Appellate Practice and Procedure

by Roland F. L. Hall*

I. INTRODUCTION

This Article surveys noteworthy decisions addressing appellate practice and procedure handed down by the Georgia appellate courts from June 1, 2004 through May 31, 2005. The cases discussed fall into the following categories: (1) appellate jurisdiction; (2) preserving the record; (3) timeliness of appeal; and (4) miscellaneous cases of interest.

II. APPELLATE JURISDICTION

Several cases decided during the survey period addressed difficult issues of appellate jurisdiction concerning appeals from administrative proceedings. In *City of Rincon v. Couch*,[1] the appellant, City of Rincon ("City"), appealed the superior court order that enforced a consent order the City entered into with the Director of the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources. The City brought its appeal under Official Code of Georgia Annotated ("O.C.G.A.") section 5-6-35(a)(1),[2] casting the proceedings below as the superior court's review of an agency decision, which is subject to discretionary review.[3] The court of appeals disagreed and held that the appeal arose from proceedings under O.C.G.A. section 12-5-189,[4] which allows a superior court to confirm a final order of the Director of the

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1. 272 Ga. App. 411, 612 S.E.2d 596 (2005).
2. O.C.G.A. § 5-6-35(a)(1) (1995).
3. *City of Rincon*, 272 Ga. App. at 411, 612 S.E.2d at 597.
4. O.C.G.A. § 12-5-189 (2001).

EPD where such order has not been appealed or has been affirmed on appeal.[5] Because the City had not appealed the EPD's decision, the superior court's order affirming the consent order was correctly entered pursuant to O.C.G.A. section 12-5-189.[6] Thus, the City was limited to a direct appeal of the propriety of the superior court's order.[7] The City could not challenge the underlying consent order, and the court of appeals declined to consider the City's eight enumerations of error challenging the consent order.[8]

In *Hughey v. Gwinnett County*,[9] another case concerning the Georgia EPD, the plaintiffs administratively appealed the EPD's issuance of a permit to Gwinnett County to discharge treated wastewater into Lake Lanier. An administrative law judge ("ALJ") affirmed the issuance of the permit, the superior court reversed the ALJ, and the court of appeals reversed the trial court and reaffirmed issuance of the permit.[10] The supreme court granted a writ of certiorari, and the plaintiffs argued that the court of appeals lacked jurisdiction to decide the case because the superior court's judgment remanded the case to the ALJ, meaning the decision was not final and was therefore not appealable.[11] (The superior court concluded in its order that the ALJ committed legal error, and thus, the court ordered the case returned to the ALJ.)[12] The supreme court disagreed with the appellants' argument, holding that because remand did not require further proceedings in front of the ALJ or require the ALJ to reconsider any issues under a different standard than that previously applied, the function and substance of the superior court's order was that of a final and appealable order.[13] Accordingly, the court of appeals had jurisdiction to decide the case.[14]

In *Best Tobacco, Inc. v. Department of Revenue*,[15] the plaintiff, Best Tobacco, sought an injunction and declaratory judgment against the defendant concerning the defendant's refusal to allow the plaintiff to sell certain cigarettes in Georgia. After the superior court dismissed the plaintiff's action for failure to exhaust administrative remedies, the

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5. *City of Rincon*, 272 Ga. App. at 411-12, 612 S.E.2d at 597.
6. *Id.* at 412, 612 S.E.2d at 597.
7. *Id.*
8. *Id.* at 413, 612 S.E.2d at 598.
9. 278 Ga. 740, 609 S.E.2d 324 (2004).
10. Gwinnett County v. Lake Lanier Ass'n, 265 Ga. App. 214, 214, 593 S.E.2d 678, 681 (2004), *cert. granted.*
11. *Hughey*, 278 Ga. at 740, 609 S.E.2d at 326.
12. *Id.* at 740-41, 609 S.E.2d at 326-27.
13. *Id.* at 741, 609 S.E.2d at 327.
14. *See id.*
15. 269 Ga. App. 484, 604 S.E.2d 578 (2004).

plaintiff filed a direct appeal with the court of appeals. The appealed order was of a type listed in O.C.G.A. section 5-6-34,[16] which is the direct appeal statute. However, the underlying subject matter prevailed because the order concerned subject matter listed in the discretionary appeal statute, O.C.G.A. section 5-6-35,[17] and thus, the plaintiff was required to seek discretionary review.[18] Because the plaintiff had not done so, the court of appeals held that it lacked jurisdiction to consider the merits of the plaintiff's appeal.[19] The court of appeals noted in dicta that the intent of O.C.G.A. section 5-6-35(a)(1), addressing appeals from decisions of state administrative agencies, was to give appellate courts discretion to reject an appeal when both an agency and a trial court had already adjudicated the case.[20] Additionally, the court noted that although the plaintiff's case had only been considered by the superior court, this was the case only because the plaintiff decided to "opt out" of the administrative process by proceeding directly to the superior court.[21]

In *Johnson v. Allgood Farm, LLC,*[22] a mineral rights case, the supreme court previously affirmed the trial court's grant of summary judgment to the plaintiffs that established their claims to mineral rights in the defendant's property.[23] The trial court then issued a writ of possession from which the plaintiffs appealed, requesting that the supreme court require modification of the writ of possession to clarify the plaintiffs' right of access to the defendant's property and the scope of the plaintiffs' interests.[24] The supreme court declined to modify the writ of possession, holding that the plaintiffs "never asked the trial court to make any determination regarding the locations, extent, and scope of the mineral interests," and that summary judgment had been granted solely on the question of ownership.[25] Accordingly, issues other than ownership were not ripe for review.[26]

It is not always clear whether an appeal should be filed with the court of appeals or the supreme court. In *Georgia Department of Transporta-*

16. O.C.G.A. § 5-6-34 (1995).
17. O.C.G.A. § 5-6-35.
18. *Best Tobacco, Inc.*, 269 Ga. App. at 485-86, 604 S.E.2d at 579-80.
19. *Id.* at 486, 604 S.E.2d at 580.
20. *Id.* at 485, 604 S.E.2d at 579.
21. *Id.* at 485-86, 604 S.E.2d at 579-80.
22. 278 Ga. 283, 602 S.E.2d 837 (2004).
23. Allgood Farm v. Johnson, 275 Ga. 297, 565 S.E.2d 471 (2002).
24. *Johnson*, 278 Ga. at 283, 602 S.E.2d at 837.
25. *Id.* at 284, 602 S.E.2d at 838.
26. *Id.*

tion v. Meadow Trace, Inc.,[27] a condemnation case, the critical issue in determining the value of compensation to the landowner was the property's right of access to a public highway, which directly affected the value of the property. In resolving this issue, the critical document was a right of way deed from 1966 that gave certain access rights to the State Highway Department. After the trial court granted summary judgment to the landowner on the access issue, the Department of Transportation ("DOT"), in an abundance of caution, filed separate appeals with the court of appeals and the supreme court. The court of appeals subsequently sought clarification from the supreme court concerning appellate jurisdiction.[28] The DOT's reasoning for appealing to the supreme court was that the case fell within the supreme court's jurisdiction over cases concerning title to land.[29] The supreme court returned the case to the court of appeals, holding that although the case required construction of a deed, the action would only result in a determination of value and not in any adjudication of who had superior title to the property.[30] Accordingly, the case was not one "involving title to land."[31]

In *Coffield v. Kuperman*,[32] a mortgage holder obtained the appointment of a receiver to act in the place of a condominium association that had failed to make necessary repairs to the property. Subsequently, a dispute between one of the condominium owners and the receiver took on a life of its own. Both the condominium owner and the receiver filed motions for contempt against the other, with the receiver complaining that the owner was interfering with the intended repairs. The trial court ultimately enjoined the owner from interference and subsequently denied the owner's motion alleging the receiver's noncompliance with the court's order concerning repairs.[33] The owner petitioned the supreme court for certiorari, and the supreme court remanded the case to the court of appeals to determine whether the court of appeals had jurisdiction to hear the appeal.[34] The court of appeals held that although the trial court "entertained [the owner's] motions, entered an order which was only applicable to her, and even entered a restraining order against her," because the owner never sought to intervene and was

27. 278 Ga. 423, 603 S.E.2d 257 (2004).
28. *Id.* at 424, 603 S.E.2d at 258.
29. *See* GA. CONST. art. VI, § 6, para. 3.
30. *Meadow Trace*, 278 Ga. at 424-25, 603 S.E.2d at 258-59.
31. *Id.* at 425, 603 S.E.2d at 259.
32. 269 Ga. App. 432, 604 S.E.2d 288 (2004).
33. *Id.* at 432-33, 604 S.E.2d at 289-90.
34. *Id.* at 432, 604 S.E.2d at 289.

never made a party to the lawsuit, the owner actually lacked standing to file any of her motions.[35] Furthermore, the court of appeals held that the owner was not entitled to appeal because she was not a party, even though the owner likely believed she was a party based on the trial court's actions.[36] An interesting point to consider is whether the court of appeals would have accepted jurisdiction if the owner had appealed from the restraining order against her. The court of appeals has previously held that a non-party to an action has standing to appeal when directly affected by an injunction.[37]

III. PRESERVING THE RECORD

The cases decided during the survey period that address preserving the record illustrate that the mechanical task of properly including all relevant evidence in the appellate record ranks equally high in importance with the more glamorous duty of presenting persuasive argument. For example, in *Fulton Greens L.P. v. City of Alpharetta*,[38] both parties relied on a city ordinance to support their arguments on appeal, but neither party included a copy of the ordinance in the record on appeal. After scouring the record, the court of appeals found only a copy of one section of the ordinance with handwritten deletions and additions.[39] Because judicial notice cannot be taken of city or county ordinances, which must be proved by producing the original ordinance or a certified copy, the court of appeals was precluded from considering the ordinance in its decision.[40]

Even when it appears that important evidence is in the record, any such assumption should be verified. In *Wallace v. Wal-Mart Stores, Inc.*,[41] a slip and fall case, the trial court granted summary judgment to the defendant, Wal-Mart, on the basis of the deposition testimony of the plaintiff and store employees. The plaintiffs appealed, contending that an issue of fact as to Wal-Mart's constructive knowledge of the hazard, a grape that had fallen on the floor, was established by the conflict between an employee's affidavit and that same employee's deposition testimony. However, because the affidavit referenced in the

35. *Id.* at 433, 434, 604 S.E.2d at 290, 291.
36. *Id.* at 434-35, 604 S.E.2d at 291.
37. BEA Sys., Inc. v. WebMethods, Inc., 265 Ga. App. 503, 508-09, 595 S.E.2d 87, 91 (2004).
38. 272 Ga. App. 459, 612 S.E.2d 491 (2005).
39. *Id.* at 461 n.9, 612 S.E.2d at 493 n.9.
40. *Id.*
41. 272 Ga. App. 343, 612 S.E.2d 528 (2005).

defendant's motion for summary judgment had not been included in the record, the court of appeals could not consider any references to the affidavit or determine whether the affidavit and deposition testimony conflicted.[42] In the absence of any other evidence, the court of appeals affirmed the judgment.[43]

In *Threatt v. Rogers*,[44] the defendants entered into a sales contract with the plaintiff, country singer Kenny Rogers ("Rogers"), to purchase land owned by Rogers in Georgia. The trial court granted partial summary judgment to Rogers on several of the defendants' counterclaims, and the defendants appealed. Although the defendants' enumerations of error addressed two orders entered by the trial court, and the defendants' brief quoted from the two orders, the orders had not been made part of the record on appeal.[45] The court of appeals, after noting that it had searched for the orders through 4,000 pages of the record on appeal, agreed with the defendants "that the absence of the orders [was] 'inexplicable'—at least to the extent it appears appellate counsel knowingly pursued this appeal on a record that does not contain the orders claimed to be erroneous."[46] The defendants were deemed to have abandoned their enumerations of error that related to the orders, and the judgment was affirmed.[47]

In *Strickland v. Auto-Owners Insurance Co.*,[48] a declaratory judgment action in which summary judgment had been granted to the plaintiff insurer,[49] the defendants argued on appeal that a critical insurance policy was not part of the evidence submitted by the plaintiff insurer to the trial court and that the summary judgment ruling should thus be reversed. Although the trial court's written order referenced its review of the plaintiff's evidence, it did not specifically refer to the policy.[50] However, because the defendants failed to submit a transcript of the summary judgment hearing to the court of appeals, the court was required to apply the presumption of regularity in proceedings and assume that the trial court had considered evidence of the policy in

42. *Id.* at 345, 612 S.E.2d at 529.
43. *Id.* at 347, 612 S.E.2d at 532.
44. 269 Ga. App. 402, 604 S.E.2d 269 (2004).
45. *Id.* at 402-03, 604 S.E.2d at 270-71.
46. *Id.* at 404, 604 S.E.2d at 271.
47. *Id.*
48. 273 Ga. App. 662, 615 S.E.2d 808 (2005).
49. *Id.* at 662, 615 S.E.2d at 808.
50. *Id.* at 664-65, 615 S.E.2d at 811.

reaching its decision.[51] The summary judgment in favor of the insurer was affirmed.[52]

Failure to provide a transcript also proved problematic in *Fluke v. Westerman*,[53] a case in which the plaintiff, co-owner of a brokerage account with the defendant, brought suit seeking an equitable division of the account.[54] The trial court granted partial summary judgment to the defendant.[55] On appeal, the plaintiff argued that while the trial court directed the parties at a hearing to brief one particular narrow legal issue, the trial court erroneously broadened the scope of the issue on summary judgment. In her notice of appeal, the plaintiff failed to designate the transcript of the hearing for inclusion in the record on appeal.[56] Thus, the court of appeals could not consider the events that occurred during the hearing and relied instead upon the trial court's order arising from that hearing.[57] That order had been drafted by the plaintiff's counsel, but ran contrary to the plaintiff's arguments on appeal.[58] In the absence of the transcript and with only the order to consider, the court of appeals held no basis for reversal existed.[59]

IV. TIMELINESS OF APPEAL

On a timely direct appeal pursuant to O.C.G.A. section 5-6-34(a)(1),[60] an appellant can also challenge earlier, unappealed orders, even though an appeal from such an earlier order, standing alone, would be untimely.[61] However, as illustrated by *In the Interest of I.S.*,[62] deciding not to appeal at the first opportunity might not lead to problems of timeliness, but the decision can lead to other adverse consequences. In that case, the juvenile court made a deprivation finding regarding two children and entered an order permitting the children to remain with their parents subject to certain conditions and limitations. The parents failed to timely appeal from the deprivation order or to file a motion to

51. *Id.* at 665, 615 S.E.2d at 811.
52. *Id.*
53. 271 Ga. App. 418, 609 S.E.2d 744 (2005).
54. *Id.* at 418, 609 S.E.2d at 745.
55. *Id.* at 419, 609 S.E.2d at 746.
56. *Id.* at 420, 609 S.E.2d at 746-47.
57. *Id.* at 421, 609 S.E.2d at 747.
58. *Id.*
59. *Id.* at 422, 609 S.E.2d at 748.
60. O.C.G.A. § 5-6-34(a)(1) (1995).
61. Pierce v. Wendy's Int'l, Inc., 233 Ga. App. 227, 228, 504 S.E.2d 14, 16 (1998).
62. 278 Ga. 859, 607 S.E.2d 546 (2005).

modify or vacate the order.[63] The agency subsequently recommended that the case be closed, and the juvenile court issued a written order closing the case. The parents appealed from the second order, but challenged only the findings of the first order. The court of appeals dismissed the appeal as untimely and as having been rendered moot by the parents retaining custody.[64] The supreme court held the appeal to be timely, on the basis that the challenge to the first order was brought as part of a timely appeal from the second order, even though the appeal did not challenge the second order.[65] However, because the second order terminated the proceedings and constituted a ruling by the juvenile court that the children were no longer considered to be "deprived," the parents' appeal of the deprivation finding was rendered moot.[66] Had the parents timely appealed the first order, the case would not yet have been closed, and the merits of their appeal could have been considered.[67]

In *Schreck v. Standridge*,[68] the plaintiff failed to timely file the required transcript of evidence and proceedings in support of his appeal from entry of summary judgment in favor of the defendant, and the defendant filed a motion in the trial court to dismiss the appeal. Before the trial court ruled on the defendant's motion, the plaintiff dismissed his appeal and filed a second notice of appeal, purportedly on the basis of O.C.G.A. section 9-2-61,[69] the renewal statute, which provides that when a plaintiff voluntarily dismisses his case, the plaintiff can recommence the action within the specified time period.[70] The trial court then granted the defendant's motion to dismiss the plaintiff's appeal. On appeal, the plaintiff argued that he was entitled to renew his appeal of the summary judgment order.[71] The court of appeals disagreed, holding that by its terms the renewal statute applies only after the dismissal of an entire civil action.[72] Thus, the plaintiff could not recommence his appeal and avoid the trial court's dismissal of his appeal.[73] Accordingly, the court of appeals affirmed.[74]

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63. *Id.* at 859-60, 607 S.E.2d at 547-48.
64. In the Interest of I.S., 265 Ga. App. 759, 595 S.E.2d 528 (2004), *cert. granted.*
65. *In the Interest of I.S.*, 278 Ga. 859, 860-61, 607 S.E.2d 546, 548.
66. *Id.* at 862, 607 S.E.2d at 549.
67. *Id.*
68. 273 Ga. App. 58, 614 S.E.2d 185 (2005).
69. O.C.G.A. § 9-2-61 (1982).
70. *Schreck*, 273 Ga. App. at 58-59, 614 S.E.2d at 186.
71. *Id.* at 59, 614 S.E.2d at 186.
72. *Id.*
73. *See id.* at 59-60, 614 S.E.2d at 186-87.
74. *Id.* at 60, 614 S.E.2d at 187.

V. MISCELLANEOUS

A. *Appeals from Oral Rulings*

In *Wachovia Bank Savannah, N.A. v. Kitchen*,[75] at a hearing on Wachovia Bank Savannah's ("Wachovia") motion to dismiss the Kitchens' complaint, the trial court orally announced it would grant the motion, but the order was never put into writing and signed by the court. The Kitchens filed a motion to voluntarily dismiss their action without prejudice. Wachovia moved to strike the Kitchens' motion to dismiss on the ground that the trial court's prior oral ruling was a ruling on the merits and that the Kitchens' claims had already been dismissed with prejudice.[76] The court of appeals, after noting the well-established principle that an oral ruling is neither final nor appealable unless reduced to writing, held that "[i]t is equally elementary that a trial court is not bound by its oral statements made during the course of a hearing to the extent that such oral decisions cannot be changed prior to the time a final written order is entered."[77] Because Wachovia could show no abuse of discretion on the part of the trial court in changing its decision, the trial court's decision to deny the motion to strike was affirmed.[78]

A similar result was obtained in *Stoker v. Bellemeade, LLC*,[79] where the trial court orally announced that it intended to grant summary judgment to the plaintiffs and dismiss a particular claim, but did not address the claim in its written summary judgment order. The plaintiffs appealed on the basis of the trial court's oral statement, but because the statement had no binding effect, there was nothing for the court of appeals to review.[80]

B. *Failure to Pay Costs*

The decision in *Park Regency Partners, L.P. v. Gruber*[81] illustrates the care that must be taken in handling the basic mechanics of filing an appeal. After Park Regency, the defendant, filed a notice of appeal from a ruling of the trial court, the plaintiffs filed a notice of cross-appeal and

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75. 272 Ga. App. 601, 612 S.E.2d 885 (2005).
76. *Id.* at 602, 612 S.E.2d at 886.
77. *Id.*
78. *Id.* at 604, 612 S.E.2d at 887.
79. 272 Ga. App. 817, 615 S.E.2d 1 (2005).
80. *Id.* at 826, 615 S.E.2d at 10.
81. 271 Ga. App. 66, 608 S.E.2d 667 (2004).

timely paid their bill of costs in the trial courts. The defendant failed to pay its bill of costs within twenty days because, although the defendant's law firm admittedly received the bill of costs from the trial court, the bill was addressed to the firm, rather than a particular attorney, and the firm's system for handling such mail broke down. The bill of costs was ultimately paid after a delay of forty-seven days. Upon the plaintiff's motion to dismiss pursuant to O.C.G.A. section 5-6-48(c)[82] for failure to pay costs, the trial court dismissed the defendant's appeal.[83] The court of appeals affirmed, holding that the trial court's decision was not an abuse of discretion.[84] Although the defendant argued that its failure to pay costs was not shown to be willful and did not cause any delay in the appeals process, the court of appeals held that it was sufficient that the defendant's failure to timely pay costs caused an unreasonable and inexcusable delay in transmitting the record to the court of appeals.[85] The fact that the internal "mystery mail" procedure of the defendant's law firm failed was not an excuse when, even if the bill of costs had been improperly addressed by the clerk's office, the return receipt showed that the bill of costs had been received by the defendant's law firm.[86]

C. Court Rules and Sanctions

The appellate courts continue to demand adherence with format requirements. Meeting these requirements both avoids censure and eliminates the possibility of sanctions that could adversely affect the client's case. In *Rathbone v. Ward*,[87] the court of appeals concluded that the appellant's brief did not meet the requirements of Court of Appeals Rule 27(c)(1),[88] which provides that the sequence of arguments in the brief must follow the order of the enumeration of errors.[89] The court of appeals determined that the appellant listed ten alleged errors, "numbered one through ten, which [bore] little resemblance to his argument section, labeled A through H."[90] Although the court of appeals noted that it could have held the appellant in contempt, dismissed the appeal, or stricken the appellant's brief, the court of

82. O.C.G.A. § 5-6-48(c) (1995).
83. *Park Regency Partners*, 271 Ga. App. at 68-69, 608 S.E.2d at 670-71.
84. *Id.* at 71, 608 S.E.2d at 672.
85. *Id.*
86. *Id.*
87. 268 Ga. App. 822, 603 S.E.2d 20 (2004).
88. GA. APP. R. 27(c)(1).
89. *Rathbone*, 268 Ga. App. at 824, 603 S.E.2d at 21.
90. *Id.* at 823, 603 S.E.2d at 21.

appeals nonetheless went on to consider the merits of the appellant's appeal.[91]

In *Triguero v. ABN AMRO Bank N.V.*,[92] the court of appeals considered the appellant's failure to timely file its reply brief and to comply with Court of Appeal Rule 1(c),[93] which provides the requirements for spacing and font size.[94] In response to the appellant's violations of its rules, the court of appeals granted the appellees' motion to strike the appellant's reply brief.[95]

Even when the court of appeals does not impose such a drastic sanction as striking a brief, failing to comply with the court's rules can negatively impact a party's chances on appeal. For example, in *Premier/Georgia Management Co. v. Realty Management Corp.*,[96] the court of appeals noted that counsel for the appellant and the appellees both failed to provide specific citations to the record.[97] Although the court of appeals imposed no sanctions, it stated that "if we have omitted any facts or failed to locate some evidence in the record, the responsibility rests with counsel."[98]

In *Greenbriar Homes, Inc. v. Builders Insurance*,[99] appellee moved to dismiss the appellant's appeal on the grounds that the appellant failed to comply with Court of Appeals Rules 22[100] and 25,[101] which concerned the content and structure of the appellant's enumeration of errors and brief.[102] The court of appeals held that "[a]lthough violations of these Rules may provide grounds for affirming an appeal, rejecting a non-compliant brief and ordering the filing of a new one, or even imposing damages for frivolous appeal, they do not provide grounds for dismissing an appeal."[103] As the court noted, Court of Appeals Rule 23,[104] in contrast to Rules 22 and 25, specifically states that an appellant's failure to timely file its brief may result in dismissal of the appeal.[105]

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91. *Id.*
92. 273 Ga. App. 92, 614 S.E.2d 209 (2005).
93. GA. APP. R. 1(c).
94. *Triguero*, 273 Ga. App. at 92 n.1, 614 S.E.2d at 210 n.1; GA. APP. R. 27(c)(1).
95. *Triguero*, 273 Ga. App. at 92 n.1, 614 S.E.2d at 210 n.1.
96. 272 Ga. App. 780, 613 S.E.2d 112 (2005).
97. *Id.* at 780, 613 S.E.2d at 113.
98. *Id.*
99. 273 Ga. App. 344, 615 S.E.2d 191 (2005).
100. GA. APP. R. 22.
101. GA. APP. R. 25.
102. *Greenbriar Homes*, 273 Ga. App. at 345, 615 S.E.2d at 192.
103. *Id.*, 615 S.E.2d at 192-93.
104. GA. APP. R. 23.
105. *Greenbriar Homes*, 273 Ga. App. at 345 n.1, 615 S.E.2d at 193 n.1.

The court of appeals signaled its willingness to penalize frivolous appeals by imposing monetary penalties on parties and their attorneys in several cases decided during the survey period. In *Davita, Inc. v. Othman*,[106] a commercial dispossessory action, the defendants ignored the plaintiff's repeated reminders that their commercial property lease was about to expire and remained in possession of the property for months after the expiration of the lease. The defendants raised numerous legal and equitable defenses to the plaintiff's dispossessory action, and also sought to transfer the action to superior court on the basis of their equitable claims. The trial court denied the motion to transfer and granted a writ of possession to the plaintiff.[107]

On appeal, the plaintiff also moved for imposition of frivolous appeal penalties. The court of appeals assessed monetary penalties against the defendants and their appellate counsel.[108] Although the court of appeals imposed penalties in part because the defendants failed to cite any controlling authority for their appeal, the court of appeals stated that the primary basis was its determination that the defendants' appeal had been entered purely for purposes of delay.[109] The court of appeals based its conclusion on the defendants' failure to provide any explanation of their lack of response to the plaintiffs' repeated reminders that their lease was about to expire.[110]

In *McLain v. George*,[111] the plaintiff sued his business partner for corporate dissolution of two corporations on the basis of a deadlock in management, and also sought injunctive relief and damages, alleging that the defendant converted corporate profits and committed fraud. The trial court granted injunctive relief and appointed a receiver. The parties reached a settlement agreement, and upon the plaintiff's motion, the trial court later ordered the defendant to comply with the settlement agreement by transferring certain property to the plaintiff and making a $300,000 payment to the plaintiff. The defendant appealed, contending that the trial court erred in enforcing the settlement agreement, granting the injunctive relief, and appointing the receiver.[112] The court of appeals concluded that most of the issues raised by the defendant were foreclosed by the settlement agreement, that the defendant had failed to show that he had preserved the remaining issues

106. 270 Ga. App. 93, 606 S.E.2d 112 (2004).
107. *Id.* at 94-95, 606 S.E.2d at 113-14.
108. *Id.* at 97, 606 S.E.2d at 115-16.
109. *Id.*, 606 S.E.2d at 115.
110. *Id.*
111. 267 Ga. App. 851, 600 S.E.2d 837 (2004).
112. *Id.* at 851, 600 S.E.2d at 838.

for appeal, and that the defendant had also failed to provide the relevant hearing transcript for review.[113] The court of appeals assessed monetary penalties against the defendant and his counsel, basing such penalties on the "spurious nature" of the appeal, particularly the failure to show preservation of issues for appeal and the failure to provide a transcript for review.[114]

113. *Id.* at 855, 600 S.E.2d at 840.
114. *Id.*

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