

# Business Associations

by David A. Pope\*

This Article surveys recent developments in the corporate, partnership, and limited liability company law of Georgia. It covers noteworthy cases decided by the Georgia courts during the survey period of June 1, 2001 through May 31, 2002. This Article also surveys the recent revisions to the Official Code of Georgia Annotated ("O.C.G.A.") enacted by the Georgia General Assembly during the survey period.

## I. CORPORATIONS

### A. *Piercing the Corporate Veil*

Generally, a shareholder of a corporation has limited liability for the debts, obligations, and liabilities of the corporation. Georgia courts will, however, utilize the concept of piercing the corporate veil "to remedy injustices [that] arise where a party has overextended his privilege in the use of a corporate entity in order to defeat justice, perpetrate fraud or to evade contractual or tort responsibility."<sup>1</sup> A number of cases decided during the survey period involve the concept of piercing the corporate veil. The Georgia courts did not substantially change the law with regard to the concept; however, the following cases are illustrative of the courts' decisions during the survey period.

The case of *Paul v. Destito*<sup>2</sup> involved claims of fraud, negligent misrepresentations, conspiracy to breach fiduciary duty, negligent breach

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\* Partner in the firm of James, Bates, Pope & Spivey, LLP, Macon, Georgia. Georgia Southwestern College (B.A., cum laude, 1981); Mercer University, Walter F. George School of Law (J.D., cum laude, 1992). Member, Mercer Law Review (1990-1992). Member, State Bar of Georgia.

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1. *Soerries v. Dancause*, 248 Ga. App. 374, 375, 546 S.E.2d 356, 358 (2001).
2. 250 Ga. App. 631, 550 S.E.2d 739 (2001).

of fiduciary duty, and alter ego liability. Plaintiff alleged that fellow shareholders and directors of the subject corporation breached their fiduciary duty (1) by failing to inform him of an attempted corporate merger and (2) by failing to inform him that a separate corporation owned by defendants pledged the corporation's assets as collateral for a loan.<sup>3</sup> The court of appeals cited the well-settled law that "corporate officers and directors have a fiduciary relationship to the corporation and its shareholders and must act in good faith."<sup>4</sup>

Defendants in *Paul* asserted that the trial court erred in failing to grant their motions for directed verdict and judgment notwithstanding the verdict on plaintiff's alter ego liability claim because "Georgia law does not allow a person who is a shareholder, director, and officer of a corporation to 'pierce the [corporate] veil' of his own corporation."<sup>5</sup> The court of appeals upheld the trial court, stating that "Georgia courts pierce the corporate veil 'to remedy injustices [that] arise where a party has overextended his privilege in the use of a corporate entity in order to defeat justice, perpetrate fraud or evade contractual or tort responsibility.'"<sup>6</sup> The court explained, "The theory applies when 'there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist.'"<sup>7</sup> The Georgia Court of Appeals rejected defendants' argument that Georgia law prohibits the piercing of the corporate veil by a director, officer, or shareholder.<sup>8</sup> Accordingly, the court of appeals upheld the trial court's refusal to find plaintiff's alter ego liability allegations legally insufficient.<sup>9</sup>

In *Ishak v. Lanier Contractors Supply, Inc.*,<sup>10</sup> the Georgia Court of Appeals held that the corporate veil may be pierced when one who owns or controls a corporation abuses the corporate form, disregards the corporate entity, or uses the corporation for personal transactions.<sup>11</sup> In *Ishak*, plaintiff, a supplier of building materials, brought suit against two construction companies, an individual who served as the president

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3. *Id.* at 631, 635, 550 S.E.2d at 742, 745.

4. *Id.* at 635, 550 S.E.2d at 745 (quoting GLW Int'l Corp. v. Yao, 243 Ga. App. 38, 42, 532 S.E.2d 151, 155 (2000)).

5. *Id.* at 639, 550 S.E.2d at 747 (quoting Plaza Props., Ltd. v. Prime Bus. Invs., Inc., 240 Ga. App. 639, 643, 524 S.E.2d 306, 310 (1999)).

6. *Id.* (quoting Cheney v. Moore, 193 Ga. App. 312, 312-13, 387 S.E.2d 575, 576 (1989)).

7. *Id.* (quoting Heyde v. Xtraman, Inc., 199 Ga. App. 303, 306, 404 S.E.2d 607, 610 (1991)).

8. *Id.*

9. *Id.*

10. 254 Ga. App. 237, 561 S.E.2d 883 (2002).

11. *Id.* at 238, 561 S.E.2d at 885.

and sole shareholder of both companies, and an individual who served as vice president and the sole employee of one company for failure to pay for building materials. Plaintiff sought to charge both individual defendants with liability for the corporations' debts under a theory of piercing the corporate veil. After a nonjury trial, the court awarded plaintiff the relief sought against the individual defendants.<sup>12</sup>

The Georgia Court of Appeals found that evidence of a corporate officer conveying one of the corporation's primary assets to himself without payment of adequate consideration to the corporation and appropriating corporate funds to his own personal use supported a finding that the defendant had "abused the corporate form, disregarded the corporate entity, and made the corporation a mere instrumentality for transacting his own affairs."<sup>13</sup> The court of appeals held that "[w]here those who own or control a corporation have brought about such a unity of interest and ownership as between themselves and the corporation, the unpaid corporate creditor may look to them for satisfaction of the corporation's debts."<sup>14</sup>

In *Nat Katz & Associates, Ltd. v. Barber*,<sup>15</sup> a creditor sued the president of a construction company and a limited liability company, of which the individual defendant was the managing member, for payment of goods and services provided to the construction company. Plaintiff sought to hold the president of ICR, Inc. ("ICR"), Barber, personally liable for ICR's debt under an alter ego theory. After a bench trial, the trial court refused to pierce ICR's corporate veil and entered judgment for Barber.<sup>16</sup>

At trial, Barber admitted that ICR was indebted to plaintiff. Barber presented evidence that he, ICR, and a related limited liability company all maintained separate bank accounts. Evidence was also presented that ICR acted as the general contractor for Barber's home renovations and paid expenses of the project out of its corporate accounts.<sup>17</sup> Barber testified that he reimbursed ICR for the renovation expenses, "which were recorded on ICR's books as officer advances" to Barber.<sup>18</sup> The court of appeals affirmed the trial court's requirement that plaintiff show Barber "disregarded the separate entities by commingling on an interchangeable or joint basis or confusing the otherwise separate

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12. *Id.* at 237, 561 S.E.2d at 884-85.

13. *Id.* at 238, 561 S.E.2d at 885.

14. *Id.*

15. 255 Ga. App. 207, 564 S.E.2d 802 (2002).

16. *Id.* at 207, 564 S.E.2d at 803.

17. *Id.* at 208, 564 S.E.2d at 804.

18. *Id.* at 209, 564 S.E.2d at 804.

properties, records or control.”<sup>19</sup> The court of appeals held that given the evidence presented, the trial court was authorized to reject plaintiff’s alter ego allegations.<sup>20</sup>

The Georgia Supreme Court decided perhaps the most significant case of the survey period involving the issue of piercing the corporate veil. In *Miller v. Harco National Insurance Co.*,<sup>21</sup> the Eleventh Circuit Court of Appeals certified to the Georgia Supreme Court three questions regarding Georgia corporate law. In *Miller* plaintiffs brought suit in Michigan for personal injuries sustained in a motor vehicle collision. In the Michigan action, plaintiffs received a default judgment against Shippers Services Express. Plaintiffs subsequently filed suit in the Northern District of Georgia against the following defendants: Shippers Services Express, Inc. (“Corporation”); its sole shareholder, Galo Moya (“Moya”); Galo Moya d/b/a Shippers Services Express (“Sole Proprietorship”); and Harco National Insurance Company (“Harco”), an insurer that named the Sole Proprietorship as the only insured on a motor carrier policy.<sup>22</sup>

The district court concluded that “the default judgment was enforceable against the Corporation under Michigan law. The district court also pierced the corporate veil based upon the alter ego theory and ruled that the Michigan judgment was enforceable against Moya and the Sole Proprietorship.”<sup>23</sup> In addition, the district court granted summary judgment in favor of Harco, finding “there was no coverage because the policy insured only the Sole Proprietorship and the Corporation was the only entity against which the Michigan judgment was entered.”<sup>24</sup>

The United States Court of Appeals for the Eleventh Circuit upheld the district court’s grant of summary judgment against the Corporation, the Sole Proprietorship, and Moya.<sup>25</sup> Regarding the grant of summary judgment in favor of Harco, plaintiffs argued that the primary issue “[was] not whether Harco would be liable under its policy for the Michigan judgment, but whether Harco [was] liable for the judgment issued in the district court against all the Moya defendants, including its named insured.”<sup>26</sup> The Eleventh Circuit Court of Appeals questioned

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19. *Id.*, 564 S.E.2d at 805 (quoting *Soerries*, 248 Ga. App. at 375, 546 S.E.2d at 358).

20. *Id.*

21. 274 Ga. 387, 552 S.E.2d 848 (2002).

22. *Id.* at 387-89, 552 S.E.2d at 849-50.

23. *Id.* at 388, 552 S.E.2d at 850.

24. *Id.*

25. *Id.* (citing *Miller v. Harco Nat’l Ins. Co.*, 241 F.3d 1331, 1332-33 (11th Cir. 2001)).

26. *Id.* (quoting *Miller*, 241 F.3d at 1333).

the decision of the district court<sup>27</sup> and, therefore, certified to the Georgia Supreme Court the following questions:

"(1) Whether Georgia law recognizes a distinction between a suit against an individual doing business as a corporate entity and a suit against just the aforementioned legal entity? The question becomes whether insurance coverage given to final judgments against a named individual doing business as a corporate entity also provides such coverage when the final judgment is rendered solely against the corporate entity in suits under the motor common carrier provisions?

(2) When the insured party is found liable based on a theory of piercing the corporate veil, is the insurer then liable for the same, even if no independent coverage exists under the insurance policy?

(3) Does the mere fact that a court held the insured liable for an act covered by his policy create liability for the insurer?"<sup>28</sup>

The Georgia Supreme Court noted that the Eleventh Circuit requested its assistance only on the insurer's "contention that there is no coverage because [p]laintiffs did not recover a judgment against the insured, as required by a federally mandated policy endorsement, and [p]laintiffs' assertion that the judgment against the Sole Proprietorship in the Georgia federal domestication action satisfies that policy requirement."<sup>29</sup>

The Georgia Supreme Court characterized the Eleventh Circuit's initial inquiry as whether Georgia law recognizes a distinction between a suit against an individual shareholder and a suit against just the corporation.<sup>30</sup> The supreme court stated that "[a]n individual doing business under a trade name is clearly a sole proprietor distinct under Georgia law from a corporation in which that individual holds stock."<sup>31</sup> With respect to coverage under the policy issued to the Sole Proprietorship, the court stated:

Although a policy provides coverage for final judgments recovered against the insured, it generally does not cover final judgments against a corporation in which the insured is the controlling stockholder. Because corporations and their shareholders are separate and distinct entities, insurance coverage for final judgments against the latter

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27. *Id.*

28. *Id.* at 389, 552 S.E.2d at 850 (quoting *Miller*, 241 F.3d at 1334).

29. *Id.* at 389-90, 552 S.E.2d at 851.

30. *Id.* at 390, 552 S.E.2d at 851.

31. *Id.* (citing *S. Guar. Ins. Co. v. Premier Ins. Co.*, 219 Ga. App. 413, 414, 465 S.E.2d 521, 523 (1995)).

cannot ordinarily be enlarged to include final judgments against the former.<sup>32</sup>

In its second question, the Eleventh Circuit inquired "whether an insurer is liable whenever the insured party is found liable based on a theory of piercing the corporate veil."<sup>33</sup> The Georgia Supreme Court noted that this particular issue is one of first impression in Georgia.<sup>34</sup> The supreme court recognized that the insurer was a motor carrier insurer and that pursuant to Georgia law the subject insurance policy was "in the nature of a substitute surety bond (which) creates liability in the insurer regardless of the insured's breach of the conditions of the policy."<sup>35</sup> "The intent of this state's motor carrier laws is 'that the insurer is to stand in the shoes of the motor carrier . . . and be liable . . . in any instance of negligence where the motor carrier is liable.'<sup>36</sup>

The supreme court also noted that the Sole Proprietorship was merely an assumed name or trade name and that "a trade name (is) nothing more than the alter ego of the individual."<sup>37</sup> "Accordingly, a policy that lists a trade name as the 'named insured' also extends coverage to the individual."<sup>38</sup>

The Georgia Supreme Court pointed out that coverage under such a policy does not extend to a corporation in which an individual is a controlling stockholder because corporations are legally distinct from their shareholders.<sup>39</sup> The supreme court determined:

[I]t is not appropriate to apply this limitation in the rare case where the corporation is not a separate entity, but rather is an alter ego of its controlling stockholder, at least where the business involved is a motor carrier. Viewing that situation in light of the purpose of the motor carrier laws, the corporation should be considered as a named insured even though the insurance policy is issued in the name of its shareholder doing business under a trade name.<sup>40</sup>

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32. *Id.* (citing *Shelby Ins. Co. v. Ford*, 265 Ga. 232, 234, 454 S.E.2d 464, 465-66 (1995)).

33. *Id.*

34. *Id.*

35. *Id.* at 391, 552 S.E.2d at 852 (quoting *Ross v. Stephens*, 269 Ga. 266, 267, 496 S.E.2d 705, 707 (1998) (citations omitted)).

36. *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Fleet Transp. Co.*, 116 Ga. App. 606, 609, 158 S.E.2d 476, 479 (1967) (citation omitted)).

37. *Id.* (quoting *Simmons v. Ins. Co. of N. Am.*, 17 P.3d 56, 61 (Alaska 2001)).

38. *Id.* (citing *Purcell v. Allstate Ins. Co.*, 168 Ga. App. 863, 865, 310 S.E.2d 530, 532 (1983); *Simmons*, 17 P.3d at 62).

39. *Id.*

40. *Id.*

The supreme court in *Miller* distinguished the case of *Shelby Insurance Co. v. Ford*,<sup>41</sup> pointing out that in *Miller* a corporate motor carrier was found to be the alter ego of the carrier's controlling shareholder.<sup>42</sup> However, the court stated:

*Shelby* did not involve either a motor carrier or a piercing of the corporate veil. Its holding applies only to the expansion of insurance coverage "to include as a named insured a wholly distinct legal entity." By definition, two entities are not legally distinct when they are alter egos. "Under the alter ego doctrine, equitable principles are used to disregard the separate and distinct legal existence possessed by a corporation. . . ."<sup>43</sup>

The Georgia Supreme Court concluded that under the insurance policy, when an act of negligence involves the insurer's vehicle, the insurer must pay any judgment against the Sole Proprietorship, as named insured, regardless of who committed the act.<sup>44</sup> Because the district court found the Sole Proprietorship liable for the tort judgment rendered against the Corporation under the alter ego theory, the Georgia Supreme Court held that the insurer was liable under the policy because plaintiffs had obtained a final judgment against Harco's named insured for the negligent operation of a motor vehicle.<sup>45</sup> The supreme court reasoned that because the Eleventh Circuit affirmed plaintiffs' judgment against the Sole Proprietorship as named insured, the insurer could not "evade contractual liability by asserting that only the Corporation was responsible for the actual negligent act."<sup>46</sup>

### *B. Breach of Fiduciary Duty*

In *David C. Joel, Attorney at Law, P.C. v. Chastain*,<sup>47</sup> plaintiff brought suit against a professional corporation that she engaged to handle a legal matter. Plaintiff's suit against the professional corporation was for fraud, breach of fiduciary duty, and violation of the Fair Business Practices Act.<sup>48</sup> A jury found for plaintiff on her breach of

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41. 265 Ga. 232, 454 S.E.2d 464 (1995).

42. *Miller*, 274 Ga. at 391, 552 S.E.2d at 852.

43. *Id.* at 391-92, 552 S.E.2d at 852 (citations omitted).

44. *Id.* at 392-93, 552 S.E.2d at 853.

45. *Id.* at 392, 552 S.E.2d at 853.

46. *Id.* at 393, 552 S.E.2d at 853.

47. 254 Ga. App. 592, 562 S.E.2d 746 (2002).

48. O.C.G.A. §§ 10-1-391 to -407 (2000).

fiduciary duty claim but found in favor of the professional corporation on plaintiff's remaining claims and refused to award punitive damages.<sup>49</sup>

Plaintiff's claim arose out of the professional corporation's representation of her in a personal injury claim. The evidence presented at trial indicated that a nonattorney case negotiator employed by the professional corporation settled plaintiff's personal injury claim without her authorization.<sup>50</sup> The court of appeals held that the professional corporation, as plaintiff's legal representative, had a fiduciary duty to its client and a fiduciary duty to exercise the utmost good faith and loyalty, and to act solely for plaintiff's benefit.<sup>51</sup> "In performing this duty, the [professional corporation] was obligated not to pursue any interest or take any act adverse to [plaintiff's] interest or incompatible with applying its best skill, zeal, and diligence in representing [plaintiff]."<sup>52</sup> The court of appeals rejected the professional corporation's contention that plaintiff waived her breach of fiduciary duty claim because she subsequently allowed the professional corporation to continue to represent her by filing suit and settling her case.<sup>53</sup>

### C. Volunteer Organizations

In *Piney Grove Baptist Church v. Goss*,<sup>54</sup> a church member was injured while volunteering with the construction of a church fellowship hall. The member brought suit against the church on the basis of premises liability and respondeat superior. The defendant church, an unincorporated association, appealed the trial court's denial of its motion for summary judgment.<sup>55</sup>

The church argued that *Gilbert v. Crystal Fountain Lodge*<sup>56</sup> prohibited plaintiff from bringing the suit. The church asserted that *Gilbert* held that an unincorporated association cannot be sued by one of its members.<sup>57</sup> The court of appeals disagreed, pointing out that O.C.G.A. section 9-2-25<sup>58</sup> permitted an action to be maintained against an unincorporated association, stating:

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49. 254 Ga. App. at 592-95, 562 S.E.2d at 747-49.

50. *Id.* at 594, 562 S.E.2d at 749.

51. *Id.* at 595-96, 562 S.E.2d at 750.

52. *Id.* at 596, 562 S.E.2d at 750 (citations omitted).

53. *Id.* at 597, 562 S.E.2d at 750.

54. 255 Ga. App. 380, 565 S.E.2d 569 (2002).

55. *Id.* at 380-81, 565 S.E.2d at 570-71.

56. 80 Ga. 284, 4 S.E. 905 (1887).

57. 255 Ga. App. at 381-82, 565 S.E.2d at 571.

58. O.C.G.A. § 9-2-25 (1993).



"[W]here a judgment in such actions is rendered in favor of the plaintiff against the organizations or associations, the property of the organization or association shall be liable to the satisfaction of the judgment. No such judgment shall be enforced against the individual property of any member of an unincorporated association, unless the member has personally participated in the transaction for which the action was instituted and has been served with process as provided by law."<sup>59</sup>

The court of appeals explained that "[t]he clear implication underlying this statute is that, unlike a partnership, an unincorporated association may be treated as a separate legal entity from its members."<sup>60</sup>

The church contended that the trial court should have granted summary judgment on plaintiff's claim for negligent hiring. Plaintiff claimed that the church negligently selected the foreman<sup>61</sup> of the construction project because it failed to investigate his qualifications.<sup>62</sup> The trial court stated that pursuant to O.C.G.A. section 34-7-20,<sup>63</sup> "An employer must exercise ordinary care in the selection of employees, must not retain them after knowledge of incompetency, and must warn other employees of dangers incident to employment that the employer knows or ought to know but which are unknown to the employee."<sup>64</sup> The court of appeals applied these principles to organizations soliciting volunteers to perform projects on its behalf.<sup>65</sup>

## II. PARTNERSHIPS

### A. Venue

In *Nolan Road West, Ltd. v. PNC Realty Holding Corp.*,<sup>66</sup> the Supreme Court of Georgia granted certiorari to determine "whether the Court of Appeals correctly ruled that venue in a suit against a limited partnership is proper in a county to which the limited partnership's sole connection is to residents of one of its limited partners."<sup>67</sup> The supreme court noted the Georgia Constitution provides that "[s]uits against joint obligors, joint tort feorsors, joint promissors, co-partners, or joint

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59. 255 Ga. App. at 382, 565 S.E.2d at 571 (quoting O.C.G.A. § 9-2-25(d)).

60. *Id.*

61. *Id.* at 383, 565 S.E.2d at 571. Interestingly, the foreman selected by the church was the father of the plaintiff. *Id.*

62. *Id.* at 383-84, 565 S.E.2d at 571-72.

63. O.C.G.A. § 34-7-20 (1998).

64. 255 Ga. App. at 383, 565 S.E.2d at 572 (citing O.C.G.A. § 34-7-20).

65. *Id.*

66. 274 Ga. 742, 559 S.E.2d 447 (2002).

67. *Id.* at 742, 559 S.E.2d at 448.

trespassers residing in different counties may be tried in either county."<sup>68</sup> The court of appeals also relied on *Farmers Hardware of Athens, Inc. v. L.A. Properties, Ltd.*<sup>69</sup> for the proposition that "the constitutional and statutory provisions as to venue of suits against partners must apply to a limited partnership."<sup>70</sup> The court of appeals upheld venue in Fulton County because one of the limited partners resided in that county.<sup>71</sup> The Georgia Supreme Court disagreed with the holding of the court of appeals and concluded that venue was not proper under the circumstances of this case.<sup>72</sup>

The Georgia Supreme Court distinguished *Farmers Hardware* because the court in that case held "that the constitutional venue provisions concerning partners appl[ie]d to limited partnerships, [and] it is a separate issue whether a limited partner should be considered a copartner within the meaning of that provision, and *Farmers Hardware* in no way undertook to resolve that issue."<sup>73</sup> The supreme court further pointed out:

[I]n *Farmers Hardware*, no partner, limited or general, resided in the county in which the suit had been filed. The issue of venue therefore was resolved adversely to the plaintiff simply by rejecting the plaintiff's assertion that a limited partnership should be treated as an unincorporated organization or association for purposes of venue . . . .<sup>74</sup>

In *Nolan Road*, the Georgia Supreme Court undertook "to resolve whether a limited partner may be treated as a copartner for purposes of [the] constitutional venue provision."<sup>75</sup> The supreme court reasoned that in previous decisions the court had interpreted article VI, section 2, paragraph 4 of the Georgia Constitution as "evidently intend[ing] to declare what might be the venue in suits where persons were jointly liable for a tort."<sup>76</sup> The court asserted that with regard to copartners, it is reasonable to interpret the constitutional provision to apply to partners who are jointly liable in an action.<sup>77</sup> The supreme court interpreted the use of the prefix "co" to imply such a joint liability

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68. *Id.* at 742-43, 559 S.E.2d at 448 (quoting GA. CONST. art. VI, § 2, para. 4).

69. 136 Ga. App. 180, 220 S.E.2d 465 (1975).

70. *Nolan Rd. W., Ltd.*, 274 Ga. at 743, 559 S.E.2d at 448 (quoting *Farmers Hardware of Athens, Inc.*, 136 Ga. App. at 181, 220 S.E.2d at 466).

71. *Id.*

72. *Id.* at 742, 559 S.E.2d at 448.

73. *Id.* at 743, 559 S.E.2d at 449.

74. *Id.*

75. *Id.*

76. *Id.* (quoting *Cox v. Strickland*, 120 Ga. 104, 108, 47 S.E. 912, 914 (1904)).

77. *Id.*

requirement and examined whether a limited partner may be considered a copartner within the meaning of Georgia's constitutional venue provision.<sup>78</sup>

The Georgia Supreme Court defined the nature of a limited partner's liability in the context of a limited partnership, saying:

"A limited partnership is . . . a form of business organization in which one or more of the owners are general partners who are personally liable to the creditors of the business and who manage the business, and in which one or more of the owners are limited partners who are not personally liable to creditors of a business."<sup>79</sup>

The court relied on O.C.G.A. section 14-9-303,<sup>80</sup> which provides that "limited partners are not personally liable for the obligations of the partnership."<sup>81</sup> The Georgia Supreme Court acknowledged that the capital contributions of limited partners to the partnership are at risk for partnership obligations.<sup>82</sup> However, the court excepted plaintiff, explaining:

[B]ecause [plaintiff in the present case did] not attempt to recover any capital contribution from [the] limited partner, [the court did] not undertake to determine how such an obligation by the limited partner is enforced or the effect such an obligation would have on the issue whether a limited partner may be considered a "copartner" within the meaning of [Georgia's] constitutional venue provision.<sup>83</sup>

The supreme court concluded that under article VI, section 2, paragraph 4 of the Georgia Constitution, a partner may be considered a copartner only if the partner is jointly liable in the action at issue.<sup>84</sup> Because limited partners are not individually liable for the partnership's obligations, they cannot be considered a copartner within the meaning of the constitutional provision.<sup>85</sup> Thus, the Georgia Supreme Court reversed the court of appeals holding.<sup>86</sup>

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78. *Id.*

79. *Id.* at 744, 559 S.E.2d at 449 (quoting Larry E. Ribstein, *An Implied Theory of Limited Partnership*, 37 EMORY L.J. 835, 840 (1988)).

80. O.C.G.A. § 14-9-303 (1994).

81. 274 Ga. at 744, 559 S.E.2d at 449 (citing O.C.G.A. § 14-9-303).

82. *Id.* at 744 n.11, 559 S.E.2d at 449 n.11 (citing Ribstein, *supra* note 79, at 840).

83. *Id.*

84. *Id.* at 744, 559 S.E.2d at 449-50.

85. *Id.*

86. *Id.*, 559 S.E.2d at 450.

*B. Liquidation: Fiduciary Duty*

In *Chaney v. Burdett*,<sup>87</sup> the Supreme Court of Georgia granted certiorari to determine the following issue:

[W]hether, upon the death of one of two partners and the dissolution of a partnership: (1) in the absence of an agreement to continue the business of the partnership, the representative of the deceased partner has the right to liquidate partnership property; and, if so, (2) whether the representative is owed a fiduciary duty by the surviving partner with respect to winding up.<sup>88</sup>

Chaney and Burdett were equal partners in BMW Partners. The two parties executed a partnership agreement that did not address the effect of a partner's death on the partnership. The partnership's sole asset was a building rented to a corporation co-owned by Chaney and Burdett. Chaney died in April 1998 and his wife became his legal representative. Chaney's wife wanted to liquidate the partnership's assets, but Burdett wanted to continue the partnership's business. Burdett offered to purchase Chaney's interest in the partnership. Subsequently, Burdett informed Chaney's wife the corporation would no longer pay the rental amount of \$9,000 per month. According to Burdett, fair market value of the rent was only \$4,500 per month. Furthermore, Burdett claimed the corporation had overpaid the rent by \$80,000 and that the overpayment should be recouped by retroactively adjusting the rent payments.<sup>89</sup>

Chaney's wife brought suit, as the representative of the husband's estate, alleging Burdett breached his fiduciary duty, and requesting the partnership's assets be liquidated.<sup>90</sup> The trial court granted summary judgment in favor of Burdett, and Chaney appealed.<sup>91</sup> The court of appeals stated

that upon the death of a partner in a two-person partnership, the surviving partner can unilaterally choose to continue the business even in the absence of an agreement to continue the partnership; that following the death of Charles Chaney, Burdett was the sole partner[,] and he chose to continue the business of the partnership; and that,

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87. 274 Ga. 805, 560 S.E.2d 21 (2002).

88. *Id.* at 805, 560 S.E.2d at 22.

89. *Id.*

90. *Id.*

91. *Id.*

therefore [Chaney's wife] could not compel liquidation of the partnership assets.<sup>92</sup>

The court of appeals further held that Burdett owed no fiduciary duty to Chaney's wife because "as the representative of her husband's estate, she stands as an ordinary creditor of the partnership, not a partner."<sup>93</sup>

The Georgia Supreme Court reversed the decision of the court of appeals.<sup>94</sup> The supreme court found that unless partners agree in writing to the contrary, a partnership dissolves upon the death of a partner.<sup>95</sup> A partnership is not terminated upon dissolution; rather, it "continues until the winding up of the partnership business is complete."<sup>96</sup> The supreme court held that during the winding up period "any partner or the legal representative of the estate of a deceased partner has the right to application of the partnership property; the surviving partner is entitled to possession of the partnership assets only for the purpose of winding up its affairs."<sup>97</sup> The supreme court also found that O.C.G.A. section 14-8-38(a)<sup>98</sup> supported this proposition.<sup>99</sup>

The Georgia Supreme Court ruled that O.C.G.A. sections 14-8-41(a)<sup>100</sup> and 14-8-42<sup>101</sup> did not require a different interpretation of O.C.G.A. section 14-8-38<sup>102</sup> because those sections were based on the presumption "either that the partners agreed in writing to continue the business of the partnership, or that dissolution of the partnership was

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92. *Id.* at 805-06, 560 S.E.2d at 22 (citing *Chaney v. Burdett*, 248 Ga. App. 668, 670, 548 S.E.2d 407, 410 (2001)).

93. *Id.* at 806, 560 S.E.2d at 22 (citing *Chaney*, 248 Ga. App. at 674, 548 S.E.2d at 413).

94. *Id.*

95. *Id.* (citing O.C.G.A. § 14-8-31(a)(5) (1994)).

96. *Id.* (citing O.C.G.A. § 14-8-30 (1994)).

97. *Id.* at 806, 560 S.E.2d at 22-23 (citing *Murphy v. Murphy*, 214 Ga. 602, 604, 106 S.E.2d 280, 283 (1958)).

98. O.C.G.A. § 14-8-38(a) (1994).

99. 274 Ga. at 806, 560 S.E.2d at 23 (quoting in part O.C.G.A. § 14-8-38(a):

Unless otherwise agreed by the partners in the partnership agreement, at the time of the transaction, or at any other time, including but not limited to, an agreement to continue the business of the partnership, when dissolution is caused in any way, other than wrongfully either in contravention of the partnership agreement or as a result of other wrongful conduct of a partner, any partner, or the legal representative of the estate of a deceased partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, may have the partnership property applied to discharge its liabilities and the surplus applied to pay in cash or its equivalent the net amount owing to the respective partners.).

100. O.C.G.A. § 14-8-41(a) (1994).

101. *Id.* § 14-8-42.

102. *Id.* § 14-8-38.

caused wrongfully."<sup>103</sup> Therefore, the supreme court held that because there was no partnership agreement requiring the continuation of the partnership "and dissolution of the partnership was not caused wrongfully, . . . the legal representative of the deceased partner's estate[] was entitled to liquidate the partnership property upon the dissolution of the partnership."<sup>104</sup> On the issue of whether there was a breach of fiduciary duty, the Georgia Supreme Court stated that "the law is clear that partners owe a duty to act in the utmost good faith with regard to each other."<sup>105</sup> The court noted that this fiduciary duty, like the partnership itself, does not end until all partnership matters are settled.<sup>106</sup> As a result, the Georgia Supreme Court ruled that "the court of appeals erred in holding that [the surviving partner] did not owe a fiduciary duty to the legal representative of his deceased partner's estate during the winding up of the partnership business."<sup>107</sup>

### III. LEGISLATIVE CHANGES

The General Assembly made several changes to the Limited Liability Company Act<sup>108</sup> during the 2002 legislative session. The most significant changes to the Limited Liability Company Act were to provisions relating to distributions upon an event of dissociation, dissociation, and cessation of membership.<sup>109</sup>

The General Assembly amended O.C.G.A. section 14-11-601.1(d) to provide that for limited liability companies formed on or after July 1, 1999, "[e]xcept as otherwise provided in the articles of organization or a written operating agreement, a member may not withdraw from the limited liability company."<sup>110</sup>

Pursuant to the changes to O.C.G.A section 14-11-602,<sup>111</sup> Code section 14-11-308<sup>112</sup> was amended to provide that "[u]nless otherwise provided in the articles of organization or a written operating agreement, the unanimous vote or consent of the members shall be required to approve . . . (1) [t]he dissolution of a limited liability company under paragraph (3) of subsection (a) or paragraph (b) of Code [s]ection 14-11-

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103. *Chaney*, 274 Ga. at 807, 560 S.E.2d at 23 (citation omitted).

104. *Id.*

105. *Id.* (citing O.C.G.A. § 23-2-58 (1982); *Wylenski v. Blalock*, 262 Ga. 95, 98, 414 S.E.2d 1, 4 (1992); *Crosby v. Rogers*, 197 Ga. 616, 622, 30 S.E.2d 248, 251 (1944)).

106. *Id.*

107. *Id.*

108. O.C.G.A. § 14-11-100 to -1109 (1994 & Supp. 2002).

109. *Id.* § 14-11-601 (Supp. 2002).

110. *Id.* § 14-11-601.1(d).

111. *Id.* § 14-11-602 (1994 & Supp. 2002).

112. *Id.* § 14-11-308 (Supp. 2002).

602,<sup>113</sup> or “(8) [t]o continue a limited liability company under paragraph (4) of subsection (a) or paragraph (4) of subsection (b) of Code [s]ection 14-11-602.”<sup>114</sup>

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113. *Id.* § 14-11-308(b)(1).

114. *Id.* § 14-11-308(b)(8).

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