

Trial Practice and Procedure

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I. INTRODUCTION

The recent survey period yielded a great number of decisions of interest and importance to practitioners trying and preparing cases for trial. This Article will analyze the recent judicial developments in the law relating to punitive damages, tort actions, sovereign immunity, venue, arbitration, professional negligence, and juror qualification, as

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well as other issues of import to the trial practitioner. This Article also impact trial practice.

II. CASE LAW

A. Damages

1. Punitive Damages: Appellate Review. An area of Georgia law of great interest to the trial practitioner during the survey period is damages. In an interesting about-face, within the span of exactly two months, the court of appeals in *Kent v. White*¹ declared the determination of punitive damages a question of law to be decided de novo by the appellate court and then overruled that finding in *Time Warner Entertainment Co. v. Six Flags Over Georgia, L.L.C.*,² making it once again a question of fact to be decided under an abuse of discretion standard, as it had forever been.

In both cases, the issue was whether a punitive damages award was excessive. In *Kent* the court found the award excessive, adopting a de novo standard of review of punitive damages and declaring the determination of punitive damages to be a question of law.³ As explained by the court, the reason for this decision stemmed not so much from an interpretation of the law—which up to that point stood for the exact opposite proposition—as from the procedural posture of the case.⁴

The punitive damages award had survived all the way to the Supreme Court of Georgia, but during the appeals process, the Supreme Court of the United States decided the cases of *Time Warner Entertainment Co. v. Six Flags Over Georgia, L.L.C.*⁵ and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*⁶ In those cases, the nation's highest court held that the issue of whether a punitive damages award is so excessive that it violates federal Due Process or Equal Protection was a question of law for the appellate court to determine de novo.⁷ The Supreme Court also expressly held that the review of punitive damages for nonconstitutional reasons, for instance, to determine whether they are excessive as a matter of federal or state common law, would remain

1. 253 Ga. App. 492, 559 S.E.2d 731 (2002), *overruled by* *Time Warner Entm't Co. v. Six Flags Over Ga., L.L.C.*, 254 Ga. App. 598, 563 S.E.2d 178 (2002).

2. 254 Ga. App. at 598, 563 S.E.2d at 178.

3. 253 Ga. App. at 497-98, 559 S.E.2d at 736.

4. *Id.* at 497-99, 559 S.E.2d at 736-37.

5. 122 S. Ct. 24 (2001).

6. 532 U.S. 424 (2001).

7. *Id.* at 435 (citing *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998)).

unaffected by the decision.⁸ In other words, the Supreme Court left the decision of whether punitive damages are excessive under state law to the states, whose courts are free to review such awards as questions of fact under an abuse of discretion standard.⁹

The Supreme Court of Georgia vacated the court of appeals decision in *Kent* and remanded it to the court of appeals for further consideration in light of the two cases decided by the United States Supreme Court.¹⁰ The court of appeals then interpreted the state supreme court's action as an implicit direction to change the common law standard for reviewing punitive damages to a de novo review of a question of law.¹¹ Accordingly, the court of appeals changed the standard.¹²

Just two months later, the *Six Flags* case made its way back from the United States Supreme Court to the Georgia Court of Appeals. In a stunning decision, only because of the rapid reversal of course, a full panel of the court of appeals voted unanimously to overrule the two-month-old precedent of *Kent*.¹³ The court stated 10-0 that just because a higher court remands a case to the court of appeals for determination in light of another case, that remand is not the equivalent of a direction to change the law.¹⁴ Because the United States Supreme Court required a de novo review of punitive damages as a matter of law only when the award is challenged on federal constitutional grounds, and because Georgia precedent has for nearly a century reviewed punitive damages as a question of fact subject to an abuse of discretion standard,¹⁵ the court felt bound to follow controlling Georgia precedent on the state law issue.¹⁶ Defendant had not preserved the federal constitutional objection to punitive damages on appeal so a common law review under an abuse of discretion standard was appropriate.¹⁷

Some observations are worth making because of their significance to trial lawyers. First, how can the same issue—excessiveness of a punitive

8. *Id.* at 433.

9. 254 Ga. App. at 600, 563 S.E.2d at 181.

10. 253 Ga. App. at 498, 559 S.E.2d at 736.

11. *Id.* at 497-98, 559 S.E.2d at 736-37.

12. *Id.*

13. 254 Ga. App. at 601, 563 S.E.2d at 182.

14. *Id.*

15. *Id.* at 601-02, 563 S.E.2d at 182 (citing *Seaboard Air-Line Ry. v. Miller*, 5 Ga. App. 402, 405, 63 S.E. 299, 300 (1908) (citation omitted)).

16. *Id.* at 603, 563 S.E.2d at 183.

17. *Id.* at 604-05, 563 S.E.2d at 184. The court of appeals analyzed the punitive damages award de novo "as a matter of judicial economy" anyway, finding that even under such a heightened review, the punitive damages award was not excessive. *Id.* at 6C5, 563 S.E.2d at 185.

damages award—be a question of fact when analyzed under state law and a question of law when analyzed under the federal constitution? This dichotomy seems to have been crafted by the United States Supreme Court to avoid running afoul of the Seventh Amendment right to a jury trial.¹⁸ By defining the analysis of a punitive damages award under the federal constitution as a question of law, contrary to common sense and precedent older than the republic, the United States Supreme Court deftly avoided a troublesome Seventh Amendment issue.

The dichotomy assures that defendants faced with a punitive damages award will always assert constitutional claims, and indeed, the Authors believe those claims will become the focus of defense attacks on punitive damages. The straight-forward de novo analysis conducted by the court of appeals in dicta in *Six Flags* belies the judicial quagmire that the United States Supreme Court has imposed from on high. Making a properly preserved constitutional objection to a punitive damages award a question of law, thereby denying litigants' right to trial by jury on this issue, will open up every punitive damages award not merely to second-guessing, but potentially to wholesale revision and appellate court imposition of its will upon the parties. An appellate court buying either party's arguments now has the theoretical power to consider the parties' arguments and award any amount of punitive damages it deems required "as a matter of law."

The lesson for defense lawyers: always make and preserve your constitutional arguments to punitive damages. The lesson for plaintiffs' lawyers: load up the record with all your evidence supporting punitive damages and argue it all on appeal, including filing a cross-appeal asking the higher court to increase the award. When it was a question of fact, the only issue was whether the award was excessive; in the new era wherein the determination is one of law, the decision would seemingly be entirely up to the appellate court, which could raise or lower the award in making its determination "as a matter of law."

2. Punitive Damages: Trial Procedure and Evidence. During this survey period, the court of appeals underscored that in order to obtain punitive damages, a litigant must follow the dictates of the punitive damages statute precisely. The case is *Conseco Finance Servicing Corp. v. Hill*.¹⁹ In *Hill* plaintiff obtained a default judgment

18. See *Kent*, 253 Ga. App. at 503, 559 S.E.2d at 740 (quoting *Cooper Industries, Inc.*, 532 U.S. at 437) ("Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review of the [trial court's] determination that an award is consistent with due process does not implicate the Seventh Amendment concerns.").

19. 252 Ga. App. 774, 556 S.E.2d 468 (2001).

against defendant, and after a hearing on damages, the trial court, sitting as finder of fact, entered a judgment that included an award of punitive damages. Defendant appealed the award, and argued that the trial court failed to follow the punitive damages statute, section 51-12-5.1(d)(1)²⁰ of the Official Code of Georgia Annotated ("O.C.G.A.").²¹ The court of appeals agreed, reversing because the trial court failed to "resolve from the evidence produced at trial whether an award of punitive damages shall be made. This finding shall be made specially through an appropriate form of verdict, along with the other required findings."²² While it is technically true that the trial court, sitting as the finder of fact, did not render its finding in "an appropriate form of verdict," it must have resolved "from the evidence produced at trial" that "an award of punitive damages [should] be made."²³ Since when have trial courts, sitting as finders of fact, been required to render their judgments in a verdict form? The point of practice for plaintiffs' lawyers is to submit a verdict form on punitive damages no matter who is the trier of fact.

In *Crane Bros. v. May*,²⁴ the court of appeals established the principle that an employer responsible for punitive damages on a respondeat superior theory may introduce evidence of the employee's criminal punishment in mitigation.²⁵ The practical significance of this holding is that it grants beneficial arguments to both plaintiffs and defendants. Defendants, particularly vicariously responsible defendants, can argue that the employee has been punished and that the employer should not be. Plaintiffs can argue that if criminal punishment is admissible in mitigation, it should also be admissible to show that the punishment did not work.

3. Wrongful Death Damages and Apportionment. The court of appeals took the opportunity to develop the law of wrongful death damages this survey period in *Stewart v. Bourn*.²⁶ In *Stewart* the court was called upon to interpret the term "next of kin" in O.C.G.A. section

20. O.C.G.A. § 51-12-5.1(d)(1) (2000).

21. 252 Ga. App. at 774-75, 778, 556 S.E.2d at 470-71, 473.

22. *Id.* (quoting *Chrysler Credit Corp. v. Brown*, 198 Ga. App. 653, 656, 402 S.E.2d 753, 756 (1991) (quoting O.C.G.A. § 51-12-5.1(d)(1))).

23. *Id.* (quoting *Brown*, 198 Ga. App. at 656, 402 S.E.2d at 756 (quoting O.C.G.A. § 51-12-5.1(d)(1))).

24. 252 Ga. App. 690, 556 S.E.2d 865 (2001).

25. *Id.* at 691, 556 S.E.2d at 866.

26. 250 Ga. App. 755, 552 S.E.2d 450 (2001).

51-4-5(a),²⁷ the Wrongful Death Statute.²⁸ The reason: the decedent died leaving behind no spouse, child, or parent; only four siblings and three children of two previously deceased siblings remained as heirs.²⁹ So, the question was simply, do the surviving four siblings divide the proceeds of the wrongful death action, excluding the children of the deceased siblings, or do the children of the deceased siblings "fill the shoes" of their deceased parent? The court held that the children of the deceased siblings fit the definition of "next of kin" under Georgia's law of descent and distribution, so they take per stirpes.³⁰

Finally, in *Hall v. Bailey*,³¹ the court of appeals upheld a common-sense trial court ruling apportioning ninety-five percent of a wrongful death award to the custodial mother of the decedent and five percent to the father.³² Georgia law allows the trial court to apportion such damages between divorced parents based on their respective relationships with the deceased child.³³ This decision provides solid authority for trial courts to prevent dead beat parents from showing up for a payday after the death of a child they neglected.

B. Torts

Although there is a whole survey article dedicated to torts, the Authors of this Article believe that a handful of holdings in this area of the law are important enough to trial practitioners to mention here. The case of *Jones v. NordicTrack, Inc.*,³⁴ makes it clear that the law of product liability imposes no requirement that the product be "in use" at the time it causes an injury,³⁵ a holding entirely consistent with the plain language of the Georgia statute that authorizes product liability.³⁶

One recent case was notable for the argument that was not made and, therefore, not addressed by the appellate court. The case, *Canberg v.*

27. O.C.G.A. § 51-4-5 (2000).

28. 250 Ga. App. at 758, 552 S.E.2d at 452.

29. *Id.* at 756, 552 S.E.2d at 451.

30. *Id.* at 759, 552 S.E.2d at 453.

31. 253 Ga. App. 595, 560 S.E.2d 76 (2002).

32. *Id.* at 595, 560 S.E.2d at 76.

33. O.C.G.A. § 19-7-1(c)(6) (1999).

34. 274 Ga. 115, 550 S.E.2d 101 (2001).

35. *Id.* at 117-18, 550 S.E.2d at 102-04.

36. O.C.G.A. § 51-1-11(b)(1) (2000). As the court stated in *Jones*, this section provides for liability "to any natural person, who may use, consume, or reasonably be affected by the property and who suffers injury." *Jones*, 274 Ga. at 117, 550 S.E.2d at 102-03 (quoting O.C.G.A. § 51-1-11(b)(1)).

City of Toccoa,³⁷ involved the law of negligent infliction of emotional distress. The facts of the case, if not so outrageous, would be comical. A homeowner whose home was on fire called the City of Toccoa fire department. The fire department failed to respond initially because it erroneously believed the Canbergs' home to be just outside the city limits of Toccoa. When the city fire department finally responded, it failed to fight the fire, again, because of its erroneous belief that the property lay outside the city limits. The assistant fire chief, looking on as the Canbergs' home burned, was unmoved by Mr. Canberg's plea for help, in which he pointed out that he owned a city garbage can and a city recycling bin as proof that his home was within the city limits. The city official responded by pointing out that anyone could procure a city garbage can and recycling bin for the purpose of persuading a firefighter to respond to a fire just outside the city limits.³⁸ Apparently, the City had fallen for the old "put a city garbage can in your driveway to convince firefighters to save your burning home outside the city limits trick" too many times and would not be fooled again.

The Canbergs sued the City of Toccoa, claiming intentional and negligent infliction of emotional distress.³⁹ The appellate court, not surprisingly, upheld the intentional infliction claim, but it affirmed summary judgment for the City on the Canbergs' negligent infliction claim because the physical injury necessary to sustain such a claim was not what caused the Canbergs' mental suffering.⁴⁰ While this statement of the law is technically true, it is incomplete. For in addition to physical injury, one may recover for negligent infliction of emotional distress if one has sustained a pecuniary loss from a tort involving personal injury, even if that injury is not physical; the Canbergs indisputably suffered both.⁴¹ It is not clear from the opinion whether this point was ever made by the Canbergs, but trial practitioners should be prepared to make this argument in cases involving negligent infliction of emotional distress. Too often, this point is overlooked and valid claims are lost.

It is no news that Georgia is an employment-at-will state. In *Eckhardt v. Yerkes Regional Primate Center*,⁴² plaintiffs asked the court

37. 255 Ga. App. 890, 567 S.E.2d 21 (2002).

38. *Id.* at 890-91, 567 S.E.2d at 23.

39. *Id.* at 890, 567 S.E.2d at 22.

40. *Id.* at 891-92, 567 S.E.2d at 23.

41. See *Lee v. State Farm Mut. Ins. Co.*, 272 Ga. 583, 585 n.3, 533 S.E.2d 82, 84 (2000) ("[F]or a pecuniary loss to support a claim for damages for emotional distress, the pecuniary loss must occur as a result of a tort involving an injury to the person even though this injury may not be physical.").

42. 254 Ga. App. 38, 561 S.E.2d 164 (2002).

of appeals to create a public policy exception to the employment-at-will principle by allowing a wrongful termination suit to proceed on behalf of a whistleblower who was terminated because he blew the whistle on an illegal or hazardous activity being undertaken by the employer.⁴³ The court of appeals refused to create such an exception because doing so would be more appropriately left to the legislature.⁴⁴

C. Sovereign Immunity

The appellate courts were active in the area of sovereign immunity this survey period. In *Clark v. Board of Regents*,⁴⁵ the court of appeals addressed the issue of when the one-year ante litem notice period begins to run.⁴⁶ Plaintiff argued that it should begin to run only after she discovered that defendant was a state employee.⁴⁷ The court of appeals deferred to the plain language of the statute: "(1) Notice of a claim shall be given in writing within [twelve] months of the date the loss was discovered or should have been discovered."⁴⁸ The beginning of the period is only tolled by fraudulent concealment by the defendant that prevents the claimant from learning that she has a cause of action.⁴⁹

In *Ridley v. Johns*,⁵⁰ the Supreme Court of Georgia held that official immunity extends to state employees even for malicious and intentional acts committed within the scope of their employment.⁵¹ The court relied upon the language of the State Tort Claims Act:⁵² "A state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor."⁵³

Practitioners learned yet again this period that the failure to comply with the strict terms of the State Tort Claims Act is jurisdictional and fatal. In *Sylvester v. Department of Transportation*,⁵⁴ plaintiff filed suit originally within the statute of limitations, but failed to serve the

43. *Id.* at 38, 561 S.E.2d at 165.

44. *Id.* at 39, 561 S.E.2d at 166.

45. 250 Ga. App. 448, 552 S.E.2d 445 (2001).

46. *Id.* at 448-49, 552 S.E.2d at 446.

47. *Id.* at 449, 552 S.E.2d at 446.

48. *Id.* at 448, 552 S.E.2d at 446 (quoting O.C.G.A. § 50-21-26(a)(1) (1998 & Supp. 2000)).

49. *Id.* at 449, 552 S.E.2d at 446.

50. 274 Ga. 241, 552 S.E.2d 853 (2001).

51. *Id.* at 242, 552 S.E.2d at 854.

52. O.C.G.A. § 50-21-20 to -37 (2002).

53. 274 Ga. at 242, 552 S.E.2d at 854 (quoting O.C.G.A. § 50-21-25(a)).

54. 252 Ga. App. 31, 555 S.E.2d 740 (2001).

Department of Administrative Services, Risk Management Division.⁵⁵ Plaintiff attempted to dismiss the suit and renew it, pursuant to the Renewal Statute.⁵⁶ The court of appeals held that the initial suit was void because plaintiff had not complied with the jurisdictional requirements of the State Tort Claims Act when it failed to serve the Department of Administrative Services.⁵⁷ Therefore, no valid suit existed to “renew.”⁵⁸

The supreme court struck a more forgiving note in *Georgia Ports Authority v. Harris*.⁵⁹ In that case, the highest court ruled that a delivery by Federal Express satisfied the requirement that the ante litem notice be “delivered personally” to the Department of Administrative Services, Risk Management Division.⁶⁰ As for the requirement that a “receipt [be] obtained” if “delivered personally,” the court clarified that a plaintiff need not obtain the receipt upon delivery, but can even obtain the receipt during discovery.⁶¹ While this holding seems fair and reasonable in light of the fact that the receipt requirement is for the protection of the plaintiff, it could conceivably create an unfortunate incentive for the Department of Administrative Services to destroy its receipts or otherwise fail to turn them over in discovery.

The court of appeals made clear this term that the state can be held liable for indemnification and contribution under the State Tort Claims Act.⁶² In another important decision, governing the procedural handling of cases stemming from police chases, the supreme court held that trial courts must first determine the threshold question of official immunity of the police officer before determining the issue of causation under O.C.G.A. section 40-6-6,⁶³ the statute setting forth the legal standard for police chases.⁶⁴ This arrangement could potentially impact the sequence and timing of discovery in these cases, as well as potentially require courts to hear multiple motions for summary judgment.

55. *Id.* at 31, 555 S.E.2d at 740.

56. O.C.G.A. § 9-2-61 (1982 & Supp. 2002).

57. 252 Ga. App. at 32, 555 S.E.2d at 741.

58. *Id.*, 555 S.E.2d at 742.

59. 274 Ga. 146, 549 S.E.2d 95 (2001).

60. *Id.* at 150, 549 S.E.2d at 99.

61. *Id.*, 549 S.E.2d at 99-100.

62. *Dep't of Transp. v. Montgomery Tank Lines, Inc.*, 253 Ga. App. 143, 144, 558 S.E.2d 723, 725 (2001).

63. O.C.G.A. § 40-6-6 (2001).

64. *Cameron v. Lang*, 274 Ga. 122, 124, 549 S.E.2d 341, 345 (2001).

D. Discovery and Attorney Conduct

Once again the court of appeals affirmed the principle that discovery orders are not *directly* appealable in Georgia when it dismissed a direct appeal in *General Motors Corp. v. Hammock*.⁶⁵ In *Hammock* the trial court conducted an in camera review of twelve boxes of documents that General Motors claimed were privileged. After the trial court's in camera review, General Motors was ordered to produce several of the documents. When the trial court denied General Motors's request for a certificate of immediate review, General Motors attempted an end-run around the trial court and filed a direct appeal with the court of appeals, arguing that it could do so under the collateral orders doctrine.⁶⁶

The court of appeals dismissed the appeal and reaffirmed its holding from *Johnson & Johnson v. Kaufman*⁶⁷ that discovery orders are not directly appealable.⁶⁸ The holding does not mean that a discovery dispute can never be reviewed on appeal prior to final adjudication of the case. Rather, it simply confirms that an appeal of such orders is *discretionary* and does not arise as a matter of right. As noted in *Hammock*: "[I]n the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling."⁶⁹ A party may also seek a certificate of immediate review from the trial court.

The holding fosters judicial economy by leaving discovery disputes, which are not final adjudications, for resolution by trial courts. If the rule was otherwise, virtually every discovery dispute would be appealed, and cases would never move forward to trial.⁷⁰

65. 255 Ga. App. 131, 564 S.E.2d 536 (2002).

66. *Id.* at 131, 564 S.E.2d at 536. The collateral orders doctrine applies only to a small class of cases and is limited to an order that: "(1) completely and conclusively resolves the issue appealed; (2) concerns an issue which is 'substantially separate' from the basic issues presented in the complaint; and (3) would result in the loss of an important right and is 'effectively unreviewable on appeal.'" *Johnson & Johnson v. Kaufman*, 226 Ga. App. 77, 79, 485 S.E.2d 525, 527 (1997) (citations omitted).

67. 226 Ga. App. 77, 485 S.E.2d 525 (1997).

68. 255 Ga. App. at 131, 564 S.E.2d at 537.

69. *Id.* at 131-32, 564 S.E.2d at 537 (citations omitted).

70. General Motors further contended the discovery order was directly appealable because the order implicated the work product doctrine and, thus, affected its attorney, who was a non-party. *Id.* at 132, 564 S.E.2d at 537. General Motors based its argument on *In re Keith Paul*, 270 Ga. 680, 513 S.E.2d 219 (1999), wherein the Georgia Supreme Court allowed a direct appeal by a reporter whose notes were sought in discovery. *Hammock*, 255 Ga. App. at 132, 564 S.E.2d at 537. In *In re Keith Paul*, the reporter was not a party to the action in which his notes were sought, and thus the discovery order in

In *McKesson HBOC, Inc. v. Adler*,⁷¹ the court of appeals addressed the applicability of the work-product doctrine to items that are voluntarily produced for a third party.⁷² In *Adler* plaintiff filed an action against related corporate entities ("McKesson") for McKesson's alleged filing of false financial statements.⁷³

During discovery plaintiff sought documents that were generated by McKesson during an investigation by McKesson's audit committee into the allegedly false financial statements. These documents consisted of interviews of present and former employees of McKesson, "legal memoranda," and an audit committee report. At some point after McKesson revised its financial statements, the Securities and Exchange Commission ("SEC") began an "informal inquiry" of McKesson.⁷⁴ McKesson authorized its audit committee to cooperate with the SEC "provided that a suitable confidentiality agreement was in place."⁷⁵ The agreement was signed, and the documents sought by plaintiff were apparently provided to the SEC.⁷⁶

McKesson asserted claims of attorney-client privilege and work-product protection over the documents McKesson provided to the SEC.⁷⁷ The trial court ruled that the attorney-client privilege was waived by the disclosure of the documents to the SEC, and the court of appeals affirmed that ruling.⁷⁸ The trial court, however, did not rule on McKesson's work-product objection.⁷⁹

The court of appeals remanded the case to the trial court so that it could address McKesson's work-product claim.⁸⁰ In doing so, the court of appeals discussed the work-product doctrine and its applicability under the facts of the case.⁸¹ The court of appeals began by noting the standard for discovery of items that are protected by the work-product

that case *was* final as to the reporter. 270 Ga. at 683, 513 S.E.2d at 222.

The court of appeals in *Hammock* dismissed General Motors's argument that the order was final on its attorney as unpersuasive because "the [discovery] order sought to be appealed is directed to a party, directly related to the merits of the pending litigation, and there is no countervailing public interest as with the reporter's privilege." 255 Ga. App. at 132-33, 564 S.E.2d at 538.

71. 254 Ga. App. 500, 562 S.E.2d 809 (2002).

72. *Id.* at 500, 562 S.E.2d at 811.

73. *Id.*

74. *Id.* at 500-01, 562 S.E.2d at 811.

75. *Id.* at 501, 562 S.E.2d at 811.

76. *Id.*, 562 S.E.2d at 812.

77. *Id.*

78. *Id.* at 501, 504, 562 S.E.2d at 812, 814.

79. *Id.* at 501, 562 S.E.2d at 812.

80. *Id.* at 504, 562 S.E.2d at 814.

81. *Id.* at 501-04, 562 S.E.2d at 812-14.

doctrine, as provided in O.C.G.A. section 9-11-26(b)(3),⁸² as well as the procedure for obtaining the discovery of such items.⁸³

The court noted that "once the documents falling within the scope of work-product protection are determined, the trial court must consider the issue of waiver."⁸⁴ The court stated that a distinction exists between the attorney-client privilege and the work-product doctrine, and waiver of the attorney-client privilege does not necessarily effect a waiver of work-product protection.⁸⁵ The court explained that a higher threshold exists for finding a waiver of the work-product doctrine than for finding a waiver of the attorney-client privilege.⁸⁶ Specifically, the court stated that "protection of work-product is not necessarily waived by disclosure to a third party."⁸⁷ The court further noted that "[m]ost courts hold that to waive the protection of the work-product doctrine, the disclosure must enable an adversary to gain access to the information."⁸⁸

McKesson argued that the SEC was not "adverse" to the government because it "share[d] a common interest in developing legal theories and analyzing information", and it had produced the information under a confidentiality agreement.⁸⁹ The SEC also joined McKesson in opposing a finding of waiver.⁹⁰ The court of appeals, however, declined to rule on McKesson's work-product claim because the trial court had not yet considered and made a ruling on the claim.⁹¹ The court remanded the case for the trial court to resolve the "material, disputed issues of fact" concerning all aspects of McKesson's work-product claim.⁹²

This case presents an important issue for resolution in the appellate courts of Georgia. While some federal courts have found that a party may disclose documents to a governmental agency and still retain a claim of protection against other persons, the better approach seems to favor a finding of waiver under the facts of *McKesson*.

First, it is unfair for a party to be able to selectively produce documents for one party and withhold them from another. For example, suppose a party provides certain documents to the SEC, and the SEC

82. O.C.G.A. § 9-11-26(b)(3) (1993).

83. 254 Ga. App. at 501-02, 562 S.E.2d at 812.

84. *Id.* at 502, 562 S.E.2d at 812-13.

85. *Id.*

86. *Id.* at 503, 562 S.E.2d at 813.

87. *Id.*

88. *Id.* (quoting *In re Steinhardt Partners*, 9 F.3d 230, 236 (2d Cir. 1993)).

89. *Id.* at 503, 562 S.E.2d at 813 (quoting *In re Steinhardt*, 9 F.3d at 236).

90. *Id.* at 504, 562 S.E.2d at 813-14.

91. *Id.*

92. *Id.*

makes a finding of no criminal liability, deciding not to open a "formal" investigation, et cetera. The disclosing party may then try to use the favorable finding by the SEC as evidence of no wrongdoing in a subsequent civil suit, while withholding documents that may, at least in a civil jury's eyes, be indicative of wrongdoing.

Regardless of the opinion in *McKesson*, the case has been remanded for factual findings to the trial court, which may find that the SEC is "adverse" to *McKesson*. Indeed, it is difficult to imagine how a governmental agency that is investigating a corporation's alleged wrongdoing with the purported purpose of protecting the public and which can levy charges against the corporation could be considered anything but "adverse." If the trial court makes a finding that the SEC was "adverse" to *McKesson*, the federal cases suggest that protection is waived as to all persons thereafter.⁹³

It should go without saying, but it bears emphasis that practitioners must be cognizant of strictly following the pre-trial rulings of a trial court with respect to admissible and inadmissible evidence and to be sure that their witnesses do so as well. Failure to adhere to this mandate garnered an attorney a criminal contempt conviction, a jail sentence of twenty-four hours, and a fine of five hundred dollars in *In re Longino*.⁹⁴

Longino represented Ideal Leasing Services, Inc. ("Ideal") in a condemnation action filed against it and certain property by Whitfield County. Prior to the condemnation trial, Whitfield County filed a motion in limine to exclude evidence concerning future improvements that Ideal had intended to make to its property and which Ideal considered part of its special damages. The trial court granted the motion in limine.⁹⁵

At trial Longino put on evidence through an expert witness concerning the special damages that had been precluded by the trial court's order. The violation of the order became apparent on cross-examination, and the trial court questioned the expert witness on why he had included the prohibited evidence in his testimony. The expert responded that Longino had told him to testify to the special damages. The trial court found that Longino had deliberately violated the order and held Longino in contempt.⁹⁶

93. *In re Steinhardt*, 9 F.3d at 235; *Bowne of New York City, Inc. v. AmBase Corp.*, 150 FRD 465, 479 (S.D.N.Y. 1993); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1429-30 (3d Cir. 1991) (privilege waived if disclosure enables adversary to gain access to information).

94. 254 Ga. App. 366, 367-68, 562 S.E.2d 761, 763 (2002).

95. *Id.* at 367, 562 S.E.2d at 762.

96. *Id.* at 367-68, 562 S.E.2d at 762-63.

On appeal the court of appeals wrote, "To intentionally introduce evidence in contravention of a ruling by a trial court is contemptuous."⁹⁷ In addition to arguing that his conduct was not contemptuous, Longino argued that the trial court's order did not clearly preclude the introduction of the special damages evidence and that he did not have fair warning that his conduct was prohibited.⁹⁸ The court of appeals stated that "a common sense reading of the trial court's" order precluded the evidence and that the ruling on the motion in limine was fair warning enough.⁹⁹ It is a much better position post-trial to appeal an evidentiary ruling than a contempt conviction.

E. Structured Settlement Agreements and Assignment Provisions

In *CGU Life Insurance Co. v. Singer Asset Finance Co.*,¹⁰⁰ the court of appeals addressed as a matter of first impression whether nonassignment provisions in settlement agreements are enforceable.¹⁰¹ Specifically, the court considered whether a tort plaintiff's right to sell or assign future settlement payments can be limited by nonassignment provisions included in such agreements.¹⁰² The court held that under certain circumstances nonassignment agreements are enforceable, but not if the assignment is specifically precluded by contract or if assignment imposes an additional burden on the nonassigning party.¹⁰³

Under a "structured" settlement agreement, a tortfeasor will pay damages awarded to a plaintiff over an extended period of time, as opposed to a lump sum payment.¹⁰⁴ Generally, a tortfeasor's insurer would assign to a "qualified assignee" its liability to make periodic payments to a plaintiff.¹⁰⁵ In exchange for assuming its liability, the tortfeasor's insurer would pay the qualified assignee a lump sum, which the assignee would use to purchase an annuity to fund the periodic payments to plaintiff.¹⁰⁶ This is an attractive arrangement because of the income tax advantages for all parties involved. The tortfeasor's insurer is allowed to deduct from its gross income the amount of the lump sum payment made to the assignee company.¹⁰⁷ Also, the

97. *Id.* at 368, 562 S.E.2d at 763.

98. *Id.* at 368-69, 562 S.E.2d at 763.

99. *Id.* at 369, 371, 562 S.E.2d at 763, 765.

100. 250 Ga. App. 516, 553 S.E.2d 8 (2001).

101. *Id.* at 516, 553 S.E.2d at 8.

102. *Id.*

103. *Id.* at 523, 553 S.E.2d at 14.

104. *See id.* at 520, 553 S.E.2d at 12.

105. *See id.*

106. *See id.* at 526, 553 S.E.2d at 15.

107. *See id.* at 527, 553 S.E.2d at 16.

assignee company does not have to report the lump sum payment as income until it receives the annuity payments, at which time it is entitled to an offsetting deduction for making periodic payments to a plaintiff.¹⁰⁸ For the plaintiff, if the requirements of I.R.C. § 104(a)(2) are met, the entire amount of periodic payments can be excluded from gross income—effectively sheltering the returns that would have been received from a lump sum payment.¹⁰⁹

Problems arise, however, when a plaintiff desires to sell or assign his rights to receive *future* payments. In *Singer Asset Finance Co.*, plaintiffs filed a wrongful death action against defendant on behalf of their mother, who was killed in an automobile collision. CGU Insurance Company (“CGU”), the liability insurer for defendant, reached a structured settlement agreement with plaintiffs. The terms included an initial lump sum payment to plaintiffs and five additional payments to be made over a twenty-year period.¹¹⁰ The settlement agreement stated that the “future payments could not be: ‘accelerated, deferred, increased or decreased . . . nor shall [plaintiffs] have the power to sell or mortgage or encumber same, or any part thereof, nor anticipate the same, or any part thereof, by assignment or otherwise.’”¹¹¹

Despite the unambiguous terms of their agreement with CGU, plaintiffs entered into a purchase agreement with a third party, seeking to sell over \$70,000 of their future payments for a discounted present payment of \$33,295. Plaintiffs argued that because they completed all of their obligations under the settlement agreement, they could sell or assign their right to enforce such agreement without CGU’s consent, despite the nonassignment clause included in the agreement. The trial court agreed with this argument, finding that the case was controlled by *Mail Concepts, Inc. v. Foote & Davies, Inc.*¹¹² and that “once a party to a contract performs its obligations [under the contract,] its right to enforce the other party’s liability under the contract may be assigned without the other party’s consent even if the contract contains a non-assignment clause.”¹¹³

The court of appeals held that although structured settlement agreements are sometimes assignable, the agreement in question was not assignable because it met two of three recognized exceptions barring

108. *See id.*

109. *See id.*

110. *Id.* at 517, 553 S.E.2d at 10.

111. *Id.* at 518, 553 S.E.2d at 11.

112. 200 Ga. App. 778, 409 S.E.2d 567 (1991).

113. 250 Ga. App. at 519-21, 553 S.E.2d at 11-13 (citations omitted).

assignment.¹¹⁴ According to the *Restatement (Second) of Contracts*,¹¹⁵ settlement agreements are generally assignable and valid under law, but with three important exceptions:

(a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or (c) assignment is validly precluded by contract.¹¹⁶

Thus, the court of appeals held that, contrary to the court's holding in *Mail Concepts, Inc.*, it was necessary in this case to enforce the nonassignment clause because failure to do so could materially increase the burden or risk imposed on CGU's tax liability.¹¹⁷ Therefore, the nonassignment clause would be enforced to protect against CGU's tax liability. Furthermore, the court held that the contract specifically and unambiguously precluded assignment.¹¹⁸ Thus, the assignment provision of the agreement met two of the three exceptions to a valid assignment under the *Restatement (Second) of Contracts*.¹¹⁹

F. Summary Judgment and Res Ipsa Loquitur

The doctrine of res ipsa loquitur can be an important tool for the trial lawyer in avoiding summary judgment. In *Persinger v. Step by Step Infant Development Center*,¹²⁰ the court of appeals reversed the trial court's grant of summary judgment to daycare providers after a child in

114. *Id.* at 522, 553 S.E.2d at 13.

115. RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981).

116. 250 Ga. App. at 522, 553 S.E.2d at 13 (quoting *Grieve v. Gen Am. Life Ins. Co.*, 58 F. Supp. 2d 319, 322-23 (D. Vt. 1999) (citing RESTATEMENT (SECOND) OF CONTRACTS § 317(2))).

117. *Id.* at 523, 553 S.E.2d at 14. Under § 130 of the Internal Revenue Code, insurance companies, like CGU, who assume liability to make periodic payments on account of a personal injury settlement are eligible for favorable tax treatment if certain conditions are satisfied. 26 U.S.C. § 130 (2000). For example, one of the conditions requires that periodic payments be made to the actual plaintiff(s) of a personal injury action. This is because under § 104(a)(2) of the Internal Revenue Code, plaintiffs are allowed to exclude personal injury compensation from taxable income. 26 U.S.C. § 104(a)(2) (2000). However, once a plaintiff assigns his right to compensation to another, the IRS may no longer consider the settlement payments to be personal injury compensation, which would subject insurance companies, like CGU, to an increased risk of tax liability.

118. 250 Ga. App. at 523, 553 S.E.2d at 13.

119. *Id.*

120. 253 Ga. App. 768, 560 S.E.2d 333 (2002).

defendant's care suffered a severely broken leg.¹²¹ Although defendant claimed ignorance of the circumstances surrounding the child's injury, the court of appeals found that the evidence sufficiently demonstrated that the type of injury in question ordinarily did not occur in the absence of negligence; thus, application of *res ipsa loquitur* was warranted.¹²²

Res ipsa loquitur allows an inference of negligence to arise if an injury: "(1) is of a kind which ordinarily does not occur in the absence of someone's negligence; (2) [is] caused by an agency or instrumentality within the exclusive control of the defendant; and (3) [is] not [] due to any voluntary action or contribution on the part of the plaintiff."¹²³

In *Persinger* the parents offered the affidavit of an orthopedic surgeon who, upon review of x-rays, testified that the child's leg fracture resulted from a "significant" twisting or a fall from a height greater than the height of the child. The surgeon also testified that the type of injury suffered by the child would not occur simply by the child's walking or running across a floor, as suggested by the daycare providers.¹²⁴ The court of appeals held that the expert's testimony raised a direct inference that the accident did not happen the way the defendants claimed it did and that a jury could find such an injury does not ordinarily occur in the absence of someone's negligence.¹²⁵ Therefore, the court held the doctrine of *res ipsa loquitur* applied and reversed summary judgment.¹²⁶

It is important to point out that plaintiff's use of expert testimony, though not necessary, was an effective way to establish and support the existence of *res ipsa loquitur*. According to the *Restatement (Second) of Torts* section 328D, a finding of *res ipsa loquitur* may be based on common knowledge of the community or expert testimony.¹²⁷

G. Arbitration

During this survey period the courts resolved several issues concerning the validity of arbitration clauses in contracts. The supreme court in

121. *Id.* at 772, 560 S.E.2d at 338.

122. *Id.* at 771, 560 S.E.2d at 337.

123. *Id.* at 770, 560 S.E.2d at 336 (quoting *Fender v. Colonial Stores*, 138 Ga. App. 31, 38, 225 S.E.2d 691, 696 (1976)). That the jury may rely on circumstantial evidence is written in our Code: "In arriving at a verdict, the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved." O.C.G.A. § 24-4-9 (1995).

124. 253 Ga. App. at 768-69, 560 S.E.2d at 335.

125. *Id.* at 772, 560 S.E.2d at 337.

126. *Id.*

127. RESTATEMENT (SECOND) OF TORTS § 328D cmt. D (1965).

Crawford v. Results Oriented, Inc.,¹²⁸ held that arbitration clauses in contracts are not per se unconscionable.¹²⁹

Nonetheless, when an arbitration clause runs afoul of Georgia public policy, it will not be enforced under Georgia or federal law.¹³⁰ In *Continental Insurance Co. v. Equity Residential Properties Trust*,¹³¹ Equity Residential Trust ("Equity") sued its insurer, Continental, for breach of contract because Continental failed to pay amounts due under the policy.¹³² Continental moved to compel arbitration in accordance with the terms of their policy, but the trial court denied the motion "finding that O.C.G.A. § 9-9-2(c)(3) of the Georgia Arbitration Code invalidated the arbitration agreement in the insurance policy."¹³³

Although the insurance policy issued by Continental to Equity contained an agreement to arbitrate all disputes arising out of or related to the policy, the court held that insureds could "not be compelled by the terms of an insurance contract written by the insurer to give up their common law right to access to the courts to resolve disputes arising under the contract."¹³⁴ Essentially, O.C.G.A. section 9-9-2(c)(3)¹³⁵ of the Georgia Arbitration Code codifies Georgia's public policy concerning the resolution of insurance contract disputes. "This provision invalidates arbitration agreements in insurance contracts"¹³⁶

The court further made it clear that the Federal Arbitration Act ("FAA"),¹³⁷ which ordinarily preempts state laws prohibiting the enforcement of an arbitration clause, cannot compel arbitration of an insurance dispute.¹³⁸ Despite the FAA, the court observed that Congress has passed the McCarran-Ferguson Act ("MFA"),¹³⁹ which bars the FAA from preempting Georgia Arbitration law ("GAC").¹⁴⁰ Under the MFA, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance."¹⁴¹ Hence, it appears that

128. 273 Ga. 884, 548 S.E.2d 342 (2001).

129. *Id.* at 885, 548 S.E.2d at 343.

130. *Continental Ins. Co. v. Equity Residential Props. Trust*, 255 Ga. App. 445, 446, 565 S.E.2d 603, 604 (2002).

131. 255 Ga. App. 445, 565 S.E.2d 603 (2002).

132. *Id.* at 445, 565 S.E.2d at 603.

133. *Id.*

134. *Id.* at 446, 565 S.E.2d 604.

135. O.C.G.A. § 9-9-2(c)(3) (1982).

136. 255 Ga. App. at 446, 565 S.E.2d at 604.

137. 9 U.S.C. §§ 1-307 (1999).

138. 255 Ga. App. at 447, 565 S.E.2d at 605.

139. 15 U.S.C. § 1012 (1997).

140. 255 Ga. App. at 447, 565 S.E.2d at 605.

141. *Id.* (quoting 15 U.S.C. § 1012(b)).

arbitration agreements in insurance contracts, to the extent they address disputes between the insured and the insurer, are per se unenforceable in Georgia courts.

H. Insurance—Exclusions

During this survey period, Georgia courts revisited issues concerning commercial general liability policies pertaining to the enforcement of “auto” exclusion policies. In *Jacobs v. American Interstate Insurance Co.*,¹⁴² American Interstate brought suit seeking a declaration that its commercial general liability policy did not provide coverage for losses resulting from a collision between one of its trucks and the deceased’s vehicle.¹⁴³ American Interstate argued its policy excluded coverage for “[b]odily injury or property damage arising out of the ownership, maintenance, use or entrustment to others of any . . . auto . . . owned or operated by . . . any insured.”¹⁴⁴ In this case, the decedent was fatally injured when an overhanging load, which extended two feet off each side of defendant’s tractor-trailer, met with decedent’s truck as she was traveling in the opposite direction, fatally injuring her.¹⁴⁵

In determining whether to enforce the auto exclusion policy, the court had to decide whether the collision arose out of the “use” of an “auto.”¹⁴⁶ Under the terms of the policy, “[u]se includes operation and loading or unloading [of the trailer]” and “auto” is defined to include a “trailer or semi-trailer designed for travel on public roads.”¹⁴⁷ The court of appeals in *Jacobs* enforced the policy exclusion in favor of the insurers, finding that defendant’s truck was in “use” at the time of the accident, and although the skidder did not literally meet the definition of an “auto” under the policy, the fact that it was attached to the tractor-trailer was sufficient for it to satisfy the condition.¹⁴⁸

In contrast, the court of appeals in *Old Republic Union Insurance Co. v. Floyd Beasley & Sons*¹⁴⁹ ruled against the insurers of a parked and broken trailer that caused a collision among other traveling vehicles.¹⁵⁰ The court held that a parked semitrailer did not meet the definition of

142. 249 Ga. App. 795, 549 S.E.2d 767 (2001).

143. *Id.* at 795, 549 S.E.2d at 767.

144. *Id.* (emphasis added).

145. *Id.* at 795-96, 549 S.E.2d at 767-68.

146. *Id.* at 796, 549 S.E.2d at 768.

147. *Id.* at 795, 549 S.E.2d at 767.

148. *Id.* at 796, 549 S.E.2d at 768.

149. 250 Ga. App. 673, 551 S.E.2d 388 (2002).

150. *Id.* at 676, 551 S.E.2d at 391.

a vehicle in "use" and, therefore, the automobile exclusion policy was unenforceable.¹⁵¹

The insurer argued that the accident arose from the "use" of the trailer because "the parking of the semitrailer on the side of the road occurred as a result of the use of the semitrailer, and the accident . . . grew out of or flowed from such use."¹⁵² The court disagreed, finding that at the time of the accident the trailer was not being utilized as a trailer.¹⁵³ Use of a trailer for insurance purposes "embraces the notion that the person using the trailer [has immediate physical] control over it or that such control is reasonably at hand" in terms of proximity of time.¹⁵⁴ In other words, the issue was whether the trailer was operating as such at the exact time of the accident. This is relevant because the concept of "use" does not embrace remoteness. Because the trailer was parked in the same location for over two weeks prior to the accident, it was evident that no one had immediate control over the vehicle and that the trailer was not in operation at the exact time of the accident. Thus, contrary to *Jacobs*, the collision in this case did not arise out of the insured's "use" of the trailer, and the policy exclusion did not apply.

I. Jurisdiction

The Georgia Court of Appeals addressed the proper method of appealing a trial court's grant of attorney fees in *Capricorn Systems, Inc. v. Godavarthy*.¹⁵⁵ In *Capricorn Systems* defendant sought to directly appeal the trial court's grant of fees and litigation expenses to plaintiffs pursuant to O.C.G.A. section 9-15-14¹⁵⁶ rather than directly appealing the trial court's order and judgment on the underlying jury verdict.¹⁵⁷ The court of appeals held that such an appeal was improper.¹⁵⁸ Defendant could only directly appeal the trial court's grant of fees and litigation expenses pursuant to the discretionary appeal procedures of O.C.G.A. section 5-6-35,¹⁵⁹ or as part of the appeal of the underlying judgment.¹⁶⁰

151. *Id.*

152. *Id.* at 675, 551 S.E.2d at 391.

153. *Id.* at 676, 551 S.E.2d at 391.

154. *Id.* at 676-77, 551 S.E.2d at 391-92.

155. 253 Ga. App. 840, 560 S.E.2d 730 (2002).

156. O.C.G.A. § 9-15-14 (1993).

157. 253 Ga. App. at 840, 560 S.E.2d at 730.

158. *Id.* at 842, 560 S.E.2d at 731.

159. O.C.G.A. § 5-6-35 (Supp. 2002).

160. 253 Ga. App. at 840, 560 S.E.2d at 730.

In *Sea Tow/Sea Spill v. Phillips*,¹⁶¹ the court of appeals sought to delineate the scope of the federal court's exclusive jurisdiction in admiralty cases.¹⁶² Plaintiff brought an action against a boat owner, "seeking recovery for services rendered in connection with the salvage of" defendant's boat.¹⁶³ The trial court dismissed plaintiff's suit for lack of jurisdiction, holding that the federal district courts had exclusive jurisdiction over this case brought under admiralty law.¹⁶⁴ The court of appeals reversed and found that plaintiffs could proceed in the state trial court with an in personam salvage action under Georgia law because the state court had concurrent jurisdiction with the district court over an in personam action to recover services for the salvage operation.¹⁶⁵

The court of appeals addressed the quantum and nature of contact required to obtain personal jurisdiction over a nonresident defendant under Georgia's long-arm statute¹⁶⁶ in *McHale v. HJGM, Inc.*¹⁶⁷ Plaintiff, a Georgia resident, purchased a rebuilt engine from a car dealership in Indiana after plaintiff contacted the car dealership by telephone. Defendant had no office, employees, or agents in Georgia and had never sent any representatives to Georgia for business purposes.¹⁶⁸

The court of appeals held this evidence was insufficient to subject defendant to personal jurisdiction in Georgia; "Georgia courts have long held that an out-of-state corporation's placement of advertisements in national publications, acceptance of telephone orders placed from Georgia, and subsequent delivery of goods to this state do not constitute the transaction of business in this state for purposes of long-arm jurisdiction."¹⁶⁹ The court seemed to emphasize that under O.C.G.A. section 9-10-91(1),¹⁷⁰ who makes the initial contact is a pivotal factor in assessing the reach of subsection (1) of the long-arm statute.¹⁷¹

161. 253 Ga. App. 842, 561 S.E.2d 827 (2002).

162. *Id.* at 843, 561 S.E.2d at 828.

163. *Id.* at 842, 561 S.E.2d at 828.

164. *Id.* at 845, 561 S.E.2d at 830.

165. *Id.* at 847-48, 561 S.E.2d at 831.

166. O.C.G.A. § 9-10-90 to -94 (1993 & Supp. 2002).

167. 252 Ga. App. 641, 641, 556 S.E.2d 853, 854 (2001).

168. *Id.* at 641-43, 556 S.E.2d at 854-55.

169. *Id.* at 643, 556 S.E.2d at 855.

170. O.C.G.A. § 9-10-91(1) (1993 & Supp. 2002).

171. 252 Ga. App. at 641, 556 S.E.2d at 854 (noting in first sentence of the opinion that "McHale, a Georgia resident, contacted HJGM, Inc."). Plaintiff had also asserted a fraud claim and attempted to obtain jurisdiction over defendant pursuant to O.C.G.A. section 9-10-91(2) & (3). *Id.* at 643, 556 S.E.2d at 856. But the court was unable to assert jurisdiction for this tort claim because plaintiff failed to present any affidavits or other evidence to rebut defendant's evidence. *Id.*

In *AT&T Corp. v. Sigala*,¹⁷² the supreme court clarified the law relating to foreign nationals suing American corporations for damages arising out of actions occurring in foreign countries.¹⁷³ In this case, Venezuelan nationals brought wrongful death and personal injury actions against AT&T, seeking damages from a pipeline explosion in Venezuela.¹⁷⁴ AT&T removed the case to federal court, but plaintiff was able to remand the case to state court. AT&T moved to dismiss the case, but the motion was denied by the state trial court. After the court of appeals declined to accept the discretionary appeal, the supreme court accepted AT&T's petition for certiorari.¹⁷⁵ The supreme court reversed the trial court and held that the case should be dismissed under the doctrine of *forum non conveniens*.¹⁷⁶ The court held, "Georgia statutes concerning the rights of aliens" do not give aliens living outside our country "an equal right of access to our state courts."¹⁷⁷ The court distinguished other precedent involving *forum non conveniens* by noting that the other cases involved parties who resided within the territorial jurisdiction of the United States.¹⁷⁸ In essence, the court adopted *forum non conveniens* in the context of international torts with *nonresident* aliens.¹⁷⁹ Without such a rule, Georgia could become a "courthouse for the world."¹⁸⁰

J. Venue

In *Nolan Road West, Ltd. v. PNC Realty Holding Corp.*,¹⁸¹ the supreme court reversed the court of appeals decision that held "venue in a suit against a limited partnership is proper in a county to which the limited partnership's sole connection is the residence of one of its limited partners."¹⁸² The court reasoned that a "'partner' may only be considered a 'copartner' within the meaning of Art. VI, Sec. II, Par. IV of our Constitution if the 'partner' is jointly liable in the action at issue."¹⁸³ In the case, the limited partner was not personally liable for the

172. 274 Ga. 137, 549 S.E.2d 373 (2001).

173. *Id.* at 137, 549 S.E.2d at 375.

174. *Id.*

175. *Id.* at 137-38, 549 S.E.2d at 375.

176. *Id.* at 141, 549 S.E.2d at 378.

177. *Id.* at 140, 549 S.E.2d at 377.

178. *Id.* at 140-41, 549 S.E.2d at 377-78.

179. *Id.* at 139-40, 549 S.E.2d at 377.

180. *Id.* at 140 n.18, 549 S.E.2d at 377 (quoting *Kinney Sys. v. Cont'l Ins. Co.*, 674 So. 2d 86, 88 (Fla. 1996)).

181. 274 Ga. 742, 559 S.E.2d 447 (2002).

182. *Id.* at 742, 559 S.E.2d at 447.

183. *Id.* at 744, 560 S.E.2d at 449-50.

damages at issue, so venue was improper in the county of the limited partner's residence.¹⁸⁴

K. Bankruptcy

The supreme court overruled existing precedent regarding automatic stays in bankruptcy in *McKeen v. Federal Deposit Insurance Corp.*¹⁸⁵ In *McKeen* the court held that actions taken in violation of a stay are void ab initio.¹⁸⁶ In other words, they are considered void, not just voidable.¹⁸⁷ The court further held that a stay can be annulled at the discretion of the court, particularly when there are issues of bad faith.¹⁸⁸

In *West v. Men's Focus Health Centers, Inc.*,¹⁸⁹ the court of appeals interpreted the supreme court's decision in *McKeen*.¹⁹⁰ Plaintiffs in *West* moved in the bankruptcy court for relief to file a malpractice case against defendant, notwithstanding the automatic stay granted to defendant under its bankruptcy.¹⁹¹ Because the bankruptcy court granted plaintiffs' motion for relief from the automatic stay, plaintiffs' malpractice case was not void and without effect.¹⁹² Accordingly, plaintiffs were entitled to renew their malpractice action.¹⁹³ Therefore, an automatic stay is not fatal to a cause of action if appropriate relief is sought prior to the filing of the separate cause of action.

Georgia courts also decided cases dealing with judicial estoppel in bankruptcy. In *Cochran v. Emory University*,¹⁹⁴ the court of appeals affirmed the dismissal of plaintiff's tort claim for failure to disclose the potential malpractice claim as an asset in her bankruptcy petition.¹⁹⁵ The underlying malpractice claim arose on January 2, 1996. Plaintiff filed her bankruptcy petition on March 11, 1997.¹⁹⁶ The bankruptcy petition did not list her potential malpractice action under the section requiring disclosure of all "contingent and unliquidated claims of every

184. *Id.*

185. 274 Ga. 46, 46, 549 S.E.2d 104, 104 (2001).

186. *Id.* at 48, 549 S.E.2d at 106.

187. *Id.*

188. *Id.*

189. 251 Ga. App. 202, 553 S.E.2d 379 (2001).

190. *Id.* at 202, 553 S.E.2d at 380.

191. *Id.*

192. *Id.* at 203, 553 S.E.2d at 380.

193. *Id.*

194. 251 Ga. App. 737, 555 S.E.2d 96 (2001).

195. *Id.* at 737, 555 S.E.2d at 97.

196. *Id.*, 555 S.E.2d at 98.

nature.”¹⁹⁷ Rather than moving to amend her bankruptcy petition to include this tort claim as soon as defendant raised the defense, plaintiff waited until after the trial court had dismissed her case before she amended her bankruptcy petition. Because the bankruptcy petition was not amended prior to the court’s ruling, the trial court correctly dismissed plaintiff’s malpractice case.¹⁹⁸ The lesson, as noted in previous surveys, is clear: failure to ascertain the financial condition of your client can spell disaster in subsequent litigation unrelated to bankruptcy proceedings.

In a similar case, the court of appeals in *Weiser v. Wert*¹⁹⁹ held that judicial estoppel did not bar a malpractice action that was not disclosed in a bankruptcy petition when that bankruptcy petition was voluntarily dismissed prior to defendants’ filing of their motion to dismiss.²⁰⁰ The distinction between these cases and the lesson for practitioners is, of course, to pay critical attention to your client’s bankruptcy petition and be sure that amendments are promptly made.

L. Professional Liability

The survey period offered a number of intriguing appellate decisions in the field of professional liability including several cases involving the professional malpractice statute, O.C.G.A. section 9-11-11.1.²⁰¹ Statutory immunity was at the crux of the court of appeals ruling in *Martin v. Fulton-DeKalb Hospital Authority*.²⁰² In *Martin* Grady Health Systems provided a neonatal transport team to bring an infant to Atlanta via ambulance.²⁰³ The Martins filed a suit alleging that the transport team and other defendants administered an overdose of a blood thinner known as Heparin, causing their child to bleed excessively in her brain.²⁰⁴

Grady Health Systems and the transporters moved for summary judgment, claiming statutory immunity under O.C.G.A. section 31-11-8(c),²⁰⁵ which provides immunity for certain ambulance services that perform “emergency services for no remuneration.”²⁰⁶ The trial court

197. *Id.*

198. *Id.* at 739, 555 S.E.2d at 99.

199. 251 Ga. App. 566, 554 S.E.2d 762 (2001).

200. *Id.* at 568-69, 554 S.E.2d at 765.

201. O.C.G.A. § 9-11-11.1 (1993 & Supp. 2002).

202. 250 Ga. App. 663, 551 S.E.2d 415 (2001), *cert. denied*.

203. *Id.* at 664, 551 S.E.2d at 416.

204. *Id.*

205. O.C.G.A. § 31-11-8(c) (2001).

206. *Martin*, 250 Ga. App. at 664, 551 S.E.2d at 416 (quoting O.C.G.A. § 31-11-8(c)).

partially granted the motion based on statutory immunity.²⁰⁷ The court of appeals reversed, finding that Medicaid payments received by the transporting defendants amounted to remuneration under O.C.G.A. section 31-11-8.²⁰⁸

The remittance from Medicaid to the transporters indicated payment by Medicaid for ambulance service and mileage. While the Medicaid payment was for an amount less than that actually charged, Grady Health Systems received and accepted the Medicaid reimbursement as payment in full, as required by its procedures manual.²⁰⁹

Accordingly, the court of appeals found that the payment obviated immunity under O.C.G.A. section 31-11-8.²¹⁰ The court in *Martin* distinguished all prior appellate decisions, finding that payment in this case obviated immunity because Medicaid's intent was to pay for ambulance services.²¹¹ Although the payment did not completely reimburse Grady Hospital, it did not constitute payment of a mere administrative fee, which keeps the statutory immunity intact.²¹² The case was remanded to the State Court of Fulton County for further proceedings against the ambulance service and the transporters.²¹³

The minefield for counsel created by the professional affidavit statute, O.C.G.A. section 9-11-9.1,²¹⁴ nearly exploded to the detriment of plaintiff's counsel in the case of *Memorial Hospital of Adel, Inc. v. Dunn*.²¹⁵ Defendant's counsel claimed the trial court abused its discretion under O.C.G.A. section 9-11-9.1 by extending the time that plaintiff had to file an expert affidavit on more than one occasion after the filing of the complaint.²¹⁶

Plaintiff sought several extensions after the expiration of the original forty-five day extension period, citing the provision that "[t]he trial court may on motion, after hearing and for good cause extend such time as it shall determine justice requires."²¹⁷ Plaintiff had an expert on board for a substantial period of time who promised to execute an affidavit and, in fact, even gave those assurances to plaintiff's counsel

207. *Id.*

208. *Id.* at 668, 551 S.E.2d at 419.

209. *Id.* at 665-66, 551 S.E.2d at 417.

210. *Id.* at 668, 551 S.E.2d at 419.

211. *Id.*

212. *Id.*

213. *Id.* at 669, 551 S.E.2d at 419.

214. O.C.G.A. § 9-11-9.1 (1993 & Supp. 2002).

215. 251 Ga. App. 399, 554 S.E.2d 548 (2001).

216. *Id.* at 399-400, 554 S.E.2d at 549-50.

217. *Id.* at 399, 554 S.E.2d at 549 (alteration in original) (quoting O.C.G.A. § 9-11-9.1(b)).

during the bulk of the initial forty-five day extension period before he decided not to participate.²¹⁸

In view of his late withdrawal, plaintiff filed another motion for extension within two days of learning that the treating physician would not execute the affidavit.²¹⁹ The court of appeals found that the grant of an extension by the trial court was clearly a matter left to the discretion of the trial court and would not be reversed if any evidence authorized and supported the exercise of that discretion.²²⁰ The court of appeals affirmed the trial court's extensions under the circumstances.²²¹

Defendants won the affidavit argument in the case of *Sullivan v. Fredericks*.²²² In *Sullivan* plaintiff failed to file a professional affidavit contemporaneously with the complaint and failed to include in the complaint the language required by O.C.G.A. section 9-11-9.1(b) to the effect that because of time requirements, an affidavit could not be obtained.²²³

The court of appeals affirmed the trial court's dismissal of plaintiff's complaint, finding that the affidavit language requesting an additional forty-five days, triggered by O.C.G.A. section 9-11-9.1(b), cannot be implied and must be specifically alleged in the complaint.²²⁴ Hence, recitation of the magic language asking for the grant of the grace period is, in the words of the court of appeals, "not simply a technicality [nor] 'mere verbiage but rather representation of a fact, a fact which is a necessary ingredient for the applicability of the grace period.'"²²⁵

Another procedural pitfall of the professional negligence statute was revealed in the case of *Griffin v. Carson*.²²⁶ In *Griffin* plaintiff filed an initial complaint for medical malpractice within the two-year statute of limitations. Plaintiff did not, however, file a professional affidavit, nor did he submit one within the forty-five days provided by the statute.²²⁷

Plaintiff then voluntarily dismissed the first action and refiled under O.C.G.A. section 9-2-61,²²⁸ the renewal statute, after the two-year

218. *Id.* at 400, 554 S.E.2d at 550.

219. *Id.*

220. *Id.* (quoting *Archie v. Scott*, 190 Ga. App. 145, 147, 378 S.E.2d 182, 184 (1989)).

221. *Id.*

222. 251 Ga. App. 790, 790, 554 S.E.2d 809, 809 (2001).

223. *Id.* at 791-92, 554 S.E.2d at 811.

224. *Id.*

225. *Id.* (quoting *Anderson v. Navarro*, 227 Ga. App. 184, 185, 489 S.E.2d 40, 41 (1997)).

226. 255 Ga. App. 373, 566 S.E.2d 36 (2002).

227. *Id.* at 373, 566 S.E.2d at 37.

228. O.C.G.A. § 9-2-61 (1993).

statute of limitations had expired.²²⁹ The trial court dismissed the second action as time-barred, and the court of appeals affirmed.²³⁰ The renewal statute could not be used because the first action was void ab initio for plaintiff's failure to timely submit a professional affidavit.²³¹

In *Young v. Williams*,²³² the Georgia Supreme Court declined to adopt the continuous treatment doctrine in medical malpractice claims.²³³ The court of appeals had held that the two-year statute of limitations in medical malpractice cases begins to run on "the date on which 'treatment by the doctor for the particular disease or condition involved has terminated—unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery.'"²³⁴

The rationale underlying the doctrine adopted by the court of appeals is commendable, for it recognizes the realities faced in the treatment relationship:

- (1) a patient should properly place trust and confidence in his physician and should be excused from challenging the quality of care being rendered to him until that confidential relationship terminates;
- (2) to require a patient to bring suit against his physician before treatment is terminated would conceivably afford the physician a defense that the patient left before treatment was terminated and before the physician had a chance to effectuate a proper result; and (3) the treating physician is in the best position to identify and correct the malpractice.²³⁵

The court of appeals emphasized that the continuous treatment doctrine merely interpreted the language of the statute regarding when the injury "is claimed to have occurred."²³⁶

Despite the rationale of the doctrine, the supreme court reversed the holding of the court of appeals, finding that the court of appeals had effectively abrogated the statute of limitations in Georgia for medical malpractice actions rather than merely interpreting the statute.²³⁷

229. 255 Ga. App. at 373, 556 S.E.2d at 37.

230. *Id.* at 373, 375, 566 S.E.2d at 38-39.

231. *Id.* at 374-75, 566 S.E.2d at 38.

232. 274 Ga. 845, 560 S.E.2d 690 (2002).

233. *Id.* at 848, 560 S.E.2d at 693.

234. *Id.* at 846, 560 S.E.2d at 691 (quoting *Williams v. Young*, 247 Ga. App. 337, 340, 543 S.E.2d 737, 740-41 (2000)).

235. *Williams v. Young*, 247 Ga. App. 337, 341, 543 S.E.2d 737, 741 (2000) (quoting *Vitner v. Miller*, 208 Ga. App. 306, 308-09, 430 S.E.2d 671, 673 (Pope, C.J., concurring specially)) (citations omitted).

236. *Id.*

237. 274 Ga. at 848, 560 S.E.2d at 693.

The legislature has declared the statute of limitations for such actions in O.C.G.A. section 9-3-71(a)²³⁸ as follows: "an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred."²³⁹

Thus, the supreme court clearly stated that the cause of action for medical malpractice accrues on the date of the negligently caused injury and not at the later date fixed by the last treatment of the patient.²⁴⁰ If the continuing treatment doctrine is to be adopted in Georgia, it must be grafted onto the statute by the legislature²⁴¹—something that should be considered in light of the doctrine's benefits pointed to by the court of appeals.

Another twist on the professional affidavit statute, O.C.G.A. section 9-11-9.1, occurred in the case of *Frieson v. South Fulton Medical Center*.²⁴² Plaintiff brought suit against a physician on staff at South Fulton Hospital, naming the physician and the hospital as defendants. Plaintiff failed to attach an expert affidavit to her complaint as required by O.C.G.A. section 9-11-9.1. The physician raised the defense and moved for dismissal, which was granted. The trial court observed that South Fulton Hospital would be in the same position as the physician and, therefore, dismissed the claim against the hospital as well.²⁴³

The court of appeals reversed the dismissal of the claim against the hospital.²⁴⁴ The court held that failure to file an affidavit is an affirmative defense and, in the event a plaintiff fails to comply with section 9-11-9.1, each defendant is obligated to file a motion to dismiss contemporaneously with its initial responsive pleading to preserve the defense.²⁴⁵

*Johnson v. Riverdale Anesthesia Associates, P.C.*²⁴⁶ was one of the most widely followed professional negligence cases during the survey period. The case involved the death of a patient who suffered a severe adverse reaction to the anesthesia she received during surgery.²⁴⁷ The

238. O.C.G.A. § 9-3-71(a) (1982 & Supp. 2002).

239. *Young*, 274 Ga. at 846, 560 S.E.2d at 691 (quoting O.C.G.A. § 9-3-71(a)).

240. *Id.* at 848, 560 S.E. 2d at 693.

241. *Id.*

242. 255 Ga. App. 217, 564 S.E.2d 821 (2002).

243. *Id.* at 217, 564 S.E.2d at 822.

244. *Id.* at 218, 564 S.E.2d at 823.

245. *Id.*, 564 S.E.2d at 822-23.

246. 275 Ga. 240, 563 S.E.2d 431 (2002).

247. *Id.* at 240, 563 S.E.2d at 432.

decedent's widower sued Anesthesia Associates for malpractice, claiming that the defendants had failed to "pre-oxygenate the patient."²⁴⁸

The trial court granted defendant's motion in limine to prevent plaintiff's counsel from cross-examining defendant's medical expert regarding whether he personally would have pre-oxygenated decedent.²⁴⁹ After a jury verdict in favor of the defense, the Supreme Court of Georgia issued a 4-3 opinion upholding the trial court's exercise of its discretion in excluding such questioning.²⁵⁰

The majority ruled that when expert medical testimony has been presented, either to support or rebut a claim that the applicable standard of care was breached, questions aimed at determining how the expert would personally elect to treat a patient are irrelevant.²⁵¹ Incredibly, the majority declared that what a testifying expert would have personally done is irrelevant to that expert's opinion of the applicable standard of care.

A strong dissent from Justice Carley, joined by Justices Benham and Hunstein, pointed out the real disservice the ruling does to the opposing party and the fact finder.²⁵² Specifically, the dissent observed that

[i]f a defense expert has testified that a defendant's medical act conformed [to an] acceptable standard of care, the credibility of said testimony certainly would be severely shaken if [the testifying] expert conceded on cross-examination that he personally does not perform and/or teach the medical act in the same manner.²⁵³

In other words, the dissent pointed out that when a testifying expert says one thing and does another, it is relevant for impeachment purposes.²⁵⁴ "Do as I say, not as I do" would be no more convincing to jurors than it is to children.

*McCall v. Henry Medical Center*²⁵⁵ was notable for its review and limitation of the scope of the medical peer review privilege. In *McCall* the court of appeals held that the peer review privilege did not shield a hospital from a claim for the negligent granting of medical privileges to a staff physician.²⁵⁶ The court of appeals reasoned that "a hospital

248. *Id.* at 240-41, 563 S.E.2d at 432.

249. *Id.* at 241, 563 S.E.2d at 231.

250. *Id.* at 243, 563 S.E.2d at 434.

251. *Id.* at 242, 563 S.E.2d at 433.

252. *See id.* at 245, 563 S.E.2d at 435 (Carley, J., dissenting).

253. *Id.* (Carley, J., dissenting) (quoting 2 PEGALIS & WACHSMAN, AMERICAN LAW OF MEDICAL MALPRACTICE § 14:7(e), 492 (2d ed. 1993)).

254. *See id.* at 244-45, 563 S.E.2d at 434-35 (Carley, J., dissenting).

255. 250 Ga. App. 679, 551 S.E.2d 739 (2001).

256. *Id.* at 682, 551 S.E.2d at 742-43.

has a direct and independent responsibility to its patients to take reasonable steps to ensure that staff physicians are qualified for [the] privileges granted" them by the hospital.²⁵⁷ The court noted that even if the decision to grant privileges was made by a peer review group, this alone could not insulate the hospital from liability.²⁵⁸ To hold otherwise would effectively eliminate, through peer review immunity, a hospital's responsibility to a patient to exercise reasonable care in ensuring that its medical care providers are qualified.²⁵⁹

In *Ray v. Scottish Rite Children's Medical Center, Inc.*,²⁶⁰ the court determined that claims against a hospital for negligent retention of an incompetent physician are considered claims for medical malpractice.²⁶¹ The court in *Ray* held that an action against a healthcare provider for negligent retention constituted a medical malpractice action under the dictates of O.C.G.A. section 9-3-70²⁶² and, therefore, was subject to a two-year statute of limitation and a five-year statute of repose.²⁶³ The decision unfairly affords a hospital the protection of a medical professional by making no distinction between the tort of negligent retention and medical malpractice.

M. Trials, Evidence, and Juries

The trial court's ability to modify a pretrial order after its entry was at stake in *Brown v. Walker*.²⁶⁴ At the close of plaintiff's evidence, the trial court directed a verdict for defendant based on the running of the statute of limitations. On appeal plaintiff argued that while the statute of limitations defense had been raised in the answer, it had not been included in the pretrial order signed by the trial court, and thus, defendant had waived the defense.²⁶⁵

The court of appeals affirmed the trial court and held that a trial court's decision to modify a pretrial order will not be disturbed absent an abuse of discretion.²⁶⁶ The court also noted that plaintiff had failed to show any prejudice, having been aware of the potential defense when

257. *Id.* at 681, 551 S.E.2d at 742 (quoting *Candler Gen. Hosp. v. Persaud*, 212 Ga. App. 762, 766, 442 S.E.2d 775, 777 (1994) (physical precedent only)).

258. *Id.* at 682, 551 S.E.2d at 743.

259. *Id.*, 551 S.E.2d at 742.

260. 251 Ga. App. 798, 555 S.E.2d 166 (2001).

261. *Id.* at 800-01, 555 S.E.2d at 168.

262. O.C.G.A. § 9-3-70 (1982).

263. 251 Ga. App. at 799-801, 555 S.E.2d at 168-69.

264. 251 Ga. App. 877, 555 S.E.2d 223 (2001).

265. *Id.* at 878, 555 S.E.2d at 224.

266. *Id.*

it was initially raised in defendant's answer.²⁶⁷ The court ruled O.C.G.A. section 9-11-16(b)²⁶⁸ clearly states the pre-trial order "controls the subsequent course of the action unless modified at the trial to prevent manifest injustice."²⁶⁹

In an automobile collision case, *Shaw v. Brannon*,²⁷⁰ defendants appealed a verdict in favor of plaintiff, which defendants claimed was tainted by plaintiff's counsel's "send a message" argument. During closing argument, plaintiff's counsel asked the jury to return a verdict of over one million dollars in order to "send a message" to defendant. The case did not include a punitive damages claim. Defendants accordingly requested a mistrial for the improper argument.²⁷¹

The trial court rebuked defendants' lawyer's motion for mistrial and instead instructed the jury that sending a message was not an appropriate issue for the plaintiff's lawyer to go into. The trial court then directed plaintiff's counsel to make his argument in other areas. Defendant's counsel did not object to the curative instruction.²⁷² The court of appeals affirmed the trial judge's denial of the mistrial and noted the trial court's broad discretion to "instruct the jury to disregard the argument, [to] rebuke the offending counsel . . . , or, as a last resort, [to] grant a mistrial."²⁷³

A widely followed opinion emerged in the wrongful death case of *Brock v. Wedincamp*.²⁷⁴ In *Brock* the trial court granted plaintiff's motion in limine and excluded any evidence from defendant regarding decedent's abortions, adoptions, sex life, custody disputes, and possible reduced life expectancy due to her sexual practices. The trial court, however, ruled that if plaintiff put into evidence, impliedly or expressly, that decedent was a good mother, a good person, or liked or wanted to work with children, plaintiff would be deemed to have opened the door for the admission of such evidence.²⁷⁵

In a strongly worded opinion, the court of appeals held that inflammatory and "[i]rrelevant matters which improperly tend to reflect adversely on the victim's character, which destroy a jury's impartiality, or which

267. *Id.* The obvious prejudice of preparing the presentation of your case for the jury was not considered "prejudice."

268. O.C.G.A. § 9-11-16(b) (1993 & Supp. 2002).

269. 251 Ga. App. at 878, 555 S.E.2d at 224 (quoting O.C.G.A. § 9-11-16(b)).

270. 253 Ga. App. 673, 560 S.E.2d 289 (2002).

271. *Id.* at 674, 560 S.E.2d at 291.

272. *Id.* at 674-75, 560 S.E.2d at 291.

273. *Id.* at 675, 560 S.E.2d at 291.

274. 253 Ga. App. 275, 558 S.E.2d 836 (2002).

275. *Id.* at 282-83, 558 S.E.2d at 842.

excite only the passions of the jurors should not be admitted.²⁷⁶ Evidence of abortions, adoptions, or the sex life of a victim in the abstract does not rebut evidence that the decedent was a good person and a good parent and is clearly prejudicial.²⁷⁷ Accordingly, the court affirmed the trial court's grant of the motion in limine to exclude the evidence.²⁷⁸

The court of appeals further stated that the trial court's ruling that the prejudicial evidence might be admitted if plaintiff merely presented some evidence that decedent was a good mother or good person, or liked or wanted to work with children, was erroneous.²⁷⁹ Practitioners are cautioned that such evidence must be handled delicately or reversal of a verdict may be the result.

In *Chambers v. Guinnett Community Hospital, Inc.*,²⁸⁰ the court of appeals held that evidence showing two defense experts were policy holders of MAG Mutual Insurance Co. ("MAG") was inadmissible in a medical malpractice action.²⁸¹ Plaintiff argued that the evidence should be allowed for impeachment purposes because MAG is a mutual company and, as policyholders, the experts had a financial interest in the outcome of the case.²⁸² The court rejected the argument and held that there must be a more substantial financial interest to warrant the introduction of evidence that the defendant and the expert share the same insurance company.²⁸³

The court noted that most states have adopted a "substantial connection test" to determine when evidence of common liability coverage is permissible.²⁸⁴ Under this test, a plaintiff must be able to establish that an expert has a more substantial connection to a defendant's insurer than merely that of a policy holder or membership in a mutual insurance company.²⁸⁵

It was held that plaintiff opened the door to questions regarding her medical insurance coverage in the case of *Matheson v. Stilkenboom*.²⁸⁶ After an automobile collision, plaintiff did not complain about injury at

276. *Id.* at 282, 558 S.E.2d at 842 (quoting *Cook v. State*, 232 Ga. App. 796, 797, 503 S.E.2d 40, 42 (1998)).

277. *Id.* at 283, 558 S.E.2d at 842-43.

278. *Id.* at 282, 558 S.E.2d at 842.

279. *Id.* at 283, 558 S.E.2d at 842.

280. 253 Ga. App. 25, 557 S.E.2d 412 (2001).

281. *Id.* at 28, 557 S.E.2d at 417.

282. *Id.* at 26, 557 S.E.2d at 415.

283. *Id.* at 27, 557 S.E.2d at 416.

284. *Id.*

285. *Id.*

286. 251 Ga. App. 693, 555 S.E.2d 73 (2001).

the scene and took a cruise to the Bahamas two days after the wreck.²⁸⁷

At trial plaintiff admitted that despite being in pain, she did not seek any medical treatment on the cruise for injuries suffered in the collision. Trying to explain this delay, she stated that she did not visit the ship's doctor during the cruise because she could not afford the treatment.²⁸⁸ The court of appeals held that it was proper to cross-examine plaintiff on the otherwise forbidden topic of medical insurance because plaintiff injected evidence of her own insurance into the trial.²⁸⁹

A case of first impression was presented to the supreme court in the case of *Mullins v. Thompson*.²⁹⁰ The case involved a will contest wherein one of the witnesses was an attorney. The party contesting the will desired to impeach the attorney by showing the attorney had previously made false statements to a client in violation of the Rules of Professional Conduct and that his license to practice law had been suspended for six months.²⁹¹

The supreme court held that the attorney's suspension from the practice of law "reflected moral shortcomings," but "was not the equivalent of a conviction of a crime of moral turpitude."²⁹² The court thus held that the proposed cross-examination was not a proper approach to impeach one's character.²⁹³

In *Latimore v. Department of Transportation*,²⁹⁴ the court of appeals affirmed the trial judge's decision in admitting impeachment evidence that a treating physician's medical license had been previously suspended and that he had been placed on probation.²⁹⁵ The court examined the contents of the offered impeachment materials, finding that a witness may be impeached on a collateral issue that is indirectly material to the case.²⁹⁶

In this instance, the physician had been disciplined for failing to perform appropriate testing and evaluation on prior patients, and hence, the court concluded that this impeachment evidence could demonstrate weakness in the physician's credentials and competency.²⁹⁷ The court

287. *Id.* at 695, 555 S.E.2d at 75.

288. *Id.*

289. *Id.* at 696, 555 S.E.2d at 75.

290. 274 Ga. 366, 553 S.E.2d 154 (2001).

291. *Id.* at 366, 553 S.E.2d at 155.

292. *Id.*

293. *Id.*

294. 250 Ga. App. 360, 552 S.E.2d 439 (2001).

295. *Id.* at 361, 552 S.E.2d at 440.

296. *Id.*

297. *Id.*

held that the evidence also challenged the physician's credibility and his ultimate opinion as to whether the patient he was treating suffered the damages sought.²⁹⁸

*Kim v. Walls*²⁹⁹ possibly represents the most significant case to trial practitioners decided in the survey period. In *Walls* the supreme court addressed the issue of striking jurors for cause when a juror has indicated bias in favor of a party.³⁰⁰

Walls was a medical malpractice case that resulted in a defense verdict for Dr. Kim. During voir dire, a juror indicated that she knew and worked with Dr. Kim at the hospital emergency room. The juror admitted that "[t]his ongoing relationship . . . would 'probably' color her view of which party ought to prevail."³⁰¹ The juror further stated that "the scales are not equally balanced because of her professional relationship with" defendant.³⁰²

Despite these *clear* expressions of bias, the trial court "asked" her the "rehabilitation" question. Following that, the juror responded that she could set aside her preconceived notions, but admitted upon further questioning from defense counsel that she "did not view the parties equally or neutrally" because she knew Dr. Kim.³⁰³ The trial court then prohibited plaintiff's counsel from further questioning the juror.³⁰⁴

The supreme court noted that trial courts have broad discretion in evaluating a juror's impartiality and underscored the importance of the trial court's role in this regard. "[T]he trial judge 'is the only person in a courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury.'"³⁰⁵ Despite that broad latitude given the trial judge, the supreme court held it was an abuse of that discretion to qualify the juror when plaintiff's counsel was not allowed to develop competent evidence as to bias and when the court itself conducted only a cursory rehabilitation.³⁰⁶ The court wrote:

[P]otential impact of juror bias must not be underestimated. "Running through the entire fabric of our Georgia decisions is a thread which plainly indicates that the broad general principle intended to be

298. *Id.*

299. 275 Ga. 177, 563 S.E.2d 847 (2002).

300. *Id.* at 177, 563 S.E.2d at 848.

301. *Id.*

302. *Id.*

303. *Id.*, 563 S.E.2d at 849.

304. *Id.*

305. *Id.* at 178, 563 S.E.2d at 849 (quoting *Walls v. Kim*, 250 Ga. App. 259, 260, 549 S.E.2d 797, 799 (2001)).

306. *Id.* at 179, 563 S.E.2d at 850-51.

applied in every case is that each juror shall be so free from either prejudice or bias as to guarantee the inviolability of an impartial trial [I]f error is to be committed, let it be in favor of the absolute impartiality and purity of the jurors.³⁰⁷

The court emphasized that when a juror has a relationship with a party to the case that would suggest bias, “the trial court must do more than ‘rehabilitate’ the juror through the use of any talismanic question.”³⁰⁸ Indeed, the trial court should conduct “voir dire of sufficient scope and depth to ascertain any partiality.”³⁰⁹ Further, “counsel should be given the ‘broadest of latitude’ in questioning prospective jurors who have expressed interest or bias.”³¹⁰ Thus, the court affirmed the court of appeals reversal of the trial court because plaintiff’s “voir dire questioning [was] curtailed.”³¹¹

III. LEGISLATION

A. *Expert Testimony*

The legislature took a cautious step towards giving trial courts more flexibility in handling the late declaration of expert witnesses by amending O.C.G.A. section 9-11-16.³¹² The amended statute provides:

After entry of the pretrial order, it shall be within the discretion of the court to permit or disallow the presentation of testimony from any expert witness whose name is not contained in the pretrial order; provided, however, that if the additional expert witness is permitted to testify, any opposing party shall be permitted reasonable time to take the deposition of the additional expert witness.³¹³

Prior to this amendment, trial courts could not exclude expert testimony of an expert declared after entry of a pretrial order.³¹⁴

307. *Id.* (alteration in original) (quoting *Cambron v. State*, 164 Ga. 111, 113-14, 137 S.E. 780, 781 (1927)).

308. *Id.*

309. *Id.* at 179, 563 S.E.2d at 849 (citing *Speed v. State*, 270 Ga. 688, 691, 512 S.E.2d 896, 903 (1999); O.C.G.A. § 15-12-134 (2001)).

310. *Id.* (quoting *White v. State*, 230 Ga. 327, 336, 196 S.E.2d 849, 855 (1973)). While the supreme court did not hold that any relationship with a party is per se cause to strike a juror, the court did make it clear that such persons should be adequately examined to ensure impartiality. *Id.*, 563 S.E.2d at 850.

311. *Id.*

312. O.C.G.A. § 9-11-16(b) (1982 & Supp. 2002).

313. *Id.*

314. *See, e.g., Thakkar v. St. Ives Country Club*, 250 Ga. App. 893, 894, 553 S.E.2d 181, 183 (2001).

Rather, the trial court's only options were to grant a continuance of the trial or declare a mistrial.³¹⁵ The amendment makes Georgia's approach similar to that of the federal courts and Federal Rules of Civil Procedure,³¹⁶ which clearly permit the exclusion of expert testimony when the witness is not timely disclosed.³¹⁷ The amendment was much needed and long overdue. Absent the power to exclude late disclosed experts, litigation is unnecessarily prolonged and opposing parties can be prejudiced.³¹⁸

B. Jury Trials

In civil actions, the minimum amount in controversy required to entitle a party to a twelve person jury in state court was raised from \$10,000 to \$25,000 this year.³¹⁹ For civil actions in which the amount in controversy is less than \$25,000, a party is only entitled to a jury of six persons.³²⁰

C. Hospital Liens

The hospital lien chapter underwent change in 2002. The amendments make it clear that perfected hospital liens are liens against an injured party's cause of action only and are not liens against the patient, his property, or assets. The chapter was amended in part as follows:

The [hospital] lien provided for in this subsection is only a lien against such causes of action [held by the injured party against a third party] and shall not be a lien against such injured person, such [person's] legal representative, or any other property or assets of such persons and shall not be evidence of such person's failure to pay a debt.³²¹

While a hospital cannot pursue an injured patient's property or personal assets, the hospital can file an action to enforce a perfected lien against the person responsible for causing the patient's injuries.³²² The action may be commenced within one year of the date "liability is finally determined by a settlement, by a release, by a covenant not to

315. *Id.*

316. FED. R. CIV. P. 26(a)(2)(C).

317. *See, e.g.,* Derby v. Godfather's Pizza, Inc., 45 F.3d 1212, 1215 (8th Cir. 1995) (citing FED. R. CIV. P. 26(a)(2)(C)).

318. Of course the amendment also *permits* the testimony of late disclosed experts. The decision to allow or disallow the testimony is left to the discretion of the trial court.

319. *See* O.C.G.A. § 15-12-122(a)(2) (2001 & Supp. 2002).

320. *See id.*

321. *Id.* § 44-14-470(b) (2002).

322. *Id.*

bring an action, or by [a] judgment."³²³ This right of action may be cut off only if the tortfeasor obtains an appropriate affidavit as provided for in O.C.G.A. section 44-14-473(c).³²⁴ The amendment appears to be largely a codification of the existing case law with respect to whom the hospital may enforce its lien against.³²⁵

D. Service of Process on Foreign Defendants

The legislature amended O.C.G.A. section 9-11-4³²⁶ and adopted the Federal Rules of Civil Procedure approach for service of process on persons in foreign countries. The amendment adds subsection (f)(3) and permits as one option, service by certified mail, return receipt requested sent by the clerk of court, if such service is not prohibited by the law of the foreign country wherein service is to be made.³²⁷

IV. CONCLUSION

This year's survey period yielded several notable decisions and legislative developments. While the survey is not intended to be exhaustive, the Authors have endeavored to provide material that will be useful to keep practitioners updated in the area of trial practice and procedure.

323. *Id.* § 44-14-473(a).

324. *Id.* § 44-14-473(c).

325. *See Hosp. Auth. v. Boyd*, 96 Ga. App. 705, 101 S.E.2d 207 (1957).

326. O.C.G.A. § 9-11-4 (1993 & Supp. 2002).

327. *Id.* § 9-11-4(f)(3)(B).

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