Business Associations

by Stuart E. Walker*

This Article surveys cases involving corporations and limited liability companies decided by the Georgia Supreme Court and the Georgia Court of Appeals between June 1, 2017 and May 31, 2018.[1]

I. ISSUES OF FIRST IMPRESSION

A. Business Entities Cannot Pursue Claims for the Tort of Intentional Infliction of Emotional Distress

Business entities are incapable of experiencing emotion and are, as a result, incapable of maintaining tort claims for intentional infliction of emotional distress.[2] So held the Georgia Court of Appeals in *Osprey Cove Real Estate, LLC v. Towerview Construction, LLC*,[3] resolving that issue for the first time as a matter of Georgia law.[4]

After a residential real estate development deal soured for various reasons, the general contractor, Towerview Construction, LLC (Towerview) sued the entity responsible both for financing the project

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1. Given the variety of noteworthy decisions rendered by Georgia's appellate courts during the survey period, and the reality of space constraints, I have not, as past authors of this annual survey have, included orders entered by United States district courts in Georgia. Although decisions of federal courts do not speak authoritatively on matters of state law, *LeFrere v. Quezada*, 582 F.3d 1260, 1262 (11th Cir. 2009) ("[W]hen [federal judges] write to state law issues, we write in faint and disappearing ink."), and although district court orders are not binding precedent, federal court decisions interpreting Georgia law are often persuasively reasoned and can, and do, influence Georgia's trial and appellate courts. For an analysis of business association law during the prior survey period, see Edward P. Bonapfel & E. Bowen Reichert Shoemaker, *Business Associations*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 33 (2017).

2. Osprey Cove Real Estate, LLC v. Towerview Constr., LLC, 343 Ga. App. 436, 439, 808 S.E.2d 425, 428 (2017).

3. 343 Ga. App. 436, 808 S.E.2d 425 (2017).

4. *Id.* at 439, 808 S.E.2d at 429.

and marketing and listing the lots for sale, Osprey Cove Real Estate, LLC (Osprey). Towerview alleged a cornucopia of fourteen different claims against Osprey. One was a tort claim to recover damages for Osprey's alleged intentional infliction of emotional distress. Osprey moved to dismiss this claim, and others, for failure to state a claim upon which relief could be granted.[5] The trial court denied the motion in its entirety, and the court of appeals granted Osprey's application for interlocutory review of that denial.[6]

The court surveyed decisions in which courts applying Alabama, Arizona, Iowa, New Jersey, and Oklahoma law had answered "no" to the question whether legal entities, as opposed to natural persons, could sue in tort for the infliction of emotional distress.[7] Finding those decisions persuasive, the court of appeals held that "business entities, including limited liability companies, cannot recover on claims of intentional . . . infliction of emotional distress as a matter of law because business entities lack 'the cognizant ability to [perceive] emotions.'"[8] The court thus reversed the trial court's denial of Osprey's motion to dismiss Towerview's tort claim for the intentional infliction of emotional distress.[9]

5. *Id.* at 436, 808 S.E.2d at 427.

6. *Id.* As the development progressed, Osprey became a licensed real estate brokerage company and thereafter served not only as the project's lender but also as the listing agent for certain properties under development. In one way or another, the various claims alleged by Towerview all centered on Towerview's accusation that the two hats worn by Osprey—as lender and mortgagee under the deeds to secure debt, on one hand, and as listing agent for the completed homes, on the other—led Osprey to act arbitrarily and fraudulently toward Towerview. *Id.* at 438–39, 808 S.E.2d at 428.

7. *Id.* at 439–40, 808 S.E.2d at 429.

8. *Id.* at 440, 808 S.E.2d at 429 (quoting FDIC v. Hulsey, 22 F.3d 1472, 1489 (10th Cir. 1994)).

9. *Id.* In defense of its holding, the court distinguished an earlier decision that might have been viewed as inconsistent, *Oglethorpe Power Co. v. Estate of Forrister*, 332 Ga. App. 693, 774 S.E.2d 755 (2015), in which the court had recognized that a limited liability company could maintain a nuisance claim seeking the recovery of "discomfort and annoyance" damages arising out of a nuisance's effect on the use of the LLC's property by individual LLC members. *Id.* at 712, 774 S.E.2d at 769. The court in *Oglethorpe Power Co.*, though, stressed that "[c]ases addressing this issue demonstrate that 'discomfort and annoyance' in the context of nuisance is not a species of emotional distress, but a distinct element of nuisance damages, as found in our Code and those cases which rely on the Restatement (Second) of Torts." *Id.* at 708, 774 S.E.2d at 767. The court in *Oglethorpe Power Co.* went on to hold, reasoning by analogy to a nineteenth century Supreme Court of the United States decision, that when an LLC's property is interfered with in a way that affects the use of that property by the LLC's individual members, the LLC may seek damages on their behalf to compensate for that harm. *Id.* at 711–12, 774 S.E.2d at 768–69. Not surprisingly, the tort claim at issue in *Osprey Cove Real Estate, LLC* did not involve allegations that the individual members of Towerview had personally experienced

B. The Georgia Uniform Fraudulent Transfer Act Does Not Bar the Recovery of General and Punitive Damages for Claims Arising Under the UFTA

Confronting another issue of first impression, the court of appeals held in *Interfinancial Midtown, Inc. v. Choate Construction Co.*,[10] that creditors may seek general and punitive damages—in addition to the remedies specifically mentioned in the statute—under Georgia's former Uniform Fraudulent Transfer Act (UFTA),[11] which was enacted in 2002 and revised and retitled in 2015.[12] Interfinancial Midtown, Inc. (I-Midtown) borrowed about $900,000 from Quantum National Bank (QNB) to buy property on which to develop townhomes in Atlanta. I-Midtown hired Choate Construction Company to perform the construction work. The project stalled in 2001, and I-Midtown entered into a number of loan modifications with QNB from 2001 to 2004 because I-Midtown was having trouble paying interest on the loan and taxes on the property under development.[13] Meanwhile, Choate sued I-Midtown in 2002 to recover about $400,000, which Choate claimed I-Midtown owed for unpaid construction work. One of I-Midtown's shareholders, Scott Leventhal, tried to find a buyer for the property to generate money to pay I-Midtown's debts, but was unsuccessful. Ultimately, Leventhal did find an investor, John Williams, who agreed to invest in the project only if the property was transferred to a new company in which Williams owned an interest.[14]

In 2004, honoring Williams's request, Leventhal formed Piedmont Fountains, LLC, to buy and finish developing the property. Piedmont Fountains had only two members: John Williams and Interfinancial Properties, Inc. (I-Properties), a corporation also controlled by Leventhal. Piedmont Fountains bought the property from I-Midtown for $1.29 million in mid-2004. Piedmont Fountains borrowed $3.1 million from Regions Bank to finance the purchase of the property and the completion

emotional distress because of Osprey's alleged conduct—a fact that, odd though it may have been, would have made the rule adopted in *Oglethorpe Power Co.* a much closer analogy.

10. 343 Ga. App. 793, 806 S.E.2d 255 (2017).

11. O.C.G.A. § 18-2-70 (2018) (revised and retitled Uniform Voidable Transactions Act in 2015).

12. It remains an open question whether the court's holding will apply to transactions governed by the Uniform Voidable Transactions Act (UVTA), which, effective July 1, 2015, retitled the UFTA and revised some of its former provisions. See *infra* note 30 for the Author's prediction. The UVTA was not implicated in *Interfinancial Midtown, Inc.* because the relevant transfers predated its enactment. *See Interfinancial Midtown, Inc.*, 343 Ga. App. at 797 n.7, 806 S.E.2d at 260 n.7.

13. *Interfinancial Midtown, Inc.*, 343 Ga. App. at 794, 806 S.E.2d at 258.

14. *Id.*

of the development, and Williams and I-Properties contributed $125,000 and $145,000, respectively, to the project. Williams and Regions Bank were both made aware of the pending Choate lawsuit against I-Midtown, from 2002, for $400,000. I-Midtown used the $1.29 million proceeds from the sale of the property to pay off the balance of its $900,000 loan from QNB and to pay property taxes and attorney's fees. Those payments left I-Midtown holding a surplus of approximately $300,000, the bulk of which, at Leventhal's direction, was paid to Leventhal and Leventhal's corporation, I-Properties. None of the surplus proceeds were used to pay or settle Choate's claim against I-Midtown.[15]

Between 2005 and 2010, I-Midtown was recapitalized with approximately $350,000, but none of that money was used to pay Choate's outstanding claim against I-Midtown for unpaid construction work. After work on the development project recommenced using the proceeds from the Regions Bank loan, the final unit was sold in 2006—but not before Choate filed a second suit, in 2005, against Leventhal, I-Midtown, I-Properties, and Piedmont Fountains, alleging that the transfer of the property from I-Midtown to Piedmont Fountains in 2004 was fraudulent under the UFTA and that the distribution of the sale proceeds to Leventhal and I-Properties was likewise fraudulent under the UFTA.[16] In the 2005 suit, Choate also "sought compensatory and punitive damages as a result of the alleged fraudulent transfers." Choate's 2002 lawsuit resulted in a $1 million judgment in Choate's favor, and Choate's 2005 lawsuit resulted in a jury verdict and $1.7 million judgment in Choate's favor against all four defendants. The jury additionally awarded Choate approximately $40,000 in punitive damages solely against Leventhal.[17]

On appeal, as relevant here, the appellants argued that "the trial court erred by concluding that general and punitive damages may be recovered under the UFTA." As support for that proposition, they emphasized that the UFTA identifies specific kinds of relief available to creditors—for example, the return of transferred property, the attachment of property in the hands of transferees, and the entry of money judgments limited to the lesser of the creditor's claim or the value of the transferred property—and that, by implication, the recovery of general and punitive damages is thereby precluded.[18] Choate countered by pointing to the Official Code of Georgia Annotated (O.C.G.A.) § 18-2-77(a)(3)(C),[19] which authorizes a

15. *Id.* at 794–96, 806 S.E.2d at 258–59.

16. *Id.* at 796, 806 S.E.2d at 259.

17. *Id.*

18. *Id.* at 796–97, 806 S.E.2d at 260.

19. O.C.G.A. § 18-2-77(a)(3)(C) (2018).

creditor to obtain—in addition to the specific remedies described in the UFTA—"[*a*]*ny other relief* the circumstances may require."[20] The court of appeals rejected the appellants' narrow view of the remedies available to creditors under the UFTA, holding that the mere recitation of specific remedies in O.C.G.A. §§ 18-2-77[21] and 18-2-78[22] does not preclude the availability of additional forms of relief.[23] Three reasons were offered in support of that conclusion.

First, the court observed that creditors could recover general and punitive damages for fraudulent transfers under Georgia law before the UFTA was enacted in 2002, based at least in part on the fact that the relevant statute prior to 2002, O.C.G.A. § 18-2-22,[24] defined voidable transfers "as fraudulent in law against creditors."[25] Second, applying the maxim that legislatures are presumed to enact statutes with full knowledge of the existing state of the law, the court emphasized that the UFTA also contained a provision defining voidable transfers as "fraudulent as to a creditor,"[26] and a provision saying that "[u]nless displaced by the provisions of this article, the principles of law and equity, including . . . the law relating to . . . fraud . . . supplement its provisions."[27] Finally, the court underscored the fact that the Georgia General Assembly has never repealed O.C.G.A. §§ 18-2-20[28] or 18-2-21[29]—two provisions that, in tandem, evince a policy that creditors should be afforded robust remedies to detect fraudulent transfers and remedy the harm caused by them.[30]

20. *Id.* (emphasis added). Choate highlighted that under O.C.G.A. § 51-12-2(a) (2018) general damages are available for "any tortious act" without "proof of any amount" and also argued that "claims under the [UFTA] sound in the tort of fraud for which general damages can be recovered." *Id.* at 797, 806 S.E.2d at 260.

21. O.C.G.A. § 18-2-77 (2018).

22. O.C.G.A. § 18-2-78 (2018).

23. *Interfinancial Midtown, Inc.*, 343 Ga. App. at 805, 806 S.E.2d at 264.

24. O.C.G.A. § 18-2-22 (2018).

25. *Interfinancial Midtown, Inc.*, 343 Ga. App. at 798, 806 S.E.2d at 260.

26. *Id.* at 800, 806 S.E.2d at 262.

27. *Id.* at 801, 806 S.E.2d at 262 (quoting O.C.G.A. § 18-2-82 (2018)).

28. O.C.G.A. § 18-2-20 (2018).

29. O.C.G.A. § 18-2-21 (2018). These two provisions predated the UFTA's 2002 enactment, co-existed alongside the UFTA from 2002 to 2015, and currently remain on the books alongside the revised UVTA.

30. *Interfinancial Midtown, Inc.*, 343 Ga. App. at 804–05, 806 S.E.2d at 264. O.C.G.A. § 18-2-20 provides: "The rights of creditors shall be favored by the courts; and every remedy and facility shall be afforded them to detect, defeat, and annul any effort to defraud them of their just rights." O.C.G.A. § 18-2-21 provides: "Creditors may attack as fraudulent a judgment, conveyance, or any other arrangement interfering with their rights, either at law or in equity." Those two statutes remain in force today. As pointed out by the court in

C. A Trial Court Errs by Applying a Minority-Interest Discount in Valuing Shares of Stock in a "Small, Family-Owned" Corporation When Those Shares are Sold Back to the Corporation

In *Wallace v. Wallace*,[31] the court of appeals addressed a number of issues arising out of an interfamily dispute over the ownership and valuation of stock shares in a family-owned corporation.[32] The following treatment glosses over or omits many of those issues. The case has been included here because the court held, as an apparent issue of first impression, that a minority-interest discount cannot be applied in valuing stock shares of a minority owner in a "small, family-owned business, with little marketability."[33] According to the court, a discount is inappropriate because "the value of the shares necessarily accounts for the minority interest without further reduction."[34]

Three brothers—Gary, Phillip, and Dorsey "Doss" Wallace—worked for and owned stock in Wallace Electric Company (WEC), a family business started by their father. WEC's bylaws contained a provision obligating WEC to repurchase—at "book value"—all shares of any WEC employee when the employee's employment terminated for any reason. The Wallace brothers, as WEC shareholders, had also entered into a Buy–Sell Agreement containing a similar, but not identical, provision obligating WEC to repurchase—at the "current value"[35]—all shares of any WEC employee within sixty days after the employee's employment

Interfinancial Midtown, Inc., under the pre-2002 statute, O.C.G.A. § 18-2-22, fraudulent transfers were defined as "*fraudulent* in law against creditors," and under the 2002-enacted UFTA, O.C.G.A. § 18-2-74(a) (as it existed before July 1, 2015), such transfers were also referred to as "*fraudulent* as to a creditor." *Interfinancial Midtown, Inc.*, 343 Ga. App. at 798, 806 S.E.2d at 260 (emphasis added). The reader will note, however, that O.C.G.A. § 18-2-74(a) as it currently exists (as modified in 2015 by the enactment of the UVTA) refers to such transfers as "*voidable* as to a creditor" (not "fraudulent"). O.C.G.A. § 18-2-74(a) (2018) (emphasis added). Does this descriptive change matter? In the Author's view, the court's holding in *Interfinancial Midtown, Inc.* was bolstered by, but not strictly dependent on, the use of the word "fraudulent" in the pre-2002 statute and in the UFTA version of O.C.G.A. § 18-2-74(a). It is hard to see how this subtle shift in language could change the outcome in a future case decided under the UVTA, given the other sound reasons for recognizing the availability of general and punitive damages under appropriate circumstances.

31. 345 Ga. App. 764, 813 S.E.2d 428 (2018).

32. *Id.* at 764, 813 S.E.2d at 431.

33. *Id.* at 773, 813 S.E.2d at 437.

34. *Id.* at 773–74, 813 S.E.2d at 437.

35. The "current value" was defined as a particular per-share dollar amount, and the Buy–Sell Agreement contemplated that the dollar amount would be subject to future revisions, which did not happen. *Id.* at 772, 813 S.E.2d at 436.

terminated for any reason.[36] Doss quit working for WEC in 1994, but did not offer his stock to WEC for repurchase. WEC likewise did not demand to repurchase Doss's shares at that time. When he quit working for WEC, Doss owned 16.67% of WEC's outstanding shares. In 2003, when it was discovered that Doss still owned his WEC stock, Phillip reached out to him to discuss WEC's repurchase of the shares, but Phillip and Doss did not discuss any purchase price because Doss refused to sell the shares. Renewed discussions in 2006 or 2007 were similarly unfruitful.[37]

In 2011, Doss sued Gary and Phillip, alleging claims for breach of fiduciary duty and tortious interference with his stock shares, and sought as remedies an accounting and damages. In 2015, while the suit remained pending, Doss, for the first time, asked WEC to repurchase his stock shares at their 2015 current value, under the Buy–Sell Agreement. WEC refused and instead tendered Doss a check representing the 1994 book value of the shares, under the Bylaws, the year he quit working for WEC. After the brothers failed to reach an agreement on WEC's repurchase of Doss's shares, a bench trial ensued.[38]

The trial court ruled that the share price must be determined using the shares' current value, as required by the Buy–Sell Agreement, and not their book value, as required by the Bylaws.[39] The trial court also ruled that the relevant time for valuing Doss's shares was 1994, when Doss left WEC's employment, and calculated the share value by applying a minority-interest discount to reflect that Doss owned only 16.67% of WEC's outstanding shares in 1994.[40] Doss appealed, arguing, in part, that the trial court erred by applying a minority-interest discount to value his shares.[41] The court of appeals agreed, vacating the trial court's judgment and remanding with instructions.[42]

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36. *Id.* at 765, 813 S.E.2d at 432.

37. *Id.* at 766, 813 S.E.2d at 432.

38. *Id.* at 766–67, 813 S.E.2d at 432–33.

39. *Id.* at 767, 813 S.E.2d at 433.

40. The trial court computed the value of Doss's shares by crediting the testimony of an expert witness:

> According to the expert testimony at trial, the "fair market value" of Wallace Electric's stock in 2003 was $1,834,305. At that time, Doss owned 16.67 percent of the company, which placed the "fair market value" of Doss's stock at $305,700. Because Doss's 16.67 percent share of the company was not a controlling interest, the expert applied a minority interest discount to 15 percent, which he testified made Doss's shares worth $259,900.

Id. at 772, 813 S.E.2d at 436.

41. *Id.*

42. *Id.* The court of appeals concluded that the parties waived their right to insist on a share repurchase in 1994 because neither Doss nor WEC demanded that the shares be repurchased by WEC at that time. *Id.* at 771, 813 S.E.2d at 435. The court instead

The court of appeals held that the trial court erred by applying a minority-interest discount to the value of Doss's shares,[43] relying on *Blitch v. Peoples Bank*,[44] an appeal that arose from a dissenters'-rights action following a corporate merger.[45] In an action between a corporation and a shareholder who has dissented from a corporate merger (or some other triggering transaction), the critical issue is determining the "fair value" of the dissenting shareholder's shares.[46] *Blitch* identified several reasons for rejecting the application of minority-interest discounts in the context of dissenters'-rights actions, among them the fact that doing so would "encourage[] corporations to squeeze out minority shareholders, and penalize[] the minority [shareholders] for taking advantage of the protection afforded by dissenters' rights statutes."[47] At first blush, it might seem odd that the court in *Wallace* would look to *Blitch* as authority for adopting a no-minority-interest-discount rule for stock valuations in "small, family-owned" corporations outside the context of

determined that the relevant date for valuing Doss's 16.67% interest in WEC was 2003, when Doss first refused Phillip's demand, made on WEC's behalf, that Doss sell his shares back to WEC. *Id.* at 772–73, 813 S.E.2d at 436. The court also concluded that the shares must be valued using the current value under the Buy–Sell Agreement rather than the book value under the Bylaws, on the theory that the Buy–Sell Agreement was inconsistent with the Bylaws on this issue and that, as a result, the Buy–Sell Agreement superseded the Bylaws as to valuation because the Buy–Sell Agreement was adopted in 1988, well after the Bylaws were adopted in 1959. *Id.* at 769–70, 813 S.E.2d at 434–35.

43. *Id.* at 773, 813 S.E.2d at 436–37.

44. 246 Ga. App. 453, 540 S.E.2d 667 (2000).

45. *Id.* at 454–55, 540 S.E.2d at 668.

46. In Georgia, dissenters'-rights actions are governed by O.C.G.A. §§ 14-2-1301 to -327 (2018). "Fair value" is a statutorily defined term. *See* O.C.G.A. § 14-2-1302(a) (2018) ("A record shareholder of the corporation is entitled to dissent from, and obtain payment of the *fair value* of his or her shares in the event of, any of the following corporate actions.") (emphasis added); O.C.G.A. § 14-2-1301(5) (2018) ("'Fair value,' with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action."). The term "fair value" is not synonymous with the concept of fair market value.

47. *Wallace*, 345 Ga. App. at 773, 813 S.E.2d at 437 (quoting *Blitch*, 246 Ga. App. at 456, 540 S.E.2d at 669). In rejecting the use of minority-interest discounts in dissenters'-rights actions, the court in *Blitch* heavily emphasized the statutory definition of the term "fair value" under the Revised Model Business Corporation Act (The Model Act). REVISED MODEL BUS. CORP. ACT § 1 (AM. BAR ASS'N 2016). The Model Act defines fair value to mean "the value of the corporation's shares determined: *without discounting for* lack of marketability or *minority status*." REVISED MODEL BUS. CORP. ACT § 13.01(4)(iii) (AM. BAR ASS'N 2016) (emphasis added). The discount prohibition is thus baked into the statutory definition of fair value under the Model Act. Significantly, however, the General Assembly has never imported the Model Act's definition of fair value into the Georgia Business Corporation Code. *See* O.C.G.A. § 14-2-1301(5).

dissenters'-right actions.[48] The court in *Wallace* acknowledged that "the instant case does not arise in the context of a dissenters' rights suit," but nevertheless concluded that "we find the logic of our prior holding [in *Blitch*] persuasive."[49]

Although not articulated by the court, perhaps the soundest justification for the result in *Wallace*, as to share valuation, is simply that the use of minority-interest discounts makes no economic sense when a minority shareholder is selling his or her shares to a majority shareholder or to the corporation itself, as in the case of Doss's sale to WEC. As the Montana Supreme Court observed in *Hansen v. 75 Ranch Co.*[50]:

> Applying a [minority-interest] discount is inappropriate when the shareholder is selling her shares to a majority shareholder or to the corporation. The sale differs from a sale to a third party and, thus, different interests must be recognized. When selling to a third party, the value of the shares is either the same as or less than it was in the hands of the transferor because the third party gains no right to control or manage the corporation. However, a sale to a majority shareholder or to the corporation simply consolidates or increases the interests of those already in control. Therefore, requiring the application of a minority discount when selling to an "insider" would result in a windfall to the transferee.[51]

The precise scope and application of *Wallace*'s rule will be worked out in future cases.[52] For now, it suffices to note that *Wallace* marks a new development in the law to be heeded by practitioners.[53]

48. *Wallace*, 345 Ga. App. at 773–74, 813 S.E.2d at 437.

49. *Id.* at 773, 813 S.E.2d at 437.

50. 1998 MT 77 (1998).

51. *Id.* at ¶ 41.

52. One might ask, for example, whether it makes sense to prohibit minority-interest discounts when a minority owner sells his or her shares to a purchaser who does not already have, and who would not as a result of the purchase acquire, a controlling interest in the company. There are good reasons for thinking it does not. One might also ask whether in light of *Wallace* shareholders remain free to contract around *Wallace*'s rule. The answer is likely yes. *Wallace* is best understood as setting forth a default valuation rule, applicable only when a company's bylaws or a shareholder agreement are silent on the application of valuation discounts. On that score, the court's opinion in *Wallace* does not disclose whether the bylaws or the shareholder agreement mentioned valuation discounts of any sort, but it seems safe to conclude that neither document did.

53. A petition for a writ of certiorari to review the decision of the court of appeals has been filed in the Georgia Supreme Court and remains pending at the time of this writing. The Author has no knowledge concerning the content of that filing or the basis on which certiorari review is being sought.

II. NOTEWORTHY CASES

A. The Georgia Supreme Court Overruled the Decision of the Georgia Court of Appeals in PlayNation Play Systems, Inc. v. Jackson

In *Colonial Oil Industries, Inc. v. Lynchar, Inc.*,[54] the Georgia Supreme Court asked "whether the identification in a guaranty [agreement] of the principal debtor by only its trade name is sufficient to make such a guaranty enforceable [under the statute of frauds]."[55] The court's answer: yes.[56]

Colonial Oil Industries, Inc. sold fuel products on credit to a corporation named Lynchar, Inc., whose name in a 1986 document evidencing the credit account was shown as "Lynchar, Inc. d/b/a T & W Oil Co." A decade later, an updated document was signed to evidence the same credit account, but this one, on the signature line, showed the name of the account debtor as simply "T & W Oil." In 2008, Charles G. Thompson, Jr., and Lawrence M. Derby, Sr.—Lynchar, Inc.'s shareholders—signed written guaranty agreements in favor of Colonial, under which they agreed to guarantee the repayment of the debt owed to Colonial by a debtor identified as "T & W Oil, Inc."[57]

When Lynchar, Inc. defaulted on its credit account in the amount of nearly $1.4 million, Colonial sued Thompson and Derby to recover that amount under their written guaranty agreements. On the issue whether the guaranty agreements satisfied Georgia's statute of frauds,[58] the parties filed cross-motions for summary judgment. Thompson and Derby argued in support of their motion that the guaranty agreements were unenforceable because they identified the principal debtor as "T & W Oil, Inc." rather than using the debtor's correct legal name—"Lynchar, Inc."[59]

The summary judgment record included the corporation's federal tax return filed in the name of "Lynchar, Inc. d/b/a T & W Oil Company, Inc." and included Derby's deposition testimony, in which he acknowledged he had agreed to repay the debt of a corporation named "Lynchar," which he further acknowledged transacted business in the trade name of "T & W Oil."[60]

The trial court denied Thompson's and Derby's summary judgment motion and granted Colonial's cross-motion, concluding that Thompson

54. 303 Ga. 839, 815 S.E.2d 917 (2018).
55. *Id.* at 844, 815 S.E.2d at 920.
56. *Id.* at 846–47, 815 S.E.2d at 922.
57. *Id.* at 840, 815 S.E.2d at 918.
58. O.C.G.A. § 13-5-30 (2018).
59. *Colonial Oil Indus., Inc.*, 303 Ga. at 841, 815 S.E.2d at 919.
60. *Id.* at 841–42, 815 S.E.2d at 919.

and Derby agreed to repay Lynchar, Inc.'s debt, even though the guaranty agreements identified Lynchar, Inc. only by its trade name.[61] Thompson and Derby appealed the grant of summary judgment in Colonial's favor. Applying its decision in *PlayNation Play Stations, Inc. v. Jackson*,[62] the Georgia Court of Appeals reversed, reasoning that the guaranty agreements were unenforceable under the statute of frauds because the principal debtor was identified using only its trade name.[63] The supreme court granted certiorari to review that conclusion.[64]

The supreme court set forth four background principles to guide its analysis. First, the court reiterated the core requirement of the statute of frauds that "[a] promise to answer for the debt . . . of another . . . must be in writing and signed by the party to be charged."[65] Second, the court noted that certain additional requirements have been judicially engrafted onto the statute of frauds as applied to guaranty agreements, including, as relevant here, the requirement that a guaranty agreement identify the name of "the principal debtor."[66] Third, the court recognized the principle of suretyship law that a guarantor's liability "will not be extended by implication or interpretation."[67] And finally, the court identified the unsurprising purpose of the statute of frauds: the "prevention of frauds and perjuries."[68]

The court explained that, under Georgia law, a trade name is merely a name adopted by a natural person or a legal entity and that any obligation undertaken using a trade name is simply an obligation of the natural person or legal entity that adopted the trade name.[69] A trade name, in other words, is not capable of having legal rights or obligations of its own. The court explained that "the use of a trade name does not shield" the natural person or legal entity using it from the consequences of using the trade name to undertake binding legal commitments.[70]

The court next noted that nothing in Georgia's statute of frauds displaced the rules relating to the use of trade names or the consequences of using trade names.[71] Indeed, the court pointed out that the purpose of

61. *Id.* at 842–43, 815 S.E.2d at 919–20.

62. 312 Ga. App. 340, 718 S.E.2d 568 (2011), *overruled by Colonial Oil Indus., Inc.*, 303 Ga. 839, 815 S.E.2d 917.

63. *Colonial Oil Indus., Inc.*, 303 Ga. at 843, 815 S.E.2d at 920.

64. *Id.* at 839, 815 S.E.2d at 918.

65. *Id.* at 843, 815 S.E.2d at 920 (quoting O.C.G.A. § 13-5-30(2) (2018)).

66. *Id.*

67. *Id.* at 844, 815 S.E.2d at 920 (quoting O.C.G.A. § 10-7-3 (2018)).

68. *Id.*

69. *Id.*

70. *Id.* at 844, 815 S.E.2d at 921.

71. *Id.*

the statute of frauds would be thwarted if binding legal obligations could be evaded simply by undertaking those obligations using a trade name—a rule countenancing that result would "shield or enable" frauds.[72]

The court then explained why *PlayNation Play Stations, Inc.* was wrongly decided.[73] That decision proceeded on a mistaken premise—namely, that a guaranty agreement identifying the principal debtor only by a trade name has the effect of "extending" a guarantor's liability "by implication or interpretation," contrary to O.C.G.A. § 10-7-3.[74] But using a trade name does not *extend* a guarantor's liability, the court explained, because the guarantor has consented to repay the debt of only one person—the natural person or business entity whose trade name is identified in the guaranty agreement.[75] Because a trade name is not capable of having rights or duties of its own—but is instead merely a stand-in for the natural person or legal entity using it—the use of a trade name does not "extend" the guarantor's liability to anyone.[76] The name of the principal debtor *is* identified in the guaranty agreement—in the form of a trade name—and Georgia law authorizes a natural person or legal entity to make enforceable agreements using only a trade name.[77] "There is, therefore, no missing essential element required to make the guaranty enforceable, and the writing requirement of O.C.G.A. § 13-5-30(2) is satisfied."[78]

The court concluded by observing that even if "T&W Oil, Inc." was a misnomer of "T&W Oil, Co." or of "T&W Oil Company, Inc.," the same result would obtain, because "the inclusion in the guaranty of a named debtor, though *misnamed*, satisfies the writing requirement of the Statute of Frauds. To the extent that any misnomer or clerical defect created any ambiguity . . . parol evidence would be admissible to identify the parties to the guaranty."[79]

72. *Id.* at 844–45, 815 S.E.2d at 921.

73. *Id.* at 845–47, 815 S.E.2d at 921–22 ("[W]e . . . find that the . . . holding in *PlayNation*, supra, is incorrect, and we hereby overrule that opinion.").

74. *Id.* at 846, 815 S.E.2d at 921; *contra* O.C.G.A. § 10-7-3.

75. *Colonial Oil Indus., Inc.*, 303 Ga. at 846, 815 S.E.2d at 922.

76. *Id.*

77. *Id.*

78. *Id*. Importantly, the court added that "[i]f . . . Lynchar were to contend that T&W Oil was not its trade name or that Lynchar had not, in fact, entered into the agreement, parol evidence could then be introduced to show that it was and did." *Id.* That use of parol evidence, the court explained, "would not extend the liabilities of the individual guarantors . . . by implication or interpretation [because t]heir liability is established by the terms of the guaranties they knowingly entered." *Id.*; *see also* O.C.G.A. § 13-5-30(2) (2018).

79. *Colonial Oil Indus., Inc.,* 303 Ga. at 846–47, 815 S.E.2d at 922 (emphasis added).

B. An Administratively Dissolved Corporation that is Time-Barred from Having Its Charter Reinstated by the Secretary of State May Not Exercise Its Pre-Dissolution Contract Rights, and a Later-Incorporated, Identically Named Corporation Cannot, by Mere Use of the Same Name, Assume the Contract Rights of the Defunct Corporation Under a Theory of Corporate Continuity

After a corporation has been administratively dissolved and has become time-barred from having its charter reinstated by the Secretary of State, the corporation "can no longer be resuscitated" and cannot enforce its pre-dissolution contract rights.[80] Moreover, a new corporation that later incorporates in the same name as the defunct corporation does not, by the mere use of the same name, become entitled to enforce the defunct corporation's contract rights.[81] So confirmed the court of appeals in *Medical Center of Central Georgia, Inc. v. Macon Health Center, Inc.*,[82] which involved a dispute arising out of a contract between a hospital and a corporation concerning the operation of a health club.[83]

Under a 1991 agreement, the Macon-Bibb County Hospital Authority bought from Macon Health Center, Inc. d/b/a Macon Health Club a building housing a gym and a health club and the associated equipment. The 1991 agreement contained the following material terms:

- the Authority agreed to operate a gym on the property for "so long as it could feasibly do so;"
- if the Authority decided to quit operating a gym, then Macon Health Center, Inc. would become entitled to exercise an option to operate a gym on the property under a lease agreement with the Authority; and
- Macon Health Center, Inc. obligated itself to "remain a corporation in good standing under the laws of the State of Georgia" and to "take such action as is necessary . . . to maintain [its] corporate existence in good standing."[84]

Importantly, the Hospital Authority and Macon Health Center Inc. were the only parties to the 1991 agreement. In 1995, the Hospital Authority transferred all its interests in the 1991 agreement to Medical Center of Central Georgia, Inc., making that corporation and Macon

80. Gas Pump, Inc. v. Gen. Cinema Beverages of N. Fla., Inc., 263 Ga. 583, 584, 436 S.E.2d 207, 208 (1993).

81. Med. Ctr. of Cent. Ga., Inc. v. Macon Health Ctr., Inc., 345 Ga. App. 879, 884, 815 S.E.2d 199, 203 (2018).

82. 345 Ga. App. 879, 815 S.E.2d 199 (2018).

83. *See id.* Full disclosure: The Author was one of several counsel of record for the appellant in this case.

84. *Med. Ctr. of Cent. Ga., Inc.*, 345 Ga. App. at 879–81, 815 S.E.2d at 201.

Health Center, Inc. the sole parties to the agreement from 1995 forward.[85]

In the meantime, in 2001, the Secretary of State administratively dissolved the corporate charter of Macon Health Center, Inc. for failing to pay the required annual registration fees, and Macon Health Center, Inc. did not, within five years of the dissolution, apply to the Secretary of State for reinstatement of its charter.[86] Macon Health Center, Inc.'s failure to timely reinstate its charter by 2006 was its death knell.[87]

In late 2008, Medical Center of Central Georgia, Inc. announced plans to close the health club and communicated its intention to the persons who it believed were serving as board members of Macon Health Center, Inc. In January 2009, a new corporation was incorporated—using the name Macon Health Center, Inc.—and the president of this newly formed corporation, Donald J. Cornett, sent a letter to Medical Center of Central Georgia, Inc. concerning its plan to stop operating the health club.[88] In that letter, the new corporation purported to "give[] written notice to [the Medical Center of Central Georgia, Inc.] of its intent to lease the space described in . . . the [1991] Agreement [that is, the health club,] for a term ending December 13, 2020."[89]

Negotiations ensued between Medical Center of Central Georgia, Inc. and Cornett about the ongoing operation of the health club, and in the fall of 2009 an agreement was reached under which Medical Center of Central Georgia, Inc. would continue to operate the health club under certain circumstances. The document that evidenced that agreement was signed by Medical Center of Central Georgia, Inc. and Cornett, in his capacity as president of the corporation formed in 2009, using the name Macon Health Center, Inc.[90]

In September 2016, Medical Center of Central Georgia, Inc. again decided to stop operating the health club, and again negotiations ensued about the possibility of a lease under the 1991 agreement. A deal was reached to keep the health club open until March 2017 while negotiations were pursued. In December 2016, legal counsel for the 2009

85. *Id.* at 881, 815 S.E.2d at 201.

86. *Id.* at 883, 815 S.E.2d at 203; *see* O.C.G.A. § 14-2-1422 (2018).

87. *See Gas Pump, Inc.*, 263 Ga. at 584, 436 S.E.2d at 208 (underscoring that "[O.C.G.A.] § 14-2-1422 gives the administratively dissolved corporation [five] years in which it may seek reinstatement. The expiration of the time for reinstatement puts a stamp of finality on the demise of the corporation[—]it can no longer be resuscitated. The unavoidable conclusion is that the corporation cannot, after the time its demise is deemed complete, initiate any activity.").

88. *Med. Ctr. of Cent. Ga., Inc.*, 345 Ga. App. at 882, 815 S.E.2d at 202.

89. *Id.* at 881, 815 S.E.2d at 202.

90. *Id.*

corporation—purporting to act under the 1991 agreement—sent a letter to Medical Center of Central Georgia, Inc. invoking the lease option under the 1991 agreement.[91]

In February 2017, soon after it claimed to have first learned that the 2009 corporation was not the same corporation that was a party to the 1991 agreement, Medical Center of Central Georgia, Inc. filed a declaratory judgment action against the 2009 corporation (Macon Health Center, Inc.) in which it sought, among other things, a declaration that the 2009 corporation was not a party to the 1991 agreement and thus lacked standing to exercise the lease option with respect to the health club property. Medical Center of Central Georgia, Inc. moved for summary judgment on the issue of the 2009 corporation's standing under the 1991 agreement. The trial court denied summary judgment, reasoning that there existed factual disputes about whether Medical Center of Central Georgia, Inc. knew that it was negotiating with a non-party to the 1991 agreement and whether, if it did know and nevertheless continued negotiating the lease option, it thus acquiesced in the 2009 corporation's authority to exercise rights under the 1991 agreement.[92]

The court of appeals reversed the denial of summary judgment.[93] The court first concluded that the original Macon Health Center, Inc., the party to the 1991 agreement—whose charter had been dissolved in 2001 and not reinstated by 2006—"[was] barred by law from conducting further business, and thus [was] legally prohibited from exercising the Lease Option or continuing to operate the gym."[94]

The court next addressed whether there was any legal basis for recognizing a right of the 2009 corporation to exercise the lease option under the 1991 agreement and concluded there was "no valid legal theory to support a jury finding that [the 2009 corporation] ha[d] any such right."[95] First, the court noted that the original Macon Health Center, Inc. did not at any time—either before its 2001 dissolution or during the winding-up period that preceded the 2006 reinstatement deadline—assign its rights under the 1991 agreement to anyone else.[96] Second, the court rejected the notion that merely using the same corporate name as

91. *Id.*

92. *Id.* at 882–83, 815 S.E.2d at 202–03.

93. *Id.* at 883, 815 S.E.2d at 203. The denial of summary judgment was reviewed by the court of appeals as part of the direct appeal from a grant of injunctive relief against Medical Center of Central Georgia, Inc. *See* O.C.G.A. § 5-6-34(a)(4), (d) (2018).

94. *Med. Ctr. of Cent. Ga., Inc.*, 345 Ga. App. at 883, 815 S.E.2d at 203.

95. *Id.*

96. *Id.* at 883–84, 815 S.E.2d at 203.

a formerly existing corporation—even when that same name is used "with the intent of stepping into [the former corporation's] shoes"—serves to vest the new corporation with the contractual rights of the former corporation.[97] In reaching this conclusion, the court observed that the theory of "corporate continuity" did not apply because there was "no evidence of any identity of corporate ownership, no transfer of assets, and no evidence that either [the] Board or shareholders [of the original corporation] voted on the incorporation of [the 2009 corporation]."[98] The upshot was that the 2009 corporation "cannot be considered a successor in interest to [the original corporation] for purposes of the [1991] Agreement."[99]

On the question that the trial court thought precluded the entry of summary judgment in favor of Medical Center of Central Georgia, Inc.—whether Medical Center of Central Georgia, Inc. knew or should have known that, in 2009 and 2016, it was actually negotiating with a representative of the 2009 corporation (and not the original corporation), thereby waiving its right to challenge the standing of the 2009 corporation to exercise rights under the 1991 agreement—the court agreed that a factual dispute existed but concluded that the dispute was not "material" for purposes of summary judgment.[100] The court determined that even if Medical Center of Central Georgia, Inc. actually knew it was negotiating with the 2009 corporation, that knowledge could not, as a matter of law, support a finding of waiver—because a party to a contract cannot, by dealing with a stranger to the contract (the 2009 corporation), waive its right to insist that the true counterparty to the contract (the original Macon Health Center, Inc.) perform its contractual duties.[101] Or, in the words of the court, judicial decisions "address[ing] the waiver of contractual rights or defenses as between the existing parties to a contract" do not "support the proposition that a [stranger to the contract] may be unilaterally waived *into* a contract with the rights to enforce its provisions."[102]

97. *Id.* at 884, 815 S.E.2d at 203 ("[T]he fact that [the 2009 corporation] incorporated under the same name as [the defunct corporation] with the intent of stepping into its shoes is not a sufficient basis for finding that the [the 2009 corporation] is vested with [the defunct corporation's] contractual rights.").

98. *Id.* at 884, 815 S.E.2d at 204.

99. *Id.*

100. *Id.* at 885, 815 S.E.2d at 204.

101. *Id.*

102. *Id.* at 885 n.4, 815 S.E.2d at 204 n.4 (emphasis added). The court noted that the document signed in 2009 (between the 2009 corporation and Medical Center of Central Georgia, Inc.) expressly preserved all rights of Medical Center of Central Georgia, Inc. under the 1991 agreement and, as a result, could not be construed to contain "any implied

C. Managers of a Limited Liability Company Owe Fiduciary Duties to the Creditors of the Limited Liability Company Once the Company Has Become Insolvent

A corporation's officers and directors are obligated to act in good faith to pursue the best interests of the corporation.[103] So too are the managers of a limited liability company (and the managing members, if the limited liability company is member-managed).[104] Ordinarily, those duties are owed to the corporation or the limited liability company itself, not to creditors or other third parties.[105] Things change once an organization becomes insolvent. At that point, corporate officers and directors and limited liability company managers and managing members owe a duty to manage the organization's affairs and remaining assets for the additional benefit of the organization's creditors. In *Georgia Commercial Stores, Inc. v. Forsman*,[106] the court of appeals underscored these principles.[107]

In 1998, Daniel T. Forsman organized Pargar, LLC, which consisted of only two members: Forsman and Prudential Real Estate Financial Services of America, Inc. (Prudential). Prudential owned a majority interest in Pargar, while Forsman, as the managing member, president, treasurer, secretary, and sole director, oversaw Pargar's daily affairs. In connection with its formation, Pargar bought a realty company for $16

or express promise . . . granting [the 2009 corporation] the same or similar rights . . . granted to [the original Macon Health Center, Inc.] under the [1991] Agreement so as to establish a claim by [the 2009 corporation] to enforce a lease option under a theory of promissory estoppel or any other legal theory." *Id.* at 885–86, 815 S.E.2d at 204–05.

103. *See* O.C.G.A. § 14-2-830(a) (2018) (directors) ("A director shall perform his or her duties as a director in good faith and with the degree of care an ordinarily prudent person in a like position would exercise under similar circumstances."); cmt. to O.C.G.A. § 14-2-830 (2018) ("[T]he belief that action is in the best interests of the corporation is a facet of the good faith requirement. The good faith must relate to the director's belief that the action is in the best interests of the corporation."); O.C.G.A. § 14-2-842 (2018) (officers); cmt. to O.C.G.A. § 14-2-842 ("This section provides that a nondirector officer with discretionary authority must meet the same standards of conduct required of directors under Section 14-2-830.").

104. *See* O.C.G.A. § 14-11-305(1) (2018) ("A member or manager shall act in a manner he or she believes in good faith to be in the best interests of the limited liability company and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.").

105. *See, e.g.*, O.C.G.A. § 14-2-830 cmt. (citing with approval the following statement of the American Law Institute's Principles of Corporate Governance: "The duty of care standards set forth in § 14-2-401 involve duties owed directly to the corporation . . . [and are] not intended to create new third-party rights (e.g., for tort claimants or government agencies) against directors or officers.").

106. 342 Ga. App. 542, 803 S.E.2d 805 (2017).

107. *Id.* at 546, 803 S.E.2d at 809–10.

million, financing part of the purchase with a loan from Prudential of nearly $12 million, which Prudential secured by taking a security interest in Pargar's assets and in Forsman's minority membership interest in Pargar. Forsman also made an unsecured loan of $250,000 to Pargar.[108]

In 2007, Pargar signed a ten-year lease of real property with an owner that later sold the property to Georgia Commercial Stores, Inc., which assumed the lease agreement and, as the new property owner, became Pargar's landlord. Pargar was unable to repay the $12 million Prudential loan when it matured in June 2012. Financial records revealed that Pargar was at that time insolvent on both a "going concern" basis and a "balance sheet" basis.[109]

While insolvent, Pargar distributed to Forsman—at Forsman's direction—nearly $240,000 to satisfy the balance of Forsman's earlier loan to Pargar. Prudential knew and approved of that repayment. By 2013, Pargar remained insolvent, and the Prudential loan remained unpaid. Prudential thus foreclosed on its security interest in Pargar's assets and foreclosed on its security interest in Forsman's minority membership interest in Pargar. Prudential then, as the sole member of Pargar, began taking steps to wind up its affairs. Meanwhile, Pargar continued making lease payments to Georgia Commercial Stores, Inc. through 2013, but after Prudential foreclosed on Pargar's assets, Pargar quit making lease payments and vacated the leased property. Georgia Commercial Stores, Inc. received notice of Prudential's foreclosure and the sale of Pargar's assets but was not informed of Pargar's payment to Forsman of $239,011.[110]

Georgia Commercial Stores, Inc. sued Pargar for breaching the lease agreement, sought as damages the rent due under the balance of the lease term, and obtained a $1 million judgment against Pargar. It was not until Georgia Commercial Stores, Inc. conducted post-judgment discovery, however, that Pargar's $239,011 distribution to Forsman first came to light. Georgia Commercial Stores, Inc. then sued Forsman, alleging, as relevant here, a claim for breach of fiduciary duty arising out of Pargar's repayment of Forsman's loan at a time when Pargar was insolvent.[111] On the fiduciary duty claim, the trial court granted

108. *Id.* at 543, 803 S.E.2d at 808.

109. *Id.* at 544, 803 S.E.2d at 808. A company is insolvent on a "going concern" basis when it cannot "repay all of its debts as they mature[] and on a 'balance sheet' basis [when] its debts exceed[] the fair valuation of its assets." *Id.*

110. *Id.* at 544, 803 S.E.2d at 808–09.

111. *Id.* at 542–43, 803 S.E.2d at 807–08.

summary judgment in Forsman's favor, reasoning that any breach by Forsman did not cause an injury to Georgia Commercial Stores, Inc.[112]

On appeal, the court reversed the grant of summary judgment on the fiduciary duty claim, explaining as an initial matter that Forsman owed a fiduciary duty to Georgia Commercial Stores, Inc., as Pargar's creditor, at all times during Pargar's insolvency.[113] The court reiterated that "[i]n a solvent, going concern, directors are the agents or fiduciaries of the corporation, not of its creditors," but that "when a company becomes insolvent, 'the directors stand in a trust relation toward creditors.'"[114] While in a state of insolvency, "the managing officers and directors of a corporation are charged with the duty of conserving and managing the remaining assets . . . in trust for the creditors," and "are bound to manage the remaining assets for the benefits of its creditors, and cannot in any manner use their powers for the purpose of obtaining a preference or advantage to themselves."[115]

The court explained that these principles apply to limited liability companies just as they do to corporations.[116] As a result, the court recognized that

> if a managing member of an insolvent limited liability company breaches his fiduciary duty to the company's creditors by making an improper preferential transfer of company assets to himself, a creditor may bring an action against the member to set aside the transfer and recover the funds impermissibly paid to that member.[117]

The court first determined that summary judgment was inappropriate because a reasonable juror could conclude that Pargar's $239,011 payment to Forsman, while Pargar was indisputably insolvent, breached a fiduciary duty owed by Forsman to Georgia Commercial Stores, Inc. (Pargar's judgment creditor) not to use Pargar's assets for Forsman's personal advantage.[118] The court next determined that a jury must

112. *Id.* at 551, 803 S.E.2d at 813.

113. *Id.* at 543, 803 S.E.2d at 808.

114. *Id.* at 546, 803 S.E.2d at 809 (quoting Bank Leumi-Le-Israel, B.M., Phila. Branch v. Sunbelt Indus., Inc., 485 F. Supp. 556, 559 (S.D. Ga. 1980)).

115. *Id.* at 546, 803 S.E.2d at 810.

116. *Id.* at 547, 803 S.E.2d at 810–11. ("The management duties of the . . . managers of a limited liability company are similar to the duties of the directors of a corporation . . . [and t]hus, like corporate directors of an insolvent corporation, the managing members of an insolvent limited liability company owe a fiduciary duty to the company's creditors to conserve and manage the remaining assets of the company in trust for the benefit of those creditors." (citations omitted)).

117. *Id.* at 547, 803 S.E.2d at 811.

118. *Id.* at 551, 803 S.E.2d at 813.

resolve whether Pargar's payment to Forsman "was in fact a mere scheme and device on [Forsman's part] to indemnify [himself] against loss, and as such constituted a legal fraud."[119] And finally, the court determined that Georgia Commercial Stores, Inc. was proximately damaged by Forsman's conduct to the extent that the $239,011 was not an available source of funds from which the $1 million judgment might be partially satisfied.[120]

D. Shareholder "Derivative" Actions vs. Shareholder "Direct" Actions

In two notable cases handed down during the survey period, the court of appeals considered whether certain claims by shareholders[121] had to be brought "derivatively" in the corporation's name or whether, instead, the claims could be brought "directly" in the shareholders' own names.[122] In both cases, the plaintiffs brought suit in their own names, and in both cases the court held that the claims were improper, concluding that they should have been brought derivatively.[123]

Some background will set the stage for the summary of these cases. Generally, when a corporation has been injured by the actions of its officers or directors, a shareholder may pursue a claim on the corporation's behalf against the person or persons responsible for the harm and seek a remedy for the corporation itself.[124] Such claims are brought by the shareholder derivatively—on behalf of the corporation, with any recovery going to the corporation—not directly in the shareholder's own name. Conversely, when a shareholder has suffered a "special" injury (one not suffered by the corporation itself and thus not suffered indirectly by all shareholders) by the actions of the corporation's officers or directors, the shareholder pursues a claim on his or her own behalf and seeks a remedy for him- or herself. These claims against the responsible person or persons are said to be brought directly—and any recovery goes to the injured shareholder. In the latter instance, there is no need to proceed derivatively in the name of the corporation since the

119. *Id.* at 549, 803 S.E.2d at 811.

120. *Id.*

121. *See* Ga. Appreciation Prop., Inc. v. Enclave at Riverwalk Townhome Ass'n, 345 Ga. App. 413, 812 S.E.2d 157 (2018) (where the claims were brought by a "member" of a non-profit corporation; non-profit corporations do not have shareholders).

122. *Id.*; Rollins v. LOR, Inc., 345 Ga. App. 832, 815 S.E.2d 169 (2018).

123. *Ga. Appreciation Prop., Inc.*, 345 Ga. App. 413, 812 S.E.2d 157; *Rollins*, 345 Ga. App. at 832, 815 S.E.2d at 169.

124. *See generally* O.C.G.A. §§ 14-2-740 to -743 (2018) (authorizing shareholders of for-profit corporations to initiate derivative proceedings).

corporation itself (and by extension all shareholders) has suffered no harm.[125]

1. A Member of a Homeowner's Association That Sues the Association to Enforce Voting Requirements Governing the Adoption of Amendments to the Association's Recorded Covenants Must Bring the Suit Derivatively on the Association's Behalf, and not Directly in the Member's Own Name

In *Georgia Appreciation Property, Inc. v. Enclave at Riverwalk Townhome Ass'n*,[126] the court of appeals, by a 2–1 vote,[127] affirmed the dismissal of a lawsuit based on the plaintiff's lack of standing to bring it, concluding that the suit, filed by a member of a property owners' association, was wrongly filed in the association member's own name instead of derivatively in the name and on behalf of the association itself.[128]

Georgia Appreciation Property, Inc. owned two units in a townhome development whose unit owners were members of an owner's association named Enclave at Riverwalk Townhome Association, Inc. The development was subject to recorded declarations of covenants, and the development's units and the recorded declarations were made subject to the Georgia Property Owners' Association Act (POAA).[129] The association's declarations contained a provision setting forth a minimum

125. At least four policies justify the use of derivative proceedings. Derivative proceedings are used:

> (1) to prevent multiple suits by shareholders; (2) to protect corporate creditors by ensuring that the recovery goes to the corporation; (3) to protect the interest of all the shareholders by ensuring that the recovery goes to the corporation, rather than allowing recovery by one or a few shareholders to the prejudice of others; and (4) to adequately compensate injured shareholders by increasing their share values.

Southland Propane, Inc. v. McWhorter, 312 Ga. App. 812, 817, 720 S.E.2d 270, 275 (2011). There are some instances, however, in which a shareholder can show that, under the circumstances, those policies will not be served even though it is the corporation that has been injured and not the individual shareholder. When the policies do not apply, a shareholder may sue the responsible corporate agents directly (not in the name of the corporation) for the harm to the corporation. *Id.* at 816–17, 720 S.E.2d at 275 ("[A] direct action may nevertheless be proper in the context of a closely held corporation *where the circumstances show that the reasons for the general rule requiring a derivative suit do not apply*.").

126. 345 Ga. App. 413, 812 S.E.2d 157 (2018).

127. Judge McFadden dissented, rendering the decision a physical precedent only. *See* Ga. Ct. App. R. 33.2(a). The case is noteworthy even though it is non-binding.

128. *Ga. Appreciation Prop., Inc.*, 345 Ga. App. at 423, 812 S.E.2d at 165.

129. O.C.G.A. § 44-3-220 (2018).

vote requirement for the adoption of declaration amendments, and the POAA also contained a provision setting forth a minimum vote requirement for declaration amendments. The declaration and the POAA, however, prescribed different ways of determining which votes counted toward the requisite minimum number needed for a valid amendment.[130] That difference lay at the heart of the dispute between Georgia Appreciation Property, Inc. and the association.

In 2016, the association proposed certain amendments to the declarations that restricted the leasing rights of unit owners. The association tallied the votes of the unit owners, determined that certain amendments (ones adversely affecting Georgia Appreciation Property, Inc.) were adopted by the minimum number of required votes (as calculated under the declarations), and recorded the amendments in the county deed records. Georgia Appreciation Property, Inc. disagreed that the amendments had received the requisite number of votes and, as a result, filed a declaratory judgment action against the association, alleging that the 2016 amendments failed to receive the necessary number of votes required by the POAA.[131]

In its complaint, Georgia Appreciation Property, Inc. alleged that the slate of 2016 amendments was void in its entirety (or, at a minimum, that certain individual amendments were void) because the slate's adoption (or, at a minimum, the adoption of certain individual amendments) failed to receive the minimum votes required by the POAA, and sought a declaration of voidness from the trial court.[132] For its part, the association asserted that the lawsuit was in reality a "derivative action" and therefore subject to dismissal because Georgia Appreciation Property, Inc. "had not satisfied the necessary prerequisites for asserting such a [derivative] claim."[133] The trial court agreed with the association and dismissed the suit for lack of standing.[134] The court of appeals affirmed.[135]

The court recognized that the association was a non-profit corporation under Georgia law and that members of non-profit corporations are

130. *Ga. Appreciation Prop., Inc.*, 345 Ga. App. at 413–17, 812 S.E.2d at 159–61.

131. *Id.* at 417, 812 S.E.2d at 161.

132. *Id.*

133. *Id.* at 418, 812 S.E.2d at 161.

134. *Id.* at 413, 812 S.E.2d at 159.

135. *Id.* The trial court alternatively ruled on the merits of Georgia Appreciation Property, Inc.'s claims for relief, but the court of appeals vacated those merits rulings after concluding that the dismissal of a lawsuit because of a party's failure to comply with the procedural requirements of Georgia's derivative-action statute is a dismissal for lack of subject matter jurisdiction, such that the trial court lacked authority to reach the merits. *Id.* at 423–24, 812 S.E.2d at 165.

entitled to file "derivative" actions under certain circumstances.[136] A derivative action is proper when "a member asserts for the corporation's benefit rights or remedies belonging to the corporation, not to the member. The wrong which the action seeks to redress is one which the corporation, not the individual, has sustained."[137] The court identified the conditions that must be satisfied before a derivative action may be initiated[138] and noted that the conditions were not satisfied.[139]

The court acknowledged that a member of a non-profit corporation "may also bring direct [claims] against the corporation, but 'only if [the member] suffered a special injury as a result of the [corporate wrong].'"[140] Whether a claim is derivative or direct is determined "by looking to what the pleader alleged. It is the nature of the wrong alleged and not th[at] pleader's designation or stated intention that controls the court's decision."[141] Applying this test, the court determined that Georgia Appreciation Property, Inc. was attempting to vindicate a right—a right to have "the votes that led to the . . . 2016 Amendment [counted by the association's board of directors] in accordance with the [POAA]"—afforded to all members of the association, not just Georgia Appreciation Property, Inc. alone.[142] The court reasoned that, whether "valid or invalid," the slate of 2016 amendments "plainly affected all of the members of the association whether they were then leasing out their townhomes or simply had a right to do so."[143] What is more, the court observed, for any relief afforded by the trial court to Georgia Appreciation Property, Inc.'s claims to succeed, such relief "would come in the form of an order . . . declaring that the amendment was void, which would affect every members' ability to lease out their townhome."[144] In short, Georgia Appreciation Property, Inc.'s complaint failed to allege a "special injury"—one that is "separate and distinct from that suffered by other members"—and therefore the claims "are derivative and not direct."[145]

136. *Id.* at 419, 812 S.E.2d at 162.

137. *Id.*

138. *Id.* (citing O.C.G.A. § 14-3-742(a) (2018)).

139. *Id.* at 418, 812 S.E.2d at 161.

140. *Id.* at 420, 812 S.E.2d at 163 (alteration in original) (quoting Dunn v. Ceccarelli, 227 Ga. App. 505, 508, 489 S.E.2d 563, 566 (1997)).

141. *Id.*

142. *Id.* at 421, 812 S.E.2d at 163.

143. *Id.*

144. *Id.* at 421, 812 S.E.2d at 164.

145. *Id.* In addition to the claim that the votes were counted in a way that violated the POAA, Georgia Appreciation Property, Inc. also alleged that the amendments were adopted without its consent, in violation of Georgia law, but the court concluded that this allegation too failed to plead a "special injury" because if the consent of each property owner were

Judge McFadden dissented, beginning simply: "This is not a derivative proceeding."[146] Judge McFadden instead viewed the suit as one brought by a property owner to vindicate the "power of disposition,"[147] over its own property.[148] That Georgia Appreciation Property, Inc. happened to be a member of the association did not change the fundamental thrust of its complaint—that its own property interest had been diminished by the association's action.[149]

Judge McFadden started from the principle that "[t]here is no general rule that suits brought by members or shareholders against corporations must be brought as derivative suits."[150] He then explained that, instead, "[t]he general rule is that actions for *breach of fiduciary duties* are to be brought in derivative suits."[151] What he could also have underscored, but did not, is that when a shareholder brings a fiduciary-duty claim he brings it not against the corporation itself, as Georgia Appreciation Property, Inc. did, but against the corporate agents who owe the duty (the directors and officers) to the corporation. Georgia Appreciation Property, Inc., however, did not allege a breach of any fiduciary duty and did not name as defendants any officer or director of the association. Judge McFadden would have reversed the trial court's dismissal of the suit.[152]

2. A Shareholder's Claims That Corporate Directors Misused Corporate Assets, Caused the Corporation to Make Below-Market-Rate Loans to Themselves, and Set the Corporation's Dividend Policies in an Oppressive Manner Must Be Brought Derivatively, Not Directly, Because the Harms Alleged Were Suffered by All Shareholders

In *Rollins v. LOR, Inc.*,[153] the court of appeals reversed the denial of summary judgment to a corporation's directors whom a shareholder had

required (as Georgia Appreciation Property, Inc. alleged), then that right would be one enjoyed by all members of the association, not just Georgia Appreciation Property, Inc., and its vindication would accordingly inure to the benefit of *all* members. *Id.* at 422–23, 812 S.E.2d at 164–65.

146. *Id.* at 424, 812 S.E.2d at 166 (McFadden, J., dissenting).

147. O.C.G.A. § 44-6-20 (2018).

148. *Ga. Appreciation Prop., Inc.*, 345 Ga. App. at 424, 812 S.E.2d at 166.

149. *Id.* at 424–25, 812 S.E.2d at 166.

150. *Id.* at 425, 812 S.E.2d at 166.

151. *Id.* (emphasis added).

152. *Id.*

153. 345 Ga. App. 832, 815 S.E.2d 169 (2018).

sued for alleged breaches of fiduciary duties.[154] The court concluded that the shareholder's claims alleged harms suffered by all shareholders (not just the plaintiff) and thus should have been brought derivatively in the name of the corporation and in compliance with O.C.G.A. § 14-2-740.[155]

In 1978, O. Wayne Rollins, Sr., formed LOR, Incorporated (LOR) "as a way to manage the [Rollins] family's wealth." LOR's capital stock consisted of voting and nonvoting shares. The nonvoting shares were owned by nine trusts, one for each of Mr. Rollins's grandchildren, and, after Mr. Rollins's death, the voting shares became owned by his two sons—Gary and Randall. In addition, Randall served as LOR's president, and Gary served as its vice president.[156]

In 1993, Gary transferred his nonvoting shares to a marital trust for the benefit of his wife and appointed his four children—Glen, Ellen, Nancy, and Wayne—to serve as trustees of the marital trust. The marital trust at all times owned 18.3% of LOR's total nonvoting shares. The sole source of income for the marital trust was the dividend payments it received from LOR. At the end of 1993, Gary held a meeting with his wife and four children and announced that he planned to serve as the trustee of the marital trust during the remainder of his lifetime and that when he died the four children would become the trustees again. Gary's representation was untrue: Glen, Ellen, Nancy, and Wayne remained trustees of the marital trust at all times. Every time some action needed to be taken on behalf of the marital trust, Gary would have the children sign documents to effect the transactions, and while the documents indicated that the children were signing as trustees, they testified that Gary told them they were signing only for administrative purposes, since Gary was, the children believed, the trustee.[157]

In 1994, a custodial account was created for the marital trust's LOR shares, and Gary's four children signed an agreement authorizing all communications about the custodial account to be sent to LOR rather than to the four children as trustees. After that, an officer of LOR communicated directly with Gary, not the trustees, about the distributions to be made to Gary's wife from the marital trust. Concerning the 1994 agreement, the trustees later testified that "they did not know that they were [signing it] in their capacities as trustees of

154. *Id.* at 849, 815 S.E.2d at 183.

155. *Id.* at 852–53, 815 S.E.2d at 185–86; *see* O.C.G.A. § 14-2-740 (2018). The denial of summary judgment to the corporate directors on the fiduciary-duty claims came to the court of appeals for review on the directors' cross-appeal, after the shareholder appealed the grant of summary judgment to the directors on other claims. *Rollins*, 345 Ga. App. at 833, 815 S.E.2d at 172–73; *see* O.C.G.A. § 5-6-38(a) (2018).

156. *Rollins*, 345 Ga. App. at 833–34, 815 S.E.2d at 173.

157. *Id.* at 834–36, 815 S.E.2d at 173–74.

the marital trust because, at the time, they were still relying on their father's representation that he was the trustee."[158] About ten years later, Gary and Randall, as directors of LOR, voted with the third LOR director to fix, on a standing basis, LOR's dividend distribution at a flat $2 million each year—regardless of LOR's annual performance or its capital needs—based on their determination "that the marital trust would get $360,000 a year."[159]

By 2010, Gary's four children had become suspicious of the way Gary and their uncle, Randall, were managing the family's business dealings. They sued Gary and Randall to obtain an accounting for their four grandchildren's trusts, which continued to own LOR's nonvoting stock.[160] In retaliation, Gary quit managing the affairs of the marital trust, and Glen, Ellen, Nancy, and Wayne were alerted by e-mail that they were the current trustees of the marital trust. "Upon learning this information, the trustees began controlling and administering the marital trust."[161]

During litigation over the grandchildren's trust, and after consulting lawyers and accountants to help them sort out how the family businesses had been managed, Glen, Ellen, Nancy, and Wayne discovered that LOR owned certain cattle ranches formerly thought to be personally owned by Gary or Randall, and they discovered that Gary and Randall leased some of the ranch acreage from LOR for "only nominal amounts of money," an opportunity from which the remaining LOR shareholders (including the marital trust) were excluded. They also discovered that an airplane and a luxury bus formerly thought to be personally owned by Randall were actually owned by LOR but used exclusively for Randall's and Gary's personal purposes.[162]

In 2014, Glen, Ellen, Nancy, and Wayne—on behalf of the marital trust—sued Gary and Randall, alleging, among other things, that Gary and Randall, in their capacities as LOR's directors and LOR's controlling shareholders, "breached their fiduciary duties to the marital trust in several ways."[163] They identified three alleged fiduciary-duty breaches: (1) fixing LOR's annual dividend payment at an artificially low amount; (2) using LOR assets (plane and bus) for personal use; and (3) causing LOR to make below-market-rate loans to themselves and other family

158. *Id.* at 836, 815 S.E.2d at 174–75.

159. *Id.* at 838, 815 S.E.2d at 175–76.

160. *Id.* at 838, 815 S.E.2d at 176. Glen, Ellen, Nancy, and Wayne were four of Mr. Rollins's nine grandchildren, each of whom had a trust created to hold LOR stock for his or her own benefit. *Id.* at 834, 815 S.E.2d at 173.

161. *Id.* at 838–39, 815 S.E.2d at 176.

162. *Id.* at 839–40, 815 S.E.2d at 176–77.

163. *Id.* at 840, 815 S.E.2d at 177.

members.[164] Gary and Randall moved for summary judgment on the fiduciary-duty claims, arguing that the claims "were derivative and could not be brought in a direct action."[165] The trial court disagreed and denied summary judgment.[166]

On appeal, the court of appeals reiterated the familiar distinction between derivative and direct claims, as discussed in *Georgia Appreciation Property, Inc.*, above, and concluded that all three fiduciary-duty claims were derivative because the alleged harms were suffered by all LOR shareholders, not just the marital trust.[167] "We disagree with the trial court that any of the [fiduciary-duty] claims alleged a special injury to the marital trust separate and distinct from that suffered by the other non-party [LOR] shareholders."[168] Concerning Gary and Randall's personal use of LOR's assets, the court noted that "[w]hile the . . . personal use of LOR assets without sufficient compensation benefitted some shareholders, but not others, any injury suffered by the marital trust as a result of this misuse of LOR assets is the same as the injury suffered by the non-party shareholders and the corporation itself."[169] Similarly, the court determined that all shareholders and the corporation itself suffered harm from Gary and Randall's authorization "of any below-market loans that LOR made to Gary and Randall or other Rollins family entities and [from] any actions [Gary and Randall] took to lower dividend distributions" paid by LOR to its shareholders.[170]

The court bolstered its determination that the martial trust's fiduciary-duty claims should be treated as derivative ones by underscoring that "there are several LOR shareholders who are not a party to this litigation, but who could be prejudiced if damages are awarded to a single shareholder (i.e., the marital trust), rather than to LOR," and that there was no evidence to show that the non-party LOR

164. *Id.* at 851–52, 815 S.E.2d at 184–85.

165. *Id.* at 840, 815 S.E.2d at 177.

166. *Id.*

167. *Id.* at 855, 815 S.E.2d at 188.

168. *Id.* at 854, 815 S.E.2d at 186.

169. *Id.*

170. *Id.* at 854, 815 S.E.2d at 186–87. With respect to the marital trust's artificially depressed dividend claim, the court observed that because "Gary and Randall could not make 'disparate dividends from LOR'"—namely, could not pay different dividend rates to different shareholders—"any actions taken to reduce LOR's dividend distributions injured all of its shareholders equally, including numerous Rollins family trusts other than the marital trust that are not parties to this litigation." *Id.* at 854 n.59, 815 S.E.2d at 187 n.59.

shareholders had consented to the payment of damages solely to the marital trust.[171]

Lastly, the court reasoned that the fiduciary-duty claims should have been brought derivatively "to prevent a multiplicity of lawsuits."[172] The court pointed out that the trustees of the marital trust—Glen, Ellen, Nancy, and Wayne—were also beneficiaries of LOR nonvoting stock under their grandchildren's trusts and that the four of them, either through their trusts or as owners of LOR shares,[173] "could file another action asserting the same claims at issue here."[174] Because the fiduciary-duty claims pursued by the marital trust were not filed in a derivative proceeding that complied with O.C.G.A. § 14-2-740, Gary and Randall were entitled to summary judgment on those claims.[175]

D. Failure to Serve Process in Compliance with O.C.G.A. § 9-11-4(e)(7) on a Foreign Limited Liability Company Not Registered to Transact Business in Georgia Provides a Basis for Setting Aside a Default Judgment Against the Foreign Limited Liability Company Under O.C.G.A. § 9-11-60(d)(2) for Lack of Personal Jurisdiction

In *Delta Aliraq, Inc. v. Arcturus International, LLC*,[176] the court of appeals affirmed a trial court order setting aside a default judgment, under O.C.G.A. § 9-11-60(d)(2),[177] entered against a foreign limited liability company on the ground that the plaintiff failed to perfect service of process on, and thus obtain personal jurisdiction over, the company.[178] Delta Aliraq, Inc. (Delta) obtained a $1 million judgment against Delta Alpha X-Ray, LLC (DAX) in a California state court. Delta then sought to domesticate the foreign judgment in Georgia by commencing suit against DAX in Fulton County. DAX did not file any responsive pleading to the complaint for domestication. Delta then moved for and obtained a default judgment against DAX. Thereafter, DAX moved the trial court to set aside the default judgment under O.C.G.A. § 9-11-60(d)(2) for lack of personal jurisdiction. The trial court granted the motion, set aside the

171. *Id.* at 854–55, 815 S.E.2d at 187.

172. *Id.* at 855, 815 S.E.2d at 187.

173. *Id.* at 834, 815 S.E.2d at 173.

174. *Id.* at 855, 815 S.E.2d at 187.

175. A petition for a writ of certiorari to review the decision of the court of appeals has been filed in the Georgia Supreme Court and remains pending at the time of this writing. The Author has no knowledge concerning the content of that filing or the basis on which certiorari review is being sought.

176. 345 Ga. App. 778, 815 S.E.2d 129 (2018).

177. O.C.G.A. § 9-11-60(d)(2) (2018).

178. *Delta Aliraq, Inc.*, 345 Ga. App. at 778, 815 S.E.2d at 130.

judgment, and certified its order for immediate review.[179] The court of appeals granted Delta's application for interlocutory appeal and affirmed.[180] Delta argued that DAX was subject to personal jurisdiction in Georgia under Georgia's Long Arm Statute, O.C.G.A. § 9-10-91,[181] because DAX had an interest in real property in Georgia.[182] The Long Arm Statute's venue provision says that nonresidents suable in Georgia "may be served with a summons outside the state in the same manner as service is made within the state."[183]

Ordinarily, the court noted, service of process on a foreign limited liability company would be made in accordance with the relevant service provisions of Georgia's Limited Liability Company Act, O.C.G.A. § 14-11-703,[184] but those service provisions, the court pointed out, apply only when a foreign limited liability company has registered to transact business in Georgia, which DAX had never done.[185] As a result, the court determined that "[s]ervice [on DAX] in this case . . . is governed by the catchall provision in O.C.G.A. § 9-11-4(e)(7)."[186] Under that service provision, the summons and a copy of the complaint must be delivered "to an agent authorized by appointment or by law to receive service of process."[187]

To establish that it served DAX with the summons and a copy of the complaint for domestication of the California judgment, Delta submitted to the trial court a Sheriff's Entry of Service form identifying the party to be served as follows:

> Delta Alpha X-Ray, LLC
> Neighborhood Homes & Realty, Inc.
> 737 Chadwick Shores Drive
> Sneads Ferry, NC 28460

The form showed boxes indicating "Personal" service or service on a "Corporation." Only the box beside "Personal" was checked. Beside that box, the form's pre-printed language said: "I have this day served the defendant _____ personally with a copy of the within action and summons." Hand-written on the blank line indicating the name of

179. *Id.* at 778–79, 815 S.E.2d at 130.

180. *Id.* at 778, 815 S.E.2d at 130.

181. O.C.G.A. § 9-10-91 (2018).

182. *Delta Aliraq, Inc.*, 345 Ga. App. at 780, 815 S.E.2d at 131.

183. O.C.G.A. § 9-10-94 (2018).

184. O.C.G.A. § 14-11-703 (2018).

185. *Delta Aliraq, Inc.*, 345 Ga. App. at 780, 815 S.E.2d at 131.

186. *Id.*; O.C.G.A. § 9-11-4(e)(7) (2018).

187. *Delta Aliraq, Inc.*, 345 Ga. App. at 780, 815 S.E.2d at 131 (quoting O.C.G.A. § 9-11-4(e)(7)).

the "defendant" was the name William Treweek, a person whom the form failed to identify.[188]

On appeal, Delta argued that Neighborhood Homes & Realty, Inc. was DAX's former registered agent in North Carolina. Nothing on the entry of service form filed in the trial court indicated that Mr. Treweek was authorized to receive service of process on behalf of DAX or Neighborhood Homes & Realty, Inc.[189] Rather, "[o]n its face, the form identifies Treweek as an individual defendant, which indisputably is not the case."[190] At most, the court reasoned, the entry of service form indicated only that Mr. Treweek was a person present at the physical address indicated on the form on the date that the deputy sheriff delivered the summons and complaint.[191] "Absent some indication in the record that Treweek was an agent of either DAX or Neighborhood Homes & Realty, this is insufficient to show that service [of process] was perfected on DAX through Neighborhood Homes & Realty."[192] The court of appeals thus held that because Delta failed to properly serve DAX with process, the trial court never acquired personal jurisdiction over DAX in the domestication proceeding, and the trial court correctly set aside the default judgment under O.C.G.A. § 9-11-60(d)(2).[193]

E. Venue-Removal Provision of O.C.G.A. § 14-2-510(b)(4) Does Not Apply if There is Any Other Basis for Venue Against a Defendant–Corporation Under Georgia Law

In *Blakemore v. Dirt Movers, Inc.*,[194] the court of appeals held that the venue-removal provision in O.C.G.A. § 14-2-510(b)(4)[195]—which permits a defendant–corporation to remove a tort claim asserted against it to a court in the Georgia county, if any,[196] in which the corporation maintains its principal place of business—applies only if no other venue provision of Georgia law would render venue appropriate against the defendant–corporation in the county in which the suit is originally filed.[197] The

188. *Id.* at 780–81, 815 S.E.2d at 131.

189. *Id.* at 781, 815 S.E.2d at 131–32.

190. *Id.* at 781, 815 S.E.2d at 132.

191. *Id.*

192. *Id.*

193. *Id.* at 783, 815 S.E.2d at 133.

194. 344 Ga. App. 238, 809 S.E.2d 827 (2018).

195. O.C.G.A. § 14-2-510(b)(4) (2018).

196. *See* Pandora Franchising, LLC v. Kingdom Retail Grp., LLLP, 299 Ga. 723, 727, 791 S.E.2d 786, 789 (2016) (a corporation can have only one principal place of business, and "[i]f that place is not located in a Georgia county, then no right to remove is granted" under O.C.G.A. 14-2-510(b)(4)).

197. *Blakemore*, 344 Ga. App. at 243, 809 S.E.2d at 831.

court's holding follows from a straightforward reading of the plain statutory text.

After her daughter was killed in an automobile accident, Natasha Blakemore filed a wrongful death lawsuit in Bibb County against Dirt Movers, Inc. (a motor carrier); Dirt Movers, Inc.'s driver; and Dirt Movers, Inc.'s liability insurance carrier. Blakemore alleged that her daughter was hit or forced off the road on I-75 in Bibb County by a tractor-trailer owned by Dirt Movers, Inc.—a "domestic corporation engaged in interstate commerce and registered with, licensed by, and insured in accordance with the Federal Motor Carrier Safety Administration."[198] Blakemore alleged that venue was proper against Dirt Movers, Inc. in Bibb County under the Georgia Motor Carrier Act (MCA),[199] because the MCA's venue provision authorizes venue against a motor carrier in the county where the cause of action arose.[200]

Dirt Movers, Inc. acknowledged that the accident occurred in Bibb County, but filed a notice of removal to Jeff Davis County, the location of its principal place of business, on the ground that it was authorized to do so by O.C.G.A. § 14-2-510(b)(4). Following Dirt Movers, Inc.'s removal to Jeff Davis County, the trial court denied Blakemore's motion to remand the case to Bibb County and certified its order denying remand for immediate review.[201] The court of appeals granted Blakemore's application for interlocutory appeal and reversed.[202]

A defendant–corporation's "right to remove" a lawsuit under O.C.G.A. § 14-2-510(b)(4) applies—by the statute's terms—only "[i]f venue is based *solely* on this paragraph."[203] The court pointed out that venue over Dirt Movers, Inc. in Bibb County was not based "solely" on the venue provision of subsection (b)(4) of O.C.G.A. § 14-2-510 because venue was also proper in Bibb County based on the venue provision specifically applicable to motor carriers under the MCA, O.C.G.A. § 40-1-117(b).[204] The court stressed that under O.C.G.A. § 14-2-510(c),[205] "any residences established by this Code section [which includes subsection (b)(4)] shall be in addition to, and not in limitation of, any other residence that any domestic or

198. *Id.* at 238–39, 809 S.E.2d at 828.

199. O.C.G.A. § 40-1-50 (2018).

200. *Blakemore*, 344 Ga. App. at 239, 809 S.E.2d at 829 (citing O.C.G.A. § 40-1-117(b) (2018)).

201. *Id.* at 239, 243, 809 S.E.2d at 829, 831.

202. *Id.* at 243, 809 S.E.2d at 831; *see* O.C.G.A. § 5-6-34(b) (2018).

203. *Blakemore*, 344 Ga. App. at 239, 809 S.E.2d at 829 (quoting O.C.G.A. § 14-2-510(b)(4)) (emphasis added).

204. *Id.*

205. O.C.G.A. § 14-2-510(c) (2018).

foreign corporation may have by reason of other laws."[206] Similarly, the MCA's venue provision says that "[t]he venue prescribed by this Code section shall be cumulative of any other venue provided by law."[207] In short, the availability of venue in Bibb County under the MCA meant that venue in Bibb County was not based "solely" on O.C.G.A. § 14-2-510(b)(4), and that fact alone rendered removal unavailable.[208] In the words of the court of appeals:

> [T]he issue in this case is whether a domestic motor carrier retains the right to remove a case under O.C.G.A. § 14-2-510(b)(4), by virtue of its status as a corporation or other business entity, when venue is also predicated upon O.C.G.A. § 40-1-117(b). We conclude that it does not . . . . Under the plain language of O.C.G.A. § 14-2-510(b)(4), a corporation cannot remove an action to the county where its principal place of business is located if there is *any* basis for venue other than O.C.G.A. § 14-2-510(b)(4).[209]

206. *Blakemore*, 344 Ga. App. at 241, 809 S.E.2d at 830.

207. O.C.G.A. § 40-1-117(b).

208. *Blakemore*, 344 Ga. App. at 241–42, 809 S.E.2d at 830–31.

209. *Id.* at 241–42, 809 S.E.2d at 830.