-year limitation period.[141] Pamela Langley was injured when she tripped on a crumbling portion of a curb located in a common area of her apartment complex.[142] Langley sued the apartment complex within the two-year statute of limitation period for personal injuries provided by Georgia law.[143] However, because of a broad provision buried in the thirty-third paragraph of her lease agreement requiring any legal actions against the apartment complex be filed within one year, the trial court found the complaint to be untimely and granted

136. *Id.* at 343, 812 S.E.2d at 263.

137. *Id.* at 340, 812 S.E.2d at 261. The court also explained that it was appropriate for the trial court to consider certain factors to determine whether a party's duty to preserve evidence had begun at the time the evidence was destroyed. *Id.* A list of non-exclusive factors was provided by the supreme court in *Phillips v. Harmon*, 297 Ga. 386, 397, 774 S.E.2d 596, 605 (2015).

138. *Koch*, 303 Ga. at 344, 812 S.E.2d at 264.

139. *Id.* There was evidence that the plaintiff's husband told the plaintiff to "save the tires" or "save the tire." But the "[p]laintiff's husband did not give a reason for his request that she save the tires, much less suggest that she should do so because the tire had a design or manufacturing defect that could lead to litigation against its manufacturer." *Id.*

140. 345 Ga. App. 739, 813 S.E.2d 441 (2018), *reconsideration denied* (May 15, 2018).

141. *Id.* at 739, 813 S.E.2d at 442.

142. *Id.* Langley was injured on March 3, 2014. The subject lawsuit was filed by Langley two years later on March 3, 2016. *Id.*

143. *Id.*; *see* O.C.G.A. § 9-3-33 (2018) ("[A]ctions for injuries to the person shall be brought within two years after the right of action accrues.").

the defendant's motion for summary judgment.[144] The court of appeals agreed.[145]

Although Langley was unaware of the existence of the one-year limitation provision in the lease agreement,[146] the court of appeals concluded that "Langley contractually agreed to bring *any* action against Spring Lake—including, but not limited to, personal-injury actions—within *one* year."[147] Enforcing the one-year limitation provision, the court explained that "parties are free to contract on any terms regarding a subject matter" so long as it is not prohibited by statute or public policy.[148] In this instance, the court reasoned that the one-year limitation provision is not explicitly against public policy and no statute has been enacted by the General Assembly disallowing such contractual limitation provisions.[149] The court upheld the trial court's ruling and enforced the contractual one-year limitation provision.[150] This case has troubling implications for many plaintiffs who sign routine contracts, such as retail installment contracts when purchasing a vehicle or lease agreements. Unless and until this case is either overruled or addressed through legislation, private practitioners should request that prospective clients provide them with all potentially relevant contracts, many of which the prospective client likely does not recall reading or signing.

I. Witness Cross Examination

In *Stephens v. Castano-Castano*,[151] the Georgia Court of Appeals held that a trial court abused its discretion by prohibiting a defendant in a car wreck trial from cross-examining the plaintiff's treating physician about whether the physician treated the plaintiff on a lien.[152] Additionally, the court held that the trial court did not err when it refused to permit the

144. *Langley*, 345 Ga. App. at 739, 813 S.E.2d at 442.

145. *Id.* at 744, 813 S.E.2d at 446.

146. The one-year limitation provision in the lease agreement provided:

> Limitation on Actions. To the extent allowed by law, Resident also agrees and understands that any legal action against Management or Owner must be instituted within one year of the date any claim or cause of action arises and that any action filed after one year from such date shall be time barred as a matter of law.

Id. at 740, 813 S.E.2d at 442.

147. *Id.* at 741–42, 813 S.E.2d at 444.

148. *Id.* at 743, 813 S.E.2d at 445.

149. *Id.* at 744, 813 S.E.2d at 445.

150. *Id.* at 744, 813 S.E.2d at 446.

151. 346 Ga. App. 284, 814 S.E.2d 434 (2018). This opinion is physical precedent only. *See* Ga. Ct. App. R. 33.2.

152. *Stephen*s, 346 Ga. App. at 290, 814 S.E.2d at 439.

defendant to inquire into whether the plaintiff's attorney referred the plaintiff to the treating physician.[153]

Following a car wreck, the plaintiff retained legal counsel. The plaintiff's lawyer referred the plaintiff to a physician for surgery for injuries sustained in the car wreck. Rather than charge the plaintiff immediately for the surgery, the physician agreed to assert a lien on the plaintiff's potential recovery in her lawsuit. Before trial, the plaintiff filed a motion *in limine* to exclude (1) any reference to the fact that the plaintiff's lawyer referred the plaintiff to the physician and (2) any reference to the fact that the physician treated the plaintiff on a lien. The trial court granted the motion *in limine*, finding that "the attorney referral to the physician was not relevant" and that "the lien on the lawsuit was merely security on the debt." At trial, the jury awarded the plaintiff $700,000.[154]

The court of appeals reversed in part and affirmed in part.[155] First, the court held that the trial court erred in preventing the defendant from cross-examining the plaintiff's treating physician about providing medical care to the plaintiff on a lien.[156] The court held that evidence was highly relevant to the treating physician's credibility and potential bias.[157] As the court reasoned, the treating physician had "become an investor of sorts in the lawsuit" by agreeing to treat the plaintiff on a lien.[158] In the court's view, the treating physician had a financial motivation to testify favorably for the plaintiff because the treating physician had a better "chance of fully and quickly recovering the costs of the treatment provided to [the plaintiff] at no initial cost" if the plaintiff prevailed at trial.[159]

Second, the court held that the trial court did not err in refusing to allow the defendant to inquire into whether the plaintiff's lawyer referred the plaintiff to the treating physician.[160] The defendant contended that this line of inquiry was relevant to the treating physician's credibility and bias.[161] The court disagreed, reasoning that "[a]t most, there is a

153. *Id.* at 291, 814 S.E.2d at 440.
154. *Id.* at 284–86, 814 S.E.2d at 436–37.
155. *Id.* at 293, 814 S.E.2d at 441.
156. *Id.* at 290, 814 S.E.2d at 439.
157. *Id.* at 290–91, 814 S.E.2d at 440.
158. *Id.* at 291, 814 S.E.2d at 440.
159. *Id.*
160. *Id.*
161. *Id.*

suggestion of unseemliness which creates a danger of unfair prejudice and confusion of the issues before the jury."[162]

In *Chrysler Group, LLC v. Walden*,[163] the Georgia Supreme Court held that evidence of an employee–witness's compensation is potentially subject to exclusion under O.C.G.A. § 24-4-403,[164] which provides that "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[165]

Walden's facts are tragic. On March 6, 2012, four-year-old Remington Walden burned to death when the rear-mounted gas tank of the 1999 Jeep Grand Cherokee, in which he was a back-seat passenger, ruptured and caught fire following a rear-end collision. After filing a wrongful death lawsuit against the Jeep's manufacturer, the plaintiffs, Remington's parents, proved the location of the rear-mounted gas tank was dangerous and that Fiat Chrysler Automobiles US, LLC (FCA) knew the location of the gas tank was dangerous. The jury found that FCA "acted with a reckless . . . disregard for human life and failed to warn of the hazard [such as, the rear-mounted gas tank] that killed Remington." The jury awarded $120 million in wrongful death damages and $30 million in pain and suffering damages.[166]

During trial, the plaintiffs presented evidence that FCA's chief executive officer, Sergio Marchionne, met with the heads of the National Highway Traffic Safety Administration (NHTSA) and the Department of Transportation (DOT) in an effort to persuade the NHTSA and the DOT to exclude the 1999 Jeep Grand Cherokee from a government recall. Marchionne was successful in doing so. Marchionne, however, denied that "he had persuaded NHTSA to resolve its investigation without finding a defect in order to avoid a drop in car sales." In an attempt to establish that Marchionne's testimony was biased in favor of his employer, plaintiffs questioned another FCA witness at trial regarding Marchionne's annual compensation, which totaled over $68 million. FCA objected at trial that evidence of Marchionne's annual compensation was irrelevant and inadmissible as evidence of wealth of a party, but the trial

162. *Id.* at 292, 814 S.E.2d at 441.

163. 303 Ga. 358, 812 S.E.2d 244 (2018). Butler Wooten & Peak LLP represented the plaintiffs in *Walden* at trial and on appeal.

164. O.C.G.A. § 24-4-403 (2018).

165. *Id.*

166. *Walden*, 303 Ga. at 359–60, 812 S.E.2d at 247–48. The jury's verdict was remitted to $30 million for the wrongful death and $10 million for Remington's pain and suffering by the trial judge. *Id.* at 360, 812 S.E.2d at 248.

court overruled those objections. FCA did not object at trial that the probative value of the evidence of Marchionne's annual compensation was substantially outweighed by the danger of unfair prejudice under O.C.G.A. § 24-4-403.[167]

On appeal to the Georgia Court of Appeals, FCA argued that the trial court erred in admitting evidence of Marchionne's annual compensation for several reasons. The court rejected all of FCA's arguments.[168] Relying on O.C.G.A. § 24-6-622,[169] which provides that "[t]he state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury,"[170] the court of appeals "approved the admission of Marchionne's compensation evidence, stating that 'evidence of a witness's relationship to a party is always admissible' and that Marchionne's compensation 'made the existence of Marchionne's bias in favor of Chrysler more probable.'"[171]

The Georgia Supreme Court affirmed, but for a different reason.[172] The supreme court disagreed with the court of appeals that evidence of an employee–witness's compensation is always admissible to establish bias under O.C.G.A. § 24-6-622.[173] As the supreme court explained, section 24-4-403 of Georgia's new Evidence Code[174] empowers trial courts to exclude relevant evidence if the evidence's "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[175] Indeed, "Rule 403 guards against unfair prejudice, mandating that judges consider the balance between how useful or 'probative' the evidence is and how likely it is that the evidence will cause a factfinder to decide a case on the wrong grounds."[176] In other words, the supreme court rejected the idea that O.C.G.A. § 24-6-622 functioned as a rule of super-admissibility, permitting evidence of bias regardless of the evidence's prejudicial value.[177] Instead, the supreme court explained that, under Georgia's new Evidence Code,

167. *Id.* at 359–60, 812 S.E.2d at 247–48; *see also* O.C.G.A. § 24-4-403.

168. *Walden*, 303 Ga. at 360–61, 812 S.E.2d at 248.

169. O.C.G.A. § 24-6-622 (2018).

170. *Id.*

171. *Walden*, 303 Ga. at 360, 812 S.E.2d at 248 (quoting Chrysler Grp., LLC v. Walden, 339 Ga. App. 733, 734, 743, 792 S.E.2d 754, 759, 764 (2016)).

172. *Id.* at 371, 812 S.E.2d at 255.

173. *Id.* at 362–63, 812 S.E.2d at 249–50.

174. *See* O.C.G.A. tit. 24 (2018).

175. *Walden,* 303 Ga. at 362, 812 S.E.2d at 249 (quoting O.C.G.A. § 24-4-403).

176. *Id.*

177. *Id.* at 363, 812 S.E.2d at 250.

evidence of an employee–witness's compensation is potentially subject to exclusion under O.C.G.A. § 24-4-403.[178]

Although it disagreed with the court of appeals over the proper application of O.C.G.A. § 24-6-622, the supreme court affirmed the trial court's decision to admit evidence of Marchionne's annual compensation.[179] Because FCA did not lodge a Rule 403 objection at trial, section 24-1-103(d)[180] of Georgia's new Evidence Code only permitted the Court to "analyze whether the admission of this evidence constituted plain error, not whether it was an 'ordinary' abuse of discretion."[181]

> To meet the plain error standard, an appellant must show an error or defect that has not been "affirmatively waived" by the appellant, that is "clear or obvious," and that "affected the appellant's substantial rights" by "affecting the outcome of the trial court proceedings"; if these three requirements are satisfied, [an appellate court] ha[s] the discretion to remedy the error but should do so only if the error "seriously affect(s) the fairness, integrity or public reputation of judicial proceedings."[182]

The supreme court dispatched with FCA's argument that admission of the evidence constituted plain error given the central role Marchionne's testimony played at trial.[183] As the supreme court held:

> [W]e cannot conclude that under the facts of this case the prejudicial effect of the compensation evidence (which was admittedly significant) so dramatically outweighed its probative value that the decision below must be reversed. Here, unlike in the mine run of cases, the actions of the CEO were directly relevant to the claims at hand, and his credibility (or lack thereof) was central to the question before the jury.[184]

IV. CONCLUSION

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

178. *Id.* at 371, 812 S.E.2d at 255.

179. *Id.*

180. O.C.G.A. § 24-1-103(d) (2018).

181. *Walden*, 303 Ga. at 369, 812 S.E.2d at 254.

182. *Id.* at 370, 812 S.E.2d at 254 (quoting Gates v. State, 298 Ga. 324, 327, 781 S.E.2d 772, 776 (2016)).

183. *Id.* at 370, 812 S.E.2d at 254–55.

184. *Id.*