Trial Practice and Procedure

by Brandon L. Peak,* John C. Morrison III,** Tedra C. Hobson,*** Mary K. Weeks,**** Jeb Butler,***** Anna W. Howard,****** and Morgan E. Duncan*******

I. INTRODUCTION

This Article addresses several significant cases and legislation of interest to the Georgia civil trial practitioner occurring during the survey period of this publication.[1]

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* Partner in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. The Citadel (B.S., summa cum laude, 2001); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 2004). Member, State Bar of Georgia.

** Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. Mercer University (B.A., magna cum laude, 2003); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 2006). Member, State Bar of Georgia.

*** Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. Emory University (B.A., 2000); Georgetown Public Policy Institute (M.P.P., 2004); University of Georgia School of Law (J.D., magna cum laude, 2007). Member, State Bar of Georgia.

**** Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. University of Kentucky (B.A., summa cum laude, 1999); Mercer University, Walter F. George School of Law (J.D., magna cum laude, 2007). Member, State Bar of Georgia.

***** Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. Vanderbilt University (B.A., cum laude, 2004); University of Georgia School of Law (J.D., magna cum laude, 2008). Member, State Bar of Georgia.

****** Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. University of Georgia (B.A., cum laude, 2004); University of Georgia School of Law (J.D., magna cum laude, 2010). Member, State Bar of Georgia.

******* Associate in the firm of Butler, Wooten & Fryhofer, LLP, Columbus and Atlanta, Georgia. University of Georgia (B.A., summa cum laude, 2006); University of Georgia School of Law (J.D., cum laude, 2012). Member, State Bar of Georgia.

1. For an analysis of Georgia trial practice and procedure during the prior survey period, see Kate S. Cook et al., *Trial Practice and Procedure, Annual Survey of Georgia Law*, 64 MERCER L. REV. 305 (2012).

II. LEGISLATION

During the survey period, the Georgia General Assembly enacted several substantive laws of potential interest to practitioners. For example, the Georgia Taxpayer Protection False Claims Act[2] will now permit civil actions under certain circumstances against persons or entities submitting false claims to the state of Georgia.[3] Practitioners who work on trucking cases should carefully review House Bill 865,[4] enacting the Georgia Motor Common Carrier Act of 2012.[5] Several sections of Title 51,[6] governing torts, were also enacted during the survey period. House Bill 499,[7] providing that payor guidelines and federal criteria "shall not establish a legal basis for negligence or a standard of care for medical malpractice or product liability" claims,[8] and House Bill 94,[9] relating to the calculation of damages in tort claims,[10] are noteworthy.

Trial lawyers should also review several bills that could affect procedural issues in their cases. Of particular note is House Bill 336,[11] which specifies requirements for a presuit offer of settlement made by an attorney in a tort claim for death or injury arising from the use of a motor vehicle.[12] In addition, House Bill 665,[13] clarifying the qualifications of persons who are eligible to serve as grand or trial jurors,[14] and House Bill 247,[15] requiring individuals seeking to become guardians or conservators to submit to a criminal-history background check if

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2. Ga. H.R. Bill 822, Reg. Sess., 2013 Ga. Laws 141 (codified at O.C.G.A. §§ 23-3-120 to -127 (Supp. 2013), and in scattered sections of O.C.G.A.).

3. *Id.*

4. Ga. H.R. Bill 865, Reg. Sess., 2012 Ga. Laws 632 (codified in scattered sections of O.C.G.A. tit. 40 (Supp. 2013)).

5. *Id.*

6. O.C.G.A. tit. 51 (Supp. 2013).

7. Ga. H.R. Bill 499, Reg. Sess., 2013 Ga. Laws 627 (codified at O.C.G.A. § 51-1-52 (Supp. 2013)).

8. *Id.*

9. Ga. H.R. Bill 94, Reg. Sess., 2013 Ga. Laws 759 (codified at O.C.G.A. § 51-12-13 (Supp. 2013)).

10. *Id.*

11. Ga. H.R. Bill 336, Reg. Sess., 2013 Ga. Laws 860 (codified at O.C.G.A. § 9-11-67.1 (Supp. 2013)).

12. *Id.*

13. Ga. H.R. Bill 665, Reg. Sess., 2012 Ga. Laws 173 (codified at O.C.G.A. §§ 15-12-40, -40.1, -60 (Supp. 2013)).

14. *Id.*

15. Ga. H.R. Bill 247, Reg. Sess., 2012 Ga. Laws 83 (codified in relevant parts at O.C.G.A. § 29-9-19 (Supp. 2013)).

requested by the court,[16] both became effective on July 1, 2012.[17] The Uniform Interstate Depositions and Discovery Act[18] also became effective during the survey period.[19] Finally, a portion of House Bill 359,[20] which became effective May 6, 2013, provides that rights of action for legal malpractice are not assignable.[21]

III. CASE LAW

A. *Statute of Limitations*

In *Norred v. Teaver*,[22] the Georgia Court of Appeals, sitting en banc and overruling its prior precedent, held that section 9-3-72 of the Official Code of Georgia Annotated (O.C.G.A.),[23] the statute of limitations when "a foreign object has been left in a patient's body,"[24] applies regardless of whether the object was left in the body intentionally or unintentionally.[25] The court reasoned that the statutory language was unambiguous

16. *Id.*

17. Ga. H.R. Bill 247; Ga. H.R. Bill 665.

18. Ga. H.R. Bill 46, Reg. Sess., 2012 Ga. Laws 651 (codified at O.C.G.A. §§ 24-13-110 to -116 (Supp. 2013)).

19. *Id.* This Act, intended to manage the issuance, service, and enforcement of subpoenas, repealed the Uniform Foreign Depositions Act and is divided into two parts: Part I, which became effective July 1, 2011 and was repealed effective January 1, 2013, applies to subpoenas served on or after July 1, 2011, and to actions pending on or after July 1, 2011; and Part II, which became effective January 1, 2013, applies to subpoenas served on or after January 1, 2013, and to actions pending on or after July 1, 2013. *Id.*

20. Ga. H.R. Bill 359, Reg. Sess., 2013 Ga. Laws 636 (codified in relevant parts at O.C.G.A. § 44-12-24 (Supp. 2013)).

21. *Id.* This provision was enacted in response to the Georgia Supreme Court's decision in *Villanueva v. First American Title Insurance Co.*, 292 Ga. 630, 740 S.E.2d 108 (2013). Despite opposition from the State Bar of Georgia, the supreme court in *Villanueva* held that "the assignment of legal malpractice claims is not prohibited as a matter of law." *Id.* at 632, 740 S.E.2d at 110. The court reserved ruling on whether in other circumstances, such as when the legal malpractice claim could be considered a personal tort, attorney malpractice may not be assignable. *Id.* at 635, 740 S.E.2d at 112.

22. 320 Ga. App. 508, 740 S.E.2d 251 (2013).

23. O.C.G.A. § 9-3-72 (2007).

24. *Id.*

25. *Norred*, 320 Ga. App. at 512, 740 S.E.2d at 253-54. A majority of the judges concurred fully in the decision, with two judges concurring specially. *Id.* at 514, 740 S.E.2d at 255. The concurrence disagreed with the decision to overrule prior precedent. *Id.* (Andrews, P.J., concurring specially). Nonetheless, the rules required only a majority to effectively overrule the court's precedent when the appellate court is sitting en banc. O.C.G.A. § 15-3-1(d) (2012).

in its application to all objects that do not originate in the person's body.[26]

B. *Immunity*

In *Hagan v. Georgia Department of Transportation*,[27] the plaintiff sued the Georgia Department of Transportation (GDOT) for failing to maintain a sidewalk where she fell and injured herself.[28] The court of appeals held that GDOT's "specific decision to forego routine inspections, repairs, or maintenance of sidewalks within a state right-of-way as a result of prioritizing maintenance activities based on budgetary constraints" fell under the discretionary function exception to the Georgia Tort Claims Act,[29] thus making GDOT immune from liability.[30]

C. *Mootness*

WMW, Inc. v. American Honda Motor Co.[31] involved a dispute about the future location of an automobile dealership franchise.[32] After the Georgia Supreme Court granted certiorari to consider the case, American Honda Motor Co. (Honda), the franchisor, unilaterally decided not to place a new dealership at the disputed site.[33] It therefore filed an unopposed motion to dismiss the appeal as moot.[34] The court noted that the mootness issue was a novel one in Georgia courts and adopted the *Knox v. Service Employees International Union, Local 1000*[35] reasoning.[36] It held that "[a]n appellee's 'voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.'"[37] The court therefore denied the motion to dismiss and considered the merits of the case.[38]

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26. *Norred*, 320 Ga. App. at 512, 740 S.E.2d at 253-54.
27. 321 Ga. App. 472, 739 S.E.2d 123 (2013).
28. *Id.* at 472, 739 S.E.2d at 125.
29. O.C.G.A. §§ 50-21-20 to -37 (2013); *see also* O.C.G.A. § 51-21-24 (providing specific exceptions to state liability).
30. *Hagan*, 321 Ga. App. at 477-78, 739 S.E.2d at 128.
31. 291 Ga. 683, 733 S.E.2d 269 (2012).
32. *Id.* at 683-84, 733 S.E.2d at 271-72.
33. *Id.*
34. *Id.*
35. 132 S. Ct. 2277 (2012).
36. *WMW, Inc.*, 291 Ga. at 685, 733 S.E.2d at 273.
37. *Id.* (quoting *Knox*, 132 S. Ct. at 2287).
38. *Id.* at 686, 733 S.E.2d at 273.

D. Laches

In *Marsh v. Clarke County School District*,[39] the supreme court resolved two conflicting lines of cases regarding the defense of laches in mandamus claims.[40] Mandamus is considered a legal claim, although it is "an extraordinary legal remedy . . . much like a mandatory injunction," and is "quasi-equitable in its nature."[41] Under one line of prior cases, the court held that because laches is an equitable defense, it could not apply to actions at law, including a mandamus claim.[42] But the court in *Marsh* sided with the older and "better[-]reasoned" line of cases, which held claims for mandamus could be barred by gross laches.[43]

E. Preemption

In *American General Financial Services v. Jape*,[44] the State Court of Cherokee County denied the plaintiff's motion to compel arbitration and also denied its application for interlocutory appeal of the issue.[45] The plaintiff filed a direct appeal in the court of appeals, which the court denied based on a lack of jurisdiction because the plaintiff did not appeal under O.C.G.A. § 5-6-34(b)'s[46] interlocutory procedure.[47] The plaintiff contended it did not have to follow the interlocutory procedure because under the Federal Arbitration Act (FAA),[48] it had the right to a direct appeal, which preempted Georgia's interlocutory procedure.[49] The supreme court granted certiorari to consider the question.[50]

The supreme court held that the FAA's right to direct appeal did not preempt Georgia's interlocutory appeal procedure.[51] Where a statute contains no express preemption provisions, federal law will only preempt state law to the extent the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

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39. 292 Ga. 28, 732 S.E.2d 443 (2012).
40. *Id.* at 30, 732 S.E.2d at 445.
41. *Id.*
42. *Id.* at 29-30, 732 S.E.2d at 445.
43. *Id.* at 30, 732 S.E.2d at 445.
44. 291 Ga. 637, 732 S.E.2d 746 (2012).
45. *Id.* at 638, 732 S.E.2d at 747.
46. O.C.G.A. § 5-6-34(b) (2013).
47. *Am. Gen. Fin. Servs.*, 291 Ga. at 638, 732 S.E.2d at 747.
48. 9 U.S.C. § 16(a)(1)(B) (2012).
49. *Am. Gen. Fin. Servs.*, 291 Ga. at 639, 732 S.E.2d at 748.
50. *Id.* at 637-38, 732 S.E.2d at 747. The United States Supreme Court has not addressed the question whether the FAA's procedural rules also apply to state courts. *Id.* at 640, 732 S.E.2d at 749.
51. *Id.* at 642, 732 S.E.2d at 750.

Congress."[52] The court reasoned that the interlocutory procedure did not undermine the purposes or objectives of the FAA.[53] Because O.C.G.A. § 5-6-34(b) does not single out cases involving arbitration agreements and treats them the same as cases involving other contracts, the court held that the statute is consistent with Congress's intent and not preempted by the FAA.[54]

F. Venue

In *Wang v. Liu*,[55] the supreme court addressed whether, when adjudicating a motion to dismiss under the doctrine of forum non conveniens, trial courts must detail their findings on each of the O.C.G.A. § 9-10-31.1(a)[56] factors.[57] Reversing a prior line of cases from the court of appeals, the supreme court held that "we acknowledge explicitly that specific findings on each of the enumerated statutory factors are a better practice, but we cannot conclude that such findings are required absolutely in every case."[58] Instead, the court explained that "[w]hat is required to permit meaningful appellate review is that the trial court set out upon the record the essential reasoning that forms the basis for its exercise of discretion to grant or deny a motion to dismiss under the doctrine of forum non conveniens."[59]

Following the dismissal of the resident defendants, the plaintiff in *Richardson v. Gilbert*[60] sought to transfer venue from Spalding County to Clayton County, where the remaining defendant resided at the time the suit was filed. The defendant, however, waived her venue defense and sought to keep the case in Spalding County.[61] The State Court of Spalding County granted the motion to transfer and the court of appeals reversed, holding that "[a] plaintiff lacks standing to object to jurisdiction or venue over a nonresident defendant who waived his venue defenses."[62]

52. *Id.* at 639, 732 S.E.2d at 748 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
53. *Id.* at 642, 732 S.E.2d at 750.
54. *Id.* at 642-43, 732 S.E.2d at 750.
55. 292 Ga. 568, 740 S.E.2d 136 (2013).
56. O.C.G.A. § 9-10-31.1(a) (2007).
57. *Wang*, 292 Ga. at 569-70, 740 S.E.2d at 139.
58. *Id.* at 570, 740 S.E.2d at 139-40.
59. *Id.* at 570, 740 S.E.2d at 140.
60. 319 Ga. App. 72, 733 S.E.2d 783 (2012).
61. *Id.* at 73, 733 S.E.2d at 784.
62. *Id.* at 74, 733 S.E.2d at 785.

G. Dismissal and Renewal

In *Parsons v. Mertz*,[63] the court of appeals overruled prior cases that appeared to "require dismissal of *all* breach of contract cases where joint obligors cannot be joined."[64] Instead, the court held that "[t]o determine if a joint obligor is an indispensable party, the trial court must consider the factors set forth in [O.C.G.A. § 9-11-19(b)] in light of the substantive law regarding contractual joint obligors."[65]

The court in *Walker v. Mecca*[66] reaffirmed its prior decisions, holding that O.C.G.A. § 9-11-41(a)(3)[67] "applies when an action seeking recovery on the same claim was brought and dismissed twice, regardless of the parties named as defendants."[68] As a result, a plaintiff was barred from bringing a third lawsuit arising from the same automobile wreck, even though not all of the defendants named in the third lawsuit were named in each of the prior two lawsuits.[69] In a special concurrence, in which she also concurred fully in the majority opinion, Presiding Judge Barnes encouraged the Georgia legislature to "amend [O.C.G.A. § 9-11-41] so that the 'two[-] dismissal' rule applies only to the same or substantially the same defendant."[70]

In *Crawford v. Kingston*,[71] the court of appeals also interpreted O.C.G.A. § 9-11-41,[72] determining that a federal dismissal for lack of subject matter jurisdiction was involuntary, and therefore such dismissal could not operate as an adjudication on the merits for purposes of the statute.[73]

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63. 320 Ga. App. 786, 740 S.E.2d 743 (2013).

64. *Id.* at 791 n.18, 740 S.E.2d at 747 n.18 (overruling Indus. Mech., Inc. v. Siemens Energy & Automation, Inc., 230 Ga. App. 1, 495 S.E.2d 103 (1997); Turner Outdoor Adver., Ltd. v. Old S. Corp., 185 Ga. App. 582, 365 S.E.2d 149 (1988)).

65. *Id.* (interpreting O.C.G.A. § 9-11-19(b) (2006)).

66. 320 Ga. App. 142, 739 S.E.2d 450 (2013).

67. O.C.G.A. § 9-11-41(a)(3) (2006).

68. *Walker*, 320 Ga. App. at 143, 739 S.E.2d at 451.

69. *Id.* at 143-44, 739 S.E.2d at 451.

70. *Id.* at 144, 739 S.E.2d at 452 (Barnes, P.J., concurring specially); *see also* O.C.G.A. § 9-11-41 (2006).

71. 316 Ga. App. 313, 728 S.E.2d 904 (2012).

72. O.C.G.A. § 9-11-41 (2006).

73. *Crawford*, 316 Ga. App. at 315, 728 S.E.2d at 906 (citing O.C.G.A. § 9-11-41(a)). The court also held that the trial court erred in dismissing the plaintiff's third complaint, noting that because the plaintiff never actually served the defendant with the second complaint (the one filed in federal court), "it was void and could not amount to a renewal of the first complaint" for purposes of O.C.G.A. § 9-2-61. 316 Ga. App. at 316, 728 S.E.2d at 906-07 (citing O.C.G.A. § 9-2-61 (2007)).

In *Green v. Flanagan*,[74] the court of appeals held as a matter of first impression that under the renewal statute, O.C.G.A. § 9-2-61,[75] an arbitration was not a proceeding that could be renewed within six months of its discontinuation or dismissal.[76] The court observed that an "[a]rbitration is not a judicial proceeding, of course; it is an alternative to a judicial proceeding" and analogized to other cases "suggest[ing] that official, quasi-judicial proceedings do not properly form the basis for a renewal under [O.C.G.A. § 9-2-61]."[77]

H. Service

In *Ragan v. Mallow*,[78] the court of appeals "overrule[d] prior cases holding incorrectly that service by publication can *never* confer personal jurisdiction."[79] The court observed,

> If the defendant is a resident who is actually present within the jurisdiction of the court, has actual knowledge of the suit, and "wilfully secrets himself in order to frustrate all reasonable efforts to effect personal service," then the service by publication affords sufficient due process and confers personal jurisdiction over the defendant.[80]

The court held, however, that the Superior Court of Fulton County erred in dismissing the plaintiff's case "without deciding whether the defendant acted in bad faith to avoid personal service, 'whether the plaintiff exercised the appropriate diligence, and whether any other utilized method of service should be considered valid,'" and the court remanded the case for the superior court to make such determinations.[81]

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74. 317 Ga. App. 152, 730 S.E.2d 161 (2012).

75. O.C.G.A. § 9-2-61 (2007).

76. *Green*, 317 Ga. App. at 155, 730 S.E.2d at 163 (noting that the court had found "no Georgia cases specifically concerning" the issue).

77. *Id.* (citing O.C.G.A. § 9-2-61).

78. 319 Ga. App. 443, 744 S.E.2d 337 (2012).

79. *Id.* at 443, 744 S.E.2d at 338.

80. *Id.* at 446-47, 744 S.E.2d at 340 (quoting Melton v. Johnson, 242 Ga. 400, 403, 249 S.E.2d 82, 84 (1978)).

81. *Id.* at 446, 744 S.E.2d at 340 (quoting plaintiff's brief). The court also held "that the defendant did not waive his affirmative defenses by filing a notice of his intent to introduce the plaintiff's medical narrative" because such "did not manifest an intention on the defendant's part to relinquish his defenses, but simply preserved an evidentiary issue should it arise later." *Id.* at 446, 744 S.E.2d at 339-40.

I. The Health Insurance Portability and Accountability Act (HIPAA) and Other Privilege Issues

In *Arby's Restaurant Group, Inc. v. McRae*,[82] the supreme court held that the defendant in a workers' compensation case could properly meet ex parte with the claimant's treating physician for an informal interview.[83] The court held,

> Under the unambiguous language of [O.C.G.A. § 34-9-207(a)], any privilege the employee may have had in protected medical records and information related to a workers' compensation claim is waived once the employee submits a claim for workers' compensation benefits or is receiving weekly income benefits or the employer has paid any medical expenses.[84]

The court distinguished *Baker v. Wellstar Health System, Inc.*,[85] in which the court held that in some circumstances such ex parte informal interviews were barred by HIPAA,[86] as "a medical malpractice case . . . subject to HIPAA's requirements for disclosure."[87]

In *Wellstar Health System, Inc. v. Jordan*,[88] the supreme court held that in a medical malpractice case where the defendant had conducted ex parte interviews of the plaintiff's treating physicians and had transcribed those interviews pursuant to a qualified protective order, the transcripts constituted attorney work product.[89]

During the survey period, the United States District Court for the Northern District of Georgia entered two orders extending the circumstances in which the attorney-client privilege may be waived and limiting the instances in which the privilege may be used to withhold documents.[90]

In the case of *In re Capital One Bank Credit Card Interest Rate Litigation*,[91] a putative class action, the district court considered the

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82. 292 Ga. 243, 734 S.E.2d 55 (2012).

83. *Id.* at 243, 247, 734 S.E.2d at 56, 58; *see also* O.C.G.A. § 34-9-207(a) (2008 & Supp. 2013).

84. *Arby's Rest. Grp., Inc.*, 292 Ga. at 244, 734 S.E.2d at 56 (interpreting O.C.G.A. § 34-9-207(a)).

85. 288 Ga. 336, 703 S.E.2d 601 (2010).

86. 42 U.S.C. § 1320d(4) (2006).

87. *Arby's Rest. Grp., Inc.*, 292 Ga. at 246, 734 S.E.2d at 57.

88. 293 Ga. 12, 743 S.E.2d 375 (2013).

89. *Id.* at 13, 17, 743 S.E.2d at 377, 380.

90. Camacho v. Nationwide Mut. Ins. Co., 287 F.R.D. 688 (N.D. Ga. 2012); *In re* Capital One Bank Credit Card Interest Rate Litig., 286 F.R.D. 676 (N.D. Ga. 2012) [hereinafter *In re Capital One*].

91. 286 F.R.D. 676 (N.D. Ga. 2012).

plaintiffs' challenges to the privilege log submitted by the defendants.[92] The plaintiffs alleged that "it is unlikely that [the defendants Capital One Bank (USA), N.A. and Capital One Financial Corp. (together hereinafter Capital One)] performed an appropriate privilege review" before submitting the log (and withholding the documents listed thereon).[93] The district court found in favor of the plaintiffs in two key respects: the defendants could not "claim attorney-client protection for documents that have no recipient identified" and it could not "now assert attorney-client protection on a number of documents that it misidentified as attorney work-product."[94]

To the extent the defendants listed documents on the privilege log without a recipient, the court found the privilege log "deficient in its present form" because "[w]here there are no recipients listed, the court has no way of knowing whether the communications remained confidential."[95] The court ordered production of those documents.[96]

To the extent the defendants also mistakenly asserted a work-product protection objection rather than an attorney-client privilege objection, the district court did not even reach the question of whether the documents were actually privileged.[97] Instead, the court required immediate production because the defendant had waived any purported privilege protection.[98] The court further found the defendant had shown bad faith in responding to discovery requests.[99] Earlier in the case, the court had partially granted a motion to compel.[100] In response, "Capital One then proceeded to 'dump' over 900,000 pages of

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92. *In re Capital One*, 286 F.R.D. at 679; *see also* FED. R. CIV. P. 26(b)(5)(A) (2006 & Supp. V 2011) ("When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.").

93. *In re Capital One*, 286 F.R.D. at 679.

94. *Id.*

95. *Id.* at 681.

96. *Id.*

97. The court, relying on cases considering Federal Rule of Civil Procedure 37, FED. R. CIV. P. 37 (2006 & Supp. 2011), instead considered whether waiver of any purported privilege was appropriate as a discovery sanction. *See In re Capital One*, 286 F.R.D. at 679-80.

98. *In re Capital One*, 286 F.R.D. at 679-80. The attorney-client privilege may be waived when a party (1) "fails to timely and properly object to a discovery request" or (2) shows "unjustifiable delay, inexcusable conduct, or bad faith in responding to discovery requests." *Id.* at 679.

99. *Id.* at 680.

100. *Id.*

documents on [the plaintiffs], much of which was duplicative."[101] Because the defendant had made it "much more difficult for [the] [p]laintiffs' attorneys to sift through the evidence and prepare a case," the court found there was "sufficient evidence of bad faith in this litigation to justify waiver of the privilege as to these documents."[102] Thus, even while recognizing that "waiver of the attorney-client privilege is an extreme sanction," the court considered the defendant's discovery misconduct as a whole in requiring production of the documents.[103]

The district court's rationale and findings send a powerful message to parties who may consider abusing the discovery process. Such parties cannot fail to properly assert privilege objections, provide a facially deficient privilege log, and then expect the court to grant them a "do-over" when the discovering party files a motion to compel. Instead, parties must meet the burden of proving privilege when they respond to discovery requests. Parties who fail to do so risk waiver of otherwise appropriate privilege claims.

In *Camacho v. Nationwide Mutual Insurance Co.*,[104] the district court considered the attorney-client privilege in the context of an insured's claim against its insurer arising from the insurer's alleged bad-faith failure to settle a claim within the policy limits.[105] During discovery, the insured sought communications between the insurer and the outside counsel it hired to represent the insured and defend the claim against him, and the insurer objected on a number of grounds, including attorney-client privilege. The insured argued that because the outside counsel represented both the insurer and the insured, and the interests of those two parties subsequently became adverse, the attorney-client privilege did not apply.[106]

Recognizing that "no Georgia court has yet to expressly hold that the privilege vanishes when the same attorney represents both the insurer and the insured under the joint-defense exception,"[107] the court looked to other jurisdictions for guidance, and ultimately concluded that "[the

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101. *Id.*

102. *Id.*

103. *Id.* at 679-80.

104. 287 F.R.D. 688 (N.D. Ga. 2012).

105. *Camacho*, 287 F.R.D. at 690. Unlike *In re Capital One*, *Camacho* involved a question of purely Georgia law, so the district court looked to Georgia attorney-client privilege law. *Id.* at 691; *see also* Cotton States Mut. Ins. Co. v. Brightman, 276 Ga. 683, 684, 580 S.E.2d 519, 521 (2003); S. Gen. Ins. Co. v. Holt, 262 Ga. 267, 268, 416 S.E.2d 274, 276 (1992).

106. *Id.* at 690-92; *see also, e.g.*, Spence v. Hamm, 226 Ga. App. 357, 487 S.E.2d 9 (1997).

107. *Camacho*, 287 F.R.D. at 692.

defendant] cannot claim the protection of the attorney-client privilege over its communications . . . regarding the defense of its insured in the underlying action unrelated to the issue of coverage."[108] Thus, the court overruled the defendant's privilege objection and required production of the documents.[109]

J. Insurance

In *Landrum v. Infinity Safeguard Insurance Co.*,[110] the court of appeals held that an automobile insurance policy exclusion for bodily injury to a named insured was not void as against public policy where the named insured was injured by a relative who was a permissive user of the covered vehicle.[111] The court distinguished two earlier decisions[112] in which the supreme court held that similar policy exclusions violated public policy where the relative driving the vehicle was also a named insured of the policy.[113] The court of appeals stated that it was bound by its earlier decision in *Spivey v. Safeway Insurance Co.*,[114] which created a bright-line rule against voiding policy exclusions for mere permissive users of the vehicle.[115]

In *Reaves v. State Farm Mutual Automobile Insurance Co.*,[116] the court of appeals, overruling *Bone v. State Farm Mutual Insurance*,[117] held that a plaintiff pursuing an uninsured motorist claim under O.C.G.A. § 33-7-11(b)(2)[118] does not have to produce corroborating evidence of physical contact between the plaintiff and the uninsured vehicle when there is direct evidence of actual physical contact, such as the plaintiff's statement that he was struck by an unidentified tractor trailer.[119]

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108. *Id.* at 693. The court allowed the privilege claim on coverage questions because the interests of the insurer and the insured are always adverse when determining whether coverage exists. *Id.*

109. *Id.*

110. 318 Ga. App. 701, 734 S.E.2d 520 (2012).

111. *Id.* at 704-05, 734 S.E.2d at 523.

112. Stepho v. Allstate Ins. Co., 259 Ga. 475, 383 S.E.2d 887 (1989); Se. Fid. Ins. Co. v. Chaney, 259 Ga. 474, 381 S.E.2d 747 (1989).

113. *Landrum*, 318 Ga. App. at 703-04, 734 S.E.2d at 522.

114. 210 Ga. App. 775, 437 S.E.2d 641 (1993).

115. *Landrum*, 318 Ga. App. at 705, 734 S.E.2d at 523.

116. 319 Ga. App. 426, 734 S.E.2d 773 (2012).

117. 215 Ga. App. 782, 452 S.E.2d 523 (1994).

118. O.C.G.A. § 33-7-11(b)(2) (2000 & Supp. 2013).

119. *Reaves*, 319 Ga. App. at 428-30, 734 S.E.2d at 774-76.

K. Tort Claims

In *Bullard v. MRA Holding, LLC*,[120] the supreme court answered several certified questions regarding the availability and scope of an appropriation-of-likeness claim under Georgia law.[121] When the plaintiff was fourteen years old, she exposed her breasts to two unknown men in Panama City, Florida. The defendant ultimately obtained the video clip and included it in its *College Girls Gone Wild* series. The defendant also displayed a still photo of the plaintiff, taken from the video clip, in a prominent position on the cover of the video.[122]

After determining Georgia law would apply, the court held that Georgia law does not require a plaintiff to have any inherent or preexisting value in her name before a wrongful appropriation takes place and concluded that the facts of this case gave rise to a cause of action for appropriation of the plaintiff's image.[123] The court further held that recovery in an appropriation-of-likeness claim is limited to the plaintiff's actual damages.[124] In order to collect damages, the plaintiff would have to show that the use of her image actually added value to the defendant's advertising efforts that otherwise would not have existed without the use of her image, likely a difficult feat.[125]

In cases decided during the survey period, both the court of appeals and the supreme court found that the assumption-of-the-risk defense barred the plaintiffs' claims as a matter of law.[126] In *Landings Ass'n v. Williams*,[127] the supreme court concluded as a matter of law that an elderly woman killed by an alligator either assumed the risks of walking in areas inhabited by alligators or failed to exercise ordinary care by doing so.[128] Likewise, in *Kensington Place Owners Ass'n v. Thomas*,[129] the court of appeals held that a thirteen-year-old boy, killed when a dead tree fell on him while he and his friends were attempting to push it over, assumed the risk of his conduct as a matter of law.[130]

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120. 292 Ga. 748, 740 S.E.2d 622 (2013).

121. *Id.* at 748-50, 740 S.E.2d at 624-25.

122. *Id.* at 748, 740 S.E.2d at 624.

123. *Id.* at 751, 740 S.E.2d at 625-26. The court declined to address whether the plaintiff's consent could be rendered invalid due to her age. *Id.* at 755, 740 S.E.2d at 628.

124. *Id.* at 754, 740 S.E.2d at 627-28.

125. *Id.* at 754-55, 740 S.E.2d at 628.

126. Landings Ass'n v. Williams, 219 Ga. 397, 728 S.E.2d 577 (2012); Kensington Place Owners Ass'n v. Thomas, 318 Ga. App. 609, 734 S.E.2d 445 (2012).

127. 291 Ga. 397, 728 S.E.2d 577 (2012).

128. *Id.* at 399, 728 S.E.2d at 580.

129. 318 Ga. App. 609, 734 S.E.2d 445 (2012).

130. *Id.* at 613-14, 734 S.E.2d at 449.

Practitioners may wish to keep an eye on *Johnson v. Omondi*,[131] a medical malpractice case in which the court of appeals concluded that summary judgment for the defendants was proper because the plaintiffs failed to produce "clear and convincing evidence" that the doctor failed to "exercise even a slight degree of care."[132] A long dissent details the conflicting evidence in the record and criticizes the majority for "fail[ing] to give due consideration to the medical expert evidence and opinions in reaching their erroneous conclusion that no genuine issues of fact exist for jury determination," and "improperly expand[ing] the gross negligence standard under [O.C.G.A. § 51-1-29.5(c)]."[133] Certiorari was granted on April 29, 2013.[134]

L. Class Actions

In *Walthour v. Chipio Windshield Repair, LLC*,[135] the United States District Court for the Northern District of Georgia held that clauses in an employment contract that purported to compel arbitration of any disputes and waive class-based proceedings were enforceable.[136] The case arose out of the Fair Labor Standards Act (FLSA),[137] which expressly permits an aggrieved employee or employees to bring an action "for and [o]n behalf of himself or themselves and other employees similarly situated."[138] The court noted "the increasing trend of federal courts . . . to uphold class [and] collective action waivers in mandatory arbitration agreements" and observed that both the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit had upheld such waivers in *Gilmer v. Interstate/Johnson Lane Corp.*[139] and *Caley v. Gulfstream Aerospace Corp.*,[140] respectively.[141] However, the court concluded that neither case controlled directly; the court wrote that "[c]ontrary to how it has sometimes been interpreted, *Gilmer* did not expressly decide whether the right to proceed collectively is a substantive right under the [FLSA]"[142] and that because *Caley* had

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131. 318 Ga. App. 787, 736 S.E.2d 129 (2012), *cert. granted*, 2013 Ga. LEXIS 409 (Ga. Apr. 29, 2013).
132. *Id.* at 792-94, 736 S.E.2d at 133-34; *see also* O.C.G.A. § 51-1-29.5(c) (Supp. 2013).
133. 318 Ga. App. at 797, 799, 736 S.E.2d at 136, 138 (Miller, J., dissenting).
134. Johnson v. Omondi, 2013 Ga. LEXIS 409 (Ga. Apr. 29, 2013).
135. 2013 U.S. Dist. LEXIS 56223 (N.D. Ga. Feb. 27, 2013).
136. *Id.* at *1-2.
137. 29 U.S.C. § 216(b) (2006).
138. *Walthour*, 2013 U.S. Dist. LEXIS 56223, at *9 (citing 29 U.S.C. § 216(b) (2006)).
139. 500 U.S. 20 (1991).
140. 428 F.3d 1359 (11th Cir. 2005).
141. *Walthour*, 2013 U.S. Dist. LEXIS 56223, at *13.
142. *Id.* at *16-17.

been decided on grounds of state-law unconscionability, it "did not determine whether the right to proceed in a collective action was a non-waivable substantive right."[143] Therefore, despite finding the employee-plaintiff's arguments "persuasive," the court granted the defendant's motions to compel arbitration and dismissed "so as to permit the Court of Appeals itself to review the distinct issues presented here more closely."[144]

M. Juries and Trials

In *Kesterson v. Jarrett*,[145] the supreme court held, as a matter of first impression, that a party may not be excluded from trial "simply because her physical and mental condition may evoke sympathy";[146] the party may not be excluded unless she has been disruptive or has fabricated or excessively paraded her injuries to the jury.[147] The State Court of Clarke County excluded the plaintiff, a young girl with severe cerebral palsy, from most of the liability portion of her medical malpractice trial due to concerns that her physical and mental condition could evoke sympathy, which would prejudice the defendants. The court of appeals affirmed the trial court's exclusion, adopting a test from the United States Court of Appeals for the Sixth Circuit.[148] The supreme court rejected the test adopted by the court of appeals, stating that "[u]nder the longstanding law of Georgia, the parties to a lawsuit have a fundamental right to be present in court during the trial of their case," which does not depend on the competence of the parties.[149] This right to be present includes a "personal element"; "[t]he right is based not only

143. *Id.* at *14.

144. *Id.* at *1.

145. 291 Ga. 380, 728 S.E.2d 557 (2012).

146. *Id.* at 381, 728 S.E.2d at 559.

147. *Id.* at 381, 395, 728 S.E.2d at 559, 568.

148. *Id.* at 381, 728 S.E.2d at 559. The court of appeals held that a trial judge could exclude a party if the judge made written findings that:

> (1) the plaintiff is severely injured; (2) the plaintiff attributes those injuries to the conduct of the defendant(s); (3) there is a substantial likelihood that the plaintiff's presence in the courtroom will cause the jury to be biased toward the plaintiff based on sympathy rather than the evidence such that the jury would be prevented or substantially impaired from performing its duty; (4) the plaintiff is unable to communicate with counsel or to participate in the trial in any meaningful way; and (5) the plaintiff is unable to comprehend the proceedings.

Id. at 383, 728 S.E.2d at 560-61. When all of those circumstances exist, the court of appeals ruled that the party was essentially an exhibit—a piece of evidence—and could be excluded. *Id.* at 383, 728 S.E.2d at 561.

149. *Id.* at 380, 394-96, 728 S.E.2d at 559, 568-69.

on what the party can do to the case, but on what the case will do to the party."[150]

In *Reese v. Ford Motor Co.*,[151] the court of appeals held that the State Court of Cobb County did not abuse its discretion when it granted an extraordinary motion for a new trial based on Ford Motor Company's failure to identify its insurance carriers in response to the plaintiffs' interrogatory.[152] The plaintiffs did not learn about Ford's intentionally misleading discovery responses until after trial, and these responses prevented jurors from being properly qualified regarding their relationships with the insurance carriers.[153]

As a matter of first impression, the supreme court held in *Stolte v. Fagan*[154] that (1) civil litigants are entitled to the removal of unqualified jurors before they exercise their peremptory strikes just as parties in criminal cases are, and (2) a trial court must take corrective measures to remedy an improper argument in a civil case pursuant to its duties under O.C.G.A. § 9-10-185,[155] without regard to whether a specific remedy was requested by the objecting party.[156]

In *Holland v. Caviness*,[157] on a certified question from the United States District Court for the Southern District of Georgia, the Georgia Supreme Court held, that pursuant to O.C.G.A. § 51-12-6,[158] the defendant's "worldly circumstances" may not be considered in deciding the amount of damages when the only harm is to the plaintiff's "peace, happiness, or feelings."[159] The court also overruled *Tahamtan v.*

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150. *Id.* at 392, 728 S.E.2d at 566. Instead of excluding the party, the court directed the trial court to use common methods to ensure that both parties would have a fair trial, including changing venue, asking questions during voir dire and excluding prospective jurors for cause or peremptorily, excluding evidence that violates O.C.G.A. § 24-4-403, restricting opening statements and closing arguments, issuing jury instructions, and using the appeals process to review a jury verdict. *Id.* at 381, 387-88, 728 S.E.2d at 559, 563-64.

151. 320 Ga. App. 78, 738 S.E.2d 301 (2013).

152. *Id.* at 80-81, 738 S.E.2d at 303.

153. *Id.* at 79-80, 738 S.E.2d at 303.

154. 291 Ga. 477, 731 S.E.2d 653 (2012).

155. O.C.G.A. § 9-10-185 (2007).

156. *Stolte*, 291 Ga. at 478-81, 731 S.E.2d at 655-56. The court also held that other improper closing argument statements about the "trust" the defendant's patients placed in him, which were not objected to at trial, would be subject to review on remand, but only regarding "whether the improper argument in reasonable probability changed the result of the trial." *Id.* at 482-83, 731 S.E.2d at 657 (quoting Mullins v. Thompson, 274 Ga. 366, 367, 553 S.E.2d 154 (2001)).

157. 292 Ga. 332, 737 S.E.2d 669 (2013).

158. O.C.G.A. § 51-12-6 (2000).

159. *Holland*, 292 Ga. at 332, 737 S.E.2d at 669-70. O.C.G.A. § 51-12-6 provides that "[i]n a tort action in which the entire injury is to the peace, happiness, or feelings of the plaintiff, no measure of damages can be prescribed except the enlightened consciences of

Tahamtan[160] to the extent it held the defendant's worldly circumstances could be considered.[161]

N. Apportionment

In *Couch v. Red Roof Inns, Inc.*,[162] the Georgia Supreme Court held in response to a certified question from the United States District Court for the Northern District of Georgia that (1) the jury is allowed to apportion damages pursuant to O.C.G.A. § 51-12-33[163] between a criminal assailant and the defendant property owner in a premises liability action, and (2) a jury instruction or special verdict form to that effect does not violate the plaintiff's constitutional rights to a jury trial, due process, or equal protection.[164]

First, the court ruled that because the intentional tortfeasor was at least partially at "fault" for the attack under a plain reading of O.C.G.A. § 51-12-33, his liability should be apportioned with the defendant property owner's liability.[165] "Fault" is used in O.C.G.A. § 51-12-33 without limitation and thus includes all wrongdoing—whether intentional or otherwise.[166] The court determined this holding was consistent with the purpose of the apportionment statute, which is "to have the jury consider all of the tortfeasors who may be liable to the plaintiff together, so their respective responsibilities for the harm can be determined."[167] Second, the court found a jury instruction or special verdict form allowing for apportionment between intentional and negligent tortfeasors would be constitutional because (1) the right to a jury trial would not be violated as the jury is not abdicating its normal function in apportioning damages, (2) the statutory scheme is "discernible" and gives "adequate guidance" consistent with due process, and (3) the statute, by requiring fault to be apportioned among all tortfeasors, is supported by a rational basis consistent with the equal protection clause.[168]

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impartial jurors. In such an action, punitive damages . . . shall not be awarded." O.C.G.A. § 51-12-6.

160. 204 Ga. App. 680, 420 S.E.2d 363 (1992).

161. *Holland*, 292 Ga. at 337 n.9, 737 S.E.2d at 673 n.9.

162. 291 Ga. 359, 729 S.E.2d 378 (2012).

163. O.C.G.A. § 51-12-33 (2000 & Supp. 2013).

164. *Couch*, 291 Ga. at 359, 729 S.E.2d at 379.

165. *Id.*

166. *Id.* at 365, 729 S.E.2d at 383 (interpreting O.C.G.A. § 51-12-33).

167. *Id.*

168. *Id.* at 367, 729 S.E.2d at 384.

In *Zurich American Insurance Co. v. Heard*,[169] the court of appeals was also called to interpret the apportionment statute.[170] Relevant here, the court determined that apportionment does not apply to settlements in light of O.C.G.A. § 51-12-33's requirement that a "trier of fact" be the entity to apportion damages, which does not occur in settlement, and O.C.G.A. § 51-12-32(a)'s[171] provision that a right of contribution exists when the apportionment statute does not apply.[172]

IV. CONCLUSION

The above cases and legislation have in the Authors' estimation most significantly affected trial practice and procedure in Georgia over the survey period. This Article, however, is not intended to be exhaustive of all legal developments for this topic.

169. 321 Ga. App. 325, 740 S.E.2d 429 (2013).

170. *Zurich Am. Ins.*, 321 Ga. App. at 329, 740 S.E.2d at 432.

171. O.C.G.A. § 51-12-32(a) (2000).

172. *Zurich Am. Ins.*, 321 Ga. App. at 330, 740 S.E.2d at 432-33. The court also held that the defendants were joint tortfeasors—notwithstanding that the defendants were pursued in separate legal proceedings and the professional services defendants' settlement agreement specifically stated that the general contractor's settlement was not based on their negligence—because their separate acts of negligence combined naturally and directly into a single indivisible injury—the moisture incursion. *Id.* at 327 n.1, 331, 740 S.E.2d at 431 n.1, 433.