1-1-1983

Trial Practice and Procedure (Annual Survey of Georgia Law)

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Trial Practice and Procedure

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The most significant developments in trial practice and procedure during the survey period occurred in the legislative rather than in the judicial arena. The General Assembly added a "domestic relations" section to the Georgia long arm statute[1] and enacted other legislation to implement some of the changes in the court system brought about by the new Georgia Constitution, which became effective on July 1, 1983.[2] These legislative changes, along with selected Georgia appellate court decisions, will be discussed starting with the topics of subject matter and personal jurisdiction and venue. This discussion will be followed by an analysis of cases that construed the Civil Practice Act (CPA),[3] which are arranged under each section in numerical order, and by two cases that dealt with the law of former adjudication.

I. Subject Matter Jurisdiction

The 1983 Georgia Constitution created a unified judicial system consisting of five classes of trial courts: superior courts, state courts, probate courts, juvenile courts, and magistrate courts.[4] The magistrate courts

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1. O.C.G.A. § 9-10-91(5) (Michie Supp. 1983), Ga. Code Ann. § 24-113.1(5) (Harrison Supp. 1983).

2. Ga. Const. art. VI, Ga. Code Ann. §§ 2-2701 to -3602 (Harrison 1983) (formerly art. VI, Ga. Code Ann. §§ 2-3001 to -4502 (Harrison 1977)).

3. O.C.G.A. tit. 9, ch. 11 (Michie 1982 & Supp. 1983) (formerly Ga. Code Ann. tit. 81A (Harrison 1977 & Supp. 1983)).

4. Ga. Const. art. VI, § 3, para. 1, Ga. Code Ann. § 2-2901 (Harrison 1983); Ga. Const. art. VI, § 1, para. 5, Ga. Code Ann. § 2-2705 (Harrison 1983).

are new, replacing in each county what were formerly small claims courts and justice of the peace courts. In what may be its single most salutary change, the 1983 Constitution requires the magistrate courts, as well as all other courts of each class except probate courts, to have uniform jurisdiction, powers, and rules of practice and procedure.[5] Under the new arrangement, the magistrate court in each county will exercise the same subject matter jurisdiction and will operate according to the same rules of practice and procedure as every other like court. This change will eliminate, at long last, the cost and inefficiency that resulted from having a host of assorted courts of limited jurisdiction operating in the state with varying and often confusing jurisdiction and rules.

To carry out this constitutional mandate of uniformity, the General Assembly enacted legislation during the year to establish a magistrate court in each county.[6] Section 15-10-2(5) of the Official Code of Georgia Ann. provides that the magistrate court shall have jurisdiction, among other things, over "[t]he trial of civil claims including garnishment and attachment in which exclusive jurisdiction is not vested in the superior court and the amount demanded or the value of the property claimed does not exceed $2,500.00."[7] Thus, in civil actions other than divorce, in cases respecting title to land, and in equity cases that come within the exclusive jurisdiction of the superior court,[8] the magistrate court, the superior court, and in counties where it exists, the state court,[9] all have concurrent jurisdiction to hear claims for damages or for the recovery of property when the amount demanded is $2500 or less.[10]

Should the plaintiff file a claim for more than this amount, the magistrate should transfer the case to a state court or a superior court that

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5. GA. CONST. art. VI, § 1, para. 5, GA. CODE ANN. § 2-2705 (Harrison 1983).

6. 1983 Ga. Laws 884, § 2-1. O.C.G.A. § 15-10-1 (Michie Supp. 1983), GA. CODE ANN. § 24-401 (Harrison Supp. 1983).

7. O.C.G.A. § 15-10-2(5) (Michie Supp. 1983), GA. CODE ANN. § 24-402(5) (Harrison Supp. 1983).

8. GA. CONST. art. VI, § 4, para. 1, GA. CODE ANN. § 2-3001 (Harrison 1983) (formerly art. VI, § 4, para. 1, GA. CODE ANN. § 2-3301 (Harrison 1977)).

9. O.C.G.A. § 15-7-4(2) (Michie Supp. 1983), GA. CODE ANN. § 24-2104a(2) (Harrison Supp. 1983).

10. 1983 Ga. Laws 1419, 1420 enacted a new chapter concerning state courts to implement changes required by the 1983 Constitution. The chapter expanded and made uniform the jurisdiction of state courts. Among other areas, O.C.G.A. § 15-7-4(2) (Michie Supp. 1983), GA. CODE ANN. § 24-2104a(2) (Harrison Supp. 1983), gives state courts jurisdiction over "[t]he trial of civil actions without regard to the amount in controversy, except those actions in which exclusive jurisdiction is vested in the superior courts." This section enlarges the former grant of jurisdiction to state courts that left their jurisdiction to hear ex delicto claims dependent entirely on local law. *See* O.C.G.A. § 15-7-7 (Michie 1982), GA. CODE ANN. § 24-2106(a) (Harrison Supp. 1982), *repealed by* 1983 Ga. Laws 1419, 1420 (codified at O.C.G.A. § 15-7-4 (Michie Supp. 1983), GA. CODE ANN. § 24-2104a (Harrison Supp. 1983)).

does have jurisdiction, rather than dismiss it for lack of subject matter jurisdiction. The power of a trial court to transfer a case when it lacks jurisdiction is based on a new provision found in the 1983 Constitution, which states: "Any court shall transfer to the appropriate court in the state any civil case in which it determines that jurisdiction or venue lies elsewhere."[11] The power to transfer was once the province only of the supreme court and the court of appeals.[12] The 1983 Constitution extended the power to perform this beneficial remedial measure to all courts and expanded it to permit the courts to cure the defect of improper venue, as well as the lack of subject matter jurisdiction.[13]

When a limited jurisdiction court, such as the magistrate court, exists alongside a general jurisdiction court, such as the superior court, and both courts share concurrent jurisdiction over some civil claims while other claims are assigned to only one of the courts, a problem can arise when there are counterclaims that exceed the jurisdiction of the limited jurisdiction court. Anticipating this situation, the drafters of section 15-10-45 basically adopted a compulsory counterclaim rule so that if a defendant who is sued in a magistrate court also has a claim against the plaintiff "arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim,"[14] the defendant must assert that claim in the magistrate court "at or before the hearing on plaintiff's claim or thereafter be barred."[15] An exception to this rule occurs when adjudication of the counterclaim requires the presence of a third person over whom the court cannot acquire jurisdiction.[16]

If the *amount* of the defendant's counterclaim exceeds the jurisdictional limits of the magistrate court, the statute commands that the 'case' be transferred to the state court of that county or to the superior court if there is no state court.[17] Thus, if a plaintiff files an action in a magistrate court seeking $2000 in damages and the defendant has a claim for damages arising out of that same occurrence or incident, the defendant must assert his or her claim in the magistrate court.[18] If the amount of the defendant's counterclaim exceeds $2500, then the magistrate court should transfer the entire case, including the plaintiff's claim, to the appropriate state or superior court.[19]

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11. GA. CONST. art. VI, § 1, para. 8, GA. CODE ANN. § 2-2708 (Harrison 1983).
12. *Id.* art. VI, § 2, para. 4 (Michie 1982), GA. CODE ANN. § 2-3104 (Harrison 1977).
13. *Id.* art. VI, § 1, para. 8, GA. CODE ANN. § 2-2708 (Harrison 1983).
14. O.C.G.A. § 15-10-45(a) (Michie Supp. 1983), GA. CODE ANN. § 24-606(a) (Harrison Supp. 1983).
15. *Id.*
16. *Id.*
17. *Id.* § 15-10-45(d), GA. CODE ANN. § 24-606(d).
18. *Id.* § 15-10-45(a), GA. CODE ANN. § 24-606(a).
19. *Id.* § 15-10-45(d), GA. CODE ANN. § 24-606(d).

The statute does not specify how additional clerks' fees, if imposed by the transferee court, will be collected. Filing the counterclaim in the magistrate court is sufficient in itself to cause the case to be transferred to the second court. If the transferee court imposes a second filing fee or collects other court costs by prepayment, and these go unpaid, what is the status of the transferred case?[20] Does the case remain in limbo or does it revert back to the magistrate court without the counterclaim or perhaps without that portion of the counterclaim in excess of $2500? This is a new problem for Georgia courts. Other states, however, have dealt with this potential problem by providing that the defendant in this situation, at the time of filing the counterclaim, must tender to the transferor court any court fees that will be due the transferee court. Filing the counterclaim and depositing the necessary fees will effect the transfer. Failure to deposit these fees for forwarding along with the case will block transfer altogether and will result in the reduction of the relief demanded in the counterclaim to the relief that the first court could have awarded.[21]

The language used in section 15-10-45(d) causes a potentially more serious problem in that it speaks of transferring the case to a court with jurisdiction if the *amount* of the counterclaim exceeds the jurisdictional limits of the magistrate court. The drafters of the statute obviously had in mind the problem of a counterclaim for money or property in excess of $2500. A counterclaim could also exceed the jurisdiction of the magistrate court, however, if it demanded a type of affirmative equitable relief, such as specific performance or reformation, that only a superior court could award. This relief exceeds the subject matter jurisdiction of the magistrate court, yet it hardly fits the statute, which conditions transfer on the *amount* of the counterclaim exceeding the transferor court's jurisdiction. The new constitutional provision[22] that empowers a court to transfer rather than dismiss a case for lack of jurisdiction may not help in this situation because the plaintiff's claim will have been filed in a court that has jurisdiction to hear it. It is the defendant's counterclaim that exceeds the court's authority. In this situation, transfer may not be possible unless the courts rule that the constitutional provision applies to counterclaims as well as original claims. A better course may be to amend section 15-10-45(d) to require transfer whenever the relief demanded in the counterclaim exceeds the jurisdiction of the magistrate court.

The Magistrate Court Act[23] is designed to create a limited jurisdiction

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20. *See generally* Orr v. Culpepper, 161 Ga. App. 801, 288 S.E.2d 898 (1982) (clerk of court justifiably may refuse to accept a complaint for filing until proper fees have been paid).

21. *See, e.g.*, Fla. R. Civ. P. 1.170(j).

22. Ga. Const. art. VI, § 1, para. 8, Ga. Code Ann. § 2-2708 (Harrison Supp. 1983).

23. O.C.G.A. tit. 15, ch. 10 (Michie Supp. 1983) (formerly Ga. Code Ann. ch. 24-4 (Harri-

court that is less formal, less rule bound, and less costly than either the state court or the superior court. There are no jury trials in the magistrate court,[24] and its proceedings are not subject to the provisions of the CPA.[25] Instead, the Act contains simplified rules of practice and procedure that call for the judge or clerk to assist the plaintiff in stating the claim for relief and that allow the defendant to present his answer orally to the judge, who shall then reduce it to writing.[26] Given the desire for informality, it is regrettable that the Magistrate Court Act did not adopt different provisions for service of process. The Act calls for process to be "served on the defendant."[27] This language may be satisfied only by personal delivery to the defendant rather than by some easier-to-accomplish form of service such as leaving the statement of claim and notice at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion residing therein.[28] The process server is required to be either an official authorized by law to serve process or a person not a party to and not otherwise interested in the action, who has been designated specially by the court to serve process.[29]

The importance of obtaining valid service on the defendant to ensure the power of the court to proceed and to ensure the validity of its eventual judgment dictates that any departure from the traditional and time tested means of serving process receive careful consideration, but the creation of the magistrate court presented an opportune time for this state to adopt its own version of the new service-by-mail rule recently enacted by Congress for most civil actions in the federal district courts.[30] The Georgia courts recently have recognized a foreign judgment based on service by mail made on an out-of-state defendant,[31] and with the impetus given this less costly form of service by the amendment to Federal Rule of Civil Procedure 4[32] during 1983, additional states are likely to utilize

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son Supp. 1983)).

24. *Id.* § 15-10-41(a) (Michie Supp. 1983), GA. CODE ANN. § 24-602(a) (Harrison Supp. 1983).

25. *Id.* § 15-10-42 (Michie Supp. 1983), GA. CODE ANN. § 24-603 (Harrison Supp. 1983).

26. *Id.* § 15-10-43(a), (d) (Michie Supp. 1983), GA. CODE ANN. § 24-604(a), (d) (Harrison Supp. 1983).

27. *Id.* § 15-10-43(b), GA. CODE ANN. § 24-604(b).

28. *Cf. id.* § 9-11-4(d)(7) (Michie 1982), GA. CODE ANN. § 81A-104(d)(7) (Harrison Supp. 1983).

29. *Id.* § 15-10-43(b) (Michie Supp. 1983), GA. CODE ANN. § 24-604(b) (Harrison Supp. 1983).

30. 96 Stat. 2527 (1983). This law amending Fed. R. Civ. P. 4 became effective on February 26, 1983. An excellent discussion of the new rule appears at 96 F.R.D. 81 (1983).

31. *See* Crosby v. Wenzoski, 164 Ga. App. 266, 296 S.E.2d 162 (1982) (California default judgment based on service by mail was entitled to full faith and credit since it was not repugnant to Georgia public policy).

32. 96 Stat. 2527 (1983).

this means of service in the future. Some thought should be given to amending the Magistrate Court Act to allow service by mail.

II. PERSONAL JURISDICTION

The General Assembly amended the Georgia long arm statute to add a new "domestic relations" section designed to empower courts in Georgia to exercise personal jurisdiction over former residents for money claims for family obligations in connection with divorce, alimony, or child support actions.[33] The need for this addition to the long arm statute had been recognized for some time. Before this amendment, a spouse seeking a divorce in Georgia, where the couple had lived, sometimes found the local courts able to award the divorce but not alimony or child support. This situation occurred because these money claims required in personam jurisdiction over the defendant, which often could not be obtained if the defendant spouse had moved his home to another state before the plaintiff brought the action.[34] While the plaintiff need not go without a remedy in these cases, several of Georgia's neighboring states had included special provisions in their long arm statutes to meet the problem directly.[35] Unfortunately, the General Assembly modeled Georgia's new provision after the Florida law, which the supreme court once had applauded,[36] but which on closer inspection seems inherently flawed.

New section 9-10-91(5) imposes personal jurisdiction over a person who:

> (5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.[37]

Although the purpose of the legislature in enacting the subsection is unmistakable, the language used to express this worthy goal may cause needless problems. First, a defendant who "maintains a matrimonial

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33. 1983 Ga. Laws 1304, 1305 (codified at O.C.G.A. § 9-10-91(5) (Michie Supp. 1983), GA. CODE ANN. § 24-113.1(5) (Harrison Supp. 1983)).

34. *See* Warren v. Warren, 249 Ga. 130, 287 S.E.2d 524 (1982).

35. *See, e.g.*, ALA. R. CIV. P. 4.2(a)(2)(H); FLA. STAT. ANN. § 48.193(1)(e) (Harrison 1976); N.C. GEN. STAT. § 1-75.4(12) (Supp. 1981).

36. *See* Whitaker v. Whitaker, 237 Ga. 895, 230 S.E.2d 486 (1976).

37. O.C.G.A. § 9-10-91(5) (Michie Supp. 1983), GA. CODE ANN. § 24-113.1(5) (Harrison Supp. 1983).

domicile in this state at the time of the commencement of this action"[38] can be served as a resident in most cases. This part of the long arm statute will be helpful only when the defendant leaves the state and changes his or her domicile after the plaintiff files suit but before he or she attempts service of process. Surely, this circumstance occurs only rarely.

On the other hand, the alternative prong of coverage seems overly broad, even unconstitutionally broad. It allows the courts of this state to exercise personal jurisdiction in the described actions over a defendant who "resided in this state preceding the commencement of the action, whether cohabiting during that time or not."[39] It seems beyond dispute that a spouse who has maintained a marital relationship in this state has the requisite connection with the state to allow claims for family obligations, such as alimony and child support, to be asserted against him in the courts of this state even though he since has departed from the state. Indeed, to satisfy the modern requirements of due process it appears necessary only to show that the defendant has purposeful "minimum contacts" with the state and that the plaintiff's claim against the defendant arises out of those contacts.[40] The 'domestic relations' amendment, however, does not explicitly require the presence of any connection between the defendant's residence in the state and the asserted family obligations.[41] By its terms, the new provision seems to give personal jurisdiction for alimony, child support, or similar claims against a former resident even though the defendant had never maintained a marital domicile in this state. The section does not even specify the length of time which the defendant must have resided in the state, nor how soon "preceeding" the commencement of the action this period of residency must have occurred, nor does it require that the defendant have been married during this period of residence. Thus, the statute purports to reach a nonresident defendant whose sole contact with the state is a period of residency here, however brief.

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38. *Id.*

39. *Id.*

40. International Shoe Co. v. Washington, 326 U.S. 310 (1945). The Alabama rule is carefully tailored to meet these constitutional requirements. ALA. R. CIV. P. 4.2(a)(2)(H) extends personal jurisdiction over a nonresident because of that person's "living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising from alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state." In construing this rule, Alabama courts have held that a couple's having *once* lived in a marital relationship in Alabama is not a sufficient basis for jurisdiction when the couple's last and main marital domicile was in another state. *See* Corcoran v. Corcoran, 353 So. 2d 805 (Ala. Civ. App. 1978).

41. O.C.G.A. § 9-10-91(5) (Michie Supp. 1983), GA. CODE ANN. § 24-113.1(5) (Harrison Supp. 1983).

The courts may be able to uphold the constitutionality of this new subsection by limiting its application to clear cases in which the family obligations asserted do arise out of, and are incidents of, the defendant having had a marital domicile in this state. Yet, the statute sweeps far more broadly than that and may be susceptible to a fourteenth amendment due process challenge.

The supreme court wrestled with the validity of so-called 'nail and mail' service in the context of landlord and tenant dispossessory actions in *Housing Authority v. Hudson*[42] and in *Housing Authority v. Sterlin.*[43] By statute, when the tenant fails to pay rent when due, the owner may demand and then sue for possession.[44] In addition to demanding possession of the premises, the owner may seek in the same action to recover a money judgment for all rents due.[45] The statute specifies that the defendant-tenant shall be personally served,[46] but the court in *Hudson* stated:

> If the sheriff cannot effect personal service or service upon a person sui juris residing on the premises, he may tack a copy of the summons and the affidavit on the door of the premises and on the same day, he may mail copies by first class mail to the defendant at his last known address.[47]

The statute thus allows a landlord to use 'nail and mail' service not only to recover possession of the premises, but also to recover a money judgment for past due rent. It was this second feature, that a landlord could obtain a money judgment requiring in personam jurisdiction after 'nail and mail' service, that the court found constitutionally troublesome.[48] Another salient fact in both *Hudson* and *Sterlin* was that each defendant had answered and had sought to contest the court's jurisdiction over the claim for past due rent.[49] In the end, defendant's contest of jurisdiction proved pivotal.

The court relied on the old *York v. Texas*[50] line of cases that had held that a state does not deny a defendant due process by denying him the right to contest personal jurisdiction through making a special appear-

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42. 250 Ga. 109, 296 S.E.2d 558 (1982).
43. 250 Ga. 95, 296 S.E.2d 564 (1982).
44. O.C.G.A. § 44-7-50 (Michie Supp. 1983), GA. CODE ANN. § 61-301 (Harrison Supp. 1983).
45. *Id.* §§ 44-7-50, -53 (Michie Supp. 1983), GA. CODE ANN. §§ 61-301, -303 (Harrison Supp. 1983).
46. *Id.* § 44-7-51(a) (Michie Supp. 1983), GA. CODE ANN. § 61-302(a) (Harrison Supp. 1982).
47. 250 Ga. at 109, 296 S.E.2d at 558.
48. *Id.* at 110, 296 S.E.2d at 559.
49. *Id.* at 109, 296 S.E.2d at 559; 250 Ga. at 96, 296 S.E.2d at 565.
50. 137 U.S. 15 (1890); *see also* Western Life Indem. Co. v. Rupp, 235 U.S. 261 (1914).

ance. In measuring the validity of 'nail and mail' service with regard to claims for back rent, the supreme court in *Sterlin* distinguished cases in which the defendants appear and contest from those in which the defendants default:

> There is not a statutory mechanism in these proceedings allowing the defendant tenant to answer the merits subject to a challenge to the jurisdiction of the court. We determined due process does not require that a defendant be permitted to make a special appearance, object to the service and raise the question of jurisdiction, and file his answer subject thereto. *York v. Texas*, 137 U.S. 15 (11 SC 9, 34 LE 604 (1890). While such a procedure may be reasonable or even desirable, it is not constitutionally required. If the defendant answers, notice is not an issue, and the trial court has jurisdiction over his person as to both the dispossessory proceeding and to enter a money judgment against him. When the defendant is served by 'nail and mail' and does not answer, however, the trial court has jurisdiction over his person for the purposes of the dispossessory proceeding, but may not enter a judgment for rent due upon default.[51]

The court's rationale is inconsistent with several seemingly well-settled principles of civil procedure. At the outset it is well to have in mind that while these cases concerned 'nail and mail' service in dispossessory proceedings, the supreme court in actuality was announcing constitutional rules about how plaintiffs may validly serve on the defendants in civil actions. There are no significant constitutional differences between this statutory service provision and the one added in 1980 to CPA section 4(d)(6),[52] after the suggestion in *Benton v. Modern Finance & Investment Co.*[53] The Georgia legislature added new requirements to cure what were obvious defects in the former rule, which had allowed the plaintiff to serve process on the defendant simply by leaving the summons and complaint unattended at his "most notorious place of abode."[54] While, of

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51. 250 Ga. at 96, 296 S.E.2d at 565.

52. 1980 Ga. Laws 1124, 1125. The statute states that:

> (6) If the principal sum involved is less than $200.00, and if reasonable efforts have been made to obtain personal service by attempting to find some person residing at the most notorious place of abode of the defendant, then by securely attaching the service copy of the complaint in a conspicuously marked and waterproof packet to the upper part of the door of the abode and on the same day mailing by certified or registered mail an additional copy to the defendant at his last known address, if any, and making an entry of this action on the return of service.

O.C.G.A. § 9-11-4(d)(6) (Michie 1982), GA. CODE ANN. § 81A-104(d)(6) (Harrison Supp. 1983).

53. 244 Ga. 533, 535-36, 261 S.E.2d 359, 361 (1979) (Hill, J., concurring).

54. O.C.G.A. § 9-11-4(d)(6) (Michie 1982), GA. CODE ANN. § 81A-104(d)(6) (Harrison

course, there are some differences in the two statutory service provisions, one must seriously doubt whether the requirements in CPA section 4(d)(6), which call for leaving the service copy "securely attached" and in a "conspicuously marked and waterproof packet" and for using certified or registered mail rather than first class mail, amount to real differences. Thus, at the very least, the rationale of *Hudson* and *Sterlin* will be employed in future challenges to service accomplished under CPA section 4(d)(6). That is not, however, the end of the impact. *Hudson* and *Sterlin* contain some disconcerting signs and, perhaps, some unintended messages as well.

First, in upholding the validity of 'nail and mail' service in dispossessory proceedings insofar as possession of the premises is concerned, but not insofar as recovery of back rent is sought, the court seems to have reintroduced an artificial distinction in regard to the sufficiency of the notice required by due process between actions in rem or quasi in rem and actions in personam.[55] The court in *Allan v. Allan*,[56] however, had recognized the illogic of making this distinction and had held that:

> the characterization of a proceeding as 'in rem' or 'quasi-in-rem' is not in itself determinative of the requirements of the Fourteenth Amendment. . . . As previously stated, due process requires 'that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'[57]

Hence, if notice by 'nail and mail' is sufficient for the dispossessory feature of the action, it also should be sufficient to recover money owed as rent, and vice versa.

Second, the supreme court's emphasis on the fact that due process requires the defendant to be given notice of the lawsuit and that by answering, the defendant makes it "clear beyond peradventure"[58] that he has received notice and that due process is thus satisfied, is a new position for the Georgia courts. Previously it seemingly had been well-settled that actual notice to the defendant did not cure defective service of process.[59]

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55. *Cf.* Womble v. Commercial Credit Corp., 231 Ga. 569, 203 S.E.2d 204 (1974) (leaving process at unattended, most notorious place of abode violates due process in an in personam action) *with* Pelletier v. Northbrook Garden Apartments, 233 Ga. 208, 210 S.E.2d 722 (1974) (service by tacking notice to door permissible in quasi in rem action such as landlord's dispossessory action).

56. 236 Ga. 199, 223 S.E.2d 445 (1976).

57. 236 Ga. at 205, 223 S.E.2d at 450 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)).

58. 250 Ga. at 111, 296 S.E.2d at 560.

59. *See, e.g.*, KMM Indus., Inc. v. Professional Placement Ass'n, 164 Ga. App. 475, 297 S.E.2d 512 (1982); Holloway v. Frey, 130 Ga. App. 224, 202 S.E.2d 845 (1973).

Although the modern view has been to equate actual notice with adequate service,[60] this state's courts had not embraced that idea. Nevertheless, the supreme court's opinions in *Hudson* and *Sterlin* suggest that actual notice, shown conclusively by the defendant's answering, satisfies the underlying requirement of due process.[61] If proof of actual notice becomes the test of valid service rather than literal adherence to the terms of the service statute, then may we expect that other ways of proving actual notice, including the return of the process server, could be used to cut off objections to defective service in the future?

Finally, it is surprising to find that by the act of answering and contesting jurisdiction on the money claim, defendant conferred jurisdiction on the court. To sustain this point the court in *Sterlin* states that, "there is not a statutory mechanism in these [dispossessory statute] proceedings allowing the defendant tenant to answer the merits subject to a challenge to the jurisdiction of the court."[62] This statement seems refuted by the statute itself which provides that, "[t]he answer may contain any legal or equitable defense or counterclaim."[63] That language hardly warns a defendant that he may not defend on the merits and simultaneously deny the court's jurisdiction, which is a recognized defense.

Furthermore, the court should have considered the applicability of the CPA to dispossessory proceedings. CPA section 81 states that "[t]his chapter shall apply to all special statutory proceedings except to the extent that specific rules of practice and procedure in conflict herewith are expressly prescribed by law . . . ."[64] A dispossessory proceeding would seem to be the kind of special statutory proceeding to which CPA section 81 refers. Consequently, if there is no provision in the dispossessory proceeding statute expressly governing whether a defendant can answer and still contest jurisdiction, then one must look to the rules in the CPA itself. As a matter of fact, even if the dispossessory proceeding statute had a rule on this point expressly in conflict with the CPA, the CPA rule should control because CPA section 81 states that in the event of a conflict between the special statutory proceeding and the CPA, the CPA's

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60. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 3 (1982).

61. 250 Ga. at 96, 296 S.E.2d at 565; 250 Ga. at 111, 296 S.E.2d at 560.

62. 250 Ga. at 96, 296 S.E.2d at 565.

63. O.C.G.A. § 44-7-51(b) (Michie Supp. 1983), GA. CODE ANN. § 61-302(b) (Harrison Supp. 1983).

64. *Id.* § 9-11-81 (Michie 1982), GA. CODE ANN. § 81A-181 (Harrison 1982). The remaining part of the statute provides:

> but, in any event, the provisions of this chapter governing the sufficiency of pleadings, defenses, amendments, counterclaims, cross-claims, third-party practice, joinder of parties and causes, making parties, discovery and depositions, interpleader, intervention, evidence, motions, summary judgment, relief from judgments, and the effect of judgments shall apply to all such proceedings.

provisions governing "defenses" shall apply to all such proceedings.[65]

One of the CPA's provisions governing defenses is CPA section 12(b), which lists various defenses, including lack of jurisdiction over the person and insufficiency of service of process.[66] These defenses may be asserted in the defendant's answer, and CPA section 12(b) expressly provides that "[n]o defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion."[67] Thus, according to the CPA, the defense of lack of jurisdiction over the person is not waived whether asserted singly as a "special appearance" or when asserted in an answer pleading on the merits, and this CPA provision should govern in special statutory proceedings such as dispossessory proceedings.

One can readily understand and appreciate the court's reluctance to endorse a method of notice-giving in dispossessory proceedings that could degenerate all too easily into less than real notice. Nevertheless, the legislature recently improved the service provisions in both the dispossessory proceeding statute and CPA section 4(d)(6) by adding requirements for service by mail when efforts at personal delivery have failed.[68] In an era in which there is likely to be increased reliance on the use of the mail to serve process, *Hudson* and *Sterlin* may indicate undue hostility to this form of notice-giving.

III. VENUE

In *Smith v. Board of Regents*,[69] the court refused a request to apply the judicial doctrine of forum non conveniens, which allows a court that has proper venue to dismiss an action so that it can be brought in another forum to facilitate the trial of the case. *Smith* offered a good opportunity to employ this device.

Plaintiffs, who were residents of Walton County, brought a wrongful death action against the Board of Regents alleging negligence on the part of various hospital personnel in treating their son while he was a patient at Talmadge Memorial Hospital in Augusta.[70] The relevant constitutional and statutory provisions placed venue for the action in Fulton County, where defendant Board of Regents resided,[71] but all the witnesses and

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65. *Id.*

66. *Id.* § 9-11-12(b) (Michie 1982), GA. CODE ANN. § 81A-112(b) (Harrison Supp. 1982).

67. *Id.*

68. *Id.* § 44-7-51(a) (Michie Supp. 1983), GA. CODE ANN. § 61-302(a) (Harrison Supp. 1983); *id.* § 9-11-4(d)(6) (Michie 1982), GA. CODE ANN. § 81A-104(d)(6) (Harrison Supp. 1982).

69. 165 Ga. App. 565, 302 S.E.2d 124 (1983).

70. *Id.* at 565, 302 S.E.2d at 125.

71. *See* GA. CONST. art. VI, § 14, para. 6, GA. CODE ANN. § 2-4306 (Harrison Supp. 1977)

medical records were located in Augusta.[72] Because the Georgia courts generally do not recognize the doctrine of forum non conveniens, the court of appeals felt bound to reject defendant's request despite the Board's willingness to accept service in Richmond County and despite the court's agreement that superior access to witnesses, to records, and to the site would outweigh any disadvantage to plaintiff. The court urged that the legislature consider a statutory solution to these problems.[73]

Although forum non conveniens is recognized elsewhere and applied as a judge made doctrine, both federal law and the laws of many states provide for the transfer of a civil action from a court in which venue is properly laid to another forum within the jurisdiction for the convenience of the parties and witnesses and in the interest of justice.[74] It should be noted that such a provision was not included as part of the 1983 Constitution. The constitutional provision stating that "[a]ny court shall transfer to the appropriate court in the state any civil case in which it determines that jurisdiction or venue lies elsewhere"[75] probably refers only to transfers in which venue is improper in the first forum, not to a case such as *Smith*, in which, despite the existence of a better forum in the state, venue was proper according to the statute.

IV. Claims and Parties

The court in *Cohen v. McLaughlin*[76] resolved two important points about third-party practice. CPA section 14[77] allows a defendant, as a third-party plaintiff, to bring into the action a person not already a party, whom the defendant claims is or may be liable to the defendant if the defendant is adjudged liable on the principal claim to the plaintiff. Because the third-party claim is perforce a claim for secondary liability, there were questions concerning defendant's right to assert, in addition, a claim for his own direct losses arising from the occurrence and questions

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(presently art. VI, § 2, para. 6, Ga. Code Ann. § 2-2806 (Harrison 1983)).

72. 165 Ga. App. at 565, 302 S.E.2d at 125.

73. *Id.* at 566, 302 S.E.2d at 126.

74. *See, e.g.*, 28 U.S.C. § 1404(a) (1976): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Emphasizing the last phrase, the Supreme Court read the federal statute narrowly in Hoffman v. Blaski, 363 U.S. 335 (1960), to mean that the case could be transferred only to a district where the plaintiff originally could have brought the action as of right and without the consent of the defendant. Thus construed, a similar statute would not have aided defendant Board in the present case since it could not be sued without its consent in Richmond County.

75. Ga. Const. art. VI, § 1, para. 8, Ga. Code Ann. § 2-2708 (Harrison 1983).

76. 250 Ga. 661, 301 S.E.2d 37 (1983).

77. O.C.G.A. § 9-11-14 (Michie 1982), Ga. Code Ann. § 81A-114 (Harrison 1977).

concerning the effect on the defendant's third-party claims of the dismissal of the case against defendant.[78]

In *Cohen* the court first held that CPA section 18(a)[79] permitted a third-party plaintiff to join a direct damage claim against a third-party defendant with a claim for secondary liability.[80] The court stated that the direct claim need not have arisen out of the same transaction or occurrence as the claim for secondary liability and that the trial court may exercise discretion over whether to order separate trials.[81]

When both secondary and direct claims have been asserted, the CPA is silent on the effect of the dismissal of the main case on the maintenance of these claims. Absent statutory guidance, the court adopted the federal practice rule that "jurisdiction over a third-party direct damage claim is not destroyed if the original action is settled or disposed of in some fashion before adjudication of such claim; but the court, in the exercise of its discretion, either may proceed with the claim or dismiss it."[82] In the nature of things, however, it would seem that the court must dismiss the claim for secondary liability.

The case of *Equitable Life Assurance Society v. Tinsley Mill Village*[83] points out the need for the General Assembly to adopt legislation to permit a condominium association representing the unit owners to sue as their legal representative concerning matters of common interest. Plaintiff, an unincorporated association, brought the instant action on behalf of its members who were the owners of condominiums in the Tinsley Mill Village complex.[84] The association sought damages and equitable relief because of damage done to various units and common areas by repeated flooding caused by allegedly faulty culverts.[85] Defendants challenged the association's right to bring the suit because the condominium association did not own any of the property damaged.[86]

The supreme court agreed that the condominium association was not the real party in interest,[87] and hence agreed that it could not bring the

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78. 250 Ga. at 663, 301 S.E.2d at 40.

79. O.C.G.A. § 9-11-18(a) (Michie 1982), GA. CODE ANN. § 81A-118(a) (Harrison 1977). The statute provides: "(a) *Joinder of claims.* A party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party."

80. 250 Ga. at 662, 301 S.E.2d at 39.

81. *Id.* at 663, 301 S.E.2d at 40.

82. *Id.*

83. 249 Ga. 769, 294 S.E.2d 495 (1982).

84. *Id.*at 769, 294 S.E.2d at 496.

85. *Id.* at 770, 294 S.E.2d at 496.

86. *Id.*

87. *Id.* at 772, 294 S.E.2d at 498.

action. In cases in which parties seek relief because of damage to real property, "the real party in interest is the person or persons who own, lease, or have a legal interest in the property."[88] Although by statute[89] an unincorporated association has the *capacity* to sue, that does not, of itself, allow it to assert the individual rights of its members.[90] To avoid the necessity of the individual condominium owners having to bring separate actions or a class action, the General Assembly should adopt a law similar to those found in other states[91] that would empower the condominium association to sue as a representative of the owners in cases such as this one.

In *Stapleton v. Palmore*,[92] the supreme court granted certiorari to determine whether a judgment on the merits in favor of the alleged tortfeasor in one spouse's negligence action bars the other spouse's later action for loss of consortium arising out of the same accident. Finding the law on this point to be well-settled, the court held:

> [W]hen the personal injury and loss of consortium claims of the spouses are tried separately and the alleged tortfeasor prevails on the merits at the first trial, the other claim may be maintained later because it is a 'separate' and 'distinct' claim of another person who was not a party or privy to the previous proceedings and who, therefore, is not bound by the judgment therein.[93]

The court, aware of the cost to judicial economy that results from trying a case concerning one accident twice and of the loss of public confidence that occurs when two juries hearing the same evidence reach different conclusions, found a solution in CPA section 19(a),[94] the joinder of necessary parties rule. When the defendant faces one spouse's personal injury claim and fears a subsequent claim by the injured plaintiff's spouse for loss of consortium, he may move to compel the joinder of the other spouse's claim on the ground that the defendant is, in the language of CPA section 19(a)(2)(ii), subject to a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations"[95] by reason of the two claims made against him or her.

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88. 249 Ga. at 771, 294 S.E.2d at 497.

89. O.C.G.A. § 9-2-24 (Michie 1982), GA. CODE ANN. § 3-117 (Harrison 1975).

90. 249 Ga. at 772, 294 S.E.2d at 497. *See generally* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1552 (1971).

91. *See, e.g.*, FLA. R. CIV. P. 1.221. Even this type of rule may not help in a case such as the instant one where unit owners sustained separate and varying damages in addition to damage to common areas.

92. 250 Ga. 259, 297 S.E.2d 270 (1982).

93. *Id.* at 260, 297 S.E.2d at 272.

94. O.C.G.A. § 9-11-19(a) (Michie 1982), GA. CODE ANN. § 81A-119(a) (Harrison 1977).

95. *Id.* § 9-11-19(a)(2)(B), GA. CODE ANN. § 81A-119(a)(2)(B).

The usefulness of the joinder rule announced in *Stapleton* may be more limited than it first appears. A plaintiff's failure to join his or her spouse to assert that person's claim for loss of consortium is not grounds for dismissing the plaintiff's own action.[96] Further, due process also forbids barring the other spouse's loss of consortium claim on the basis that the spouse with the personal injury claim failed to join him or her in the earlier action.[97] Although the decision in *Stapleton* gives a defendant a way to protect himself from such repetitive suits by spouses, it remains to be seen how many defendants actually will take advantage of this opportunity to expand the number of claims being asserted against them.

V. Discovery

The use of depositions at a trial generally is thought to be conditioned upon a finding by the trial court of extraordinary circumstances such as unavailability of the witness. The Georgia Court of Appeals accepted this view in *Rosser v. Atlanta Coca-Cola Bottling Co.*,[98] in which the court held that before the proponent may offer a deposition into evidence, he must satisfy one of the six criteria set forth in Section 32(a)(3) of the CPA.[99] The Georgia Supreme Court, however, reversed the court of appeals.[100] Section 32(a)(4) of the CPA provides that the deposition of a witness "may be used in the discretion of a trial judge, even though the witness is available to testify in person at the trial."[101] The court held that this latter provision was independent of the specific factors set forth in section 32(a)(3) and that a trial judge has the discretion, reversible only upon a showing of abuse of discretion, to admit a deposition into evidence without any showing or finding of the unavailability of the witness.[102]

In the case of *Orr v. Sievert*,[103] the Georgia Court of Appeals rejected the existence of any physician-patient privilege concerning the medical records of a patient when the patient has put his medical condition, to which those records relate, at issue in any civil or criminal proceeding. In

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96. 250 Ga. at 261, 297 S.E.2d at 273.

97. *Id.*

98. 162 Ga. App. 503, 291 S.E.2d 109, *rev'd*, 250 Ga. 52, 295 S.E.2d 827, *vacated*, 164 Ga. App. 384, 297 S.E.2d 738 (1982).

99. O.C.G.A. § 9-11-32(a)(3) (Michie 1982), Ga. Code Ann. § 81A-132(a)(3) (Harrison 1977).

100. Atlanta Coca-Cola Bottling Co. v. Rosser, 250 Ga. 52, 295 S.E.2d 827 (1982).

101. O.C.G.A. § 9-11-32(a)(4) (Michie 1982), Ga. Code Ann. § 81A-132(a)(4) (Harrison 1977).

102. Atlanta Coca-Cola Bottling Co. v. Rosser, 250 Ga. 52, 53, 295 S.E.2d 827, 828 (1982).

103. 162 Ga. App. 677, 292 S.E.2d 548 (1982).

the first lawsuit, the mother of a child whom a physician had treated sued the physician and a medical group, of which he was a member, for medical malpractice.[104] During the pendency of that case, defendants obtained affidavits and medical records from physicians who had subsequently treated the child, without having obtained consent or a release from the mother.[105] The mother then sued the latter group of physicians who had furnished the affidavits and medical information for violating her child's right of privacy.[106] Defendants then moved for summary judgment, which the trial court granted.[107] The decision by the court of appeals represented the first appellate court treatment of Official Code of Georgia Ann. section 24-9-40,[108] which creates a physician-patient privilege against the release of medical information concerning the patient except upon written authorization or other waiver by the patient. The statute provides, however, "that the privilege shall be waived to the extent that the patient places his care and treatment or the nature and extent of his injuries at issue in any civil or criminal proceeding."[109] Plaintiff argued, notwithstanding this exception, that a doctor has a professional and contractual duty to protect the privacy of his patients and that a breach of that duty gives rise to a cause of action for damages. The court of appeals rejected this argument and held that plaintiff had waived her son's qualified right of privacy by filing the complaint for medical malpractice.[110] Once plaintiff had questioned the nature and quality of the treatment by filing a lawsuit, a physician having knowledge pertaining to the treatment was authorized to release the information and was immune from any liability to the patient or other persons for the release of that information. A physician is free to release information even without legal process and without prior notice to the patient or his representative.[111]

VI. DISMISSALS

Section 41(a) of the CPA[112] provides that a voluntary dismissal "is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has twice dismissed

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104. *Id.* at 677, 292 S.E.2d at 549.
105. *Id.* at 678, 292 S.E.2d at 549.
106. *Id.*
107. *Id.*
108. O.C.G.A. § 24-9-40 (Michie 1982 & Supp. 1983), GA. CODE ANN. § 38-418(b) (Harrison 1981 & Supp. 1983).
109. *Id.*
110. 162 Ga. App. at 680, 292 S.E.2d at 550.
111. *Id.*
112. O.C.G.A. § 9-11-41(a) (Michie 1982), GA. CODE ANN. § 81A-141(a) (Harrison 1977).

in any court an action based on or including the same claim."[113] The provision, in effect, would allow three voluntary dismissals before the claim sued upon is barred. A case including multiple defendants illustrates the possible difficulties in counting the number of prior dismissals. In *Harris v. Sampson*,[114] plaintiffs instituted four separate lawsuits arising from the same automobile collision. Plaintiff, voluntarily dismissed the first three lawsuits, and the court dismissed the fourth on the ground that the third voluntary dismissal was an adjudication on the merits.[115] Plaintiffs argued, however, that except for one defendant, none of the defendants ever was subject to "three valid complaints."[116] One defendant was not a party in the first complaint, and another defendant never was served with process in the third lawsuit. The court of appeals rejected plaintiffs' argument and stated that section 41(a)

> provides that a third notice of dismissal from any court of an action based upon the same claim operates as an adjudication on the merits. . . . Thus, it is the mere filing of the complaint followed by a voluntary dismissal that brings the statute [section 41(a)] into play, not that a defendant must be served and be forced to answer or suffer default.[117]

Plaintiffs conceded that all four of the complaints related to the same accident and the same cause of action and thus constituted the same claim. It is immaterial that separate lawsuits based on the same claim are filed against different defendants, or that plaintiffs may not have perfected service of process upon a defendant prior to dismissal of the case. What matters is the number of lawsuits previously dismissed and not the identity of the defendants and of the lawsuits.

In the 1977 case of *Jones v. Burton*,[118] the Georgia Supreme Court held that a plaintiff may not voluntarily dismiss the complaint between the time when the court announces the judgment and the time that a judgment actually is entered.[119] In *Groves v. Groves*,[120] the Georgia Supreme Court extended this rule to include temporary or interlocutory orders as well as final judgments. In that case, plaintiff-wife attempted to voluntarily dismiss her divorce and custody action two days after the trial court had announced its ruling concerning the temporary custody of the children, but before the order was signed and entered. The supreme court

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113. *Id.*
114. 162 Ga. App. 241, 290 S.E.2d 165 (1982).
115. *Id.* at 242, 290 S.E.2d at 166.
116. *Id.*
117. *Id.* at 243, 290 S.E.2d at 167 (citations omitted).
118. 238 Ga. 394, 233 S.E.2d 367 (1977).
119. *Id.* at 395, 233 S.E.2d at 369.
120. 250 Ga. 459, 298 S.E.2d 506 (1983).

held that the trial court correctly retained jurisdiction over the litigation, notwithstanding plaintiff's attempted voluntary dismissal.[121]

Section 41(d) of the CPA provides that a plaintiff who previously has dismissed any action may recommence the action, provided the "plaintiff shall first pay the court costs of the action previously dismissed."[122] In *McLanahan v. Keith*,[123] the Georgia Supreme Court had held that a party may satisfy the cost of a previously dismissed action after recommencing the lawsuit.[124] In so ruling, the court had disapproved those cases[125] that had held that the failure to pay costs in the prior action could not be cured by payment after the filing of the recommenced action. In *Little v. Walker*,[126] the supreme court held that the payment of costs of the dismissed suit is a precondition to the filing of the second suit and overruled *McLanahan v. Keith*.[127] In *Little*, which was an action for damages arising from an automobile accident that occurred on June 4, 1977, plaintiffs dismissed their lawsuit on January 8, 1980. They filed the second suit on April 8, 1980, and on May 2, 1980, plaintiffs paid the costs of the first action. Defendant moved for summary judgment on grounds that the action was barred by the statute of limitations. The supreme court held that since payment of costs was a precondition to the filing of the second lawsuit, there was no viable action pending.[128] Furthermore, because plaintiffs had failed to pay the costs of the first action, the statute of limitations was not tolled by the renewal statute[129] and the second lawsuit therefore was barred by the statute of limitations.[130] Chief Justice Hill reluctantly concurred in the majority opinion only because the plain language of section 41(d) made payment of costs a precondition to filing a new suit.[131] Curiously, Chief Justice Hill did not suggest that the legisla-

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121. *Id.* at 460, 298 S.E.2d at 508. *See* Kilby v. Keener, 249 Ga. 667, 293 S.E.2d 318 (1982). The court held that defendants could not voluntarily dismiss their counterclaim, following the trial court's announcement of its intention to dismiss the counterclaim with leave to amend. Defendants could either appeal immediately, appeal within thirty days from the last day allowed for amendment, or file a timely amendment, but they could not dismiss their counterclaim.

122. O.C.G.A. § 9-11-41(d) (Michie 1982), GA. CODE ANN. § 81A-141(d) (Harrison Supp. 1982).

123. 239 Ga. 94, 236 S.E.2d 52 (1977).

124. *Id.* at 97, 236 S.E.2d at 55.

125. *See, e.g.*, Sparks v. Sparks, 125 Ga. App. 198, 186 S.E.2d 780 (1971), *overruled*, 239 Ga. 94, 236 S.E.2d 52 (1977).

126. 250 Ga. 854, 301 S.E.2d 639 (1983).

127. *Id.* at 855, 301 S.E.2d at 639.

128. 250 Ga. at 855, 301 S.E.2d at 640.

129. O.C.G.A. § 9-2-61 (Michie 1982), GA. CODE ANN. § 3-808 (Harrison 1975) (new law provides that this section will not apply to contracts for the sale of goods).

130. 250 Ga. at 855, 301 S.E.2d at 640.

131. *Id.* at 855-56, 301 S.E.2d at 641 (Hill, C.J., concurring).

ture should amend section 41(d) to permit the plaintiff to cure by paying costs after filing a subsequent suit, but he did suggest that the renewal statute should be amended to conform to section 41(d) with respect to prepayment of costs in the original case.[132]

VII. DEFAULT JUDGMENTS

Under Georgia procedure, unlike federal procedure, the filing of a pre-answer motion normally will not toll the time permitted to file an answer to avoid default; an answer must be filed within the prescribed time.[133] Georgia courts have recognized a narrow exception to this rule for the confident defendant. In *Cato Oil & Grease Co. v. Lewis*,[134] defendant filed a motion to strike the entire complaint within the time permitted to file an answer. The trial court nevertheless granted plaintiff's motion for default judgment without ruling on defendant's motion to strike. The supreme court recognized that the filing of a motion by the defendant does not toll the time for filing an answer; the court, however, pointed to decisions of the court of appeals holding that it was error to grant a motion for default judgment prior to ruling on a timely, pending motion to dismiss for failure to state a claim or motion for summary judgment.[135] Since the motion to strike went to the entire complaint and since, had the court granted the motion, plaintiff would have been required to file a new complaint, defendant would have been allowed thirty days to answer the new complaint. The trial court's ruling on the motion for default judgment prior to the ruling on the motion to strike was premature.[136]

Two cases from the Georgia Court of Appeals discuss what constitutes excusable neglect to open a default after *Cobb County Fair Association v. Boyle*.[137] In *Howell Enterprises v. Ray*,[138] Howell owned and leased commercial property to the Seays. The lease provided that the Seays would indemnify Howell for all liability arising from personal injuries sustained

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132. *Id.* at 856, 301 S.E.2d at 641.

133. O.C.G.A. § 9-11-12(a) (Michie 1982), GA. CODE ANN. § 81A-112(a) (Harrison 1977). *Cf.* FED. R. CIV. P. 12(a).

134. 250 Ga. 24, 295 S.E.2d 527 (1982).

135. *Id.* at 25, 295 S.E.2d at 528 (citing Williams v. Coca-Cola Co., 158 Ga. App. 139, 279 S.E.2d 261 (1981); Bigley v. Lawrence, 149 Ga. App. 249, 253 S.E.2d 870 (1979); Hopkins v. Harris, 130 Ga. App. 489, 203 S.E.2d 762 (1973)).

136. 250 Ga. at 26, 295 S.E.2d at 528. The court distinguished Mock v. Copeland, 160 Ga. App. 876, 288 S.E.2d 591 (1982), in which the court of appeals held that the filing of a motion to strike directed to only a portion of the complaint did not toll the time to answer. In *Mock*, the granting of the motion would not have terminated the action.

137. 143 Ga. App. 754, 240 S.E.2d 136 (1977); *see also* O.C.G.A. § 9-11-55 (Michie 1982), GA. CODE ANN. § 81A-155 (Harrison Supp. 1983).

138. 163 Ga. App. 68, 293 S.E.2d 24 (1982).

on the property. Plaintiff Ray, who was injured on the property, sued Howell and the Seays. Howell contacted the Seays' attorney requesting that the Seays defend the action. The attorney stated that he would contact the Seays' insurer and, according to Howell's representative, left him with the impression that the Seays' insurance company would answer the lawsuit. No answer was filed and the case against Howell went into default. The trial court denied Howell's motion to open default and the court of appeals affirmed.[139] Significantly, Howell had turned over a copy of the complaint to its own legal counsel, who declined or failed to file an answer based upon the impression received from the telephone conversation with the Seays' attorney that the Seays would answer for Howell. Apparently because Howell's attorney was involved, the court applied a more stringent standard in determining whether there had been excusable neglect.[140] Judge Sognier strongly dissented.[141] He believed that Howell had shown promptness and good faith in handling the matter and that Howell's reliance was due to a reasonable misunderstanding between it and the Seays' attorney.[142] Judge Sognier pointed out that there would have been no prejudice to any party if the court had opened the default, because the case, which concerned multiple defendants, would have been tried in any event to determine liability.[143]

In contrast, in the case of *Stevens v. Wakefield*,[144] defendant, after being served with a complaint arising from a motor vehicle collision, turned the complaint over to his supervisor at work and was informed that the employer would take care of the matter. A higher official of his employer also informed him that the answers to the complaint were being prepared. The interrogatories attached to the complaint were similar to those that defendant already had participated in answering on behalf of his employer. The court concluded that defendant reasonably believed that the matter would be handled by his employer and that no further action on his part was necessary.[145] The court held that the facts showed excusable neglect, that no prejudice resulted to plaintiffs, and that defendant had made a proper case for the court to open the default.[146] The difference in the two cases appears to turn on the relative sophistication of the defaulting defendants, and upon the explicitness of the codefendants' representations or assurances that a defense would be provided.

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139. *Id.* at 70, 293 S.E.2d at 26.
140. *Id.* at 69, 293 S.E.2d at 25.
141. *Id.* at 70, 293 S.E.2d at 26 (Sognier, J., dissenting).
142. *Id.* at 70-71, 293 S.E.2d at 26.
143. *Id.* at 71, 293 S.E.2d at 26.
144. 163 Ga. App. 40, 292 S.E.2d 516 (1982).
145. *Id.* at 41, 292 S.E.2d at 517.
146. *Id.*

Finally, in *Teamsters Local 515 v. Roadbuilders, Inc.*,[147] the supreme court reiterated the requirement that when an amendment to a complaint in a case in which the defendant is in default adds a new claim or cause of action, the plaintiff must notify the defendant, and the defendant may answer the amended claim. In that case, defendants were in default of a complaint in which plaintiff sought injunctive relief only. One year after filing the original complaint, plaintiff amended the complaint to state a claim for damages. Defendant filed an answer to the new complaint, but the court nevertheless struck the answer and entered a default judgment against defendant on the amended complaint for damages.[148] The supreme court held that "after a defendant is in default as to a complaint seeking injunctive relief, when the complaint is amended to claim damages, the defendant has 30 days from the date of the amendment to file an answer in superior court before becoming in default on the claim for damages."[149]

VIII. Attack on Judgment

Two decisions in the supreme court[150] illustrate what conduct may constitute fraud under section 60(e) of the CPA,[151] which provides that a "[c]omplaint in equity may be brought to set aside a judgment for fraud, accident, or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant."[152] In *Leventhal v. Citizens & Southern National Bank*,[153] Dobbs Industries was indebted to the bank on a note that represented the renewal of an outstanding indebtedness. The note was guaranteed by Leventhal and Dobbs and was secured by three deeds to secure debt, which Dobbs Industries had conveyed to the bank. When Dobbs Industries defaulted on the note, the bank sued Dobbs Industries, Dobbs, and Leventhal on their guarantee. Leventhal and the bank entered into a "consent judgment agreement" whereby Leventhal agreed to pay the indebtedness if Dobbs Industries failed to

147. 249 Ga. 418, 291 S.E.2d 698 (1982).

148. *Id.* at 419, 291 S.E.2d at 699.

149. *Id.* at 420, 291 S.E.2d at 700 (citations omitted). The court also held that when a defendant removes a case from state court to federal court, pursuant to 28 U.S.C. § 1446(a) (1976), the timely filing of an answer in the federal court following removal is sufficient to prevent a default in the state court if the case subsequently is remanded to the state court. Plaintiff had argued that the failure to file an answer in the state court was a default notwithstanding the timely filing of an answer in federal court.

150. Cox v. Kirkland, 249 Ga. 796, 294 S.E.2d 514 (1982); Leventhal v. Citizens & Southern Nat'l Bank, 249 Ga. 390, 291 S.E.2d 222 (1982).

151. O.C.G.A. § 9-11-60(e) (Michie 1982), Ga. Code Ann. § 81A-160(e) (Harrison 1977).

152. *Id.*

153. 249 Ga. 390, 291 S.E.2d 222 (1982).

pay it by a certain date.[154] In return, the bank agreed to assign the three deeds to secure debt to Leventhal.

Dobbs Industries failed to pay, and the bank applied for and obtained a judgment against Leventhal as permitted by the consent judgment agreement.[155] Leventhal then discovered that Dobbs Industries had conveyed the lots to Dobbs prior to its attempted conveyance to the bank by deeds to secure debt. The bank, and therefore Leventhal, had no recorded interest in the property. Leventhal filed a complaint in equity to set aside the judgment and consent judgment agreement on the grounds that they were procured by fraud or, alternatively, were the product of a mutual mistake. The trial court granted the bank's motion for summary judgment.[156] The supreme court affirmed.[157] Since the agreements had been made part of the judgment of the court, they were subject to attack only as a judgment, not as a contract. The court recognized the rule that "the fraud in the procurement of the judgment must have been actual and positive, done with knowledge, and not merely constructive fraud, committed in ignorance of the facts."[158]

The court concluded that the evidence failed to create an issue of fact concerning whether the bank had actual knowledge that the deeds to secure debt did not convey a valid security interest.[159] Leventhal also argued that there had been a mutual mistake, which warranted the setting aside of the judgment. The court rejected this argument on the ground that the mistake must have been "unmixed with the negligence or fault of the complainant."[160] Leventhal had failed to have a title search, and this failure constituted negligence or fault on his part.[161]

In the case of *Cox v. Kirkland*,[162] the alleged fraud by the opposing party involved more positive acts of misrepresentation. In that case, plaintiff Cox sued defendant Kirkland, alleging that Kirkland was doing business as Piggly Wiggly Store No. 24, when in fact Kirkland was not doing business as that designation, but rather as Piggly Wiggly Store No. 4. After Kirkland had been served with the complaint, he attempted to contact the attorney for plaintiff to inform him of the erroneous designation. Instead, he spoke with the attorney's secretary, who was also the attorney's wife. The secretary-wife informed Kirkland that she would

154. *Id.* at 390, 291 S.E.2d at 223.
155. *Id.* at 391, 291 S.E.2d at 224.
156. *Id.*
157. *Id.* at 393, 291 S.E.2d at 225.
158. *Id.* at 392, 291 S.E.2d at 224 (citations omitted).
159. *Id.* at 392, 291 S.E.2d at 225.
160. *Id.* at 390, 291 S.E.2d at 225.
161. *Id.*
162. 249 Ga. 796, 294 S.E.2d 514 (1982).

handle the matter, and she passed the message on to her husband-employer by a telephone message slip and verbally informed him of her conversation with Kirkland. Kirkland also notified his insurance carrier, who declined coverage because the store was not insured. Kirkland did not answer the suit and plaintiff obtained judgment by default.[163] Kirkland filed a separate action to set aside the money judgment. The supreme court concluded that fraud, within the meaning of section 60(e), had been practiced upon Kirkland by plaintiff through the actions of her attorney, who was aware of the secretary-wife's representations that she would handle the matter, but who, nonetheless, pursued plaintiff's claim to default judgment.[164]

IX. Res Judicata

In *Gilmer v. Porterfield*,[165] decided in 1975, the supreme court held that an adjudication of no liability against an employer did not bar a subsequent suit against an employee whose acts or omissions were the basis of the alleged liability of the employer in the first suit.[166] The court predicated its holding upon the determination that the employee was not in privity with the employer which would have enabled them to claim the benefit of an adjudication in favor of the employer.[167] In *McNeal v. Paine, Webber, Jackson &Curtis, Inc*,[168] the supreme court distinguished *Gilmer* although the facts were similar. In *McNeal*, Paine, Webber obtained a favorable verdict in federal court on McNeal's complaint that stated that Paine, Webber's employee, Skone, illicitly had churned McNeal's account in violation of federal securities laws.[169] Simultaneously with the filing of the federal court action, McNeal had filed a complaint against Paine, Webber and Skone in the State Court of Fulton County for the same acts. Following the verdict in federal court, Paine, Webber and Skone filed motions for summary judgment on the basis of collateral estoppel and res judicata.[170] With respect to the action against Skone, the supreme court declined to overrule *Gilmer* but, instead, distinguished it.[171] In *Gilmer*, the employer had defenses available that were not available to the employee, and accordingly it would have been unjust to plaintiff to refuse to allow him to proceed against the employee in the second

163. *Id.* at 797, 294 S.E.2d at 515.
164. *Id.* at 798, 294 S.E.2d at 516.
165. 233 Ga. 671, 212 S.E.2d 842 (1975).
166. *Id.* at 674, 212 S.E.2d at 844.
167. *Id.*
168. 249 Ga. 662, 293 S.E.2d 331 (1982).
169. *Id.* at 662, 293 S.E.2d at 331.
170. *Id.*
171. *Id.* at 664, 293 S.E.2d at 332.

suit. In *McNeal*, the court found that there were no defenses available to Paine, Webber that were not also available to Skone, and that, consequently, all the issues that could have imposed liability upon Skone had been litigated in the federal court case.[172] The court stressed that the parties in the federal court case had stipulated at trial that proof of churning by Skone would render Paine, Webber liable on a theory of respondeat superior.[173]

The court failed to note that in *Gilmer*, the employer also had accepted responsibility for any negligence of the employee under the doctrine of respondeat superior.[174] Furthermore, the court in *McNeal* never stated which defenses were available to the employer that were not available to the employee. It did appear that in *Gilmer*, the court held that the employee's declarations that he was at fault were inadmissible hearsay against the employer in the first trial, but the statements would have been admissible in an action against the employee-declarant. This hearsay objection may have been the defense that was not available to the employee in *Gilmer* to which the court in that case referred.

In *Lowe Engineers, Inc. v. Royal Indemnity Co.*,[175] the court held that a prior adjudication of an issue could be used by a party, who was not a party to the prior adjudication, to defeat a claim.[176] In that case, Lowe Engineers was engaged in surveying and mapping navigable waters in Arkansas. Royal Indemnity Co. had issued Lowe Engineering an insurance policy covering workers' compensation and employers' liability but excluding injury and death sustained by the master or members of the crew of any vessel. During the work in mapping the Red River, a boat carrying six employees capsized causing the drowning of five employees. Royal Indemnity began paying workers' compensation benefits to the estates and survivors of the deceased employees. In the meantime, four survivors of the deceased employees filed a complaint in the federal district court in Arkansas[177] against Lowe Engineering seeking damages under the Jones Act[178] and general maritime law. Royal Indemnity declined to defend Lowe Engineering in that suit, based on the exclusion in the policy for injury to members of the crew of any vessel.[179]

The federal court entered judgment against Lowe Engineering and its

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172. *Id.* at 664, 293 S.E.2d at 332-33.
173. *Id.*
174. 233 Ga. at 672, 212 S.E.2d at 843.
175. 164 Ga. App. 255, 297 S.E.2d 41 (1982).
176. *Id.* at 259, 297 S.E.2d at 44.
177. Spiller v. Lowe, 328 F. Supp. 54 (W.D. Ark. 1971), *aff'd*, 466 F.2d 903 (8th Cir. 1972).
178. 46 U.S.C. § 688 (1976).
179. 164 Ga. App. at 256, 297 S.E.2d at 42-43.

umbrella insurer.[180] The court necessarily found that the deceased employees were a part of a crew of a vessel on navigable waters at the time of their death.[181] Lowe Engineering and its umbrella insurer filed suit against Royal Indemnity to recover the damages and attorneys' fees incurred in the Arkansas action. Royal Indemnity argued that the doctrine of binding precedent precluded relitigation of the issue concerning the status of the employees at the time of their death. The court of appeals held that the doctrine did apply:

> Succinctly stated, that doctrine provides where the issue of liability has previously been adjudicated with negative results for a party contending for the same rights in subsequent litigation, the former judgment, although not res judicata, estoppel by judgment nor collateral estoppel as to the present action because the parties are different, does constitute binding precedent, inasmuch as the controlling issue (i.e., the prior complaint was cognizable as a maritime claim because the employees were crew members on a vessel engaged on navigable waters of the United States) has already been adjudicated under substantially similar allegations.[182]

Though the court stated expressly that its decision was not based upon collateral estoppel because of the lack of mutuality,[183] it is apparent that the court relaxed the requirement of mutuality and applied collateral estoppel defensively.

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180. Spiller v. Lowe, 328 F. Supp. 54, 66 (W.D. Ark. 1971), *aff'd*, 466 F.2d 903 (8th Cir. 1972).

181. 164 Ga. App. at 258, 297 S.E.2d at 44.

182. *Id.* at 259, 297 S.E.2d at 44 (citations omitted).

183. 164 Ga. App. at 259, 297 S.E.2d at 44.