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Trial Practice and Procedure (Annual Survey of Georgia Law)

C. Ronald Ellington
University of Georgia School of Law, cre@uga.edu

T. Bart Gary
Wasson, Sours & Harris

Trial Practice and Procedure

by C. Ronald Ellington*
and
T. Bart Gary**

This survey contains only a handful of the hundreds of decisions rendered last year by the Georgia appellate courts on points of trial practice and procedure. The decisions chosen for review were selected because they resolved previously undecided issues or aptly illustrated some important principle of civil procedure. Three fairly technical legislative amendments to the Civil Practice Act (CPA)[1] dealing with the applicability of the CPA, the requirement of filing discovery documents, and the effect of a dismissal for failure to prosecute are also noted. This survey will follow the format used in the past by beginning with cases dealing with jurisdiction and venue, followed by cases construing the CPA arranged under each section in numerical order.

I. Personal Jurisdiction

In *Crowder v. Ginn*,[2] the supreme court upheld the constitutionality of the 1977 amendment to the Georgia long arm statute[3] that extended the jurisdiction of the Georgia courts over former residents for claims arising

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* Professor of Law, University of Georgia. Emory University (A.B., 1963); University of Virginia (LL.B., 1966); Harvard University (LL.M., 1978). Member, State Bar of Georgia.

** Associate in the firm of Wasson, Sours & Harris, Atlanta, Georgia. Furman University (B.A., 1975); University of Georgia (J.D., 1978). Member, State Bar of Georgia.

1. Official Code of Ga. Ann. tit. 9, ch. 11 (Michie 1982), (formerly Ga. Code Ann. tit. 81A (Harrison 1977)) [hereinafter cited as CPA].

2. 248 Ga. 824, 286 S.E.2d 706 (1982).

3. Ga. Code Ann. § 24-117 (Harrison 1981), Official Code of Ga. Ann. § 9-10-90 (Michie 1982) (editorial changes only) was amended by adding:

> The term "nonresident" shall also include an individual . . . who, at the time a claim or cause of action arises under section 1 of this Act, was residing . . . in this State and subsequently becomes a resident . . . outside of this State as of the date of perfection of service of process as provided by section 3 of this Act.

1977 Ga. Laws 586, 587.

in connection with specified acts done by them while residents of Georgia. Although the decision to uphold personal jurisdiction in these circumstances is entirely consistent with the modern due process approach that asks only for minimum contacts and a reasonable nexus between the defendant, the claim asserted, and the forum state in order to support jurisdiction, a shadow of uncertainty about the validity of the 1977 amendment remained until *Crowder* was decided. The uncertainty arose because a previous court decision, *Young v. Morrison*,[4] had ruled a substantially similar amendment to the Nonresident Motorists Act unconstitutional on due process grounds.

The court in *Crowder* quickly rejected the due process challenge to this extension of the long arm statute:

> We hold that the due process clauses of our state and federal constitutions do not preclude defining the term "nonresident" for purposes of our Long Arm Statute so as to include a defendant who was a resident of Georgia on the date of an automobile collision in Georgia but who had become a resident of another state by the day on which he personally was served with process in the other state in accordance with the statute.[5]

In addition, the court in *Crowder* expressly overruled *Young* as outmoded.[6] Although *Young* certainly deserved the treatment it got at the hands of the court, overruling it raises some particularly knotty problems for the future. The Nonresident Motorists Act offers more alternatives for venue than are available in the long arm statute.[7] Accordingly, it may be

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4. 220 Ga. 127, 137 S.E.2d 456 (1964). In a badly flawed opinion, the court held unconstitutional as a denial of due process 1957 Ga. Laws 649, 650, which sought to extend coverage under the Nonresident Motorists Act (GA. CODE ANN. ch. 68-8 (Harrison 1980), (presently OFFICIAL CODE OF GA. ANN. tit. 40, ch. 12 (Michie 1982)) to persons who had been residents of Georgia at the time of the automobile accident for which a claim was being asserted, but who had become residents of some other state before suit was commenced. *Young* created the anomalous situation that a person who was a nonresident altogether and whose only contact with Georgia was the act of operating a car in the state and of having an accident here could be subjected to personal jurisdiction to answer claims arising from the accident, yet a person who resided in Georgia at the time of the accident and who, accordingly, had far more substantial contacts with the state could not be sued in Georgia once he had moved out of state. It was this loophole that the 1977 amendment to the long arm statute was designed to close.

5. 248 Ga. at 825, 286 S.E.2d at 707.

6. *Id.* at 825-26, 286 S.E.2d at 706.

7. Under the long arm statute, venue is fixed in the county in which the tortious act or omission occurred. *See* OFFICIAL CODE OF GA. ANN. § 9-10-93 (Michie 1982), GA. CODE ANN. § 24-116 (Harrison 1981) (editorial changes only). Under the Nonresident Motorists Act, on the other hand, at the plaintiff's option venue may be had in the county in which the plaintiff resides, in the county in which the accident occurred, or in the county in which a resident of Georgia joined as a codefendant can be sued. *See* OFFICIAL CODE OF GA. ANN. § 40-

decidedly in the interest of a plaintiff to use the Nonresident Motorists Act to acquire jurisdiction over a former resident and thereby place venue in the plaintiff's own home county or in a resident codefendant's county rather than to use the long arm statute, which sets the venue in the county in which the cause of action arose. In such a case, the following questions will have to be considered: (1) Did overruling *Young* breathe new life into the 1957 amendment to the Nonresident Motorists Act declared by *Young* to be unconstitutional? (2) If so, does the General Assembly's failure to adopt the 1957 statute as part of the Code of 1981 mean that it is no longer a law in force in Georgia?[8] Questions like these pointedly remind us that, even after its demise, *Young* is capable of causing problems.

Unlike the long arm statutes of some sister states,[9] Georgia's long arm statute does not contain a specific domestic relations section that allows the courts to exercise personal jurisdiction over a nonresident for claims for alimony or child support based on the nonresident's former marital domicile in Georgia. In *Warren v. Warren*,[10] the court declined to hold that the 'transacts any business' section of the long arm statute embraces the performance of 'family' as contrasted to 'business' obligations. Although acknowledging that the phrase 'transacts any business' is somewhat ambiguous, the court decided that common understanding limits its meaning to dealings of an industrial, commercial, or professional nature.[11] Thus, the court concluded that the 'transacts any business' subsection "was not intended to extend long-arm jurisdiction to claims, such as alimony, that arise out of the dissolution of the marriage."[12]

12-3 (Michie 1982), GA. CODE ANN. § 68-803 (Harrison 1980) (editorial changes only).

8. The General Assembly at a special session in August-September 1981 enacted a recodified Official Code of Georgia, which took effect on November 1, 1982. *See* Acts 1981, Extraordinary Session, p. 8. The new Code of 1981 states in § 1-1-2 that its enactment was "intended as a recodification, revision, modernization, and reenactment of the general laws of the State of Georgia which are currently of force and is intended . . . to repeal those laws . . . which have been declared unconstitutional."

The Code of 1981 continues in the same section, however, to provide that "the enactment of this Code by the General Assembly *is not intended to alter the substantive law in existence on the effective date of this code.*" *Id.* (emphasis added).

Since *Crowder v. Ginn* was decided in January 1982, a plausible argument can be made that its express overruling of *Young v. Morrison* revived the 1957 amendment to the Nonresident Motorists Act and that this law, although considered to be unconstitutional in 1981 and hence omitted from the 1981 Code, nevertheless, sprang to life in January 1982, and survives as a law now in force in Georgia despite its omission from the 1981 Code.

9. *See, e.g.*, FLA. STAT. § 48-193(1)(e) (1976); N.C. GEN. STAT. § 1-75.4(12) (Supp. 1981). *See also* Whitaker v. Whitaker, 237 Ga. 895, 230 S.E.2d 486 (1976).

10. 249 Ga. 130, 287 S.E.2d 524 (1982).

11. *Id.* at 131, 287 S.E.2d at 526.

12. *Id.*

On the other hand, a separation agreement is contractual in nature, is the product of negotiation, and involves definite elements of a business nature,[13] all of which bring it within the purview of the 'transacts any business' language of the statute. Thus, the court held that executing a separation agreement in Georgia constitutes the transaction of business within the meaning of the long arm statute and, for claims connected with the agreement, permits the state courts to exercise personal jurisdiction over a spouse who now resides in another state.[14] Once a separation agreement is incorporated into and becomes part of the parties' final divorce decree, however, any action with respect to issues covered in the agreement must be brought on the judgment itself rather than the agreement. Rendering such a judgment in Georgia does not qualify as sufficient minimum contacts to allow Georgia courts thereafter to exercise personal jurisdiction under the long arm statute over a spouse who was a resident of Georgia when the agreement was executed or the judgment entered.[15]

The individual character of the minimum contacts required to establish jurisdiction under the long arm statute was emphasized in *Girard v. Weiss*,[16] which held that a nonresident defendant who is sued individually cannot be shown to have availed himself purposefully of the privilege of doing business in Georgia simply because a foreign corporation of which he was an officer and director had minimum contacts with the state that could subject the corporation to personal jurisdiction. Other officers, directors, and agents who personally visited Georgia to carry on the business of the foreign corporation might subject the corporation and themselves, individually, to jurisdiction in Georgia courts for claims arising from those activities.[17] Nevertheless, *Girard* requires, in the name of due process, that a more particularized assessment of each defendant's contacts with Georgia be made in order to ensure that every defendant sued individually has the requisite purposeful contacts.[18]

In holding that the state lacked power under the long arm statute to obtain personal jurisdiction over a nonresident newsman for acts of defamation committed within the state, the court of appeals in *Cassells v. Bradlee Management Services, Inc.*[19] determined that the explicit defamation exclusion in subsection (b) should be read by implication into

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13. *Id.* at 132, 287 S.E.2d at 526.
14. *Id.*
15. Pannell v. Pannell, 162 Ga. App. 96, 97, 290 S.E.2d 184, 185 (1982).
16. 160 Ga. App. 295, 287 S.E.2d 301 (1981).
17. *Id.* at 298, 287 S.E.2d at 303.
18. *Accord* Coopers & Lybrand v. Cocklereece, 157 Ga. App. 240, 246, 276 S.E.2d 845, 850 (1981) (acts of alleged coconspirator within state do not establish jurisdiction over nonresident alleged coconspirator absent evidence of purposefully sought activity with or in Georgia by the nonresident).
19. 161 Ga. App. 325, 291 S.E.2d 48 (1982).

subsection (c) as well.[20] As originally enacted, the long arm statute did not contain the provisions of subsection (c), and in its earlier cases applying subsection (b), the court of appeals adopted the restrictive New York rule[21] requiring both act and injury to occur within the state.[22] This result was unsatisfactory to the Georgia General Assembly, which amended the long arm statute to circumvent the restrictive interpretation of the court of appeals by adding the present subsection (c).[23] The Georgia Supreme Court also rejected this narrow view and instead opted for the Illinois rule[24] that extended judicial jurisdiction under subsection (b) to the limits of due process.[25] Thus, the court of appeals in *Cassells* held that the effect of this construction of subsection (b) by the supreme court was to reduce subsection (c) of the act to "nothing more than an advisory appendage designed to correct the interpretation previously given to subsection (b)."[26]

Although federal courts in Georgia had reached differing conclusions about the applicability of subsection (c) to defamation actions, the pre-

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20. *See* GA. CODE ANN. § 24-113.1 (Harrison 1981), OFFICIAL CODE OF GA. ANN. § 9-10-91 (Michie 1982) (editorial changes only):

> A court of this State may exercise personal jurisdiction over any nonresident, or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use or possession enumerated in this section, in the same manner as if he were a resident of the State, if in person or through an agent, he:
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> . . .
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> (b) Commits a tortious act or omission within this State, except as to a cause of action for defamation of character arising from the act; or
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> (c) Commits a tortious injury in this State caused by an act or omission outside this State, if the tortfeasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State. . . .

21. *See* Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). This case construed New York's long arm statute, N.Y. CIV. PRAC. LAW § 302(a)(2) (McKinney 1962), which provides in part for personal jurisdiction over a nondomiciliary who "commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act." *Id.* The court construed this language to mean that the act as well as the injury must occur in the forum. 15 N.Y.2d at 460, 209 N.E.2d at 77, 261 N.Y.S.2d at 21.

22. *See, e.g.*, O'Neal Steel, Inc. v. Smith, 120 Ga. App. 106, 169 S.E.2d 827 (1969).

23. 1970 Ga. Laws 443.

24. *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). This case construed Illinois' long arm statute, ILL. REV. STAT. ch. 110, § 17(1)(b) (1959), which provides that a nonresident who, either in person or through an agent, commits a tortious act within the state submits himself to jurisdiction in Illinois. The court construed this language to mean that jurisdiction could be asserted over a nondomiciliary if the injury occurred in the state, even if the tortious act did not occur there. 22 Ill. 2d at 436, 176 N.E.2d at 763.

25. Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 195 S.E.2d 399 (1973).

26. 161 Ga. App. at 327, 291 S.E.2d at 50.

vailing federal view was to allow jurisdiction under subsection (c) when the nonresident defendant had significant contacts with the state apart from the acts giving rise to the alleged defamation.[27]

Since defendant Cassells was the Washington, D.C., news bureau chief for Cox Broadcasting Corporation, the Georgia corporation that owns and operates television station WSB-TV, Cassells' total contacts with Georgia might well have satisfied the federal courts' test for allowing the defamation action against him to be brought under subsection (c) of the long arm statute. In light of the clear purpose for adding subsection (c), however, and the Georgia Supreme Court's recently expressed view that "there is no essential difference between subsection (b) and (c),"[28] the court of appeals reasoned that the blanket exclusion for defamation actions should apply alike to both subsections.

The supreme court disagreed.[29] Although protecting first amendment values warrants requiring greater contact to subject a nonresident to personal jurisdiction in defamation suits than in other kinds of tort actions, this protection does not mean that long arm jurisdiction is never exercisable in a defamation case.[30] Thus, the supreme court ruled that "under subsection (c) of our Long Arm Statute, Georgia courts do have jurisdiction over nonresident defendants in defamation cases when there exist requisite minimum contacts other than the commission of the tort itself."[31]

Rather surprisingly, however, the court found those requisite minimum contacts lacking in this case. Although Cassells prepared the script for a story about abused patients in a Georgia nursing home, appeared in the report as narrator, spoke the alleged defamatory words, and sent the videotape report to his Georgia employer who broadcast it on WSB-TV, the supreme court ruled that Cassells' contacts with Georgia did not meet the specific requirements set out in subsection (c). Thus, according to the supreme court, Cassells individually, as contrasted with his employer, Cox Broadcasting, had not regularly done or solicited business in Georgia, engaged in a persistent course of conduct in the state, or derived substantial revenue from goods used or services rendered in Georgia.[32]

The court did note that Cassells' "contacts with Georgia might be sufficient to satisfy the general requirements of due process."[33] The problem

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27. *See, e.g.*, Process Control Corp. v. Witherup Fabrication, 439 F. Supp. 1284 (N.D. Ga. 1977).
28. Clarkson Power Flow, Inc. v. Thompson, 244 Ga. 300, 302, 260 S.E.2d 9, 11 (1979).
29. Bradlee Management Servs. v. Cassells, 249 Ga. 614, 617, 292 S.E.2d 717, 720 (1982).
30. *Id.* at 617, 292 S.E.2d at 720.
31. *Id.* at 617-18, 292 S.E.2d at 720.
32. *Id.* at 618, 292 S.E.2d at 720.
33. *Id.*

was that the more specific, quantified standards of subsection (c) were not satisfied. The result in *Cassells* suggests that the General Assembly should consider the advisability of closing the gap between the present reach of Georgia's long arm statute in defamation actions and the greater reach of this state's judicial power permitted by due process. After all, one must wonder how a nonresident individual would ever satisfy the requirements of subsection (c) in a defamation action if WSB-TV's Andy Cassells does not.

In upholding the constitutionality of Georgia Code Ann. section 74-302(a)[34] as the basis for obtaining personal jurisdiction over the putative father of an illegitimate child in an action to establish paternity and recover child support, the court in *Bell v. Arnold*[35] rejected the nonresident defendant's due process arguments. The terms of the statute were satisfied because both parents were residents of Georgia when the child was conceived, although the father left the state after the child was born. The court concluded that fathering a child in Georgia easily satisfied the minimum contacts required by due process.[36]

II. VENUE

In the decade since the Georgia Supreme Court announced, in *Buford v. Buford*,[37] that under the Georgia Constitution venue in a divorce action is jurisdictional and cannot be waived, that rule has been criticized as wasteful and uneconomical for both the litigants and the courts.[38] The supreme court's opinion in *Herring v. Herring*[39] was the first portent that the court might soften its 'no waiver' rule for divorce actions and hold that venue could be waived for the defendant's counterclaim for divorce

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34. GA. CODE ANN. § 74-302(a) (Harrison 1981), OFFICIAL CODE OF GA. ANN. § 19-7-41 (Michie 1982):

> In a proceeding under this chapter, the court, pursuant to Title 81A, the "Georgia Civil Practice Act, " may order service upon a person outside the State upon a finding that there is a constitutionally permissible basis for jurisdiction over such person arising out of the fact that the child was conceived as a result of an act of sexual intercourse within this State while either parent was a resident of this State and the person on whom service is required is the alleged father of the child.

35. 248 Ga. 9, 279 S.E.2d 449 (1981).

36. *Id.* at 10, 279 S.E.2d at 450.

37. 231 Ga. 9, 200 S.E.2d 97 (1973) *overruled by* Ledford v. Bowers, 248 Ga. 804, 286 S.E.2d 293 (1982).

38. 231 Ga. at 12, 200 S.E.2d at 99 (Jordan, J., concurring); *see also* Beaird & Ellington, *Trial Practice and Procedure, Annual Survey of Georgia Law, 1973-1974*, 26 MERCER L. REV. 239, 246 (1974); Ellington & Gary, *Trial Practice and Procedure, Annual Survey of Georgia Law, 1980-1981*, 33 MERCER L. REV. 275, 285-86 (1981).

39. 246 Ga. 462, 271 S.E.2d 857 (1980). *See also* Harrison v. Speidel, 244 Ga. 643, 644 n.1, 261 S.E.2d 577, 578 n.1 (1979) (dicta).

in response to the plaintiff's suit seeking separate maintenance or child support. Although stopping a step short of ruling that venue for defendant-husband's counterclaim for divorce had been waived, the court demonstrated an unmistakable willingness to preserve uncontested divorce judgments from attack by finding that the wife, who resided in a different county and who brought suit for separate maintenance in the county in which her husband lived, was estopped after judgment to contend that the court had lacked jurisdiction over her for the counterclaim.[40]

In *Ledford v. Bowers*,[41] the supreme court took that salutary next step and expressly overruled *Buford*. The *Ledford* case concerned an action filed in Toombs County by plaintiff-father, a resident of Cherokee County, against his former wife, a resident of Toombs County. Plaintiff sought a modification of his visitation rights with his minor daughter. Defendant-wife opposed the modification and filed a counterclaim for increased child support. The trial court granted plaintiff's request for modification of his visitation rights and dismissed defendant's counterclaim for lack of venue. The supreme court reversed on both points. Although the court in *Ledford* could have distinguished *Buford* by continuing to treat venue for divorce as a special circumstance, the court chose instead to disapprove the rationale employed by *Buford* and to reaffirm and extend the well-established general principle that

> [o]ne who goes into the court of a county other than that of his residence, to assert a claim or set up an equity, must be content to allow that court to determine any counterclaim growing out of the original suit which the defendant sees fit to set up by a cross-action.[42]

The court in *Henderson v. Kent*[43] recognized the basic distinction between the corporate entity and its shareholders and corporate officers for purposes of venue. Henderson Electric Company brought suit in DeKalb Superior Court against two corporate officers for an unspecified breach of fiduciary duty. Defendants, in their status as minority stockholders, filed counterclaims against individual members of the Henderson family and another officer of the corporation, alleging various acts of wrongdoing. None of the individuals named in the counterclaim was a resident of DeKalb County.[44] The counterclaim was dismissed as improper. Although Henderson Electric Company, the named plaintiff, submitted to

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40. 246 Ga. at 463, 271 S.E.2d at 860.

41. 248 Ga. 804, 286 S.E.2d 293 (1982).

42. *Id.* at 806, 286 S.E.2d at 295 (quoting Ray v. Home & Foreign Inv. & Agency Co., 106 Ga. 492, 497, 32 S.E. 603, 606 (1899)).

43. 158 Ga. App. 206, 279 S.E.2d 503 (1981).

44. *Id.* at 207, 279 S.E.2d at 504.

the jurisdiction of the court generally for the purpose of valid counterclaims, defendant's counterclaims sought no relief against the company. Moreover, venue for claims asserted against the corporation was insufficient to support venue for a counterclaim against its officers and shareholders who were not named as parties plaintiff in the lawsuit, and who did not reside in the county.[45]

The proper venue for suits against corporations was clarified in two cases decided during the survey period. In *Hagood v. Garner*,[46] plaintiffs brought suit in Hall County to enforce a contract against defendant, a foreign corporation, and asserted that venue was proper there under Georgia law.[47] Defendant had an office in Hall County and was transacting business there at the time the cause of action arose. At the time suit was filed, however, defendant no longer had an office in the county. The court of appeals ruled that the Code offers the county in which the contract sought to be enforced was made or is to be performed as an alternative venue site only if the corporation *has* an office in the county and transacts business at the time the suit is filed.[48] The fact that defendant *had* an office in the county and transacted business there at the time the claim arose does not satisfy the terms of the statute.[49]

Although semantically correct and in accord with the general principle that whether venue exists ordinarily is determined at the time the action is commenced,[50] *Hagood* nevertheless reveals a serious defect in the venue statutes. Recent Georgia decisions have stretched to find venue proper under the statute in suits against corporations that continue to transact business in a county even though the corporation's only 'office' in the county is somewhat artificial.[51] Yet, it appears now that a corporation that ceases to transact business in a county and closes its office there before suit is filed can avoid having that county declared as the forum for

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45. *Id.*

46. 159 Ga. App. 289, 283 S.E.2d 355 (1981).

47. *See* GA. CODE ANN. § 22-404(c) (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 14-2-63(c) (Michie 1982) (editorial change only):

> For the purpose of determining venue, each domestic corporation and each foreign corporation authorized to transact business in this State shall be deemed to reside and may be sued on contract in that county in which the contract sought to be enforced was made or is to be performed, if it has an office and transacts business in that county. . . .

48. 159 Ga. App. at 289, 283 S.E.2d at 355.

49. *Id.*

50. *See* Franek v. Ray, 239 Ga. 282, 236 S.E.2d 629 (1977).

51. *See* Scott v. Atlanta Dairies Co-op., 239 Ga. 721, 723, 238 S.E.2d 340, 342 (1977) ('office' equals 'place of business'); Musgrove v. Kirksey Ford Sales, Inc., 159 Ga. App. 276, 278, 283 S.E.2d 292, 293 (1981) (Ford Motor Credit Company used dealer's facilities in extending credit to customers); Gillis v. Orkin Exterminating Co., 155 Ga. App. 804, 805-06, 272 S.E.2d 728, 729-30 (1980) (telephone answering service).

the lawsuit against it no matter how substantial its activities in the county had been. In such a case, a plaintiff will be compelled to sue the corporation in whatever county its registered office is located by its corporation charter.[52]

The corporate venue statute[53] also received a narrow reading by the supreme court. In *Ball v. Brunswick Pulp & Paper Co.*,[54] the court ruled that this statute offers an alternative place of venue only for suits to *enforce*, not to set aside, contracts.[55]

III. Scope and Applicability of the CPA

The CPA governs the procedure in courts of record in suits of a civil nature and, after a 1981 amendment, also applies to "courts which are not courts of record to the extent that no other rule governing a particular practice or procedure . . . is prescribed by general or local law."[56] Moreover, the CPA applies to "all special statutory proceedings except to the extent that specific rules of practice and procedure in conflict herewith are expressly prescribed by law."[57] Even then, broad provisions of the CPA are made applicable to such proceedings by CPA section 81,[58] but the rules governing service of process are not so designated. Because garnishment is a special statutory proceeding and specifically requires personal service on the garnishee,[59] the conventional view was that other methods of serving process permitted by CPA section 4[60] were inapplicable to garnishment proceedings.[61] In *Alpha Transportation Service, Inc. v. Cartwright*,[62] however, the supreme court ruled that CPA section 4(j)[63]

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52. *See* Ga. Code Ann. § 22-404(b) (Harrison 1977), Official Code of Ga. Ann. § 14-2-63(b) (Michie 1982) (editorial changes only).

53. *Id.* § 22-404, Official Code of Ga. Ann. § 14-2-63.

54. 248 Ga. 106, 281 S.E.2d 571 (1981).

55. *See* text of Ga. Code Ann. § 22-404(c), Official Code of Ga. Ann. § 14-2-63(c), *supra* note 47.

56. Official Code of Ga. Ann. § 9-11-1 (Michie 1982), Ga. Code Ann. § 81A-101 (Harrison 1977) (new law makes Civil Practice Act applicable to courts not of record if no other rule governs them).

57. Ga. Code Ann. § 81A-181 (Harrison 1977), Official Code of Ga. Ann. § 9-11-81 (Michie 1982) (editorial changes only).

58. *Id.*

59. Ga. Code Ann. § 46-103 (Harrison 1979), Official Code of Ga. Ann. § 18-4-62 (Michie 1982) (editorial changes only).

60. Official Code of Ga. Ann. § 9-11-4 (Michie 1982) (formerly Ga. Code Ann. § 81A-104 (Harrison 1977)).

61. *See, e.g.*, Cartwright v. Alpha Transp. Serv., Inc., 159 Ga. App. 296, 298-99, 283 S.E.2d 282, 284 (1981), *rev'd*, 248 Ga. 701, 285 S.E.2d 713 (1982).

62. 248 Ga. 701, 285 S.E.2d 713 (1982).

63. Ga. Code Ann. § 81A-104(j) (Harrison 1977), Official Code of Ga. Ann. § 9-11-4(j) (Michie 1982) (editorial changes only):

makes all the methods of service provided in CPA section 4 available as alternative methods of service in special statutory proceedings. Although the CPA's provisions for service of process are not specifically designated by CPA section 81[64] as applicable to special statutory proceedings, these methods are made applicable nonetheless by CPA section 4(j). The effect of this decision is to expand greatly the methods of service that may be employed in special statutory proceedings.

IV. PLEADING

If a plaintiff's complaint shows on its face that the action was commenced after the applicable statute of limitations ran, the defendant can assert the statute of limitations defense by a motion to dismiss. Georgia law, however, extends the period for commencing civil actions for various reasons, including the plaintiff's insanity or other disability during part of the statutory period.[65] In *Mullins v. Belcher*,[66] the court of appeals made clear that to avoid having the facially defective complaint dismissed by motion based on the bar of the statute of limitations in such cases, the plaintiff must plead specifically the disability that extends the statute or introduce competent evidence of the disability by appropriate means at the hearing on the defendant's motion.

In *Hanover Insurance Co. v. Nelson Conveyor & Machinery Co.*,[67] the court of appeals held that a defendant may not raise an affirmative defense to oppose a motion for summary judgment when the defense was not raised previously in the pleadings. As authority, the court cited *First National Bank v. McClendon*[68] and *New Homes Products v. Commercial Plastics & Supply Corp.*,[69] both cases in which a party sought to use an unpleaded affirmative defense to *support* a motion for summary judg-

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The methods of service provided in this section may be used as alternative methods of service in proceedings in the court of ordinary and in any other special statutory proceedings, and may be used with, after or independently of the method of service specifically provided for in any such proceeding, and, in any such proceeding, service shall be sufficient when made in accordance with the statutes relating particularly to the proceeding or in accordance with this section.

64. *See supra* note 57.

65. *See, e.g.*, OFFICIAL CODE OF GA. ANN. § 9-3-90 (Michie 1982), GA. CODE ANN. § 3-801 (Harrison 1975) (new law replaces reference to infants, idiots, and insane persons), which provides, "[m]inors, persons who are legally incompetent because of mental retardation or mental illness, or persons imprisoned, who are such when the cause of action accrues, shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons."

66. 159 Ga. App. 520, 284 S.E.2d 35 (1981).

67. 159 Ga. App. 13, 282 S.E.2d 670 (1981).

68. 147 Ga. App. 722, 250 S.E.2d 175 (1978).

69. 141 Ga. App. 199, 233 S.E.2d 45 (1977).

ment.[70] At the same time, the court failed to cite another line of court of appeals cases that has permitted unpleaded affirmative defenses to be raised by parties to defeat motions for summary judgment.[71] Given these conflicting decisions, it is difficult to say with any assurance what the Georgia law is today on using unpleaded affirmative defenses to oppose or support motions for summary judgment.

In clarifying this area, the courts should consider carefully the policy requiring that affirmative defenses be pleaded and the very different considerations for impinging on that policy when unpleaded affirmative defenses are used to defeat rather than support motions for summary judgment. CPA section 8(c)[72] requires certain defenses that serve to avoid rather than to defeat plaintiff's claim head on to be pleaded "to prevent surprise and to give the opposing party fair notice of what he must meet as a defense."[73] The affirmative defenses listed in CPA section 8(c)[74] can be added by amendment,[75] if overlooked in the original pleadings. There is, therefore, no general rule that failing to plead an affirmative defense at the outset results in its waiver.

The rules governing summary judgments require that all material used in support of a motion for summary judgment must be served at least thirty days prior to the time fixed for the hearing on the motion.[76] The purpose of this thirty-day rule is to give the opposing party fair notice of the grounds for the motion and the material on which the movant relies so that the nonmovant may have adequate time to defend.[77] Hence, any possibility that an unpleaded affirmative defense used to support a motion for summary judgment would catch the nonmovant by surprise

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70. For a recent decision in which the court of appeals held that a party could not raise an unpleaded affirmative defense by affidavit to *oppose* a motion for summary judgment, see Dromedary, Inc. v. Restaurant Equip. Mfg. Co., 153 Ga. App. 103, 264 S.E.2d 571 (1980).

71. *See* Williams-East, Inc. v. Weeks, 156 Ga. App. 861, 275 S.E.2d 801 (1981); Bailey v. Polote, 152 Ga. App. 255, 262 S.E.2d 551 (1979); Fortier v. Ramsey, 136 Ga. App. 203, 220 S.E.2d 753 (1975).

72. OFFICIAL CODE OF GA. ANN. § 9-11-8(c) (Michie 1982), GA. CODE ANN. § 81A-108(c) (Harrison 1977) (editorial changes only).

73. Williams-East, Inc. v. Weeks, 156 Ga. App. 861, 862, 275 S.E.2d 801, 802 (1981).

74. CPA section 8(c) includes the following affirmative defenses: Accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license payment, release, res judicata, statute of frauds, statute of limitations, and waiver. OFFICIAL CODE OF GA. ANN. § 9-11-8(c), GA. CODE ANN. § 81A-108(c).

75. *See* Security Ins. Co. v. Gill, 141 Ga. App. 324, 233 S.E.2d 278 (1977).

76. OFFICIAL CODE OF GA. ANN. § 9-11-56(c) (Michie 1982), GA. CODE ANN. § 81A-156(c) (Harrison 1977) (editorial changes only).

77. *See* Benton Bros. Ford Co. v. Cotton States Mut. Ins. Co., 157 Ga. App. 448, 278 S.E.2d 40 (1981).

seems unrealistic. On the other hand, CPA section 56(c)[78] permits a party opposing a motion for summary judgment to offer affidavits and other material to defeat the motion on the eve of the hearing.[79] Thus, contrary to the apparent direction taken by the court of appeals, unfair surprise is more likely when a nonmovant attempts to defeat a summary judgment motion by urging an unpleaded affirmative defense than vice versa.

V. Parties and Claims

In *Clark v. Weaver*,[80] plaintiff in a medical malpractice suit against multiple defendants from different counties made a novel attempt to avoid the operation of the rule that when a judgment is rendered in favor of the resident defendant, the court loses jurisdiction over the nonresident defendants.[81] Of the five defendants sued in this action, two resided in DeKalb County, two in Gwinnett County, and one in Fulton County. Plaintiff simultaneously commenced three identical suits in all three counties against all five defendants. Plaintiff proceeded to prosecute the Fulton County action while attempting to leave the other two actions pending. The DeKalb County defendants moved to dismiss the DeKalb County action pursuant to Code section 3-601, which provides that:

> No suitor may prosecute two actions in the courts at the same time, for the same cause, and against the same party, and in such a case the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously; and the pendency of the former shall be a good defense to the latter, if commenced at different times.[82]

Plaintiff argued that since she had commenced the suits simultaneously, she could elect to pursue one and keep the others pending. Though acknowledging the ingenuity of plaintiff's attempt, the court of appeals held that the prevailing jurisprudential philosophy is that a party is not entitled to prosecute multiple suits for the same cause of action at the same time, irrespective of whether they are filed simultaneously or con-

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78. Official Code of Ga. Ann. § 9-11-56(c) (Michie 1982), Ga. Code Ann. § 81A-156(c) (Harrison 1977) (editorial changes only).

79. *See* Bailey v. Dunn, 158 Ga. App. 347, 280 S.E.2d 388 (1981).

80. 159 Ga. App. 594, 284 S.E.2d 95 (1981).

81. *See* Steding Pile Driving Corp. v. John H. Cunningham & Assocs., 137 Ga. App. 165, 166, 223 S.E.2d 217, 218 (1976):

> Where joint tortfeasors or joint obligors residing in different counties are sued in the county of one, and on the trial of the case the resident defendant is discharged and a verdict returned solely against the non-resident defendant, the court is without jurisdiction to enter a judgment against the non-resident defendant.

82. Ga. Code Ann. § 3-601 (Harrison 1977), Official Code of Ga. Ann. § 9-2-5(a) (Michie 1982) (editorial changes only).

secutively.[83] The statute does allow a plaintiff to select which suit to pursue in the instance of simultaneous filings, an option not available when the suits are commenced at different times. The plaintiff's option, however, is to choose which case to prosecute, not which case to prosecute first.[84]

In *Mathews v. Cleveland*,[85] an attorney filed an affidavit of garnishment on behalf of a deceased judgment creditor. Defendant debtor traversed the garnishment and moved to dismiss the proceeding on the ground that at the time of the filing, plaintiff was deceased. The trial court overruled the traverse and subsequently permitted the substitution of the executor of plaintiff's estate as a party plaintiff.[86] The debtor, nevertheless, maintained that the action was a nullity from the outset and that this defect could not be cured by substitution. The court of appeals agreed and reversed.[87]

The court noted that under section 17(a) of the CPA[88] an action is not subject to dismissal on the ground that it is not prosecuted in the name of the real party in interest, until a reasonable time has been allowed for substitution of the real party in interest. The court pointed out, however, that section 17(a) contemplates that an action has been validly commenced prior to substitution.[89] The court reiterated the rule that a dead person cannot validly commence or maintain an action and that an attempt to do so is void ab initio.[90] Hence, the trial court erred in allowing the substitution. It should be emphasized that the holding in *Mathews* is limited to cases in which an action is commenced on behalf of a deceased person and does not nullify an action when a party dies during the pendency of a case. Section 25(a)(1) of the CPA[91] permits the substitution of another party for a party who dies after an action has been commenced.

Section 25(c) of the CPA[92] also provides that in the event of a transfer of interest, the action may be continued by or against the original party unless the court provides otherwise. In *Goodyear v. Trust Co. Bank*,[93]

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83. 159 Ga. App. at 595, 284 S.E.2d at 97.

84. *Id.*

85. 159 Ga. App. 616, 284 S.E.2d 634 (1981).

86. *Id.* at 616, 284 S.E.2d at 635.

87. *Id.* at 618, 284 S.E.2d at 636.

88. GA. CODE ANN. § 81A-117(a) (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 9-11-17(a) (Michie 1982) (editorial changes only).

89. 159 Ga. App. at 617, 284 S.E.2d at 635-36.

90. *See, e.g.*, Sirmans v. Banks, 217 Ga. 64, 121 S.E.2d 137 (1961).

91. GA. CODE ANN. § 81A-125(a)(1) (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 9-11-25(a)(1) (Michie 1982) (editorial changes only).

92. GA. CODE ANN. § 81A-125(c) (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 9-11-25(c) (Michie 1982) (editorial changes only).

93. 248 Ga. 407, 284 S.E.2d 6 (1981).

Goodyear sued seeking a declaratory judgment, an injunction, and damages for defendants' interference with certain easements that he claimed for his beachfront property. Goodyear conveyed his interest in the property but continued to prosecute the suit. The supreme court held that, notwithstanding the language of section 25(c), Goodyear could not continue to maintain the action.[94] The court stated: "[Section] 25 does not determine what actions shall survive the . . . transfer of interest by a party; it deals only with the mechanics of substitution in an action which *does* survive under the applicable substantive law."[95] The substantive law in Georgia is that such an action by a property owner does not survive the transfer of his interest.[96]

VI. DISCOVERY

A. General

During this survey period, a new section was added to the CPA. Section 29.1[97] states that depositions and other discovery material, otherwise required to be filed with the court, will not be filed unless (1) a local rule of court requires it; (2) the court orders it; (3) a party requests it; (4) relief relating to the discovery material is sought; or (5) the material is to be used at a trial or hearing on a motion. The party taking a deposition or requesting discovery is required to retain the original of the deposition or other discovery material and is deemed the custodian of it until it is filed with the court.[98]

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94. *Id.* at 408, 284 S.E.2d at 7.

95. *Id.* at 408, 284 S.E.2d at 7 (quoting 3B J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 25.04[3] (2d ed. 1979) (emphasis in original)).

96. In a related decision, Kelley v. Citizens & S. Nat'l Bank, 160 Ga. App. 405, 287 S.E.2d 343 (1981), the court of appeals announced the rule that venue in an interpleader action under section 22 of the CPA (GA. CODE ANN. § 81A-122 (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 9-11-22 (Michie 1982) (editorial changes only)), is proper in any county in which one of the claimants resides. The court relied upon Williams v. Overstreet, 230 Ga. 112, 195 S.E.2d 906 (1973), a case that concerned the question of venue in an equitable interpleader action pursuant to GA. CODE ANN. § 37-1503 (Harrison 1979), OFFICIAL CODE OF GA. ANN. § 23-3-90 (Michie 1982) (editorial changes only), and that applied the rules of venue in equity cases. GA. CONST. art. VI, § 14, para. 3, GA. CODE ANN. § 2-4303 (Harrison 1977).

97. OFFICIAL CODE OF GA. ANN. § 9-11-29.1 (Michie Supp. 1982), GA. CODE ANN. § 81A-129.1 (Harrison Supp. 1982).

98. *Id.*

B. Scope of Discovery

In *Bullard v. Ewing*,[99] plaintiff, a homeowner, sued her insurance carrier, the carrier's adjuster, and a builder for negligence and conspiracy in failing to repair her home properly following a fire.[100] The adjuster determined that the loss should be repaired, and the insurance carrier exercised its option to repair the loss and hired the builder to make the repairs. A dispute arose between plaintiff and defendants over the workmanship and timeliness of the repair work. Plaintiff alleged that the three defendants had conspired to injure her. During discovery, plaintiff posed interrogatories to the builder. In one interrogatory, plaintiff sought details of every construction repair job the builder had engaged in during a specified period of time. In two other interrogatories, plaintiff sought the details of all the builder's jobs with which defendant adjuster was in any way concerned and the details of all jobs for which defendant insurance company paid for the repair or replacement of property. The builder objected to these interrogatories on the grounds that plaintiff did not seek information relevant to the subject matter of the litigation and that the information sought was inadmissible and not calculated to lead to the discovery of admissible evidence.[101] The trial court sustained the objections.

The court of appeals affirmed the trial court on the first interrogatory and concluded that it was too general and unreasonably broad.[102] On the other interrogatories, the court noted that the party opposing discovery has the burden of showing that there should be no discovery.[103] Plaintiff hypothesized that the interrogatories relating to other jobs involving the same defendants might lead to the discovery of evidence showing that defendants previously had worked together and that the insurance company and the adjuster, therefore, had knowledge of the builder's incompetence.[104] Although there was no evidence that this was the case, defendants had failed to show that it was not the case. Furthermore, the court emphasized that admissibility is not the test of discoverability. It stated that "[t]he discovery procedure is to be given a liberal construction in favor of supplying a party with the facts without reference to whether the facts sought are admissible upon the trial of the action."[105] The court reversed the trial court and remanded for a determination of whether the

99. 158 Ga. App. 287, 279 S.E.2d 737 (1981).
100. *Id.* at 287, 279 S.E.2d at 737-38.
101. *Id.* at 289, 279 S.E.2d at 739.
102. *Id.* at 290, 279 S.E.2d at 740.
103. *Id.* at 291, 279 S.E.2d at 740.
104. *Id.*
105. *Id.*

interrogatories were unduly burdensome.

In *E.H. Siler Realty & Business Broker, Inc. v. Sanderlin*,[106] defendant requested, among other things, production of all documents and memoranda that Sanderlin intended to use as evidence at trial. The court of appeals sustained Sanderlin's objections to this request and held that the request was outside the permissible scope of discovery.[107] The court analogized the interrogatory to a request for the identity of all witnesses a party intends to call at trial, which, according to prior decisions,[108] is outside the permissible scope of discovery. According to the court, an interrogatory or request for a list "of all documents relied upon to demonstrate and support *facts* relevant to the litigation would be within the permissible scope of discovery."[109]

Finally, the Georgia Supreme Court was faced with an issue of first impression: whether a trial court can prohibit the dissemination of information obtained by one party from another through discovery. The question arose in the case of *Georgia Gazette Publishing Co. v. Ramsey*,[110] in which plaintiff Ramsey, a dentist in Savannah, Georgia, sued a newspaper and alleged that the newspaper had violated his right to privacy by publishing articles stating that he was a suspect in a murder case. Ramsey sought and obtained from the trial court a protective order that prohibited the newspaper from disseminating any information gained by discovery from Ramsey without following certain procedures, including notice before disclosing any material. The majority of the supreme court concluded[111] that the protective order violated the right to free speech embodied in the first amendment to the United States Constitution[112] and in the Constitution of Georgia.[113] Justice Smith, in his dissent, criticized the unqualified tone of the majority's holding: "Regrettably, the majority concludes that, regardless of the severity and certainty of the harm to occur upon publication of information obtained through discovery, a trial court is powerless to act because of the 'plain language' of Code Ann. § 2-104."[114] Justice Smith noted that under CPA section 26(c),[115] the trial court may issue protective orders to prevent a party

106. 158 Ga. App. 796, 282 S.E.2d 381 (1981).

107. *Id.* at 798, 282 S.E.2d at 383.

108. *See* Grant v. Huff, 122 Ga. App. 783, 178 S.E.2d 734 (1970); Nathan v. Duncan, 113 Ga. App. 630, 149 S.E.2d 383 (1966).

109. 158 Ga. App. at 798, 282 S.E.2d at 383 (emphasis in original).

110. 248 Ga. 528, 284 S.E.2d 386 (1981).

111. *Id.* at 530, 284 S.E.2d at 387.

112. U.S. CONST. amend. I.

113. GA. CONST. art. I, § 1, para. 4, GA. CODE ANN. § 2-104 (Harrison 1977).

114. 248 Ga. at 534-35, 284 S.E.2d at 390 (Smith, J., dissenting).

115. GA. CODE ANN. § 81A-126(c) (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 9-11-26(c) (Michie 1982) (editorial changes only).

from experiencing "annoyance, embarrassment, oppression, or undue burden"[116] and suggested that the trial court's power under section 26(c) is limited, if not destroyed, by the majority's unqualified interpretation of the right of free speech.[117]

C. Depositions

In *Global Van Lines, Inc. v. Daniel Moving & Storage, Inc.*,[118] the court of appeals decided the novel question of the appropriate place to take the deposition of officers and agents of a defendant corporation. Defendant corporation's officers and agents, who resided and were employed in California, objected to coming to Georgia to be deposed. The court held that "[i]t is presumed that a defendant will be examined at his residence or at his place of business or employment; if another place is named and defendant files a timely objection, the objection should be sustained absent some unusual circumstances to justify putting the defendant to such inconvenience."[119] The fact that defendants had filed a counterclaim did not alter the operation of this rule.[120]

D. Admissions

In *Whitemarsh Contractors, Inc. v. Wells*,[121] the supreme court elaborated upon the test for determining whether a party should be permitted

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116. 248 Ga. at 535 n.2, 284 S.E.2d at 390 n.2 (Smith, J., dissenting) (quoting GA. CODE ANN. § 81A-126(c) (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 9-11-26(c) (Michie 1982) (editorial changes only)).

117. 248 Ga. at 534-35, 284 S.E.2d at 390 (Smith, J., dissenting).

118. 159 Ga. App. 124, 283 S.E.2d 56 (1981).

119. *Id.* at 125, 283 S.E.2d at 57 (quoting Grey v. Continental Mktg. Assocs., 315 F. Supp. 826, 832 (N.D. Ga. 1970)).

120. 159 Ga. App. at 125, 283 S.E.2d at 57. In Transamerica Ins. Co. v. Thrift-Mart, Inc., 159 Ga. App. 874, 285 S.E.2d 566 (1981), the court held that a deposition taken in one case ordinarily cannot be used in a subsequent case against a party who was not a party in the first case. The admissibility of depositions taken in a prior case is governed by OFFICIAL CODE OF GA. ANN. § 24-3-10 (Michie 1982), GA. CODE ANN. § 38-314 (Harrison 1981) (editorial changes only), which provides that the prior testimony of a witness who is unavailable for a subsequent trial may be admitted if the testimony was given under oath on a former trial, upon substantially the same issue and between substantially the same parties. Section 32(a) of the CPA (OFFICIAL CODE OF GA. ANN. § 9-11-32(a) (Michie 1982), GA. CODE ANN. § 81A-132(a) (Harrison 1977) (editorial changes only)), arguably would permit the use of a deposition taken in a former trial to be used in a subsequent trial against a party who was not a party to the first trial on the theory that the new party's interests were represented by another party with the same adversarial motive to cross-examine the defendant; the court in *Transamerica*, however, rejected such a theory on the ground that it would create the anomalous situation that prior trial testimony would be inadmissible under section 38-314 (presently section 24-3-13), but a deposition in the same case might be admissible.

121. 249 Ga. 194, 288 S.E.2d 198 (1982).

to withdraw admissions resulting from his failure to respond to requests for admission. In *Cielock v. Munn*,[122] the court had decided in 1979 that a two-part test should be applied: (1) Whether the presentation of the merits of the action will be subserved by permitting withdrawal of admissions; and (2) whether the party opposing the motion to withdraw can satisfy the court that the withdrawal or amendment of the admissions will prejudice him in maintaining his action on the merits.[123] In *Cielock*, Justice Hill had offered an expansive concurring opinion in which he expressed the view that the first prong of the test cannot be "perfunctorily satisfied"[124] simply by filing a motion to withdraw admissions. The court first should determine which party would bear the burden of proof on the subject matter of the request at trial. If the party moving to withdraw the admission has the burden of proof on the subject matter of the request, then he must show that the denial of the request can be proved by competent evidence "having a modicum of credibility"[125] and that the motion is not offered solely for purposes of delay. If, on the other hand, the party opposing the motion to withdraw has the burden of proof on the subject matter of the request, then the movant is required to establish that the admitted request either can be refuted by admissible evidence "having a modicum of credibility" or is incredible on its face, and that the motion to withdraw is not offered solely for purposes of delay.[126] In *Whitemarsh Contractors*, the supreme court adopted these sensible views expressed by Justice Hill in *Cielock* and explained that those views had not been incorporated into the majority decision at that time because the precise question had not been presented.[127]

VII. DISMISSALS

Section 41(a) of the CPA[128] states the three dismissal rule: a party may dismiss voluntarily and refile a complaint two times, but the third voluntary dismissal acts as an adjudication on the merits. In *Reese v. Frazier*,[129] the court of appeals held "that only voluntary dismissals filed by a plaintiff are to be counted for purposes of that section."[130] Although that

122. 244 Ga. 810, 262 S.E.2d 114 (1979).

123. *See* GA. CODE ANN. § 81A-135 (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 9-11-36(b) (Michie 1982) (editorial changes only).

124. 244 Ga. at 812, 262 S.E.2d at 115 (Hill, J., concurring).

125. *Id.* at 813, 262 S.E.2d at 116.

126. *Id.*

127. 249 Ga. at 196, 288 S.E.2d at 199.

128. OFFICIAL CODE OF GA. ANN. § 9-11-41(a) (Michie & Supp. 1982), GA. CODE ANN. § 81A-141(a) (Harrison 1977 & Supp. 1982) (editorial changes only).

129. 158 Ga. App. 237, 279 S.E.2d 529 (1981).

130. *Id.* at 238, 279 S.E.2d at 531.

case involved a complicated set of filings and dismissals, the court of appeals held that automatic dismissals by operation of law[131] and involuntary dismissals on grounds of a prior pending action did not count for purposes of section 41(a).[132]

Section 41(b)[133] was amended during this survey period to provide that a dismissal for failure to prosecute does not operate as an adjudication on the merits.[134] The amendment overrules a line of decisions holding that a dismissal for failure to prosecute under section 41(b) is an adjudication on the merits.[135] The amendment preserves the language to the effect that any dismissal under section 41(b), other than a dismissal for lack of jurisdiction, improper venue, or lack of an indispensible party, operates as an adjudication on the merits unless otherwise specified.

VIII. TRIALS

In *Cawthon v. Douglas County*,[136] the supreme court reaffirmed that there is no constitutional or statutory right to a jury trial in equity cases. In support of her argument that there was a statutory right to a jury trial, defendant cited Georgia Code Ann. section 37-1101,[137] the final sentence of which states that when no issue of fact is involved in a claim for equitable relief, the verdict of a jury is unnecessary. Defendant argued that by implication this language created a statutory right to a jury trial. The court traced the history of this Code section and determined that it must be read in light of a former Code section[138] that did provide a right to a jury trial in equity cases when an issue of fact was involved; this provi-

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131. The dismissal was by operation of section 41(e) of the CPA (GA. CODE ANN. § 81A-141(e) (Harrison 1977 & Supp. 1982), OFFICIAL CODE OF GA. ANN. § 9-11-41(e) (Michie & Supp. 1982) (editorial changes only)), which provides that an action shall stand dismissed automatically when no written order is taken for a period of five years.

132. In Johnson v. Freeman, 160 Ga. App. 431, 287 S.E.2d 314 (1981), plaintiff, who was not represented by counsel, filed four separate but related actions. After plaintiff retained counsel, the attorney dismissed all four suits and brought one consolidated action. The court of appeals held that the dismissal of the four suits did not act as an adjudication on the merits under the three dismissal rule and stated that there actually had been only one dismissal of several suits which should have been filed as one suit in the first place.

133. GA. CODE ANN. § 81A-141(b) (Harrison 1977 & Supp. 1982), OFFICIAL CODE OF GA. ANN. § 9-11-41(b) (Michie & Supp. 1982) (editorial changes only).

134. 1982 Ga. Laws 784.

135. *See* City of Atlanta v. Schaffer, 245 Ga. 164, 264 S.E.2d 6 (1980); Krasner v. Verner Auto Supply, Inc., 130 Ga. App. 892, 204 S.E.2d 770 (1974).

136. 248 Ga. 760, 286 S.E.2d 30 (1982).

137. GA. CODE ANN. § 37-1101 (Harrison 1979), OFFICIAL CODE OF GA. ANN. § 23-4-34 (Michie 1982) (editorial changes only).

138. GA. CODE § 4849 (1895).

sion, however, was partially repealed by the 1933 Code[139] and repealed in its entirety by the enactment of the CPA.[140] The court stated that the last sentence of section 37-1101 simply was an overlooked counterpart to the repealed Code section and could not be read as creating an implied statutory right to a jury trial.

IX. DEFAULTS

In *Knox v. Landers*,[141] plaintiff sued two defendants for conversion of timber on her property. One defendant was served properly with process, but never answered; the other defendant was never served. A default judgment was entered against both defendants, jointly and severally. Both defendants moved to set aside the judgment. The trial court granted the motion of the defendant who had not been served, but denied the motion of the defendant who had been properly served.[142] The court of appeals held that both judgments should be set aside on the basis of the rule of indivisibility of judgments. According to this rule, a judgment against tortfeasors is deemed to be indivisible when a new trial is granted for some codefendants, but not for all, or when some are released from a judgment rendered against all, if the adjudication was not on the merits. These adjudications include lack of venue, death, or lack of service of process.[143] When there is indivisibility of judgments, then the judgment should be vacated for all defendants, because those who are bound by the judgment could not claim or assert their right to contribution against a codefendant who, for technical reasons, was not bound to the judgment.

This rule and rationale may have had some validity when contribution among joint tortfeasors was permitted only because they were jointly sued and judgment was entered against them. The 1966 and 1972 amendments to Georgia Code Ann. section 105-2012,[144] however, now permit a tortfeasor to seek contribution from a cotortfeasor even when they are not jointly sued[145] and without the precondition of a judgment having first been entered against them.[146]

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139. GA. CODE ANN. § 37-1104 (Harrison 1933).

140. *See* GA. CODE ANN. § 81A-201(g) (Harrison 1977) (not carried forward to Code of 1981).

141. 160 Ga. App. 1, 285 S.E.2d 767 (1981).

142. *Id.* at 1, 285 S.E.2d at 767.

143. *Id.* at 2, 285 S.E.2d at 768.

144. 1966 Ga. Laws 433, 1972 Ga. Laws 132. *See* OFFICIAL CODE OF GA. ANN. § 51-12-32 (Michie 1982), GA. CODE ANN. § 105-2012 (Harrison 1968 & Supp. 1982) (editorial changes only).

145. 1966 Ga. Laws 433. *See also* Register v. Stone's Indep. Oil Distrib., Inc., 227 Ga. 123, 179 S.E.2d 68 (1971).

146. 1972 Ga. Laws 132.

In *Brannon Enterprises, v. Deaton,*[147] the court of appeals held that by failing to answer, a defaulting defendant had, by operation of law, admitted that he had caused plaintiff unnecessary expense and trouble.[148] This is one of the statutory grounds that entitles a plaintiff to recover reasonable attorneys' fees.[149] The court, however, must determine the amount of the fees.

X. SUMMARY JUDGMENTS

The use of expert opinion testimony in summary judgment practice continues to draw the attention of Georgia's appellate courts. In *Howard v. Walker,*[150] the supreme court held that, in cases in which the plaintiff must produce the opinion of an expert to prevail at trial, summary judgment properly can be granted to the defendant when he produces expert opinion in his favor on motion for summary judgment and the plaintiff fails to adduce contrary expert opinion.[151] In *Savannah Valley Production Credit Association v. Cheek,*[152] the supreme court received several certified questions from the court of appeals. These included: (1) Does the rule in *Howard* apply only to medical and legal malpractice cases or does it also apply to other professional malpractice cases? (2) Does the *Howard* rule apply to expert testimony concerning the value of real property? The supreme court held that the rule applies to medical and legal malpractice cases and to any other case in which a contention of fact is capable of proof only by expert testimony. Because value is established both by expert opinion and by other evidence, the court held that the rule of *Howard* did not apply to cases in which the value of real property is at issue.[153]

In *Tri-Cities Hospital Authority v. Sheats,*[154] the court addressed another troublesome rule in summary judgment practice. In *Chambers v. Citizens & Southern National Bank,*[155] the supreme court had held that, in ruling on a motion for summary judgment, a trial court may consider the unfavorable portion of the nonmovant's testimony when he makes

147. 159 Ga. App. 685, 285 S.E.2d 58 (1981).

148. *Id.* at 686, 285 S.E.2d at 60.

149. *See* GA. CODE ANN. § 20-1404 (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 13-6-11 (Michie 1982) (new law adds requirement that plaintiff must "specially plead and make prayer for" expenses allowed by this section).

150. 242 Ga. 406, 249 S.E.2d 45 (1978).

151. *Id.* at 408, 249 S.E.2d at 46-47. *See also* Payne v. Golden, 245 Ga. 784, 267 S.E.2d 211 (1980); Parker v. Knight, 245 Ga. 782, 267 S.E.2d 222 (1980).

152. 248 Ga. 745, 285 S.E.2d 689 (1982).

153. *Id.* at 747, 285 S.E.2d at 691.

154. 247 Ga. 713, 279 S.E.2d 210 (1981).

155. 242 Ga. 498, 249 S.E.2d 214 (1978).

self-contradictory statements in opposition to the motion. This rule differs from the general rule that all evidence adduced on a motion for summary judgment must be construed most strongly against the movant and in favor of the opposing party.[156] The court in *Sheats* reiterated that the nonmovant's unfavorable testimony will be taken against him only when there is a "direct contradiction in the testimony of the respondent as to a material issue of fact."[157] The court did not define the phrase "direct contradiction," but did try to reconcile the assertedly inconsistent statements of the nonmovant.[158] Justice Smith would go even further. He suggested that the rule in *Chambers* should apply only in those cases in which the contradictory affidavit or testimony was clearly a sham and was given simply to create an issue of fact to defeat a motion for summary judgment.[159]

In *Miller Grading Contractors, Inc. v. Georgia Federal Savings & Loan Association,*[160] the supreme court held that an appellate court may consider all materials filed of record, such as unopened depositions, that the trial court did not consider before granting a motion for summary judgment.[161] Since the party opposing a motion for summary judgment is entitled to the benefit of all reasonable doubts, the court of appeals in *Jackson v. Couch Funeral Home*[162] had previously held that it could not consider sealed depositions, which had not been reviewed in the trial.[163] Therefore, the only appropriate action in such a case is to reverse the summary judgment and remand to the trial court for a new determination that takes into consideration the unopened depositions. In *Miller*, the supreme court overruled *Jackson*[164] and its progeny.[165] The supreme court considered the sealed depositions, determined that nothing in them raised a genuine issue of material fact, and affirmed the grant of summary judgment. "Accordingly, we will not reverse the grant of summary judgment, even if it affirmatively appears that the trial court erroneously failed to consider a portion of the record, unless the appellant can show

156. Winkles v. Brown, 227 Ga. 33, 178 S.E.2d 865 (1970).
157. 247 Ga. at 714, 279 S.E.2d at 211.
158. *Id.*
159. *Id.* at 715, 279 S.E.2d at 211 (Smith, J., concurring).
160. 247 Ga. 730, 279 S.E.2d 442 (1981).
161. *Id.* at 734, 279 S.E.2d at 446.
162. 131 Ga. App. 695, 206 S.E.2d 718 (1974).
163. *Id.* at 695, 206 S.E.2d at 718.
164. 247 Ga. at 734, 279 S.E.2d at 446.
165. *See* Corbin v. Pilgrim Realty Co., 151 Ga. App. 102, 258 S.E.2d 758 (1979); Walker v. General Motors Corp., 244 Ga. 191, 259 S.E.2d 449 (1979); Realty Contractors, Inc. v. Citizens & S. Nat'l Bank, 146 Ga. App. 69, 245 S.E.2d 342 (1978); Brown v. Rooks, 139 Ga. App. 770, 229 S.E.2d 548 (1976).

that a genuine issue of material fact remains for trial."[166]

XI. Attack on Judgments

In Georgia practice, a judgment may be set aside because of fraud only when the fraud is extrinsic as opposed to intrinsic.[167] The case of *Great Atlantic Insurance Co. v. Morgan*[168] illustrates the distinctions between the two types of fraud. In that case, the Great Atlantic Insurance Company had denied its insured's claim for a fire loss on the ground that they had burned the property intentionally. The parties eventually settled the dispute and memorialized the settlement in a consent judgment.[169] Great Atlantic then filed a complaint in equity pursuant to section 60(e) of the CPA[170] to set aside the consent judgment on the ground that it had been procured by fraud. Great Atlantic apparently had discovered evidence that the insureds had made false statements concerning the cause of the loss in their proof of loss statements and depositions. The trial court declined to set the judgment aside,[171] and the court of appeals affirmed on the basis of the trial court's findings.[172] Although Great Atlantic now raised the issue of fraud in the complaint to set aside, it had raised this issue—that the insured caused the loss and had concealed the fact—in the prior action that resulted in the consent judgment. The alleged fraud was, therefore, intrinsic or inherent to the issues adjudicated by the judgment itself, albeit a consent judgment, and did not provide a basis for relief. Extrinsic fraud, which may be a ground to attack a judgment, is fraud that is collateral to the issue adjudicated by the judgment, such as fraud that prevents a party from discovering an available defense.[173]

166. 247 Ga. at 734, 279 S.E.2d at 446.

167. *See, e.g.*, Frost v. Frost, 235 Ga. 672, 221 S.E.2d 567 (1975). *Cf.* Fed. R. Civ. P. 60(b)(3) (court may relieve a party from a final judgment for fraud irrespective of whether it is deemed intrinsic or extrinsic fraud).

168. 161 Ga. App. 680, 288 S.E.2d 287 (1982).

169. *Id.*at 680, 288 S.E.2d at 287.

170. Ga. Code Ann. § 81A-160(e) (Harrison 1977), Official Code of Ga. Ann. § 9-11-60(e) (Michie 1982) (editorial changes only).

171. 161 Ga. App. at 680-81, 288 S.E.2d at 287.

172. *Id.* at 682, 288 S.E.2d at 288.

173. *Id.* at 682, 288 S.E.2d at 289.