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Trial Practice and Procedure

by C. Frederick Overby*
and
Jason Crawford**

I. INTRODUCTION

Developments in the law interpreting and applying the Official Code of Georgia Annotated ("O.C.G.A.") section 9-11-9.1, the professional negligence affidavit pleading requirement, and Georgia's various statutes of ultimate repose overshadowed the usual decisions concerning personal jurisdiction, service of process, and venue. This review will analyze the developments in these areas of trial practice and procedure in Georgia for the survey period. Also, the authors will discuss new developments concerning Georgia's renewal and dismissal statutes, res judicata, and discovery.

II. O.C.G.A. SECTION 9-11-9.1

The Georgia appellate courts have been inconsistent in their interpretation and application of O.C.G.A. section 9-11-9.1, the malpractice affidavit pleading requirement, since the statute's enactment in 1987.

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The statute sets out the proper form and content of an expert's affidavit, which must be attached to any complaint alleging professional negligence in order for the complaint to state a claim.¹ Failure to follow the requirements of this statute will result in dismissal of the claim with prejudice.²

During this survey period, the courts clouded the waters significantly. In a confusing and often contradictory series of cases, the appellate courts addressed the sufficiency of the form and content of a malpractice affidavit, as well as the applicability of the affidavit requirement. After another year of addressing varied factual scenarios and inability to reach a workable solution under the statute as written and many times amended, the court of appeals, in one holding, seemingly retreated to the general and liberal pleading requirements of the Georgia Civil Practice Act.³ Whether this holding marks a fundamental change in the interpretation and application of this statute or an isolated aberration is unclear.

A. *Affidavits Made Pursuant to O.C.G.A. section 9-11-9.1*

Should the Court Liberally Construe the Statute, Not Liberally Construe the Statute, or Does it Matter? Striking examples of the confusion surrounding O.C.G.A. section 9-11-9.1 can be found by examining two cases decided within four months of each other, *Sisk v. Patel*⁴ and *Raskin v. Wallace*.⁵ Both cases address how a court should decide a motion to dismiss based upon a plaintiff's failure to follow the precise affidavit form requirements of the statute.

Both cases initially cite the seminal case of *Gadd v. Wilson & Co., Engineers & Architects*.⁶ In *Gadd*, the Supreme Court of Georgia held that

since § 9-11-9.1 establishes an "exception to the general liberality of pleading permitted under [the Civil Practice Act]," it should be construed in a manner consistent with the liberality of the Civil Practice Act where such construction does not detract from the purpose of § 9-11-9.1 "to reduce the number of frivolous malpractice suits being filed."⁷

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1. See O.C.G.A. § 9-11-9.1 (1993).
 2. *Id.*
 3. *Sisk v. Patel*, 217 Ga. App. 156, 160, 456 S.E.2d 718, 720 (1995).
 4. 217 Ga. App. 156, 456 S.E.2d 718 (1995).
 5. 215 Ga. App. 603, 451 S.E.2d 485 (1994).
 6. 262 Ga. 234, 416 S.E.2d 285 (1992).
 7. *Id.* at 235, 416 S.E.2d at 285 (citations omitted).

At this point, however, the cases depart in inexplicably divergent directions, one heeding the directive of *Gadd*, the other ignoring it altogether. *Raskin* was a psychiatric malpractice case filed by an inmate incarcerated for murdering his wife. The inmate, James Raskin, sued his treating psychiatrist for allegedly failing to hospitalize Raskin after he threatened his wife's life. Along with the complaint, in attempt to comply with O.C.G.A. section 9-11-9.1, Raskin filed his own affidavit, referencing an uncertified copy of certain portions of the criminal trial transcript in which Raskin was convicted for the murder of his wife. The referenced portions of transcript contained the trial testimony of a board certified psychiatrist, Dr. Harold Clifford Morgan, who opined that Raskin's physician, Dr. Wallace, should have hospitalized Raskin after Raskin threatened his wife's life.⁸

In its analysis, the court of appeals first conceded that the Georgia Supreme Court in *Gadd* held that O.C.G.A. section 9-11-9.1 should be liberally construed so long as such a construction does not detract from the purpose of deterring frivolous suits.⁹ The court next conceded that it had previously allowed, in *Hospital Authority of Fulton County v. McDaniel*,¹⁰ in lieu of an affidavit,¹¹ an expert's deposition from an original action to be incorporated into the complaint in a renewed action because such an allowance "complied with the spirit, if not the letter, of O.C.G.A. § 9-11-9.1."¹²

The court next conceded that Raskin's affidavit demonstrated attempted compliance.¹³ The court even conceded that

given Dr. Morgan's [trial] testimony that Raskin's doctor should have immediately hospitalized him when he made the death threats against his wife and warned Mrs. Raskin as well as the fact that Dr. Morgan gave the factual basis for this opinion, it is likely that Raskin's complaint against Wallace is not frivolous.¹⁴

At this point, one would expect the court to hold that Raskin's complaint stated a claim in keeping with the liberal construction of pleadings under the Civil Practice Act. But this was not the case.

8. *Raskin*, 215 Ga. App. at 603-04, 451 S.E.2d at 425.

9. *Id.* at 604-05, 451 S.E.2d at 486.

10. 192 Ga. App. 398, 385 S.E.2d 8 (1989).

11. O.C.G.A. § 9-11-9.1(a) requires a plaintiff to file an affidavit contemporaneously with the complaint in a malpractice case. O.C.G.A. § 9-11-9.1(a).

12. 215 Ga. App. at 605, 451 S.E.2d at 486.

13. *Id.*

14. *Id.*

Notwithstanding the fact that Raskin's complaint appeared meritorious and that his pleadings under *Gadd* ought to be liberally construed, the court focused upon the technical wording of the statute.¹⁵ The court held that because O.C.G.A. section 9-11-9.1 requires an affidavit of an "expert competent to testify," and the affidavit the plaintiff filed (his own) was not such an affidavit, the complaint was properly dismissed.¹⁶

The court never explained why it focused on the technical aspect of the statutory language "expert competent to testify," when the claim was admittedly not frivolous, yet be so liberal and accepting of compliance with merely the spirit of the statute with respect to the term affidavit in *McDaniel*.¹⁷ It is impossible to explain this distinction. Dr. Morgan was, in fact, an expert competent to testify.¹⁸ It seems the court of appeals dismissed the claim because the affidavit was not that of Dr. Morgan. If this were true, cases like *McDaniel* would appear to be indistinguishable. The court likewise never addressed the obvious question: How would a plaintiff in Raskin's position, with a claim that at least appeared meritorious on its face, go about asserting it?

Four months later, the court of appeals decided *Sisk*, a malpractice action wherein the plaintiff filed a facsimile copy of his expert's affidavit with his complaint. The defendant moved to dismiss arguing that *Sisk's* facsimile copy of his expert's affidavit was not an affidavit as required by the statute. The trial court agreed and dismissed *Sisk's* complaint.¹⁹

Reversing the trial court, the court of appeals again first turned to *Gadd*.²⁰ If the claim appeared to be non-frivolous, the pleadings would be liberally construed.²¹ Since the facsimile copy demonstrated, and the defendant did not dispute, that an expert deemed the action to have factual merit, "no question of frivolity" existed.²² The court was thus free to liberally construe the statute.²³

In connection with that liberal construction, the court noted that an affidavit is subject to stricter evidentiary requirements at the summary judgment stage than at the pleading stage.²⁴ An affidavit that would

15. *Id.*

16. *Id.*

17. 192 Ga. App. at 398, 385 S.E.2d at 8.

18. 215 Ga. App. at 605, 451 S.E.2d at 486.

19. *Sisk v. Patel*, 217 Ga. App. 156, 157, 456 S.E.2d 718, 718-19 (1995).

20. *Id.* at 158, 456 S.E.2d at 719.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 158-59, 456 S.E.2d at 720.

be insufficient at the summary judgment stage could be sufficient at the pleading stage "when justice so requires."²⁵

As if for good measure, the court disavowed its recent holding in *Brown v. Middle Georgia Hospital*,²⁶

which would require application of the [Renewal Statute] in those instances in which a facsimile was filed, rendering the filing of a facsimile an amendable defect. Under [the Renewal Statute] the original affidavit would have had to have been in the *physical* possession of counsel at the time of filing, and the facsimile filed as a result of a mistake.²⁷

According to the court,

the better approach should be to allow the filing of a facsimile of a properly executed affidavit with a complaint in a professional malpractice action so as to avoid the running of the statute of limitation. Then the original should be allowed to be filed as a supplemental pleading, without requiring the action to be "renewed."²⁸

It seems that at least as far as the court of appeals is concerned, the term "affidavit" is to be more liberally construed than the phrase "expert competent to testify."²⁹ As illogical as it seems, had Mr. Raskin simply filed no affidavit at all and merely attached the pertinent copies of Dr. Morgan's trial transcript, under *McDaniel*³⁰ and *Sisk*, these materials would have constituted as much of an affidavit as the deposition in *McDaniel* and the facsimile in *Sisk*. Conversely, if the plaintiffs in *McDaniel* and *Sisk* had filed their own personal affidavits incorporating the deposition and the facsimile, according to the rationale in *Raskin*, those cases would have been properly dismissed. Obviously, such hair-splitting is illogical if in both cases the court was truly liberally construing the statute so as to do justice.

When is an Expert "Competent to Testify"? It is well established that a malpractice affidavit must be that of an expert competent to testify³¹ and that the court of appeals may not be as willing to liberally construe that language.³² What if your expert is a teacher and not a

25. *Id.* at 159, 456 S.E.2d at 720.

26. 211 Ga. App. 884, 440 S.E.2d 687 (1994).

27. 217 Ga. App. at 159, 456 S.E.2d at 720 (emphasis in original).

28. *Id.*

29. Both terms appear in O.C.G.A. § 9-11-9.1(a).

30. 192 Ga. App. 398, 385 S.E.2d 8 (1989).

31. O.C.G.A. § 9-11-9.1(a).

32. *See supra* note 28 and accompanying text.

practitioner? According to the court of appeals, the plaintiff should secure another expert.³³ In *Riggins v. Wyatt*,³⁴ the court of appeals held that a professor who is not licensed to practice and who does not practice within his area of expertise is incompetent to testify against a practitioner.³⁵ Accordingly, an affidavit from such a professor, regardless of his credentials reflecting extensive education and training, is not sufficient to satisfy O.C.G.A. section 9-11-9.1.³⁶

Content: To Incorporate or not to Incorporate, that is the Question? Once a practitioner has obtained the opinion of an expert competent to testify, as is required before suit is filed, the issue arises as to how much to include in the affidavit and how much information should be incorporated by reference. In *Crook v. Funk*,³⁷ the court of appeals reaffirmed that notwithstanding *Gadd*, an O.C.G.A. section 9-11-9.1 affidavit "cannot incorporate by reference matters required by O.C.G.A. § 9-11-9.1 to be set forth in the body of the affidavit."³⁸ The court held that because the plaintiff's affidavit set forth at least one negligent act or omission of each defendant and the factual basis therefore, the affidavit was sufficient.³⁹ It is therefore prudent for the practitioner to take great care to ensure that the information contained in the affidavit is sufficient standing alone to comply with the statute.

Content: What Factual Basis Must Be Included? In *Crook, Fidelity Enterprises, Inc. v. Beltran*,⁴⁰ and *Hutchinson v. Divorce & Custody Law Center of Arline Kerman & Associates*,⁴¹ the court of appeals prescribed what information satisfies the O.C.G.A. section 9-11-9.1 requirement that a factual basis be shown for at least one negligent act or omission. In contrast to O.C.G.A. section 9-11-56, which imposes an evidentiary requirement at the procedural juncture of a motion for summary judgment, O.C.G.A. section 9-11-9.1 imposes a mere pleading requirement at the time of filing.⁴² Thus, an affidavit which would not

33. *Riggins v. Wyatt*, 215 Ga. App. 854, 855, 452 S.E.2d 577, 578 (1994).

34. 215 Ga. App. 854, 452 S.E.2d 577 (1994).

35. *Id.* at 855, 452 S.E.2d at 578.

36. *Id.* As noted by the dissent, the majority ignored, without explanation, supreme court and court of appeals authority that "any person learned in medical or physiological matters is qualified to testify as an expert thereon, even though he is not a medical practitioner." *Id.* at 856, 452 S.E.2d at 579.

37. 214 Ga. App. 213, 447 S.E.2d 60 (1994).

38. *Id.* at 213, 447 S.E.2d at 61.

39. *Id.* at 214, 447 S.E.2d at 62.

40. 214 Ga. App. 205, 447 S.E.2d 150 (1994).

41. 215 Ga. App. 25, 449 S.E.2d 866 (1994).

42. *Bowen v. Adams*, 203 Ga. App. 123, 123, 416 S.E.2d 102, 102 (1992).

be sufficient to overcome a motion for summary judgment may nonetheless be sufficient to satisfy the pleading requirements of O.C.G.A. section 9-11-9.1. Unless the affidavit demonstrates that the plaintiff is not entitled to relief under any state of facts, the affidavit satisfies the requirements of O.C.G.A. section 9-11-9.1.⁴³

According to the court in *Crook*, the affidavit need only specify the dates and procedure performed (or, implicitly, not performed if a negligent omission amounted to the breach of care) and why the treatment should have been handled differently.⁴⁴ Judge Pope wrote in *Beltran*, “[i]t is sufficient to state what the defendant did not do that he should have done (or vice versa).”⁴⁵ The factual bases of the claim and the allegations of negligence need not be stated in separate sentences.⁴⁶ Likewise, it is not a valid objection that the affidavit contains conclusory allegations so long as it sets forth factual allegations which, if true, support at least one negligent act or omission.⁴⁷ “It need not state admissible facts or facts sufficient to withstand a motion for summary judgment.”⁴⁸

B. Applicability of O.C.G.A. section 9-11-9.1

Over the years, the courts have held that O.C.G.A. section 9-11-9.1 applies to any claim against a “professional” based upon negligence or a deviation from the standard of care (malpractice).⁴⁹ The cases define professional as one who can legally carry on an occupation upon obtaining a license to do so pursuant to O.C.G.A. section 43-1-24, and persons who pursue certain occupations defined as professions by O.C.G.A. section 14-7-2(2) or section 14-10-2(2).⁵⁰

When Affidavit is not Required: Claims for Ordinary Negligence. Assuming a defendant is a professional, is any claim against that person subject to the pleading requirements of O.C.G.A. section 9-11-9.1? Obviously, the answer to that question is “no”. The courts

43. *Crook v. Funk*, 214 Ga. App. 213, 214, 447 S.E.2d 60, 62 (1994); *Fidelity Enters., Inc. v. Beltran*, 214 Ga. App. 205, 205-06, 447 S.E.2d 150, 151-52 (1994); *Hutcherson*, 215 Ga. App. at 26, 449 S.E.2d at 867-68.

44. *Crook*, 214 Ga. App. at 214, 447 S.E.2d at 62.

45. *Beltran*, 214 Ga. App. at 206, 447 S.E.2d at 151.

46. 214 Ga. App. at 214-15, 447 S.E.2d at 62.

47. *Id.*

48. *Id.* at 215, 447 S.E.2d at 62.

49. *Gillis v. Goodman*, 262 Ga. 117, 118, 414 S.E.2d 197, 198 (1992).

50. *Id.*

quickly established that no affidavit is necessary if the claim is one for ordinary negligence, as opposed to professional negligence.⁵¹

The court of appeals reaffirmed this principal during the survey period. In *Raley v. Terminix International Co.*,⁵² the court held that allegations questioning the performance of professional services in a defendant's area of expertise, "rather than . . . [alleging] negligence in the performance of administrative, clerical or routine acts which require no special expertise," require an accompanying malpractice affidavit.⁵³ Since the plaintiff in *Raley* alleged negligent rendition of professional services, the claim was one for professional negligence.⁵⁴

Robinson v. Medical Center of Central Georgia,⁵⁵ which also addressed the issue of when a claim constitutes ordinary negligence or professional negligence, highlighted the plaintiff's lawyer's need to err on the side of filing a malpractice affidavit. In that case, the plaintiff claimed the defendant hospital's agents negligently left the plaintiff's bed rails in a down position. The hospital moved to dismiss, claiming that the plaintiff did not file a malpractice affidavit. The hospital attached an affidavit of a senior registered nurse describing the hospital's fall risk protocol, which allowed nurses to determine, in their professional judgment, when bed rails should be put up or left down.⁵⁶

The trial court dismissed the claim, and the court of appeals affirmed,⁵⁷ distinguishing *Smith v. North Fulton Medical Center*.⁵⁸ In *Smith*, the court held that the nurse's failure to follow a nurse's assessment which mandated that the bed rails be left up constituted ordinary negligence.⁵⁹ No such prior written protocols existed in *Robinson*.⁶⁰ The court's attempts to distinguish *Smith* are, however, incomplete. If the hospital's nurses in *Robinson* failed to exercise their professional judgment as to whether to put up the bed rails (*i.e.*, if they had not gotten around to it yet or simply forgot— facts that might have been later developed in discovery), a claim for ordinary negligence would

51. See, e.g., *HCA Health Servs. of Ga., Inc. v. Hampshire*, 206 Ga. App. 108, 113, 424 S.E.2d 293, 298 (1992) (holding hospital's furnishing defective equipment constitutes ordinary, as opposed to medical, negligence); *Jones v. Bates*, 261 Ga. 240, 242, 403 S.E.2d 804, 806 (1991) (involving a decision regarding removal of heat shield from lamp to increase lighting one of simple negligence).

52. 215 Ga. App. 324, 450 S.E.2d 343 (1994).

53. *Id.* at 325, 450 S.E.2d at 345.

54. *Id.*

55. 217 Ga. App. 8, 456 S.E.2d 254 (1995).

56. *Id.* at 8-9, 456 S.E.2d at 255.

57. *Id.* at 9-10, 456 S.E.2d at 256.

58. 200 Ga. App. 464, 408 S.E.2d 468 (1991).

59. *Id.* at 465-66, 408 S.E.2d at 469-70.

60. 217 Ga. App. at 10, 456 S.E.2d at 256.

exist under the reasoning of *Smith*. The court failed to carry its analysis this far, even though the hospital's affidavit apparently failed to provide this information.

Other Claims: Breach of Fiduciary Duty; Fraud. During the survey period, the Supreme Court of Georgia held that a claim for tortious breach of the lawyer's fiduciary duty not to obtain and use confidential client information to one's own advantage rests not upon negligent performance of legal services, but upon independent ethical requirements imposed by the attorney-client relationship.⁶¹ Accordingly, the law requires no malpractice affidavit to state such a claim.⁶² The court of appeals held similarly with respect to a claim for fraud made against an attorney since all persons have a general duty not to defraud.⁶³

In *Tante v. Herring*,⁶⁴ the plaintiffs, a husband and wife, accused the defendant lawyer of legal malpractice and breach of fiduciary duty by engaging in an adulterous affair with the wife while representing her.⁶⁵ The court ruled that a claim for legal malpractice cannot be asserted if the lawyer undisputedly obtained the results for the client for which the lawyer was retained.⁶⁶ As to the plaintiffs' claims for breach of the lawyer's fiduciary duty, the court held that such a claim could be asserted.⁶⁷ Such a claim, however, requires no malpractice affidavit because the claim is "not based on negligence involving [the lawyer's] performance of legal services."⁶⁸

In *Hodge v. Jennings Mill, Ltd.*,⁶⁹ the plaintiff brought an action against his previous attorney sounding in tort for legal malpractice, breach of fiduciary duty, fraud, and a contract claim for failure to properly render the legal performance contracted.⁷⁰ The court held that a malpractice affidavit is required, regardless of how the plaintiff casts his claim, only "where the claim is based upon the failure of the professional to meet the requisite standards of the subject profession."⁷¹

61. *Tante v. Herring*, 264 Ga. 694, 695, 453 S.E.2d 686, 687 (1994).

62. *Id.*

63. *Hodge v. Jennings Mill, Ltd.*, 215 Ga. App. 507, 507, 451 S.E.2d 66, 67 (1994).

64. 264 Ga. 694, 453 S.E.2d 686 (1994).

65. *Id.* at 694, 453 S.E.2d at 687.

66. *Id.* at 694-95, 453 S.E.2d at 687.

67. *Id.* at 695, 453 S.E.2d at 687.

68. *Id.*

69. 215 Ga. App. 507, 451 S.E.2d 66 (1994).

70. *Id.* at 507, 451 S.E.2d at 67.

71. *Id.* at 508, 451 S.E.2d at 68.

The court held that a claim for fraud is not such a claim.⁷² Everyone should be familiar with the standard, "Thou shalt not defraud," and this standard applies to everyone, including professionals.⁷³

The court in *Hodge*, without any analysis whatsoever, dismissed the plaintiff's claim for breach of fiduciary duty.⁷⁴ If *Hodge* is to be reconciled with *Tante*, we are only left to assume that in *Hodge* the alleged breach of fiduciary duty involved "the failure of the professional to meet the requisite standard of the subject profession."⁷⁵ Whereas in *Tante*, perhaps, all lawyers are familiar with the standard "Thou shalt not commit adultery with your client." One must wonder, nonetheless, that if the alleged breach of the fiduciary duty in *Hodge* was the fraud, as to which everyone is presumed to know the standard, how would this claim be based any more upon the lawyer's failure to meet the applicable standard of care than the fraud action? One can only wonder based on these decisions.

C. *Timing: O.C.G.A. section 9-11-9.1(b)*

O.C.G.A. section 9-11-9.1(b) allows plaintiffs who file suit within ten days of the expiration of the applicable limitations period forty-five additional days to supplement their pleadings with a sufficient malpractice affidavit.⁷⁶ To come within this exception, the plaintiff must allege that a sufficient affidavit could not have been prepared and filed contemporaneously with the complaint because of the eminent expiration of the statute of limitations.⁷⁷ Finally, "[t]he trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires."⁷⁸

*Dixon v. Barnes*⁷⁹ involved a plaintiff who invoked this subsection in his complaint. The plaintiff failed, however, to move for an extension of time or to file an affidavit until seven weeks after the expiration of the additional forty-five day period. The trial court nevertheless denied the defendant's motion to dismiss.⁸⁰

The court of appeals reversed, holding that O.C.G.A. section 9-11-9.1(b) carves out specific time limitations for filing affidavits.⁸¹

72. *Id.* at 509, 451 S.E.2d at 68.

73. *Id.*

74. *Id.*

75. *Id.* at 508, 451 S.E.2d at 68.

76. O.C.G.A. § 9-11-9.1(b).

77. *Id.*

78. *Id.*

79. 214 Ga. App. 7, 446 S.E.2d 774 (1994).

80. *Id.* at 8, 446 S.E.2d at 775.

81. *Id.* at 9-10, 446 S.E.2d at 776-77.

Accordingly, O.C.G.A. section 9-11-6(b) which pertains generally to extensions of filing periods for cause shown and to the trial court's discretion to allow an act to be done outside the time prescribed by law in the case of excusable neglect, is inapplicable.⁸²

Under O.C.G.A. section 9-11-9.1, the question now becomes whether the statute mandates that the plaintiff move for an extension prior to the expiration of the forty-five day period. To answer this question, the court turned its focus back to O.C.G.A. section 9-11-6(b).⁸³

That enactment addresses two distinct situations: (1) it allows the court for cause shown to order a time period extended upon motion made prior to the expiration of the original period; and (2) the statute allows the court, upon the higher showing of excusable neglect, to grant leave for a party to do an act outside the prescribed time period for doing that act.⁸⁴ Because O.C.G.A. section 9-11-9.1(b) only allows the court to extend the time period and, unlike O.C.G.A. section 9-11-6(b), makes no provision for doing the act outside the applicable time period, the court reasoned that the legislature intended that an extension only be allowed if the motion were made within the forty-five day extension.⁸⁵

As noted by the court, this construction makes sense because O.C.G.A. section 9-11-9.1(c) allows the defendant thirty days from the filing of the affidavit to file an answer.⁸⁶ To hold otherwise places defendants in malpractice actions in the position of dangling in limbo indefinitely, not knowing when, or even if they will need to file an answer to the plaintiff's charges.⁸⁷

D. O.C.G.A. section 9-11-9.1 and Dismissal or Renewal

What does a plaintiff's lawyer in a malpractice case do after filing suit without attaching an affidavit to comply with O.C.G.A. section 9-11-9.1? The answer depends upon whether the statute of limitations has run on the claim. If the limitations period has expired, recent decisions preclude dismissal and renewal, pursuant to O.C.G.A. section 9-2-61. If it has not, survey cases allow dismissal and re-filing within the applicable period of limitations.⁸⁸

82. *Id.* at 8, 446 S.E.2d at 776.

83. *Id.* at 9, 446 S.E.2d at 776.

84. *Id.* at 8, 446 S.E.2d at 776. See O.C.G.A. § 9-11-6(b).

85. 214 Ga. App. at 9, 446 S.E.2d at 776.

86. *Id.* at 10, 446 S.E.2d at 776-77. See O.C.G.A. § 9-11-9.1(c).

87. 214 Ga. App. at 10, 446 S.E.2d at 777.

88. See *infra* notes 89-102 and accompanying text.

The former situation was recently addressed by the court of appeals in *Fidelity Enterprises, Inc. v. Beltran*,⁸⁹ in which the plaintiff filed a legal malpractice claim against his former lawyer and the lawyer's firm. Contemporaneously, the plaintiff filed an O.C.G.A. section 9-11-9.1 affidavit. The defendants challenged the sufficiency of the affidavit in their answer and filed a motion to dismiss. The plaintiff filed a second affidavit and later voluntarily dismissed his case. The plaintiff re-filed, pursuant to O.C.G.A. section 9-2-61, within six months of his voluntary dismissal but after the statute of limitations would otherwise have run on his claim. Along with the renewed action, the plaintiff filed a third affidavit. Again, the defendants moved to dismiss.⁹⁰

The court of appeals held that because no evidence existed to show the plaintiff possessed the latter two affidavits and the failure to attach them to the original complaint resulted from a mistake, O.C.G.A. section 9-11-9.1(e) and (f) barred their consideration.⁹¹ Accordingly, in passing upon the motion to dismiss, the court could only consider the originally filed affidavit. If that affidavit was insufficient, the original action as filed contained a non-amendable defect and was an invalid suit.⁹²

The holding in *Beltran* as it pertains to Georgia's Renewal Statute was dictated by the plain terms of O.C.G.A. section 9-11-9.1(f). That subsection expressly limits a plaintiff's ability to renew, pursuant to O.C.G.A. section 9-2-61, an action in which the plaintiff originally failed to comply with O.C.G.A. section 9-11-9.1 after the expiration of the applicable limitations period.⁹³ O.C.G.A. § 9-11-9.1(e) similarly limits a plaintiff's ability to amend a complaint to add an affidavit, pursuant to O.C.G.A. section 9-11-15, when the plaintiff initially failed to comply with O.C.G.A. section 9-11-9.1.⁹⁴

Consider a situation where the statute of limitations has not run on the plaintiff's claim. Whether intentionally or unintentionally, O.C.G.A. section 9-11-9.1 fails to address the situation where plaintiffs voluntarily dismiss their case pursuant to O.C.G.A. section 9-11-41 within the statute of limitations for the claim and refile within the statute of limitations.⁹⁵ O.C.G.A. section 9-11-9.1(f) would not apply to bar the suit because the second action would not have been renewed outside the applicable statute of limitations pursuant to O.C.G.A. section 9-2-61.⁹⁶

89. 214 Ga. App. 205, 447 S.E.2d 150 (1994).

90. *Id.* at 205, 447 S.E.2d at 151.

91. *Id.*

92. *Id.*

93. O.C.G.A. § 9-11-9.1(f).

94. *Beltran*, 214 Ga. App. at 205, 447 S.E.2d at 151.

95. Compare O.C.G.A. § 9-11-9.1 with O.C.G.A. § 9-11-41 (1993).

96. See O.C.G.A. § 9-11-9.1(f); O.C.G.A. § 9-2-61 (1982 & Supp. 1995).

O.C.G.A. section 9-11-9.1(e) would not foreclose the second suit, as this subsection only prevents amendments which add a proper affidavit.⁹⁷

For years this question went unanswered. On one hand, O.C.G.A. section 9-11-9.1 appears comprehensive. An argument could be made that the General Assembly, by strictly limiting the ordinarily liberal amendment of pleadings allowed by O.C.G.A. section 9-11-15 and by limiting the ability to dismiss and renew outside the statute of limitations, intended to limit the ability to correct noncompliance with the procedural requirements of O.C.G.A. section 9-11-9.1. On the other hand, pleadings in general under the Civil Practice Act are to be liberally construed. O.C.G.A. section 9-11-9.1 derogates from this universally accepted liberality, and because the filing of a subsequent claim within the statute of limitations with an appropriate affidavit demonstrates nonfrivolity, limitations not contained within the express terms of the statute should not be read into it by the courts.⁹⁸

In *Moritz v. Orkin Exterminating Co.*⁹⁹ and *Orkin Exterminating Co. v. Carder*,¹⁰⁰ the court of appeals took the latter position.¹⁰¹ The court held that reading in a prohibition precluding dismissal and refileing within the statute of limitations would render O.C.G.A. section 9-11-9.1(f) meaningless (which precludes renewal under O.C.G.A. section 9-2-61) when the statute of limitations has run.¹⁰²

E. Preclusive Effect of O.C.G.A. section 9-11-9.1

What happens to a wrongful death claim when the victim suffers injury as a result of the malpractice of another, files suit for personal injury attaching no affidavit, the suit is dismissed with prejudice, and the victim subsequently dies as a result of the same negligent acts or omissions? According to the court of appeals in *Greene County Hospital Authority v. Waldroup*,¹⁰³ the claim would be barred by collateral estoppel.¹⁰⁴

In *Waldroup*, the plaintiff originally filed malpractice claims on behalf of her incapacitated husband and herself for loss of consortium. The claims were subsequently dismissed upon motion by the trial court for

97. O.C.G.A. § 9-11-9.1(c).

98. See *Gadd v Wilson & Co., Eng'rs, & Architects*, 262 Ga. 234, 235, 416 S.E.2d 285, 286 (1992).

99. 215 Ga. App. 255, 450 S.E.2d 233 (1994).

100. 215 Ga. App. 257, 450 S.E.2d 217 (1994).

101. 215 Ga. App. at 255, 450 S.E.2d at 233; 215 Ga. App. at 257, 450 S.E.2d at 217.

102. 215 Ga. App. at 256, 450 S.E.2d at 234.

103. 215 Ga. App. 344, 451 S.E.2d 62 (1994).

104. *Id.* at 348, 451 S.E.2d at 66.

failure to file a sufficient affidavit in compliance with O.C.G.A. section 9-11-9.1. When the plaintiff's husband later died, she filed a claim against the same defendants for the wrongful death of her husband, attaching an appropriate affidavit. The question for the court of appeals to decide was straight-forward: "Under the above facts, is an indisputably separate claim for wrongful death barred by a previous dismissal of the victim's personal injury claim which arose from the identical facts?"¹⁰⁵

The court of appeals, Judge Smith writing, first distinguished between and defined the doctrines of *res judicata* and collateral estoppel.¹⁰⁶ *Res judicata* would not bar the claim because that doctrine only bars claims that were brought or could have been brought in the original suit.¹⁰⁷ The wrongful death claim could not have been brought with the prior personal injury claims because the victim was not yet dead. Therefore, the court next turned to the doctrine of collateral estoppel.¹⁰⁸

Under the doctrine of collateral estoppel, the court noted, "The second action is upon a different cause of action and the judgment in the prior suit precludes re-litigation [sic] of issues actually litigated and necessary to the outcome of the first action."¹⁰⁹ The court reasoned that because a dismissal for failure to file a sufficient affidavit is a dismissal on the merits, the underlying malpractice claim was actually litigated.¹¹⁰ Collateral estoppel thus applied to preclude relitigation of the same issues in the wrongful death case.¹¹¹ The court held that the issue is not required to have been actually litigated before a jury as long as it was actually litigated and decided by the court.¹¹² As support for its conclusion, the court cited a 1948 decision which held that a judgment based upon the statute of limitations or laches is a judgment "on the merits."¹¹³

The court of appeals, however, appears to have been mixing apples with oranges. The question is not whether a decision was on the merits. The question for collateral estoppel purposes is whether the *issue* was *actually litigated*.¹¹⁴ The court of appeals is correct that the *issue* does

105. *Id.* at 344-45, 451 S.E.2d at 63-64.

106. *Id.* at 345, 451 S.E.2d at 64.

107. *Id.*

108. *Id.* at 346, 451 S.E.2d at 65.

109. *Id.* at 345, 45 S.E.2d at 64.

110. *Id.* at 346, 451 S.E.2d at 65.

111. *Id.*

112. *Id.* at 347, 451 S.E.2d at 65.

113. *Id.*

114. See *Sorrells Constr. Co. v. Chandler Armentrout & Roebuck, P.C.*, 214 Ga. App. 193, 194, 447 S.E.2d 101, 102 (1994).

not have to have been decided by the jury, but the *issue* has to have been *actually litigated*.¹¹⁵

It is beyond question that a dismissal for failure to file a sufficient malpractice affidavit is a dismissal on the merits.¹¹⁶ The only thing on the merits has meant in this context, however, is that the dismissal is with prejudice.¹¹⁷ In other words, the dismissal is final for res judicata purposes. The same plaintiff cannot sue the same defendant again based upon the same cause of action.

The same is true with respect to a dismissal based upon the expiration of the statute of limitations. A dismissal based upon the expiration of the statute of limitations, the very example employed by the court of appeals, although sufficient for res judicata purposes, has been held insufficient to constitute actual litigation for purposes of collateral estoppel, even though such a dismissal is on the merits.¹¹⁸

The only thing actually litigated when a claim is dismissed based upon the expiration of the statute of limitations is the applicability of the statute of limitations to the claim asserted by the plaintiff. Similarly, as inexplicably conceded by the court of appeals in *Waldroup*, the only thing actually litigated in the original personal injury action in that case was the insufficiency of the malpractice affidavit in the context of those claims in that case.¹¹⁹

Oddly, in *Sorrells Construction Co. v. Chandler Armentrout & Roebuck, P.C.*¹²⁰ and *Thornton v. Ware County Hospital Authority*,¹²¹ the court of appeals, in opinions joined in and authored by Judge Smith, held that a voluntary dismissal of employee defendants with prejudice is on the merits but nonetheless does not preclude suit against their employer under respondeat superior.¹²² Those claims were voluntarily dismissed on the merits, but, as the court pointed out, the underlying issues of negligence of the servants was not actually litigated.¹²³ Collateral estoppel, for that reason, did not apply.

115. *Id.* at 194, 447 S.E.2d at 102.

116. O.C.G.A. § 9-11-9.1. *See* Lutz v. Foran, 262 Ga. 819, 824, 427 S.E.2d 248, 252 (1993).

117. 262 Ga. at 824, 427 S.E.2d at 252.

118. *See* Humana, Inc. v. Davis, 261 Ga. 514, 407 S.E.2d 725 (1991) (Actual litigation of statute of limitations defense on the merits as to one defendant did not preclude finding that defendant's principal was vicariously liable for defendant's negligence.).

119. *Waldroup*, 215 Ga. App. at 346, 451, S.E.2d at 65.

120. 214 Ga. App. 193, 447 S.E.2d 101 (1994).

121. 215 Ga. App. 276, 450 S.E.2d 260 (1994).

122. 214 Ga. App. at 195, 447 S.E.2d at 103-04; 215 Ga. App. at 278, 450 S.E.2d at 262.

123. *Id.*

In *Waldroup*, because the substantive claims for malpractice, likewise, were not actually litigated (even though they were dismissed on the merits) and because the plaintiff's affidavits in the subsequent wrongful death statute apparently complied with O.C.G.A. section 9-11-9.1, the claim for wrongful death, it would logically follow, should not have been foreclosed.¹²⁴ These decisions seem to be impossible to reconcile.

As just one year of decisions indicate, this statute has caused confusion and added a layer of litigation with motions related solely to compliance with the statute, even in cases which are admittedly nonfrivolous. Several judges from the court of appeals agree. According to Judge Johnson, in a scathing attack upon the efficacy of the statute (an opinion joined by Judges McMurray, Birdsong, Pope, Blackburn, and Smith) the malpractice pleading requirement's:

[H]istory . . . in the appellate courts has shown beyond a reasonable doubt that it is only with great difficulty made workable in the practical arena of litigation, and has largely failed to achieve its purpose of reducing frivolous litigation. Rather, it has created an added layer of motions regarding the sufficiency of affidavits preceding the motions for summary judgment on the merits. Rather than continuing to interpret and reconcile subsection after subsection added to the statute by the legislature in attempts to fix what is fundamentally broken, the better approach is to construe pleadings liberally to do substantial justice in accordance with O.C.G.A. § 9-11-8(f).¹²⁵

Perhaps the General Assembly will heed this call and repeal this ill-conceived enactment altogether.

III. STATUTE OF LIMITATIONS/STATUTE OF REPOSE ISSUES

The Georgia General Assembly has enacted several statutes of ultimate repose.¹²⁶ Statutes of ultimate repose act like statutes of limitations in that they bar certain claims if not filed before the expiration of the prescribed time period.

They differ from statutes of limitations in that statutes of ultimate repose are almost uniformly interpreted to be the outer time limit for the filing of a claim, enacted to provide defendants and their insurers¹²⁷

124. In a decision announced beyond the timeframe of cases analyzed in this survey, the Supreme Court of Georgia reversed the decision of the court of appeals in this case. *Waldroup v. Greene County Hosp. Auth.*, 265 Ga. 864, 463 S.E.2d 5 (1995).

125. *Sisk v. Patel*, 217 Ga. App. 156, 159-60, 456 S.E.2d 718, 720 (1995).

126. See, e.g., O.C.G.A. §§ 9-3-71 (1982 & Supp. 1995), 9-3-51 (1982), 51-1-11(b)&(c) (1982 & Supp. 1995).

127. See *Love v. Whirlpool Corp.*, 264 Ga. 701, 449 S.E.2d 602; 214 Ga. App. 259, 447 S.E.2d 617 (1994).

with a date certain beyond which they can rest without fear of litigation. Accordingly, courts generally hold that statutes of ultimate repose, unlike statutes of limitations, are not subject to the "discovery rule."¹²⁸ For choice of law purposes, statutes of ultimate repose are generally considered substantive, unlike procedural statutes of limitations.¹²⁹ Finally, statutes of ultimate repose generally run without regard for when the plaintiff's cause of action accrued.

During the survey period, several interesting issues cropped up surrounding the interpretation of some of Georgia's statutes of limitations and statutes of ultimate repose. The courts decided cases concerning the Georgia five year statute of ultimate repose for medical malpractice claims,¹³⁰ the eight year statute pertaining to actions arising from improvements to real property,¹³¹ and the ten year statute for product liability claims.¹³² The court also charted new territory in interpreting traditional statutes of limitation.

A. *Statutes of Limitations*

Applicability: Which Statute of Limitation Applies? In *Reaugh v. Inner Harbor Hospital, Ltd.*,¹³³ the court of appeals held that specific statutes of limitations that address a plaintiff's particular claim supersede general statutes of limitation, such as O.C.G.A. section 9-3-33, which sets a general two year limitation upon actions for injury to the person.¹³⁴ In that case, the plaintiff sued the operators of the infamous Anneewakee treatment facility. The plaintiff asserted claims under the Georgia Racketeering Influenced and Corrupt Organizations Act ("RICO"). She alleged that the defendants engaged in a pattern of criminal activity towards her and others from January 1985 through November 1986, and that she suffered harm as a result. Reaugh also

128. *Hanna v. McWilliams*, 213 Ga. App. 648, 651, 446 S.E.2d 741, 744 (1994); *Fort Oglethorpe Assoc. v. Hails Constr. Co.*, 196 Ga. App. 663, 664, 396 S.E.2d 585, 586 (1990); *Benning Constr. Co. v. Lakeshore Plaza*, 240 Ga. 426, 428, 241 S.E.2d 184, 186 (1977).

129. See, e.g., *Waller v. Pittsburgh Corning Corp.*, 946 F.2d 1514 (10th Cir. 1991); *Thornton v. Cessna Aircraft Co.*, 886 F.2d 85, (4th Cir. 1989); see also Annotation, *Validity and Construction of Statute Terminating Right of Action for Product-Caused Injury at Fixed Period After Manufacture Sale or Delivery*, 25 A.L.R. 4th 641. Thus a court applying foreign law will likewise generally apply the foreign statute of ultimate repose and apply its own statute of limitations.

130. O.C.G.A. § 9-3-71.

131. *Id.* § 9-3-51.

132. *Id.* § 51-1-11(b) & (c).

133. 214 Ga. App. 259, 447 S.E.2d 617 (1994).

134. *Id.* at 260, 447 S.E.2d at 619.

asserted claims for fraud, breach of contract, and breach of fiduciary duty. Reaugh reached the age of majority on January 30, 1988 and filed suit on December 3, 1991. The defendants moved for summary judgment, asserting, among other things, that the claims were time barred. The trial court granted summary judgment, holding that the plaintiff's personal injury claims were barred by the general two year statute of limitations applying to injuries to the person contained in O.C.G.A. section 9-3-33. The trial court summarily avoided Reaugh's RICO claims, concluding they were "without merit and subject to summary judgment."¹³⁵

The court of appeals reversed, noting that O.C.G.A. section 9-3-33 is merely a general statute of limitations that applies to claims for personal injury in the absence of a more specific statute of limitations. The court held that the special five year statute of limitations applicable to RICO actions, O.C.G.A. section 16-14-8, applies.¹³⁶ Since the claim was filed within five years of the plaintiff having attained majority, the claim was not time barred. Similarly, the four year statute of limitations for fraud and the six year statute of limitations for a breach of contract controlled.¹³⁷ Again, these claims were held not time barred.¹³⁸

On the other hand, no specific statute of limitations provided the time period within which Reaugh was to bring her claim for breach of fiduciary duty.¹³⁹ Accordingly, the court must look to the nature of the injury sustained in order to determine which limitations period applies.¹⁴⁰ Since the personal injury was alleged to have resulted from the defendant's breach of fiduciary duty, the general two year statute of limitations barred the claim.¹⁴¹

To Toll or Not to Toll: Mental Incompetency. The court of appeals reaffirmed the distinction between the statutory tolling provisions for causes of action possessed by minors and causes of action possessed by mentally incompetent persons in *Price v. Department of Transportation*.¹⁴² The former causes are tolled without exception

135. *Id.* at 259-60, 447 S.E.2d at 618-19.

136. *Id.* at 260, 447 S.E.2d at 219. Compare O.C.G.A. § 16-14-8 with O.C.G.A. § 9-3-33 (1982).

137. *Reaugh*, 244 Ga. App. at 260, 447 S.E.2d at 619. Compare O.C.G.A. § 16-14-8 with O.C.G.A. §§ 9-3-24 (1982) (contracts) and 9-3-31 (1982) (fraud).

138. 244 Ga. App. at 260, 447 S.E.2d at 619.

139. *Id.*

140. *Id.*

141. *Id.*

142. 214 Ga. App. 85, 88, 446 S.E.2d 749, 752 (1994).

until the minor reaches majority.¹⁴³ The latter causes of action are tolled only until: (1) capacity is regained; (2) a guardian is appointed and begins to act; or (3) "until such time as one bona fide acting for him as next friend thereafter, during the continuance of the disability of plaintiff, brings an action seeking recovery for the injury sustained."¹⁴⁴ The distinction is rational, the trial court noted, because a person's status as a minor terminates at a definite time, while a person's status as mentally incompetent may continue indefinitely.¹⁴⁵

The court of appeals also held, in *Moore v. Louis Smith Memorial Hospital*,¹⁴⁶ that although a malpractice claim is not tolled by the plaintiff's mental incompetency, a claim is not necessarily for medical malpractice simply because it arises from care provided by a health care facility.¹⁴⁷ The court should instead determine whether the claim "calls into question the conduct of a professional in his area of expertise."¹⁴⁸ In this case, the plaintiff was injured while being moved from her wheelchair to her bed. Since the act involved physical strength and dexterity and not the exercise of medical judgment, it was not a claim for medical malpractice. Thus, the jury was entitled to determine whether the plaintiff's mental incapacity existed so as to toll the statute of limitations.¹⁴⁹

To Toll or Not to Toll: Fraud. Fraud which conceals the defendant's tortious conduct, the plaintiff's injury, or the cause thereof tolls the applicable statute of limitations until the plaintiff discovers the conduct, injury, or cause thereof.¹⁵⁰ In *Bynum v. Gregory*,¹⁵¹ the plaintiffs were the parents of a child allegedly injured during her birth on February 20, 1975 because of the defendants' negligence. The parents filed suit on behalf of themselves and as guardians of their minor daughter in February 1993. The parents sued the treating obstetrician and his employer, Associates in Obstetrics & Gynecology, P.C. ("Associates").

143. O.C.G.A. § 9-3-90 (1982 & Supp. 1995). See *Barnum v. Martin*, 135 Ga. App. 712, 219 S.E.2d 341 (1975); *Whalen v. Certain-Teed Prods. Corp.*, 108 Ga. App. 686, 687, 134 S.E.2d 528 (1963).

144. *Price*, 214 Ga. App. at 88, 446 S.E.2d at 752; see also *Cline v. Lever Bros. Co.*, 124 Ga. App. 22, 23, 183 S.E.2d 63 (1971).

145. *Price*, 214 Ga. App. at 87-88, 446 S.E.2d at 751.

146. 216 Ga. App. 299, 454 S.E.2d 190 (1995).

147. *Id.* at 299, 454 S.E.2d at 191-92.

148. *Id.*, 454 S.E.2d at 192.

149. *Id.* at 300, 454 S.E.2d at 192.

150. *Hill v. Fordham*, 186 Ga. App. 354, 355, 367 S.E.2d 128, 129-30 (1988).

151. 215 Ga. App. 431, 450 S.E.2d 840 (1994).

The defendants moved for summary judgment, contending that the statute of limitations for a medical malpractice claim, O.C.G.A. section 9-3-73(b), barred the claims. The plaintiff alleged that the statute of limitations was tolled by the defendants' fraud.¹⁵²

Immediately after birth, the child, a full-term female infant, was diagnosed with a brain injury due to anoxia (lack of oxygen), with convulsive seizures due to brain injury. The diagnosis ruled out meningitis. Nonetheless, Dr. Eidson, an employee and stockholder of Associates, told Mrs. Bynum that the injury was caused by a one in a million case of meningitis and that the doctors were unable to prevent it. Also, Dr. Gregory, the treating obstetrician at birth and an employee stockholder of Associates, failed to tell Mrs. Bynum the true diagnosis in a conversation about the birth-related problems. The plaintiffs in fact found out for the first time from another doctor in 1991 that their daughter never suffered from meningitis. The plaintiffs filed suit within two years after discovering these facts.¹⁵³

The court of appeals held that fact issues existed as to whether the defendants' non-disclosure and misrepresentations were sufficient to toll the statute of limitations.¹⁵⁴ Given that the defendants failed to deny that the misrepresentation and non-disclosure took place and produced no evidence demonstrating a lack of fraudulent intent, one must wonder why the court of appeals refused to hold the statute tolled as a matter of law. The case sends the clear signal that such questions are invariably left to the jury.

What Constitutes a Separate Act of Malpractice: The Doctrine of "Reverse Relation-Back"? In *Long v. Wallace*,¹⁵⁵ the court of appeals affirmed the grant of summary judgment to the defendant lawyer in a legal malpractice case.¹⁵⁶ The lawyer represented the client in a 1986 trial for statutory rape, and the client/plaintiff alleged that in the trial, the attorney/defendant committed malpractice. The original trial took place in 1986 and the plaintiff did not file suit until 1992.¹⁵⁷ The court held that claim barred because the statute of limitations for legal malpractice is four years.¹⁵⁸

However, because the employment contract required the lawyer to represent the client during and after trial, the plaintiff also alleged that

152. *Id.* at 431-33, 450 S.E.2d at 840-42.

153. *Id.* at 432-33, 450 S.E.2d at 841-42.

154. *Id.* at 433, 450 S.E.2d at 842.

155. 214 Ga. App. 466, 448 S.E.2d 229 (1994).

156. *Id.* at 468, 448 S.E.2d at 230.

157. *Id.* at 466, 448 S.E.2d at 229.

158. *Id.* at 467, 448 S.E.2d at 230.

the lawyer's post-trial failure to assert his own ineffectiveness on direct or habeas appeal constituted separate, subsequent acts of malpractice.¹⁵⁹ The court of appeals held that while this inaction may have constituted a failure of the lawyer to avoid the effect of his ultimate breach or a failure to mitigate damages, it was not an act inflicting new harm. Accordingly, such a claim would relate-back to the original negligent act or acts, and the claim would be barred.¹⁶⁰

B. Statutes of Repose

The Perils of Dismissing and Renewing. In two survey period decisions, *Burns v. Radiology Associates of Gwinnett, P.C.*¹⁶¹ and *Love v. Whirlpool Corp.*,¹⁶² both the court of appeals and supreme court held that the medical malpractice and product liability statutes of repose bar an otherwise proper renewal action brought pursuant to O.C.G.A. section 9-2-61 if the statute of repose has run before the renewed action was filed.¹⁶³ The courts reasoned that a renewed action is an action *de novo*.¹⁶⁴ Accordingly, one cannot file a new action based upon an extinguished cause of action.¹⁶⁵

Tolling Based on Fraud Revisited. Citing the age-old principal that "the sun never sets on fraud," the court of appeals, in *Bynum v. Gregory and Beck v. Dennis*,¹⁶⁶ held that fraud tolls the medical malpractice statute of repose just as it tolls the medical malpractice statute of limitations.¹⁶⁷ "The statute of ultimate repose should not provide an incentive for a doctor or other medical professional to conceal

159. *Id.* at 467-68, 448 S.E.2d at 230.

160. *Id.* Generally, when one claim *relates back* to another claim, the relation back operates to save another claim from the operation of the statute of limitations. For example, a claim which arises out of the same transaction or occurrence as a claim filed before the expiration of the statute of limitations, when asserted subsequent to the running of the statute, relates back and is not barred. O.C.G.A. § 9-11-15(c) (1993).

161. 214 Ga. App. 76, 446 S.E.2d 788 (1994).

162. 264 Ga. 701, 449 S.E.2d 602 (1994).

163. *Burns*, 214 Ga. App. at 77, 446 S.E.2d at 789; *Love*, 264 Ga. at 705-06, 449 S.E.2d at 606-07.

164. 214 Ga. App. at 77, 446 S.E.2d at 789; 264 Ga. at 705-06, 449 S.E.2d at 606-07.

165. Statutes of ultimate repose, therefore, can be said to extinguish the plaintiff's right of action, whereas a statute of limitations merely affects the plaintiff's remedy. See *Hollingsworth v. Hubbard*, 184 Ga. App. 121, 122, 361 S.E.2d 12, 13 (1987).

166. 215 Ga. App. 728, 452 S.E.2d 205 (1994).

167. *Bynum*, 215 Ga. App. at 434, 450 S.E.2d at 842-43; *Beck*, 215 Ga. App. at 729-30, 452 S.E.2d at 206-07.

[their] [sic] negligence with the assurance that after five years such fraudulent conduct will insulate [them] [sic] from liability."¹⁶⁸

Actions for Indemnification. Is a third party action for indemnification filed after the expiration of the applicable statute of ultimate repose barred? The court of appeals addressed this issue in *Gwinnett Place Associates, L.P. v. Pharr Engineering, Inc.*¹⁶⁹

In that case, the plaintiff sued Gwinnett Place Mall for injuries she sustained in a slip and fall on a ramp outside a mall restaurant. The mall filed a third party claim for indemnification against the engineering, construction, and architectural firms responsible for the design and construction of the mall's sidewalks and ramps. The third party defendants moved for summary judgment, citing O.C.G.A. section 9-3-51.¹⁷⁰

O.C.G.A. section 9-3-51 is a statute of ultimate repose that bars claims for injury to the person brought more than eight years after the "substantial completion" of any "improvement to real property."¹⁷¹ The claim must be based on "deficiency in the . . . planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property . . ."¹⁷² The parties did not dispute that the mall was substantially completed more than eight years before the mall filed its third party claim. The mall argued that because a claim for indemnification was not a claim for injury to the person, it was not subject to the statute of repose.¹⁷³

The court of appeals disagreed, relying on its recent decision in *Krasaeth v. Parker*,¹⁷⁴ which held that a claim for contribution was subject to the medical malpractice statute of repose.¹⁷⁵ The court

168. 215 Ga. App. at 434, 450 S.E.2d at 842-43.

169. 215 Ga. App. 53, 449 S.E.2d 889 (1994).

170. *Id.* at 53-54, 449 S.E.2d at 890.

171. O.C.G.A. § 9-3-51(a).

172. *Id.*

173. *Gwinnett Place Assoc., L.P.*, 215 Ga. App. at 54, 449 S.E.2d at 890.

174. 212 Ga. App. 525, 441 S.E.2d 868 (1994).

175. See O.C.G.A. § 9-3-71(b) (1982 & Supp. 1995). In *Krasaeth*, the plaintiff settled with one of many joint tortfeasors and, pursuant to that settlement, was assigned that defendant's right to contribution. *Krasaeth v. Parker*, 212 Ga. App. 525, 441 S.E.2d 868, 869 (1994). The applicable two year statute of limitations for bringing a medical malpractice claim, O.C.G.A. § 9-3-71(a), had run on the plaintiff's claims against certain joint tortfeasors, but the statute of limitations for an action for contribution allows twenty years. O.C.G.A. §§ 51-12-32 and 23-2-71. The court held that the five year statute of repose for medical malpractice claims applies even to claims for contribution if the claim for contribution is dependant upon proof of professional negligence on the part of the joint tortfeasor. 212 Ga. App. at 527, 441 S.E.2d at 870.

reasoned that a claim for indemnification, dependant upon proof of professional negligence on the part of the joint tortfeasor, falls within the scope of the statute of ultimate repose.¹⁷⁶

The Product Liability Statute of Repose. The supreme court provided a much-needed explication of the applicability of the product liability statute of ultimate repose during this survey period. In *Chrysler Corp. v. Batten*,¹⁷⁷ the court delineated the reach of O.C.G.A. section 51-1-11(b)(2) and (c). Those provisions provide the following limitations:

(b)(2) No action shall be commenced pursuant to this subsection with respect to an injury after ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury

(c) The limitation of [subsection (b)(2)] regarding bringing an action within ten years from the date of the first sale for use or consumption of personal property shall also apply to the commencement of an action claiming negligence of a manufacturer as the basis of liability, except an action seeking to recover from a manufacturer for injuries or damages arising out of the negligence of such manufacturer in manufacturing products which cause a disease or birth defect, or arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property. Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer.¹⁷⁸

In *Batten* plaintiffs brought claims in 1990 against Chrysler based upon allegations that the subject 1978 Chrysler LeBaron contained a defective seatbelt retractor mechanism and that Chrysler negligently failed to warn of this defect.¹⁷⁹ The vehicle was first sold for use or consumption in 1978, more than ten years before the lawsuit was filed. Chrysler moved for summary judgment, arguing that the statute of repose barred the plaintiffs' claims.¹⁸⁰

The court held that, pursuant to the pertinent provisions of the product liability statute of repose, whether a claim is barred depends upon which of three types of claims is at issue.¹⁸¹ The statute provides

176. 215 Ga. App. at 527, 449 S.E.2d at 870.

177. 264 Ga. 723, 450 S.E.2d 208 (1994).

178. O.C.G.A. § 51-1-11(b)(2) and (c).

179. 264 Ga. at 723-24, 450 S.E.2d at 210-11, 212. The plaintiff alleged that Chrysler was strictly liable and liable for negligence because of the alleged defective design. *Id.*

180. *Id.*

181. *Id.* at 725-26, 450 S.E.2d at 212.

distinct rules of applicability (or non-applicability) depending upon whether the claim is one for strict liability, negligence, or failure to warn.¹⁸²

If the claim is based on a strict liability theory of defect, the claim is barred without exception if it is filed after ten years from the date of first sale for use or consumption.¹⁸³ In *Batten*, therefore, the statute of repose barred the plaintiffs' strict liability claims based upon the alleged defective design of the seatbelt retractor mechanism.¹⁸⁴

If the claim is based upon negligent design or manufacture, the claim is barred after ten years unless one of two exceptions apply.¹⁸⁵ If the claim is for injuries arising out of the negligence of a manufacturer in placing upon the market a product which causes disease or birth defect, the ten year statute of repose is inapplicable.¹⁸⁶ Also, the statute fails to operate as a bar to an action if a product maker's misconduct manifests a willful, reckless, or wanton disregard for life or property.¹⁸⁷ This standard is almost indistinguishable from the standard for awarding punitive damages in Georgia. In *Batten*, the court found no evidence of such egregious misconduct by Chrysler, so the statute barred the plaintiffs' negligence claims.¹⁸⁸

If the claim is based upon the defendant's failure to warn when the defendant has actual or constructive knowledge of the defect, the ten year statute of repose does not apply.¹⁸⁹ In *Batten*, the plaintiffs' claims that were based upon the defendants' failure to warn survived.¹⁹⁰

The defendants, and Justice Fletcher in his dissent, argued that the failure to warn exception should be limited to cases where the defendant possesses actual knowledge of the danger and nonetheless fails to warn.¹⁹¹ As pointed out by the majority, such a construction ignores the fact that for years the Georgia courts have recognized that a product maker's duty to warn rests upon its actual or constructive knowledge of the danger. The General Assembly, in enacting this exception to the

182. *Id.* at 723, 450 S.E.2d at 210-11.

183. *Id.* at 725, 450 S.E.2d at 212.

184. *Id.*

185. *Id.* at 725-26, 450 S.E.2d at 212.

186. *Id.*

187. *Id.*

188. *Id.* at 726, 450 S.E.2d at 212.

189. *Id.* at 727, 450 S.E.2d at 213.

190. *Id.*

191. *Id.* at 728, 450 S.E.2d at 214 (Fletcher, J., dissenting).

statute of repose, must be presumed to have been aware of this age-old principal.¹⁹²

This construction also makes sense because a product maker is charged with being the ultimate expert as to its own product. It would be irrational to allow a product maker to close its eyes and ears once ten years have passed since it foisted its product onto consumers. If a manufacturer reasonably believes its product is still in the stream of commerce and has reason to know of a danger which would otherwise give rise to a duty to warn, there is no rational reason for this duty to be lessened by the passage of ten years. Claims which arise strictly from the sale of a product many years ago stand on a different footing than failure to warn claims based upon more recently acquired knowledge.

IV. VENUE

During this survey period, the appellate courts decided one significant case dealing with the issue of venue, *Owens v. Pollock*.¹⁹³ In that case, the plaintiffs, shareholders in a closely held corporation, sued the majority shareholders and the corporation for slander, breach of fiduciary duties, and fraud. The plaintiffs filed the action in Gwinnett County, basing venue on the residence of the defendant corporation.¹⁹⁴ None of the individual defendants resided in Gwinnett County, so venue was only proper with respect to them by virtue of Georgia's joint tortfeasor venue provision.¹⁹⁵

The jury rendered its verdict against all the non-resident defendants and for the corporate defendant, the only Gwinnett County defendant. The individual defendants then raised the issue of improper venue and moved to transfer. The plaintiffs contended that venue was proper as to the legal claims asserted against the non-resident individual defendants because the defendants had agreed to a consent order granting certain equitable relief prior to trial. The order commanded the parties to refrain from certain actions, to maintain and preserve certain information, to produce certain information, and to suspend certain disbursements of funds.¹⁹⁶

The plaintiffs argued that since venue existed for the equitable claims, the legal claims were pendent under the now famous *Natpar*¹⁹⁷ doctrine. According to the landmark *Natpar* decision, "[W]here a

192. *Id.* at 727, 450 S.E.2d at 213.

193. 214 Ga. App. 107, 447 S.E.2d 325 (1994).

194. *Id.* at 107-08, 449 S.E.2d at 326-27.

195. *Id.* at 108, 449 S.E.2d at 327; GA. CONST. art. 6, § 2, para. 4.

196. *Owens*, 214 Ga. App. at 107-08, 447 S.E.2d at 326-27.

197. *Natpar Corp. v. E.T. Kassinger, Inc.*, 258 Ga. 102, 104, 365 S.E.2d 442, 443 (1988).

plaintiff brings suit in the same county on two claims arising from the same transaction and the Georgia Constitution designates that county as the venue for one of those claims, the trial court has the discretion to entertain both claims."¹⁹⁸

The court of appeals disagreed.¹⁹⁹ The problem with the plaintiffs' argument was that the claims for equitable relief merely preserved or brought to light the status quo and were accordingly only ancillary to the plaintiffs' legal claims.²⁰⁰ In a colorful flurry, the court opined that while *Natpar* modified the venue principal that "each tub must stand on its own bottom, . . . it is still essential that at least one 'tub' should 'stand on its own bottom.'"²⁰¹

V. PERSONAL JURISDICTION

A. *The Long-Arm Statute*

O.C.G.A. sections 9-10-91(2) and (3) (Tort Cases): Is *Coe & Payne Dead*? In 1973, the Georgia Supreme Court interpreted Georgia's Long-Arm Statute, O.C.G.A. section 9-10-91, in the case of *Coe & Payne Co. v. Wood-Mosaic Corp.*²⁰² Georgia's Long-Arm Statute that controlled the *Coe & Payne* decision contained just one provision granting extra-territorial personal jurisdiction to Georgia courts in tort cases.²⁰³ That provision allowed Georgia courts to exercise personal jurisdiction over a non-resident defendant who had committed a tortious act or omission within this State.²⁰⁴

The obvious question that arose under this statute was: "Is jurisdiction proper in Georgia when a non-resident defendant committed a tortious act or omission in some other state, which act or omission caused an injury in Georgia?" Other jurisdictions, interpreting similar long-arm provisions, split.

The Illinois rule holds that a tort is not committed until an injury is sustained. Therefore, the term tortious act or omission would encompass

198. *Id.* at 104, 365 S.E.2d 443-44.

199. *Owens*, 214 Ga. App. at 109, 447 S.E.2d at 328 (1994).

200. *Id.*

201. *Id.* at 110, 447 S.E.2d at 328.

202. 230 Ga. 58, 195 S.E.2d 399 (1973).

203. See O.C.G.A. § 9-10-91(2) (1982 & Supp. 1995). O.C.G.A. § 9-10-91(3) had not yet become effective. See O.C.G.A. § 9-10-91(3) (1982 & Supp. 1995).

204. O.C.G.A. § 9-10-91(2).

the place where the ultimate injury occurred.²⁰⁵ The New York rule holds that the term act or omission means just that, regardless of where the ultimate injury takes place.²⁰⁶

In *Coe & Payne*, the Georgia Supreme Court followed the Illinois rule in favor of broadening the State's power to protect its citizens who are injured in this State by the tortious conduct of an out of state defendant.²⁰⁷ However, before *Coe & Payne* was actually decided the General Assembly amended the Long-Arm Statute to add O.C.G.A. section 9-10-91(3), which provides for jurisdiction over non-resident defendants who commit a tortious act or omission outside Georgia which causes injury in Georgia.²⁰⁸

That subsection, however, unlike O.C.G.A. section 9-10-91(2) (upon which *Coe & Payne* was decided), is expressly limited to non-resident defendants who regularly do or solicit business, engage in any other persistent course of conduct, or derive substantial revenue from goods used or consumed or services rendered in this State.²⁰⁹ *Is Coe & Payne* still good law in light of O.C.G.A. section 9-10-91(3)?

Cases decided after *Coe & Payne* and after O.C.G.A. section 9-10-91(3) took effect consistently hold that O.C.G.A. section 9-10-91(2) still permits Georgia courts to exercise jurisdiction over nonresident defendants to the maximum extent permitted by due process, including nonresident defendants who have committed a tortious act or omission outside this State which has caused an injury in Georgia.²¹⁰

During the survey period, the court of appeals decided *White v. Roberts*.²¹¹ In that case, the plaintiffs had bought a horse from a Nebraska couple, and the horse had been examined by a Nebraska veterinarian before the sale. When the horse turned out lame, the plaintiffs sued the sellers and the veterinarian. The veterinarian moved to dismiss for lack of personal jurisdiction.²¹²

Because the veterinarian indisputably conducted no business, engaged in no consistent course of conduct, and did not derive substantial revenue from services rendered in Georgia, O.C.G.A. section 9-10-91(3)

205. *Coe & Payne Co.*, 230 Ga. at 60, 195 S.E.2d at 400-01.

206. *Id.* at 59-60, 195 S.E.2d at 400.

207. *Id.* at 61, 195 S.E.2d at 401.

208. *See* O.C.G.A. § 9-10-91(3).

209. *Id.*

210. *See, e.g., Clarkson Power Flow, Inc. v. Thompson*, 244 Ga. 300, 260 S.E.2d 9 (1979); *Timberland Equip., Ltd. v. Jones*, 146 Ga. App. 589, 246 S.E.2d 709 (1978).

211. 216 Ga. App. 273, 454 S.E.2d 584 (1995).

212. *Id.* at 273, 454 S.E.2d at 585.

was inapplicable.²¹³ The plaintiffs, therefore, argued that jurisdiction was appropriate under O.C.G.A. section 9-10-91(2) and *Coe & Payne*.²¹⁴

The court of appeals summarily rebuked this argument, holding that "[t]he statutory interpretation of [O.C.G.A. section 9-10-91(2)] has been superseded" by the addition of O.C.G.A. section 9-10-91(3).²¹⁵ "The rule that controls is our statute, which requires that an out-of-state defendant must do certain acts within the State of Georgia before he can be subjected to personal jurisdiction."²¹⁶

Citing *Gust v. Flint*²¹⁷ and ignoring the cases which have followed *Coe & Payne* since O.C.G.A. section 9-10-91(3) was enacted, the court held that the relative merits of the Illinois rule versus the New York rule were not dispositive.²¹⁸ This language would seem to indicate that *Coe & Payne's* extension of long-arm jurisdiction to the limits of due process has been retracted—over twenty years after the enactment of O.C.G.A. section 9-10-91(3).

However, the death of *Coe & Payne* should not be lamented just yet. Ironically, only a few months before the court of appeals decided *White*, the very same panel, Judges McMurray, Pope, and Smith, decided the case of *Taege Enterprises, Inc. v. Herdlein Technologies, Inc.*²¹⁹ In that case, the court cited *Coe & Payne* for the proposition that "a 'tortious' act is a composite of both negligence and damage, and if damage occurred within the state then the tortious act occurred within the state within the meaning of . . . the Long-Arm Statute."²²⁰ The court upheld dismissal because the defendants had no contacts with Georgia, as they committed no acts or omissions in this State, and the injury was not suffered in this State.²²¹ Perhaps, therefore, the court's statements in *White*, which seemingly jettisoned *Coe & Payne*, were mere dicta, as the defendant veterinarian in that case had insufficient contacts with Georgia even to satisfy due process.²²²

213. *Id.* at 275, 454 S.E.2d at 587.

214. *Id.*, 454 S.E.2d at 586.

215. *Id.*

216. *Id.*

217. 257 Ga. 129, 356 S.E.2d 587 (1987).

218. *White*, 216 Ga. App. at 275, 454 S.E.2d at 586-87.

219. 213 Ga. App. 740, 445 S.E.2d 848 (1994).

220. *Id.* at 748, 445 S.E.2d at 855.

221. *Id.*, 445 S.E.2d at 856.

222. *White*, 216 Ga. App. at 274-75, 454 S.E.2d at 586.

O.C.G.A. section 9-10-91(1) (Contract actions). O.C.G.A. section 9-10-91(1) allows Georgia courts to exercise personal jurisdiction over nonresident defendants who "transact any business" in Georgia.²²³ The court of appeals reaffirmed during this survey period that this provision only applies to actions based on breach of contract and not to tort actions.²²⁴

The court of appeals also recently reaffirmed that, in a contract case, in order to meet the transacts any business provision, a more systematic course of conduct is necessary than is generally required in a tort case.²²⁵ In *Taeger*, a subcontractor sued the president of a nonresident corporate contractor and a nonresident corporate consultant.²²⁶ The court held that two visits by the contractor's president to the contract job site located in Georgia were too fortuitous and attenuated to support jurisdiction under the Long-Arm Statute.²²⁷

The court disregarded the plaintiff's speculation regarding the contractor's president's intent in making the visits and the plaintiff's unsupported conclusions that the contractor's president had dealt with the plaintiff during those visits because the plaintiff failed to support either assertion with any facts.²²⁸ Any Georgia contacts of the nonresident contractor (who was not a party to the action) were not attributable to the consultant, regardless of the plaintiff's ignorance of the contractor's and consultant's separate corporate existence and regardless of the fact that the two corporations shared office space, secretaries, and telephone numbers, because the two entities in fact were distinct legal entities.²²⁹ Once the court stripped away this speculative veneer of contacts, the case fell within the established precedent that one or a few visits to this State in connection with a contract are not enough to establish jurisdiction under the Long-Arm Statute.²³⁰

223. O.C.G.A. § 9-10-91(1).

224. *Allen v. Black*, 214 Ga. App. 450, 447 S.E.2d 718 (1994).

225. *See Taeger Enters., Inc. v. Herdlein Technologies, Inc.* at 213 Ga. App. 740, 445 S.E.2d 848 (1994).

226. 213 Ga. App. at 740, 445 S.E.2d at 850-51.

227. *Id.* at 747, 445 S.E.2d at 855.

228. *Id.*

229. *Id.*

230. *Id.*, 445 S.E.2d at 545.

In *Habersham Metal Products Co. v. Huntsville Fastener & Supply, Inc.*,²³¹ the nonresident defendant's activities in Georgia were ongoing and continuous. In that case, while the out-of-state seller of fasteners did not solicit the plaintiff-business, it maintained an ongoing relation with that business. It continuously corresponded with the plaintiff in Georgia, by mail and by phone. It regularly sent its products to the plaintiff in Georgia, and it sent the plaintiff catalogs and sample products. After the dispute giving rise to the lawsuit arose, representatives of the defendant came to Georgia to negotiate a resolution and, perhaps, to discuss ongoing business relations.²³² The court held that the defendant was transacting business in Georgia and subject to jurisdiction here on the plaintiff's contract claim.²³³

The fact that a party to a contract has executed a choice of law provision selecting Georgia law is also insufficient, standing alone, to confer jurisdiction over a non-resident under this provision of the Long-Arm Statute.²³⁴

The transacts any business provision of the Long-Arm Statute is perhaps the most enigmatic provision in the statute. To show that jurisdiction is proper, a litigant must develop the facts to show that more contacts exist than attenuated correspondence and visits to Georgia. In this regard, no well settled "test" presently exists. Plaintiffs must simply show in the record as many such contacts as possible, distinguish any which are different from contacts the courts have previously held to be insufficient, add them all up, and hope the court agrees that jurisdiction exists.

B. Consent to Jurisdiction

Can a party consent ahead of time, when he enters into a contract, to be subject to the personal jurisdiction of this State? In *Apparel Resources, International, Ltd. v. Amerisig Southeast, Inc.*,²³⁵ the court of appeals answered in the affirmative. In that case, the dispute involved a printing contract the parties had entered. In that contract, the forum selection clause provided that the defendant consented to jurisdiction in Georgia.²³⁶ The court reasoned that because a party can waive personal jurisdiction, unlike subject matter jurisdiction which

231. 216 Ga. App. 646, 455 S.E.2d 356 (1995).

232. *Id.* at 646-47, 455 S.E.2d at 356-57.

233. *Id.* at 647, 455 S.E.2d at 357.

234. *Apparel Resources, Int'l, Ltd. v. Amerisig Southeast, Inc.*, 215 Ga. App. 483, 485, 451 S.E.2d 113, 115 (1994).

235. 215 Ga. App. at 483, 451 S.E.2d at 113.

236. *Id.*, 451 S.E.2d at 113-14.

cannot be waived, nothing prevents a party from doing so even before the dispute arose.²³⁷

VI. DISCOVERY PRACTICE

A. *The Inter-Relation of the Work Product Doctrine and Discovery Pertaining to Expert Witnesses*

Perhaps one of the most significant cases of the survey period was *McKinnon v. Smock*.²³⁸ In division one of that case, the Georgia Supreme Court held that the attorney-client privilege does not prevent disclosure of the identity of documents reviewed by a party in preparation for his deposition.²³⁹ Because the attorney-client privilege only protects communications between attorney and client and because the identity of documents reviewed in preparation for a deposition in no way constitutes such communications, the privilege was deemed inapplicable.²⁴⁰

In division two, the court, perhaps more importantly, also held that the opinion work product doctrine prevents disclosure of a correspondence between an attorney and an expert to the extent the correspondence contains opinion work product.²⁴¹ The court interpreted the language of O.C.G.A. section 9-11-26(b)(3), which sets forth the work product doctrine, and O.C.G.A. section 9-11-26(b)(4), which outlines discovery which may be had from an opponent's expert.²⁴² In its opinion, the court parsed the language of O.C.G.A. section 9-11-26(b)(3), which seems on its face to expressly limit the work product doctrine in situations involving discovery from an opposing expert.²⁴³

O.C.G.A. section 9-11-26(b)(3), the work product doctrine, by its own terms, is subject to O.C.G.A. section 9-11-26(b)(4) concerning discovery from experts.²⁴⁴ O.C.G.A. section 9-11-26(b)(4) allows discovery of the identity of experts expected to be called at trial, of the facts known by those experts, opinions held, and grounds underlying those opinions, even though all these matters were acquired and developed in anticipation of litigation.²⁴⁵ For years, practitioners assumed that once a

237. *Id.* at 484, 451 S.E.2d at 114.

238. 264 Ga. 375, 445 S.E.2d 526 (1994).

239. *Id.* at 376, 445 S.E.2d at 527.

240. *Id.*

241. *Id.* at 377-78, 445 S.E.2d at 528.

242. *Id.* at 378, 445 S.E.2d at 528.

243. *Id.*

244. O.C.G.A. § 9-11-26(b)(3) (1993).

245. *Id.* § 9-11-26(b)(4).

document or correspondence was provided to an expert, it was discoverable, notwithstanding the work product doctrine.

The court, however, distinguished between ordinary work product and opinion work product.²⁴⁶ Opinion work product, defined as the "mental impressions, conclusions, opinions, or legal theories" of the lawyer, is somehow and for some reason not stated by the court, exempt from being subject to O.C.G.A. section 9-11-26(b)(4).²⁴⁷

The court held that the work product doctrine is only subject to the provision concerning discovery from opposing experts in that the party seeking discovery need not show substantial need and undue hardship to obtain the discovery.²⁴⁸ If the materials contain opinion work product, however, the materials are exempt from discovery, and O.C.G.A. section 9-11-26(b)(4) is then subject to O.C.G.A. section 9-11-26(b)(3), even though the statute provides otherwise.²⁴⁹

The court held that once a lawyer shows that his client has a substantial need for protected work product and that undue hardship would result if discovery were not obtained, the court should determine in camera whether the documents contain opinion work product and are therefore, immune from discovery.²⁵⁰

It would seem that from the majority's analysis of the work product doctrine, the defendant, in division one, should have objected to the disclosure of documents relied upon in preparation for a deposition based upon the opinion work product doctrine. To the extent the sequence or selection of particular documents reflected the attorney's opinion work product, it would arguably be exempt from discovery under the majority's analysis in division two.

Justice Fletcher, joined by Chief Justice Hunt, dissented.²⁵¹ They pointed out that the majority's holding flies in the face of the statute's plain language.²⁵² The holding also, according to the dissent, undermines the age-old principal in Georgia that a party is entitled to full discovery from expert witnesses, so as to allow a thorough and sifting cross-examination.²⁵³

246. 264 Ga. at 378, 445 S.E.2d at 528.

247. *Id.*

248. *Id.*

249. *Id.* Compare O.C.G.A. § 9-11-26(b)(3) which seems to make *all* of O.C.G.A. § 9-11-26(b)(4) "subject to" its provisions, not just the first sentence of 9-11-26(b)(4).

250. 264 Ga. at 378, 445 S.E.2d at 528.

251. *Id.* at 378-81, 445 S.E.2d at 528-30. (Fletcher, J., dissenting.)

252. *Id.* at 379, 455 S.E.2d at 529.

253. *Id.* at 379-80, 455 S.E.2d at 529-30.

B. Psychiatrist-Patient Privilege

In *Plunkett v. Ginsburg*,²⁵⁴ the court of appeals held that communications between a psychiatrist or psychologist and patient are absolutely privileged from discovery.²⁵⁵ Placing one's mental condition in issue in a case does not waive this absolute privilege, as this waiver is statutorily created,²⁵⁶ and the same statute exempts psychiatric records from this waiver.²⁵⁷ The court did hold that putting the psychiatrist on the stand to testify concerning the patient's condition waives the privilege.²⁵⁸

C. Withdrawal of Requests for Admission

O.C.G.A. section 9-11-36 allows a party to propound requests for admission of facts so as to narrow the issues for trial. If a party fails to respond to a request for admission, the request is taken as admitted.²⁵⁹ O.C.G.A. section 9-11-36(b) allows withdrawal of such an admission "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits."²⁶⁰

In *Rowland v. Tsay*,²⁶¹ the court of appeals explained what this language means. In that case, the plaintiff buried requests for admissions within his responses to the defendant's requests for production of documents. The defendant overlooked the requests for admission, and after thirty days, the requests were deemed admitted. Upon discovering this omission, the defendant moved to withdraw certain admissions, attaching new responses to the requests along with testimony by affidavit and deposition showing that the responses were meritorious. The trial court allowed the motion, and the court of appeals affirmed. The evidence negating the admissions showed that their withdrawal would subserve the merits.²⁶²

The plaintiff was not prejudiced because one is never unfairly prejudiced by being deprived of a judgment and being forced to go to

254. 217 Ga. App. 20, 456 S.E.2d 595 (1995).

255. *Id.* at 21, 456 S.E.2d at 597.

256. *See* O.C.G.A. § 24-9-40 (1995).

257. *Id.*

258. 217 Ga. App. at 21, 456 S.E.2d at 597.

259. O.C.G.A. § 9-11-36 (1993).

260. *Id.* § 9-11-36(b).

261. 213 Ga. App. 679, 445 S.E.2d 822 (1994).

262. *Id.* at 680, 445 S.E.2d at 822-23. *See* O.C.G.A. § 9-11-36.

trial on the merits, as opposed to winning on a technicality.²⁶³ The court made it clear that a party "has no right to a judgment based on *false* 'admissions' effected merely because [a party] was late in answering . . . requests for admission, for such false admissions do not subserve the merits."²⁶⁴

VII. CONCLUSION

This survey is by no means all inclusive, as neither space nor time permitted such an exhaustive analysis. Nonetheless, the authors hope their insights and observations prove useful to readers of this survey.

263. 213 Ga. App. at 680-81, 445 S.E.2d at 823.

264. *Id.* at 681, 445 S.E.2d at 823 (emphasis added).