Appellate Practice and Procedure

By Tommy Day Wilcox*

There were a number of significant cases decided by the appellate courts of Georgia during the past survey year in the area of appellate practice and procedure. The Georgia Supreme Court and the Georgia Court of Appeals handed down more than sixty opinions that turned in part on a consideration of the Appellate Practice Act of 1965, the rules of the appellate benches, and the case law which has evolved under these standards. The most noteworthy of these cases will be highlighted here under four general headings: Enumeration of Errors; Payment of Costs and Transcripts; Final Judgments; and Miscellany.

Unlike the activity in the case law area of appellate practice, the past year was marked by an absence of any legislative enactments and a lack of any significant changes in the rules of either the Georgia Supreme Court or the Georgia Court of Appeals. Whether this development indicates a general satisfaction of the courts and the bar with the Appellate Practice Act of 1965, as amended, and the present rules, remains to be determined.

I. Enumeration of Errors

Rule 14(a) of the rules of both appellate courts provides in part:

> (a) Time of filing — the enumeration of errors shall be filed with the clerk of this court within 20 days after the case is docketed in this office . . . . Failure to file the enumeration of errors within the time specified in these rules shall subject the offender to contempt. Failure to comply with with an order of this court directing the filing of the enumeration of errors shall cause the appeal to be dismissed.[1]

In most instances where the enumeration of errors is not filed within the 20-day period, the court, by order, gives the appellant additional time to perfect his appeal. However, if the enumeration of errors is not filed within the period set out in the order the appeal will be dismissed. In *Spencer v. Young*,[2] the appellant filed five days after the extension of time lapsed and the court of appeals dismissed the appeal. A similar fate was met by the appellants in *Worthington Financial Services, Inc. v. Ivey*,[3] *Perrin v.*

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1. Ga. Code Ann. § 24-4514 (Supp. 1975).
2. 136 Ga. App. 108, 220 S.E.2d 465 (1975).
3. 135 Ga. App. 577, 218 S.E.2d 640 (1975).

McDonald,[4] and *Brown v. State*.[5]

The opinions in the above noted cases were brief and are important to the appellant practitioner only to the extent that they emphasize a continued response by the appellate courts to the tardy appellant, *i.e., appeal dismissed*. One suspects, given this procedure in a number of cases in the past, that the attorney for the appellant may have decided, with the concurrence of his client, that the appeal did not have any merit. The failure to file the requested enumeration of errors was by design a means of ending the appellate process. This approach or procedure, however, is not condoned by the courts, and practitioners should note well the Georgia Supreme Court's decision in *Pettiford v. State*.[6]

In *Pettiford* the appellant was convicted of armed robbery and sentenced to six years in the penitentiary. Notice of appeal was timely filed by the appellant's employed counsel on July 15, 1975, and the case was docketed in the supreme court on September 19, 1975. No timely enumeration of errors was filed and the court issued its order on October 9, 1975, directing counsel to file the enumeration of errors by October 15, 1975. On November 24, 1975, the supreme court noted that counsel had neither filed an enumeration of errors nor a brief, found the attorney in contempt, and had his name stricken from the roll of attorneys authorized to practice before the Georgia Supreme Court. The court went on to review the merits of the appeal and the lower court's decision was upheld.

Justice Ingram dissented insofar as the opinion held counsel in contempt of court and disbarred him from practicing before the court. The thrust of his dissent was that the lawyer was never ordered to show cause why this action should not be taken and, therefore, was not given an opportunity to be heard. This lack of due process was unjustified in Justice Ingram's opinion. "I believe the essence of due process is fairness and that this lawyer has not received it in this case."[7]

Given the many decisions in the past where an appeal has been dismissed for lack of timely filing of enumeration of errors with no comment about the lack of diligence on the part of appellant's counsel, one senses that the attorney in the *Pettiford* case was singled out as an example. But, the fairness doctrine and Justice Ingram's due process argument aside, counsel for appellant in the future would be well advised to either file a timely enumeration of errors or file a motion to dismiss the appeal.

The sufficiency of the enumeration of errors on appeal following denial of a motion for summary judgment was considered by the Georgia Supreme Court in *Adams-Cates Co. v. Marler*.[8] The court granted certiorari in the

4. 234 Ga. 239, 215 S.E.2d 470 (1975).
5. 236 Ga. 333, ___ S.E.2d ___ (1976).
6. 235 Ga. 622, 221 S.E.2d 43 (1975).
7. *Id.* at 623-24, 221 S.E.2d at 44-45 (1975).
8. 235 Ga. 606, 221 S.E.2d 30 (1975).

case after the court of appeals concluded that the higher court's earlier decision in *Weaver v. Whaley*[9] mandated a non-consideration of the merits of the trial court's ruling where no enumerated error directly contested the trial court's decision on the summary judgment motion.[10] The supreme court clarified its decision in *Weaver* and set forth the following guidelines:

> The correct rule with respect to the legal sufficiency of an enumeration of error is that it "need be only sufficient to point out the error complained of . . . ." *Puckett v. Puckett*, 222 Ga. 653 (151 S.E. 2d 767) (1966). "[T]he subect matter need be indicated only in the most general way," (*Wall v. Rhodes*, 112 Ga. App. 572 (1) (145 S.E. 2d 756) (1965)), and if the error asserted is properly supported, as provided by the rules of the appellate court, it should be considered on the merits.[11]

In a similar case concerning the sufficiency of an appellant's notice of appeal following the lower court's grant of defendant's motion for directed verdict, the court of appeals citing *Holcomb v. Gray*[12] stated:

> It is the policy of both appellate courts in Georgia to attempt to avoid dismissing appeals and to try to reach the merits of every case when it can be done consistent with the mandate of the law.[13]

In this same general area, the Georgia Court of Appeals served notice that even though a timely enumeration of errors is filed, where the brief in support of the enumeration of errors contains no accompanying reference to the record or transcript which would show that citations made in the brief have any bearing on the case before the court, this failure will constitute an abandonment and the enumerations will not be considered. In the case under consideration, appellant's argument and citation of authority consisted of nothing more than quotations from three decisions of the court of appeals on the general subject of adequate compensation and consequential damages in a condemnation case.[14] It is clear the appellate courts expect something more.

II. Payment Of Costs And Transcripts

Appellant's failure to pay the costs for preparation of the transcript and record or file a pauper's affidavit in the lower court was the basis for two adverse judgments during the survey year.[15] In each case the appellant

9. 233 Ga. 635, 212 S.E.2d 812 (1975).
10. Adams-Cates Co. v. Marler, 135 Ga. App. 298, 217 S.E.2d 398 (1975).
11. 235 Ga. at 606, 221 S.E.2d at 31.
12. 234 Ga. 7, 214 S.E.2d 512 (1975).
13. Johnson v. Daniel, 135 Ga. App. 926, 927, 219 S.E.2d 579, 580 (1975).
14. McCollum Mfg. Co. v. Dep't of Transp., 135 Ga. App. 815, 218 S.E.2d 926 (1975).
15. Elliott v. Walton, 136 Ga. App. 211, 220 S.E.2d 696 (1975) and Haynes v. City of Lake City, 136 Ga. App. 112, 220 S.E.2d 33 (1975).

attempted to salvage his appeal by filing an untimely pauper's affidavit but to no avail. Both of these cases were civil in nature and the record was not forwarded to the higher court in either action because the cost bill was not paid. Dictum in one of the cases, however, indicates that the rule continues to be that where the record is transmitted even though the costs remain unpaid, the appellate court will consider the matter on its merits.[16] Unfortunately, the appellants here were not the beneficiaries of such a fortuitous occurrence.

In last year's survey article, the following language in *Interstate Corp. v. Appel*[17] was praised as signaling a more liberal attitude on the part of the supreme court with respect to reviewing the merits of a case even though the record on appeal was incomplete.

> In any event, we now hold that the Appellate Practice Act requires that appeals from final judgments be determined on their merits if at all possible, and the absence in the appellate record of existing transcripts or documents, available in the trial court, is not ground to refuse consideration of enumerated errors on their merits. In every case the appellee has ample opportunity to designate anything in the record or the transcript of the evidence that has not been designated by the appellant. We believe that the ends of justice are better served by allowing the appellant or the appellee to send up through the clerk of the trial court additional available documents or transcripts that will enable the appellate courts to render decisions on the merits.[18]

Appel notwithstanding, there were a number of cases this past year that were affirmed on appeal without a consideration of the merits of appellant's enumeration of errors because a copy of the transcript was not transmitted to the higher court.[19] *Appel*, therefore, should not be read too broadly and practitioners should continue to be alert regarding the timely preparation and transmittal of a transcript and record. And, as the appellant in *Savage v. Savage*[20] learned, the duty of overseeing the preparation and transmittal is on counsel for the appellant, not the clerk of the court.

Where appellant's only justification for failing to file a transcript on time in the trial court is an alleged oral agreement with opposing counsel that

16. Elliott v. Walton, 136 Ga. App. 211, 212, 220 S.E.2d 696, 697 (1975).

17. 233 Ga. 649, 212 S.E.2d 821 (1975).

18. *Id.* at 651, 212 S.E.2d at 823; *see also* Wilcox, *Appellate Practice and Procedure*, 27 MERCER L. REV. 1 (1975).

19. Canon v. Canon, 236 Ga. 99, 222 S.E.2d 381 (1976); Anderson v. Anderson, 235 Ga. 115, 218 S.E.2d 846 (1975); Taylor v. Whitmire, 234 Ga. 449, 216 S.E.2d 310 (1975); Herring v. Herring, 134 Ga. App. 766, 216 S.E.2d 641 (1975); Diamond v. Chatham County Bd. of Tax Assessors, 135 Ga. App. 645, 218 S.E.2d 657 (1975); Knighton v. FNB Financial Co., 134 Ga. App. 807, 216 S.E.2d 365 (1975); Johnson v. Clements, 135 Ga. App. 495, 218 S.E.2d 109 (1975); Herrell v. Biddy, 137 Ga. App. 9, 223 S.E.2d 23 (1975); and, Best Buy Hosiery of Ga., Inc. v. William Miller Associates, 134 Ga. App. 472, 215 S.E.2d 25 (1975).

20. 234 Ga. 853, 218 S.E.2d 568 (1975).

the time for filing would be extended and the record does not show such an agreement and no order extending the time for filing is entered, the judgment of the trial court will be affirmed. This is especially true where, as in *Taylor v. Whitmire*,[21] counsel for appellee moves to dismiss and denies there was any such agreement to extend the time. It is apparent from a reading of the cases that extensions of time for filing the transcript are easily obtained but, again, it is the duty of counsel for the appellant to see that the order is obtained and entered in the record.

On the criminal side the Georgia Supreme Court clarified its earlier decisions in *McAuliffe v. Rutledge*[22] and *Cunningham v. State*[23] regarding late filing of the transcript where the proceeding is criminal in nature. These two opinions held that the appellate court should entertain and decide a criminal appeal on its merits even though counsel for the appellant had either failed to have the transcript transmitted or did so in an untimely manner. The theory was the criminal defendant had been ineffectually represented by counsel at trial. Of course, when the appellate court grants an affirmance of the conviction on reviewing the merits of the case the state has no interest in pressing its motion to dismiss the appeal. This result is evidenced by the state's non-action in *Ingram v. State*.[24] However, where the appellate court reverses the lower court conviction on review after denial of the state's motion to dismiss the appeal, the state will not be content.

This brings us to a consideration of *Denson v. State*.[25] The court of appeals reversed the trial court's dismissal of the defendant's appeal on the grounds of an inexcusable delay in transmitting the record to the appellate court. The court of appeals considered itself bound by the supreme court cases of *McAuliffe* and *Cunningham*. The Georgia Supreme Court reversed the court of appeals' decision on certiorari concluding that the middle bench had misinterpreted and misapplied the higher court's decisions.[26] The *Denson* decision limits the effect of *McAuliffe* and *Cunningham* and warns defendants that inexcusable delay in filing the transcript will result in dismissal of their appeals.

> A person convicted of a crime in a trial court in this state is not entitled to have his conviction reviewed as a matter of right by an appellate court. He must pursue applicable statutory requirements. A convicted party can, by his own conduct or by his conduct in concert with that of his attorney, forfeit his appeal.[27]

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21. 234 Ga. 449, 216 S.E.2d 310 (1975).
22. 231 Ga. 745, 204 S.E.2d 141 (1974).
23. 232 Ga. 416, 207 S.E.2d 48 (1974).
24. 134 Ga. App. 935, 216 S.E.2d 608 (1975).
25. 134 Ga. App. 876, 216 S.E.2d 606 (1975).
26. State v. Denson, 236 Ga. 239, ___ S.E.2d ___ (1976).
27. *Id.* at 240, ___ S.E.2d at ___ (1976).

A practice and procedure note for counsel for the appellee seeking to have appellant's appeal dismissed because a transcript is not filed in a timely fashion was offered by the Georgia Supreme Court in *Gilman Paper Co. v. James*.[28] In the past, case law dictated that counsel file a motion to dismiss the appeal in the trial court and if an adverse ruling resulted a new motion to dismiss the appeal had to be filed in the appropriate appellate court. Authority for this procedure in the respective appellate courts was found in *McDonald v. Rogers*[29] and *Gilmore v. State*.[30] The *Gilman Paper* case overrules the prior decisions, and now the procedure for appellees seeking dismissal of an appeal for a tardy filing of the transcript by the appellant is to appeal the trial court's judgment directly rather than submitting a new motion to dismiss.

III. Final Judgments

Is a final judgment assessing attorney's fees during the discovery stage of a case sufficient to support an appeal? Yes, and then, no. The court of appeals in the April term concluded that an appeal would be proper[31] and then in the September term overruled its earlier pronouncement.[32] The prevailing opinion reasoned that an order for attorney's fees incurred in responding to interrogatories or depositions is an interlocutory order and, therefore, subject to the provisions of the Appellate Practice Act of 1965 relating to certificates of immediate review. In other words, ". . . the cause is still pending on its merits and requires a certificate of review to be viable."[33] Judge Deen admits, nevertheless, that the judgment as to attorney's fees is final as to one material party in the proceeding, *i.e.*, the attorney.[34] There was a six page dissent, so there is hope.

The appellate courts continue to hold that denials of motions to set aside dismissals of complaints[35] and motions to vacate judgments[36] are not final judgments from which appeals may be had and they cannot toll the time for filing an appeal. The order dismissing the complaint and the judgment under attack are the key rulings and both start the time running for the filing of a timely notice of appeal.

On two occasions during the most recent survey period, appeals were taken following oral pronouncements of rulings and on each such occasion the appellate court refused to consider the appeal.[37] There was simply

28. 235 Ga. 348, 219 S.E.2d 447 (1975).
29. 229 Ga. 369, 191 S.E.2d 844 (1972).
30. 127 Ga. App. 249, 193 S.E.2d 219 (1972).
31. Marchman v. Head, 135 Ga. App. 475, 218 S.E.2d 151 (1975).
32. General Recording Corp. v. Chadwick, 136 Ga. App. 213, 220 S.E.2d 697 (1975).
33. *Id.* at 214, 220 S.E.2d at 698 (1975).
34. *Id.*
35. Azar v. Westview Cemetery, Inc., 134 Ga. App. 682, 215 S.E.2d 719 (1975).
36. Gresham v. John Roth Associates, 134 Ga. App. 691, 215 S.E.2d 538 (1975).
37. Crowell v. State, 234 Ga. 313, 215 S.E.2d 685 (1975); and *In re* Thomas, 134 Ga. App.

nothing to appeal in that the judgment is not effective until it is signed by the judge and filed with the clerk. Interestingly, one of these appeals originated from a citation for contempt of court against the attorney who in turn filed her own appeal.[38]

There were fewer cases dismissed this past year because of the appealing party's failure to obtain a certificate of immediate review. There continues to be some confusion, however, regarding when a certificate is necessary. The following appeals were dismissed as premature and, therefore, nonappealable absent a certificate of immediate review. *Gordon v. Gordon*,[39] appeal from a judgment granting a new trial; *Bouldin v. Mote*,[40] appeal from an order vacating and setting aside a default judgment; *Trump v. Scott Exterminating Co.*,[41] appeal from dismissal of plaintiff's action where defendant's counter-claim is still pending; *Spikes v. Carter Realty Co.*,[42] and *Mulligan v. Scott*,[43] appeal from an order which adjudicates with respect to fewer than all the claims or all the parties.

IV. MISCELLANY

Perhaps the most significant decision during the most recent year was *Gillen v. Bostick*[44] which overruled the supreme court's earlier opinion in *Herrington v. Herrington*.[45] The *Herrington* case stood for the proposition that even though a final judgment has been prepared and signed by the judge, if the notice of appeal was filed before the judgment is actually filed with the clerk, then the appeal must be dismissed.[46] This ruling proved to be a stumbling block for many unwary appellants. In the *Gillen* case the final order finding appellant in contempt in a domestic case was dated December 20, 1974, and the judgment was entered January 15, 1975. But appellant's notice of appeal was filed January 7, 1975, before the entry of the judgment, and under the rule in the *Herrington* case the appeal from the court's order was subject to prompt dismissal. However, relying on a Fifth Circuit Court of Appeals' case, *Markham v. Holt*,[47] and citing what the court considered the spirit of 9 MOORE'S FEDERAL PRACTICE 119, § 110.08(2) (1974), the court held that it had jurisdiction of the appeal.[48] This decision represents an enlightened approach to appellate practice and

728, 215 S.E.2d 735 (1975).

38. *In re* Thomas, 134 Ga. App. 728, 215 S.E.2d 735 (1975).
39. 236 Ga. 99, 222 S.E.2d 380 (1976).
40. 136 Ga. App. 73, 220 S.E.2d 79 (1975).
41. 135 Ga. App. 473, 218 S.E. 2d 149 (1975).
42. 136 Ga. App. 648, 222 S.E.2d 154 (1975).
43. 134 Ga. App. 815, 217 S.E.2d 307 (1975).
44. 234 Ga. 308, 215 S.E.2d 676 (1975).
45. 230 Ga. 94, 195 S.E.2d 654 (1973).
46. *Id.*
47. 369 F.2d 940 (5th Cir. 1966).
48. Gillen v. Bostick, 234 Ga. 308, 310-11, 215 S.E.2d 676, 678 (1975).

procedure and certainly would seem to be in accord with Section 23 of the Appellate Practice Act of 1965 which provides that the Act should be liberally construed so as to bring about a decision on the merits of every case appealed.[49]

While premature filers of notices of appeal were getting some relief, counsel for appellants who filed their notice of appeal after thirty days following entry of the appealable decision or judgment complained of will continue to have their appeals dismissed even though they filed within a few days after the running of the thirty day requirement. In *Lewis & Sheron Enterprises, Inc. v. Great A&P Tea Co.*,[50] the order complained of was filed with the clerk on July 11, 1975, and entered on the clerk's "docket sheet" on July 16, 1975. The notice of appeal was filed on August 14, 1975. The court rejected appellant's argument that the thirty day period begins to run from the time the judgment is entered on the clerk's docket and the appeal was dismissed. Filing with the clerk a judgment signed by the judge, not the clerk's subsequent entry on the docket, starts the applicable thirty day limit. A concurring opinion laments that the court's decision requires a lawyer to inquire of the clerk each and every day as to whether a certain judgment has been filed and voices concern about how the clerk finds time to transact the other business of his office if he is busily answering the lawyers who anxiously wish to know whether their judgment has been filed in the clerk's office. The law ought to require, in this judge's view, the trial judge to let counsel for all parties know the exact date he signs the judgment and that the date for appealing should begin to run from that date. Alternatively, the law should require the clerk to notify counsel for all parties on the day when the judgment is filed with the clerk by the trial judge.[51] The result under the majority decision does appear to be harsh and contrary to the spirit of the *Gillen* case noted above. The goal should be to have each and every case decided on its merits rather than dismissed on a technicality. In short, as the concurring judge in *Great A&P Tea Co.* reasoned, "There ought to be a law!"[52]

After some decisions to the contrary both appellate courts now seem to be in agreement that findings of fact and conclusions of law required by Georgia Code §81A-152(a) are mandatory and the facts must be found specially and the conclusions of law must be stated separately or otherwise the appeal will be remanded as in *Hagin v. Powers*.[53] The court of appeals' decision in *Wiggins v. Darrah*[54] indicates that this defect may be cured by the trial court amending its judgment by adding findings of fact and conclusions of law before the case is presented to the higher court.

49. GA. CODE ANN. § 6-905 (Rev. 1975).
50. 136 Ga. App. 910, 222 S.E.2d 659 (1975).
51. *Id.* at 911, 222 S.E.2d at 661 (1975).
52. *Id.*
53. 136 Ga. App. 395, 221 S.E.2d 245 (1975).
54. 135 Ga. App. 509, 218 S.E.2d 106 (1975).