Insurance

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I. INTRODUCTION

During this survey period, the Georgia courts continued to respond to unique and varied issues arising in connection with uninsured motorist (UM) coverage. The courts decided cases of first impression in UM matters involving vehicles furnished for an insured's regular use, out-of-state settlements, and the effect of workers' compensation claims on UM limits, among others. In the previous survey period,[1] the courts seemed to struggle with the issue of late notice in UM cases. This survey period included two more examples. Other cases in this survey period include state and federal decisions on reservations of rights, the effect of a bankruptcy on seeking excess judgments against a debtor, rescission of homeowners' policies, coverage for residence premises, and the growing interest in diminished value in real property cases.

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1. For an analysis of insurance law during the prior survey period, see Bradley S. Wolff, Maren R. Cave & Stephen M. Schatz, *Insurance*, *Annual Survey of Georgia Law*, 69 MERCER L. REV. 117 (2017).

II. UNINSURED MOTORIST COVERAGE

A. Exclusion for Vehicle Furnished for Regular Use

In *Hazelwood v. Auto-Owners Insurance Co.*,[2] the Georgia Court of Appeals held that an insured was not entitled to UM coverage where the insured was injured by a vehicle owned by his employer and furnished for his regular use.[3] Hazelwood was attempting to inflate a tire on his employer's truck when it blew, causing injuries. Contending the truck was underinsured, Hazelwood pursued a claim against his own UM carrier. That policy had an exclusion for vehicles furnished to or available for Hazelwood's regular use.[4] Since Hazelwood drove the truck five days per week and kept the truck overnight at least twice, the court found that the truck was furnished for his regular use.[5] Hazelwood argued that the exclusion violated the statutory obligation to provide UM coverage.[6] The court disagreed, holding the exclusion did not violate the statute since the UM statute excepted from the statutory definition of an "uninsured motor vehicle" those vehicles "*owned by or furnished for the regular use of the named insured*."[7] *Hazelwood* appears to be the first case to examine this part of the definition of "uninsured motor vehicle," upholding an exclusion common to UM policies.[8]

B. Georgia UM Law Applies to Out-of-State Collisions

In another case of first impression, the court of appeals held that where an insured is injured out of state but seeks to recover UM benefits in Georgia, Georgia law controls as to the effect of a release.[9] Newstrom, a California resident, was involved in a collision in California while driving a car principally garaged in California. The car was registered in Georgia and insured under a Georgia policy issued to Newstrom's parents. Following California law, when Newstrom settled with the other driver, she signed a general release. She then made a UM claim and demanded binding arbitration under California law. When Auto-Owners

2. 344 Ga. App. 891, 812 S.E.2d 781 (2018).

3. *Id.* at 895, 812 S.E.2d at 783.

4. *Id.* at 892–93, 812 S.E.2d at 782.

5. *Id.*

6. *Id.* at 894, 812 S.E.2d at 782 (citing O.C.G.A. § 33-7-11(a) (2018)).

7. *Id.* at 895, 812 S.E.2d at 783 (quoting O.C.G.A. § 33-7-11(b)(1)(D) (2018)).

8. *Id.*

9. Newstrom v. Auto-Owners Ins. Co., 343 Ga. App. 576, 578, 807 S.E.2d 501, 503 (2017).

refused, the Newstroms brought suit against Auto-Owners. Auto-Owners prevailed and the Newstroms appealed.[10]

Based on *Allstate Insurance Co. v. Duncan*,[11] the Georgia Court of Appeals affirmed, holding that an insured's right to recover UM benefits in Georgia is a procedural and remedial matter governed by Georgia law.[12] Because Georgia law requires that an insured execute a limited liability release rather than a general release in order to preserve a right to recover from a UM carrier, pursuant to O.C.G.A. § 33-24-41,[13] Newstrom's general release precluded her UM claim.[14]

C. UM Limits Not Reduced By Workers' Compensation Payments

In *Georgia Farm Bureau Mutual Insurance Co. v. Rockefeller*,[15] the Georgia Court of Appeals held Farm Bureau liable up to the combined coverage limits of four UM policies for losses the insured sustained in an accident which was not fully compensated by his workers' compensation benefits.[16] Based on provisions in its UM policies and O.C.G.A. § 33-7-11(i),[17] Farm Bureau argued that it could reduce the combined coverage limits of its UM policies by the insured's workers' compensation benefits.[18] In rejecting Farm Bureau's argument, the court first clarified that O.C.G.A. § 33-7-11(i) does not permit a dollar-for-dollar reduction in the UM limits based on workers' compensation benefits paid, but allows the exclusion of UM coverage for damages for which the insured was actually compensated.[19] The court then analogized the case to *Mabry v. State Farm Mutual Automotive Insurance Co.*,[20] which held that so-called "non-duplication" provisions in UM policies did not bar recovery for uncompensated losses,[21] explaining further that, under O.C.G.A. § 33-7-11(i), the "limit of liability" provision at issue in this case had the

10. *Id.* at 577–78, 807 S.E.2d at 502–03.

11. 218 Ga. App. 552, 462 S.E.2d 638 (1995) (holding that, in the context of an insurance policy that included UM coverage, what is required to recover benefits is a procedural and remedial matter governed by Georgia law).

12. *Newstrom*, 343 Ga. App. at 579, 807 S.E.2d at 503.

13. O.C.G.A. § 33-24-41 (2018).

14. *Newstrom*, 343 Ga. App. at 579, 807 S.E.2d at 504.

15. 343 Ga. App. 36, 805 S.E.2d 660 (2017).

16. *Id.* at 38, 805 S.E.2d at 662.

17. O.C.G.A. § 33-7-11(i) (2018).

18. *Rockefeller*, 343 Ga. App. at 38, 805 S.E.2d at 662.

19. *Id.*

20. 334 Ga. App. 785, 780 S.E.2d 533 (2015).

21. *Id.* at 789, 780 S.E.2d at 536.

same effect.[22] Therefore, Farm Bureau could be liable for the insured's uncompensated losses.[23]

D. Excusing Late Notice

As discussed in last year's survey, UM policies often require timely notice of an accident.[24] Last year's survey discussed two cases that reached opposite results where the policies required notice "promptly" or "as soon as possible."[25] The Authors concluded that the cases did not provide clear guidance as to the basis for the distinction between the two cases.[26] In this past year, the Georgia Court of Appeals issued two more decisions with seemingly contradictory results concerning whether an insured's excuse for delay in giving notice raises a triable issue.[27]

In *Silva v. Liberty Mutual Fire Insurance Co.*,[28] the court held that notice given four years and seven months after a collision, and eighteen months after a lawsuit, was not "prompt."[29] Silva argued that her delay was excused because her attorney was unaware that she would need UM coverage until her losses exceeded the liability coverage.[30] The court rejected that excuse, noting that the same excuse was previously rejected.[31]

However, a seemingly different result was reached in *Bramley v. Nationwide Affinity Insurance Co.*[32] After an accident, Bramley waited eight months to notify her insurer. Her policy required written proof "immediately."[33] The court concluded the notice was untimely but found a fact question as to whether Bramley was excused because of "her inability to understand the extent of her injuries."[34] Despite the decision in *Silva* almost six months earlier, the court in *Bramley* did not discuss

22. *Rockefeller*, 343 Ga. App. at 39, 805 S.E.2d at 662–63.

23. *Id.* at 40, 805 S.E.2d at 663.

24. *See* Wolf et al., *supra* note 1, at 117.

25. Progressive Mut. Ins. Co. v. Bishop, 338 Ga. App. 115, 790 S.E.2d 91 (2016); GEICO Indem. Co. v. Smith, 338 Ga. App. 455, 788 S.E.2d 150 (2016).

26. *See* Wolf et al., *supra* note 1, at 122.

27. *See* Bramley v. Nationwide Affinity Ins. Co., 345 Ga. App. 624, 814 S.E.2d 770 (2018); Silva v. Liberty Mut. Fire Ins. Co., 344 Ga. App. 81, 808 S.E.2d 886 (2017).

28. 344 Ga. App. 81, 808 S.E.2d 886 (2017).

29. *Id.* at 88, 808 S.E.2d at 891.

30. *Id.* at 83, 808 S.E.2d at 888.

31. *Id.* at 84, 808 S.E.2d at 888 (quoting Lankford v. State Farm Mut. Auto. Ins. Co., 307 Ga. App. 12, 15, 703 S.E.2d 436, 439 (2010)).

32. 345 Ga. App. 624, 814 S.E.2d 770 (2018).

33. *Id.* at 625, 628, 814 S.E.2d at 772, 774.

34. *Id.* at 628, 814 S.E.2d at 774.

or distinguish *Silva*, arguably creating further confusion for practitioners and courts dealing with notice issues.

E. Additional Driver and Fiancée Not a Named Insured

In *Stanley v. Government Employees Insurance Co.*,[35] the Georgia Court of Appeals held that Stanley was not entitled to UM coverage from the insurer of his fiancée's parents because he was not a named insured.[36] GEICO denied coverage, arguing that, although Stanley was an "Additional Driver" on the parents' policy, he was not an "insured."[37] In affirming the judgment for GEICO, the court explained that, under Georgia law, "listed drivers are not named insureds."[38] The court did not address Stanley's argument that his fiancée was his common-law wife and that, as such, he was a resident relative, because the trial court never ruled on that issue.[39]

III. OTHER AUTOMOBILE INSURANCE CASES

A. Bankruptcy Did Not Preclude Seeking an Excess Judgment

In *Flanders v. Jackson*,[40] the Georgia Court of Appeals held that a bankruptcy discharge would not preclude an injured party from seeking an excess judgment against the debtor driver.[41] After a car accident that resulted in the death of a passenger, the passenger's mother, as administrator of her son's estate, made a policy-limits demand on the driver's insurer that was rejected. The passenger's mother then filed a wrongful death action against the driver. The driver filed a Chapter 7 bankruptcy. The tort lawsuit was stayed. After the driver was discharged, the driver moved for partial summary judgment in the tort lawsuit, arguing that the discharge limited his liability to the policy's available coverage. The mother responded that the bankruptcy did not preclude her from seeking an excess judgment as a precursor to a potential bad faith claim against the liability carrier. The trial court granted the driver's motion.[42]

35. 344 Ga. App. 342, 810 S.E.2d 179 (2018).

36. *Id.* at 342, 810 S.E.2d at 180.

37. *Id.* at 342–43, 810 S.E.2d at 180.

38. *Id.* at 345, 810 S.E.2d at 182 (quoting Dunn-Craft v. State Farm Mut. Auto. Ins. Co., 314 Ga. App. 620, 621, 724 S.E.2d 903, 906 (2012)).

39. *Id.* at 346, 810 S.E.2d at 183.

40. 344 Ga. App. 493, 810 S.E.2d 656 (2018).

41. *Id.* at 497–98, 810 S.E.2d at 659–60.

42. *Id.* at 493–94, 810 S.E.2d at 657–58.

In reversing, the court of appeals analyzed 11 U.S.C. § 524[43] and held that "a creditor may establish the debtor's . . . liability for a claim 'solely for the purpose of collecting the debt from a third party, such as an insurer or guarantor.'"[44] The court looked to the language of the discharge order, which stated that it "would not 'prejudice, impair or affect in any way any rights relating to any bad faith claim or judgment against the Debtor's insurer(s) arising in connection with the claim.'"[45] The court noted that the driver's "argument conflate[d] [the mother's] ability to *seek* an excess judgment . . . with her ability to *collect* such a judgment."[46] Finding no Georgia law on point, the court looked to its "sister state" of Florida, which "held that '[a] defendant's discharge in bankruptcy cannot be a legal basis upon which to compel a plaintiff to accept the liability insurance policy limits.'"[47] Therefore, the mother could proceed against the driver to establish the driver's liability in order to obtain an excess judgment against the driver's insurer.[48]

B. Coverage for A Mule-Drawn Carriage

In *Georgia Farm Bureau Mutual Insurance Co. v. Claxton*,[49] the Georgia Court of Appeals grappled with coverage for a mule-drawn carriage. The carriage was used in a Christmas parade, and after the parade, a motor vehicle struck it, resulting in injuries to a carriage passenger. The passenger sued the carriage operator. The operator argued that the passenger's injuries were covered by the operator's liability policy. However, the policy had a livestock exclusion for "[t]he use of any . . . animal, with or without an accessory vehicle, for providing rides to any person for a fee or in connection with or during a fair, charitable function, or similar type of event."[50] The court held that summary judgment for the insurer was inappropriate because it could not say, "as a matter of law, [that] the Christmas parade was an event similar to a fair or charitable function."[51] The passenger also argued that her injuries were covered by two UM policies she held with Farm Bureau.

43. 11 U.S.C. § 524 (2018).

44. *Flanders*, 344 Ga. App. at 497, 810 S.E.2d at 659 (quoting *In re* Hayden, 477 B.R. 260, 264 (Bankr. N.D. Ga. 2012)).

45. *Id.*

46. *Id.*

47. *Id.* at 498, 810 S.E.2d at 660 (quoting Whritenour v. Thompson, 145 So. 3d 870, 874 (Fla. Dist. Ct. App. 2014)).

48. *Id.*

49. 345 Ga. App. 539, 812 S.E.2d 167 (2018).

50. *Id.* at 539–40, 812 S.E.2d at 168–69.

51. *Id.* at 542, 812 S.E.2d at 170.

The policies defined "trailer" as a "vehicle designed to be pulled by a . . . [p]rivate passenger auto [or] [p]ickup or van."[52] Based on the definition, the mule-drawn carriage was not a "motor vehicle" because it was designed to be pulled by animals.[53]

IV. LIABILITY COVERAGE

A. Policy Exclusions and Resolving Ambiguities

In *Blue Ridge Auto Auction v. Acceptance Indemnity Insurance Co.*,[54] the Georgia Court of Appeals repeated its popular refrain that ambiguities in a policy will be construed against the carrier.[55] Acceptance issued a garage policy to the Tommy Nobis Foundation, which auctioned off donated cars to raise money. The Foundation hired an auctioneer to help sell these vehicles. One employee of the auctioneer lost control of a vehicle, injuring several auction attendees. The auctioneer sought coverage with Acceptance under the Foundation's garage policy, but Acceptance denied coverage. Acceptance obtained summary judgment and the auctioneer appealed. The garage policy defined an "insured" to include someone who was using a "covered 'auto'" but excluded someone "working in the business of selling" a vehicle "unless that business is [the Foundation's] 'garage operations.'" The policy defined "'[g]arage operations' [to] include all operations necessary or incidental to a garage business."[56] The court concluded that, because the phrase "garage business" reasonably included the Foundation's business in selling donated vehicles, the use of an auctioneer was "necessary, or at least incidental, to this business" and any ambiguity in coverage would be construed against Acceptance.[57]

B. Reservation of Rights Letters

In two separate decisions, courts once again addressed the proper and effective way for an insurer to issue a reservation of rights (ROR) letter and avoid claims of estoppel. In *North American Specialty Insurance Co. v. Bull River Marina, LLC*,[58] the United States Court of Appeals for the Eleventh Circuit, in a *per curiam* opinion, held that a carrier was not

52. *Id.* at 543, 812 S.E.2d at 170 (alteration in original).
53. *Id.* at 543, 812 S.E.2d at 171.
54. 343 Ga. App. 319, 807 S.E.2d 51 (2017).
55. *Id.* at 320, 807 S.E.2d at 53.
56. *Id.* at 319–22, 807 S.E.2d at 53–54.
57. *Id.* at 322, 807 S.E.2d at 54.
58. 709 F. App'x 623 (11th Cir. 2017).

estopped from raising coverage defenses because of the language in its ROR letters.[59] Bull River, through North American, held two insurance policies: a commercial, general-liability policy (CGL) and a marina operators policy. Two fishermen sued Bull River (in four different lawsuits) for injuries sustained in a boating accident. North American sent Bull River its first ROR letter, which listed only the CGL policy on the subject line and did not reference the marina policy, informing Bull River it had assigned counsel for a defense and would review coverage subject to a "complete" ROR. One year later "North American sent Bull River a second [ROR] letter" listing both policies on the subject line, stating that both policies barred coverage for the allegations made in the complaint, but acknowledging it would continue to defend the matter, subject to the right to deny coverage.[60]

North American later filed for declaratory relief, claiming neither policy required it to defend or indemnify Bull River. The United States District Court for the Southern District of Georgia granted partial summary judgment to North American and held that the two policies did not cover the accident.[61] However, the district court also concluded that North American was estopped from denying coverage under the marina policy based upon the Georgia Supreme Court's decision in *Hoover v. Maxum Indemnity Co*.[62] since the company concluded in its second letter there was no coverage for the accident but "purport[ed] to reserve the right to assert other defenses under that policy."[63]

The Eleventh Circuit reversed.[64] Distinguishing *Hoover*, the court acknowledged North American did not reference the marina policy in the first letter but "fail[ed] to see how *Hoover* mandates . . . that North American be estopped from denying coverage altogether."[65] "*Hoover* would only prohibit North American from asserting a policy defense under [the marina policy] that it should have raised the first time around."[66]

In *American Safety Indemnity Co. v. Sto Corp.*,[67] Sto notified its insurer, American Safety, of a claim made against it related to its stucco products, and American Safety responded by letter indicating an

59. *Id.* at 630.
60. *Id.* at 625–26.
61. *Id.* at 627.
62. 291 Ga. 402, 730 S.E.2d 413 (2012).
63. *Bull River Marina, LLC*, 709 F. App'x at 630.
64. *Id.* at 631.
65. *Id.*
66. *Id.*
67. 342 Ga. App. 263, 802 S.E.2d 448 (2017).

"investigation and evaluation" would be conducted pursuant to an ROR. However, after Sto notified American Safety that a lawsuit was filed, American Safety denied coverage, providing a detailed letter containing the reasons for its denial. Four months later, American Safety "re-evaluated its position" and agreed to defend Sto, though no new ROR was located. American Safety continued to defend this suit for almost two years before withdrawing coverage, claiming Sto misrepresented notice of the claim.[68]

Sto also tendered another claim related to its stucco operations for which American Safety sent a similar ROR. Again, after suit was filed on this second claim, American Safety sent a letter denying coverage on the basis that Sto was on notice before the applicable policy period. Then, American Safety "reversed its denial" and took over the defense of Sto through trial, though it later denied coverage for the verdict.[69] Sto filed suit against American Safety for breach of contract and bad faith. American Safety lost on summary judgment and an appeal ensued.[70]

The Georgia Court of Appeals held that American Safety's initial ROR letters were ineffective because American Safety later denied coverage.[71] The court concluded American Safety denied coverage for both lawsuits, noting that "an insurer cannot both deny a claim and reserve its right to assert other defenses later."[72] The court "fail[ed] to see how a previous reservation of rights issued" by American Safety "would remain effective post-denial."[73]

C. Work-Related Exclusion Upheld in CGL Policy

Howard Tyson worked occasionally for Hank Rowe, d/b/a Shellmar Tree Service (Shellmar). In September 2014, Tyson traveled to Sea Island with Shellmar to remove trees from a construction site. Tyson was standing away from the tree cutting, talking on his phone, when he was struck by a limb. Tyson was paralyzed. Tyson submitted a claim to Shellmar's liability insurer, Scottsdale.[74] Scottsdale denied the claim because the policy excluded liability for injuries to "'anyone hired or retained by or for any insured' if the injury 'arises out of and in the course of their employment or retention.'" Following the denial, Tyson filed suit

68. *Id.* at 264–65, 802 S.E.2d at 451.

69. *Id.* at 265–66, 802 S.E.2d at 452.

70. *Id.* at 266, 802 S.E.2d at 452.

71. *Id.* at 268, 802 S.E.2d at 453.

72. *Id.* (citing *Hoover*, 291 Ga. at 405, 730 S.E.2d at 417).

73. *Id.*

74. Tyson v. Scottsdale Indem. Co., 343 Ga. App. 370, 371, 805 S.E.2d 138, 139–40 (2017).

against Rowe. Rowe filed a third-party complaint against Scottsdale challenging the denial of Tyson's claim. Scottsdale won summary judgment. Tyson and Rowe appealed.[75]

On appeal, Tyson and Rowe argued that the exclusion did not apply because Tyson was not Shellmar's employee and was not engaged in any work-related task at the time of the accident. Rather, Tyson was away from the job site speaking on his phone.[76] The Georgia Court of Appeals disagreed, however, finding that the exclusion applied to Tyson as a person "hired or retained" by Shellmar for an incident that arose "out of and in the course of [his] employment."[77] The court relied on workers' compensation cases to construe the terms "in the course of" and "arising out of" employment.[78] Under these cases, an injury occurring during working hours and on the employer's premises presumptively would be considered "arising out of and in the course of employment."[79]

The court distinguished an exception for "injuries occurring during a regularly scheduled lunch break or rest break."[80] Though Tyson was on a break, there was no evidence that the break was regularly scheduled or that Tyson was free do what he wanted during the break.[81] Further, the court rejected Tyson's argument that he was not an employee since he did not receive a 1099 tax form, did not have any withholding from his pay, was paid in cash, and was never provided with any tax documents.[82] The court held that evidence regarding Tyson's pay or payroll deductions would not be dispositive of Tyson's employment status.[83]

The court also rejected Rowe's contention that the policy exclusion was unenforceable because the policy was not given to him.[84] Even if Rowe never received a copy of the policy, he was bound by the exclusion because the policy was delivered to his agent.[85] Rowe was chargeable with knowledge of the contents of his policy even if he did not have physical

75. *Id.* at 371, 805 S.E.2d at 140.

76. *Id.* at 372, 805 S.E.2d at 140.

77. *Id.* at 372–73, 805 S.E.2d at 141. The court stated that when "construing an insurance policy, we begin, as with any contract, with the text of the contract itself." *Id.* at 372, 805 S.E.2d at 140 (quoting Royal v. Ga. Farm Bureau Mut. Ins. Co., 333 Ga. App. 881, 882, 777 S.E.2d 713, 715 (2015)).

78. *Id.* at 373, 805 S.E.2d at 141.

79. *Id.*

80. *Id.* at 373 n.2, 805 S.E.2d at 141 n.2.

81. *Id.*

82. *Id.* at 374, 805 S.E.2d at 141.

83. *Id.* (citing *Royal,* 333 Ga. App. at 885, 777 S.E.2d at 714).

84. *Id.* at 374, 805 S.E.2d at 141–42.

85. *Id.* at 374, 805 S.E.2d at 142.

possession of it.[86] Also, Rowe could not rely upon the agent's alleged misstatements about coverage because the agent was his and there was no evidence indicating Scottsdale held out the agent as its own.[87]

V. PROPERTY COVERAGE CASES

A. Insurance Claim for Diminished Value of Real Property

John and Leigh Ann Thompson brought suit against State Farm alleging State Farm failed to assess and pay for diminished value (DV) to their home following a water loss in September 2013. The lawsuit was later certified as a class action.[88] State Farm moved for summary judgment, alleging its policies did not cover DV because such loss involved "intangible, economic" damages and its policies only covered "direct physical loss." State Farm also alleged that it did not owe DV because its policies only required payment of the cost to repair or replace.[89]

The district court, however, rejected State Farm's arguments as mere "variations" on arguments allegedly rebuffed by the Georgia Supreme Court in *State Farm Mutual Auto Insurance Co. v. Mabry*.[90] The district court held that, because the policy in this case, like the policy in *Mabry*, did not specifically define "loss," DV was covered.[91] The district court examined the effect of changes State Farm made in its homeowner policies after *Mabry* and its successor,[92] *Royal Capital Development LLC v. Maryland Casualty Co*.[93] After November 1, 2013, State Farm's new policies excluded DV.[94] However, the district court said that endorsements issued by State Farm on existing policies were not effective because they specifically excluded DV, providing less coverage than the existing policies.[95] The district court reasoned that, by statute, State Farm was procedurally required to non-renew the existing policies and issue new ones, not simply endorse the old ones.[96] By not following the

86. *Id.* at 374–75, 805 S.E.2d at 141–42.

87. *Id.*

88. Thompson v. State Farm Fire & Cas. Co., 264 F. Supp. 3d 1302, 1306 (M.D. Ga. 2017).

89. *Id.* at 1309.

90. *Id.*; *see also* 274 Ga. 498, 556 S.E.2d 114 (2001).

91. *Thompson*, 264 F. Supp. 3d at 1309–10.

92. *Id.* at 1310.

93. 291 Ga. 262, 728 S.E.2d 234 (2012).

94. *Thompson*, 264 F. Supp. 3d at 1310.

95. *Id.* at 1312.

96. *Id.* (citing O.C.G.A. § 33-24-46 (2018)).

proper procedure, the endorsements were ineffective.[97] As such, State Farm had to assess DV whether or not requested by an insured.[98] Still, the district court held that the plaintiffs were entitled to an assessment only, not to damages based upon the estimated cost of an appraisal.[99] The district court said that *Mabry* did not establish a specific method by which to assess diminished value, and did not create a right to recover monetary damages.[100] Rather, it created a duty to assess the loss.[101]

B. Rescission for Application Misrepresentation

Ronald Lee lived in South Carolina but frequently traveled for his job. In 2007, he traveled between Georgia and Florida. During this time, Lee's childhood friend, Constable, was having some problems. To help Constable, and to have a place to stay while traveling, Lee purchased Constable's home in Georgia, allowing Constable and his family to remain in the home. At first, Lee stayed there often enough for his mortgage company to consider it a primary residence. Later, Lee stayed in the home only a few nights a month.[102]

In 2010, Lee's insurance premiums were on the rise, and Constable told Lee that Constable knew an agent who could help. Because Lee traveled, Lee asked the agent if Constable could sign for Lee on an application. The agent agreed. The agent was aware that Lee was not regularly residing in the home. Still, the application indicated Lee occupied the home as his primary residence and that Constable and his two children were "Rel. to Ins."[103]

In 2012, the home was destroyed by an accidental fire in which Constable was killed and one of his children was seriously injured. Mercury denied Lee's claim for damage to the home, and Lee filed a complaint alleging breach of contract and bad faith. Mercury alleged material misrepresentations in the application. Mercury also alleged that the policy did not cover the loss because Lee did not reside in the home. The trial court granted summary judgment to Mercury on all issues.[104]

On appeal, Mercury argued that the home did not qualify as the "residence premises." "Residence premises" was defined in the policy as

97. *Id.* at 1312–13.
98. *Id.* at 1319–20.
99. *Id.*
100. *Id.*
101. *Id.* at 1320.
102. Lee v. Mercury Ins. Co., 343 Ga. App. 729, 729–30, 808 S.E.2d 116, 121 (2017).
103. *Id.* at 730–31, 808 S.E.2d at 121–22.
104. *Id.* at 731, 808 S.E.2d at 122.

the "family dwelling . . . used principally as a private residence; where you reside and which is shown in the Declarations."[105] Reversing the trial court, the Georgia Court of Appeals held that the definition of "residence premises" was ambiguous because the placement of the semicolon, without more, could lead a person to understand "residence premises" to mean "[the dwelling] . . . used principally as a private residence [or] where you reside and which is shown in the Declarations."[106] Citing a 1982 decision,[107] the court ruled that, because neither an "and" nor an "or" appeared in the provision, it was "inherently ambiguous."[108] The court reversed the judgment for Mercury and granted judgment to Lee.[109]

Regarding its rescission of the policy, Mercury argued that an uncontradicted affidavit from its underwriter authorized the rescission.[110] However, relying on the whole-court decision in *Case v. RGA Insurance Services*,[111] the court overruled the authority relied upon by Mercury, affirming the principle "that summary judgment can never issue based upon opinion evidence alone."[112] The court concluded that the affidavit of Mercury's underwriter, without more, was mere opinion evidence and was insufficient to support summary judgment.[113] Since Mercury did not detail how the misinformation "changed the nature, extent, or character of its risk," genuine issues of fact remained.[114]

The court also found factual disputes regarding agency and estoppel.[115] Regarding agency, while some evidence indicated the agent acted for Lee,[116] other evidence indicated that the agent may have been a dual agent because he signed his name as a representative of Mercury, bound coverage for Mercury, and routinely created obligations for Mercury.[117] As such, fact issues existed regarding whether Mercury was estopped to rescind based upon its knowledge—actual or imputed—of the

105. *Id.* at 733–34, 808 S.E.2d at 123–24.

106. *Id.* at 734, 808 S.E.2d at 123–24.

107. Ga. Int'l Life Ins. Co. v. Bear's Den, 162 Ga. App. 833, 835, 292 S.E.2d 502, 505 (1982).

108. *Lee*, 343 Ga. App. at 734–35, 808 S.E.2d at 124 (citing *Bear's Den*, 162 Ga. App. at 835, 292 S.E.2d at 505).

109. *Id.* at 729, 808 S.E.2d at 120.

110. *Id.* at 741, 808 S.E.2d at 128.

111. 239 Ga. App. 1, 521 S.E.2d 32 (1999).

112. *Lee*, 343 Ga. App. at 740–41, 808 S.E.2d at 127–28.

113. *Id.* at 741, 808 S.E.2d at 128.

114. *Id.* at 744, 808 S.E.2d at 130.

115. *Id.* at 744–47, 808 S.E.2d at 130–32.

116. *Id.* at 744, 808 S.E.2d at 130.

117. *Id.* at 744–45, 808 S.E.2d at 130–31 (citing Bowen Tree Surgeons v. Canal Indem. Co., 264 Ga. App. 520, 522, 591 S.E.2d 415, 416 (2003)).

facts misstated in the application.[118] Additionally, the court found fact questions concerning Mercury's alleged delay in rescinding the policy.[119] Facts suggested Mercury continued to send form letters stating its investigation was ongoing even after Lee's examination under oath disclosed the application misstatements.[120] The court concluded that genuine issues of fact existed regarding whether Mercury failed to timely rescind the policy once it learned of the application misrepresentations.[121]

118. *Id.* at 747, 808 S.E.2d at 132.
119. *Id.* at 745, 808 S.E.2d at 130.
120. *Id.* at 747, 808 S.E.2d at 132.
121. *Id.*